

Deadlocks in Multilateral Negotiations

Deadlocks are a feature of everyday life, as well as high politics. This volume focuses on the concept, causes and consequences of deadlocks in multilateral settings, and analyses the types of strategies that could be used to break them. It commences with a definition of deadlock, hypothesises about its occurrence, and proposes solutions. Each chapter then makes an original contribution to the issue of deadlock – theoretical, methodological or empirical – and further tests the original concepts and hypotheses, either theoretically or through case-study analysis, developing or altering them accordingly. This is a unique volume which provides an in-depth examination of the problem of deadlock and a more thorough understanding of specific negotiation problems than has ever been done before. It will be directly relevant to students, researchers, teachers and scholars of negotiation and will also be of interest to practitioners involved in negotiation and diplomacy.

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Deadlocks in Multilateral Negotiations

Causes and Solutions

Edited by
AMRITA NARLIKAR



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Contents

<i>List of figures</i>	<i>page</i> vii
<i>List of tables</i>	viii
<i>Notes on contributors</i>	ix
<i>Acknowledgements</i>	xiii
Introduction AMRITA NARLIKAR	1
Part I Disciplinary insights	23
1 The politics of deadlocks ANDREW GAMBLE	25
2 From Bretton Woods to Havana: multilateral deadlocks in historical perspective MARTIN DAUNTON	47
3 Talking one's way out of strikes WILLIAM BROWN	79
4 Litigating the way out of deadlock: the WTO, the EU and the UN MARKUS W. GEHRING	96
Part II Case studies	121
5 Transatlantic intransigence in the Doha Round: domestic politics and the difficulty of compromise ALASDAIR R. YOUNG	123
6 Know the enemy: uncertainty and deadlock in the WTO AMRITA NARLIKAR AND PIETER VAN HOUTEN	142

7	Entering the zone of agreement: the United States in climate change negotiations	
	SEVASTI-ELENI VEZIRGIANNIDOU	164
8	The role of informal negotiation processes in breaking deadlocks: the UN Security Council	
	JOCHEN PRANTL	188
9	Negotiating international policies on Kosovo	
	PIETER VAN HOUTEN	210
10	Beyond negotiation deadlocks: the importance of mediation and leadership change	
	JACOB BERCOVITCH AND CARMELA LUTMAR	232
	Conclusion: case studies as evidence: lessons learned	
	DANIEL DRUCKMAN AND AMRITA NARLIKAR	254
	<i>Bibliography</i>	280
	<i>Index</i>	307

Figures

6.1 The basic signalling game	<i>page</i> 146
8.1 Growth in United Nations membership, 1945–2006	198
8.2 Formal meetings and informal consultations of the Security Council, 1972–82	201
8.3 Formal meetings and informal consultations of the Security Council, 1988–2007	202

Tables

8.1 Number of vetoes cast in the UN Security Council, 1946–2008	<i>page</i> 199
10.1 Descriptive statistics	249
10.2 Deadlock in negotiation and leadership change	251
10.3 Marginal effects	251
11.1 Demonstrations of hypotheses	258
11.2 Demonstrations of solution sets	259
11.3 Type of deadlock	273

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Introduction

AMRITA NARLIKAR

At the still point of the turning world. Neither flesh nor fleshless;
Neither from nor towards; at the still point, there the dance is,
But neither arrest nor movement. And do not call it fixity,
Where past and future are gathered. Neither movement from nor towards,
Neither ascent nor decline. Except for the point, the still point,
There would be no dance, and there is only the dance.

T. S. Eliot, *Burnt Norton*, *Four Quartets*

Deadlocks are the still points of all negotiation. In their stillness lies much promise but also the potential to inflict much damage. They are a familiar feature of most negotiations, ranging from the realm of the everyday to that of high politics. While there exists a rich body of literature on how to negotiate wisely and effectively, very few works have focused specifically on the problem of deadlocks. *Deadlocks in Multilateral Negotiations: Causes and Solutions* addresses this gap, and is designed to facilitate interdisciplinary exchange on the subject of deadlocks. Together, we aim to provide a more holistic analysis of the concept, and also improve the academic's and practitioner's understanding of what causes deadlocks and how they might be broken. In particular, we focus on deadlocks in multilateral negotiations. Involving multiple actors and sometimes even multiple issues, deadlocks of this type pose a particularly challenging set of intellectual problems. They are a recurrent phenomenon that practitioners must encounter, and they occur across international institutions and in diverse issue areas. If successfully broken, they can generate pay-offs for a large group of countries in the system; equally, failure to break multilateral deadlocks can generate very high costs at the individual and systemic level.

In this introductory chapter, I start out by examining the anatomy of deadlocks. The first section presents a definition and typology of deadlocks. In the second section, I advance six causal hypotheses that explain the occurrence of deadlocks, and also offer six solution sets. The third

section provides a brief outline of the structure of the book. As it highlights, all the chapters in the volume use the concepts and hypotheses presented in this Introduction, and evaluate them theoretically or through case-study analysis to make an original contribution – theoretical, methodological or empirical – towards understanding the puzzle of deadlock. The book benefits from the insights of several disciplines that it brings together as well as case studies that cover several different issue areas. The fourth and concluding section provides a brief discussion of the existing literature and how this book differs from and complements it.

Anatomy of deadlocks: definition, typology and actors

Deadlocks represent a subset of the bigger set of problems of cooperation (as addressed by the extended literature on problems of collective action, cooperation under anarchy, regime theory, and different variants of institutionalism including sociological, historical and rational design) and conflict resolution (as addressed by a substantial body of work within negotiation analysis). The question then arises: are any distinctive features that typify this subset. More specifically, how do we recognise a deadlock when we see a situation where agreement or cooperation is proving elusive or a conflict is proving difficult to resolve? To the extent that deadlock is assumed to be simply a category of the problems of achieving cooperation, are we to assume that deadlock begins on Day 1 of every negotiation? And what represents cooperation: does a deadlock end every time a party changes its position, and further re-emerge until the next party makes concessions? Finally, are deadlocks and stalemates synonyms; if not, what are the differences between them, and are the two related in any way?

We define a negotiation process as deadlocked if the following two conditions are present:

- 1) An extended situation of non-agreement exists, such that parties adopt inconsistent positions and are unable or unwilling to make the concessions sufficient to achieve a breakthrough on the particular issue; and
- 2) A landmark moment in the negotiation process – which may be an ‘action-forcing event’¹ in the shape of a chair’s text or a deadline

¹ Watkins 1998.

imposed by a mediator, or may be a natural landmark endogenous to the negotiation and recognised as such by the parties involved – despite having set up expectations towards a compromise, is unable to trigger the necessary concessions to ensure an agreement on the particular issue.

Both conditions must exist for us to identify a situation as one of deadlock. The first condition captures Faure's idea of 'a protracted standstill of the dynamics of the negotiation system'.² But it clarifies the definition by providing a harder condition for deadlock: that parties adopt inconsistent positions, and further, that movement in the form of insufficient concessions does not signify an end to the deadlock. To see the deadlock broken, we would need to see agreement on the particular issue under negotiation.³ It also helps us see resolving deadlocks as distinct from the set of tasks associated with conflict resolution: breaking deadlocks involves finding a solution to a situation of standstill rather than an escalatory dynamic. The second condition is important as it ensures that we do not regard each and every situation of non-agreement, i.e. all stages of the negotiation process until agreement is reached, as one of deadlock. Deadlock does not begin on Day 1 of every negotiation, even though the seeds of the deadlock may be sown on Day 1. We would recognise a situation of deadlock only after a landmark moment for agreement passes by, and non-agreement persists. A deadlock is a special and narrow case of non-agreement or non-cooperation.

Based on the outcome that it generates, we propose that deadlock can further be divided into three types. The first type of deadlock is stalemate, i.e. 'an impasse in terms of movement and offers no more possibilities for escalation'.⁴ Dean Pruitt, for instance, argues that in a deadlock,

² Faure 2005, p. 25.

³ Note that this does not mean that deadlock persists until a full and complete deal is achieved. For instance, if members of the WTO today were to reach an agreement on agriculture, we could regard the deadlock as having been broken as per the definition given here, even if deadlocks persisted in other issue areas under negotiation in the Doha Development Agenda.

⁴ Faure 2005, p. 25. Note that Faure makes a distinction between deadlock and stalemate, where he defines deadlock as 'an impasse in terms of position, a situation in which no concession or constructive action takes place'. We find this distinction helpful, but see stalemate as a subcategory of the broader phenomenon of deadlock or impasse, taken as protracted non-agreement. Persistent non-agreement may result in delay of the negotiation, breakdown of the negotiation, or de-escalation (i.e. stalemate).

competitive actions ‘become decreasingly attractive because the other party seems quite firm’.⁵ In a later work, Pruitt and Kim continue to develop this idea in the context of stalemates: ‘Negotiation and mediation ordinarily grow out of *perceived stalemate*’.⁶ I. William Zartman similarly develops the model of the ‘ripe moment’ that emerges from a stalemate under the following conditions: ‘The stalemate must be seen as tight and hurting, reinforced by additional sticks if necessary, and a way out must first be perceived as possible and then developed as an attracting reality’.⁷ Daniel Druckman suggests the idea of precipitating events that lead to deadlock-breaking turning points with consequences for possible agreements:

Turning points are indicated by such key events as resolving an impasse, signing a framework agreement, developing formulas and then bargaining over details, and absorbing events outside the talks by changing evaluations of the terms on the table or resolving the decision dilemma in the endgame. Each of these events is viewed as instrumental to moving the negotiation from one stage to the next.⁸

Faure rightly notes, ‘In the scientific literature, the concept of deadlock is either embedded in a concession-making dynamic or viewed as a point of reversal in an escalation process’.

Deadlock conceptualised as stalemate with a de-escalatory dynamic has important normative implications. Most significantly, this view suggests that not all deadlocks need be regarded as pernicious to the negotiation process or welfare-reducing. In some instances, deadlocks may indicate the strength, independence and legitimacy of the institution as they demonstrate that the institution does not simply rubber-stamp decisions made by the powerful. Further, the short-term costs of deadlock may provide just the trigger to jolt parties into making concessions that produce longer-lasting agreements. But not all deadlocks provide the turning point to de-escalation and resolution, which leads us to the two other types of deadlock.

Deadlock, rather than take the shape of a mutually-hurting stalemate that facilitates resolution, may sometimes assume its second form: extended delay.⁹ The state of non-agreement over the particular issue

⁵ Pruitt 1981, p. 133. ⁶ Pruitt and Kim 2004, p. 172. ⁷ Zartman 2002, p. 354.

⁸ Druckman 2001, p. 52. Note also the distinction between ripe moments and turning points. The former refers to a condition for negotiation. The latter refers to changes that occur during the negotiation process.

⁹ Evenett 2006 presents a different categorization of impasse, where he also includes the category of ‘impasse as delay’ along with four other types of impasse: ‘impasse

area persists for a long time, or even worsens, over and beyond the landmark moments through missed deadlines, rejected compromise texts, and failed summits. Deadlock in this form, rather than leading to de-escalation, results not only in delayed benefits of the agreement but also political disengagement and public apathy. These in turn can further decrease the probability of an agreement and also impose systemic costs by undermining the credibility of the institution.

The third form of deadlock is a complete breakdown in the negotiation process. The deadlock persists for so long, or worsens, that negotiators walk away from the negotiating table. A breakdown in the negotiation process results not only in costs sunk into the process but also additional costs in terms of the sustainability of the institution and the search for alternatives (some of which may be less suitable/less legitimate forums).

The three types of deadlock need not always exist as discrete alternatives. For instance, deadlock as delay may not persist indefinitely, and could well transform into a stalemate-type deadlock or result in a breakdown-type deadlock. However, there may also be situations wherein deadlock as extended delay persists, with no change occurring to compel either party to concede or escalate or indeed walk away from the negotiation. An example is when parties negotiate for 'side effects' that are realised by continued negotiating without an agreement.¹⁰ This is why it is analytically useful to retain the division between the three types of deadlock: stalemate, delay and breakdown.

The central actors who negotiate their ways into and out of deadlocks in multilateral settings are diplomats and ministers as agents who have been delegated with the authority of representing the interests of their respective states. As such, they are engaged in two-level games, negotiating with their international counterparts as well as their constituencies at home.¹¹ Three chapters, one written by a historian (Martin Daunton, Chapter 2) and the other two by political scientists (Alasdair Young, Chapter 5 and Sevasti-Eleni Vezirgiannidou, Chapter 7), in this book focus explicitly on the role of domestic factors in the making of international deadlocks. Additionally, third parties can play a role in the creation

as perceived failure to agree', 'impasse as actual failure to agree', 'impasse on initiation', and 'impasse on contents'.

¹⁰ See Ikle 1964.

¹¹ See Druckman 1977a for models of the boundary role dilemmas that occur in international negotiations.

and resolution of deadlocks. Mediators may be genuine outsiders and 'third parties', but they may also include individuals who acquire such a role by virtue of their position as Chair of a particular negotiation, whilst still representing the interests of their respective countries in other contexts of the same institution. Two chapters in the volume (Chapters 3 and 10) examine the processes of mediation, and further examine the conditions in which the role of third parties can be particularly constructive.

Causes and solutions

Deadlocks can be a product of many idiosyncratic factors, some of which may include personality clashes amongst negotiators. But deadlocks can and do occur even in the absence of such idiosyncrasies. Thus deadlocks need explaining, as this book aims to do.

Deadlocks may also be a product of strategy choice. Negotiators have a range of strategies available to them, with the strict distributive strategy forming one end of the spectrum and a purely integrative strategy the other. The distributive strategy comprises a set of tactics that are functional only for claiming value from others and defending against such claiming, when one party's goals are partly in conflict with those of others. Examples of strict distributive strategies include: high opening demands, refusing all concessions, exaggerating one's minimum needs and priorities, manipulating information to others' disadvantage, taking others' issues hostage, worsening their BATNA (Best Alternative to a Negotiated Agreement), issuing threats, imposing penalties. At the other end of the continuum lies the integrative or value-creating strategy, which comprises a set of tactics that are instrumental to the attainment of goals that are not in fundamental conflict, and hence can be integrated for mutual gain to some degree. Examples include sharing information relatively openly to explore common problems or common threats; proposing an exchange of concessions that might benefit more than one party; reframing the issue space itself to ease an impasse. Such a strategy involves 'actions designed to expand rather than split the pie'.¹² If negotiators show a willingness to engage in integrative bargaining, the probability of deadlock decreases, whereas the choice of distributive strategies by one or more parties increases the likelihood of deadlock. However, to root explanations for deadlocks primarily in strategy choice presents more of

¹² Odell 2000; also see Hopmann 1995 and Odell 2006.

a descriptive than an analytic claim. In this book, we recognise that deadlock occurs at the distributive end of the strategy spectrum. For all the authors in this project, the central focus lies in the prior question – why do countries end up in a bargaining mode – often distributive – that leads to deadlocks? Our central puzzle is hence not what proximate strategies lead to deadlocks, but what the fundamental causes of and solutions to deadlocks are.

Below I advance six hypotheses to explain the occurrence of deadlock. I use examples from the deadlocks of the recent Doha negotiations in the WTO in each of the hypotheses to illustrate the comparative value-added and limitations of each type of explanation. Solutions vary depending on the cause. Indeed, a driving assumption of this book is that we cannot understand breakthroughs in the negotiation process without a clear analysis of the causes of the deadlock in the first place. Further, deadlocks are seldom mono-causal, and different phases of the deadlock may be explained by referring to different causes. The subsequent chapters examine the way the hypothesised factors are manifest in a variety of complex cases, illuminating their role in the dynamics of extended negotiation processes. Such an examination reveals the relevance of these factors or conditions as aspects of the explanation for the causes and solutions of deadlocks. It is also worth noting that there are some important links between the different hypotheses. For instance, one's own perception of one's BATNA (as per Hypothesis 1) may differ from the outside party's recognition of the alternatives available, producing considerable uncertainty in the negotiation and making it deadlock-prone (as per Hypothesis 2). Similarly, one's own BATNA may change dramatically due to alterations at the domestic level (Hypothesis 6), including the changing power of particular interest groups or indeed regime change that brings new preferences to the negotiating table. These linkages are important in themselves, and also generate implications for the solutions on menu.

Hypothesis 1: Deadlocks occur because of superior 'BATNA' or occur whenever and as long as parties believe their alternative to agreement is superior to the deal on offer.

Standard negotiation analysis suggests that a deadlock occurs if all the parties, or at least the key parties, believe that their BATNA is superior to the proposed agreement. As such, they have no incentive to make

concessions to reach an agreement.¹³ For instance, it could be argued that the current round of trade negotiations – the Doha Development Agenda – has repeatedly run into deadlock because key negotiating parties have regional alternatives that they can easily turn to. An alternative argument would be that the zone of agreement has shrunk so much that it is better to have no agreement at all than the one on the table with its limited gains and high costs. The importance of the BATNA in both causing and breaking deadlocks is explored in some depth in Chapter 3, which applies insights from labour–management relations to the multilateral level. This hypothesis is further investigated in the two case studies on the Doha negotiations, as well as the chapters on climate change negotiations and Kosovo negotiations.

Hypothesis 2: Deadlocks occur because negotiators bluff and lie.

Bluffing is commonplace in most bargaining situations.¹⁴ And not all bluffs result in deadlocks. But when levels of uncertainty and/or distrust are high, deadlock can result. One party may indeed have a superior BATNA or firmly believe that no deal is better than the one offered. But if the negotiator is unable to communicate these bottom-lines credibly (partly because they have a reputation for lying, or because such claims go against all previous behaviour), the other party may understandably assume that he/she is bluffing, and refuse to make any concessions. Deadlock ensues. Amrita Narlikar and Pieter van Houten argue in Chapter 6 that an important reason for the first phase of the deadlock in the Doha negotiations, i.e. at the Cancun Ministerial Conference, was the inability of the developed world to recognise that it was dealing with a much more powerful coalition of developing countries than ever before, and one that would not yield as easily as former coalitions of the South had done. Several other chapters in this volume, including Chapter 3 on strikes, and Chapter 4 on litigation in the EU, NAFTA and WTO, also investigate the importance of bluffing in causing and exacerbating deadlock.

¹³ Fisher and Ury 1991, who also coined the acronym of BATNA in the first edition of their book, have made such an argument: 'If both sides have attractive BATNAs, the best outcome of the negotiation – for both parties – may well be not to reach agreement' (p. 110).

¹⁴ For classics on the problem of credibly communicating and recognizing commitment, see Schelling 1960 and Walton and McKersie 1965.

Hypothesis 3: Deadlocks occur because of certain types of balances of power.

Hypothesis 3a: Deadlock is more likely, the more equal the power distribution.

Hypothesis 3b: Deadlock is more likely, the more diverse the culture of the parties that constitute the balance of power.

Power matters crucially in the making and breaking of deadlocks. Negotiation analysis recognises this: for instance, it has been pointed out that deadlock occurs if there is symmetry of power and neither party is able to impose its will on the other.¹⁵ This simple idea can be taken much further when applied to multilateral negotiations. First, we can hypothesise that a multipolar world would be more deadlock-prone, in comparison to systems of hegemony. Second, concerts and clubs of power are less likely to be prone to deadlock in comparison to systems where considerable diversity of interest or culture exists among the Great Powers. To apply this example to trade, it could be argued that a key reason for the recurrent Doha deadlocks is because of the rise of Brazil, China and India as key players in the WTO. These countries are not part of the traditional decision-making group of the GATT – the old ‘Quad’ comprising the EU, Canada, the United States and Japan – and bring some very different interests and also diplomatic strategies to the high table of trade negotiations. Andrew Gamble, in Chapter 1 on the politics that underlie deadlocks, analyses the impact that pronounced power asymmetries and the ability of a system to accommodate new powers have on producing major deadlock. Martin Daunton, in Chapter 2 on the failed negotiations towards the International Trade Organization, explores the impact of the huge power differential at the end of the Second World War on the difficulties faced by trade negotiators at the time. Indeed, this is our most popular hypothesis. It is explored by nine chapters of the book, with all four of the disciplinary chapters, and five of the six case studies, engaging with it.

¹⁵ Faure 2005; Zartman 2002. Deadlocks are more likely when parties are symmetrically strong, but not when they are equally weak (Beriker and Druckman 1996). However, it has also been found that mild discrepancies in power often leads to stalemate as stronger parties respond to the weaker party's demand for equal treatment with escalatory tactics (Vitz and Kite 1970).

Hypothesis 4: Deadlocks occur because certain institutional structures facilitate or deter agreement.

Most of the specific cases examined in this book take place within institutions, or at least have multilateral institutions exercising a shadow on the negotiation. Certain institutional peculiarities can make a system more deadlock-prone. For instance, some would argue that the consensus rule of the WTO is precisely what makes it so prone to deadlock as it gives de facto veto power to all 152 members. Or, alternatively, it could be argued that the problem lies with the Single Undertaking of the WTO, which allows parties to take all other issues hostage to one particular issue. The role played by institutions in deadlocks is highlighted in seven chapters in this volume. For instance, Martin Daunton (Chapter 2) provides a historical analysis of the critical institutional differences between the Bretton Woods negotiations and the ITO negotiations, which contributed to the success of the former versus the failure of the latter. William Brown (Chapter 3), drawing on the repertoire of literature on industrial bargaining, identifies the institutional features of both parties as the first necessary condition for the avoidance and management of deadlock. Chapter 8 by Jochen Prantl examines the institutional features of the Security Council that make it more deadlock-prone. Pieter van Houten (Chapter 9) provides a comparative insight into the impact of different features of particular institutions (including the UN, NATO and the EU) involved in the negotiations over Kosovo, and Markus Gehring (Chapter 4) also focuses on institutional differences – particularly the nature of their negotiation and litigation processes – between the EU, NAFTA and the WTO, and the tendency of these institutions to deadlock.

Hypothesis 5: Deadlocks occur because fairness and justice matter.

Only a limited amount of previous research has been done to investigate the impact of fairness considerations on negotiation,¹⁶ especially when fairness is defined in harder terms of going beyond and even against the self-interest of the parties. Max Bazerman and Margaret Neale argue that ‘fairness considerations can lead negotiators to opt for joint outcomes that leave both parties worse off than they would have been had fairness considerations been ignored’.¹⁷ These agreements are also

¹⁶ Exceptions include Brown and Stern 2007 and Kapstein 2008.

¹⁷ Bazerman and Neale 1995, p. 89.

likely to be less durable. By extension, we can hypothesise that deadlocks sometimes occur because certain parties see the deals on offer as lacking in fairness, legitimacy or justice. Even if these parties have no BATNA available, they would still prefer to incur the costs of deadlock rather than make concessions to achieve a deal that they (or their constituents) see as deeply unfair. In the trade case, for instance, it could be argued that deadlock could be broken if the major issue causing it – agriculture – were simply taken out of the negotiation; several other gains could be made instead, which would benefit both developed and developing countries. However, given the history of trade negotiations and concessions developing countries agreed to in the Uruguay Round, a deal without agriculture in it would be seen by developing country negotiators and certain members of the transnational civil society as violating the premise of development enshrined in the Doha *Development* Agenda. Developing countries are unlikely to agree to such a deal. Markus Gehring's chapter in this volume (Chapter 4) engages directly with this hypothesis by applying it to different systems of dispute settlement. Martin Daunton's chapter (Chapter 2) highlights the role that ideas of fairness and justice played in the abortive negotiations of the International Trade Organization. Jochen Prantl (Chapter 8) demonstrates the problems of legitimacy that are generated by certain solutions to deadlocks.

Hypothesis 6: Deadlocks occur internationally because of certain configurations of domestic interests.

Even when levels of trust are high and negotiators brimming over with good will, multilateral deadlocks can still occur due to the presence of powerful domestic constituencies that do not favour agreement.¹⁸ Certain types of negotiations and issue areas are more prone to this problem than others. For instance, obscure policy areas may not produce the same level of mobilization and resistance at home than others. Eight chapters in the book focus on the domestic sources of deadlocks, identifying different types of domestic deterrents to agreement and also using different methodologies. For instance, three of the four disciplinary chapters in Part I focus on this explanation. In Part II, while Alasdair Young, Sevasti-Eleni Vezirgiannidou and Pieter van Houten use case

¹⁸ On the impact of domestic politics on international bargaining via two-level games, see Evans *et al.* 1993; also Milner 1997.

studies to evaluate this hypothesis, Chapter 10 by Jacob Bercovitch and Carmela Lutmar focuses specifically, with the help of original datasets, on the role of domestic leadership in causing deadlock and mediation in overcoming them.

For analysts and practitioners interested in analysing and breaking deadlocks, solutions depend critically on the cause identified as the main source of the problem. Sometimes, attacking the particular source of deadlock may be the only route to a breakthrough. In other conditions however, when a particular problem is especially difficult to resolve, it may be possible for negotiators to work around it through an alternative solution set. For instance, if the negotiator perceives his/her BATNA to be superior to the agreement, besides attempting to worsen that BATNA by somehow removing it from the range of options available, the other negotiators may try to delegitimise it by reframing it in terms of unfairness or bring in a third party as a mediator.

Solution set 1: BATNA-related

If the principal cause of deadlock is the availability of a better BATNA, negotiators will have to expand the zone of agreement such that its gains come to outweigh the BATNA. They might simultaneously, or alternatively, pursue a strategy of worsening the BATNA of the parties and thus bringing them back to the negotiating table. In the case of the Doha deadlocks, a radical measure implementing the latter strategy would be to place a moratorium on all regional and bilateral agreements, thereby leaving members with no other choice but to place all their eggs in the multilateral basket.

Solution set 2: Uncertainty-related

If the central problem is uncertainty, negotiators can build in more effective communication mechanisms, which would facilitate the signalling of positions and interests. Institutions can play a role in this by establishing better transparency and monitoring mechanisms. Attempts by Minister Pierre Pettigrew, at one of the ministerial conferences of the WTO, to hold bilateral meetings with members called ‘confessionals’ where they were asked to reveal their bottom-lines to the Facilitator, provide an example of this.

Solution set 3: Balance of power-related

Balance of power, at first glance, can appear to be a structural constraint, and thus one that negotiators might not have much agency over. However, balances of power can indeed be altered within specific institutional contexts, partly by establishing institutional countermeasures (such as voting rules that alter the relative weights of the participants), but also by the negotiators themselves through coalition building. In the case of the WTO, for example, one possible strategy for developed countries would be to undermine the newfound power of the larger developing countries by playing divide-and-conquer.

Solution set 4: Institution-related

If the source of deadlock is a particular institutional process, members of the organization may be able to amend it (depending on the flexibility allowed by the institution), or at least find some wiggle-room by establishing new norms and working practices. In the case of the WTO, certain sector-specific agreements, such as the Information Technology Agreement, have been negotiated using a 'critical mass' approach rather than subject the negotiation to a Single Undertaking where members can hold up agreement in the one area until everything else is agreed in all other issue areas.

Solution set 5: Ideas-related

If the problem is based on differing conceptions of fairness and legitimacy, then negotiators and analysts would need to give considerably greater attention to normative issues than they have done until now. For instance, notions of victory would have to be framed carefully so that even the losing party can appear to show that it has won a moral victory. Considerably greater attention would also have to be paid to how demands for concessions are framed. In the trade case, for instance, developing countries were able to break a deadlock on TRIPs and public health, and win concessions in their favour, through strategic framing of the issue.¹⁹

¹⁹ Odell and Sell 2006.

Solution set 6: Altering domestic forces

If the primary source of the deadlock lies at the domestic level, inter-state negotiation may be inadequate, short of expanding the zone of agreement very significantly so as to buy the approval of the dissenting constituencies of the negotiating counterpart. But the range of alternatives available to the state-level negotiator is broader than that. The negotiator may try to reframe the issue so as to win the domestic constituencies over, or s/he may expand the negotiating pie so as to trigger the support of alternative lobbies in favour of the agreement. In the case of the Doha Development Agenda, this would involve a campaign from the South to delegitimise the agricultural subsidies of the North, and/or expand the zone of agreement to include issues such as some of the Singapore issues that would mobilise powerful, pro-liberalization lobbies in the Northern countries.

All the authors in this volume have worked with the definition, typology and hypotheses, and solution sets outlined in these pages. Brief descriptions of each of the chapters follow below.

Structure of the book

Deadlocks in Multilateral Negotiations is divided into two parts comprising disciplinary and case-based studies. Following this Introduction, the first section includes four chapters that draw theoretical and methodological insights from four disciplines (History, Economics, Political Science and Law) and apply them to the puzzle of explaining the making and breaking of deadlocks in multilateral settings. While not presenting detailed case studies, all these chapters rely on several illustrative empirical examples and cases. The second section of the volume comprises case-study analysis. Two case studies relate directly to one of the most testy and costly deadlocks in recent years in global economic governance – the deadlock of the Doha Development Agenda. The other three provide equally timely and relevant analysis of deadlocks and breakthroughs in the climate change regime, UN Security Council, and the negotiations over Kosovo. Together these case studies present us with a reasonably broad coverage of issue areas ranging from the world of ‘high politics’ (UN Security Council and Kosovo), ‘low politics’ (trade) as well as regimes intervening between the high and the low (climate change). The concluding chapter brings together the theoretical and methodological insights of Part 1, along with the various examples

that they engage with, and the in-depth case studies of Part II, and offers some generalizations about the causes of and solutions to deadlocks in the multilateral arena.

Most of the chapters, whilst located within a rationalist framework, use a variety of theoretical approaches including game theory, two-level games, and historical institutionalism. They also use a variety of methodologies, such as case studies and statistical analyses. To ensure that interdisciplinary exchange and methodological eclecticism do not come at the cost of coherence, all the authors were provided with a common starting point on the conceptual and analytic issues discussed in the previous section.

Following this Introduction, which provides the collective starting point for the project, the first chapter, by Andrew Gamble, is on the politics of deadlocks. Here, Gamble challenges the mainstream liberal view that dominates most negotiation analysis, 'where everything is commensurable, everything can be bought or sold, and all obstacles can be negotiated'. Gamble critically reminds us that deadlocks are not simply a matter of market failure, and cannot be understood or resolved without taking political considerations into account. He draws a key distinction between negotiations of the first order, i.e. negotiations on the rules of the game that establish the parameters of the system, versus second order negotiations, i.e. negotiations aimed at resolving particular problems within those set rules. In principle, first-order deadlocks are harder to resolve than second-order ones, especially when the existing system is unable to accommodate new and rising powers. Exogenous shocks may sometimes be necessary to break such deadlocks. Gamble focuses most explicitly on Hypothesis 3 as the source of deadlock, but also draws some important links between this hypothesis and the other five. One of the important lessons that emerges from this chapter is that certain types of deadlocks may persist indefinitely. This reinforces the importance of expanding negotiation studies beyond processes internal to the negotiation to include deeper and more lasting causes.

Chapter 2, by Martin Daunton, provides a historical perspective on the issue of deadlock. Drawing on extensive archival material, Daunton analyses why the resolution of financial and monetary issues in 1944 was easier than the resolution of trade issues. Using the successful Bretton Woods negotiations versus the abortive ITO negotiations as the historical testing ground, the chapter engages directly with four of

the six hypotheses (H3, H4, H5 and H6) presented here: the impact of power distribution on the occurrence of deadlock, institutional design features, differing notions of fairness and legitimacy, and the role of domestic politics. Daunton's historical argument allows us to get to the heart of deadlock and breakthrough in the trade and monetary regimes when they were created, and sheds new light on the continuity and change in the types of deadlocks that we see in the same issue areas today.

Chapter 3, by William Brown, is located in the field of industrial economics. It is worth recalling that one of the seminal works of negotiation analysis was on labour–management relations.²⁰ Unfortunately, however, exchange between this branch of scholarship and negotiation analysis for International Relations has been rather limited.²¹ William Brown's chapter, which focuses on the problem of deadlocks in the context of collective bargaining, re-introduces us to the insights of Economics in this area and helps us apply them to multilateral negotiations. Brown focuses most directly on the importance of BATNA, uncertainty, and institutional features in the making and breaking of deadlocks (i.e. H1, H2 and H4), whilst also engaging with some of the other hypotheses. Given that relationships in collective bargaining tend to be long-term and marked by interdependence, we find some powerful analogies at hand that work particularly well for states bargaining in multilateral institutions.

Chapter 4 draws on findings in the field of Law to address our puzzle. Markus Gehring analyses the interaction between systems of dispute settlement and processes of negotiation across three institutions. Drawing on examples from the WTO, the EU and the UN, Gehring proposes that countries launch cases strategically to resolve deadlock, to influence negotiations and to improve their bargaining position. He assesses the validity of three of the hypotheses presented earlier in this chapter, and illustrates how institutions can facilitate agreement (H4) while diminishing especially legal uncertainty (H2) or increasing fairness and justice (H5).

Chapter 5, by Alasdair Young, presents the first of our six case study chapters that comprise Part II of the book. Young tests Hypothesis 6, and argues that the absence of strong transatlantic commitment to the

²⁰ Walton and McKersie 1965.

²¹ Exceptions to this are Druckman 1977a; Odell 2000 and Putnam 1988.

Doha Round is due to domestic politics, particularly decreased business support for and greater domestic reticence about trade liberalization in both polities. Moreover, political institutions that privilege the status quo amplify the impact of these domestic political factors. Additionally, Young also takes into account the impact of the availability of a superior BATNA (H1), and the relatively even power distribution in the global economy (H3) as deterrents to reaching agreement over the Doha negotiations.

Chapter 6 also focuses on a different dimension of the Doha deadlock. Amrita Narlikar and Pieter van Houten argue that a major reason why the current round of trade negotiations has run into so much difficulty is because of the uncertainty that surrounds the newfound power of the South. They develop a simple game theoretic model to capture these negotiation dynamics, focusing particularly on Hypothesis 2 on uncertainty. They argue that were the strengths and intentions of developing country coalitions better known, the likelihood of deadlock would be considerably reduced. They further assess the utility of this explanation against others, drawing particularly on H1, H3, H4 and H6.

Chapter 7 focuses on a transitional regime (lying between 'low' and 'high' politics). In this chapter, Sevasti-Eleni Vezirgiannidou analyses the deadlock of negotiations in The Hague in 2000, which led to the withdrawal of the United States from the Kyoto Protocol. She argues that the deadlock between the United States and other Kyoto countries was a product of two reasons: competitiveness concerns in relation to developing countries (i.e. H1 relating to a superior BATNA), and perceptions of a prohibitive cost of implementation (i.e. H6 relating to domestic preferences). Vezirgiannidou further explains the trend of the United States to re-engage with the regime via the Bali process – effectively a potential trend towards the resolution of the deadlock – by referring to developments regarding the BATNA of the United States (solution set SS 1) and changes in domestic politics (SS6).

Chapter 8 is one of two that deal with issues in 'high politics'. Jochen Prantl focuses particularly on institutional features of the Security Council that make it more deadlock-prone, thereby testing Hypothesis 4 most directly. He addresses the institutional limitations of the Security Council, particularly in the context of power balances and legitimacy questions (thereby engaging also with H3 and H5). Faced with these

different sources of deadlock, he argues that members have turned to informal processes to work around institutional deterrents (SS3, SS4 and SS5). Prantl addresses three questions: first, why has the role of informal negotiation processes grown in importance in and around the Security Council? Second, at what point do members of the institution choose informal tracks? Third, what is the nature of these processes and how do they contribute to breaking institutional deadlock?

Chapter 9, by Pieter van Houten, analyses and explains the outcomes of different multilateral negotiations over Kosovo. He focuses particularly on the 1999 negotiations, which led to NATO military intervention and the adoption of UNSCR 1244, and the 2007–8 negotiations (about the future status of the territory and in the aftermath of Kosovo's declaration of independence in February 2008). By comparing the forums wherein these negotiations were conducted – including the UN, NATO, EU, and ad hoc bodies such as the Contact Group – van Houten offers us a comparative assessment of different institutional features and thus a test of Hypothesis 4. Insofar as the negotiations have been part of a larger power game, particularly between Russia and the West, the chapter also provides an application of Hypothesis 3.

Chapter 10, by Jacob Bercovitch and Carmela Lutmar, engages with Hypothesis 6 to argue that certain configurations of domestic interests are particularly deadlock-inducing. The configuration that Bercovitch and Lutmar analyse relates to the tenure of leaders in power. They examine the relationship between leadership tenure and deadlocks conceptually, develop some hypotheses to illustrate these points, and then test them using an original dataset on conflict and leadership change. They find that under some circumstances stubborn leaders in power can indeed cause deadlocks and delay any political settlement. This relationship is even stronger when such leaders refuse any mediation efforts. Their analysis suggests that attention must be given to the interplay of external and domestic factors if deadlocks are to be broken.

The final and concluding chapter by Daniel Druckman and Amrita Narlikar summarises the collective findings of the book and provides an account of the particular hypotheses and solutions addressed in each of the chapters. In the light of these findings, it offers further refinements and revisions to the original hypotheses and solution sets, and also identifies an agenda for future research.

Contribution to the literature

As indicated in the discussion in the previous sections, this volume fits most easily in the broad group of writings that belongs to negotiation analysis. A large section of work in this genre is targeted towards understanding how to reach agreements. *Deadlocks in Multilateral Negotiations* draws on this literature and also contributes to it. The volume draws on the insights of several disciplines: History, Economics, Law, and Politics and International Relations. Part I of the book in particular brings together chapters located in the different disciplines, which apply theoretical and methodological insights from their respective fields to the issue of deadlock with the use of cases and examples. The concluding chapter further pulls these insights together. While the field of negotiation has a rich tradition of taking on multidisciplinary research, this book is different in that it consciously showcases the insights from four different disciplines in Part I. Further, there are three important ways in which the book goes beyond the existing literature and thereby makes a distinctive and unique contribution to the field.

First and foremost is our central focus on deadlocks. Most other major works in negotiation analysis examine the broader question of how to reach agreement,²² which means that their insights for understanding deadlocks, while still valuable, are usually indirect or peripheral. In a few of these works, moreover, the normative bias towards reaching agreement automatically leads to the sidelining of questions that relate to the anatomy and causes of deadlocks. In contrast, by focusing on one of the most fundamental puzzles in the negotiation process – deadlock as a specific form of non-agreement – we are able to shed new light on its nature, causes and solutions.²³

Second, the main insights that we gain from the literature on deadlocks relate to the strategies that individuals or states adopt that lead to

²² These are too numerous to list here, but examples include Fisher and Ury 1991; Kremenjuk 2002; Lax and Sebenius 1986; Raiffa 1982; Schelling 1960; Walton and McKersie 1965 and Zartman 1978.

²³ Similarly, while we benefit from the literature on conflict resolution and management (e.g. Druckman and Diehl 2006; Pruitt and Kim 2004; Watkins and Rosegrant 2001 and Zartman and Faure 2005), recall from the discussion in the first section of this Introduction that we see deadlocks as posing a distinct and important puzzle that differs from other situations of non-agreement that include conflict and other forms of crisis.

an impasse of some sort. While recognizing the utility of these findings, we find them more descriptive than analytic.²⁴ In this project, we are directly concerned with the prior question: what leads countries to adopt distributive strategies in the first place? Rather than being a ‘how’ question, i.e. how do countries negotiate to end up in a situation of non-agreement, this question is a ‘why’ question of what *causes* deadlocks. By exploring the explanations for the phenomenon of deadlock, we hope that we will be advancing the literature further for both the academic and the practitioner. We return to this question in our concluding chapter.

Third, our book is different from a large section of the literature in its aim to address the problem of deadlocks at the multilateral level (a large and influential part of negotiation analysis has traditionally focused on experimental analyses of bilateral negotiations). Some of our chapters draw on insights from the bilateral and regional levels, but with the purpose of making comparisons with the multilateral. Multilateral negotiations present us with several added layers of complexity due to a large number of actors (some of whom may act in coalitions and thereby play a multiple level game with their domestic constituencies, coalition allies and opposing parties) and often a large number of issues. As such, deadlocks in multilateral settings pose us with a particularly challenging set of problems. They also present us with an exciting range of opportunities and constraints in terms of solution sets. For instance, we might find that framing one’s cause in terms of fairness and justice is likely to have a greater impact in a multilateral setting, than in a bilateral or regional context where there are fewer third parties involved and hence fewer actors serving as the audience. Depending on how such framing tactics are used, attention to fairness and justice concerns may increase the probability of arriving at a deadlock – and especially if there is a great deal of contestation on what constitutes a fair deal (as per Hypothesis 5) – but may also increase the probability of reaching a more equitable agreement if the deadlock is broken. Similarly, the institutional settings in which most multilateral negotiations are conducted can help increase the likelihood of agreement or deadlock, depending on the substance of their rules and the processes that underpin their workings (Hypothesis 4). Normatively too, the resolution of multilateral deadlocks is attractive as the benefits of an agreement are likely to

²⁴ See for instance Odell 2009 on the Seattle and Doha deadlocks.

be more widespread amongst a larger set of players, in comparison to most bilateral and regional agreements.

While the gaps in the literature point to the academic utility of a project that is focused specifically on multilateral deadlocks, the current global economic crisis reinforces the need for such a work at a very practical and real level. A high degree of multilateral cooperation will be necessary to find a way out of this crisis. The persistence of deadlocks in areas such as trade, climate change and security issues will not help. Understanding the anatomy, causes and solutions of deadlocks will be a crucial part of the process of tackling this crisis as well as future ones.

PART I

Disciplinary insights

1 *The politics of deadlocks*

ANDREW GAMBLE

Deadlocks abound in politics. At its simplest a deadlock is a position in which it is impossible to proceed or act. It signals a complete standstill, an impasse. Relationships become frozen, and characterised by immobility and inflexibility. Deadlocks arise frequently in political negotiations of all kinds, but it is important to ask why this is so. Is there something about politics and political relationships which are especially liable to deadlocks, or is the phenomenon a more general one? Might it be possible to design a world in which deadlocks did not occur at all, or only infrequently?

Deadlocks are generally seen as undesirable. If there is an impasse in a negotiation and it becomes impossible to proceed or act, it is often assumed that the resulting situation will be less optimal than if there had been an agreement. But as other papers in this collection point out this is not necessarily the case. An impasse can be rational if the best alternative to a negotiated agreement (the BATNA) is seen as superior to what is being offered by the other parties. There remains an assumption that the path of negotiation and the conclusion of negotiated agreements is generally in the best interests of the parties, and that the gains that come from negotiation in the end outweigh whatever has to be given up or compromised in order to get the agreement.

The mainstream view

The key idea, as discussed above, has come to represent the mainstream in negotiation studies, which focuses on the role of individual negotiators and individual mediators. This reflects the liberal presumption in favour of the individual, individual choice, individual personality, individual rationality and calculation, in contrast originally to conservative ideas of authority and hierarchy as the principles that should order society. This liberal view assumes that economies should be society led rather than state led, and that civil society is based on cooperative

relationships of exchange, which facilitate a constant process of bargaining and negotiation between all citizens. The outcome is a society which has become progressively more integrated and more interdependent, evolving ever more complex forms of both the division of labour in Adam Smith's sense and the division of knowledge in Friedrich Hayek's sense. The management of these highly integrated social systems is seen to require relationships which emphasise flexibility and openness and which create means to anticipate conflicts wherever possible, resolving them quickly when they do occur.

This vision of the modern market economy when it was first put forward was an unfamiliar and unsettling one for many contemporaries. It gave legitimacy to practices which had long existed but which were now rapidly extending to more and more spheres of the economy and society. One of the key objections to these developments was that they changed the moral framework of society. They encouraged a morally neutral set of procedures in which individuals could concentrate on pursuing their own advantage, and offering deals to other individuals which would be to their advantage. Classic formulations appear in Adam Smith: 'Whoever offers to another a bargain of any kind, proposes to do this. Give me that which I want, and you shall have this which you want, is the meaning of every such offer; and it is in this manner that we obtain from one another the far greater part of those good offices which we stand in need of'.¹

From the perspective of the marketplace everything is commensurable, everything can in principle be bought and sold, all obstacles can be negotiated. Many philosophers (and economists) have argued that people's needs and the goods they strive for are ultimately incommensurable,² but the market establishes a common denominator, a common standard of monetary value, by which all goods can acquire an exchange value, and so allow trade and negotiation to take place, in principle on anything. There is nothing that cannot be made subject to contract, nothing on which a monetary value cannot be placed, and therefore become the subject of a bargain. The justification for such a society was, as Adam Smith again suggested, that everyone had an intrinsic desire to better their condition, and that governments should seek to remove the obstacles in their path, and set free this natural impetus:

¹ Smith 1961, p. 18. ² See Berlin 1997 and Robbins 1935.

(The man of system) seems to imagine that he can arrange the different members of a great society with as much ease as the hand arranges the different pieces upon the chessboard; he does not consider that the pieces upon the chessboard have no other principle of motion besides that which the hand impresses upon them; but that in the great chessboard of human society, every single piece has a principle of motion of its own, altogether different from that which the legislator might choose to impress upon it.³

This is a view of human society as a seamless web of interactions and negotiation between individuals, which is not frictionless, but which allows a constant process of adjustment and negotiation to take place which issues in a set of positive sum relations for everyone. As all individuals come to participate in the market so the process spreads within national economies and within the global economy, and everyone becomes increasingly dependent on everyone else for the satisfaction of their needs and wants. The process is impersonal, in the sense that there does not need to be personal contact between buyers and sellers at many points of the production chain, and the final consumer in particular can be completely oblivious about the chain of agreements and bargains which have led to the product that is consumed being available in the first place, and does not need to have any knowledge of the various stages of its production in order to enjoy it.

This modern world of the global market, which has seen the decline of self-sufficient agricultural communities all over the world, appears very often as a world without politics, or at least a world that would be better off without politics, and which has no need of politics. It is a world that has been abstracted from politics. It is also a world apparently without significant deadlocks, and therefore has no need of political negotiations to resolve them. From this standpoint the fact that our world is full of political negotiations and full of deadlocks is regarded as both unnecessary and harmful. It is often blamed upon the continuing desires of legislators to impress their own principles of motion upon society rather than to allow the principle of motion within every individual free rein.⁴

From this classical liberal perspective deadlocks arise primarily because of the intrusion of politics into what should be relationships between individuals. Politics is associated above all with states, but it also extends to all relationships which involve power, and therefore to

³ Smith 1961. ⁴ Hayek 1982.

all attempts to bargain collectively rather than individually. The formation of trade unions or business cartels are seen in these theories as attempts to impose patterns on social outcomes which would not exist if it was left to bargaining between individuals. The tendency of individuals to form groups and associations and then use their collective strength to defend their interests and negotiate with other groups, and in particular with governments, is regarded as the ultimate source of the many deadlocks that are found in society, from international relations to industrial relations. The solution is always to dissolve the collective power which these groups exert, and return to individual negotiation and individual compromise. The existence of collectives turns positive sum relationships into zero sum relationships, and leads to contests of will and power, and therefore to deadlocks. These produce at the least relative impoverishment, in comparison to what might have been, and at worst they can produce violent conflict, as one side or both resort to force to try and overcome the impasse. Deadlocks in this sense are treated as an aspect of collective action problems in general. They arise because of a market failure which has either arisen spontaneously through the formation of special interest groups or as a result of political interference.⁵

The problem with the liberal perspective is that the frictionless and constantly self-adjusting process of the market, which works best when it is free from politics, still requires politics both to establish it in the first place and to sustain it. So even if the liberal vision of the self-adjusting market was achievable, it would still need a process of political negotiation to establish it in the first place. This was one reason why liberal theorists used the device of the social contract to establish the framework of law that a liberal society required, but which could not be generated spontaneously from the exchanges of a society of individuals. The social contract in all its different manifestations was a grand negotiation which established the state and what kind of state it was to be. The paradox for liberal accounts of politics is that the device of the social contract accepted that a political deadlock existed which had to be resolved through a negotiation in order for a liberal society to be possible in the first place.

In the Hobbesian account of this process it was the fear of violent death that persuaded recalcitrant individuals into establishing a polity

⁵ Olson 1982.

that could lift that fear. The anarchy and uncertainty of the state of nature was exchanged for the order and security of civil society under the watchful eye of the sovereign. Once supreme powers had been granted to the sovereign, civil peace became possible, but also external defence. One of the sovereign's most important roles was to protect the citizens of the commonwealth from external attack. The sovereign power had to be enhanced so as not only to pacify internal quarrels but allow the commonwealth to hold its own in relations with other states, where no sovereign existed to force states to disarm. The end of anarchy within the state did not mean the end of anarchy in relations between states. It tended to intensify the competition and the possibility of conflict.

The necessity of politics

This irredeemable political character of international relations introduces a second perspective into the debate, one which rejects the liberal emphasis on the individual as the starting point for thinking about problems of politics and problems of political economy, however important markets have become in the modern world as the primary means of coordinating economic activity. This second perspective believes that the human condition has an inescapable political dimension. Politics is not an optional extra that is needed only once and then can be dispensed with, or that can be banished from the way society is established and organised. Politics is instead a central aspect of human life, because there are certain conflicts between different goods which human beings seek which cannot be resolved except through discussion and negotiation, or through force. There are many things that are beyond the market and market processes, and cannot be subjected to them and, even within market processes, there are many issues that cannot be solved except through resort to political means, particularly the means of negotiation, persuasion, compromise and conflict.⁶

Some of these political approaches have been ignored in negotiation analysis, because very abstract models of bargaining are often employed which strip the analysis of all political content. Key political concepts such as power, identity, legitimacy, authority, interest, consensus, compromise and conflict need to be fully integrated into the analysis, in

⁶ Crick 2000.

order to understand better the contexts in which deadlocks can arise, and why they can be so difficult to overcome. Political concepts introduce a degree of complexity which is unwelcome to some of the parsimonious models. Such models need supplementing with insights into the context of decision-making which political analysis can supply. Politics and the political have been given many definitions, but central to most of them are the concepts of order, identity and power.⁷ The political is concerned with the rules which create orders and frameworks, it is concerned with the way in which individuals define what they belong to and what they value, and it is concerned with who gets what, when and how. These three ways of understanding the political can be applied to how the agenda and non-agenda of politics is constructed, and used to explore the nature of deadlocks.

Another way of thinking about how the political can be applied to deadlocks is Albert Hirschman's analysis of the ways in which individuals can react to the decline of an organization.⁸ The basic choice is between voice and exit. In the case of exit, individuals react to a decline in the quality of the organization or country by switching to another supplier or another employer or another jurisdiction. They vote with their feet. The ways in which this works in many different situations has been studied by economists. In the case of voice, individuals react by using whatever channels of representation are open to them to campaign for a change of policy, a reorganization of the company, or a change of government. Which of these two alternatives will be chosen depends on a third factor, loyalty. If loyalty is high, strategies employing voice are much more likely to be adopted than strategies of exit. Where deadlocks exist in multilateral negotiations this is likely to be because strategies of voice are paramount. To analyse 'voice', however, in all its different ramifications, is to analyse the political, the ways in which interests are formed, and power and authority are distributed, and identities constructed. If voice is dominant, this may be because exit is not feasible, or because loyalty is high, either to another state, or to an international organization and its rules. But that raises an intriguing question. Why is exit not possible? What is it about some multilateral negotiations which means that the participants do keep coming back to the negotiating table even if they are not making much progress?

⁷ Gamble 2000. ⁸ Hirschman 1970.

Much depends on whether multilateral negotiations are viewed as primarily zero sum or positive sum games. If they are zero sum then one party can only gain at the expense of others. Deadlocks would be very likely if some or all of the participants were to approach negotiations in that way. But it would be surprising if the participants then kept coming back for more. Exit might seem a much more attractive option. It is the possibility that multilateral negotiations might be positive sum, which keeps negotiations alive and persuades many participants to keep trying. The rewards from a genuine breakthrough are large, and incentive enough to stay involved. Except in very extreme circumstances multilateral negotiations are unlikely to yield zero sum results to any participant. Those seeing the negotiations in zero sum terms are more likely to consider other means, including war, in order to transform their bargaining position in relation to others. The prospect of achieving positive sum gains through multilateral negotiations implies that the negotiations are serious, and that participants are willing to compromise. Even then, for reasons analysed in this book, there is always the possibility of failure. Understanding the sources of that failure is the task of political analysis.

First-order and second-order negotiations

The contrast between positive sum perspectives and zero sum perspectives is also a contrast between liberal perspectives with their emphasis on economic interdependence and realist perspectives with their emphasis on state interests. How does it help us understand the politics of deadlocks? One way is to stand back from the politics and processes of negotiations over particular issues, which we might call second-order negotiations, and instead consider how the basic institutions of the international state system and the international political economy have been constructed. This means focusing on the treaties and international agreements which were seminal for the development of these institutions. When this is done it becomes obvious not only how important such negotiations were, but how they are of a different character to other negotiations. These are the first-order negotiations which set the parameters of the international state system and the international economy, and thereby allowed a set of second-order negotiations to become established, aimed at resolving particular problems. One set of negotiations is needed to establish rules of the game, another set then works

within those rules. As with paradigms in scientific enquiry a point may come where the paradigm is exhausted, or where it no longer works as well as it did, because circumstances have changed, and the original circumstances in which it did work well no longer obtain.⁹

The international state system and the international political economy over the last 200 years have seen a substantial growth in interdependence and complexity, and a growing need for multilateral negotiations on a wide range of issues. States cannot ignore markets and rely on policies of national self-sufficiency, but equally states cannot be excluded from markets. Markets alone cannot produce solutions; negotiations are often indispensable. A current example has been the financial crash of 2007–8. At the height of the crisis in September 2008 the very real danger of a meltdown of the international financial system and the failure of some of the largest global banks was averted by rapid and decisive intervention by governments and central banks in the leading economies. This action contradicted the principles of the neo-liberal policy regime which had governed global finance since the 1980s, and whose architects and supporters were present in large numbers within the world's treasuries. But the situation was so serious that the role of the state as the guarantor of last resort was invoked, and this necessarily began to change the basis of the paradigm which had allowed global finance such freedom in the previous twenty-five years.¹⁰

What the new paradigm for global finance and for global trade will be was still unclear in early 2009. But it was certain to involve a complex series of multilateral negotiations to try and reach agreement on what the basic principles should be, and the prospect of a deadlock developing in these negotiations was very real. This was partly because so many countries needed to be involved, since the crisis was a global crisis, and it was obvious that several of the rising economic powers, including China, India and Brazil, had to be represented in those discussions. Their agreement had become essential if the global economy was to be re-established on a sound basis. Increasing the number of countries to be consulted was both necessary for reasons of legitimacy, but also necessary in order to reach solutions that might work and offer some prospect of restoring the global economy to health. The G20 meeting held in April 2009 was a preliminary step towards considering what changes of rules might be needed for the future. But, as many observers

⁹ Kuhn 1970. ¹⁰ Wolf 2009.

noted, the risk of a deadlock or partial deadlock was likely in the talks, since states had many reasons for not wanting to agree to changes which might involve them making some major concessions, given the uncertainty of not knowing the consequences of any such agreement in the future. A crisis of the magnitude of 2008–9 is a reminder both of the necessity of first-order negotiations to establish the ground rules for any long-lasting regime, but also the complexity of actually bringing it about, when so many of the participants in the negotiation may have other options and therefore good reasons for not agreeing a change which might possibly benefit them in the long-term, but with no guarantee that it would do so.

There are many examples of what are here termed first-order negotiations in the history of the international state system. That system has been constructed by a series of treaties, most often concluded at the end of wars, after a previous deadlock had been resolved by force. The Congress of Vienna at the end of the Napoleonic Wars, the Treaty of Versailles at the end of the First World War, and the Yalta and Potsdam Agreements at the end of the Second World War were all negotiations which shaped the character of the international state system for the next period, but although they involved negotiation between the various allies on the victorious side, the defeated nations were largely obliged to accept the terms that were imposed on them. These were for the most part one-sided negotiations, resulting from a position of overwhelming power, following the course of the war itself and the relative balance of military forces at the end of it. Does this mean that it is not possible for first-order changes to come about in any other way? Does there need to be a pronounced asymmetry of power (as Hypothesis 3 suggests)¹¹ for a major redrawing of boundaries and the imposition of new rules for the conduct of international relations?

Major changes do often follow the kind of shake-up which wars provide, particularly if they end in a clear-cut victory for one side. The reason why nations resort to war is when the participants decide there is no other option to break the deadlock that has arisen, because of the mutual conflict of interests. But it does not cover every eventuality. Substantial first-order changes in the international state system have occurred between key players without resorting to war, but which did either resolve a deadlock or prevented one from emerging. Sometimes

¹¹ See Introduction, p. 9.

this has not directly involved a negotiation between the parties involved, but resulted from a series of events which dramatically transfigured the relationships between the major participants. An example is the end of the Cold War between 1989 and 1991. The collapse and subsequent disintegration of the Soviet Union caused a profound change in the international state system, allowing the United States to emerge as the sole superpower, in a position of extraordinary dominance, and forced a reassessment by Russia of its position in relation to the United States.

A rather different example is that of Britain and the United States at the end of the nineteenth century, when Britain's established power was challenged by the rising power of the United States, particularly in the Western hemisphere. Following the Venezuela incident in 1895–6, which had almost led to war between the United States and Britain, the situation was defused and the deadlock over their rival claims in the Western hemisphere ultimately broken, by a fundamental reassessment of British foreign policy by Lord Landsdowne, British foreign secretary between 1900 and 1905. It led to series of negotiations with the United States over contentious issues between them, including the international status of the Panama Canal, the border between Canada and Alaska, and fishing rights in Newfoundland. In each case the issue was settled substantially on US terms, to the dismay of Canadian political opinion, and at the end of the process the British fleet was withdrawn from its permanent station in the Caribbean. These changes followed the strategic reassessment that Britain could not fight a war simultaneously against the United States in the Western hemisphere and against Germany in Europe. Accordingly, a decision was made to conciliate the United States, and accept a fundamental change in the international state system, with the aim of making the United States an ally of Great Britain rather than a potential enemy. This policy subsequently informed later negotiations between the two countries, particularly after both world wars. By this means the United States was gradually to assume the position that Britain had enjoyed within the global economy and the international state system, but without the necessity for conflict between these two powers. A major first-order change was accomplished, and a major deadlock broken, but through a process of adjustment and negotiation.¹²

¹² Adams 2005.

The international state system is governed by conflict and by negotiation, and the territorial boundaries of each state and their ability to project power are carefully guarded. The international political economy however has been very different, at least since the end of the period of mercantilism, during which national economic policy was entirely subordinated to other objectives of national policy. In the nineteenth century, however, the attempt by Britain to develop a liberal world order, based on free trade, the gold standard, sound money and enforceable property rights, created a new dispensation. The global economy which came into existence had Britain at its centre, and Britain profited hugely from its existence, but it was also larger than Britain, and in due course the leadership of this global economy was to pass from Britain. What made this international political economy possible in the nineteenth century was not any particular set of negotiations, although there were some important ones, such as the Anglo-French commercial treaty of 1860. The most important factor was the position of structural power which Britain had come to occupy by the middle of the nineteenth century, with a lead in productivity, in trade, and in finance which made Britain for a time not just the workshop of the world but its banker, its shipper and its insurer.¹³ In response to this dominance in the second half of the nineteenth century the rising powers of Germany and the United States responded by imposing high tariffs against British goods to maintain their development of their industries. Britain however did not retaliate, but was content unilaterally to maintain the openness of the global economy due to the long-established view in its governing class that the long-term prosperity and security of the British state depended on it. Britain's unilateral actions created the framework for order in the international economy, the structure of rules which greatly expanded global trade and drew ever larger numbers of the world's peoples into relationships of exchange.¹⁴

This was an exceptional period, because no one had planned the global economy, and the British were not disposed to take conscious control of governing it in a way which was to characterise the United States after 1945. But British power was nonetheless instrumental in achieving the creation of this new order, with momentous consequences for the future of world politics. It was this period more than any other which gave rise to the liberal hope voiced by Richard Cobden and later

¹³ Hobsbawm 1968. ¹⁴ Gilpin 1987.

J. A. Hobson, among others, that a lasting peace might indeed be achieved between nations if priority was given to economic development and to trade, and if there was a withdrawal from colonial empires and the pursuit of territorial claims through military means.¹⁵ This was the trade-off between security and wealth, but the compromise underpinning it was shattered by the First World War. The military challenges to the international order which Britain had created were eventually defeated, but it produced a fundamental reordering of the global economy and the international state system.

The exercise of power has always been crucial in establishing and maintaining the parameters of both the international state system and the international political economy. Order does not arise spontaneously, it has to be created, and in the last hundred years this has increasingly focused attention on the possibility of global bargains which would make possible new periods of order. Sometimes hopes of this have been dashed, as after the Versailles Treaty in 1919. At other times, and particularly after 1945, there has been substantial achievement, with the United States emerging to assume a global leadership role in both security and political economy. In the 1970s there was a further substantial reordering of the international political economy, but less change in the international state system. In 1991 there was a major change in the international state system. The world order since 1945 has also allowed the growth of many new multilateral institutions, in part a recognition of growing interdependence and the need for multilateral negotiations to solve many of the problems of trying to develop an ever more integrated international economy with a still fragmented state system.¹⁶

The political deadlocks that arise in this world order are of two kinds. There are the first-order deadlocks which concern the basic rules of the system and whether or not these are still legitimate or effective in securing the objectives for which they were instituted. Then there are the second-order deadlocks which emerge within negotiations over particular issues, such as trade, or climate change. In principle these are easier to resolve than first-order deadlocks, which sometimes do need an exogenous shock to shift positions. Examples of first-order deadlocks include the long-running deadlock over membership of the Security Council of the United Nations, and over the governance of key

¹⁵ Hobson 1988. ¹⁶ Payne 2005.

institutions such as the IMF and the World Bank; as well as over some of the basic rules and institutions of the global economy, such as the reserve currency status of the dollar.

The international political economy has suffered two periods since 1945 when there has been pronounced questioning of the basic rules, and efforts to resolve the deadlocks. The first was in the 1970s, which began with the United States unilaterally deciding to cut the dollar loose from gold, in effect suspending Bretton Woods. The reserve currency status of the dollar was preserved, but at the cost of much greater volatility and uncertainty, and ultimately the creation of a new boom but in a much more deregulated market place. The second period began in 2007–8 as a result of the financial crash and the collapse of the financial growth model which had predominated since the 1970s. The crisis arises from a series of deadlocks which there was no way of addressing satisfactorily or negotiating an outcome under the present dispensation. The reason for that lies in the balance of power¹⁷ that exists between the United States and other significant players, not just the European Union and Japan as in the past, but crucially the BRICs – Brazil, Russia, India and China – whose entry as rising economic powers and significant global players has been marked during the prolonged economic upturn since 1992. The difficulty of resolving the differences between the various global players and finding a way to repair the damaged financial and commercial circuits of the global economy and resume growth is that unlike in 1945 and even in the 1970s, the continued dominance of the United States can no longer be taken for granted. There has been a shift in the balance of power which in certain areas does not favour the United States. This makes it very difficult for the United States to impose substantially its own solutions on the rest of the international community, even while making some concessions, in the way that it was able to in 1944 at Bretton Woods, and also to a lesser extent in 1974–6. The United States is in military terms still vastly more powerful than any conceivable rival or combination of rivals. But this is no longer true as far as the international political economy is concerned.

The situation can be fruitfully compared to that before 1914 and to the interwar years. In the nineteenth century, despite the growth of world trade, migration and finance, the prevalence of empires meant

¹⁷ See Hypothesis 3, in the Introduction.

that many powerful states could avoid multilateral negotiations over the international political economy or anything else because their empires gave them a certain self-sufficiency, while also reinforcing the territorial fixations of their rulers, as Cobden had feared. Economic and security interdependence were increasing, but the international community mostly lacked forums or agencies to deal with the problems which these were creating. In particular there was no way to address the grievances of latecomers to the international state system, such as reunified Germany, which complained that the rest of the world had already been mostly divided territorially between the existing Great Powers. The inability to create multilateral negotiations about the issues which divided the Great Powers made war between them much more likely.¹⁸

In the interwar years there was a brave attempt to reconstruct the international political economy and recreate the conditions for the prosperity which had been enjoyed at that time. The re-establishment of the gold standard was the most obvious symbol of this policy. But as many scholars have since pointed out, most notably Charles Kindleberger, the attempt was doomed because it needed one state to act as the global hegemon. Britain, which had the will to do so, no longer had the capacity, while the United States, which had the capacity, did not yet possess the will.¹⁹ The change in the balance of power meant that no solution could be imposed, and the new multilateral institutions such as the League of Nations did not work as they were intended – the United States had in any case rejected membership. The problems of the time were encapsulated in the failure of the World Economic Conference in 1933. There was widespread perception of what needed to be done to prevent the slump becoming a long economic depression, but the negotiation was deadlocked because all the participants had other options, and the securing of international agreement was a low priority. Germany, the United States, Great Britain and France all had protectionist options, based on the continental economies they could organise in the case of Germany and the United States, and large overseas empires in the case of Britain and France.

The failure of the World Economic Conference in 1933 has often been cited as a portent of what happens when deadlocks cannot be broken by multilateral negotiations, but underlying it is the problem

¹⁸ Howard 2000. ¹⁹ Kindleberger 1973.

that the changing balance of power between the leading states made it very hard for a solution to emerge, because no state was in a position to impose it, and there were insufficient incentives for states to agree to a plan which would have been in their long-term interest.²⁰ When they did agree it was in the very different political circumstances of 1945. The problem for the G20 in the present financial crisis is how to avoid what happened in the 1930s, when everyone talked of the need to preserve free trade and international economic cooperation, but in practice embraced competitive devaluation and protectionism.

The most important first-order deadlock in the security field is the existence of nuclear weapons. These weapons have changed the nature of warfare and made it impossible for the first time in the modern era for states to guarantee the security of their citizens.²¹ The certainty that a major nuclear exchange would cause irreparable damage to all countries, combatants and non-combatants alike, facing the human species and human civilization with the prospect of annihilation, makes this the ultimate deadlock in world affairs. The only one that comes close is the threat of climate change, which is less immediate than a nuclear exchange, but has the same potential as nuclear weapons to put the continuation of human civilization in doubt.²² There have been periodic attempts to deal with nuclear weapons, and a number of multilateral negotiations have taken place with some success to remove second-order deadlocks. The Test Ban Treaty (1963) and the Nuclear Proliferation Treaty (1968) are examples of this. However there has been little success in actually disarming existing nuclear powers, or in preventing the spread of nuclear weapons to more states. So long as nuclear weapons exist it is likely that one day they will be used again, either through accident or an explicit political decision. There can therefore be no more important deadlock to remove, but there seems little prospect of achieving a breakthrough, because it would require all states to renounce both the intention and the capacity to maintain or develop nuclear weapons. With the wide diffusion of the technology and the science necessary to create these weapons, the trust in the intentions of other states is always likely to be lacking. States prefer to rely on MAD, mutually assured destruction, as the United States and USSR did during the Cold War, because assuming that all states have a

²⁰ An example of Hypotheses 1 and 3. See Introduction, pp. 7–9.

²¹ Cerutti 2007. ²² Giddens 2009; Stern 2009.

certain basic rationality they will be deterred from launching first strikes. States without nuclear weapons are still vulnerable to invasion, as Iraq demonstrated, which is why many states see the possession of nuclear weapons as the means of deterring both nuclear and conventional attacks upon them. A state might choose to break this deadlock by offering to disarm unilaterally, but no one is proposing this, so the fundamental deadlock persists. In order to lift the curse of nuclear weapons some way would need to be found to disarm all the leading states and create a global leviathan, either in the form of a global state or an international authority with sufficient power to police the world. The prospects for this are not high, since no state dares to disarm unless it is sure that all other states will do so. It is the ultimate prisoners' dilemma, with no resolution in sight.

Climate change is another security issue which offers a similar prisoners' dilemma, but here at least the problem is more akin to some of the deadlocks in international political economy, and there is a slightly greater optimism that progress may be made, in part because the threat is less immediate, and there is more time to reach an agreement which might reduce or at least stabilise the amount of CO₂ emissions. But the difficulties are still formidable because although all countries will be affected by climate change, they will be affected in different ways, and they are at different stages of development, so inevitably have very different interests. The United States is still responsible for 45 per cent of the world's emissions from car use,²³ but the sharpest rise in emissions is now coming from China and India and other developing countries, starting from a very low base. Crafting a multilateral agreement which puts the major burden of adjustment onto the rich nations, while committing the developed nations to implement reductions when they can afford to do so, is the likely shape of any global bargain on climate change. However, an agreement which would be genuinely first-order rather than second-order, in the sense that it would create a global low carbon economy which would be sustainable in a way that the present energy economy is not, is still distant. The difficulty with security deadlocks is that time is not a luxury. In terms of climate change time is quite obviously running out. Resolving second-order deadlocks is very important and helps to build confidence for the resolution of first-order deadlocks, but by itself is not enough. Somehow

²³ Giddens 2009, p. 159.

the anarchy of the international state system has to be overcome through multilateral negotiations if the human species is to enjoy any kind of secure future.

Levels of analysis

In discussing different kinds of deadlocks it is important to distinguish the level at which the deadlock operates, to understand why multilateral negotiations have become such a common feature of international affairs. Why are these negotiations necessary at all? This chapter has suggested that the starting point should be the structure of the international state system and the international political economy, and the way in which they have been constituted as a series of trade-offs between states and markets and between security and wealth. The world has never existed as a single polity, there has never been the possibility of a social contract embracing all its peoples, and there has certainly never been anything approaching a world government. Instead, political authority and political power have been fragmented in many separate jurisdictions, each claiming control over particular territories, populations and resources. From this standpoint politics is not fundamentally about civil society but about the state without which there would be no civil society. This holds at both the national and, still more, at the international level, where the different jurisdictions confront and recognise one another, and have an interest in establishing ways to organise their affairs to their mutual advantage with the least amount of conflict. One form this can take is negotiating about the rules to be enforced throughout the global economy, with the aim of increasing the number of decisions which can be left to individual economic agents. The point is that for any of this to be possible agreements between states will be necessary.

States are the essential building blocks of this conception of politics. The formation of a collective will, and the creation of state capacities to express that will and implement its decisions, are vital. The existence of many separate jurisdictions and powers is the basis of the international state system, and makes necessary diplomacy, international agreements and negotiations as a continuous process without which the system could not function. The issue is not the external interference of politics in this world, but the fact that this world is so constituted that politics is an integral part of it. Considerations of will, interest, power and

capacity at the level of the collective and not just the individual are unavoidable. A powerful literature has developed which analyses the behaviour of states as the basic units in the international system, and this assumes that states take precedence over markets and security takes precedence over wealth. Whatever may be the trade-offs between these two, in the end the survival of the state itself is the supreme value to which everything else is sacrificed.²⁴

All deadlocks are difficult to resolve, but those that concern resources, who gets what, when and how, are potentially easier than those which involve the ordering of the system or identity. The former create problems because the benefits tend to be long-term while the costs are short-term, so negotiators are asked to take a system view rather than the more immediate narrow short-term view of their group or state. The latter create problems because questions of identity are often the least negotiable, so if an issue becomes defined in terms of identity, then finding a common solution can prove very difficult. As Northern Ireland and many similar disputes have shown, divisions of identity can create the toughest deadlocks of all. One of the methods used to deal with them is to increase the number of participants in the negotiation, to make it multilateral rather than bilateral. In the case of Northern Ireland this meant, in addition to the different factions on the Republican and the Unionist sides and the British government, involving the governments of the United States and the Republic of Ireland.²⁵ Deadlocks which arrive from contested identities are similar in their form to deadlocks which arise from lack of agreement on first-order principles, because with the politics of identity what is often contested are the basic rules, symbols and constitution of the state itself. If two groups do not share the same national identity, but see themselves as different nations and demand their own states, finding a way to persuade them that they do have common ground and that rules can be devised which create a set of institutions which are genuinely neutral between the two groups is extremely difficult, but not impossible as the example of Northern Ireland appears to show. It remains only a qualified success, however, because the peace process has allowed a truce but has not yet produced genuine integration of the two communities, which would allow a normal politics to arise across the sectarian divide.

²⁴ Morgenthau 1954. ²⁵ Tonge 2002.

If the basic deadlocks concerning issues of order and identity can be resolved within a state, it allows the development of a normal political process of bargaining, adjustment and compromise. Deadlocks can still arise, but often solutions can be found, and the impasse broken. At the level of the international state system and the international political economy deadlocks around issues of identity might appear to be not such a problem, because of the lack of an overarching polity and of much sense or desire on the part of most citizens to belong to one if it existed. But this indicates the difficulty of resolving deadlocks in these kinds of multilateral settings, because one of the most effective means, that of creating a focus for loyalty and belonging, is not available. The thin loyalties which transnational institutions attract are a slender base on which to build a lasting regime, and once circumstances shift, the policy regime may come under threat.

Notwithstanding the difficulties there has been considerable progress in creating international regimes, which have persisted for quite long periods, and which have been responsible for increasing levels of economic connectedness and interdependence. Circumstances and events have combined to overcome the deadlocks at this level, at least for a time. That has allowed the development of multilateral bargaining between states within the basic rules that have been accepted as the framework for the international political economy. Given the great imbalances in power, resources and capacities between states and regions of the international political economy it is hardly surprising that the course of multilateral negotiation has often not been smooth, and that deadlocks are quite frequent, as with the Doha Round of the WTO. Yet it is little use complaining that it is political interference in markets that is the cause of these deadlocks and that if power could be banished from the process individuals would be free to adjust their behaviour in a smooth and frictionless manner. It is because the market process cannot exist without political guarantees, and because many markets have become global markets, while political authority has remained largely national and fragmented, that the problems arise in the first place. The sphere of power relationships involves hierarchy and inflexibility which makes negotiation essential to try to overcome conflicts and avoid deadlocks between the participants, all of whom claim to be sovereign. Such fragmentation could only be overcome if there were serious steps towards the creation of a single polity, and a single government for the entire world. It is very hard to imagine the circumstances in which such

a polity and such a government might arise. The difficulties which the EU has encountered in moving towards a deeper political integration have received a great deal of attention recently. It remains stuck at a confederal, intergovernmental level, with some transnational elements.²⁶ Such a structure encourages deadlocks to emerge quite regularly. There is no authority within the EU which can effectively override them. They have to be patiently worked through.

The same is true at the international level. Several decades of multilateral negotiation have not been without effect. There is now an embryonic global polity of a kind which never existed in the nineteenth century. But it continues to be threatened by both first-order deadlocks over the basic rules of the world order, and how they should be changed to accommodate the interests of rising economic powers, particularly in times of crisis, as at present. There also serious deadlocks over a number of more immediate but very pressing problems, such as the stalled trade talks, and the precise nature of the economic package which national governments ought to commit to, in order to bring the global economy out of recession as quickly as possible.

Conclusion

Classifying deadlocks as first-order or second-order in the sense used here is only a starting point. The analysis needs to be deepened by considering the hypotheses about multilateral negotiations discussed in the opening chapter by Amrita Narlikar. Her six hypotheses isolate different causes of deadlock in multilateral negotiations, and these deadlocks may be either first-order or second-order, although some of the hypotheses are more obviously associated with one or the other. As will be clear from the analysis of the deadlock over how to reform global economic institutions, or of the deadlock over how to deal with climate change, several of the hypotheses are particularly fruitful for understanding deadlocks, particularly Hypothesis 1 – *deadlocks occur whenever and as long as parties believe their alternative to agreement is superior to the deal on offer* and Hypotheses 3a and 3b – *deadlock is more likely the more equal the power distribution, and the more diverse the culture of the parties that constitute the balance of power*. This is what makes deadlocks so difficult to resolve. One of the main reasons

²⁶ Telo 2006.

why states think there is an alternative to agreement is when there is no great asymmetry of power between them. Periods when there has been no hegemonic power are typically periods when first-order deadlocks persist. Such problems are compounded if there is wide diversity in the states which constitute the balance of power. That is one reason why some observers from very different political perspectives are prepared to put their trust in coalitions of the willing, groups of states with similar perspectives and similar values, which can make progress through multilateral negotiations among themselves on some of the big security questions like terrorism and climate change.²⁷ For Hypothesis 2 – *deadlocks occur because negotiators bluff and lie* – it is the absence of trust between the negotiators which causes breakdowns in the negotiations, and this relates to Hypothesis 3b, since this is more likely where the culture and identity of the participants are very different. Hypothesis 4 – *deadlocks occur because certain institutional structures facilitate or deter agreement* – directs attention to some of the rules which frustrate agreement. Such rules can reflect previous power relationships, but they can also be a product of historical accident and deep institutional conservatism which prevents sensible rule changes. The EU and the UN are two institutions which have suffered in particular from the embedding of particular rules which has made both institutions highly prone to deadlocks. Great political skill is required to circumvent them. Hypothesis 5 – *deadlocks occur because fairness and justice matter* – brings into play consideration of values and the construction of identities, alongside interests. The rising economic powers, for example, deploy arguments of fairness and justice in making their case to be exempted from having to adopt the same policies to combat climate change as the rich countries. Finally Hypothesis 6 – *deadlocks occur internationally because of certain configurations of domestic interests* – links with the arguments made in this chapter about the different levels of analysis that can be deployed in analysing deadlocks. Agreement can even be reached in a multilateral negotiation and then scuppered by domestic opposition, as happened most famously with the repudiation by the US Senate of the treaty Woodrow Wilson negotiated at Versailles. It can be seen in relation to many aspects of the EU, and the gap that has emerged on some issues between the European political elite and their national electorates.

²⁷ Giddens 2009; Kagan 2008.

Deadlocks are not going to disappear, and some deadlocks may never be broken, at least for very long periods. They are characterised by 'extended delay', as suggested in the Introduction to this book. Much of the literature in negotiation analysis deals with processes internal to the negotiation, but this chapter has argued that important though that is we also need to consider some of the deeper and more lasting causes. Political analysis has a great deal to offer here, drawing attention to factors which some of the more parsimonious models of the economists ignore. Deadlocks deserve much more study than they have so far received, and from a wider interdisciplinary perspective. There are ways of overcoming deadlocks, as many of the chapters in this book testify, and given the scale of the global challenges now confronting us, we urgently need better understanding of the causes of deadlocks so as to maximise the chances of multilateral negotiations producing breakthroughs.

2

*From Bretton Woods to Havana:
multilateral deadlocks in
historical perspective*

MARTIN DAUNTON

Multilateralism in trade negotiations was a procedural reaction to the collapse of the world economy into trade blocs in the 1930s, with the erection of the Smoot-Hawley tariff in the United States in 1930, the adoption of imperial preference in Britain in 1932-3, the emergence of 'Schachtianism' in Germany, and the creation of the Japanese 'co-prosperity sphere'. One response to these trade blocs was to negotiate bilateral deals on a case-by-case basis, so that Britain might strike a bargain with, say, Argentina to allow beef to enter on preferential terms in return for a reduction in duties on British manufactures. Prior to the war, Britain and the United States embarked on detailed (and largely ineffective) negotiations to reduce tariffs between the two countries on a bilateral, case-by-case basis.¹ Of course, such negotiations were tortuous and time-consuming, with very limited impact on the general level of protection or on the dismantling of trade blocs before the Second World War. The emergence of these trade blocs was associated with a second feature of the 1930s: the collapse of fixed exchange rates and an attempt to foster exports and limit imports through competitive devaluation. The result, as in the case of trade, was 'beggar-my-neighbour' policies so that in pursuit of national self-interest, everyone suffered and the world economy declined. Cooperation was generally accepted as a prerequisite for post-war recovery.

In the 1930s, economists at the League of Nations discussed ways of dealing with trade and currency disorder, arguing that international bodies were needed in order to prevent the pursuit of narrow self-interest. Countries should be brought to understand that self-interest was in the interest of no one, and that institutions were needed to

¹ Rooth 1993.

restrain self-seeking behaviour.² But would the attempt to create cooperation succeed or might detailed negotiations result in deadlock? During the war, the British and US governments began serious discussions of the shape of the post-war institutions, starting with Keynes' plan for a clearing union to create international monetary stability, and continuing with James Meade's plan for a complementary commercial union.³ In the first case, cooperation was achieved and deadlock avoided: in 1944, the discussions over Keynes' plan and US counter-proposals resulted in the Bretton Woods agreement and the establishment of the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD). Permanent, formal multilateral institutions were created.

Could a similar outcome emerge in the case of trade? Discussions between Britain and the United States led to the publication of 'Proposals for consideration by an international conference of trade and employment' in December 1945, with the aim of creating a similar multilateral institution for trade – the International Trade Organization (ITO).⁴ Preparatory meetings were held in 1946 prior to conferences at Geneva in 1947 and Havana in 1947-8 to reduce tariff barriers, promulgate the General Agreement on Tariffs and Trade (GATT), and formulate the Charter of the ITO. The ambition was not fully achieved, for the Charter was not ratified by Congress, the ITO was not established, and only GATT survived – a supposedly interim agreement, without a secretariat or organization, which nevertheless provided a framework for continued multilateral negotiations and the reduction of trade barriers. The negotiations at Geneva and above all at Havana had mutually inconsistent assumptions and in the case of Havana faced complete breakdown. Although a compromise text of the Charter of the ITO was agreed, it did not resolve the issues: it was clear that the concessions made at Havana would not secure consent from domestic interests. In a two-level game, the negotiation of an international agreement was an empty gesture which did not resolve the problem of creating support from domestic interests.

This chapter addresses the puzzle of why it proved far easier to create multilateral institutions and avoid deadlock in international monetary relations than in trade. The answer rests on a number of factors: the technical nature of monetary economics which made it less susceptible

² For example, De Marchi 1991; Ikenberry 1992; Ruggie 1982.

³ Meade 1988 [1942]. ⁴ British Parliamentary Paper 1945.

to political pressures; the emergence of a broad degree of consensus between technical experts; and the formulation of a plan by two countries – Britain and the United States – whose financial clout meant that it could largely secure its wishes within the broad consensus on policy. Deadlock was avoided by the strict limits placed on external political pressures, both from domestic interests and dissentient international voices. By contrast, the two-level game was much more complicated in trade. In this case, domestic interests intruded to a much greater extent for trade issues were highly politicised and more difficult to prevent from entering into the negotiations. Consensus between Britain and the United States was much more fragile, and apparent support for multilateral trade was shaped by radically different intellectual and ideological contexts. And even if Britain and the United States as the initiators of the conferences on trade had been able to reach agreement between themselves, it did not follow that their views would have the same influence as at Bretton Woods. At Geneva and Havana, many other countries had voice, with deeply divergent views on distributive justice. Although the negotiators at Havana did agree the text for a Charter for the ITO, the deals and compromises struck during the conference were far from satisfying domestic interests back home in the United States. Hence a bargain struck at one level of the two-level game was not acceptable at the second level, and the Charter was never ratified.

Deadlocks and breakthroughs: multilateral trade versus the monetary regime

The contrast between success at Bretton Woods in 1944 and relative failure in the trade negotiations between 1945 and 1948 has implications for the hypotheses explored in this book. Historically, trade was more prone to deadlock than exchange rates, for trade was often more highly politicised than international monetary issues which were usually seen as technical matters best left to central bankers, and only understood by economic experts. Monetary issues rarely became a matter of partisan politics that determined elections or party identity.

In the case of Britain, the major political debate over monetary policy was in the early nineteenth century when the terms for returning to gold convertibility after suspension during the French Revolutionary and Napoleonic Wars were highly contentious. The restoration of the gold standard had implications for price levels and for the relationship

between debtors and creditors, and for the nature of growth in the economy. These debates continued even after the resumption of convertibility in 1821, for the monetary supply could be more or less constrained through the note-issuing powers of banks. The 'banking school' felt that the amount of money in circulation should allow full employment, expanding trade and modestly rising prices. The 'currency' school felt that the supply of money should be more carefully controlled, with restrictions on the note-issuing power of the banks in order to drive out speculation and instability from the economy. The 'currency' school triumphed in the Bank Charter Act of 1844, and up to the First World War the gold standard and conservative banking policies seemed to underpin British economic prosperity. Although some historians have argued that the 'tight' money policies of the gold standard harmed employment and favoured the financiers of the City of London over industrialists, in reality the gold standard was widely seen as beneficial. Workers gained from falling prices which gave them an unprecedented increase in real wages in the last quarter of the nineteenth century. The automatic operation of the gold standard removed the power of financiers or politicians to manipulate the money supply, and prevented the corruption of politics by special interests. Gold was a mark of civilization and progress in contrast to the 'barbaric' nations relying on silver – and the countries on gold formed the most prosperous and dynamic trade bloc in the world. Between 1844 and 1914, the gold standard largely depoliticised money in Britain.⁵

After the First World War, similar issues appeared as at the end of the Napoleonic Wars. Convertibility was again suspended by the British government, and resumption once more led to serious problems of deflation. The attempt to restore the gold standard at the pre-war parity meant high interest rates to hold up the value of sterling and resulted in over-pricing British goods so that export markets were lost, wages put under pressure, and employment threatened. The real burden of the national debt rose, and the transfer of resources from active creators of wealth to passive rentiers became a serious political issue. One potential response was to politicise monetary policy, yet this happened to a surprisingly small extent. The major political disputes were not directly over the nature of monetary policy, and the focus was on more immediately grasped issues. The burden of national debt, for example, was

⁵ Daunton 2006; Green 1988; Hilton 1977; Howe 1990.

not related to the restoration of the gold standard (which made it more expensive to service in real terms as a result of deflation and high interest rates) so much as to Labour's demand for a 'capital levy' (a tax on accumulated assets) to pay it off more swiftly. The loss of jobs caused by difficulties in export markets as a result of the overvaluation of sterling was difficult to extricate from other influences such as the emergence of foreign competition during the war or the imposition of tariff barriers in major markets such as India. The main focus of attention was less on monetary policy than on trade policy, and the case for and against imperial preference. When the gold standard was abandoned in 1931, the national government could adopt a more flexible monetary policy designed to assist domestic economic recovery, with low interest rates to stimulate the housing market and to reduce the cost of servicing the national debt, and to hold down the value of the pound to boost exports and constrain imports. Although the deflationary policies of the 1920s led to pain at the time, they gave British politicians considerable freedom over monetary policy in the 1930s. Unlike Germany and other continental European countries, Britain did not experience serious inflation and as a result was less wary of monetary flexibility. When Britain entered the Second World War, money was not at the centre of political debate and it could be safely left to experts as a technical issue.⁶

Money was more central to politics in the United States, where the creation of a central bank led to deep political divisions between those who felt that it was vital for economic growth and those who feared that the power of money undermined republican virtue. Andrew Jackson's 'bank war' against the Second Bank of the United States was at the heart of politics – and some of the same concerns about financial power emerged in the populist attacks on financiers and trusts in the later nineteenth century. The suspension of the gold standard during the Civil War also led to political disputes, on similar lines to Britain after the Napoleonic Wars: resumption of the gold standard entailed falling prices which hit debtors such as farmers in the mid-west and cotton growers in the south. The two issues came together in the populist demand to monetise silver in order to increase the circulation of money and produce rising prices. However, monetary issues were less central by the First World War. The long period of falling prices stopped in 1896 so that the silver question lost its rationale. The creation of the

⁶ Daunton 1996; Hume 1963; Moggridge 1972; Nevin 1955; Solomou 1996.

Federal Reserve system in 1913 also resolved the deep divide between the supporters and opponents of a central bank by establishing regional Federal Reserve banks with representation of local interests as well as bankers, in addition to the Federal Reserve board in Washington. The Federal Reserve system was not without its problems, and many banks failed in the early 1930s, but monetary politics were now much more muted.⁷

At Bretton Woods, the agreement that was ratified by forty-four countries was determined by bilateral negotiations over the previous two years between two countries: the United States and Britain. More accurately, the agreement was between one and a half countries, for Britain was in a weak financial position, and largely accepted the US plan of Harry Dexter White rather than the proposals of John Maynard Keynes. Both sides were in agreement on the need to create financial stability by ending the competitive devaluations of the 1930s. Both agreed on the need for fixed exchange rates as a precondition for the recovery of trade; and both accepted that domestic prosperity should be a prime concern to prevent the resurgence of economic nationalism that marred the 1930s. In order to ensure that exchange rates were stable and domestic prosperity preserved, they agreed on the need to limit capital mobility. They agreed that sudden movements of capital in the 1930s put pressure on the exchanges; and that changes in the interest rate for domestic reasons should not be threatened by capital inflows or outflows in search of the best return. Finally, they could also agree that international institutions were necessary to prevent the pursuit of narrow self-interest. So far, there was a high level of consensus, underpinned by the work of economists at the League of Nations who analysed the international economy of the 1930s.

Nevertheless, there were differences of emphasis between Britain and the United States within the general consensus. In part, the difference arose from the countries' position as creditor and debtor, and in part from their divergent banking systems. Keynes' proposal for a clearing union rested on his concern for Britain's position as a debtor, and he urged that the burdens of adjustment should also fall on the United States as the leading creditor. In order to create liquidity in the world economy, and to remove deflationary pressure on debtors, Keynes

⁷ Friedman and Schwartz 1963; Goodwyn 1978; Livingston 1990; Meltzer 2003; Remini 1984; Schlesinger 1953; Timberlake 1993; White 2000.

proposed the creation of 'bancor', a form of international money; and the provision of overdrafts to debtor countries so that they were not compelled to deflate. Harry Dexter White's stabilization fund was more conservative: it did not allow for the creation of bank money, and instead limited the International Monetary Fund to the quotas contributed by each member state. Of course, the Americans felt that Britain as the debtor should take action to put its economy on a firm footing, and the British felt that the Americans lacked a full appreciation of their plight. The different approaches also reflected the practice of British banks which, unlike in the United States, allowed customers an overdraft facility – something that the Americans felt would lead to inflation and imprudence.⁸

Although there were differences of emphasis, there was also a very high degree of convergence on monetary issues – and Britain had very little alternative except to agree to the US proposals. Despite the different starting points of Keynes and White, deadlock was avoided for two reasons. First, the British negotiators in the period leading to Bretton Woods were in a weak position and had little option except to make concessions. Second, domestic political interests did not intrude to any great extent – not only because of the highly technical nature of the issues, but also because of the circumstances of the war. Consequently, the problem of a two-level game with asymmetry between international and domestic considerations did not arise.

The preparatory meetings of 1946 and the Geneva and Havana conferences of 1947–8 on trade were very different. Many more countries were present, and they had a much greater voice which challenged the proposals put forward by the Americans. Furthermore, Britain had a chance to reopen some of the issues of 1944, seeking redress for the problems of debtor countries in the agreement on trade. Thus the concessions made to resolve the monetary problems were fought again in the negotiations over trade, which were connected more immediately with domestic interests. The result was a draft Charter for the ITO which did not stand a realistic chance of ratification: concessions in the international arena led to a document that alienated far too many groups at home. The failure of the ITO may be explained by the intrusion of domestic interests to a much greater extent than in 1944 (Hypothesis 6), both because trade was intrinsically more liable to become a

⁸ James 1996; Skidelsky 2000; van Dormael 1978.

political issue, and because the conference was differently constituted (Hypothesis 3), with more and divergent voices. Above all, the problems of negotiating an acceptable Charter for the ITO were intensified by deeply divisive notions of fairness and justice (Hypothesis 5) which connected with domestic concerns. Indeed, the failure to establish the ITO was probably a desirable outcome for the future of multilateral trade negotiations: it was over-burdened with deeply contentious issues going far beyond trade. By contrast, the interim General Agreement on Tariffs and Trade could proceed to reduce tariffs on a more pragmatic basis without such a destructive presence of normative issues.

Trade and domestic politics

Deadlocks are likely to occur internationally because of the configuration of domestic interests (Hypothesis 6) which is much more likely in the case of trade where policies were more central to political debates, leading to the realignment of party structures and forming central issues in elections. This was in part because trade issues were more immediately apparent through physical goods, prices and jobs than the exchange rate, and much more readily mobilised interest groups or shaped political culture. The result was that multilateral negotiations over trade were more easily deadlocked as a result of the intrusion of powerful domestic interests than the more technical issues settled at Bretton Woods in 1944.

Trade politics in Britain reshaped political parties and provided a focal issue in general elections at critical points. The Conservative Party was split over Robert Peel's repeal of the corn laws in 1846 until it was converted to free trade in the 1850s.⁹ There were two visions of free trade. As Europe turned to protectionism from the 1870s, Britain adopted a policy of unilateralism, clinging to free trade without using its power to negotiate reciprocity. By the 1890s, many trade associations started to question the dominant approach of unilateral or pure free trade, with its assumption that Britain should not retaliate against higher tariffs in Germany or the United States, arguing instead for a policy of reciprocity by bargaining with countries as they increased their own tariffs in order to keep markets open. But this possibility was abandoned as a result of the programme of tariff reform or imperial preference announced by Joseph Chamberlain in 1903. The proposal

⁹ Gambles 1999.

split the Conservatives, and the Liberals' victory in the general election of 1906 on a platform of free trade resulted in a much more dogmatic adherence to this policy as the basis not only of British economic prosperity but of the incorruptibility of politics by special interests. Alternative options were abandoned. Chamberlain's programme of tariff reform precluded more pragmatic responses, and narrowed the political choice to either his own idiosyncratic vision of Britain's economic future or a dogmatic insistence on the virtues of free trade.

By the early 1930s, the Liberal case for free trade was fatally weakened and a version of tariff reform was introduced. The shift came, in part, from an internal tension within the apparently victorious ideology of free trade. The more radical 'new' Liberals, as well as the fledgling Labour Party, supported free trade, but on certain conditions. A reliance on exports of goods and capital should not reflect a maldistribution of income and wealth at home, and free trade should therefore be associated with a prosperous domestic market based on efficient, productive workers receiving decent wages and employment. In the debates over trade policy prior to 1914, the Labour Party therefore stressed a 'right to work' and welfare funded by redistributive taxation as complementary to free trade. Although tariff reform was again rejected in the election of 1924 when Labour formed its first minority government, attitudes soon changed under the pressure of economic depression, with the massive loss of employment in export industries such as coal, cotton and shipbuilding. The shift to a policy of protection was swift.¹⁰

Equally, when opinion started to move in favour of multilateralism after the Second World War, the issue was contentious. Should Britain retain imperial preference as a matter of principle, as argued by some members of the Conservative Party – or at very least as a matter of pragmatism in the difficult markets expected after the war? Should there be a firm commitment to free trade as desired by economists such as Lionel Robbins and Roy Harrod? Or should the pursuit of multilateralism be on the same terms as Labour's earlier thinking on free trade – on condition that it was firmly linked with domestic redistribution and employment? This final point was pursued by the post-war Labour government and led to serious tensions with the United States, as well as generating problems over the post-war structure of multilateral institutions.¹¹

¹⁰ Green 1995; Howe 1997; Marrison 1996; Marsh 1999; Trentmann 2008.

¹¹ Dauntton 2007, pp. 302–4.

In the United States, trade was similarly contentious. Prior to the Civil War, protection was a sectional interest between the south (generally in favour of free trade as an importer of manufactures and an exporter of raw cotton to Lancashire) and the north (which was more inclined to favour protection of infant industries). Disagreements over tariffs led to the 'nullification crisis' in 1832, when South Carolina declared the tariffs of 1828 and 1832 null and void within the state. Although other southern states did not follow, a compromise in 1833 allowed the tariffs to be reduced in stages to more modest levels. The northern Republican Party was generally protectionist from its foundation in the 1850s, and tariff policy remained controversial in the later nineteenth century. Democrats were favourably disposed to free trade, both because of their power base in the south and the electoral support of poor urban workers who feared protection meant higher prices. Some Democrats took a more idealistic, Cobdenite line, especially Cordell Hull (Secretary of State, 1933–44) who argued that free trade meant peace and prosperity by tying nations together in harmony and allowing them to concentrate on what they did best.¹²

Although President Wilson reduced tariffs in 1913, his Cobdenite stance was threatened by the Republicans after the war. The Fordney-McCumber tariff of 1922 raised tariffs, and they soon went still higher. In 1928, the Republican presidential candidate, Herbert Hoover, campaigned for tariffs to protect US farmers from low prices, and the case was soon widened to a general principle that duties should be revised to prevent competition from foreign producers with lower wages so that 'American labor in the industries may again command the home market, may maintain its standard of living, and may count upon steady employment in its accustomed field'. Hoover won the election, and the onset of the depression secured a narrow majority for the Smoot-Hawley tariff in 1930. Hoover himself felt that the tariff was excessive, and a large number of economists unsuccessfully urged him to use his veto. The US tariff particularly hit Canada, the leading trade partner of the United States, and it was the crucial issue in the election of 1930 which led to victory for the protectionist Conservatives.¹³ The British followed suit with the introduction of tariffs and imperial preference in

¹² Howe 1997.

¹³ Callahan *et al.* 1994; Eichengreen 1989; Hoover 1926 and 1952; Irwin and Kroszner 1996; Jones 1934; McDonald *et al.* 1997; O'Brien 2001; Pastor 1980; 'Republican Platform' 1928; Schattschneider 1935.

1932-3, more as a result of internal political processes than as a direct response to the US tariff. The world was moving to economic nationalism and bilateral deals – a process that horrified Hull as an indicator of the breakdown of international relations and trust. When he became Secretary of State in 1933, he stressed the need to reduce tariffs in order to recreate the Cobdenite world of peace and prosperity – and that meant not only reducing US tariffs but also ending British imperial preference which was seen as particularly pernicious because it distorted trade by favouring some producers over others.

In Britain, trade policy became a matter of high politics at particular moments, but it was not something that dominated daily political business at Westminster as it did on Capitol Hill. In Britain, tariffs on particular goods were not subjects of bargaining in parliament, and political debate was largely on the general issues of policy. The same approach applied to trade as to fiscal policy in Britain: all changes in taxes or tariffs were presented as a package to the Commons by the Chancellor of the Exchequer in the annual budget. The shape of the budget was determined by the Chancellor in consultation with a small group of officials, and often with minimal involvement by other members of the Cabinet. When the budget was presented to the Commons, the party in office usually had a majority to ensure that it was accepted: voting against the budget was a matter of confidence, and defeat would mean a general election. Hence there was no scope for bargaining in the Commons over particular issues, whether to increase this duty to protect a particular trade or area, or to offer a tax break to benefit the constituents of particular MPs. ‘Pork barrel’ politics were constrained, unlike in the United States where the executive presented taxes and tariffs to Congress which had the power to bargain over the details and rewrite the package of measures. Defeat of the executive did not mean an election, given that terms were fixed. The president needed to build a majority in Congress to pass the budget, which allowed interest groups to intrude in a way that was not possible in Britain. The result was a mass of exemptions and anomalies as each Representative traded his vote for privileges for his own constituents.¹⁴

This broad contrast between the political system in Britain and the United States had an important influence on multilateral trade negotiations. A successful outcome would be more likely if the US Congress

¹⁴ Steinmo 1989.

could be encouraged to abdicate its powers and hand over responsibility to the executive, as was the norm in Britain. In the United States, trade policy was the responsibility of Congress whereas foreign policy was the responsibility of the president, so that there was always ambiguity where to place negotiations with other countries over tariffs. The tension was resolved, at least in part, by the Reciprocal Trade Agreement Act, 1934 – an initiative of Cordell Hull that took authority away from the Ways and Means and Finance Committees and gave the president authority to enter into bilateral agreements to reduce tariffs by 50 per cent, and to apply them to other countries through most-favoured-nation agreements. Senate ratification of trade agreements was removed, and now all that was needed was a majority vote to renew the RTAA.¹⁵ Generally, presidents were likely to prefer lower tariffs, for they were less reliant than members of Congress on support from particular local interests. Delegation to the president meant that log-rolling and pork-barrel politics were largely eliminated – and a Democratic-controlled Congress was willing to cede authority to the president in 1934 in response to its earlier failures to liberalise trade. After the Second World War, the Republican Congress was willing to continue the RTAA as a result of greater support for trade liberalization created by the export boom which altered earlier political coalitions. In 1945, the RTAA was renewed, and the way was prepared for multi-lateral tariff reductions as set out in the ‘Proposals’ of December 1945. But would it prove possible entirely to limit the intrusion of domestic politics? The answer depended on how far the negotiations moved away from pragmatic issues of tariffs – in themselves contentious – to wider issues of justice and equity.

Defining multilateralism

At the end of the war, the US economy was by far the strongest in the world: it was the largest market for goods and the major exporter of commodities, with a large surplus on its balance of payments which led to a dollar shortage. A major issue was whether the Americans should take action to reduce their exports and encourage imports, rather than putting the burden on other countries to improve their own balance of payments. The British government felt that US pressure to abandon

¹⁵ Dam 2004.

imperial preference was unrealistic, failing to appreciate the grave weakness of the British (and wider European) economy and balance of payments at the end of the war. There was alarm at US refusal to accept that post-war adjustments were as much a matter for the world's greatest creditor as for the debtors.

The Bretton Woods agreement on monetary policy rejected the proposals of Britain to place some of the burdens of post-war adjustment on the United States as the leading creditor nation. Keynes did hope that he could reinstate some constraints on the United States through the 'scarce-currency clause' (article 7) of Bretton Woods: a country whose currency was in short supply should take action to reduce its balance of payments surplus and so remove pressure on other countries to deflate. The requirement was bound to apply to the dollar after the war, given the demand for US goods during reconstruction, but article 7 was defined in a very narrow way by the US administration.¹⁶ If the Americans were to be controlled, perhaps it could be done through negotiations over trade, through the definition of multilateralism and the proposals on the maintenance of full employment. The issues that had been closed at Bretton Woods could now be reopened: just what were the responsibilities of the world's major creditor nation, and how could the Americans be subjected to some control?

The definition of multilateralism was immediately contested between Britain and the United States.¹⁷ Britain pledged itself to the adoption of multilateral trade, but the implications were not the same in the eyes of the post-war Labour government as in the eyes of Hull or Will Clayton (assistant Secretary of State for economic affairs, 1944–7). The 'Proposals' started with a grand statement that collective measures to safeguard peace needed machinery to deal with disputes but even more required 'economic co-operation among nations with the object of preventing and removing economic and social maladjustments, of achieving fairness and equity in economic relations between states, and of raising the level of economic well-being among all peoples'. The foundation of such a policy was 'the attainment of approximately full employment by the major industrial and trading nations' which was 'essential to the expansion of international trade on which the full prosperity of these and other nations depends; to the full realization of the objectives of all liberal international agreements in such fields as

¹⁶ James 1995, pp. 100–1; Skidelsky 2000, pp. 251–2. ¹⁷ See Gardner 1956.

commercial policy, commodity problems, restrictive business practices, monetary stabilization, and investment; and, therefore, to the preservation of world peace and security'.¹⁸ One country's pursuit of full employment should not be at the expense of creating unemployment elsewhere, as happened in the 'beggar my neighbour' policies of the 1930s when protective duties to preserve jobs led to a decline in world trade and economic activity.

US domestic politics at once intruded, for the proposals were issued at the same time as a dispute within the United States over the desirability of a commitment to full employment. In 1945, Congress was considering a Full Employment Bill, drawing in part on the thinking of Vice-President Henry Wallace. The Full Employment Bill of 1945 followed Wallace's line in assuming that unemployment was a natural consequence of free enterprise which was liable to 'brief periods of growth and development culminating in peaks of prosperity that gave way to disastrous collapse'. On this view, 'private enterprise, left to its own devices, cannot provide full employment and cannot eliminate periodic mass unemployment and economic depressions.' The bill therefore proposed to supplement free enterprise by setting the level of federal 'compensatory finance' in order to ensure that 'all Americans able to work and desiring to work are entitled to an opportunity for useful, remunerative, regular, and full-time employment'.¹⁹

Opponents of the bill argued that the 1930s were unusual and that in normal circumstances the economy tended to full employment so that compensatory finance was only needed in extreme conditions. They felt that some unemployment was inevitable and even desirable: business cycles were an essential part of the process of economic adjustment as resources moved in response to changing consumer demand. The bill would slow down the process of adjustment so that reduction of unemployment in the short term would only intensify it in the long run. At the same time, the pursuit of full employment 'would result in inflation of prices and an artificial boom, and then the very depression and unemployment we are trying to avoid'. The opponents of the bill rejected the

¹⁸ PP 1945–6 XXVI (British Parliamentary Paper), Proposals for Consideration by an International Conference of Trade and Employment as transmitted by the Secretary of State of the United States of America to His Majesty's Ambassador at Washington, 6 December 1945.

¹⁹ See Culver and Hyde 2002; Maze and White 1995; Walker 1976; Wallace 1943 and 1945.

insertion of a right to employment into law as at best pointless since nothing could be done to enforce it; and at worst as a non-American exercise in socialism. The outcome was the Employment Act of 1946 – the change in title indicating a fundamental weakening of ambition. The right to employment and the federal government's responsibility to ensure full employment through 'compensatory finance' were dropped. The Act expressed an *intention* and not a *requirement* to achieve maximum unemployment (that is, what was actually feasible) rather than full employment.²⁰

Domestic defeat of the radical policies of full employment was not replicated in international discussions on the 'Proposals' that started in 1946 and culminated in the draft Charter of the ITO agreed at Havana in 1948. The definition of full employment in the US bill of 1945 was not rejected in Britain; on the contrary, the Labour government saw an opportunity in the charter of the ITO to extend its views on an international stage and constrain the disruptive impact (as they saw it) of the United States.

The origins of the 'Proposals' of 1945 were to be found in Meade's plan of 1942 for a commercial union. Meade pointed out that Britain's heavy reliance on international trade meant that it was firmly committed to multilateralism, from which it stood to gain more than most other countries. He proposed 'the general removal of restrictions to international commerce' by increasing purchasing power in world markets, reducing trade barriers, and ending discrimination and bilateral deals. Members of the commercial union would agree not to grant a preference to one member without offering it to all; and would reduce protective duties against other members. Nevertheless, countries would be allowed to adopt protective measures if they were also members of the clearing union and their deficit reached a certain level.²¹ Meade subsequently argued that free trade would not simply follow from the agreement on international monetary policy reached at Bretton Woods or from the ideological beliefs of the US government, and he insisted on the need for an appreciation of the realities of the post-war world. In 1945, he welcomed the US proposals, rejecting the view of critics who feared that the IMF and the ITO were 'inflexible rules for the restoration of Free Trade and the Gold Standard imposed upon us by a United States which is ignorant of a world of disordered balance of payments

²⁰ Santoni 1986; US Senate 1945a and 1945b. ²¹ Meade 1988 [1942], p. 52.

and which is prepared to make unscrupulous use of its present powerful position to force its doctrinaire ideas down our and other throats'. In his view, the ITO and IMF would recreate equilibrium in the world, and countries would still be able to use protection and controls in order to deal with balance of payments problems within an agreed system of rules. But his support for the US proposals went hand-in-hand with a scheme to stimulate domestic employment and external purchasing power in order to maintain worldwide demand – a very different set of ideas from those of the United States.²² Unlike in the US definition, he argued that multilateralism should be combined with democratic planning of the economy both at home and in the wider international sphere – an approach that was to be central to the post-war Labour government's negotiations over the ITO.

The post-war British government's approach to multilateralism was therefore far removed from Hull's and Clayton's belief that reduced trade barriers alone would lead to prosperity and to peace. This Cobdenite approach to free trade was modified in Edwardian Britain, with a growing sense that trade was only really free if it rested on fair conditions of production and employment at home and abroad.²³ Hence the 'Proposals' became part of a very different intellectual framework in Britain. As Clement Attlee admitted in 1946, 'In certain specific points of world economic planning, we find the United States in agreement with us, but, generally speaking, they hold a capitalist philosophy which we do not accept'. Hugh Dalton, the Chancellor of the Exchequer, believed that multilateralism meant agreements between governments to create 'the most sensible forms of International Economic specialisation ... the *ultimate* goal, must, I think, be a kind of supreme International Economic Planning Body, which would attempt to co-ordinate the various Agreements between Governments and producers, and would all the time be suggesting ways of improving agreements so as to secure a more sensible distribution of resources'.²⁴

Many members of the post-war Labour government were deeply suspicious of the United States as an uncontrolled capitalist economy peculiarly prone to intense booms and slumps which could spill over into the rest of the world. R. W. B. 'Otto' Clarke, a leading official at the

²² Meade 1988 [1948]; The National Archive [hereafter TNA] T236/702, 'International Full Employment Policy', n.d. [June 1946].

²³ Trentmann 2008. ²⁴ Toye 2000, pp. 190, 195, 204, 215.

British Treasury, was concerned that the US proposals to recreate multi-lateral trade

are on the whole creative of unemployment and ... certainly hinder individual countries from pursuing an internal full employment policy ... We tie ourselves up to the highly peripatetic US economy – and, what is more, we agree to increase our dependence upon international trade ... We are, in fact, embarking upon a high import-high export policy with no safeguards at all about the stability in USA and with very limited powers to take protective action in co-operation with like-minded countries to ease the impact of US depression on our economy.²⁵

It followed that the trade measures should be complemented by a commitment by all members of the putative ITO to full employment both at home and abroad. The debates that took place within the United States in 1945 and 1946 over the Full Employment Bill were repeated in the discussions over the charter of the ITO between 1946 and 1948.

The post-war Labour government had a markedly different conception of what was meant by full employment from the US administration. The White Paper of 1944 pledged the government to ‘the maintenance of a high and stable level of employment after the war’ and William Beveridge went even further, arguing that full employment ‘means having always more vacant jobs than unemployed men, not slightly fewer jobs ... [T]he labour market should always be a seller’s market rather than a buyer’s market’.²⁶ Beveridge realised that such a commitment to full employment had international implications. International trade should be expanded, but on the basis that ‘overseas trade is a means of raising the standard of life of all countries by fair exchange, and is not a device for exporting unemployment’.²⁷ Beveridge himself did not develop these thoughts; others rose to the challenge.

Meade and the Economic Section of the Cabinet developed an international employment policy in 1946 as part of British preparations for the international conference on trade and employment. Meade felt that an international commitment to full employment was crucial, and above all by the United States as the driver of the world economy: an obligation to maintain domestic employment meant that ‘other countries would be able to put American policies in the dock and ... bring

²⁵ TNA, T236/702, ‘International Full Employment’, R. W. B. Clarke, 18 July 1946.

²⁶ Beveridge 1944, pp. 18–19; British Parliamentary Paper 1944.

²⁷ Beveridge 1944, pp. 33–4.

pressure upon them to take measures to remove the fundamental causes of the slump'.²⁸ The achievement of full employment could not only be a matter for national governments. International buffer stocks should be created to maintain stable demand and prices; international public works should be timed to offset fluctuations in employment, and the IBRD should provide funds for capital development with the same ambition; changes in national credit policy should be coordinated and the international flow of capital controlled; exchange rates and duties should be adjusted in response to changes in employment. Thus a country experiencing problems would be allowed to depreciate its currency to make its exports more competitive, or impose import restrictions to produce more goods for its domestic market, or impose discriminatory duties on countries acting as a centre of depression. These policies gave a major coordinating and planning role to the IMF, the IBRD and the putative ITO.²⁹

Meade's approach offered a means of combining two elements of Labour policy which were otherwise in tension: a commitment to domestic planning of the economy and to multilateral trade which would leave the allocation of resources to market forces. The solution was international planning.³⁰ As a Treasury official explained, Meade's plan was 'good socialism and good sense':

The U.K. has taken the initiative in the announcement of internal full employment policy, and we want to hold this initiative in advocating plans for international full employment. Secondly, although one can hardly expect that the signature of such an undertaking by the Americans can make any difference to whether they have full employment or not, that signature is significant. It means that they recognise that, if contrary to our hopes, they have mass unemployment the rest of the world will be bound to take steps to safe-guard ourselves, contrary to their hopes, with the implication that they have a full measure of the responsibility for putting things right.

Thirdly, we have included a valuable undertaking ... that puts a responsibility on a country with a favourable balance of payments to right it. This is definitely of value; it means acceptance of the view that it is not a nation's fault if it has an adverse balance of payments; it may just as easily be the fault of the nation with a favourable balance of payments. Fourthly, this whole thing is in any case necessary in order to induce smaller countries to come into ITO ...

²⁸ TNA, T236/702, Commercial policy: talks with New Zealand, note of meeting, 17 June 1946.

²⁹ TNA, T236/702, 'International Employment Policy', n.d. [June 1946].

³⁰ Toye 2000.

[T]here is very considerable feeling everywhere that countries cannot afford to disarm if the elephant [the US] is going to run amok. Especially if the elephant then says that it is the only sane and virtuous animal in the zoo.³¹

The draft employment charter, like the abortive 'scarce currency clause' of the IMF, was intended to bring the Americans under control and above all to show 'that a free society can engage in sufficient economic planning to prevent serious economic depression. The forthcoming Conference on Trade and Employment would provide an international forum for this purpose, if we were prepared to consider the Employment Policy work of the conference as an important element in its activity'.³²

Although Britain and the United States were the two main advocates of an international agreement on trade at the end of the war, there were clearly radical differences in their attitude to multilateralism, full employment and planning the international economy. The employment policy of the British draft was intended as a way of taming the American elephant and bringing it to its senses. But the Americans for their part doubted that good socialism and good sense were compatible. At home, they turned away from the ideas of Full Employment Bill: by contrast, the British government had a much stronger commitment to full employment which would be achieved by planning at home and abroad. A commitment to multilateral trade was placed within a different ideological context from that of the US State Department, and the pursuit of international full employment was seen as a way of controlling the Americans with their destructively capitalistic economy and their failure to appreciate the requirements of a creditor nation. The debate over the meaning of full employment was set to become a major point of contention at the preparatory conference leading up to Geneva and Havana.

Trade and distributive justice

The Economic and Social Council of the UN agreed that the agenda for the preparatory meeting of the conference on trade and employment should include discussion of 'international agreement relating to the achievement and maintenance of high and stable levels of employment

³¹ TNA, T236/702, S. D. Waley to B. Trend, 18 October 1946; T236/704, S. D. Waley to P. J. Grigg, 28 October 1946.

³² TNA, T236/703, International employment policy, note prepared by the Treasury, the Board of Trade and the Economic Section, n.d.; S. D. Waley to B. Trend, 'International Employment Policy', 14 October 1946.

and economic activity', and Meade's draft convention formed the basis for discussion. The stage was set for widely differing views on the meaning of full employment and the nature of international action in pursuit of this objective. The preparatory meetings and the conferences at Geneva and Havana provided the venues for heated discussion of the meaning of full employment, its connections with multilateral trade, and the definition of distributive justice in the international economy. New voices were soon to intrude into the discussion, apart from Britain and the United States, and with an unsettling effect: rather than taming the American elephant, the British found they had unleashed many other animals in the zoo. Problems were to arise because of the diversity of the cultures of the parties to the negotiations (Hypothesis 3) and because of the impact of differing notions of fairness and justice (Hypothesis 5).

Initially, the voice of the developing countries was provided by Australia, whose attitude to full employment was shaped by its own political idiosyncrasies as well as by its status as a primary producer. As in the United States and Britain, the meaning of full employment and the need for government action were discussed during the war, with a White Paper on full employment in 1945 asserting that 'full employment can be maintained only as long as total expenditure provides a market for all goods and services turned out by Australian men and women, working with available equipment and materials, and fully employed after allowing for the need for leisure'. The government's commitment to full employment was particularly important because of the politics of demobilization: there was long-standing opposition to conscription, and in compensation the Labour government aimed to give demobilised soldiers priority in jobs. This concession contradicted an equally long-standing union demand for a closed shop. Full employment was a means of satisfying both the trade unions and the opponents of conscription. H. C. Coombs, the Director-General of the Department of Post-War Reconstruction, also hoped that a commitment to full employment would weaken Australia's rigid system of wage determination through the courts and arbitration. Furthermore, the Commonwealth (federal) government failed to renew its wartime powers over the economy in the face of hostility from the states, and consequently turned to the commitment to full employment and development contained in the UN Charter as authority for the pursuit of its domestic ambitions.³³

³³ Jenkins 1945, pp. 240–2; Rowse 2000, pp. 1–13.

Coombs served as the leading Australian negotiator in the preparatory talks for the conference on trade and employment, pressing for a stronger commitment than the British on the use of international resources to their fullest extent in order to maintain international demand and employment. The Australians were obviously concerned about the impact of multilateral trade as defined by the Americans, for they were heavily dependent on exports of food and raw materials. Coombs stressed the need for strong action against any signatory of the Charter of the ITO who did not fulfil the undertaking to maintain domestic full employment, to use its resources for international payments for goods and services or investments abroad, or to develop resources and raise standard of living in its own jurisdiction. If 'dependent countries' – primary producers such as Australia – were required to abandon economic protectionism, they needed assurance that other countries fulfilled their 'basic obligation' to maintain effective demand. Failure to do so should permit the complainant to take action, under the authority of the ITO to prevent unilateralism, against the culprit in order to prevent the spread of depression.³⁴

The British Treasury expressed concern that the Australian approach 'is bound to cause resentment on the part of the Americans at whom it is obviously aimed', and decided that it was 'tactically wrong for us to put it forward'.³⁵ Matters soon took a still more alarming turn from the British point of view as other primary-producing or under-developed countries started to develop an even more radical position on employment issues.

³⁴ TNA, T236/703, 'Preparatory Committee on Trade and Employment: Expansion of Effective International Demand', note by the Australian delegation, UN Economic and Social Council, London, E/FC/T/W.10, 15 October 1946; Preparatory committee on trade and employment, British Commonwealth talks, 4 October 1946; Proposed draft convention on employment, n.d.; T236/704, United Nations, Economic and Social Council, Preparatory committee of the international conference on trade and employment, Committee I, summary record of meetings, second meeting, first part, 21 October 1946, E/PC/T/C/4, 21 October 1946.

³⁵ TNA, T236/703, S. D. Waley to B. Trend, 'International Employment Policy', 14 October 1946; for the Australian proposal, see 'Preparatory Committee on Trade and Employment: Expansion of Effective International Demand', note by the Australian delegation, UN Economic and Social Council, London, E/FC/T/W.10, 15 October 1946; T236/704, United Nations, Economic and Social Council, Preparatory committee of the international conference on trade and employment, Committee I, summary record of meetings, second meeting, part two, 21 October 1946, E/PC/T/C/7, 22 October 1946.

In the preparatory meetings in 1946, the Colombian representatives pointed out that the Americans assumed that a precondition for a high level of employment was the removal of regulations and practices impeding the free development of world trade. They were sceptical, arguing that full employment was inseparable from two objectives: a variety of production; and manufacturing industries which paid higher wages than extractive industries and helped to create 'a mentally and morally superior working class'. The Colombians argued that the Economic and Social Council 'should ask itself if such an evolution can be got by depriving young industries of all protection, and if it is not more natural that a policy of trade freedom should be developed in harmony with the peculiar conditions prevailing in industrially-backward countries'.³⁶

The theme was developed by the Indian delegates who complained that the Americans showed insufficient appreciation of the problems of less developed countries and that the preparatory committee should pay special attention to '(a) the maintenance and stability of incomes of primary producers, (b) the diversification of employment, and (c) industrial and economic development'.³⁷ Nehru put the Indian case most strongly and forcefully, contradicting American commitment to free enterprise and multilateral trade:

the obligation of countries with undeveloped economies to develop their resources could only be fulfilled by instruments such as developmental tariffs and quantitative controls, and by adequate safeguards. India was wedded to economic planning as opposed to free enterprise ... A developing country was ... likely to cause immediate unemployment in other countries in the industries it was developing ... Developed countries should be obliged to make reasonable adjustments in their own industries.³⁸

³⁶ TNA, T236/704, United Nations, Economic and Social Council, Preparatory committee of the international conference of trade and employment: memorandum on the objectives of the international trade organization in respect to employment (submitted by the secretariat), London E/PC/T/W.18, 19 October 1946.

³⁷ TNA, T236/704, United Nations, Economic and Social Council, Preparatory committee of the international conference on trade and employment, Committee I, summary record of meetings, second meeting, first part, 21 Oct. 1946, E/PC/T/CI/4, 21 October 1946.

³⁸ TNA, T236/704, United Nations, Economic and Social Council, Preparatory committee of the international conference on trade and employment, Committee I, summary record of meetings, second meeting, part two, 21 October 1946, E/PC/T/CI/7, 22 October 1946.

The newly independent government of India was wedded to a controlled and regulated economy which was only feasible with the continuation of limits on imports. In particular, the Indians were adamant that the Charter should allow countries to take action appropriate to their particular stage of development and to their social and political institutions.

The Cubans pressed yet another line, arguing that members of the ITO 'should be obliged to take every action against conditions detrimental to work-people, and towards raising their standard of living'. In their view, sweated labour contradicted the purpose of the ITO, and 'tended to attract foreign investors who were not so much interested in improving the workers' conditions as in profits. Goods produced under these circumstances would undersell in the world market those produced in countries with better workers' conditions and would ultimately have a detrimental effect on these conditions'. Consequently, the ITO 'should endeavour to establish a salary regime and general working conditions which would enable the workers to bear a dignified existence'. Although they were told that the issue was one for the International Labour Organization, the Cubans continued to press their case, arguing that countries in the first stage of industrial development should be able to obtain full employment through diversification of agriculture and promotion of industries. Eventually, Cuba threatened not to sign the Charter of the ITO unless there was such a commitment.³⁹

Clearly, these claims to special treatment and the right to dignified existence alarmed developed countries. Although the British tried to argue that they too were a 'dependent country' which could be hit by a depression in the United States, they shared the concern of the Americans about the proposals from the less developed countries. The British feared that the draft charter on employment might become a threat rather than (as originally intended) a buffer against the power of the United States. As a Treasury official remarked, 'all under-developed

³⁹ TNA, T236/704, United Nations, Economic and Social Council, Preparatory committee of the international conference on trade and employment, Committee I, summary record of meetings, second meeting, part two, 21 October 1946, E/PC/T/CI/7, 22 October 1946; T236/704, United Nations, Economic and Social Council, Preparatory committee of the international conference on trade and employment, observations by the Cuban delegation, E/PC/T/CI/10, 28 October 1946.

countries are pressing for virtually unlimited rights to protect infant industries. This is of course completely unacceptable to us, but it is likely that the provision will have to be made under ITO for the promotion of such countries' economic development'.⁴⁰

Alarm about the definition of full employment was most fully articulated by the Belgian delegation to the preparatory meetings. They felt that employment policy should be more cautiously and realistically defined as 'the attainment of the highest possible and most stable level of employment', both because a modest formula would prevent later disappointment, but also on grounds of basic principle. The Belgians preferred the definition in the British White Paper on Full Employment and the Canadian document on 'Labour and income' of April 1945 to that of Beveridge in *Full Employment in a Free Society* which they feared had influenced various documents at the preparatory conference. The Belgians rejected Beveridge's definition which 'attributes to the policy of employment the aim of creating a reverse situation to that of unemployment; to create an excess of effective demand'. Such an approach would require 'methods of complex economic control and ... would entirely abolish individual initiative and the free choice of the consumer': excess demand would mean rationing to ensure that goods were evenly distributed, and entail labour control. The Belgians argued instead for 'the creation of general conditions in which individual decisions of consumers and producers can have free play'. They stressed the benefits of harsher times in reducing costs, rationalizing activities and improving technology: constant effective demand, by contrast, would mean that 'natural stimulants to progress disappear and have to be replaced by governmental incentives'.⁴¹ Such an approach had much more in common with the American opponents to the Full Employment Bill of 1945 than with the Labour government in Britain.

These issues were fought over in the preparatory meetings and conferences. The Americans and the IMF wanted to abandon the proposal that international organizations should coordinate employment policy; the British wished to retain it, but lost the argument so that their role was merely to exchange information. The exact words of the

⁴⁰ TNA, T236/704, No 102 Eager 28 October 1946.

⁴¹ TNA, T236/704, United Nations, Economic and Social Council, Preparatory committee of the international conference on trade and employment, Committee I, Belgian Delegation, note regarding the drafting of articles relating to employment policy, London E/PC/T/CI/8, 24 October 1946.

Employment Act of 1946 – ‘the attainment and maintenance of useful employment opportunities for those able, willing, and seeking to work’ – were adopted which would be more acceptable to Congress and to the Belgians.⁴² But the Americans did not entirely get their way. Each member agreed to develop its economic resources and raise production; and a reference was inserted to ‘measures appropriate to its political and, economic and social conditions’ as a way of meeting Indian concerns. A statement was inserted obliging countries to take whatever action was appropriate and feasible to eliminate substandard conditions of labour in production for export, which met some of the demands of Cuba. It was also agreed that if a country had a fundamental disequilibrium in its balance of payments which involved others in persistent difficulties, it should act to correct the maladjustment.⁴³ The conflicting and inconsistent demands of the various approaches to employment had been brought together in a single document. Although the proposals of Meade and the British government for specific action had been lost, the claims of the less developed countries moderated, and the definition of full employment modified, there was still much to alarm Congress and domestic interests in the United States.

The extended discussions of 1946–8 ran into serious problems because they involved much more than trade, which was itself more contentious than the financial issues at the Bretton Woods conference. These difficulties were compounded by inserting deeply divisive considerations of distributive justice and employment. At Geneva and Havana, issues of preferences and quantitative restrictions continued to collide with the US ideology of multilateral free trade. The negotiators at Geneva and Havana were faced with huge difficulties in producing a text that all participants in the international conferences could accept – but success in creating a compromise in negotiations at an international level was highly unlikely to win support from domestic interests within the United States. The two-level game could not be reconciled, for in creating a deal at Geneva and Havana the American negotiators were seeking to reconcile the views of other countries which were out of kilter with the domestic coalitions it needed to ratify the

⁴² T236/704, International employment policy – proposed amendments to undertakings (1) to (5) in annex A of the UK paper.

⁴³ TNA, T236/704, United Nations Economic and Social Council, Preparatory committee of the international conference on trade and employment, report of the subcommittee, London E/PC/T/C.I/11, 4 November 1946.

Charter in Congress. The problem was made all the more intense by the shift in membership and voting rights between Geneva and Havana which meant that undeveloped countries had a greater voice (Hypothesis 4).

Institutional design

The Bretton Woods agreement was determined by negotiations between the United States and Britain, and other participants at the conference signed a 'done deal'. Negotiations over trade took a very different form, for other countries had a greater say. When detailed discussion over the path to multilateral trade started at Geneva in 1947, twenty-three countries comprising 80 per cent of world trade revised the text of the Charter of the ITO and negotiated the General Agreement on Tariffs and Trade. The Americans cut their tariffs on average by 35 per cent and replaced existing bilateral deals with individual countries by most-favoured-nation agreements. These concessions were made by Presidential action through the RTAA which permitted tariff reductions of up to 50 per cent. Of course, there were tensions. The British felt that the US tariffs were still too high; the Americans felt that Britain should abandon imperial preference. Further, representatives of the under-developed world demanded quantitative restrictions and preferences between neighbouring states which were clearly inconsistent with multilateral trade. They did not make much progress at Geneva, for the conference was dominated by developed countries. The Americans were anxious that voting rights should be limited to full members of the United Nations, but the British government was critical, arguing that the limitation rested on the 'completely misconceived idea that the prestige of the United Nations depended on exclusivity rather than on the successes it achieves'.⁴⁴

Of course, votes in the UN on security and general political issues were necessarily confined to members. In the case of functional specialised agencies, however, effectiveness meant including the greatest possible number of countries in the particular field, as in the International Labour Organization and Food and Agriculture Office. The British argued that the Charter of the ITO would affect the economy and

⁴⁴ Brown 1950; *Documents on Canadian External Relations* 1948a and 1948b; TNA, Fo371/62312, S. L. Holmes (Board of Trade) to F. W. Marten (Foreign Office), 23 Aug. 1947.

trade of everyone, and would arouse opposition unless everyone invited to Havana could show their parliament and public opinion that they had a voice. Indeed, this realization applied with considerable force to the British government itself. In the end, the British won the argument and every country was allowed to vote. However, the Americans then went much further than the British had wished, abandoning the initial proposal that voting should be weighted by trade so as to ensure the dominance of the developed world. Instead, the Americans accepted a franchise of one country, one vote as a way of securing wider adherence to the ITO, rather than a more limited body that could more readily safeguard US (and British) interests.⁴⁵ Rather than expressing gratitude, as was naively assumed, the majority of undeveloped countries instead pressed for greater concessions. The balance of power changed in favour of the under-developed countries which altered the dynamic of the two-level game: a compromise in international negotiations was more likely to result in concessions that alienated important domestic interests. Institutional design made ratification of the Charter more problematical (Hypothesis 4).

The under-developed countries took it as axiomatic that the Genevan text of the Charter was heavily weighted in favour of the 'big commercial countries'. In particular, the Latin American countries played a crucial role. They were concerned that the United States was turning its attention to the reconstruction of Europe through the Marshall Plan. The Canadian report on the Havana conference reported the fears of the Latin American delegates:

the fairy godmother of the North was deserting them in favour of Europe. Their acquaintance with socialist ideas had converted them to a form of international socialism in which the richer countries were under an obligation to the poorer countries to promote the economic development of these countries and to raise their standard of living up to that of the richer countries.⁴⁶

During the war, new industries developed in Latin America as a result of a reduction in imports from the United States and Europe. Once the war was over, Latin Americans feared the revival of European competition. Their aim was to maintain quantitative restrictions and preferential

⁴⁵ TNA, PREM8/1416, CP(48)84, Cabinet, Havana Trade Conference, memorandum by the President of the Board of Trade, H. Wilson, 12 March 1948.

⁴⁶ *Documents on Canadian External Relations* 1948b.

arrangements to encourage development within Latin America, based on economic integration and import-substituting industrialisation. Their approach was clearly expressed at Havana by the representative of Venezuela:

The equality embodied in the Charter must not be of the nineteenth-century type, which actually established disequality [*sic*] by making it impossible, for instance, for Latin American Countries to develop new economies. During that period they had furnished raw materials and had been a dumping ground for finished products. This had now been substituted by the just idea of economic interdependence for the welfare of all. A Charter would not be possible unless the old prejudices were discarded and instead modern dynamic principles of co-operation adopted.⁴⁷

Such a developmental approach clearly complicated Hull's and Clayton's panacea of multilateralism as a solution to the economic problems of the world.

One concession granted to the developing countries was protective or development quotas designed to restrict imports in order to support infant industries. The Americans opposed any such concession at Geneva but gave way at Havana. The second concession was the right to introduce new preferences. At Geneva, no new preferences were allowed unless a two-thirds majority of the ITO agreed that they were needed for economic development. At Havana, new preferences could be introduced provided they were within the same economic region and were needed for development. Since Britain was committed to ending its own preferences by the terms of Lend-Lease and the US loan of 1945, there was an obvious inequity if other countries were able to introduce new preferences at the expense of British export markets. The issue was finally resolved by inserting a footnote to the effect that an economic region could be defined in terms of integration as well as proximity – a definition that covered the British Empire. Hence Commonwealth preferences could be preserved by the Charter of the ITO – a considerable loss to the US negotiators. Although the British government had considered adjourning the Havana conference on the grounds that the Americans were making too many concessions to the developing countries, British ministers also realised that such a step would allow the Americans to cast the blame for failure on them and so gain credit in the

⁴⁷ TNA, BT11/5206, seventh plenary meeting, 29 November 1947.

developing world of Latin America as well as India. Such a step would go against Labour's support for international cooperation, as well as provoking isolationism in the United States.⁴⁸ Trade was clearly part of a much wider set of strategic concerns.

In reality, American opposition to the ITO did not need much provocation. Whilst Clayton was busy pursuing multilateralism at Havana, domestic opposition was becoming apparent. The RTAA was one thing; the ITO charter was quite another matter. Warning signs were apparent in 1947 when Clayton's negotiation of tariff reductions at Geneva coincided with Congressional discussion of protection of US wool growers. The administration feared that any such measure would be seen as a turn to isolationism and would 'scuttle' discussions at Geneva. The bill was, in the end, vetoed by President Truman. More significantly, Congress did not ratify the ITO which fell foul simultaneously of the 'perfectionists' who felt it was insufficiently committed to free trade and of the 'protectionists' who felt that it surrendered too much.⁴⁹ Although the Americans did not retreat into isolationism, as the British feared, the grand ambitions of Hull and Clayton were frustrated. US policy turned away from the pursuit of multilateralism and convertibility to a more gradual and realistic programme which took greater account of the problems of reconstruction in Europe. After the war a customs union in Europe, unlike imperial preference in the British Empire, could be seen as a step away from bilateralism to freer trade in a multilateral world. Although regionalism is now seen as a potentially serious threat to multilateralism, in reality, less than full reciprocity co-existed with the most-favoured-nation principle in GATT without serious problems. The Americans thus moved from pure multilateralism to an intermediate phase of widening trade between countries, in conjunction with the European Payments Union. Idealism was moderated by pragmatism.⁵⁰

⁴⁸ TNA, PREM8/1416, Prime Minister, Havana Trade Conference, memorandum by the Chancellor of the Exchequer and the President of the Board of Trade, EPC (48)16, 10 March 1948; CP(48)84, Cabinet, Havana Trade Conference, memorandum by the Board of Trade, H. Wilson, 12 March 1948; CP(49)114, Cabinet, Havana Charter for an International Trade Organization, memorandum by the President of the Board of Trade, 10 May 1949; *Documents on Canadian External Relations*, 1948a and 1948b; Toye 2003.

⁴⁹ Aaronson 1996, p. 115; Diebold 1952, pp. 16–24.

⁵⁰ Kaplan and Schleiminger 1989.

Above all, the Charter of the ITO had become over-burdened with conflicting unrealisable, ambitions and the limited scope of the GATT was more realistic. The failure of the ITO and survival of GATT was, in the words of recent commentators:

a blessing in disguise: with a multifaceted agenda ranging from restrictive business practices to intergovernmental commodity agreements, the ITO risked evolving into a large bureaucracy that would have institutionalized and sanctioned state regulation of international commerce as much as it would have freed trade from such controls ... The narrow focus of the GATT served the process of trade liberalization ... well because the GATT's mission was simple and straightforward. The GATT had no autonomous power, independent leverage, or financial sanction. The GATT, in some sense, did not exist beyond the commitment of its members ... to reach certain goals through a negotiated consensus.⁵¹

The Havana conference showed the dangers of wide representation which led to serious difficulties in solving the two-level game. Success at Havana meant failure on Capitol Hill.

Conclusion

The experiences of the monetary conference at Bretton Woods and the trade conferences at Geneva and Havana were very different. In the first case, the two-level game was relatively simple. Both the British and the US administrations wished to resolve the problems of currency instability, and they had a high level of agreement on the basic requirements for success. There were different emphases between the proposals of Keynes for Britain and White for the United States, but these did not prove to be insurmountable, because both sides realised that there was too much at stake, and because the Americans could in the end impose their wishes on a much weaker partner. The British took comfort from any concessions by the Americans. At Bretton Woods, the agreement reached between these two unequal partners was acceded to by the other forty-two countries. After all, the dollar and sterling were the two key international currencies so that the United States and Britain had the major say. Furthermore, the international negotiations were insulated from domestic politics. The issues were highly technical and

⁵¹ Anderson and Hoekman 2002, p. 221.

difficult to explain – not least during the exigencies of war and other more immediate concerns. Popular political debate focused instead on issues such as the nature of the post-war welfare system and on full employment – and it was these issues that contributed to difficulties in negotiating the post-war deal on trade.

The post-war conferences on trade faced much greater difficulties at both the international and intra-national level. Trade was intrinsically more politicised and more immediately understood by electors and by various interest groups: it had been central to the identities of political parties in both countries. In the closing stages of the war, trade politics intersected with policies on full employment and welfare in a manner that created fissures both within countries (as in the debates over the Full Employment Bill in the United States) and between them (as over the divergent approaches of Britain, the United States and less developed countries). The negotiations over trade and the wider issues of equity between developed and under-developed countries started with fewer countries (twenty-three) but they all had some voice; and by the time of the conference at Havana, more representatives with widely disparate views had greater voice with the shift to wider participation and the replacement of weighted voting by one member, one vote. The dispute over institutional design raised major issues of what was politically realistic and feasible.

The final draft Charter of the ITO was hard-won at Havana, but the deals struck there did not command support from domestic interests where another pattern of coalitions and trade-offs was needed. The solution at Bretton Woods rested on a separation between domestic and international concerns; this was not feasible in the debate over the ITO. Although the RTAA created something of a buffer between domestic and international concerns, this was only partially successful in permitting a reduction in tariffs without too much intrusion by Congressional politics; it was not likely to succeed on the wider normative issues of full employment and justice in international economic relations. Might the two-level game at Havana have been resolved by a much closer engagement with domestic interests during the process of negotiation at the international conferences? The US government attempted to build support for the draft Charter by meetings across the country at the *end* of the process rather than during the negotiations. But a strategy of engagement from the start of the process was not likely to succeed; it might simply have led to hostility at an earlier stage which

would have derailed the negotiations at Havana. What is clear is that the inter-state negotiations at Havana were never likely to succeed given the impracticability of intra-state consensus in the United States.

The example of Havana shows that a wider membership and more democratic franchise are deeply problematic if combined with an extremely broad agenda. The draft Charter of the ITO raised major normative issues of justice and equity on which compromise was extremely difficult – as at Doha. The attempt to create a consensus between the extremely diverse parties at the conference meant that domestic acceptance was more difficult within the United States, which was what really mattered if the Charter were to have any credibility. The relationship between agenda-setting and representation was crucial. The British wanted a wider agenda to control the elephant of the United States, with the danger that the agenda could then be captured by less developed countries and taken in a radical direction. The British also wanted wider membership to legitimate the agreement, though with a less democratic franchise than acceded to by the Americans. Could a wide agenda and wide membership be reconciled? The evidence of the conferences suggests that success was more likely when the agenda was limited to trade issues and representation was narrower: GATT and tariff cuts survived, whereas the ITO failed. But did the failure of the ITO matter? In fact, it was probably beneficial for the future of trade negotiations by passing the large normative issues of distribution to the UN ECONSOC so that trade issues could be left to GATT.⁵² Compartmentalization proved beneficial.

⁵² Toye and Toye 2006.

3

Talking one's way out of strikes

WILLIAM BROWN

Deadlocks are a recurrent feature and hazard of collective bargaining whenever trade unions are strong. Their economic cost to employer, employee and the wider public can be severe. The avoidance and management of deadlocks has, consequently, tended to become highly institutionalised through conflict resolution procedures, which usually have the option of intervention by third parties. This chapter discusses these with a view to providing insights of relevance to the management of multilateral negotiations. The chapter deals first with the avoidance of deadlock. It considers the intra-organizational processes whereby the opposing sides develop their respective positions. It explores the bargaining relationships that may facilitate the reconciliation of these positions. It then goes on to consider techniques for breaking deadlocks when they occur, by the use of third parties for conciliation, mediation and arbitration. While there are some very particular features of collective bargaining, insights from this field nonetheless have considerable relevance for bargaining in multilateral negotiations.

The particular nature of collective bargaining

Collective bargaining is a generic term used when employers involve independent trade unions in managing their relationship with their employees. At one extreme, the degree of involvement may be intense, with few aspects of pay, hours and the organization of work not subject to close joint regulation with trade unions. This was the case thirty years ago in Britain in, for example, the coal, steel and television industries. It remains the case in, for example, the fire service, and some seaports and airlines. At the other extreme, the degree of union involvement may be slight, intruding no more than by providing an agreement setting out basic pay scales, as may be found today in, for example, much of construction and many supermarkets and universities. In general, unions tend to be stronger, and collective bargaining more all-embracing, the

tighter the market for the relevant labour and, more important, the less competitive is the market for the employer's products and services. More than anything else, it has been the intensification of product market competition, nationally and internationally, that has undermined collective bargaining so dramatically in recent years. For Britain, the coverage of collective bargaining for pay-fixing purposes collapsed from over three-quarters of employees thirty years ago to under one-third today.

Collective bargaining is now increasingly characterised by a largely consultative relationship, with trade unions contributing to a 'positive-sum game' by facilitating the smooth management and adaptation of the workforce. But in the recent past, the relationship was often far more combative – indeed, it sometimes still is in, for example, London Underground, HM Prisons, or the London theatres. The issues at stake were wages, hours of work, effort levels, and influence over work organization. Trade unions have always sought to influence the rules governing these, whether the rules appear as pay scales, written agreements or informal working practices. The main means of winning and exercising that influence has been collective action, primarily in the form of strikes and strike threats.

Deadlocks arise during labour negotiations from all the three circumstances outlined in the introductory chapter. That is, negotiations seize up in stalemates because neither side is willing to make adequate concessions; they are subject to long delays because either or both sides deliberately prevaricate; and they suffer breakdowns as a result of failures to agree. Breakdowns typically result in strike action or the threat of strike action. Once strike action is under way, settlement may be delayed by a more dynamic form of deadlock that typically gains complexity as fresh grievances, costs and consequences boil up in the heat and acrimony of overt conflict.

Throughout the industrialised world, strike propensity in the private sector has diminished dramatically over the past twenty years, again primarily in response to tightening international competition. Britain, for example, has seen the incidence of both strikes and working days lost through strikes fall by tenfold between the 1970s and 2000s. They are now at levels far lower than ever on record and, in a historic reversal, are largely confined to the public rather than private sector. But when strike propensity was higher, and strike threats were credible, collective bargaining was often characterised by confrontational relationships. There was an ever-present tacit threat of strikes to fight 'zero-sum'

conflicts in order to win, directly or otherwise, a share of the employer's profits. Deadlocks and failures-to-agree implied the possibility of incurring very substantial costs for both sides.

The context of these power relationships in collective bargaining is distinctive. It differs from normal commercial relationships between customers and suppliers, or from relationships between trading partners, partly because it is close and continuous. Employers and employees are heavily dependent on each other. That is, although the relationship has many aspects in common with multilateral relations, its bilateralism is a dominant feature. Shedding a workforce is as unpalatable to an employer as losing a job is for an employee. However bitter the dispute of the day, both sides know that they will have to pick up the bits and make amends in the near future. In the United States context, collective bargaining disputes typically revolve around the renewal of a legal contract every two or three years. American contract renewal in the past was often seen to offer an opportunity to test bargaining strength with a set-piece strike. By contrast, in the European, and especially in the British context, such fixed-term agreements and predictable major confrontations are almost unknown. The normal pattern is of a bundle of agreements of indeterminate duration and legal status, some aspects of which may be expected to be renegotiated annually. The European picture is more one of a continuously rolling bargain, with occasional crises that may or may not feature a strike.

Whatever the country's legal system, collective bargainers on both sides are usually anxious to avoid the mutual damage of strike action, and they try to take into account shifting market conditions in making their claims and offers. A shrewd understanding of each other's market position and organizational strength can lead to a shift in the balance of advantage being reflected in the agreed settlement without any strike action being necessary, although there may be a lurking awareness of an implicit strike threat. In John Hicks' seminal economic analysis, should the two sides have perfect information about each other's strengths, weaknesses and preferences, agreement would be reached without the occurrence of a strike.¹

If, however, the two sides have different evaluations of their relative market and organizational strength, a strike may be precipitated. The employer may decide to call what they believe to be the union's bluff.

¹ Hicks 1932.

Or the union may believe that the employer has failed to appreciate how much the union's strength has increased, perhaps as a result of raised worker aspirations. In either case, the open fighting out of a strike is a worthwhile investment for whichever side emerges as the winner. For both sides, the consequences last well beyond the current bargaining period. Bargaining reputations endure. Examples of British strikes with consequences that endured for years are the victory of the fire-fighters in 1978, and the defeat of the coalminers in 1985.

Whether or not a given negotiation involves a strike, the threat of action may carry heavy and long-term implications for the continuing relationship between employer and their employees' union. As a result, a set of negotiations often goes through periods of deadlock. In part, this is because a quick settlement might be perceived by those with an interest to be a sign of weakness, like a token haggle in an oriental market. All-night sessions and eleventh-hour breakthroughs are a necessary part of the theatre for stakeholders outside. Such deadlocks may arise from bluffing behaviour, and from efforts to manage domestic interests that often characterise the second and sixth hypotheses of the introductory chapter. In part, and more seriously, deadlocks often develop as a part of the dynamics of the working out of the balance of power – akin to the third hypothesis of the introductory chapter. This is because the psychological and political pressures that are cranked up by the experience of a deadlock may have a substantial effect in changing the resolve, the expectations, and the aspirations of the two sides.

Because of these dynamics, the negotiating process of collective bargaining tends to have considerable complexity. It requires sophistication on the part of those involved and considerable commitment of resources to avoid damaging disputes. The most serviceable analysis of the complexities of negotiations in collective bargaining is that by Walton and McKersie.² They identified, from a substantial number of observed negotiations in the United States, four distinct processes that can be found at work in parallel with each other.

The first process, which fits the popular conception, is what they called 'distributive bargaining'. This is a 'zero-sum' bargain over how the 'cake' should be divided up, typical of simple annual pay claims. In terms of behaviour, it is characterised by a very formal process, for which opposing parties meet round a table, make statements for the

² Walton and McKersie 1965.

record, and edge towards compromise by means of a series of adjournments. Distributive bargaining was a dominant feature of the more confrontational form of collective bargaining that has, as we have noted, diminished so markedly in the British private sector since the 1980s. It is the domain of negotiation where deadlocks are most common.

The second is 'integrative bargaining'. This is a 'positive-sum' process that is characterised by both sides taking a problem-solving approach. Confrontation is minimised and informality emphasised. Such bargaining is usually carried out away from the normal place of work, perhaps in a weekend retreat in a country hotel. The objective is to encourage both sides to adopt lateral thinking and flexible attitudes in order to facilitate concessions and improved ways of working. In Britain it became a feature of the 'workplace partnership' agreements that flourished, with government and TUC encouragement, at the end of the 1990s. Although the 'partnership' word quickly fell from favour, an emphasis on integrative bargaining continues to be a feature of the more consultative and cooperative style of collective bargaining in the British private sector of the 2000s. Deadlocks are not unknown in integrative bargaining, but the likelihood of them is reduced by the greater scope for compromise.

Negotiators do not operate in a vacuum, and Walton and McKersie identified two further, complementary processes. One, which they described as 'intra-organizational bargaining', is the way in which the negotiators seek to manage the attitudes and preferences of the organizations on whose behalf they negotiate. Informal networking, report-back meetings, and statements to the media are important in this. The other, described as 'attitudinal structuring', is a more diffuse process whereby they seek to influence the wider climate of opinion and expectation, not least of the opposing side. It is sometimes called 'framing' attitudes, and can have similarities with the style of propagandists in wartime.

Before considering further the context within which these parallel processes interact, we need to reflect on two further crucial aspects. Both relate to the fourth hypothesis in the introductory chapter, which is concerned with internal institutional features that may facilitate or deter agreement. The first of these aspects concerns the internal politics of each side – their intra-organizational efficiency. The second aspect is the relationship between the individual bargaining agents who confront

each other. Both aspects contribute towards the necessary conditions for effective negotiation and the effective management, if not the avoidance, of deadlocks.

Intra-organizational efficiency and deadlock avoidance

A common source of deadlock arises from the intra-organizational complexity of one or both of the two opposing parties. These parties often consist of coalitions of interests, in bilateral as in multilateral negotiations. The greater their heterogeneity, the bigger the task of intra-organizational bargaining whereby divergent interests can be reconciled and agreement reached on a compromise set of priorities and bargaining objectives. Failure can lead to paralysis. Much depends upon the clarity of the coalition's decision-making constitution and upon the skill and sensitivity of the officers who have to administer it.

The typical European collective agreement of the mid-twentieth century was one covering a whole industry – hosiery, ceramics, electrical contracting, or whatever – within a given country. Under this all the employers in an industry, although in competition with each other in the product market, would 'take wages out of competition' by uniting to negotiate an agreement covering industry-wide pay rates and other conditions with the relevant unions. Forming a united front against the unions was often not easy. It was especially difficult where employers differed substantially in size, in the extent to which their sales were in specialised niches, or in the extent to which they relied upon export markets. Such heterogeneity creates substantial constitutional challenges for the maintenance of unity. In continental European countries, employers' associations were strengthened by the fact that they usually also ran compulsory training systems, and some had strike insurance schemes to bolster solidarity.

In Britain where, for various historical reasons, employer solidarity was never strong, industrial employers' associations began to break apart from the 1960s onwards. This was typically because one very large employer came to see little net benefit by being tied to industry-wide pay scales. And once a major employer deserted the association, it was hard for those remaining to uphold the common agreement. Thus, for example, in the 1960s Cadbury's defection led to the break-up of the confectioners' association, and Dunlop's to that of the rubber manufacturers. In both 1979 and 1989, the most historically important

private sector employers' association, the Engineering Employers' Federation, suffered serious setbacks from strike action by unions in pursuit of a shorter working week. The employers' strategic confusion arose in large part from the failure of their constitution to cope with conflicting pressures within their membership. As a result, the Federation died as a bargaining institution. In the public sector in the twenty-first century, the large employer federations that manage collective bargaining for Local Authorities, the Police, and the Fire and Emergency Services all struggle to achieve representative bargaining outcomes with their heterogeneous, geographically and politically defined memberships.

The challenge of maintaining a united front is a very different one for trade unions. Unions often have to mobilise a credible threat of collective action. Or at least they have to mobilise consent to an eventual agreement, across a diversity of markets, skill levels and occupational interests. In support of this, the union movement has developed a substantial rhetoric of egalitarianism and solidarity, which in reality is more functional than ideological. Unions have to place great emphasis on constitutional rectitude and democratic procedures. Joint union negotiating committees typically have carefully balanced representative memberships. They have precise standing orders to ensure the legitimization of decisions. They typically are required to ratify provisional pay settlements through a further democratic consultation with the rank-and-file. When constitutional rectitude within the union side breaks down, settlement with the employers can become all but impossible. The historic British coal mineworkers' strike of 1984-5 finally ended without agreement partly because the dispute had been allowed to develop without proper adherence to internal trade union procedures to secure a mandate for action. No constitutional basis remained for negotiating an agreement. This resulted in the union splitting, a partial strike, and a deadlock that lasted a year. It was terminally disastrous for both the union and the British coal industry.

Failures of internal decision-making within the opposing bargaining parties are by no means the only reason for deadlocks, but they do not help. Such failures arise from ambiguous authorization procedures, inadequate means of disseminating information and explanation, and inconclusive mechanisms of internal debate. The more complex the process of establishing a bargaining mandate, of reference back and of ratification, the more constraints are placed on the negotiating

committee. This, then, is a first condition for minimizing the likelihood of deadlock: an efficient and clear constitutional arrangement for decision-making within each of the opposing bargaining parties. The greater the constraints under which the negotiators are obliged to operate, the less the chance for success of the side-deals, trade-offs, face-savers and compromises which will ease the way to agreement. To this relationship between the opposing negotiators we now turn.

The bargaining relationship between negotiators

Quite apart from the difficulties involved in achieving consensus and compliance within the organizations that confront each other, a key determinant of the extent to which deadlocks can be avoided is the quality of the bargaining relationship between the opposing negotiators who represent those organizations. This is to do with the efficiency with which negotiators exchange information. The bargaining relationship can be defined as the extent to which the negotiators are able to make each other aware of the constraints under which they each operate, and of the likely reactions of one organization to actions by the other. The better the bargaining relationship, the better the information exchange and the more accurate the anticipation of outcomes to fresh developments.³

With a strong bargaining relationship, the negotiators have much greater freedom of action and manoeuvre than when it is weak. They can informally 'fly kites' with possible solutions in a way that is without prejudice and will not be held against them should the kites crash on take-off. They can allow the other side to put on a public show of strength or outrage without overreacting, aware that the show was aimed at placating intra-organizational pressures behind the negotiator putting on the act, not at antagonizing the opposing negotiators in front. They can provide their opposing negotiators with insights into the underlying priorities of the side they are representing, and of the strength of feeling on different bargaining issues of their constituents. They can help their opposing negotiators manage their respective organizations by arranging credit for small victories and avoiding their humiliation.⁴

This is not to say that, at times, negotiators may not see advantage in tactical ploys that increase the uncertainty confronting their opponents.

³ Brown 1973. ⁴ Batstone *et al.* 1977.

Schelling (1960), among others, has analysed many diversions and ploys used by negotiators. These include making themselves unavailable at key phases of negotiations, or unexpectedly making apparently binding commitments. An ability to ride out each other's bargaining tactics without damaging the bargaining relationship is a sign of professionalism. But in the long run, the power relationship will be managed most efficiently, and with least use of costly sanctions, if the bargaining relationship is strong.

One way of describing a strong bargaining relationship is that it has a high level of trust. It is a reciprocal business relationship between professional negotiators. Like tugs bringing an oil tanker into the quayside, they, in effect, develop a privileged and more subtle means of communication between each other in order to help align the coarser perceptions and expectations of the parties they represent. Their relationship may, or may not, involve affective friendship. But it frequently does, not least because informal chats in pubs lead on to mutual moans about intractably awkward bosses and about the unreal aspirations of constituents, and on from there. Indeed, close but professional friendships are a feature of some of the most productive bargaining relationships.

The apparent success of Britain's Low Pay Commission, for example, in reaching repeated unanimous agreement on the level of the National Minimum Wage since 1998, can be partly attributed to just this. It consists of a changing group of nine people – three from a trade union and three from an employer background, and three independents. Its formal negotiating sessions on the level of the Wage have at times been very difficult. Shut away in a country hotel until agreement is reached, they lasted up to two days, with all the tactical ploys of professional negotiators on show. But because the Commissioners worked closely together on consultative visits around Britain, and in the non-partisan problem-solving that characterised the major and largely hidden part of introducing so substantial a labour market intervention, they built up a close personal regard for each other. This meant that they dealt with the cut-and-thrust of formal negotiations with a valuable understanding of each other's background pressures. They were able to be bolder in taking risks in the bargaining process. It also helped them separate role from personality in ways that avoided residual acrimony and allowed the Commission, once agreement had been hammered out, to move on.⁵

⁵ Brown 2009.

There are, of course, inherent dangers if the professional negotiating teams become too close. Any strong bargaining relationship can mutate into a self-serving stitch-up between consenting professionals if they are not exposed to some sort of democratic or managerial accountability. The more isolated the negotiators, the greater the danger of this. The history of trade unionism is littered with negotiators who were considered to have ‘sold-out’ by developing too close a relationship with management. It is, perhaps, a particular problem when the individuals in question become too far separated from the day-to-day running of their organizations. It is a hazard when career paths potentially lead on to higher things beyond the organization. Again, labour movement history is littered with negotiators whose migration into Parliament and peerages was accompanied by a reputation for betrayal.

One further precondition reduces the likelihood of deadlock, and this is a shared understanding of the facts. Any aspect of society is fairly cluttered with myths and firmly-held beliefs. These may or may not bear much relationship to reality, but they will almost certainly influence both the opposing organizations and their negotiators. Much can be done to reduce misunderstandings if both sides can ascertain and agree on salient facts, however unpalatable. For the Low Pay Commission, advising on the National Minimum Wage, the reaching of agreement was made much easier because great emphasis was placed on high quality research and on extensive consultation, in which Commissioners from both ‘sides’ were jointly involved. Many issues of internal controversy were settled to everyone’s content by a well-focused visit, a special statistical analysis, or some commissioned research.

This, then, is a second precondition for minimizing the probability of deadlock: a close, but professionally role-related, well-informed, bargaining relationship between the key negotiators on both sides.

Third-party intervention – active conciliation

The most externally obvious way of breaking deadlock in collective bargaining is by means of third-party intervention. Most countries have some sort of state-sponsored conciliation and arbitration service. They are state sponsored because a service paid for by the disputants usually comes to have its independence challenged. Some countries have had legal requirements to use such interventions – Canada’s compulsory conciliation and Australia’s compulsory arbitration endured for most of

the twentieth century. Britain's Ministry of Labour ran a conciliation service from the 1890s until replaced by the Advisory, Conciliation and Arbitration Service (Acas) in 1976.⁶

Acas currently employs about 500 full-time conciliators whose main task is dealing with over a hundred thousand complaints per year by individual employees against employers about unfair dismissal, discrimination, under-payment, denial of parental leave, or whatever. But the conciliators also process about a thousand collective disputes per year between employers and trade unions, of which pay-related issues are the most numerous. The great bulk of these are settled through conciliation, but about 5 per cent are passed on to a panel of part-time arbitrators; almost all of these are dealt with by a single arbitrator. Although arbitrated awards are not legally binding, there is no case of an award being rejected or contravened since Acas was established.

There is a spectrum of third-party interventions, from conciliation to arbitration. At one extreme, conciliation may amount simply to facilitating information exchange between the disputing parties. At the other, arbitration is a quasi-judicial process in which a formal hearing leads to an award that is binding on the disputants. But in practice there is a range of more-or-less active interventions between these extremes, some of which may be referred to as mediation. One part of the conciliator's role is the relatively passive one of exchanging perceptions and proposals between the disputing parties, who are usually kept in separate rooms. But in practice such a role quickly becomes more active. A perhaps surprisingly important first step is to get the parties to agree on what they are in disagreement about. This can take time as they often have different perceptions of both what is in dispute and what problems underlie it. Getting agreed understanding of the issue, and getting agreement to put aside tangential controversies over causes, often paves the way to getting a settlement. Many an arbitration has been averted because the process of agreeing the terms of reference has led to a voluntary settlement.

Effective active conciliation can call on a variety of skills. The disputing parties have often become so bogged down in particular ways of looking at the issues in contention that the fresh eye of the conciliator may allow them to be repacked in novel and more acceptable ways. An important early part of the conciliator's task is getting each party,

⁶ Dickens and Neal 2006; Towers and Brown 2000.

independently and alone, to describe and analyse the issues, testing and rephrasing and probing ambiguities in order to clarify the disputing parties' thinking.

Another phase may be one of getting the parties, again in isolation from each other, to discuss the worst possible outcome of a failure to agree, and to reflect aloud about its more unpleasant implications. If done before an adjournment, when they can brood on it, this may improve the acceptability of hitherto unacceptable compromises. In effect it stimulates a reappraisal of the BATNA discussed in the introductory chapter. Both sides are, metaphorically, made to look over the precipices down which they could drop if agreement is not reached. Whether or not the timing of the shuttle diplomacy requires it, leaving the parties to stew in uncertainty for an hour or so can be helpful. A successful conciliator is far from passive. He or she may have to make the opposing parties extremely uncomfortable during the course of the process. Agreement comes not simply through rational argument and sweet reason, but through the sometimes painful adjustment of expectations to a more realistic appreciation of the options and the costs.

The conciliator's fresh eye and genuinely naïve questions may help the parties to avoid worn pathways of thinking. For example, progress may be furthered by stripping out from the draft terms of agreement any phrases and words that have become semantically sticky with adverse associations. It helped the fire-fighters to reach agreement on a national disputes procedure in 2004 to replace the battle-scarred jargon of 'status quo' with the plain-English phrase 'whatever conditions, practice or agreement existed prior to the dispute'.

Lateral thinking is always helpful. An example of an apparently intractable problem arose, again, while mopping up the formal settlement after the fire-fighters' disputes in 2004. It had been traditional in the normal negotiating procedures of much of the public sector that, if there were deadlock in negotiations, either side, acting unilaterally, could opt to take a dispute into arbitration. It was by most standards a poor provision, as it could encourage delay, a 'nothing-to-lose' attitude, and a loss of 'ownership' of the final agreement. The practice in the private sector has almost universally been that a dispute could only go on to arbitration if both sides agreed. For the new fire-fighters' procedure, the union was adamant that reference to arbitration should be unilateral. The employers, who considered themselves, with good

reason, to have got the better of the dispute, were equally adamant to break away from that and make it bilateral. It was seen to be a crucial matter of principle. The solution, suggested by an independent member of the drafting team, was that there should be no reference at all to who might bring in an arbitrator. Instead, the procedure should simply say that the terms of reference of any arbitration should be agreed by both sides. Since that is normal practice, it was unarguable, but it provided an implicit way of falling in with the employers' position without any loss of face to the union. It removed the last point of disagreement.

Preventing loss of face by the negotiators is often important in a third-party intervention. This applies at both the personal and the public level. Negotiators who have been in each other's company over long periods will place considerable store in emerging with their mutual respect and self-esteem intact. But during the negotiations they may have used some fairly outrageous, possibly judgemental and tendentious arguments, and they will have conceded some passionately defended positions. The conciliator will know that they will reach agreement easier if both sides can envisage a dignified exit in each other's eyes. Considerable store is thus placed on devising what is often called a 'silken ladder' down which those who have to make major concessions can climb. It may involve the puffing up of a minor favourable concession, subordinate to the main issue at stake, to look like a major one. It may be a robust (but actually unenforceable) agreed statement of intent about the future. If the bargaining relationship is good, the negotiators will protect each other's self-esteem.

At the public level, it is important that neither negotiator should have reason to fear that they might be humiliated either by the news media or in the eyes of their respective organizations. An old adage of American union negotiators was 'mourn in victory; cheer in defeat' – meaning that it was foolish in terms of long-term relations for the perceived winner to be triumphant. Settlements are typically followed by soundbites about the courage and toughness of the opposition, and by statements of the sort: 'not a victory for either side but for common-sense'.

It usually helps to have a number of variables in play, around which concessions can be traded. It particularly helps if the two sides differ slightly in the priority they place on these, or in their perception of the importance ascribed to them by their respective organizations. At one extreme, a settlement of great technical complexity can often be 'sold' relatively easily to each organization because different aspects of it can

be stressed to the different audiences. But a single-issue dispute is more difficult. A conciliator may be able to create negotiating space by, in effect, breaking down a single-issue bargain into separate items. The difficult task of fixing the initial level of the National Minimum Wage was made more so because it was a single number, on which there was a great deal of public speculation, and around which there was a great deal of empirical ignorance. Agreement was reached, at the end of two days of deepening deadlock, because the parties agreed to recommend a two-stage, phased introduction. That gave the negotiators several things to trade with – the initial and final rate, and the dates of the initial and final introduction. Each side could soften the considerable unpopularity of the settlement with both their constituencies by choosing which of the two rates to emphasise when it went public.

Third-party intervention – arbitration

During the course of a conciliation, it may come about that the two sides are unwilling to be seen to be accepting a settlement, even though they both can see it is the only one that is feasible. The appropriate action may then be for the conciliator formally to propose that as the settlement, and the two sides to accept it with public protests of reluctance. This process, which is sometimes called mediation, or ‘med-arb’, leaves the two sides free to ‘blame’ the conciliator for what they have, in the interest of peace, gone along with. This function is more evident in a straightforward arbitration – the arbitrator is there to be blamed for his or her ‘award’, and will normally have no further contact with the organization in which the dispute arose. The arbitrator’s prime objective is to protect the continuing relationship between the opposing parties. Their relationship with the arbitrator is as expendable as a car’s inflatable air-bag.

Labour arbitrations have many functions. Part of the function is simply to be there as an option in reserve, as a threat to encourage a negotiated outcome: ‘If you do not settle this between yourselves, you are at the mercy of an outsider.’ Part of the function of an arbitration is to focus their thinking through the preparatory conciliation, when they have to work out and agree terms of reference, as already discussed. This is itself a negotiation, because good terms of reference have to set sufficiently tight limits to constrain the damage an incompetent arbitrator can do.

Another function is to provide either side with the chance to kick an embarrassment into touch so it will not sour the wider relationship. One typical example would be where a middle manager has made a mistake, perhaps by withholding some informal arrangement to which the workforce felt entitled by custom and practice. The senior management may not want to be seen to be climbing down, but they are content to have the manager's hapless decision reversed by an arbitrator. Another common example these days is when management and the local union negotiators have concluded a deal which is seen to be sensible if not generous, only to have it rejected in a ballot of the members. The restoration of the deal by an arbitrator will set relations back on course. Arbitrators are accustomed to, in effect, being used tacitly to protect an otherwise functional collective bargaining arrangement.

The actual procedure of arbitration can also have its own utility. There is nothing concerned with the hearing that the arbitrator reads that is not also read, and can be challenged, by either side. There is also nothing that the arbitrator hears during the hearing that is not heard, and can be challenged, by either side. The arbitrator's questioning, always with both sides present, usually uncovers issues neither side has articulated, and often allows the competing cases to be set out with stark clarity that exposes any weaknesses. There is often an institutional therapeutic value, quite irrespective of the final award, in the hearing process. Each side has to hear the other set out its case and have it probed by an independent person. Each side has an opportunity to challenge the other side's case, in what is almost always a calm and positive atmosphere.

The arbitrator's written award augments this process. Usually under a thousand words in length, it sets out the background to the dispute, and then summarises the two sides' arguments as concisely and as strongly as possible. The objective at this stage is to make each side feel not only that its case has been understood, but that they put forward their arguments effectively. Then the arbitrator writes what are called 'general considerations', which is a terse statement of the points that appear to be relevant to deciding the award, usually put in such a way that suggests that neither side is wholly right or wrong. Relevant arguments might relate to existing agreements, special circumstances, agreed custom and practice, and reasonable expectations. The words of the actual award stick very closely to those of the initial terms of reference in order to minimise the chance that unforeseen precedents might be set. There is no appeal because it is not a judicial process. Whether or not the

arbitrator's written efforts have any didactic influence, the verdict has, over the past thirty years, always been accepted and adhered to by both sides.

The terms of reference under which an arbitration takes place may leave the arbitrator with some range of choice. There may, for example, be a specified possible range of settlement for an annual pay rise between 2.2 per cent and 2.9 per cent, and the arbitrator would normally be foolish to choose one of the two extremes. A total victory for one side would not help them restore working relationships in the longer term. But often the terms of reference deliberately provide the arbitrator with a simple choice between two options, and this is sometimes called 'pendulum arbitration' or 'forced choice' arbitration.

One reason why some firms choose to make regular use of pendulum arbitration is that they have so-called 'no strike' agreements whereby the final stage of the dispute procedure says that, rather than strike, the union will opt for arbitration. Two difficulties then arise. One is that they may be tempted to become habitual users of arbitration, on the grounds that the arbitrator might always improve on the employer's last offer. The other is that, in order to give a wide range for the arbitrator to choose within, neither side will make much effort to reach compromise before the arbitration, and expectations of employees will be raised unrealistically high. If, however, forced choice arbitration is used, and the choice is simply one of either the employer's last offer and the union's last claim, there is an incentive for both sides to make those last bids 'moderate'.

Although pendulum arbitration has its uses, its value is limited. Many disputes revolve around bundles of items, and the options cannot be of a simple 'either/or' nature. But perhaps the main reason why it is not used more as a technique is to do with the purpose of third-party intervention: that is, to help restore an independent collective bargaining relationship between the two parties. Pendulum arbitration forces the arbitrator to choose victor and vanquished, in a relationship where things are soonest mended with a degree of compromise. An indefinitely continuing power relationship is most likely to remain conflict free if the spirit of compromise is nurtured.

The possibility of arbitration plays an important role in the breaking of deadlocks in collective bargaining. But it is a role that is best seen as supporting conciliation rather than the other way round. The objective is to facilitate independent collective bargaining, and the possibility of

arbitration provides the conciliator with a form of sanction or a fall-back. Used sparingly, conciliation may be useful, but it does not provide a substitute for a strong long-term bargaining relationship.

Conclusion

The theoretical structure set out in the introductory chapter for multilateral negotiations has fitted very satisfactorily this analysis of the largely bilateral negotiations that characterise collective bargaining. The nature and sources of deadlock, and the solutions for its resolution, have much in common. The main insight that this account of labour negotiations has highlighted has been the importance of suitable institutional preconditions for efficient negotiation. There is the need for a clear constitutional means of decision-making within the organizations of the separate parties. There are the benefits of a professional, well-informed, bargaining relationship between the key negotiators on all sides. If deadlocks do occur, and if the parties can move no further on their own, then third-party intervention may be useful. Such intervention is most effective if it is not arbitration on its own, as that does little to nurture the independence and 'buy-in' of the parties. It is active conciliation that has potential in breaking deadlocks in multilateral negotiations. At best this has a facilitating role, which increases the options open to the negotiating opponents, and provides protections to encourage them to take risks. Conciliation can refine their understanding of the power relationship in which they are enmeshed, and thereby ease their acceptance of compromise.

4

Litigating the way out of deadlock: the WTO, the EU and the UN

MARKUS W. GEHRING

In current public international law, normative regimes generally develop as the result of states' common interests. Various institutions are involved in the interplay of multilateral processes and diplomatic practices, which largely contributes to the development of legal regimes. Among those institutions, dispute settlement bodies play the vital role of interpreting and applying the relevant treaty law, customs and agreements which are the outgrowth of previous negotiations. However, the less-studied opposite might also be true: in some cases, judicial recourse and dispute settlement decisions can be used to influence treaty negotiations. As this chapter demonstrates, states can use a variety of institutions in order to attempt to influence and/or influence the outcome of treaty negotiations. Indeed, the dispute settlement mechanisms, for example in the WTO, help states to influence the negotiation of WTO-based treaties in the same policy areas. Thus, the dispute settlement mechanism and the treaty negotiation function of the same institution can form part of an overall policy of states to advance their treaty negotiation strategies.

Multidisciplinary approaches can be used to monitor the way that states use, or restrain from using, case law arguments in their negotiations. If there is indeed a link between dispute settlement based litigation and ensuing or concurrent negotiations, we should be able to observe it in the dispute settlement cases themselves from facts, from declarations by parties, and from the opinions of the deciders. This chapter will first

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state reasons for linking international disputes to treaty negotiations, then analyse briefly the application of this dynamic within the dispute settlement and treaty negotiation settlement mechanisms of the UN, EU and WTO. The goal of discussing and comparing the relationship between dispute settlement mechanisms and treaty negotiations within these institutions is to both examine these especially important institutions and to compare these relationships in the regional and multilateral setting. The cases discussed in this chapter were selected because they occurred parallel to negotiations involving some or all of their subject matter, thus allowing an analysis of the impact of litigation on negotiation of deadlocks.

As a particularly illustrative example, this chapter will focus on three WTO post-Doha cases of *US-Cotton*, *EC-Sugar* and *US-Gambling*. The *US-Cotton* case is particularly helpful in illustrating the relationship between hypotheses 2, 4 and 5, as stated in the Introduction to this book, as well as demonstrating the applicability of solution sets 3, 4 and 5 offered in the Introduction. In so doing, this chapter emphasises that the lessons of the *US-Cotton* case are more than purely practical from a legal or political viewpoint; rather, they form a theoretical foundation upon which future WTO disputes and treaty negotiations may become intertwined. In this sense, the cases discussed in this chapter highlight the importance of legal frameworks to international negotiations in general, and particularly in the making and breaking of deadlocks. The chapter concludes by providing examples of policy areas in which this foundation has and may come into use.

Regime development: linking international disputes to treaty negotiations

In the existing international framework, the presence of judicial institutions such as the International Court of Justice, the World Trade Organization Dispute Settlement Body and the European Court of Justice play a normative role in interpreting treaty law based on the existing conventions, customs and agreements. Although disputes before these institutions might be brought in an individual or case-by-case setting, the role of the judiciary in these institutions should not be underestimated, as it has a direct impact – negative or positive – on the future of the treaty regime it enforces and, additionally, on the future of negotiations within the overall institutional body that gave rise to the

dispute settlement mechanism. On the other hand, it can be argued that, due to the individual and issue-specific nature of disputes brought before these institutions, the lessons to be learned from them are extremely limited within the context of the institution itself and the broader context of other treaty regimes which have created similar mechanisms for dispute settlement.

However, this chapter is grounded in the working hypothesis that states launch dispute settlement cases strategically within the framework of the institution in which they are operating. This chapter argues that states bring dispute settlement cases strategically for three reasons: to improve their bargaining position; to resolve deadlocks and influence negotiations; and to change the rules of the broader institutional regimes themselves. If the dispute settlement mechanisms of international institutions – which can be said to be litigation functions in themselves – are considered as a remarkable step forward to a pacific conflict resolution regime from a power-based dynamic, it must be realised that the power-based relations between states are still far from non-existent within these institutions even though they help to inject a level of objective deliberation and the necessity to frame the dispute in legal terms can help states to find common ground. But it happens that the very institutions that are meant to resolve conflicts peacefully and lawfully do sometimes themselves become the object of power-play between states by being used strategically and can thus not provide the only answer to overcoming deadlocks.

It should be noted that while in terms of the jurisdiction and structure all three regimes that this chapter discusses, the European Union (EU), the United Nations (UN) and the World Trade Organization (WTO) share only a few similarities, they all possess comparatively strong dispute settlement mechanisms, so that important lessons can be learned by comparing and contrasting the interaction of the respective courts or dispute settlement mechanisms with negotiation deadlocks within the respective regime and beyond.

Strategic litigation in the European Union: the European Court of Justice

The European Union as an institution itself has been shaped by many negotiations and judicial construction. Its negotiations have been punctuated by several instances of litigations to remove diplomatic

deadlocks; these instances of litigation have been productive in developing an international law regime that has come to form the core of the European Union's understanding of its own functions and boundaries. It could thus be said that without the interplay between negotiations and litigation, the European Union as a whole would not be the same entity that it has evolved into. Indeed, with regard to the enforcement of the Treaty of Rome by the European Court of Justice (ECJ), it has been asserted that 'each contracting party to it has an interest in seeing that the other parties or their obligations will be punished for failure to do so. One job of the Court, then, is to clarify, over time, the meaning of the contract, and to monitor and punish noncompliance'.¹

The strength of the ECJ has influenced the legal system and integration process in the European Union and its constituent member states. Unlike the WTO, disputes brought before the ECJ are largely driven by private litigants, removing some of the political and institutional boundaries to litigation which are associated with the WTO's dispute settlement mechanism. However, an analysis of ECJ case law and its impact on legislation, or the negotiation thereof, finds several substantive areas in which member states have incorporated the rulings of the ECJ as a matter of law. In some instances, member states used ECJ case law as a basis for negotiations and/or enacted legislation following important ECJ cases, often simply codifying case outcomes as a matter of domestic law.

Furthermore, ECJ case law is followed by member states even in instances where the ECJ decided against stated preferences of member states in regard to the legal question at issue. This was most obviously the issue in the area of free movement of goods, where traders used the Art. 234 EC Treaty preliminary reference procedure to strike down barriers to trade erected by their own member states. As such in the *Cassis de Dijon* case, Germany argued strongly against liberalization in cases where domestic and foreign producers faced indistinctly applicable rules. The ECJ however decided against the stated member state preference and allowed traders to litigate against national laws even without having to prove discrimination. As such it can rightly be argued that prior to the *Single European Act*, the ECJ had largely replaced the Council as a force for positive integration regarding the free movement

¹ Sweet 2004, p. 25.

of goods.² Similar tendencies can be identified in the areas of environment policy³ and sex discrimination.⁴

Another good example is the case of *Danish Bottles*,⁵ again a case where one member state supported the Commission that argued against recognition of environmental protection as a ground to restrict trade above and beyond the protection of human life and health within the application of what is now Art. 30 EC Treaty. This case was launched (in December 1986) after the Single European Act (SEA) had been agreed (in December 1985) and signed (in February 1986) but before the SEA entered into force (1 July 1987). The SEA introduced environmental protection as an area of competence for the European Community but did not include any changes to Art. 30 EC Treaty. The ECJ however decided against the stated preference, this time of the Commission and the UK supporting her by recognizing a general mandatory requirement of environmental protection which could serve as a basis to erect barriers to community trade.

Finally, it is probably fair to say that member states, particularly Belgium, were surprised to find that Art. 119 EEC Treaty was not only directly applicable as found in the *Defrenne* case⁶ but also horizontally directly applicable. The court referred to extensive negotiations between the Commission and several of the original member states about their failure to give proper effect to the provision through national negotiations of the industrial partners:

The information provided by the Commission shows that several of the original Member States have failed to observe the terms of that Resolution and that, for this reason, within the context of the tasks entrusted to it by Article 155 of the Treaty, the Commission was led to bring together the representatives of the governments and the two sides of industry in order to study the situation and to agree together upon the measures necessary to ensure progress towards the full attainment of the objective laid down in Article 119.⁷

In other words this preliminary reference procedure gave the Commission the ability to adopt a strategic position, pointing out the

² See McCown 2004, ch. 3. ³ See Gehring 2004, ch. 5.

⁴ See Cichowski 2004, ch. 4.

⁵ ECJ, Case 302/86, *Commission vs. Denmark* [1988] ECR 4607.

⁶ ECJ, Case 43/75, *Defrenne II* [1976] ECR 455.

⁷ ECJ, Case 43/75, *Defrenne II* [1976] ECR 455, para. 49.

failure of member states to comply with previous agreements. It shows that in the European context strategic positions that have the potential to influence negotiations can also be adopted for cases launched by private parties under the Art. 234 EC Treaty preliminary reference procedure.

Strategic litigation in the UN: the International Court of Justice

Given the access difficulties to the jurisdiction of the International Court of Justice (ICJ), its use for strategic litigation is less frequent. Also it should be noted that this section can be used to further strengthen the hypothesis that external deadlocks are more likely to persist, i.e. deadlocks outside the UN regime as such. Indeed, the issue of whether the ICJ had appropriate jurisdiction to hear the referenced cases was one which constantly occupied the ICJ, which resulted in extensive portions of these decisions justifying the ICJ's decision to exercise jurisdiction. Many of the arguments advanced against the ICJ exercising jurisdiction were procedural, but a constant theme was that there were already ongoing negotiations between the parties or in regards to the question that would be harmed by the ICJ rendering an opinion on the fundamental issues of the case. This was a particular concern where the ICJ was asked to render advisory opinions for the UN General Assembly or the UN Security Council.

An interesting example of the relationship between negotiations and litigation is the *Gabcikovo-Nagymaros* case.⁸ This case was brought by Hungary against Slovakia – as the successor state to Czechoslovakia – in regards to Hungary's ability to abrogate a treaty which required both states to work together on a water system on the Danube River.⁹ Much of the deadlock in this case stemmed from the nature of the treaty which established the joint project, in that it was silent on issues relating to the withdrawal of a party from the agreement.¹⁰ The central cause of the deadlock therefore relates to Hypothesis 4 of the Introduction, where features of the institution (in this case, the treaty) limited a resolution of the deadlock. Hypothesis 5, stating that deadlocks occur because fairness or justice matter, is also implicated in this deadlock. Here, to the Hungarians, there was a fairness issue in that they believed it unfair for them to be obliged to follow through on an agreement which, they

⁸ *Gabcikovo-Nagymaros* 1997. ⁹ *Gabcikovo-Nagymaros* 1997, para. 15.

¹⁰ *Gabcikovo-Nagymaros* 1997, para. 15.

maintained, would result in environmental damage to their territory. To the Slovaks, however, who had already completed much of the work on their portion of the project, it was a matter of justice, that they would be compensated for what they had already spent and was a matter of fairness in terms of securing the benefit of their investment.

Initially, Hungary tried to bring the dispute to the ICJ but there were arguments regarding ICJ jurisdiction and the Commission of the European Communities offered to mediate the dispute.¹¹ After first accepting an offer of assistance, the parties agreed to accept ICJ jurisdiction over the dispute due to stalled mediation.¹² Although the ICJ accepted jurisdiction in the case and rendered a judgement in which it made findings of law regarding fault and entitlement to compensation, what is interesting for the purposes of this chapter is that the ICJ then ordered the parties to submit to further negotiations regarding many issues in the case, stating that negotiation was the proper forum for these issues to be resolved.¹³ Thus, the ICJ's judgement can be seen as validating the link between institutions as facilitators of agreement – in so far as the parties agreed to send a particular set of legal questions which had proven to be non-negotiable to the ICJ for a determination – and as actors capable of decreasing legal uncertainties between the parties for future reference and interaction. This also supports the validity of solution set 4, in that the solution to at least the major stumbling blocks of negotiation between the parties was achievable through the apparatus of the ICJ, to which the parties consented to be bound, and to solution set 5, as the ICJ judgement reframes the issues which have been left open for negotiation by settling the questions of fault and damages between the parties.

Among litigation cases at the ICJ level, advisory opinions, in particular, are used to move past impasses in international treaty law. The *Palestine Wall* case is probably one of the clearest attempts to urge one party to the negotiation table, albeit with little success and considerable public relations costs on all sides. The deadlock in this case did not only concern the much more restricted question about the legality of the wall built in the West Bank but rather the whole relationship between Israel and the Palestinian Authority which had reached a low point and no

¹¹ Gabčíkovo-Nagymaros 1997, para. 24.

¹² Gabčíkovo-Nagymaros 1997, para. 25.

¹³ Gabčíkovo-Nagymaros 1997, para. 83.

new negotiations were planned. Again this seems to indicate that external deadlocks are likely to persist even when judicial mechanisms are available. Although the ICJ's opinion in the *Palestine Wall* case¹⁴ might be viewed as largely unsuccessful, it too has importance to the topic of this chapter in terms of its holdings regarding attempts at negotiation and arbitration which occurred concurrent to the ICJ litigation. The deadlock in this case stemmed from the idea that fairness and justice matter (Hypothesis 5) and that certain institutional structures (Hypothesis 4) can deter or facilitate agreement. In this case, both sides had a sense of right in the course they had pursued and wrong – indeed threatening – conduct on the part of the other. Specifically, the ICJ opinion stated that the existence of a 'Negotiating Framework' between the parties did not preclude its ability to exercise jurisdiction over the case.¹⁵ The ICJ also reframed the core issues involved as not being solely within the purview of the two parties, but rather as being of global interest.¹⁶ In so doing, the court invoked the principles behind Hypothesis 5 through its emphasis on fairness and justice for the world community as well as the parties, and also invoked solution set 5 by reframing the dispute between the parties as a larger dispute within which the global community has both a consideration and a role.

The *Namibia* case and the *Nuclear Weapons* case can also be seen as ways to advance UN negotiations from an impasse. In the *Namibia* case, the UN Security Council requested an advisory opinion on 'the legal consequences for states of the continued presence of South Africa in Namibia'.¹⁷ This was a particularly difficult question for the UN itself to answer, given the role of the international community in allowing Namibia to come under South African rule through the Mandate system.¹⁸ The deadlock here was the result of several hypotheses, namely 2,

¹⁴ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory 2004.

¹⁵ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory 2004, para. 53.

¹⁶ See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory 2004.

¹⁷ See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 1970.

¹⁸ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 1970.

4 and 5. The ICJ rendered an opinion in which it explicitly explained that states – regardless of their membership in the UN – incurred obligations not to assist South Africa in its continued occupation of Namibia while, at the same time, not to take actions which would harm Namibia.¹⁹ Thus, the ICJ again engaged with the premise behind Hypothesis 5 as well as Hypothesis 4, in that, operating within a different institutional setting than the UN Security Council, the ICJ was able to render an opinion which was otherwise difficult to foster agreement around. In the *Nuclear Weapons* case, the ICJ was asked by the UN General Assembly to provide an advisory opinion on the question of whether the threat or use of nuclear weapons would ever be legal under international law.²⁰ The ICJ examined a number of human rights treaties and the UN Charter before addressing the issue.²¹ Ultimately, the ICJ stressed to the international community that, while it might render an advisory opinion on the issue, the best course of action for those wishing for an answer to the question was to promulgate a nuclear non-proliferation treaty.²² Here, the ICJ opinion can be seen as invoking the principles behind Hypothesis 4, in that it seeks to foster a sense of agreement between actors that will lead to a treaty-based outcome, while also providing a set of legal principles to guide the treaty-negotiating process, implicating Hypothesis 2. Similarly, the recent Georgia dispute with Russia can be analysed as an effort to influence diplomatic negotiations away from an impasse.²³ Such cases have a strategic importance in treaty negotiations, but also influence the development of the broader United Nations itself, as an international regime.

Strategic litigation in the World Trade Organization: dispute settlement mechanism

The WTO's Dispute Settlement Body exists to assist WTO member states in seeking a settlement of their trade-related grievances with

¹⁹ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 1970.

²⁰ See *Legality of the Threat or Use of Nuclear Weapons*, 1996.

²¹ See *Legality of the Threat or Use of Nuclear Weapons*, 1996.

²² See *Legality of the Threat or Use of Nuclear Weapons*, 1996.

²³ See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia vs. Russian Federation)* 2008.

each other.²⁴ While it encourages negotiation and conciliation between the parties, this mechanism is also capable of rendering judicial decisions from the Panel convened to hear them and of hearing appeals and issuing appellate decisions through its Appellate Body.²⁵ For WTO litigants, the Dispute Settlement Body's decisions can be 'binding', however these decisions have no binding quality for future litigants.²⁶ However many decisions do take on a role similar to that in a *stare decisis* system. Although it is possible that a party to a dispute does not comply with the decision of the Dispute Settlement Body, the rule of negative consensus leads to the adoption of WTO Dispute Settlement Body decisions by the parties involved. This can, however, be a lengthy process, especially when domestic legislation must be enacted to effect the required change in state policy or practice.

Currently, there is an increasing debate surrounding the concept of WTO 'judicialisation'. The concerns inherent in this concept are that the role of the diplomat at the WTO level, which was formerly the primary place of diplomatic activity, is now being replaced by that of trade lawyers. This raises many potential shifts in institutional functioning and philosophy, not the least in regards to the possibility that issues regarding the effectiveness of judges and/or judicial activism in WTO dispute settlement proceedings might become a characteristic of the system.

Despite its increase in prominence, the success of the WTO can still be questioned in terms of its ability to solve or avoid conflicts. The WTO still interprets and makes declarations regarding institutional agreements. In 2001, the Doha Ministerial Declaration²⁷ influenced various Dispute Settlement Body decisions, such as *Mexico – Measures Affecting Telecommunications Services*.²⁸ While formally not a 'legal' text, the 2001 Doha Ministerial Declaration provides the framework for agreed negotiations on future WTO treaty law. It is precisely this framework value that links disputes to current WTO negotiations. Such a built-in

²⁴ See Narlikar 2005. ²⁵ Gehring *et al.* 2007, p. 15. ²⁶ Gehring *et al.* 2007.

²⁷ WTO, Doha Ministerial Declaration.

²⁸ In this case, Mexico claimed that some issues which were raised at Doha precluded elements of US claims and the dispute settlement Panel explicitly rejected this argument ('In the Doha round, the main issue for Members with respect to the Understanding has been whether it should be maintained and not what its scope might be').

agenda can be observed in trade law negotiations on issues related to services and agriculture, among others.

The 'peace clause', article 13 of the Agreement on Agriculture expired on 13 December 2003, and due restraint has not always been exercised by WTO members, as illustrated by the *US-Cotton* case. In such cases, the potential avenues to move forward include political negotiations, bringing another case in the WTO Dispute Settlement Body, or trying to shape negotiations in the shadow of the trade law.

A case study: WTO US-Cotton case

Litigation background

In February 2003, Brazil initiated a formal complaint against support subsidies to US cotton producers.²⁹ The members had established provisions for further negotiations on the progressive opening of agricultural markets in the Agreement on Agriculture³⁰. It was also their intention to limit future legal recourses on agricultural measure during the initial implementation period, which was nine years, from 1995.³¹ It was called a 'Due Restraint', or the 'Peace Clause' article 13.³² The initial negotiations were not very fruitful until the launch of the Doha Round in November 2001. Paragraph 13 ('Agriculture') states (in relevant part):

We recognise the work already undertaken in the negotiations initiated in early 2000 under Article 20 of the Agreement on Agriculture, including the large number of negotiating proposals submitted on behalf of a total of 121 members. We recall the long-term objective referred to in the Agreement to establish a fair and market-oriented trading system through a programme of fundamental reform encompassing strengthened rules and specific commitments on support and protection in order to correct and prevent restrictions and distortions in world agricultural markets. We reconfirm our commitment to this programme. Building on the work carried out to date and without prejudging the outcome of

²⁹ See World Trade Organization 2009b.

³⁰ World Trade Organization 2009m ('Recognizing that the long-term objective of substantial progressive reductions in support and protection resulting in fundamental reform is an ongoing process, Members agree that negotiations for continuing the process will be initiated one year before the end of the implementation period').

³¹ See World Trade Organization 2009m.

³² See World Trade Organization 2009m.

the negotiations we commit ourselves to comprehensive negotiations aimed at: substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support.³³

The last two clauses of the final sentence of this excerpt are the most important in relation to the cotton negotiations. They record members' 2001 commitment to reduce 'with a view to phasing out, all forms of export subsidies' and to make 'substantial reductions in trade-distorting domestic support'. Export subsidies have traditionally been employed by the EU.³⁴ They are considered the most trade-distorting category of subsidies and are therefore a high priority for elimination in the pursuit of freer trade.

Before the legal process, in September 2001 the Government of Brazil requested consultations to discuss the subsidies provided to US producers and exporters of cotton.³⁵ According to Brazil, these subsidies were prohibited under WTO law, making them actionable before the WTO Dispute Settlement Body.³⁶ Initially, a few consultations between the parties took place, however they did not settle the dispute.³⁷ Here, there were instances of deadlock occurring due to bluffing or lying – in this case, the United States not realizing the state of balance of power in the agricultural trade sector, which is discussed below – as well as fairness and justice, in that Brazil saw more this case as a way to bring fairness to the field of cotton trade, not merely an attempt to win trade concessions. This was a sentiment that was echoed by more than just Brazil, and, indeed, during this consultative period, other interested states began to join the dispute as third parties; eventually, the number of third-party states would rise to thirteen.³⁸ Subsequently, Brazil requested and the Dispute Settlement Body agreed to the establishment of a Panel; the Panel was established specifically to adjudicate the issue of US domestic support and export subsidies to cotton producers.³⁹

At the Panel level, Brazil's allegations against US measures affecting cotton producers can be grouped into seven broad categories.⁴⁰ The United States in turn rejected each of these allegations in its own filings

³³ See World Trade Organization 2009m.

³⁴ International Centre for Trade and Sustainable Development 2005b.

³⁵ World Trade Organization 2009b. ³⁶ World Trade Organization 2009b.

³⁷ World Trade Organization 2009b. ³⁸ World Trade Organization 2009b.

³⁹ World Trade Organization Dispute Settlement Body 2004.

⁴⁰ World Trade Organization Dispute Settlement Body 2004, pp. 28–30.

with the Panel.⁴¹ The Panel submitted its interim report to the parties on 26 April 2004 and its 377-page final report on 18 June 2004.⁴² The following section summarises the Panel's major findings.

The 'Peace Clause'

Article 13 of the Agreement on Agriculture (entitled 'Due Restraint', also known as the 'Peace Clause') provides that signatory states will refrain from challenging agricultural subsidies until the end of 2003 as long as they satisfy certain conditions.⁴³ Brazil claimed that Article 13 did not exempt the impugned US measures from actions based on the SCM Agreement and Article XVI:1 of the GATT 1994.⁴⁴ The United States argued that, pursuant to Article 13(a)(ii) of the Agreement on Agriculture, direct payments under the 2002 Farm Security and Regional Investment Act (FSRI) and expired production flexibility contract payments under the 1996 Federal Agriculture Improvement and Reform Act (FAIR) 'conform fully to the provisions of Annex 2 to [the Agriculture] Agreement' such that they should be treated as exempt from actions under Article 13.⁴⁵ The United States also argued that, pursuant to Article 13(b)(ii) of the Agreement on Agriculture, US domestic support measures that fully conformed to Article 6 of the Agreement on Agriculture, including the marketing loan programme (involving marketing loan gains and loan deficiency payments), user marketing (known as step 2) payments, direct payments, counter-cyclical payments, and crop insurance payments, for marketing year 2002, as well as payments made during each of marketing years 1999–2001, 'do not grant support to a specific commodity in excess of that decided during the 1992 marketing year' and are 'exempt from actions based on paragraph 1 of Article XVI of GATT 1994 and Articles 5 and 6 of the Subsidies Agreement'.⁴⁶

Rejecting the US position, the Panel found that production flexibility contract (PFC) payments, direct payments, and the legislative and regulatory provisions which establish and maintain the direct payment programme, do not satisfy the condition in paragraph (a) of Article 13

⁴¹ World Trade Organization Dispute Settlement Body 2004.

⁴² World Trade Organization Dispute Settlement Body 2004, pp. 372–6.

⁴³ World Trade Organization Dispute Settlement Body 2004.

⁴⁴ World Trade Organization Dispute Settlement Body 2004.

⁴⁵ World Trade Organization Dispute Settlement Body 2004.

⁴⁶ World Trade Organization Dispute Settlement Body 2004.

of the Agreement on Agriculture and are 'non-green box measures covered by paragraph (b) of Article 13'.⁴⁷ It also held that the US domestic support measures at issue 'grant support to a specific commodity in excess of that decided during the 1992 marketing year and, therefore, do not satisfy the conditions in paragraph (b) of Article 13 of the Agreement on Agriculture and, therefore, are not exempt from actions based on paragraph 1 of Article XVI of the GATT 1994 or Articles 5 and 6 of the SCM Agreement'.⁴⁸

Export credit guarantee programmes

Brazil argued that certain export credit guarantee programmes operated by the United States constituted export subsidies within the meaning of the Agreement on Agriculture that violate Article 10.1 of the Agreement on Agriculture by circumventing and threatening to circumvent the US export subsidy commitments.⁴⁹ Accordingly, it was the Brazilian position that the three programmes also violated Article 8 of the Agreement on Agriculture.⁵⁰ Further, Brazil argued that they constituted prohibited export subsidies within the meaning of item (j) of the Illustrative List of Export Subsidies, and within the meaning of Articles 3.1(a) and 3.2 of the SCM Agreement. The United States rejected all of these claims.⁵¹

The Panel found that in respect of exports of upland cotton and other unscheduled agricultural products, and in respect of one scheduled product (rice), the US export credit guarantee programmes at issue 'are export subsidies applied in a manner which results in circumvention of United States' export subsidy commitments, within the meaning of Article 10.1 of the Agreement on Agriculture and they are therefore inconsistent with Article 8 of the Agreement on Agriculture'.⁵² These programmes, the Panel held, 'do not conform fully to the provisions of Part V of the Agreement on Agriculture, they do not satisfy the condition in paragraph (c) of Article 13 of the Agreement on Agriculture and, therefore, are not exempt from actions based on Article XVI of the GATT 1994 or Articles 3, 5 and 6 of the SCM Agreement'.⁵³ The Panel

⁴⁷ World Trade Organization Dispute Settlement Body 2004, p. 144, para. 7.414.

⁴⁸ World Trade Organization Dispute Settlement Body 2004.

⁴⁹ World Trade Organization Dispute Settlement Body 2004.

⁵⁰ World Trade Organization Dispute Settlement Body 2004.

⁵¹ World Trade Organization Dispute Settlement Body 2004.

⁵² World Trade Organization Dispute Settlement Body 2004.

⁵³ World Trade Organization Dispute Settlement Body 2004.

further determined that these programmes 'are provided by the United States government at premium rates which are inadequate to cover long-term operating costs and losses of the programmes within the meaning of item (j) of the Illustrative List of Export Subsidies in Annex I of the SCM Agreement, and therefore constitute *per se* export subsidies prohibited by Articles 3.1(a) and 3.2 of the SCM Agreement'.⁵⁴

Extraterritorial Income Act 2000

Brazil alleged that the FSC Repeal and Extraterritorial Income Act of 2000 (ETI) was inconsistent with Articles 10.1 and 8 of the Agreement on Agriculture, and with Articles 3.1(a) and 3.2 of the SCM Agreement.⁵⁵ The United States maintained that Brazil had failed to make a *prima facie* case to support these claims.⁵⁶ The Panel agreed with the US position.⁵⁷

Brazil also alleged a number of other violations of the agreements and was partially successful with those arguments.

In closing its report, the Panel noted that 'Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment' and recommended pursuant to Article 19.1 of the DSU that the United States bring its measures into conformity with the Agreement on Agriculture and withdraw the prohibited subsidies without delay, at the latest within six months of the date of adoption of the Panel report or 1 July 2005 (whichever is earlier).⁵⁸

Following the Panel's decision, both the United States and Brazil filed appeals.⁵⁹ The Appellate Body upheld all of the Panel's major findings in its decision.⁶⁰ The Appellate Body's decision was adopted by the DSB on 21 March 2005, so bringing to an end the core part of the legal process that had commenced in February 2003.⁶¹ However, subsequent hearings

⁵⁴ World Trade Organization Dispute Settlement Body 2004.

⁵⁵ World Trade Organization Dispute Settlement Body 2004.

⁵⁶ World Trade Organization Dispute Settlement Body 2004.

⁵⁷ World Trade Organization Dispute Settlement Body 2004.

⁵⁸ World Trade Organization Dispute Settlement Body 2004.

⁵⁹ See World Trade Organization 2009b.

⁶⁰ World Trade Organization Dispute Settlement Body 2005.

⁶¹ World Trade Organization Dispute Settlement Body 2005.

regarding the implementation of the Panel and Appellate Body decisions indicates that the United States has not fully implemented the decision requirements, signalling that, although the litigation portion of the *US-Cotton* case is over, the compliance portion is far from being settled.⁶²

Given the impact of the Panel and Appellate Body decisions on the United States and Brazil themselves, it is perhaps best to examine how each side reacted to the process before examining the overall impact of the litigation and negotiation processes.

In the US view, there was a stated preference for 'negotiation, rather than litigation, as the most effective way to address distortions in agricultural trade'.⁶³ The United States also expressed displeasure with the methodology used by the Panel in its decision-making, and argued that, beyond its own issues with the outcome of the Panel's findings, there were serious flaws in the overall methodology used by the Panel which called into question the system used by the WTO.⁶⁴

For its part, Brazil was pleased with the Panel and Appellate Body decisions. Brazilian officials stressed that the decision to bring the *US-Cotton* case when it was brought 'was not initiated with the aim of impacting WTO talks or to seek relevant jurisprudence in this area'.⁶⁵ However, the Brazilian point of view was that, unless such cases were brought before the WTO, 'the EU and US would never change their policies.'⁶⁶

Separate treaty negotiations

In April 2003, the states of Benin, Burkina Faso, Chad and Mali submitted a proposal to the WTO to eliminate export subsidies on cotton over three years, and the removal of production-related domestic support over three years, to the end of December 2006.⁶⁷ The proposal also included a transitional compensation mechanism for loss caused by

⁶² See World Trade Organization 2009b.

⁶³ *Bridges Weekly Trade News Digest*, 23 March 2005, vol. 9, no. 10, <http://ictsd.net/i/news/bridgesweekly/6092/> (last accessed 9 February 2009).

⁶⁴ *Bridges Weekly Trade News Digest*, 23 March 2005, vol. 9, no. 10, <http://ictsd.net/i/news/bridgesweekly/6092/> (last accessed 9 February 2009).

⁶⁵ *Bridges Weekly Trade News Digest*, 15 September 2004, vol. 8, no. 30, <http://ictsd.net/i/news/bridgesweekly/7458/> (last accessed 9 February 2009).

⁶⁶ International Centre for Trade and Sustainable Development 2005a.

⁶⁷ See World Trade Organization 2003a.

subsidies, and was put forward at the Fifth WTO Ministerial Conference in Cancun, Mexico.⁶⁸ The Cancun Conference ended without producing an agreement on the issues addressed during the conference proceedings, including the cotton proposal.

After Cancun, the G20 group of developing countries, including China, India, Brazil and South Africa, emerged as a major player in international trade negotiations. The new position of prominence enjoyed by the G20 significantly undermined the former ability of 'the Quad' (comprised of the United States, the EU, Japan and Canada) to dominate negotiations. This change in power relationships between state groups was demonstrated by the fact that, leading up to agreement on the July Package was the 'Group of Five', comprised of the United States, the EU, India, Brazil and Australia.⁶⁹ In the course of these negotiations, the United States agreed that while cotton should be integrated into the agricultural negotiations it would be guided by a devoted sub-committee. This would 'ensure appropriate prioritization of the cotton issue independently from sectoral initiatives'.⁷⁰

Post US-Cotton

In 2005, the WTO Hong Kong Ministerial Declaration asserted that 'without prejudice to Members' current WTO rights and obligations, including those flowing from actions taken by the Dispute Settlement Body, we reaffirm our commitment to ensure having an explicit decision on cotton within the agriculture negotiations ... all forms of export subsidies for cotton will be eliminated by developed countries in 2006'.⁷¹ In this quote, the Declaration states an express intention to follow the Dispute Settlement Body's decisions.

What becomes clear from an examination of negotiations over the initial period is that while activity in relation to general reform of the agricultural section began in 2000, cotton had not yet arisen as a distinct negotiating item. Indeed, a survey of the International Centre for Trade and Sustainable Development's regular agricultural negotiation reports reveals no mention of specific negotiations on the cotton

⁶⁸ World Trade Organization 2003b; World Trade Organization 2003c.

⁶⁹ International Centre for Trade and Sustainable Development 2005b.

⁷⁰ International Centre for Trade and Sustainable Development 2005b, p. 4.

⁷¹ World Trade Organization 2005.

sector for the first three years of agricultural negotiations, that is, between November 2000 and October 2003.⁷²

In the period following Brazil's initiation of the legal process, cotton became a key issue in WTO agricultural negotiations but the connection between that development and the legal process is far from clear. Although the final Panel decision on the cotton subsidies complaint was still some way off, it is important to remember that, by the time the July Package was settled on, the parties involved in its negotiation had received the interim and final reports of the Panel.⁷³ In other words, by this stage, the United States would have been aware of the high likelihood of findings by the Dispute Settlement Body that its cotton-related measures violated the relevant WTO agreements. Of course, recourse to the Appellate Body was still possible, but it is not clear to what extent the respondent entertained real hope that the Panel decision would be overruled.

Perhaps the most interesting point to be observed is that the great weight of the available commentary during this period seems to focus on the Cotton Initiative, a political negotiating tool used within the context of the WTO trade negotiations, rather than on Brazil's ongoing case against the United States before the WTO Dispute Settlement Body. This perception that the political initiative rather than the legal process was of overwhelming importance is supported by a memorandum produced by the Assistant Director of the Tanzanian Department of Trade, which makes no mention of the legal process, but concludes that

The primary lesson emerging from the cotton initiative is the power of concerted analysis to enable even small poor countries to take the issues of primary interest to their economies to the center stage in the MTS and to benefit from the rules-based system. Clearly there is advantage to be gained and apparent inherent strength for small countries in focusing on highly specific issues of interest compared to former initiatives that focused on generalities on broad areas concerning the major WTO agreements such as AoA ... The Cotton initiative points to the way that LDCs have to travel in adopting such a strategy for enhancing negotiations capacity and building on the outcome to enhance performance on implementation.⁷⁴

⁷² Reports from November 2000 to April 2005 are available online, at: www.agradepolicy.org/page/ictsd/resource.htm.

⁷³ The Interim Report was issued on 26 April 2004 and the Final Report was circulated on 8 September 2004.

⁷⁴ Lyimo 2004.

By spring 2005, the legal process had yielded clear results and it is noteworthy that each of the negotiation coalitions referred to above made specific reference to the Dispute Settlement Body's decision, suggesting that it was regarded as significantly strengthening the legitimacy of the calls to abolish subsidies that had risen to prominence with the Cotton Initiative. Thus, within the parameters of the hypotheses which are examined throughout this book, the *US-Cotton* case and the Doha and associated WTO agriculture negotiations demonstrate the importance of institutional structure. The *US-Cotton* case came to a judicial conclusion because the structure of the Dispute Settlement Body required one, and decisions of the Dispute Settlement Body are generally given weight by those who are bound by them. By contrast, the negotiating framework within which the WTO's agriculture negotiations – especially in regards to cotton – took place did not provide for the same type of structure, and broke down along the way. Although the WTO agriculture negotiations have not come to fruition, it is important to note that they have been influenced by a changing balance of power among member states, as discussed in solution set 3. This also links into both Hypothesis 5 and solution set 5 in that it reflects a policy shift to fairness in cotton trading for developing states and in the reframing of the issues involved in the negotiations as more than purely economic terms.

Other relevant WTO disputes

Many post-Doha cases brought before the WTO Dispute Settlement Body are of similar negotiation relevance across a variety of trade policy areas. The goal of the discussion below is to highlight those dispute settlement cases which can be seen as having importance within the larger framework of the post-Doha negotiations as well as between the parties in the particular disputes.

In agriculture trade policy area, several cases are of note. In *Canada – Wheat Exports and Grain Imports*, the United States, later joined by the Australia, Chile, China, Chinese Taipei, the EC, Japan and Mexico, requested consultations with Canada regarding Canadian treatment of domestic and imported wheat.⁷⁵ The deadlock in this dispute centred on Hypothesis 5 in that the arguments advanced by each side related to the fairness of access to the Canadian wheat

⁷⁵ See World Trade Organization 2009c.

market.⁷⁶ Ultimately, both the Panel and Appellate Body issued a limited holding against Canada.⁷⁷

EC – Sugar

In the *EC – Export Subsidies on Sugar* dispute, numerous states brought claims against the EC regarding its allotment and subsidization practices for imported and exported sugar. While the technical legal details of this case involve difficult questions about the calculation of subsidies and levels of support for ACP/India sugar, this dispute is important and interesting against the background of the Doha negotiations, particularly on agriculture. The consultations, at the beginning of the dispute, were requested in late 2002 and early 2003 by Australia, Brazil and Thailand. Many African, Caribbean and Pacific states objected formally. This dispute was launched in the general climate of the looming Doha agriculture negotiations, a key part of which formed the request to negotiate ‘reductions of, with a view to phasing out, all forms of export subsidies’ on the one hand, and to ‘enable developing countries to effectively take account of their development needs, including food security and rural development’ (para. 13 *Doha Declaration*). There is no direct evidence that the dispute was launched with a view to a possible ministerial declaration including negotiations on substantive reductions or phase out of export subsidies, but in the preceding sessions of the agricultural committee, sugar was a key part of the discussions on export subsidies. A background paper prepared by the WTO Secretariat in 2000 for the special negotiation sessions on the ‘built-in’ agricultural negotiations focused on sugar as one of the main products receiving export subsidies.⁷⁸ Only a few months later did Australia propose the elimination and thereafter prohibition of export subsidies in the agricultural negotiations on behalf of the Cairns group. The proposal’s critique of current policies focused on the United States and the EU and specifically mentioned the EU’s subsidies for sugar. The Cairns group was claiming fairness by decrying export subsidies in agricultural trades as:

quite fundamentally unfair. They are literally ‘beggar thy neighbour policies’ for those whose Treasuries cannot compete. They reflect discrimination in the

⁷⁶ World Trade Organization 2009c.

⁷⁷ World Trade Organization 2009c.

⁷⁸ World Trade Organization 2000.

trading rules against those countries who do not subsidise exports – against their farmers and rural communities – and, in reverse, effectively provide discrimination in favour of those whose comparative advantage is in manufactures, where these policies were outlawed 40 years ago.⁷⁹

Thus when Australia and Brazil finally launched the dispute, there was an obvious connection with the agricultural negotiations which were by that time in full swing and for which the Cairns group had gained a partial victory in the Doha declaration itself.

In the *EC – Sugar* dispute, the Panel and Appellate Body found that the EC had violated provisions of WTO law; however, it was only during the post-Appellate Body decision arbitration that the parties began to engage in fruitful negotiations regarding implementation of the Panel decisions.⁸⁰ Given this case and others it was also no surprise that finally, in Hong Kong, the EU agreed to a phase-out date for ‘the parallel elimination of all forms of export subsidies and disciplines on all export measures with equivalent effect to be completed by the end of 2013’.⁸¹

The deadlock leading to Panel intervention involved Hypothesis 5’s elements of fairness in trade policy on both sides and also demonstrated that the consultation element of the WTO dispute settlement process can deter agreement, in that each side knows it has recourse to a Panel and can be seen as less motivated to act in a conciliatory fashion, in accordance with Hypothesis 4.

EC – Bananas

A slightly different variant on the fairness and justice deadlock hypothesis is provided in the *EC – Regime for the Importation of Bananas* case.⁸² In June 2007, Panama requested consultations with the European Communities concerning its regime for the importation of bananas that had applied since 1 January 2006. The request for consultations has not yet led to the establishment of a panel but a certain connection with the ongoing negotiations can be drawn. Here, the charge brought by Panama was that the EC used a different standard to govern the importation of bananas from Africa Caribbean Pacific (ACP) and most-favoured nation (MFN) states.⁸³ Even though the EC

⁷⁹ World Trade Organization 2000.

⁸¹ World Trade Organization 2005.

⁸³ World Trade Organization 2009h.

⁸⁰ See World Trade Organization 2009d.

⁸² See World Trade Organization 2009h.

had received a waiver during the Doha negotiations for its ACP regime, in the field of agriculture and with a view to establishing a free market for agricultural product, ‘substantial improvements in market access’ remain a key part of the Doha Development Agenda in the field of agriculture. Thus, the arguments on both sides centre not only on the fairness of the trade policies at issue per se, but also on the attempts by the EC to incorporate its concepts of justice into its trade policy by providing certain benefits to developing states.⁸⁴ Finally, another example of deadlock caused by fairness resulting in a case before the WTO Dispute Settlement Body is *US – Subsidies and Other Domestic Support for Corn and Other Agricultural Products*, in which Canada, joined by several other states, contests US policies regarding corn subsidies and other forms of subsidies.⁸⁵

US – Gambling

The *US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, involving issues related to the General Agreement on Trade in Services (GATS), illustrates the applicability of Hypothesis 4 to WTO dispute settlement cases because the case stemmed from the inability of the parties to implement a previous decision of the Dispute Settlement Body.⁸⁶ The case is interesting because it again illustrates that it can on the one hand integrate fairness into the negotiations. In the *US – Gambling* case the tiny island nations of Antigua litigated against market access restrictions in the United States for its online gambling services. The negotiations in services follow a slightly different logic to trade in goods negotiations since most countries actually have not yet liberalised many of their service sectors. The United States had, according to the interpretation of the Panel and Appellate Body in the case, agreed to the liberalization of gambling services and Antigua’s online industry wanted to benefit from this liberalization and complained about various state and federal laws prohibiting gambling. This case was one of the few high profile services cases and thus left its mark on the negotiations in the services sector. The case can be seen as helping developing countries. While the United States had been one of the greatest proponents for comprehensive services liberalization ‘with a

⁸⁴ World Trade Organization 2009h. ⁸⁵ See World Trade Organization 2009g.

⁸⁶ See World Trade Organization 2009e.

view to promoting the economic growth of all trading partners' as provided in the Doha Development Agenda, this case showed that even the United States had not liberalised all services sectors it had committed to open in the General Agreement on Trade in Services and its positive lists. In some ways the ongoing negotiations also helped the United States and thus confirm the findings above for the *US-Cotton* case, because the United States could try to overturn the victory of Antigua in the services negotiations as they did in many side letters signed with FTA partners such as the CAFTA, Bahrain or even as for market-access commitments from Russia.⁸⁷

On the other hand, *EC – Approval and Marketing of Biotech Products* demonstrates that Hypothesis 4 is also applicable to the post-decision WTO dispute settlement mechanism in that negotiations to implement Panel and Appellate Body decisions were fruitful in this case, suggesting that the institutional pressure of implementing a decision facilitates negotiation and can break a deadlock.⁸⁸ This reading of Hypothesis 4 is also evident in *EC – Tariff Preferences*,⁸⁹ *EC – Sardines (highlighted fishery subsidies)*⁹⁰ and *EC – Commercial Vessels*.⁹¹ However, later cases, such as *EC – Trademarks and Geographical Indications* support the idea that the institutional structure of the post-decision WTO Dispute Settlement Body can lead to a negative atmosphere for breaking deadlocks as well.⁹² Additionally, cases such as *US – Continued Existence and Application of Zeroing Methodology*⁹³ demonstrate an institutional weakness in breaking deadlock between the parties during the initial consultative period of the WTO's dispute settlement mechanism. It is possible that, where a decision was rendered by the Dispute Settlement Body, these cases played the role of settled jurisprudence and affected the outcome of subsequent negotiations. In some of them, the litigants express an intention to use the dispute settlement process to influence ongoing or future negotiations. For instance, in *EC – Selected Customs Matters*, it is stated that 'the United States has also not contested that one of its

⁸⁷ See USTR, *U.S.-Russia Bilateral Market Access Agreement Side Letters*.

⁸⁸ See World Trade Organization 2009f.

⁸⁹ See World Trade Organization 2009a.

⁹⁰ See World Trade Organization 2009i.

⁹¹ See World Trade Organization 2009k.

⁹² See World Trade Organization 2009j.

⁹³ See World Trade Organization 2009l.

essential motives behind the present case is to influence the Doha Trade Facilitation Negotiations'.⁹⁴

Conclusion

This chapter has examined the relationship between litigation and negotiation in two multilateral institutions – the ICJ and the WTO – and one regional institution – the EU. Through this examination, several trends are observed. The first trend is that Hypothesis 5 is an important consideration, especially in the multilateral setting, because framing issues in litigation and negotiation within the terms of fairness and justice opens the dialogue within the institutional framework. This also implicates solution set 5, in that reframing the ideas of what is at stake and how to judge victory and defeat will also allow the parties and the institutions involved to work towards different, and often less polarizing, goals. The overall importance of the institution as an entity within which litigation and negotiation occur has been demonstrated as critical in the relationship between litigation and negotiation, reinforcing the applicability of Hypothesis 4 and solution set 4. Balance of power considerations, as raised in solution set 3, and the issue of legal uncertainties, as implicated by Hypothesis 2, are also lessons which can be learned from the studies conducted in this chapter. Beyond law, further research on way to litigate out of deadlock could impact on a wide variety of disciplines and assist in understanding how to break deadlocks generally.

⁹⁴ See World Trade Organization Dispute Settlement Body 2006.

PART II

Case studies

5

Transatlantic intransigence in the Doha Round: domestic politics and the difficulty of compromise

ALASDAIR R. YOUNG

The Doha Development Round of multilateral trade talks have struggled since they began in November 2001 following a false start in December 1999. Ministerial meetings in Cancun in 2003 and Hong Kong in 2005 did not witness substantial progress. Subsequent smaller and more informal meetings intended to galvanise the negotiations in the summers of 2007 and 2008 also foundered on significant differences among the parties. As of the end of 2009 the negotiations had not been abandoned, but prospects of a rapid resolution appeared remote given the internal preoccupations of a number of the key players. Thus the Doha Round at the time of writing (January 2010) is an example of deadlock, in the form of an ‘extended delay’.

Rather than consider all of the reasons for deadlock in the negotiations, this chapter examines the challenges the negotiations pose for the European Union¹ and the United States and how they have responded to them. The chapter focuses on the EU and the United States because they are the world’s largest economies and largest importers and exporters of goods and services. Moreover, the multilateral trading system began as a primarily transatlantic project, and the United States and EU have been the key protagonists in the previous rounds of multilateral trade talks. With the greater assertiveness of emerging country governments – most notably those of Brazil and India and more quietly China – however, the multilateral trading system has become less of a duopoly. The active support of both the EU and United States is, however, still necessary for the successful conclusion of multilateral trade negotiations.

This chapter argues that at least part of the reason for the deadlock in the Doha Round is that domestic politics have constrained the ability of

¹ With the entry into force of the Treaty of Lisbon the European Union has formally replaced the European Community as a member of the WTO.

both the United States and EU to exercise leadership. In both polities remaining protectionism is concentrated in a few particularly influential sectors, most notably agriculture. Moreover, public scepticism about trade liberalism is increasing. At the same time export-oriented interests have been muted in their support for the Round in part because unilateral liberalization by trading partners and actual or prospective liberalization through bilateral or regional agreements have or will deliver improved market access. Consequently, important domestic actors within each polity prefer the status quo to any apparently likely agreement or do not consider it much worse; the status quo is a superior BATNA to what is on offer. Further, in both polities the political balance is tipped further against liberalization by relatively high thresholds for ratification, which strengthen the hands of those most satisfied with the status quo. As a consequence, in the language of two-level games, both polities have relatively small 'win-sets'; constellations of outcomes for which a necessary majority can be constructed for ratification. The narrowness of their domestic win-sets has had particularly pronounced implications for the Doha Round because the increased influence of the emerging economies has reduced the ability of the EU and United States to move the international negotiations towards more domestically acceptable outcomes.

This chapter thus illustrates how the interaction among three of the hypotheses advanced by this volume contribute to the deadlock in the Doha Round. The presence of a superior or at least acceptable BATNA (the status quo) for key actors in both polities (Hypothesis 1) combined with demanding ratification procedures means that each polity has a relatively small win-set (Hypothesis 6). The relatively even distribution of power in the global economy (Hypothesis 3a) has thus far prevented EU and US negotiators from being able to shift the negotiations such that a prospective agreement is sufficiently superior to the status quo to fall within their win-sets. There are thus three reinforcing explanations of deadlock in the Doha Round.

The chapter begins by summarizing the role of the transatlantic partnership in promoting multilateral trade liberalization. It then briefly summarises the two-level game framework and introduces how it applies to the two polities, paying particular attention to their ratification procedures. It then examines the constellations of interests within the EU and the United States and their resulting negotiating objectives, before considering how successful they have been in realizing those

objectives. The chapter concludes by considering the implications for breaking the deadlock in the Doha Round.

The transatlantic partnership: crucial if not dominant

From the outset the multilateral trading system has been based on transatlantic cooperation.² From the end of the Second World War into the 1970s the United States led. As the US economy stagnated and European integration progressed, both in intensity and in the number of participating states, the EU emerged as an essentially equal partner with the United States in the leadership of the multilateral trading system, as became evident during the Uruguay Round.³ Almost as soon as this duopoly emerged, however, it began to erode, as developing country governments began to assert themselves more vigorously during the Uruguay Round.⁴ Developing country governments' assertiveness has subsequently increased, with the WTO Ministerials in Seattle (1999) and Cancun (2003), in particular, demonstrating their greater negotiating leverage.⁵ Thus while the EU and United States remain the most powerful actors in trade politics – together they account for more than half of world economic output and are the world's leading exporters and importers of goods and commercial services⁶ – they are now only two among several, as recognised by the prominence of the G4 (EU, United States, Brazil and India) and G7 (G4 plus Australia, China and Japan) in trying to find a breakthrough in the wake of the 2005 Hong Kong Ministerial.

Although transatlantic accord has ceased to be sufficient for progress in multilateral trade negotiations, it is still necessary.⁷ In the Doha Round, however, transatlantic cooperation has not been vigorous. There was fairly extensive, if largely informal, cooperation between the EU and United States early in the Round, but part of this early success lay in avoiding some of the more contentious issues between the

² Ikenberry 1993; Ruggie 1982; Warwick Commission 2007. ³ Peterson 2004.

⁴ Hoekman and Kostecki 2001.

⁵ Baldwin 2006; Narlikar 2004; Wilkinson 2005.

⁶ Excluding trade amongst the EU's twenty-seven member states, in 2007 the EU and the United States together accounted for 28 per cent of world merchandise exports and 37 per cent of imports, and 47 per cent of commercial service exports and 39 per cent of imports (World Trade Organization 2008).

⁷ Peterson 2004; Zoellick 2002.

two.⁸ There were also concerns that being seen to be cooperating too closely would be counter-productive;⁹ a return to the EU and United States reaching an agreement and then trying to multilateralise the deal.¹⁰

Thus through the end of 2009 there had been only a few joint EU–US initiatives in the Doha Round. The most substantial collaboration was a joint proposal on agriculture in the run-up to the Cancun Ministerial. This initiative, however, was not well received. It failed to address the key concerns of a number of other key players and it was seen as the EU–US seeking to dictate the terms of agreement as they had in the past. Given the new balance of power within the negotiations, the joint proposal was a non-starter. Transatlantic cooperation was, however, more successful in May 2005 when it contributed to finding a formula for converting specific tariffs on agricultural products into *ad valorem* tariffs.¹¹ Differences between the EU and United States, however, have also been frequent and sharp, such as when disagreements over the scale of agricultural tariff cuts contributed to the failure to revive the negotiations in the summer of 2006,¹² which was followed by acrimonious finger pointing;¹³ and the EU's criticisms of the United States in the wake of the failure of G7 talks in the summer of 2008.¹⁴ Thus, at least through the end of 2009, vigorous and constructive transatlantic leadership was lacking in the Doha Round.

Two-level games: the intersection of domestic politics and international negotiations

International cooperation in general and international trade negotiations in particular are often depicted as 'two-level games',¹⁵ with 'chiefs of government' (COGs) needing to reach an agreement with the COGs of other countries that can also be ratified domestically. The prospects

⁸ Author interviews with US State Department and USTR officials, Washington, DC, 12 and 14 January 2005.

⁹ Author interview with a US State Department official, Washington, DC, 12 January 2005.

¹⁰ Grant 2007; Peterson 2004. ¹¹ *The Economist*, 5 May 2005.

¹² *Financial Times*, 10 June 2006. ¹³ *Financial Times*, 25 and 26 July 2006.

¹⁴ Mandelson 2008.

¹⁵ See, for example, Evans *et al.* 1993; Hocking and Smith 1997; Milner 1997; Moravcsik 1997; Putnam 1988.

for ratification reflect both the ratification procedures of the polity and the domestic constellation of interests, with the range of outcomes for which a sufficient majority for ratification can be constructed, called the 'win-set'. Although the metaphor might imply two distinct stages – negotiation and ratification – the expectation is that the 'shadow of ratification' will influence the negotiations; negotiators will avoid accepting agreements that they anticipate would be unacceptable domestically.

The 'two-level game' metaphor has several particularly important implications for the analysis of international negotiations. First, the higher the ratification threshold, *ceteris paribus*, the smaller the win-set. Second, as the constellation of interests is influenced by the attractiveness of deal relative to the best alternative to no agreement (BATNA), the worse the status quo or other realistic the alternatives, the wider the win-set. Third, within the constraints imposed by the domestic win-set and the positions of the negotiating partners, the COG is able to 'select' the deal closest to its preferences. Fourth, the COG may seek to increase the likelihood of agreement by increasing the size of its domestic win-set through exploiting information asymmetries or by offering side-payments to those likely to be disadvantaged by the agreement or of the win-sets of its negotiating partners, for example, through making threats or offering inducements.

The proper application of the two-level game metaphor to explain government behaviour in international negotiations, therefore, requires specification of:¹⁶

- (1) domestic politics, including the constellations of influential domestic interests, which is shaped by their assessments of their BATNAs; the institutions for aggregating their preferences; and the ratification procedures;
- (2) the COG's preferences; and
- (3) the international context, the distribution of power and preferences among the participants in the negotiations.

This chapter focuses primarily on the first two of these elements with respect to the EU and United States, but the international context is manifest in terms of the (in)ability of the COGs to shift the substance of the negotiations so that it is more politically acceptable domestically.

¹⁶ Milner 2002; Moravcsik 1993.

Political institutions: amplifying protectionist pressures

In both the EU and the United States the trade policy institutions have been designed to mitigate protectionist pressures, in part by insulating decision-makers from vested interests.¹⁷ Nonetheless, because both political systems, despite their very different origins, are designed to limit the power of the centre in all things, including trade policy, there are high thresholds for ratifying trade agreements. High ratification thresholds privileges the status quo (more protectionist interests), *ceteris paribus* reducing the size of each polity's win-set.

The European Union: a common policy on multiple short leashes

The decision in 1957 to create a customs union among the founding six member states of what was to become the EU necessitated the establishment of arrangements for agreeing a common policy towards the rest of the world; the common commercial policy. These arrangements delegated negotiations to the European Commission (the EU's supranational executive), based on a mandate from the member state governments acting collectively in the Council of Ministers. Trade policy in the EU, therefore, largely reflects a double delegation; from the member states to the EU and (at the EU level) from the Council to the Commission. Consequently, the EU's participation in international negotiations should be depicted as two two-level games linked at the EU level: in one 'game' the EU is the international level at which the member governments representing their domestic interests seek to find a common position; in the other the EU is the domestic level and the Commission negotiates at the international level.¹⁸ For reasons of manageability this chapter follows the common practice of concentrating on the EU-international game; focusing on the positions of the member state governments, rather than their origins.¹⁹

Ratification of agreements concluded under the common commercial policy requires the support of a qualified majority of the member

¹⁷ On the United States see Bailey *et al.* 1997; Destler 2005; Goldstein 1993; O'Halloran 1994; Sherman 2002. On the EU see Bayne and Woolcock 2003; Dür and De Bièvre 2007; Hocking 2004.

¹⁸ Young 2005. ¹⁹ Woolcock 2003.

states.²⁰ Although qualified majority voting (QMV) is more favourable to liberalization than unanimous decision-making, it still sets a high threshold for agreement. This status quo bias is reinforced by the practice of the member state governments to take decisions in trade policy by consensus.²¹

Moreover, the common commercial policy did not fully keep pace with the extent of the international trade agenda. Consequently, some aspects of trade policy fell outside its remit, which meant that any trade agreement addressing these issues also had to be ratified by all of the member states individually; effectively requiring that comprehensive trade agreements be ratified unanimously. The entry into force of the Treaty of Lisbon in December 2009 expands EU competence to the extent that the need for member state ratification of trade agreements has essentially been eliminated. Trade agreements that 'risk prejudicing the Union's cultural and linguistic diversity [i.e. affect audio-visual services] or 'seriously risk disturbing' and 'prejudicing the responsibility of Member States to deliver' social, education and health services, however, must still be ratified unanimously (Art. 207(4)).

The United States: two houses divided

Trade agreements also face a high hurdle for ratification in the United States. The Constitution gives responsibility for the conduct of trade policy to Congress, which means that trade agreements must be ratified by both houses of Congress; no super majority is required (although 60 votes are required to overcome a filibuster in the Senate), but a double majority is. Under Trade Promotion Authority (TPA), previously known as 'fast-track', Congress temporarily delegates the conduct of trade negotiations to the executive, which means that each chamber votes 'up or down' on

²⁰ In the EU, of twenty-seven member states, a qualified majority is a super majority of votes (255 out of 345, roughly 74 per cent) weighted broadly in line with the populations of the states, although smaller states have higher proportions of votes than their populations would imply (see Nugent 2006, pp. 106–9). The member states voting in favour must also account for at least 62 per cent of the population of the EU.

²¹ Woolcock 2000. The European Parliament would also have to give its consent to the agreement.

the agreement and does not introduce amendments. Trade Promotion Authority, however, lapsed on 30 June 2007.

Although arguably the ratification threshold in the United States is lower than in the EU its impact is augmented by the nature of those voting. In the EU the ratification decision is taken by governments, in the United States the decision is taken by individual legislators. This is particularly significant because the constituencies of US legislators, particularly those in the House of Representatives but also a number of Senators, are heavily dependent on only one or a few sectors for employment, while the EU's member states tend to have relatively diverse economies. As a consequence, US legislators are less likely to represent countervailing trade interests than are EU member state governments.

Moreover, trade policy in the United States is more partisan than in the EU, further complicating ratification. A number of factors have contributed to the heightened partisanship of US trade politics. Destler argues that the gerrymandering of Congressional districts, which, by making the seat effectively safe for one party, shifts the competition to the intra-party primary, in which only committed party activists participate.²² This means that candidates have incentives to appeal to the extremes rather than to the centre. The rise of the new trade issues – environment and labour standards – which are divisive along partisan lines, has reinforced the trend. The Democrats' success in the 2006 mid-term elections in which they gained control of both chambers and 2008 elections in which they secured the presidency and strengthened their majorities in both houses has arguably undermined support for trade liberalization.²³

Little domestic support for liberalization

The status quo biases of the EU's and US's political institutions have particularly problematic implications for the conclusion of the Doha Round because of the lack of domestic political support for liberalization in both polities. This lack of political support reflects the confluence of three factors, which are broadly similar in both polities. First, the Doha Round has been focused overwhelmingly on

²² Destler 2005. See also, *Washington Post*, 6 July 2005.

²³ Evenett and Meier 2006; McMahon 2007; *Washington Post*, 6 July 2005.

agriculture, the sector in which protectionist pressures are strongest in each polity.²⁴ Second, although protectionism has generally waned among European and American manufacturers, concerns about international competition have increased among workers, most acutely in the United States. Third, due to the internationalization of business and unilateral liberalization by many important emerging economies there has been less pressure from export-oriented industries to provide a political counter to these protectionist concerns.

Agriculture: a tough nut to crack

Both the EU and the United States have been on the defensive about their agricultural regimes during the Doha Round. Both provide extensive support to their farmers, but the EU does so primarily through price supports, while the United States does so through subsidies paid directly to farmers. Because of these different approaches to supporting agriculture the EU and United States have, with the exception of their 2003 joint proposal on agriculture, frequently been at odds with each other, as well as with other WTO members.

For much of the Doha Round the EU's common agricultural policy (CAP) attracted particular attention because of its explicit trade effects – high tariffs and export subsidies – which are (intentional) side-effects of the internal policy objective of maintaining farm incomes through price supports. The EU's position throughout the Doha Round has been that the existing internal policy determines what it will accept in the negotiations; there will be no concessions that are not compatible with the CAP.²⁵ Crucially, however, the CAP was reformed in June 2003 and, to a lesser extent, in November 2008 to further replace price supports with direct payments to farmers.²⁶ These reforms, although influenced by trade policy pressures, also reflected budgetary considerations, not least in the wake of the EU's enlargements in 2004 and 2007.²⁷ The resulting further 'decoupling' of support from production made it possible for the EU's trade negotiators to make a series of concessions on the trade policy aspects of the CAP, tariffs and particularly export subsidies.²⁸

²⁴ Grant 2007. ²⁵ European Commission 2004; Council of Ministers 2005.

²⁶ Roederer-Rynning 2010.

²⁷ Dinan and Camhis 2004; Roederer-Rynning 2010; Swinbank and Daugbjerg 2006; Woolcock 2005.

²⁸ For a discussion see Young 2007.

These concessions, particularly on market access, however, have been repeatedly and vociferously opposed by the governments of a number of EU member states.²⁹

Although the United States has some directly trade-distorting measures – import restrictions and export subsidies apply to some products, such as sugar, cotton, dairy products and orange juice³⁰ – its trading partners are particularly concerned about its agricultural subsidies. These concerns have heightened during the Doha Round as the United States has adopted additional trade-distorting subsidies. The 2002 Farm Act, among other things, increased spending on commodity subsidies; introduced ‘counter-cyclical’ payments for arable crops (to compensate for decreases in prices); and increased export assistance measures.³¹ The 2008 Farm Act introduced an additional counter-cyclical payment scheme for arable crops (Average Drop Revenue Election programme) and slightly increased loan rates and target prices for a number of crops.³² The power and protectionist inclinations of US agriculture are evident in the 2008 Farm Act being adopted despite high food prices, which significantly reduced the need for agricultural subsidies.

Heightened worker anxiety about liberalization

Support for protectionism among US workers has strengthened during the Doha Round.³³ The percentage of Americans saying that trade is good for the United States has dropped from 78 per cent in 2002 to 59 per cent in 2007 to 53 per cent in 2008.³⁴ Concerns about the impact of trade on jobs are reflected in the US labour movement’s vigorous opposition to trade agreements with developing countries on the grounds that they take jobs away from Americans and drive down wages.³⁵ As labour is a key constituency of the Democratic Party, Democratic control of both Houses of Congress since 2006³⁶ has given real political weight to

²⁹ Young 2007. ³⁰ Destler 2005. ³¹ European Commission 2003, p. 55.

³² European Commission, Market Access Barrier Fiche 020074. Available at <http://mkacddb.eu.int/> (accessed 19 January 2009).

³³ Destler 2005, p. 251. ³⁴ Pew Research Centre 2008, p. 7.

³⁵ Eizenstat and Cheek 2007.

³⁶ During 2007 and 2008 the Democrats did not have a formal majority in the Senate, but had an effective one as two independents tended to vote with the Democrats.

workers' concerns that trade liberalization does not benefit them individually.³⁷ A clear manifestation of this influence was the insertion of a 'buy American' clause into the 2009 stimulus bill.³⁸

Worker opposition to international trade liberalization has been more muted in the EU, with sizeable majorities in Germany (87 per cent), France (82 per cent) and the UK (77 per cent) having a favourable view of trade in 2008.³⁹ One possible explanation is that in western Europe fears about globalization have focused primarily on the movement of low-cost labour from the new member states.⁴⁰ Alternatively, it might be that western Europe's more extensive welfare provisions reduce worker concern about greater competition.

Nonetheless, early in the Doha Round, the EU advocated enhancing cooperation between the WTO and the International Labour Organization (ILO), expressed its strong support for the protection of core labour rights but ruled out the use of trade sanctions to promote them.⁴¹ This position attempted to bridge the disparate positions of the member states, including those that saw the WTO as a way to promote labour rights (e.g. Denmark, Germany and Sweden); those that saw a way to provide protection (e.g. France);⁴² and those opposed to including social rights on tactical grounds (e.g. the Netherlands and the UK).⁴³ Given the evident hostility from developing countries at the 2001 Doha WTO Ministerial, however, the Commission decided not to push for the inclusion of even this limited objective in the Round.⁴⁴

Moreover, there is still some political support for protectionism in the EU. French President Sarkozy stated in May 2007 that 'Europe must protect its citizens' and 'prepare itself for globalisation',⁴⁵ and protectionist rhetoric has increased with the sharpening of the economic downturn in autumn 2008. Protectionist rhetoric by some member state governments has not generally translated into more protectionist EU trade policy,⁴⁶ although the EU has introduced new export subsidies on butter, cheese and milk powder, and has frequently imposed anti-dumping duties.⁴⁷

³⁷ Destler 2005; Eizenstat and Cheek 2007; McMahon 2007; Scheve and Slaughter 2007.

³⁸ Gamberoni and Newfarmer 2009. ³⁹ Pew Research Centre 2008, p. 18.

⁴⁰ See, for example, *The Economist*, 6 October 2007, p. 50.

⁴¹ Council of Ministers 1999. ⁴² Ahnlid 2005; Young *et al.* 2000.

⁴³ Ahnlid 2005. ⁴⁴ Lamy 2002. ⁴⁵ *Financial Times*, 24 May 2007, p. 9.

⁴⁶ House of Lords 2008, p. 16. ⁴⁷ Gamberoni and Newfarmer 2009.

Tepid business support for Doha

Among merchandise producers in both the EU and the United States support for protectionism has waned since the mid-1980s. Even traditionally protectionist industries, such as textiles, have become less protectionist.⁴⁸ In both polities this shift reflects the increasing internationalization of business,⁴⁹ with domestic firms increasingly integrated into the international economy, as evident in the high proportion of trade that is within firms, the prevalence of outward processing and the outsourcing of functions. As a consequence, both the United States and EU have felt free in the Doha Round to seek significant reductions in non-agricultural market access (NAMA) barriers, primarily from the emerging economies, especially Brazil, China and India.⁵⁰

Business support for the Doha Round has also been undermined by improvements in market access that have come about as the result of unilateral liberalization by emerging economies and, particularly for US firms, through the pursuit of bilateral and regional free trade agreements.⁵¹ As a consequence, many EU and US firms were relatively satisfied with the status quo; the most readily realizable BATNA. Consequently, although many firms would like to see an agreement that delivers real benefits, cuts in applied tariffs not the bound rates,⁵² they have not been inclined to press vigorously for compromises, particularly given the protracted nature of the negotiations and the view that any likely agreement would not bring significant gains in terms of market access.⁵³ This is not to say that firms have not

⁴⁸ Author interviews with a former senior Commission trade official, London, March 2005; a German trade official, Brussels, March 2005.

⁴⁹ Destler 2005, p. 234; Dür 2008; Heron 2007; van den Hoven 2006; Woolcock 2005.

⁵⁰ Fergusson 2007. It should be noted, however, that European Business is reluctant to see any lowering of European industrial tariffs if there are not real gains in market access in emerging markets (Adrian van den Hoven, Director of International Relations, BusinessEurope, testimony, House of Lords 2008, p. E90–1). In addition, the United States has resisted changes to the rules on trade remedies to limit their scope and impact. Many of the tabled proposals would require changes to US legislation (Fergusson 2007, p. 18; *Bridges Weekly Trade New Digest*, 13/1, 14 January 2009).

⁵¹ Destler 2005, p. 251; Evenett 2007.

⁵² BusinessEurope 2007, 2008; BusinessEurope and NAM 2007.

⁵³ Adrian van den Hoven, Director of International Relations, BusinessEurope, testimony (House of Lords 2008, p. E89); interviews with a German trade

advocated concluding the Round, and particularly compromising on agricultural support and/or protection to do so, but their support has generally been perceived as intermittent and half-hearted.⁵⁴ Thus while in both the EU and the United States there have been quite sharp shifts in business attitudes away from traditional protectionism, in neither is there an active and vocal constituency supporting painful cuts in domestic (agricultural) protection in order to secure a successful outcome to the Doha Round.

Dovish COGs

The negotiators for both the United States and the EU seem to be more committed to trade liberalization than their domestic constituencies. The annex to the Commission's 2007 communication 'Global Europe Competing in the World', for example, states 'Openness to trade is essential for growth and jobs'.⁵⁵ And 'We need to promote our economic interests by activism abroad not protectionism at home'.⁵⁶ The January 2007 issue of the US Department of State's journal *Economic Perspectives* is dedicated to the 'Benefits of Trade: Costs of Protection'.⁵⁷

During the Doha Round both sets of negotiators have repeatedly offered concessions that have provoked substantial protests from those that would have to ratify any agreement (see below). Thus both sets of negotiators seem more inclined to compromise than the pivotal domestic political actors. Both sets of negotiators, however, have sought to leverage their domestic weakness into negotiating strength; seeking significant concessions from leading developing country governments and each other in the name of building sufficient political support for the agreement to overcome those opposed.

official, Brussels, March 2005 and a European trade association representative, Brussels, 26 March 2004. This view was supported by others off the record. See also USTR Schwab's call for business to make the case for trade liberalization (*Financial Times*, 2 July 2007, p. 10).

⁵⁴ European Commission 2004, p. 27; van den Hoven 2006; Interviews with European trade association representatives, Brussels, 16 September 2003 and 26 March 2004; comments by a WTO official, Birmingham, 12 November 2005.

⁵⁵ European Commission 2007, p. 6. ⁵⁶ European Commission 2007, p. 7.

⁵⁷ Vol. 12, no. 1. Available at <http://usinfo.state.gov/journals/ites/0107/ijee/ijee0107.htm> (accessed 26 October 2007).

The EU, the United States and the Doha negotiations

During the Doha negotiations both the United States and EU have engaged primarily in distributive bargaining in an effort to secure concessions from trading partners in order to offset political opposition to concessions on agriculture. Although the EU initially sought to broaden the negotiating agenda, at least in part in an effort to create more opportunities to offset concessions on agriculture, opposition from emerging economy governments has whittled down that far-reaching agenda so that it resembles the more traditional, market-access-oriented approach of the United States,⁵⁸ albeit with some important differences of emphasis.

*The EU: seeking cross-sectoral trade-offs*⁵⁹

The EU was the principal demander for launching a broad multi-lateral trade round, going beyond the 'built-in agenda' for negotiations on agriculture and services agreed as part of the Uruguay Round. In order to secure gains in other sectors to offset the anticipated political costs of concessions on agriculture, the European Commission proposed negotiations on NAMA; the 'Singapore Issues' – competition policy, investment, public procurement and trade facilitation; labour standards; environmental protection; and other rules.⁶⁰

Although some viewed these 'deep trade' issues as delaying tactics or as disguised protectionism, the Commission argued that these rules would be beneficial to the global economy.⁶¹ With respect to the Singapore Issues in particular, therefore, the Commission sought to persuade others of the value of having global rules, thus departing from the typical bargaining over concessions.⁶² It spectacularly failed to do so, however.

⁵⁸ Falke 2005.

⁵⁹ For a more extensive discussion of the EU's approach to the negotiations, see Young 2007.

⁶⁰ Allen and Smith 2001; Kerremans 2005.

⁶¹ Rollo 2003; Woolcock 2005; Young *et al.* 2000.

⁶² Jean Charles Van Eckhaute, Directorate-General for Trade, European Commission, testimony, 23 June (House of Lords 2008, p. E58).

Widespread opposition to the EU's broad agenda led to most of it falling by the wayside.⁶³ Labour standards were dropped at the Doha Ministerial that launched the Round and only very narrow negotiations on clarifying the relationship between WTO rules and multilateral environmental agreements were included in the negotiating agenda. Three of the Singapore Issues – competition policy, investment and public procurement – were abandoned in the wake of the unsuccessful Cancun Ministerial in 2003. As a consequence, the EU's approach to the negotiations has become a more traditional one of seeking market access in non-agricultural goods in exchange for concessions in agriculture.

The EU's negotiating position is complicated by it already having adopted unilateral reforms on agriculture. As discussed above, the EU reformed its common agricultural policy in 2003 and again, to a much lesser extent, in 2008. These reforms have involved a shift away from price supports to less trade-distorting direct subsidies.⁶⁴ Consequently, the reforms imply that export subsidies will no longer be necessary and create scope for reductions in agricultural tariffs. The EU's insistence throughout the Round that any concessions on agriculture must be compatible with already agreed reforms of the CAP⁶⁵ has presented two problems for the Commission. First, the EU has adopted unilateral reforms to domestic support and (effectively) export subsidies, which makes it difficult to extract concessions from others as the changes have already been made.⁶⁶ Second, the adopted CAP reform sets limits on what the Commission can concede on the crucial issue of agricultural market access.⁶⁷

During the Doha Round, the Commission has repeatedly provoked the ire of the more protectionist member state governments by making concessions on agricultural market access.⁶⁸ In doing so it has arguably gone to the outer limits of what is compatible with the already agreed reform of the CAP.⁶⁹ The EU's Trade Commissioner (2004–9) Peter

⁶³ Damro 2004; Falke 2005; Sek 2004; Paolo Garzotti, Directorate-General for Trade, European Commission, testimony, 23 June (House of Lords 2008, p. E58).

⁶⁴ Roederer-Rynning 2010. ⁶⁵ Council of Ministers 1999, 2005; Young 2007.

⁶⁶ Pascal Lamy, Director General, WTO; former European Commissioner for Trade, testimony, 10 July 2008 (House of Lords 2008, p. E149).

⁶⁷ Young 2007. ⁶⁸ Young 2007.

⁶⁹ I am grateful to Jim Rollo and Wyn Grant for sharing their assessments with me. Then US Trade Representative Susan Schwab even indicated that the EU has gone far enough in its offers to reduce agricultural tariffs (*Financial Times*, 17 October 2007, p. 11).

Mandelson claimed that in the Doha Round the EU is 'paying through the nose on agriculture'.⁷⁰

The EU, however, has not secured much for these concessions beyond the Doha negotiations limping forward. European business⁷¹ is dissatisfied and alarmed with what it perceives as the limited ambitions of the Round on NAMA and services, and is adamant that it wants real increases in market access, not just binding liberalization that has already occurred unilaterally. In July 2008 the then EU Trade Commissioner Mandelson's assessment was that without real improvements in NAMA the EU's member states would not ratify the agreement, and that if the Commission presented them with such a deal, there would be 'a road crash' between the Commissioner and the member states.⁷² From the Commission's perspective, it is clear that the member states opposed to agricultural reform will not countenance agricultural tariff reductions unless their manufacturers and service providers realise improved market access,⁷³ which, at least through the end of 2009, emerging economy governments have been loathe to concede.

The United States: seeking intra-sectoral trade-offs and more

The United States did not enter the Doha negotiations as enthusiastically as the EU. Its support for the Round reflected geostrategic considerations in wake of the terrorist attacks on the United States on 11 September 2001 rather than the potential economic gains.⁷⁴ Moreover, from the outset the United States pursued a more limited, market-access-focused agenda than the EU.

As with the EU, agriculture is the key area where the US's trading partners, including the EU, would like to see significant change. As mentioned above, the key problem with US agriculture, from its trade partners' perspective, is the level of domestic support. Addressing US subsidies, however, is made more complicated by it having bound

⁷⁰ Mandelson, testimony, 24 June 2008 (House of Lords 2008, pp. E81–2).

⁷¹ BusinessEurope 2007, 2008.

⁷² Mandelson, testimony, 24 June 2008 (House of Lords 2008, pp. E81–2); see also Peter Balas, Deputy Director-General, DG Trade, testimony, 23 June 2008 (House of Lords 2008, p. E51).

⁷³ Peter Balas, Deputy Director-General, DG Trade, testimony, 23 June 2008 (House of Lords 2008, p. E51).

⁷⁴ Destler 2005; Guy de Jonquières, testimony, 6 May 2008; L. Alan Winters, testimony, 13 May 2008 (House of Lords 2008, pp. E2 and E12).

during the Uruguay Round a level of subsidies (\$19.1 billion) well above what it actually provided. Given high agricultural prices the United States is still well under that ceiling despite the 2002 and 2008 Farm Acts.⁷⁵ As its trading partners, not least the EU, want a reduction in actual subsidies, a very large percentage cut in the bound rates is required, which is particularly difficult to sell politically.⁷⁶

As the United States is the world's largest agricultural exporter (and importer), it has been more offensive than the EU in promoting its farm interests. In particular it has sought the elimination of agricultural export subsidies and lower market access barriers,⁷⁷ which are strongly supported by the farm lobby.⁷⁸ The United States, therefore, is largely seeking an intra-sectoral trade-off; seeking to use support for improved agricultural market access to offset opposition to reduced agricultural subsidies.⁷⁹ Such an intra-sectoral trade-off would be one way of addressing the economic importance of agriculture in some states – in 1997 ten states had more than 20 per cent of their employment in farming and supporting sectors⁸⁰ – and which is even higher in some Congressional districts (in smaller districts it is harder to make trade-offs between groups with cross-cutting interests).⁸¹ In April 2007, for example, a bipartisan group of fifty-eight Senators (out of 100) wrote to President Bush to caution against further concessions in agricultural talks and to insist that new market access and the elimination of foreign export subsidies 'provide net gains' for US agriculture relative to any reductions in trade-distorting US agricultural support.⁸² Thus,

⁷⁵ High prices meant price-based subsidies were \$12 billion in 2007 (*Financial Times*, 21 June 2007, p. 6).

⁷⁶ Pascal Lamy, Director General, WTO; former European Commissioner for Trade, testimony, 10 July 2008 (House of Lords 2008, p. E149).

⁷⁷ Fergusson 2007. ⁷⁸ AFBF 2008a.

⁷⁹ Bruce Gosper, Permanent Representative of Australia to the WTO and Chair of the WTO General Council, testimony 10 July 2008 (House of Lords 2008, p. E138).

⁸⁰ USDA 2000. The states in descending order of employment share are: Nebraska, North Dakota, South Dakota, Iowa, North Carolina, Arkansas, Kansas, Idaho, Kentucky and Tennessee.

⁸¹ Goldstein 2000.

⁸² Letter to President Bush, 12 April 2007, available at: <http://finance.senate.gov/press/Bpress/2007press/prb041607a.pdf> (accessed 19 October 2007). Almost a year earlier the EU's Trade Commissioner indicated that he recognised the constraints that Congress imposed on the US's trade negotiators (*Financial Times*, 31 July 2006, p. 15).

securing improved agricultural market access is an important part of making a multilateral trade agreement acceptable to Senators and Representatives representing rural constituencies.

The United States, however, is not uninterested in cross-sectoral trade-offs for agricultural liberalization. As noted earlier, US business has been adamant that it wants to see real gains in market access in non-agricultural products and services. The view of US industry,⁸³ US farming⁸⁴ and the Congressional leadership on trade⁸⁵ has been that the tabled concessions by emerging economies (notably Argentina, Brazil, China and India) would not deliver 'meaningful market access', and thus were unacceptable. The Congressional leaders stated that new market access opportunities in developed and emerging economies are necessary for Congressional support for a Doha Round agreement.

Conclusions

In both the EU and the United States powerful interests in agriculture oppose domestic liberalization in the Doha Round. The negotiators for both polities have sought to generate offsetting political support by securing benefits for export-oriented domestic actors. Business support for the Round, always rather tepid, is non-existent unless it delivers real improvements in access to product and service markets. Moreover, domestic political institutions in both polities, albeit in different ways, further complicate securing ratification. Consequently, both polities can be described as having small win-sets; there are relatively few outcomes that are preferable to the status quo; they have relatively attractive BATNAs. Consequently, with the partial exception of the Commission on the Singapore issues, both sets of negotiators have engaged in aggressive distributional bargaining with their trade partners. In essence, the negotiators for both the EU and the United States have been seeking to shift the focal point of the negotiations so that it falls within their respective win-sets. Through the end of 2009, however, the emerging economy governments, particularly India, had resisted these efforts.

This account of the EU and the United States in the Doha Round thus suggests that the deadlock in the negotiations is due to the relatively small win-sets of two key actors, reflecting the acceptability of the status

⁸³ NAM 2008. ⁸⁴ AFBF 2008b. ⁸⁵ Bacus *et al.* 2008.

quo, compounded by their inability (due to more even distribution of global economic power) to dictate the terms of the agreement. This chapter therefore finds support for Hypotheses 1, 3a and 6 and suggests that there is an important interaction among them that contributes to deadlock.

At the time of writing (January 2010) the deadlock in the Doha Round was one of extended delay. The prospects for breaking that deadlock hinge either on the emerging economies making greater concessions (moving the focal point within the win-sets of the EU and United States), or the win-sets of the United States and EU expanding sufficiently to accommodate a less ambitious agreement. It is possible that the win-set to the United States and EU might expand if the economic downturn prompts more countries to adopt protectionist measures, particularly raising applied tariffs still within their bound rates. In this context the status quo becomes less attractive and binding existing liberalization becomes more valuable. Thus, rather perversely, the prospects for breaking the Doha deadlock may hinge on the proliferation of protectionism.

6 *Know the enemy: uncertainty and deadlock in the WTO*

AMRITA NARLIKAR AND PIETER VAN HOUTEN

Know the Enemy and know yourself; in a hundred battles you will never be in peril.

Sun Tzu, Section III: 31–3, p. 84

Deadlocks have plagued the Doha Development Agenda (DDA). The round was launched in November 2001, but negotiations got deadlocked at the Cancun Ministerial Conference in 2003. Despite being scheduled for completion by 1 January 2005, it continued to run into missed deadlines. In July 2006, Director General of the WTO, Pascal Lamy, called for an indefinite suspension of the negotiations, and admitted, ‘There’s no beating around the bush. We’re in dire straits’.¹ It took over six months for negotiators to resume the full-fledged negotiation process in February 2007, which collapsed once again in the July talks of 2008. Even at the time of writing this chapter, a completion of the Round remains elusive.

This outcome – of extended non-agreement, or deadlock taking the form of an extended delay – presents a puzzle for two reasons. First, both developed and developing countries can potentially benefit from the Doha Round, and there, thus, exists a positive zone of agreement. A World Bank study estimates, for instance, that global gains would be in the range of \$95–120 billion per year through an agreement based on the Hong Kong Ministerial Declaration.² Second, in contrast to the 1960s–1970s when confrontations between the North and South were

¹ WTO’s Doha Round talks collapse as G6 ministerial ends in acrimony, *International Trade Reporter*, vol. 23, no. 30, Thursday, 27 July 2006. Negotiators expressed disappointment; EU Trade Commissioner, Peter Mandelson, for instance, stated in a press statement on 24 July 2006, ‘There is no more time left. We have missed yesterday the last exit on the motorway of negotiations this summer and it would be unwise to conceal this from ourselves.’ Online, available at: http://trade.ec.europa.eu/doclib/docs/2006/july/tradoc_129415.pdf (accessed on 27 April 2008).

² Anderson *et al.* 2006.

rooted in deep ideological differences and divergent visions of development, most developing countries today have begun to recognise the benefits of controlled trade liberalization. This recognition is borne out in their unprecedented engagement with the WTO. The developed world too has begun to show greater sensitivity to the concerns of developing countries, not only through initiatives such as the Millennium Development Goals, but through other commitments to development such as the naming of the current round of trade negotiations as the Doha *Development* Agenda. But in spite of an existing ideational meeting ground and the promise of material gains, deadlock has persisted.

We argue that a central explanation for the recurrence of the Doha deadlock lies in uncertainty within the negotiation process (Hypothesis 2, set out in the Introduction). We recognise that actors seldom act under conditions of full information in any negotiation process, and further that there are many different kinds of uncertainty specific to the institutional context of the WTO. However, we advance that one kind of uncertainty is paramount to explaining the Doha deadlock: parties are unsure of the credibility of the stated negotiating positions of their counterparts, particularly when these positions are collectively arrived at through coalitions.³ We focus specifically on two key phases of the negotiation process where this problem has recurred. Both cases provide an illustration of how developed countries, based on their previous experiences in dealing with developing countries in the WTO and in the absence of any credible signals to the contrary, assumed that the new coalitions of the South would concede in the endgame, and negotiated accordingly. In the face of these expectations, the refusal of the South to back down produced deadlock. Admittedly, the long period over which the Doha deadlock has extended means that at different points, other explanations may provide the immediate cause of deadlock (see Chapter 5, this volume). But even if these alternative factors were to disappear, the deadlock would not be broken until this fundamental factor – uncertainty about mutual goals and bottom-lines – were addressed.

³ We anticipate that an added layer of uncertainty emerges when coalitions are led by new and rising powers, such as China, Brazil and India, which may have some implications for Hypothesis 3b (Introduction). We do not, however, formally evaluate this hypothesis in this chapter.

The chapter proceeds in four sections. In the first section, we present some insights from the relevant literature and a generic version of our model. In the second section, we apply the model to explain the Doha deadlocks in the WTO, first at the Cancun Ministerial conference in 2003, and then again when a major deadline was missed in Geneva in July 2006. The third section discusses alternative and supplementary explanations. A fourth section concludes.

Bargaining, uncertainty and deadlock

Bargaining and negotiation are ubiquitous in domestic and international politics, and have received considerable attention in the academic literature.⁴ We highlight two important insights from this literature, which play a crucial role in our arguments about the effects of specific forms of uncertainty on bargaining outcomes in the WTO.

The first useful insight from bargaining theory is that uncertainty (or more accurately, private or incomplete information) can be a reason for bargaining outcomes that make all involved parties worse off than in other available options. Under complete information, such inefficiencies are not expected to occur, as actors are aware of the availability of better outcomes and will be able to reach the necessary agreements. But, as Powell phrases it, ‘a striking feature of actual bargaining is that it often results in costly delays and inefficient outcomes’.⁵ Deadlock in economic negotiations, when there are – in principle – mutually beneficial deals available, is an example of such an inefficient outcome. While irrational behaviour by actors could be seen as a reason for inefficiencies, many believe that ‘incomplete or asymmetric information would provide a much better explanation’.⁶ Scholars in international relations have applied this insight to account for phenomena such as wars (which, given their costs, are inefficient compared to peaceful

⁴ Much of this work is based on rational choice foundations. Schelling 1960 is the most important pioneering work. For examples and overviews of applications to various political phenomena, see Doron and Sened 2001; Jönsson 2002; Powell 2002. Bargaining theory has also been very widely applied in economics; for example, see Kennan and Wilson 1993 on the role of private information in economic bargaining issues.

⁵ Powell 2002, p. 6.

⁶ Powell 2002, p. 7. See also Kennan and Wilson 1993, pp. 45–8.

bargaining outcomes),⁷ arms races between states,⁸ and the higher likelihood that non-democratic states engage in wars.⁹ We apply this insight to WTO negotiations, where deadlock has occurred despite the apparent presence of mutually beneficial agreements.

The second insight is that in strategic interactions in which some of the actors have private information, signalling is a crucial issue.¹⁰ Signals are actions which may convey information to other actors and, thus, reduce uncertainty. A key consideration in such analyses concerns the conditions under which signals are indeed informative (or, in game-theoretic terms, allow actors to 'separate' between the different possibilities). While costless signals may be informative under certain – typically restrictive – conditions, *signalling costs* are usually an essential factor for the credibility and informativeness of signals. In international relations applications, costly actions that may credibly signal intentions and other information include threats and army mobilization by states,¹¹ offers by a state to change or maintain the territorial status quo,¹² and substantial offers by actors involved in international bargaining.¹³ Signalling costs also play a crucial role in our analysis.

A simple model of a game with incomplete information, shown in Figure 6.1, applies these insights and helps us derive implications that we subsequently apply to recent WTO negotiations. The model depicts a game between two negotiating actors, A and B. The outcomes in the game represent final negotiation outcomes.¹⁴ It is a game of incomplete information, as player B is not sure whether it is facing a 'tough' or 'weak' opponent (A_{Tough} or A_{Weak}).¹⁵ That is, player B is uncertain about the preferences and nature of player A. The players have two possible strategies: refuse to make any concessions to its negotiating partner ('Resist'), or compromise and make concessions ('Give in'). We assume that if A is 'tough', it will always resist; if it is 'weak', it will always give in (hence, these strategies are not explicitly depicted in Figure 6.1). There are four possible outcomes: compromise (when

⁷ Fearon 1995; Powell 1996. ⁸ Kydd 2000. ⁹ Schultz 1999.

¹⁰ See Banks 1991 for an overview of signalling games in political science. The classic account of the importance of signals in international relations is Jervis 1976.

¹¹ Fearon 1994. ¹² Powell 1996. ¹³ Stasavage 2004.

¹⁴ We do not explicitly model the process that leads to these outcomes. In game-theoretic terms, this is a signalling game, not a bargaining game.

¹⁵ Player B a priori assumes that there is a probability p that it is facing A_{Tough} .

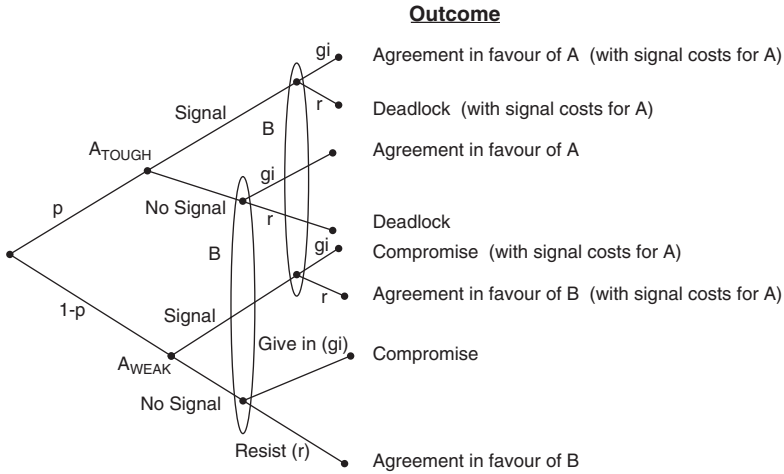


Figure 6.1. The basic signalling game

both players give in); an agreement on A's terms (if A resists and B gives in); an agreement on B's terms (if B resists and A gives in); and deadlock (when both resist). The most preferred outcome for each player is an agreement on his own terms, while deadlock is the worst possible outcome for both. Each player prefers a compromise outcome over an agreement on the other's terms.¹⁶

Importantly, player A has the possibility to try to signal its 'type' to player B, but incurs a signalling cost in doing this. Unlike more elaborate applications in the literature (see above), we model the signals explicitly and generically (i.e. simply as 'signals' or 'messages'), rather than as specific actions.¹⁷ This allows us to straightforwardly derive equilibrium results for different signalling costs, and, thus, to determine the conditions under which signals are informative.

An analysis of this model provides two main conclusions. First, deadlock is a possible outcome. Note, first, that deadlock is *not* a possible equilibrium outcome if there was complete information. If player B were certain that it faced a 'tough' opponent (which is the only scenario in

¹⁶ Let the payoffs be A_A for player A and a_A for player B in the case of an agreement in favor of A, A_B and a_B for an agreement in favour of B, C and c if there is a compromise, and D and d if there is deadlock. The preference orderings are $A_A > C > A_B > D$ for player A and $a_B > c > a_A > d$ for player B.

¹⁷ Cf. Banks 1991, ch. 2.

which deadlock might occur), then it would make compromises to avoid this worst possible outcome. However, under incomplete information, deadlock can occur. If player B thinks it is not very likely that it is facing a 'tough' opponent, then he has an incentive to resist making any concessions. But if this expectation turns out to be wrong and A is actually 'tough', deadlock results.¹⁸ This outcome does not depend on any conditions on signalling costs, and illustrates that Pareto-inefficient outcomes are possible under conditions of uncertainty.

Second, deadlock is not inevitable in these circumstances. Even if B is initially mistaken in assuming that there is only a small chance it is facing a 'tough' opponent, player A may be able to 'signal' its true nature (of toughness) to B, and thereby get B to alter its strategy accordingly. The outcome in this scenario is an agreement on A's terms. This may not be ideal from B's perspective, but the important implication is that deadlock – the worst possible outcome – is avoided. Importantly, this outcome is possible only under certain conditions on signalling costs. Essentially, signalling costs must be low enough to make it worthwhile for a 'tough' A to incur these costs and get B to cave in to its demands and obtain a favourable agreement instead of a deadlock (which would ensue if it did not signal). On the other hand, the costs must be large enough to deter a 'weak' A from pretending it is actually 'tough', so that B will make concessions and a compromise agreement is reached (rather than an agreement on B's terms).¹⁹

This chapter argues that these two insights can help us understand recent deadlocks in the WTO. To show this, it is necessary to address two questions. First, do negotiating parties in the WTO act under

¹⁸ More formally, this equilibrium exists if $p < p^*$, where $p^* = (a_B - c) / (a_B - c + a_A - d)$. In this equilibrium, A_T and A_W send no signals, and B resists when it sees no signals (still assuming that it is facing a 'tough' opponent with probability p). Note that if $p > p^*$, B will give in when it observes no signals, and deadlock is not a possible outcome.

¹⁹ Let λ be A's cost for signalling. The separating equilibrium described in the text exists if $C - A_B < \lambda < A_A - D$. In this equilibrium, A_T sends signals, A_W sends no signals, and B gives in if it observes signals and resists if it observes no signals (as it updates its beliefs such that it now assumes that it is facing a tough opponent when A signals and a weak opponent when A sends no signals). Note that this is not the only equilibrium within this range of signalling costs. In particular, as indicated above, there is also a pooling equilibrium in which both types of A send no signals. The model itself, however, cannot predict which of these equilibria the actors will coordinate on, and factors external to the model (e.g. 'focal points') will determine this. Cf. Schelling 1960.

conditions of uncertainty resembling those indicated in our model? Second, if there is such uncertainty, what has prevented the 'successful signalling' outcome? These issues are analysed in the next section.

Applications to the WTO: uncertainty and deadlock in the Doha negotiations

To some extent, uncertainty about others' preferences is pervasive in any international negotiation. Particularly at the start of a negotiation process, parties seldom have full information regarding the true versus revealed preferences of their counterparts. Claims by other parties that their hands are tied by domestic constraints are seldom easy to verify, nor is it obvious that an opponent is bluffing when she claims that she has attractive alternatives. But these uncertainties are considerably exacerbated when states bargain through coalitions.²⁰

When faced with a coalition of states putting forth a collective demand, it is difficult for the outside party to determine the intent and resistance points of their rivals. A coalition may claim complete commitment to a particular position, and its members may threaten to collectively block the negotiation process unless their joint demand is met. But unless the outside party has some additional information about the credibility of this position, it may assume that the members of the coalition are bluffing and could actually be bought off through individual side-deals. The outside party may feel well-justified in assuming this, especially if this has happened in the past and the coalition is led by the same countries as before. However, if the assumption turns out to be incorrect, and the coalition continues to act collectively and refuses to make any concessions, deadlock may ensue, as indicated in the model presented above.

Uncertainty about preferences provides a useful lens to view the faultlines of the recent Doha negotiations. The most difficult issue in these negotiations has been agriculture. The over 150 members of the WTO can be broadly divided into three categories on this issue: the EU, the United States and developing countries (though within the EU there

²⁰ The term coalition is defined at its most inclusive, and covers a variety of groupings with differing degrees of formality and institutionalization: it is 'a set of governments that defend a common position in a negotiation through explicit coordination'. Odell 2006, p. 13.

are important differences, as there are also differences between developing countries and coalitions among them, including the G20, G33 and the G90). The United States has sought significantly improved market access through deep tariff cuts for all countries, but has made it clear that it will make only modest cuts on domestic subsidies. The EU, while refusing to take on across-the-board tariff cuts of significance, has been demanding a further exemption of 'sensitive products' from tariff reduction and also wants the United States to cut its farm subsidies. These differences between the EU and the United States, and the name-calling and finger-pointing between the two, have of course made it harder to reach an agreement.²¹ But at least some scholars have pointed to the fracture between the developed and developing worlds as being just as critical to the conflict. Jennifer Clapp, for instance, writes:

While it may be tempting to interpret the difficulty of reaching an agricultural trade deal as part of the longstanding agricultural trade disputes between the United States and the European Union, a distinct North-South dynamic is now an integral part of the politics of global agricultural trade. Both the United States and the European Union have been reluctant to agree to provisions that developing countries would like to see in an agricultural trade deal.²²

That developing countries are a major part of the 'problem' is unprecedented and of vital importance. They have demanded tariff cuts from the industrialised countries, but have been reluctant to provide greater market access themselves. Additional demands have included the designation of certain products as 'special products', the use of a special safeguard mechanism, and other forms of Special and Differential Treatment.

In our analysis of the Doha Round negotiations, we focus particularly on the interaction between the developed countries, which we label the 'North', and the developing countries, the 'South'. Two characteristics of these coalitions are crucial: whether they are coherent and able to sustain themselves in the face of attempts by other parties to divide them

²¹ Polaski 2007.

²² Clapp 2006b. Acute differences between developed and developing countries have also received public and private comment from key negotiators, for instance Robert Zoellick, 'America will not wait for the won't do countries', *The Financial Times*, 22 September 2003.

(‘strong’ vs. ‘weak’ coalitions), and whether they are willing to make compromises for mutual benefits or are inflexible in their demands and strategies (‘integrative’ vs. ‘distributive’ coalitions).²³

The ‘North’ refers to one or more developed countries. It can be a coalition of developed countries (like the old Quad: the United States, Canada, the EU and Japan), a more informal alliance of two or more developed countries (e.g. the EU and the United States, which came up with a joint text on agriculture prior to the Cancun Ministerial) or just one large, developed country (like the United States). As we discuss in the case studies below, we argue that the North is a strong actor; whether acting in coalitions or alone, the North does not have a reputation of retracting all its claims and disintegrating in the endgame. Further, the North is, in principle, willing and capable of employing integrative tactics.

The ‘South’ refers to various coalitions of developing countries. In the GATT, and until recently in the WTO, many of these coalitions of the South struggled to maintain their unity in the course of negotiations. In particular, coalition members proved susceptible to being bought off by the North through bilateral pressures and side-deals. Such examples of coalitions that stood firm in the initial stages of the negotiation but unravelled in the endgame abound, from the G10 in the pre-launch and early phases of the Uruguay Round negotiations to the Like Minded Group in the run-up to the Doha Ministerial Conference in 2001.²⁴ We refer to coalitions of this type as the ‘Weak South’. On the other hand, a ‘Strong South’ is a coalition which is organised and structured such that it can withstand bilateral pressures and ‘divide and conquer’ strategies by the North. This strength of the coalition can be based on strong leadership, the availability of side payments within the coalition, and various other means. However, building such a strong coalition of developing states, especially if this has not been achieved in the past, is

²³ ‘Integrative’ negotiation tactics are aimed at discovering and achieving mutual gains from agreements, even if both parties attempt to obtain the larger share of these gains. Such strategies involve a willingness to show flexibility and make concessions. By contrast, ‘distributive’ tactics are aimed at gaining benefits at the expense of the other party and entail ‘the risks of discouraging the discovery of opportunities for mutual gains and provoking deadlocks and conflict’. Odell 2006, p. 15. See also this volume’s Introduction. Both types of tactics, often mixed together, can be found in all forms of negotiations.

²⁴ Narlikar and Tussie 2004.

likely to initially make it a rather inflexible actor. There are not many examples of such strong coalitions of developing actors in past trade negotiations, but as we argue below, Doha has been different.

Despite some minor compromises, the negotiating parties in this Round have remained entrenched in their positions.²⁵ One important reason why trade-offs through the Single Undertaking, to produce win-win situations, have been difficult is that the real preference orderings of all the parties remain poorly understood. All parties recognise to some degree that the stated positions do not represent the bottom-lines of the negotiating parties. But amidst uncertainty about the extent to which coalitions (and countries within them) are willing to stand firm over certain areas and concede on others, the zone of agreement itself remains ambiguous.

This uncertainty – when the real intentions and strengths of coalitions are not known – can be overcome in two ways. The first way is institutional (solution set 4). Through a strong secretariat, chairmanship, or some form of greater transparency or mediation mechanisms, the WTO could build in certain mechanisms into the negotiation process that would require members to show their cards and reveal their bottom lines. But given its ‘member-driven’ nature (a legacy from the GATT), the WTO is not an organization where such institutional mechanisms can be easily put into place.²⁶

In the absence of an institutional solution, the negotiation process itself can help to overcome this uncertainty. As the model in the previous section indicated, uncertainty can be reduced – and deadlock potentially avoided – if actors can credibly relay information about their preferences to their negotiation partners (solution set 2). More concretely, the issue is whether there are actions available such that the signalling costs fall in the ‘right’ range. So, in the following discussion of the Cancun and Geneva negotiations, we have to ask why such possible signals did not occur.

Deadlock at Cancun, September 2003: uncertainty about the strength of the South

In terms of the model presented earlier in the chapter (pp. 145–7), we argue that the North was in player B’s position. It assumed it faced a

²⁵ www.wto.org, Clapp 2006a. ²⁶ Barton *et al.* 2006.

relatively weak coalition of developing countries (A_{Weak}), while in fact this coalition turned out to be strong and resistant (A_{Tough}). In essence, the North coalition had insufficient information on the nature of the South coalition at Cancun, and, in the absence of any signals to suggest otherwise, it miscalculated.

As in the model, the North (as player B) is assumed to be a strong actor. A part of this bargaining power is simply the power of larger markets and larger shares in trade. But evidence from trade negotiations in the past further indicates that even when acting in a coalition – due to strong leadership and sufficiently shared interests – the strength of the North is a realistic assumption. The North usually includes only a small group of countries with reasonably similar interests, in contrast to the larger numbers and often divergent interests of members of the South. The smaller numbers and similar interests of members mean that coalitions of the North do not risk unravelling if they offer concessions to the South.

Several coalitions of developing countries were active at the Cancun Ministerial in September 2003. They included the ACP, the African Group, the LDCs (that came together into the last days of the conference to become the G90), the Like Minded Group, the Small and Vulnerable Economies Group, the Core Group on Singapore issues, the G33 on Strategic Products and Special Safeguard Mechanisms, the coalition on cotton, and the G20 on agriculture. We focus specifically on dynamics between the North (comprising chiefly the EU and the United States) and the G20, given that agriculture has provided the central issue for conflict in the Doha Development Agenda (DDA) so far.

The G20 coalition was created as a direct response to the EU–US text on agriculture, which came out on 13 August 2003,²⁷ in the lead-up to the Cancun Ministerial Conference. The EU–US text – and the fear that Cancun would result in another bilateral Blair House Accord that marginalised their interests in agriculture – prompted Brazil and India to draft an alternative text together, which also came to be supported by China. With the three giants of the developing world at its helm, the G20 attracted other members. Its framework declaration was issued on 2 September 2003, and signed by twenty countries: Argentina, Bolivia, Brazil, Chile, China, Colombia, Costa Rica, Cuba, Ecuador,

²⁷ Online, available at: www.agradepolicy.org/output/resource/EC-US_joint_text_13_Aug_2003.pdf (accessed on 1 August 2007).

El Salvador, Guatemala, India, Mexico, Pakistan, Paraguay, Peru, Philippines, South Africa, Thailand and Venezuela. They were joined by Egypt and Kenya, and came to be referred to as the G22 at the time of the Ministerial.

Intra-coalition G20 dynamics have been explored by other authors elsewhere.²⁸ At this point, suffice it to note that the G20 did not bring together 'natural allies' and there were several potential fractures visible within it. The most obvious faultline was between the agricultural exporters within the group, and those with a defensive interest and concerned about protecting their domestic markets against import surges; Brazil typified the first group, and India the second. The second potential rift was between the smaller countries of the group and the giants; the susceptibility of the smaller countries to bilateral carrots (such as preferential market access) was higher and their ability to withstand bilateral sticks (e.g. withdrawal of aid or preferential treatment) lower than that of the larger countries. Further, the G20 had deployed a strict distributive strategy from the time of its formation – a strategy which, in the past, had prompted divide-and-conquer tactics from the outside party, resulting in the collapse of the coalition in the endgame. The Like Minded Group in the Doha Ministerial conference had used a strict distributive strategy, and had met with exactly this fate.²⁹

Faced with a G20 coalition that suffered from several potential faultlines, and had adopted a strict distributive strategy, along with the many precedents of developing country coalitions that had collapsed in the endgame, there was little reason for the United States or the EU to believe that they were facing anything other than a weak South. Admittedly, when questioned in private interviews at the time, even the weaker members of the G20 claimed that they would not defect in the endgame, and that no bilateral side-deal could outweigh the gains that were to be had from agricultural liberalization as per the G20 proposal. But in the absence of any concrete and costly signals, it was difficult to distinguish these claims from cheap talk, bravado, or wishful thinking. Representatives at Cancun from developed countries as well as international organizations naturally predicted that the G20 would cave in on the final day.³⁰ The North assumed that it was still facing a

²⁸ Clapp 2006a; Narlikar and Tussie 2004; Taylor 2007.

²⁹ Narlikar and Odell 2006.

³⁰ Interviews, Cancun (9–14 September 2003).

Weak South, and played resist; the G20, being the (unrecognised) Tough South, also resisted. Cancun presents us with an instance of how the negotiating parties ended up in an equilibrium where the outcome is deadlock.

But could deadlock have been avoided through signalling? As the previous section argued, within a range of signalling costs, there is a possible equilibrium where the Tough South signals, the Weak South would not, and the negotiation ends in agreement. One can imagine several ways in which negotiators can calibrate signalling costs to make them fall within this range. First, the coalition itself can be constituted/re-constituted to comprise members with a greater similarity of primary interests. Such coalitions entail the cost of excluding states that may be allies in other issue-areas and thereby jeopardizing other alliances, as well as the cost deriving from being a small coalition with lesser collective weight than that afforded by a much larger, Third-Worldist bloc-type coalition. But by incurring such costs, members can signal their commitment to stand firm on the primary, shared issue. The G20 could have been constituted to signal this.

Second, individual members can reject bilateral deals that they might be offered, and thereby signal their commitment to stand together and stand firm on their demand. Of course the susceptibility of smaller members to bilateral pressures is high. But even here, the larger and more advanced members of the group may be able to compensate these countries to keep the costs down and prevent defection. In the case of the G20, Brazil and India could have made public and preferential deals with smaller members as counter-offers to balance the pressures that some of the Central and Latin American countries were facing from the United States at Cancun.

Third, the G20 could have prioritised its demands, and made issue-linkages by promising concessions in an area of high priority to the North in return for concessions in its own preferred area; in other words, by showing a willingness to pay for its goods, the South shows its determination and commitment – within reasonable costs – to acquire what it is bidding for. For instance, developing countries could have made some concessions on the Singapore Issues. Instead, they used the exact opposite strategy: the G20 focused exclusively on agriculture, while other groupings (that included G20 members such as the Core Group on the Singapore Issues) refused to concede to the North on the Singapore issues.

Fourth, even within the issue area of agriculture, the G20 could have taken a less hard-line position on the elimination of domestic support mechanisms by allowing certain kinds of phase-out subsidies for farmers in the EU or other kinds of subsidies for countries concerned about non-trade issues in agriculture. Such prioritization would have shown the North that the G20 was even willing to incur costs rather than give up on its main demands on agriculture; recognizing this, it is probable that both the United States and the EU may have been more willing to make concessions. However, the absence of these signals meant that the negotiating partners coordinated on the equilibrium that implied a deadlock.

Deadlock in Geneva, July 2006: uncertainty about the nature of a strong South

The dynamics illustrated by the signalling game presented in the previous section also help to explain the deadlock in the negotiations in Geneva in 2006. While the North can be assumed to know at that point that it was negotiating with a strong coalition, it was uncertain about the goals and flexibility of this coalition. The North assumed that it was dealing with a South that would make 'integrative' moves, whereas the G20 continued to use distributive strategies. Consequently, an agreement was not assured.

We argue that even when it became relatively clear to the North that it was facing a strong coalition of developing countries, it was, in the absence of extended past negotiations with such a strong coalition, uncertain about which tactics and strategies the G20 would follow. The model presented earlier can capture these dynamics. The North is (as before) in the position of player B, while A_{Tough} now corresponds to a 'distributive' coalition of developing countries, and A_{Weak} to an 'integrative' coalition. We also assume that the North's prior belief that it faces a distributive South is relatively small. This seems a realistic assumption for the WTO negotiations in the Doha Round, especially as the G20, having credibly demonstrated its toughness at Cancun at considerable cost (including the delayed benefits of the DDA and the recourse to regional trade agreements by many WTO members),³¹

³¹ The costs of deadlock are incurred by the North as well. However, the chief beneficiaries of 'authoritative' regimes are developing countries (Krasner 1985); they are also, in general, less equipped to negotiate optimally in bilateral and

could reasonably be expected to make some concessions (be 'integrative') to ensure agreement whilst negotiating from a position of strength. Further, from the perspective of the North, it is more plausible to assume that a strong actor (akin to itself) is likely to pursue mutual gains and show some flexibility, i.e. to use integrative tactics. Indeed most North–South negotiations have involved some such concessions in a later stage from the North (e.g. agriculture and textiles were included in the 'Grand Bargain' of the Uruguay Round as a concession to the South from the North, or indeed the development component of the DDA). If the North, even when acting as a coalition, is strong and uses such tactics, it is understandable that it expects the South, once it has realised that this is a strong coalition too, to act in similar ways.

Let us now turn to the actual negotiations in Geneva to show how the insights from the model can explain the dynamics and outcome. Subsequent to the impasse at Cancun, negotiations continued in a stop–start fashion. Some progress was made in the July Package of 2004.³² The G20 made a small concession: it agreed to the continuation of the Blue Box. However, in return, it managed to get the 'blended' formula for market access replaced by the 'tiered formula', retention of *de minimis* payments for subsistence farmers, and the recognition of Special Products and a Special Safeguard Mechanism for developing countries. The next step was the Hong Kong Ministerial Conference, held in 2005. But except for the one achievement of getting the EU to commit to ending its export subsidies, the Hong Kong Declaration did not go much further than the July Framework.³³ Overall, the July Framework and the Hong Kong declaration were token gestures, with concrete modalities and figures still to be agreed on. Six months after the Hong Kong Declaration, negotiators were still unable to iron out their differences, finally leading to Pascal Lamy's decision to suspend the negotiations indefinitely in July 2006.

This time, the standoff included an EU vs. United States faultline, in contrast to Cancun 2003 when the EU and the United States had managed to come up with a joint draft prior to the ministerial

regional arrangements involving the North. As such, having triggered deadlock once at Cancun and established its 'toughness', it would be reasonable to expect that the South would not risk this strategy again and would instead prefer to use its reputation of being tough, make some concessions, and secure a deal.

³² WT/L/579, 2 August 2007, www.wto.org.

³³ WT/MIN (05)/DEC, 22 December 2005, www.wto.org.

conference. Much media attention has focused on this rift between the two giants with the EU refusing to make deep cuts on tariffs and the United States showing equal reticence in cutting domestic subsidies – a rift that became increasingly public and acrimonious in the consultations of July 2006. EU Trade Commissioner, Peter Mandelson, for instance, singled out the United States in precipitating the deadlock because of its refusal to make significant cuts in the domestic subsidies: ‘the US has been asking too much from others in exchange for doing too little themselves. This is not my definition of leadership’. The United States countered the ‘false and misleading’ statements by the EU: ‘Indeed, during recent discussions, it became clear that the EU was in fact offering even less market access than originally thought, through their intended use of loopholes’.³⁴ But the blame for deadlock cannot be placed on the EU–US fracas alone.

The G20, particularly Brazil and India which are leaders of the coalition and have also been privy to small group discussions with the developed world through the G6, played a major role in the breakdown of the negotiation process. Negotiators, particularly from the United States but also the EU, reiterated that the larger developing countries would have to make some concessions. At some level, Northern negotiators must actually have believed that the South could – and would – make some concessions, or they would not have spent so much effort in attempting to persuade their Southern counterparts along such lines. As discussed above, given that the G20 had demonstrated its credibility as a tough coalition at Cancun, the North had even greater reason to believe that the G20 would engage in a process of give-and-take from its newfound position of strength, rather than risk deadlock and surrender the possible gains from agreement.

Evidence of the willingness of EU and US trade negotiators to invest in persuading the G20 to make integrative moves is borne out not only in the fact that the G6 came to include Brazil and India, but also in the surprise and disappointment expressed in July 2006 when the G20 failed to concede. On 24 July, US Secretary of Agriculture, Mike Johanns, made the following statement: ‘Now advanced developing countries are world class competitors. This would be China, this would be India, this would be Brazil, this would be other countries around the world that quite honestly can compete with anybody very

³⁴ *International Trade Reporter*, 23 (30), 27 July 2006.

effectively. Yet in the proposal that they tabled, it essentially blocked 95 to 98 percent of their market.³⁵

Could this deadlock have been avoided? Our model suggests two possibilities: either the G20 could have made integrative moves, thereby resulting in an agreement on terms favourable to the North, or the coalition could have signalled its determination to use distributive strategies, thereby getting the North to give in and reach an agreement that favoured the G20.

There were several reasons why it was difficult for the South to make integrative moves within agriculture, despite the fact that the North, as a strong coalition, had made integrative moves in the past and had expected the South to do the same. The most important of these lay in the coalition dynamics within the G20: by bringing together a considerable diversity of interests on agriculture, the coalition risked collapse by conceding on any one issue (which could prompt the defection of a member to whom the issue was important). Brazil, for example, could have readily conceded on granting more market access, but would have precipitated a strong reaction from India and other members that also constituted the G33. Admittedly, the G20 had come up with statements about its resolve on agriculture, alone and with other coalitions of developing countries.³⁶ But once again, there was little reason to believe these statements in the absence of credible signalling.

In what ways could the G20 have signalled its distributive intentions on agriculture? Most obviously, it could have used a cross-issue mixed strategy, employing signals that would have worked in the Cancun negotiations as well. For instance, while showing that it was unable to make concessions on agriculture (which would remain the deal-breaker), the G20 could have offered to make concessions in other areas such as Non-Agricultural Market Access or services. Alternatively, it could have made some concessions on certain aspects of Special and Differential Treatment (SDT) – not a huge cost to the majority of its members, but a sufficiently large cost in that the G20 would have lost the support of outside groups such as the LDC and Africa Group. But as in the earlier negotiations, the G20 continued to oppose such issue linkages.³⁷

³⁵ Statement by Mike Johanns, 24 July 2006, <http://geneva.usmission.gov/Press2006/0724Doha.html> (accessed on 27 April 2007).

³⁶ www.g-20.mre.gov.br/statements.asp (accessed on 27 April 2007).

³⁷ Joint Statement G-20, the G-33, the ACP, the LDCs, the African Group, the SVEs, NAMA-11, Cotton-4 and CARICON, Geneva, 1 July 2006, www.g-20.mre.gov.br/conteudo/statement_01072006.htm (accessed on 27 April 2007).

The timing or the phasing of the negotiations acted as a further deterrent to agreement. Almost three years after Cancun, it was reasonable for the North – in the absence of any signals to the contrary – to expect that the South would be unwilling to forego the benefits of agreement any longer, despite outward posturing. The North, thus expecting an integrative South, played resist, and ended up in another deadlock.

Alternative explanations

The extended period over which the Doha deadlock has stretched out means that it is unlikely that a mono-causal explanation will suffice. In this section, we examine several other prominent possible explanations for the Doha deadlock. We identify their shortcomings and, in some instances, their utility in providing us with immediate causes for explaining particular phases of the deadlock. These alternative explanations focus on two broad sets of factors: a shrinking zone of agreement, and institutional limitations of the WTO.

The first set of plausible explanations suggests that the gains from a successfully negotiated DDA are so small that the bargaining space is effectively empty. There are four versions of this argument. The simplest version is that the agenda is inadequate to keep the various parties committed to the negotiation, or that the costs of agreeing to the agreement outweigh the promised benefits.³⁸ However, several studies have been conducted which reveal that developed and developing countries will benefit from even a scaled-down Doha agreement, although possibly to different extents.³⁹ Admittedly, the range of benefits may have been wider if there were more issues on the table (e.g. inclusion of the four Singapore issues may have allowed a bigger win-set for the EU and greater commitment from business lobbies). But given the range of issues up for negotiation, there is at least theoretically enough on the table to keep everyone engaged.

The second version of the argument about the zone of agreement views the bargaining space not in absolute terms, but relative to the 'BATNA' (best alternative to negotiated agreement) of the involved parties. In keeping with Hypothesis 1, this argument holds that the

³⁸ A variant of this explanation can be found in Gallagher 2008.

³⁹ E.g. Anderson *et al.* 2006.

gains from the Doha negotiations – however significant – cannot be matched by the regional and bilateral agreements that countries can now turn to. This explanation may hold some validity for the deadlock today. But insofar as recourse to regional trade agreements as a second-best alternative represents a reaction to the failures of multilateralism, the turn to regionalism and bilateralism is as much a result of the Doha deadlock as a plausible cause of it.

The third version of the zone of the agreement explanation recognises that whilst countries may stand to gain from the DDA, domestic politics influence the win-sets of negotiation parties (Hypothesis 6). If certain interest groups within key players in the negotiation prefer no agreement to the deal, deadlock can ensue. This argument is representative of a considerable literature focusing on ‘how domestic politics promotes the establishment of trade agreements and shapes their very nature’ and on ‘leaders’ domestic political incentives for international cooperation’.⁴⁰ Depending on the exact conditions, such domestic constraints can enhance the bargaining power of a state and lead to a more favourable agreement (cf. the so-called ‘Schelling conjecture’⁴¹) or make agreements impossible.⁴²

This line of reasoning (explored in detail in Chapter 5, this volume) provides a useful supportive explanation for the deadlocks today, given the context of the expiry of the US Executive’s Trade Promotion Authority (TPA) in 2007 and the 2008 US elections. But we argue it is of limited value in explaining the deadlocks of 2003 and mid-2006. First, it seems implausible that negotiators would go through the costly effort of trying to arrive at an agreement if their ability to get it through were as constrained as theories of domestic political economy suggest. Second, a counterfactual thought experiment reduces the centrality of this explanation, at least for the early period of the negotiations. Even if domestic lobbies in the EU and the United States were persuaded that certain concessions on domestic support by their governments would not be detrimental to them (through compensation schemes or even some measure of ‘box-shifting’), and the President’s TPA had not been due for expiry in 2007, it is unlikely that the deadlock would have been

⁴⁰ Milner *et al.* 2004, p. 17. See Milner 1997 and Frieden and Martin 2002, pp. 120–6, for concise overviews of this literature, which builds heavily on Putnam’s notion of ‘two level games’. See Evans *et al.* 1993; Putnam 1988.

⁴¹ Frieden and Martin 2002; Schelling 1960.

⁴² Milner 1997; Milner and Rosendorff 1997.

resolved without some concessions from the South in return for concessions from the North.⁴³ To make concessions constructively, both developed and developing countries would need to know what the others' bottom lines are, where there is scope for negotiation, and which issues are the real deal-breakers. The blame game in the two episodes suggests that negotiators never got to the point of weighing up domestic costs and losses, and returning to the table for further negotiation. All parties were caught up in posturing and failed communication, and even the complete disappearance of domestic limitations would not have resolved these problems.

The fourth version of the bargaining space explanation is linked to changing perceptions of negotiators under the constraints of bounded rationality. In a recent paper, Odell uses this approach to explain the different outcomes in the WTO negotiations in Seattle in 1999 (no agreement) and in Doha in 2001 (some form of agreement), which were held under similar institutional conditions and similar underlying state interests and regime types.⁴⁴ The difference in outcomes is attributed to changes in the perceptions of some key negotiating states about the situation if no agreement were to be reached, changed negotiation strategies (from distributive to integrative strategies), and the presence of more effective mediators in 2001. This reasoning, in our view, is not a sufficient explanation, especially for the WTO deadlocks in 2003 and 2006. First, there is little evidence that states had particularly positive views of their alternatives to agreements at these times, or that mediation by WTO officials and chairs was inadequate in these cases. Second, as we have tried to demonstrate in this chapter, it is the uncertainty about alternatives to agreement and the type of strategies that a coalition will pursue, and the *inability to communicate* these that are fundamental to an explanation of deadlocks in these WTO negotiations. Deadlocks in the Doha negotiations are, thus, more convincingly explained as the outcome of bargaining situations between rational actors under conditions of incomplete information, rather than by some form of bounded rationality on the part of these actors.

⁴³ This argument holds for our two cases of Cancun 2003 and the July 2006 deadlocks. Given, however, the expiry of the US President's TPA in July 2007, the argument attaching primacy to domestic politics can be more convincingly made for later developments.

⁴⁴ Odell 2009.

The second set of alternative explanations is institutional (Hypothesis 4) coupled with power political (Hypothesis 3). As summed up in a recent paper by Collier, 'The WTO has a larger membership than the GATT, and its remit is much wider. Both differences make it harder to reach agreements, a problem evident from the lack of progress in the Doha Round to date'.⁴⁵ We agree. But the uncertainty that we have identified in this chapter provides a central analytical mechanism whereby these institutional features become a problem. And short of major institutional reform, signalling (of intentions and other information) is one of the few ways in which this uncertainty in WTO negotiations can be overcome.

Conclusion

In this chapter, we have argued that a central explanation for the Doha deadlocks lies in one particular kind of uncertainty: the North has been unable to determine the kind of South it is dealing with. While this uncertainty of preferences is intrinsic to any negotiation process, it is compounded in the WTO by the fact that bargaining takes place in coalitions. Aided by a simple game-theoretic model, we have shown that effective signalling could help negotiators overcome the uncertainty at hand. That said, one caveat is in order.

In a stable world, we would expect the North – having observed and learnt from its encounter with the strong South in the first step and the Distributive South in the second – to simply update its preferences, and yield in future negotiations to avoid deadlock. Coalitions, however, are dynamic entities. The G20 of today is different from the one that the North met at Cancun 2003 or Geneva 2006. Old rifts seem to have become deeper within the coalition (which came out most patently in the July 2008 talks), whilst new ones have appeared. India, a founding member of the G20, has become a full member of the G33 and has been showing considerably greater interest in the latter. Some view this as a decline in its G20 commitment.⁴⁶ Argentina, and also Paraguay and Uruguay, on the other hand, have expressed their concerns regarding the implementation of the G33 idea on Special Products and Special

⁴⁵ Collier 2006, p. 1423; also see Warwick Commission 2007.

⁴⁶ Interviews with researcher from a leading Indian think-tank, New Delhi, 20 March 2007 and with a senior official, Itamaraty, Brasilia, 13 March 2007.

Safeguard Mechanism (which the G20 has supported despite differences within the group).⁴⁷ Both Brazil and India have provoked rumblings of discontent from other developing countries by having emerged as part of the 'New Quad', i.e. through their having become invited members on all small group consultations as part of the 'Five Interested Parties', the G6, and the G4. Faced with this new G20, the North could still well decide that it differs sufficiently from the strong and distributive South it has encountered in previous plays. If this new G20, despite obvious differences within it, still stands firm, we may see a repeat of the same problem of deadlock.

As a result, credible signalling – or its absence – will continue to be a crucial issue. Knowing your enemy may be the best strategy to successful negotiation. However, since both parties must agree for a negotiation to succeed, a corollary is that you must also allow and enable your enemy to get to know you. Investing in signalling your intentions is a key aspect of this.

⁴⁷ JOB(06)/197/Rev.1, Revised Consolidated Reference paper on Possible Modalities on Market Access – some unanswered technical issues, 21 June 2006.

7 *Entering the zone of agreement: the United States in climate change negotiations*

SEVASTI-ELENI VEZIRGIANNIDOU

This chapter addresses climate negotiations and focuses on the deadlock of negotiations in The Hague in 2000, which led to the withdrawal of the United States from the Kyoto Protocol. Although the remaining industrialised countries decided to continue with the Protocol without the United States, and Kyoto eventually came into force in 2005, the protracted US withdrawal seriously compromised the chances of success of the regime and called its future into question. Therefore, the deadlock between the United States and the rest of the industrialized countries remains unresolved. However, since the Bali Conference it seems that the United States is re-engaging, as it agreed to the Bali Roadmap which specifies the negotiating mandate of the post-Kyoto agreement. This turn of events could mean that the United States will be willing to participate in a post-Kyoto agreement and even take up a significant reduction target. Although this will not be known until the Copenhagen Conference in 2009, the move by the United States to accept the Roadmap indicates a significant re-engagement with the climate regime.

I argue in this chapter that the main sources of deadlock between the United States and the remaining Kyoto countries were based on two major reasons: competitiveness concerns in relation to developing countries, and perceptions of a prohibitive cost of implementation. These essentially tie in with two of the main hypotheses on the causes of deadlock: the perception of a superior 'BATNA' and domestic preferences (Hypotheses 1 and 6). Between the withdrawal of the United States from Kyoto in 2001 and the Bali Roadmap in 2007, the domestic and international factors which contributed to the deadlock were significantly changed. On the one hand, developing countries agreed to take some action in the new agreement, albeit this depends on relevant funding opportunities. On the other hand, domestic interests in the United States have become more diverse and voices in favour of climate policy have increased markedly. Changes in the Congress and

Administration are also more favourable towards regulation. Therefore, whereas the zone of agreement in 2000–1 was too narrow for the United States, it has now broadened through the change of domestic and international factors.

The first part of this chapter presents the main developments in the climate regime with a particular focus on the stance of the United States and the landmark developments of US climate policy. It also explains why US participation is a prerequisite for a successful climate treaty. The following two parts then focus on the two theoretical hypotheses that play the major role for the US–Kyoto deadlock. More specifically, the second part explains why the deadlock that led to the US withdrawal can be explained through the hypotheses on superior ‘BATNA’ and domestic configuration of interests. The third part then applies the same two hypotheses to explain the turn-around of the US position during the Bali Conference, but also presents some reasons for scepticism on the willingness of the United States to take up strong commitments in the context of an international treaty on climate change. The fourth part discusses this case more generally in relation to the theoretical framework developed in the Introduction. Finally, the concluding section brings all arguments together to support that the United States may be willing to take more concrete domestic action on climate change, but the extent to which they are willing to be bound by a strong international treaty might still be limited.

The United States in the climate regime

The development of the climate regime has gone through several important stages. In 1987, the World Meteorological Organization (WMO) and the United Nations Environmental Program (UNEP) created the Intergovernmental Panel on Climate Change (IPCC), the main body collecting and disseminating the latest scientific knowledge on the causes and consequences of climate change, along with policy proposals. The IPCC has so far produced four Assessment Reports on climate change, each one presenting stronger evidence of anthropogenic climate change and more specific information on the possible impacts. According to the latest Assessment Report in 2007, current trends of global greenhouse gas (GHG) emissions will lead to significant sea level rise, water shortages, decreased food production and more frequent extreme weather events in the next hundred years and further into the

future.¹ In order to avoid global warming of more than 2 degrees Celsius (the process has already started), global GHG emissions need to peak no later than 2015 and start to fall quite steeply thereafter.² Current trends, however, are far from that pattern.

The first treaty dealing with climate change was the United Nations Framework Convention on Climate Change (UNFCCC) signed in 1992, which set the stage for further developments. The UNFCCC divided its member countries into two categories or Annexes; Annex I included industrialized countries, which made the commitment to lead the effort on climate change mitigation. The developing world was non-Annex I, and according to the principle of common but differentiated responsibilities, was expected to do less on climate change. The UNFCCC also established the goal of the international community with respect to climate change; therefore, the aim of the Convention is to 'prevent dangerous anthropogenic interference with the climate'.³ In the spirit of common but differentiated responsibilities, Annex I countries undertook a voluntary commitment to reduce their GHG emissions to 1990 levels by 2000.

Following the entry into force of the UNFCCC, it was soon agreed at the first Conference of the Parties (COP1) that the provisions of the Convention were not adequate to limit dangerous climate change and the mandate for the negotiation of new and legally binding commitments was agreed in Berlin in 1995. The result of this negotiation process was the Kyoto Protocol of 1997. Kyoto included binding emissions targets for Annex I countries, amounting to an average decrease of their emissions by 5.2 per cent of 1990 levels by 2008–12. In the spirit of common but differentiated responsibilities, there were no commitments for emissions targets by non-Annex I countries. Individual commitments varied, and some Annex I countries managed to negotiate an increase of their emissions.⁴ The commitment for the United States was a 7 per cent decrease. Despite the differentiation of commitments, concerns with cost were rife in most Annex I countries. Through a US-led coalition, several cost-saving mechanisms were inserted into the treaty. These involved emissions trading, joint implementation, a Clean Development Mechanism (CDM) and the inclusion of carbon sinks.⁵ Although Kyoto was concluded in 1997, the precise details on

¹ IPCC 2007, pp. 11–12. ² IPCC 2007, p. 67. ³ UNFCCC 1992, p. 5.

⁴ Saunders 2006, p. 173. ⁵ Earth Negotiations Bulletin 1996.

how the treaty would work in practice were left for subsequent negotiation. This included compliance, the exact use of sinks, as well as the details of how the flexibility mechanisms would operate and how much of the target would be allowed to be achieved through flexibility measures.

Some of Kyoto's substantial provisions reflected the negotiating position of the United States, particularly in relation to cost-saving mechanisms and parts of the compliance system.⁶ Despite this, however, there was significant scepticism in Congress over the benefits of the treaty. Major concerns were the potential cost involved in implementing the treaty and the subsequent effects on the economy, as well as the loss of competitiveness towards developing countries in case they were exempt from controls.⁷ The Senate passed a resolution in 1997 before the conclusion of the Protocol saying it would refuse to ratify a treaty which would harm the US economy and which did not include substantial commitments for developing countries. Although the Clinton Administration signed the treaty, it never submitted it to the Senate for ratification.

Meanwhile, the negotiations on establishing the rulebook of Kyoto continued. A particular sticking point in the COPs of 1998 and 1999 was the issue of the use of the flexibility mechanisms. The United States, joined by the rest of the umbrella group, wanted to maximise the use of the flexibility mechanisms in order to minimise costs. The EU, on the other hand, pushed for a very limited use of these mechanisms and wanted most of the abatement to be achieved through domestic measures. These incompatible positions were leading to a standstill in negotiations and were compromising the entry into force of the Protocol as these issues needed to be resolved for ratification. A severe controversy on the use of sinks took place in the 2000 COP at The Hague. The United States, Canada and Japan wanted to add additional sink activities to the first commitment period, as well as use sinks in the CDM. This was resisted by the EU and the G77/China.⁸ A last-minute attempt to broker a deal by the UK delegation fell through because it was not acceptable to the EU.⁹ Subsequently the negotiations broke down and no deal was reached at The Hague.¹⁰

⁶ Hovi *et al.* 2003, p. 1. ⁷ Saunders 2006, p. 185.

⁸ Earth Negotiations Bulletin 2000, pp. 10–11.

⁹ Earth Negotiations Bulletin 2000, p. 18. ¹⁰ Hovi *et al.* 2003, p. 17.

This point in the negotiations can be considered one of deadlock, and we can identify the conditions of deadlock provided in the definition here. On the one hand, little progress was achieved from 1997 to 2000, mostly because of incompatible positions between the umbrella group on the one hand, and the EU and G77/China on the other. Second, the UK proposal tried to broker a deal but failed to do so, leading to the breakdown of negotiations and thus to deadlock.

The negotiations reconvened in 2001. However, in the meantime, the US administration changed, and President George W. Bush decided to withdraw the United States from Kyoto in 2001. The reasons he gave were similar to the Byrd-Hagel Senate Resolution: the treaty would harm the US economy and it does not include commitments for developing countries.¹¹ Therefore, although the remaining Annex I countries continued with the negotiation process and eventually came to an agreement over the issue of sinks (which ironically was quite similar to what the EU rejected in 2000), the United States left the Protocol and remained outside the process. They were still, however, a member of the UNFCCC and thus continued to send delegations to the COP.

Despite the US withdrawal, the remaining parties to the Protocol continued the process, and enough ratifications were achieved for the Protocol to come into force in February 2005. The absence of the United States, however, is particularly significant for the success of the Protocol. In environmental terms, the United States has the highest emissions among Annex I countries and has also been the main emitter for the longest time. In 2002, the United States accounted for 23 per cent of global annual emissions, which was 74 per cent higher than the second largest emitter, China.¹² The United States is also the third highest per capita emitter among Annex I countries (after Luxembourg and Australia) and seventh in the world, and its per capita emissions are significantly higher than those of China.¹³ Without US participation and the reductions they were meant to achieve, the Kyoto Protocol's impact on global emissions is significantly reduced: only a 0.9 per cent reduction would occur from Kyoto without US participation, as opposed to 5.5 per cent with US participation.¹⁴ A further by-product

¹¹ Boehmer-Christiansen and Kellow 2002, p. 80. ¹² Kopp 2006, p. 6.

¹³ Data from the Climate Analysis Indicators Tool (CAIT) of the World Resources Institute, available at <http://cait.wri.org/cait-unfccc.php>.

¹⁴ Hovi *et al.* 2003, p. 4.

of the US withdrawal which affected the quality of the environmental commitment in Kyoto had to do with the eventual use of the flexibility mechanisms. Since the US withdrawal, the EU, which was keen to keep the Protocol going, made large concessions on the flexibility mechanisms to countries like Russia, Canada and Australia to keep them in the process and persuade them to ratify.¹⁵

In addition to the environmental impact of US absence from the Protocol, there are additional complications. Given the prominent role of the United States in global politics, it is often expected to take leading roles in global problems, including security, economic and environmental concerns. The lack of US involvement and leadership therefore also makes it easier for other countries to drag their feet or demand further concessions for participation. In addition, the developing world has made it a prerequisite for their participation that industrialized countries should take the lead in climate change mitigation. It will be much more difficult to engage them if the leading economic power and greenhouse gas producer of the developed world is not part of the process.

Because of the central role of the United States in global politics, there is a case to be made about a continuous deadlock between the United States and the rest of the Kyoto countries, for as long as their position in the climate regime does not involve any meaningful commitment to mitigate emissions of GHGs. There is evidence, however, that this deadlock might be coming to a close. The Kyoto Protocol was never meant to be a stand-alone treaty. As soon as the Protocol came into force in 2005, a dialogue on future commitments was initiated both within the Convention and the Protocol. Although not a member of the Protocol, the United States participated in the Convention process. This culminated in 2007, at the Bali Conference, with the adoption of the Bali Roadmap. The Roadmap creates an ad hoc working group on long-term cooperative action under the auspices of the Convention, where both developed and developing countries will adopt new commitments.¹⁶ Although the United States blocked any reference to particular emissions targets for an eventual deal under this process, it is now engaged in a process for new commitments. In addition, the United States, in the late negotiating hour, backed down from its opposition to an Indian proposal making developing country action contingent on

¹⁵ Hovi *et al.* 2003, p. 19. ¹⁶ UNFCCC 2007.

financial and technological transfers.¹⁷ In the end the United States joined the consensus, and will be involved in a process of new rounds of commitments for all Convention members. Although the final result of the process started in Bali is unknown, there are reasons for optimism in relation to the US involvement in the climate regime, which would end the deadlock between them and the remaining Kyoto countries. The reasons for both the occurrence of the deadlock and US re-engagement are examined below.

The US position and deadlock in the climate regime

I propose in this chapter that there are mainly two reasons for the US withdrawal from the Kyoto Protocol which correspond to two of the hypotheses on the cause of deadlocks provided in the introductory chapter. After having discussed the events that led to deadlock in the previous section, I focus here on the reasons that led to deadlock from the US point of view. These centre on the US preference for the status quo rather than agreement, and on the US domestic coalition of interests. These two aspects of the US position are clearly interrelated, as the preference for no agreement was formed through the domestic constellation of interests. However, certain institutional features of the Protocol and the positions of other countries also led to the US preference for no agreement. I will discuss these issues first, and then move on to the particular role of domestic politics on the final US withdrawal.

The first hypothesis that will therefore be discussed is that ‘deadlock occurs because of superior “BATNA”, or whenever and as long as parties believe their alternative to agreement is superior to the deal on offer’. I argue here that the United States believed their alternative to agreement was superior, and that the alternative was the status quo or no agreement outcome. Their belief that no agreement was superior was based on a rough cost–benefit analysis of the particular provisions and level of participation of Kyoto. Their main concerns were the economic cost involved in implementation, as well as competitiveness concerns against developing countries.

Although very few studies were conducted in the United States over the long-term costs of climate change, there was fervour of activity in order to assess the economic costs of compliance with Kyoto. Several

¹⁷ Earth Negotiations Bulletin 2007, p. 20.

studies were conducted, both by the Clinton and Bush Administrations, as well as some commissioned by Congress and others which were independent of government. Certain independent studies predicted the cost of compliance for the United States would be between 0.25 to 1.6 per cent of GDP in the first commitment period.¹⁸ The Clinton Administration, which supported the Protocol, estimated 0.15 per cent of GDP with cost-effective implementation.¹⁹ However, the Bush Administration that eventually rejected the Protocol predicted a cost of between 1 to 2 per cent of GDP, and compared this sum to the oil shock of the 1970s.²⁰ Most of the cost projections were significantly high.

An additional consideration with costs was that the lack of participation of developing countries would shift investment and employment abroad to countries that were not subject to controls. Many debates in the Senate and House of Representatives centred on this theme and there was a significant concern over the loss of industry and jobs on the part of Senators and Representatives.²¹ The debate in the Senate on the Byrd-Hagel resolution focused heavily on this. Therefore, the overall cost of participation in the treaty did not only involve the cost of compliance, but other indirect costs through flight of capital and potential job losses to developing countries.

In addition to the high costs, it was perceived that the environmental benefits of the treaty would be too minor to justify the costs. This was related to the perception that any effort by Annex I countries would be counterbalanced by increases in the developing world. Unless climate change was regulated globally the US efforts would not make a difference, while at the same time being very costly. There were arguments in policy circles that the treaty was 'unfair' to the United States because it demanded a sacrifice while not delivering on reducing emissions globally.²² This view on unfairness was strengthened when comparing the commitment of the United States with other Annex I countries. Some countries, like Australia, managed to negotiate an increase of their emissions relative to 1990 levels. Others, like the former Soviet Republics and Russia, negotiated a different base level which gave them plenty of room for emissions growth. Very few countries had onerous emissions limits relative to their Business as Usual (BAU)

¹⁸ Vezirgiannidou 2008, p. 49. ¹⁹ Barrett 1998, p. 27.

²⁰ Bush Administration 2001. ²¹ Vezirgiannidou 2008, pp. 50–1.

²² Saunders 2006, pp. 184–6.

emissions trajectories, and the United States was one of these few. A large number of Congressmen considered this as a failure of the Administration to negotiate an acceptable commitment for the United States.²³

It was because of such concerns with cost that the US delegation was pushing hard for a wide use of the flexibility mechanisms in negotiations that followed the conclusion of the Protocol. It was thought by the Clinton Administration that if costs could be reduced the Senate might approve the Protocol. But the breakdown of negotiations in 2000 over sinks showed that the United States might not be able to rely on cost-effective implementation as much as they hoped.²⁴ This reduced the popularity of the agreement among policy-makers even further. The United States also tried to involve developing countries in negotiations between 1998 and 2000 but there was no success on that front either.²⁵

Considering all the above, it is not surprising that the United States preferred no agreement to agreement and therefore withdrew. However, applying the same cost–benefit logic to the remaining Annex I countries, one would suggest that the puzzle is not why the United States withdrew but why anyone decided to go through with the treaty. Besides a few countries that stood to benefit from Kyoto by selling emissions credits, there were no additional economic or environmental incentives for Annex I countries to continue with Kyoto and most faced similar constraints with the United States.²⁶ This indicates that there is more to the US withdrawal that can be discerned solely by a cost–benefit analysis of the provisions. The following paragraphs therefore focus on the particular domestic constellation of interests that led to the US withdrawal.

There are several actors to consider in relation to public and foreign policy decisions in the United States. The two main ones that are of relevance for international treaties are the Administration and Congress. The Administration negotiates international treaties, whereas the Congress is responsible for ratifying treaties and controls the funding

²³ Park 2000, p. 83. ²⁴ Lisowski 2002, p. 111. ²⁵ Lisowski 2002.

²⁶ There are several explanations on why other Annex I countries decided to stick with Kyoto, some of which are particular to individual states and some that are more general. For a discussion see *Global Environmental Politics*, vol. 7, no. 4 (special issue on the Comparative Politics of Climate Change) as well as Hovi *et al.* 2003.

for their implementation.²⁷ On a lower level, both the Administration and Congress are affected in their decisions by various stakeholder groups, including industries, public advocacy groups like NGOs and public opinion more generally. Congressmen are much more bound to their local communities and advocate local interests,²⁸ whereas the Administration is more comprehensive in its outlook. I will start from the lower level upwards to examine the positions of all these groups.

In terms of the public opinion on the Kyoto Protocol, surveys conducted both before the treaty was signed and after show a clear majority of support for the Protocol. Surveys conducted in 2001 and 2002 show that respondents preferred mandatory to voluntary emissions controls, even if this would have economic consequences. However, they did not support raising taxes for emissions controls, with the exception of taxes for gas-guzzling cars.²⁹ Surveys of Congressional members and executive officials in 2002 and 2004 also showed a strong majority in favour of US participation in the Kyoto Protocol (72 per cent in favour in 2004).³⁰ Therefore, it appears that both the public and politicians support Kyoto on the face of it. So why did they not ratify it?

First of all, although there is an overall acceptance of Kyoto's legitimacy in political circles and the public, there is a disparity among the main political parties. Congressional staff in the Republican Party supported the Protocol only by 21 per cent in 2004, an interesting contrast with the 68 per cent support by the executive branch, which was also Republican at the time.³¹ Also, in terms of public support, although Republican voters approved of Kyoto by 54 per cent in 2001 and by 83 per cent in 2003, they also agreed that the United States was right not to accept Kyoto by 64 per cent in 2001 and 49 per cent in 2002 (only 37 per cent thought the decision was wrong in 2002).³² In contrast, Democratic congressional staff approved of participation to Kyoto by 94 per cent and Democratic voters approved of the Protocol by 86 and 94 per cent in 2001 and 2003 respectively and also disapproved of the Administration's decision not to accept Kyoto by 66 and 70 per cent in 2001 and 2002 respectively.³³ Therefore, the support of Kyoto by Democrats is quite established, whereas the Republican view appears more fickle when looking at the survey results. There does seem

²⁷ Hao 1997, p. 27. ²⁸ Harrison and McIntosh 2007, p. 10.

²⁹ Brewer 2005, pp. 368–9. ³⁰ Brewer 2005, p. 371. ³¹ Brewer 2005.

³² Brewer 2005, p. 367. ³³ Brewer 2005.

to be evidence of a rift between the parties in relation to support of the Protocol. Republicans seem to be much more sceptical of its benefits, and it was a Republican Administration that refuted it.

An additional reason that policy-makers are unresponsive to the public could be that they are unaware of the actual level of public support for Kyoto. The same 2004 survey of politicians showed that only 38 per cent recognised that the majority of the public favours participation in Kyoto.³⁴ This shows a certain lack of awareness of public attitudes on the part of politicians, something they are often criticised for. But of course politicians do not really enjoy extensive exposure to the public, especially once in office. They are however significantly exposed to pressure or lobby groups, which have much more pressing demands on several issues, including climate change policy.

Industry and business groups are very prominent in US politics. The degree of access of industry groups to the policy-making process is considered to be very high in US politics, more so than in other industrialized countries.³⁵ This is assisted by the federal structure which gives significant powers to individual states, which in turn produce politicians with narrow local interests as their main focus. The position of US industry in the years between Kyoto's negotiation and US withdrawal was not entirely negative towards the treaty. First of all, there were aspects of US business that would greatly suffer from global warming. The insurance industry in particular stood to suffer significant losses through the effects of climate change like the spread of tropical diseases, flooding due to increased precipitation and sea level rise, increased heatwaves and wildfires.³⁶ They therefore had an interest in protecting the climate and thus supporting the Kyoto Protocol. Even within the fossil fuel industry, there was not a uniform interest because oil is cleaner than coal and gas is cleaner than oil.³⁷ In addition, certain European fossil fuel producers, like BP, accepted climate change as a problem and started investing in renewable energy.³⁸

³⁴ Brewer 2005. ³⁵ Depledge 2005, p. 12.

³⁶ Saunders 2006, pp. 201–5. Although insurance premiums would rise in sensitive areas, and this could benefit the insurance industry, the potential costs of insurance claims would most likely outweigh the benefits. This was demonstrated recently with the destruction and consecutive claims after hurricane Katrina in New Orleans.

³⁷ Boehmer-Christiansen and Kellow 2002, p. 36. ³⁸ Levy 2003, p. 94.

Despite the fact that there was no obvious reason why US industry should vehemently oppose Kyoto, this is in fact what happened around 1997. The insurance industry did not raise its voice significantly in favour of Kyoto. On the other hand, fossil fuel industries and manufacturers were vehemently opposed to the treaty, and to binding regulation more generally.³⁹ There are several strategies the industry pursued to discredit climate policy. At first, they questioned the science of climate change.⁴⁰ Climate-sceptic science was funded by industrial lobby groups and these scientists were often invited to give testimonies to the Senate or House Committees.⁴¹ In time, however, it became increasingly difficult to uphold that position, as there was significant progress in climate science and sceptics were increasingly marginalised. This was close to the time of the Kyoto negotiations, and the industry focus shifted from the science to economics in their fight against GHG regulation. They argued that the economy would suffer, and increasingly pointed out that their competitors in the developing world would not be subject to controls, therefore increasing unemployment and capital flight.⁴²

The exact influence of industry groups on Congress cannot be straightforwardly traced. However, it is widely known that industry has easy access to the ear of politicians in the United States.⁴³ In addition, there is a strong correlation between industry groups' arguments and those provided in Congress in 1997 (and later by the Bush Administration) against the Protocol. It could therefore be said that the Byrd-Hagel Resolution was quite significantly influenced by fossil fuel and manufacturer interests.

It is more difficult however to attribute the 2001 decision to leave the Protocol to business interests. This is because by 2000 the fossil fuel industry overall had changed its intransigent position and started being more supportive of GHG emissions controls.⁴⁴ Levy (2003) attributes this to two factors. On the one hand, the European innovators who had diversified their investment portfolio were starting to move into new markets, leaving their US counterparts behind. Considering the global nature of the fossil fuel industry, this was considered to compromise the

³⁹ Levy 2003, p. 83. ⁴⁰ Levy 2003, p. 82. ⁴¹ Levy 2003.

⁴² Levy 2003, p. 83.

⁴³ Bang *et al.* 2005; Bryner 2000, p. 127; Depledge 2005, p. 12.

⁴⁴ Bang *et al.* 2005, pp. 291–2.

competitiveness of US firms.⁴⁵ In addition, perceptions about the cost of emissions controls were starting to change; ‘win-win’ rhetoric was increasingly popular, meaning that emissions reductions could also bring profit through new technology and ‘green’ markets.⁴⁶ In this light, Levy finds the fact that President Bush decided to withdraw from Kyoto perplexing.⁴⁷

However, this decision would not be perceived as perplexing if one considers the Bush Administration and the President’s close ties with the oil and gas industry, especially companies that were still fighting GHG controls tooth and nail.⁴⁸ The Bush Administration in particular played its own independent role in the demise of Kyoto in the United States. Although public support for the treaty was reasonably strong and some parts of industry were changing their tune towards favouring controls and even local initiatives at states and cities were trying to reduce emissions, the Bush Administration was not in favour of controls. This was largely due to their connection with particular fossil fuel interests and their conviction that refuting the Protocol would bear no political cost, given the low level of perceived interest by the public.⁴⁹ According to Lisowski, President Bush preferred an energy policy of expanding the use of oil and gas, which clashed with the Protocol’s aims; and although there were some international costs involved in repudiating the Protocol, domestically this was perceived by the Administration as a benefit.⁵⁰ Although this might have been true in relation to the benefits accruing to the fossil fuel industry, connected with the Administration, it will become evident in the following section that domestic costs did accrue from the repudiation of the Protocol.

In sum, it is fair to say that the withdrawal of the United States was a result of a combination of factors, including genuine cost and benefits calculations, as well as the preferences of the Administration and its own perceptions about public and interest group preferences. It perhaps failed to realise that attitudes were changing and thus Kyoto should not perhaps be totally abandoned. The following section tries to account for

⁴⁵ Levy 2003, p. 94. ⁴⁶ Levy 2003, p. 93. ⁴⁷ Levy 2003, p. 94.

⁴⁸ President Bush had pursued a career in the oil and gas industry for eleven years. In addition, several members of his administration, including Vice President Cheney, and the Commerce and Energy Secretaries had held senior positions and held stock and shares in oil, gas and automotive industries. For more details see Lisowski 2002, p. 106.

⁴⁹ Lisowski 2002, p. 104. ⁵⁰ Lisowski 2002, p. 112.

the re-engagement of the United States in the climate regime, by assessing how the two factors of superior 'BATNA' and the constellation of domestic interests changed in the period between 2001 and 2007.

US re-engagement in 2007

The reasons for US re-engagement in 2007 by their agreement to join the consensus on the Bali Roadmap can again be traced in relation to their perceptions of a superior 'BATNA' and the domestic constellation of interests.

In relation to the superior 'BATNA', the two issues that made no agreement preferable were the costs to the economy and the non-participation of developing countries. A substantial change in the position of developing countries in the Bali Conference however means that they have agreed to take on additional commitments in the post-Kyoto treaty.⁵¹ Of course, they have made this contingent on financial and technological support by Annex I countries, which almost caused the US withdrawal of support for the Roadmap.⁵² In addition, the level of commitment of the developing world will be revealed in the negotiations leading to the Copenhagen agreement in 2009. It is highly unlikely that this will involve actual emissions reductions from non-Annex I countries. Most likely caps on increases will result. Even so, this is a substantial commitment from developing countries, and it will increase flexibility in implementation and cost-effectiveness, both of which are substantial US goals. In this sense, the participation of developing countries alleviates one of the major stumbling blocks for US participation.

Another important issue that led to US withdrawal was the concern over the costs of implementation. This is somewhat alleviated by the participation of developing countries, because it does eliminate the options for emissions leakage and the loss of competitiveness vis-à-vis developing countries. Additional cost-saving mechanisms will most likely be available in the form of sinks, joint implementation and emissions trading. This makes it easier for the United States to participate, as cost-effectiveness is one of their main concerns. However, assessments of cost on any proposed post-Kyoto treaty would have to be made nearer the finalization of text, and we do not yet know what the

⁵¹ Depledge 2008, p. 154. ⁵² Earth Negotiations Bulletin 2007, p. 20.

particular provisions will look like. Either way, assessment of cost will make a big difference for US approval of any prospective treaty. It is obvious however, from domestic processes, outlined below, that there is much more interest in climate policy in the United States than was the case in 1997 and even in 2001. This will also affect how assessments of costs are made.

Domestic politics will again play a significant role on the perceptions of 'BATNA' and the benefits of agreement. Several developments in the years 2001–8 give cause for optimism. There is a particular change in the perceptions of both public and private stakeholders at the local and national level over the possible costs and benefits of GHG mitigation. As discussed above, the united front of business against climate policy is starting to shift. There are several industry initiatives to curb GHG emissions in the United States, like the Partnership for Climate Action, which has a goal of reducing their GHG levels by 15 per cent relative to 1990 by the year 2020.⁵³ This is a more ambitious commitment than Kyoto and this partnership includes major players in the fossil fuel and manufacturing industry in the United States (Shell, BP, Du Pont). Other initiatives, like the Chicago Climate Exchange, are working through emissions trading as a mechanism for GHG reductions.⁵⁴ Industry interest in GHG reductions comes from perceived benefits of technological advances and first-mover advantages.⁵⁵ Another incentive is the potential of lawsuits for pollution (much like those against tobacco companies and fast food chains).⁵⁶ In addition, some companies take measures in anticipation of government action.⁵⁷ Once companies take measures for GHG reductions, they are then keen to impose these on their competitors in order to even out the playing field. Pressure to the federal government then comes from industry itself. However, not all companies are interested in mitigation and, according to Bang *et al.*, the voices of those opposing controls reverberate more with the government.⁵⁸ Of course this was mostly true for the Bush Administration, which had links to particular industrial groups that opposed regulation. This is not so much the case for the Obama Administration.

An additional important factor in terms of the US domestic constellation of interests is action taken by local actors, particularly states and

⁵³ Bang *et al.* 2005, pp. 291–2.

⁵⁴ Bang *et al.* 2005.

⁵⁵ Bang *et al.* 2005, p. 292.

⁵⁶ Saunders 2006, pp. 201–5.

⁵⁷ Bang *et al.* 2005, p. 292.

⁵⁸ Bang *et al.* 2005, p. 292.

cities.⁵⁹ The lack of federal policies to tackle GHG emissions has spurred a number of states and other local actors into action. The level of ambition of those varies greatly, but most reflect a general displeasure with federal inaction. There are states that apply significant mandatory policies to curb GHGs; California (with a Republican governor) has taken measures to control tailpipe emissions of CO₂ by cars amongst its policies, something that the northeastern states are considering, provided it clears the Courts, as it has been challenged by the auto industry.⁶⁰ By 2007 the number of states that had adopted explicit measures to mitigate GHGs was more than twenty.⁶¹ Also, twenty-two states had implemented Renewable Portfolio Standards mandating that renewable energy provides an increasing share of their electricity by 2006. New York City has committed to a target of 25 per cent renewable electricity by 2013.⁶² There are several reasons that states opt for these measures. Some are motivated by public support for climate change policies and also want to attract professionals by providing environmental services.⁶³ Others are economically motivated, either to protect their resource base from the effects of climate change, or to increase their economic output through investment in clean technologies.⁶⁴ In that sense, not all state initiatives are environmentally motivated, although the results can induce environmental improvements.⁶⁵

Regardless of why states may pursue climate policies, once they have done so they then have an incentive to spread regulation to other states in order to minimise competitive pressures and to create further markets for their products.⁶⁶ They are therefore more likely to push for federal regulation in order to share the costs with other states and not to disadvantage their industries. States have actually put pressure on the federal government through a court action against not regulating CO₂ in the Clean Air Act. Thirteen states were involved in this lawsuit in 2003.⁶⁷ Although the Supreme Court decided in 2007 that the Environmental Protection Agency (EPA) had the authority to regulate, the Bush Administration refused to instruct it to do so, claiming that reductions would be offset by Chinese emissions.⁶⁸

⁵⁹ Bang *et al.* 2005; Koehn 2008; Kosloff *et al.* 2004; Moser 2007; Rabe *et al.* 2005.

⁶⁰ Koehn 2008, p. 66. ⁶¹ Koehn 2008, p. 61. ⁶² Koehn 2008, p. 65.

⁶³ Rabe *et al.* 2005, p. 23. ⁶⁴ Rabe *et al.* 2005, p. 10.

⁶⁵ Rabe *et al.* 2005, p. 32. ⁶⁶ Rabe *et al.* 2005, p. 26.

⁶⁷ Kosloff *et al.* 2004, p. 192. ⁶⁸ Koehn 2008, p. 64.

The recent shift of position by several US states and industries over their estimates of costs and benefits of climate change mitigation means that there is more domestic pressure in favour of regulation. However, again this is not a unified position across the board. There are still states and industries who oppose action, and several authors have concluded that positive developments are the exception rather than the norm.⁶⁹ A lot of these initiatives however come from multinational companies and also several states and cities are linking their efforts to international mitigation, including that of Kyoto-type initiatives, like the EU Emissions Trading Scheme (ETS). This linkage with international efforts brings even more pressure to the government. An additional element of course is the link of such efforts to Congressional politics and the Administration. It was out of federal inaction that these initiatives came about.⁷⁰ However, several developments in Congress and the presidential race can also shed light on US re-engagement in Bali.

There is a broad agreement in the literature that one of the major stumbling blocks to the ratification of Kyoto in the United States has been the separation of powers between Administration and Congress during the Clinton years, but also the particular role of Congress in international policy-making.⁷¹ Specifically, Congressmen's commitment to their immediate constituencies and their accessibility to industry have been cited as reasons for the domestic deadlock on climate policy. Additionally, the fact that the Republicans enjoyed a majority in Congress has been cited as a hindrance to the efforts of the Clinton Administration's efforts on Kyoto. This majority was largely unchanged during most of the Bush Administration years, in which case their preferences on Kyoto were similar.

Interestingly, however, there have been a number of new bills proposed in Congress towards regulating GHGs at the federal level. Starting in 2003, several bipartisan proposals in the House and Senate on comprehensive regulation of GHGs have been introduced and increasingly gained more support. All these proposals are not as ambitious as the US Kyoto targets and none have been passed into law. The Lieberman-Warner Bill of 2008 was the only one that made it through a

⁶⁹ Bang *et al.* 2005, 293; Moser 2007, p. 140. ⁷⁰ Kosloff *et al.* 2004.

⁷¹ Bang *et al.* 2005, p. 293; Bryner 2000; Depledge 2005, p. 12; Harrison and McIntosh 2007, p. 9; Tamura 2006.

Senate Committee.⁷² Although major bills like these have not been successful, the amount of climate relevant work in Congress has really taken off since the balance of power shifted from the Republicans to the Democrats in 2006. The year 2007–8 saw 235 bills, resolutions and amendments addressing global climate change and greenhouse gas (GHG) emissions by July 2008 – compared with the 106 pieces of relevant legislation the previous Congress submitted during its entire two-year (2004–6) term.⁷³ Some of these initiatives have been passed into law, like the Energy Act of 2005, which included several GHG-reducing measures.⁷⁴ Also in 2005, the Senate passed a resolution endorsing ‘mandatory, market based limits and incentives on emissions of GHGs’, thus ‘superseding’ its 1997 Byrd/Hagel resolution.⁷⁵ Finally, in March 2007, the House of Representatives voted 269:150 to form a new Select Committee on Energy Independence and Global Warming, chaired by Democratic representative Edward Markey.⁷⁶

The above discussion on Congressional initiatives shows that there is increasing movement in Congress in taking climate change seriously and trying to regulate at the federal level. The lack of success for more substantial initiatives like the Lieberman-Warner Bill indicates that Congress has not yet reached a point where pro-regulation interests dominate. The increase of initiatives for climate legislation, especially considering similar developments at a more local level, indicate that the balance of domestic interests is not monolithic anymore and that the climate agenda is more and more forcefully pushed forward. This can only increase given the recent result of the 2008 election, where the candidate with a strong climate agenda was elected. An Administration that favours action will have a positive effect on Congress, and a Democrat-controlled Congress will be much more in favour of the Administration’s initiatives.

The above paragraphs centre on the evolving attitudes of business, local authorities and Congress. It is useful at this stage to discuss public opinion and its role in these processes. The reason public opinion is discussed last is because it seems to figure the least in most policy-makers’ calculations, and most do not even seem to be aware of it.⁷⁷ Most analysts agree that the public has not been vocal enough on the issue of climate change for politicians to take notice.⁷⁸ It therefore seems that the above

⁷² Pew Centre 2008a. ⁷³ Pew Centre 2008a. ⁷⁴ Pew Centre 2005.

⁷⁵ Saunders 2006, p. 207. ⁷⁶ Pew Centre 2008b. ⁷⁷ Brewer 2005, p. 371.

⁷⁸ Bang *et al.* 2005, p. 295; Harrison and McIntosh 2007, p. 6; Lisowski 2002.

developments are despite, rather than because of, public opinion on the issue. Although surveys show that support for the Kyoto Protocol is high, the level of concern over climate change peaked at 40 per cent in 2000 but fell every year after that to 26 per cent in 2004.⁷⁹ This roughly reflects the diminished priority of the issue after the 9/11 bombings and preoccupation with the war on terror. After Hurricane Katrina in 2005 there is again an increase of concern (reaching 41 per cent in 2007) but we also see a decrease in the beginning of 2008 (37 per cent), perhaps reflecting the priority of economic concerns after the financial crisis.⁸⁰ Overall, the level of concern is not significantly high to grab the attention of policy-makers. Other processes, like international pressure, changing business attitudes and state level and local initiatives seem to be making more of an impact on federal policy than the levels of concern in the general public.

The limited attention of the public to the issue of climate change is mostly related to the view that it is a distant rather than an immediate threat.⁸¹ More urgent issues like the economy and security focus the attention of the public. Even though major events like Katrina were expected to affect public attitudes,⁸² this did not really materialise since the media did not highlight the relationship between Katrina and climate change. However, the fact that a large percentage of the population approves of Kyoto and disapproves of its rejection does give some cause for optimism. Although the public does not yet seem ready to fight hard on climate change, they do not oppose regulation either (rather the contrary). The generally favourable public attitude towards regulation on climate change could strengthen the position of those states and businesses that are in favour of regulation. It also appears unlikely that the public will be motivated against climate change regulation, which is positive for US re-engagement.

A final aspect showing changing perceptions of the climate change problem in the United States is related to federal initiatives on climate policy. The Bush Administration acknowledged climate change as a real threat but disagrees that Kyoto is the best way for the United States to contribute to solutions; thus the Bush Administration developed its own approach to climate policy. This is admittedly very weak, involving intensity targets and voluntary schemes with industry that do not reflect a real change from business-as-usual.⁸³ Internationally, the Bush Administration

⁷⁹ Gallup, 21 April 2008. ⁸⁰ Gallup, 21 April 2008. ⁸¹ Gallup, 21 April 2008.

⁸² Saunders 2006, pp. 199–201. ⁸³ Bang *et al.* 2005, p. 291.

initiated cooperative agreements on technological innovation and technology transfers, mainly with South-east Asian countries. Again these talks had no teeth, and some commentators thought they were counter-productive to the Kyoto process.⁸⁴ Technology initiatives were prominent at home too. None of these policies indicates a strong commitment on the part of the Bush Administration on the issue of climate change. However, it does indicate that domestic and international pressures did not allow the Bush Administration to ignore climate change and pushed them to at least appear to be taking measures to address this problem.

The above developments can together explain why the US negotiators did not block the consensus on the Bali Roadmap, despite their initial reticence after the Indian amendment to the text (which stipulated that developing country action would be conditional on funding and technology transfers). The changed attitude of some business interests, pressure from individual states, a Democrat-controlled Congress and international pressure and concessions all contributed to US re-engagement. Concerns over costs are diminishing and potential benefits from green technologies are starting to become more prominent in industry, local politics and Congress. Therefore support for domestic mitigation measures is increasing in the domestic context. At the same time, concerns over competitiveness are alleviated through developing countries' concessions. Finally, it is worth noting that the Bali Roadmap is just a framework for further negotiations and the United States has not bound itself to anything specific yet. Therefore, the exact level of their commitment remains to be seen. The election of Barack Obama as president in November 2008 is a promising development, given that he is committed to a strong response on climate change, and has emphasised this issue during his campaign. With a majority of Democrats in Congress, more climate change policy might be able to pass into legislation.

I have argued so far that US re-engagement is due to domestic changes which have increased the level of support for climate policy and to the recent agreement of developing countries to participate in a post-Kyoto treaty. However, as much as there are many reasons for optimism, there still could be some stumbling blocks for a future treaty. I discuss these briefly here.

One potential stumbling block includes the negotiation process, and particularly the level of financial transfers between North and South.⁸⁵

⁸⁴ Bang *et al.* 2005, p. 292. ⁸⁵ Saunders 2006, p. 207.

The United States was not happy about making developing country commitments contingent on financial transfers. If financial transfers are particularly high, the benefits of developing countries' participation could be overshadowed by the costs of financial and technology transfers. That will make the treaty much less appealing to domestic groups, particularly considering that developing countries' targets will be much softer than those of the United States. There are already ominous signs from the recent Climate Conference in Poznan in December 2008. Developing countries felt like the commitment to financial and technology transfers was not evident on the part of Annex I countries.⁸⁶ And US Senator John Kerry, although stating that 'President Obama will be like night and day to President Bush',⁸⁷ also reiterated the well-established position that US commitments were contingent on the involvement of the developing world.⁸⁸ If both parties are waiting for the other one to show commitment first the negotiation will be caught up in mutual accusations and nothing may materialise.

Another open question is whether the progressive forces on the climate change issue are actually strong enough to ensure ratification of a new agreement. Several authors find that these forces are still in the periphery of policy-making.⁸⁹ The new Obama Administration will definitely push the agenda, but will Congress be swayed? The fact that comprehensive bills on climate policy have been rejected, even though they are much more modest than the Kyoto targets is a cause for concern. There are several states that are dependent on fossil fuel extraction or process and which are heavy users.⁹⁰ Congressmen from these areas are likely to fight hard against meaningful policies. The expansion of favourable industry coalitions and the level of ambition of the commitments will play a significant part in the acceptance of a future treaty by the United States.

A final obvious hurdle is the current financial crisis that has affected the global economy. This is a factor unrelated to the negotiation process but which may alter the negotiating positions of several parties, making them more conservative in relation to their ambition over commitments. The negotiations are to be concluded at the end of 2009, a time in which most experts expect the global economy to be in recession. This could affect the willingness of most parties to commit to strong reductions and

⁸⁶ Rosenthal 2008. ⁸⁷ Rosenthal 2008.

⁸⁸ Black 2008. ⁸⁹ Bang *et al.* 2005; Moser 2007. ⁹⁰ Tamura 2006, p. 296.

would also intensify distributive concerns. Strong leadership could resolve those issues, but they are likely to complicate the negotiation and/or ratification process of a post-Kyoto agreement.⁹¹

Climate deadlock and breaking deadlocks

This chapter argues that the causes of deadlock between the United States and the remaining Kyoto countries were rooted in the US perception of a superior 'BATNA' and the domestic constellation of interests which created that perception. These two hypotheses work particularly well in this case, as shown above. The BATNA-related solution set also works well in this case. According to the BATNA-solution set outlined in the Introduction, negotiators can expand the zone of agreement, such that the proposed solution outweighs the 'BATNA'. In this case, both US and other Annex I countries' negotiators managed to convince developing countries to accept in principle some commitments in the post-Kyoto regime, thus expanding the zone of agreement for the United States and making their participation more likely, as seen in the Bali Roadmap.

In terms of the domestic constellation of interests, however, the changes were much more organic than the ones pursued by the negotiating parties. Although the inclusion of developing countries will play a role in placating some domestic concerns over costs and competitiveness, there was not any evident intentional activity to alter the domestic configuration of interests, either internationally or by domestic negotiators. Internationally there was very little negotiators could do, considering the United States had withdrawn from the Protocol. Domestically, the Bush Administration was uninterested in pushing the climate agenda forward.⁹² Therefore, all progress was driven by motivated Congressmen and state-level administration. In the business community, progressive coalitions formed in anticipation of legislation and to reap first-mover advantages.⁹³ This perhaps indicates the limited potential of international processes in

⁹¹ Since the time of writing and publication the Copenhagen Conference was concluded. The US played a leading role in a new agreement which specifies voluntary emissions targets from key developed and developing states. This has not yet been endorsed by the full membership of the convention, and has been criticised as being weak and disrespectful of the multilateral nature of the convention process. However, this does not change the conclusions over US engagement made here, or the driving forces behind such engagement.

⁹² Lisowski 2002. ⁹³ Saunders 2006, pp. 201–5.

changing particular domestic perceptions of interest. However, a more 'climate-friendly' White House might have been able to make more progress domestically than was the case.

Besides the two hypotheses that I have examined in some length here, it is useful to assess whether one can draw insights in this case from the other hypotheses. The second hypothesis stipulates that deadlocks can occur because of bluffing. There is no indication here that this was the case, particularly at the point of deadlock at The Hague in 2000. Although the eventual deal on sinks was very similar to the deal rejected by the EU in 2000, this was mostly to do with the changed negotiation dynamics after the exit of the United States.⁹⁴ The 2000 rejection of the deal was as far as we know sincere and led to the deadlock. Perhaps the tipping points of each party were not well understood at the time.

The third hypothesis specifies that deadlocks sometimes occur with more equal power distributions or when the culture of the parties that constitute the balance of power is diverse. Again this does not seem to be particularly prevalent in this case. The power distribution was more skewed towards the United States, since they were allied with a number of Annex I countries (leading the umbrella group) and their position of prioritizing cost-effectiveness was also shared by Russia and the Countries with Economies in Transition (CEITs). The EU was rather isolated in its emphasis on domestic implementation, and although supported by developing countries, these had no commitments under Kyoto and therefore could not add too much to its leverage. Considering this, one would not necessarily expect deadlock, but rather more flexibility on the part of EU negotiators.

The fourth hypothesis supports that certain institutional mechanisms can contribute to deadlock. The consensus decision-making mechanism in the WTO is mentioned as an example and this also applies in this case. The need for consensus in the adoption of rules in the climate regime definitely contributed to the deadlock, although it would be difficult to imagine either the United States or the EU being bypassed by majority voting procedures. It is conceivable therefore, given the importance of the two main contending parties, that deadlock would have ensued even with a different institutional arrangement.

⁹⁴ This essentially amounted to the EU trying to get other reluctant Annex I countries on board. According to Hovi *et al.* 2003, p. 19, the EU gave in to these countries' demands in order to secure agreement.

Finally, the fifth hypothesis states that deadlock sometimes occurs because fairness and justice matter. In such cases deadlock happens because one or more parties perceive the rules as unfair or illegitimate. The United States often made fairness claims with respect to the impact of the Kyoto Protocol on its economy, particularly in relation to developing countries.⁹⁵ Although the assessment that Kyoto would harm the US economy and provide advantages to developing countries in the short term is probably correct, it is debatable whether this is 'unfair' to the United States. This is because the United States enjoys far higher per capita income levels and shares a significantly higher per capita emissions level than any of its developing country competitors. The fairness argument was mostly for domestic consumption, since the domestic configuration of interests was already opposed to Kyoto.

Conclusion

This chapter examined two of the hypotheses on the origins and resolution of negotiation deadlocks using the climate regime as a case study. It is argued here that the deadlock between the United States and the remaining Kyoto parties was a result of the domestic constellation of interests and the perception of a superior 'BATNA' on the part of US political elites.

Concerns that led to deadlock and the eventual withdrawal of the United States from the Kyoto Protocol were mostly related to costs, both of domestic implementation and indirectly through loss of competitiveness. This was aided by a generally impassive public and the close ties of the Bush Administration with conservative parts of the fossil fuel industry. However, changes in some of these domestic constituencies, particularly in relation to cost assessment and worries over competitiveness and participation have led to a gradual re-engagement with the regime to the extent that the United States agreed to take on further commitments under the Convention.

There are reasons for both optimism and scepticism for the re-engagement of the United States in the climate regime. Some level of re-engagement has already occurred in their agreement in principle to take on new commitments under a post-Kyoto treaty. But we are not out of the woods yet. Delicate negotiations will be required for a solution that will satisfy Congress.

⁹⁵ Vezirgiannidou 2008.

8

The role of informal negotiation processes in breaking deadlocks: the UN Security Council

JOCHEN PRANTL

This chapter analyses the causes and consequences of deadlocks in the UN Security Council, highlighting in particular the impact of the underlying power distribution among its members (Hypothesis 3) as well as the institutional features that facilitate or deter international agreement in addressing collective action problems (Hypothesis 4), including the normative issues involved (Hypothesis 5). The central premise is that in order to understand the making and breaking of deadlocks, one needs to look at how members of an organization establish institutional counter-measures to alter the intra-institutional balance of power (solution set 3) and to adjust institutional decision-making processes to facilitate agreement (solution set 4), including the normative issues that arise from those adjustments (solution set 5). In particular, we need to account for the dynamic nature of the formal and informal processes that define multi-lateral diplomacy within an institutional setting. In order to substantiate this claim, the chapter addresses three questions: first, how do power distribution and institutional design help or hinder the emergence of deadlock? Second, why has the role of informal negotiation processes grown in importance to break or prevent deadlock? Third, what is the nature of these processes and how do they contribute to breaking or preventing institutional deadlock?

If one had to define the institutional design of the UN Security Council in a nutshell, its ‘in-built flexibility’ certainly stands out as the defining element that clearly distinguishes the institution from other intergovernmental bodies. Learning from the shortcomings of the League of Nations, UN founders ‘were determined . . . to avoid erecting a static defence, an institutional Maginot Line’ by allowing for flexible rules of procedures and guidelines.¹ Maximum flexibility in Security Council decision-making was considered a key requirement to address security challenges effectively. Most of the current items on the Security

¹ Luck 2008, p. 62.

Council's agenda – e.g. peacekeeping, peacebuilding, children in armed conflict, terrorism, climate change, weapons of mass destruction – cannot be found in the UN Charter. Council members therefore had to invent new procedures and to adjust existing ones to deal with those new challenges. The Council, as the master of its still *Provisional Rules of Procedures*, has a theoretically unlimited range of options to adjust institutional decision-making, both at the formal and informal levels, in order to facilitate agreement in the management of risk and the resolution of conflict.² Those negotiation processes can have a more regular pattern, or they can emerge ad hoc, as will be further illustrated below.

While the in-built flexibility of the Council clearly avoided an *institutional* Maginot Line, the in-built inequality of the Council's membership erected a *political* defence line, epitomised in the veto power of the five permanent members (P-5).³ UN founders transformed the former Second World War alliance into a permanent oligopoly of powers with special voting and decision-making rights. The accommodation of great power interests, including their consensus on central questions of war and peace, was considered more important than equal rights and opportunities of the Council membership in defining the course of action. UN Security Council performance is therefore defined by the tension arising from its in-built flexibility on the one hand and its in-built inequality on the other, which are essential features in the making or breaking of deadlocks. Looked at from this perspective, the workings of the Council in fact illustrate a play between Hypothesis 4 and Hypothesis 3. Underlying the establishment of a permanent oligopoly of powers was the belief that concerts of power are less deadlock-prone compared to institutional settings with a high degree of diverging interest or culture among the Great Powers. At the same time, the dependency on great power consensus constituted an institutional peculiarity that potentially made the Security Council prone to deadlock. Especially in those cases where the Council was or appeared to be deadlocked, its in-built flexibility allowed for procedural innovation to overcome or circumvent blockade situations.

This chapter looks in particular at the role of institutional innovation and informal negotiation processes in breaking deadlocks. Although

² Aust 1993.

³ The P-5 includes China, France, Russia, the United Kingdom and the United States.

those processes are 'an important feature of world politics, not rare and peripheral', they have remained remarkably understudied.⁴ Informal negotiation processes are located on a formal–informal continuum, with varying degrees of formalization and legalization. They may exist permanently or develop ad hoc around a specific issue. Looking at the formal–informal continuum, we see at the thinner end bilateral and multilateral caucuses and backstage negotiations to facilitate agreement in addressing collective action problems. At the thicker end, we may find more formalised informal institutions, e.g. bargaining coalitions, contact groups, core groups, and groups of friends.

It is argued that informal negotiation processes may break deadlock situations that have arisen as a result of either change in the structural conditions of the international system – e.g. the rise and demise of the Cold War; the acceleration of decolonization in the 1960s and 1970s – or of distributive strategies employed by veto players and groups of member states respectively. This is a key pattern which can be observed throughout the institutional history of the Security Council.⁵ In order to illustrate the point, this chapter concentrates on key innovations of Security Council decision-making across time that occurred both in direct response to deadlock but also in an attempt to reduce the probability of political impasse and deadlock.⁶ The chapter looks in particular at:

- (1) the Uniting-for-Peace Resolution, first adopted during the Korean War (1950–3), which expanded the competences of the General Assembly at the expense of the Security Council;
- (2) the Advisory Committee on the United Nations Emergency Force (UNEF), created in response to Security Council deadlock over the Suez crisis of 1956, which helped to invent the concept of UN peacekeeping;
- (3) the emergence of informal Security Council consultations in the early 1970s as an exit strategy to escape from the multiple constraints of formal meetings;

⁴ Lipson 1991, p. 498.

⁵ The simultaneity of deadlock and institutional development can also be observed in other complex international organizations such as the European Union. (Héritier) 1999.

⁶ Héritier argues in a similar vein that innovative informal strategies and policy-making patterns in fact prevent political impasse and reinforce the primary functions of the European polity, that is, the accommodation of diversity, policy innovation and legitimization. (Héritier) 1999.

- (4) informal P-5 consultations that emerged with the Cold War thaw and that have become a regular pattern in the post-Cold War era; and
- (5) the proliferation of informal groups of states since 1989 in order to cope with the heavily increased workload of the Security Council.

Uniting-for-Peace Resolution

The Uniting-for-Peace Resolution constitutes the earliest case of breaking Security Council deadlock during a major crisis situation through the adjustment of institutional decision-making processes. The resolution created an exit mechanism of 'emergency special sessions' that can be convened by the General Assembly in case of Security Council deadlock. Although the Council had been able to call for the immediate cessation of hostilities after the outbreak of the Korean War on 25 June 1950, demanding the withdrawal of North Korean troops to the 38th parallel and authorizing a UN military operation under the unified command of the United States, the response had only been possible because of the Soviet boycott of Council meetings since January 1950 over the question of Chinese representation at the United Nations.⁷ Terminating its empty chair policy in August 1950, the Soviet Union prevented any further action by vetoing all subsequent decisions of the Council.⁸

In order to break the deadlock, US Secretary of State Dean Acheson initiated an Action Plan, which was submitted by the so-called Joint Seven Powers – the United States, the United Kingdom, France, Canada, Turkey, Philippines and Uruguay – to the Western-dominated General Assembly. After fourteen days of debate the initiative was finally adopted on 3 November 1950 as the so-called Uniting-for-Peace Resolution:

[I]f the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or acts of aggression the use of armed force when

⁷ Hiscocks 1973, pp. 163–4. ⁸ Hiscocks 1973, p. 166.

necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefore. Such an emergency special session may be called if requested by the Security Council on the vote of any seven members, or by a majority of the members of the United Nations.⁹

In essence, the resolution provided an exit strategy from Security Council deadlock by a procedural vote, which could be adopted – unlike decisions on substantive matters – against the expressed disagreement of a permanent member. The example of the *Uniting-for-Peace* Resolution illustrates how the United States actively promoted in the early 1950s a greater use of the General Assembly that was being controlled by its allies. The *ultima ratio* of US policy was to develop an exit option that allowed the use of an alternative forum in order to circumvent the veto-prone Security Council. However, the attractiveness of the General Assembly turned out to be short-lived. The year 1955 marked the influx of sixteen new member states,¹⁰ which changed the balance of power within the General Assembly to the effect that the United States lost its ‘automatic majority’. Furthermore, the effectiveness of the *Uniting-for-Peace* Resolution as a deadlock-breaking tool was bound to remain limited, as any military measures adopted by the General Assembly were not legally binding, creating a significant enforcement gap.¹¹ No further measures were built around it to increase the effectiveness of *Uniting-for-Peace*.

While *Uniting-for-Peace* constituted an institutional innovation that helped circumventing Security Council deadlock in a very limited number of cases, in the long run, neither did this seriously undermine the Council’s primary, though not exclusive, role in the maintenance of peace and international security according to Article 24 of the UN Charter nor did this break the power oligopoly in the Council. With the General Assembly turning more and more into the stage of North–South confrontation, the politics of this body became at times fairly

⁹ UN Document A/RES/377, 3 November, 1950, operative paragraph 1.

¹⁰ Albania, Austria, Bulgaria, Cambodia, Ceylon, Finland, Hungary, Ireland, Italy, Jordan, Lao People’s Democratic Republic, Kingdom of Libya, Nepal, Portugal, Romania and Spain; see www.un.org/members/growth.shtml (accessed on 21 January 2009).

¹¹ Until 2008, only ten special emergency sessions have been convened thus far. See www.un.org/ga/sessions/emergency.shtml (accessed on 1 February 2009).

unpredictable and consequently far harder to steer even by the most powerful members of the Organization, which limited its attractiveness as an alternative forum in the making of peace. Furthermore, looked at from the individual perspectives of the five permanent members, empowering the General Assembly would in the long run erode their strong political defence line and undermine their gatekeeper function.

UNEF Advisory Committee

The Suez crisis is a rare, though significant, Cold War case where Security Council deadlock did not occur as the result of US–Soviet antagonism but because of the direct involvement of Britain and France in the invasion of Egypt, commencing on 29 October 1956. In an attempt to address the crisis situation, both the United States and the Soviet Union had subsequently tabled draft resolutions, which were however vetoed by the British and French permanent representatives. Security Council deadlock was finally circumvented through a procedural vote (Resolution 119), which called for an emergency special session of the General Assembly under the Uniting-for-Peace formula.¹² The Assembly decided to set up an interposition force, the first UN armed force of its kind, and asked the Secretary-General to negotiate its deployment into Egypt. The emergency force was supposed to stabilise the situation on the ground until a more durable settlement could be achieved.

However, while the Uniting-for-Peace Resolution helped break Security Council deadlock, shifting the forum of negotiation to the General Assembly provided only part of the solution and raised new problems that needed to be addressed. Two aspects are worth highlighting here with specific reference to the propositions of solution sets 3, 4 and 5. First, circumventing the Council created a legitimacy gap. The interposition force derived its mandate not from the Security Council, which has, according to Article 24 of the UN Charter, the primary responsibility for the maintenance of international peace and security, but from a set of General Assembly resolutions. The deployment of UNEF constituted therefore a clear deviation from the provisions of the UN Charter which had originally foreseen concerted action by the permanent members of the Security Council. While those

¹² UN Document A/RES/119 (1956), 31 October 1956.

countermeasures successfully altered the institutional balance of power, as solution set 3 suggests, such institutional innovation created new legitimacy demands which needed to be accommodated (solution set 5). And second, circumventing the Council created a power gap. UN member states left it to the UN Secretary-General, Dag Hammarskjöld, to define the principles of what would be the first military operation of the United Nations. The deep tensions created by the lack of an institutional Maginot Line, which had opened the gate for procedural innovations such as the Uniting-for-Peace Resolution, and the strong political defence line of the P-5 became strongly exposed. In consequence, the Secretary-General was confronted with the challenge of implementing the mandate entrusted to him by the General Assembly without antagonizing the five permanent members in the execution of his delegated authority, which constituted a delicate task, given Britain's and France's direct involvement in the conflict and the Soviet Union's lack of enthusiasm to set up a military force that would not operate under direct control of the Council. Thus, the Secretary-General, including the UNEF Advisory Committee, assumed the role of mediator to accommodate the competing demands of power and legitimacy, as outlined in solution sets 3 and 5.

The UNEF Advisory Committee, constituted by the General Assembly at the request of Dag Hammarskjöld, effectively provided a mechanism to address those problems by establishing a small group of like-minded states supporting the Secretary-General in setting up the policy and the regulations of the emergency force.¹³ The Advisory Committee originally comprised seven countries that had already earmarked troops to UNEF, that is, Brazil, Canada, Ceylon, Colombia, India, Norway and Pakistan. Chaired by the UN Secretary-General, the Advisory Committee should 'undertake the development of those aspects of the planning for the Force and its operation not already dealt with by the General Assembly and which do not fall within the area of the direct responsibility of the Chief of Command'.¹⁴ Through the advice of the committee, the Secretary-General secured continuous feedback of his negotiations with the Egyptian government, without asking the General Assembly as a whole for approval of every single step. Some questions of the operation were delegated to a subcommittee

¹³ Urquhart 1972, pp. 183–4.

¹⁴ UN Doc A/RES/1001 (ES-I), 7 November 1956, operative paragraph 6.

composed of Brazil, India and Norway, assisting the Secretary-General in his direct negotiations with Egypt, France and the United Kingdom.¹⁵

On occasion, Hammarskjöld consulted the representatives on the committee in their personal capacity, whereby those discussions were strictly held off the record. As Brian Urquhart recalls:

It also allowed Hammarskjöld to say what he thought to a group of government representatives who would then explain things he could not say publicly. There was a very complicated arrangement, for example, about Sharm el Sheikh . . . One of the points was that the Egyptians could not take over the coastal batteries again, and of course Fawzi,¹⁶ representing a country which had just been invaded by three foreign armies, could not conceivably say publicly that a fourth group of foreigners would be sitting in one of the key strategic locations of Egypt. So Hammarskjöld simply said 'Let me try it this way: I assume . . . that as long as UN troops are stationed in Sharm el Sheikh the Egyptians will find it unnecessary to be there,' and Fawzi simply closed his eyes and nodded. Hammarskjöld could not possibly publish that, but he told the advisory committee and the advisory committee was a kind of guarantors' club.¹⁷

The guarantors' club function of the UNEF Advisory Committee illustrates in particular its role as legitimacy provider in order to secure the wider acceptance of the deployment of UN forces into Egyptian territory.

While Hammarskjöld sought to emphasise the supporting role of the Advisory Committee as a gathering of like-minded states, power political considerations were certainly not absent. Establishing institutional countermeasures to alter balances of power may therefore create new power distributions that heavily impact on institutional effects, with sometimes unanticipated consequences. For example, India, which was to deploy the largest contingent to UNEF, pursued behind-the-scene negotiations with Egypt on a parallel track. Arthur Lall, the then Permanent Representative of India to the UN, kept his Egyptian colleague, Omar Loutfi, informed throughout the process of Advisory Committee consultations.¹⁸ The two representatives coordinated their positions in advance of those meetings, trying to find a joint agreement which Lall

¹⁵ United Nations 1956.

¹⁶ Mahmoud Fawzi served as Foreign Minister of Egypt from 1952 to 1964.

¹⁷ UN Oral History Interview Transcripts, Brian Urquhart, 15 October 1984.

¹⁸ Yale-UN Oral History Project Interview Transcripts, Arthur Lall, 27 June 1990.

would present accordingly. In doing so, the Egyptian government tried to influence from outside the informal consultations of the Advisory Committee in order to get the low profile force it wanted, which under no circumstances should look like another occupation force.

In conclusion, breaking Security Council deadlock over the Suez crisis of 1956 through the engagement of the General Assembly, created a legitimacy and power gap that needed to be addressed by the UNEF Advisory Committee. The Advisory Committee provided a mechanism to legitimise the quiet diplomacy of the Secretary-General, thereby decreasing his exposure vis-à-vis the larger membership of the General Assembly and the permanent members of the UN Security Council, in particular Britain, France and the Soviet Union. In this context, the Secretary-General and the Committee assumed the role of mediator between the competing demands of power (solution set 3) and legitimacy (solution set 5).

Taking into account the specific circumstances under which the Advisory Committee was formed, it is no coincidence that the second UNEF operation (UNEF II) would be run without an advisory committee involved. Deployed in October 1973, US–Soviet détente greatly facilitated cooperation and agreement on a second peacekeeping operation to supervise a ceasefire between Egyptian and Israeli forces. At this stage, the structural conditions of the international system allowed the United States to use the Security Council as a multilateral instrument to back up its bilateral Middle East policy. While UNEF I was set up against the background of Security Council deadlock, the changing structural conditions of the international system in the 1970s generated a political environment conducive to close US–Soviet cooperation which enabled the Council to define a relatively clear response to the crisis on the ground.¹⁹

Informal consultations of the Security Council

The acceleration of decolonization in the 1960s and 1970s brought a significant enlargement of UN membership, which also transformed the character of negotiation processes in the UN system. Until 1965, UN

¹⁹ For example, Security Council Resolutions 338 and 339, adopted on 22 and 23 October 1973, addressing the situation on the ground, were in fact co-sponsored by the US and Soviet delegations.

membership had risen from fifty-one to 117 member states. The proportion of Asian, African and Caribbean states increased from 25 per cent in 1945 to roughly 50 per cent in 1965 (see Figure 8.1). Post-colonial states gained a stronger voice in the world organization, changing the inner-institutional balance of power, especially in the General Assembly. However, while the voice and influence of post-colonial states grew stronger at UN Headquarters, their actual influence in international affairs 'progressively diminished'.²⁰ This was evident, for example, in the struggle against apartheid where post-colonial states were pushing for economic sanctions as a forceful international response to human rights violations in South Africa without actually having the means to implement such policy. Furthermore, discussions related to the New International Economic Order in the 1970s, initiating a North-South Dialogue on how to restructure the world economy in order to improve the terms of trade of developing countries and to allow for their greater participation in the international economic system, illustrated the considerable dependency of 'the South' on the political and economic goodwill of 'the North'. At the same time, in New York, most permanent missions of post-colonial states faced a clear capacity problem to effectively influence decision-making processes in the Security Council or the General Assembly, as they could hardly afford to employ more than a handful of full-time staff, which had to cover the full array of items under consideration at UN Headquarters. In consequence, there was an almost inverse relationship between the lack of influence of post-colonial states in global politics and the strong demand for voice opportunities at UN Headquarters level.

Decolonization and the subsequent accession of new members to the Organization had a long-term impact on Security Council governance. The most immediate impact was the increasing pressure to enlarge Council membership, which eventually came into effect on 31 August 1965.²¹ The altered composition of the Security Council, including the adapted quorum for decision-making, effectively resulted into a change of institutional process, with the dominance of Western countries waning. In principle, if there was a conversion of interest, the Afro-Asian

²⁰ Mayall 1971, p. 9.

²¹ The number of elected members rose from six to ten, with five seats being allocated to African and Asian states, one to an eastern European state, two to Latin American states, and two to western European states.

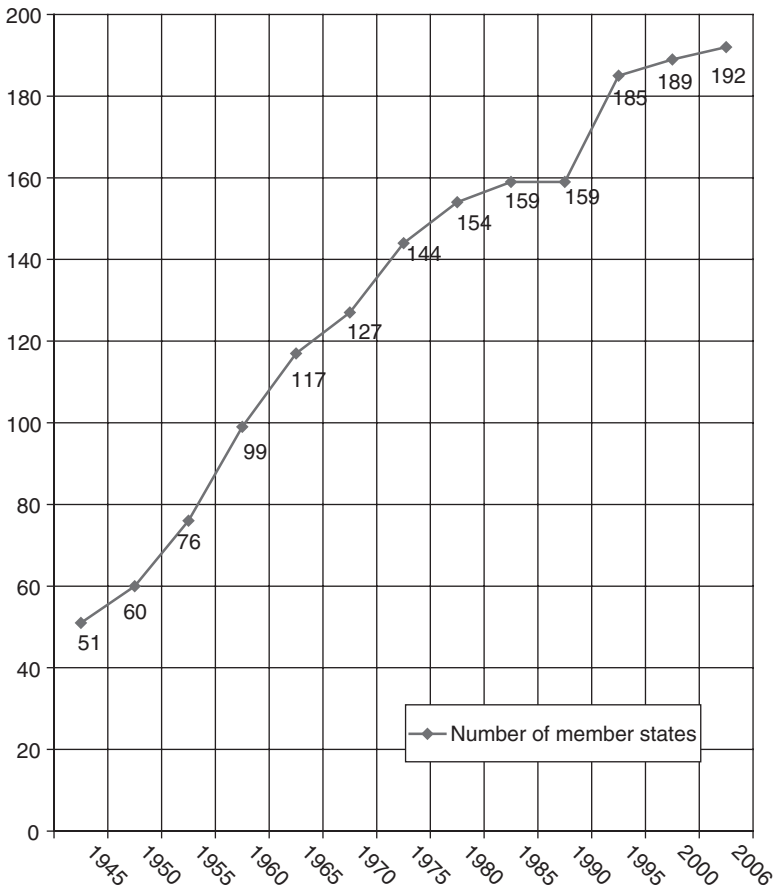


Figure 8.1. Growth in United Nations membership, 1945–2006

Source: www.un.org/Overview/growth.htm, accessed on 21 January 2009.

group, in cooperation with the Soviet Union and the eastern European members, could form a blocking coalition that would prevent any Council decision from being adopted. Enlargement affected therefore the process of coalition building, which in turn impacted on patterns in the use of the veto by the P-5. Prior to Security Council enlargement, especially the United States had been able to build voting alliances in the Council to the effect that it was forced to cast a veto only under rare circumstances. This pattern reversed almost completely since then: while the Soviet Union had cast 92 per cent of the vetoes until 1965, the P-3 accounted for 86 per cent of the vetoes thereafter (see Table 8.1).

Table 8.1. Number of vetoes cast in the UN Security Council, 1946–2008

Period	China*	France	UK	United States	USSR/Russia	Total
2008	1	–	–	–	1	2
2007	1	–	–	–	1	2
2006	–	–	–	2	–	2
2005	–	–	–	–	–	–
2004	–	–	–	2	1	3
2003	–	–	–	2	–	2
2002	–	–	–	2	–	2
2001	–	–	–	2	–	2
2000	–	–	–	–	–	–
1999	1	–	–	–	–	1
1998	–	–	–	–	–	–
1997	1	–	–	2	–	3
1996	–	–	–	–	–	–
1986–95	–	3	8	24	2	37
1976–85	–	9	11	34	6	60
1966–75	2	2	10	12	7	33
1956–65	–	2	3	–	26	31
1946–55	1	2	–	–	80	83
Total	6	18	32	82	123	263

* The Republic of China (Taiwan) occupied the Chinese permanent seat on the Council between 1946 and 1971.

Source: www.globalpolicy.org/security/data/vetotab.htm (accessed on 21 March 2009).

Furthermore, the strong demand for voice opportunities significantly changed the character of Security Council deliberations, with the ideological battles taking place between ‘the North’ and ‘the South’ in the General Assembly being transferred right into the Security Council Chamber. Article 31 of the UN Charter allowed delegations, not being represented on the Council but affected in their interests, to participate in the discussions of its formal meetings.²² However, after 1965, this practice started to impact negatively on the efficiency of

²² Article 31 reads: ‘Any Member of the United Nations which is not a member of the Security Council may participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of that Member are specially affected.’

Security Council negotiations, especially on matters related to decolonization and apartheid. Speaking before the Council was considered by many post-colonial countries 'a public relations exercise', which helped signalling to the public at home that the government's voice was being heard at UN Headquarters.²³ At peak times, as much as 50 per cent of the total UN membership participated in its formal meetings discussing issues related to South Africa and Namibia respectively.²⁴ In consequence, the Security Council became increasingly deadlock-prone.

Informal consultations emerged in response to the efficiency losses of Council negotiations at the formal level. The possibility of holding those consultations is mentioned neither in the UN Charter nor in the Council's Provisional Rules of Procedure. Convening meetings at the informal level that remained restricted to the fifteen Council members constituted therefore an incremental adaptation of Security Council working methods and practices. Such amendment was a partial exit from the constraints of formal meetings in order to cope with systemic changes that had seriously affected the efficient working of the body. In essence, this confirms the assumptions of solution set 4: informal consultations provided Security Council members with some new wiggle-room to facilitate agreement on a particular course of action.

Over time, informal consultations developed into the forum where the Security Council's substantial work was done, for example, negotiations on resolutions and statements, while formal meetings served the mere purpose of sanctioning what had been informally discussed before. The proliferation of informal consultations of the Security Council from the mid-1970s onwards clearly illustrates the devaluation of formal meetings as the institutional forum for negotiations on substantive action.

Figure 8.2 shows the number of formal meetings and informal consultations between 1972 and 1982. In this context, 1978 appears as a watershed, with the number of informal consultations tripling from thirty-eight meetings in 1977 to 113 the following year. At the same time, the number of formal meetings declined in the same period from

²³ Nicol 1982, p. 91.

²⁴ See UN Document S/PV.2451, 1 June 1983. A total number of sixty-four delegations that were not members on the Council participated in this meeting. Further participants included representatives of the UN Council for Namibia, SWAPO, the African National Congress (ANC) and the Pan African Congress (PAC).

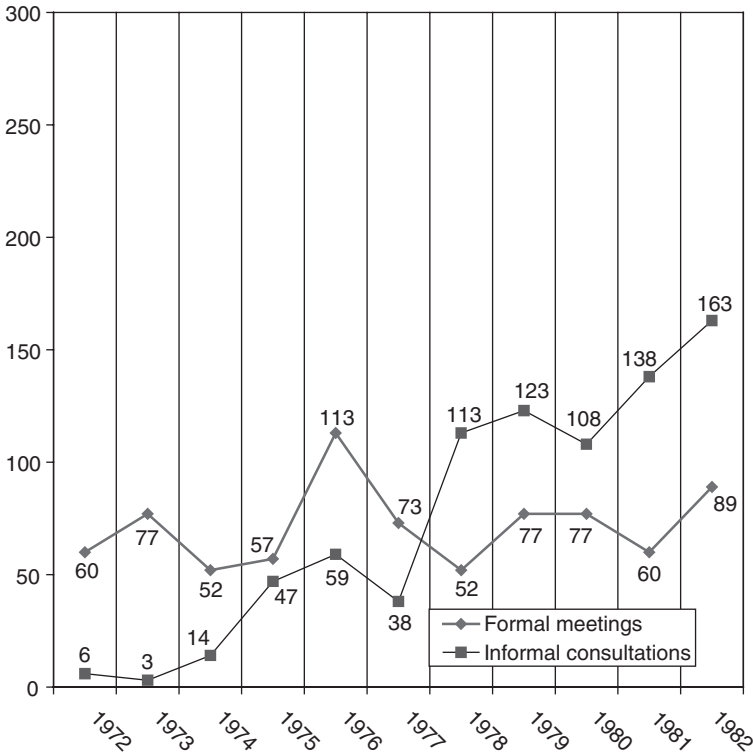


Figure 8.2. Formal meetings and informal consultations of the Security Council, 1972–82

Source: *Index to proceedings of the Security Council* (New York: United Nations, 1973–83); Feuerle 1985, p. 288.

seventy-three to fifty-two.²⁵ The breakdown of the bipolar system exacerbated a problem that had originated in the 1970s. Analysis of the frequency of formal meetings and informal consultations after the end of the Cold War therefore unsurprisingly resemble the trend of the 1970s, albeit on a much higher scale, given the larger number of items on the Council's agenda. As Figure 8.3 illustrates, the number of informal consultations rose much faster than the number of formal meetings,

²⁵ In 1978, Security Council members had started meeting in a new consultation room, which had been built in addition to the Security Council chamber for the exclusive purpose of holding informal meetings. This was the most visible sign that these consultations had become increasingly formalised.

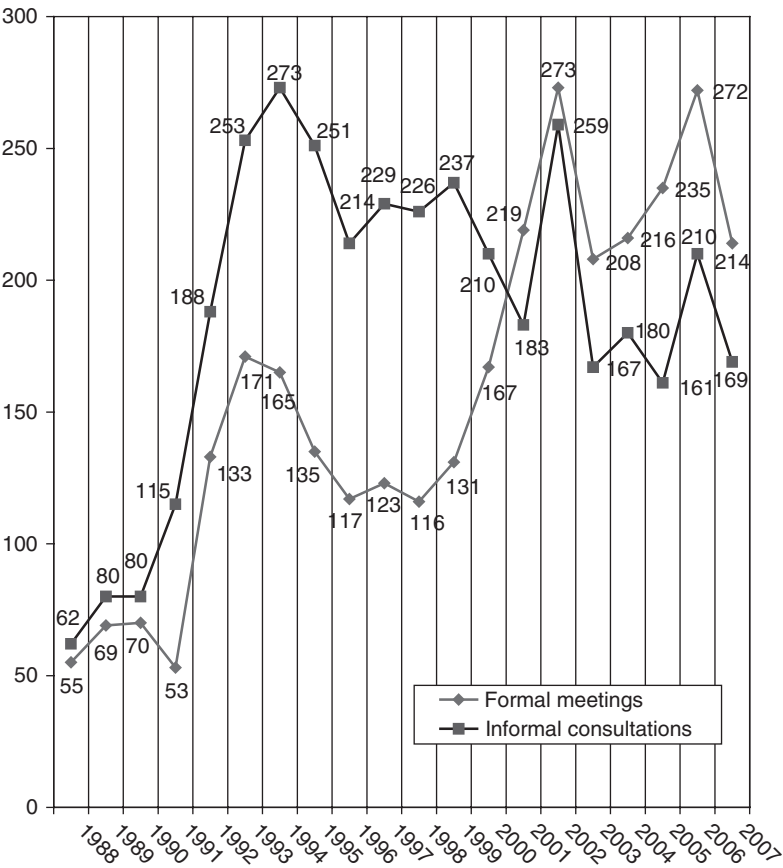


Figure 8.3. Formal meetings and informal consultations of the Security Council, 1988–2007

Source: www.globalpolicy.org/security/data/secmgtab.htm (accessed on 21 January 2009).

culminating in 1994, when the Security Council convened 165 formal meetings but closed the door 273 times for informal consultations. The number of informal consultations clearly outweighed the formal meetings prior to the year 2000, with the trend reversing in the following years. In 2002, the Council held 273 formal meetings and 259 informal consultations, which reflected an increasing number of public debates and open meetings that allowed non-members to participate in the discussions of the Security Council. Granting voice to non-members

has become to some degree a compensation for the lack of formal adaptation of the Council. Voice channels the growing pressure resulting from demands for greater transparency of Security Council working methods and procedures and expansion of its membership, which could only be partially supplied by opening the doors of the Council.

In conclusion, systemic changes in the 1960s and at the end of the 1980s generated adaptations in the Security Council working methods and procedures resulting in the retreat to informal consultations that constituted a partial exit from the United Nations' constitutional framework. The proliferation of informal consultations of the Security Council in the mid-1970s and again from the early 1990s onwards has to be analysed against the background of the devaluation of the Council's formal meetings as the institutional setting for the agreement on substantive action. Formal meetings have become first and foremost a platform for the articulation of voice. However, various diplomats of permanent missions and officials of the UN Secretariat pointed already in the early 1980s to the downside of informal consultations that had been inherent in the process, that is, 'deliberate stalling, inaction, watered-down resolutions, secrecy, over-formalization of an informal process, and lack of outside input'.²⁶ The maximum retreat to informal consultations has not been able to overcome the structural constraints of the Council.

P-5 cooperation

The transformation of the bipolar system generated an international political environment conducive to enhanced cooperation between the permanent members of the UN Security Council. Since the end of the Cold War, P-5 consultation, coordination and cooperation have become the most important mechanisms of deadlock prevention in the Security Council. P-5 cooperation initially emerged over the Iran–Iraq war. In 1987, on the initiative of the United Kingdom and strongly supported by then UN Secretary-General, Pérez de Cuéllar, the five permanent members of the Council, for the first time, engaged in informal meetings for an exchange of views outside the Council chambers to coordinate their positions vis-à-vis the conflict.²⁷ The consultation set a precedent that would define Security Council governance in

²⁶ Cited in Feuerle 1985, p. 294. ²⁷ Hume 1994.

the post-bipolar era, with the perception growing that the P-5 had become the gatekeeper of Security Council decision-making and procedures. The United States would assume a preponderant role within the body, especially after the demise of the Soviet empire. Yet, the new pattern of consultation, coordination and cooperation between the permanent members was also welcomed by China and the Soviet Union. The strengthening of the P-5 was especially in the interest of the latter country as the declining Soviet empire sought to compensate for its weakness by upgrading the role of the UN Security Council in order to maintain its relative influence in world affairs. In addition, China and the Soviet Union had a strong interest to retain control over the growing interventions of the Council in internal conflicts such as Cambodia and El Salvador. Given the expansion of the scope of Article 39 and the subsequent erosion of Article 2.7 of the UN Charter, the two permanent members were especially keen to keep in control of the process and to avoid any unwanted involvement of the United Nations especially in areas within their sphere of influence.

While the emergence of P-5 cooperation helped addressing international conflict more effectively, it also underlined the Security Council's dependency on (tacit) agreement among China, France, Russia, the United Kingdom and the United States, which constituted a rather diverse group of countries. This has two implications for the study of deadlocks: first, P-5 cooperation is a good example which clearly supports the claims of solution set 4 that establishing new working practices may decrease the likelihood of deadlock; second, it also confirms the proposition of Hypothesis 3b that the probability of deadlock increases with the diversity of the parties that constitute the balance of power.

Cooperation between the P-5 had a lasting impact on the actual and perceived functioning of the UN Security Council.²⁸ The frequency of meetings, especially between 1991 and 1993, the number of resolutions adopted, as well as the increasing reluctance of permanent members to cast the veto, illustrated the high expectations of UN member states vis-à-vis the potential of the Council to discharge its primary responsibility for the maintenance of international peace and security (see Table 8.1). At the same time, it demonstrated its limits, as the increasing workload exacerbated the structural deficiencies of the Council, which made the

²⁸ Malone 2004.

body more deadlock-prone. Especially China and Russia have become more assertive in pursuing their national interests and in positioning themselves as vital stakeholders of the international system whose positions cannot be ignored.²⁹

In the period between 1987 and 1992, the list of matters under consideration by the UN Security Council rose from eleven to twenty-seven.³⁰ Besides dealing with the Central American peace process in general and the situation in El Salvador in particular, from 1991 to 1992, the Security Council had to consider a plethora of other agenda items such as the situation in Afghanistan, Cambodia, Cyprus, Liberia, the political conditions in Haiti and Yugoslavia as well as the situation between Iraq–Iran and Iraq–Kuwait respectively. Informal groups of states constituted a mechanism to cope with the increasing workload of the Council and to reduce the probability of deadlock, as the following section will further illustrate.

Informal groups of states

While the breakdown of the bipolar system generated a permissive political context to engage the United Nations in more and more complex conflicts than ever before, the quantity and quality of crisis settings critically widened and, at times, overstrained the role of the UN Security Council leading to problems of overload. The United Nations and its member states have been constantly facing hard choices regarding which conflicts to address. In addition to problems of overload and reluctance by the P-5 to become engaged, the structural conditions of the Council constitute a serious constrain in the development of consistent policies and standards. The post-Cold War international security environment therefore further exposed the structural constraints of the United Nations and reduced its capacity to solve problems, which in fact reflected a wider trend in institutionalised governance. In general, multi-lateral organizations have become challenged by the gap between highly increased geographical, functional and normative ambitions and the lack of means to deliver them. The problem-solving capacity of

²⁹ In 2007 and 2008, China and Russia blocked Security Council action with regard to Myanmar and Zimbabwe respectively. See UN-Doc. S/PV.5619, 12 January 2007 and S/PV. 5933, 11 July 2008.

³⁰ United Nations 1988–93.

international organizations is therefore rather limited and their effectiveness in global governance is sub-optimal.³¹ At the same time, the increasing returns to and sunk costs of formal international organizations make their complete overhaul or replacement extremely difficult.³² While the complexity of the post-Cold War security environment seemed to generate a demand for stronger multilateral institutions, many scholars called instead for the establishment of concert-like structures to enhance great power management of security issues.³³ Informal groups of states represented one important response to the tension between these two positions, because they allow for a trade-off between the competing demands of inclusiveness and efficiency, of power and legitimacy. Those ad hoc mechanisms have proliferated in the post-Cold War world. According to Whitfield, between 1990 and 2006, one could observe 'a growth from four to more than thirty such mechanisms, a larger than sevenfold increase developed in parallel to the surge in conflict prevention, conflict management, and post-conflict peacebuilding activities by the United Nations and others in the international community in this period'.³⁴

Informal groups of states may effectively provide platforms to escape what one may call 'the multilateral predicament', redefining the role and functions of formal international organizations.³⁵ Looked at from this perspective, the propositions of Hypothesis 3b seemed to be confirmed, with informal groups of states providing the solution for the imponderables of P-5 cooperation or the lack thereof. Those mechanisms constitute a convenient exit strategy in response to the institutional and structural constraints of the UN Security Council. Yet, two further observations can be made. First, informal groups may also grant voice to stakeholders in the conflict that do not have a seat on the Council table and that do not participate in the formal decision-making process, which can be analysed as a variation on the theme of solution set 3. The engagement of informal mechanisms alters the Security Council's balance of power by reducing the preponderance of the P-5 in managing risk and responding to conflict. Second, informal groups of states can be

³¹ This is particularly evident in hard cases 'in which participants have both incentives and opportunities to disregard or change institutional requirements'. Young 1992, p. 161.

³² North 1990. On the phenomenon of sunk costs see Stinchcombe 1968, pp. 108–18.

³³ Kupchan and Kupchan 1991; Rosecrance 1992; Schroeder 1994; Zelikow 1992.

³⁴ Whitfield 2007, p. 4. ³⁵ Prantl 2006; Whitfield 2007.

analysed as a variation on the theme of solution set 5. By including non-Council members, informal groups of states broaden participation in Security Council decision-making, effectively enhancing the legitimacy, accountability and fairness of the negotiation process. The engagement of informal groups of states may result into greater ownership of the Council's decision-making process.

In conclusion, informal groups of states proliferated out of both the demands and constraints the United Nations faced at various levels. Those informal mechanisms may constitute a flexible diplomatic device for increased cooperation. However, they are certainly not the silver bullet to prevent or break institutional deadlock, as their record has been very mixed thus far.³⁶ In general, in order to be successful, informal groups of states need to accommodate competing demands of effectiveness, inclusiveness, legitimacy, accountability and transparency. Furthermore, as recent comparative research into the engagement of informal groups of states in El Salvador, Guatemala, Haiti, Georgia, Western Sahara and East Timor has illustrated, there seem to be in particular five key variables that define success or failure of informal groups of states:

- (1) the regional environment of the conflict;
- (2) the relationship between conflict parties and the United Nations;
- (3) the composition of the groupings;
- (4) the question of leadership; and
- (5) the timing of the group's engagement.³⁷

How do those findings relate to the making or breaking of deadlocks? First, there are institutional requirements, as advanced in Hypothesis 4. The institutional design of informal groups needs to be reasonably flexible to accommodate competing demands (effectiveness, inclusiveness, legitimacy, accountability and transparency). Second, there are legitimacy requirements, as argued in Hypothesis 5. If informal groups of states operate outside the institutional framework of the United Nations without the formal legitimation of the Security Council, the policy outcomes generated by those informal mechanisms are unlikely to be recognised by the wider UN membership. Third, there are power political requirements, as suggested in Hypothesis 3. The composition of the groupings usually comprises at least one or two permanent

³⁶ Whitfield 2007. ³⁷ Whitfield 2007.

members of the Council which secures the smooth translation of the substance of the workings of informal groups into the process of Security Council decision-making. Yet, there is one key requirement that is prevalent in all successful cases, which none of the hypotheses cover, that is, the crucial role of political leadership by a single country or charismatic leadership by a country representative.³⁸

Conclusions

This chapter analysed the causes and consequences of deadlocks in the UN Security Council, shedding light on how informal negotiation processes may contribute to the breaking or prevention of deadlock situations. It highlighted key innovations in Security Council decision-making across time. Three questions have informed my analysis: first, how does the institutional design help or hinder the emergence of deadlock; second, why has the role of informal negotiation processes grown in importance to break or prevent deadlock; and third, what is the nature of these processes and how do they contribute to breaking or preventing institutional deadlock?

In addressing those questions, the chapter highlighted in particular the impact of the underlying power distribution among its members (Hypothesis 3) as well as the institutional features that facilitate or deter international agreement in responding to collective action problems (Hypothesis 4), including the normative issues involved (Hypothesis 5). While the institutional design of the UN Security Council allows for a wide range of options to adjust institutional decision-making, both at the formal and informal levels, the high degree of flexibility is clearly constrained by the political defence line of the five permanent members that act as the gatekeepers of Security Council action (or the lack thereof). Informal negotiation processes gained in importance particularly after the end of the Cold War which had both generated a higher demand for collective action problem solving and created a political environment conducive for deeper UN engagement. However, the quantity and quality of conflict settings exposed the structural constraints of the United Nations and triggered the sustained recourse to

³⁸ See, however, Chapter 10 in this volume, which is specifically focused on the role of leadership within countries, particularly leadership tenure and its impact on the persistence and resolution of deadlock.

informal negotiation mechanisms such as informal groups of states in order to prevent political impasse and reduce the probability of institutional deadlock. P-5 cooperation and consultation, emerging as an important institutional innovation in 1987, has reduced the number of vetoes cast to almost zero. While the veto during the Cold War constituted perhaps the landmark moment to signal non-agreement with a specific course action, those occasions have become very rare in the post-Cold War period. The political defence line of the P-5 has become less pronounced. Informal negotiation processes help settle conflict and signal disagreement well before a formal vote at the Horseshoe Table. Furthermore, the post-Cold War security environment exposed the limited problem-solving capacities of the world organization, which increased the probability of institutional deadlock for structural – not political – reasons. Informal negotiation processes may offer alternative avenues to escape the multilateral predicament of the UN Security Council, reducing the probability of institutional deadlock.

The findings of the chapter suggest that, in order to understand the making and breaking of deadlocks in the UN Security Council, we need to scrutinise how members of an organization establish institutional countermeasures to alter the intra-institutional balance of power (solution set 3) and to adjust institutional decision-making processes to facilitate agreement (solution set 4), including the normative issues that arise from those adjustments (solution set 5). In particular, we need to account for the dynamic nature of the formal and informal processes that define multilateral diplomacy within an institutional setting.

Finally, the chapter also highlighted the paramount importance of political or charismatic leadership in steering negotiation processes. Further study would be needed to substantiate the extent to which leadership may or may not contribute to the breaking of deadlocks.³⁹

³⁹ While Chapter 10 (this volume) sheds new light on the role of leadership as part of the domestic configuration of interests that affect deadlocks, leadership at the international level presents a complementary agenda for further research.

9

*Negotiating international policies
on Kosovo*

PIETER VAN HOUTEN

On 17 February 2008, Kosovo declared independence. This event received attention and generated debates around the world. This was, however, not the first time Kosovo received international attention. In fact, Kosovo had been an important issue on the international agenda for more than a decade by then. And the declaration of independence has not ended this, as the recognition of its independent status by other states and international organizations continues to be contested. Although somewhat eclipsed by the focus on Afghanistan and Iraq since 2001, the Kosovo conflict, the international intervention in the conflict, the subsequent international administration of the territory, and its unilateral declaration of independence are still crucial issues at the heart of discussions about humanitarian intervention, international law, and the mandate and functioning of international organizations. It is therefore highly appropriate to consider some of the international negotiations on Kosovo as a case study in this volume.

It is not my aim in this chapter to discuss and explain the various aspects of the Kosovo conflict or the intricacies and consequences of its international administration and declared independence. Instead, I focus more narrowly on some of the key international negotiations on Kosovo, in light of the concepts and hypotheses presented in the Introduction to this volume.

The most significant international negotiations on Kosovo occurred in two episodes. The first episode occurred in the late 1990s, when the conflict escalated and the international community decided – if hesitantly, and not always coherently – to get involved. This involvement led, first, to several United Nations Security Council (UNSC) resolutions attempting to prevent or deter violent conflict; then, to military intervention (in the form of air attacks) by NATO in March 1999; and, finally, to an agreement to end the hostilities and – through UNSC Resolution 1244 – to establish a temporary international administration for the territory in

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June 1999. Thus, in this episode the multilateral negotiations involving various states and international organizations managed to avoid a deadlock and produce an agreement. Second, from 2005 to December 2007 negotiations took place about the ‘final status’ for Kosovo, where the basic options were for the territory to become an independent state or to remain part of Serbia (although there were further questions about what position within Serbia it would have in case of the latter option, and in either option about the role of the international community in the territory’s governance in the short- and medium-term). These negotiations failed to produce an agreement. This, in turn, induced the Kosovar government and parliament to unilaterally declare the territory’s independence. Not surprisingly, multilateral discussions and negotiations about the recognition of Kosovo as an independent state have similarly failed to produce an agreement. Thus, this episode of negotiations led to a deadlock at the multilateral – in particular United Nations – level. One aim of this chapter is to account for the variation in negotiation outcomes between these two episodes. I argue that a combination of some of the hypotheses presented in the Introduction to this volume can account for the negotiation outcomes (including the deadlock experienced in 2007).

In addition, an analysis of these negotiations generates several other arguments and insights. In particular, I show that the multilateral agreement in 1999 was partly the result of deferring decisions on the most contested issues; that the negotiations on Kosovo were extraordinarily complex, and cannot be analysed or understood as only ‘multilateral’ negotiations; that the involvement and availability of several multilateral institutions created a dynamic of its own in the negotiations; and that the process by which a deadlock occurred in this case was significant in itself, that is, separately from the actual negotiation outcome (deadlock).

The next section describes the main features of the Kosovo conflict and the international negotiations on Kosovo, while the subsequent section analyses the nature and outcomes of these negotiations, and relates these to the theoretical framework presented in the Introduction to this volume. The concluding section summarises the main points of the chapter, and suggests the various functions that deadlocks had in this case.

The Kosovo conflict and the international community, 1995–2008

Kosovo plays a crucial role in the history and imaginings of the Serbian nation, and is considered to be the cradle of the Serbian Orthodox

church. The territory is, however, mainly populated by Kosovar Albanians (who, according to most estimates, comprised more than 80 per cent of the territory's population in the 1990s), while Serbs are in a minority. The relations between these ethnic groups and the consequent governance arrangements for the territory are at the heart of the Kosovo conflict as it has developed in recent decades. The 1974 Yugoslav constitution attempted to accommodate the Kosovar Albanians by giving Kosovo the status of an autonomous province in the Serbian republic (but, crucially, not as a republic in the Yugoslav federation). This arrangement started to unravel in the late 1980s, in the context of rising Kosovar Albanian demands for more powers, protests from Kosovar Serbs against their position, and especially the use of the Kosovo issue and the cause of the Kosovar Serbs by Slobodan Milosevic in his consolidation of power over Yugoslavia and Serbia. Milosevic annulled Kosovo's autonomy in 1989, and brought it under direct Serbian rule again. This triggered widespread resistance by the Kosovar Albanians at the time when Yugoslavia – as it then existed – dissolved and descended into war. Initially, this resistance was non-violent, as the Kosovar Albanians – led by Ibrahim Rugova – established their own governance and societal structures, parallel to official Serbia-run institutions and financed largely by contributions from its diaspora. However, in the mid-1990s violent resistance, conducted mainly by the Kosovo Liberation Army (KLA), started to emerge. The responses by the Yugoslav (by then, equivalent to Serbian) government and army, as well as the increased availability of weapons after the breakdown of the Albanian state in 1997, induced further cycles of violence from 1998 on, and led to accusations of the 'ethnic cleansing' of Kosovo. These accusations eventually triggered the extensive involvement of the international community in the conflict.¹

¹ The short description in this section obviously fails to do justice to the complexity of the conflict in Kosovo, the developments since the Kosovo war in 1999, and the role of the international community in all of this. For more details, see Malcolm 1998 and Judah 2000 on the historical importance of Kosovo for the Serbian nation; Daalder and O'Hanlon 2000, Independent International Commission on Kosovo 2000 and Judah 2002 on the Kosovo conflict and the 1999 war; and Weller 2009 on international attempts to prevent and manage the conflict from the 1990s until 2008, as well as the international legal aspects and implications of the Kosovo issue.

Although warnings about the situation and conflict potential in Kosovo had been occasionally voiced since the late 1980s,² most attention was understandably paid to the wars in Croatia and Bosnia, and the international community did not seriously turn its attention to Kosovo until 1998. During the Yugoslav war in the early 1990s, there was some limited international attention given to Kosovo (for example, by the OSCE), but this did not amount to much. Moreover, and against the expectations of the Kosovar Albanians, the issue of Kosovo was not addressed by the international community in the Dayton negotiations in 1995, which ended the Bosnian war and established international governance arrangements for Bosnia. The international community became more involved only after the rise of the KLA and the violent responses by the Yugoslav state. This occurred through several channels, especially through the so-called Contact Group (consisting of major states – more on this in the next section) and through direct initiatives (mostly by the United States, with Richard Holbrooke as its most prominent envoy). This involvement produced several multilateral actions and declarations. The most important of these was the adoption of UNSC Resolution 1199 in September 1998, which was the result of a deal reached by Holbrooke with Milosevic, and called for a halt to the violence in Kosovo, urged negotiations between Kosovar Albanians and Serbs, established the OSCE Verification Mission (to monitor the withdrawal of Yugoslav troops),³ and contained an ambiguous threat of international intervention if the Yugoslav government and army did not adhere to the agreement.

These measures, however, did not stem the violence in Kosovo. In a final attempt to prevent further conflict and intervention, the international community – to be specific, the Contact Group – convened negotiations between the Yugoslav government and representatives of the Kosovar Albanians in Rambouillet, France.⁴ After long and contentious discussions, a compromise proposed by the Contact Group – which would have meant a three-year interim arrangement for Kosovo, after which a possible referendum would determine its future status – was accepted by the Kosovar Albanian delegation, but rejected by Milosevic. Subsequent further attempts by Holbrooke and others to

² Bellamy 2002. ³ On this mission, see Bellamy 2002, ch. 4; Weller 2009, ch. 7.

⁴ For detailed accounts of this crucial meeting, see Judah 2002, ch. 7; Weller 2009, ch. 8.

persuade Milosevic failed. As a result, NATO intervened militarily on 24 March 1999 and attacked Serbian targets from the air, first in Kosovo and then in Serbia proper. It is worth emphasizing that, although the possibility of intervention had been mentioned in an earlier UNSC resolution, the NATO intervention occurred without explicit authorization by the UN Security Council.⁵ This war lasted for seventy-eight days. It was brought to an end through an agreement that Talbott (as US representative), Chernomyrdin (as Russia's representative) and Ahtisaari (as EU representative) reached with Milosevic in June 1999. This agreement was the basis of the debate in the UN Security Council and the adoption of Resolution 1244, which formalised the end of the hostilities and established the international administration of Kosovo.

UNSC Resolution 1244 is undoubtedly a multilateral agreement, and, thus, deadlock was avoided in this case. It is worth pointing out, however, that it contained several ambiguities and left some crucial issues unresolved. The most important ambiguity is that it appears to simultaneously endorse the Kosovar Albanians' right to self-determination and Yugoslavia's territorial sovereignty – two principles which, given the virtually unanimous support for independence among the Kosovar Albanians, are clearly incompatible with each other. Related to this, the most important unresolved issue is the future and final status of Kosovo. The resolution makes clear that the international administration of the territory was temporary, but it fails to specify what would follow after this or even a procedure to determine Kosovo's final status. In other words, the resolution avoids, or at least postpones, the most important issues raised by the Kosovo conflict and the international intervention. Furthermore, the most important multilateral institution, the United Nations, was essentially sidestepped during some of the crucial phases, and 'the UN Security Council ... in particular, was bypassed by the major Western powers that employed NATO as the vehicle for their intervention'.⁶ No authorization of this intervention by the Security Council was sought, and the main actors returned to the UN only when an end to the hostilities had already been reached and an agreement on the next step had been worked out

⁵ This has generated endless debates about the legality (under international law) and legitimacy of the NATO intervention. For concise overviews of these debates, see Economides 2007, pp. 231–5; Independent International Commission on Kosovo 2000, ch. 6.

⁶ Economides 2007, p. 217.

between, essentially, the United States, Russia and Milosevic. And even within NATO, no formal and unanimous decision was reached, and it can be argued that the decision was essentially imposed on its member states by the United States and the UK.⁷

The international administration and security force established by UNSC Resolution 1244 managed to stabilise the territory, but the situation remained precarious and progress was slow on many fronts.⁸ To give Kosovo's 'provisional government' incentives to improve its performance, but without opening the can of worms of Kosovo's future status, the international community adapted the 'standards before status' process, by which the Kosovar institutions had to meet various criteria before the status discussions would commence. Ethnic riots in March 2004 showed, however, that the situation was still explosive, and it was concluded that the status issue had to be addressed, even if the established criteria had not yet been met.

On the basis of several reports documenting the situation in Kosovo, the United Nations appointed Martti Ahtisaari as its special envoy for Kosovo in late 2005, and asked him to conduct negotiations between the Serbian government and Kosovar Albanian political actors (for this purpose, the Kosovars formed a 'unity team' with representatives of all relevant Kosovar political parties). More detailed instructions were given by the Contact Group, to which the UN effectively delegated the steering of these negotiations. The negotiations took place in Vienna throughout 2006. Although progress was made on some issues, no agreement was reached. Based on his experience in the negotiations, Ahtisaari then formulated his own proposal for the future status of Kosovo, and sent this to the United Nations in March 2007. This 'Ahtisaari plan' envisioned 'conditional independence' for Kosovo, whereby the international community – led by the European Union (EU) – would continue to steer and oversee the political and economic progress of Kosovo towards eventual EU membership, and various power-sharing arrangements to accommodate the Kosovar Serbs. The UN Security Council failed to agree on the Ahtisaari plan, largely due to opposition from Russia. The UN then decided to allow time for further negotiations between the Kosovar parties and the Serbian government to see if a compromise was possible after all. These negotiations were led by three envoys representing the Contact Group, but yielded no results.⁹

⁷ Daalder and O'Hanlon 2000. ⁸ King and Mason 2006. ⁹ ICG 2007c.

At the deadline in December 2007 (which the UN had set earlier in the year), the UN Security Council announced that no agreement had been reached on the future status of Kosovo. This failure to reach an agreement at a clearly specified – even if self-imposed – deadline, qualifies this outcome as a deadlock – in this case a ‘deadlock as breakdown’.¹⁰ Subsequently, the Kosovar parliament declared independence in February 2008, and various states – including the United States and many, but not all, EU member states – recognised Kosovo as an independent state. Discussions at the multilateral level (in the UN Security Council) failed to reach any consensus, either on the recognition of Kosovo or – as Russia wanted – to condemn the declaration of independence. Although not further discussed in this chapter, the situation that developed in the course of 2008 on these issues has the features of a ‘deadlock as stalemate’.¹¹

Thus, the two episodes produced two different outcomes. There was an agreement in June 1999, while the outcome in December 2007 was clearly a deadlock (‘as breakdown’). This variation demands analysis and explanation.

Analysing the international negotiations on Kosovo

This section tries to account for the negotiation outcomes described in the previous section, and relates the offered explanations to the hypotheses presented in the Introduction to this volume. It first discusses the actors involved in and the complex nature of the negotiations, and then presents the main explanations for the outcomes.

Actors and levels of negotiations

The various negotiations surrounding the Kosovo conflict and the territory’s status were wide-ranging and complex, and involved a large number of actors and institutional settings. Even when focusing only on the international or multilateral level, the picture is highly complex. As one report summarises for the negotiations in the late-1990s:

The international response was formulated by a dozen or more key states, each with its own perceptions of national interests, its own particular set of

¹⁰ Introduction, this volume. ¹¹ Introduction, this volume; ICG 2008.

domestic constraints and forces, including different perspectives of political and military leadership, and its own analysis of the past and possible future of the Balkans. In addition, these states were collaborating to reach joint policies simultaneously in several distinctly different groupings, including the UN, NATO, the OSCE, and the EU. The logical result was a lack of consistency in the diplomatic response.¹²

In addition, actors and government directly involved in the conflict – the Yugoslav and Serbian governments, representatives of the Kosovar Albanians and then the Kosovo government – also participated in negotiations. Cutting through this complexity, how can we characterise the most crucial actors, institutions and features of the negotiations?

Let us start with the main actors. For the international or multilateral negotiations, the main actors were the United States and Russia, with further relevant roles for states such as the United Kingdom, France and China. Although not always entirely coherent in its position and not always equally committed to or focused on the issue, the United States in the late 1990s pushed for a halt to the conflict. It put pressure on Milosevic, supported sanctions against Yugoslavia, and was in the end willing to intervene militarily – even if only by air attacks – through NATO. At this point, however, it did not clearly favour Kosovar independence, and focused primarily on the need for stability in the Balkan region. After 1999, the United States was a supporter of and primary advisor to the Kosovar ‘provisional government’, aided by the enormous prestige of the United States in the eyes of Kosovar Albanians, who perceived the United States as the main reason for their freedom from Serbian rule. By the time of the negotiations on Kosovo’s final status, the Kosovar government considered the United States an ally in its quest for independence, and there is indeed evidence that the United States signalled its support for this to the Kosovars.¹³ The United States was one of the first states to recognise Kosovo’s independence in February 2008, and it was the main advisor to the Kosovar government in the drafting of a constitution for the new state.

Russia has mostly been on the side of the Serbs in the negotiations on Kosovo. This is often publicly justified by reference to their common Slavic and Orthodox identities, but geopolitical considerations have undoubtedly played a role as well. In the negotiations on Kosovo’s

¹² Independent International Commission on Kosovo 2000, p. 133.

¹³ ICG 2007b.

final status, Russia's position supporting the Serbian government was clear and consistent throughout the process. It argued that the territorial sovereignty of Serbia had to be respected, and that it would only accept arrangements that had been agreed to by the Serbian government.¹⁴ While this is a coherent position as such, it should be noted that the principle of state sovereignty is not absolute or unbendable for the Russian government, as its arguments in the cases of South Ossetia and Abkhazia in Georgia – which came to a head during the war with Georgia in the summer of 2008 – make clear. Geopolitical considerations, such as the desire by Putin and the Russian government to retain or re-establish Russia's position as a major power in international affairs, and to signal its opposition to EU and especially NATO enlargement to the east, also played a role. During the negotiations in the late 1990s, Russia's position was less clear. It vehemently opposed NATO intervention,¹⁵ but engaged in some of the international attempts to prevent the escalation of the conflict and especially in the attempts to end the war resulting from NATO's intervention. It appears that the Russian government at this time was trying to find a balance between asserting itself as a prominent player at the international level (despite all its problems since the collapse of the Soviet Union) and attempting to form a strategic alliance with the West on various issues.

Other states have also been directly involved in the negotiations on Kosovo, but their roles – at least when accounting for the main features and outcomes of these negotiations – have been less important. The United Kingdom, for example, has mostly taken the same line as the United States. Other European Union member states such as France and Italy also played a role, and have not always taken the same positions. This has arguably reduced the influence of the EU on the main negotiation outcome, although it has played an important role in the administration of the territory, managed to maintain a coherent position in the lead up to Kosovo's declaration of independence (but not in the recognition of Kosovo's independence), and is likely to be a crucial actor in the future governance of Kosovo. China, as a permanent member of the UN Security Council, is another potentially important actor. While occasionally vocal on the Kosovo issue, it has, however, not played a very important role. In 1998–9, it abstained – but did not block – the various UNSC resolutions related to Kosovo. In 2005–7, it voiced its

¹⁴ ICG 2007a, p. 3; ICG 2007b, p. 2. ¹⁵ Facon 2006.

opposition to the possibility of Kosovo's independence and any agreement not supported by Serbia, but it is clear that Russia is the most important actor on this side of the arguments.

Obviously, the other crucial actors have been the Kosovar Albanians and – after 1999 – the Kosovar government and political parties on the one hand, and Serbs and the Serbian government (which, in the late 1990s, was still formally the Yugoslav government) on the other hand. Their primary positions and preferences have been clear and consistent. The Kosovar Albanians initially wanted mostly more autonomy and powers, but since 1998 have consistently pursued independence. The Yugoslav and Serbian governments, as well as most Serbs in Kosovo (who, interestingly, have never featured directly as actors in the negotiations), have wanted to maintain the territorial integrity of their state, and, more concretely, to keep Kosovo as part of Serbia. Secondly, however, both sets of actors also were concerned about support from external actors. The Kosovar Albanians have needed such support to obtain freedom from Serbia (through the military intervention in 1999), to set up and run their provisional institutions in collaboration with the international administration of the territory, and to gain recognition for its independence and obtain resources to make this independence work. Serbia's reliance on external support is less obvious, but diplomatic support from Russia has been essential at times, and one strand within the Serbian political scene (which has become increasingly important since 2005) strives for closer relations with the European Union, facing the dilemma of how to balance this with opposition to any agreement on Kosovo that might entail the territory's independence.

In essence, negotiations on Kosovo were conducted at two levels.¹⁶ The first level is *bilateral*, between the Kosovar Albanians and Serbian leaders. More specifically, these negotiations took place between various representatives of the Kosovar Albanians (mainly representatives of Rugova's LDK and the KLA) and Milosevic and his government in 1998–9. In 2005–7, negotiations at this level occurred between the representatives of all the main Kosovar political parties (brought together in the 'unity team') and the Serbian government. The second level is *multilateral*, conducted in various international organizations. The primary multilateral organization is the United Nations, but as

¹⁶ For a more fine-grained distinction between different 'dimensions' of negotiations on the final status of Kosovo, see Weller 2009, pp. 217–18.

indicated in the quotation above, negotiations also took place in other multilateral forums.

These two levels of negotiations were closely connected. First, an agreement at the bilateral level would almost certainly have meant an agreement at the multilateral level, as it would have been politically very difficult for an actor at the multilateral level to block such an agreement. For example, Russia stated from the outset that it would be willing to accept any agreement between the Serbian government and the Kosovars in the 2005–7 negotiations. Second, the multilateral level can, under certain circumstances, impose an agreement on the bilateral level.¹⁷ This dynamic occurred during the Rambouillet negotiations in 1999, when the Kosovar Albanians agreed to the final proposal, which seemed closer to the original Yugoslav position, under great pressure from the Contact Group representatives.¹⁸ However, an agreement was not reached at this time, as Milosevic refused to bow to international pressure. Similarly, UNSC Resolution 1244 was a multilateral agreement, in which the Kosovar Albanians played no direct role and which was imposed on them. For the 2005–7 negotiations, it has been suggested that if the Serbian government had come up with a plausible compromise for the status of Kosovo, then the Contact Group and the international community would have been willing to impose this on the Kosovar parties. In the event, the Serbian government only presented such proposals late in the negotiation process, when the main international actors were no longer open to this.¹⁹ In short, lack of direct agreement at the bilateral level does not preclude the possibility of an overall agreement. Third, representatives of third states (such as US and Russian officials) and international bodies (most prominently Ahtisaari) served at various points as mediators in the bilateral negotiations, thus linking the two levels further together. While the main focus of this chapter and the volume as a whole is on multilateral negotiations, a sole focus on this level would be insufficient in this particular case.²⁰ Rather,

¹⁷ Weller 2009, p. 201. ¹⁸ Judah 2002. ¹⁹ Weller 2009, pp. 224, 228, 239.

²⁰ This may apply to other contexts and cases too, and it seems worth asking in any specific issue area whether a sole focus on multilateral negotiations is sufficient to explain their dynamics and outcomes. On the other hand, it is possible that the specific nature of the Kosovo issue, given that it – at its core – is a geographically concentrated affair and features issues on which it is difficult to reach compromises (such as whether to militarily intervene or not, or whether to grant Kosovo independence or not), makes this a special case.

the indicated linkages justify the focus on both the bilateral and multi-lateral levels in the remainder of this chapter.

At the multilateral level, which were the main organizations and actors involved in the negotiations? While this chapter is ultimately interested in the United Nations, and the extent to which an agreement or deadlock occurred at this most multilateral institution, the UN was actually not the main multilateral body in which negotiations occurred. As indicated in the quotation at the outset of this section, organizations such as NATO, the OSCE and the EU also played a role. However, arguably most important has been an ad hoc body: the Contact Group.²¹ This group was formed during the Yugoslav conflict in the early 1990s, and consists of representatives of six states: the United States, Russia, the UK, Germany, France and Italy. It is a purely inter-governmental organization, with no particular institutional rules. It took some of the lead in the international involvement in the Kosovo conflict in 1998–9 (although direct initiatives by certain states, especially the United States, were also important), including organizing and leading the Rambouillet negotiations.²² In 2005–7, it again played a leading role, and ‘while the Security Council had confirmed the leadership of the UN in the status process, in reality the Contact Group was to act as the controlling body for the negotiations and for the UN Special Envoy, Martti Ahtisaari’.²³ The Contact Group instructed Ahtisaari, and directly appointed the envoys who led the further negotiations that followed the announcement of Ahtisaari’s plan for Kosovo’s future status.

Given the wide variety of international organizations involved, it is useful to briefly discuss the relevance of Hypothesis 4 presented in the volume’s Introduction (*‘Deadlocks occur because certain institutional structures facilitate or deter agreement’*) for this case. Did different institutional rules have an impact on the negotiations and their outcomes? To a limited extent, they did. For example, the decision-making procedures in NATO – where the NATO Council had given authority

²¹ This is an example of cooperation between an informal body and the UN Security Council, as discussed by Prantl in this volume (Chapter 8). The Kosovo case supports Prantl’s point that the effect of the involvement of such informal bodies is varied. However, contrary to Prantl’s assertion, I do not see the Contact Group’s involvement as direct evidence for Hypothesis 4 (see below).

²² Independent International Commission on Kosovo 2000, pp. 137–40.

²³ Weller 2009, p. 194.

to its Secretary-General to make the decisions, together with the main member states, to go to war – facilitated the initiation of the military intervention in 1999.²⁴ Under different organizational rules, this might not have been possible and intervention would have been more difficult to achieve. Also, it can be argued that the veto powers of the permanent members of the UN Security Council contributed to the relatively limited importance of the UN as a negotiating forum in this case. On the whole, however, institutional structures and rules were not very relevant in the negotiations on Kosovo.

However, the presence of various institutional settings did affect the negotiations in two other relevant ways. First, rather than institutional rules, differences in the *membership* of the various institutions mattered. The fact that Russia is not a member of NATO undoubtedly played a crucial role in the decision by the United States and other states to confine the planning and approval of the military intervention in 1999 to NATO, where this approval could be secured relatively easily, and not seek authorization from the UN Security Council. Similarly, the smaller, and therefore potentially more efficient, setting of the Contact Group may be one of the reasons why it has played a key role in the negotiations.²⁵ Second, the sheer availability of different institutional settings, and the consequent possibility to shift to a different forum when negotiations become bogged down in one setting, affected the negotiations in this case. Rather than different rules or membership, this is one of the main reasons for the frequent use of the Contact Group as a forum for negotiations and planning when avenues at the UN were blocked. Although not discussed in detail here, this can also explain why the OSCE came into picture on several occasions in the late 1990s. While it certainly affected the negotiation process, the impact of this practice of *forum shifting* on the negotiation outcomes is more ambiguous. On the one hand, it kept the process going at time when there were no prospects for any progress at the UN level. In this sense it may have increased the likelihood of an agreement. On the other hand, the availability of various institutional channels prevents actors from facing a clear ‘take it or leave it’ situation (thus improving the BATNAs of the

²⁴ Daalder and O’Hanlon 2000, pp. 220–3; Economides 2007, pp. 235–6.

²⁵ By contrast, given the effective veto power that each member of the Contact Group has, its decision-making dynamics can be expected to be similar to that of the UN Security Council.

involved actors, as it provides other venues to pursue their objectives), and thus may paradoxically decrease the chance of obtaining an agreement. In particular, it may increase the possibility of a 'deadlock as extended delay' outcome.²⁶ This practice of 'forum shifting' may also be relevant in other cases and issue areas, and deserves further empirical and theoretical investigation.

Accounting for the negotiation outcomes

What, then, explains the observed negotiation outcomes in this case? And how do these explanations relate to the theoretical framework presented in the Introduction to this volume?

At the bilateral level, the explanation of the failure to reach agreements in 1998–9 and 2005–7 appears straightforward. As the report of the Independent International Commission on the 1998–9 negotiations summarises it, 'the minimum goals of the Kosovar Albanians and of Belgrade [the Yugoslav and Serbian capital] were irreconcilable'.²⁷ The situation in 2005–7 was similar. The Kosovar Albanians wanted nothing short of independence, while for the Serbs independence was unacceptable. Thus, 'this looked like a zero-sum game if ever there was one',²⁸ and 'neither side had much of an incentive to find a historic compromise'.²⁹ In other words, the 'zone of agreement' or 'bargaining space' was seemingly empty in these bilateral negotiations. As indicated in the volume's Introduction, this is a situation consistent with Hypothesis 1 (*'Deadlocks occur because of Superior BATNA or occur whenever and as long as parties believe their alternative to agreement is superior to the deal on offer'*) – the better the BATNAs, the smaller the zone of agreement will be. However, there are a few further issues and questions to be addressed here.

First of all, for a fuller explanation we need to ask which factors influenced the bargaining stances of the two main actors in these bilateral negotiations. In this case, domestic political factors and external actors combined to shape the bargaining positions of these actors. The former factors are obviously consistent with the introductory chapter's Hypothesis 6 (*'Deadlocks occur internationally because of certain*

²⁶ Introduction, this volume.

²⁷ Independent International Commission on Kosovo 2000, p. 161.

²⁸ Weller 2009, p. 191. See also Rohan 2008. ²⁹ Judah 2008, p. 111.

configurations of domestic interests'), while the role of external actors can be conceptualised as influencing the BATNAs of the actors (cf. Hypothesis 1). For the Kosovar Albanians, independence became the main goal since about 1998, following the rise of the KLA. Due to domestic competition for support and outbidding dynamics, it became essentially impossible for more moderate views to come to the fore.³⁰ Only under severe pressure from the Contact Group, which threatened to withdraw any support to the Kosovar Albanian cause, did the Kosovar Albanian delegation agree to the final compromise discussed at Rambouillet. The Kosovar Albanian factions all interpreted the military intervention and establishment of international administration in 1999 as a crucial step towards independence and a vindication of their campaigns. The Kosovar Albanian public has continuously supported independence, giving the Kosovar political actors no reason to advocate other stances. Moreover, the functioning of the international administration in Kosovo and the implicit and explicit signals sent by external actors largely pointed in a similar direction. Particularly the United States made it clear on various occasions that it would support Kosovo's independence.³¹ As a result, the Kosovar Albanians were confident that their alternative to an agreement with the Serbian government was good.

A similar combination of factors influenced the Serbian bargaining positions, especially in the 2005–7 negotiations. The situation in the 1990s was perhaps different, as at this time Milosevic still governed Yugoslavia (as the state was still formally called then) as an authoritarian ruler, so we need to look into his personal motives, which have been the topic of much debate and speculation. Milosevic's position, especially his refusal to agree to the final proposal at Rambouillet, appears to have been influenced by his desire to stay in power in the face of growing domestic protests and opposition (who would have vilified him if he was seen to 'give up' Kosovo), and his perception that the Western powers would not follow up on their threat to intervene militarily.³² Needless to say, the fact that this perception turned out to be mistaken does not rule it out as a significant factor in Milosevic's decision. In the 2005–7 negotiations, domestic factors and the support from Russia shaped Serbia's inflexible stance. The latter provided Serbia with some

³⁰ Weller 2009, p. 218. ³¹ ICG 2007b, pp. 14–15; Judah 2008, p. 115.

³² Judah 2002, p. 228; Weller 2009, pp. 120, 152.

guarantee that a multilateral agreement, which could then be imposed on it, would be hard to reach (that is, it gave Serbia a relatively good BATNA).³³ As for domestic politics, the emotive nature of the Kosovo issue in Serbia, and the presence of nationalist parties as a strong political force made it virtually impossible for any political actor to defect from the position that Kosovo's continued incorporation (at least nominally) in Serbia was a non-negotiable demand. Doing so would have guaranteed accusations of being a 'national traitor' and would have resulted in electoral losses.³⁴ It is also worth noting that only at the later stages of the negotiations about the final status of Kosovo did the Serbian government present constructive proposals for an alternative to Kosovo independence (presented as a 'maximal autonomy for Kosovo' arrangement). The timing of these proposals can be explained by the fact that elections took place in early 2007, which had brought into power a slightly more moderate government and, more generally, took some electoral pressure off the main Serbian political actors.

Second, as indicated above, the bilateral and multilateral levels were linked in various ways, and this could at certain points have been utilised by one of the bilateral parties to get a more beneficial deal. For example, as already mentioned, there may have been such a possibility for the Serbian government early during the 2005–7 negotiations (most likely right before or at the start of the Vienna negotiations). If the Serbian government had come up with a constructive alternative proposal to Kosovo independence, this may have had a chance.³⁵ The Contact Group might have jumped on this as a way of avoiding deadlock at the multilateral level, and there are indeed indications that some international actors made it clear to the Serbian government that they would support a viable Serbian proposal (which could possibly have evolved around large forms of autonomy – bordering on virtual independence – for Kosovo or the partition of Kosovo with the Serb-dominated northern region remaining part of Serbia).³⁶ However, as indicated above, no such proposals emerged. Moreover, it should be pointed out that the role of the international community in this was far from consistent or clear. On the one hand, as just indicated, some international actors may have sent signals to the Serbian government

³³ Weller 2009, pp. 199, 207. ³⁴ ICG 2007a, pp. 12, 36.

³⁵ Weller 2009, pp. 224, 228, 239.

³⁶ Conversation with member of the Serbian negotiation team, April 2009.

that it would find support for a proposal that would fall short of Kosovar independence. On the other hand, the mediator at the Vienna negotiations, Ahtisaari, and his deputy, Albert Rohan, have both indicated that their interpretation of the instructions from the UN and Contact Group was that only Kosovo's (conditional) independence was an acceptable outcome.³⁷ If this is the case, then this will surely have further decreased the chance of reaching an agreement at the Vienna negotiations.

This last observation points to a final issue on these bilateral negotiations, namely, the role that international mediators (and the international community more generally) played. While until sometime in 1998 international actors largely tried to act as neutral mediators, this has not been the case since then (although particularly Ahtisaari may argue otherwise).³⁸ Most Western mediators supported – or, at least, were seen to support – the Kosovar Albanians, while Russian mediators were on Serbia's side. As the outcomes of these bilateral negotiations are overdetermined, it is hard to say how important this factor has been, but it is something worth considering.³⁹

At the multilateral level, on the other hand, the bargaining space was larger and positive, especially as it is, in principle, possible to link Kosovo to other issues at this level. Importantly, as noted in the introduction to this chapter, we observed some variation in outcomes in the multilateral negotiations between the two main episodes. I argue that the role and position of Russia is the key factor in accounting for this variation. As a permanent member of the UN Security Council with a veto, and as one of the members of the Contact Group, its support or acquiescence is required for any multilateral agreement. In 1999, it agreed to UNSC Resolution 1244 (as well as to the earlier UNSC resolutions on Kosovo, but these did not raise very controversial issues and principles, and aimed at conflict prevention or containment only). In the 2005–7 negotiations, the Russian government never indicated any willingness to acquiesce to an agreement, unless the Serbian government would reach an agreement in the bilateral negotiations.

A first look at the 1999 negotiations suggests that one of the reasons for Russia's support or acquiescence was the active role it played in the

³⁷ Ahtisaari 2008, p. 184; Rohan 2008, p. 121. ³⁸ Economides 2007, p. 226.

³⁹ For more on the role of mediators in negotiations, see Chapters 1 and 3, this volume.

various stages of international involvement. Through its participation in the Contact Group, it was involved in some of the attempts at mediation in the developing conflict. Russia was a useful, if often awkward partner for Western powers, as it had direct contacts with Milosevic and might be able to influence him.⁴⁰ Russia was not part of the decision to intervene militarily in March 1999, and would probably have opposed and tried to block if it had been. It certainly protested strongly against the intervention.⁴¹ However, as the war developed Russia became involved, and was actively encouraged to do so especially by the US government, in attempts to end it.⁴² Its envoy Chernomyrdin played a key role in reaching an agreement with Milosevic, which subsequently resulted in UNSC Resolution 1244. Given this involvement in reaching this agreement, it is not surprising that Russia supported it in the UN Security Council.

This explanation is, however, incomplete. First, Russia was, through its membership in the Contact Group, also involved in the negotiations in 2005–7. In fact, this is one of the reasons why other powers wanted the Contact Group to be the body that would try to broker a deal between the Kosovar Albanian parties and the Serbian government, as this would imply that any agreement reached in these negotiations would involve, implicate and hopefully bind Russia.⁴³ In fact, one of the Contact Group envoys conducting the negotiations between the Kosovars and Serbs in 2007 was a Russian representative.⁴⁴ However, Russia's involvement now had different results than in the earlier episode. Second, it begs the question why Russia was willing to engage actively in 1999 and acquiesce in the agreement, while it did not acquiesce in 2008. The underlying factor behind this appears to be Russia's changed position as a global power. In 1999, Russia was still struggling with the consequences of the collapse of the Soviet Union and was trying to find a new position in global affairs. It appeared to try to do this by develop a 'strategic partnership' with the West rather than

⁴⁰ Independent International Commission on Kosovo 2000, pp. 143–6.

⁴¹ Facon 2006. ⁴² Daalder and O'Hanlon 2000, pp. 72–5, 219–20.

⁴³ 'This arrangement was intended to ensure that Russia would be bound into the process at an early stage, so that the results of the negotiations would be guaranteed passage through the Security Council, given Russia's controlling involvement throughout'. Weller 2009, p. 195.

⁴⁴ Weller 2009, p. 223.

rely on a direct ‘balance of power’ logic.⁴⁵ This had changed by 2005. Rising oil prices and the actions of Vladimir Putin’s government, for which Russia’s standing in global affairs was an important claim to legitimacy,⁴⁶ had re-established Russia as a significant global power. Its unaccommodating stance on Kosovo’s final status fitted nicely with this larger objective and strategy. Thus, this explanation for the multilateral negotiation outcomes is consistent with Hypothesis 3a of the theoretical framework presented in the volume’s Introduction (*‘Deadlock is more likely, the more equal the power distribution’*).

A logical implication of the analysis in this section is that the deadlock in the Kosovo negotiations (as of early 2009, with no multilateral agreement on the final status of Kosovo or recognition of its declared independence) could possibly be solved if some external actors changed their positions. For example, if Russia would give up its support for Serbia and change its stance in the Contact Group and UN Security Council, or if the United States and the European Union would withdraw – or threaten to withdraw – support for Kosovo, then a deal between the Kosovar Albanians and Serbs might occur, which in turn would facilitate a multilateral agreement. Withdrawal of external support would significantly change the BATNAs of both the Kosovar Albanians and the Serbs (cf. solution set 1, Introduction to this volume). However, whether this is a feasible scenario is a different matter. Russia and the United States have not shown any inclination (at the time of writing in mid-2009) to change their positions, and the EU is so heavily invested and implicated in the governance and prospects of Kosovo that threats to withdraw its support are hardly credible. Perhaps Russia will feel at some point that it is in its interest to drop its opposition to Kosovo’s independence in return for concessions on some other international issue it feels strongly about, but there have been no indications of this so far.⁴⁷ Other possible developments that may unlock this situation would be changes in domestic politics (cf. solution set 6), for example, if pro-European forces become increasingly dominant in

⁴⁵ Bellamy 2002, p. 211; Economides 2007, pp. 233–4; Facon 2006. Judah 2002, p. 183, reports that in October 1998 a Russian minister ‘in effect, told NATO that it would do nothing if it were to bomb’, although it would not authorise such action in the UN Security Council.

⁴⁶ This, of course, indicates that domestic politics played a role in this too (cf. Hypothesis 6).

⁴⁷ ICG 2007a, 2007b, 2008; Judah 2008, pp. 135–9.

Serbia or if a Russian government less focused on its standing in international affairs were to emerge; or changes in the balance of power at the international level (cf. solution set 3), for example, if persistently low oil prices were to reduce Russia's international position.

Concluding observations

As one should expect when investigating a specific, complicated and lengthy set of negotiations, the analysis of the international negotiations on Kosovo provides support for several aspects of the theoretical framework presented in the Introduction to this volume. Especially Hypothesis 1 on the role of the BATNAs of key actors in the negotiations (in this case the Kosovar Albanians and Serbs), Hypothesis 3a on the relevance of power balances between actors (in this case the balance between Russia and the West, which was arguably more equal in 2005–7 than in the late 1990s), and Hypothesis 6 on the relevance of domestic politics (in explaining the negotiation positions of Kosovar and Serbian political actors, and also possibly of the Russian government) can help to account for the various outcomes of these negotiations. On the other hand, the hypotheses on the importance of bluffing, institutional features or concerns about justice and fairness appear to be less relevant in this case.

Moreover, this brief case study indicates that these factors are not necessarily independent, but mutually influence each other. In particular, the hypotheses on the roles of domestic politics and BATNAs are related, as domestic political developments within some of the states involved in negotiations often influence their own BATNAs or those of other states. For example, domestic opinion in Serbia is such that any government that agrees to Kosovo's independence is likely to be out of power soon, making its BATNA relatively good (no agreement, but a much better chance to stay in power). Similarly, the relatively nationalist Russian government under Putin would have lost support if it had not stood strong on the Kosovo issues and had not supported Serbia, which in turn improved Serbia's BATNA (it could continue to count on Russia's support, even if it failed to reach a bilateral deal with the Kosovar Albanians). More generally, this case demonstrates that external actors – including multilateral organizations – can influence the BATNAs of negotiating parties through their support, promises and threats. This, in turn, provides one avenue by which deadlocks may be solved (cf. solution set 1).

To conclude, it is useful to reflect on one further puzzle that this case of the international negotiations on Kosovo raises: if an agreement between the Kosovar Albanians and Serbs was so implausible (as was the case in both episodes discussed in this chapter), why were these negotiations conducted at all and for so long? If zones of agreement were indeed empty, why not concede this and avoid the trouble and costs of negotiations? This is particularly worth addressing, as there appear to be many instances of negotiations, in which agreement is never very likely, but which occur anyway. The Kosovo case suggests several points in relation to this puzzle. Most obviously, it may only be apparent with hindsight that a deal was never feasible. Especially in cases such as the Kosovo negotiations, where many external actors are trying to influence the main negotiating actors (and there is, thus, a prospect that these actors will significantly change their positions), it may not be clear at the outset of negotiations that the bargaining space is empty.

However, this is not the whole explanation for why negotiations took place – and occurred so often – in the two episodes on Kosovo. A second reason is that the process by which a deadlock is reached is itself important. In 1999, the failed negotiations between the Yugoslav government and the Kosovar Albanians were necessary for NATO and parts of the international community to legitimise certain options, in particular military intervention.⁴⁸ Without the bilateral negotiations, it would have been much more difficult to decide on such actions, even within NATO, and especially to reach any form of multilateral agreement afterwards. Furthermore, it matters who gets blamed for a deadlock, and part of actors' strategic actions are aimed at avoiding blame. Some external actors made it clear to the Kosovar Albanians in Rambouillet that continued support for their cause would depend on them not being seen as the main cause for the breakdown of negotiations. A minimum condition for continued external support may be to show at least the willingness to engage in negotiations. This was one of the reasons for the participation and some accommodating positions of the Kosovar parties in the negotiations in 2005–7.⁴⁹ Also, these negotiations occurred at the same time as the Serbian government (or, more

⁴⁸ Daalder and O'Hanlon 2000, p. 89; Independent International Commission on Kosovo 2000, p. 153.

⁴⁹ Weller 2009, pp. 201, 210.

accurately, part of the Serbian government, as there were significant internal divisions on this issue) was trying to improve its relation with the EU. Refusing to negotiate on Kosovo's final status would certainly have jeopardised this objective.⁵⁰ Finally, for actors in multilateral negotiations, it can also be politically useful to be able to blame other actors (in this case, those involved in the 'bilateral' negotiations).

All this suggests that the process by which a deadlock occurs can be significant in itself, as it may influence a party's ability to obtain side or future benefits, and may influence the position of actors in other or further negotiations. This reinforces the points made in the Introduction to this volume that deadlocks should not simply be seen as failures to reach agreements and, therefore, as wholly negative outcomes for all involved parties, but need to be analysed closely for their dynamics and range of consequences.

⁵⁰ ICG 2007b, pp. 8–11.

10

Beyond negotiation deadlocks: the importance of mediation and leadership change

JACOB BERCOVITCH AND CARMELA LUTMAR

International conflicts have become quite a common feature of international relations. When they arise, numerous methods may be used to get out of a conflict or to resolve it. Of these we wish to pay particular attention to negotiation. Negotiation is one of the most common responses to any conflict. It is a complex process used to settle disputes over competing interests, resources or positions. The scale of negotiations varies greatly from frequent daily negotiations between individuals through to complex negotiations between states. Similarly, negotiation outcomes may have different consequences. The outcomes of negotiations at the interpersonal level will usually affect those directly involved in the process. At the international level, negotiations may, when successful, lead to a cessation of violence and new ways of interactions, or, when they fail, be responsible for an even larger scale of violence affecting many in all sides of the conflict. We are interested here in one aspect of negotiation, namely, why do some negotiation efforts drag on and on, and finally fail? We want to understand what conditions in international relations produce such deadlocks and how best to break a deadlock.

Negotiation and conflict management

Negotiation is the most frequently used method of conflict management in international relations. This is so not only 'because it is always the first to be tried and successful, but also because states may believe its advantages to be so great as to rule out the use of other methods, even in situations where the chances of a negotiated settlement are slight'.¹

¹ Merrills 1998, p. 2.

The practice of negotiation pre-dates the modern international system; diplomats have been used by different political entities to resolve their disputes for millennia. Wherever different parties need to cooperate to achieve goals or to resolve conflicts, some form of negotiations will have to take place.

As a way of resolving conflicts, negotiation involves a decision and a termination mechanism that can move adversaries from a conflictual to a non-conflictual position. Negotiation is a successful method in resolving even the most difficult and intractable issues (e.g. the GATT negotiations, negotiations over Antarctic resources, negotiations to resolve the Northern Ireland conflict, etc.), but on many occasions parties to a conflict may reach a deadlock, fail to resolve a conflict or just experience a deadlock in their efforts (e.g. US negotiations with North Korea). Failure in negotiations, or a deadlock, is as common in international relations as success.² A deadlock represents some kind of a discontinuity in the process of negotiation. The really interesting question relates to how best to cope with, or overcome, such discontinuities, as is the purpose of this book.

As deadlocks are inseparable from the negotiation process, a brief discussion of the phenomenon of negotiation is in order. Negotiation is a conflict resolution strategy that aims to reach an agreement through a decision-making process involving parties to the conflict. It is a process where an exchange of concessions is regarded as common, even when the parties' preferences have not been completely satisfied. Of the many definitions, both narrow and wide, the most satisfactory definition, and the one which accounts for the openness of scientific terms at the same time as reflecting the manner, context and objectives of bargaining and negotiation, is that offered by Stephenson and Morley.³ They refer to negotiation as 'any form of verbal (or non-verbal) communication, direct or indirect, whereby parties to a conflict of interest discuss, without resort to arbitration or other judicial processes, the form of any joint action which they might take to manage a dispute between them'.⁴ This is a broad definition that suggests the broad parameters of negotiations and draws attention to both its structure and dynamics and factors that may interfere with either of these. We adopt this definition for the purpose of this chapter.

² Spector 1999. ³ Morley and Stephenson 1977.

⁴ Morley and Stephenson 1977, p. 7.

The negotiation process

As a method of conflict management, negotiation has several key advantages. First, it can provide satisfactory results for the parties, as it involves both parties in a voluntary process where parties themselves can craft an agreement and ensure it is durable. Negotiation is a process in which parties decide how to negotiate, where to negotiate and over what to negotiate. Second, it is an efficient process. In most cases negotiations take less time and fewer resources than other conflict management processes. Third, it provides a basis for more regulated and predictable interactions between the parties in the future (negotiation is as much about future behaviour as it is about current issues). Finally, negotiations provide the parties with a set of legitimate standards (objective criteria) for evaluating and accepting any options.⁵

Given the broad appeal of negotiations, it is not surprising to note that the process has been so popular. In one comprehensive account we find that since the Second World War, over 1,631 cases of official negotiations have been initiated in response to major international conflicts.⁶ As a result of the frequency with which negotiation is used, and the seriousness of the issues with which it deals, considerable academic attention has been focused on the negotiation process. A vast number of prescriptive guides have been published in hope of improving its success rate. These guides tend to provide step-by-step accounts of the process on how best to optimise the procedures, covering issues such as preparation; negotiation strategies; agenda-setting; communication techniques; and the physical location of negotiations. The inherent assumption behind all these studies is that there are basic rules and norms that can be adopted to overcome any negotiation problem in any conflict, and that the process is essentially linear where parties can be encouraged to move from one phase to the next without any breaks in the process.

A good example of such an approach to negotiation studies is the seminal work *Getting to Yes* by Roger Fisher and William Ury.⁷ They advocate a form of conflict management known as 'principled negotiation', where decisions are made on the basis of their merits rather than through a haggling process centred on achieving concessions from the opposition. Principled negotiation suggests that negotiators should

⁵ Funken 2002. ⁶ Bercovitch and Fretter 2004, p. 29. ⁷ Fisher and Ury 1981.

look for mutual gains wherever possible, and that the result of negotiations should be based on some fair standards, rather than through one party conceding to another's demands. Fisher and Ury⁸ present eight major strategies which can assist the principled negotiation approach such as separating people from the problem; focusing on interests rather than positions; inventing options for mutual gain; and insisting on objective criteria. A voluminous literature has been published in a similar vein.⁹ All these studies assume that negotiations, if properly conducted, can overcome all difficulties and lead inevitably to an agreement. This is not an assumption we share. The process of negotiation is not quite so linear, nor is it quite so predetermined, in reality it ebbs and flows and has as many sticking points to it as there are issues.

Negotiation deadlock

Clearly, the use of negotiation to manage conflict has a number of advantages, and additionally, considerable effort has gone into improving and refining the process in order to maximise its effectiveness. However, regardless of how skilled, well prepared, or knowledgeable a negotiator is, negotiations will not always proceed as planned. Negotiation efforts can – and often do – grind to a halt, where progress toward any form of settlement or resolution stalls. This phenomenon is known as deadlock.

A deadlock stops progress in negotiations. It represents a protracted situation of no agreement, where parties simply can not move forward whatever they do. A deadlock is best seen as a situation where there is no agreement coupled with an obvious landmark in the cycle of negotiations (see Introduction). A deadlock is thus a situation where there is no progress, no mutual influence, no concessions in negotiations, and where there a perception of immobility and inactivity takes hold. It is in short a situation of little or no cooperation. As such, a deadlock may trigger escalation and renewed violence between the parties, create a feeling that a compromise is no longer possible (resulting thereby in either extended delay or a complete breakdown of the negotiation process, as discussed in the Introduction). Or a deadlock can help

⁸ Fisher and Ury 1981.

⁹ See Druckman 1977b; Hawkins and Hudson 1990; Lewicki and Litterer 1985; Pruitt and Carnevale 1993; and Wall 1985.

negotiators to reverse their course of action and work harder towards a compromise (thereby taking the shape of a stalemate).¹⁰ This is why deadlocks are so important to us, and why we need to understand their causes in order to find out the best way of getting out of a deadlock.

We may think of deadlocks *structurally* and suggest that they can be of two kinds:¹¹ strategic (where a deadlock relates to real and basic incompatibilities between the parties); or tactical (where it results because of failures to coordinate the process of negotiation). Or we may analyse deadlocks in *process* terms and suggest three types of deadlocks: a genuine stalemate in the process of negotiations; an extended delay in the process; and a complete breakdown in the process (as per the typology provided in the Introduction). Each of these types of deadlocks may require different coping strategies if the parties in conflict are to transform their situation.¹²

A deadlock of any kind may occur with or without the presence of a third party. A deadlock is not limited to situations where disputants exhibit a low motivation to reduce or resolve the conflict.¹³ A deadlock may occur, *inter alia*, because of inflexible positions, lack of commitment or desire to resolve a conflict, or political leaders' commitment to their official position. On the international stage, the conflicts surrounding the break-up of Yugoslavia in the 1990s represent an excellent example of the difficult realities faced by negotiators. The issues and complications involved in these conflicts were diverse and included ethnic, religious and economic factors. In the early stages of the conflict, a combined negotiation effort involving the foreign ministers of Luxembourg, Italy and the Netherlands was initiated, yet despite their continued efforts, substantive progress towards some form of ceasefire was never achieved.¹⁴

The lack of success experienced by the trio of European foreign ministers, and many of the other negotiation efforts dealing with the conflict in the former Yugoslavia raises the issue of what should be done when negotiation efforts are deadlocked? Whilst there is an abundance of literature which seeks to guide negotiators to improve their effectiveness by adopting a few generic rules (about which we are very doubtful),

¹⁰ See the Introduction to this volume for a detailed typology of deadlocks based on outcomes.

¹¹ Cohen 2001. ¹² See Introduction. ¹³ Bloomfield *et al.* 1998, p. 99.

¹⁴ Weller 1992, p. 571.

there is a notable absence of scholarly work considering the steps negotiators should take to break out of a deadlock, what internal or external factors may be needed to jolt the negotiation forward and reverse any escalation which may result from a deadlock. To answer that question, we first need to understand something about the causes and origins of negotiation deadlocks.

Why deadlocks?

Deadlocks may represent a major barrier to the dynamics and possible success of any negotiation process. They are characterised by a high degree of uncertainty and a low degree of progress. Underdal, in an early study, presents four primary causes for negotiation deadlocks.¹⁵ First, there is the issue of uncertainty. This occurs where disputants are uncertain about aspects of the negotiation process such as the preferences, perceptions and beliefs of their opposition, or uncertainty about the actual effects of certain proposals. When uncertainty is high, parties will fail to realise possible shared interests and gains, and thus increase the likelihood of a deadlock. Second, and related to the issue of uncertainty, is the idea of imperfect (and often inaccurate) information as a possible cause of deadlocks. Both imperfect information and uncertainty will make disputants cautious about moving away from the status quo and particularly sceptical about making any commitments. A third factor which may produce a deadlock in negotiation is the tendency for the process to reinforce certain 'stakes'. When negotiations begin in this fashion, the likelihood of deadlock is pretty high. For example, the very act of entering negotiations may have serious repercussions for some parties in terms of reputation, standing and position (e.g. for the United States to enter into direct negotiations with Iran may in itself send a series of messages that could affect the US position and reputation in other cases). Finally, some negotiations are destined simply to reach a deadlock or fail, simply due to the absence of a politically acceptable solution model (e.g. any negotiations between Israel and the Palestinian faction of Hamas will reach a deadlock in the very first session of negotiations). Deadlocks can thus occur because of any one (or more) of these factors cited above.

¹⁵ Underdal 1983.

To these factors we may add other factors that may produce deadlocks. Here we can mention factors such as the number of negotiating parties (e.g. when many parties are involved, a deadlock is more likely to occur), openness and publicity of negotiations (the more secret the negotiations, the higher the chances of a successful outcome), the nature of the issues in conflict (e.g. the more substantive the issues the higher the likelihood of a deadlock), and the rank of negotiators (negotiations conducted by heads of states or prime ministers are less likely to result in a deadlock). Each and every one of these can produce a serious disruption to any negotiation process.

This book presents six different conditions or factors for the occurrence of a deadlock (see Introduction). These factors can be described as falling into two main categories; *process* and *structural*. Process factors relate to the way the negotiation process unfolds (e.g. when parties engage in too much bluffing, posturing and lying, as per Hypothesis 2 or when they feel they have no incentive to make concessions, perhaps because they have a superior BATNA available, as per Hypothesis 1, Introduction). Structural factors relate to such causes as asymmetry of power between the parties (Hypothesis 3, Introduction), which may result in the stronger party simply stonewalling, or because of certain institutional constraints on negotiations (Hypothesis 4, Introduction) (e.g. a lack of clear guidelines on such issues as chairmanship, prominence of issues, level of representation, etc. stymied the Madrid Peace Negotiations in 1992), or indeed certain configurations of domestic political structures and interests (Hypothesis 6, Introduction), for instance when some political leaders may feel that their interests would be better served by creating deadlocks and inducing a sense of crisis than by achieving an agreement. The last, though by no means the least important factor, is the one we propose to examine here. We believe this is an important cause of deadlocks and will spend some time below developing and examining this idea.

Once we can analyse the possible causes of a deadlock, it behoves us to appreciate the characteristics and manifestations of a deadlocked situation. Lewicki and Litterer suggest that once a deadlock emerges there are six main factors that are typical of it, and make the whole conflict management effort that much more complicated.¹⁶ These factors are both of a strategic and psychological kind. First, a deadlocked

¹⁶ Lewicki and Litterer 1985, p. 281.

environment is charged with anger and frustration and these sentiments are directed at the opposing negotiator. Second, as a result of this anger and frustration, disputants' positions become increasingly entrenched and, rather than searching for ways to make concessions, parties become firmer in their initial demands and resort to threats and deceptions in an effort to force their opposite to back down. Third, channels of communication which had been active are no longer viable except for the purpose of criticism and apportion of blame. Fourth, the original issues at stake in the conflict have distorted and become ill-defined. Fifth, the parties perceive extreme differences between their respective positions and areas of commonality are perceived as either minimal or non-existent. Finally, the in-group dynamics of the disputants will change. Disputants will tend to view those on the same side more favourably and minimise any differences that exist. In an effort to present a united front to opponents, leaders will demand more uniformity within their team and increasingly autocratic and militant leadership styles will emerge.¹⁷ Whichever way we look at it, deadlocks are very difficult social situations with serious consequences negotiation at any level.

As mentioned earlier, negotiation deadlocks present major obstacles preventing progress towards a reduction in conflict. In fact, we can safely say that deadlocks may actually intensify conflict as disputants become increasingly entrenched in their positions. And yet, on some levels it may be posited that deadlocks – especially when they take the shape of stalemates (see Introduction) – actually create opportunities for conflict management. If nothing else, they at least provide us with signposts as to the real state of the negotiation. Is it possible to see deadlocks as opportunities? There are very few studies that attempt to address this issue.¹⁸ Yet, we must clearly see deadlocks as a warning sign as well as an opportunity. Our task is to ensure the opportunities are grasped and the deadlock broken. This is not an easy task when the causes of a deadlock are structural.

Some scholars believe that all it takes to break a deadlock is to train the parties and refocus their efforts. William Ury provides a good example of such an approach. Ury states that certain negotiation situations are particularly susceptible to deadlock and that these situations call for more than just ordinary negotiation skills.¹⁹ These situations are generally characterised by the presence of particularly difficult issues,

¹⁷ Blake and Mouton 1961; Corwin 1969. ¹⁸ Downie 1993. ¹⁹ Ury 1991.

and clearly hostile disputants. The combination of these two factors creates a deadlock of some sort. To overcome such deadlocks, Ury provides negotiators with a five-step process, which he refers to as 'breakthrough negotiation'. The first step emphasises the importance of avoiding an adverse reactions to initial positions. This can be achieved by stepping back from the conflict and attempting to distance actions from impulses and reactions. Second, disputants must diffuse their anger, fears and suspicions. Third, Ury emphasises the importance of reframing an opponent's position rather than rejecting it, as this generally only strengthens and reinforces it. Fourth, mediators should be enlisted to help disputants to save face and provide them with an easy way out of the conflict. Finally, if one party is still committed to unilateral methods (i.e. violence) in the hope of achieving all its objectives, that party must be educated by third parties and others, as to the folly of this course of action.²⁰ Ury's conception of negotiation as a process that can just keep on moving forward irrespective of circumstances is as touching as it is erroneous.

In a similar vein, Bloomfield *et al.* outline a number of 'tried and tested techniques' which may be useful for overcoming situations of deadlock. The first of these is the idea of building a 'coalition of commitment' between members of both the parties who still value the negotiation process.²¹ A strong pro-negotiation coalition can increase pressure on those causing the deadlock by the implicit threat that they will take the blame if the talks stall or collapse. A second technique is the use of unofficial channels of communication, which can supplement the official negotiation process. Where a specific issue is causing deadlock, the use of subgroups or subcommittees may be convened to address that specific issue. The use of subgroups can divide the agenda into more manageable segments. A further technique for dealing with specific issues, particularly when emotions are running high, is the use of 'proximity talks'. This technique eases the pressure on the disputants by separating them into different locations (but in relatively close proximity, e.g. different rooms of the same building). Disputants will then communicate entirely through a nominated chairperson.

Lewicki and Litterer also discuss the problem of how to break a negotiation deadlock.²² They make an important point by noting that

²⁰ Ury 1991. ²¹ Bloomfield *et al.* 1998, p. 99.

²² Lewicki and Litterer 1985, p. 280.

negotiation techniques are particularly difficult to implement 'in the heat of the battle'. Under conditions of mistrust and suspicion, disputants will often view indications of cooperation or concession as tricks or ploys aimed at luring their own party into a position of vulnerability. Lewicki and Litterer introduce a range of methods to help move disputants away from deadlock. These can be summarised as techniques to reduce or release tension; improvement of the accuracy of communication; controlling the issues that are under negotiation; establishing commonalities; and techniques regarding how to make preferred options more desirable to the opponent.²³

A common theme regarding the causes of deadlock is that the fear of one or both disputants losing face will prevent them from moving towards agreement.²⁴ Examples of situations where maintaining face has hindered negotiations include the 1951 Korean ceasefire negotiations, the 1972 Vietnam talks in Paris, and the continuing negotiations in the Middle East.²⁵ In response to this, a deadlock may be broken, by allowing disputants time to present options to their constituents, and seek approval for their actions.²⁶ Additionally, negotiators may shift responsibility for any concessions on to a mediator, so that they at least can be seen as sticking to their original position.

While acknowledging the importance of saving face in negotiations, Hawkins and Hudson²⁷ argue that negotiation deadlock primarily occurs when either one or both of the disputants are not having their important needs met. As such, the first step to resolving deadlock is to re-evaluate the disputants' needs to ensure that they are accurately identified. Once disputant needs are accurately identified, the content of discussion, and negotiation style and behaviour should be changed accordingly. Processes such as redefining issues in a new and different manner; finding a bridging issue; recapping areas of agreement; recollection of previous good association; and discussion of the failure to negotiate are all put forward as additional techniques to help disputants move beyond deadlock.²⁸

Rubin suggests a further explanation for negotiation deadlock, arguing that stalemate is commonly caused by entrapment. Once

²³ Lewicki and Litterer 1985, pp. 282–99.

²⁴ Deutsch 1973; Rubin and Brown 1975; and Tjosvold 1974.

²⁵ Brown 1977, pp. 275–6. ²⁶ Bloomfield *et al.* 1998, pp. 99–102.

²⁷ Hawkins and Hudson 1990. ²⁸ Hawkins and Hudson 1990, pp. 109–10.

disputants invest a certain amount in a conflict, they become increasingly reluctant to sacrifice that investment, regardless of how fruitless the conflict has become.²⁹ On a large scale, the US involvement in the Vietnam War, or the Soviet invasion of Afghanistan provide us with good examples of how costly entrapment can become.³⁰ A range of strategies are recommended to overcome problems of entrapment such as setting limits; ensuring disputants stick to their limits; and reminding disputants of the costs involved.³¹

What has been considered so far could be described as the 'conventional' approaches to negotiation deadlock. Most of these approaches simply see deadlock as a result of problems in the way in which negotiation is applied. As such, the techniques prescribed to deal with deadlock essentially amount to an extension of the negotiation process, for example clarification of positions, or allowing disputants time to cool their heels. Some research considering negotiation deadlock discusses approaches to the problem which are distinct from the basic negotiation process. Lewicki and Litterer (1985) suggest that when negotiations become deadlocked, it may be necessary to introduce a new form of conflict management.³² Arbitration, mediation and process consultation are put forward as potential alternative forms of conflict management. The benefits of moving to a completely new form of conflict management, such as mediation, have been identified by a number of scholars.³³

A new approach – leaders and mediation

Here we are trying to look at the issue of how domestic political structures or certain configurations of domestic interests produce deadlocks, and how best to escape the constraints of a deadlock. We agree with the central premise of this book: if we are to understand the solution to deadlocked negotiations, we have to understand the causes of these deadlocks. In this chapter, we emphasise a factor that has been largely neglected in the literature on negotiations and deadlocks: domestic political interests (Hypothesis 6, Introduction) and, more specifically, the role of leaders in this process. We know that in any

²⁹ Rubin 1993. ³⁰ Rubin 1993, p. 209. ³¹ Rubin 1993, pp. 215–16.

³² Lewicki and Litterer 1985.

³³ Bloomfield *et al.* 1998, pp. 108–9; Pruitt and Carnevale 1993.

process of conflict management there are some internal factions who may have an interest in prolonging rather than resolving a conflict, but how do political leaders as individuals affect the whole process of negotiations?

Scholars in international relations have shifted their research focus only recently, in the last decade or so, to leaders as the main unit of analysis. Recent studies have shown that the outcome of wars yield significant effects on the fate of leaders.³⁴ Moreover, Bueno de Mesquita and Siverson³⁵ also found that democratic leaders are more likely to engage in wars in their early years in office when domestic support is still high as opposed to dictators who engage later.³⁶

This line of reasoning has been further developed (and tested) to claim that losing wars generates different consequences in terms of leaders' tenure in various regime types.³⁷ Thus democratic leaders face higher costs than dictators in case they lose a war or if war is costly. This argument was later expanded to what is known as the institutional explanation for the democratic peace.³⁸ If democratic leaders are more likely to be removed from power in the event of a defeat in war they will place less expected value on wars.³⁹ Furthermore, anticipating these possible consequences, democratic leaders engage only in wars in which they think there is a high probability of winning.

Goemans examined the link between war outcomes and post-war fate of leaders and the relationship between duration of wars and domestic institutions.⁴⁰ He finds that only leaders of mixed regimes can expect the same degree of punishment in cases when they lose moderately or terribly. Thus these leaders do not have incentives to reach agreement and would rather continue fighting, which makes wars against them last longer and result in a larger number of casualties.

McGillivray and Smith⁴¹ employ an interesting approach where they rely on recent theoretical work by Bueno de Mesquita *et al.*⁴² and McGillivray and Smith⁴³ and derive hypotheses on the effect of

³⁴ Bueno de Mesquita *et al.* 1992; Bueno de Mesquita and Siverson 1995; Werner 1996.

³⁵ Bueno de Mesquita and Siverson 1995. ³⁶ Gaubatz 1991.

³⁷ Bueno de Mesquita and Lalman 1994; Bueno de Mesquita and Siverson 1997.

³⁸ Bueno de Mesquita *et al.* 1999.

³⁹ Bennett and Stam 1996; Reiter and Stam 1998, 2002, 2003; Schultz 1999, 2001.

⁴⁰ Goemans 2000. ⁴¹ McGillivray and Smith 2004, 2008.

⁴² Bueno de Mesquita *et al.* 2003. ⁴³ McGillivray and Smith 2000.

leadership change in different winning coalitions systems on bilateral relationships (measured by trade). They find that trade between systems with large winning coalitions (democracies) is less likely to be affected by leadership whereas systems with small winning coalitions (dictatorships) are more vulnerable to those changes and that bilateral trade will decrease as a result of leadership change. Moreover, leadership change in dictatorships will most likely restore the bilateral trade to its previous level.

Theirs is the first study, to the best of our knowledge, that links leaders' tenure in office (or its termination) to the way relations between states are affected by it. The findings suggest that democratic regimes are not only less likely to engage in conflicts and to solve their disputes in a peaceful way but also that these regimes are more stable in the face of leadership change and thus have a stabilizing effect on bilateral relationships.⁴⁴

The main underlying assumption of this literature is that leaders want to keep their position and will do everything to avoid losing, or being removed from power. Therefore, it is sensible also to assume that when they go to war they have in mind an institutional arrangement they would like to see when the war is over. Whereas the immediate purpose is to win the war, a no-less-important goal, once the first one is achieved, is to see a favourable leadership in the rival state that will allow for the implementation of policies to the liking of the winning state. It is also sensible to assume that leaders that are engaged in a negotiation process will be very attentive to their domestic constituents, and this is much more so in democracies where elections are held frequently, and can result in removal from power.

Let us take a step further and apply this approach to deadlocks in negotiations. We can assume that leaders involved in prolonged negotiations will have invested quite a lot in the process of negotiations. As the issues on the table are more complex, and the conflict longer-lasting, the leaders of the respective states will be more entrenched in their positions. The more entrenched and the more inflexible they are, the longer their deadlock. From this point of view it is easy to see how deadlocks can arise in the course of negotiations, and how difficult it will be to break them as long as the same leaders remain in charge of the negotiation process. Moreover, the longer the deadlock, the more

⁴⁴ Dixon 1994.

difficult will it be to get out of it, as the respective leaders become more and more identified with the positions they espouse at the negotiation table.

The grim prognosis for the probability of success in case of deadlocks does not change dramatically even in cases when a third-party mediator is present. Leaders of the parties present their positions, and whatever the initial reasons for the deadlock, those are not likely to change once positions have been exposed, and backing off from those might bear a domestic cost for the leaders in the form of future electoral defeat. Again, we are more likely to observe those considerations in more democratic regimes where leaders' accountability to the domestic audiences plays a bigger role than in more autocratic regimes.

We argue in this chapter that deadlocks are more likely to arise when leaders have been in power for a long time, and when they show no sign of abdicating their positions. Our reasoning is straightforward – every negotiation process in complex conflict situations requires imaginative solutions and constant creativity in an attempt to bridge the parties' opposing views on the issues at stake, and a willingness to take some calculated risks when offering concessions followed by the commitment to 'sell' it to its constituents. The longer the respective leaders are in power, the more the same ideas will be on offer at the negotiation table, thus increasing the likelihood of a deadlock. The cost of backing off from publicly declared positions is much higher for democratic leaders, therefore those will be even more reluctant to change their positions once they have openly exposed them. The presence of a third-party negotiator can ameliorate those effects but not to do away with them entirely. Third-party mediators can offer fresh ideas, alter the parties' preferences to some degree, and even present guarantees in case of a superpower involvement, but they cannot modify leaders' perceptions regarding their probability of staying in power. The longer leaders are in power, the harder it is for them to change their policies, and to deviate dramatically from positions they have put forward in earlier stages. No leader wants to be perceived as weak or as caving in to external pressure, either from the other party or from a third-party mediator.

We turn now to summarise the hypotheses we test in this chapter –

Hypothesis 1: Deadlocks in negotiations defined as rejection of negotiation offers, or unsuccessful efforts, are results of lack in leadership turnover in one of the parties or both.

Hypothesis 2: The relationship between tenure of leaders and deadlocks in negotiation processes is more evident in democracies.

Quantitative analysis

To test our hypotheses we turn to two distinct datasets that address the negotiation/mediation component and the leadership change factor. This section describes in detail the two datasets and the statistical analysis we conducted.

There are very few datasets that code conflicts among states in combination with the mediation attempts that may have taken place between the disputing parties. One main dataset, the International Conflict Management (ICM) dataset, codes the conflict management efforts that states undertake to resolve their disputes.⁴⁵ One can find there the descriptions of the conflicts, the conflict management attempts and the coding of variables. This is the dataset we use here for the purpose of indentifying negotiation attempts (or lack of).

Conflicts were included in the ICM dataset if they conformed to the following criteria: first, they involved at least two states, one of which could have been involved indirectly; and second, they were characterised by a significant use of force (which ranged from a demonstration of intention to use military force such as a military build-up to open warfare), regardless of whether there were fatalities.⁴⁶ A total of 221 inter-state conflicts were identified in the 1945–2000 period. Out of the 221 conflicts, 156 (i.e. 70 per cent) witnessed some type of negotiation/mediation attempt. That is, ‘they experienced reported formal, or sometimes relatively informal, attempts by the disputing parties to communicate with each other about substantive issues related to the cause and/or consequences of their conflict’.⁴⁷ In some disputes, mediation was attempted more than once. The range per conflict varied from zero to seventy-six (in the Yugoslavia–Kosovo case) negotiation attempts. There were 533 separate mediation efforts in these disputes.

However, recall that our purpose in this chapter is to identify cases of negotiation deadlocks, that is, cases in which there were offers to negotiate or mediate between the belligerent parties, but those attempts have been rejected by one of the parties or both, or the attempts to negotiate or

⁴⁵ Bercovitch and Jackson 1997. ⁴⁶ Jackson 2000, p. 329.

⁴⁷ Jackson 2000, p. 329.

mediate have been accepted but failed along the way. In both instances the outcome is a deadlock. Out of all 221 cases of inter-state conflicts, sixty-five cases did *not* witness *any* mediation effort at all.

The unit of analysis in this chapter is the conflict-dyad-per-quarter. After excluding all intra-state wars, all cases in which the data did not correspond to COW (Correlates of War) member states, cases of independence wars, and cases that do not have Polity IV scores, we have 18,156 observations. We get this number of observations by constructing a panel data with all countries entering our dataset from 1946 until 2000 or from the state's independence year if it is post-1946. There are two dependent variables in this analysis – our definition of deadlocks includes two possibilities, the first one distinguishes between mediation *offers* that have not been accepted and those that have eventually been accepted by the rival parties. We look at mediation attempts that have been rejected by one of the parties or both. The second option for the occurrence of a deadlock is when mediation offers have been accepted but failed later on. The International Conflict Management dataset includes six categories of conflict management type – we code as ‘1’ any mediation attempts that have been offered *and* rejected, *and* offers that have been accepted but failed.

We include two independent variables – leadership change and regime type. The leadership change variable was coded for each state identifying whether a new leader came into power within the previous three months. Thus, we created five dichotomous variables, one for each state, one that was coded as ‘1’ if there was a leadership change in *at least* one of the states, one coded ‘1’ if there was a leadership change in *both* states, and one if there was *no* leadership change in any of them. The main reason we chose a three-month period was based on the assumption that if a new leader is going to accept a mediation attempt she will do it early on in her tenure when there is still time for the efforts to bear fruit, and also far enough from the next election that failure does not affect the election results. We added two control variables – the rivals' capabilities and their alliance. Those two were generated using the EUGene program.⁴⁸ Data on leadership change was constructed using Bueno de Mesquita and Siverson's Heads of State Data and extending it to 2000.⁴⁹ Regime type is coded by using W (winning

⁴⁸ Bennett and Stam 2000. ⁴⁹ Lutmar 2004.

coalition) as used by Bueno de Mesquita *et al.*⁵⁰ W is constructed as a composite index based on the variables REGTYPE, XRCOMP, XROPEN and PARCOMP (all variables in Polity IV). The values of W can vary between 0 and 1. The closer W is to 1 the more democratic a state is and so the larger the electorate and the larger the winning coalition in that state. The closer W is to 0 the less democratic a state is, thus the smaller its winning coalition. Given that we have two states we created two variables that describe the regimes type in both – W1 is State A and W2 is State B.

Leadership change was coded as mentioned earlier. The rationale for including five dichotomous variables was to capture all the possible options for leadership change in one state at a time, both states, at least one state, or none of them. We believe that by including all options for leadership change we can examine its impact on mediation efforts. The three months threshold we have for the tenure in office is somewhat arbitrary, but we believe it represents a reasonable compromise between the need to establish a close enough time to the leader's beginning of tenure while allowing for some time for the leader to already be in office before initiating (or responding to) mediation efforts. To capture the relationship between regimes type and leadership change we created two new variables which are interaction terms between regime type and leadership change in each one of the countries.

The capability values for the disputants are from the Correlates of War composite index for national capabilities (CINC score). It is a non-directed measure which calculates the ratio of the maximum capability of the two sides over the minimum capability.⁵¹ With respect to alliances, the focus was on whether the two sides in a dispute had a defence pact with one another.⁵² This is a binary variable that takes on a value of 1 if both sides shared a defence pact and 0 otherwise. The expectation in this case is that countries that share a defence pact will be less likely to reach situations of deadlock because of the security ties that might prevent them from escalating the conflict beyond a certain point. The same logic follows the variable of Joint Democracy – the democratic peace literature tells us that democracies are bound by shared norms of

⁵⁰ Bueno de Mesquita *et al.* 2003.

⁵¹ The variable was operationalised in the following way: $[\max(\text{cap}_1, \text{cap}_2) / \min(\text{cap}_1, \text{cap}_2)]$.

⁵² Small and Singer 1969.

Table 10.1. *Descriptive statistics*

Variable	Obs	Mean	Std. Dev.	Min	Max
statea	0				
stateb	0				
codea	18155	431.8858	275.5587	2	850
codeb	18155	497.5541	242.8975	40	910
year	18155	1976.204	14.99135	1945	2000
conflict	18155	0.0805288	0.2721176	0	1
mediation_~s	18155	0.0262187	0.1597894	0	1
cmoutcome	18140	0.0375965	0.2003854	0	9
col9	0				
col10	0				
success	0				
lc1	18155	0.0422473	0.2011584	0	1
lc2	18155	0.0402093	0.1964552	0	1
lc	18153	0.0799868	0.2712802	0	1
xrreg1	18155	2.336326	0.6407963	0	3
xrcomp1	18155	1.614321	1.111238	0	3
xropen1	18155	3.282622	1.461731	0	4
parcomp1	18155	2.424291	1.617368	0	5
xrreg2	18155	2.258606	0.6568611	0	3
xrcomp2	18155	1.475296	1.087898	0	3
xropen2	18155	3.126852	1.560976	0	4
parcomp2	18155	2.306197	1.459732	0	5
w1	18155	0.5644175	0.3099169	0	1
w2	18155	0.5126549	0.2919785	0	1
rlc1	18153	0.0448824	0.1760537	0	1
rlc2	18153	0.0429819	0.1723028	0	1

non-violent conflict resolution and by institutional constraints that make disputes more likely to be solved in a non-confrontational way. We also added a dichotomous variable that denotes whether the states are an enduring rivalry. It can be argued that states that have a long history of confrontation will be less likely to be open to mediation efforts even in the presence of leadership changes in one of them (or both), and so the likelihood of deadlocks in the negotiation process is higher in these cases.

Table 10.1 shows the descriptive statistics. Note that ‘codea’ and ‘codeb’ are the codes given to both states by the Correlates of War

dataset. The notation 'cmoutcome' is the Conflict Management Outcome variable that captures our definition of deadlocks in negotiations.

We run several tests in which we use probit. In all the models we test the dependent variable is *Deadlock* in the negotiation process, whereas we change some independent variables and test various specifications. To avoid the problem of multicollinearity we test the cases of Leadership Change in A and B separately from Leadership Change in A or B. We report the results of two models – one in which we do *not* include any interaction term, and one model in which we include two different interaction terms – one that examines the relationship between leadership change in both states and the regime type in country A, and the other one captures the relationship between leadership change in both states and the regime type in country B. The results are shown in Table 10.2. We present the marginal effects in Table 10.3.

Results and analysis

The preliminary findings are quite encouraging and confirm our main hypotheses – that is, that lack of leadership change in one of the states involved in a conflict (or both) is likely to lead to deadlocks in the negotiation process between the two sides of the conflict. The explanations for this pattern can be diverse – 'old' elected leaders are committed to positions they take, and in many cases backing off from those positions can be costly and might end up in the leaders being removed from office. Though we have not tested this hypothesis, the international relations literature suggests that democratic leaders are more likely to 'pay' for backing off from declared positions. Moreover, leaders who are further into their tenure in office stick to old ideas whereas new elected leaders tend to bring fresh ideas that might contribute to a progress in negotiation initiatives. Those new elected leaders might feel that they have a mandate to start a new page and be open for new initiatives in the form of mediation/negotiation. They might not feel bounded by old commitments or promises to the domestic audiences, and so the long tenure of leaders, or lack of leadership change, might be the catalyst for deadlocks in conflict resolution efforts. Moreover, mediators will be less likely to initiate mediation efforts when both leaders have been in power for some time and have a history of failed negotiations. Those leaders will be less susceptible to those attempts. A leadership change might be the

Table 10.2. *Deadlock in negotiation and leadership change*

	Model 1	Model 2
Regime state A – W1	0.262** (0.057)	0.249*** (0.059)
Regime state B – W2	-0.4727** (0.062)	0.483*** (0.0646)
Joint democracy	-0.23*** (0.0028)	-0.0379*** (0.0039)
Allies	-0.034 (0.087)	-0.058 (0.063)
Rivals	0.24*** (0.04)	0.257 (0.0042)
Leadership change in A or B	-0.034** (0.067)	-0.179 (0.159)
Leadership change A+B	-0.0801** (0.062)	-0.383 (0.322)
Interaction term 1		0.259 (0.214)
Interaction term 2		0.184 (0.322)
Constant	-1.76*** (0.054)	-1.73*** (0.055)
N	18,156	18,156
Prob> Chi-Square	0.000	

Robust standard errors in parentheses

* significant at 10 per cent,

** significant at 5 per cent,

*** significant at 1 per cent.

Table 10.3. *Marginal effects*

variable	dy/dx	Std. Err.	z	P> z	[95% C.I.]	X
w1	0.2619854	0.05769	4.54	0.000	0.148909 0.375062	0.564678
w2	-0.4727893	0.06187	-7.64	0.000	-0.594055 -0.351523	0.512665
lc1*	-0.0419565	0.09137	-0.46	0.646	-0.221042 0.137129	0.042282

exogenous 'shock' that Stedman thinks adds 'fluidity' to a conflict.⁵³ These effects will be magnified if there is a leadership change in both states or at least in one of them.

The preliminary findings also indicate that the more democratic one of the states is, and the less democratic the other state is, the more likely we are to reach a state of deadlock. This finding is in line with the democratic peace literature – we know that democracies do not fight each other, but they are no less conflict-prone. Therefore, we are more likely to witness deadlocks when the regime type of the belligerents is different. This can be reasoned in several ways. The most plausible explanation stems from the famous democratic peace proposition – democracies are more likely to approach their disagreements in a peaceful way and to turn to non-violent means to solve them. So if they hit a deadlock, things might escalate and end up in a full-scale war. An alternative explanation, which can complement our account, is that leaders in democracies are accountable to their domestic audiences and feel that they should give every opportunity if conflict solution a fair chance. They will certainly do so if they think it might improve their chances of being re-elected. Therefore, a democratic leader might stick to a position if she thinks this course of action increases her chances of being re-elected.

Another interesting finding is that if the two states are allies, they are less likely to find themselves in a deadlock. It fits our expectation that allies are more likely to turn to alternative paths to address their disagreements. Also, if the states are rivals (that is, they have been in a prolonged historical relationship of conflictual disagreements and rivalry), they are more likely to end up in a deadlock. Past experience of being in conflict seems to cast a heavy shadow over present efforts to manage a conflict.

Conclusions and future research


If we want to resolve deadlocks, we need to understand their causes. The main purpose of this chapter was to look at one of the possible six causes of deadlocks and empirically test the assertion that domestic configuration, by which we mean lack of leadership change, has a clear effect on producing deadlocks in the negotiations between the two states in

⁵³ Stedman 1991.

conflict. This is the first study of its kind, and as with any exploratory attempt it gives very preliminary answers and opens up new questions. The first results confirm what we hypothesised and back up our initial intuition. A lack of leadership change in any of the states in conflict increases the likelihood of deadlocks in the negotiation processes.

It will be interesting to examine how long after a new leader has been in power those negotiation attempts tend to reach a deadlock. Moreover, and maybe even more importantly, it will be necessarily to examine if this pattern persists if at least one negotiation attempt has been successful. Does lack of leadership change only prompt deadlock in the initiation of negotiation efforts or is it also a first step on the way to further escalation? Does having an 'old' leader in power, and the prospects of escalation, lead to the dissatisfaction of domestic audiences to the point of ousting the leader and opening a new page in the conflict or do we need to wait for the new leader to strengthen his hold on power before we witness a successful outcome of the mediation? The International Conflict Management dataset allows us to examine that quite easily as it includes a variable that codes the outcome of the mediation/negotiation efforts. Also, a natural extension is to include a variable that takes into consideration the *number* of mediation efforts that took place between the states, that is to examine whether a higher number of mediation attempts increases the probability of their success, or the lower number of mediation/negotiation efforts, the higher the likelihood of deadlocks? One can also look at the mediator, that is to say, that maybe the type of mediator (UN, third party, etc.) also has to do with the change (or lack of) in leadership in one of the states (or both).

Despite the many unanswered questions and numerous avenues of future research that follow the findings presented here, we believe that we have established the initial link between the notion of deadlocks in negotiation processes and lack of leadership changes, and by doing that we have offered the first conceptualization of deadlocks and its empirical test of the relationship between domestic factors and how they might affect the propensity of states to enter or stumble into a deadlock. Anyone interested in deadlocks would do well to identify its causes before offering any solution. Where the causes of a deadlock are domestic, nothing short of altering domestic configurations will do.



Conclusion

Case studies as evidence: lessons learned

DANIEL DRUCKMAN AND AMRITA NARLIKAR

The chapters in this book address a set of hypotheses about sources of deadlocks with a variety of disciplinary and case-study analyses. The result is a rich corpus of insights about how deadlocks may occur and possible ways to exit them. The insights include both those that address the hypotheses (a form of deduction) and those that are relevant to other processes observed to operate in the cases (a form of induction). These dual products are important contributions to the literatures on multi-lateral negotiation and conflict settlement/resolution. They emerge from diverse settings and issue areas, take circumstances into account, and illuminate the way several hypothesised structures and processes interact: they bolster arguments for generalizability, reinforce contingency theories of conflict, and highlight synergies among the hypothesised processes. But, the approach also raises a question about whether cases provide an adequate evaluation of competing hypotheses. This issue is discussed in the following section.

Theory and case studies

This book is the most recent of a stream of negotiation studies referred to as analytical (or enhanced) case studies. The approach is based on the idea that cases can be understood through the lens of theoretical concepts or propositions.¹ Earlier studies based on this approach have highlighted either structural/cultural or process influences on negotiation outcomes. The former connect to our Hypotheses 3, 4 and 6. Examples include Barbara Haskel's research on the role of power asymmetries in Scandinavian market negotiations (Hypothesis 3a),² John Newhouse's discussion of SALT I in terms of domestic politics

¹ Druckman 2005. ² Haskel 1974.

(Hypothesis 6),³ Arild Underdal's analysis of the way that structural characteristics of the European Community influenced negotiations (Hypothesis 4),⁴ and Kenneth Young's analysis of post-Second World War negotiations between the United States and the People's Republic of China in terms of culturally-influenced bargaining styles (Hypothesis 3b).⁵

An emphasis on process is relevant to Hypotheses 1, 2 and 5. Examples of earlier studies include analyses of issue incompatibility and complexity in disarmament talks⁶ and in the Kennedy Round of trade talks⁷ (relevant to Hypothesis 2), the interplay of values and interests in a 1986 negotiation between the Philippines' Aquino regime and the National Democratic Front⁸ (relevant to Hypothesis 5), and an analysis of NAFTA in terms of turning points during the talks.⁹ The approach is illustrated as well by the interdisciplinary perspectives found in Jeffrey Rubin's study of Kissinger's shuttle diplomacy,¹⁰ I. William Zartman's focus on two cases of multilateral negotiations in the European Community,¹¹ and in the Raymond Cohen and Raymond Westbrook collection of perspectives on ancient Near East diplomacy.¹²

The analytical case-study approach has both strengths and weaknesses. Strengths include providing a theoretical underpinning for case studies, demonstrating the applicability of theoretical concepts, and using the concepts as bases for comparing different cases. An example from this book is the concept of a two-level game: it provides a useful idea for understanding the role of domestic interests (Hypothesis 6) in cases from a variety of issue areas. The concept gains relevance in the discussions of the tactical use of constituencies (Chapter 2), domestic perceptions about changes in power (Chapter 1), impacts of demanding ratification procedures on win-sets (Chapter 5), the idea of transnational alliances with domestic groups as a solution strategy (Chapter 7) and the role played by domestic leadership in negotiation (Chapter 10). And, when the two-level game is construed in the form of Hypothesis 6, comparisons among the cases are facilitated. For example, in six of the ten chapter analyses, Hypothesis 6 is demonstrated.

³ Newhouse 1973. ⁴ Underdal 1973. ⁵ Young 1968. ⁶ Bonham 1971.

⁷ Winham 1977. ⁸ Druckman and Green 1995.

⁹ Cameron and Tomlin 2000. ¹⁰ Rubin 1981. ¹¹ Zartman 1994.

¹² Cohen and Westbrook 2000.

A well-known weakness of case studies is the opportunistic evaluation of theory-derived hypotheses. The choice of cases influences the selection of concepts used in the analysis: concepts and cases are intertwined. Although focused-comparison methods have reduced this problem by isolating theory-relevant independent variables,¹³ the selection problem remains a stumbling block in efforts to evaluate alternative theories. It is particularly severe for the single case study and for comparisons of cases that are not matched on dimensions of similarity. Interestingly, however, it may be somewhat less problematic for several of the chapters in this book. Amrita Narlikar and Pieter van Houten's demonstration of uncertainty in two phases of the Doha negotiations (Chapter 6) and Sevasti-Eleni Vezirgiannidou's comparison between related climate change talks in Kyoto and Bali (Chapter 7) satisfy some of the requirements needed for a focused comparison. By retaining a focus on UN Security Council negotiations, Jochen Prantl provides a common context for comparing five cases (Chapter 8). By holding the context 'constant', the authors of these chapters afford a stronger basis for comparison. They achieve this goal, however, at the cost of independence between the matched cases: by choosing sequential rounds or talks within the same institutional setting, they raise questions about whether these are different cases or merely extensions of the same general case. Other chapters present the opposite problem, namely, analysing different but largely unrelated cases (Chapters 1, 2 and 9). While increasing the number of distinct cases analysed, these authors forfeit the advantages of controlled comparisons. Together, this set of studies highlight a trade-off between two desirable features of case-study research – assuring that cases are independent and comparable.

The approach taken by Jacob Bercovitch and Carmela Lutmar (Chapter 10) addresses these issues with a different approach – a statistical analysis of many cases. Referred to as aggregate case comparisons,¹⁴ these authors avoid the traps of small-*n* case research by sampling broadly across many different cases. By doing so, they satisfy the criterion of independence and substitute statistical variability for selective matching. By increasing the scope of the comparison, these researchers provide insights about a sampled universe of cases rather than about the way processes unfold in particular cases within that universe. The result is a strong demonstration of the role played by

¹³ George and Bennett 2005. ¹⁴ Druckman 2005.

domestic interests (Hypothesis 6). That demonstration is, however, based on correlational (rather than causal) analyses. Thus, the counterfactual problem of eliminating possible alternative explanations for deadlocks remains. This problem is shared with the small-n case studies used by other authors.

Viewed across the chapters, this book advances the art and science of negotiation analysis in several ways. One is that the analyses are based on a broad sampling of cases and issue areas. Another is that the theoretical lens is wider; more concepts are invoked than in many of the earlier treatments. Further, the approach of comparing several hypotheses about structure and process as sources of deadlocks and possible ways to resolve them is unique. The authors trade analytical specificity for robustness. As with the earlier works referred to above, hypotheses are not subject to confirmation or to rejection. Rather, they are demonstrated to operate in particular contexts: in a sense, this case study can be likened to the demonstration experiment which lacks replication and random assignment to conditions.

The authors' conclusions are more useful for theory development than for theory evaluation. These are summarised in Table 11.1, where the strength of Hypotheses 3 and 6 are shown (see the number of double plus entries). These hypotheses emphasise power and domestic interests, suggesting that structural factors are important sources of deadlocks in multilateral cases. Since this conclusion emerges from analyses of diverse cases, it guides the development of theories of deadlocks. It also provides a basis for research that uses confirmatory methodologies for addressing counterfactual issues.

The two sections to follow illuminate the dual value of our robust enhanced case study approach. In the next section, we use the various chapters to probe the plausibility of the hypotheses and solution sets. Then, we generate a variety of new concepts and hypotheses from the analyses. The fourth and concluding section peers into the future.

Demonstrating the hypotheses and solution sets

We proposed six hypotheses to help us better understand the causes of deadlocks. The extent to which they are demonstrated in the chapters is shown in Table 11.1. We also proposed corresponding solution sets. Their demonstration is shown in Table 11.2. The entries in the cells are judgements of the extent to which the hypothesis or solution set is

Table 11.1. *Demonstrations of hypotheses*

	AG	MD	WB	MG	AY	AN & PVH	EV	JP	PVH	JB & CL	Number of analyses	Modal outcome
Hypothesis 1	+		++		++	-	++		++		6	++
Hypothesis 2	+		++	++		++	-				5	++
Hypothesis 3	++	++	+	+	++(3a)	+	-	++	++ (3a)		9	++
Hypothesis 4	+	++	++	++		+	-	++			7	++
Hypothesis 5	+	++		++			-	++			5	++
Hypothesis 6	+	++	+		++	-	++		++	++	8	++
Number of hypotheses demonstrated	6	4	1	4	3	5	6	3	3	1		

++Hypothesis is clearly demonstrated.

+Hypothesis is partially demonstrated.

-Hypothesis is highlighted but not demonstrated.

Note: A double plus indicates that the hypothesis was clearly demonstrated. A single plus indicates that the hypothesis was partially demonstrated, either because some qualifications were necessary, or because the particular hypothesis did not form the central focus of the analysis. A minus indicates that the hypothesis was considered (albeit not as a central argument), and was not demonstrated. Blank cells indicate that the particular hypothesis was not analysed in the chapter.

Table 11.2. *Demonstrations of solution sets*

	AG	MD	WB	MG	AY	AN & PVH	EV	JP	PVH	JB & CL	Number of analyses	Modal outcome
Solution set 1							++		++		2	++
Solution set 2				+		++					2	++
Solution set 3				+				++	+		3	+
Solution set 4			++	++				++			3	++
Solution set 5				++				++			2	++
Solution set 6							++		+	++	3	++
Number of solutions advanced			1	4		1	2	3	3	1		

++ Solution set is clearly demonstrated.

+ Solution set is partially demonstrated.

demonstrated. When a particular hypothesis or solution set forms the main focus of a chapter, or appears on a recurring basis in the chapter, and is further demonstrated by the study, we code the result as double plus. A single plus is used if the particular hypothesis (or solution set) is taken into account and is demonstrated in the chapter, perhaps as an alternative or secondary explanation; it does not however form the central focus of the study and is qualified in some way. We use minus to code results for those hypotheses or solution sets that are considered, and are not demonstrated by the chapter's analysis.

As Table 11.1 illustrates, almost all the chapters engaged with more than one hypothesis. The most recurring hypothesis is Hypothesis 3, followed by Hypothesis 6 and Hypothesis 4. Six chapters have engaged with Hypothesis 1, while Hypothesis 2 and Hypothesis 5 are the ones that received the least attention with only five chapters engaging with them directly. The solution sets received less attention than the hypotheses, as is illustrated in Table 11.2. All the chapters focus first and foremost on understanding the causes of deadlocks, and some subsequently use the analysis to build on solutions.

The preponderance of double plus judgements suggests that these cases did not distinguish among the hypotheses or solution sets. There are very few negative judgements. When hypotheses were observed in the case analysis, they were usually clearly demonstrated. This may not be surprising with this methodology. Authors as analysts used the hypotheses as lenses through which to understand the case – and this is a hallmark of the approach. The cases are not randomly sampled. Nor are the concepts/hypotheses independent of the cases. Given this state of affairs, what can we conclude about the hypotheses/solution sets? We can conclude that some hypotheses appear more often than others (namely 3 and 6) – and help us to understand a number of different cases. This finding is an important contribution. It takes us several steps beyond the findings of earlier studies that used fewer cases and concepts. It has relevance for guiding us toward fruitful theoretical development even if not confirmatory of theories. In this section, we evaluate the utility of each hypothesis and solution set. We also discuss the interactions among the various hypotheses.

Hypothesis 1: Deadlocks occur because of superior BATNA or occur whenever and as long as parties believe their alternative to agreement is superior to the deal on offer.

Hypothesis 1 finds clear demonstration in four of the case studies. It is further reinforced in the chapter by Andrew Gamble (Chapter 1) that draws on disciplinary insights from politics in understanding deadlocks, and the chapter by William Brown (Chapter 3) that brings disciplinary insights from industrial economics. Vezirgiannidou (Chapter 6), in her chapter on the United States in climate change negotiations, argues that a central reason for the US withdrawal from Kyoto in 2001 and its subsequent re-engagement at Bali in 2007 can be explained in terms of a change in the US BATNA. In 2000–1, the United States believed that its BATNA – the status quo – was superior to an agreement for two reasons. First, several studies showed that the costs of implementing the Kyoto Protocol for the United States were high. Second, the fact that developing countries would not be subject to the same controls heightened fears that they would divert investment and employment away from the United States, thereby further increasing the anticipated costs of implementation. By the time of the Bali conference, perceptions of BATNA had changed for several reasons, including a greater willingness of developing countries to take on any commitments. Thus, the United States participated in the Bali process. Pieter van Houten's study of the negotiations over Kosovo (Chapter 9) similarly shows that changing perceptions of their BATNA by the Serbs and the Kosovar Albanians resulted in the Rambouillet Agreement in 1998–9 – when they perceived strong BATNAs – versus deadlock in 2005–7 – when they perceived weaker alternatives. In his case study of the deadlock in the Doha trade negotiations in Chapter 5, Alasdair Young argues that the perception of a superior or at least acceptable BATNA for the key actors within the EU and the United States has contributed to small win-sets for both parties and, thus, a continuing deadlock.

Interestingly, the second case study on the Doha trade negotiations, by Narlikar and van Houten (Chapter 6), offers mixed results on Hypothesis 1. At least in the first phase of the Doha negotiations, these authors argue that there was no better alternative for any of the parties to multilateral trade liberalization, and hence the Doha deadlock cannot be explained by Hypothesis 1. They recognise that the BATNA of many players has changed today, given the availability of regional and bilateral agreements. But in so far as recourse to regional trade agreements represents a reaction to the failures of multilateralism, the turn to regional and bilateral alternatives is as much a product of the failure of the Doha deadlock in Phase 1 as a cause of it in Phase 2. As will

be discussed later in this section, the two trade chapters provide important complements to each other, and together give a phased explanation, offering a contingency-based approach, to the problem of deadlock in multilateral trade.

In sum, this hypothesis provides an understanding of case dynamics in six of the ten chapters. Of particular interest is the recognition of changing evaluations of alternatives through time or successive rounds of ongoing negotiations on trade and environmental issues. The idea of changing perceptions of BATNAs comports well with experimental findings.¹⁵

Hypothesis 2: Deadlocks occur because negotiators bluff and lie.

Hypothesis 2 is demonstrated in case studies by Narlikar and van Houten (Chapter 6), as well as in the chapters by Gamble (Chapter 1), Brown (Chapter 3) and Markus Gehring (Chapter 4) that draw on the disciplinary insights of politics, economics and law, respectively. Narlikar and van Houten rely on Hypothesis 2 as the central explanation for the occurrence of deadlock in the WTO negotiations. They examine two sets of deadlocks in the Doha negotiations: Cancun 2003 and Geneva, July, 2006. Both deadlocks provide an illustration of how developed countries, based on their previous experiences in dealing with developing countries in the WTO and in the absence of any credible signals to the contrary, assumed that the new coalitions of the South would concede in the endgame, and negotiated accordingly. In the face of these expectations, the refusal of the South to back down produced deadlock. They argue that effective signalling mechanisms could help negotiators overcome the uncertainty at hand, and thereby reduce the probability of deadlock.

Gamble rightly points out that uncertainty and lack of trust may be exacerbated by the numbers of actors as well as diversity among them, thereby highlighting the interplay between Hypothesis 2 and Hypothesis 3. We elaborate on these (and other) interactions between the hypotheses later in this section. Brown points out that if trade unions and management have different evaluations of their relative market and organizational strengths, strikes may result (which may have been avoided under conditions of perfect information). Implicit in Brown's

¹⁵ For example, see Pinkley *et al.* 1994.

analysis is a link among Hypotheses 2, 4 and 6 through the mechanism of intra-organizational complexity of one or both parties, especially when parties comprise coalitions of interests. Certain institutional features – such as clarity of the coalition’s decision-making constitution – can reduce some uncertainty and thereby improve the probability of reaching agreement. These insights from industrial relations can be usefully applied to multilateral negotiations as well, where actors are almost never unitary, represent various domestic constituencies and operate in alliances with other actors within and outside the institution.

Gehring, using case analysis across three institutions – the EU, the UN and the WTO – demonstrates the importance of legal uncertainty in exacerbating deadlock, and further analyses ways in which the dispute settlement mechanisms of these three institutions can help in resolving those deadlocks. While Gehring’s chapter examines legal ambiguity as the principal source of uncertainty, Narlikar and van Houten’s analysis focuses on the uncertainty that results from the inability of parties to determine the credibility of the negotiating positions taken by their counterparts. In both Chapters 4 and 6, there is also an interesting link between Hypotheses 2 and 4, and also solution sets 2 and 4, i.e. institutional design can increase or decrease the levels of uncertainty, and thereby decrease or increase the probability of reaching agreement.

In sum, bluffing and lying are sources of uncertainty in negotiation. Ambiguity about the credibility of offers or demands slows progress and sustains deadlocks. The mechanism suggested by the analyses that demonstrates this hypothesis is mistrust, which increases the perception of risk and associated anxieties surrounding decisions to reach agreements. The informal processes discussed by Jochen Prantl (Chapter 8) are one way to reduce uncertainty. Another consists of designing institutional mechanisms (solution set 4) that address issues of bluffing and other forms of insincerity.

Hypothesis 3: Deadlocks occur because of certain types of balances of power.

Hypothesis 3a: Deadlock is more likely, the more equal the power distribution.

Hypothesis 3b: Deadlock is more likely, the more diverse the culture of the parties that constitute the balance of power.

Hypothesis 3 finds the greatest occurrence, with nine chapters engaging with it, and eight of the nine providing clear or partial demonstration of it. Interestingly, however, only two of the nine specify the variant of the hypothesis (Chapters 5 and 9), and both these chapters deal with Hypothesis 3a. The reason for this may be that despite the theoretical distinction made in the Introduction between Hypotheses 3a and 3b, in certain cases the two variants are inextricably linked and their effects are particularly difficult to distinguish empirically. For instance, Gamble relies centrally on the generic version of Hypothesis 3 when he traces the rise of new powers as contributing to deadlock and the inability of the system to accommodate their rise. This is partly a function of numbers, with deadlock becoming more likely as new powers are included in decision-making clubs, and hence Gamble's argument that deadlocks are more likely under conditions of symmetry of power and absence of hegemony. But equally important is the nature of the new power on the rise. Hence, while a greater number of powers at the table is likely to prove disruptive to agreement, the rise of culturally different powers (with differing notions of world order and justice) is likely to heighten the likelihood of deadlock. Note also Gamble's argument that uncertainty and lack of trust are likely to be exacerbated when there is a greater diversity of powers involved in the negotiation. Communication challenges between strong and weak powers are exacerbated when the parties differ also on worldviews or ideologies, such as the distinction between collectivist and individualist cultures. An example is the conflation of power and cultural differences between the Turkish and Greek communities in Cyprus. Together, these differences have served to sustain a long-standing deadlock in continuing negotiations. Brown argues that deadlocks are often a result of the dynamics of the working out of the balance of power; such deadlocks, in turn, may have a significant impact on changing the resolve and expectations of both sides.

The unspecified linkage between Hypotheses 3a and 3b is a recurring theme in several other chapters as well. In Chapter 2, Martin Dauntun presents an in-depth historical analysis of the puzzle: why did it prove far easier to create multilateral institutions and avoid deadlock in international monetary relations than in trade? An important part of the answer, he argues, lies in the generic version of Hypothesis 3: the Bretton Woods agreement was primarily a result of Anglo-American relations, whereas the trade negotiations process had both a large

number of players and a great diversity of players. In Chapter 6, Narlikar and van Houten recognise that uncertainty may have been exacerbated as a result of changing balances of power in the WTO. The source of this uncertainty is rooted partly in the fact that there is a larger number of players at the table (from the old Quad in the GATT, for instance, to the G7 in the Geneva talks of July 2008). But the problem is compounded by the fact that these new players are from the developing world – e.g. Brazil, China and India – and are acting not only in their individual capacities but as leaders of coalitions of the developing world. Similarly, Prantl uses the generic version of the same hypothesis, in Chapter 8, where he argues that the limitations of the structure of the Security Council (particularly its preservation of the veto power of the P5) make it deadlock-prone. He further analyses the various institutional mechanisms whereby the Security Council has overcome these limitations, which include altering the intra-institutional balance of power via informal processes, thereby indirectly addressing both issues of including more powers and culturally-different powers.

Indeed, even in the two chapters that focus on Hypothesis 3a, links with Hypothesis 3b may be worth exploring. Particularly in Chapter 5, Young's argument that 'the relatively even distribution of power in the global economy has thus far prevented EU and US negotiators from being able to shift the negotiations' can be extended to one about the diversity of powers at the table that bring together a variety of interests and beliefs that are irreconcilable. Similarly, in Chapter 9, van Houten establishes a crucial link between Hypotheses 1 and 3a: the BATNA of the Kosovan Albanians and Serbs has been altered as a result of the support received from outside powers. While this argument relies on the structural balance of power, it may be worth exploring the extent to which outside parties are less likely to intervene in regional conflict if they belong to a similar grouping (either an alliance, or occupy one side of a major divide), and thereby investigate the linkage between Hypotheses 3a and 3b.

In terms of future research, one of the ways in which the distinction between Hypotheses 3a and 3b could be honed is to conduct counterfactual or focused-comparison analysis. Several strategies are suggested: by holding power 'constant', the impact of culture would be assessed. By holding culture 'constant', the separate impact of power would be observed. And, by combining power and culture in a factorial design, both separate and interactive effects would be revealed.

Experiments that help us better identify how individuals identify in-groups and out-groups, and thereby welcome or resent, or facilitate or deter, the rise of new powers, would also be relevant here.¹⁶

In sum, this is one of the more popular hypotheses. The hypothesised processes surface in most of the analyses, and across issue areas. A salient concern is the relationship between power and culture. Although separated as two features of negotiating parties, these dimensions are often conflated in the authors' analyses. A research challenge is to better understand their separate and synergistic impacts on deadlocks.

Hypothesis 4: deadlocks occur because certain institutional structures facilitate or deter agreement.

Of the seven chapters highlighting this hypothesis, four provide a clear demonstration of it. Chapter 2 by Dauntou demonstrates that the institutional design of the Havana process contributed to the eventual failure to establish the ITO. With all the participants acquiring a vote in the process, the balance of power changed in favour of the underdeveloped countries, which in turn changed the dynamic of the two-level game (thus linking Hypothesis 4 with Hypothesis 6). The compromise in international negotiations – the Havana Charter – also entailed concessions that alienated important domestic interests, particularly within the United States. In Chapter 3, Brown uses labour negotiations to demonstrate the importance of suitable institutional preconditions for efficient negotiations. Particularly important is the role of 'clear constitutional means' and other internal decision-making procedures within the organizations of separate parties. Applied to multi-lateral negotiations, this translates partly into clear mandates for governments from their constituencies, and also clear mandates for coalitions from their member states. In Chapter 4, Gehring demonstrates that when states are unable to negotiate their way out of deadlock, they can turn to the dispute settlement mechanisms of institutions as an alternative route to resolving the deadlock. Prantl, in Chapter 8, deals centrally with the question of the institutional design of the Security Council. He focuses on the tension between its in-built flexibility that allows it to adjust to changing realities of power balances on

¹⁶ See Druckman 2006, for a discussion of consequences of group attachments.

the ground (i.e. the link between Hypotheses 4 and 3), while also being bound to preserving the status of the Great Powers by preserving the veto-power of the P5 and thereby also being characterised by an in-built inequality and resulting lack of legitimacy (i.e. the link between Hypotheses 4 and 5).

Hypothesis 4 is partially demonstrated in Chapter 6, where Narlikar and van Houten argue that the institutional limitations of the WTO – partly a product of its member-driven character – heighten the problem of uncertainty in the organization and the inability of its members to distinguish bottom-lines and bluffs. Gamble further points out that, somewhat paradoxically, while conflicts over identity provide the basis for some of the most difficult first-order deadlocks, the thin loyalties that international institutions attract also mean that when circumstances change, the stability of the regime comes under threat. Many institutions are a product of power relationships at the time, and by showing a lack of adaptability to changing circumstance, can jeopardise attempts to exit from deadlocks, leading frequently to an escalation of the conflict. Developing on this argument, international institutions may find themselves unable to adapt to accommodate new powers (Hypothesis 3a) or new visions of fairness that they bring to the negotiating table (Hypothesis 3b plus Hypothesis 5) because they do not enjoy the flexibility and resilience afforded to other institutions.

While Young does not address Hypothesis 4 directly, his focus on Hypothesis 3a, i.e. the rise of new powers that has made it harder to reach agreement in the organization, is linked with the institutional dimension: old club-like methods of decision-making in the organization – based primarily on an agreement being reached between the EU and the United States – no longer suffice. Van Houten argues that his study of the negotiations over Kosovo does not demonstrate Hypothesis 4. However, his argument about forum-shifting by the various parties suggests otherwise. The availability of institutional alternatives along with differing memberships of these institutions (i.e. a feature of institutional design) created new opportunities as well as challenges for resolving the deadlock.

The common theme that emerges from all these studies is that institutions, if they are to be effective in facilitating the breaking of deadlocks, must tread the difficult balance between reflecting power realities (Hypothesis 3) and addressing concerns of equal representation and other justice-related demands (Hypothesis 5). Flexible institutions,

which are able to reconcile these demands, may be better able to tread this fine balance, but also run the risk of creating new problems of legitimacy caused by too much flexible innovation (as demonstrated in Chapter 8) as well as ambiguity and lack of authorization for reaching agreement (as demonstrated in Chapter 3). Van Houten's chapter (Chapter 9), and also Chapters 5 and 6 on the WTO, show that the availability of institutional alternatives – multilateral, regional or bilateral – produces a paradoxical effect. On the one hand, it keeps the process of negotiation going by allowing negotiators to shift to an alternative forum if they encounter a deadlock in one institution. On the other hand, by improving the BATNAs of several of the parties (Hypothesis 1), forum-shifting can also heighten the risk of deadlock.

In sum, the role played by institutional structures in resolving deadlocks is understood largely in relation to other hypothesised processes. These structures can offset the deadlock-enhancing impacts of domestic constituencies, power imbalances, attractive alternatives and demands for equal representation. They can also reinforce those processes by creating new demands and strengthening the attractiveness of BATNAs. This two-edged sword is an interesting challenge for research on the consequences of institutional structures.

Hypothesis 5: deadlocks occur because fairness and justice matter.

In the three chapters that show a strong demonstration of this hypothesis (Chapters 2, 4 and 8), along with Gamble's chapter that presents a partial demonstration (Chapter 1), we find that framing one's position in terms of fairness, justice or legitimacy heightens the risk of deadlock. This occurs because these principles are often regarded as rights not subject to compromise. There is also a close link between Hypothesis 3 and Hypothesis 5, and new and aspiring powers often appeal to such norms when attempting to secure a larger voice. Daunton demonstrates an important link between Hypotheses 4, 5 and 6: diverse demands at the Havana Conference were framed in terms of distributive justice, which, in turn, were a product of an institutional design that enhanced procedural justice by giving equal voice and vote to all players. The result was heightened antagonisms at the international table. The international compromises that were necessary to reconcile these antagonisms proved to be domestically unpalatable, particularly within the United States, resulting in the eventual failure of the ITO.

This hypothesis addresses an interesting controversy in the negotiation literature. The issue is whether justice considerations facilitate or hinder reaching agreements and the durability of those outcomes. The arguments made by our authors come down on the side of exacerbating conflict among the parties. This consequence may occur in the sorts of institutionalised global forums treated in these chapters. The opposite argument – that justice, particularly equality, encourages agreement – is based on resolving the sources of conflict. This argument is supported by research on ending civil wars.¹⁷ Support for either of these contending arguments may turn on the type of negotiation examined. This is an interesting issue for further research.

Hypothesis 6: deadlocks occur internationally because of certain configurations of domestic interests.

Developing the idea of a two-level game, seven chapters demonstrate this hypothesis, and appeal to three sources of domestic influence on the conduct of international negotiation: domestic institutions (Chapters 2, 3, 5 and 7), domestic interest groups (Chapters 1, 2, 3, 5, 7 and 9), and leadership (Chapter 10). By placing leadership tenure and regime type under the umbrella of domestic interests, and thereby taking us beyond anecdotal accounts of idiosyncratic characteristics of leaders, Bercovitch and Lutmar make an important contribution to the literature on two-level games as well as negotiation analysis.

Some important linkages also emerge between Hypothesis 6 and other hypotheses, which are particularly useful in developing two-level games in new directions. As was mentioned earlier, Daunton's analysis establishes the links between Hypotheses 4, 5 and 6, thereby leading him to argue that 'success at Havana meant failure at Capitol Hill'. Young in Chapter 5, Vezirgiannidou in Chapter 7, and van Houten in Chapter 10 show the linkage between Hypotheses 1 and 6: the availability of a superior BATNA leads particular domestic constituencies to be resistant to compromise in negotiations as wide-ranging as trade, climate change and policies over Kosovo. Van Houten further demonstrates an impact that external balances of power can have on domestic politics, thereby illustrating the inter-relationship between Hypotheses 3 and 6: for instance, the changing balance of power

¹⁷ See Druckman and Albin 2008.

between Russia and the West has also changed the negotiation dynamic between the Kosovar Albanians and the Serbs.

Equally important, however, is the insight, particularly from Chapters 1 and 6 (but also from Chapters 4 and 7, that do not take Hypothesis 6 into account), that not all international politics is domestic. In Chapter 1, Gamble reminds us that for the analysis of deadlocks, the structure of the international state system and the international political economy, and the way in which they have been constituted as a series of trade-offs between states, may provide a more useful starting point. Prantl's omission of domestic variables in Chapter 8 is understandable in this light. In Chapter 6, Narlikar and van Houten illustrate a large window in the Doha negotiations – in 2003 and 2006 – where deadlock was primarily a result of uncertainty at the international level rather than due to the pressures of domestic politics.

In sum, the two-level game idea is a theme that weaves through many of the chapters. The concept provides a useful lens for viewing the interplay between international players and their constituents. Going further, our authors shed light on the way that the interests of domestic constituencies highlight alternatives, encourage a re-examination of them, offset the impacts of institutional structures, and frame issues of fairness. This interplay among the hypothesised processes expands the concept and, by so doing, makes an important contribution worthy of further research.

Solution sets

Seven of the ten chapters deal directly with the solution sets that were laid out in the Introduction. Based on these analyses, three trends emerge.

First, in some of the chapters, we find a direct symmetry between the hypotheses and solution sets. Vezirgiannidou in Chapter 7, for instance, identifies the availability of a superior BATNA and domestic politics as the causes behind the US withdrawal from Kyoto, and also finds that US re-engagement in the Bali process was triggered by complementary solution sets. She also points out that while the altered perceptions of BATNA were a product of conscious strategies pursued by negotiators from the United States and Annex I countries to win over concessions from developing countries (in terms of a greater willingness to accept some of commitments in the post-Kyoto regime), changes in domestic

politics were more 'organic', less subject to strategic manipulation. Similarly, in Chapter 10, Bercovitch and Lutmar argue, 'When the causes are domestic, nothing short of altering domestic configurations will do'. Examples of altering strategies include keeping constituents at a distance from the day-to-day negotiations, framing arguments that cater to their interests, changing their perceptions of alternatives, building supportive coalitions, and encouraging a proactive leadership. And, in Chapter 6, Narlikar and van Houten suggest that when uncertainty is the problem (Hypothesis 2), removing this uncertainty through effective signalling (solution set 2) is the most straightforward solution.

Second, we find cases where the complementarity is more circuitous due to linkages between the hypotheses. Van Houten in Chapter 9 argues that one of the causes for the deadlock is that the BATNA of the Serbs and Kosovar Albanians has been strengthened (Hypothesis 1) as a result of external support (Hypothesis 3). Possible solutions then would be an alteration of the BATNA through the withdrawal of this support (solution set 1), or agreement could be simply a result of changes in domestic politics that could include a growing dominance of pro-European sentiment in Serbia (solution set 6), or a decline in Russia's position in the international balance of power (solution set 3). Similarly, Narlikar and van Houten also imply that other ways could be used to reduce uncertainty in the WTO besides signalling, including institutional reform (solution set 4). Or indeed, in Chapter 4, Gehring shows us how the interpretation of courts (solution sets 2 and 4) can help alleviate concerns of fairness and justice (Hypothesis 5). For practitioners seeking to break deadlocks, this trend may offer the greatest reassurance as it suggests that there are multiple solutions to one problem. Working around the central cause of the deadlock – which is a polarizing issue – and addressing less emotional side-issues may, in some instances, be just as effective and relatively easy to implement.

Third, in Chapter 8, we find a particularly interesting dynamic between the causes of deadlock and their solutions. Prantl demonstrates how attempts to address one particular source of the deadlock can create new and unanticipated problems. Hence, for instance, the attempt to break the deadlock in the Security Council through shifting decision-making to the General Assembly via the Uniting for Peace Resolution allowed members to bypass the veto of the P5. In other words, an institutional solution (solution set 4) was provided for an institutional problem (Hypothesis 4). However, as Prantl points out,

circumventing the Security Council created a legitimacy gap (Hypothesis 5) and also a power gap (Hypothesis 3a), thereby creating new problems of deadlock. Prantl's study alerts us to the fact that even when negotiators adopt solutions that directly address the cause of the deadlock, they may produce unintended effects that trigger new forms of deadlock. The better their understanding of additional causes of deadlocks and alternative solution possibilities, the more likely they are able to guard against such risks.

A question arises about the large asymmetry between the authors' focus on hypotheses (forty demonstrations across the chapters) and solution sets (fifteen demonstrations). This difference may be due to a preference for performing analyses rather than offering strategies. Many of our authors focused on understanding their cases. The analysis of sources was viewed as their primary task. Providing advice – as is done often in consulting roles – appeared to be a secondary consideration. Yet, an important contribution of this book is its attempt to link analysis to strategy. The chapters that demonstrate the link – Chapters 3, 6, 7 and 10 – show that effective strategy depends on sound analysis. But, the relationship may be complex: there may be several solutions to a particular problem (Chapters 4, 6 and 9), some solutions may create new problems (Chapter 8), and solutions may need to be adapted to the phase of the negotiation as shown for the Doha rounds in Chapters 5 and 6. These examples suggest a more nuanced view of the link between analysis and solution strategies. Indeed, calling attention to complexity in this relationship is a major contribution of the book.

Expanding the concepts and hypotheses

In addition to building on the hypotheses and solution sets as provided in the Introduction, the ten chapters in Parts I and II of the book generate several new ideas and offer new directions for further research.

Recall that the Introduction had offered a typology of three types of deadlocks, which was based primarily on outcomes. Thus deadlocks were divided into stalemate (with a de-escalatory dynamic), delay and breakdown. Table 11.3 highlights which types of deadlock were analysed by each chapter.

One of the counter-intuitive findings of the book is on deadlock as breakdown. In the Introduction, this third type of deadlock was defined

Table 11.3. *Type of deadlock*

Deadlock as stalemate	Deadlock as delay	Deadlock as breakdown
Jochen Prantl Markus Gehring	Andrew Gamble Markus Gehring Alasdair Young Amrita Narlikar and Pieter van Houten Pieter van Houten Bercovitch and Lutmar	Martin Daunton Sevasti-Eleni Vezirgiannidou Bercovitch and Lutmar
William Brown	William Brown	William Brown

as ‘a complete breakdown of the negotiation process. The deadlock persists for so long, or worsens, that negotiators walk away from the negotiating table’. Vezirgiannidou’s chapter (Chapter 7) adds an important nuance to this definition. By walking away from the table at the Hague, the United States triggered a breakdown of the negotiation process. Admittedly, the agreement itself continued, but as Vezirgiannidou convincingly argues, the protracted withdrawal of the United States from Kyoto seriously compromised the chances of success of the regime and called its future into question. With the return of the United States to the negotiations at Bali, we see a transformation of the deadlock from breakdown to stalemate or delay. This suggests that deadlock as breakdown actually entails two possible categories. In the first category, breakdown is definitive, with all the parties leaving the negotiation for alternatives and the regime itself breaking down. The failed ITO negotiation falls in this category of breakdown. The second category of breakdown is when major players leave the talks, rendering the negotiation less meaningful, but the regime itself persists. This second type of breakdown has a greater chance of evolving into delay or stalemate should one or more of the major players show re-engagement with the regime.

Gamble, highlighting the importance of deadlock as indefinite delay, in addition offers a very useful categorization of deadlocks into first-order and second-order negotiations that can be extended to deadlocks. Gamble defines first-order negotiations as those that set the parameters

of the international state system and the international economy. Second-order negotiations deal with the resolution of particular problems. Deadlocks in the former are usually much harder to break than those that occur in the latter. Our initial tripartite division of deadlocks fits well into this categorization. Breakdowns, delays and stalemates can be seen in both first-order negotiations and second-order ones.

Gamble also makes an important distinction between resource-related issues and identity-related issues, with the latter ones being more difficult to resolve. This comports with a number of findings from studies cited earlier. However, he makes a paradoxical point. The lack of identity at the level of international institutions can make it harder to resolve deadlocks because 'the thin loyalties which international institutions attract is a slender base on which to build a lasting regime, and, once circumstances shift, the policy regime may come under threat'. Thus, identity can be a two-edged sword: durable and widespread identities strengthen commitments to positions, making agreements difficult to attain. However, they can also strengthen the regime, making those agreements less subject to abrogation or re-negotiation.

Bercovitch and Lutmar draw the distinction between structural deadlocks and process-oriented deadlocks. Following this categorization, Hypotheses 1, 2 and 5 (with their corresponding solution sets) are more process-oriented, whereas Hypotheses 3a and 4 are more structural. In general, we may expect that structural sources of deadlock are more difficult to resolve than process sources. For example, framing strategies can alter the way that alternatives and fairness issues are viewed. Facilitated informal and unofficial workshops can provide information about interests and needs that reduce uncertainty. Other kinds of strategies address structural sources of deadlocks. Balances of power can, to some extent, be altered using informal processes. Institutional reforms may be effective if strategically framed in normative terms, paving the way for rule changes and more flexible institutions.

In terms of finding additional solutions to deadlocks, besides the ones listed in our original solution sets, Gamble proposes the addition of new players in the negotiation. In some instances, this may involve transforming a bilateral negotiation into a multilateral one. Reasons why this strategy can work include: 1) a change in the balance of power among the parties; 2) inclusion of new voices representing relevant interests; 3)

forming of coalitions that may tip the balance in favour of one or the other party; and 4) gravitation toward a common denominator outcome. However, it may also be the case that adding parties perpetuates deadlocks because new interests come into play in a more complex environment. These alternative consequences remain to be investigated.

A related solution involves adding issues to the agenda. This strategy can also either end or perpetuate deadlocks. On the positive side, more issues can expand the zone of possible agreement, allowing trade-offs to be made as argued by Lloyd Jensen.¹⁸ The idea of linking issues may reduce polarization around flash points or reduce the salience of ideological differences. The added issues can also contribute to bundling by allowing trades among issues not previously noticed. The trading (or log-rolling) encouraged by an enlarged agenda may suggest acceptable outcomes at the cost of compromise. As noted by Daunton, however, attempts to please all parties with a compromise outcome may create new divisions among domestic stakeholders, serving to stall the process further. The added issues may create new cleavages within the negotiation as well as among the domestic communities.

The distinction made by Daunton between monetary and trade issues has additional implications for deadlocks. Monetary issues primarily concern technical matters. When conflict occurs it is usually over the means for achieving a shared goal or value. Referred to by Kenneth Hammond as a cognitive conflict,¹⁹ this source of differences has been found to be difficult to resolve and, often, more difficult to reconcile than conflicting interests.²⁰ However, the difficulties are mostly contained within the negotiating forum. They are unlikely to arouse the passions of domestic constituencies and, thus, perpetuate deadlocks. The more politicised trade talks evoke values, which have been shown frequently to be irreconcilable through negotiation processes. More importantly, these issues become rallying points for domestic audiences with different views on the broad issues of free versus protected trade or environmental regulation versus industrial development. As a result, deadlocks over trade issues are difficult to resolve. Less is known about solutions. One interesting line of research would focus on framing strategies. For example, following Daunton, trade issues can be construed as competing intellectual frameworks amenable to debate. Or, an

¹⁸ Jensen 1995. ¹⁹ Hammond 1965.

²⁰ See the review of these studies in Druckman 1971.

emphasis can be placed on the technical features of the issues rather than on their implications for values or worldviews.

Understandably, the authors pay attention to those aspects of the negotiation process (and structure) highlighted by the hypotheses, namely, alternatives, uncertainty, fairness and domestic interests. As noted above, it is evident that other features of the process emerge in several of their analyses. One example is the importance of a close, trust-based and well-informed bargaining relationship among negotiators if deadlock is to be avoided or managed. Brown develops this idea most explicitly in his chapter, and identifies this as one of two conditions for effective deadlock management (with the first one being 'intra-organizational efficiency' or institutional conditions). He argues that professional friendships among the negotiators can generate some of the most productive bargaining relationships. Successful third-party interventions must also take this into account via various face-saving devices for the party that has to make the most concessions.

Yet another aspect of process that emerges from the studies here is the idea of turning points, mentioned in the introductory chapter. Young recognises the role of external events in extended delays. His analysis of the Doha round shows that events can encourage parties to re-evaluate the prospects for agreement. As countries react to the economic downturn in 2009, they adopt protectionist measures, particularly by raising tariffs. This prospect, in turn, encourages the United States and EU to lower their free trade aspirations and lock in the existing liberalization regime which will, presumably, discourage a proliferation of protectionist measures. This 'concession' (or expanded win-set) would break the Doha deadlock. Thus, the economic downturn precipitates a departure (turning point) which results in an agreement that has long-term consequences for trading practices.

The turning point concept refers also to phase transitions. Several authors analyse progressions from earlier to later phases of an extended negotiation process: examples are Chapters 5 and 6 on Doha, Chapter 7 on Kyoto and Bali, and Chapter 9 on the episodes of the Kosovo conflict. Although the turning points concept is not invoked to explain the transitions, it is clear that changes occurred – sometimes breaking deadlocks (as in the climate change talks), other times perpetuating them (as in Doha), and, yet again, producing them (as in Kosovo). Presumably, the breaks between rounds provided opportunities for

reframing, but they also allowed for the emergence of events and re-alignments of domestic constituencies.

The transitions bring into play other hypothesised processes. For example, the influence of uncertainty is clearly demonstrated by Narlikar and van Houten (Chapter 6) during the early phases of the Doha rounds; alternatives and domestic interests are more important during the later phases analysed by Young (Chapter 5). Phased explanations of this sort illustrate the contingent feature of the hypotheses. Different processes and structures are salient during different phases of an extended or linked negotiation. In the parlance of experimentation, this is an interaction between conditions and phases; deadlocks are sensitive to different processes occurring during different phases. This observation can be treated as an hypothesis subject to further investigation.

Another dynamic may counter progression towards agreement. In some cases, negotiators derive benefits from the process, preferring that it be prolonged rather than concluded with an agreement. An example is the Kosovo negotiations from 2005–7. Van Houten observes that a number of side benefits accrued to the parties. Most compelling perhaps was the delay in deciding about the final status of Kosovo. The continuing process allowed for adjustments in BATNAs, largely in response to the changing pressures from domestic constituencies. These side benefits are more likely to flow from the type of deadlock referred to in Table 11.3 as delay than from stalemates or breakdowns.

Peering into the future

The analyses conducted by our authors bridge two research traditions of negotiation analysis, case studies and hypothesis evaluation. These traditions are often regarded as being based on alternative epistemologies, such as *emic* and *etic*,²¹ or as complementary methods. By bringing the two approaches together, this book presents a new investigatory strategy. The idea of demonstrating hypotheses is a useful middle ground between empirical analyses that are descriptive and those that are explanatory. Hypotheses drawn from the large literature on negotiation are used to structure comparative case analyses. These analyses demonstrate the importance of power and domestic interests as sources

²¹ See Harris 1990 for this distinction.

and solutions to deadlocks. The former captures international dynamics, particularly with regard to changes in power balances; the latter illuminates intra-national processes, particularly the pressures of constituencies. These are the parts of the two-level game in international politics. This theme runs through many of the chapters and is likely to remain an important concept in further research.

Another theme is that of multiple causation. As shown in the last row of Table 11.1, most of the case analyses demonstrate several hypotheses. Clearly, deadlocks in multilateral negotiations are influenced by interactions between processes and structures. One example is the uncertainty created (Hypothesis 2) when new powers and cultures (Hypotheses 3a and b) become key players in trade talks (see Chapter 6). Another is when alternatives are re-evaluated (Hypothesis 1) in light of changes in institutional norms (Hypothesis 4) or domestic re-alignments (Hypothesis 6) (see Chapters 5 and 7). A third example is the impact of changes in voting rules (Hypothesis 4) on the balance of power among the negotiating parties (Hypothesis 3a). These changes raise latent issues of distributive justice (Hypothesis 5) which polarise domestic constituencies (Hypothesis 6), resulting in a failed negotiation (see Chapter 2). These examples highlight synergies among the hypothesised processes and structures.

Synergies can be construed also as reinforcing or offsetting effects on deadlocks. One example of a reinforcing effect is when institutional rules or norms combine with informal processes to reduce the uncertainties that discourage binding agreements. Another example is when adding issues create new domestic cleavages that escalate tensions further. And, a third example is when new parties change the power balance at the table, leading to domestic realignments that prevent progress. An example of offsetting effects include the role of flexible institutions in balancing power imbalances and demands for equal representation, both of which contribute to deadlocks. Another example is the role played by side benefits in prolonging the process. They discourage re-evaluating BATNAs, neutralise domestic pressures and reduce the likelihood of a 'breakdown (crises)-breakthrough (turning points)' dynamic.

These examples are only a sampling of insights generated by our authors. They call attention to an intricate network of relationships among factors that perpetuate and resolve deadlocks. An understanding of this network would be aided by an organizing framework that

connects the broad categories of party background factors (power, culture, identities) to conditions (domestic interests, institutional structures, deadlines) and processes (uncertainties, turning points, side benefits, tactics). By labelling the categories as antecedent, concurrent and consequent, the framework highlights phased interactions among the factors.²² This is a next step in the study of negotiation deadlocks.

Complementing the discovery of synergies is our attempt to compare the six hypotheses in terms of their separate impacts on deadlocks. As shown in the column on 'number of analyses' in Table 11.1, some hypotheses are more popular than others – namely Hypotheses 3 and 6. By ranking the hypotheses in terms of frequency of demonstration, we are able to decide among them. Thus, insights are generated about both relative importance of the hypotheses and the synergies among them. These dual contributions may become a standard for future comparative analyses of cases on negotiation and related topics. They also contribute to the further development of enhanced case study methodologies by strengthening the bases for inferences from the case analyses.

²² See Sawyer and Guetzkow 1965, for an early example of a similar framework.

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Index

- Acheson, Dean, 191
- actors
- chiefs of government (COGs), 126–27, 135
 - in deadlocks, 5–6, 274–75
 - Kosovo conflict, 216–19
 - ‘North’ and ‘South’ coalitions, 149–51
 - perceptions, 161
- Advisory, Conciliation and Arbitration Service (Acas), 89
- Agreement on Agriculture (WTO), 106–07, 108–10
- agriculture
- Canada – Wheat Exports and Grain Imports* case, 114–15
 - Cancun negotiations, 152–55
 - Doha Development Agenda, 11, 130–31, 132, 136–40, 148–49
 - European Communities – Export Subsidies on Sugar* case, 115–16
 - European Communities – Regime for the Importation of Bananas* case, 116–17
 - EU-US role, 126, 136–40
 - Geneva negotiations, 156–58
 - United States – Cotton* case, 106–14
 - United States – Subsidies and Other Domestic Support for Corn and Other Agricultural Products* case, 117
- Ahtisaari, Martti, 215, 221, 226
- allies, 252
- Antigua, 117–18
- Arab–Israeli War (1973), 196
- arbitration, 89, 92–95
- Argentina, 152–53, 162–63
- asymmetry of power, 33–34, 44–45, 53
see also power, balance of
- attitudinal structuring, 83
- Attlee, Clement, 62
- Australia, 66–67, 88–89, 114–15, 116, 169, 171
- balance of power *see* power, balance of
- Bali Roadmap, 164, 169–70, 177–85
- bananas, 116–17
- Bang, Guri, 178
- bargaining, 86–88, 144–45, 159–61, 223, 230–31
- BATNA (Best Alternative to a Negotiated Agreement)
- climate negotiations, 164, 170–72, 177–78, 185, 261, 270–71
 - conciliation, 90
 - and deadlocks, 7–8, 44–45, 170–77
 - hypothesis demonstration, 257–62, 278
 - Kosovo conflict, 223–29, 261, 265, 271
 - as process factor, 238, 255, 274
 - solutions, 12, 259, 270–71
 - trade negotiations, 124, 140–41, 159–60, 261–62
 - two-level games, 126–27
- Bazerman, Max, 10
- Belgium, 70
- Benin, 111–12
- Bercovitch, Jacob, 12, 18, 256–57, 258, 259, 269, 271, 273, 274
- Beveridge, William, 63, 70
- bilateral negotiations, 219–21, 225–29, 274–75
- bilateralism, 81–82, 154
- Bloomfield, David, 240
- bluffing
- climate negotiations, 186
 - collective bargaining, 82, 262–63

- bluffing (cont.)
 - and deadlocks, 8, 45
 - hypothesis demonstration, 257–60, 262–63
 - as process factor, 238, 255
 - solutions, 12, 259
 - United States – Cotton* case, 107
- Bolivia, 152–53
- Bosnia, 213
- Brazil
 - Cancun negotiations, 154
 - cultural diversity, 9
 - Doha Development Agenda, 134
 - European Communities – Export Subsidies on Sugar* case, 115, 116
 - financial crisis (2007), 32, 37
 - G20 developing countries, 152–53
 - Geneva negotiations, 157, 158
 - multilateral trade negotiations, 123
 - UN Security Council, 194, 195
 - United States – Cotton* case, 106–14
- breakdown, in the negotiation process, 5, 236, 272–73
- breakthrough negotiation, 239–40
- Bretton Woods agreement, 48, 52–53, 59, 76–77
- Britain
 - Advisory, Conciliation and Arbitration Service (Acas), 89
 - collective bargaining, 79–80, 81, 83
 - fire-fighters' dispute, 82, 90–91
 - global economy role, 35–36, 38
 - imperial preference, 47, 54–55, 74
 - intra-organizational efficiency, 84–85
 - Low Pay Commission, 87, 88, 92
 - mineworkers' dispute, 82
 - monetary stability negotiations, 47–49, 76–77
 - Northern Ireland deadlock, 42
 - strikes, 80–81, 82, 85
 - Suez crisis, 193–96
 - trade negotiations, 49, 53, 69–70, 72–73, 74–75, 77–78
 - trade policy, 54–55, 56–65
 - and the United States (US), 34
 - World Economic Conference (1933), 38
 - see also* United Kingdom (UK)
- Brown, William, 8, 10, 16, 258, 259, 261, 262–63, 264, 266, 273, 276
- Bueno de Mesquita, Bruce, 243–44, 247–48
- Burkina Faso, 111–12
- Bush, George W., 168, 176
- business, 134–35, 138, 140, 174–76, 178
- Byrd-Hagel Resolution, 168, 171, 175, 181
- Canada, 9, 56, 88–89, 114–15, 169, 194
- Canada – Wheat Exports and Grain Imports* case, 114–15
- Cancun negotiations (WTO Ministerial Conference 2003), 111–12, 125, 126, 137, 151–55
- carbon sinks, 166–67, 168, 172, 186
- case study approach, 254–57, 277–79
- Chad, 111–12
- Chamberlain, Joseph, 54–55
- chiefs of government (COGs), 126–27, 135
- Chile, 114–15, 152–53
- China
 - Canada – Wheat Exports and Grain Imports* case, 114–15
 - climate negotiations, 40, 167
 - cultural diversity, 9
 - Doha Development Agenda, 134
 - financial crisis (2007), 32, 37
 - G20 developing countries, 152–53
 - Kosovo conflict, 218–19
 - multilateral trade negotiations, 123
 - UN Security Council, 189, 191, 198, 203–05, 218–19
- Chinese Taipei, 114–15
- civil society, 28–29
- Clapp, Jennifer, 149
- Clarke, R. W. B. 'Otto', 62–63
- Clayton, Will, 59, 75
- climate negotiations
 - Bali Roadmap, 164, 169–70, 177–85
 - BATNA (Best Alternative to a Negotiated Agreement), 164, 170–72, 177–78, 185, 261, 270–71
 - climate trends, 165–66
 - deadlocks, causes of, 164–65, 170–77, 185–87
 - domestic interests, 164, 170, 172–77, 185–86

- fairness, 171–72, 187
- first order deadlocks, 40–41
- institutions, 186
- Kyoto Protocol, 166–69
- politics, 172–74, 178–83, 184, 185–86
- power, balance of, 186
- United States (US), 164–65, 170–85, 187
- coalitions
 - for breaking deadlocks, 240
 - meaning of, 148
 - ‘North’ (coalition of developed countries), 149–51, 153–54, 155–59, 162–63, 183–84, 192–93, 197, 199
 - signalling, 154, 162–63
 - ‘South’ (coalition of developing countries), 149–51, 153–54, 155–59, 162–63, 183–84, 192–93, 197, 199
 - UN Security Council, 197–98, 205–08
 - and uncertainty, 148, 162–63
- Cohen, Raymond, 255
- Cold War, 34, 39–40
- collective bargaining
 - arbitration, 89, 92–95
 - bargaining relationships, 86–88
 - conciliation, 88–92
 - deadlocks, 79, 82, 83, 95
 - intra-organizational efficiency, 84–86, 266
 - nature of, 79–84
 - and politics, 27–28
 - uncertainty, 82, 262–63
 - see also* negotiations
- Collier, Paul, 162
- Colombia, 67–68, 152–53, 194
- Common Agricultural Policy (CAP), 131–32, 137–38
- conciliation, 88–92
- conflict management, 232–42
- Congress of Vienna, 33
- Contact Group, Kosovo conflict negotiations, 213, 215, 224
- role of, 213, 220, 221, 222
- Russian role, 227
- Coombs, H. C., 66–67
- Correlates of War datasets, 248–50
- Costa Rica, 152–53
- costs, 170–72, 177–78
- cotton (*United States – Cotton* case), 106–14
- Croatia, 213
- cross-sectoral trade-offs, 136–38
- Cuba, 69, 71, 152–53
- cultural diversity
 - case study approach, 257
 - and deadlocks, 9, 45
 - hypothesis demonstration, 257–60, 263–66, 278
 - ITO trade negotiations, 66–70, 78
 - solutions, 259
 - as structural factor, 254–55
 - UN Security Council, 204
- Cyprus, 264
- Dalton, Hugh, 62
- Danish Bottles* case, 100
- Daunton, Martin, 9, 10, 11, 15–16, 258, 259, 264–65, 266, 268, 269, 273, 275
- deadlocks
 - actors in, 5–6, 274–75
 - arbitration, 89, 92–95
 - bargaining relationships, 86–88
 - BATNA (Best Alternative to a Negotiated Agreement) in climate negotiations, 7–8, 44–45, 170–77, 257–62, 278
 - breaking, 239–42
 - causes, 6–12, 123–25, 140–41, 142–44, 148–62, 237–38, 257–72, 277–79
 - characteristics, 238–39
 - climate negotiations, 164–65, 170–77, 185–87
 - collective bargaining, 79, 82, 83, 95
 - conciliation, 88–92
 - contribution of this project, 19–21
 - cultural diversity, 9, 45, 257–60, 263–66, 278
 - domestic interests, 5, 11–12, 45, 257–60, 269–70, 278
 - fairness, 10–11, 45, 257–60, 268–69, 278
 - first order negotiations, 31–41
 - hypotheses, 6–12, 257–72, 277–79

- deadlocks (cont.)
 - institutions, 10, 45, 118–19, 257–60, 266–68, 278
 - international monetary stability, 47–49
 - international trade, 47–49, 264–65, 275–76
 - intra-organizational efficiency, 84–86
 - Kosovo conflict, 18, 210–11, 215–16, 229–31, 277
 - leadership, 242–53
 - levels of, 41–44
 - liberal economies, 25–29
 - meaning of, 2–3, 25, 235
 - mediators, 5–6
 - multilateral deadlocks, 20–21, 41–44, 47–49, 123–25, 140–41, 205–08
 - negotiations, 230–31, 232, 235–42, 274–75
 - as opportunities, 239
 - politics, 25, 27–31, 41–46
 - power, balance of, 9, 44–45, 257–60, 263–66, 278
 - second order negotiations, 31–41
 - signalling, 145–48
 - solution sets, 12–14, 237, 259, 270–72
 - structural factors, 238, 254–55, 274
 - study of, 1–2
 - timing, 159
 - trade negotiations, 47–49, 264–65, 275–76
 - transitions, 276–77
 - types, 3–5, 273
 - UN Security Council, 17–18, 188, 208–09, 271–72
 - uncertainty, 8, 45, 144–45, 162–63, 237, 257–60, 262–63, 278
 - World Trade Organization (WTO), 10, 186
 - zone of agreement, 159–61
- delay, 4–5, 236, 273
- democracies, 243–53
- Destler, I. M., 130
- developing countries
 - climate negotiations, 167, 171, 177, 183–84
 - financial transfers from developed countries, 183–84
 - trade negotiations, 66–69, 73–75, 148–51
 - UN Security Council, 196–200
 - see also* ‘South’ (coalition of developing countries)
- dispute settlement mechanisms
 - European Court of Justice (ECJ), 98–101
 - International Court of Justice (ICJ), 101–04
 - and treaty negotiations, 96–97
 - World Trade Organization (WTO), 96, 104–19
- distributive bargaining, 82–83
- distributive justice, 65–72
- distributive strategy, 6–7, 150, 153, 155–56, 158
- Doha Development Agenda
 - agriculture, 11, 130–31, 132, 136–40, 148–49
- BATNA (Best Alternative to a Negotiated Agreement), 124, 140–41, 159–60, 261–62
- Canada – Wheat Exports and Grain Imports* case, 114–15
- causes of deadlocks, 7–12, 123–25, 140–41, 142–44, 148–62
- Doha Ministerial Declaration, 105–06
- European Communities – Export Subsidies on Sugar* case, 115–16
- European Communities – Regime for the Importation of Bananas* case, 116–17
- European Union (EU), 123–25, 136–38, 140–41, 148–49, 160–61
- solutions, 276
- uncertainty, 143, 148–59, 162–63, 262
- United States – Cotton* case, 106–14
- United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* case, 117–18
- United States – Subsidies and Other Domestic Support for Corn and Other Agricultural Products* case, 117
- United States (US), 123–26, 136, 138–41, 148–49, 160–61
- zone of agreement, 159–61
- see also* World Trade Organization (WTO)

- domestic interests
 - case study approach, 256–57
 - climate negotiations, 164, 170, 172–77, 185–86
 - collective bargaining, 82
 - and deadlocks, 5, 11–12, 45
 - hypothesis demonstration, 257–60, 269–70, 278
 - Kosovo conflict, 223–25, 229
 - leadership, 242–53
 - monetary stability negotiations, 50–52, 53
 - power, balance of, 269–70
 - solutions, 14, 259, 271
 - as structural factor, 238, 254–55
 - trade negotiations, 53–58, 60–61, 71–72, 75, 77–78, 124, 140–41, 160–61
 - two-level games, 126–27, 255
- Druckman, Daniel, 4, 18
- Due Restraint (WTO), 106–07, 108–09
- Economic and Social Council, UN, 65–72
- Ecuador, 152–53
- Egypt, 152–53, 193–96
- El Salvador, 152–53, 207
- Eliot, T. S., 1
- employers' associations, 84–85
- employment, 60–61, 63–65, 66–72
- Employment Act (1946), 60–61, 70–71
- Energy Act (2005), 181
- Engineering Employers Federation (EEF), 85
- entrapment, 241–42
- Europe, 81, 84
- European Communities – Approval and Marketing of Biotech Products* case, 118
- European Communities – Commercial Vessels* case, 118
- European Communities – Export Subsidies on Sugar* case, 114–16
- European Communities – Regime for the Importation of Bananas* case, 116–17
- European Communities – Sardines (highlighted fishery subsidies)* case, 118
- European Communities – Selected Customs Matters* case, 118
- European Communities – Tariff Preferences* case, 118
- European Communities – Trademarks and Geographical Indications* case, 118
- European Community (EC) *see* European Union (EU)
- European Court of Justice (ECJ), 98–101
- European Union (EU)
 - BATNA (Best Alternative to a Negotiated Agreement), 261
 - Cancun negotiations, 153
 - climate negotiations, 167, 169, 186
 - cultural diversity, 9
 - deadlocks, propensity to, 45
 - Doha Development Agenda negotiations, 123–25, 136–38, 140–41, 148–49, 160–61
 - export subsidies, 107
 - financial crisis (2007), 37
 - Geneva negotiations, 156–58
 - Kosovo conflict, 218, 228
 - liberalization of trade, 130–35
 - power, balance of, 265
 - trade agreement ratification, 128–29, 130
 - trade negotiations, 125–26, 156–57
 - WTO trade dispute cases, 115–17, 118–19
- exit, as a strategy, 30
- export credit guarantee programmes, 109–10
- export subsidies, 107
- extended delay, 4–5, 236, 273
- Extraterritorial Income Act (ETI, 2000), 110
- face-saving positions, 241
- fairness
 - Canada – Wheat Exports and Grain Imports* case, 114–15
 - climate negotiations, 171–72, 187
 - and deadlocks, 10–11, 45
 - European Communities – Export Subsidies on Sugar* case, 115–16
 - European Communities – Regime for the Importation of Bananas* case, 116–17
 - Gabcikovo-Nagymaros* case, 101–02

- fairness (cont.)
 hypothesis demonstration, 257–60, 268–69, 278
 International Trade Organization (ITO) failure, 53–54
 Namibia case, 103–04
 Palestine Wall case, 102–03
 as process factor, 255
 solutions, 13, 194, 259, 271
 trade negotiations, 66–70, 78
 UN Security Council, 206–07
 United States – Cotton case, 107, 114
 Faure, Guy Olivier, 3, 4
 financial crisis, 32–33, 37, 39, 47–49, 184–85, 276
 financial stability negotiations
 multilateral deadlocks, 47–49
 propensity to deadlocks, 49–53, 264–65, 275–76
 success of Bretton Woods, 76–77
 fire-fighters' dispute, 82, 90–91
 first order negotiations, 15, 31–41, 273–74
 First World War, 33
 Fisher, Roger, 234–35
 flexibility, 166–67, 169, 172, 188–89, 208, 266–67
 forced choice arbitration, 94
 forum shifting, 222–23
 framing, 13
 France
 Kosovo conflict, 218, 221
 liberalization of trade, 133
 Suez crisis, 193–96
 UN Security Council, 189, 198, 203–05
 World Economic Conference (1933), 38
 G10 (Group of Ten), 150
 G20 (Group of Twenty) developing countries, 112, 152–59, 162–63
 G20 (Group of Twenty) Finance Ministers and Central Bank Governors, 32, 39
 G33 (Group of Thirty Three) developing countries, 162–63
Gabcikovo-Nagymaros case, 101–02
 Gamble, Andrew, 9, 15, 258, 259, 261, 262, 264, 267, 268, 270, 273–74
 gambling, 117–18
 GATT (General Agreement on Tariffs and Trade), 9, 48, 54, 76, 78, 150
 Gehring, Markus, 8, 10, 11, 16, 258, 259, 263, 266, 271, 273
 Geneva negotiations (WTO Ministerial Conference 2006), 155–59
 Geneva Trade Conference (1947), 53–54, 71–76, 77–78
 Georgia, 104, 207, 218
 Germany, 38, 47, 99, 133, 221
Getting to Yes (Fisher and Ury), 234–35
 global economy, 32–33, 35–36, 37, 39, 43–44
 Goemans, Hein E., 243
 gold standard, 38–39, 49–52
 grain, 114–15
 Great Britain *see* Britain; United Kingdom (UK)
 Greece, 264
 Guatemala, 152–53, 207
 Hammarskjöld, Dag, 194–95
 Hammond, Kenneth, 275
 Harris, Peter, 240
 Haskel, Barbara, 254
 Havana Trade Conference (1948), 53–54, 71–76, 77–78, 266, 268
 Hawkins, Leo, 241
 Heads of State data, 247–48
 Hicks, John, 81
 Hirschman, Albert, 30
 Holbrooke, Richard, 213–14
 Hong Kong negotiations (WTO Ministerial Conference 2005), 156
 Hoover, Herbert, 56
 Houten, Pieter van, 8, 10, 11–12, 17, 18, 256, 258, 259, 261–62, 263, 265, 267, 268, 269–70, 271, 273, 276, 277
 Hudson, Michael, 241
 Hull, Cordell, 56, 57, 58
 Hungary, 101–02
 Hurricane Katrina, 182
 identity, 42, 45, 274
 imperfect information, 237
 imperial preference, 47, 54–55, 74
 India
 Cancun negotiations, 154
 climate change, 40

- cultural diversity, 9
- financial crisis (2007), 32, 37
- G20 developing countries, 152–53, 162–63
- Geneva negotiations, 157, 158
- trade negotiations, 58–65, 71, 123, 134
- UN Security Council, 194, 195–96
- individuals, role of, 25–29
- industrial relations *see* collective bargaining; trade unions
- industry, 174–76, 178
- informal groups, 205–08
- informal negotiations
 - deadlocks, 17–18, 188, 189–91, 208–09, 263, 271–72
 - flexibility, 188–89, 208, 266–67
 - informal consultations, 196–203
 - informal groups of states, 205–08
 - permanent members (P-5), 189, 203–05, 206, 208–09, 222, 266–67
 - power, balance of, 265
 - UN Emergency Force (UNEF) Advisory Committee, 193–96
 - Uniting-for-Peace Resolution, 191–94, 271–72
- information, 237
- institutions
 - climate negotiations, 186
 - collective bargaining, 83–88
 - and deadlocks, 10, 45, 118–19
 - European Communities – Export Subsidies on Sugar* case, 116
 - flexibility, 188–89
 - Gabcikovo-Nagymaros* case, 101–02
 - hypothesis demonstration, 257–60, 266–68, 278
 - informal groups of states, 205–08
 - Kosovo conflict, 221–23, 267
 - and litigation, 119
 - Namibia* case, 103–04
 - Nuclear Weapons* case, 104
 - Palestine Wall* case, 102–03
 - solutions, 13, 259
 - as structural factor, 238, 254–55
 - trade negotiations, 72–76, 162
 - UN Security Council, 188, 189, 200, 204, 208–09
 - uncertainty, reduction of, 151
 - United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* case, 117–18
 - world economic collapse (1930s), 47–49
- integrative strategy, 6, 83, 150, 155–56, 158
- Intergovernmental Panel on Climate Change (IPCC), 165–66
- International Bank for Reconstruction and Development (IBRD), 48
- International Conflict Management (ICM) data, 246–47, 253
- International Court of Justice (ICJ), 101–04
- international disputes
 - European Court of Justice (ECJ), 98–101
 - International Court of Justice (ICJ), 101–04
 - litigation, 96–97
 - and treaty negotiations, 97–98
 - World Trade Organization (WTO), 104–19
- international financial crisis (2007), 32–33, 37, 39, 184–85, 276
- International Labour Organization (ILO), 133
- International Monetary Fund (IMF), 36–37, 48, 61–62
- international monetary stability negotiations
 - multilateral deadlocks, 47–49
 - propensity to deadlocks, 49–53, 264–65, 275–76
 - success of Bretton Woods, 76–77
- international state system, 31–44
- international trade negotiations
 - deadlocks, 47–49, 264–65, 275–76
 - distributive justice, 65–72
 - domestic interests, 53–58, 60–61, 71–72, 75, 77–78, 124, 140–41, 160–61
 - European Court of Justice (ECJ), 99–100
 - failure of ITO trade negotiations, 77–78
 - institutional design, 72–76
 - multilateralism, 58–65

- international trade negotiations (cont.)
 - two-level games, 126–27
 - United States – Cotton* case, 106–14
 - see also* multilateral trade negotiations
- International Trade Organization (ITO)
 - domestic interests, 49, 61–62, 63
 - Geneva and Havana conferences, 71–76
 - origins, 48
 - preparatory meetings, 65–72
 - proposals, 59–65
 - reasons for failure, 53–54, 266, 268, 273
- intra-organizational bargaining, 83
- intra-organizational efficiency, 84–86, 266
- intra-sectoral trade-offs, 138–40
- Iran–Iraq war, 203
- Israel, 102–03, 196
- issue-linkages in negotiations, 154, 275
- issues, substantiveness of, 238
- Italy, 218, 221, 236

- Jackson, Andrew, 51
- Japan, 37, 47, 114–15
- Jensen, Lloyd, 275
- Johanns, Mike, 157–58
- justice
 - Canada – Wheat Exports and Grain Imports* case, 114–15
 - climate negotiations, 171–72, 187
 - and deadlocks, 10–11, 45
 - European Communities – Export Subsidies on Sugar* case, 115–16
 - European Communities – Regime for the Importation of Bananas* case, 116–17
 - Gabcikovo-Nagymaros* case, 101–02
 - hypothesis demonstration, 257–60, 268–69, 278
 - International Trade Organization (ITO) failure, 53–54
 - Namibia* case, 103–04
 - Palestine Wall* case, 102–03
 - as process factor, 255
 - solutions, 13, 194, 259, 271
 - trade negotiations, 66–70, 78
 - UN Security Council, 206–07
 - United States – Cotton* case, 107, 114
 - Katrina, Hurricane, 182
 - Kenya, 152–53
 - Kerry, John, 184
 - Keynes, John Maynard, 48, 52–53, 59, 76
 - Kim, Sung Hee, 3–4
 - Kindleberger, Charles, 38
 - Korean War, 191–92, 241
 - Kosovo conflict
 - actors, 216–19
 - background, 211–16
 - BATNA (Best Alternative to a Negotiated Agreement), 223–29, 261, 265, 271
 - deadlocks, 18, 210–11, 215–16, 229–31, 277
 - independence declaration, 210, 211
 - institutions, 221–23, 267
 - negotiations, 210–11, 213–16, 219–21, 223–29, 261
 - power, balance of, 227–28, 229, 265
 - Kyoto Protocol
 - BATNA (Best Alternative to a Negotiated Agreement), 170–72
 - domestic interests, 172–77
 - negotiations, 166–69
 - US withdrawal, 17, 164–65, 182

 - labour, 132–33
 - see also* trade unions
 - Lall, Arthur, 195–96
 - Lamy, Pascal, 142, 156
 - language, 90
 - Latin America, 73–75
 - leadership, 208, 209, 242–53, 269
 - League of Nations, 47–48, 52
 - legitimacy, 10–11, 13, 193–94, 195, 206–07
 - Levy, David, 175–76
 - Lewicki, Roy, 238, 240–41, 242
 - liberal economies, 25–29, 32–33, 35–36, 37
 - liberalization of trade, 124, 130–35, 261–62
 - Lieberman-Warner Bill (2008), 180–81
 - Like Minded Group, 150, 153
 - Lisowski, M., 176
 - litigation
 - European Court of Justice (ECJ), 98–101

- institutions, 119
- International Court of Justice (ICJ), 101–04
- international negotiations, 96–98
- power, balance of, 119
- uncertainty, 119, 263
- World Trade Organization (WTO), 104–19
- Litterer, Joseph, 238, 240–41, 242
- Loutfi, Omar, 195–96
- Low Pay Commission, 87, 88, 92
- loyalty, 30, 43
- Lutmar, Carmela, 12, 18, 256–57, 258, 259, 269, 271, 273, 274
- Luxembourg, 236
- lying
 - climate negotiations, 186
 - collective bargaining, 82, 262–63
 - and deadlocks, 8, 45
 - hypothesis demonstration, 257–60, 262–63
 - as process factor, 238, 255
 - solutions, 12, 259
 - United States – Cotton* case, 107
- McGillivray, Fiona, 243–44
- McKersie, R. B., 82, 83
- Mali, 111–12
- Mandelson, Peter, 137–38, 157
- market economies, 25–29, 32–33, 35–36, 37
- Meade, James, 48, 61–62, 63–65
- mediation, 5–6, 92–95, 226, 242–53
- Mexico, 114–15, 152–53
- Mexico – Measures Affecting Telecommunications Services* case, 105–06
- Middle East negotiations, 241
- Milosevic, Slobodan, 212, 213–14, 215, 217, 219, 220, 224
- mineworkers' dispute, 82, 85
- monetary stability negotiations
 - multilateral deadlocks, 47–49
 - propensity to deadlocks, 49–53, 264–65, 275–76
 - success of Bretton Woods, 76–77
- Morley, Ian, 233
- multilateral deadlocks, 20–21, 41–44, 47–49, 123–25, 140–41, 205–08
- multilateral negotiations
 - and deadlocks, 230–31, 274–75
 - interwar years, 37–38
 - Kosovo conflict, 213–16, 219–21, 223–29, 261
 - levels of deadlocks, 41–44
- multilateral trade negotiations
 - BATNA (Best Alternative to a Negotiated Agreement), 261–62
 - Doha Development Agenda negotiations, 123–25, 136–41
 - EU-US role, 125–26, 136–40
 - liberalization of trade, 130–35
 - ratification procedures, 128–30
 - two-level games, 126–27
 - see also* international trade negotiations
- multilateralism, 47–49, 58–65
- mutually assured destruction (MAD), 39–40
- Namibia, 199–200
- Namibia* case, 103–04
- Napoleonic Wars, 33
- Narlikar, Amrita, 8, 17, 18, 256, 258, 259, 261–62, 263, 265, 267, 270, 271, 273, 276, 277
- National Minimum Wage negotiations, 87, 88, 92
- NATO (North Atlantic Treaty Organization), 210, 214–15, 217, 218, 221–22, 230
- Neale, Margaret, 10
- negotiations
 - bargaining relationships, 86–88
 - conciliation, 88–92
 - conflict management, 232–42
 - and deadlocks, 230–31, 232, 235–42
 - definition, 233
 - frequency of use in international conflicts, 234
 - institutions, 119
 - Kosovo conflict, 210–11, 213–16, 219–21, 223–29, 261
 - leadership, 242–53
 - process of, 234–35
 - uncertainty, 144–45

- negotiations (cont.)
 - zone of agreement, 159–61
 - see also* climate negotiations; collective bargaining; informal negotiations; trade negotiations; treaty negotiations
- negotiators, 135, 161, 238, 276
- Nehru, Jawaharlal, 68
- Netherlands, 236
- Newhouse, John, 254–55
- non-agreement, 2–3
- Non-Agricultural Market Access (NAMA), 136–38, 158
- non-cooperation, 2–3
- ‘North’ (coalition of developed countries)
 - Cancun negotiations, 149–51, 153–54
 - financial transfers to ‘South’, 183–84
 - Geneva negotiations, 155–59
 - UN Security Council, 192–93, 197, 199
 - uncertainty, 162–63
- Northern Ireland, 42
- Norway, 194, 195
- nuclear weapons, 39–40
- Nuclear Weapons* case, 104
- Obama, Barack, 183, 184
- Odell, John S., 161
- openness, 238
- Organization for Security and Co-operation in Europe (OSCE), 213
- Pakistan, 152–53, 194
- Palestine Wall* case, 102–03
- Palestinian Authority, 102–03
- Panama, 116–17
- Paraguay, 152–53, 162–63
- Peace Clause (WTO), 106–07, 108–09
- pendulum arbitration, 94
- Pérez de Cuéllar, Javier, 203
- Peru, 152–53
- Pettigrew, Pierre, 12
- Philippines, 152–53
- politics
 - climate negotiations, 172–74, 178–83, 184, 185–86
 - and deadlocks, 25, 27–31, 41–46
 - definition, 30
 - first order negotiations, 31–41
 - liberal economies, 27–29
 - second order negotiations, 31–41
 - UN Security Council, 189
- positive sum games, 31
- post-colonial countries, 196–200
- Potsdam Conference, 33
- Powell, Robert, 144
- power, balance of
 - asymmetry in, 33–34, 44–45, 53
 - case study approach, 257
 - climate negotiations, 186
 - collective bargaining, 82
 - and deadlocks, 9, 44–45
 - and domestic interests, 269–70
 - global economy, 35–36, 37, 38–39
 - hypothesis demonstration, 257–60, 263–66, 278
 - Kosovo conflict, 227–28, 229, 265
 - litigation, 119
 - national vs. global, 43–44
 - solutions, 13, 259
 - as structural factor, 238, 254–55
 - trade negotiations, 53–54, 72–75, 124, 140–41, 162
 - two-level games, 127
 - UN Security Council, 188, 189, 193–94, 195–96, 206–09, 265
 - United States – Cotton* case, 107, 114
- Prantl, Jochen, 10, 11, 17–18, 256, 258, 259, 263, 265, 266–67, 270, 271–72, 273
- process factors in deadlocks, 238, 255, 274
- proximity talks, 240
- Pruitt, Dean, 3–4
- public opinion, 173–74, 181–82
- publicity, 238
- Reciprocal Trade Agreement Act (1934), 58, 72, 77
- regime type, 243–53
- relationships between negotiators, 86–88, 276
- repercussions, 237
- Republic of Ireland, 42
- reserve currency, 59
- rivals, 252
- Rubin, Jeffery, 241–42, 255

- Rugova, Ibrahim, 212
- Russia
 climate negotiations, 169, 171, 186
 and Georgia, 104
 Kosovo conflict, 215, 217–18, 219,
 220, 221, 226–29
 UN Security Council, 189, 198,
 203–05, 226
 see also Soviet Union; USSR (Union of
 Soviet Socialist Republics)
- Sarkozy, Nicolas, 133
- Schachtianism, 47
- Schelling, T. C., 86–87
- second order negotiations, 15, 31–41,
 273–74
- Second World War, 33
- Serbia, 211–16, 217–18, 219, 220,
 224–26, 229, 230–31
- signalling, 145–48, 151–59,
 162–63, 262
- Singapore issues (resulting from WTO
 Ministerial Conference 1996),
 136–38, 154
- sinks, carbon, 166–67, 168, 172, 186
- Siverson, Randolph, 243, 247–48
- Slovakia, 101–02
- Smith, Adam, 26–27
- Smith, Alastair, 243–44
- Smoot-Hawley tariff, 47, 56–57
- social contract, 28
- solution sets for breaking deadlocks,
 12–14, 194, 237, 259, 270–72
- ‘South’ (coalition of developing
 countries)
 Cancun negotiations, 149–51, 153–54
 financial transfers from ‘North’, 183–84
 Geneva negotiations, 155–59
 UN Security Council, 192–93,
 197, 199
 uncertainty, 162–63
 see also developing countries
- South Africa, 152–53, 197, 199–200
- sovereign, role of the, 28–29
- Soviet Union, 34, 191, 193, 194,
 196, 198
 see also Russia; USSR (Union of
 Soviet Socialist Republics)
- Special and Differential Treatment
 (SDT), 158
- Special Products (G33 proposal), 162–63
- Special Safeguard Mechanism (G33
 proposal), 162–63
- Sri Lanka (Ceylon), 194
- stalemate, 3–4, 5, 236, 273
- states
 levels of deadlocks, 41–44
 negotiations, 31–41
 and politics, 27–28
- Stedman, Stephen, 252
- Stephenson, Geoffrey, 233
- strategic deadlocks, 236
- strategy choice, 6–7
- strikes, 80–81, 82, 85
- ‘Strong South’ (coalition of developing
 countries), 150–51
- structural factors in deadlocks, 238,
 254–55, 274
- subsidies, 107, 132, 133, 138–40
- Suez crisis, 193–96
- sugar, 115–16
- superior BATNA *see* BATNA (Best
 Alternative to a Negotiated
 Agreement)
- tactical deadlocks, 236
- Taiwan (Chinese Taipei), 114–15
- tariffs, 47–49, 54–58, 132
- Thailand, 115, 152–53
- timing, 159
- trade blocs, 47–49
- trade liberalization, 124, 130–35
- trade negotiations
 BATNA (Best Alternative to a
 Negotiated Agreement), 124,
 140–41, 159–60, 261–62
 deadlocks, 47–49, 264–65, 275–76
 distributive justice, 65–72
 domestic interests, 53–58, 60–61,
 71–72, 75, 77–78, 124, 140–41,
 160–61
 European Union (EU), 125–26,
 156–57
 failure of ITO trade negotiations,
 77–78
 fairness, 66–70, 78
 institutional design, 72–76
 multilateralism, 47–49, 58–65
 power, balance of, 53–54, 72–75,
 124, 140–41, 162

- trade negotiations (cont.)
 - ratification procedures, 128–30
 - United States (US), 49, 53, 58–65, 70–75, 77–78
 - see also* Doha Development Agenda
- trade policy, 54–55, 56–65, 99–100, 106–14
- Trade Promotion Authority (TPA), 129–30, 160–61
- trade unions, 79–84, 85, 88, 262–63
- transitions, 276–77
- treaty negotiations
 - and dispute settlement mechanisms, 96–97
 - European Court of Justice (ECJ), 98–101
 - International Court of Justice (ICJ), 101–04
 - and international disputes, 97–98
 - World Trade Organization (WTO), 104–19
- Treaty of Versailles, 33, 36, 45
- Turkey, 264
- turning points, 4, 276–77
- two-level games, 126–27, 128–29, 255, 266, 269–70
- uncertainty
 - bargaining outcomes, effect on, 144–45
 - and deadlocks, 8, 45, 144–45, 162–63, 237
 - Doha Development Agenda deadlock, 143, 148–59, 162–63, 262
 - hypothesis demonstration, 257–60, 262–63, 278
 - litigation, 119, 263
 - Namibia* case, 103–04
 - Nuclear Weapons* case, 104
 - as process factor, 255
 - solutions, 12, 259, 271
 - United States – Cotton* case, 107
 - World Trade Organization (WTO), 143, 148–59, 162–63
- Underdal, Arild, 237, 255
- United Kingdom (UK), 133, 167, 189, 198, 203–05, 215, 218, 221
 - see also* Britain
- United Nations Emergency Force (UNEF) Advisory Committee, 193–96
- United Nations Framework Convention on Climate Change (UNFCCC), 166, 168
- United Nations Secretary General, 194–95, 203
- United Nations (UN), 36–37, 45, 65–73, 101–04, 214–16, 221
- United Nations (UN) Security Council
 - deadlocks, 17–18, 188, 189–91, 208–09, 271–72
 - enlargement, 196–200
 - flexibility, 188–89, 208, 266–67
 - informal consultations, 196–203
 - informal groups of states, 205–08
 - Kosovo conflict, 210, 213, 214–16, 218–19, 220, 222, 226
 - permanent members (P-5), 189, 203–05, 206, 208–09, 222, 266–67
 - power, balance of, 188, 189, 193–94, 195–96, 206–09, 265
- UN Emergency Force (UNEF) Advisory Committee, 193–96
- Uniting-for-Peace Resolution, 191–94, 271–72
- United States – Continued Existence and Application of Zeroing Methodology* case, 118
- United States – Cotton* case, 97, 106–14
- United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* case, 117–18
- United States – Subsidies and Other Domestic Support for Corn and Other Agricultural Products* case, 117
- United States (US)
 - Administration, 172–74, 180–81, 182–83, 184, 185–86
 - BATNA (Best Alternative to a Negotiated Agreement) in climate negotiations, 164, 170–72, 177–78, 185, 261, 270–71
 - and Britain, 34
 - Cancun negotiations, 153
 - carbon emissions, 168
 - climate change, 40, 165–70
 - climate negotiations, 164–65, 170–85, 187
 - Cold War, 34
 - collective bargaining, 81

- Congress, 172–74, 180–81, 184, 185–86
- cultural diversity, 9
- deadlocks, 164–65, 170–77, 185–87, 273
- Doha Development Agenda negotiations, 123–26, 136, 138–41, 148–49, 160–61
- dollar as reserve currency, 37
- domestic interests, 170, 172–77, 185–86
- and EU trade negotiations, 125–26, 156–57
- financial crisis (2007), 37
- Geneva negotiations, 156–58
- global role, 36, 38
- Kosovo conflict, 213, 215, 217, 221, 224, 228
- Kyoto Protocol withdrawal, 17, 164–65, 182
- liberalization of trade, 130–35
- monetary stability negotiations, 47–49, 76–77
- Northern Ireland deadlock, 42
- nuclear weapons, 39–40
- power, balance of, 265
- re-engagement in climate negotiations, 177–85, 187
- Smoot-Hawley tariff, 47
- Suez crisis, 193
- trade agreement ratification, 128, 129–30
- trade negotiations, 49, 53, 58–65, 70–75, 77–78
- trade policy, 56–58
- UN Security Council, 189, 192, 196, 198, 203–05
- Versailles, Treaty of, 45
- World Economic Conference (1933), 38
- WTO trade dispute cases, 106–15, 117–18
- Uniting-for-Peace Resolution, 191–94, 271–72
- unofficial communication, 240
- Urquhart, Brian, 195
- Uruguay, 162–63
- Ury, William, 234–35, 239–40
- USSR (Union of Soviet Socialist Republics), 39–40, 198
see also Russia; Soviet Union
- value-creating strategy, 6
- Venezuela, 74, 152–53
- Versailles, Treaty of, 33, 36, 45
- Vezirgiannidou, Sevasti-Eleni, 11–12, 17, 256, 258, 259, 261, 269, 270–71, 273, 276
- Vienna, Congress of, 33
- Vietnam War, 241, 242
- voice, as a strategy, 30
- Wallace, Henry, 60
- Walton, R. E., 82, 83
- war, 33–34
- ‘Weak South’ (coalition of developing countries), 150–51, 153–54
- Westbrook, Raymond, 255
- wheat, 114–15
- White, Harry Dexter, 52, 53, 76
- Wilson, Woodrow, 45, 56
- workers, 132–33
- World Bank, 36–37
- World Economic Conference (1933), 38–39
- World Trade Organization (WTO)
 - Canada – Wheat Exports and Grain Imports* case, 114–15
 - deadlocks in, 10, 186
 - dispute settlement mechanisms, 96, 104–19
 - European Communities – Approval and Marketing of Biotech Products* case, 118
 - European Communities – Commercial Vessels* case, 118
 - European Communities – Export Subsidies on Sugar* case, 115–16
 - European Communities – Regime for the Importation of Bananas* case, 116–17
 - European Communities – Sardines (highlighted fishery subsidies)* case, 118
 - European Communities – Selected Customs Matters* case, 118
 - European Communities – Tariff Preferences* case, 118
 - European Communities – Trademarks and Geographical Indications* case, 118

- World Trade Organization (WTO) (cont.)
 institutional limitations, 267
 and International Labour
 Organization (ILO), 133
 power, balance of, 265
 solutions, 12, 13
 uncertainty, 143, 148–59,
 162–63
*United States – Continued
 Existence and Application of
 Zeroing Methodology*
 case, 118
United States – Cotton case,
 106–14
*United States – Measures Affecting
 the Cross-Border Supply of
 Gambling and Betting Services*
 case, 117–18
*United States – Subsidies and Other
 Domestic Support for Corn and
 Other Agricultural Products case*, 117
 zone of agreement as cause of
 deadlock, 159–61
see also Doha Development Agenda
- Yalta Conference, 33
 Young, Alasdair, 11–12, 16–17, 258,
 259, 261, 265, 267, 269, 273,
 276, 277
 Young, Kenneth, 255
 Yugoslavia, 211–16, 224, 236
- Zartman, I. William, 4, 255
 zero sum games, 31, 223, 230–31
 zone of agreement, 159–61, 165, 223,
 230–31