Train for Trade II
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Skills and Techniques for Trade Negotiators:

A Practical Guide

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Chapter 1: An Overview of the Topic

Introduction to this Guide and the Negotiations Simulation

The purpose of the present analysis is to offer guidance on the conduct of trade negotiations. It is written on the expectation that the typical reader will be a diplomat or other policymaker in a developing country who has been tasked with representing the country or otherwise participating in a trade negotiation. Those talks may be with a single partner, or several, or encompass nearly the whole world, but for the sake of simplicity it is assumed here that they are most likely to fit one of two major patterns: multilateral negotiations in the World Trade Organization (WTO), or a bilateral FREE TRADE AGREEMENT[1] (FTA) between a developing country and a developed country. Even if those negotiations are for an FTA, it is useful here to cover the WTO procedures so as to set a baseline and then understand the ways in which FTA negotiations may be either similar or different.

This is not entirely a stand-alone analysis, but instead is related to three other resources. One is a training program in which the present analysis is a key component; while this volume can be coherently read on its own, it is designed to be used as part of the curriculum in a course that covers the same territory in greater depth and with full discussion.

Second, an interactive exercise in the training program is designed to give participants some experience in dealing with issues that arise in actual trade negotiations. The premise of the simulation is that four countries have agreed in principle to negotiate an FTA, but are still in the preparatory phase of those proposed negotiations. As laid out more fully in the appendix to this volume, which provides the general instructions and draft texts, the most immediate negotiations aim to eliminate as many "BRACKETS" as possible (i.e., to resolve outstanding areas of debate) from the document that will formally LAUNCH the talks. Beyond giving participants an opportunity to work with the types of issues that arise in such negotiations, the main objective of this exercise is provide a chance to devise and try out their negotiating tactics — and also to see how well those choices work. In addition to the general instructions, each of the four teams in that simulation will receive confidential instructions on what they are to seek and how the results of the exercise will be scored and critiqued.

Third, the training program associated with this volume is one aspect of a two-part curriculum in which both strategy and tactics are covered. As is discussed throughout the present document, these two levels of policymaking are intimately linked, but also distinct. It is assumed that most or all of the participants in the present training on negotiating tactics will also engage in the training on trade strategy.

Simply stated, the present analysis starts from the simplifying assumption that a country's policymakers have already devised an overall trade strategy, and decided what types of trade agreements they wish to negotiate — and with whom. Apart from the special case of the negotiations by which countries accede to the WTO, which are almost uniquely one-sided affairs in which the acceding country is the only one making new CONCESSIONS, any other trade negotiation offers the opportunity for at least some give-and-take between the parties. This point is equally applicable to initiatives that might variously be bilateral, regional, plurilateral, or multilateral; the commitments of which might be extended on a preferential or MOST-FAVORED-NATION (MFN) basis; and partners might be developed, developing, or both. The exchange of concessions may not be equal; they may indeed be far from it whenever the

[1] All terms that are defined in the Glossary of Key Terms in the Theory and Practice of Negotiations (Appendix A) are formatted this way when they first appear in the text.

negotiations are conducted on a distributive rather than an integrative basis (a distinction discussed at length below), and/or are conducted between countries for which the economic, demographic, or security disparities are vast. That said, it will always be the case that a well-prepared and tactically adept country should do better in any trade negotiation than will a country that takes a haphazard approach.

It is also important to stress what the present document does *not* aim to do. People who are new to the world of strategies and negotiations may hope that they can learn a few, simple tricks that will invariably produce success, but that is not a realistic expectation. Just as there is no single trade strategy that will always be appropriate for every country, so too are there no tactics that will be appropriate to every negotiation. Readers who are familiar with card games should think of negotiating tactics as being more like a game of poker with other players than a game of blackjack (also known as twenty-one) against a dealer who cannot make any choices. In that latter game there are some fairly simple "rules of thumb" that, based on mathematical probability, lay out when a player should draw another card. The same cannot be said for poker, where the winner is not always the player with the best hand, but the one who plays their hand the best. There are no absolute guidelines on when a poker player should hold the cards he or she has been dealt, or fold, or bet, or bluff, nor can the player know what cards the other players have and whether they are merely BLUFFING.

The analogy between trade negotiations and a poker game is not perfect, as there are a few fundamental differences. The chief strategic difference is that a poker game is zero-sum, meaning that every gain by one player is necessarily a loss by others, whereas a trade negotiation will normally aim for positive-sum outcomes by which all participants are better off than they would be without the agreement. The chief tactical difference is that there are steps that a trade negotiator may take to gain better insight into the other side's motivations and actions. If you are properly prepared before and during a negotiation, learning as much as you can not just about the issues but how and why the other side takes the positions that they do, it could be almost like taking a peek at their cards. That is the main reason why the present document devotes so much attention to the context in which negotiations take place, and the importance of understanding one's negotiating partner. Even if you know as much as you can about the other side, however, there are still no absolute rules regarding any tactics that should always or never be employed.

Point 1: The Relationship between Strategy and Tactics

As a first cut, we may make the following rough distinction: A country's trade *strategy* identifies its larger objectives in this field, as well as the principal instruments by which it intends to devise and pursue them (e.g., domestic institutions and procedures, national laws, international negotiations, etc.), while *tactics* are the means by which the country achieves those aspects of its trade strategy that require the negotiation of agreements with its trading partners. The broader issues regarding trade strategy are the subject of the aforementioned companion volume, but readers will note that there are necessarily some issues that arise both in that volume's coverage of strategy and at the tactical level in the present document. That sometimes means making relatively brief mention here of subject matter that receives more extensive coverage treatment in the other document. Similarly, some of the issues covered in depth in the present volume are alluded to in that strategy document.

One of the ways that strategy and tactics interact is the expectation that any good strategy will be adaptive, and that policymakers can respond to real-world developments either by making tactical "tweaks" to their established strategy or (when necessary) a grander revision. Imagine, for the sake of illustration, that a country decided some years ago that it preferred to negotiate on a purely multilateral and non-preferential basis, and that it therefore wished to put all of its efforts into advancing negotiations in the WTO. But what should such a country do if,

as one might conclude under the present circumstances, the prospects for substantial progress at the multilateral level are burdened by a series of difficult challenges? Even if our hypothetical country were to try distinct tactics in pursuit of these larger, strategic aims, it may find relatively few likeminded countries that are equally committed to a purely multilateral approach. In that case, the information the country acquires from repeated tactical setbacks might lead it to consider significant revisions to its strategy.

Another and more immediate way that tactical thinkers must consider larger, strategic issues concerns the understanding of their specific partners. A key point that runs throughout the present analysis is that a good negotiator will fully understand the motivations, interests, and constraints of the negotiating partner, and knowing that partner's strategy is an indispensable aspect of one's own preparations. All other things being equal, a negotiation is more likely to be relatively smooth and ultimately successful for a negotiator who manages to couch the national position in a way that makes it appear consonant with the preferences of one's partner. Or to put it in terms once expressed by the Italian statesman Daniele Varè, "Diplomacy is the art of letting other people have your way." That is more easily accomplished not by the negotiator who tries to convince a counterpart that his or her country ought to change its perspectives and objectives, or even to act contrary to them, but instead by the negotiator who tries to find ways in which the two countries' strategies can be treated as complementary to one another. In short, your tactics should adapt to your partner's strategy.

Point 2: Fairness in Trade Agreements and Honesty in Negotiating Tactics

Before examining best practices in negotiations, it is appropriate to begin with two points related to the ethics of international negotiations. At the level of strategy, it is worth asking whether trade agreements should aim to be fundamentally fair; at the level of tactics, we may likewise ask whether effective negotiators are (or at least should be) honest and transparent in their dealings. While these questions are legitimate, they also suggest concerns that would — in the view of many experienced negotiators — be seen as misplaced or even naïve. Negotiations theorists are fond of saying, "You don't get what you deserve, you get what you negotiate." Instead of hoping that their partner will be generous in what they are willing to concede or merciful in how they pursue their objectives, a negotiator should expect each party to claim as much for themselves as they can.

Should an agreement be fair? From one perspective, any agreement that two or more parties agree to is a fair, "win-win" outcome — assuming they entered willingly into the negotiation, neither side engaged in outright deception, and both sides intend to abide by the commitments that they made. If a buyer and a seller settle on the price of a house, for example, any deal that they agree to might be considered "good" as long as the neither of them were forced into the sale, the house is in the physical and legal conditions that the seller stated, and they exchange the money and the title as agreed. That said, the terms of the deal could always be better or worse for either party, depending on the price. The art of negotiation is not simply about "getting to yes," but getting to that version of "yes" that is, for each participant, more favorable than other versions. (We will later consider how this point is modified when there is more than one dimension, such as price, at stake in a negotiation.)

As for honesty in negotiations, this is a topic on which subtle distinctions must be made. On the one hand, the quickest way for a negotiator to lose credibility is to develop a reputation for dishonesty. It could be fatal to the reputation of a negotiator to be caught in an outright falsehood, or to promise something and then not carry through, or take any other action that results in being branded as a liar, a cheat, or unreliable. On the other hand, the quickest way for a negotiator to lose effectiveness is to forget the importance of shaping a partner's perceptions. While this process of salesmanship cannot be based on outright dishonesty,

seasoned negotiators may engage in some degree on theatricality, exaggeration, or hyperbole. They might also be less than candid when telling their counterparts what they can accept.

Many common negotiating tactics are based on the willingness and ability of a negotiator to engage in something short of absolute transparency. These include such classic maneuvers as bluffing, BRINKMANSHIP, LOW-BALLING and high-balling, STALLING, STONEWALLING, WALKING OUT, and the famous GOOD COP/BAD COP gambit; those terms are defined in Chapter 2. Many of these options are, or can be, more about the role-playing of negotiations than they are about any objective facts that may exist outside the room where those talks take place.

Whether or not a negotiator chooses to engage in any tactics that entail some level of deception, it is always good — but often difficult — to know whether one's partners are being sincere or cynical. Suppose, for example, that the other party threatens to walk out if you do not capitulate to a specific demand. That threat might be either a genuine expression of your partner's bottom line, or an attempt to pressure you into making a concession. How can you tell the difference? That is one of many things about negotiations that could not be learned from even the most exhaustive written treatment. It in instead a complex matter of instinct, psychology, calculation, and emotional intelligence, and is most often learned not from reading books or attending lectures but instead from the trial-and-error of experience. This is precisely why the overall course with which this document is associated includes a detailed simulation of a negotiation, as that exercise gives participants an opportunity to acquire experience, and learn from their mistakes without suffering any real-world consequences.

Point 3: Negotiating Power Is a Function Not Just of Resources but also Preparation

Negotiations may indeed entail some element of fairness, or at least the desire of larger parties to appear that they are acting fairly toward smaller parties, but it is not unusual for power to play a larger role than fairness in determining outcomes. We may define power to be the capacity of one actor — be that a person, a country, or some other entity — to get another actor to do something that the second actor might not otherwise do. Negotiations can be especially difficult in a world of vast disparities in size and development. Consider the simple issue of population: We live in a world where there are about as many countries that each have over one hundred million persons as there are countries with populations of less than one hundred thousand. Similar disparities exist in total economic size, governmental resources, military capacity, and so forth. We should not be surprised if diplomats feel somewhat intimidated when entering into negotiations with a partner that is, as measured along some or all of these dimensions, many times larger. Negotiators may likewise feel constrained if they engage in talks with another country that has a special relationship with them, such as a major donor of economic assistance or the larger partner in a security relationship.

It would however be a mistake to gauge power in negotiations solely according to such measurable differences. While demographic and economic disparities can be great, we must also take into account the importance of preparatory work and bargaining skills. Depending on the extent to the different parties do their research, consider their options, and cultivate their skills, they may either expand or contract these asymmetries in power. The capacity to bargain is at least partly dependent upon one's ability to obtain, analyze, and make effective use of information; in any setting larger than one-on-one, it may also depend on the ability to communicate and coordinate action with partners that share common interests.

In addition to doing all that they can to enhance and retain national talent in these areas, and establishing consultative mechanisms in government and between the public and private sectors, there are other steps that countries might take to fill perceived gaps in their capacities. These include working in coalitions with other, likeminded countries; taking full advantage of the resources provided by international organizations; and commissioning the assistance of

consultants. All of those latter steps are best treated as complements and not as substitutes for the development of one's own capacities.

Point 4: International Negotiations Are also Domestic Negotiations

While trade negotiations might appear on the surface to be a series of interactions between the diplomats of two or more countries, they might more properly be seen as exercises through which relationships are worked out between the entirety of the countries that are represented at the negotiating table. The most rigid and formal expectations of international relations is based on the notion that countries deal with one another diplomat-to-diplomat, with accredited representatives acting on behalf of their governments. As Figure 1.1 illustrates in simplified form, these relations can instead be seen as a process of continuous and multilayered communication that does not always respect strict boundary lines between states.

These more complex patterns of communication and influence are emphasized here because they can have important consequences for both the conduct of trade negotiations and for the ultimate fate of agreements. At a minimum, every country that engages in trade negotiations must have a clear idea of the domestic trade politics of its partners, as this is vital to understanding how seriously it should be taken when a counterpart says something like, "We cannot accept what you propose because it would never be approved by our legislature." Is that a factual statement intended to avoid future reversals, or merely a negotiating tactic based on some degree of deception? You cannot know the difference if you do not have a good notion of how the different segments of your partner's public and private sectors deal with one another.

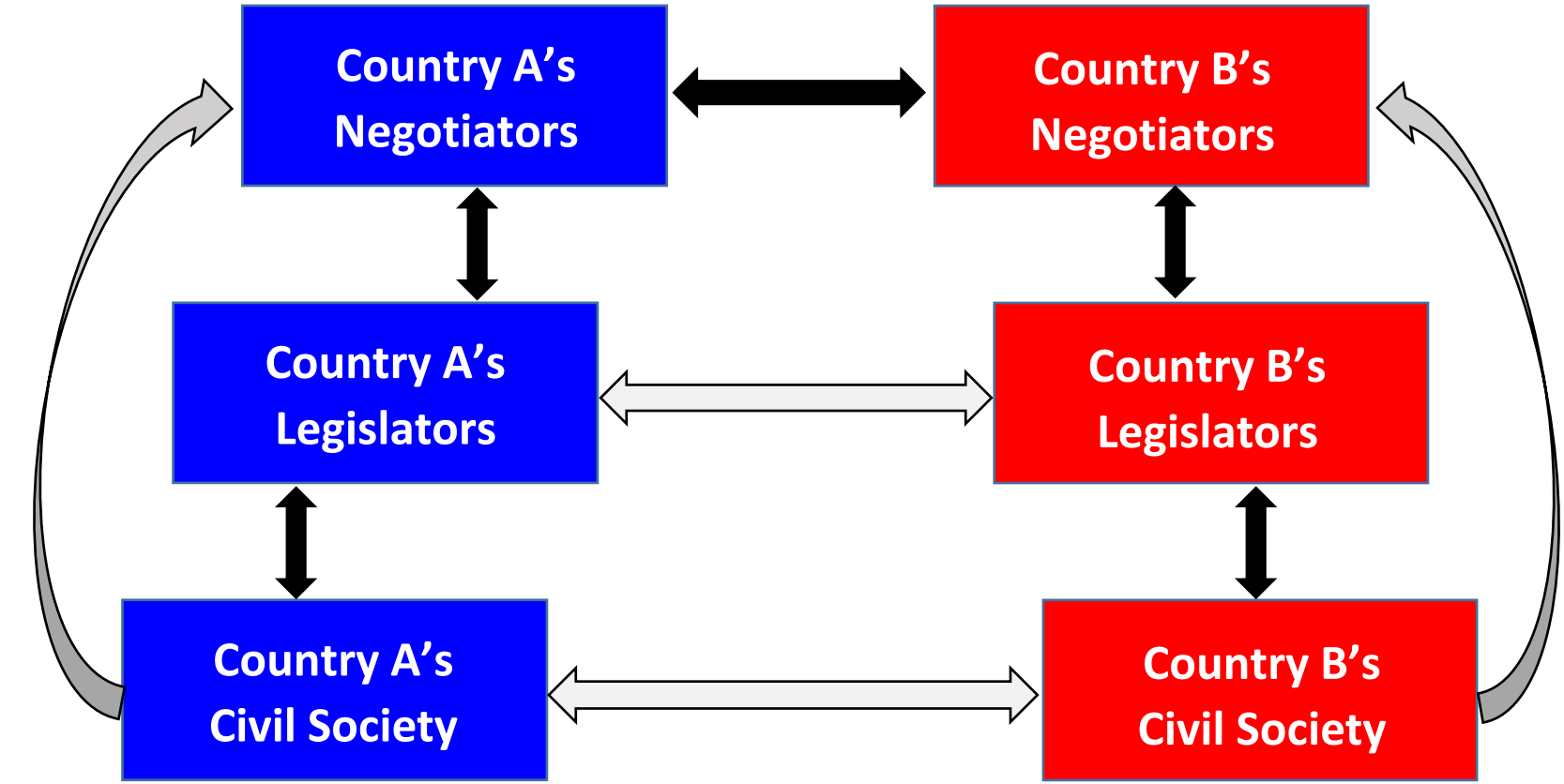
A country should also be prepared for the possibility that actors in either country — their own and/or their partner's — will treat a trade negotiation as a two- or even a three-level game. Countries differ greatly not just in their constitutional arrangements but in their political cultures, and this is sometimes made especially apparent when dealing with another country where there are different notions regarding what is and is not appropriate for contacts between foreign diplomats, legislators, and the private sector. These are points to which we return when reviewing potential cause of failure (Chapter 2), and the need to understand the domestic and international politics of trade agreements (Chapter 5). The principal purpose of that last chapter is to stress the importance of taking into account a partner's strategic objectives and policymaking processes when devising and executing a negotiating strategy.

Point 5: The Multiplicity of Issues, Options, and Institutions

Not all trade agreements are identical, as there are a great many different options with respect to what one may negotiate, with whom, and in what forum. This is one of many ways that the trading system todays differs from its predecessor of a generation or two ago, where the world could largely be divided between developed countries that negotiated with one another in the General Agreement on Tariffs and Trade (GATT) and developing countries that, whether or not they were nominally in the GATT, tended to make their trade policy on an autonomous (non-negotiated) basis. Countries today face a sometimes bewildering array of choices. A few still engage in principally autonomous policymaking, many more negotiate numerous agreements in all manner of configurations, and most fit somewhere in the spectrum between these two extremes.

The subject matter of trade policy is always a work in progress. While there are a few topics that are undeniably core issues in trade, especially tariffs and other measures affecting the cross-border movement of goods, most others are elective. The expanded scope of trade policy was the principal reason for the transition from the GATT of 1947 to the WTO of 1995, as the earlier arrangement ─ which was more a contract than an institution ─ was considered

Figure 1.1: Lines of Communication and Influence in a Hypothetical Trade Negotiation



Strongest and most frequent lines of communication and influence.

Somewhat weaker or less frequent lines of communication and influence.

Weaker and less frequent lines of communication and influence.

to be too weak a vessel to contain the new issues. The creation of this new body did not put an end to the squabbles over what constitutes trade, however, as WTO members continue to debate whether and in what ways the system might be stretched. It has always fallen to the leading countries to act as the principal *DEMANDEURS* on new issues, and they have not confined this activity solely to multilateral negotiations. As is discussed in Chapter 5, REGIONAL TRADE ARRANGEMENTS (RTAs) can be used both to bring new issues into the system and to encourage deeper commitments on those issues that are within the scope of the multilateral system.

Beyond choosing *what* to negotiate, countries have many options on *where* and *how* to pursue these negotiating objectives. In Chapter 4 we review how the options can be initially divided between non-preferential and preferential, and that latter category can be further divided into a variety of choices.

Chapter 2: Negotiations Theory and Practice

Introduction

The principal focus of this chapter is on what negotiations theory can tell us about how best to go about reaching trade agreements. In addition to reviewing the major concepts in this field and their application to real-world bargaining, and how readers might maximize the benefits of these lessons, this chapter also reviews the various ways that countries may sometimes mishandle their negotiations — and what they ought to do to avoid these problems.

There is no single, unified thing we may call "negotiations theory," at least not in the sense of there being some universally agreed set of best practices that will invariably produce the ideal outcome. As in any other academic discipline, and especially one that is as much an art as a science, there are a great many different approaches. Specialists in this field disagree not just on what the best answers may be, but indeed on how best to pose the underlying questions. They deal with such dichotomies as interests *versus* positions, conflict resolution *versus* conflict settlement, and negotiations *versus* mediation (which may in turn be subdivided into various types). There are also large literatures on the distinct factors that may facilitate or complicate negotiations, such as the impact that differing value systems or perspectives may have when negotiators have to deal with persons unlike themselves.

In place of trying to cover a sprawling topic where only some of the material may appear relevant to practical issues in trade negotiations, our emphasis is on the aspects of negotiations theory that speak most directly to real-world problems. Our guiding principle here is to concentrate on those insights that are both relevant and useful to practitioners in the field of trade policy, with special emphasis on the interests of developing countries. Focusing on *relevant* materials means leaving aside topics that may be quite important to some other types of negotiations, but do not figure in the ways that trade negotiations are typically structured; the *useful* criterion leads us to set aside any works that are of greater interest to theorists than they are to practitioners. The good news is that much of this guidance is readily understood, in large part because it is often consistent with what common sense tells us.

Readers are nonetheless encouraged to learn the key terms of negotiations theory, and to read more widely in this field. The books summarized in Box 2.1 offer some good choices. In order to get the most out of the discussion that follows, readers should also learn at least the basics in the language of negotiators; many of the key terms are defined in the Glossary of Key Terms in the Theory and Practice of Negotiations (Appendix A).

Point 1: Trade Negotiations Are not an Event but a Process — With Multiple Chances to Fail

Before examining what one ought to do *in* a negotiation we will first consider two things that a country ought to do *before* negotiations even begin. One, as discussed here, is to plan how the country intends to carry out the full process. The other, as discussed in the next section, is to consider what its alternatives may be to a given negotiation.

It is a common mistake of rookie negotiators to treat each step in the process as an immediate challenge to be overcome, not always thinking through where that step fits in the full process. The press of deadlines can lead some officials to place a greater emphasis on getting each task done on time than on ensuring that it gets done right. A negotiation is best seen as a sequence in which every step needs to be concluded successfully if the enterprise is not to fail. There are seven such steps identified in Table 2.1, although one of them (modalities) might be necessary only for multilateral negotiations.

Box 2.1: The Negotiator's Bookshelf

Space does not permit an exhaustive review of the burgeoning literature that constitutes negotiations theory, as it is too easy to get caught up in sometimes subtle distinctions that authorities are so fond of drawing. Readers who want to go farther in this field are commended to the list below.

A good place to start is J. William Breslin and Jeffrey Rubin, (editors), *Negotiation Theory and Practice* (1991). This text collects numerous essays that are organized in nine sections devoted to such topics as the nature of conflict and negotiation, preparatory work, assessing participants' power and their alternatives to negotiation, etc. Other introductions to the theory and practice of negotiations include Amira Galin, *The World of Negotiation: Theories, Perceptions and Practice* (2015), and Alvin L. Goldman and Jacques Rojot, *Negotiation: Theory and Practice* (2002).

Some texts take a frankly emotional approach to the subject, and can be broadly divided between those that stress rationality, cooperation, and value creation *versus* those that emphasize value claiming. Roger Fisher, William L. Ury, and Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In* (3rd revised edition, 2011) is arguably the most influential book ever written on negotiations, emphasizing the importance of reaching a "win-win" result based on mutual gains. See also Stuart Diamond, *Getting More: How You Can Negotiate to Succeed in Work and Life* (2012). Diamond challenges common conceptions about negotiating, starting from the premise that one must respect the other person's emotions and perceptions.

Chris Voss and Tahl Raz, *Never Split the Difference: Negotiating As If Your Life Depended On It* (2016) take a completely different approach than *Getting to Yes*. They argue all humans suffer from cognitive bias, that unconscious and irrational processes distort our views of the world, and that good negotiators will use these insights to their advantage.

Psychology figures heavily in many studies of negotiations. Robert B. Cialdini, *Influence: The Psychology of Persuasion* (revised edition, 2006) lays out the psychology of prior positioning and the need to offer specific solutions that drive a negotiation to a successful conclusion. Another rationalist text is G. Richard Shell, *Bargaining for Advantage: Negotiation Strategies for Reasonable People* (2nd edition, 2014). Shell's premise is that you must "know thyself" before you try to negotiate with others, identifying five styles of negotiating that each might work under different circumstances. See also Leigh L. Thompson, *The Mind and Heart of the Negotiator* (4th edition, 2008).

A related approach is to stress the importance of communications. Kerry Patterson, Joseph Grenny, Ron McMillan, and Al Switzler, *Crucial Conversations: Tools for Talking When Stakes Are High* (3rd edition, 2021) emphasizes preparation, effective communications, creating a safe environment to speak, and the need for persuasion rather than demands. Communications are more broadly addressed in Terri Morrison and Wayne A. Conaway, *Kiss, Bow, or Shake Hands: The Bestselling Guide to Doing Business in More Than 60 Countries* (2006). The authors stress how negotiating styles differ from country to country, and seek to help readers understand the thinking and protocols they may encounter in a global economy.

Table 2.1: Stages in Trade Negotiations and the Potential for Failure

Stage	Importance	Potential for Failure
Preparations (Domestic)	Preparation for a modern, multi-issue trade negotiation should ideally be preceded by detailed consultations with all relevant decision-makers and stakeholders in the country.	Some analysts contend that most of the outcome is determined *before* countries meet to negotiate, and that the least successful countries fail at this stage.
Preparations (International)	Countries may spend months or years deciding not just *whether* they want to negotiate, but *what* broad objectives they will pursue, *how* they will do so, and *when* to conclude.	If countries value the launch of negotiations over where they may eventually land they could merely postpone a showdown over their differences.
Launch	A MINISTERIAL DECLARATION or other instrument will set the broad terms of the agreement to launch negotiations.	Strong objections can block the launch of negotiations, especially in an organization based on consensus.
Modalities	Multilateral negotiations may have an interim stage in which the launch's broader mandate is translated into somewhat more precise principles; these might for example specify the precise formula to be used in a tariff negotiation.	This is the stage at which the WTO's Doha Development Agenda stalled, due in part to the decision in 2001 to launch negotiations even when some fundamental issues remained unresolved.
Negotiations	Negotiators bargain over the details until they reach a final and precise agreement or set of agreements.	Talks might fail, leading either to formal collapse or an indefinite deadlock.
Approval	All countries have their own procedures for the approval and ratification of international agreements.	An agreement might ultimately be rejected by a country's cabinet, its legislature, or by the entire public in a referendum.
Implementation	Agreements ultimately depend on the willingness of countries to abide by the principles to which they agree.	It is rare for agreements to be abrogated altogether due to one party's violations, but very common for complaints to result in dispute-settlement cases.

How do negotiations fail? One here is put in mind of how Tolstoy began *Anna Karenina*: "All happy families are alike; each unhappy family is unhappy in its own way." All successful negotiations work because the necessary steps were taken, but negotiations fail in their own ways. Perhaps the largest number of failed negotiations never even made it to the launch. That has been the case for some initiatives for which the principal proponent failed to convince a sufficient number of its partners to join, and others in which the domestic institutions in the *demandeur* (i.e., the principal proponent) balked. Other negotiations failed between the launch and the adoption of MODALITIES,[2] as in the Doha Development Agenda of the WTO, and still others fail at later stages. Perhaps the most disappointing negotiations get all the way to "yes," only to see results get rejected at home; we return to this subject in Chapter 5.

The main point is that a good negotiator will not only think through all of the steps, but also think about where they might fail — and act accordingly. While negotiations theorists differ on many points, they universally agree that no one should enter into a negotiation without adequate preparation. That is a point discussed at length in the companion volume on trade strategy, which emphasizes the importance of enhancing policymakers' analytical capacity. Both in the development of strategy and in the tactical conduct of negotiations, policymakers should have access to the best available economic, legal, and political information, as well as the capacity to assess what that information means for their own country.

This is one reason why the concluding chapter is devoted to consideration of a partner's interests. It is not uncommon for a trade negotiator to tell a counterpart that it would be impossible to accept some proposal because that would lead to the rejection of the deal by its ultimate gatekeeper; that might be a national legislature (e.g., the U.S. Congress), its regional equivalent (e.g., the European Parliament), a cabinet, or — for countries that hold referenda — the electorate as a whole. One of the most difficult tasks of any negotiator is to determine which warnings are real, and which are merely tactical. When a partner takes an especially strident position, claiming that some outcome is absolutely necessary to win legislative approval, it can be difficult to know whether that is an honest expression of domestic realities or is an example of the Good Cop, Bad Cop style of negotiation.

Point 2: Choosing the Forum and Knowing Your BATNA

Beyond the all-important point regarding preparatory work, the most fundamental points to be made in both the theory and the practice of trade negotiations are closely related. From a theoretical perspective, negotiators must start by identifying their BEST ALTERNATIVE TO A NEGOTIATED AGREEMENT (BATNA). In addition to choosing which among the available fora is best, the country should also decide when it might fall back on another. Even if a country has already determined that its interests are better pursued through negotiation rather than unilateral action or litigation, and also that the best way to negotiate is in (for example) a bilateral FTA, it would be advisable to retain such options as (for example) enacting a new law, bringing a complaint under the WTO's Dispute-Settlement Mechanism, or negotiating in some other forum. Whatever SECOND-BEST option it retains for possible future use is the country's BATNA, otherwise known as its Plan B; it may also want to have a Plan C.

The more complex question, from a negotiator's perspective, is *which* of the parties is in a stronger position to make such threats? This is one of the distinguishing characteristics of North-South FTA negotiations; as discussed in Chapter 5, these agreements will typically be

[2] All terms that are defined in the Glossary of Key Terms in the Theory and Practice of Negotiations (Appendix A) are formatted this way when they first appear in the text.

more economically consequential for the smaller, poorer party, and thus make the threatened walk-out more credible on the part of the larger, richer party.

A country that walks away from one negotiation may have other talks underway. The creation of the WTO ironically came just when many of its most prominent members began negotiating preferential agreements in earnest. The data in Table 2.2 show how quickly RTAs have proliferated, especially by comparison with slow growth in most of the GATT period. As of 1965 only four of the two dozen future WTO members shown in the table had RTAs, but by 1985 — just as the Uruguay Round was starting — precisely half of them did. The rate of increase stepped up after the WTO came into effect, with the average number of RTAs among these members more than doubling during 1995-2005, then doubling again during 2005-2015. Growth since then has been somewhat slower, but it still continues. Most countries had more RTAs in effect in 2021 than they did in 2015, and more than half of them had increased their stock of agreements by at least four.

From a multilateral perspective, the most significant development has been the introduction of FTAs between the "Big Four" economies. Of the six possible combinations of pairings among China, the European Union, Japan, and the United States, one is already completed (the E.U.-Japan FTA) and three others are at least nominally under negotiation.[3] The only two arrangements that policymakers in the Big Four countries have yet to broach are U.S.-China or E.U.-China agreements. These observations offer further support for the contentions that (1) most negotiating energy today is devoted to preferential initiatives, and (2) the world may be drifting toward a system in which blocs are at least as important as the WTO. If present trends continue, the WTO is in danger not only of losing its place as the principal negotiating option, but not even being most countries' BATNA.

Point 3: The Zone of Possible Agreement in a Distributive Negotiation

After the BATNA, which is arguably the most widely employed concept in negotiations theory, the next most common ideas are two-fold. A good negotiator needs to understand not only the ZONE OF POSSIBLE AGREEMENT (ZOPA), but also the different ways that this concept manifests itself in distributive *versus* integrative negotiations. In a DISTRIBUTIVE NEGOTIATION each side seeks to claim the greatest degree of value for itself. This is most often the case for such transactions as a sale of a single item between two parties, where the outcome is necessarily zero-sum: The seller's gain is the buyer's loss. Fortunately, most trade negotiations are *not* of this "win-lose" sort, but can instead be characterized as INTEGRATIVE. Those are negotiations in which a "win-win" outcome is possible due to the multiplicity of issues and differences in countries' objectives.

We may start with a simple example to illustrate the ZOPA in a distributive negotiation. Imagine, as shown in Figure 2.1, that one person has a watch that she wishes to sell, and another person is interested in buying it — provided that the price is right. Let us further suppose that the seller is asking $35, but is willing to accept as little as $18, while the buyer would prefer to pay just $10 but is willing to go as high as $28. They are quite likely to reach agreement, assuming that neither of these parties bargains so hard as to make the deal impossible, but where will they end up? It will certainly be no lower than $18 and no higher than $28; the $10 range between these two values is the ZOPA. We might reasonably suppose that the final price may be approximately $23, which falls precisely between the most that the buyer is willing to

[3] Negotiations for U.S.-Japan and U.S.-E.U. FTAs have been in an on-again, off-again pattern for years. As of this writing they are once more off, or at least suspended, but could be revived yet again.

Table 2.2: Cumulative Notified RTAs of Selected WTO Members, 1965-2021

Includes Free Trade Agreements and Customs Unions in Effect at Year's End

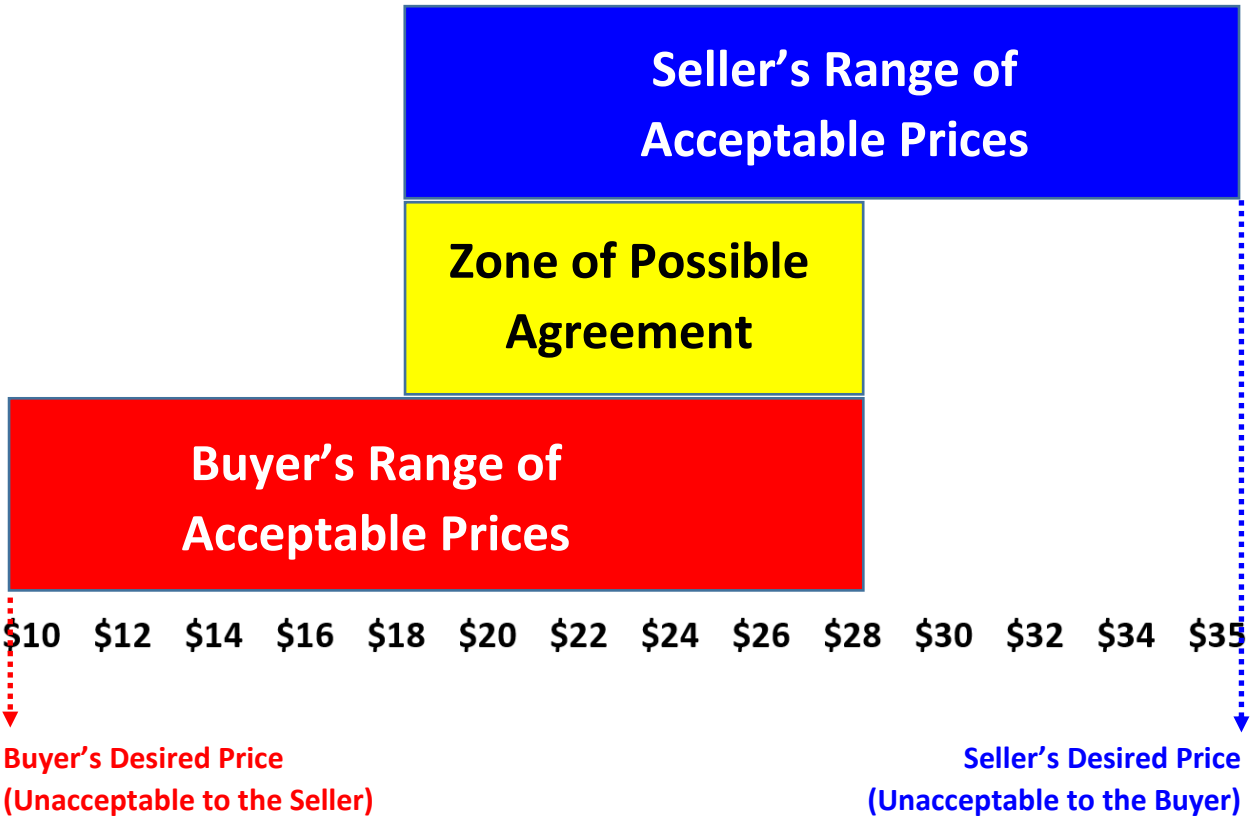
	GATT Period			WTO Period			
	1965	**1975**	**1985**	**1995**	**2005**	**2015**	**2021**
Quad							
European Union	1	5	5	8	25	37	46
Japan	0	0	0	0	2	14	18
Canada	0	0	0	1	4	10	15
United States	0	0	1	2	8	14	14
Average for Group	*0.3*	*1.3*	*1.5*	*2.8*	*9.8*	*18.8*	*23.2*
Other Developed							
Norway	1	2	2	6	15	28	33
Switzerland	1	2	2	5	15	30	33
Australia	0	0	2	2	5	11	17
Average for Group	*0.7*	*1.3*	*2.0*	*4.3*	*11.7*	*23.0*	*27.7*
BRICS							
China	0	0	0	0	4	13	16
India	0	0	0	0	3	15	16
Russian Federation	0	0	0	12	14	16	12
South Africa	0	0	0	0	3	3	7
Brazil	0	0	1	2	2	2	6
Average for Group	*0.0*	*0.0*	*0.2*	*2.8*	*5.2*	*9.8*	*11.4*
Other Developing							
Chile	0	0	1	1	9	26	28
Singapore	0	0	0	1	9	22	26
Türkiye	0	0	0	1	7	20	24
Mexico	0	0	1	4	13	13	20
Korea	0	0	0	0	1	13	18
Peru	0	0	1	2	2	13	18
Costa Rica	1	1	2	3	6	11	15
Colombia	0	0	1	3	3	9	13
Thailand	0	0	0	2	5	10	13
Israel	0	0	1	2	6	6	9
Angola	0	0	0	1	2	2	2
Nigeria	0	0	0	1	1	1	1
Average for Group	*<0.1*	*<0.1*	*0.6*	*1.8*	*5.3*	*12.2*	*15.6*
Average for All	**0.2**	**0.4**	**0.8**	**2.5**	**6.8**	**14.1**	**17.5**

Source: WTO Regional Trade Agreements Information System at http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx.

Note that the data are reported as averages rather than totals so as to avoid the problem of double-counting.

Figure 2.1: The ZOPA in a Hypothetical Distributive Negotiation

Scenario: A buyer and a seller negotiate over the price of a watch



pay and the least the seller is willing to take, but a SPLIT-THE-DIFFERENCE bargain is not inevitable. Either party may prove to be the better negotiator, achieving some final deal that comes closer to the price that they desired at the start.

What is each party's best approach to such a negotiation? There are no absolute rules, but a few general points of guidance are in order. Neither party should start from a position that gives away too much. The buyer should not begin with anything close to the $28 maximum, and might even start lower than the range shown here. The buyer might start *below* $10, and the seller might actually propose a price *above* $35. Whatever values each side chooses for the initial request or offer, those proposed prices are known as "ANCHORING." Three general rules follow: (1) buyers tend to do better in the end by anchoring low, and (2) sellers tend to do better in the end by anchoring high, but (3) neither side will win anything if either or both of them propose prices so ridiculous as to insult the other party or make bargaining look futile.

As yet a fourth rule, we should assess the value of any opening position not by some abstract standard, but in comparison to the opening position and bargaining style of one's partner. It should not surprise us if the final price ends up below that split-the-difference value of $23 in cases where both the buyer and the seller start by anchoring at what are, for each of them, relatively low prices. Similarly, we might expect a final price above $23 if the buyer and seller both anchor relatively high. And we might also expect negotiations to be either very short

(with one or both parties walking away in frustration) or very long (perhaps with lots of drama in-between) if the buyer anchors very low *and* the seller anchors very high.

Point 4: The Zone of Possible Agreement in an Integrative Negotiation

Most trade negotiations are *not* single-issue initiatives that are fundamentally similar to the example discussed above. It is instead more common for there to be many issues on the table, and for the parties to the negotiations to have more opportunities to CREATE VALUE by making tradeoffs across issues. Trade negotiations are more often integrative, thus allowing for a larger ZOPA that is more likely to allow for win-win outcomes. Even so, the points made above with respect to anchoring remain valid: In most cases, countries will do better if they start from an ambitious position — provided they do not anchor so far out that they alienate the other party.

In Figure 2.2 we explore a somewhat complicated, two-issue negotiation. Countries A and B are negotiating over market-access for goods (i.e., reductions in tariffs and other border measures affecting trade in goods) as well as protection for intellectual property rights (primarily patents, trademarks, and copyrights). Both countries have interests in both topics, but Country A's principal offensive interests are on intellectual property and Country B's are on market-access. In place of a single price, we may more generally array the options along a pair of spectra from "modest" to "ambitious" outcomes. Each country has a range of acceptable outcomes on each issue, resulting in the ZOPA illustrated in the figure.

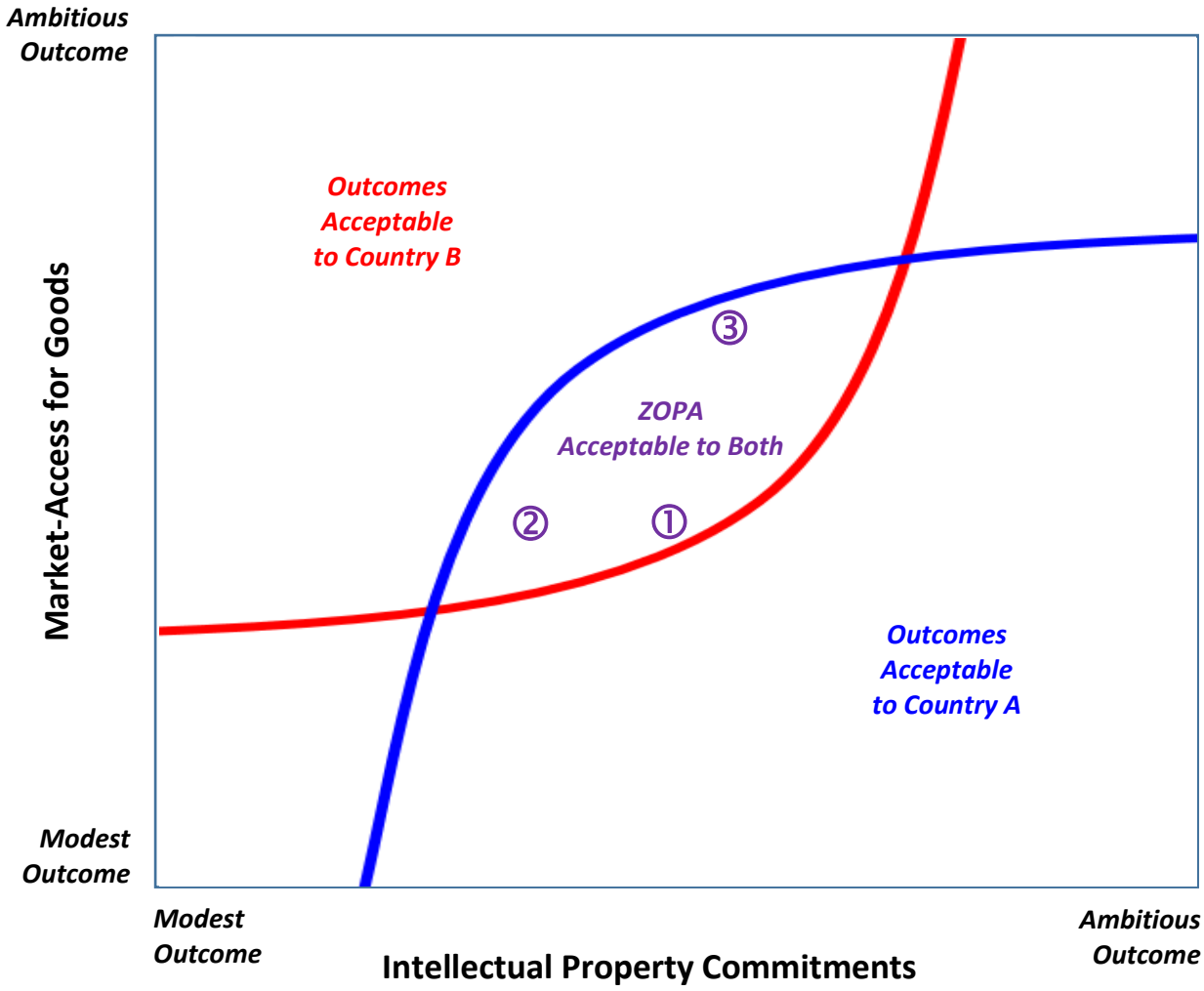
Readers should understand that this scenario and the analysis that follows are deliberately simplified, as a typical trade negotiation is more likely to involve a dozen or more issues than just two. This hypothetical case is nevertheless sufficient to get across the main distinctions. It also allows us to consider how even the weaker party might make the most out of a bad hand.

Let us suppose that you are negotiating on behalf of Country B, and that you and your partner have gone back and forth long enough for the contours of all possible (and impossible) deals to be clear to you. In other words, you fully comprehend what is shown in Figure 2.2. When next you sit down with your partner, Country A proposes a deal that would occupy Point 1. Should you accept? You *could*, insofar as it falls inside the ZOPA, but your government would greatly prefer the outcome shown here as Point 3. One way of getting from Point 1 to Point 3 is simply to propose that deal, and hope that your counterpart also prefers a more ambitious outcome. Another way to get there is instead to propose Point 2, which is no less attractive to you on the issue that matters more to your country while being considerably less attractive to Country A on its preferred issue. You might propose Point 2 with the idea in mind of later offering Point 3, thus making Country A think they are getting a better deal; your subtler aim might instead be to let Country A propose Point 3 (or some other point that then allows you to propose Point 3). Either way, you will have achieved that ideal outcome of creating value for the parties as a whole *and* claiming a greater share on the issue that matters most to you.

Which way of getting from Point 1 to Point 3 is better? This question cannot be answered absolutely or the abstract. It depends on too many factors to consider, relating to that part of negotiations that is more an art than a science, or seems more like psychology than mathematics. The principal points are instead that you need to understand the ZOPA in the first place, and then devise your tactics within it.

Figure 2.2: The ZOPA in a Hypothetical Integrative Negotiation

Scenario: Two countries negotiate on market access and protection of intellectual property rights



Country A's principal objective is to achieve an ambitious outcome with respect to intellectual property commitments; it also wishes to maintain protection for some of its goods.

Country B's principal objective is to achieve an ambitious outcome on market-access for goods, but does not wish to make all of the commitments on intellectual property that Country A seeks.

Points 1, 2, and 3 are each acceptable outcomes, as discussed in the text.

The tradeoff shown here presents a simplified version of a grand bargains made in the Uruguay Round of GATT negotiations. Although not formally tied together, it was generally understood that developing countries agreed to phase in the stricter protection of intellectual property rights precisely in exchange for the developed countries' agreement to phase out the quota system that had heretofore restricted their markets for textiles and apparel. It is true that some countries later felt "buyer's remorse" over both aspects of that bargain, as the gains from the more open textile and apparel market largely accrued to a small number of countries. That

later regret certainly suggests that countries need to be careful in determining what their objectives should be, and would do well to base their negotiating objectives on objective analyses, but does not contradict a key point: Countries may find it easier for all parties to achieve their negotiating objectives when they can deal along more than one dimension.

Point 5: Why Most Trade Negotiations Are Integrative

It would be an exaggeration to say that *all* trade negotiations today are integrative, win-win undertakings. One may certainly cite examples of cases in which one party takes advantage of its market position to force on its partners an unattractive choice of either seeing their access to a major market unilaterally reduced, or concluding an agreement by which they do so on a seemingly "voluntary" basis. That type of negotiation was fairly common in the 1970s and the 1980s, especially in certain high-profile commodities where some developed countries had lost competitiveness and were prepared to impose protection autonomously, but preferred to restrict trade through negotiated agreements. They sometimes responded to these pressures by engaging in win-lose, distributive negotiations by which their partners were coerced into imposing "voluntary" restrictions on exports of such products as apparel, footwear, steel, and automobiles. The only benefit to an exporting country was that the agreements they reached might be marginally less restrictive than what they might get if the developed countries were to impose protection on their own; put another way, the smaller party to these negotiations entered into them not in hopes of winning anything, but to minimize the losses.

That general pattern since then[4] is one in which trade negotiations, whether they are conducted on a preferential or a non-preferential basis, typically aim primarily to create opportunities across multiple sectors rather than to determine outcomes in specific sectors. Those opportunities come when we cut or eliminate tariffs, quotas, and other measures that restrict the movement of tradeables across borders. One of the principal differences between older and modern trade agreements is that our understanding of what is tradeable has expanded greatly, so that agreements are no longer confined primarily to border measures affecting trade in goods. And while there are a great many implications that stem from the expansion in our definition of trade, which now covers such diverse topics as services, investment, and intellectual property rights, our present concern is how this creates a negotiating table that is not just quantitatively but qualitatively different.

From the perspective of negotiations theory, bringing a larger number of issues to the table makes negotiations more integrative than distributive. Unless we assume that (1) partners hold diametrically opposed positions on all issues, (2) those countries attach approximately the same value to each issue, and (3) one of those parties consistently prevails over the other, it is unlikely that the gains from a multi-issue agreement will be captured exclusively by one party and thus be purely win-lose. To the contrary, a negotiation that covers (let's say) twelve issues creates more opportunities for win-win tradeoffs than a negotiation that covers just one. This is not to say the both parties will inevitably reach an agreement by which they both gain in the same way, or to the same degree, but there is a much higher chance that they can conclude a

[4] Distributive trade negotiations made at least a brief comeback in the United States during the Trump administration, which reverted to earlier practices by restricting imports of certain types of goods (principally iron, steel, and aluminum) especially from certain partners (principally China); many of those restrictions were pursued through negotiated arrangements. Unless those recent exceptions are seen as precedents that might now be generalized, leading perhaps to a new system in which trade is increasingly managed, they should be considered temporary deviations from the general pattern.

Table 2.3: Issue Coverage of Multilateral Trade Instruments

Years Indicate Date of Signature

	GATT 1947	Tokyo Round Agreements 1979	Uruguay Round Agreements 1994	Doha Ministerial Declaration 2001
Core Issues				
Tariffs	⊙	●	●	●
Antidumping & Countervailing	⊙	●	●	●
Safeguards	⊙	●	●	-
Uruguay Issues				
Agriculture	-	◘	●	●
Intellectual Property Rights	-	-	●	●
Services	-	-	●	●
Singapore Issues				
Government Procurement	-	◘	◘	☒
Investment	-	-	●	☒
Competition Policy	-	-	-	☒
Trade Facilitation	-	-	-	●
Other Issues in WTO Instruments				
State-Owned Enterprises	⊙	-	⊙	-
Environment	-	-	●	●
Geographical Indications	-	-	⊙	●
Temporary Entry	-	-	⊙	-
Electronic Commerce	-	-	-	●

● *= Full chapter, annex, appendix, or other section or side agreement devoted to the issue (or implied to be so by the terms of the Doha Ministerial Declaration).*

◘ *= A GATT or WTO agreement that is plurilateral.*

⊙ *= One or more full articles devoted to the issue.*

☒ *= Issues that were originally covered by the Doha Ministerial Declaration but were subsequently taken off the table in the Doha Round.*

\- *= No explicit coverage (apart from exceptions clauses such as GATT Article XX).*

multifaceted bargain in which both sides have, on net, greater opportunities for gains than they would without the agreement.

Point 6: The Scope of Issues in Trade Agreements Varies over Time

While scope of negotiations has tended to increase over time, that growth is neither constant nor irreversible. Table 2.3 offers a quick summary of how the subject matter of trade negotiations has changed over time by tabulating the principal issues covered by a series of

GATT and WTO initiatives. The original GATT agreement covered only four of fifteen issues that the Uruguay and/or Doha rounds covered. When an issue appears in successive trade agreements, the provisions tend to get more detailed. That can be seen in the sequence by which some items get promoted from the level of mere articles to entire chapters, often entailing both a deepening of the commitments and a greater specificity in countries' commitments. We will see this same pattern repeated in the case of regional trade arrangements (see Chapter 5).

These observations do not mean it is always beneficial to include as many issues as possible in a negotiation. If that were the sole determinant of success, there would be no more successful undertaking than the Doha Development Agenda. Also known as the Doha Round, these talks — which were launched in 2001 but remain unresolved — are revealing in two respects. On the one hand, upon its launch it covered more issues than any previous round. On the other hand, it did not take long for the negotiations to stall and even reverse. Not only did negotiators feel compelled after a few years to take off the table three of the newest issues — namely government procurement, competition policy, and investment[5] — but negotiators have made almost no forward movement since 2003. While these repeated failures cannot be attributed solely to the scope of issues in the talks, it may be that negotiators derived the wrong lesson from the salutary effect that numerous issues had in the prior (Uruguay) round. The WTO faces several other challenges (as discussed in Chapter 3), which is one reason why preferential trade negotiations have become more common (to which we will turn in Chapter 4).

[5] These three issues, together with trade facilitation, are generally called the "Singapore issues" for the 1996 WTO ministerial in which they played a large role. Of the four issues, only trade facilitation remained on the table.

Chapter 3: The Conduct of Multilateral Trade Negotiations

Introduction

The main features of multilateral trade negotiations in the World Trade Organization are reviewed here, with emphasis on how the WTO decision-making process affects negotiations. Much of what is discussed here is also relevant for preferential agreements, with the multilateral system having established major principles by which negotiations are conducted while also coining the basic terminology of trade agreements; see the Glossary of Key Terms in the Theory and Practice of Negotiations (Appendix A).

The WTO is not just a set of agreements but an institution, and its rules are more formal. Those rules have had to adjust to the shifting distribution of power and wealth as the WTO has come to approach universal membership. This can be seen in the relative decline of the Quad (Canada, the European Union, Japan, and the United States) and the rise of such emerging economies as Brazil, China, India, Indonesia, Malaysia, Mexico, South Africa, and Türkiye.

There is necessarily a tension in an institution with such a heterogeneous membership. Any forum in which such demographically and economically imbalanced units come together to regulate relations between them needs to develop rules that balance the sometimes conflicting needs of inclusiveness and efficiency, as well as the competing demands of predictability and flexibility. If the rules and norms of the WTO err they tend to do so on the sides of inclusiveness and flexibility, insofar as efficiency and predictability do not always sit well with countries that are on guard against any threat to their sovereignty.

To employ the terminology of negotiations theory, we must consider both the ZOPA and the BATNA when we assess the shift from the GATT to the WTO. With regard to the ZOPA, this new body offers several advantages. It combines a near-universal membership with a more transparent ethos of decision-making, as well as the principle of the SINGLE UNDERTAKING[6] (which creates a strong incentive for all members to engage actively) and a stronger institutional structure (which facilitates communication and access to information). Greater participation and transparency should make it easier for countries to determine the contours of the ZOPA and then reach agreement within it — if they are indeed prepared to deal.

Against this advantage must be weighed the changes in the menu of post-GATT negotiating options. This shift in the BATNA is arguably more a product of the times, which are marked by a greater tendency for countries to emphasize defensive than offensive interests, than of the WTO's nature or rules. RTAs were rare in the early GATT period, and treated as special cases outside the multilateral system; by the late GATT and early WTO periods they were more common, but still usually seen as complementary to multilateralism. With the Doha Round having stalled since about 2003, however, RTAs may increasingly be seen more as substitutes than as complements to multilateralism. One might even say that we went from a time when RTAs were the BATNA to the WTO, to one where the WTO was the BATNA to RTAs, to one where many see different RTAs as BATNAs to one another. To the extent that the WTO still figures in their hierarchy of choices, it is either as a dispute-settlement option or as a forum in which less consequential agreements are negotiated.

[6] All terms that are defined in the Glossary of Key Terms in the Theory and Practice of Negotiations (Appendix A) are formatted this way when they first appear in the text.

Point 1: Negotiating in Rounds

Throughout the GATT period the conduct of trade negotiations was marked by multi-issue and (eventually) multi-year rounds as the main organizing principle. Or to use the language of Chapter 2, rounds were designed to be more integrative than distributive, and to encourage greater ambition by allowing countries to make tradeoffs across an ever-widening array of issues. This could best be seen in the success of the Uruguay Round, some aspects of which were actually more ambitious at the end of the round than they were at the beginning. That included the establishment of the WTO itself, which was not even contemplated at the launch of the negotiations, as well as such innovations as the single undertaking.

Negotiators tried to replicate that pattern of success in the WTO, spending several years shaping what became in 2001 the multi-issue Doha Round, but that effort has not produced the intended results. The difficulties that this round encountered were not an entirely new development. One problem with rounds that was already evident in the late GATT period is that each one became longer than its predecessor. None of the first five rounds in the GATT period lasted as long as a year, and on average they took just over seven months. Thereafter the negotiations grew much longer: The Kennedy Round (1962-1967) took 37 months, the Tokyo Round (1972-1979) lasted precisely twice as long (74 months), and the Uruguay Round (1986-1994) took just over a year more than its predecessor (87 months). The Doha negotiations outdo them all, of course, having been nominally underway (as of this writing) for 21 years. Lengthy rounds might not only delay liberalization on an MFN basis, but push countries towards more preferential options that then create further disincentives for the conclusion of a round that would reduce the margins of preference that countries now enjoy.

Point 2: The Single Undertaking

Another way that the conduct of rounds changed was a move from *a la carte* negotiations to a *prix fixe* menu. Prior to the Uruguay Round, contracting parties to the GATT operated on a principle of "CODE RECIPROCITY." Each party could pick which agreements it chose to adopt, which in practice meant that developed countries adopted most or all agreements and developing countries signed few or none of them. This principle recognized the sovereign rights of each country, and generally restricted the rights under agreements to those countries that were also willing to take on its obligations, but it became an increasing source of frustration to the developed countries. They came to see this practice as encouragement to "free riding" on the part of the most advanced developing countries, and began to demand reform.

The single undertaking is an innovation from the final (Uruguay) round of the GATT period that entails the bundling of all the issues in a round. The meaning of this principle has evolved over time. When it was first provided for in the ministerial declaration that launched the Uruguay Round in 1986, the single undertaking was understood to refer solely to the way that the round itself would be conducted: All issues are to be negotiated simultaneously, and nothing is agreed on any one topic until everything is agreed on all topics.[7] In the concluding years of the round, however, it was agreed that the term referred not only to the sequencing of the negotiation but to the indivisibility of the final package: All WTO members would be required to adopt all of the agreements reached in the round, plus some items reached in the prior (Tokyo) round. This was another of the "grand bargains" of the Uruguay Round, being

[7] This original expression of the single undertaking is one form of what negotiations theorists call a sequencing strategy. To tie all items together can thus be distinguished from such alternatives as gradualism (negotiators attempt to move from simpler to more complex issues); the boulder-in-the-road approach (the more complex issues are handled first); and the agreement-in-principle approach (a general agreement is sought early in the process so that the details can be decided at a later stage).

related to the expanded concept of trade and the need for a strong, unified dispute-settlement system. Because all of the various agreements were legally binding, and they all fell under the same umbrella of enforcement and interpretation, it was thought necessary for all members to sign on to all agreements.

The scope of the WTO's single undertaking is not absolute. There are some pre-Uruguay Round agreements still in place,[8] and it is also possible to negotiate individual agreements outside of a round.[9] As long as WTO countries still prefer in theory to negotiate in multi-issue rounds, however, it may be assumed —unless they agree to a major change in the rules — that this remains a core principle. Conversely, this very principle may be one reason why members have thus far been incapable of bringing to a successful conclusion the one round that they have initiated in the WTO era.

We may fall back on the terminology introduced in the previous chapter to frame the problems that the multilateral system in general, and the single undertaking in particular, have encountered in the WTO era. In the comparatively optimistic environment of the Uruguay Round, the single undertaking was conceived as a principle by which the ZOPA was expanded through restrictions on each country's BATNA: When countries were told that in order to advance their offensive interests they were required to give ground on their defensive interests, insofar as they no longer had the option of adhering to some agreements and not others, they opted for bolder outcomes. The mood is different in the Doha Round. In an environment where ambitions are lower, and defensive interests may be more highly valued than offensive interests, the single undertaking may actually restrict the ZOPA by encouraging countries to fall back on the least ambitious BATNA (i.e., no agreement). The value of the single undertaking may thus be situational: What is seen as a confidence-building measure in ambitious times may result in a "something for everyone" package, but when ambitions are lower it may be closer to a rule of "nothing for anyone."

Point 3: Decision-Making by Consensus

Perhaps the greatest problem with the single undertaking is that there is an inevitable tension between it and the principle of decision-making by CONSENSUS, which is the most important procedural rule in the multilateral system. It is also the oldest. Although the word "consensus" does not appear in the original GATT, it soon became the preferred means of reaching decisions; the concept is more formally enshrined now in the Agreement Establishing the WTO. While some question whether the system is well-served by a rule that confers a veto power on every member, there is also a widespread belief that the WTO members would likely oppose any efforts to replace consensus with voting.

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[8] The term "plurilateral" has a formal status, covering the agreements listed in Annex 4 of the Agreement Establishing the WTO. There are only two such agreements that still remain in effect, namely the Agreement on Government Procurement (GPA) and the Agreement on Trade in Civil Aircraft; two others — namely the International Dairy Agreement and the International Bovine Meat Agreement — were scrapped in 1997. Although not part of the Uruguay Round, the Information Technology Agreement (ITA) can also be considered a plurilateral, although it differs in one crucial respect. Whereas the benefits of the GPA are available only to the signatories (a principle known as "code reciprocity"), the tariff cuts made under the ITA are extended to all WTO members (or other partners that receive MFN treatment).

[9] Early harvests are another deviation from a "pure" single undertaking, being something of a compromise between that principle and plurilateral agreements. They allow for the temporary separation of specific negotiations from the round, permitting them to be concluded and to enter into effect before other matters are settled. Once the rest of a round is concluded, however, any items that were in an early harvest become part of the final package.

Box 3.1: Handling the Mechanics of Negotiating Documents

One of the fundamentals in the conduct of trade negotiations at any level, from bilateral through multilateral, is the evolution of the draft text. It may take months or years of negotiations for the parties to a negotiation to move from their respective proposals to a final, agreed text; in the meantime, the evolution of that text resembles the editing of a document. Whether the custody of this document is put in the hands of an organization's secretariat, or the chairman of a negotiating group, or one of the parties to a bilateral or a plurilateral negotiation, there are certain conventions that are always followed — albeit with some variations — to indicate what text has been agreed and what remains subject to negotiation.

The most important of these conventions is the square bracket, as in [X], which is always used to mean that the text or numbers falling between the left and right brackets remains to be decided. Depending on the specific negotiation and the context, those square brackets may variously indicate language that is necessary but as yet undetermined (e.g., it may be a specific word or number in a section of text that has been agreed in principle but for which some specific words or numbers remain under discussion) or may be entirely optional (e.g., one or more of the negotiating parties has proposed text that might or might not ultimately be adopted).

The square brackets in a negotiating text might include letters or words to indicate the sponsorship of different options. As a hypothetical example, suppose that an FTA is under negotiation between Country A and Country B. One could imagine a sentence in the draft text that reads as follows: "Tariffs on these products will be phased out over a period of [*Country A*: 5] [*Country B*: 10] years." This language implies that both parties have agreed in principle that there be language included on this point, and that it will most likely be somewhere in the range between 5 and 10 years. The negotiators might ultimately settle on A's number, or on B's number, or on some compromise (perhaps 7 or 8).

Square brackets might also contain only ellipses, as in […], meaning that there is as yet no proposed language in some section where it is generally agreed that something must be inserted. That is especially common in the earliest stages of a text's development. To return to the previous example, it could at some stage have been rendered as, "Tariffs on these products will be phased out over a period of […] years." Later those brackets might be filled with one set of words or numbers, indicating that the language is proposed but not yet agreed. Brackets might also come in series of two or more that each have their own texts, for example: "Tariffs on [*Country A*: these] [*Country B*: these and other] products will be [*Country A*: phased out] [*Country B*: substantially reduced] over a period [*Country A*: of 5 years] [*Country B*: to be determined in further consultations between the parties]."

A text may employ other conventions to indicate that different versions are in play. Sometimes whole paragraphs will be given in different versions without square brackets, but the versions are either separated by the word "or" or identified as "Alt.1" and "Alt.2."

In the later stages of its development a draft text may also use ~~strike-throughs~~ to indicate language that had been under consideration but is now deleted, and <u>underlines</u> to indicate new language that has been agreed. To use our hypothetical example once more, it might at some late (but not final) stage of the negotiation be rendered as, "Tariffs on these products will be phased out over a period of ~~5~~ <u>10</u> years." The very last version will consist entirely of normal type, without any italics, strike-throughs, or underlines.

Box 3.2: The Role of a Chairman in Trade Negotiations

One of the many ways in which the conduct of multilateral diplomacy differs from bilateral or regional negotiations is in the important role played by diplomats who preside over the many councils, committees, negotiating groups, working parties, and other bodies in this institution. When there are only a few countries engaged in an RTA negotiation — and often just two — it would not be reasonable to ask that one of them take on the role of "honest broker" for the group. That is a much more realistic request when there are over one hundred countries negotiating across a wide range of subjects.

A chairman in WTO negotiations is expected not merely to facilitate debate but to build consensus, and to take an active role in developing texts. The ideal chairman should act on behalf of the system as a whole, and must balance impartiality toward the members with the responsibility to advance negotiations by proposing texts, breaking deadlocks, and achieving consensus. That means the diplomat must engage in creative compartmentalization, placing the chairman's obligation to the system ahead of the national representative's duty to promote specific objectives. Or in the language of negotiations theory, a chairman is supposed to concentrate on creating value for the community as a whole rather than on claiming value for one's own country (or the coalitions with which they might be associated).

The first task of the chairman is to gather information on members' positions. To use the terminology of negotiations theory, a chairman is responsible for determining the actual ZOPA in whatever topics fall within the jurisdiction of that chairman's negotiations. Their consultations go beyond simply compiling the views of the most active members, both on the offensive and defensive sides, but also require that they sound out members to determine the intensity of their views and their willingness to consider compromises and accommodations. The most common device is the "confessional," a one-on-one meeting to review issues and positions. Taken together, the information collected from many such meetings will allow the chairman to define not only the technical issues (generally in consultation with the secretariat) but also to map out the zone of possible agreement. That latter task is based on the chairman's own intuition, as well as the discussions he or she may hold with other chairmen, the director general, secretariat staff, or other trusted persons. If the topic is technically challenging, a chairman must also develop his or her own expertise on the subject.

Chairmen will sometimes prepare a "CHAIRMAN'S TEXT" (or "chairman's mark") as the proposed text for a final deal. Such a proposal might involve some effort to "cut the Gordian knot" by siding with one country or another on one issue, and others on yet another issue, or (perhaps most often) by finding some compromise language or numbers whenever feasible, all with the aim of putting together a total package that should be at least minimally acceptable to all. Preparing such a proposal is not always necessary, and indeed should be done only if there is a deadlock that needs to be broken. A chairman will sometimes resort to the preparation of such a text when the parties are entrenched, progress is slow or nonexistent, or the text has too many brackets to be manageable. A chairman cannot impose such a solution, but can seek to persuade his or her peers. The transition from the technical to the negotiating part of the process can be gradual, and may require coordination with chairmen who deal with other subject matter. There will come a point at which no further trade-offs might be made within a single text, but members might be persuaded to make trade-offs across them. That will typically require a political decision at the MINISTERIAL level.

To be more specific, Article IX of the Agreement Establishing the World Trade Organization provides that, "The WTO shall continue the practice of decision-making by consensus followed under GATT 1947." That same article does go on in the very next sentence to state that, "Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting," and other language in the same article distinguishes between some issues that may be decided by majority votes and others for which three-fourths are required. In actual practice, however, those references to voting have been irrelevant; virtually all decisions of any significance in the WTO are indeed made by consensus.

Even though voting is anathema to WTO members, neither they nor analysts are blind to some of the shortcomings to the general rule of consensus. In a system where all countries know that they must sign on to all or nearly all agreements, but also know that they each have something like a unit veto, it is very easy for small blocs of countries — or even just one — to bring negotiations to a halt. Some participants in the launch and early years of the Doha Round took full advantage of their leverage to limit the scope of issues on the table, and this same rule gets at least some of the blame for the subsequent inability to conclude the negotiations.

Point 4: Coalitions in Multilateral Diplomacy

Multilateral trade diplomacy once appeared to be something like a developed-country oligarchy that met in the GATT's GREEN ROOM, but today bears a closer resemblance to a diverse, representative democracy that is conducted through WTO coalitions. The so-called green room was not an actual room painted that color, but was instead used metaphorically to mean any closed negotiation in which only a small number of countries were invited to participate. The few contracting parties allowed in the room cut the most important deals, provoking resentment from those left outside. That resentment only grew as the membership of the WTO became larger and more diverse. Over time the WTO members came to rely more on coalitions as a device for mobilizing, communicating, and negotiating, and nearly all members are now represented in multiple coalitions that are formed along geographic, SECTORAL, or other lines. Green rooms have not been eliminated altogether, but those on the inside are now expected to keep in close contact with their coalition partners. The result is a system that bears a closer resemblance to representative democracy than to oligarchy.

Today there are a great many coalitions in the WTO, some of the most important of which are shown in Table 3.1. A few points stand out. First, all manner of WTO members engage in coalition diplomacy. Even the European Union and the United States, which often stand aloof from certain tasks or gatherings in the WTO (e.g., their diplomats virtually never chair WTO bodies), are members of two and three (respectively) of the ten coalitions shown here. Nor is there any discernible relationship between income and coalition membership: Developed and developing countries alike can typically be found in both offensive and defensive coalitions. That points to one of the real difficulties in the Doha Round, which — by comparison with the Uruguay Round — tends to be marked more by countries' defensive than their offensive objectives.

Table 3.1: Membership of Selected WTO Members in Selected Coalitions

	Defensive Coalitions				Offensive Coalitions					
	SVEs	NAMA-11	Joint proposal	G-33	Friends of Ambition	Cairns	Friends of Fish	G-20	Tropical Products	W52
Developed										
Australia			●		●	●	●			
Canada			●		●	●				
European Union					●					●
Japan			●		●					
New Zealand			●		●	●	●			
Norway					●		●			
Switzerland		●								●
United States			●		●		●			
Developing										
Angola										●
Argentina		●	●				●	●		
Bolivia	●			●				●	●	
Brazil		●				●		●		●
Chile			●			●	●	●		
China				●				●		●
Colombia						●	●		●	●
Costa Rica			●			●			●	
Egypt		●						●		●
Guatemala	●		●	●		●		●	●	
India		●		●				●		●
Indonesia		●		●		●		●		●
Jamaica	●			●						●
Korea			●	●						
Malaysia						●				
Mexico			●					●		
Mozambique				●						●
Nicaragua	●		●	●					●	
Niger										●
Nigeria				●				●		●

	Defensive Coalitions				Offensive Coalitions					
	SVEs	NAMA-11	Joint proposal	G-33	Friends of Ambition	Cairns	Friends of Fish	G-20	Tropical Products	W52
Pakistan				●		●	●	●		●
Panama	●			●					●	
Peru						●	●	●	●	●
Philippines				●		●		●		
South Africa		●	●			●		●		●
Sri Lanka	●			●						●
Tanzania				●				●		●
Thailand						●		●		●
Tunisia		●								●
Türkiye				●						●
Uganda				●						●
Uruguay						●		●		
Venezuela		●		●				●		
Viet Nam						●				
Zimbabwe				●				●		●

SVEs (Small, vulnerable economies): Developing countries seeking flexibilities and enhanced special and differential treatment for small, vulnerable economies in the negotiations.

NAMA-11: Developing countries seeking flexibilities to limit market opening in industrial goods trade.

Joint proposal: Sponsors of a proposed geographical indications database that is entirely voluntary.

G-33: Developing countries pressing for flexibility for developing countries to undertake limited market opening in agriculture.

Friends of Ambition: Seeking to maximize tariff reductions and achieve real market access in NAMA.

Cairns: Favor agricultural trade liberalization.

Friends of Fish: Seeking to significantly reduce fisheries subsidies.

G-20: Developing countries pressing for ambitious reforms of agriculture in developed countries.

Tropical products: Developing countries seeking greater market access for tropical products

W52: Sponsors of a proposal for "modalities" in negotiations on geographical indications.

Not shown: Regional groupings (e.g., ACP, African group, Asian developing members, etc.), RTAs (e.g., ASEAN, MERCOSUR, etc.), groupings based on broad geographic factors (e.g., Land-locked Developing Countries) or economic characteristics (e.g., LDCs, Low-income economies in transition), status of membership (e.g., Article XII Members).

Source: WTO at https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm. Note that the designations used here of defensive versus *offensive are made by the present author rather than by the WTO in its original listing.*

There are real advantages to coalition diplomacy. Smaller countries that might otherwise be voiceless can be represented in this way, while also lending greater legitimacy to the outcome. That said, coalitions may serve to impede as well as impel negotiations, depending on the circumstances. Coalition diplomacy is complicated by the fact that countries within a region will often have similar but never identical interests. This sometimes means pursuing negotiations within negotiations: By backing other members in the region on their selected issues, the rest of the members in a group know that they can expect the same sort of solidarity on some other issue for which their own interests are higher. The end result may be a smaller ZOPA in the WTO, and a greater tendency for countries to favor other approaches.

Some critics nonetheless see a larger drawback in this approach to representation. The gradual movement from fluid, issue-based coalitions to a more rigid system of regional or other blocs can make for a less cooperative negotiating environment. Or to return to the language of negotiations theory, coalitions may tend to reinforce countries' proclivity to view issues in isolation (and thus in distributive terms) while discouraging the treatment of individual issues as potential elements in a larger, more integrative agreement. That is especially true when a coalition is organized along defensive rather than offensive lines.

Chapter 4: Non-Preferential and Preferential Market-Access Negotiations

Introduction

Trade negotiations are more frequently conducted today in bilateral or regional contexts than at the multilateral level, with the various options being generally classified as regional trade arrangements (RTAs). Among the most significant RTAs are free trade agreements (FTAs) involving one developed country or group and one developing country or group; such agreements are often called North-South FTAs. Given the far greater number of FTAs than other types of RTAs, such as genuine CUSTOMS UNIONS[10] and COMMON MARKETS, we will generally use the terms RTA and FTA interchangeably below.

It is important here to distinguish between two types of knowledge that every negotiator should acquire. All negotiators dealing with trade, no matter what their more precise subject matter, should know the general concepts that we reviewed in chapters 2 (negotiations theory) and 3 (negotiations practice). Now that trade agreements have come to encompass a far wider array of topics than they did in past generations, however, it would be unrealistic to expect any one negotiator to acquire deep knowledge of all the topics on the table. They must instead distinguish between those subjects on which they will cultivate their own deeper expertise, and those for which they must rely on guidance from others with specialized knowledge. That said, the concepts and terminology related to market-access negotiations are so central to trade negotiations that they should be understood by every person who participates in trade negotiations. Even newcomers must master the vocabulary presented in the Glossary of Key Terms in the Theory and Practice of Negotiations (Appendix A).

The discussion starts from the premise that there is no "best" form of negotiations that is always superior to any alternatives. It would be misleading to present a blanket conclusion such as (for example) the multilateral option is always better than preferential alternatives (or *vice versa*). Strategists and negotiators should instead think about what the presence of these options implies for different countries' negotiating strategies. So while many free-trading economists have long considered any alternatives to multilateral liberalization as "second-best" to non-preferential agreements, there are several grounds on which RTAs might be complements or even substitutes for WTO agreements. That latter option may be especially important if, as may now be the case, the WTO members find it difficult to conclude major agreements. RTAs had once been a BATNA for countries that were not able to achieve as much as they wished multilaterally; now that some countries treat RTAs as "the only game in town," the principal BATNA for one RTA may be another.

From the perspective of negotiations theory, the multiplicity of negotiating fora can be seen as an expanding BATNA — at least for some of the participants in the trading system. In other words, when there are many different available options, and when countries encounter resistance in one of them, they may respond by signaling their readiness to negotiate elsewhere. Depending on the context, such a signal might appear to other countries either like an invitation or a threat. The presence of these alternatives thus matters not just in devising one's own strategy, but in understanding the strategies and the tactics of one's negotiating partners. This is a point to which we will return in Chapter 5.

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[10] All terms that are defined in the Glossary of Key Terms in the Theory and Practice of Negotiations (Appendix A) are formatted this way when they first appear in the text.

Point 1: The Differing Objectives of Preferential* versus *Non-Preferential Agreements

It would be a major fallacy of construction to think of FTAs, as well as other RTAs such as customs unions and common markets simply as smaller versions of the WTO. To start with, we should not assume that their issue coverage is identical to the WTO; any given RTA might be either more or less ambitious than the WTO with respect to the width of issues, and may also be more or less ambitious with respect to the depth of the commitments on those issues.

Let us assume, for the sake of simplicity, that the principal form of RTA in which we are interested is a North-South FTA (i.e., one developed partner paired with one or more developing partners). This means setting aside the special cases of PARTIAL SCOPE AGREEMENTS (a category of South-South agreement that tend to cover only some products or sectors) or North-North FTAs (which have systemic implications). As a general rule, we should normally expect the developed country that engages in North-South FTA negotiations to seek commitments from its developing country partners that go beyond what one finds in the WTO. These commitments can be further distinguished between what is sometimes called WTO+Plus (i.e., commitments on issues that are in the WTO but that go beyond what one finds there) and those that are WTO+Plus+Plus (i.e., commitments on issues that are not covered yet in the WTO). For example, the developing countries might be asked to make WTO+Plus commitments on intellectual property rights that go deeper than what is provided in the WTO (and thus often called TRIPS+Plus), and WTO+Plus+Plus commitments on labor rights.[11]

Why do so many developing countries agree to make commitments that go beyond what is required in the WTO? The inducements come in two major groups. One consists of relatively advanced countries that are either prepared to make such commitments on the basis of their levels of development, or may already have made such reforms autonomously; they may hope to make themselves more attractive to potential foreign investors by "locking in" economic reforms as solemn treaty commitments. Other countries may so highly value the elimination of remaining barriers to developed-country markets (or a guarantee that they will not be excluded via new barriers) that they are willing to pay any reasonable price for that benefit. No matter what their motivations, all developing countries that negotiate North-South FTAs have at least some areas where they wish to retain as much "policy space" as possible. That is why these issues tend to take up more time, and more political capital, in trade negotiations and in subsequent debates over the national approval of agreements.

Although RTAs generally go beyond WTO commitments, some issues are much better handled in a multilateral agreement. Consider the case of agricultural production subsidies, where the developed countries are generally unwilling to make commitments in preferential agreements. That is largely a function of how subsidies operate: Whereas it is quite easy to discriminate among partners in the application of tariffs on imports, there is no practical way to restrict the impact of production subsidies to some countries while exempting others. Moreover, this is an area where developed countries tend to face strong domestic constituencies that would fight against approval of agreements that made significant commitments to the reduction or elimination of subsidies. (These same countries may also be very reluctant to make meaningful multilateral commitments on agricultural subsidies, but at least as a matter of principle the multilateral option would be more workable than its preferential alternative.)

[11] Note that these terms are not universally employed. Some negotiators and analysts will instead use such terms as "WTO-X" or "WTO+" when referring to issues that go deeper or wider than WTO commitments.

Point 2: Market-Access Commitments in Multilateral Agreements and in RTAs

When it comes to the original, core issue of trade policy, there is no doubt that RTAs in general and FTAs in particular are more ambitious than the WTO. Whereas the multilateral system works to reduce most tariffs, and to eliminate some, an RTA must — in order to meet the legal requirements of GATT Article XXIV — eliminate substantially all of them. The term "SUBSTANTIALLY ALL" is nowhere defined, and countries have taken different approaches along a spectrum of ambition, but as a general rule we may expect the market-access negotiations in an RTA to produce much more consequential results than their counterpart in the WTO. This point is further elaborated upon in Table 4.1, and in the discussion below.

One way of understanding the differences between multilateral and preferential agreements is that the latter tend to have a smaller ZOPA. If counties understand from the start that they are obliged to include a large (if ill-defined) share of their tariff lines in an agreement, and that these lines must ultimately be brought down to zero, the potential range of outcomes seems at first glance to be fairly narrow. In actual practice, however, the differences may not be as great as they appear. For all of the thousands of lines that comprise the HARMONIZED SYSTEM of tariff nomenclature, there will always be a very finite number — often dozens rather than hundreds — that receive the greatest attention in any trade negotiation, be it with one partner or many. Moreover, there are numerous ways that the parties to an RTA may qualify the commitments they make to one another, from the speed of tariff reductions to the RULES OF ORIGIN. Thus while bilateral agreements may appear on their face to pose fewer choices than their multilateral counterpart, they can be just as difficult to negotiate.

There are several different ways that tariff negotiations might be structured. Beyond the aforementioned distinction in ambition, which is followed closely in importance by the question of whether the agreement will cover market-access commitments only for goods (as is the case for some South-South FTAs) or also cover trade in services (as is the case for nearly all FTAs involving developed countries), negotiators must resolve several other issues. The main questions are whether the principal form of bargaining is the bilateral exchange of requests and offers, or if multilateral negotiations will be based on the application of FORMULAS (the results of which might then be adjusted through some process of negotiation); whether they will make some products or sectors subject to deeper or shallower cuts; and whether developing and developed countries will be obliged to make the same degree of cuts.

Point 3: Applied Tariffs versus *Bound Tariffs*

In order to understand these distinctions one must first grasp the difference between bound and applied tariffs. A BOUND RATE is a legal commitment, but it is the APPLIED RATE that goods actually face when they cross borders. For any given product, the applied rate may be equal to or less than the bound rate; if it is above that rate, the country is in violation of its commitments. The only time that an applied tariff *must* by definition be equal to the bound tariff is when the latter is set at zero. Any other number leaves at least a little room for maneuver. As a general rule, however, some developed countries — including the European Union, Japan, and the United States — apply their tariffs at the bound rate. It is more common in developing countries to have relatively high bound rates, and to apply tariffs at a lower rate. In such cases, the distance between the applied and the bound rate is usually referred to as the "WATER" in the tariff. For example, if a country has a bound rate of 25% but an applied rate of 10% there are 15 percentage points of water in its schedule. Not all tariffs in a country's schedule need be bound; while the countries that accede to the WTO are obliged to bind their

Table 4.1: Differences in WTO and RTA Market-Access Negotiations

Issue	Multilateral Negotiations	RTA Negotiations
Product Coverage	Only those products that are explicitly scheduled in countries' commitments (or other agreements) are covered.	"Substantially all the trade" between RTA partners must be covered for the agreement to be legal under GATT Article XXIV; the term "substantially all" is not defined.
What Is Cut	Countries' commitments are made on their bound rates.	Countries' commitments are typically (but not always) made on their applied rates.
How Far Cuts Go	Bound rates are more typically reduced (by varying degrees) than eliminated altogether, except for any deals made on a sectoral, ZERO-FOR-ZERO basis.	Applied rates are supposed to be reduced to zero by the end of any phase-out periods.
Negotiating Method	The earliest GATT negotiations were conducted principally on a request-offer basis, but since the 1960s various forms of formula cut have been more common.	Countries typically bargain over which products will be placed on which phase-out schedule, which may range from duty-free on Day One to lengthy phase-outs.
Safeguards and Related	WTO provisions allow for safeguards (even if in practice these are often rejected by dispute-settlement panels) and also allow for renegotiations and other special treatment.	In addition to exempting some products or sectors from liberalization, countries may negotiate other provisions such as safeguards, snapbacks, tariff-rate quotas, etc.
Special and Differential (S&D) Treatment	Countries may negotiate various means by which developing countries (and especially the least-developed) are given special treatment in their rights and obligations.	While an agreement may include S&D provisions, the negotiation of a comprehensive and reciprocal agreement between developed and developing countries marks a major departure from older concepts of North-South relations.
Rules of Origin	These rules are generally not controversial in an agreement whose benefits are extended on an MFN basis; non-preferential rules of origin are primarily of statistical significance.	If these rules are designed to limit the benefits of an agreement to the participating countries they may impose costs on third countries from whom trade is diverted. Negotiations over these rules can be detailed and time-consuming.

entire schedule, most of the incumbent members have at least some (and often many) UNBOUND tariff lines in their schedules. Developed countries generally have only a small number of unbound tariff lines in their schedules, but developing countries (other than those that have recently acceded) often have kept large swaths of their schedules unbound.

Tariff negotiations in the WTO are generally based on the bound rate, and thus tend to be incremental and modest. When the water is high, even commitments that appear substantial may have little or no impact on the applied rate. For example, imagine that a country has a bound rate of 10% on Product X, but its applied rate on that same product is just 1%. The country could cut its bound tariff by as much as 90% and still do nothing more than take out the "water" in the BINDING; only a reduction of more than 90% would actually oblige the country to reduce the applied rate below 1%. Some analysts (especially economists) argue that commitments that merely take out the water are insignificant, while others (especially lawyers) view such a commitment as liberalizing insofar as it reduces uncertainty regarding a country's tariff rates in the future.

By contrast, commitments in an FTA typically — but not always — are made on the basis of countries' applied tariffs. The main market-access issues to be negotiated in an FTA are not how far these tariffs will be cut, but rather how comprehensive those cuts will be (i.e., whether any items are exempt) and how fast they will be made. It is unusual for all cuts to take effect upon an agreement's entry into force; phase-ins are commonly employed. Phase-ins are typically set at a ten-year period, as was the case in the Uruguay Round, but might be shorter or longer for some products. In some FTAs, these might last 15, 20, or even more years for the most sensitive products. A schedule will often provide for equal annual cuts during the phase-in period, but might also specify that some products are subject to the full cut upon the agreement's entry into force, while others might not be cut until much later or even all at once in the very last stage (a "BACK-END LOADED" approach). FTA negotiators may also agree to special rules for sensitive products if imports increase faster than expected, such as safeguards (i.e., quotas or protective measures), snapbacks (i.e., the shifting of a product from one reduction category to another), TARIFF-RATE QUOTAS, or other special restrictions.

Note as well that the negotiation of rules or origin can be a key issue in FTAs. Whereas such rules are of merely statistical interest in non-preferential trade, in an FTA the benefits may be restricted to products that meet certain criteria. The rules might provide, for example, that for an article of apparel to receive duty-free benefits it must not only be sewn in the FTA partner country, but made from fabric that is woven in one of the FTA countries — or perhaps even that the fabric be made from fibers that originate in one or more of the partner countries. Depending on the precise rules that they agree to, the negotiators in an FTA may seek to exacerbate the extent to which an agreement results in TRADE DIVERSION (i.e., some of the trade that agreement creates between its members comes at the expense of third parties).

Point 4: The Request-Offer Approach to Multilateral Negotiations

There are two major ways that multilateral negotiators might deal with the thousands of items in a tariff schedule. One is to negotiate some or all of them item-by-item in a REQUEST-OFFER negotiation, and the other is to use mathematical formulas. Each approach has its advantages and disadvantages. What is at issue in both cases is the extent to which cuts are made to a tariff (typically the bound rate); this is a moot point in RTA negotiations, where tariffs are supposed to be eliminated altogether.

Request-offer is the oldest approach to the conduct of tariff negotiations, having been the practice in centuries of bilateral tariff negotiations, and was used in the first several GATT

rounds. For example, Peru might offer to reduce its MFN tariff on televisions while requesting that Korea reduce its MFN tariff on fish. The items that one country places on the request list to the other party might number in the dozens or even the hundreds, and working their way from those lists to a final agreement might involve numerous rounds of requests and offers. If these two countries ultimately struck a bargain they would extend the concessions made to one another to all other GATT contracting parties on a non-preferential basis, as required by the MFN principle of GATT Article I.

Conducting negotiations by request-offer is often seen as too slow and time-consuming for modern trade negotiations, considering the much larger number of countries in the WTO and the growing array of products that they trade. Bilateral deal-making relied heavily on the initiative of individual countries, and left relatively little role for countries that were small and/or developing, insofar as only the principal supplier of any given product was supposed to make requests. That rule is especially unattractive to smaller countries that might not be the principal supplier of anything. There are nonetheless three ways in which this approach has carried over from the early GATT period. One is to supplement whatever formulas may be used in a negotiation. That was the case in the Uruguay Round, for example, in which the agreed procedure was to target a 30% average reduction on industrial products, but the distribution among tariff lines was then negotiated bilaterally on a request-offer basis. Second, the request-offer approach remains the principal means by which negotiations are conducted over trade in services; GATS negotiations are described later in this chapter. Third, request-offer lives on in the negotiation of sectoral deals.

Point 5: Formulas in Multilateral Negotiations

The formula approach to tariff-cutting is more efficient and inclusive than request-offer, provided that it is relatively easy to reach agreement over the terms of the formula. First used in the Kennedy Round (1962-1967) of GATT negotiations, formulas facilitate matters by subjecting most or all tariffs to an equation that specifies the cut. The main questions then are (1) how the formula should be devised, (2) whether tariffs on any specific products will be handled on a different formula (or exempted altogether), and (3) whether some countries (e.g., developing or least-developed) might be asked to provide less than full reciprocity or even be exempt from making commitments.

Formulas have virtues as well as shortcomings. Perhaps their chief virtue is that negotiating this way makes it easier for countries to learn the contours of the ZOPA. They nevertheless require both data and the skills to process it, placing at a disadvantage any countries that lack accurate, up-to-date numbers as well as the capacity to handle formulas and even perform sophisticated, computable general equilibrium forecasts in-house. Many developing countries may lack such resources, and might be limited to static, back-of-the-envelope calculations of how individual tariff lines would be affected. Formulas can also be problematic if the haggling over their structure and terms becomes just as elongated as was the case for request-offer negotiations. Even if they agree in principle to negotiate on the basis of a formula, negotiators can then wrangle for years over questions both large and small.

Point 6: Sectoral Negotiations

Sectoral tariff negotiations, which are also called zero-for-zero negotiations when their ambitions are sufficiently high, aim to reduce or eliminate tariffs in a specific product or sector. The method here is not based on the bilateral exchange of concessions across a heterogeneous range of products but is instead a negotiation in which a group of countries eliminate tariffs in a narrower range of goods. Examples include the Tokyo Round’s

Box 4.1: Types of Tariff-Cutting Formulas

The simplest formula is known either as a linear cut or a HORIZONTAL cut, and consists of a straight percentage reduction. The basic Kennedy Round formula was a 50% cut for bound tariffs on industrial products, but also allowing for negotiated exceptions, with the goal being an overall average reduction of 30%. The advantage of this approach is that it is conceptually and computationally simple; the main disadvantages of such cuts is that they do not do well in reducing either "PEAK" TARIFFS or those for which there is a great deal of water. The only way they could be very effective for such items would be to set the COEFFICIENT of reduction (i.e., the percentage) at an especially high level. There is no universally agreed definition as to what constitutes a peak: In some countries' schedules there may be a great many items that are duty-free on an MFN basis, and average tariffs on dutiable products may be somewhere in the 3-6% range, but there are other, exceptional products on which tariffs might be 25%, 50%, 75%, or even higher. If one starts with a tariff that is (for example) 50% and applies a seemingly ambitious linear cut of 50% the resulting tariff will still be 25%. That means going from one level of peak tariff to another that is, by any reasonable definition, still a peak tariff.

The principal method adopted for the Tokyo Round (1972-1979) was the Swiss formula, those main virtue is to attack the peak tariffs aggressively. This approach to formula cuts is expressed by the formula "new tariff equals (old tariff multiplied by the coefficient) divided by (new tariff plus the coefficient)." For example, suppose that — as was the case in the Tokyo Round — the coefficient were 16. If one started with a tariff of 50% the Swiss formula would, with a coefficient of 16, result in this calculation: (16 times 50) divided by (16 plus 50), which is to say 800 divided by 66, and thus (after rounding) a new bound tariff of 12.1%. The Swiss formula can more easily be understood by way of two simple rules of thumb: (1) Ambitions rise as the coefficient falls, such that the lower the coefficient deeper the cut, and (2) the maximum rate that will remain in place after a cut is made is equal to the coefficient. For example, if we do use that coefficient of 16 the result will never be higher than that value; even if we started with a rate of 1000%, for example, the result would still be 15.7%.

A TIERED CUT is a compromise between the linear and Swiss formulas. In this formula tariffs are cut by a percentage that rises with the level of the base rate, such that relatively low tariffs are cut by a certain percentage and higher tariffs are cut more aggressively. For example, tariffs that are currently lower than 10% might be cut by 25%, those that are between 10% and 20% might be cut by 50%, and those that are above 20% might be cut by 75%. A tiered formula may stack the tiers at whatever dividing lines the negotiators might choose, and they can assign whatever level of linear cut to each tier that they wish. As in any formula the actual ambition of the cuts will depend both on the base rate and the level of the coefficient of reduction.

Negotiators are not limited to these three approaches, as they could instead devise any number of formulas that either accelerate or retard cuts beyond what might be achieved in one of these methods. In general terms, however, these are the three principal options.

The formulas used in a negotiation can make distinctions between types of products and countries. For example, one could use a Swiss formula for non-agricultural products and either a linear or a tiered cut for agricultural products, and also negotiate different coefficients of reduction in both formulas for developed *versus* developing countries. It is also possible to identify specific sectors or products that might be exempt, or subject to zero-for-zero deals, or whatever other adjustments might be considered desirable.

Agreement on Trade in Civil Aircraft, the Uruguay Round's Pharmaceutical Agreement, and the Information Technology Agreement (ITA) that was negotiated after the Uruguay Round. The Doha Round saw numerous sectoral initiatives, with some members placing high priority on chemicals, industrial machinery, electronics and electrical products, forest products, raw materials, and gems and jewelry. Like the rest of the round, however, these initiatives stalled over disagreements regarding both the principles and the details.

Some sectoral deals reached after the Uruguay Round represent a significant departure from the principle of the single undertaking, and also show that negotiations do not necessarily have to be conducted as part of a larger, multi-issue round. Negotiations over these narrower deals are generally conducted on the basis of a "critical mass," with the participating countries aiming to obtain commitments from countries that together account for some agreed, minimum percentage of global trade in the products in question. In the case of the ITA, for example, the goal was to reach an agreement with members that accounted for 90% of trade in the covered information technology products. The benefits of these deals are then extended on an MFN basis to all WTO members, with other countries urged to join as well.

Point 7: Market-Access Negotiations on Services

Although the general scheme of the General Agreement on Trade in Services (GATS) closely mimics the principles and structure of the GATT, the resemblance can be deceptive. Whereas most of the key terms and concepts of market-access for goods have their counterpart in services, one must adopt a more variegated approach to the conduct of negotiations in this field. That starts with understanding the more complex terminology, some of which is summarized in the Glossary of Key Terms in the Theory and Practice of Negotiations (Appendix A).

Multilateral negotiations on trade in services are conducted according to a request-offer approach that is a carry-over from the way tariff negotiations used to be done. Compared to goods, where countries are assumed to trade via just one MODE (cross-border trade) and make simple commitments in the form of numerically precise tariff bindings, the GATS is based on a wider range of transactions (four modes of supply) and an almost infinite range of commitments (all, nothing, and anything in-between). GATS distinguishes between four "modes" under which services are traded, as described in the glossary. And unlike trade in goods, where it is easy to determine whether there is any difference between a country's bound and applied tariffs, knowing the "applied rates" for a service sector would require that one examine all of the laws and policies of a country in that area.

Trade in services is conceptually distinct from trade in goods. Market-access commitments for services are more complex, and one often finds a great amount of water in GATS schedules. The concessions that countries make in RTAs are often more liberal than what they commit in the GATS, both because they tend to be GATS-Plus and may be negotiated in a different fashion, but it can be difficult to determine whether the difference is nominal or real. And while the liberalization offered to RTA partners may be restricted to them, regulators may find it necessary for practical reasons to extend to service providers from all parties whatever liberalization is agreed to in an RTA (albeit on a *de facto* basis).

Depending on the partner with which one engages in RTA negotiations, the bargaining over services might or might not replicate the GATS approach. To simplify, there are some partners that use the GATS as their model, others (such as the United States) that do away with that model altogether, and still others (such as the European Union) that use a hybrid approach in which some aspects of the GATS model are employed. Space does not permit a thorough examination of the distinctions here, as they can be quite technical.

Point 8: Positive* versus *Negative Lists in Negotiations on Services

Services negotiations can be conducted on either a POSITIVE-LIST or a NEGATIVE-LIST basis. The GATS model is based on a positive list, generally meaning that the only commitments in any specific sector are those explicitly adopted in a country's schedule. The FTAs of the United States are instead based on a negative list, generally meaning that all sectors are assumed to be fully liberalized except to the extent that exceptions are lodged. The U.S. model is further supplemented by the negotiation of specific chapters on selected sectors such as telecommunications and financial services. The E.U. model is more complex still, including elements of each approach. Countries are well-advised to examine closely the most recent FTAs of any prospective partner before entering into negotiations so as to understand the "templates" that they may bring to these talks, and how well those templates may fit in with the country's own expectations for what it is and is not willing to commit.

Negotiations over trade in services, whether they are conducted at the multilateral or RTA level, are further complicated by the desire of most countries to retain a great deal of "policy space" in the regulation and promotion of their services sectors. This might be achieved by leaving a sector out of the schedule altogether, which can be done in a positive-list negotiation by inserting "unbound" in most of the cells; in a negative-list negotiation this is instead achieved by adding language that explicitly exempts some or all of the sector, or that "grandfathers" an existing law or policy. Under either approach, one could define the country's commitments in a way that is less liberal than the applied laws and policies. As in the case of tariffs on goods, it is the interplay between the offensive and defensive interests of members that shapes the schedules and determines whether they and to what degree they achieve actual liberalization.

This distinction between the positive and negative lists represents another area where the ZOPAs of the WTO and RTAs appear in principle to be quite different, although there may be cases where that is not so in actual practice. In principle, negotiating on the basis of a negative list means expanding the scope of countries' commitments by narrowing the range of exceptions to those commitments. This approach may also tend to accelerate the conduct of negotiations, insofar as the burden is placed not on the *demandeur* seeking greater commitments but on the partner who wishes to limit them. That said, it is at least theoretically possible to negotiate a positive-list agreement that achieves more actual liberalization than a negative-list agreement (or conversely a negative-list agreement that isolates more sectors from actual liberalization than does a positive-list agreement). The principal point is that in negotiating under either one of these modalities, countries need to conduct thorough national consultations so as to ensure that analysts and negotiators understand their country's own offensive and defensive interests in advance. Failure to do so could result in agreeing to an RTA in which they make unintended and unwelcome commitments. As a general rule, that risk of an accidental over-commitment is greater when one negotiates an RTA on a negative-list model — and thus could inadvertently forget to isolate some sector where countries wish to maintain greater policy space — than is the case for positive-list negotiations.

Chapter 5: Understanding a Partner's Trade Strategy and Domestic Politics

Introduction

As was stressed in Chapter 1, the present volume is devoted to the tactics of negotiations rather than to strategy. There nevertheless are some ways in which tactics will be influenced or even determined by strategies, one of them being the necessity to devise tactics in a way that takes account of a partner's strategy. If it is indeed the case that "Diplomacy is the art of letting other people have your way," one means of pursuing that objective is to present effective arguments as to why your partner should find it in their own interest to adopt the proposals that you advance. In order to make that argument effectively, you must properly understand not only what positions your partner is taking, but also the broader strategic perspective in which it takes those positions and what domestic institutions will ultimately decide whether to approve the final results of a negotiation.

These points can be understood by returning to the basic concepts of the ZOPA and the BATNA. Consider first the ZOPA: How can you know what potential outcomes of a negotiation are reasonably attainable? Consider as well the BATNA: If your partner threatens to walk away and pursue some other alternative, how can you tell whether this is a bluff? Answering both sets of questions requires that you understand not just what your side would ideally want, but what the other side might reasonably be expected to accept. That knowledge must be based on a rational assessment of several factors, including what the partner has accepted in prior agreements, what its overall approach to trade negotiations is, and what public and private institutions have the most influence and authority in setting that country's objectives and approving (or rejecting) the outcomes of its negotiations.

This chapter stresses the importance of understanding one's partner in two ways. The first is the importance of knowing *why* that country is engaged in a specific negotiation. A successful negotiator will devise a strategy that is founded on a proper understanding of where this negotiation fits in the partner's overall goals, including how this initiative relates to that partner's larger objectives both for the trading system and other priorities in foreign policy. It is also important to understand *how* one's partner conducts its negotiations, including the relations between the public and private sectors and different segments of the public sector (especially in its division of labor between the legislative and executive branches of government). This is all necessary for any negotiator who hopes to distinguish a partner's actual constraints from the mere bluffs that its own negotiators make.

The main message of this chapter is that negotiators should not fall into the trap of believing that the way they perceive a negotiation will necessarily be shared by their counterparts. It is natural to assume that whenever we deal with persons who must perform the same task as we do they must see problems and solutions in the same way, but that is not necessarily the case. There are a great many ways in which countries may differ, from location and culture to economic circumstances and political structures, and those differences can result in major distinctions in *why* countries choose to negotiate an agreement, *what* they hope to achieve in that negotiation, *how* they negotiate, and *who* in their countries will be the ultimate gate-keeper deciding which agreements are approved and which are rejected. Any negotiator who fully understands those differences will be in a better position to conclude an agreement that is economically beneficial and politically viable.

Point 1: Countries Differ in their Economic Dependence on Trade

It might seem natural to assume from the start that a trade agreement means the same thing to all countries that enter into it. After all, our exports are simply your imports, and *vice versa*, and presumably we all want to reach agreements that allow all of us to make the most of our natural endowments and opportunities for beneficial exchange. But if one looks more closely at the differences in national economies, as well as distinct countries' positions in the world, it becomes much more evident that trade agreements can play very different roles in distinct countries. This can affect the negotiating dynamics of a given initiative in a variety of ways. A country that is heavily dependent on trade might feel much greater urgency in concluding negotiations with another, less trade-dependent partner, and is much less likely to adopt a BATNA based on the principle that "no agreement is better than a bad agreement." That is a difference that the latter country may well exploit in the conduct of negotiations.

As can be appreciated from the data in Table 5.1, trade plays a far greater role in the economy of the European Union (where imports plus exports are the equivalent of nearly 90% of GDP) than in the United States (where the same value is less than one-fourth). Put another way, European policymakers might logically consider trade to be almost four times as important as do their U.S. counterparts. This observation has extremely important implications for the role that trade agreements may play in the foreign policies of these two entities. All other things being equal, we might expect E.U. policymakers to be more likely than their U.S. counterparts to conceive of trade according to its intrinsic, economic importance, and may give greater weight to its extrinsic value. That is to say, a policymaker in the United States may feel freer than a European policymaker to consider the negotiation of a trade agreement as a useful form of leverage for the achievement of some end other than commerce *per se*. It is also interesting to note that, in this respect, the economic profile of trade in China more closely resembles that of the United States than of the European Union.

Another way of looking at these numbers is to consider the distinct way that any pair of partners might view a bilateral relationship. It is not uncommon in a North-South FTA negotiation for the relationship to figure much more prominently in the economy of the developing than the developed partner. Consider the example of Angola and the European Union. In 2021 the total trade of €4.619 billion between these two partners was equal to 7.9% of Angola's GDP. Because the economy of the European Union is 262 times larger, however, that same relationship was equal to just 0.03% of EU GDP.[12] These observations have obvious implications for the differing approaches that the negotiating partners might take, as well as the seriousness of any threats to walk away from the talks.

It is also important to understand differences in the fiscal effects of liberalization. Taxes on trade will typically provide a larger share of government revenue in developing countries, and the static effect of any reduction in those tariffs may be greater on the poorer partner. As seen in Table 5.1, the share of government revenue is attributable to trade taxes can be above 10%. This is not the same is true for all negotiating partners. Angola, for example, depends on trade taxes for just 2.9% of government revenue, and suggests that Angolan negotiators may be somewhat less constrained than are their counterparts in some other developing countries.[13]

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[12] Calculated from EU data at https://webgate.ec.europa.eu/isdb_results/factsheets/country/details_angola_en.pdf and World Bank data at https://data.worldbank.org/indicator/NY.GDP.MKTP.CD.

[13] World Bank data at https://data.worldbank.org/indicator/GC.TAX.INTT.RV.ZS.

Table 5.1: Varying Importance of Trade for Selected Regions and Countries

	Dependence on Trade Taxes	Dependence on Trade (Relative to GDP) Exports	Imports	Total Trade
European Union	NA	46.6	42.9	89.5
Canada	1.3	29.4	31.4	60.8
Other Europe & Central Asia	2.7	30.0	29.6	59.6
World	2.4	26.5	25.7	52.1
Latin America & Caribbean	3.4	25.1	23.9	47.7
Eastern & Southern Africa	7.8	22.6	25.0	47.6
Least Developed Countries	10.6	19.6	27.4	47.0
Sub-Saharan Africa	10.1	20.0	24.1	44.1
East Asia & Pacific	2.9	21.9	19.6	41.4
Western & Central Africa	11.8	17.0	23.0	40.0
China	1.9	18.5	16.0	34.5
United States	2.1	10.1	13.2	23.3

All data for East Asia & Pacific and for Other Europe & Central Asia exclude high-income countries from those regions.

Data for trade taxes shown for China, the LDCs, and Africa Western and Central are 2018; all others 2019.

Note that most LDCs are also included in the data on Sub-Saharan Africa.

Dependence on Trade Taxes = Taxes on international trade as a share of government revenue in 2019, based on World Bank data at https://data.worldbank.org/indicator/GC.TAX.INTT.RV.ZS.

Exports = Exports of goods and services as a share of GDP in 2020, based on World Bank data at https://data.worldbank.org/indicator/NE.EXP.GNFS.ZS.

Imports = Imports of goods and services as a share of GDP in 2020, based on World Bank data at https://data.worldbank.org/indicator/NE.IMP.GNFS.ZS.

Total Trade = Sum of Exports and Imports.

Point 2: Countries Differ in the Role of Trade in their Broader Strategies

Despite some differences in their economies, the European Union and the United States both see FTAs as an important means by which to advance their objectives in issues other than traditional market-access for goods. There is a well-established pattern in which they each use FTAs to introduce new issues to the trading system and, once they are on the table, to expand upon the commitments that countries are prepared to make on these topics.

There was a time when these economies' principal objective was to expand and deepen the commitments that countries make at the multilateral level, and FTAs complemented or supplemented the multilateral system. Over time, the FTAs have gone from being Plan B to Plan A. For many countries, they are now a substitute for multilateralism. The classic example of FTAs as complements dates from the Uruguay Round, when the United States used FTA negotiations with Canada (1986-1988) and then Canada and Mexico (1991-1994) to promote

Table 5.2: Issue Coverage of Selected U.S. and E.U. Free Trade Agreements

Years Indicate Date of Signature

	FTAs of the United States				FTAs of the European Union			
	Israel	**NAFTA**	**Chile**	**Korea**	**Andorra**	**Tunisia**	**Chile**	**Korea**
	1985	1993	2003	2007	1991	1995	2002	2010
Uruguay Issues								
Intellectual Property	⊙	●	●	●	–	●	●	●
Services	⊙	●	●	●	–	●	●	●
Singapore Issues								
Competition Policy	–	●	●	●	–	●	●	●
Government Procurement	⊙	●	●	●	–	⊙	●	●
Investment	⊙	●	●	●	–	⊙	⊙	●
Trade Facilitation	–	●	●	●	–	⊙	⊙	●
Other Issues								
Labor Rights	–	●	●	●	–	–	⊙	⊙
Environment	–	●	●	●	–	⊙	⊙	●
Electronic Commerce	–	–	●	●	–	–	⊙	●
Geographical Indications	–	⊙	⊙	⊙	–	○	○	⊙

● *= Full chapter, annex, appendix, or other section or side agreement devoted to the issue.*

⊙ *= One or more full articles devoted to the issue.*

○ *= Other coverage of the issue (e.g., language in the terms of an article dealing with a related issue).*

– = No explicit coverage.

what were then called the "new issues" of investment, services, and intellectual property rights. The U.S.-Canada agreement set precedents on these issues while also signalling that the United States was prepared to negotiate outside the multilateral system.

The later progression for both the United States and the European Union can be seen in Table 5.2. Since the end of the Uruguay Round, both have approached the relationship between FTAs and the multilateral system in two ways. One is to treat FTAs as a means of obtaining deeper commitments from countries than they were willing to make in that round, or in subsequent negotiations in the WTO, by exchanging deeper commitments for free access to the E.U. and U.S. markets. This allowed them to correct for what developed countries saw as the shortcomings of the Uruguay Round agreements. That dissatisfaction was based either on the general terms of an agreement, or on the specific commitments that individual WTO members make in their schedules. An example of the first type would be the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), the rules of which were not as strict as the United States would have liked, while the commitments that many countries made in the General Agreement on Trade in Services (GATS) offer a good example of the latter type of concern. In either case, RTAs offer the E.U. and U.S. negotiators a second chance with their

individual partners. Many aspects of the RTAs that they have negotiated with developing countries since 1995 have been TRIPS-plus, GATS-plus, or otherwise WTO-PLUS in the general rules and specific commitments that they achieve. And while those issues are generally WTO+Plus, others such as labor rights are WTO+Plus+Plus.

Any country negotiating FTAs with either the European Union or the United States needs to be aware of how the specific initiative fits into that larger partner's overall objectives for the trading system. Negotiators from these two major economies will see their respective FTAs not just as ways of handling their relationships with specific partners, but instead as part of a chain of precedents. This makes them less willing to "go easy" on any one partner when it comes to WTO+Plus and WTO+Plus+Plus issues, as whatever concessions they might grant to today's negotiating partner will then be demanded — even expected — by tomorrow's.

Point 3: Countries Differ in their Choice of FTA Partners

FTAs have become important instruments of foreign policy for major economies such as the European Union, the United States, and — increasingly — China. These three major players have different postures with respect to their own geographic placement, levels of trade-dependence, historical relationships with different regions, and military alliances, and it should not surprise us if these factors resulted in different sets of FTA partners. These can be appreciated from the Venn diagram shown in Figure 5.1.

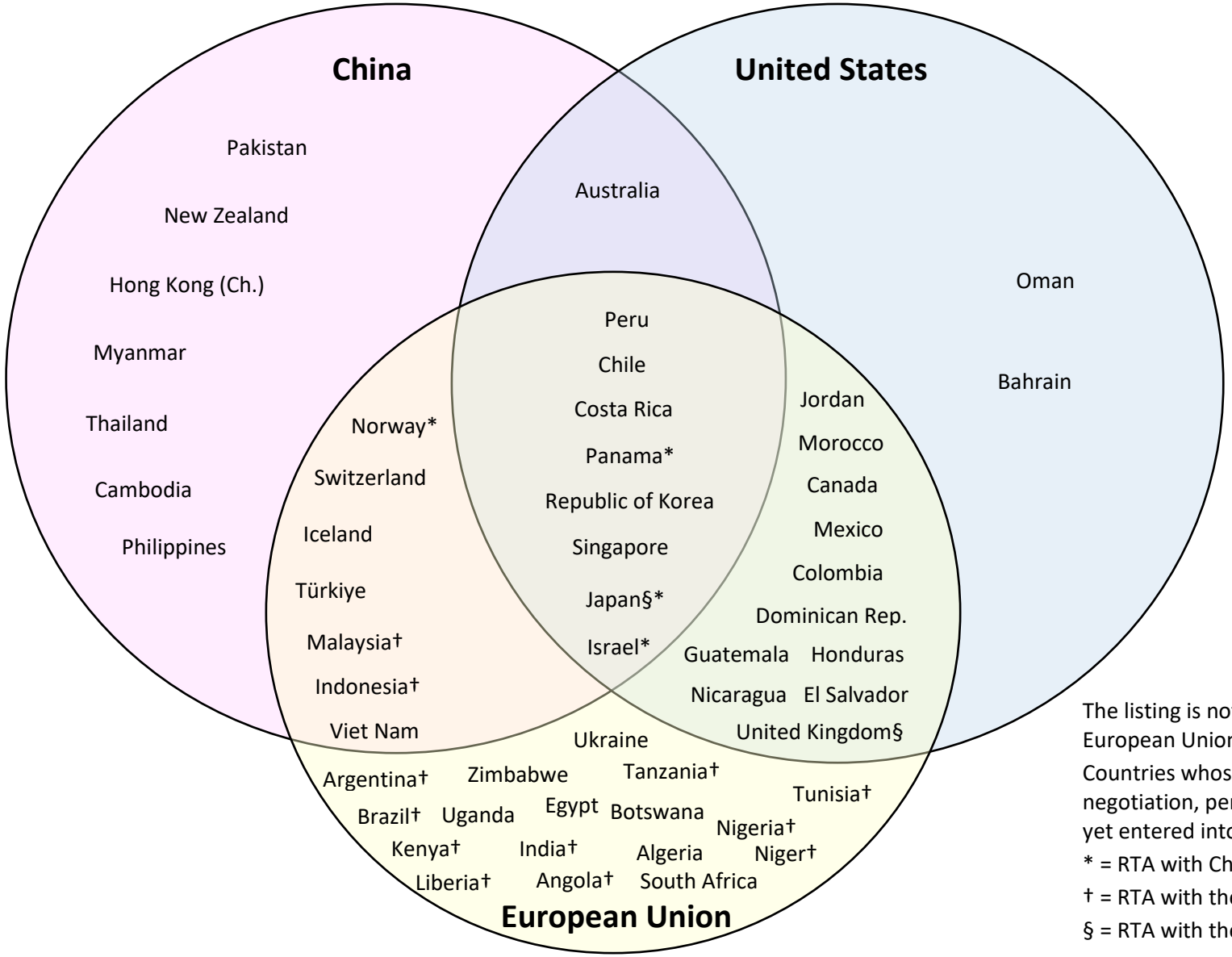
From a system perspective, the most important observation to be made from these data is how few countries have (or might soon have) FTAs with all three of these giants. They do include a few, large economies such as Korea, but most countries have somewhere between zero and (at most) two such agreements in effect. In place of the optimistic hope that a well-functioning multilateral system might be replaced with a large network of bilateral agreements, there is at least as much reason to reach the pessimistic conclusion that the world may be headed towards competing blocs.

Any country seeking an FTA with a major economy would be well-advised to ask in its own preparations, "Where do we fit within this partner's larger strategy?" While the answer should not dictate what the smaller party to the talks will propose or accept, it should help to shape how that country frames its positions, arguments, and expectations. To the extent that a negotiator can couch a proposal in terms that speak to the observed interests of a partner, that pitch may stand a greater chance. Put another way, the manner in which a proposal is framed may enhance its appearance of being seen within the partner's preferred ZOPA.

As a general rule, China tends to favor FTAs with two types of partners. One group is its partners in the Asia-Pacific region, whether they are developed or developing. The great majority of the partners that have concluded FTAs with China are located either in Asia or on the Pacific coast of the Americas. Several of the remaining FTAs partners of China are European countries that are not members of the European Union.

As for the European Union itself, the data suggest that it is especially attracted to FTAs with countries that were once in colonial relationships with one of its members. There is some irony here, insofar as many of those partners are former colonies of the United Kingdom — yet the United Kingdom itself is no longer an E.U. member. Many other current or prospective FTA partners of the European Union were once in colonial relationships with France, Portugal, Spain, the Netherlands, or Belgium. They collectively make for a much wider geographic coverage than the FTA partnerships of China, with Brussels favoring partners in Africa, the

Figure 5.1: Selected RTA Partners of Three Major Economies as of 2022



The listing is not comprehensive for the European Union.

Countries whose RTAs are still under negotiation, pending approval, or not yet entered into force:

* = RTA with China.

† = RTA with the European Union.

§ = RTA with the United States.

Source: WTO RTA database and other sources.

Note that among the many countries that do not have RTAs in effect or under negotiation with any of these three major economies include (among others) Afghanistan, Bangladesh, Ethiopia, Iran, Iraq, Kuwait, Mongolia, Nepal, Qatar, the Russian Federation, Saudi Arabia, Sri Lanka, Sudan, United Arab Emirates, Venezuela, and Yemen.

Americas, and Asia. The European Union also favors FTAs with other European countries, or countries in regions that immediately adjoin Europe.

There is a close association between the FTA partners of the United States and that country's major priorities in security relations. In addition to favoring FTAs with its immediate neighbors, and with countries in the Caribbean Basin, the United States has negotiated numerous agreements with countries in which it is in formal military alliances, and/or host major U.S. military bases, and/or have been partners in Middle East peace and/or the War on Terror. Prospective FTA partners may find it beneficial to reach out to members of the U.S. foreign policy community when they seek information and support before, during, and after an FTA negotiation. The larger the coalition that supports such an agreement, the more flexible and favorable the ZOPA could turn out to be.

These are all points that should figure into the calculations of countries that negotiate FTAs with one or more of these major economies. Negotiators should not shape the entirety of their strategies around the recognition of where they fit in the foreign policy priorities of Beijing, Brussels, or Washington, but they are well-advised to take these factors into account when dealing not just with their counterparts in these countries but also their broader policymaking establishments.

Point 4: Countries Differ in their Policymaking Systems and Approval Procedures

When a country negotiates an FTA with a partner it is not dealing solely with diplomat-to-diplomat with its counterparts in that country. Whether or not this is done directly, countries also engage in negotiations with whatever institution is ultimately responsible to approving or rejecting the agreement. Even if there are no direct contacts between the negotiators in one country and the legislators in another, they still deal with one another indirectly whenever the negotiator from that latter country claims that a given concession cannot be made because it would kill the chances for approval. That claim might be well-founded, or it might be just a negotiating tactic; a partner is always well-advised to figure out which is the case.

Countries differ greatly in the extent to which their legislative bodies are deferential to the executive on matters of foreign policy. They range from some in which nearly all matters of diplomacy and international security are treated as areas where the executive has a virtual monopoly of authority to others in which the legislature has, and may often exercise, the power to reject or even (in the case of the U.S. Senate) amend the terms of treaties that get submitted for its approval.

The United States offers the classic example of a country in which the legislative body wields tremendous power over all aspects of foreign economic policy. Much of this can be attributed to a Constitution that makes Congress a co-equal branch of government, and a political tradition in which government is divided (i.e., one or both chambers of Congress are controlled by the opposition party) more often than it is united. Divided government complicates all manner of policymaking, but is especially problematic for the approval of treaties. Even when the United States is the chief promoter of a new negotiation, the results may still fail at home. President Woodrow Wilson set that pattern when he signed the Treaty of Versailles in 1919, only to see the Senate amend it extensively[14] before rejecting it altogether. President Harry Truman did no better than Wilson when in 1947 he asked Congress to approve the Havana Charter of the International Trade Organization, although this time the rest of the world did not try to make a rump international institution function without the United States. The only thing that was special about the Trump administration's decision to pull the

[14] It is one of the peculiarities of U.S. treaty practice that the Senate has the authority to revise the terms of treaties.

United States out of the TransPacific Partnership in 2017 was that this was done even before Congress could approve or reject the agreement.

The U.S. case is extreme but not unique, as there are growing signs that getting trade agreements through Brussels could become just as difficult as getting them through Washington. While the European Commission is responsible for proposing, preparing, and negotiating trade agreements, its work is likewise subject to review. The gate-keepers include not just the Council of the European Union on which the national governments are represented, but also the European Parliament. The approval of both these bodies must be secured in order for a trade agreement to be ratified. This is somewhat comparable to what one finds in the United States, if we were to simplify and compare the Council to the Senate (where all states have equal representation). The more important comparison is in the rising willingness of these bodies to take a critical view of what the Commission has negotiated, as demonstrated by the unhappy fate of the Anti-Counterfeiting Trade Agreement. The European Parliament set an important precedent in 2012 when it effectively killed that treaty, voting against approval by a very wide margin.

There are other means by which an agreement might fail at the domestic level even after it has been successfully negotiated. That is sometimes the case for countries that provide for popular referenda on some types of treaties. The most high-profile case in recent years was the 2016 vote by which the public in the United Kingdom voted to withdraw from the European Union. This "Brexit" vote was preceded by referenda in which other countries opted either to leave the union (Greenland in 1982) or not to join it (Norway in 1972 and 1994, San Marino in 2013, and Switzerland in 1997 and 2001). Many other popular referenda to join the European Union did succeed, but this is not the only region where matters can come down to a popular vote. In Costa Rica, for example, the country's membership in the FTA with the United States, Central America, and the Dominican Republic was subject to a referendum in 2007. There are also some cases in which trade agreements do not make it past a country's cabinet. If the ministry responsible for negotiating trade agreements does not consult adequately with other ministries whose interests are affected by the agreement, it could face serious domestic opposition even after "getting to yes" internationally.

Point 5: How a Partner Country's Institutions Affect the Conduct of Negotiations

Negotiators cannot treat their dealings with foreign counterparts as the final word on the subject. They must instead consider the full sequence by which trade talks are proposed, launched, conducted, and concluded, and by which their final results are approved and implemented. They run two great risks if they do not keep themselves fully informed on the domestic trade politics of their negotiating partners. One risk is that a partner might *over*estimate the difficulties of securing approval for a trade agreement that includes some specific item, and use this claim as leverage to as to secure concessions that the other country might not otherwise make. The other, very different risk is that a country might *under*estimate the difficulty of securing approval for that agreement, and include one or more provisions in the final agreement that do indeed make it difficult or impossible to approve in one of the partners' domestic systems.

Put another way, policymakers should be prepared for the potential that a negotiation will become a multi-level game in which the traditional lines of formal diplomacy are not always respected by all parties. Public and private actors in other countries may seek to communicate directly with their counterparts, or with other actors in their own country. It may also be advisable for trade negotiators in a developing country to engage directly with actors in the other country, especially any who are predisposed toward closer economic relations. There are

multiple reasons for doing so, beyond the hope that such partners may help to promote the launch of negotiations or the approval of their results; they may also be very useful sources of intelligence and advice when it comes to understanding the partner's strategy and the negotiation's true ZOPA. Depending on the relationship in question, these may include representatives of industries that have (or expect to have) substantial trade and investment interests in the relationship, members of the diaspora community, legislators, or others who could be useful partners.

Point 6: Countries Differ in their Emphasis on Economic* versus *Non-Economic Objectives

It is possible that when partners negotiate a North-South FTA they will see the agreement and the partnership in entirely different terms. Policymakers in the developing country may perceive it as a commercial pact that includes some other provisions as well, but for their counterparts in the developed country a trade agreement may be a promise of improved access to their market in exchange for commitments from this partner on other issues of greater importance. Whether they are linked to the agreement tacitly (by being contemporaneous with the agreement) or explicitly (by being written directly into it), those other issues might relate to such diverse subject matter as labor and other human rights, democracy, environmental protection, the rule of law, and diplomatic or security relations.

Developed countries are increasingly prone to condition market access on what may be broadly called the social issues. These include environmental issues (especially with respect to primary products) and labor issues (especially with respect to manufactured products). Whether it is a question of the environmental damage caused by mining or the human rights abuses associated with some sectors in some countries, traditional industries are required to meet such international standards as the Minamata Convention and the Kimberley Process. Compliance with standards may place limits on production, as is the case for the fishing and timber industries, or otherwise affect the costs associated with production. As for labor issues, these go beyond formal issues such as adherence to International Labour Organization conventions include the treatment extended to labor unions. Such considerations have lately played an important role in domestic debates over the approval of FTAs with some developing countries.

A negotiator who knows that a partner greatly values the commitments that might be made on these non-commercial topics should leverage that fact. Here we might imagine something like the two-issue illustration we reviewed earlier in Chapter 2, where Figure 2.2 summarized the ZOPA in an integrative negotiation that involved two economic issues. Imagine now a more wide-ranging negotiation in which we label one of those dimensions "economic issues," and call the other "non-economic issues." The resulting ZOPA may indeed be larger here than if the negotiation centered solely on traditional, commercial topics, and a good negotiator may be able to extract much more significant commercial concessions from a partner by trading them off against other topics that the partner favors. This should of course be done only after conducting a thorough national consultation in which the implications of all proposed commitments on all topics are fully considered. When contemplating a commitment on environmental protection, for example, a country should examine this topic from all angles (commercial, environmental, budgetary, social, etc.). It does not necessarily follow that it is in the country's net interest to accede to any given demand that is made by a negotiating partner, nor that it should routinely subordinate its interests in other areas to its commercial needs. When such trade-offs can be made, however, a good negotiator will ensure that they are adequately compensated by wider or deeper commitments from the negotiating partner.

Even if these issues do not formally arise in the negotiation of an agreement itself, they can play a key role in the subsequent debates over approval of the agreement in the developed

country. That has most clearly been the case in the United States, where partisan conflicts over trade policy usually have much more to do with trade-*related* issues than with trade itself. Some of the FTAs submitted to Congress for its approval in recent decades came close to being rejected, sometimes taking years to win that congressional approval, despite the fact that most of them involved comparatively small shares of U.S. trade. What instead accounted for the lengthy maneuvers over these agreements, and the wide divisions between the two U.S. political parties, concerned the records of the FTA partners with respect to such issues as labor rights and environmental protection. Nor is this a uniquely American concern, as one may see a similar shift in the political profile of trade-related issues in European trade politics.

These are all points that negotiators from developing countries would be well-advised to consider when planning and carrying out their tactics to negotiate North-South FTAs with partners such as the European Union and the United States. There is every possibility that their counterparts will place greater emphasis on these issues in the negotiations, and the same may be doubly true when the time comes for approval of the final results in their respective capitols. This is not to say that negotiators from developing countries must feel constrained to approve whatever proposals their counterparts may make on these issues, but they should pay especially strong attention to these topics when they do their preparatory work and in their negotiations.

Appendix A:
Glossary of Key Terms in the Theory and Practice of Negotiations

***Ad Valorem* Equivalent (AVE)**: Expression of a specific tariff in the equivalent *ad valorem* rate. For example, if the tariff is $1 each and the average price is $10 the AVE is 10%.

***Ad Valorem* Tariff**: A tariff assessed as a percentage of the value of the imported goods.

Agricultural Products: Goods subject to the rules of the Agreement on Agriculture, defined as all items in HS chapters 1-24, minus fish and fish products, plus certain additional items.

Anchoring: The initial request or offer by which a negotiator begins the process of bargaining. As a general rule, a seller who anchors high (or a buyer who anchors low) tends to do better.

Applied Rate: The tariff rate that a country actually applies to imports.

Back Loading: Most or all of the liberalization comes at the end of an implementation period.

Bargaining Chip: Any item that the negotiator expects to use as a medium of exchange for some other desired thing or outcome; something that a negotiator is willing to give up.

Bargaining Tariff: A tariff that a country has raised specifically for the purpose of negotiating for its reduction in exchange for other countries' accessions.

Best Alternative to a Negotiated Agreement (BATNA): The negotiator's back-up plan in the event that the Least Acceptable Agreement cannot be reached. Also called Plan B.

Binding: A legally enforceable obligation; often used interchangeably with "bound rate."

Bluffing: A tactic in which a negotiator pretends to be prepared to do or agree to something that they have no intention of doing.

Bound Rate: The rate that a country has bound itself to in a trade negotiation or agreement.

Bounded Rationality: The error by which a negotiator might mistakenly believe that one's partner perceives all issues in the same way as the negotiator.

Brackets: A section of an agreement that is still being developed. One or more bracketed versions of that text will indicate the proposals put forward by parties to the negotiation.

Brinkmanship: A negotiating style based on threats of a walk-out or other precipitous action.

Chairman's Text: Also referred to as a chairman's mark or a chairman's draft, this is a text proposed by the chairman of a negotiating group or working party.

Code Reciprocity: Prior to the single undertaking, a country did not have to sign all of the agreements (or codes) reached under the auspices of GATT.

Coefficient: A variable that is "plugged into" an equation in a formula. In tariff negotiations, the coefficient is a negotiated value that determines the level of ambition for reductions.

Common External Tariff (CET): Member countries in a customs union or common market have the same tariff rate for imports from third countries.

Common Market: Members of a common market remove border restrictions on trade in goods among the members and eliminate barriers to the movement of factors of production.

Compound Tariff: A tariff that incorporates both a specific and an *ad valorem* component.

Concession: The somewhat unfortunate term by which the binding obligations in a trade agreement are known. The less pejorative term "commitment" is generally preferred today.

Consensus: Most WTO decisions are made by consensus, meaning formal votes generally are not taken. Consensus does not require that all express support, but rather that none object.

Country of Origin: The nationality of a product, as determined by rules of origin.

Creating Value/Claiming Value: In an integrative negotiation, parties create value by finding win-win solutions — but then each side will seek to claim the greatest share of that value.

Customs Union: A regional trade arrangement in which the members go beyond the elimination of barriers on internal trade to create a common external tariff.

Demandeur: The principal advocate either for a new negotiation or (more often) for adding some new issue to the negotiating table. This role is usually played by the largest members.

Distributive Negotiation: A form of negotiation conducted along a single dimension, most typically price. These are usually win-lose cases in which the seller's gain is the buyer's loss.

Formula Cuts: Tariffs are reduced according to a mathematical formula.

Free Trade Area (or Agreement): The shallowest form of regional trade arrangement. Two or more countries agree to remove border restrictions on goods (and usually services as well).

Friends Group: An informal group of WTO diplomats whose countries have shared interests in a given issue or sectoral area. These groups are ad hoc, temporary, and unofficial.

Good Cop/Bad Cop: A bargaining style in which a negotiator tells the other party that it can go only as far as a real or imagined authority figure will allow it to go.

Green Room: An informal term used to describe the closed-door meetings held by the most influential GATT contracting parties; this approach is less often employed in the WTO era.

Harmonized System (HS): Standardized system of nomenclature for tariff schedules.

Horizontal Commitments: Under GATS, a commitment that applies to trade in multiple service sectors. Horizontal commitments are typically limitations on market access or national treatment.

Horizontal Reduction: Tariffs are cut across-the-board by a percentage. Also called linear.

Implementation Period: The timing of entry into force of an agreement's provisions.

Integrative Negotiation: In contrast to the win-lose distributive negotiation, this type typically entails two or more issues to be negotiated and may more readily result in win-win outcomes.

Launch: The formal initiation of a new round of negotiations. This is generally done by issuing a ministerial declaration that defines the scope, timetable, and institutional arrangements.

Least Acceptable Agreement: Also called the "walk-away," this is the lowest value that a party is prepared to accept. See also Reservation Price.

Low Ball (or High Ball): A tactic by which a negotiator's offer is on its face unreasonably low or high, hoping the other side will accept an outcome that an informed negotiator would not.

Margin of Preference: The benefit extended by preferences as measured by the difference between the MFN rate and the preferential rate.

Ministerial Declaration: The communiqué issued at a ministerial meeting.

Ministerial: A meeting held at the level of ministers.

Modalities: The basic framework by which some aspect of a negotiation will be conducted. For example, a modality might specify the formula by which bound tariffs are to be cut.

Mode 1, Cross-Border Supply: The supply of a service "from the territory of one Member into the territory of any other Member." The service crosses the border, but both the provider and the consumer stay home. This mode is comparable to the export of a good.

Mode 2, Consumption Abroad: The supply of a service "in the territory of one Member to the service consumer of any other Member." The consumer physically travels to another country to obtain the service.

Mode 3, Commercial Presence: The supply of a service "by a service supplier of one Member, through commercial presence in the territory of any other Member" (i.e., investment through the establishment of a branch, agency, or wholly-owned subsidiary).

Mode 4, Presence of Natural Persons: The supply of a service "by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member." Private persons temporarily enter another country to provide services.

Most Favored Nation (MFN): The rule of non-discriminatory treatment between trading partners. In tariff treatment, it is the non-preferential rate.

Negative Bargaining Zones: A situation in which there is no actual ZOPA. No deal is possible because the seller's minimum demands are greater than the buyer's maximum.

Negative List: One approach to the identification of measures that are subject to the terms of an agreement is a negative list. All items are affected except those that are explicitly listed.

Nomenclature: The division and classification of products in a tariff schedule; all WTO members adhere to the Harmonized System.

None: In devising its GATS commitments, a country may use the term "none" to indicate that for certain sectors under one or more mode of delivery it makes no limits on its binding commitments.

Non-Resident Members: WTO members without permanent missions in Geneva.

Open Regionalism: Regional trade arrangements are viewed as instruments of regional and multilateral liberalization, rather than as tools of discrimination against third parties.

Partial Scope Agreement: A South-South FTA that might not meet the legal requirements for North-North or North-South FTAs (i.e., eliminating tariffs on substantially all products).

Plurilateral Trade Agreements: The few WTO agreements that fall outside of the scope of the single undertaking. Only those on civil aircraft and government procurement remain in effect.

Positive List: One approach to the identification of measures that are subject to the terms of an agreement is a positive list. Only those items that are explicitly on the list are affected.

Preference Erosion: The process by which the preferential access that one country enjoys in another's market is eroded through multilateral liberalization.

Regional Trade Arrangement (RTA): Preferential arrangements that provide (at a minimum) for free trade among the members in substantially all trade.

Request-Offer: Request-offer is the oldest modality in the conduct of tariff negotiations. It entails the exchange of commitments on a product-by-product basis.

Reservation Price: Also known as the "walk-away" point, the least favorable point at which a negotiator will accept an agreement. See also Least Acceptable Agreement.

Rules of Origin: The criteria used to determine the nationality of a product, whether merely for statistical attribution or in the extension of preferential treatment.

Second-Best: Critics of RTAs generally describe them as "second best" alternatives to non-preferential liberalization, insofar as these agreements impose costs on third countries.

Sectoral Negotiations: Negotiations that are conducted at the level of specific economic sectors. These are sometimes done on a zero-for-zero basis.

Single Undertaking: A comprehensive negotiation that produces a single "package deal" or agreement on multiple issues.

Specific Tariff: A tariff that is denominated in specific numbers or quantities (e.g., $1 per liter).

Splitting the Difference: A form of negotiation in which the two sides seek to compromise between their respective positions.

Stalling: The action by which a negotiator avoids reaching agreement by claiming that more time is needed. This is often done solely for purposes of gaining leverage.

Stonewalling: The action by which a negotiator indicates an unwillingness to consider new or proposed solutions.

Substantially All Trade: In order to be consistent with the requirements of GATT Article XXIV, an RTA must cover "substantially all" of the trade. The exact meaning is unfortunately vague.

Tariff Escalation: Rates increase as one moves up from raw materials through finished goods.

Tariff Inversion: The opposite of tariff escalation (i.e., tariffs fall with the level of processing).

Tariff Peak: Extraordinarily high tariff rates applied to protected products. There is no universally accepted standard regarding what constitutes a peak rate.

Tariff-Rate Quota (TRQ): A quantitative restriction providing for a higher rate on imported goods after a specified amount of the item has entered the country at a lower rate.

Tiered Formula: A formula approach to tariff negotiations in which different formulas, or different coefficients in a formula, are applied to different types of products or countries.

Trade Creation: The positive effect that a regional trade arrangement can have on trade among its members with the replacement of a high-cost source by a lower-cost source.

Trade Diversion: The negative effect that a regional trade arrangement can have on trade between members of the RTA and third countries.

Unbound: In a GATS schedule, a country may indicate that certain sectors are "unbound" under one or more mode of delivery. This means that the country makes no commitments.

Variable Geometry: The term used to describe differentiated integration (i.e., some members go farther than others), especially within the European Union.

Walking Out: The action by which one party abruptly leaves the negotiating table and threatens never to return; the walk-out might be either real or theatrical.

Water: The difference between an applied tariff rate and a bound tariff rate. For example, if the bound rate is 5% and the applied rate is 3% there are two points of water in the tariff.

WTO-Plus: WTO-Plus commitments are those that go beyond those required in the WTO.

Zero-for-Zero: Sectoral tariff agreements resulting in the complete elimination of tariffs.

Zone of Possible Agreement (ZOPA): The outcomes in which a potential agreement would benefit all parties more than their alternative options. Also known as the bargaining range.

Appendix B:

General Instructions for the Simulated Negotiation

Introduction

The material that follows are the general instructions for the simulated negotiation that forms an integral part of this course on negotiating tactics. That simulation is to be conducted over the entirety of the course, and will be closely interwoven with the lectures and other classroom exercises. It is designed to give participants an opportunity to test out their skills in planning and executing their tactics for a trade negotiation, and will be complemented by detailed and helpful critiques of their performance by the instructor.

Note that in addition to these general instructions, each of the four teams in this exercise will receive confidential instructions. Those instructions will specify more precisely what objectives they will pursue in these talks, as well as the number of points (positive and negative) they will receive for specific outcomes.

A Note on Class Size

These instructions assume that there are at least 25 participants in the course, such that each of the four country teams has five members. That number allows each of them to assign one person each to the five negotiating committees, plus assigning one of the team members to chair one of the committees. In the event that there are between than 26 and 49 participants, additional persons should be assigned (as evenly as possible) to each country team; in the event that there are 50 or more participants, it will be possible to run two simultaneous versions of the simulation.

Further adjustments are necessary in the event that the number of participants is smaller. It is relatively easy to accommodate a class size of 20-24 persons by consolidating the work of the first two committees. Instead of having a Steering Committee dealing with Section A of the draft declaration, and a Rules Committee dealing with Section B, the Steering Committee would thus take on both tasks. It would also be possible, though suboptimal, to make further consolidations in the event that a class were smaller still. If there were 16-19 participants, for example, the work of the two committees dealing with market-access in goods (sections D and E of the draft) could likewise be combined into one. Such a consolidation is far preferable to dropping a draft section altogether because doing so maintains the integrity of the available points. All teams start out with an approximately equal number of available points for the simulation as a whole, but these are not evenly distributed across committees and there would no longer be a “level playing field” if one or more of these draft sections were taken off the table.

Preparing the Ground for the Agreement:

Instructions for All Delegations Participating in the Sherpa Meeting of January, 2023

Introduction

You are about to participate in a preparatory meeting among four partners — India, Kenya, the United Kingdom, and the United States — who seek to establish a regional trade arrangement by a title that is yet to be determined. The plan is to launch the negotiations at a future ministerial meeting. Several working-level meetings have already been held to develop the texts of the ministerial declaration that will set the goals and establish the schedule for the negotiations. These drafts still contain many issues that must be decided either by you and your deputy-level colleagues or, failing that, by the ministers.

This is the last such Sherpa meeting to be held in advance of the ministerial. Our task is to ease the way for that meeting by reaching as many decisions as we can regarding the objectives and conduct of the four-party negotiation. The draft ministerial declaration, as reproduced below, consists of an introductory section and four subsidiary parts. Those parts correspond to the main committees in which we will be meeting.

It should be noted that this proposed ministerial declaration is somewhat more detailed than is often the case in such documents, as there are several points where it goes more deeply into modalities than is typically done. That is an artefact of the negotiations conducted thus far, which began as a purely bilateral undertaking between the United Kingdom and the United States. Those negotiations, which were announced in 2018 but could not begin in earnest until the United Kingdom completed its Brexit from the European Union, later stalled over several topics. The Anglo-American trade ministers nevertheless hoped to transfer some of their handiwork from the earlier bilateral negotiations to this new undertaking, and in the preparatory meetings that led to our present juncture their Indian and Kenyan counterparts have offered language of their own on nearly all issues on the table. There are now a great many brackets left in the text, and while all participants hope to resolve as many of these as possible in our coming meetings they recognize that there may still be considerable work left for our ministers.

Each delegation has a mixture of offensive and defensive interests, as laid out in the confidential instructions that you will be receiving shortly. Your principal objectives in this exercise are (1) to clear away as many obstacles as possible to a “clean” document for the ministers while also (2) winning as many points as you can for your team by ensuring that this language reflects your interests. You will do so initially in the committees that deal with specific parts of the declaration, and that hold their first formal meetings. Decisions made in these committees are subject to later ratification, modification, or bargaining in the plenary conference. Between those meetings you will consult within your national delegations and negotiate with other delegations so as to resolve the outstanding differences. See Table 1 for more detail on the schedule for this exercise.

Table 1: Timetable for the Sherpa Meeting Exercise

Date	Event	Content or Purpose
Prior to exercise	Distribution of instructions and assignments	Participants are encouraged to familiarize themselves with the overall exercise, and to establish contact with their team members.
Day 1	Session on conduct of negotiations	After reviewing how trade negotiations are done in the real world, the exercise's purpose and conduct will be presented.
Day 1 (afternoon)	Distribution of confidential instructions	Teams will receive their confidential instructions. They should arrange to meet after class in order to make role assignments and begin preparations for their written proposals.
Day 2	Preparation of strategy and formal proposal	Teams should review their options, devise a strategy, and prepare the written submissions. Informal and preliminary consultations with other teams are also possible. Each team will announce a list of role assignments identifying the names and contact details for their members.
Day 3	First meeting of committees	Each of the five committees will hold formal sessions, with time allotted first for summation of team proposals (maximum 10 minutes each) followed by discussion or preliminary bargaining.
Day 4	Conduct of negotiations	Teams will meet at times to be agreed to share information and form strategy, and negotiations between teams will take place in any configuration they wish (bilateral, all-party, etc.), as often as necessary, and on any issue or package of issues, whether through email, Zoom, or other means. During this same period committee chairmen will seek to build consensus.
Day 5	Final plenary session	All participants will join in a plenary session for final review of offers and deal-making, aiming to remove as many brackets as possible from the draft ministerial text.
Day 5	Results, awards, and lessons learned	The instructor will reveal the number of points won by each team, present awards on that and other bases, and offer constructive criticism of participants' performance. Participants will discuss the lessons learned from the exercise.

Countries, Committees, and Roles

Each participant in this exercise will have two assignments. The first concerns the country team to which each person is assigned by the proctors. The second is the assigned role of each member in a team, which is to be determined by consultations within that team.

As summarized in Table 2, these negotiations will be conducted in five committees. These consist of a Steering Committee as well as four subsidiary committees that each deal with a range of subject matter. Each of these committees corresponds to a section of the draft ministerial declaration. Each team is to assign its members to various roles. In addition to the head of delegation, the selection of which should be the first order of business when the teams hold their first organizational meeting, these include three different types of committee assignments. Each team must assign one of its members to chair a committee, as

Table 2: Negotiating Committees in the Sherpa Meeting

Committee	Section of Draft	Chair
Steering Committee	A	Rotating by alphabetical order, starting with India*
Rules	B	United States
Trade in Services, Investment, and Intellectual Property	C	Kenya
Non-Agricultural Market Access, Government Procurement, and Related Topics	D	India
Agriculture and Related Topics	E	United Kingdom

** : The first meeting of this committee will be chaired by India, the second by Kenya, the third by the United Kingdom, and the fourth by the United States. That sequence will repeat if the committee holds more than four meetings. Chairmanship of the plenary session will be determined by this same order (i.e., whoever would hold the next chairmanship in the Steering Committee).*

discussed at greater length below. If staffing levels permit it, you might assign more than one person to any committee; this could allow (for example) having one person speak for you while another conducts research, engages with other countries, or communicates with the rest of the delegation. Teams may also wish (if their numbers permit) to assign supervisors as "mid-level management" between the committee representatives and the heads of delegation, giving such persons the task of coordinating the national position on more than one committee.

The Texts and the Brackets

You will find attached the draft texts to be considered by the committees, in the form of a five-part draft ministerial declaration. As is standard practice, all language in the draft that remains under debate has been placed in square brackets that also signals the sponsorship by placing a Party's name within the brackets (e.g., "[India: text]"). While the unbracketed text is thought to be non-controversial, all language in these drafts is potentially open to amendment. Delegations may propose changes that take any of the following forms:

- The removal of brackets, thus indicating the adoption of the proposed language;
- The insertion of substitute language for any text (whether or not it is currently bracketed);
- The insertion of entirely new language, including on topics not yet covered in the draft; or
- The deletion of existing text (bracketed or not).

Any items that are still in brackets at the end of this meeting, or are neither definitely approved nor withdrawn, must await resolution at the ministerial conference. If important areas remain unsettled in the ministerial conference, the ministers may decide to substitute language that is less specific. It is also understood that non-substantive matters of style,

grammar, and consistency might be corrected in the weeks between this Sherpa meeting and the ministerial. For example, if the Parties reach agreement on the title of the proposed arrangement the references to "the Agreement" will be changed thoughout the text for the sake of consistency. Similarly, the topics that are listed in the opening paragraphs of Section A will, if necessary, be expanded or contracted so as to reflect accurately the content of the other sections (e.g., if the Parties decide in the Committee on Rules to drop proposed negotiations on Issue A but forget to reflect that fact in the corresponding language of Section A the "scrub" will correct this oversight). Any differences between British and American spellings (e.g., favour vs. favor, liberalise vs. liberalize) will likewise be reconciled at that stage; in light of the fact that three of the four Parties use the British style, that spelling will prevail in official texts.

Decision-Making and the Pursuit of Consensus

All decisions made in committees (other than parliamentary rulings by the chairman) will be made under a rule of consensus. In the narrowest sense, that consensus is most often discovered when one team calls the question on some proposal and the chair asks whether there are any objections; if no team objects, the chair may acknowledge this consensus and (if appropriate) make any corresponding changes in the text. More broadly, the chair and other members of the committee may need to engage in substantial probing and bargaining in order to devise formulas that are acceptable to all (or at least not rejected by any). Finding this consensus may require frequent consultations with one's head of delegation and team members on other committees, and could entail bargains that stretch across committee lines.

Any language adopted in any committee will be subject to further consideration in the plenary session. That session will start from the assumption that all language approved in committee is taken as approved by the plenary, unless objections are raised. If objections are raised to any language, modifications to any committee's text may be considered under a rule of consensus.

Note that whenever consensus is granted on any aspect of a negotiation, it can be withdrawn only by reaching a new consensus. No single party or group of parties may undo an established consensus on their own at the committee level (although issues may later be revisited in the plenary session). If a committee definitively agrees to include a certain paragraph in its declaration, for example, that language will remain approved unless all parties later agree to withdraw, alter, or replace it. Committees and their chairmen should thus be careful to distinguish between proposals that remain under discussion (for which consensus is still being sought), agreements that might be made on a provisional basis (for which all parties have indicated that consensus may be possible but need either to consult with their team members or see how the proposal fits into a final package), and agreements that are made on a definitive basis (for which consensus has definitively been established).

The Tasks of the Chair

Those who are designated to chair a committee have three responsibilities. The simplest of these is to ensure an orderly and fair discussion in the committee by recognizing speakers.

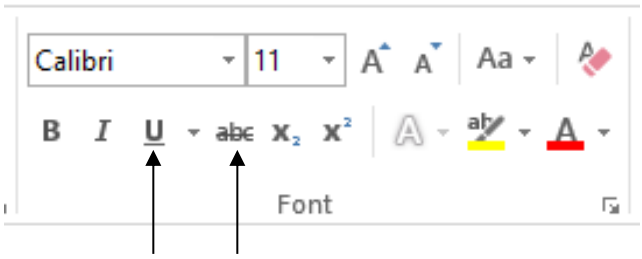
A second responsibility of the chair, which might be shared with anyone who volunteers to act as the recording secretary for the committee, is to maintain the official version of the committee's draft document. This should be done by (1) adding new and bracketed text (and

indicating its sponsorship) whenever one or more delegations propose it, (2) removing brackets and using underline to indicate any text that has been adopted by consensus, and (3) using ~~strikethrough~~ to indicate any text (whether from the original document or proposed in the course of negotiations) that has been deleted, defeated, or withdrawn. The chairman should send emails to all members of the committee, as well as the instructor, at the end of each working session. Those emails should either state that no changes were made from the previous version or — if there were changes — attach a copy of the revised working document.

Chairs should ensure that their committees do not adopt contradictory texts. This sometimes means ensuring that only one set of brackets in a given sentence or paragraph is removed, and sometimes means ensuring that a choice be made between competing paragraphs.

Whenever a wholly new paragraph is introduced, it should be numbered with the addition of a lower-case *a* to indicate what it follows (e.g., **{C1*a*}** would be new language that follows **{C1}**).

For those who may be unfamiliar with special formatting of text in Word, see the arrows below that show where to find the underlining and strikethrough options on the "home" page. Simply select the text you wish to highlight and click on either of these buttons (or click on the button and then type new text). Underlining can also be done by using the two-key CTRL-U command.



The chair's third and most difficult responsibility is to build consensus. Participants should operate here on the principle used in the WTO, where chairs are expected to act on behalf of the community as a whole. This means that the chair does not speak for his or her country; that is instead done either by another member of the same team, or upon the temporary passing of the chairmanship to a committee member from another country. The chair should instead assist all members of the committee in their efforts to strike mutually beneficial deals. That typically requires that the chair listen attentively to the concerns of all members, try to find possible zones of agreement, and suggest at times that some pair of countries meet privately to work out a specific point of friction. The chair might also try to break an impasse by devising a "chairman's text" and submitting it to the committee either for agreement or as a basis for discussion. Such a text might deal only with a single issue (usually as a compromise between two or more positions), or tie several together (thus proposing one or more trade-offs), or may even offer a comprehensive draft of the full language under debate in the committee.

How to Score Points

You will be scored in this exercise on how well you devise and pursue your strategy. Each item identified in your confidential instructions carries with it a specific number of points, and these are expressed either in positive numbers (meaning that you will win points by securing approval for bracketed or new language) or negative numbers (meaning that you will lose points if language is adopted that undermines your interests).

Note that the points associated with each item may be won or lost in the following ways:

- Most of the items in your confidential instructions concern specific text that is already on the table, but you will also be given some new language to propose. You will win all of the available points for a given issue if you secure approval for the precise language that is proposed.
- You may win a lesser number of points for securing the adoption of a revised or compromise version of this language. We will base any deductions on an assessment of the extent to which the revised language accomplishes the underlying objective, such that (for example) if you make an even-handed compromise with another delegation each team will get half of the points that were available to that team.[15]
- Any points that you win through any of these routes may nevertheless be reduced if any other language is approved in the draft that contradicts this accomplishment.

The same general instructions apply to matters on which a team's potential points are negative rather than positive. For example, if one team had four positive points at stake and another team had four negative points at stake they would receive two positive or negative points, respectively, if they were to strike an even-handed compromise.

Note as well that points will be awarded irrespective of who takes the active role in a negotiation. For example, imagine that Team A had five points at stake in securing a specific outcome, and Team B had ten points at stake in securing that same outcome; further imagine that this outcome is indeed achieved. Team B would receive its full ten points even if Team A did all the work to make it happen.

As a general rule, no points are at stake for a team on any issue that is not explicitly covered in its confidential instructions. If two or more of the other teams dispute some issue not discussed in your instructions, and neither of their positions conflict with any of your other objectives, you may consider yourself free to abstain from that part of the negotiation. In all such instances, however, teams would do well to consider how they might offer support to one of these negotiating partners in exchange for their support on some matter of interest.

[15] Note that this does *not* mean that each team will get half of the total points that are at stake. If a pair of teams reach an even compromise between their two positions, and one of them had ten points at stake and the other had just four, they will receive five and two points, respectively, rather than seven points each. The same general principles will apply, albeit with slightly more complicated math, if the results are lop-sided (e.g., the instructor might estimate that one team got 70% of what it wanted and the other team got just 30%).

How to Reach Deals

You should be aware throughout the exercise that there is little now on the table that is likely to produce a win-win-win-win for all four countries. You may assume that on most matters under consideration, in order for any party or set of parties to gain positive points on any issue, at least one other party — and sometimes two or even three — will likely need to accept some negative points. There are nonetheless several ways that the parties to this negotiation may strike deals in which all parties ultimately come out ahead:

- The simplest way to make a deal is to seek compromises within the language of a specific matter. It may sometimes be possible that the wording in a given paragraph, or the paragraphs within a given heading, can be worked out in a way that at least partly satisfies all the parties to the negotiation. Note however that at this stage of the negotiations, when most of the less controversial matters will have been resolved, there may not be much "low-hanging fruit" left for easy resolution.
- You should probe to distinguish those areas in which the opposition expressed by one or more countries is actually less severe than it might initially sound, especially if the offensive interests of the *demandeur* outweigh the defensive interests of the opponent. Knowing how much is at stake for more than one country on more than one issue is an important first step toward finding useful trade-offs across issues.
- Beyond working with your partners to find deals that reach across more than one item under consideration in your committee, it may further be advantageous to engage in such horse-trading across committees. For example, if one or more parties to the overall negotiation are willing to accept a net negative number of points for the issues under consideration in some committee(s) they may be more than compensated by the results in the remaining committees.

Or to reduce the advice to a single expression: The ultimate objective is to strike a deal that is a net positive for every member and the group as a whole, but that collective goal can be secured only if everyone is prepared to bear some share of the burden. As long as countries are willing to lower their expectations for gains in some areas, and to accept some losses in others, it should be possible to put together a package in which (1) all teams have net positive results and (2) they significantly reduce the number of issues that the ministers need to handle.

Remember as well that you are under no obligation to resolve everything. It is expected that some issues — perhaps many or even most of them — will ultimately be left for people who are above your pay-grade. If that does happen, we will simply be reproducing what occurs so often in the real world.

Commit to the Role — And Never Show Your Instructions or Mention Your Points

It is important that you approach the task as if it were taking place in the real world. That means never seeking a short-cut by breaking down the "fourth wall" and explicitly acknowledging that this is a game. Above all else, at no time should you show or otherwise reveal your confidential instructions to any member of any other delegation, nor should you ever refer directly to the number of points that are at stake.

In place of quantifying the actual points, you are encouraged instead to use euphemisms by which you can signal to your counterparts just how strong your interests are in each area.

“That is a vital interest to us” is much better than saying that you stand to win or lose some large and precise number of points on a given issue, for example, while saying something like “This is a matter on which we are prepared to show some flexibility” is an appropriate way to signal that you can afford to give way on some matter for which your stakes are lower. There are many other roundabout ways of expressing oneself: In place of saying “We have ten points at stake on Issue A but only three points at stake on Issue B,” for example, you can simply say “Issue A is significantly more important to us than Issue B.” Such expressions should typically be made with an intent to strike a deal, such as by saying “It may be difficult for us to do what you suggest about B, but we could probably manage it if you do what we propose on A,” or some other formulation than conveys the message without spoiling the game.

A. INTRODUCTION TO THE DRAFT MINISTERIAL DECLARATION

Preamble

{A1} We, the trade and foreign ministers of India, Kenya, the United Kingdom, and the United States of America, assembled in London in February, 2023 to pursue the shared interests of Developed Parties and Developing Parties[16] in promoting the further integration of our economies. We resolve to begin immediately to construct the [India: Association of Like-Minded States] [Kenya: North-South Trade Scheme] [United Kingdom: New Trade Partnership] [United States: USUKIK Alliance],[17] a regional trade agreement in which barriers to trade and investment among the Parties will be progressively eliminated.

Rules

{A2} As elaborated upon in Section B of this Declaration, we will negotiate rules concerning dispute settlement, exceptions, safeguards and trade remedies, technical barriers to trade [Kenya, United Kingdom, and United States: and mutual recognition of standards], transparency and anti-corruption, labor rights, the environment, [and] state-owned and state-trading enterprises [India and United States: , and currency and exchange rates]. [18]

Trade in Services, Investment, and Intellectual Property

{A3} As elaborated upon in Section C of this Declaration, we will negotiate commitments on trade in services, investment, and intellectual property. Among the more specific objectives of this negotiation are commitments on financial services, temporary entry [India and Kenya: for service providers] [United Kingdom and United States: for business persons], telecommunications, and electronic commerce.

Non-Agricultural Market Access, Government Procurement, and Related Topics

{A4} As elaborated upon in Section D of this Declaration, we will negotiate commitments on non-agricultural market access, government procurement, and related topics. Among the more specific topics in this negotiation are product coverage [and exceptions], base periods and base rates, rules of origin, [other duties and charges,] [and] customs administration and trade facilitation, [United Kingdom and United States: pre-shipment inspection], [India and Kenya: restrictions to safeguard the balance of payments,] as well as issues in such sectors as textiles and apparel [and iron and steel].

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[16] Any references in the text to the Developing Partners mean India and Kenya; any references to the Developed Partners mean the United Kingdom and the United States.

[17] Note that because the title of this arrangement is still subject to negotiation, all references in the texts that follow are currently styled as "The Agreement." All references will be updated if and when the Parties agree on a title.

[18] Note that while some of the language in paragraphs {A2} through {A5} is bracketed, the substantive issues to which they speak are to be decided primarily in other sections and by other committees. These paragraphs may be adjusted either by the Steering Committee or the plenary session so as to conform to decisions that are reflected elsewhere in the draft document, but that can alternatively be left for the "scrub" that will be made to this document between the Sherpa meeting and the ministerial conference.

Agriculture and Related Topics

{A5} As elaborated upon in Section E of this Declaration, we will negotiate commitments on agriculture and related topics. Among the more specific topics of this negotiation are market access, food security, subsidies and other support, sanitary and phytosanitary measures, and taxes and other restrictions on agricultural products and raw materials.

Development, Capacity Building, and Equity

{A6} The Parties seek to ensure that the Agreement will be a high-standard model for trade and economic integration, and in particular to ensure that all Parties can obtain the complete benefits of the Agreement, are fully able to implement their commitments, and emerge as more prosperous societies with strong markets. [India: The Parties will treat variable geometry as a cornerstone principle to be enshrined in the Agreement.]

{A7} The Parties will identify and review areas for potential cooperative and capacity building efforts, on a mutually agreed basis [United States: and subject to the availability of resources]. [Kenya: The Agreement will provide for specific levels of financial commitments on the part of Developed Parties to support these activities in the Developing Parties.]

{A8} [Kenya: We will negotiate disciplines providing that the Parties may waive an obligation imposed on a Party to this Agreement, upon request by a Party. Such decisions shall preferably be taken by consensus, but (failing that) may alternatively be made by three-fourths of the Parties.]

{A9} [India and Kenya: Parties shall provide flexibilities for Parties at different levels of economic development. These flexibilities shall include, among others, special consideration and an additional transition period in the implementation of this Agreement, on a case-by-case basis.]

[United States: **Non-Market Economies**]

{A10} [United States: Parties will negotiate a provision establishing that if an incumbent Party were to enter into a free trade agreement with a non-market country the other Parties may terminate this Agreement with respect to that incumbent Party on six months' notice and replace this Agreement with an agreement as between some or all of the remaining members.]

Schedule of Negotiations

{A11} [Kenya: These negotiations will be conducted in two phases. In the first phase the Agreement shall cover the issues in sections D and E of this Declaration. The Parties aim to conclude these negotiations no later than 1 January 2024, with the resulting agreement coming into force no later than 1 January 2025. In the second phase the Agreement shall cover the remaining topics in sections B and C. The Parties aim to conclude these negotiations no later than 1 January 2026, with the resulting agreement coming into force no later than 1 January 2027.]

{A12} [United Kingdom: The Parties aim to conclude all aspects of these negotiations no later than 31 July 2024, with the resulting agreement coming into force no later than 1 January 2025.]

{A13} [United States: The Parties aim to conclude all aspects of these negotiations no later than 1 January 2025, with the resulting agreement coming into force no later than 1 January 2026.]

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B. DRAFT DECLARATION OF THE COMMITTEE ON RULES

Dispute Settlement

{B1} The Agreement's Dispute Settlement chapter will establish the principle that Parties ought to make every attempt to resolve disputes through cooperation and consultation and encourage the use of alternative dispute resolution mechanisms when appropriate. When this is not possible, the Parties will aim to have these disputes resolved through impartial, unbiased panels. The dispute-settlement mechanism created in this chapter will apply across the Agreement [India and Kenya: with a few specific exceptions].

{B2} [United Kingdom: Panels will consider the written views provided by non-governmental entities located in the territory of any disputing Party during dispute-settlement proceedings.] [United States: Panels will consider requests from non-governmental entities located in the territory of any disputing Party to provide written views regarding the dispute to panels during dispute-settlement proceedings.]

{B3} The Dispute Settlement chapter will allow [India: only as a last resort] for the use of trade retaliation (e.g., suspension of benefits), if a Party that is found not to have complied with its obligations fails to bring itself into compliance with its obligations. [Kenya: Before use of trade retaliation, a Party found in violation can negotiate or arbitrate a reasonable period of time in which to remedy the breach.]

Exceptions

{B4} The Exceptions Chapter will incorporate the general exceptions provided for in Article XX of the General Agreement on Tariffs and Trade 1994, generally specifying that nothing in the Agreement shall be construed to prevent the adoption or enforcement by a Party of measures necessary to, among other things, protect public morals, protect human, animal or plant life or health, protect intellectual property, enforce measures relating to products of prison labor, and measures relating to conservation of exhaustible natural resources.

{B5} [United Kingdom: The Parties will explore the possibility of expanding upon those aspects of GATT Article XX that are related to the environment and to human, animal, and plant health, with the aim of providing greater space among the Parties to adopt and enforce policies in support of human welfare, climate change, and other environmental issues.]

{B6} [India: Any measures that a Party takes on the grounds that the measure is necessary for the protection of its essential security interests will be fully subject to review by panels.] [United Kingdom: On terms to be negotiated, panels may consider certain types of measures that a Party has taken for the protection of its essential security interests so as to determine whether these actions relate to *bona fide* concerns of national security and are not merely disguised forms of protection.] [United States: A Party may take any measure it considers necessary for the protection of its essential security interests.]

Safeguards and Trade Remedies

{B7} The Trade Remedies chapter will promote transparency and due process in trade-remedy proceedings through recognition of best practices, but will not affect the Parties' rights and obligations under the WTO. We will negotiate a mechanism to allow a Party to apply transitional safeguard measures during a certain period of time if import increases as a result of the tariff cuts implemented under the Agreement cause serious injury to a domestic industry. [United Kingdom: These measures must be progressively liberalized if they last longer than a year.]

{B8} [India and the United States: The Agreement will not prevent Parties from applying any anti-dumping measures that are consistent with the relevant WTO Agreements.]

{B9} [India: The Agreement will include disciplines by which Parties will not employ countervailing duty laws against imports from other Parties. These provisions will be coupled with disciplines providing that nothing in the Agreement shall be construed to prevent Parties from using subsidies in relation to their development programmes. Any Party that considers that it is adversely affected by a subsidy of another Party may nevertheless request consultations with that Party on such matters, and such requests shall be accorded sympathetic consideration.]

Labor Rights

{B10} The Parties recognize the importance of promoting internationally recognized labor rights. Parties will agree to adopt and maintain in their laws and practices the fundamental labor rights as recognized in the International Labor Organization 1998 Declaration, namely freedom of association and the right to collective bargaining; elimination of forced labor; abolition of child labor and a prohibition on the worst forms of child labor; and elimination of discrimination in employment. The labor chapter will include commitments to discourage importation of goods that are produced by forced labor or child labor, or that contain inputs produced by forced labor, regardless of whether the source country is a Party to the Agreement.

{B11} [India: To promote the rapid resolution of labor issues between Parties, the labor chapter will establish a labor dialogue that Parties may use to resolve any labor issue between them that might arise under the chapter. This dialogue will allow for expeditious consideration of matters and for Parties to mutually agree to a course of action to address issues.] [Kenya: The labour chapter will establish a mechanism for cooperation on labour issues, including opportunities for stakeholder input in identifying areas of cooperation and participation, as appropriate and jointly agreed, in fully funded cooperative activities.]

{B12} [United Kingdom and United States: The Parties will agree not to waive or derogate from laws implementing fundamental labour rights in order to attract trade or investment, and not to fail to effectively enforce their labor laws in a sustained or recurring pattern that would affect trade or investment between the Parties. In addition to negotiating commitments by Parties to eliminate forced labor in their own countries.] [United Kingdom: These commitments on labour will also apply to export-processing zones.]

{B13} [United Kingdom: The commitments in the labour chapter will be subject to the procedures laid out in the Dispute Settlement chapter. Parties will consider alternatives to retaliation as a means of promoting compliance.] [United States: The commitments in the

labor chapter will be subject to the procedures laid out in the Dispute Settlement chapter, including retaliation.]

The Environment

{B14} The Parties will agree to enforce their environmental laws, and not to weaken them to encourage trade or investment. They also will agree to fulfil their obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and to take measures to combat and cooperate to prevent trade in wild fauna and flora that has been taken illegally.

{B15} [United States: The Parties will agree to promote sustainable forest management, and to protect and conserve wild fauna and flora that are at risk in their territories, including through measures to conserve the ecological integrity of specially protected natural areas, such as wetlands.]

{B16} The Parties will agree to sustainable fisheries management, to promote conservation of marine species, to prohibit harmful fisheries subsidies, and to combat illegal, unreported, or unregulated fishing. The Parties will also agree [Kenya: to make best efforts] to refrain from [Kenya: new] subsidies that contribute to overfishing or overcapacity. [Kenya: The Parties agree that the developed Parties will provide substantial technical and financial assistance to developing Parties in fighting illegal, unreported, or unregulated fishing.]

{B17} [Kenya: The Environment chapter will establish a mechanism for cooperation, including opportunities for stakeholder input in identifying areas of cooperation and participation, as appropriate and jointly agreed, in cooperative activities.]

{B18} [United Kingdom: The commitments in the chapter will be subject to the procedures laid out in the Dispute Settlement chapter. Parties will consider alternatives to retaliation as a means of promoting compliance.] [United States: The commitments in the chapter will be subject to the procedures laid out in the Dispute Settlement chapter, including retaliation.]

[Currency and Exchange Rates]

{B19} [India and United States: The Parties will cooperate in the development of new disciplines, both in the Agreement and in other fora, to deal with the manipulation of exchange rates by countries with persistent trade surpluses.]

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C. DRAFT DECLARATION OF THE COMMITTEE ON TRADE IN SERVICES, INVESTMENT, AND INTELLECTUAL PROPERTY

Cross-Border Trade in Services

{C1} [India and Kenya: The Agreement will be negotiated on a "positive-list" basis, such that their markets are open to foreign providers of services only to the extent that Parties make explicit commitments on a sectoral basis. Those commitments may be negotiated in sectoral chapters and/or country-specific annexes.]

{C2} [United Kingdom: The Agreement will be negotiated principally on the basis of sectoral chapters, with special emphasis on financial services, audiovisual services, and maritime transportation services. Other sectors will be negotiated on a "negative-list" basis, such that their markets are fully open to foreign investors except where they have taken an exception for a non-conforming measure. These exceptions may cover current measures on which a Party accepts an obligation not to make its measures more restrictive in the future and to bind any future liberalization, and measures and policies on which a Party retains full discretion in the future.]

{C3} [United States: The Agreement will be negotiated primarily on a "negative-list" basis, such that their markets are fully open to foreign investors except where they have taken an exception for a non-conforming measure, supplemented by sectoral chapters. These exceptions may cover current measures on which a Party accepts an obligation not to make its measures more restrictive in the future and to bind any future liberalization, and to a very limited range of measures and policies on which a Party retains discretion in the future.]

{C4} [India: The Parties will negotiate terms by which they shall provide special consideration to the progressive liberalization of service sectors commitments and modes of supply which will promote critical sectors of growth, social and sustainable economic development. They will also take into account the challenges that may be encountered by Parties and may grant flexibilities such as transitional periods, within the framework of action plans, on a case-by-case basis, to accommodate special economic situations and development, trade and financial needs in implementing their commitments on trade in services.]

Financial Services

{C5} [United Kingdom and United States: We will negotiate a distinct chapter on Financial Services. This chapter will expand market access opportunities while also ensuring that Parties will retain the ability to regulate financial markets and institutions and to take emergency measures in the event of crisis. The chapter will allow for the sale of certain financial services across borders to a Party from a supplier in another Party rather than requiring suppliers to establish operations in the other country in order to sell their service, subject to registration or authorization of cross-border financial services suppliers of another Party.]

{C6} Parties may lodge country-specific exceptions to some of these rules in annexes attached to the Agreement. These exceptions may cover current measures on which a Party accepts an obligation not to make its measures more restrictive in the future and to bind any future liberalization, and measures and policies on which a Party retains full discretion in the future.

{C7} The Parties will also set out rules that formally recognize the importance of regulatory procedures to expedite the offering of insurance services by licensed suppliers and procedures to achieve this outcome. In addition, the Agreement will include specific commitments on portfolio management, electronic payment card services, and transfer of information for data processing.

{C8} [United Kingdom: The Parties will negotiate disciplines by which state-owned banks are progressively privatised.]

{C9} [United Kingdom and United States: The Parties will negotiate disciplines by which the permitted shares of foreign ownership of insurance companies are progressively increased.]

Temporary Entry [India and Kenya: **for Service Providers**] [United Kingdom and United States: **for Business Persons]**

{C10} We will negotiate a distinct chapter on Temporary Entry. This chapter will facilitate the entry into one Party of entry for [India and Kenya: service providers] [United Kingdom and United States: business persons] of another Party. It will encourage authorities of Parties to provide information on applications for temporary entry, to ensure that application fees are reasonable, and to make decisions on applications and inform applicants of decisions as quickly as possible. Parties will agree to ensure that information on requirements for temporary entry are readily available to the public, including by publishing information promptly and online if possible, and providing explanatory materials.

{C11} The Parties will agree to ongoing cooperation on temporary entry issues such as visa processing. Country-specific annexes will be negotiated in which the Parties will make commitments on access for each other's business persons. [India: These commitments will include a substantial increase in the number of visas provided to persons in information technology and related fields over a recent representative period to be negotiated.] [Kenya: These commitments will include a substantial increase in the number of visas available to service providers in a wide range of sectors over a recent representative period to be negotiated.]

[United Kingdom: **Maritime Transportation Services]**

{C12} [United Kingdom: The Parties will negotiate commitments by which they progressively remove restrictions on the participation of other Parties in their maritime transportation sectors. These restrictions include (but are not limited to) prohibitions or other limits on participation in cabotage trade and requirements with respect to the hiring of local citizens or companies.]

[**Health and Medical Services]**

{C13} [United States: The Parties will negotiate commitments by which they progressively remove restrictions on the participation of other Parties in their health and medical services sectors.] [India: The Parties will negotiate commitments by which they progressively remove restrictions on the movement of service providers from other Parties in their health and medical services sectors.]

Investment

{C14} The Parties will devise rules requiring non-preferential investment policies and protections that assure basic rule-of-law protections, while also protecting the ability of

Parties' governments to achieve legitimate public policy objectives. The Agreement will also provide for neutral and transparent international arbitration of investment disputes, with strong safeguards to prevent abusive and frivolous claims and ensure the right of governments to regulate in the public interest, including on health, safety, and environmental protection.

{C15} [India and Kenya: The Agreement will be negotiated on a "positive-list" basis, such that their markets are open to foreign investors only to the extent that Parties make explicit commitments on a sectoral basis. Those commitments may be negotiated in sectoral chapters and/or country-specific annexes.]

{C16} [United Kingdom: The Agreement will be principally negotiated principally on the basis of sectoral chapters, with special emphasis on financial services, audiovisual services, and maritime transportation services. Other sectors will be negotiated on a "negative-list" basis, such that their markets are fully open to foreign investors except where they have taken an exception for a non-conforming measure. These exceptions may cover current measures on which a Party accepts an obligation not to make its measures more restrictive in the future and to bind any future liberalization, and measures and policies on which a Party retains full discretion in the future.]

{C17} [United States: The Agreement will be negotiated on a "negative-list" basis, such that their markets are fully open to foreign investors except where they have taken an exception for a non-conforming measure. These exceptions may cover current measures on which a Party accepts an obligation not to make its measures more restrictive in the future and to bind any future liberalization, and to a very limited range of measures and policies on which a Party retains discretion in the future.]

D. DRAFT DECLARATION OF THE COMMITTEE ON NON-AGRICULTURAL MARKET ACCESS, GOVERNMENT PROCUREMENT, AND RELATED TOPICS

Product Coverage [and Exceptions]

{D1} We agree to negotiations that shall aim at the elimination of tariffs applied to trade in non-agricultural goods between Agreement members. These negotiations will cover all goods not dealt with in the agricultural negotiations. Coverage among these products shall be [United Kingdom: complete] [United States: comprehensive] but with certain exclusions [India: at the discretion of individual Parties] [Kenya: as negotiated among the Parties].

{D2} [Kenya: We will negotiate a principle whereby up to 7% of each Developing Party's NAMA tariff lines (3% for Developed Parties) can be designated as sensitive products, and 3% of each Developing Party's NAMA tariff lines (none for Developed Parties) can be excluded from liberalisation entirely. Developing Parties will have 13 years to eliminate tariffs on sensitive products, and may maintain their current tariffs for the first 5 years; Developed Parties will have 10 years to eliminate tariffs on sensitive products in equal annual stages.]

Base Period and Base Rates

{D3} [India: For Developed Partners, the basis for reductions in tariffs will be the applied MFN or preferential rates (whichever is lower) that were in effect with respect to a Party as of 1 January 2017. For Developing Partners, the basis for reductions in tariffs will be the WTO bound rates that were in effect as of 1 January 2022.] [Kenya: For Developed Partners, the basis for reductions in tariffs will be the applied MFN or preferential rates (whichever is lower) that were in effect with respect to a Party as of 1 January 2022. For Developing Partners, the basis for reductions in tariffs will be the WTO bound rates that were in effect as of 1 January 2022.]

{D4} [India and Kenya: For any tariff line of a Developed Partner that is both (1) unbound in the Party's WTO schedule of commitments and (2) not eligible for preferential treatment, the basis for reduction will be 5%. For any tariff line of a Developing Partner that is unbound in the Party's WTO schedule of commitments, the basis for reduction will be 50%.]

{D5} [United Kingdom: The basis for reductions in tariffs will be the applied MFN or preferential rates that were in effect as of 1 January 2022.] [United States: The basis for reductions in tariffs will be the applied MFN rates that were in effect as of 1 January 2022.]

{D6} [India and Kenya: Phase-outs of Developed Parties' tariffs on non-agricultural products will last no longer than five years; phase-outs of Developing Parties' tariffs on non-agricultural products will last no longer than twenty years.] [United Kingdom: Phase-outs of Developed Parties' tariffs on non-agricultural products will last no longer than ten years; phase-outs of Developing Parties' tariffs on non-agricultural products will last no longer than fifteen years.] [United States: Phase-outs of Parties' tariffs on non-agricultural products will last no longer than ten years.]

Rules of Origin

{D7} The Parties will devise, except where otherwise provided, on a single set of rules of origin that define whether a particular good is "originating" and therefore eligible to receive preferential tariff benefits. These rules will provide for "accumulation," so that inputs from one Party are treated the same as materials from any other Party if used to produce a product in any Party.

Government Procurement

{D8} In the Government Procurement chapter, Parties will negotiate commitments based on national treatment and non-discrimination. They also will agree to publish relevant information in a timely manner, to allow sufficient time for suppliers to obtain the tender documentation and submit a bid, to treat tenders fairly and impartially, and to maintain confidentiality of tenders. In addition, the Parties will agree to use fair and objective technical specifications, to award contracts based solely on the evaluation criteria specified in the notices and tender documentation, and to establish due process procedures to question or review complaints about an award. Each Party agrees to a positive list of entities and activities that are covered by the chapter, which are to be listed in annexes.

Customs Administration and Trade Facilitation

{D9} The Parties will agree on rules to enhance the facilitation of trade, improve transparency in customs procedures, and ensure integrity in customs administration.

{D10} Parties will agree to transparent rules, including publishing their customs laws and regulations, as well as providing for release of goods without unnecessary delay and on bond or "payment under protest" where customs has not yet made a decision on the amount of duties or fees owed.

[Other Import Restrictions]

{D11} [Kenya: Negotiations will aim to eliminate all requirements for the licensing of imports, other than those applied for sanitary and phytosanitary reasons.]

{D12} [Kenya: Negotiations will aim to eliminate all import bans, other than those applied for reasons related to the subject matter of the exceptions clauses in GATT Article XX, or on (1) agricultural products, (2) pharmaceuticals, (3) petroleum products, (4) ozone-depleting substances, (5) fireworks, (6) irradiating devices and radioactive materials, or (7) CITES products.]

{D13} [United States: Negotiations will aim to eliminate all import bans or requirements for the licensing of imports, other than those applied for reasons related to the subject matter of the exceptions clauses in GATT Article XX.]

Textiles and Apparel

{D14} The Parties will agree to eliminate tariffs on textiles and apparel, most of them upon the Agreement's entry into force. Tariffs on some sensitive products will be eliminated over longer timeframes, on terms and timetables to be agreed by the Parties.

{D15} [United States: The Agreement will include specific rules of origin that condition preferential treatment on the use of fibers, yarns, and fabrics that are sourced among the Parties.]

{D16} The Agreement will include a "short supply list" mechanism that will, on terms to be negotiated, [India and Kenya: facilitate] [United States: permit] the use of certain imported yarns and fabrics that are not widely available from suppliers in the Parties. [Kenya: This mechanism will provide terms that are no less liberal than those applying to textile and apparel trade between the Parties as of 1 January 2022.]

{D17} [United States: Commitments will be negotiated on customs cooperation and enforcement to prevent duty evasion, smuggling, and fraud, as well as a textile-specific special safeguard to respond to serious damage or the threat of serious damage to domestic industry in the event of a sudden surge in imports.]

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E. DRAFT DECLARATION OF THE COMMITTEE ON AGRICULTURE AND RELATED TOPICS

Coverage

{E1} The agricultural market-access negotiations will [United Kingdom: generally] encompass all items that meet the WTO definition of agricultural goods, as provided in Annex 1 of the WTO Agreement on Agriculture. [United Kingdom: The Parties will make an exception to this rule for alcoholic beverages. Notwithstanding the fact that these goods are treated in the WTO as agricultural products, we will make market-access commitments for these goods in the negotiations on non-agricultural products.] [Kenya: The Parties will make an exception to this rule for fish and fish products. Notwithstanding the fact that these goods are treated in the WTO as non-agricultural products, we will make market-access commitments for these goods in the negotiations on agricultural products.]

Market Access

{E2} We agree to negotiations that shall aim at the elimination of tariffs applied to trade in agricultural goods between Agreement members.

{E3} [Kenya: Up to 12% of each Developing Party's agricultural tariff lines (4% for Developed Parties) can be designated as sensitive products, and 5% of each Developing Party's agricultural tariff lines (none for Developed Parties) can be excluded from liberalisation entirely. Developing Parties have 15 years to eliminate tariffs on sensitive products, and may maintain their current tariffs for the first 7 years; Developed Parties have 11 years to eliminate tariffs on sensitive products in equal annual stages.]

{E4} [India: For Developed Partners, the basis for reductions in tariffs will be the applied MFN or preferential rates (whichever is lower) that were in effect with respect to a Party as of 1 January 2017. For Developing Partners, the basis for reductions in tariffs will be the WTO bound rates that were in effect as of 1 January 2022.] [Kenya: For Developed Partners, the basis for reductions in tariffs will be the applied MFN or preferential rates (whichever is lower) that were in effect with respect to a Party as of 1 January 2022. For Developing Partners, the basis for reductions in tariffs will be the WTO bound rates that were in effect as of 1 January 2022.]

{E5} [India and Kenya: For any tariff line of a Developed Partner that is both (1) unbound in the Party's WTO schedule of commitments and (2) not eligible for preferential treatment, the basis for reduction will be 10%. For any tariff line of a Developing Partner that is unbound in the Party's WTO schedule of commitments, the basis for reduction will be 100%.]

{E6} [United Kingdom: The basis for reductions in tariffs will be the applied MFN or preferential rates that were in effect as of 1 January 2022.] [United States: The basis for reductions in tariffs will be the applied MFN rates that were in effect as of 1 January 2022.]

{E7} [India and Kenya: Phase-outs of Developed Parties' tariffs on non-agricultural products will last no longer than five years; phase-outs of Developing Parties' tariffs on non-agricultural products will last no longer than twenty years.] [United Kingdom: Phase-outs of Developed Parties' tariffs on non-agricultural products will last no longer than ten years; phase-outs of Developing Parties' tariffs on non-agricultural products will last no longer than fifteen years.]

[United States: Phase-outs of Parties' tariffs on non-agricultural products will last no longer than ten years.]

[United States: **Genetically Modified Organisms]**

{E8} [United States: The Parties will negotiate disciplines by which they may restrict trade in genetically modified or engineered organisms only when those restrictions are based on sound science.]

Subsidies and Other Support

{E9} The Parties will also negotiate disciplines to promote policy reforms, including by [United States: limiting] [Kenya: eliminating] agricultural production subsidies and by [United States: eliminating] [Kenya: limiting] agricultural export subsidies.

{E10} [Kenya: The Parties will also recognise in the Agreement that Developing Countries may need to employ some forms of subsidy in pursuit of legitimate food security objectives.]

{E11} [United Kingdom: The Parties will also recognise in the Agreement that Parties may need to employ some forms of subsidy in pursuit of legitimate public goods such as improvements to environmental protection or in pursuit of animal health and welfare.]

Food Security

{E12} The Parties will enhance food security by [United States: eliminating or reducing tariffs and other restrictive policies in agricultural trade] [India and Kenya: providing rules by which countries may regulate, restrict, or prohibit imports of agricultural products that threaten to undermine the growth of domestic foodstuffs.]

{E13} [India: We will negotiate a principle whereby members may restrict or prohibit imports of any agricultural product that may be considered objectionable to its citizenry on religious grounds.]

Sanitary and Phytosanitary Measures

{E14} The Parties reaffirm their right to protect human, animal or plant life or health in their countries. The Agreement will builds on WTO SPS rules for identifying and managing risks in a manner that is no more trade restrictive than necessary.

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