Goldstein 1996, "International law and domestic institutions: reconciling North American 'unfair' trade laws."

Brief Summary:

This essay focuses on the purposes international organizations serve for policymakers at home. The empirical case used here is the dispute-settlement procedures that appear in the Canadian-U.S. Free Trade Agreement (FTA) and later in the North American Free trade Agreement (NAFTA). Canada and the United States agreed to establish rotating binational boards to hear appeals on particular trade matters. Counterintuitive to the relative power of the two nations and the boards' limited mandate, the boards not only ruled repeatedly in a pro-Canadian manner but also significantly changed the way the U.S. bureaucracy responded to petitions for protection against Canadian products, even in the absence of a change in domestic law. The author argues that the explanation for anomalous U.S. behavior resides in the structural relationship between the President and Congress and in presidential interests in international oversight of his own bureaucracy.

Main puzzles

Based on this empirical case study, the author asks two questions:
1) How did a weak international institution with no sanctioning power lead to a significant change in the behavior of the U.S. rational behavior, even without a change in domestic law?
2) Assuming rational behavior, why would the United States bind itself to an international agreement in which the distribution of gains went to the weaker party?

Main answers

To question 1: It occurred because binational boards—with more liberal preferences—became the last mover in unfair trade cases. Binational boards institutionalize their preferences by stipulating acceptable procedures with each remand. The result is that the US trade agencies become more risk-averse in dealing with these disputable cases and choose to follow the method prescribed by the binational boards.
To question 2: The U.S. agreement to constrain its behavior was a function of the interests of powerful domestic actors. In this case, binding itself to an international agreement, the President can control other branches of the government such as bureaucracy. President's foreign economic policy goals frequently had been frustrated by the power of an autonomous trade bureaucracy. Both the FTA and NAFTA reduced that autonomy and were therefore preferred by the President even though it reduced the ability of the United States.

FTA and administered protection

- Although the amount of trade between the United States and Canada is equivalent, the relative importance of this trade is not symmetric. Whereas the United States accounts for almost 80% of all Canadian exports, Canada buys only 25% of total U.S. exports.
- The FTA in 1989 was signed along the free-trade tradition; but the most innovative aspect of the agreement was the creation of a dispute-settlement procedure regarding the adjudication of domestic trade law in each country. For the first time, each nation agreed to international arbitration of trade disputes.
- The provision of binational panels to decide whether an administrative decision in an antidumping or countervailing duty case was in accordance with domestic law.
- In fact, commentators suggested that instead of obtaining guaranteed access through a change in U.S. trade laws. In practice, this did not occur. The boards use their power to remand cases to undercut trade sanctions and in the process created new interpretations of U.S. law that significantly influenced the arrangement of unfair trade petitions by the U.S. bureaucracy.

Internationalizing domestic law

- The procedures specified in the FTA created a strong incentive for petitioners to use the FTA procedures and not domestic courts.
- Such that petitioners were guaranteed that a decision would be made by a panel in no more than 315 days; the average time through the courts was two and a half times that long. Also, the cost of an appeal was significantly reduced under FTA procedures.

- The logic of a veto player
    - Binational judicial review replaced domestic courts to be 'veto player' or the last mover in the administration of unfair trade law.
    - The panels moved U.S. policy in a liberal direction through their power to remand cases and by instructing agencies on what adjudication procedures the FTA boards would and would not accept. Previous to FTA, CIT rulings had defended the autonomy of the two U.S. agencies that decided unfair trade cases.
    - The importance of the procedural change is its effect on preferences of the political actors involved in setting unfair trade policy. Individual bureaucrats, congressional leaders, and Presidents will vary in their preference for free trade.
    - Those with the most to gain from the AD or CVD duty will be the petition group whose ideal point would be at the protectionist end of the continuum.
    - The assumption that Congress will favor protection more than the President derives from the asymmetry between the organization of consumer and producer groups.
    - The CIT falls between Congress and the President, since they share authority to name judges.
    - In the pre-FTA world, an outcome is circumscribed by the preferences of the CIT and by those of the Congress.
    - In the FTA world, the inclusion of representatives of Canada moves the decision toward openness, the optimal proposal point moves to the right.
    - We would expect that the bureaucracy will make more pro-free trade decisions in cases that the binational boards could potentially veto.
- Empirical consequences
    - In the years preceding the agreement, the aggregate number of U.S.-imposed unfair trade sanctions on imports had increased dramatically.
    - However, from the last row of Table 1 on pg. 55, the probability of a positive AD or CVD order against a Canadian product declined with passage of the FTA.
    - The second measure of the effect of the FTA on U.S. behavior by examining the share of unfair trade orders against Canada as a proportion of Canadian imports to the U.S. By the close of 1990, the Canadian ratio of AD orders to its share of U.S. imports had been reduced from 0.83 to 0.33.
    - Based on three case studies, concerning red raspberries, paving equipment, and pork products, the FTA and later NAFTA have created a dispute-settlement mechanism that can and has fundamentally altered the behavior of the U.S. bureaucracy. Because binational boards, who have more liberal preferences, became the last mover in unfair trade cases, the ITA and ITC have become more risk-averse in dealing with Canadian and now Mexican cases, choosing to follow the method prescribed by the binational boards.

Binding itself to international arbitration

- The explanation the author offers is rooted in the political relationship between the President and the trade bureaucracy.
- The authority of the President is absent in the area of CVDs and ADs, partially explaining the vast increases in such cases relative to other forms of protection in the years preceding the FTA.
- The proposal for a binational dispute-settlement procedure was included in the FTA because it was a solution to controlling a bureaucracy with protectionist preferences.