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## Upping the Ante

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## Upping The Ante

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*The aim of this essay is to present the inherent barriers to the achievement of full co-operative solutions to global environmental problems. It reviews the literature of Swanson, Barrett, Pearse and Helme to explain the problems associated with multilateral bargaining and to compare two types of bargaining, namely "ex-post" and "ex-ante". It attempts to apply the theoretical guidelines on multilateral bargaining to GATT.*

### **PREFACE:**

The classic "Problem of the Commons" is associated with resources to which no property rights have been assigned. These resources are free to all who wish to avail of them. Human nature being what it is, such resources will be overused. This will ultimately threaten their existence if they are finite. However, because of their nature agreement on the management of open-access resources is extremely unlikely. Because agreement on restraint by some users releases proportionately higher quantities of the "free" resource for use by non-agreeing parties, the latter will have an incentive to opportunism i.e. they will "free-ride". Full co-operation becomes impossible in such a scenario except by outside intervention (government regulation, the courts). But what of the "global commons"? No international government exists to manage such resources as the environment, fish stocks in "open access" waters etc. The only alternative is to fashion agreements so as to ensure full co-operation by all the parties. This, as we shall see, is no easy task.

Finally "ex-ante" bargaining refers to a process which leads to simultaneous implementation of an agreement by all parties. "Ex-post" bargaining arises when some parties defer agreement to a later date. (Pearse and Helme 1991).

### **Inherent Difficulties of Multilateral Bargaining:**

The general framework within which international law is instituted is as follows: An multilateral conference is held from which an agreed text emerges. This text, technically known as a "convention" becomes law on ratification by a specified minimum number of countries. The convention remains open for signature by initially non-ratifying parties. This introduces a problematical feature into multilateral bargaining that of sequential accession, all parties are not simultaneously bound by the convention. This leads to "ex-post" bargaining which, in the area of natural resources, theoretically means that although many countries may bind themselves to conservation, the overall effect on resource may not be diminished (or may be only partially diminished). Thus the benefits of agreement to the acceding parties are nullified or eroded. Conversely the costs of eventual agreement to non-acceding parties will be increased because they will then be giving up a greater share of the resource than would have been the case if they had been party to the original convention. Effectively voluntary acceptance of constraints by some merely confers on others the right to appropriate a greater share of the resource. (Swanson 1991).

For Swanson, the logic of the foregoing is that the first best option for any country is unrestricted maximisation while others accept constraints. Individual incentives exist which only serve to drive the parties away from agreement. This leads to the possibility of "free riding". The more countries sign the convention the greater is the temptation to "free ride" because each successive acceptance increases the potential share of the resource for non-acceptors. The optimal benefits would be conferred on the last country to sign. We may well wonder why, given the foregoing, any country would voluntarily sign a convention. The fact remains that they do for reasons ventured by Swanson (Helm and Pearce, 1991).

Helm and Pearce (1991) considered the problem of states holding out by "free riding" as a result of the combination of open access resources and the sequential nature of acceptance of international conventions. There exists another cause of holdouts (not entirely separable from the first), namely "heterogeneous parties". In essence, because all states are not uniformly affected by decisions on resources (for instance, in the case of acid rain, states upwind of emissions have less to gain from reductions than downwind or peripheral states or the denial of full access to a resource may be a greater burden on some countries due to a lack of substitutes) any attempt to obtain agreement on uniform standards will fail.

### **Comparison Between "Ex-Post" and "Ex-Ante" bargaining:**

Historically sequential accessions to international conventions has been the norm. Early ratification by a majority of countries has led to the creation of "customary law" (i.e. the accepted practice for those countries) which can exert moral pressure on dissenting countries but lacks real teeth. Some of the weaknesses of the "ex-post" bargaining occasioned by sequential accessions and discussed in Helm and Pearce may be enumerated.

(1) Delayed full implementation of action on resources leads to irretrievable loss of that portion of the resource which is used up by "free riders" in the interim. In the extreme there may be extinction of the resource. Both effects have dire implications for future generations.

(2) "Agreed" laws become subject to unilateral restructuring either by way of reservation/derogation (explicit disagreement) or by tacit disagreement, whereby an apparently consenting country unilaterally ignores the provisions of the contract. This leads to the common perception of international laws as being ineffective.

(3) Conventions are often more formal than substantial. To achieve nominal "consensus" the text is often imprecise to accommodate the viewpoints of the various parties. Such conventions may degenerate into mere aspirations leading to wholesale breakdown in implementation. This further discredits international law. (Helme and Pearce 1991).

In sum the spectre of holdout (via "free riding" or heterogeneity ) haunts all sequential accessions.

### **"Ex -Ante" bargaining - Why it has failed.**

According to Swanson (1991) binding enforceable "ex-ante" agreements require the following components:

- (i) An effective monitoring system;
- (ii) Objective optimal usage level;
- (iii) Sanctions to deter non-compliance;
- (iv) Meaningful share allocations.

*(i) Monitoring:*

Parties to the agreement need to be assured that they are getting their full benefits. This can only be achieved by being able to verify that all others are complying. Self-implementation will not satisfy this requirement. Even if carried out scrupulously, there is no observable return to the participating countries. The only satisfactory solution is the institution of an independent international monitoring agency. This should be done "ex-ante" as part of the convention.

*(ii) Optimal Usage Level:*

Independent scientific opinions on aggregate optimal usage of the resource should be accepted "ex-ante". The tendency is for greater users of the resource to produce their own "scientific" evidence of acceptable aggregate usage because their pro-rata allocation will increase with any increase in total usage. This leads to less benefits to others due to the depletion of the resource.

*(iii) Sanctions:*

As there is no global authority to enforce agreements such as exist in individual countries (e.g. judiciary and police) enforcement must form part of the convention. Agreement on methods of enforcement is not enough on its own, performance thereafter must be provided for. This can be done by allocating meaningful shares, setting a time frame for the implementation of such allocations, and crucially, instituting a bond system to guarantee enforcement. If this is not achieved in "ex-ante" bargaining, the dynamics of changing conditions will cause contracting countries to alter their perceptions of the original distribution of shares and will lead ultimately to the collapse of the agreement. (Swanson 1991).

*(iv) Realistic Shares:*

Uniform shares: Equal access for all to open access global resources appeals to a sense of fairness. However as all countries are not equal this approach will merely institutionalise the disparity between rich and poor. As there is no international representative forum, the interests of the weaker parties cannot be protected, as is the case in democracies where the political process simplifies the relationships between heterogeneous groups through a representative system. (Swanson 1991).

Non-uniform shares: The allocation of meaningful shares in global multilateral bargaining is extremely complex. To overcome the problem of handouts highly technical formulae are required to differentiate between individual countries' burdens

(which are not uniformly distributed due to heterogeneity) and the benefits conferred on them by "free riding". Countries have incentives to distort information on the effects of agreement on them. Until this problem is solved "ex-ante" bargaining will fail. (Swanson 1991).

Scientific measurement of meaningful shares: Scientific committees with representative appointments and majority voting are seen as a possibility of introducing elements of representative government at international level.

Allocation by prior appropriation: A baseline date is established. Countries are then allocated shares based on their usage of the resource on that date. Again this would institutionalise the gap between developed and developing countries and would accordingly fail.

Swanson concludes that "ex-ante" bargaining is preferable to "ex-post" bargaining because while both involve high costs, the benefits from the former are available at an earlier date. This is significant when considering environmental resources. The longer the delay the more of the environmental "cake" is eaten. The eaten portion is foregone forever and future generations suffer from this loss.

### **(iii) GATT as an Example of "Ex-Ante" Bargaining.**

The purpose of the W.T.O (and previously GATT) is to reduce unfair competition by, inter alia, ensuring international parity of tariffs and controlling of "dumping" of low cost goods. Any application or reduction in tariffs by any group of countries must be reciprocated by all countries. In theory this is equal treatment for all. This would be fine if all contracting countries were equal, but this is patently not so. Developing countries lack the bargaining power of the developed countries, because the former's products lack the range and complexity of the latter's. While imports of raw materials into the developed world are subject to low tariffs (2% for Malaysian palm oil into the E.C.), the tariffs on value-added products are prohibitively high (25% on margarine from Malaysia). Thus developed countries are assured of a permanent supply of raw materials at the expense of the poorer countries (only 9% of the market price of timber products goes to Third World Countries suppliers).

Furthermore, the final intention of GATT, subject to agreement, is the institution of a Multilateral Trade Organisation (MTO) which will subsume GATT rules and will

have wide powers of enforcement including the power to over-ride national legislation which is inconsistent with former GATT rules.

GATT and MTO contain within them many of the elements which Swanson would consider desirable for successful contracts based on "ex-ante" bargaining i.e. universally binding, proper monitoring by way of reciprocal actions, the ultimate sanction of MTO intervention. Nonetheless one is left to ponder the wisdom of Third World parties to GATT in agreeing to a convention that is so obviously biased against them. Allocation of shares of the economic "cake" have been based on the principle of prior appropriation which should have militated against its acceptance by countries which were poorer to start with. Any possibility of "ex-post" bargaining to improve their lot is precluded by the provision for reciprocal action by others to maintain the tariff status quo. Could it be that Swanson has overlooked a vital ingredient of all "ex-ante" bargaining, the relevant strengths (economic or even military) of the bargaining parties?

### **SUMMARY:**

Examples abound in several areas of international agreement of the barriers to the attainment of full international co-operation. In the light of what Swanson has to say about "free riding" Ireland's neutrality takes on an aspect of virtuosity rather than virtuousness! Although not party to military conventions for mutual defence, we nevertheless enjoy de facto benefits of protection by virtue of our membership of the E.C. Qualifications, by way of derogations abound in EC law thus diluting the full co-operation ideal. Historically we have seen the ultimate in "free riding" when several countries opted for neutrality at the outset of World War 2 only to declare war on Germany when that country was obviously facing defeat. Thus they hoped to share in the benefits of victory while avoiding the costs of participation. At the micro-level the current peace process can be seen as analogous to sequential accession. The peace process has been instituted by the Downing Street Declaration (an implicitly multilateral convention). It has been left open to Sinn Fein to "ratify" this convention by persuading the IRA to forego violence. Benefits will then become available to Sinn Fein in the form of a possible allocation of shares in the political process. It would seem that Sinn Fein perceive themselves as benefiting politically at the expense of others by postponing acceptance of the terms of the agreement. Because simultaneous acceptance of the Declaration was not politically possible, Sinn Fein have been given the opportunity to become "free riders" by gaining benefits now

and holding out for even greater benefits in "ex-post" bargaining (which is effectively going on at present).

Multilateral bargaining is bedevilled by the complexity of motives and by technical difficulties. Incentives always exist which drive parties away from a full co-operative solution to global problems. To change the orientation of incentives is the greatest difficulty associated with any effort to solve the world's environmental problems.

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