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# In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO

Richard H. Steinberg

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Analysis of international institutions and law is shifting from earlier concerns of whether institutions matter<sup>1</sup> to questions of which aspects matter, how, and in what contexts.<sup>2</sup> This newer focus suggests considering the influence of decision-making rules in international organizations—do they matter, how, and in what contexts.

International organizations use one or a combination of three types of decision-making rules for most non-judicial action: “majoritarian” (decisions are taken by a majority vote of member states, and each member has one vote); “weighted voting” (decisions are taken by a majority or super-majority, with each state assigned votes or other procedural powers in proportion to its population, financial contribution to the organization, or other factors); or “sovereign equality.” Organizations with these latter rules—which are rooted in a notion of sovereign equality of states derived from natural law theory and later adopted by positivists and others—formally negate status, offer equal representation and voting power in international organizations, and take decisions by consensus or unanimity of the members.<sup>3</sup> Organizations like the Association of Southeast Asian Nations (ASEAN), Conference on Security and Cooperation in Europe (CSCE), the Executive Committee of the International Monetary Fund (IMF), the GATT/WTO,<sup>4</sup> Common Market of the South, Mercado

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1. See Krasner 1983b; and Keohane 1984.

2. See Martin and Simmons 1998; Downs, Rocke, and Barsoom 1998; Abbott et al. 2000; Goldstein and Martin 2000; and Koremenos, Lipson, and Snidal 2001.

3. See Vattel 1852; Dickinson 1920, 51–55, 95–99, 335; Kelson 1944, 209; and Riches 1940, 9–12.

4. GATT/WTO refers to both the General Agreement on Tariffs and Trade (GATT), and its successor, the World Trade Organization (WTO).

Comun del Sur (MERCOSUR), North Atlantic Treaty Organization (NATO), Organization for Economic Cooperation and Development (OECD), and many specialized agencies of the United Nations (UN), including the UN Development Program (UNDP) and the Executive Committee of the UN High Commission on Refugees (UNHCR), usually have taken decisions only with the consensus or unanimous support of member states. These organizations employ a host of procedures (described below) that purport to respect the sovereign equality of member states.

While sovereign equality decision-making rules are used widely in international organizations, the operation of those rules—how states behave in practice under them and the consequences of that behavior—is not well understood. Consensus decision making at the GATT/WTO and related procedural rules, which are based on the sovereign equality of states, raise three related questions about the relationship between state power and international law.

The first question is most striking. Why would powerful entities, like the EC<sup>5</sup> and the United States, support a consensus decision-making rule in an organization like the GATT/WTO, which generates hard law? There have been recent efforts to redefine the distinction between hard and soft law and to argue that soft law may be effective or might transform into hard law.<sup>6</sup> But conventionally the distinction has turned on whether or not the public international law in question is mandatory or hortatory; most public international lawyers, realists, and positivists consider soft law to be inconsequential.<sup>7</sup> Realists have long argued that—empirically—powerful countries permit majoritarianism only in organizations that are legally competent to produce only soft law, which poses little risk that powerful states would be bound by legal undertakings they might disfavor.<sup>8</sup> In contrast, in hard law organizations, structural realists, neoclassical realists, and behavioralists with realist sympathies have suggested that there must be a direct relationship between power, voting rules, and outcomes.<sup>9</sup> Yet in organizations with consensus decision-making rules, weaker countries have formal power to block the legislation of important hard law that would reflect the will of powerful countries. Structural realism would predict the collapse of organizations with decision-making rules that can be used to stop powerful countries from getting their way—or a change in those rules, which structural realism treats as brittle.<sup>10</sup> Some modified structural realists have tried to explain exceptions to the expectation that decision-making rules would reflect

5. EC is used to refer to the European Community, the European Economic Community, or both. The European Economic Community was “seated” at GATT meetings from about 1960. Jackson 1969, 102. With conclusion of the Maastricht Treaty in 1992, the name changed from European Economic Community to European Community, which then became a member of the WTO at its inception in 1995.

6. See, for example, Raustiala and Victor 1998; and Abbott and Snidal 2000.

7. See Hart 1961, 77–96; and Simma and Paulus 1999, 304.

8. See Riches 1940, 297, 894; Morgenthau 1978, 327; Zamora 1980; and Krasner 1983b.

9. See Krasner 1983a; and Morgenthau 1978, 325–28.

10. Krasner 1999.

underlying power, using institutional or sociological arguments.<sup>11</sup> However, mixing sociology and realism in this manner is theoretically degenerative,<sup>12</sup> and offers no prediction of when to expect rules to deviate from power or power to overtake institutional inertia.

The problem is solved partly by observing that the EC and the United States have dominated bargaining and outcomes at the GATT/WTO from its early years,<sup>13</sup> despite adherence to consensus decision-making. Yet that solution is only partial, as it suggests two more questions: How have the EC and the United States dominated GATT/WTO outcomes in the face of a consensus decision-making rule? And if such powerful states dominate GATT/WTO decision making, why have they bothered to maintain rules based on the sovereign equality of states, such as the consensus decision-making rule?

This article answers those questions, explaining how consensus decision making operates in practice in the GATT/WTO legislative context<sup>14</sup> and why the consensus rule has been maintained. First, the paper conceptualizes two modalities of bargaining—law-based and power-based—synthesizing previous work on these frameworks, giving them context in the GATT/WTO, and providing empirical examples of both forms of bargaining at the GATT/WTO. When GATT/WTO bargaining is law-based, states take procedural rules seriously, attempting to build a consensus that is Pareto-improving, yielding market-opening contracts that are roughly symmetrical. When GATT/WTO bargaining is power-based, states bring to bear instruments of power that are extrinsic to rules (instruments based primarily on market size), invisibly weighting<sup>15</sup> the decision-making process and generating outcomes that are asymmetrical and may not be Pareto-improving.

Second, the history of recent multilateral trade rounds is analyzed, identifying stages of rounds in which GATT/WTO legislative decision making has been primarily law-based and in which it has been primarily power-based. Since at least as far back as the Dillon Round, trade rounds have been launched through law-based bargaining that has yielded equitable, Pareto-improving contracts designating the topics to be addressed. In contrast, to varying degrees, rounds have been concluded through power-based bargaining that has yielded asymmetrical contracts favoring the interests of powerful states. The agenda-setting process (the formulation of proposals that are difficult to amend<sup>16</sup>), which takes place between launch and conclusion, has been dominated by powerful states; the extent of that domination has depended upon the extent to which powerful countries have planned to use their power to conclude the round.

11. Krasner 1985, 29.

12. See Popper 1959; Kuhn 1962; and Lakatos 1970, 173–80.

13. Curzon and Curzon 1973.

14. The analysis does not attempt to explain bargaining in the judicial context.

15. Elizabeth McIntyre used this term in reference to U.S. power in the Havana Charter negotiations, but she did not elaborate the concept. McIntyre 1954, 491.

16. See Tsebelis 1994; and Garrett and Tsebelis 1996.

Next, the paper explains why powerful countries have favored maintaining sovereign equality decision-making rules instead of adopting a weighted voting system, and why they carried them forward into the WTO. Analysis of the consensus decision-making process and interviews with GATT/WTO negotiators show that the rules generate information on state preferences that makes it possible to formulate legislative packages that favor the interests of powerful states, yet can be accepted by all participating states and generally considered legitimate by them.

This article concludes that the GATT/WTO consensus decision-making process is organized hypocrisy in the procedural context. Sociologists and political scientists have recently identified organized hypocrisy as patterns of behavior or action that are decoupled from rules, norms, scripts, or rituals that are maintained for external display.<sup>17</sup> The procedural fictions of consensus and the sovereign equality of states have served as an external display to domestic audiences to help legitimize WTO outcomes. The raw use of power that concluded the Uruguay Round may have exposed those fictions, jeopardizing the legitimacy of GATT/WTO outcomes and the decision-making rules, but weaker countries cannot impose an alternative rule. Sovereign equality decision-making rules persist at the WTO because invisible weighting assures that legislative outcomes reflect underlying power, and the rules help generate a valuable information flow to negotiators from powerful states. While theory suggests several potential challenges to the persistence of these patterns of bargaining and outcomes at the WTO, limits on transatlantic power pose the most serious challenges.

### **Bargaining and Outcomes in the GATT/WTO: Two Modalities**

Two meta-theoretical traditions help conceptualize bargaining and outcomes in the GATT/WTO: bargaining in the shadow of law and bargaining in the shadow of power. Empirically, legislative bargaining at the GATT/WTO usually takes one or a combination of these two forms.

#### *Bargaining in the Shadow of Law: Contracting for Consensus at the GATT/WTO*

In a law-based approach, bargaining power in international organizations is derived from substantive and procedural legal endowments. Decision-making rules determine voting or agenda-setting power, which shapes outcomes.

There is a rich rationalist tradition evaluating the effects of decision-making rules on bargaining and outcomes. Early models were developed for application to any legislative organization, domestic or international, although they have been applied more extensively in comparative politics and American government scholarship than in international law scholarship. Recently, prominent international relations scholars have suggested increasing use of these approaches to understand the

17. See Brunsson 1989, 7, 168; March 1994, 197–98; Meyer et al. 1997; and Krasner 1999.

politics of international organizations.<sup>18</sup> In the earliest work of this genre, the power of members in an organization was represented by mathematical indices deduced from the organization's voting rules.<sup>19</sup> That approach has been applied in analysis of EC and European Union (EU) politics,<sup>20</sup> and used less formally (particularly by international law scholars) to consider the effects of different voting rules on state power within the UN.<sup>21</sup> Some rational-institutionalists have challenged the focus on voting power indices, arguing that they matter less than agenda-setting rules and veto rights of various institutional actors, particularly in the highly institutionalized European context.<sup>22</sup> Some law scholars have demonstrated informally the usefulness of considering bargaining and outcomes in the context of procedural rules, or in conjunction with substantive rules. This may offer greater heuristic power than consideration of either alone, whether through bargaining in the shadow of law analysis of domestic litigation<sup>23</sup> or international legislation.<sup>24</sup>

Deducing bargaining power from international law entails a faith in the effectiveness of, compliance with, and commitment to international law. Most political theorists<sup>25</sup> and legal theorists<sup>26</sup> with such a faith root it in sociology. Commitment to international law may also be based on self-interest across all states. For example, rational institutionalists find the demand for Pareto-improving cooperation among states to be a basis for commitment to international institutions<sup>27</sup> and to law.<sup>28</sup> For these reasons, international law—including its procedural rules—has been seen as an effective and durable source of bargaining power.

**Sovereign equality decision-making rules at the GATT/WTO.** To understand how law-based bargaining works in the GATT/WTO legislative context, it is crucial to know the procedural rules used there. In all plenary meetings of sovereign equality organizations, including the GATT/WTO, diplomats fully respect the right of any member state to: attend; intervene; make a motion; take initiatives (raise an issue); introduce, withdraw, or reintroduce a proposal (a legal text for decision) or amendment; and block the consensus or unanimous support required for action.<sup>29</sup> A consensus decision requires no manifested opposition to a motion by any member present.<sup>30</sup> If an empowered state representative fails to object to (or reserve a position on, or accept with qualification—for example, *ad referendum*) a draft at a

18. See Martin and Simmons 1998; and Milner 1998.

19. See Shapley and Shubik 1954; Banzhaf 1965; and Riker and Shapley 1968.

20. See Brams and Affuso 1985; Hosli 1993; and Johnston 1995.

21. See Manno 1966; and Sohn 1975.

22. See Martin 1993; Garrett and Tsebelis 1996; and Moravcsik 1998, 67–77.

23. See Mnookin and Kornhauser 1979; Clermont and Eisenberg 1996; and Gross and Syverud 1996.

24. Gold 1972.

25. See Bull 1977; Sikkink 1993; March and Olsen 1998; and Wendt 1999.

26. See Weiler 1982; Franck 1990; and Chayes and Chayes 1998.

27. See Keohane 1984; and Stein 1993.

28. Abbott and Snidal 2000.

29. Schermers and Blokker 1995, 475–506.

30. M'bow 1978.

formal meeting where it is considered, that state may be subjected to an argument that it is estopped by acquiescence from any subsequent objection to the draft.<sup>31</sup>

GATT decisions were not always taken by consensus. The GATT 1947 provided for voting: each contracting party had one vote, and no nation or class of nations was given formally superior voting power. The General Agreement required different majorities of the Contracting Parties<sup>32</sup> for approval of different types of actions. Most amendments required support by two-thirds of the Contracting Parties and were binding only between those that agreed to the amendment. Judicial power to interpret the General Agreement, and administrative power to service it, could be exercised by a simple majority of the Contracting Parties. In addition, a simple majority could take "joint action" to facilitate the operation and further the objectives of the Agreement, including launching a new round of trade negotiations, administering GATT dispute settlement mechanisms, and authorizing the secretariat to service the administration of codes such as those negotiated during the Tokyo Round.

But GATT/WTO decision-making practice has differed from these formal requirements. From 1948 to 1959, the GATT often used an informal version of consensus decision making instead of formal voting. At least as early as 1953, and on several occasions thereafter, the chairman took a sense of the meeting instead of resorting to a vote. Since 1959, virtually all GATT/WTO legislative decisions (except on accessions and waivers) have been taken by consensus.<sup>33</sup>

The most common explanation for development of the consensus practice at the GATT is rooted in the *en masse* accession of developing countries beginning in the late 1950s. If a bloc of developing countries had formed, constituting a supermajority of the Contracting Parties, then that bloc might have been able to assume many of the legislative functions of the organization; would surely have been able to assume all of the administrative and judicial functions; and through its judicial power might have been able to legislate new obligations, even if all the industrialized countries stood together in opposition.<sup>34</sup> In that context, U.S. policymakers considered alternative voting rules, but rejected them for reasons ultimately related to the Cold War.<sup>35</sup> The U.S. government had some interrelated geostrategic goals in negotiating the Havana Charter: to help safeguard free enterprise among, protect market access to, and stop the trend toward collectivism in all countries outside of the emerging Soviet bloc.<sup>36</sup> By the late 1950s, many in the U.S. Congress and State

31. See Schwarzenberger 1957, 51, 95, 608–26; Bowett 1957; MacGibbon 1958, 476–80, 501–504, and Blackhurst 2001, 8.

32. In this article, Contracting Parties refers to governments, acting jointly or in their individual capacities, that were applying the provisions of the GATT between 1948 and 1994.

33. See Patterson and Patterson 1994; and Porges 1995.

34. See Jackson 1969, 123–28; Porges 1995, 2; and Schermers and Blokker 1995, 514.

35. This analysis is based on telephone interviews and conversations with Walter Hollis, Washington, D.C., December 1985; Richard Matheison, Washington, D.C., November 1989; and corroborating authorities cited below.

36. See Wilcox 1972, 164–67, 186–87, 193–94, 218–19.

Department were concerned about the geopolitical alignment of developing countries, a concern that became even more pronounced in the trade context after Soviet efforts to strengthen the UN Conference on Trade and Development (UNCTAD) in the early 1960s. This was a primary U.S. consideration in supporting the work embodied in the Haberler Report and expanding GATT membership to the developing countries.<sup>37</sup> U.S. policymakers thought it would be impossible to reach agreement on a weighted voting formula and expand the GATT into a broad-based organization that could attract and retain developing countries. Moreover, decision-making rules that were consistent with the principle of sovereign equality carried a normative appeal, particularly for less powerful countries. Some U.S. State Department officials had argued since the late 1940s that states would have to consent to GATT decisions if they were to reliably implement them, and that weighted voting would permit obligation without consent.<sup>38</sup> Finally, since the late 1940s, some U.S. trade negotiators had considered formal weighting unnecessary in light of influence over voting that was rooted in the underlying power of the United States.<sup>39</sup>

When the WTO was established, consensus decision making was not only retained, but was adopted as the formally preferred method of decision making: Article IX of the Agreement Establishing the World Trade Organization requires that only “where a decision cannot be arrived at by consensus, the matter shall be decided by voting.” It defines consensus the same way it had been defined in GATT practice since 1959: a decision by consensus shall be deemed to have been taken on a matter submitted for consideration if no signatory, present at the meeting where the decision is taken, formally objects to the proposed decision. If there were recourse to voting in the WTO, Article IX provides that decisions would be taken by majority, two-thirds, or three-fourths vote—depending on the type of measure. But there has been no voting at the WTO.

**Law-based bargaining at the GATT/WTO.** Deductions from consensus or unanimity decision-making rules suggest that legislation will be Pareto-improving, obliging the “organ to seek a formula acceptable to all,”<sup>40</sup> since legislation that would make any state worse off would be blocked by that state. Moreover, the rules permit weak countries to block positive-sum outcomes that they deem to have an inequitable distribution of benefits. Experimental economics, and legal applications of it, have suggested that individuals will often decline acceptance of a positive-sum package if the benefits are distributed inequitably.<sup>41</sup> Equity has been, of course, a persistent international theme, particularly in postwar economic organizations, and developing countries have often blocked consensus in the GATT/WTO on grounds that a proposal did not sufficiently address their special and differential needs.

37. See Kock 1969, 219–68, 236; Kennan 1972, 238, 267–68; and Curzon and Curzon 1973, 311.

38. McIntyre 1954, 490.

39. Wilcox 1972, 195–97.

40. Riches 1940, 15.

41. See Davis and Holt 1993; and Korobkin 2000.

Bargaining and outcomes at the GATT/WTO have frequently assumed this pattern. The consensus-based decision to launch the Kennedy Round offers a simple example. In November 1961, as the Dillon Round was ending, the Contracting Parties decided by consensus to establish a new committee on tariff reductions and permit existing committees to continue addressing agriculture and less-developed country (LDC) preferences, respectively. Over the next year, however, no progress was made in any of the committees, with the committee on LDC preferences deadlocked along North-South lines. In late 1962, the U.S. government shifted its position on LDC preferences, declaring that a successful round would require simultaneous negotiation of the topics being considered in all three committees. On that basis, a consensus was reached to schedule a Ministerial Meeting in early 1963. In May 1963, the Ministers launched the round, adopting by consensus a set of conclusions and recommendations embodying issues of interest to all Contracting Parties, and a resolution to establish a Trade Negotiations Committee composed of representatives of all participating countries.<sup>42</sup> The round was launched only after the developed countries agreed to include in the negotiations issues that had the potential to make all countries—including developing countries—better off.

*Bargaining in the Shadow of Power: Invisible Weighting at the GATT/WTO*

In contrast to the law-based approach, realists see most legislative bargaining and outcomes in international organizations as a function of interests and power.<sup>43</sup> Diplomatic memoirs and works by lawyers who have been employed in international organizations are replete with stories of using state power to achieve desired outcomes from international organizations.<sup>44</sup> At least one law scholar has suggested that powerful nations may use their influence to dominate organizations with unweighted voting,<sup>45</sup> and some have offered specific historical accounts of U.S. use of “carrots and sticks” to support adoption of particular UN resolutions.<sup>46</sup> Political scientists have considered the influence of U.S. foreign aid on UN voting patterns,<sup>47</sup> and in their classic book, Cox and Jacobson identify some of the sources and structure of influence in international organizations.<sup>48</sup> This work suggests that it is possible for powerful states to simultaneously respect procedural rules and use various practices to escape the constraints on power apparently intrinsic to those rules.

42. Conclusions and Resolutions adopted on 21 May 1963, in General Agreement on Tariffs and Trade, *Basic Instruments and Selected Documents: 12th Supplement* (1964), 36–48 (hereafter GATT BISD).

43. See Morgenthau 1940; Krasner 1983a,b; and Schachter 1999.

44. See Kennan 1972, 24; and Wilcox 1972, 195–97.

45. Buzan 1981, 327.

46. See Weston 1991; and Caron 1993, 562–63.

47. See Rai 1980; Kegley and Hook 1991; and Wang 1999.

48. Cox and Jacobson 1973.



**Relative market size as an underlying source of bargaining power at the GATT/WTO.** While measuring power is notoriously difficult, in trade negotiations, relative market size offers the best first approximation of bargaining power. Most political scientists suggest that governments treat foreign market opening (and associated increases in export opportunities) as a domestic political benefit and domestic market opening as a cost.<sup>49</sup> Hence, for example, the greater the export opportunities that can be attained, the greater the domestic political benefit to the government of the country attaining them. Market opening and closure have been treated as the currency of trade negotiations in the postwar era.<sup>50</sup>

Whether trade bargaining takes the form of mutual promises of market opening, threats of market closure, or a combination of both, larger, developed markets are better endowed than smaller markets in trade negotiations. The proportionate domestic economic and political impact of a given absolute change in trade access varies inversely with the size of a national economy. Larger national economies have better internal trade possibilities than smaller national economies. A given volume of trade liberalization (measured in dollar terms, for example) offers proportionately more welfare and net employment gain to smaller countries than to larger ones. The political implication is that a given volume of liberalization offers proportionately less domestic political benefit to the government delivering it in the larger country. Therefore, smaller countries may be more impatient<sup>51</sup> to reach agreement on trade liberalization than larger countries. Similarly, in trade liberalizing negotiations, the internal trade possibilities of larger, developed countries give them a better best alternative to a negotiated agreement (BATNA)<sup>52</sup> than smaller ones have.

Conversely, in negotiations entailing threats of trade closure, a threat of losing a given volume of exports is a relatively less potent tactic when used against a larger country than when used against a smaller one. Hence, it is well established that developed economies with big markets have great power in an open trading system by virtue of variance in the relative opportunity costs of closure for trading partners.<sup>53</sup>

In multilateral negotiations, the major powers in the GATT/WTO (such as the U.S. government) have long demanded absolute reciprocity (often measured in dollar terms) in trade deals.<sup>54</sup> Absolute reciprocity may combine with the difficulty of cooperation between smaller countries to permit only agreements that necessitate greater political-economic change in smaller economies than in bigger ones; in this context, absolute reciprocity may be seen as defining a high reservation point<sup>55</sup> for larger countries (measured in terms of the extent of domestic political-economic

49. See Schattschneider 1935; Bauer, de Sola Pool, and Dexter 1963; and Putnam 1988.

50. See Hirschman 1945; Waltz 1970; and Krasner 1976.

51. Baron and Ferejohn 1989.

52. Fisher, Ury, and Patton 1991, 100.

53. Krasner 1976.

54. Jackson 1969, 241–45.

55. Raiffa 1982, 37.

restructuring required of other parties to an agreement). Moreover, absolute reciprocity may give larger economies a good BATNA in negotiations with smaller economies because larger territories may each agree to liberalize trade on a most-favored nation (MFN) basis in a reciprocal package of only those goods produced wholly or largely by each other. In the final stages of the Uruguay Round, the transatlantic powers intentionally negotiated a tariff liberalization package with these latter characteristics,<sup>56</sup> and (as detailed below) the Uruguay Round commitments as a whole may be consistent with the former characteristics.

While market size is generally a good indicator of trade bargaining power, the possibility of linkage across issue areas potentially limits its usefulness. The value of market size as an approximation of trade bargaining power is diminished to the extent that states are willing to use non-trade sources of leverage. In cases of what Axelrod and Keohane have called “contextual” issue linkage, a given bargain is placed in the context of a more important long-term relationship in such a way that the long-term relationship affects the outcome of the particular bargaining process.<sup>57</sup> While the extent of linkage across issue areas has been a subject of theoretical and empirical debate for decades, regime theory suggests that, within a particular regime, bargaining can usually be best understood as confined to the particular issue area addressed by the regime.<sup>58</sup> Moreover, most empirical analyses of postwar trade policy have suggested that potential military or financial leverage has not been used in trade negotiations.<sup>59</sup> Hence, while market size is an imperfect measure of trade bargaining power, it may be considered the best first approximation.

Using market size as a measure of trade bargaining power, the EC and the United States are the world’s greatest powers. As rough indicators, consider that in 1994 (the year the Uruguay Round was closed) retained merchandise imports into the EC and the United States accounted for approximately 40 percent of all retained merchandise imports in the world,<sup>60</sup> and that the EC-U.S. combined 1994 gross domestic product (GDP) represented nearly half the world’s total GDP.<sup>61</sup> By this measure, the combined power of the EC and the United States is enormous in the trade context. And to the extent that the EC and the United States can cooperate, they wield great influence in multilateral trade negotiations.<sup>62</sup>

**Power tactics at the GATT/WTO: Asymmetrical contracting and coercion.** It is useful to think of a range of power tactics that influence outcomes in the GATT/WTO. First, powerful states may contract asymmetrically, generating consensus support for outcomes that are skewed in their favor. When aimed at an individual state, this contracting may be considered a “side-payment,”

56. Steinberg 1994, 6.

57. Axelrod and Keohane 1985.

58. Haas 1980.

59. See Krasner 1976; Cohen 1985; and Hoekman 1989.

60. World Trade Organization 1995, 26, table II.3.

61. See Central Intelligence Agency 1995; and World Trade Organization 1995, 54, table III.30.

62. Steinberg 1999.

compensation given to a bargaining party that loses from a particular measure in order to gain that party's support for it. When aimed at several weak states that might otherwise lose from a proposal, contracting usually takes the form of a "package deal," whereby a decision is taken simultaneously on different issues to achieve consensus.

Second, and more important than asymmetrical contracting for understanding GATT/WTO bargaining and outcomes, weaker states may be coerced by powerful states into consensus support of measures skewed in their favor. By threatening to make weaker states worse off, coercion may generate consensus for an outcome that makes powerful states better off and weaker states worse off,<sup>63</sup> or that is Pareto-improving but with benefits distributed in favor of powerful states. When aimed at a single state, coercion may be considered threat of a sanction, whereby the weaker state is threatened with action that will make it worse off if it does not join the consensus in favor of the measure sought by powerful countries.

When aimed at a group of states—and in its most potent form—coercion takes the form of a threat to exit<sup>64</sup> the organization that is unable to achieve consensus. In some cases, exit involves moving (or threatening to move) the issue to another organization where powerful countries are more likely to get their way. For example, in the early 1980s, when the EC and the United States were unable to attain the required majority in the World Intellectual Property Organization for broader intellectual property protection, they moved the issue to the GATT, where they were able to conclude the Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement in 1994.<sup>65</sup> In other cases, the exit tactic may involve simply ignoring the deadlocked organization and creating a new organization that will become a source of future legal benefits in the issue area. Such was the context and character of proposals to establish a GATT-Plus regime in the mid-1970s,<sup>66</sup> and a Free Trade and Investment Area in the OECD in the late 1980s,<sup>67</sup> each of which would have embodied rights available in their entirety only to the advanced industrialized countries. Some have also suggested that the negotiation of the North American Free Trade Agreement served as a U.S. exit tactic that brought Europe back to the bargaining table in the Uruguay Round.

In still another variant, the exit tactic involves withdrawing from the deadlocked organization, stepping into anarchy, and reconstituting a new organization under different terms. As shown below, this is the means by which the EC and the United States closed the Uruguay Round.

63. Gruber 2001.

64. Hirschman 1970, 21–29.

65. Beier and Schriker 1989.

66. Atlantic Council 1976.

67. Hufbauer 1989.

## **Trade Rounds as Cycles Bounded by Law-Based and Power-Based Bargaining: Launching, Agenda Setting, and Closing Trade Rounds**

Trade negotiating rounds are the means by which the vast proportion of GATT/WTO law has been legislated. Bargaining in the Tokyo and Uruguay rounds is analyzed here to understand the extent to which bargaining in trade rounds has been law- or power-based. These most recent trade rounds are most likely to exemplify a representative range of law- and power-based bargaining, largely because prior to 1970 the GATT was dominated by an “anti-legal” culture that began to melt away in the late 1960s and did not completely collapse until the early 1980s.<sup>68</sup>

As shown below, the extent to which negotiations in trade rounds have been law- or power-based has depended on the stage of the round and geostrategic context. Trade rounds may be analyzed in three overlapping stages: launching, informal agenda setting, and closing. Generally, power has been used more overtly as rounds have proceeded from launch to conclusion, with the extent of coercion used in closing the Tokyo Round constrained by the Cold War context.

### *Launching Trade Rounds through Law-Based Bargaining*

The easiest way to launch a round has been to attain consensus on a vague mandate for negotiation that includes virtually all initiatives offered by any member. This approach has enabled all parties to believe that the round could result in a Pareto-improving and equitable package of outcomes, with domestic political liabilities from increased import competition offset by foreign market opening. Negotiators typically haggle over alternative ways to frame issues and objectives in the mandate, but—to reach consensus—the less prejudice in the mandate, the better. In some rounds, there have been one or two issues that simply could not appear in the mandate because of domestic political constraints. But typically, a consensus on the draft negotiating mandate has been blocked until virtually all topics of interest to members have been included, and until the language has been sufficiently vague so as not to prejudice the outcome of negotiations in a manner that any country might oppose. From the perspective of powerful countries, invisible weighting could be used at later stages. Moreover, only at later stages, after years of negotiations, will powerful countries have enough information on state preferences to fashion a package of asymmetric outcomes that they can be confident will be accepted by weaker countries. Hence, bargaining to launch trade rounds has been law-based.

In preparing to launch each of the last five rounds, there has been a North-South split over the pace, form, or structure of liberalization. Each time, the developing

68. See Hudec 1988; and Price 1992.

countries have demanded a mandate for negotiations that would include special and differential treatment. Developed countries have initially resisted including developing country initiatives in the decision to launch. But the legal power of developing countries to block a consensus has led to the inclusion of their initiatives in the consensus decisions to launch the Dillon,<sup>69</sup> Kennedy,<sup>70</sup> Tokyo, Uruguay, and Doha rounds.

**Launching the Tokyo Round.** The launch of the Tokyo Round provides a clear example of this dynamic. In February 1972, the U.S. issued a joint declaration with the EC (and a separate declaration with Japan) undertaking to initiate and actively support multilateral and comprehensive negotiations in the framework of the GATT beginning in 1973. At the March 1972 GATT Council meeting, all the industrialized countries pledged their full support for such negotiations, but several developing countries objected to the absence of a commitment to address their special trade concerns. At the November 1972 Contracting Parties Session, a consensus was reached to establish a Preparatory Committee for multilateral negotiations only by virtue of including vague terms of reference and language demanded by several developing countries that would commit to solving “in an equitable way the trade problems of both the developed and the developing countries.”<sup>71</sup> The Preparatory Committee completed a report and draft declaration that left unresolved the extent of special treatment for developing countries. At the September 1973 Tokyo Ministerial Meeting, the developing countries finally agreed to join a consensus declaration to launch a round, after the EC and the United States agreed to designate “Tropical Products” as a special, priority sector and include elaborate language aimed at “securing additional benefits for the international trade of developing countries.”<sup>72</sup>

**Launching the Uruguay Round.** The history of launching the Uruguay Round<sup>73</sup> provides an even more compelling example of developing country power derived most proximately from law, but ultimately from the willingness of powerful countries to bargain exclusively in the shadow of law—at this initial stage of a round. Several developing countries, led by Argentina, Brazil, Egypt, India, and

69. The Dillon Round was launched by a consensus to include three sets of concerns (tariffs, agriculture, and the concerns of LDCs) in a “Program of Action Directed Towards Expansion of International Trade.” Second Report of Committee I, adopted on 19 November 1959, GATT Doc. L/1043, Add. I, Corr. 1, in GATT BSID *8th Supplement* (1960), 103–19.

70. See discussion above, corresponding to n. 42.

71. Programme of Work of the Contracting Parties, Summing Up By the Chairman, 14 November 1972, L/3773/Rev. 1, in GATT BSID *19th Supplement* (1973), 12–13.

72. See Declaration of Ministers Approved at Tokyo on 14 September 1973, GATT Doc. MIN(73)1, in General Agreement on Tariffs and Trade, GATT BSID *20th Supplement* (1974), 19–22; Winham 1986, 91–127.

73. This account is based on authorities cited below, and interviews or conversations with A. Jane Bradley, Peter Murphy, Michael Smith, and other USTR officials, Geneva, November and December 1985; and Washington, D.C., December 1986.

Yugoslavia (then often referred to by some developed country diplomats as the “Group of Five”), used three sets of GATT decision-making rules as sources of power in forcing the EC and the United States to launch a round that included topics of interest to all Contracting Parties. First, and most importantly, the GATT could not launch a new round without consensus support. With that understanding, the Group of Five blocked a consensus, demanding preconditions for negotiations, which initially included the elimination of agenda topics of high priority to the North and the addition of agenda topics of high priority to developing countries. By 1982, the EC and the United States had supported establishment of a work program in preparation for a new round, and by March 1985 both transatlantic powers had agreed to launch a new round to cut tariffs on industrial products, revise the Tokyo Round codes, and cover new issues (intellectual property, investment measures, and services), despite disagreement over what to do about agriculture.<sup>74</sup> Yet several developing countries, led by the Group of Five, insisted that they could not support a new trade round unless it also included: liberalization of trade in tropical products and textiles; elaborating rules on safeguards so as to eliminate Voluntary Restraint Agreements; an agreement on trade in domestically-prohibited substances; and a “standstill” commitment to provide that the developed countries would not raise tariff or nontariff barriers above then-prevailing levels during the course of the trade negotiations. The initial step toward a new round—establishing the Ministerial Work Program in 1982—was taken only by consensus to include all of these items.<sup>75</sup>

Second, past GATT decisions could be interpreted only by a consensus of the Contracting Parties (unless they resorted to a lengthy and uncertain dispute settlement process, the outcome of which also required approval by consensus). The Group of Five was able to block a consensus on interpretations of how the Work Program was to be completed so as to ensure that developing country issues were not dropped.<sup>76</sup>

Third, the Group of Five was able to block a consensus on interpretations of the breadth of the GATT’s legal competence to address various trade issues, such as trade in services and trade in counterfeit goods. At the 1985 Special Session, seven countries argued that there was no consensus among the Contracting Parties that the GATT was jurisdictionally competent to address intellectual property or services issues. The developing countries’ legal competence argument was baseless.<sup>77</sup> But the lack of a consensus on GATT competence signaled that the developing countries had the power not only to block a new round in which all parties would be expected to negotiate on services and intellectual property, but that the developing countries

74. Winham 1989, 54.

75. GATT Ministerial Declaration, 19 November 1982, GATT Doc. L/524 (1982), in GATT BSID 29th Supplement (1983), 9.

76. See, for example, Improvement of World Trade Relations, statement by the representative of India on behalf of 24 developing countries, GATT Doc. L5818, 7 June 1985. See also GATT Doc. L/5852 and C/W/479.

77. Roessler 1987.

could prevent the developed countries from negotiating the issues just among themselves at the GATT.

The deadlock over initiation of a new round was broken with the establishment of a Preparatory Committee in late 1985, only after all parties agreed to include all the issues that had been raised. The Preparatory Committee made little progress until a group of nine small industrialized countries drafted a vague and broadly issue-inclusive ministerial declaration that was soon supported by the transatlantic powers and an increasingly wider circle of countries. This action culminated in the consensus-supported draft that launched the new round at the summer 1986 Punta del Este ministerial meeting.<sup>78</sup>

**Launching the Doha Round.** The recent launch of the Doha Round has followed the familiar pattern. At the December 1999 Seattle Ministerial, the U.S. government supported a “mini-round” with a narrow set of issues championed exclusively by U.S. industry, focusing on agriculture, services, intellectual property, and a commitment to ban tariffs on e-commerce. European negotiators criticized the U.S. approach as a “non-starter,” and supported instead a broad negotiating mandate that would also include environment, labor, trade remedy laws, investment, and competition policy. Developing countries wanted to exclude environment, labor, investment, and competition policy and include their issues: tariffs on manufactures and tropical products, further liberalization of agriculture (but with a special right for developing countries to subsidize), extended periods for developing country implementation of the TRIPs and Trade-Related Investment Measures (TRIMs) agreements, a broad “public health” exception to the TRIPs agreement, trade and debt, technical cooperation and capacity building, and reform of the WTO decision-making process. While substantial media attention was devoted to the riots and to developing country complaints about process, disagreement about the appropriate breadth of the negotiating mandate doomed the Seattle Ministerial to failure.

Subsequent efforts to start a new round were based on recognition of the necessity of a broad mandate. The Director-General’s efforts concentrated exclusively on such an approach,<sup>79</sup> and the Bush Administration in the United States almost immediately accepted the European position on the need for a broad mandate.<sup>80</sup> By August 2001, the EC and the United States agreed that a mandate for a new round should include all the issues raised in Seattle, and many developing countries had reached the same conclusion.<sup>81</sup> In preparing for and during the November 2001 Ministerial meeting in Doha, the developing countries—individually and jointly, through mechanisms such as an October declaration by the Group of 77 plus China—continuously threatened to block a consensus to launch a new round unless the mandate was “balanced,” including issues in which they were interested. Some developing countries also

78. See Oxley 1990, 132–40; Paemen and Bensch 1995, 34–45; and Odell 2002.

79. Bruce Stokes, No Easy Fit, *National Journal*, 26 February 2000.

80. Bureau of National Affairs, Outlook, *International Trade Reporter* 18 (4):154–59.

81. Bruce Stokes, The Countdown to Doha, *National Journal*, 28 July 2001.

argued that to call the negotiation a “round” would contradict their position that the results of the Uruguay Round should be implemented fully before launching a new “round.” In the end, consensus was reached to launch a “work program” (which is indistinguishable from a round other than by its name) through a Declaration that the ministers expressly called “broad and balanced” and will enable WTO members to negotiate on each issue (except labor)<sup>82</sup> that was raised in Seattle.<sup>83</sup>

### *Informal Agenda Setting in the Shadow of Closure*

Many have argued that in legislative settings where authority to set the agenda (that is, formulate proposals that are difficult to amend) rests with a formally specified agent, the process of agenda setting explains outcomes better than plenary voting power.<sup>84</sup> In contrast, in organizations based on sovereign equality, the agenda-setting function is performed informally, largely by the coordinated action of the major powers and a secretariat that is strongly influenced by them.

The GATT/WTO agenda-setting process has three overlapping stages: (1) carefully advancing and developing *initiatives* that broadly conceptualize a new area or form of regulation; (2) drafting and fine-tuning *proposals* (namely, legal texts) that specify rules, principles, and procedures; and (3) developing a *package* of proposals into a “final act” for approval upon closing the round, which requires the major powers to match attainment of their objectives with the power they are willing and able to use to establish consensus. The agenda-setting process involves iteratively modifying proposals in minor ways (for example, providing a derogation, floor, or phase-in),<sup>85</sup> fulfilling unrelated or loosely-related objectives of weaker countries (that is, promising side-payments), and adjusting the package that will constitute the final act. After being launched, the work of trade rounds has taken place on a formal basis in proposal-specific working groups, negotiating committees, the Trade Negotiations Committee, the GATT Council, special sessions of the Contracting Parties, and occasional ministerials. But important work takes place on an informal basis in caucuses, the most important of which are convened and orchestrated by the major powers. The process has historically operated in the shadow of the coercive power of the EC and the United States.

Most initiatives, proposals, and alternative packages that evolve into documents presented for formal approval have usually been developed first in Brussels and

82. The EU acquiesced on including labor issues in a new round in exchange for including in the Doha Ministerial Declaration a reaffirmation of the June 1998 ILO Declaration on Fundamental Principles and Rights at Work.

83. There were also two relatively small side-payments to developing countries for their support of the round-launching mandate: a clarification of the TRIPs Agreement’s compulsory licensing provision and a waiver for the preferential EU-ACP “Cotonou” market access arrangement.

84. See, for example, Baron and Ferejohn 1989; Garrett and Tsebelis 1996; and Moravcsik 1998, 67–77.

85. On use of these techniques in the EC, see Esty and Geradin 1997, 550–56.



Washington, discussed informally by the transatlantic powers, then in increasingly larger caucuses (for example, Quad countries, G-7, OECD), and ultimately in the "Green Room." Green Room caucuses consist of twenty to thirty-five countries that are interested in the particular text being discussed and include the most senior members of the secretariat, diplomats from the most powerful members of the organization, and diplomats from a roughly representative subset of the GATT/WTO's membership. The agenda for most important formal meetings—round-launching ministerials, mid-term reviews, and round-closing ministerials—has been set in Green Room caucuses that usually take place in the weeks preceding and during those meetings. The draft that emerges from the Green Room is presented to a formal plenary meeting of the GATT/WTO members and is usually accepted by consensus without amendment or with only minor amendments.<sup>86</sup>

The EC and the United States have dominated advancing initiatives at the GATT/WTO for at least forty years.<sup>87</sup> Both weak and powerful countries may advance initiatives, and they may be included in the ministerial declaration that launches a round. But initiatives from weak countries have a habit of dying: after launching the Tokyo and Uruguay rounds, powerful countries often blocked a consensus to advance initiatives by weak countries when they were introduced for formal action in the relevant negotiating committee.<sup>88</sup> Moreover, weak countries are usually excluded from the initial informal caucuses at which powerful countries discuss with each other their important initiatives.<sup>89</sup>

Powerful countries have also dominated proposal development. Successful proposals have usually been drafted first in the capitals of powerful countries—Brussels or Washington. They have then been discussed informally in caucuses of the major powers, and then in other caucuses that include some less powerful countries.<sup>90</sup> In the Tokyo and Uruguay rounds, after the mid-term review, proposals and frameworks for negotiation that had been discussed informally in caucuses were then introduced into the formal working group meetings. Sometimes these texts were tabled by the EC or U.S. representative, and other times they were tabled by representatives of the secretariat or smaller industrialized states. Weaker countries rarely tabled draft texts. Tabled texts typically contained unbracketed language that all countries could accept and bracketed language representing alternative formu-

86. See Winham 1989, 54; Blackhurst 1998; and WTO General Council, Chairman's Statement, Internal Transparency and the Effective Participation of Members, 17 July 2000.

87. Curzon and Curzon 1973.

88. For example, while the declarations that launched both the Tokyo and Uruguay rounds called for "Tropical Products" liberalization and "special and differential treatment" for developing countries, most developing country initiatives in these areas died in the relevant negotiating groups, and the results in these areas disappointed developing countries. Winham 1986. In the Uruguay Round, developing country initiatives and proposals in the TRIPs negotiating group were "dead on arrival." Interview with Emery Simon, Washington, D.C., April 1994.

89. Winham 1986. This is typical in consensus-based organizations. Schermers and Blokker 1995, 501–502.

90. This process is typical in consensus-based organizations. See M'bow 1978; and Schermers and Blokker 1995, 502.

lations favored by different groups of countries. The bracketed language became the subject of detailed negotiation in working groups and—ultimately—in the Green Room prior to and during ministerials.

Simultaneous with initiative and proposal development, powerful countries have considered the package of proposals that should be included in the final act for approval upon conclusion of a round. The package has changed depending largely on how the proposals were shaping up and how much coercion was to be exercised by powerful countries.

The secretariat has usually facilitated this process and has often engaged directly in it by tabling proposals or a package as its own. The secretariat's bias in favor of great powers has been largely a result of who staffs it and the shadow of power under which it works. From its founding until 1999, every GATT and WTO Director-General was from Canada, Europe, or the United States, and most of the senior staff of the GATT/WTO secretariat have been nationals of powerful countries.<sup>91</sup> Secretariat officials may promote and set meetings, table formal or informal negotiating texts, and present their view of the consensus of a meeting.<sup>92</sup> Their actions have usually been heavily influenced or even suggested by representatives of the most powerful states. For example, the Dunkel Draft—the package of proposals that became the basis for the final stages of negotiation in the Uruguay Round—was tabled by the GATT Director-General as the secretariat's draft. However, it was largely a collection of proposals prepared by and developed and negotiated between the EC and the United States, fine-tuned after meeting with broader groups of countries, and it embodied the secretariat's changes mostly on points of contention between the two transatlantic powers.<sup>93</sup> Packages assembled in this manner have proven quite difficult to amend and have served as the basis for the final act.

### *The End of the Day: Power-Based Bargaining in Closing Trade Rounds—and the Cold War Context as a Constraint*

In closing a round, the EC and the United States must employ invisible weighting if they are to achieve an asymmetrical outcome. The decision about how much power to use to facilitate a desired outcome in a particular issue area may be linked to interests in another issue area or to geostrategic context. At the end of both the Tokyo and Uruguay rounds, there was temptation to resort to exit. Both rounds included an ambitious set of nearly completed agreements covering topics that went far beyond the traditional tariff-cutting protocols of earlier years. Reaching consensus on such an ambitious package would be

91. In 2000, twenty-three of twenty-six WTO division directors were from developed countries. WTO: Members Discuss Internal Reforms, Transparency, *BRIDGES Weekly Trade Digest*, 7 March 2000, 1–2, Geneva: International Centre for Trade and Sustainable Development.

92. See M'bow 1978, 898; and Schermers and Blokker 1995, 474–78.

93. Steinberg 1994, 73.

difficult if only contracting could be used. Yet U.S. trade negotiators ultimately decided not to exit in closing the Tokyo Round and to instead contract through law-based bargaining. In the Uruguay Round, they made the opposite decision, choosing to coerce by exiting the GATT and reconstituting the system. The difference in choices is attributable ultimately to the Cold War context: U.S. policymakers, particularly in the Department of State, maintained a trade policy-security policy contextual linkage that constrained the U.S. use of power in concluding the Tokyo Round;<sup>94</sup> this linkage did not operate in closing the Uruguay Round.

**Closing the Tokyo Round.** In the summer of 1978, as the Tokyo Round was about to close, more than 55 members of the GATT's Informal Group of Developing Countries (which was founded in the mid-1960s) began meeting regularly to consider a strategy for closure. Several developing country leaders argued that the GATT decision-making rules endowed the developing countries with substantial leverage in determining the final shape of the Tokyo Round codes. They reasoned that the codes being negotiated on dumping, subsidies, and customs valuation could be considered interpretations of the GATT, which would therefore require support by a consensus of the Contracting Parties. Moreover, these developing countries offered an interpretation that the benefits of those codes had to be provided to all GATT Contracting Parties on an MFN basis, in accordance with GATT Article I, because they constituted interpretations of GATT Articles VI, XVI, and XXIII. Finally, the GATT secretariat could not provide services to administer a code without a consensus of the Contracting Parties. In August 1978, the legal department of the UNCTAD secretariat prepared a memorandum that synthesized this legal analysis.<sup>95</sup> By spring 1979, Argentina, Brazil, Egypt, India, and Yugoslavia had hardened their positions on the multilateral trade negotiations (MTN) codes and had communicated their legal position to negotiators from the EC and the United States.

The Tokyo Round outcome reflected the success of this legal strategy: the developing countries received all of the rights to the subsidies code and the anti-dumping code, but they were not obligated to sign or otherwise abide by the obligations contained in those agreements.<sup>96</sup> The developed countries had objected strenuously to what they characterized as a "free ride" for the developing countries.

94. This argument is based on authorities cited below and interviews or conversations in Washington, D.C., in either December 1985, November 1989–February 1990, or July 2000, with Walter Hollis, Richard Matheison, Peter Murphy, and Doug Newkirk (who worked at STR at the close of the Tokyo Round), and Chip Roh and Jerry Rosen (who worked at the Department of State during that period).

95. Legal and Procedural Questions on the Conclusion of the MTN, Memorandum From the UNCTAD Secretariat, 21 August 1978, UNCTAD Doc. MTN/CB.14.

96. As of 1990, only thirteen of the more than seventy-five developing country Contracting Parties to the GATT had accepted the subsidies code, and only fifteen had accepted the anti-dumping code. Multilateral Trade Negotiations: Status of Acceptances of Protocols, Agreements and Arrangements (as at 7 December 1990), GATT Doc. L/6453/Add. 8, 10 December 1990.

But in a legal bind, the developed countries acquiesced: the decision of the Contracting Parties on administration of the subsidies code and the antidumping code obtained the necessary consensus by reflecting the commitment to apply them on an MFN basis.<sup>97</sup> These developing countries used similar legal leverage in negotiation of the customs valuation code to yield outcomes that were favored by the developing countries and disfavored by the United States and EC, including an eight year delay for developing countries in required implementation of key provisions of the code and a right to take a reservation on other key provisions.

U.S. trade negotiators were disturbed by these outcomes, which many thought could have been avoided by the use of more potent bargaining tactics. When the developing countries began pursuing an aggressive legal strategy in the GATT in the late 1970s, many veteran U.S. trade policymakers worried that the balance in U.S. trade policy between offering limited preferential treatment for developing countries and the domestic demand for absolute reciprocity might be upset. Executive branch representatives on Capitol Hill scrambled to explain away the problems in Geneva, and U.S. negotiators in Geneva were alarmed by what they saw as an “UNCTADization” of the GATT.<sup>98</sup> Some Special Trade Representative (STR) negotiators wanted to break the developing countries’ law-based leverage by threatening to create an alternative preferential regime, proposing to move all or part of the negotiations to the OECD and concluding the round as something akin to a GATT-Plus package. In 1974, when the round was just beginning, the Atlantic Council had proposed establishment of a GATT-Plus regime. The plan provided that the EC, the United States, and most industrialized countries would deepen trade liberalization among themselves, extending the benefits of the arrangements only to those willing to undertake the obligations.<sup>99</sup> The result would have been a two-tiered global trade regime, which would quietly pressure the developing countries into liberalizing or otherwise facing the trade and investment diversion associated with the more liberal GATT-Plus regime.<sup>100</sup>

The approach was controversial within the STR’s office, but the U.S. State Department killed it. Many STR officials opposed the plan as undermining the unconditional MFN principle, but some senior STR officials liked the idea and

97. Action By the Contracting Parties on the Multilateral Trade Negotiations, 28 November 1979, and Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, Decision of 28 November 1979, in *GATT BSID 26th Supplement*, (1980), 201, 203–205. The United States Congress did not faithfully implement the international commitments: U.S. law accorded the injury test in countervailing duties cases only to “countries under the [Subsidies Code] Agreement.” Tariff Act of 1930, as amended by Section 101 of the Trade Agreements Act of 1979. As a result of this contravention, the Executive Branch had to compensate several countries, including India, with a package of commercial concessions.

98. See U.S. Department of State Cable P 041557Z from U.S. Mission Geneva to the Secretary of State, December 1979; and U.S. Department of State, Cable R 181007Z from Ambassador Michael Smith to the Secretary of State, 17 March 1980. Both are on file with author.

99. Atlantic Council 1976.

100. Hufbauer 1989. See generally, Viner 1950.

conferred with State Department counterparts about the idea as the Tokyo Round was approaching conclusion. The State Department was strongly opposed on the grounds that such an action risked hardening the "UNCTADization" of the GATT, diplomatic spillovers into other international organizations, and disturbance of diplomatic relations with developing countries more broadly—all of which were undesirable in the Cold War context in which the United States did not want to alienate developing countries.<sup>101</sup> For these policymakers, eliminating a free ride on the codes was not worth the diplomatic risks posed by overt coercion. With State Department opposition, it was apparent to STR negotiators that the Trade Policy Committee could not reach the consensus required to support a formal diplomatic threat of exit.<sup>102</sup>

Debate within the Ford and Carter administrations about the possibility of establishing an alternative preferential regime, tactical mention of that possibility by USTR negotiators in Geneva, and publications and editorials on the question created enough uncertainty about a potential exercise of power to permit European and U.S. negotiators to dominate the agenda-setting process in Geneva—until the end of the day. When it became apparent to the developing countries, in spring 1979, that the transatlantic powers would ultimately not exercise power to force them on board, the Tokyo Round was closed with law-based bargaining, yielding a final package that gave developing countries a free ride on many agreements.

**Closing the Uruguay Round: The Single Undertaking.**<sup>103</sup> In contrast, by the time USTR negotiators settled on a plan for concluding the Uruguay Round, the Cold War had ended and the State Department had dropped its opposition to an overt use of power.

Since the beginning of the Uruguay Round negotiations, most developing countries had stated their intention not to sign on to the agreements on TRIPs, TRIMs, or the General Agreement on Trade in Services (GATS). U.S. negotiators considered developing country acceptance of these agreements crucial to U.S. interests and

101. This analysis is consistent with arguments by others that U.S. Cold War policy sought to avoid alienating developing countries and so led to their free-riding. See Krasner 1976; and Gilpin 1981.

102. Without such a consensus, U.S. law on and practice in the interagency trade policy process would have required a Presidential decision on the matter. See Section 242 of the Trade Expansion Act of 1962, as amended, 19 U.S.C. 1801; amended by P.L. 93-618; and 40 Fed. Reg. 18419, 28 April 1975. STR officials were unwilling to take the matter to the President.

103. The analysis in this section is based on interviews or conversations with several European, U.S., and GATT/WTO Secretariat officials, including Julius Katz, Washington, D.C., August–December 1990, and March 1995; Horst Krenzler, Los Angeles, September 1999; and Warren Lavorel, Washington, D.C., August–December 1990, and Geneva, March 1995; and several U.S. government documents, including the following memoranda (on file with author): Memorandum to UR Negotiators and Coordinators, Preliminary Legal Background on Ending the Uruguay Round, From USTR General Counsel, 1 December 1989; Memorandum for Ambassador Warren Lavorel and Ambassador Rufus Yerxa, A Single Protocol for Concluding the Round, From USTR General Counsel and Deputy General Counsel, 20 July 1990; and Memorandum for General Counsel's Office, Options for Concluding the Round, 13 August 1990.

to Congressional support of a final package. Moreover, the EC and the United States were concerned that the developing countries would use their leverage under the consensus tradition of the GATT to block the secretariat from servicing those agreements unless they were applied to both signatories and non-signatories on an MFN basis.

In late spring of 1990, USTR negotiators decided to try to build a U.S. government consensus on what some at USTR referred to internally as “the power play,” a tactic that would force the developing countries to accept the obligations of all the Uruguay Round agreements. The State Department supported the approach and, in October 1990, it was presented to EC negotiators, who agreed to back it. The plan was later to be characterized as the single undertaking approach to closing the round. Specifically, as embodied in the Uruguay Round Final Act, the Agreement Establishing the WTO contains “as integral parts” and “binding on all Members”: the GATT 1994; the GATS; the TRIPs Agreement; the TRIMs Agreement; the Subsidies Agreement; the Anti-dumping Agreement; and every other Uruguay Round multilateral agreement. The Agreement also states that the GATT 1994 “is legally distinct from the General Agreement on Tariffs and Trade, dated 30 October 1947. . .” After joining the WTO (including the GATT 1994), the EC and the United States withdrew from the GATT 1947 and thereby terminated their GATT 1947 obligations (including its MFN guarantee) to countries that did not accept the Final Act and join the WTO. The combined legal/political effect of the Final Act and transatlantic withdrawal from the GATT 1947 would be to ensure that most of the Uruguay Round agreements had mass membership rather than a limited membership.

GATT Director-General Arthur Dunkel agreed to embed the plan in the secretariat’s draft Final Act, which was issued in December 1991. From that time forward, it remained in all negotiating drafts, enabling the transatlantic partners to more completely dominate the agenda-setting process in the Uruguay Round than in the Tokyo Round.

### **Maintaining Sovereign Equality Rules to Generate Information about the Interests of All States**

As shown below, at the GATT/WTO, powerful states have used invisible weighting to define not only substantive rules, but also future decision-making rules. Powerful countries could choose either weighted voting or sovereign equality rules to achieve asymmetric outcomes. But sovereign equality rules are more likely than weighted voting to confer legitimacy on those outcomes. Whether or not that legitimacy sticks, sovereign equality rules are more useful than weighted voting in generating information that is crucial to agenda setting dominated by powerful states, and that can lead to a package acceptable to all states.

International legislative outcomes generated from a consensus-based system may enjoy more legitimacy than those from a weighted voting system.<sup>104</sup> Historically, developing countries have fiercely opposed weighted voting in organizations where they have feared that richer countries could set policies against their interests.<sup>105</sup> In contrast, a decision based on consensus appears to be a product of consent and in accord with the principle of sovereign equality of states—principles with deep pedigrees that are rooted in constitutive rules of international law. Building on Max Weber's definition of legitimacy and H.L.A. Hart's concept of law, Thomas Franck has argued that outcomes derived from procedures rooted in these "ultimate" rules of international law may enjoy the highest degree of legitimacy.<sup>106</sup> Moreover, under sovereign equality rules, the process of debating and purporting to consider relevant data from all interested countries may enhance the discursive validation of outcomes.<sup>107</sup> The legitimizing effect of sovereign equality rules on outcomes may be particularly pronounced for domestic audiences, as opposed to trade negotiators who have witnessed invisible weighting first-hand.

The asymmetry of outcomes derived through invisible weighting risks undermining the legitimacy of the outcomes and the decision-making rules. Yet developing countries do not determine what the decision-making rules will be. Powerful states have preferred sovereign equality rules to weighted voting in the GATT/WTO because they provide incentives and opportunities for collecting the information necessary for a successful agenda-setting process. Several political scientists have shown how international organization secretariats<sup>108</sup> and non-governmental organizations (NGOs)<sup>109</sup> may collect and transmit information that leads to efficiency in policymaking—or influence over it.<sup>110</sup> Law scholars have shown how alternative deliberative procedures in business organizations, among appellate judges, between litigants, and in other organizations may be used to generate efficiency-enhancing information.<sup>111</sup> The task of a powerful country negotiator in GATT/WTO agenda setting is to develop a final act that will maximize fulfillment of her country's objectives, given the power that her country can use to attain consent from all states—a process that one WTO official has described as "filling the boat to the brim, but not overloading it."<sup>112</sup> The agenda setters from powerful states must have good information about each country's preferences, the domestic politics behind those preferences, and risk tolerances—across all of the topics that might be covered—to understand potential zones of agreement on a package acceptable to

104. See Zamora 1980; and Gold 1972, 201.

105. Schermers and Blokker 1995, 514.

106. Franck 1990, 112–16, 190–93.

107. Habermas 1979, 183–88.

108. See Keohane 1983 and 1984.

109. Raustiala 1997.

110. See Haas 1989; and Bernauer 1995.

111. See Charny 1997; Bainbridge 1998; and Caminker 1999.

112. Telephone interview with Warren Lavorel, Geneva, March 1995.

all.<sup>113</sup> To be most useful, the available information must be sincere and not provided for strategic purposes (that is, not for purposes of yielding an outcome that would make the information provider better off than if he or she had provided sincere information).<sup>114</sup>

The GATT/WTO secretariat can at best transmit incomplete information for use in agenda setting. Generally, large, branching hierarchies like the GATT/WTO secretariat are unlikely to promote complete information generation and transmission.<sup>115</sup> Moreover, the GATT/WTO secretariat usually lacks authority or political power to force a revelation of state preferences, and states are often reluctant to rely on the secretariat to transmit information that may be crucial to explaining their negotiating objectives and domestic political constraints, efforts aimed at shaping perceptions of the bargaining zone. Members sometimes do not trust the secretariat to accurately or fully convey important information to other states. And the secretariat's effort to aggregate information across countries often requires re-framing information provided by members into a new taxonomy that may diminish its value or change its intended meaning. Finally, as negotiations move toward fruition, information on state preferences must be generated and transmitted iteratively. Since new information on preferences and new proposals engender demand for still more information, inserting the secretariat into this iterative process may simply add a transmission layer to what could otherwise be an interstate process, slowing it down and increasing the risk of losing information.

Under the consensus rule, diplomats from powerful states have incentives to obtain accurate information on the preferences of weaker states: they need to understand those preferences if they are to fashion a substantive package and design legal-political maneuvers that will lead to outcomes acceptable to all. In contrast, a weighted voting scheme can, under certain circumstances, permit a handful of powerful states to routinely determine outcomes without considering the interests of weaker states. If powerful states are like-minded, they could develop legislative packages among themselves in closed agenda-setting caucuses, for they would have the weighted voting strength to determine outcomes. This process would, of course, deprive weaker states of an opportunity to convey information about their preferences and could lead to a pattern of outcomes that consistently make weak countries worse off. Some commentators have suggested that the Executive Committee of the IMF adopted an informal consensus decision-making rule because use of its formal weighted voting rules had led to a pattern of exclusionary decision making, limited information generation, and outcomes that disregarded weaker country interests.<sup>116</sup>

113. Kenneth Arrow has argued that welfare-maximizing decision making by consensus requires that each party have information about every other party's preferences, whereas authority decision making requires only that the decision maker have information about every party's preferences. Arrow 1974, 69.

114. See Charny 1997; and Caminker 1999.

115. Bainbridge 1998, 1036.

116. See M'bow 1978, 898; Schermers and Blokker 1995, 514; and Gold 1972, 195–200.



Conversely, under the consensus rule, diplomats from weaker states have opportunities and incentives to provide information on preferences to powerful states. If weaker states perceive that the information they provide will be taken into account by the major powers in their agenda-setting work, then weaker states have an incentive to offer detailed information about their preferences. Even if many weaker states perceive that some of their preferences will be ignored, they would have difficulty sustaining a cooperative strategy of obstructing the information-gathering process because of wide variance in their interests across issue areas, and defensive and offensive incentives to provide the information.<sup>117</sup> A weak country that tries to resist the agenda-setting process by withholding information on its preferences risks suffering a *fait accompli* in the form of a final package that does not take into account its interests; such a final package instead would take into account the interests of other weak states that do provide information.

Moreover, in some circumstances, sovereign equality procedures may help generate important information by forcing a revelation of sincere state preferences. Powerful countries offer initiatives, proposals, amendments, or “non-papers” not only in the hope of hearing a favorable response but also as a “probe” intended to engender an informative response. Whenever a probe is tabled, a state opposed to any part of it must block consensus or that state risks an argument that it is estopped by acquiescence from subsequently opposing the text.<sup>118</sup> The consequences of an argument of estoppel by acquiescence range from the persuasive to the peremptory according to the circumstances.<sup>119</sup> Hence, failure to block consensus by a participating state may sometimes be a non-strategic transmission of information implying a sincere unwillingness to oppose it.

While consensus-blocking could be strategic, insincerity carries risks of retributive behavior by other diplomats and loss of trust in future deliberations.<sup>120</sup> Moreover, the reliability and accuracy of diplomatic statements opposing a proposal made in Geneva are often investigated by the intelligence services of powerful countries or by their diplomats stationed in the capital of the country whose representative made the statement. Powerful state negotiators may also try to gauge an expression of one state’s preferences by comparing its asserted views to those of similarly-situated states. Thus state responses to specific initiatives, proposals, and amendments tabled by powerful countries—the act of opposing or not opposing a consensus, associated explanations, and offers of amendments—generate information for refinement by agenda setters, part of a progressive and iterative dynamic of information generation and proposal refinement.

These procedures and processes generate a different depth and breadth of information in alternative fora. Informal ad hoc caucuses and Green Room discussions, which also operate on consensus and other sovereign equality practices, offer

117. Stein 1993.

118. On estoppel by acquiescence, generally, see the discussion above corresponding to n. 31.

119. See MacGibbon 1958, 502; and Bowett 1957.

120. Charny 1997, 17.

a shortcut for ascertaining information from all GATT/WTO members through negotiation with a roughly representative sample of states. The participatory rights and consensus-blocking power guaranteed to all countries in formal functional working groups and subgroup meetings generate substantially deeper information on state preferences than can be gleaned in informal caucuses. And formal subgroups, working groups, and plenary meetings have provided information across all interested countries, increasing certainty about the extent of opposition or support for particular initiatives, proposals, and packages. Indeed, powerful countries have used probes in plenary meetings to test the breadth of opposition to proposals first vetted in the Green Room. Also, the information gathered in plenary meetings helps powerful countries ascertain which states to include in informal caucuses.

Interviews with EC and U.S. diplomats who discussed alternative decision-making rules for the WTO confirm that legitimacy and information generation for drafting agreements acceptable to all were important reasons they decided to maintain consensus decision making—indeed to formalize it in the Agreement Establishing the WTO.<sup>121</sup> Their decision was made in 1990, during a series of deputy ministerial and ministerial discussions that ran from September through November. The U.S. government's initial position was that the single undertaking and creation of the WTO offered an opportunity for more direct formal transatlantic control over the GATT/WTO and that consensus decision making at the GATT would be too cumbersome for an organization expected to have more than 120 members. A senior U.S. negotiator proposed to EC counterparts two alternative weighted rules: (1) the WTO would be managed by an Executive Committee composed of the eighteen largest trading countries, which together carry on over sixty percent of world trade, with permanent membership guaranteed for the four Quadrilateral countries and the precise powers of the Executive Committee to be worked out if the EC responded affirmatively to the idea in principle—an approach modeled on the Havana Charter; or (2) most decisions would be taken by majority vote, with the four Quadrilateral Members each having a veto—an approach modeled on the UN Security Council.

Both proposals were rejected by EC representatives, who persuaded U.S. negotiators with counter-arguments for maintaining the consensus rule. All of the senior EC and U.S. negotiators agreed that a change in the decision-making rules was unnecessary: the single undertaking that they had agreed to use to close the Uruguay Round demonstrated that the EC and the United States could powerfully influence the outcome of trade negotiations under consensus decision making. Most of the negotiators thought that changing the procedure would generate a significant transaction cost: representatives of weaker countries would oppose the plan, which

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121. Interviews or conversations with Ambassador Julius Katz, Washington, D.C., August–December 1990 and March 1995; Horst Krenzler, Los Angeles, September 1999; Ambassador Warren Lavorel, Washington, D.C., August–December 1990, and via telephone to Geneva, March 1995; and others from the European Commission and USTR.

they perceived as providing leverage, so the EC and the United States would have to pay for such a change by giving up some commercial benefits they could otherwise expect from the Uruguay Round. Some negotiators believed that the principle of sovereign equality and the associated decision-making rules would continue to confer legitimacy on the process and outcomes for all member states, and that the resulting legitimacy would improve the chances of faithful and complete domestic implementation. In the end, all of the negotiators agreed that, as suggested by the single undertaking, they wanted the WTO to generate rules that could be acceptable to all of its members; the consensus decision-making practice was generating important information for European and U.S. negotiators for use in the agenda-setting process that they were dominating and that could yield packages acceptable to all; and they risked losing the processes by which that information was obtained if the decision-making rules were changed to a weighted system.

### **Conclusion: The Organized Hypocrisy of Consensus Decision Making—And Its Limits**

GATT/WTO decision-making rules based on the sovereign equality of states are organized hypocrisy in the procedural context.<sup>122</sup> The transatlantic powers have simultaneously dominated GATT/WTO legislative bargaining outcomes and supported the consensus decision-making rule—and related rules—that are based on the sovereign equality of states. The GATT/WTO decision-making rules have allowed adherence to both the instrumental reality of asymmetrical power and the logic of appropriateness of sovereign equality.<sup>123</sup> Trade rounds may be launched by law-based bargaining, but powerful states have dominated agenda setting, and rounds have been concluded in the shadow of power—to varying degrees. GATT/WTO sovereign equality decision-making rules and processes help generate crucial information for powerful states to use in the invisible weighting process, and have helped legitimize GATT/WTO bargaining and outcomes for domestic audiences. Instead of generating a pattern of Pareto-improving outcomes deemed equitable by all states, GATT/WTO sovereign equality decision-making rules may be combined with invisible weighting to produce an asymmetric distribution of outcomes of trade rounds.

#### *Distributive Consequences*

In the Tokyo Round, transatlantic capacity combined with uncertainty about whether the EC and the United States might opt for a preferential regime to yield an outcome that has been criticized as ignoring the interests of developing coun-

122. Krasner has concluded that Westphalian sovereignty is organized hypocrisy. Krasner 1999. Sovereign equality decision-making rules are corollaries of Westphalian sovereignty. See Dickinson 1920, 335; Riches 1940, 9–12; Kelson 1944, 209; and Remec 1960, 56.

123. March and Olsen 1998.

tries<sup>124</sup>—even though contextual issue-linkage attributable to the Cold War dampened U.S. willingness to coerce a more highly asymmetrical outcome. The raw use of power to close the Uruguay Round via the single undertaking best exemplifies transatlantic domination of the GATT/WTO, despite the sovereign equality decision-making rules there. Welfare gains from the round have varied across countries and regions. Studies have shown high variance in the net trade-weighted concessions given and received: some territories, such as the United States, received deeper concessions than they gave; other territories, such as India, South Korea, and Thailand, gave much deeper concessions than they received.<sup>125</sup> Moreover, several computable general equilibrium models have shown that the Uruguay Round results disproportionately benefit developed country GDPs compared to developing countries, and that some developing countries would actually suffer a net GDP loss from the Uruguay Round—at least in the short run.<sup>126</sup> More broadly, it is hard to argue that developing countries uniformly enjoyed net domestic political benefits from the nontariff agreements: they assumed new obligations in the TRIPs and TRIMs agreements, the GATS, and the Understanding on Balance-of-Payments Provisions of the GATT 1994—which most long opposed; they gained nothing of significance from the revised subsidies and anti-dumping agreements; and they were required to assume the obligations of those two agreements—in contrast to the Tokyo Round codes, which had voluntary membership. And while the Textiles Agreement provides for elimination of quotas on textiles and apparel, it is heavily back-loaded and U.S. tariff peaks of around 15 per cent on those products were not eliminated. Most developing countries got little and gave up a lot in the Uruguay Round<sup>127</sup>—yet they signed on.

Some might hypothesize that developing countries signed on to the results because their own preferences had become increasingly liberal and export-oriented over the course of the round. But these observations do not explain the structure and extent of liberalization embodied in the Uruguay Round agreements, which were imposed imperially<sup>128</sup> and later deemed imbalanced by the Group of 77 and China.<sup>129</sup> Moreover, some elements of the Uruguay Round package, such as the TRIPs Agreement, could not be justified on liberal principles alone, and most developing countries did not want to enter into those agreements—yet they did.<sup>130</sup>

This analysis does not suggest that developing countries have not benefited from GATT/WTO participation or from liberalization more broadly. But as measured by

124. See, for example, Winham 1986, 375–79, 387–88.

125. Finger, Reincke, and Castro 1999.

126. See Goldin, Knudsen, and van der Mensbrugghe 1993; Overseas Development Institute 1995, 2–3, tab. 1; and Harrison, Rutherford, and Tarr 1996, 217. GATT Secretariat 1993, 31, tab. 16 shows that developing countries benefit less than developed countries, but does not show that any developing countries are made worse off.

127. See Ramakrishna 1998; Srinivasan 1998, 99–101; and Oloka-Onyango and Udagama 2000.

128. Finger and Schuler 1999.

129. G-77 and China 2001.

130. Govaere and Demaret 2001.

their own objectives going into the last two rounds, their complaints about the shortcomings of the outcomes of those rounds, and informed by the analysis above, it is hard to conclude that developing country negotiators are—on the whole—nearly as pleased as their EC and U.S. counterparts with negotiating outcomes at the GATT/WTO. And it appears that some developing country negotiators now consider their countries worse off as a result of the Uruguay Round agreements than they were under the status quo ante.

*Limits on the Organized Hypocrisy of Consensus Decision Making at the GATT/WTO*

Is this pattern of bargaining and outcomes likely to be sustained over time? The Doha Round was recently launched in a familiar pattern, and the Doha Ministerial Declaration states that the negotiation will be closed through a single undertaking. Yet theory suggests several potential limits to invisible weighting at the WTO and to the organized hypocrisy of sovereign equality decision making, more broadly.

Several possibilities suggested by theory seem unlikely to materialize in the short run. One possibility is that the principle of sovereign equality could take on a life of its own, precluding any political action that contradicts it. Just as norms limit realist regimes theory,<sup>131</sup> they could limit invisible weighting. While theory suggests this possibility, process-tracing, memoirs, interviews, and secondary histories of the GATT/WTO offer no evidence that normative considerations have thus far precluded the eventual equilibration of outcomes with power that is explained by invisible weighting.

Another possibility is that GATT Contracting Parties and WTO members have been willing to use sovereign equality rules—and have not deadlocked the organization—only because they have agreed implicitly to move together in an embedded neoliberal<sup>132</sup> direction. Perhaps sovereign equality rules would yield deadlock if WTO members' broad goals began to run orthogonal to each other—if a substantial bloc of WTO members began disfavoring neoliberal trade, while another bloc favored it. Or perhaps the organization would deadlock if the norm converged on *dirigisme* instead of neoliberalism. But these possibilities, which would entail a fundamental change of the regime,<sup>133</sup> seem unlikely in the short term.

Still another possibility is that even when powerful states identify a common interest to pursue in negotiations with weaker countries, cooperation problems between major powers could inhibit their effective use of power tactics and their domination of agenda setting, resulting in outcomes that do not reflect the common interests of powerful states. Game theoretical analyses have suggested, from the earliest work on the subject, that serious cooperation problems will exist in

131. Krasner 1983b.

132. Ruggie 1983.

133. Krasner 1983a, 4.

multi-party negotiations.<sup>134</sup> Failure to employ collaborative solutions to cooperation problems (for example, sequencing or packaging issues) has at times constrained the effective use of power tactics and agenda setting by the transatlantic powers.<sup>135</sup> But the packaging of topics in trade rounds as the usual *modus operandi* of GATT/WTO legislation has generally solved this cooperation problem.

Finally, substantial transaction costs of exit could constrain use of the most potent forms of coercion.<sup>136</sup> There was little financial cost in exiting from the GATT and creating the WTO. While there may have been some political costs, these seem relatively low. The organized hypocrisy heuristic suggests that exposure of the mismatch between behavior (on one hand) and norms, scripts, or rituals (on the other) can engender disorder. Such disorder may be characterized by: social or political tension between those adversely affected by the behavior and those perpetrating it; a breakdown or collapse in operation of the norms, scripts, or rituals; or demands to reform them. Typically, these problems are remedied by new norms, scripts, or rituals—these may simply constitute new fictions or reinforce old ones.<sup>137</sup>

Consistent with these expectations, since conclusion of the Uruguay Round, developing country negotiators have organized to demand procedural reforms to ensure an inclusive and transparent negotiating process. Some developing country negotiators were so incensed by internal non-transparency that they tried to crash Green Room discussions at the 1999 Seattle Ministerial. There have been ongoing, contentious discussions in the WTO about increasing the internal transparency of its decision-making process. At least forty-nine developing countries opposed launching a new round without new procedural guarantees, and the Doha Declaration contains a hortatory commitment to increased internal transparency. Taken together and seen in context, these developments suggest that the single undertaking that closed the Uruguay Round may have partly exposed the organized hypocrisy of consensus decision making at the GATT/WTO. But there is no reason to believe that the putative remedy—a hortatory commitment to increased internal transparency—will fundamentally change agenda setting or invisible weighting at the WTO. Even if developing countries understand exactly why and how the WTO decision-making process leads to asymmetrical outcomes, the analysis above shows there is little they can do about it.

The most plausible contemporary constraints on invisible weighting at the WTO are related to the limits of transatlantic trade power. If power continues to disperse in the WTO, invisible weighting by Brussels and Washington will become more difficult. Expanded membership has been diffusing power in the GATT/WTO. Moreover, many developing countries tried to cooperate with each other in closing the Tokyo Round, in blocking the launch of the Uruguay Round, and in efforts to

134. von Neumann and Morgenstern 1947, 220–37.

135. Steinberg 1999.

136. See generally, Hirschman 1970 on barriers to exit.

137. Brunsson 1989.

shape the launch of the Doha Round. Sustained cooperation among developing countries—which until now has proven difficult—could further empower them. EC-U.S. cooperation could become insufficient to drive outcomes, requiring the addition of new powers to the inner core of countries that drive the organization, making cooperation within that inner core more difficult. This would favor more law-based bargaining at the WTO—dampening the flow of outcomes there, but making the pattern more symmetric.

Simultaneously, many newer issues on the WTO agenda seem to require solutions based on institutional changes to national legal, economic, and political systems that will not easily be realized and are exposing the limits of raw trade bargaining power. The apparent incapacity of most developing countries to implement the TRIPs agreement exemplifies the problem. Adding investment, environmental regulation, and competition policy to the trade agenda will magnify the limits of power.

Finally, it is possible that geostrategic context will emerge again as a constraint on the raw use of trade power by Europe and the United States. Just as the Cold War dampened U.S. willingness to exit the GATT or to formally threaten doing so, so may the war against terrorism—or the next geostrategic imperative.

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