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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.[57] *** 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[58] and non-governmental organizations (NGOs)[59] may collect and transmit information that leads to efficiency in policymaking – or influence over it.[60] 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.[61] 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."[62] 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 all.[63] To be most useful, the available information must be sincere and not provided for strategic purposes (that is, not for purposes of yielding

[57] See Zamora 1980; and Gold 1972, 201.
[58] See Keohane 1983 and 1984.
[59] Raustiala 1997.
[60] See Haas 1989; and Bernauer 1995.
[61] See Charny 1997; Bainbridge 1998; and Caminker 1999.
[62] Telephone interview with Warren Lavorel, Geneva, March 1995.
[63] 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.

an outcome that would make the information provider better off than if he or she had provided sincere information).[64]

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.[65] 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. ***

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. *** 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.[66]

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.[67] A weak country that tries to resist the agenda-setting process by withholding information on its preferences risks suffering a *fait*

[64] See Charny 1997; and Caminker 1999.
[65] Bainbridge 1998, 1036.
[66] See M'bow 1978, 898; Schermers and Blokker 1995, 514; and Gold 1972, 195–200.
[67] Stein 1993.

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.[68] The consequences of an argument of estoppel by acquiescence range from the persuasive to the peremptory according to the circumstances.[69] 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.[70] 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. *** 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.

* * *

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.[71] ***

[68] On estoppel by acquiescence, generally, see the discussion above corresponding to n. 31.

[69] See MacGibbon 1958, 502; and Bowett 1957.

[70] Charny 1997, 17.

[71] 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.

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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.[72] 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.[73] 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 countries[74] – 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. *** [It] is hard to argue that developing countries uniformly enjoyed net domestic political benefits from the

[72] 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.

[73] March and Olsen 1998.

[74] See, for example, Winham 1986, 375–79, 387–88.

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[75] – yet they signed on.

* * *

This analysis does not suggest that developing countries have not benefited from GATT/WTO participation or from liberalization more broadly. But as measured by 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,[76] they could

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

[76] Krasner 1983b.

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[77] direction. ***

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 multi-party negotiations.[78] 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.[79] 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.[80] 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.[81]

[77] Ruggie 1983.
[78] von Neumann and Morgenstern 1947, 220–37.
[79] Steinberg 1999.
[80] See generally, Hirschman 1970 on barriers to exit.
[81] Brunsson 1989.

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. *** There have been ongoing, contentious discussions in the WTO about increasing the internal transparency of its decision-making process. *** 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 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 do, so may the war against terrorism – or the next geostrategic imperative.

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The Legalization of International Monetary Affairs

Beth A. Simmons

Sovereign control over money is one of the most closely guarded national prerogatives.[1] Creating, valuating, and controlling the distribution of national legal tender is viewed as an inherent right of a nation-state in the modern period. Yet over the course of the twentieth century, international rules of good monetary conduct have become "legalized" in the sense developed in this volume. This historic shift took place after World War II in an effort to bolster the confidence that had been shattered by the interwar monetary experience.[2] If the interwar years taught monetary policymakers anything, it was that economic prosperity required credible exchange-rate commitments, open markets, and nondiscriminatory economic arrangements. International legalization of monetary affairs was a way to inspire private actors to once again trade and invest across national borders.

*** The Bretton Woods institutions involved only three international legal obligations regarding the conduct of monetary policy. The best known of these was to establish and maintain a par value, an obligation that was formally eliminated by the Second Amendment to the International

[1] Cohen 1998.

[2] See Eichengreen 1992; and Simmons 1994.

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Monetary Fund's (IMF) Articles of Agreement in 1977. But two other obligations remain: to keep one's current account free from restrictions, and to maintain a unified exchange-rate system. The first requires that if a bill comes due for imports or an external interest payment, national monetary authorities must make foreign exchange available to pay it. The second proscribes exchange-rate systems that favor certain transactions or trade partners over others. IMF members can voluntarily declare themselves bound by these rules (Article VIII status) or they can choose to maintain, though not augment, the restrictions that were in place when they joined the IMF (a form of grand-fathering under Article XIV).

My premise is that legalization of international monetary relations helps governments make credible policy commitments to market actors. As I will argue, the central mechanism encouraging compliance is the desire to avoid reputational costs associated with reneging on a legal obligation. As Kenneth Abbott and Duncan Snidal suggest in this volume, legalization is a tool that enhances credibility by increasing the costs of reneging. The hard commitments enclosed at Bretton Woods were thought to be necessary because the soft arrangements of the interwar years had proved useless. Governments have used commitment to the rules contained in the Articles of Agreement as a costly commitment to stable, liberal external monetary policies. This does not mean that compliance is perfect, but it is enhanced when other countries comply and when governments have a strong reputation for respecting the rule of law. ***

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THE INTERNATIONAL MONETARY SYSTEM BEFORE 1945: NATIONAL LAWS AND INTERNATIONAL "UNDERSTANDINGS"

The Nineteenth-Century Gold Standard

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Although the gold standard certainly had a clear legal basis, there was nothing international about the legal structure on which it rested. It was, at most, a decentralized system of regulatory harmonization.[3] To access international capital and trade, other countries had an incentive to follow Britain onto gold. So in 1871 the German Empire made gold its standard (even though this required Germany to hold much more gold in reserve

[3] See, for example, the description by the MacMillan Committee on Finance and Industry, Cmd. 3897, HMSO 1931, as reprinted in Eichengreen 1985, 185–99.

than did Britain). Switzerland and Belgium followed in 1878. France adopted the gold standard but restricted convertibility when the franc was weak. The Austro-Hungarian gulden floated until the passage of (what was purported to be) gold standard legislation in 1891. In 1900 the United States declared gold as the "standard unit of value," which put the country officially on the gold standard (though silver coins still circulated). None of these national decisions involved the international community in their making. ***

Nor was this system managed through international legal arrangements. Even if one does not accept the traditional description of balance-of-payments adjustment under the classical gold standard as fully "automatic," its cooperative aspects knew no international legal guidelines. *** This decentralized system of harmonized national rules seemed to provide a good degree of stability – at least for international traders and investors at the industrialized core of the system.[4] As long as investors were confident that the system would be maintained,[5] there was little reason to design an elaborate international legal structure for its maintenance.

The Interwar Years

World War I disrupted not only the economic relationships but also the domestic political and social stability that underlay the confidence in the gold standard.[6] As a result, the interwar years were a "largely unsuccessful groping toward some form of organizational regulation of monetary affairs."[7] Increasingly, the major governments turned to negotiated agreements that had the feel of "soft law" as described by Abbott and Snidal. *** In 1922 the governments of the major European countries met in Genoa to agree informally to the principles of a gold exchange standard, which would economize on gold by encouraging smaller financial centers to hold a portion of their reserves in foreign exchange rather than gold. Although this agreement did in fact have an important impact on the composition of reserves, it was at most a soft admonition to economize gold holding. ***

[4] Ford 1985.
[5] Eichengreen writes extensively about the confidence that investors had in the prewar gold standard. Eichengreen 1992.
[6] Simmons 1994.
[7] Dam 1982, 50.