

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

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## **ABSTRACT:**

This paper describes how the General Agreement on Tariffs and Trade/World Trade Organization (GATT/WTO) has used consensus decision-making in reality. Consensus results are Pareto-improving and approximately balanced when GATT/WTO negotiating is law-based.

When bargaining is based on power, governments use tools of power that are external to the norms, silently weighing the process and leading to uneven, perhaps non-Pareto-improving consensus results. Despite the fact that trade rounds have been initiated using law-based negotiation, empirical study demonstrates that rounds have been concluded through power-based bargaining since hard law is created when a round is closed. The European Community and the United States have dominated agenda shaping, which has occurred in the wake of that dominance. The decision-making guidelines have been preserved because they contribute to the production of data that strong nations utilize to determine the agenda. Consensus decision-making at the GATT/WTO is organized duplicity that permits adherence to the sovereign equality ideal and the instrumental reality of asymmetrical power, which is what consensus decision-making is ostensibly founded on.

## **KEYWORDS:**

GATT/WTO, Nations, Sovereign Equality, Trade.

## **I. INTRODUCTION**

For the majority of non-judicial actions, international organizations use one of three types of decision-making rules: "majoritarian" (decisions are made by a majority vote of member states, and each member has one vote); "weighted voting" (decisions are made by a majority or super-majority, and each state is 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 formally negate status, provide equal representation and voting power in international organizations, and take decisions by consensus or unanimity of the members. They are based on a notion of sovereign equality of states that was inspired by natural law theory and later adopted by positivists and others. Association of Southeast Asian Nations (ASEAN), Conference on Security and Cooperation in Europe (CSCE), Executive Committee of the International Monetary Fund (IMF), GATT/WTO, Common Market of the South, Mercado 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), are just a few of the organizations that have been These organizations use a variety of practices (explained in more detail below) that ostensibly maintain the sovereign equality of its member nations.

Although sovereign equality decision-making norms are often utilized in international organizations, it is unclear how these rules function in reality or what happens when nations behave in a certain way. The GATT/WTO's consensus decision-making process and associated procedural procedures, which are founded on the sovereign equality of states, create three interconnected issues about the connection between state authority and international law. The most interesting query is the first one. Why would strong nations like the United States and the EC3 adopt a consensus decision-making norm in a body like the GATT/WTO that produces binding regulations?

Recent attempts have been made to reevaluate the difference between hard and soft law and to make the case that soft legislation may be useful or may evolve into hard law.<sup>4</sup> However, traditionally, the difference has been based on whether the relevant public international law is hortatory or obligatory; the majority of public international lawyers, realists, and positivists see soft law as being unimportant. Realists have long contended that

majoritarianism is only tolerated by strong states in organizations that are legally able to create soft law, since there is little chance that these governments will be bound by legal obligations they may find objectionable. In contrast, structural realists, neoclassical realists, and behavior lists with realist sympathies have argued that in hard law organizations, there must be a clear link between authority, voting procedures, and results. However, lesser nations have the institutional ability to obstruct the enactment of significant hard laws that would represent the wishes of strong nations in organizations with consensus decision-making norms. According to structural realism, organizations with decision-making rules that may be used to prevent strong nations from getting their way will either fail or alter since such rules are considered fragile.<sup>8</sup> Modified structural realists have attempted to use institutional or sociological justifications to explain deviations from the assumption that power would be reflected in decision-making procedures [1], [2].

It is logically harmful to combine sociology and realism in this way, however, and does not provide any indication of when to anticipate that norms will diverge from power or that power will surpass institutional inertia. The issue is partially resolved by pointing out that, although adhering to consensus decision-making, the European Union and the United States have controlled negotiations and results at the GATT/WTO since its inception. However, that answer is only partially correct since it raises two additional issues: How, in the face of a norm requiring consensus decision-making, have the European Union and the United States controlled GATT/WTO outcomes? And why have they bothered to keep norms based on the sovereign equality of states, including the consensus decision-making rule, if such strong governments dominate GATT/WTO decision-making?

These issues are addressed in this article, along with an explanation of how consensus decision-making works in the GATT/WTO legislative environment and the rationale for the consensus rule's preservation. First, the study conceptualizes two negotiation modalities—law-based and power-based—by integrating earlier research on these frameworks, placing them within the context of the GATT/WTO, and offering empirical instances of both types of bargaining at the GATT/WTO. When GATT/WTO negotiations are law-based, governments take the norms of procedure seriously and work to reach a consensus that is Pareto-improving, producing contracts that open the market and are nearly symmetrical [3], [4]. When GATT/WTO negotiation is power-based, governments use power tools that aren't based on rules (mainly tools based on market size), silently weighting the decision-making process and producing results that are unequal and may not be Pareto-improving. Second, the history of recent multilateral trade rounds is examined in order to pinpoint the phases of rounds in which GATT/WTO legislative decision-making has been mostly based on law and predominately based on power. Trade rounds have been initiated by law-based negotiation that has produced fair, Pareto-improving contracts identifying the issues to be discussed at least as far back as the Dillon Round [5], [6].

In contrast, other rounds have been resolved by power-based negotiation, leading to asymmetrical agreements that benefit the interests of strong powers. Powerful states have dominated the agenda-setting process (the creation of difficult-to-amend proposals), which occurs between the start of a round and its conclusion. The degree of this dominance has depended on the extent to which powerful countries had planned to use their power to end the round. The article then examines why strong nations chose to maintain sovereign equality standards for decision-making rather than implement a weighted voting system and why they brought those principles into the WTO. The rules enable the formulation of legislative packages that favor the interests of powerful states while being acceptable to all participating states and generally accepted as legitimate by them, according to an analysis of the consensus decision-making process and interviews with GATT/WTO negotiators [7], [8].

The GATT/WTO consensus decision-making procedure is organized hypocrisy, according to the article's conclusion. Organized hypocrisy has lately been defined by sociologists and political scientists as patterns of conduct or action that are disconnected from laws, conventions, scripts, or rituals that are maintained for public display. To assist legitimate WTO results for domestic audiences, procedural fictions like consensus and the sovereign equality of nations have been used as external displays. Although such fabrications may have been revealed by the overt power play that ended the Uruguay Round, weaker nations are unable to enforce an alternative norm that would undermine the validity of the GATT/WTO results and the decision-making processes. Because invisible weighting ensures that legislative results reflect underlying power and because the rules provide a beneficial information flow to negotiators from strong nations, sovereign equality decision-making standards continue to be used at the WTO. Limitations on transatlantic power constitute the most significant obstacles to the continuation of these negotiation patterns and WTO results, despite the fact that theory indicates various possible obstacles [9], [10].

## II. DISCUSSION

### **Bargaining and Outcomes in the Gatt/Wto: Two Modalities**

The concepts of bargaining in the shadow of law and bargaining in the shadow of power both contribute to a better understanding of negotiations and results in the GATT/WTO. According to empirical data, legislative negotiation at the GATT/WTO often takes one of these two forms or a mixture of them.

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

An approach based on the law holds that substantive and procedural legal endowments are the source of negotiating power in international organizations. Voting or agenda-setting authority is determined by decision-making rules, and this influences results.

##### **i. Sovereign Equality Decision-Making Rules at the GATT/WTO**

It is essential to grasp the procedural standards followed in the GATT/WTO legislative setting in order to comprehend how law-based bargaining functions there. Diplomats fully respect the right of every member state to participate, intervene, make a motion, take initiatives (raise an issue), introduce, rescind, or reintroduce a proposal (a legal text for decision), and block the unanimity necessary for action in all plenary sessions of sovereign equality organizations, including the GATT/WTO. No person present must express outward opposition to a motion in order for a consensus to be reached. A state may be argued to be estopped by consent from objecting to the draft in the future 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 formal meeting where it is considered. Decisions within the GATT were not always unanimous. Each contracting party was allocated one vote under the GATT of 1947, and no country or class of countries was given officially more voting power. According to the General Agreement, certain activities needed the consent of varying majorities of the Contracting Parties.

The GATT/WTO's decision-making process has, however, deviated from these stated specifications. The GATT often substituted informal consensus decision-making for formal vote from 1948 to 1959. The chairman took the meeting's pulse rather than calling for a vote at least as early as 1953 and on several times thereafter. Almost all GATT/WTO legislative decisions since 1959 have been reached by agreement, with the exception of those involving admissions and waivers. The en masse entry of developing nations starting in the late 1950s is the most often cited reason for how the GATT's consensus practice came to be. A bloc of developing nations, making up a supermajority of the Contracting Parties, may have been able to take on many of the organization's legislative duties; it would undoubtedly have been able to take on all of the administrative and judicial duties; and through its judicial authority, it may have been able to enact new obligations even if all of the industrialized nations united in opposition. Alternative voting procedures were taken into consideration in that context by American politicians, but they were eventually rejected for Cold War-related reasons. Many members of the U.S. Congress and State Department began to express concern about the geopolitical alignment of developing nations in the late 1950s. This concern increased in the early 1960s after Soviet efforts to strengthen the UN Conference on Trade and Development (UNCTAD). Policymakers in the United States believed it would be hard to agree on a weighted voting system and grow the GATT into a large body that could draw and keep emerging nations. And last, since the late 1940s, some American trade negotiators have felt that formal weighing is superfluous given the country's inherent control over voting.

Consensus decision-making was not only maintained but also made the official preferred method of decision-making when the WTO was established. According to Article IX of the Agreement Establishing the World Trade Organization, voting is only necessary "where a decision cannot be arrived at by consensus." A decision by consensus must be assumed to have been reached on an item presented for consideration if no signatory, present at the meeting where the decision is taken, officially opposes to the proposed resolution. This definition of consensus is consistent with GATT practice dating back to 1959. Depending on the kind of legislation, decisions would be made by majority, two-thirds, or three-fourths vote under the terms of Article IX of the WTO. However, there hasn't been any WTO voting.

##### **ii. Law-Based Bargaining at the GATT/WTO**

Deductions from consensus or unanimity decision-making procedures imply that legislation would be Pareto-improving, compelling the "organ to seek a formula acceptable to everyone," as legislation that would leave any state worse off would be prevented by that state. Additionally, the regulations allow weaker nations to prohibit positive-sum outcomes that they believe have an unfair distribution of advantages. Experimental economics and its legal implications have revealed that if the advantages are divided unfairly, people would often refuse to

accept a positive-sum deal. Of fact, equity has been a recurring international issue, especially in postwar economic institutions, and developing nations have prevented agreement in the GATT/WTO on the grounds that a plan did not adequately meet their unique and varied requirements.

At the GATT/WTO, negotiations and results have regularly followed this pattern. One straightforward example is the Kennedy Round's launch, which was decided upon by agreement. The Contracting Parties reached an agreement by consensus in November 1961, as the Dillon Round was coming to a conclusion, to create a new committee on tariff reductions and allow the current committees to continue discussing agricultural and LDC preferences, respectively. However, no committee made much headway during the next year, with the committee on LDC preferences coming to a deadlock along North-South lines. The U.S. government changed its stance on LDC preferences in late 1962, stating that simultaneous discussion of the issues being discussed in all three committees was necessary for a successful round. A Ministerial Meeting was decided to be scheduled for early 1963 as a result. A set of findings and recommendations covering topics of importance to all Contracting Parties were unanimously adopted by the Ministers in May 1963, and they also resolved to form a committee for trade negotiations with members from each of the participating nations. Only once the industrialized nations agreed to include topics in the discussions that may benefit all nations, including developing nations, was the round officially began.

## **2. At the GATT/WTO, invisible weighting is used while negotiating under the shadow of power.**

Realists see most legislative negotiations and results in international organizations as a product of interests and power, in contrast to the law-based approach. The use of state power to influence international organizations is a common theme in diplomatic memoirs and writings by attorneys who have worked for international organizations. This analysis demonstrates that it is conceivable for strong nations to observe procedural norms while still using a variety of tactics to get around the seeming power restrictions ingrained in those laws.

### **i. Relative Market Size as an Underlying Source of Bargaining Power at the GATT/WTO**

Although estimating power is notoriously challenging, relative market size provides the best first estimate of negotiating strength in trade talks. The majority of political scientists believe that governments should see the opening of overseas markets (and the resulting rises in export prospects) as a domestic political advantage and the opening of domestic markets as a cost. As a result, for instance, the government of the nation achieving them will gain domestically politically from the increased export prospects that may be reached. Market opening and closing have been used as the unit of exchange in trade agreements since the end of World War II. Larger, developed markets are better equipped than smaller markets in trade, where a given absolute change in trade access varies inversely with the size of a nation's economy. This is true whether trade bargaining takes the form of mutual promises of market opening, threats of market closure, or a combination of both. Internal trade opportunities are stronger for larger than for smaller country economies. Smaller nation's benefit proportionally more from trade liberalization than bigger ones do when it comes to welfare and net employment gains (measured in dollars, for example). The political consequence is that a given level of liberalization provides a government implementing it in the bigger nation with proportionally less domestic political gain.

In contrast, threatening to lose a certain amount of exports is a somewhat less effective technique when used against a bigger nation than when used against a smaller one in discussions including trade closure threats. It is also widely known that industrialized economies with large markets have significant influence in an open trade system due to differences in the proportional opportunity costs of closure for trading partners. Although market size is often a strong predictor of trade negotiating power, its applicability may be constrained by the potential for cross-issue connection. To the degree that nations are prepared to employ non-trade sources of leverage, the usefulness of market size as an approximate measure of trade negotiating power is reduced. Regime theory contends that, under a given regime, bargaining may often be best understood as restricted to the specific problem area handled by the regime. This is true even if the level of connection across issue areas has been the topic of theoretical and empirical dispute for decades. In addition, the majority of empirical studies of postwar trade policy have shown that possible military or financial power has not been used in trade talks.

The EC and the US are the two biggest trading powers when market size is taken into account while negotiating trade agreements. Take into account that in 1994 (the year the Uruguay Round was concluded), retained merchandise imports into the European Community and the United States constituted about 40% of all retained merchandise imports globally<sup>34</sup> and that the combined GDP of the EC and the US in 1994 was close to 50% of the global GDP. By this standard, the combined influence of the EC and the US in the context of commerce is

tremendous. Additionally, the European Union and the United States have significant power in global trade discussions to the degree that they can work together.

## ii. GATT/WTO Power Tactics: Asymmetrical Contracting and Coercion

It is helpful to consider a variety of power strategies that might affect GATT/WTO results. First, asymmetrical contracting by strong nations may lead to widespread acceptance for results that are biased in their favor. This arrangement may be seen as a "side-payment" when directed at a certain state. Second, and more crucial for understanding GATT/WTO negotiating and results than asymmetrical contracting, weaker nations may be forced into consensus acceptance of policies biased in their favor by strong states. Coercion may lead to agreement for a result that helps strong states more than weaker ones while benefiting powerful states less, or it may lead to a Pareto-improving outcome with advantages distributed in favor of powerful states. Coercion takes the shape of a threat to leave an organization if agreement cannot be reached when it is directed towards a collection of nations, and this is how it is most effective. Moving (or threatening to relocate) the matter to another body where strong countries are more likely to get their way is one method of exiting a situation. For instance, the European Community and the United States moved the issue to the GATT in the early 1980s when they were unable to secure the necessary majority in the World Intellectual Property Organization for broader intellectual property protection, and they were able to reach an agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement in 1994. In other situations, the exit strategy can just include ignoring the impasse-ridden group and starting a new one that would eventually provide legal advantages related to the problem. Another variation of the exit strategy is leaving the impasse organization, entering anarchy, and then reestablishing the group on new terms. This is how the European Commission and the United States ended the Uruguay Round.

### **Trade rounds as cycles limited by power- and law-based bargaining: initiating, establishing the agenda, and concluding trade rounds**

The great majority of GATT/WTO legislation has been established via trade negotiations. Here, negotiations in the Tokyo and Uruguay rounds are examined in order to determine how much of trade negotiations have been power- or law-based. These most recent trade rounds are most likely to serve as an example of a spectrum of law- and power-based negotiation, in large part because the GATT was predominated by a "anti-legal" culture prior to 1970. This attitude started to fade away in the late 1960s but did not totally disappear until the early 1980s. The stage of the round and the geostrategic environment had an impact on how much bargaining in trade rounds was based on law or power, as illustrated below. Three overlapping phases may be used to study trade rounds: launching, informal agenda formulation, and closure. Generally speaking, as rounds have progressed from their beginning to their end, power has been employed more explicitly, with the Tokyo Round's use of coercion being limited by the setting of the Cold War.

#### **1. Getting Trade Rounds Started Through Law-Based Negotiation**

The simplest method to begin a session of negotiations has been to get agreement on a broad mandate that covers almost all ideas put up by any member. All sides have been able to think that the round may lead to a Pareto-improving and fair package of results thanks to this strategy, with the domestic political costs of greater import competition being mitigated by the opening of international markets. In order to obtain an agreement, negotiators generally argue about alternate ways to express the mandate's goals and concerns, but the less prejudicial the mandate, the better. Due to internal political restrictions, one or two problems in certain rounds were unable to be included in the mandate. However, an agreement on the draft negotiating mandate has traditionally been delayed until almost all areas of importance to members have been covered and the wording has been left ambiguous enough to avoid influencing the result of discussions in a way that any nation would object to. In the future, invisible weighing may be applied from the viewpoint of major nations. Furthermore, strong nations won't have adequate knowledge about state preferences until much later, after years of negotiations, when they may confidently design a package of unequal results that weaker countries would accept. Therefore, negotiations to begin trade rounds have been founded on the legislation.

There has been a North-South divide on the rate, style, or structure of liberalization as each of the previous five cycles has been getting ready to start. Each time, the developing nations insisted that special and differentiated treatment be included in the negotiation's mission. Developed nations originally opposed involving efforts from poor nations in the launch decision. However, because of developing nations' ability to legally obstruct a consensus, their efforts were taken into consideration when the Dillon, Kennedy, Tokyo, Uruguay, and Doha rounds were decided to be launched.

## 2. Setting an Informal Agenda in the Shadow of Closure

Many have argued that the agenda-setting process explains outcomes better than plenary voting power in legislative contexts where authority to establish the agenda (that is, construct proposals that are difficult to change) lies with a legally stated agent. In contrast, agenda-setting occurs informally in organizations founded on sovereign equality, mostly via the coordinated activity of the main powers and a secretariat that is heavily influenced by them. The GATT/WTO agenda-setting process consists of three overlapping stages: (1) carefully advancing and developing initiatives that broadly conceptualize a new area or form of regulation; (2) writing and fine-tuning proposals (specifically, 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 achievement of their goals with the p The agenda-setting process entails incrementally changing proposals in small ways (such as offering a derogation, floor, or phase-in), achieving unrelated or tangential goals of weaker countries (by making side-payment promises), and modifying the package that will serve as the final act. Following its introduction, trade rounds' work has been done formally in working groups with a focus on a particular proposal, negotiating committees, the Trade Negotiations Committee, the GATT Council, special sessions of the Contracting Parties, and sometimes ministerials. However, crucial work is done informally in caucuses, the most significant of which are called and arranged by the main powers. Historically, the process has taken place under the shadow of the EC and US's coercive authority. The majority of initiatives, proposals, and alternative packages that become documents presented for formal approval are typically developed first in Brussels and Washington, discussed casually by the transatlantic powers, then in progressively larger caucuses (such as the Quad countries, G-7, and OECD), and finally in the "Green Room." The most senior secretariat members, diplomats from the most influential members of the organization, and diplomats from a roughly representative subset of the GATT/WTO's membership attend Green Room caucuses, which are comprised of twenty to thirty-five interested countries. The Green Room caucuses that often take place in the weeks leading up to and during such sessions have defined the agenda for the majority of significant formal meetings, including round-launching ministerials, mid-term reviews, and round-closing ministerials.

The text that is produced in the Green Room is submitted to the GATT/WTO members in a formal plenary meeting and is often approved by consensus with no changes or very small ones. Powerful nations have thought about the package of suggestions that should be included in the final act for acceptance following the completion of a round at the same time that initiatives and proposals are being developed. The package has altered significantly depending on how the ideas were progressing and how much coercion was expected from strong nations. This procedure has often been aided by the secretariat, who has also frequently participated directly by submitting ideas or a package on its own. The secretariat's bias in favor of powerful nations has mostly been a product of its personnel and the circumstances in which it operates.

## 3. The Cold War Context as a Constraint and Power-Based Bargaining in Closing Trade Rounds, at the End of the Day

The EC and the US must use invisible weighing in the last round if they want to produce an unbalanced result. Choosing how much influence to exercise to influence a particular problem area's result may be influenced by interests in other issue areas or by the geostrategic situation. There was a desire to quit at the conclusion of the Tokyo and Uruguay rounds. An ambitious set of virtually finished agreements covering subjects that went much beyond the conventional tariff-cutting processes of prior years were included in both rounds. If contracting was the sole option, it would be impossible to get agreement on such a comprehensive deal. Nevertheless, U.S. trade negotiators finally opted to enter into a deal via law-based negotiation rather than withdrawing from the Tokyo Round. In contrast, they chose to impose pressure by leaving the GATT and reformulating the system during the Uruguay Round. The Cold War context, specifically the Department of State, maintained a link between trade policy and security policy that limited the use of force by the United States in concluding the Tokyo Round<sup>48</sup>; however, this link did not operate in concluding the Uruguay Round.

## III. CONCLUSION

In the context of procedure, the GATT/WTO decision-making standards, which are founded on the sovereign equality of nations, are structured hypocrisy. The transatlantic powers have backed the consensus decision-making norm, along with associated rules, that are based on the sovereign equality of states at the same time that they have dominated legislative negotiation results in the GATT/WTO. Both the instrumental reality of asymmetrical power and the logic of appropriateness of sovereign equality have been adhered to thanks to the GATT/WTO decision-making norms. Although law-based negotiation may initiate trade rounds, strong governments have historically controlled agenda-setting and, to varied degrees, trade rounds have been ended

under the shadow of power. The norms and procedures for GATT/WTO sovereign equality decision-making provide vital data that strong nations may utilize in the invisible weighing process and have aided in legitimizing GATT/WTO negotiations and results for domestic audiences. GATT/WTO sovereign equality decision-making procedures may be used with invisible weighting to yield an unequal distribution of trade round outcomes rather than a pattern of Pareto-improving results that are regarded fair by all nations.

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