International Law and International Relations

Edited by Beth A. Simmons and Richard H. Steinberg

CAMBRIDGE www.cambridge.org/9780521861861

TABLE 20.5. *Political Settlement (Weibull Estimates)*

Variables	Coefficient (RSE)	Hazard ratio
POLITICAL SETTLEMENT	−15.34***	0.000
	(1.02)	
Imposed	−15.57***	
	(0.99)	
Agreed	2.94***	0.000
	(0.47)	
TIE	−0.66***	18.89
	(0.18)	
COST OF WAR	0.91***	0.52
	(0.23)	
HISTORY OF CONFLICT	1.55***	2.49
	(0.45)	
EXISTENCE AT STAKE	0.68*	4.73
	(0.36)	
CONTIGUOUS	0.81***	1.97
	(0.24)	
CHANGES IN RELATIVE CAPABILITIES	−4.96**	2.25
	(2.50)	
Constant	0.72*	
	(0.14)	
Shape parameter *p*	770	
N	48	
Subjects	−46.39	
Log likelihood		

Note: Negative coefficients and hazard ratios <1 indicate decrease in risk of another war (increase in duration of peace). Positive coefficients and hazard ratios >1 indicate increase in risk of another war (decrease in duration of peace).
RSE = robust standard errors.
*** $p \leq .01$.
** $p \leq .05$.
* $p \leq .10$. Two-tailed tests used.

the Korean Armistice, have been the norm rather than the exception. Even if one includes settlements imposed unilaterally by a decisive victor (but without official acceptance by the defeated side, as in the Falklands), settlement is rather rare.[44] This de facto category also appears to be quite

[44] The basic issue of the war has been settled unilaterally in eight wars (nine dyads) in these data: Russia-Hungary, China-India, Vietnam (North versus South), India and Pakistan in 1971, the second round of the Turco-Cypriot War, Uganda-Tanzania, the Falklands War, and the second part of the Azeri-Armenian War.

stable. None of these imposed settlements have failed.[45] Not surprisingly, settling the underlying political issues is the best way to ensure peace. But this advice is not particularly useful for most belligerents. When the underlying issues remain disputed, it is the other mechanisms examined in this study that can be used to maintain peace.

* * *

CONCLUSION

Are some war-torn areas simply doomed to repeated conflict and warfare, or is there something that can be done to improve the chances for peace? The findings of this article warrant optimism. Peace is hard to maintain among deadly enemies, but mechanisms implemented in the context of cease-fire agreements can help reduce the risk of another war. Peace is precarious, but it is possible. Agreements are not merely scraps of paper, their content affects whether peace lasts or war resumes.

The job of building peace is harder in some cases than in others. It is more difficult when wars end in stalemates, when states' previous history is riddled with conflict, and when war can threaten the very existence of one side. It seems to be harder for neighbors, but it is easier when states have just fought a very deadly war, giving a greater incentive to avoid further bloodshed.

But given these givens, states can act to improve the chances for peace. I have focused on measures that: alter incentives by raising the cost of an attack either physically or politically; reduce uncertainty by specifying compliance, regulating activities that are likely to cause tension, providing credible signals of intention; or help prevent or manage accidents from spiraling back to war. Do these measures help encourage durable peace? I find that, in general, they do. All else being equal, peace lasts longer when stronger agreements, implementing more of these measures, are in place. A counterargument suggests that strong agreements are only associated with durable peace because they are implemented in the easy cases. But the effects of agreements do not wash out when the baseline prospects for peace are controlled for.

While some international relations scholars might be surprised to learn that states can institute measures to overcome the obstacles to peace, practitioners probably know this already. For them, the value of this

[45] The imposed settlement between India and Pakistan in 1971 failed when they fought again in 1999 after our point of censoring.

research is in its lessons about which mechanisms work better than others. Because these measures are often implemented in conjunction with each other, one cannot reach conclusions about this that are as strong as one might like. But the history of cease-fires over the past half-century suggests that creating buffer zones between opposing armies is quite effective. Making the terms of the cease-fire, including the location of the cease-fire line, as specific as possible is also important, as is setting up joint commissions to discuss the inevitable conflicts and misunderstandings that arise in the aftermath of fighting. Confidence-building measures, formal agreements, and withdrawal of forces do not hurt, but the evidence that these measures help is less clear-cut.

For their part, outsiders interested in helping belligerents maintain peace can improve its chances by providing an explicitly stated guarantee of the cease-fire, and by deploying international monitors or troops as peacekeepers. But third parties should be aware that mediation to reach a cease-fire may be counterproductive in the long run. Peacekeeping can easily become discredited. Leaving a mission in place after it has failed does little to bolster the prospects for peace.

That states can implement measures to reduce the risk of another war raises the question of whether they can do more to prevent war breaking out in the first place. If demilitarized zones or peacekeeping can help maintain peace after war, can they do so beforehand? Obviously one cannot answer this question definitively without a wider study, but at least in theory, the measures discussed above should be effective preemptively. The challenge is likely to be in convincing states to implement them. It is normal, and therefore politically more acceptable, to take measures to ensure peace in the aftermath of war. Giving up territory to create a buffer zone or allowing international peacekeepers to infringe on their sovereignty before hostilities break out, of course, is more difficult.

Whether or not the measures examined here can help prevent war in the first place, I have shown that measures to reduce uncertainty, alter incentives, and manage accidents can help maintain peace in the hardest cases – among deadly enemies with strong incentives to take advantage of each other and in an atmosphere of deep mistrust. Maintaining peace is difficult, but even bitter foes can and do institute measures to avoid another war. Creating a durable peace requires work, but it is possible.

21

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

Richard H. Steinberg

* * *

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.[1] 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,[2] 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) and the

* * *

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

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

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[3] 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.[4] 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.[5] 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.[6] 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.[7] 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

[3] 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.

[4] See, for example, Raustiala and Victor 1998; and Abbott and Snidal 2000.

[5] See Hart 1961, 77–96; and Simma and Paulus 1999, 304.

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

[7] See Krasner 1983a; and Morgenthau 1978, 325–28.

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.[8] Some modified structural realists have tried to explain exceptions to the expectation that decision-making rules would reflect underlying power, using institutional or sociological arguments.[9] However, mixing sociology and realism in this manner is theoretically degenerative,[10] 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,[11] 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[12] 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[13] 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

[8] Krasner 1999.
[9] Krasner 1985, 29.
[10] See Popper 1959; Kuhn 1962; and Lakatos 1970, 173–80.
[11] Curzon and Curzon 1973.
[12] The analysis does not attempt to explain bargaining in the judicial context.
[13] 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.

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[14]), 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.

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.[15] 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.

[14] See Tsebelis 1994; and Garrett and Tsebelis 1996.

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

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.

* * *

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.[16] A consensus decision requires no manifested opposition to a motion by any member present.[17] 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, that state may be subjected to an argument that it is estopped by acquiescence from any subsequent objection to the draft.[18]

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

[16] Schermers and Blokker 1995, 475–506.
[17] M'bow 1978.
[18] See Schwarzenberger 1957, 51, 95, 608–26; Bowett 1957; MacGibbon 1958, 476–80, 501–504, and Blackhurst 2001, 8.

General Agreement required different majorities of the Contracting Parties[19] for approval of different types of actions. ***

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.[20]

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 super-majority 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.[21] In that context, U.S. policymakers considered alternative voting rules, but rejected them for reasons ultimately related to the Cold War.[22] *** By the late 1950s, many in the U.S. Congress and State 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. *** 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. *** 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.[23]

When the WTO was established, consensus decision making was not only retained, but was adopted as the formally preferred method of

[19] 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.

[20] See Patterson and Patterson 1994; and Porges 1995.

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

[22] 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.

[23] Wilcox 1972, 195–97.

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,"[24] 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.[25] 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.

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

[24] Riches 1940, 15.
[25] See Davis and Holt 1993; and Korobkin 2000.

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.[26] 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.[27] 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.[28] *** 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.

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.[29] 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.[30]

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

[26] 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).

[27] See Morgenthau 1940; Krasner 1983a,b; and Schachter 1999.

[28] See Kennan 1972, 24; and Wilcox 1972, 195–97.

[29] See Schattschneider 1935; Bauer, de Sola Pool, and Dexter 1963; and Putnam 1988.

[30] See Hirchman 1945; Waltz 1970; and Krasner 1976.