

Part III

Rules, norms and enforcement

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6 Rules and norms

Even when laws have been written down, they ought not always to remain unaltered. As in other sciences, so in politics, it is impossible that all things should be precisely set down in writing; for enactments must be universal, but actions are concerned with particulars.

Aristotle
Politics Book II, Chapter 8 (350 BCE)
Translated by Benjamin Jowett

Introduction

Aristotle would likely approve of the way that the decision-making processes of the multilateral trading system allow for adaptation, innovation and an emphasis on unwritten norms over formal rules. A literal reading of GATT 1947 and the Agreement Establishing the World Trade Organization (WTO Agreement) gives one only an imperfect idea of how decisions are made, with the procedures that are actually followed having evolved over decades of experience, improvisation and accommodation. That evolution was neither easy nor settled, however, and one bloc or another often proposes tweaks or major changes in how issues are deliberated, decisions are made and commitments are enforced.

International organizations meet at the intersection of democracy and sovereignty. These two concepts can be difficult to reconcile in a world where there are nine countries that each have populations of more than 100 million (two of which top one billion) and another 13 countries with populations of fewer than 100,000. Consider the hypothetical case of China and India blocking consensus on some matter that otherwise has wide support, which might lead indignant negotiators from other countries to criticize the ability of just two members to frustrate the aims of the rest. A Chinese or Indian negotiator might respond that, as the representatives of 37 per cent of the world's population, they must exercise their right to prevent a deal that they judge not to be in the best interests of their people. Consider also that the 22 smallest WTO members are home to just 7.5 million people. Should that group, with a shared population approximating those of Bulgaria or Bogotá, have 10 per cent more votes than the entire Group of Twenty (G20)? Any forum in which such demographically disparate units come together needs to develop rules that balance the sometimes conflicting needs of inclusiveness and efficiency, as well as the competing demands of predictability and flexibility. If the rules and norms of the WTO err, they tend to do so on the sides of inclusiveness and

flexibility, insofar as efficiency and predictability do not always sit well with countries that are on guard against any threat to their sovereignty.

The review that follows examines how WTO members have sought to balance these competing principles in the design of the organization's decision-making system. One point stressed throughout is that, as is the case for so many other aspects of the trading system, the disagreements between developing and developed countries form a horizontal divide in the debates over rules and norms. Their divisions over these matters reach at least as far back as the post-war negotiations over the Havana Charter for an International Trade Organization, and the debate was reinvigorated when Uruguay Round negotiators developed a new international organization.

The rules for decision-making in the WTO

The exercise and derogation of sovereignty

The Vienna Convention on the Law of Treaties defines a “treaty” to be “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation” (Article 2.1(a)). Somewhat less precisely, it defines an “international organization” simply to be “an intergovernmental organization” (Article 2.1(i)). One might more bluntly describe a treaty as an instrument by which countries agree to place voluntary limitations on the exercise of their sovereignty, and an international organization as a body that states agree to create in order to facilitate the development and execution of these sovereignty-constraining instruments. Any treaty or international organization will necessarily involve some derogation of sovereignty in this sense, but states never abdicate their sovereignty altogether, no matter what the terms of a treaty or the rules of an international organization may be.

What is at issue in the architecture of the WTO is just how far members wish to go in the apparent relaxation of their sovereignty in order to reach agreements efficiently, achieve an appropriate level of liberalization and enforce the rules with an optimal level of predictability. As desirable as those objectives may be, they must also be balanced against countries' interests in preserving and exercising their right to “policy space” and allowing for some degree of flexibility in the implementation and, when necessary, the revision or even the abrogation of these agreements. Table 6.1 elaborates on the balance between these objectives by showing the range of options for three of the architectural issues. The first issue is the way that agreements are packaged, which range from one option that leaves the greatest leeway to individual states (i.e. plurilateral agreements based on code reciprocity) to another that leaves them with the least (i.e. a strict single undertaking), with a compromise position in-between. There is a similar array of least-to-most derogations for the ways that decisions are reached in the WTO and how the decision-making bodies of the organization are structured.

Table 6.1. A taxonomy of options in the decision-making of the WTO

	Least derogation of sovereignty	Compromise position	Most derogation of sovereignty
Packaging of agreements	Plurilateral agreements based on code reciprocity that states are free to accept or reject	Plurilateral agreements based on MFN treatment that states are free to accept or reject	A single undertaking under which all members must adopt all agreements concluded in a round
Decision-making procedures	Principle of consensus (i.e. approval requires that no member formally object to a decision)	Voting based on a qualified majority (e.g. two thirds, three quarters, etc.), whether or not weighted	Voting based on a simple majority (50 per cent plus one), whether or not weighted
Decision-making bodies	All decisions are made in bodies in which all members have the right to be represented	An executive board is established with limited membership that has only consultative authority	An executive board is established with limited membership that has both negotiating and executive authority

Notes: Shading indicates the options chosen by WTO members.

WTO members have collectively made very different choices in these three areas. They elected for their decision-making procedures and bodies to choose the option that involves the least derogation of sovereignty: the principle of consensus ensures that even the smallest member can block the adoption of any decision that it considers contrary to its interests, and all members are represented in all bodies. This stands in contrast to the decision made on the packaging of agreements, in which case members chose the single undertaking. The seeming mismatch between these choices is notable, as is the fact that there appears to be much more willingness on the part of countries to revisit the single undertaking/plurilateral choice than to reopen the issue of voting versus consensus.

Much of the criticism of the old GATT system, as well as the early experience of the WTO, centred on the contention that developing countries were largely excluded from decision-making. The Tokyo Round was negotiated in what Winham (1992: 55) characterized as a “pyramidal process” in which “agreements were usually initiated between the principal players – namely, the United States and the EC – and then presented successively to middle and smaller parties to establish a multilateral consensus.” Similarly, Steinberg’s examination (2002: 365) of how the Tokyo and Uruguay Rounds were launched, conducted and concluded, as well the start of the Doha Round, led him to conclude that “GATT/WTO decision-making rules based on the sovereign equality of states are organized hypocrisy in the procedural context”.¹ By this account, the two most powerful actors in the system continue to dominate the process; while the rule of consensus helps to legitimize the bargaining, the result is “an asymmetric distribution of outcomes of trade rounds” (*Ibid.*). That conclusion seems rather dated, however, given the greater role of developing countries not just in the traditional defensive mode but in active pursuit of their offensive interests.

The green room and its critics

One of the principal criticisms that developing countries leveled at the diplomacy of GATT was that the major decisions were made behind closed doors in the “green room”, a star chamber to which most of them were not routinely invited (see Box 6.1). The critiques of the green room sometimes suggest that this was an instrument solely for the developed countries, but that is an exaggeration. As far back as the 1970s the most typical configuration in the green room was “seven plus seven,” with equal numbers of developed and developing contracting parties present in the room. The composition of the seven on the developing side varied according to the issue: Hong Kong was more likely than Argentina to be there when textiles were on the agenda, for example, and the reverse was true when agriculture was on the table. The legitimacy of any such exclusive meeting with a “G” group, whether it is a G5, a G10 or a G7+7, will be viewed differently by insiders and outsiders. Or to put it in the language of mathematicians, any group G_n will be perceived differently by those countries in the 1 to n category *versus* those that are $n+1$ or higher. In the 7+7 configuration, there were thus 14 contracting parties on any given day that were likely to think the arrangement was fair and a great many others – nearly all of them developing countries – that probably thought otherwise. The perception among the ones left outside was that the major developed countries met behind closed doors with the GATT director-general and a very few of the largest developing countries, working out deals to be presented to the membership at large on a take-it-or-leave-it basis.

The controversy has subsided over the years, and the general trend over time has been for the green-room process to meld with the coalition diplomacy that was described in Chapter 3. The countries that were the “usual suspects” in green rooms during the GATT period continue to be represented in these bodies during ministerial meetings and other gatherings, but other members will be there to represent coalitions in which they are members. The older, more exclusive green-room approach has not disappeared altogether, however, as was made clear during the mid-2008 negotiations that sought to solve the Doha Round (see Chapter 12).

David Hartridge (see Biographical Appendix, p. 580) is among the old GATT hands who fondly recall the good use to which Director-General Arthur Dunkel put this institution, observing that in his time the green room –

was for several years a highly efficient tool of management. Discussions between the countries primarily concerned would take place in any case, outside the GATT, but in the Green Room the Director-General could act as a facilitator and as a spokesman for the multilateral system and the interests of the membership as a whole (Blackhurst and Hartridge, 2005: 464).

The green rooms yielded both successes and failures, and the process itself cannot be universally praised or condemned. “Restricted meetings are in principle indefensible, and they are always understandably resented by those excluded,” in the view of Blackhurst and Hartridge (2005: 463), but “experience shows that they are tolerated, because they are recognized as necessary, so long as they produce results.”

Box 6.1. Why is it called the “green room”?

The term is borrowed from the theatre, designating the proverbially verdant place where actors prepare themselves for a performance. This convention of the British stage dates back centuries. In James Boswell's *Life of Samuel Johnson* (1791), for example, the elderly Johnson once resolved no longer to “frequent the Green-Room” because “the silk stockings and white bosoms of your actresses excite my amorous propensities.” The term appeared still earlier in Thomas Shadwell's Restoration comedy “A True Widow” (1678). Many of the GATT Secretariat staff were of English origin, and it is not surprising that they would have been familiar with this otherwise obscure term. The comparison of trade negotiators with actors may be apt, as diplomats often speak lines that someone else has written and will sometimes engage in calculated histrionics.

The use of this term in trade negotiations appears to date from some time during the administration of Director-General Olivier Long (1968-1980) (see Biographical Appendix, p. 584), although memories disagree on precisely who said it first or where. It does not appear to have been used when some of the Secretariat was still housed in the Villa le Bocage, a charming building on the grounds of the Palais des Nations – the old League of Nations headquarters – that today hosts the administrative offices for the United Nations Conference on Trade and Development. If the term had been employed at that time, it would have been purely thespian in origin: the villa has a pink exterior but no green rooms. In 1977, GATT moved down the hill from the villa to the present Centre William Rappard (CWR), where there was indeed a green room. “The end walls of Dunkel's conference room,” David Hartridge recalled, “were papered in a pleasant mid-green colour.”² That room has since been redone at least once, going from green to beige in the 1990s, but not before the term was fixed in WTO terminology.

While the name may thus have carried both theatrical overtones and a specific architectural association, its ultimate meaning became political. Once employed only to refer to that specific room in the CWR, by the mid-1980s it was used generically to describe a style of negotiation in which only a select few countries were present. This sense of the term grew increasingly controversial, such that whoever claims to be its originator is seeking “a dubious distinction considering the obloquy into which it has fallen” (Blackhurst and Hartridge, 2005: 464).

The mood, composition and conduct of green rooms gradually evolved. In Mr Dunkel's time the room had not only green walls but blue air, with no small share of the smoke coming from the chain-smoking director-general himself. There was also a time when at least some of the participants would partake of alcohol, but that social lubricant was banned from the room by the late GATT period. By at least one account, that changed after an incident in which a veteran negotiator with one too many drinks lost track of his own position.³ Participants who were present in both GATT and WTO green rooms also report that there was more table-pounding in the old days, with people being more given to letting their hair down. The conduct in green rooms is more formal in the WTO period.

As in other areas, the changes were underway during the brief but transformational period when Peter Sutherland was director-general. His approach was not to call green-room

meetings in the usual sense (i.e. on an invitation-only basis) but instead to hold head-of-delegation meetings.⁴ No contracting party was excluded, which was a significant change from the 7+7 formula of the mid-1970s or the maximum 25-30 that were permitted in Mr Dunkel's time. Only ambassadors were allowed in the room, only English was spoken – with no translations – and there were no signs around the table to identify countries. In keeping with the practice of green rooms in earlier administrations, no minutes were kept. That democratization of the process deepened in subsequent administrations, especially those led by Directors-General Mike Moore and Pascal Lamy. In the Lamy administration, the director-general adopted the practice of reporting to the membership as a whole on the gist of the discussions in those meetings.

While participation in green rooms *per se* is not formally recorded, one can get a general idea of which ambassadors are “in” by way of whose ministers take part in mini-ministerial meetings. In one effort to map the participation of countries in a pair of such meetings that took place in Mexico (August 2001) and Singapore (October 2001), both of them in the run-up to the Doha Ministerial Conference, Jawara and Kwa (2003: 61) showed that the frequency of countries' participation corresponded closely to their income levels. Whereas all four Quad members (Canada, the European Union, Japan and the United States) were present at both of these gatherings, the rate fell to 25 per cent for the remaining members of the Organisation for Economic Co-operation and Development, to 17 per cent of the other high-income economies, and between 3 per cent and 6 per cent for countries in four other lower-income categories (i.e. LDCs through to upper-middle income countries).

Green rooms came under intense criticism in the years preceding the launch of the Doha Round, and developing countries continued to propose alternatives in the early days of the round. The Like-Minded Group (LMG),⁵ about half of whose members are rarely present in the green room, argued in 2002 that the “organization of the negotiations, including the structure and the process, should fully reflect the inter-governmental and member-driven character of the WTO.”⁶ In order to ensure that the organization of the work programme “facilitates and promotes effective participation by all the Members in the negotiations,” they urged, the “process should engender transparency and consensus-based decision making.” The LMG took aim in its reform proposals not just at the green room but at all other aspects of the decision-making machinery that were, in this group's view, undemocratic and susceptible to manipulation by the largest members. That meant reducing the degree of initiative and discretion that would be granted to the director-general, the Secretariat and the chairmen of negotiating committees, preferring instead a more direct exercise of democracy and consensus. They proposed that the General Council exercise overall supervision of the functioning of the Trade Negotiations Committee (TNC), for example, which would mean downgrading one of the powers of the director-general. They also proposed that all negotiations, both informal and formal, be conducted only in meetings that are open to all members. If taken to an extreme, this would presumably put an end to meetings of “friends” groups or other coalitions. They also wanted the powers of chairmen to be greatly circumscribed, as discussed in Chapter 14.

Another option for members that are unhappy with the process is to express their concerns by suggesting that they are prepared to block action formally, but not to do so actually. In the 2011 Ministerial Conference, for example, the Plurinational State of Bolivia, Cuba, Ecuador, Nicaragua and the Bolivarian Republic of Venezuela submitted a document to the conference sharply criticizing what they called the “exclusionary and undemocratic practices” in the consultation process that led up to the ministerial.⁷ By submitting this document they dissociated themselves from the consensus, but they did not prevent the rest of the membership from reaching it.

Proposals for an executive board

Where the LMG hoped to circumscribe the authority of committees, other proposals would go in just the opposite direction. The establishment of an executive board in the WTO is a recurring issue. It is something that the International Trade Organization (ITO) was supposed to have and that GATT did (in weakened form) for a decade, but the WTO Agreement makes no provision for such a body. An executive board would not be the same as a green room, but the notion raises some of the same issues. What both concepts have in common is the idea that a limited number of members would be empowered, on some issues and within limits, to reach decisions or at least propose actions that would then be subject to approval (explicit or tacit) by the membership at large. In the aforementioned trade-offs between fairness and efficiency, these are notions that emphasize efficiency. The response that a given member has to this type of approach will often depend on whether the country in question expects to be inside or outside the room.

The GATT Council established the Consultative Group of Eighteen (CG18) in mid-1975.⁸ From then to 1985, the group generally held three meetings each year. Its function was essentially consultative and not executive, but it sometimes made recommendations or suggestions to the General Council on matters of importance. The CG18 was not a green room because minutes were kept. Like the UN Security Council, which has its five permanent members and ten rotating members, the Consultative Group had both permanent and alternate members. It was much larger than the Security Council, however, with 18 permanent members and a rotating group of nine alternates. The number of permanent members was expanded to 22 in 1986. The group played an important part both in the endgame of the Tokyo Round and in the lead-up to the Uruguay Round. By the time that latter round was launched, there were some who believed that it had outlived its usefulness, as “it was variously felt to be too large to be effective or too small to be representative” (Croome, 1995: 155).

In the negotiations over creation of the WTO, the positions taken by key negotiators on the proposals for a similar structure tended to correspond to the size of their countries. Warren Lavorel of the United States was a proponent of a new executive body, while Julio Lacarte of Uruguay was an opponent. Mr Lacarte would later recall that he was against it “not only because we would be part of such a body only infrequently, but mainly due to the inescapable fact that at GATT (and now, in the WTO) there exists a very thin line between substance and procedure.” This was an issue on which he and Mr Lavorel –

often locked horns, and one evening, after a particularly lengthy exchange, Dunkel called a brief recess. Warren and I stepped out into the corridor and continued our discussion, to the point where I asked, "Warren, but you do see my point?" To which he answered, "Yes, *but I don't like it!*"⁹

Some who review the past GATT practice or the experience of other international organizations argue that the WTO would benefit from such a body. According to Alvarez-Jiménez (2009: 116), for example, the experience of the International Monetary and Financial Committee of the International Monetary Fund provides "support for the creation of a consultative body in the WTO as a potential valuable decision-making organ capable of breaking deadlocks in trade negotiations." The Sutherland Report came out in favour of a board. It did not propose a truly executive board, instead urging that "[a] consultative body ... have neither executive nor negotiating powers," and should have "an absolute maximum of 30" members of which "[s]ome major trading nations would inevitably be permanent members" (Sutherland Report, 2004: 71). It recommended that "a senior officials' consultative body ... be chaired and convened by the Director-General," meeting twice or four times a year. "Membership should be limited and composed on a partly rotating basis," according to the report," and "could meet wholly or partially at ministerial level." The report further proposed "that such a body meet immediately prior to Ministerial meetings to ease the working transition between the two levels." That report was not alone in proposing such a board. The International Law Association (2006) recommended that "the WTO's 'executive branch' (notably the Director-General) and a new WTO Consultative Body (possibly as suggested in the Sutherland Report) should be granted additional powers of initiative and of coordination (e.g. by making the Director-General chair of the General Council)."

Blackhurst and Hartridge (2005: 459) also proposed the creation of an executive body. Their proposed committee "would not be empowered to take decisions that bind the general membership" but would instead "consult, discuss, debate, and negotiate." Its output –

would be limited to recommendations put forward to the entire membership for approval/acceptance. And, as with the IMF and World Bank Executive Boards, the Board would be a formal part of the WTO organization chart, and the Board's composition – which members have a seat at the table and when – would be fixed (that is, *predictable*), presumably with the largest traders having individual seats and the remaining WTO Members divided into groups, each one with one seat that is shared among the members of the group on a rotating basis.

It would thus mean reviving something like the CG18. That was a body that Mr Hartridge knew well, having served as its secretary, and that (in his view) performed a valuable function that the current WTO membership would do well to replicate. Several other practitioners and scholars concur with this notion. Proposals for a new executive board were revived at the time of the Seattle Ministerial Conference (Hoekman and Kostecki, 2001: 471-474). Among the other advocates of an executive committee in recent decades have been Jackson (1990), Wolfe (1996), Matsushita et al. (2003), Srinivasan (2003), Cottier (2009) and Steger (2009a).

Three principal questions would arise in the event that such a board were to be established. The first and most important concerns this board's role: Would it be limited to consultative authority or might it have executive powers as well? The two other questions concern its size and composition. Eighteen is something of a "magic number", having been the number not only of the countries that were supposed to be named to the Executive Board of the ITO, but also the number that were named three decades later to the GATT CG18. It is worth asking whether the membership of an executive body should be similar to or different from the G20, which became a major global forum in 2008. If it is smaller, there will by definition be some G20 members that are not represented and, if so, which of them would be excluded? And if it is the same size or larger, should the current membership of the G20 be considered the starting point?¹⁰

How decisions are made: consensus versus voting

Despite the fact that there were no references to it in GATT 1947, the principle of consensus is the single most important rule in the decision-making processes of the multilateral system. While some question whether the system is well-served by a rule that confers a veto power on every member, there is also a widespread belief that the WTO members would likely oppose any efforts to replace consensus with voting.

What GATT provided

The institutional provisions of GATT 1947 are among the sections of that agreement that demanded the most originality on the part of the drafters. The bilateral trade agreements that the United States negotiated from 1935 to 1946 provided the template for most of the substantive content of GATT and for much of the Havana Charter as well, but the institutional arrangements in purely bilateral instruments, if there are any at all, tend to be quite spare.¹¹ The closest thing to a model for the ITO and GATT drafters came from the other international economic organizations that had been established in the immediate post-war period. The United Nations Organization had been created in outline at the Dumbarton Oaks Conference and then definitively at the San Francisco Conference, and the Bretton Woods Conference created the World Bank (more formally the International Bank for Reconstruction and Development) and the International Monetary Fund (IMF). As of 1947, both the IMF and the World Bank used a weighted-voting system in which each country had a base of 150 votes plus one vote per US\$ 100,000 in its quota of the institution's financial resources. As a result, the United States held 31.46 per cent of the votes in the IMF and 34.23 per cent in the World Bank, with smaller shares held by the United Kingdom (15.02 per cent and 14.17 per cent respectively), China (6.52 per cent and 6.68 per cent) and France (6.23 per cent and 5.88 per cent) (United Nations Conference on Trade and Employment, 1947). Had they wished to do so, the drafters of GATT and the Havana Charter could have replicated something along these lines.

Countries disagreed in 1947 on the desirability of a weighted voting system for the ITO and GATT, and this was one of several areas in which UK and US planners had differing expectations. Both in its proposal for the ITO (United States Department of State, 1945: 638) and GATT

(United Nations Economic and Social Council, 1947), the United States proposed that decisions be made by a majority of the votes cast on a one-member-one-vote basis. This is rather remarkable, considering that in any conceivable system of weighted voting (apart from one based solely on population) the United States would have had the advantage. The United Kingdom proposed instead that voting in the ITO be weighted, with this very trade-dependent country arguing that “due regard must be paid to the extent to which members of the Organization participate in international trade” (United Nations Economic and Social Council, 1946: 1). Under the proposed scheme, the United Kingdom would have had 180 votes (or 210 when its colonies were included) to the 237 US votes.¹² The UK proposal encountered opposition from countries that were small or developing, such as Chile, Czechoslovakia, India and Lebanon; received support from former colonies of the United Kingdom, such as New Zealand and South Africa; and generated mixed or tentative views from others such as China, Norway and the United States (United Nations Economic and Social Council, 1947b). The sceptics ultimately won the day, and the final terms of both the Havana Charter and the “temporary” GATT provided for a one-state-one-vote approach.

Although GATT provides for voting in theory, it did not take long for the institution to drift into decision-making by consensus. Unlike other negotiations for which the historical development of the consensus norm has been well-documented,¹³ the development of this practice appears not to have been recorded in official reports, the memoirs of negotiators, or other published sources. It seems to have been the actual practice from the start, but one will search in vain for the word “consensus” anywhere in the text of GATT 1947. Article XXV instead provides “[e]ach contracting party shall be entitled to have one vote at all meetings of the CONTRACTING PARTIES,” and “[e]xcept as otherwise provided for in this Agreement, decisions of the CONTRACTING PARTIES shall be taken by a majority of the votes cast.” In actual practice, however, the only matters that were routinely subject to formal votes in GATT were waivers (as provided under Article XXV:5) and accessions (Article XXXIII). Even these two matters were not purely vote-based; on waivers “a consensus in GATT Council very often preceded the votes” (Ehlermann and Ehring, 2005: 507) and in practice some contracting parties used the rule of consensus to block controversial accessions even before they started (Haus, 1992).

The WTO's decision-making rules

As was already discussed in Chapter 2, the question of voting versus consensus was one of the main foci of the negotiations over the establishment of the WTO in the Uruguay Round. The European Community and Canada had proposed that new agreements that are binding on all members could be brought into effect with a two-thirds vote. The US negotiators were insistent that the negotiations be used to enshrine consensus as the default rule rather than the informal (but universal) norm. They also ensured that, to the extent that the WTO rules made reference to voting, the thresholds be set even higher than they had been in GATT. The result is that the WTO rules more clearly acknowledge the practice of consensus, but Article IX and other provisions of the WTO Agreement still reiterate the possibility of voting. While the article itself is rather lengthy, one could understand almost all decisions made so far in the WTO by reading just the first sentence and the first footnote (see Box 6.2).

Box 6.2. Decision-making in the WTO

Partial text of Article IX of the Agreement Establishing the World Trade Organization.

1. The WTO shall continue the practice of decision-making by consensus followed under GATT 1947.¹ Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote. Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their member States² which are Members of the WTO. Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement.³
[...]

Footnotes:

¹The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.

²The number of votes of the European Communities and their member States shall in no case exceed the number of the member States of the European Communities.

³Decisions by the General Council when convened as the Dispute Settlement Body shall be taken only in accordance with the provisions of paragraph 4 of Article 2 of the Dispute Settlement Understanding.

As summarized in Table 6.2, several provisions in the WTO Agreement provide for voting. Each requires some form of super-majority; a simple majority is never sufficient to reach a decision. There is nonetheless one possible exception to that rule, as discussed in Chapter 14. The director-general selection procedures that were approved in 2002¹⁴ provide that, in the event that consensus cannot be reached on a single candidate, “[m]embers should consider the possibility of recourse to a vote as a last resort.” The procedures are deliberately vague on the share of votes that would be required in that eventuality, stating only that this vote would be conducted “by a procedure to be determined at that time.” Logic would however argue in favour of a majority vote in the event of a deadlock, as any threshold higher than that may simply perpetuate the deadlock.¹⁵ Even if members were to fall back on voting to select the director-general, the procedures stress that this would “be understood to be an exceptional departure from the customary practice of decision-making by consensus, and shall not establish any precedent for such recourse in respect of any future decisions in the WTO.”

Table 6.2. The levels of support needed for types of decisions in the WTO

Provision	Level	Type of decision
WTO Article IX.1	Consensus	The default decision-making rule
WTO Article X.2	Unanimity	Amendments to WTO Article IX, GATT 1994 Articles I and II, GATS Article II:1, and TRIPS Agreement Article 4
WTO Articles IX.2 and IX.3	Three quarters	Interpretations of the multilateral trade agreements and waivers of obligations imposed by the multilateral trade agreements
WTO Articles X.1, X.3, X.4, X.5, and XII.2	Two thirds	Adoption of a decision to submit to the membership amendments to agreements (when such a decision cannot be reached by consensus); adoption of certain amendments; decisions on accessions

While voting is anathema to WTO members, neither they nor analysts are necessarily happy with the general rule of consensus. Misgivings over this rule generally focus on two concerns. One is that it tends to promote timidity. According to Jackson (1990: 23), a strict application of the consensus approach “gives every country a veto and thus reduces any potential initiative to the least common denominator.” The other is that it creates tension between the weak legislative and strong judicial powers of the WTO. “In a sense the WTO has been hijacked by the legal/judicial side the house,” Stuart Harbinson observed. “That has had major advantages in terms of furthering the rule of law, but a big price has been paid in terms of the adverse effect of excessive legalism on the ability to conduct and conclude negotiations.”¹⁶ Barfield (2001: 1) concurred, arguing that the WTO “is jeopardized by a formidable constitutional flaw” in the form of “the imbalance between the WTO’s consensus-plagued, inefficient rule-making procedures and its highly efficient dispute settlement system.” The consequence of this imbalance is that it “creates pressure to ‘legislate’ new rules through adjudication and thereby flout the mandate that dispute settlement judgments must neither add to nor diminish the rights and obligations of WTO members” (*ibid.*). This is a view that several other authors share, including Hudec (1992), Pauwelyn (2005), Cottier and Takenoshita (2008) and Steger (2009b). Barfield’s solution would not be to change the consensus rule itself, but instead to rebalance the functions by weakening the dispute settlement rule. Barfield advocated a “blocking minority” rule to allow any group representing at least one third of the members and at least one quarter of total trade among WTO members to overturn any panel or Appellate Body decision. The Dispute Settlement Body would then “affirm that the decision will not become binding WTO law” (*ibid.*: 14).

Analysts generally heap more praise than condemnation on the rule of consensus, even if that praise is sometimes faint. “The advantages of consensus are obvious,” Ehlermann and Ehring (2005: 513) asserted, because “it will tend to enjoy broad support” and also “means that no one loses face.” There is nevertheless a widespread view that the rule “is likely to affect the substance because the search for consensus regularly involves the search for a compromise solution that is somehow acceptable to all” (*ibid.*: 514). According to the International Law Association (2006: 15), consensus “protects the quality and inclusiveness of decision-making and gives each WTO Member a veto power, limited by joint political pressures, which is otherwise not present in the case of voting.” Another advantage to the consensus approach during the GATT period was that the “informal method of doing business enable[d] provisional and de facto members of GATT to participate without much regard for their formal lack of vote” (Jackson, 1969: 123). Considering that as of 2012 there were 18 non-resident WTO members (i.e. members that have no permanent mission in Geneva and hence are represented only from their capitals or other diplomatic posts in Europe),¹⁷ this remains a concern. As is noted in Chapter 3, however, the frequency of non-residency declined from 21.1 per cent in 1997 to 11.7 per cent of all WTO members in 2012.

Consensus and voting in practice

The differences between consensus and voting are not necessarily as clear-cut as they are made out to be, and tend to overlap in their intent and consequences. The fuzziness of the lines separating one rule from another can be demonstrated by the fact that one experienced analyst can assert that “critical mass decision-making is itself a form of *de facto* or implicit

voting” (Low, 2009: 5) just as another can contend that “[c]onsensus implies an informal system of weighted voting” (Cottier, 2009: 57). The broader point is that any decision-making system in the WTO can be analogous to voting if we understand that term to mean a system in which all members have a voice and a sufficiently large number of them may act in concert either to advance or (perhaps more often) to block specific initiatives.

The attachment to consensus is even greater in the WTO than it had been in GATT despite the growth in the membership. The rule here was proven by the exception. The only time that the WTO employed voting was in 1995, when the General Council held votes by postal ballot on the draft decisions on the accession of Ecuador and on certain waivers; even then this came only after reaching consensus on each matter. Thereafter, the General Council adopted a decision (in the form of a statement by the chair) that accession and waivers would henceforth be decided by consensus.¹⁸ More specifically, the 15 November 1995 statement by the chairman on Decision-Making Procedures under Articles IX and XII of the WTO Agreement provided in part that:

On occasions when the General Council deals with matters related to requests for waivers or accessions to the WTO under Articles IX or XII of the WTO Agreement respectively, the General Council will seek a decision in accordance with Article IX:1. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting under the relevant provisions of Articles IX or XII.

This statement also allowed individual members to call for votes, but there are strong norms against doing so. The taboo against voting is so strong that there are cases in which WTO members have acted to enforce it even at some cost. Consider, for example, the controversy that arose in 2009 over the recognition of Palestine as an observer. In that instance, the Egyptian ambassador indicated that he would call for a vote in order to demonstrate just how isolated Israel and the United States were in their opposition to this initiative. Mario Matus (see Biographical Appendix, p. 586) of Chile was then chairman of the General Council, and while his country favoured observer status for Palestine the ambassador – acting in the General Council chairman’s capacity as a defender of the institution and its traditions – felt compelled to urge his Egyptian counterpart not to press ahead with his plans. He consulted with several members before he approached the Egyptian ambassador, and found that this was a nearly universal opinion: They too would prefer on political grounds that Palestine be granted this status, but placed an even higher priority on maintaining the general ban on voting. The Egyptian ambassador was thus persuaded to drop the matter.

Proposals for voting

Practical considerations tend to discourage contemporary commentators from advocating voting. Experienced practitioners in WTO diplomacy are especially reluctant to do so,¹⁹ just as the International Law Association (2006: 14-15) took the view that the “[i]ntroduction of a system of weighted voting ... would probably fail to win the approval of the Membership and

would risk to entail polarization." Similarly practical considerations appeared to be among the reasons why the Warwick Commission rejected a proposal for a comparable arrangement. The commission dismissed this notion because "governments would encounter great difficulty in agreeing upon the appropriate thresholds" and such an arrangement "would formalise a *de facto* disenfranchisement of some countries every time a vote was taken" (*Ibid.*: 29).

A few authors nonetheless propose the adoption of voting for at least some decisions. Cottier and Takenoshita (2008: 188-189) argued that the one-member-one-vote (OMOV) rule is fundamentally imbalanced in an institution where (at the time of their writing) the 24 industrial countries accounted for 79 per cent of total gross domestic product (GDP) among members and 71 per cent of the WTO budget, while 119 developing countries supplied 21 per cent of total GDP and 29 per cent of the WTO budget. The first group would have just 17 per cent of the votes in an OMOV system, versus 83 per cent for the latter group. They did not call for a pure switch to voting, but proposed instead that "consensus diplomacy ... be supplemented by a workable and realistic system of voting to which the members of the WTO could revert in cases of stalemate, melt-downs and break-downs of negotiations, both within rounds and in between rounds" (*Ibid.*: 192). They urged that the system be devised in such a way that "no Member alone should individually be in a position to block the adoption of a position," and that "no decision should be adopted against the combined will of major stakeholders," while also "do[ing] justice to medium and smaller Member States alike" (*Ibid.*: 195).

In a later article, Cottier (2009: 56) suggested that voting be restricted only to certain kinds of decisions, such that "[p]rimary rules could continue to operate under a rigid principle of consensus," but "secondary rules could be subject to alternative means, such as consensus based on critical mass or weighted voting." Primary (or constitutional) rules are those "setting out basic obligations and the framework for specialized regimes," where the concept of secondary rules "is normally used for decisions and acts adopted by the bodies of an international organization" (*Ibid.*: 53). He recommended that consensus (or consensus-minus) be the rule for the Dispute Settlement Body, while decisions in some other bodies could be subject to either weighted or OMOV voting, but did not specify precisely which bodies should be governed by which arrangements. Ehlermann and Ehring (2005: 520) made a similar argument when they call for "abolishing the taboo of majority voting." They proposed "a distinction between procedural aspects and real substance" in order to overcome "the currently existing problem that even procedural issues of minor importance can get stuck in a deadlock or become the object of protracted consultations until consensus is reached."

One of the chief difficulties with voting is that almost any approach taken will lead to a concentration of power that is, from the perspective of some group of countries, disproportionate. Philosophers and social scientists have long worried that voting would allow for a "tyranny of the majority" in which a mathematically dominant group may willingly violate the rights of minorities.²⁰ That preoccupation is sometimes expressed on the political left (e.g. when racial or other minorities fear discrimination) and, perhaps more frequently, on the political right (e.g. when the few rich fear that the many poor will demand "levelling"). These concerns over the proclivities of majorities to sacrifice the interests of minorities take on even greater urgency in international relations, where all countries share an interest in preserving the prerogatives of sovereign states. As suggested at the start of this chapter, if the majority ruled in the WTO that could give tremendous authority to

large groups of small countries. An OMOV system would allow a numerically large group of members that are economically and demographically small to wield more influence than would seem justified to major trading powers (developed and developing).

The tyranny of a powerful minority poses an altogether different danger, and one that may arise in a system that allows for weighted voting. In an international organization where votes are allocated on the basis of state size (however measured) it is at least hypothetically possible that a small circle of vote-rich countries could dictate outcomes for the world as a whole. Table 6.3 shows that if one were to weight votes based solely on population, for example, half the votes would be controlled by just five members. Just three members would control a majority if it were based solely on members' shares of either GDP or exports. Any formula that is based on some combination of these factors, and perhaps others as well, would almost certainly end up concentrating power in a relatively few hands, especially the European Union, the United States, China, India and Japan, in approximately that order (depending on the factors and the weighting). The only way to avoid that outcome would be to devise a formula that starts with a fairly large number of base votes for all countries – which brings us back to something resembling the OMOV system and all of its attendant problems. Balancing base values against weighted values would be a daunting task for any would-be writers of a new WTO constitution. Given the difficulties that countries have had in devising rules on such seemingly technical matters as the proper formula for determining the *ad valorem* equivalent for specific tariffs, it is difficult to imagine them coming to agreement on a more consequential formula by which they would determine the weighting of votes among themselves.

Table 6.3. Top ten WTO members by population, GDP and exports, 2011, in %

Member	Population		Member	GDP		Member	Exports of goods and services	
	Share	Cumulative		Share	Cumulative		Share	Cumulative
China	19.3	19.3	European Union	25.1	25.1	European Union	34.8	34.8
India	17.8	37.1	United States	21.6	46.7	United States	9.5	44.3
European Union	7.2	44.3	China	10.5	57.2	China	9.4	53.7
United States	4.5	48.8	Japan	8.4	65.6	Japan	4.2	57.9
Indonesia	3.5	52.3	Brazil	3.5	69.1	Korea, Rep. of	2.9	60.8
Brazil	2.8	55.1	Russian Federation	2.7	71.8	Russian Federation	2.6	63.4
Pakistan	2.5	57.6	India	2.6	74.4	Hong Kong, China	2.5	65.9
Nigeria	2.3	59.9	Canada	2.5	76.9	Canada	2.4	68.3
Bangladesh	2.2	62.1	Australia	2.0	78.9	Mexico	1.6	69.9
Russian Federation	2.0	64.1	Mexico	1.7	80.6	Brazil	1.3	71.2

Sources: Calculated from World Bank data at <http://data.worldbank.org/indicator/SP.POP.TOTL> (population) and <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD> (GDP), and <http://data.worldbank.org/indicator/BX.GSR.GNFS.CD> (exports).

It does not necessarily follow that the larger members will favour a system of weighted voting. That was not a part of the original US proposal for the ITO, for example, and one US diplomat gave an important clue as to why when he appeared before a Senate committee in 1947. He observed that “[i]t is no good to get a 75-percent vote which represents, in an extreme case three countries ... and expect the legislatures of [the remaining] countries to implement the recommendation” (quoted in McIntyre, 1954: 491). The US negotiators then, and presumably the major trading countries today, had no interest in achieving purely Pyrrhic victories.

Some analysts look to other international agreements and institutions, as well as the constitutional arrangements of countries and common markets, for examples that may be instructive. It could be argued that there is a general practice of voting in international conferences, at least as provided for in the Vienna Convention on the Law of Treaties. It states that: “The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule” (Article 9.2). Separate international organizations, however, have decision-making rules of their own. Even when the written rules call for voting there may be a tendency for the members of the organization to gravitate towards consensus. In his review of the UN General Assembly, for example, Szasz (2001: 60) found that after it had adopted “numerous resolutions that did not in fact represent the will of a significant portion of the world community,” the body came to rely more often on consensus decision-making.²¹

The EU experience offers an example of how one might maintain but transform the practice of consensus decision-making. Under the “Luxembourg Compromise” the member states “refrain from exercising their potential vote against a measure in certain circumstances, unless the measure involves something of ‘vital interest’ to the nation member involved” (Jackson, 2000: 189). By this same logic, WTO rules or practices could be changed to require that members make a “vital national interest” declaration whenever they choose to block consensus. This is similar to a recommendation made in the Sutherland Report, on which John Jackson served as a member. The Sutherland Report characterized the consensus rule as a “safety net” for the WTO system. Even so, the members of this consultative board considered the rule to be less than ideal. In lieu of suggesting a turn from consensus to voting, the report proposed a two-step approach to reform. One was its recommendation that the WTO members “give serious further study to the problems associated with achieving consensus in light of possible distinctions that could be made for certain types of decisions, such as purely procedural issues” (Sutherland Report, 2004: 64). Its second and more precise recommendation was to urge “the WTO Members to cause the General Council to adopt a declaration that a Member considering blocking a measure which otherwise has very broad consensus support shall only block such consensus if it declares in writing, with reasons included, that the matter is one of vital national interest to it.” In their study of changes in the procedures of the EU Council of Ministers, Carrubba and Volden (2001: 22) found that pressures for changes (e.g. increased use of qualified majority voting or even less inclusive rules) “occur when the number of members of the Council increases, when coalitions are more difficult to form, and when less beneficial legislation is

being proposed.” At least two of those three conditions would appear to describe the negotiating environment in the Doha Round.

How hold-outs are handled: peer pressure and expulsion

One of the acknowledged problems with consensus decision-making is that it has the effect of extending a veto to every member of the organization. The only workable solution to that veto is to hope that individual members do not abuse the privilege, a hope that is sometimes backed up by peer pressure or other tactics. The most high-profile example of this came in the adoption of the Doha Ministerial Declaration in 2001, when India was the sole hold-out. That single country had the capacity under the rules to prevent the round from being launched, and might perhaps have exercised its right if at least a few other members joined it in opposition, but when fully isolated was not willing to block a decision that had the support or acquiescence of all other members. India is not alone in having been made to feel peer pressure.

The Doha Ministerial Conference also witnessed an episode in which the United States faced the prospect of being blamed for failure if it did not support the compromise then being developed on trade-related aspects of intellectual property rights (TRIPS) and public health issue. As is discussed at greater length in Chapter 10, one of the subplots of the Doha Ministerial Conference revolved around the efforts of developing countries to overcome US resistance to a proposal that would rebalance the rights and obligations in the TRIPS Agreement as it affects patent rights for pharmaceuticals. In these negotiations, Luis Ernesto Derbez (see Biographical Appendix, p. 576), the Mexican foreign minister, was the facilitator assigned with developing a consensus position. Each of the facilitators reported to a plenary meeting on the progress in their areas, and when it was Mr Derbez's turn he announced that his group had a green light to sign the TRIPS and public health declaration. “People started to applaud,” Eduardo Pérez Motta, the Mexican ambassador, would later recall, “and there was a very good, positive movement.” He spoke to the minister just a few minutes after that announcement, commenting that he had not known that agreement had in fact been reached. “Not exactly,” Mr Derbez replied, “but with this announcement I can assure you that they are going to sign.” This was a risky move, but in making a calculatedly premature announcement, Mr Derbez “put a lot of pressure on one side of the table to close that deal.”²²

The most extreme way to conduct negotiations is to threaten expulsion to any member that blocks the approval of an agreement that otherwise receives wide support, or that refuses to ratify an agreement approved by the rest of the membership. Expulsion is a heavy-duty power that international organizations rarely exercise. The most notable examples all stem from matters that are “above the pay-grade” of trade policy-makers: the League of Nations expelled the Soviet Union in 1939 for its invasion of Finland, and both the United Nations and the GATT contracting parties did essentially the same thing with respect to Serbia and Montenegro after the invasion of Bosnia and Herzegovina in 1992.²³

It may therefore come as a surprise to many in the trade community that the WTO rules actually allow for expulsion, or something akin to it, not just for reasons of high politics but for mundane matters of trade policy. Article X of the WTO Agreement provides for amendments to WTO agreements. Some provisions can be amended “only upon acceptance by all Members,”²⁴ while others can be approved with super-majorities of varying sizes. In the case of certain agreements, any amendments that are “of a nature that would not alter the rights and obligations of the Members, shall take effect for all Members upon acceptance by two thirds of the Members.” In the more difficult case of amendments that are “of a nature that would alter the rights and obligations of the Members,” however, these will “take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it.” Article X:3 further provides that in such cases:

The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under this paragraph is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference.

More plainly stated, in the hypothetical circumstance that a single member were to block the adoption of such an amendment, it is possible that the membership as a whole could invite that member to leave voluntarily or, barring that, could even expel the member.

There is an obscure but interesting history to this little-known aspect of WTO rules, stretching back to the original US proposal for GATT in 1947. One article in that draft would have provided that the agreement could be amended, and that “amendments which involve new obligations on the part of contracting states shall take effect upon acceptance on the part of two-thirds of the contracting states for each contracting state accepting the amendments.” The innovation came in the next clause, under which an executive committee could “determine that any contracting state which has not accepted an amendment within a period specified by the Committee shall thereupon be obliged to withdraw from the Agreement” (United Nations Economic and Social Council 1947c: 31). The final version of this provision (GATT Article XXX) had no such “teeth”, providing instead in relevant part that amendments “shall become effective upon acceptance by all the contracting parties, and other amendments to this Agreement shall become effective, in respect of those contracting parties which accept them, upon acceptance by two-thirds of the contracting parties and thereafter for each other contracting party upon acceptance by it.” Both the first and second part of this clause ensured that no country would be obliged to accept an amendment to which it objects.

This is a principle that has some support in theory. Economists Maggi and Morelli (2006), who preferred the term “unanimity rule” over “consensus,” sought to determine the rational basis upon which a given international organization would choose this option over voting. Their analysis stressed an important distinction whereby:

The unanimity rule requires only *coordination*, [but] a (simple or qualified) majority rule requires also *enforcement*. This is because, any time the organization makes a nonunanimous decision, the dissenting members will be tempted to defect, and the organization must keep this temptation in check (*Ibid*: 1137).²⁵

They found that the frequent occurrence of unanimity rules in international organizations, from the WTO to the North Atlantic Treaty Organization, is entirely understandable when one takes into account the fact that enforcement is ultimately a matter of self-enforcement by sovereign states. It is nonetheless almost impossible to imagine a realistic scenario in which the expulsion authority would actually be exercised or even so much as hinted at in the WTO. In the trade-off between the community interest in facilitating the adoption of new trade agreements and the interest of sovereign states in maintaining their authority to reject undesirable pacts, the WTO membership has always shown a decided preference for the latter.

How agreements are approved: the significance of US negotiating authority

In a world of truly equal countries, there would be no need to focus on the domestic politics or approval procedures of any one WTO member. This is manifestly not such a world, however, and the history of the trading system is replete with examples of initiatives that died or were otherwise weakened because of the opposition that they encountered from the US Congress. This has sometimes been the case even when the US executive had been among the chief proponents of the initiative. If the legislative branch were habitually deferential to the executive, the United States would have approved the Versailles Treaty, the Havana Charter and the non-tariff codes of the Kennedy Round.

The scope of issues that negotiators are able to handle in the multilateral trading system depends on the extent to which this one legislative body is willing in the first instance to delegate some of its constitutional authority over trade policy to the executive branch, and then to approve the agreements that are submitted under the terms of this delegated authority. This is a matter of both procedural and practical importance to the rest of the trading community, as these grants of negotiating authority – or their sometimes conspicuous absence – can affect the pace, ambition and *denouement* of rounds. The timing of the Kennedy and Tokyo Rounds was determined by the expiration dates for the authorities that Congress had granted for those respective negotiations. The Uruguay Round was a much less disciplined affair in which negotiators missed their deadlines and Congress had to renew the president's authority in 1991 and 1993.

The fast-track rules

The fast track, or some other form of special negotiating authority, is necessitated by the serious shortcomings of the established US procedures for the approval of treaties. The US

Constitution provides in Article I, Section 8, Clause 3 (the Commerce Clause) that trade is a congressional prerogative,²⁶ and it is a long-established principle of US policy-making that the executive can act effectively in this area only to the degree that the legislature permits it to do so. While it is possible for the president to deal with trade policy as a matter of foreign policy, and to negotiate treaties with his peers, the Senate has a long history of rejecting, or just ignoring, the treaties that presidents submit for its advice and consent.²⁷ Another problem is that both treaties and the implementing legislation for them are subject to amendment, a power that the Senate is not explicitly granted by the Constitution but that it has nonetheless exercised freely since the early days of the republic. Another, more serious, problem is that a treaty or its implementing legislation can be delayed indefinitely by parliamentary manoeuvres. Senate rules offer many dilatory tactics, such as keeping a bill bottled up in a committee and conducting filibusters (endless debate). As of 2013, there was still one treaty pending in the Senate Foreign Relations Committee that had originally been submitted by President Harry S. Truman, as well as two that President Lyndon B. Johnson submitted.²⁸

The fast track is a special procedure allowing for expedited ratification of trade agreements by Congress. These provisions in the Trade Act of 1974 (as amended) call for the transformation of non-tariff agreements into a draft bill known as the “implementing legislation.” The bill specifies the changes that must be made in US trade law in order to meet the obligations set by an agreement. The text is theoretically drafted by the executive branch but in reality the congressional trade committees are closely involved in the process. Once the president submits the implementing legislation to Congress, together with statements explaining its purpose and describing any additional administrative action needed to implement the agreement, Congress has 90 legislative days in which to approve or reject the bill. Within this period, the committees with jurisdiction over the bill must vote to approve or disapprove it, as must the full House of Representatives and Senate. A simple majority is required in each chamber for approval. In effect, a majority in either the House or the Senate can kill an agreement.

The fast track operated as advertised from 1979 to 1994, with all of the agreements submitted to Congress under this authority being approved. The value of the fast track arguably declined since the start of the WTO period, however, with several incidents reducing the degree of confidence that it extends to the negotiating partners of the United States. These include revisions in the formal terms of fast-track grants, changes in the way that the two branches of government exercise their authority under these grants, and an increasing reluctance in Congress to delegate authority in the first place.

When presidents lack fast-track authority, their trade negotiators operate under a cloud of uncertainty. This was a serious constraint for the Clinton administration, which tried repeatedly from 1994 to 1997 to secure a new grant from Congress. At issue was an extended dispute between the two political parties and the two branches of government over the objectives in US trade negotiations, with Democrats in the administration and Congress insisting that trade agreements be tied to labour and environmental issues, and Republicans – who held the majority in Congress – being equally insistent that the topics not be linked. It took years to

negotiate the terms of a proposed grant of negotiating authority, and even then there were too few centrists to approve the compromise bill. Fearing that the fast-track renewal bill would be defeated in the House of Representatives, the White House asked in late 1997 that the bill not be put to a vote.

It took a change in administration and the restoration of one-party government for the two branches to reach agreement on the terms a new grant of authority. Even then, the Bush administration had to make three major concessions in 2002 to placate the demands of trade-sceptical sectors. It granted protection under the safeguards law to the steel industry, approved a new farm bill that greatly increased subsidies to farmers and issued the first in an annual series of reports to the Congressional Textile Caucus outlining the steps it was taking to advance this sector's trade interests. Congress also insisted in putting the administration on a shorter leash, writing provisions into the bill that limited its ability to strike bargains on anti-dumping laws and import-sensitive agricultural products. Even after making these concessions to protectionist sentiment, the administration barely managed to eke out a victory: the House of Representatives approved the bill by a margin of one vote.

The Trade Act of 2002 made a new grant – now called Trade Promotion Authority (TPA) – through mid-2005. The law also allowed the possibility of a two-year renewal if the executive requested it and Congress did not act to deny the request. That renewal was in fact needed, and achieved with little effort, but after the authority expired in mid-2007 it could be renewed only by enactment of a new law. That was made more complicated by the US electoral calendar: by then the Bush administration was in the final two years of its second term, Democrats had retaken control of both houses of Congress in the 2006 elections, and as the 2008 congressional and presidential elections approached the “lame duck” status of the president loomed larger. Not only did that make for a poor atmosphere for the renewal of TPA, but also emboldened the administration's critics in their opposition to its trade agreements. The steps that they took in 2007 to 2008 undermined both of the supposed guarantees of fast-track authority.

Revision of the fast track in 2007 to 2008

It is not enough for a president to have a grant of fast-track authority in hand, as the effective use of this authority requires that there be comity and cooperation between the branches. The Bush administration was able to win congressional approval for the free trade agreements (FTAs) that it submitted to Congress from 2003 to 2006, but after Democrats recaptured control of Congress in the 2006 elections, the domestic politics of trade became more confrontational. One way that the administration's antagonists upset the TPA bargain is by undermining the promise that Congress will not alter the terms of a trade agreement. This is an aspect of fast-track authority that most outside observers, and many Washington insiders as well, do not properly comprehend. It is not the case that the law offers a complete guarantee against changes in the deals that the executive makes; it instead ensures only that Congress will not make amendments to the implementing legislation for those agreements. Legislators had developed several means in earlier decades to force changes in the agreements without

touching the implementing legislation after it has been introduced. These included requiring the parties to redraft provisions of an agreement when it is in the final stages of negotiation, bargaining with the executive over the terms of that legislation while it is still being drafted, and requiring the parties to reach side agreements on other topics.²⁹

Most of the prior episodes in which Congress had exercised these authorities had been conducted subtly, and thus left US negotiating partners with a comfortingly inaccurate perception of the degree to which the fast-track rules prevented congressional tinkering with the terms of a trade agreement. The deal that was reached between the Bush administration and congressional Democrats in May 2007,³⁰ however, was too blatant to ignore. Under this bargain, the administration pledged that it would not submit the implementing legislation for the pending FTAs with the Republic of Korea, Panama and Peru until those pacts had been renegotiated to meet Democrats' demands on labour, environmental and other issues. This bargain technically did not violate the TPA ban against amendments to the implementing legislation, but in reality it produced the most substantial renegotiation of trade agreements in US history. Congress approved the renegotiated US–Peru FTA in 2007, but the agreements with the Republic of Korea and Panama – which also had been renegotiated by the Bush administration and would be further renegotiated by the Obama administration – would not be passed until 2011.

While Democrats in Congress were willing to bargain over these three FTAs, in 2007 to 2008 they would not even negotiate with the Bush administration over the terms of the FTA with Colombia. Free trade with that country was anathema to them because of Bogotá's record on labour rights. When the Bush administration tried to force the issue in 2008, submitting implementing legislation for the FTA without first working out its terms with Congress, the House of Representatives responded by approving a resolution that withdrew fast-track treatment for the agreement. The FTA would later be approved under the Obama administration in 2011, after it too had been renegotiated and accompanied by a side agreement on labour, but the 2008 episode put the lie to the other misperception about the fast track. It is not the case that the law absolutely guarantees that Congress will vote within strict time limits on the implementing bills that the administration submits. Congress has always retained the authority to withdraw fast-track treatment at any time, but until 2008 it had rarely threatened to do so.

The last grant of US negotiating authority expired in mid-2007. This is an issue that will need to be addressed before any new, significant trade agreements are submitted to Congress for its approval. And when either the Doha Round or a successive WTO negotiation enters its endgame, the events reviewed above may help to shape the perceptions of US negotiating partners regarding the utility of TPA as a check upon congressional authority.

Will the European Parliament emulate the US Congress?

The approval procedures discussed above are part of what was termed in Chapter 2 the “Washington problem”, namely the domestic US politics of approving trade agreements. The

Washington problem of internal negotiations has sometimes proven to be more intractable than the Geneva problem of external negotiations, but the inherent difficulties of multilateral trade diplomacy may be multiplied by the emergence of a Brussels problem. The internal negotiations over trade policy in the European Union may come to be just as problematic as those between the executive and legislative branches of the US government, especially with the rising power of the European Parliament. The relationship between the executive and legislative branches of the European Union remains a work in progress. It has yet to be determined the extent to which the European Parliament might act as a check upon the European Commission and a counterweight to the member states.

The Lisbon Treaty, which entered into force in late 2009, revised the institutions of the European Union.³¹ Among the changes that it made were moving from unanimity to qualified majority voting in several policy areas in the Council of Ministers, a change in how that qualified majority is calculated (now a double majority), creation of a new president of the European Council and – most consequential for trade policy – a more powerful European Parliament. The Parliament is now a bicameral legislature alongside the Council of Ministers and enjoys, among other powers, the authority to approve or reject treaties. The process by which the Lisbon Treaty itself was approved offered a demonstration of the sometimes fragile consensus within the European Union. This instrument, which stands in for the Treaty establishing a Constitution for Europe that French and Dutch voters rejected in 2005, was itself initially rejected in 2008 by the Irish electorate.

One consequence of the redistribution of power between the executive and legislative branches in the European Union is that trade negotiations may become more difficult to authorize, and the agreements that they produce may become more difficult to approve. Members of the European Parliament take the position that any new negotiations that might be contemplated within the WTO will require their explicit authorization.

As for the approval of agreements, the case of the Anti-Counterfeiting Trade Agreement (ACTA) suggests the possible shape of future developments. Although not a WTO agreement, ACTA deals with subject matter that falls within the scope of WTO agreements. The European Union signed this agreement, as did 22 of its member states, together with Australia, Canada, Japan, the Republic of Korea, Mexico, Morocco, New Zealand, Singapore and the United States. Japan was the only signatory to ratify the agreement by the end of 2012, however, and the European Parliament's rejection of this treaty made it unlikely that ACTA would ever attract the six members needed for its entry into force. ACTA had encountered sharp opposition from groups that saw it as an infringement on fundamental rights such as freedom of expression and privacy, and also brought up the perennial concerns over the relationship between intellectual property protection and access to medicines in developing countries. The European Parliament rejected the agreement in plenary session on 4 July 2012, with 478 voting against the treaty versus just 39 in favour, with 165 abstentions. The European Parliament's rejection of this agreement was, according to the chairman of its International Trade Committee, "a clear warning to the executive that they should bear in mind that we have the last say on trade agreements."³²

The opposition to the FTAs with Colombia and the Republic of Korea were also strong. These episodes suggest the possibility that in the future it may be as challenging for EU trade policy-makers to deal with their interlocutors in the European Parliament as it has been for their US counterparts to deal with Congress. If so, the dynamics of the multilateral trading system may become even more difficult than they have been to date.

Endnotes

- 1 This conclusion thus places Steinberg's analysis of GATT/WTO in the tradition of Krasner (1999), an influential neo-realist scholar for whom the model of state sovereignty amounts to a system of "organized hypocrisy" that merely disguises the true nature of power relations between states.
- 2 Author's correspondence with Mr Hartridge on 11 January 2013.
- 3 See the interview with Deputy Director-General Rufus Yerxa at www.wtcreation.org/en/videos?video=30495229.
- 4 This is a point on which the terminology differs among users. Some employ the term "green room" to mean only those meetings that were small and invitation-only, and in this sense the unrestricted head-of-delegation (HOD) meeting is a different variety of meeting altogether. Others designate HOD meetings as a variation on the green-room formula.
- 5 The members of this group at that time were Cuba, the Dominican Republic, Honduras, India, Indonesia, Jamaica, Kenya, Malaysia, Pakistan, Sri Lanka, Tanzania, Uganda and Zimbabwe.
- 6 See *Organization of Negotiations Envisaged in the Doha Ministerial Declaration*, WTO document TN/C/W/2, 29 January 2002, p. 1.
- 7 See *Communication from the Plurinational State of Bolivia, the Republic of Cuba, the Republic of Ecuador, the Republic of Nicaragua and the Bolivarian Republic of Venezuela*, WTO document WT/MIN(11)/W/4, 15 December 2011, p. 1.
- 8 For an institutional history of this body, see *The History of the Consultative Group of Eighteen: Note by the Secretariat*, GATT document MTN.GNG/NG14/W/5, 9 June 1987. For a more critical analysis, see Ostry (2001).
- 9 Author's correspondence with Mr Lacarte on 18 February 2013.
- 10 At the time of the G20's creation, the Russian Federation was the only country represented in the new body that was still in the process of completing its accession to the WTO.
- 11 Bilateral agreements will often provide for the creation of some kind of consultative mechanism for the administration of the agreement, but there is no need to establish voting rules for such a body. In a group of two, there is no difference between a majority vote, a unanimous vote and a decision by consensus.
- 12 Under the formula proposed by the United Kingdom, a country would receive 20 votes for every US\$ 1 billion in foreign trade, two votes for every US\$ 1 billion in national income, and one vote for every US\$ 25 in foreign trade per capita. Another UK-sponsored formula would have provided each country a base of 100 votes, plus additional votes under a formula that was based on four factors (trade, national income, population and trade dependence). That formula yielded a number of votes for the United Kingdom and its colonies (335) that would have been fairly close to the number held by the United States (399). The second-tier states would include the Soviet Union (199), India (194), France (182) and China (181), among others (United Nations Economic and Social Council, 1947a: 1).
- 13 See, for example, Buzan (1981) on the development of consensus decision-making in the United Nations Conference on the Law of the Sea.
- 14 See *Procedures for the Appointment of Directors-General*, WTO document WT/L/509, 20 January 2003.

- 15 This assumes that a vote would take place on a one-member-one-vote basis. While it is alternatively possible that members could opt for some form of weighted voting, it is difficult to imagine how they could reach consensus on the weighting of votes. That is hard enough to do when voting is considered in the abstract, and would be even more difficult in a circumstance in which the question is actual rather than hypothetical and the positions of the larger members would likely be matters of general knowledge.
- 16 Author's correspondence with Mr Harbinson on 30 January 2013.
- 17 The non-resident members of the WTO include eight least-developed countries (LDCs) (the Central African Republic, The Gambia, Guinea-Bissau, Malawi, Maldives, Sierra Leone, the Solomon Islands and Togo) and 11 other developing countries (Antigua and Barbuda, Belize, Dominica, Grenada, Guyana, Papua New Guinea, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname and Tonga). An even larger number of LDCs would likely be non-resident if not for the subsidy provided by the Swiss government.
- 18 For the General Council decision adopting this statement, see *Minutes of Meeting: Held in the Centre William Rappard on 15 November 1995*, WTO document WT/GC/M/8, 13 December 1995, p. 6.
- 19 For example, Pauwelyn (2005: 44-45) observed that "it is hard to imagine that any WTO member could accept being outvoted based on some majority-voting rule, be it a majority of WTO members (which would give disproportionate power to countries like Luxembourg and Trinidad and Tobago) or, even less so, a majority of the people living in WTO members (which, of course, would hugely favour countries like China and India)." Low (2009: 5) concurred, stating that: "It is difficult to imagine a situation in which WTO Members would be willing to submit to voting arrangements on any policy measures which they perceived as having real resource implications."
- 20 Among those who have expressed these concerns are Plato, Alexis de Tocqueville, John Stuart Mill, Friedrich Nietzsche and Ayn Rand.
- 21 Szasz (2001) was not noting this development with approval. Characterizing it as "a retreat to the unanimity principles of the League of Nations" (*ibid.*: 60), he proposed that the UN Charter be amended to allow the General Assembly to pass binding resolutions with the approval of a supermajority of members. For a resolution to be binding, it would require the support of countries whose combined contributions in dues comprise a majority of the UN budget and combined populations comprise a majority of the world population.
- 22 Author's interview with Mr Pérez Motta on 24 September 2012.
- 23 The decisions and the chronology in this latter case are more complicated and nuanced than a simple matter of invasion followed by expulsion. The hostilities between the states of the former Yugoslavia grew over the course of 1992, leading to the stepwise diplomatic isolation of the Federal Republic of Yugoslavia. One such step came when the GATT Council decided at its meeting on 19 June 1992 that the Federal Republic of Yugoslavia should refrain from participating in the business of the Council. This actually preceded a later recommendation by the UN Security Council on 19 September 1992 that "the Federal Republic of Yugoslavia (Serbia and Montenegro) ... shall not participate in the work of the General Assembly" and that the country "should apply for membership in the United Nations." This led three days later to the adoption of General Assembly resolution 47/1, accepting the Security Council's recommendations and declaring that "the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership" of the former Yugoslavia. In light of resolution 47/1, the GATT Council then adopted a decision at its meeting on 16-17 June 1993 that essentially repeated and applied to GATT bodies, *mutatis mutandis*, the terms of that General Assembly resolution.
- 24 This rule applies to Article IX of the WTO Agreement, Articles I and II of GATT 1994, Article II:1 of GATS, and Article 4 of the TRIPS Agreement.

- 25 Note that the authors here meant the enforcement of the decisions whereby agreements are adopted, such that all parties must abide by what the majority decided even if they were in the losing minority. This is not to be confused with the issue of enforcing the rules that are established in the agreements that get approved.
- 26 More precisely, the Commerce Clause provides that Congress has power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”
- 27 See, for example, Holt (1933) and Wiktor (1976).
- 28 All three of the treaties referenced here were ILO conventions. One important difference between treaties and bills is that the former do not “die” at the end of the two-year congress in which they are proposed. Once it is sent to the Senate for advice and consent, a treaty will remain on the calendar until it is approved, rejected or formally withdrawn by the president (either the one who submitted it or a successor).
- 29 For a fuller explanation of these tactics, with examples from FTAs and the Tokyo and Uruguay Rounds, see VanGrasstek (1997).
- 30 The text of the agreement is posted at <http://waysandmeans.house.gov/media/pdf/110/05%2014%2007/05%2014%2007.pdf>.
- 31 Note that the Lisbon Treaty also changed the name by which the group went in the WTO. Prior to its entry into force, it was the European Communities; since 1 December 2009, it has been the European Union.
- 32 Author’s interview with Vital Moreira on 26 September 2012.

