Open Covenants, Clandestinely Arrived At

Barbara Koremenos

Abstract: The first of Wilson's "Fourteen Points" called for "open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind, but diplomacy shall proceed always frankly and in the public view." Whether democratic citizens should have access to the treaty-making process was important in 1918. Today, it is more significant. In 1918, those requesting access were journalists. Today, hundreds of organizations with vested interests are implicated. Transparency is normatively connected to our notion of democracy; moreover, recent positive analyses show that transparency gives democracies an advantage in crisis negotiations. I elaborate conditions under which secret international negotiations can *enhance* social welfare in democracies. Specifically, I find that secrecy can 1) result in outcomes that are less likely to be sabotaged, 2) result in less socially inefficient use of resources by interest groups, and 3) shorten the bargaining process. I illustrate my arguments with examples from recent history. I also provide an empirical example of the transformation of a latent interest group into an organized one, which then tried to act as a veto player.

1. INTRODUCTION

In a joint session of Congress on January 8, 1918, President Woodrow Wilson announced what came to be known as the "Fourteen Points." Point I called for "open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind, but diplomacy shall proceed always frankly and in the public view." Journalists from around the world flocked to the Paris Peace Conference, expecting free access to the proceedings. Instead, they found that the rules only granted them access via official communiqués. The press requested free access to delegates and the right to attend the deliberations, to which the Conference participants replied that the proceedings should be held in private in order to reconcile differences and reach agreement before the publicity stage began. Open proceedings would, "lead to premature public controversy, … render infinitely more difficult the

process of give and take … and hinder that unanimity of agreement which is vital to success" (Finch 1919: 617). In the end, representatives of the press were allowed to attend certain meetings. The details of the meetings of the Great Powers, however (where arguably the most important decisions were made) were kept secret with the exception of a brief communiqué issued at the end of each session (Finch 1919). Indeed, Sir Harold Nicholson, a long-time member of the British diplomatic service, writes: "In fact few negotiations in history have been so secret, or indeed so occult" (1963: 43).

Whether and to what extent citizens of democratic countries should have access to the treaty-making process was an important issue in 1918. Today, it is even more important. During Wilson's time, the groups requesting access to treaty deliberations were composed almost solely of journalists. Today, hundreds or even thousands of nongovernmental organizations (NGOs) with vested interests in the issue at hand may demand a presence. Today's transnational groups can have several million members, and technological advances allow them to collect and disseminate information independently and instantaneously. Thus, the philosophy of "open covenants, openly arrived at" is at least as engaging an issue today.

Transparency is intimately connected to our notion of democracy. Many believe that democracy is threatened when there is a large separation between the people and their government. Constructive debate about public policy issues is precluded, and the public can be more easily manipulated with false arguments.

While this normative argument is compelling, in this positive analysis, I explore whether secrecy in international negotiations can, in fact, *enhance* social welfare in democratic states. In democracies, the constitutional and political processes allow individuals and/or organizations to lobby political leaders, testify before agencies, and file lawsuits (Vogel and Kessler 1998: 32-33). While access to the policy process brings many benefits in many realms, I argue that, if treaty negotiations are made public, interest

groups have the potential to sabotage cooperative endeavors.[1] With transparency, each group in a democracy knows exactly what is being brought to the bargaining table and can mobilize support *against* a negotiator if the treaty being designed either disfavors it or doesn't favor it as much as is possible. Through mobilization, the group can influence the treaty design to be consistent with its (usually) extreme preferences. When multiple groups do this, they reach a collectively irrational equilibrium because many resources are spent in the competition to win influence, and the resulting extreme treaty rarely survives; hence society is worse off. Open treaty negotiations often make it impossible to achieve outcomes with net benefits from a social welfare point of view, and, in some cases, transparency even precludes Pareto-improving outcomes.

Secrecy, on the other hand, creates uncertainty. Consequently, individual interest groups no longer know with high probability whether or not they will be disfavored. Given that mobilization is costly, they are less likely to undermine the executive negotiating the treaty than they are under open conditions.

In this paper, I elaborate some conditions under which secret negotiations are socially rational. In addition, I examine the interaction between international negotiations and interest group formation.

2. WHAT HAS BEEN SAID (AND NOT SAID) ABOUT SECRECY

Historically, diplomats have embraced secrecy. In fact, it is not clear that one had to put the word "secret" in front of "diplomacy;" it was implied. But if you examine the literature, no theoretical argument is put forth for why secrecy is good or important. It is simply asserted. Recently, a handful of scholars in the area of crisis bargaining in international relations consider issues of transparency (and hence secrecy) theoretically.[2] Nonetheless, they come to the opposite conclusion: Transparency gives

[1] I use "treaty" as a catchall for all international agreements, including actual treaties as well as congressional-executive agreements.

[2] I discuss the works of Fearon and Schultz below.

states an advantage. Did the diplomats have it wrong?

Law Literature

Much of the relevant law literature looks to the founding of the United States and focuses on secrecy from Congress and therefore the public at large. As DuVal (1986: 579) states: "There is, of course, nothing new about government secrecy. The practice of secrecy in government and debates over its desirability long antedate the framing of the Constitution." In the founding days of the U.S., Jay's Treaty with Great Britain and the XYZ Affair (named for the originally unidentified three French agents who met with a secret three-person American mission) incited hostile political debate in both government and the press about secrecy regarding important national issues. Even President Washington said: " 'The nature of foreign negotiations requires caution, and their success must often depend on secrecy; …The necessity of such caution and secrecy was one cogent reason for vesting the power of *making* treaties in the President, with the advice and consent of the Senate...' "[3]

Law articles focusing on more contemporary issues continue to *assert* the importance of secrecy. Secrecy is especially lauded in the context of peace negotiations. Spencer and Yang (1992) are representative of the conventional wisdom when they state: "Peace talks seem to be most fruitful without the spotlight effect and constant posturing caused by the presence of mass media. . .. [ ] If an early agreement can be reached to have a totally private negotiation, or at a minimum, an agreement not to make a public statement during the sessions, progress can be achieved more readily."

DuVal (1986) comes closest to thinking theoretically when he stresses secrecy's contribution to rational decision-making. "It is not that the value of greater knowledge is outweighed by some other value. Rather, communication is suppressed because the effects of greater knowledge are themselves considered, at least on balance, to be undesirable" (1986: 586-87). The author seems to be making a distinction between value and effect, but the precise argument is missing.

[3] Richardson 1909: 194. Quoted in *U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)*. Italics mine.

Bargaining Theory

Among the achievements of bargaining theory is a rigorous appreciation of how factors like outside options, asymmetric information, and relative patience can dramatically alter bargaining outcomes. We now know that altering the time between offers or changing from one-sided to two-sided private information can result in radically changed equilibria. But, for the most part, bargaining theorists have neglected to connect to (or even consider) factors related to the *political* context in which the actors operate. The transparency of the negotiation process is one such political variable.

The only economists who have considered the issue are Perry and Samuelson (1994). The authors examine bargaining between two actors, with one of the actors representing a constituency (let's call it the democracy) while the other does not (let's call it the non-democracy). The authors assume that, if negotiations are transparent, constituents can choose whether or not to terminate bargaining after intermediate offers have been made and rejected. If negotiations are secret, constituents choose only whether to approve the final agreement. A learning effect and a termination effect arise in transparent bargaining. The learning effect arises from the fact that, each time the constituency allows negotiations to continue for the democracy, the non-democracy learns something more about the disagreement payoff of the constituents. Hence the non-democracy is more likely to reject offers and hold out. The termination effect arises from the fact that each time the non-democracy rejects an offer there is a new risk that the constituents will terminate negotiations for the democracy. This decreases the payoff for the non-democracy from rejecting offers. The authors find that the termination effect dominates the learning effect. This makes the democracy more aggressive (and hence advantaged) in the transparent case.

What is driving this result is a problematic assumption: The constituency is changing over time and the non-democracy can learn only so much about a changing constituency. Quite the contrary, interest groups like unions or Greenpeace are very permanent and stable with respect to preferences (even if the actual makeup of the group changes over time) and arguably more stable than any other actors in the

model. (In fact, the authors couch their analysis in terms of a union representative and a firm.)[4]

Political Science Literature

The two-level games literature asks how domestic actors affect leaders' behavior on the international scene. It builds on the so-called Schelling (1960) conjecture, which states that, in an international bargain, a domestic ratification constraint provides the negotiator with a bargaining advantage.[5] Putnam (1988) provided the metaphor of one negotiator at two tables: domestic and international. The negotiator has to reconcile these two tables simultaneously, although Putnam's discussion implies a sequential model.

Since Putnam, most of the two-level analyses have been formal. The main issues addressed are matters like how ratification is affected by executive uncertainty about his/her own domestic constraints as well the opponent's domestic constraints (Iida 1993); whether or not a negotiator actually prefers to impose domestic constraints on himself (Mo 1995); whether a divided government increases or decreases the probability of ratification and hence executive influence over foreign policy (Milner and Rosendorff 1997); and what happens when both executives face domestic constraints (Tarar 2001). These particular articles focus on interactions between different branches of government, and while these pieces individually are impressive, no coherent conclusions emerge from this work taken as a body.

There is, however, one article that focuses directly on secrecy. Stasavage (2004) argues that public negotiations feed a government's incentive to posture and take uncompromising bargaining positions, which increases a risk of bargaining breakdown. His game-theoretic analysis demonstrates a version of the well-known result that the government always postures by making more uncompromising proposals in public negotiations than in private (see Cai 2000; Groseclose and McCarty 2000).

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[4] One other economist, Hongpin Cai (2000), assumes closed-door negotiations in his work, but he does so solely for tractability purposes. He is not sure how robust his results are to the assumption. (Personal communication: Cai and Koremenos)

[5] Schelling, himself, conditions this argument more than those who cite him.

Nevertheless, the seemingly perverse result of transparency in his model does not wipe away the beneficial effect of transparency: political accountability. Because transparency in the negotiation process holds a government politically accountable, his model shows that the government always makes a proposal closer to the public's ideal point when bargaining takes place in public.[6] Consequently, the public is better off if negotiations are held in public, while the government is better off with secret negotiation. Stasavage does not consider the role of special interest groups.

Additionally, the crisis bargaining and audience costs literature tackles the issue of transparency and has produced a set of robust results. Its general conclusion is that transparency makes democratic leaders better off internationally. Democratic leaders are able to create audience costs, which enable them more credibly to signal their resolve to other states.

Fearon (1994) uses a war of attrition model in which leaders engage in international disputes, deciding whether to attack, back down, or escalate; leaders will pay audience costs if they do not follow through with their threat. The central result of the analysis is that the state with greater domestic audience costs is always less likely to back down than is the side that is less able to generate such costs. Because democracies have larger audience costs than non-democracies (an important assumption Fearon makes), they are better able to signal private information to their opponents, which in turn decreases the probability of conflict.[7]

Schultz (1998) introduces a simple two-party electoral competition into a standard crisis bargaining model to explain whether and how domestic political institutions can help overcome the problems associated with asymmetric information. His results suggest that the probability of war is lower when both the government and the opposition party can send informative signals than when the opposition party cannot express its opinions. This is the case for two reasons. First, the opposition party can lend additional credibility to the government's threat by publicly supporting it. Second, the very

[6] Stasavage assumes an executive with a different ideal point than the public.

[7] Fearon (1997) elaborates this model and comes to the same conclusions.

existence of an opposition party forces the government to be more selective about its threats.

Guisinger and Smith (2002) attempt to provide a micro-foundation for the concept of domestic audience costs. They ask, why would a domestic audience punish a political leader who attempted to bluff to achieve a better deal but then backed down rather than pay unwarranted costs of war? In answering this, they argue that a vital distinction is whether the locus of a country's reputation resides with the country as a whole or with individual leaders. If reputations reside with leaders, as is the case in democracies, domestically accountable leaders can more credibly commit themselves because they jeopardize their domestic political tenure if they fail to follow through on a threat. I revisit the crisis bargaining literature in the conclusion.[8]

There is some research in comparative politics that is relevant, namely, Tsebelis' (1990) work on *Nested Games*. While Tsebelis does not make secrecy a choice variable, in his chapter on consociationalism in Belgium, he argues that political elites (equivalent to executives at the IR level) participate in two arenas, parliamentary and electoral, with the former being "nested" in latter. Tsebelis' variable *k* represents the weight the elites attach to the electoral arena, with *k* varying across both issues and elites. For instance, if the masses care a great deal about an issue, *k* is higher. More precisely, *k* is positively related to issue salience and visibility[9] and inversely related to the monopoly of representation – e.g., dictators would have low *k*s.[10]

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[8] I should also note the main thesis of the democratic peace literature: Democracies do not fight each other because their institutions are more transparent. Transparency implies less hidden information so the likelihood of information failure is mitigated. This is an important supplement to Fearon's audience costs argument.

[9] It is here that Tsebelis elaborates Sartori's (1976) distinction between visible and invisible politics.

[10] I will revisit Tsebelis' framework in the theory section below, arguing that *k* depends in part on whether interest groups are organized or not.

3. THEORY

The secrecy with which I am concerned is at the negotiation stage. The outcome of the negotiations is known once the treaty is presented as a fait accompli for ratification. Treaties that are secret in both the negotiation and post-negotiation phases, such as Bismarck's treaties, are beyond the theory presented here. Instead, I am concerned with cases in which the treaty-making *process* (offers, counter-offers, etc.) is kept secret.

Assumptions

First, I conceive of individuals' interests as having two components. The first is a concern for the general welfare of the state because an economically and militarily robust state benefits all. An increase in the quality of secondary schools, for example, will benefit all (or nearly all) citizens. This first component of interests is broad and often shallow. The second component is narrower and deeper and depends on the individual. This component of interest often stems from a person's employment. People employed by the coffee manufacturing industry in the United States are hurt disproportionately by a coffee cartel that results in increased prices for coffee beans. This component can also stem from ideological commitments, like a concern for the environment. Thus a long-time member of Greenpeace may reap a greater benefit from a Pareto-improving environmental regulation than does the average citizen.

Second, individuals with deep and narrow interests form groups that either have different preferences over single issues or weigh issues differently in the multi-issue case.

These groups can be further divided into two categories: *privileged* and *latent* (Olson 1965). In a *privileged group,* the benefits of the collective good are greater than the costs of contributing to it, and the public good is provided. In a *latent* group, although the interest may be deep and narrow, the benefits of collective action remain smaller than the costs, and the public good is not provided. For Olson, latent groups will *only* acquire the collective benefit if there is coercion or some selective inducement (Olson, quoted in Hardin 1982: 29). Many traditional interest groups (which Olson concludes are generally latent) provide collective goods as a by-product of organization based on other, selective incentives. Hardin (1982), however, posits that latent groups may acquire the collective good under another condition: when

political entrepreneurs seeking to further their careers find it in their interest to provide the good. Political entrepreneurs may be candidates for elective office. They are aware that, although a group may not be organized, it exists as a latent group whose members are more likely to vote for a candidate who promises to provide the collective good (Hardin 1982: 35).

Third, with respect to the negotiations themselves, I assume that the goal of the executive is to maximize social welfare.[11] Fourth, I assume that bargaining outcomes at the international level cannot be predicted ex ante. In other words, the bargaining game is much more complicated than a simple two-person, complete-information Rubinstein alternating offers bargaining game (see Osborne and Rubinstein 1990). This assumption can be justified in many ways. For instance, according to bargaining theory, incomplete information and/or more than two actors yield multiple equilibria; hence negotiations may very well take a long time.[12]

Theoretical Argument

During international negotiations, executives make offers and counteroffers, add issues and subtract issues, and use bargaining chips[13] in order to get the best deal. Suppose the international

[11] Both Fearon (1994) and Schultz (1998) make such an assumption.

[12] One simply has to recall real-life international negotiations, like the decades of negotiations leading to the Law of the Sea Treaty or the seven years leading to the Nuclear Nonproliferation Treaty, to come to the conclusion that the Rubinstein model is not appropriate in this context.

[13] I define a bargaining chip as a concession used as leverage to facilitate successful negotiations. In other words, it is something that someone else wants that *you are willing to lose* in order to reach an agreement. Bargaining chip tactics are pervasive in real-life negotiations, despite not having been theorized. Many accounts of the SALT I negotiations call attention to the use of the ABM system as a bargaining chip. See, for example, Ruina 1974 and Talbott 1988.

negotiation will involve two issues, A and B.[14] The executive will go into the negotiation with certain positions regarding its demands and its probable concessions. During the negotiation, these positions will almost always change as counteroffers are made. In fact, one of the issues may be used as a bargaining chip. That is, the executive will go into the negotiation pretending to care deeply about both issues, but he will trade one off for the other. For strategic reasons, the executive cannot make this information public or the tactic will fail at the international table.

Consider the case of clandestine negotiations with the following sequence of events:

1. The executive goes into the negotiations and, taking into account what he knows about the preferences of his opponent(s), makes both demands and concessions, which are likely to change as the negotiations take their course.
2. The negotiations conclude with an outcome characterized by net benefits from a social welfare point of view.
3. The executive presents the outcome to his domestic audience for ratification.[15]
4. Each interest group makes a choice either to support the agreement or to mobilize against the executive and try to block ratification.

The interest group that mobilizes does not do so to force the agreement to be revisited; rarely are treaties revisited immediately after they are concluded.[16] For example, in a multilateral context, other states may ratify the treaty and hence it will go into force. The following testimony by Sumner in 1945 regarding the International Monetary Fund Treaty makes this point strongly, distinguishing between revisiting before ratification versus amending later *in light of experience*:

The committee has concluded that the device of amending the articles of agreement for the fund

[14] The theory is generalizable to the single-issue case as long as the issue has at least two dimensions. For example, in arms control, offensive and defensive weapons (or even two kinds of offensive weapons) would make the issue multi-dimensional. Likewise, in environmental agreements, two separable components, like clean air and clean water, can make the issue multi-dimensional.

[15] Although ratification typically involves members of parliament/Congress, these actors are influenced by their constituents and by particular interest groups.

[16] There is one notable exception: The Law of the Sea Treaty. Still, the difficulty of revisiting an international agreement serves as a soft constraint at the least.

> and bank involves serious risk. If the United States should propose amendments to the agreements, other countries would undoubtedly do this too. A whole new set of principles would have to be examined, and the difficult procedure of negotiation and compromise would have to begin all over again. The prospect of reaching a satisfactory agreement a second time would be dim indeed. Moreover, an adequate amendment procedure is provided in the articles of the agreement. Changes of a specific nature that appear advisable in the light of experience can be made without great difficulty.[17]

Rather, the interest group that mobilizes does so to block ratification. If a group's net benefits are negative, it will always mobilize. Whether or not it mobilizes if its net benefits are zero or very small depends on whether it believes that, by mobilizing, it significantly increases its chances its preferences will be favored in the future.

Given this framework, suppose after a few offers and counteroffers the negotiations conclude with the executive gaining quite a bit on issue B while gaining only marginally on issue A. This outcome is Pareto-improving for the domestic audience. Although constituents who care more about issue A than issue B will be disappointed their issue did not win out in any substantial way, they are not hurt by the deal. Thus there will be gains from a social welfare point of view. The interest group that cares about A has to decide whether to mobilize. It faces the following tradeoff: the immediate although small gains on A versus the probability its mobilization will be effective multiplied by the discounted, albeit larger, future gains mobilization would bring. Of course, the interest group that cares about B could counter-mobilize. In that case, many resources would be spent on an even more risky outcome.

Next consider the case of open negotiations with the following sequence of events (steps 2a and 2b are added to the previous sequence):

1. The executive goes into the negotiations and, taking into account what he knows about the preferences of his opponent(s), makes both demands and concessions, which are likely to change as the negotiations take their course.

1a. The interest group that is not being favored initially can mobilize against the executive and try to influence the negotiations.

1b. As the executive changes its stance with respect to its demands and concessions, the interest

[17] See Koremenos 2001 for a model of just this kind of flexibility.

group that sees its issue losing ground can counter mobilize.[18]

2. The negotiations conclude with an outcome characterized by social welfare benefits less than or equal to those resulting from the comparable closed negotiation.[19]
3. The executive presents the outcome to his domestic audience for ratification.
4. Each interest group makes a choice either to support the agreement or to mobilize against the executive and try to block ratification.

Given this framework, interest groups have an additional opportunity to mobilize: *during* the negotiation. Importantly, mobilizing earlier provides them with a higher expected value than waiting until after the negotiation: If they successfully pressure the executive during the negotiation, the agreement will be more to their liking, and their *immediate* gains will be higher; moreover, they will not pay future mobilization costs. Put differently, successful mobilization during open negotiations provides the interest group with both agenda-setting power and immediate gains. Successful mobilization after a negotiation only provides the interest group with some probability of discounted future gains. (In this open case, I assume that the value of non-discounted future gains is equal to the value of immediate gains.)

Thus from the interest group point of view, it is more beneficial to mobilize during open negotiations than to mobilize after secret (or open) negotiations.[20] It follows then that *interest groups will mobilize more often when negotiations are open*.[21]

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[18] In the case of bargaining chips, as the bargaining chip issue is favored and then compromised, the interest group that cares about this issue can counter-mobilize.

[19] The outcome may or may not be characterized by net benefits from a social welfare point of view, e.g., an agreement to raise tariffs.

[20] Interestingly, if I were to relax my rationality assumptions and entertain some of prospect theory's notions, the conclusion would hold given the concept of "loss aversion" – it is harder for groups to back away once something is dangled in front of them.

[21] The exact nature of the interest group calculation regarding whether or not to mobilize need not be specified for this comparative static prediction to hold. Rather, in this article, I want to underscore that interest groups will mobilize more often during open negotiations as opposed to secret negotiations, holding constant all the other variables in the group's mobilization decision calculus. In fact, the most

Why is interest group mobilization potentially harmful given my assumption that the executive wants to maximize social welfare? Put differently, why might my executive succumb to organized interest group pressures that serve to harm the general public? Special interests prevail because they are better informed. Suppose the losses imposed on the majority exceed the gains for the organized minority. Importantly, these losses tend to engage the first component of individuals' interest discussed above: the broad, shallow component; therefore the majority will not take the time to become informed given that information is costly and they prefer to invest in their own narrow, deep interests. Even though the executive has a desire to serve the general public, he is constrained by the attentive special interest group(s), which, through media attention and other marketing techniques, can impose substantial pressure on the executive.[22]

Thus, the executive may cave in to special interest pressures and try to negotiate a treaty that will please those extreme interests – that is, those extreme interests that win the "influence battle." If this is the case, the treaty runs the risk of being sabotaged either literally at the international level – because the interest group's preferences may not overlap with the other state's – or more likely because its extreme nature kills it. Extreme treaties are often blocked once presented to the Congress or Parliament (where distributional politics are dominant and divisive). And if we consider a multilateral context, extreme treaties often fail to be ratified by many key states.[23]

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powerful interest groups will likely mobilize even during secret negotiations but their tactics will be limited relative to open negotiations.

[22] In a similar vein, well-known trade economist Jagdish Bhagwati (1988) assumes a government interested in social welfare maximization, but stresses the need for domestic policy makers to be insulated from political pressure to assure freer trade.

[23] In fact, states often succumb to the pressures of the media and interest groups and sign treaties that they then fail to ratify because of the agreement's extreme nature. The International Criminal Court (ICC) is a case in point, with Israel, Russia, and the U.S. signing without any intention of ratifying.

Of course, interest groups never call for secret negotiations. It may be the case that each individual interest group fails to perceive how its actions when combined with the actions of other groups leads to a socially suboptimal outcome. Or perhaps each group does in fact understand, but the situation is such that mobilizing during a negotiation is a dominant strategy, that is, it is in each group's private interest to mobilize when no other groups are mobilizing and when all other groups are mobilizing. Hence, if we consider competing interest group resources, it could be argued that transparent negotiations not only beget more social inefficiency, but also produce a collective action problem among the groups themselves.

Related to this, secrecy can bring another form of efficiency. Secret negotiations give the executive an important political resource: agenda-setting power. The early literature on the U.S. Congress regarding no amendments/closed rule is relevant. Essentially, open negotiations are akin to allowing interest groups to add amendments. With multiple interest groups pushing in different directions, cycling and thus indefinite delay can result. Secrecy can streamline the negotiation process by precluding such behavior. In fact, in this context secrecy can be viewed as *ex ante* delegation for social efficiency.

Hence negotiation when the audience is behind a "veil of ignorance" can have the benefit of focusing executives' minds on the mutual advantages of international cooperation, rather than arguing about how the benefit will be distributed domestically. Put differently, the negotiators' time can be devoted to increasing the size of the pie (and more quickly reaching the consumption stage), rather than dividing it among constituents and risking non-ratification. Moreover, open negotiations take an important tool away from the negotiator – the bargaining chip – because bargaining chips make negotiations relevant to more constituencies, thereby increasing the probability of sabotage.

In sum, relative to secret negotiations, transparent negotiations are more likely to 1) result in outcomes that are more likely to be sabotaged, 2) result in more socially inefficient use of resources by interest groups, and 3) lengthen the bargaining process.

Organized and Latent Interest Groups

To further refine my argument, I now consider the degree of interest group institutionalization. If

a negotiation implicates an actor's broad interest, that actor will not mobilize to influence the outcome because mobilization is costly. The expected benefit is so diffuse that it does not outweigh the expected cost. But if the negotiation implicates an actor's deep interest, mobilization may indeed yield an expected net benefit.

Of course, much depends on whether the interest group is organized or latent. At first glance, one might think that my argument applies only to organized interest groups. On the contrary, *non-crisis negotiations often are lengthy enough to allow a latent group to become organized.*

International negotiations make an issue salient. This salience may be enough to catapult a political entrepreneur into action. Specifically, if a political entrepreneur believes that he may further his career by organizing a latent group to oppose an executive's stance in a negotiation, he is likely to do so. He may even sell himself as an alternative political candidate to the executive. Thus transparency can result in *an endogenous veto player*. The latent interest group, once organized, becomes a veto player regarding the international negotiation.[24]

Above I argued that interest groups will mobilize more often when negotiations are open. *This result is strengthened when we consider that open negotiations can result in latent interest groups joining the influence battle.* Secret negotiations, on the other hand, can prevent an issue from becoming salient

[24] Tsebelis (1995) defines veto players as "individual or collective actors whose agreement (by majority rule for collective actors) is required for a change of the status quo" (1995: 289). The veto player concept was originally developed to analyze the ability of national and sub-national governments to change the status quo. These veto players can take the form of institutions, such as the Presidency of the United States, or partisan groups, such as a political party or faction. With respect to treaties, even if the treaty-making process is kept secret, there are veto players (e.g., the U.S. Senate) once the treaty reaches the ratification stage. Keeping negotiations secret can prevent the creation of new veto players who would potentially seek to place their veto during the negotiation process.

and thereby may prevent new veto players from forming.[25]

The negotiations regarding the transfer of the Panama Canal from the U.S. to Panama present an intriguing example of how openness can increase the salience of an issue to such an extent that a previously latent (and, in this case, hostile) interest group becomes organized. Moreover, while the treaty was eventually ratified, it was not a sure thing, passing only by a single vote. The negotiations once they became open stimulated an intense battle within the U.S.

The transfer was a response to long-standing Panamanian frustration over the status quo, represented by a bloody protest against the U.S. presence in 1964. The negotiations gradually increased in intensity from the middle 1960s until 1977. A prominent characteristic of the negotiations was the relative importance of the debate within the U.S. policy-making community. Throughout the process, whenever details of the negotiations were made public, new sources of opposition emerged.[26]

The early stages of negotiation, during the Nixon and Ford administrations, were characterized by slowness on the part of the U.S.; the ongoing conflict in Southeast Asia dominated the attention of U.S. policy-makers. In an attempt to increase the salience of the issue in Washington, Panama's government began leaking details of the negotiations. Their goal seems to have been to increase the relative

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[25] We can also think of the latency of the interest groups as being represented in the value of Tsebelis' variable, *k*. That is, when interest groups are latent, *k* is low because executives/negotiators can ignore the populist (domestic) game for a while and concentrate on the elite (international) game. This way of thinking about the issue implies another motivation for rapid bargaining. The usual story is that some of the good in question "disappears" in each round of bargaining. Thus negotiators want a resolution sooner rather than later. While such an assumption may work for some goods, it is a bit far-fetched for others. In my story, negotiators want a resolution sooner rather than later to prevent latent interest groups from organizing.

[26] The Panama Canal Treaty engaged multiple issues: military, economic, and foreign relations with tradeoffs among them. Ultimately, the conflict boiled down to supporting or opposing the treaty.

importance of their issue by embarrassing the U.S. government in the world community (Jorden 1984: 175-176).

The Panamanian strategy did result in pro-treaty voices becoming louder and more insistent. Nonetheless, the military establishment's formerly low-level opposition also increased with the new publicity. The result was that treaty advocates in the U.S. government spent more time negotiating with Defense interests than with the Panamanians. In terms of the approach I am applying here, the Panamanian leak strategy may have put the issue on the table but had the negative side effect of increasing the value of *k* (see discussion of Tsebelis above).

By the later years of the Ford administration, both the President and the Secretary of State made a new Panama Canal Treaty a priority. The Tack-Kissinger principles, which recognized Panamanian sovereignty in the Canal Zone and specified a transfer date, were released to the public in 1974, possibly in an attempt to avoid accusations of apathy towards Panama (Library of Congress 1987; LaFranchi 1999). However, the release of the principles provided a lightning rod for a new source of opposition to the treaty: Ronald Reagan made opposition to the transfer of the canal a campaign issue in the Republican presidential primaries (Cannon 1982: 210-215). In fact, his mantra that "we bought it, we paid for it and it's ours" catapulted him into defeating Ford in the North Carolina primary and coming close to winning the Republican nomination (Cannon 1977). Opposition to the treaty was now spreading beyond the Defense establishment elites to the arena of mass politics. Moreover, one year later, Reagan led a fund-raising mailing campaign for the Republicans aimed at over a half million people. His letter stated: "Unless these funds are raised, … we won't defeat those Democrats who vote time and time again to support actions that weaken our national security . . . Believe me, without your support, the canal is as good as gone" (Goshko 1977).

In 1977, the Panama Canal Treaty was signed and ratified by a single vote. However, the negotiation process shows how opposition can actually be mobilized by open negotiations. Indeed, the case illustrates how increased openness resulted in both increased intensity among existing opposition sources (the defense establishment) and the activation of a previously *latent* opposition source (in the

Republican primaries).

Spatial Model

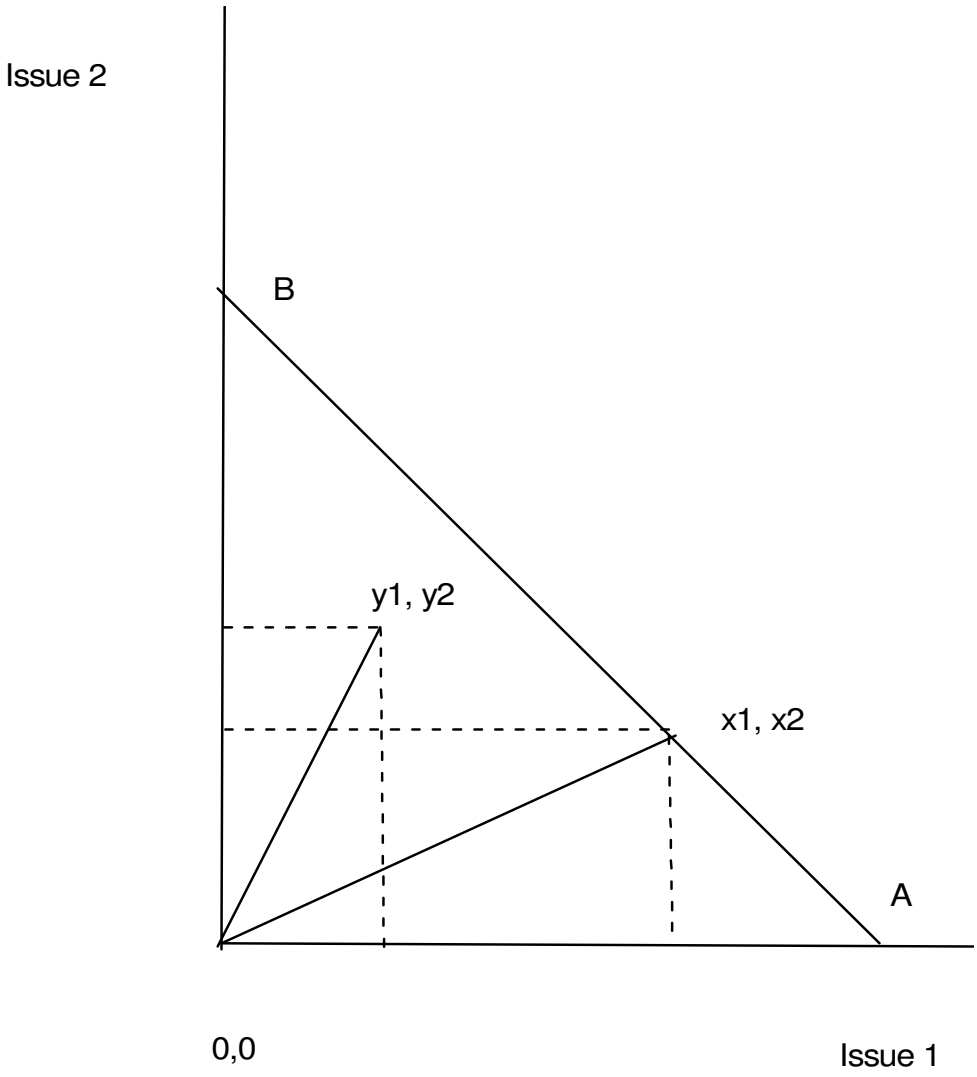
To begin, let me present the crux of the argument presented thus far – that secrecy can decrease potentially harmful interest group mobilization – by considering the baseline spatial model presented in Figure 1. The baseline model represents a treaty negotiation involving two issues, 1 and 2, and engaging two interest groups, G1 and G2, whose narrow interests surround issue 1 and issue 2, respectively. Point 0,0 is the status quo, and the Pareto set of outcomes lies on line AB, with point A being G1's most-preferred point given the feasible set of agreement outcomes and point B being G2's. Suppose further that the socially optimal point, given the constraints imposed by the other state(s) involved in the negotiation, is x1,x2.

If negotiations are public, the two interest groups will expend resources to try to move the outcome to one of the corners – that is, they will attempt to push the outcome close to their preferred points, either A or B, given their opposing interests. If negotiations are secret, the executive is able to select the optimal outcome, x1,x2. Suppose after secret negotiations the executive announces the outcome, x1,x2. Interest groups are then left with the option of either accepting point x1,x2 (which generates benefits x1 and x2 for them, respectively) or mobilizing against the executive in an attempt to gain their preferred outcome (or at least a further movement of the outcome in their preferred direction) in the future. In other words, secrecy shifts the focus of attention away from line AB to line 00x1x2. Interest groups are ignorant of just what a different executive could obtain for them in the future and hence are less likely to mobilize.

One can think of a similar case in policymaking. In a parliamentary system government (say the UK) the government may chose to present a bill to the parliament under open or closed rule. If the rule is open the parliamentarians will want to consider all possible modifications and see whether they can make a coalition (possibly with members of the opposition) to modify the government bill. If it is under closed rule, they will have to give an up or down vote and compare the bill only with the status quo and not with

all the possible outcomes.[27]

FIGURE 1



[27] So, closed rule would be better for the government, open rule better for the parliament, and the use of one or the other will depend on the support of a particular bill, and the political costs of applying a restrictive procedure in the specific case.

In public negotiations, G1 and G2 will focus on line AB. In secret negotiations, G1 and G2 will focus on their respective gains, x1 and x2, when x1x2 is announced.

Now suppose negotiations are public but only G1 exists as an organized group. While it might seem that the outcome will be pushed toward point A, the increased salience of both issues A and B resulting from public negotiations could catapult a political entrepreneur into organizing the latent G2, especially since non-crisis negotiations can be lengthy. We then find ourselves in the situation described above: Both groups expend resources to influence the outcome.

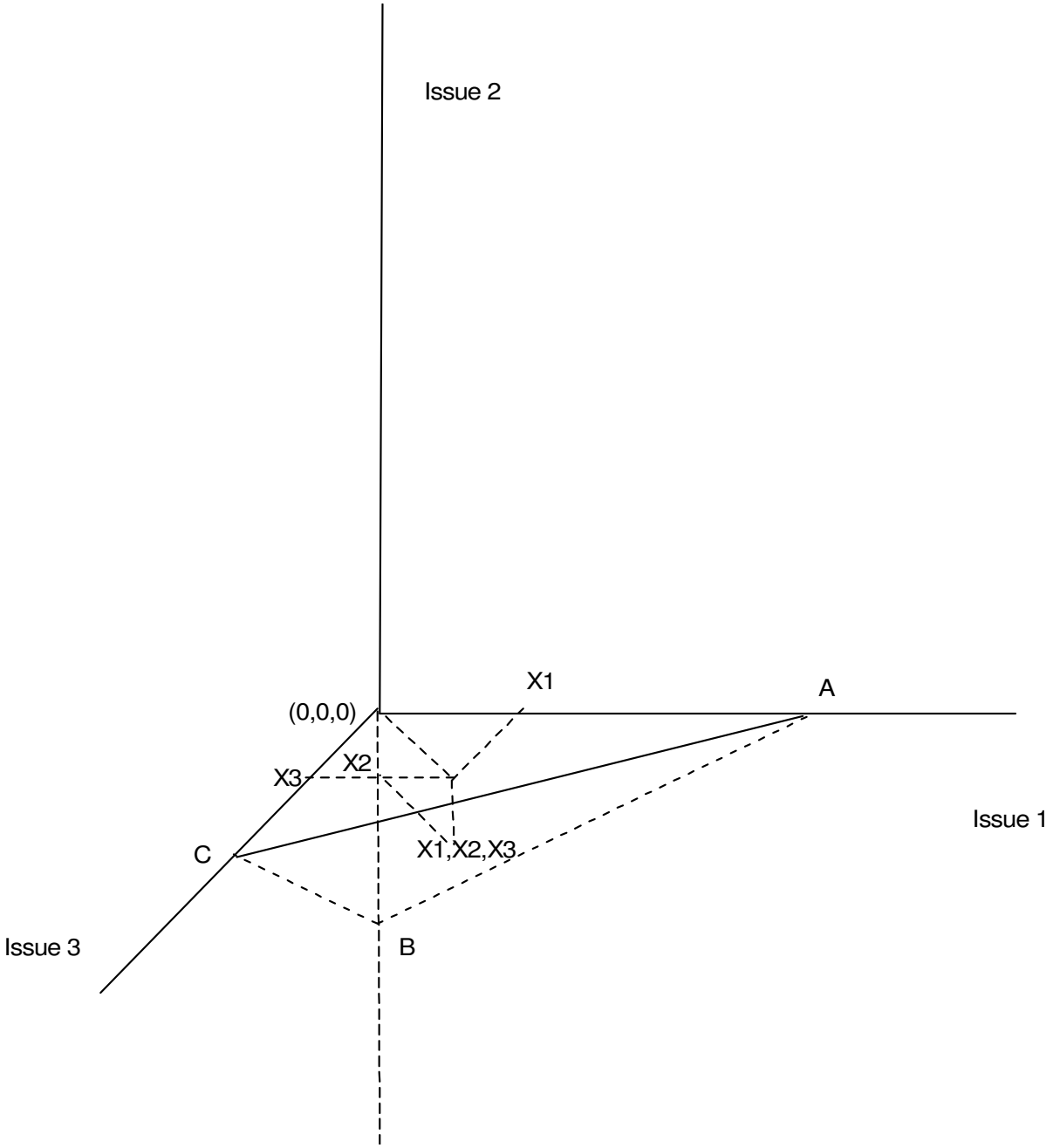
This baseline model presented in Figure 1 assumes a net benefit on both issues. However, in some instances, there will be interest groups hurt by the negotiated outcome. Assuming there is an outcome that enhances social welfare in the Kaldor-Hicks sense, secrecy is at least a weakly dominant strategy for a social welfare maximizing executive when such groups exist. If the negotiated outcome is worse than the status quo for an interest group, it will protest either during or after the negotiation, depending on whether it is open or secret. Figure 2 represents a treaty involving three issues, for which the feasible set of outcomes lies in the three-dimensional space bordered by 0,0,0, A, B, and C, and the socially optimal outcome (from a Kaldor-Hicks point of view) is x1,x2,x3. While the interest groups representing issues 1 and 3 (G1 and G3) will benefit from the treaty, the interest group interested in issue 2 (G2) will lose. Therefore G2 will oppose the treaty no matter what – although on the margin it will do so more with openness given the immediate benefits and the possibility of rallying others to its position (see case study on Panama Canal Treaty below). Hence, more likely, secrecy will be a strictly dominant strategy if we consider the possibility of coalitions. If negotiations are open, G2 will attempt to build coalitions with G1 or G3. While these groups understand that the outcome of the negotiation will not hurt them given the bargaining space, they may still want a coalition with G2 in order to shift outcomes one way or the other. Thus the executive will prefer to keep the negotiations closed.[28]

[28] Lee (1993) writes, "Last weekend, Sierra Club members joined labor leaders in anti-NAFTA rallies…"

Conjectures

Having presented the basic theoretical intuition, I turn now to specific conjectures about secrecy. In developing the conjectures, I draw upon the spatial model. Each conjecture suggests some circumstances under which secrecy may be beneficial to a democracy. More specifically, the conjectures

FIGURE 2



G2 has negative utility and will oppose the agreement no matter what.

address the expected effect of a change in a particular independent variable, such as the number of issues addressed in a negotiation, upon the degree of interest group mobilization and conflict, most often through an increase in the size of the Pareto set. In other words, the larger the difference in possible

outcomes, the more potential conflict, and the greater the value of secrecy – especially since more conflict implies a lengthened bargaining time. All conjectures assess the value of secrecy from the point of view of a social welfare-maximizing executive.

First, the value of secrecy increases as the *domestic distributional consequences* of the negotiation become more severe or as *interest groups' preferences become more extreme* (C1). If the issue being negotiated has no or quite mild distributional consequences, there is no need for secrecy because interest groups will not attempt to influence negotiators. Agreements that are primarily aimed at solving pure coordination problems – like those governing issues like the avoidance of double taxation – are unlikely to capture any group's attention. In Figure 1, we can imagine the distance between ideal points A and B shortening as either the distributional consequences become less severe or preferences become less extreme. Moreover, efficiency concerns/focal points may shorten the line representing the Pareto frontier. No group will pay the costs to influence the outcome if the space of possible outcomes is relatively small. On the other hand, in issue areas in which there are important distributional consequences and interest group preferences are extreme, the more likely groups will mobilize and the greater the conflict among them; hence the greater is the value of secrecy. In peace negotiations the distance between A and B tends to be very long, with the preferred points of doves and spoilers in opposite corners.[29]

One might think that the possibility of side payments would alleviate some of these problems. For example, suppose that an executive that concludes a social welfare enhancing agreement simply redistributes some of the net gains to the losing interest group. If interest groups anticipate this, they will not try to influence the executive to negotiate an extreme agreement. The problem with this argument is that side payments imply that benefits are fungible. Essentially, fungibility would remove the independence between issues and thereby lessen the competition between interest groups. This is simply

[29] It is worth noting that Kissinger engaged in secret negotiations with Hanoi (as did De Gaulle with Algeria, when the issue was its independence).

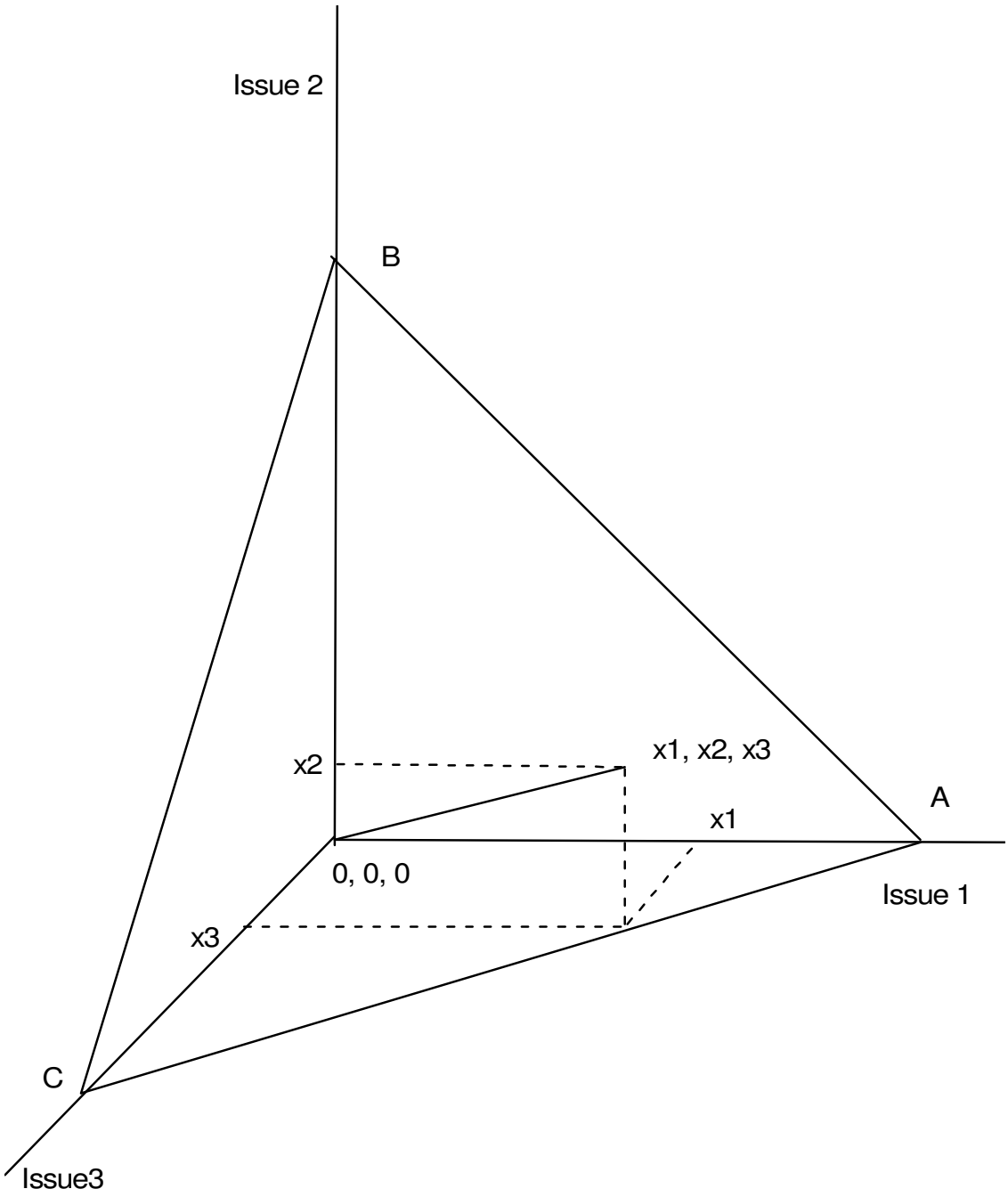
not the case when certain interest groups are involved. Their preferences are of the one-track variety, and, in fact, they might even lose support if they were "bought off."

Second, as *the number of issue areas* implicated in the treaty expands, the value of secrecy increases (C2). In terms of the spatial model, Figure 3 illustrates the addition of a third issue and point C is that third interest group's (G3) most preferred point given the feasible set of agreement outcomes. Obviously the issue space is more complicated (the policy space has one more dimension), and as a result the Pareto set expands to include the surfaces of the three-dimensional figure. There are more tradeoffs possible and therefore there is more potential for conflict if negotiations are public.[30]

Third, the value of secrecy increases with greater *uncertainty about the preferences of interest groups* (C3). Open negotiations may allow interest groups to threaten in ways that exaggerate their preferences. An interest group could, for example, claim intent to veto some proposal that it would not actually veto if it came right down to it. (In Figure 1, they could pretend their preferred points are more extreme than they are.) When negotiations are closed, interest groups make a decision about the proposal knowing it will count – it is not a bluff, it is a decision. In short, secret negotiations can reduce the costs of uncertainty to the executive. The secrecy of the negotiation truncates the game by eliminating the preliminary round where interest groups try to bluff the executive.

FIGURE 3

[30] Of course, additional issues can facilitate agreement at the *international* level. For example, Koremenos, Lipson, and Snidal 2001 argue that when cooperation among states is challenged by severe distributional consequences, linkage to other issues (or increasing the scope of the agreement) can make cooperation possible.



Addition of Issue 3 and G3 expands the Pareto set and generates more conflict in open negotiations.

There are also some circumstances under which openness may be beneficial to a social welfare maximizing executive and hence to a democracy. First, when the good being negotiated at the international level approaches the ideal of a true public good in which the good is not only shared by all

citizens but indivisible as well, secrecy is not helpful (C4). This conjecture is essentially the other side of the coin regarding C1, but it is worth restating in this context, especially because it engages the crisis bargaining literature, summarized earlier. Resolving an international crisis certainly fits into the category of providing a public good, and, as Schultz (1998) finds, domestic unity among competing political parties can signal resolve and thereby enhance a democracy's credibility. There are non-crisis negotiations that can also fit into this category, for instance, certain (but not all) alliance negotiations. In such cases, signaling resolve is not an issue but at least open negotiations are relatively neutral events from an interest group point of view.

Second, the value of secrecy decreases as the *ambiguity of the issues* being negotiated increases (C5). From the executive's point of view, when the issues involved in treaty negotiations are very uncertain and the executive is unaware of the impact a particular treaty provision or another will have, interest groups can be an enthusiastic source of *information* about policy impact. Policy advocacy groups concentrate on a narrow range of policies full time; often this enables them to bring more expertise to the issue than politicians can. This is especially the case if the agreement is about pure coordination rather than the distribution of benefits (see CS1). Given that informational concerns will be more salient and distributional ones less, open negotiations allow important information to be transmitted. In Figure 1, the government may be less certain about which policies will allow it to reach the Pareto frontier and, without interest group participation, may wind up at a point like y1,y2 rather than x1,x2.[31]

[31] Finally, if I were to consider prospect theory, given framing effects, the value of secrecy decreases as the *overall benefit* produced by the treaty increases (C6). Anything that increases the distance between 00 and x1x2 relative to the distance between A and B focuses an interest group's attention toward the gain and away from the conflict. This conjecture would hold under certain conditions in a rational choice model if interest groups weighted the risk of sabotaging the treaty quite heavily in their decision calculus. This conjecture is not really about the value of openness so much as its neutrality.

4. EMPIRICAL EXAMPLES

A true test of the theory is very difficult to design given the subject matter. Still the point of this article is to challenge the conventional wisdom regarding transparency and point out some theoretical reasons and conditions under which secrecy might be beneficial. With that in mind, I now bring to life the theoretical concepts as well as suggest the empirical importance of transparency/secrecy considerations by delving into some international negotiations. In each case, I hypothesize as to how the openness of the treaty negotiations influenced the ultimate outcome. The Antarctic Treaty case hints at how secret negotiations can result in successful treaties. I speculate as to how interest groups could have undermined the treaty. The case of the International Criminal Court (ICC) describes how open negotiations may undermine a treaty by allowing interest groups to influence its substance and design to such an extent that key states, like the United States, China, and Japan, reject it. Given that international negotiations are either open or closed, all of my arguments revolve around counterfactuals. While such analyses are less than fully satisfying, as I state above, the main goal in this section is to bring the theory to life by illustrating some of the main arguments and conjectures with important empirical examples.

The Antarctic Treaty

The negotiations for the Antarctic Treaty of 1959 suggest how secrecy can shield treaty proceedings from the influence of special interests, thereby ultimately benefiting the public. The negotiations were kept completely closed. The treaty stipulates that Antarctica should forever be used for peaceful purposes exclusively, prohibits measures of a military nature, prohibits nuclear explosions and disposal of radioactive waste, guarantees freedom of scientific research, promotes scientific exchange, and establishes a comprehensive system of on-site inspection to ensure observance of the treaty. Finally, under the treaty the parties agree not to press or surrender their divergent views regarding territorial sovereignty.

To assess how the secrecy of the Antarctic Treaty negotiations influenced the outcome, we must think counterfactually. Had the negotiations been open, would certain groups have attempted to influence the content of the agreement?

It is quite probable that several groups would have mobilized had the proceedings not been secret. During the negotiations, there was concern among US officials about whether the treaty would strengthen the USSR's influence in Antarctica, its latent territorial claims, and its access to Antarctic resources.[32] Anti-Communist groups in the US very likely would have been opposed to negotiating with the Soviet Union at all. The anti-Communists are an example of the losing group depicted in Figure 3. Such a group will oppose the treaty regardless of the openness of the negotiations. Had the anti-Communists had access to the negotiations and witnessed the kind of give and take that characterizes almost all international negotiations, these ideologically motivated groups could have pressured American leaders to cease negotiations with "the enemy."[33] Instead, anti-Communists were left to oppose it after it was presented as a fait accompli. Myhre (1986: 35) notes "at the time of American ratification of the agreement, Senator Engle decried it as a betrayal of American interests and as a triumph for the Soviet Union." Senator Dodd colorfully asked, "Do we want to spread the disease of communism even to the penguins?"[34] Not surprisingly, these senators did not have enough time to rally others to his extreme position, and the treaty was ratified. It is worth mentioning that, at the time, there were nationalist groups in Chile and Argentina who were worried about the erosion of their territorial claims. Similar pressures could have been brought to bear by these groups had the negotiations been open.

Environmental groups would have been likely to mobilize, lobbying for the protection of the

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[32] Boczek 1984.

[33] In fact, President Adams worried about the same type of thing! When he took office in March 1797, hoping to avoid war with France, he sent a small team to Paris to work out a "commercial agreement similar to Jay's Treaty…. The President feared that the anti-French sentiment was high among the conservative High Federalists in his own party, and that this faction would want the talks to fail. Talks could be sabotaged if Federalist leaders in the Senate pushed for unrealistic American terms, which they knew the French would never accept" (Halstuk 2002: 51, 67-68).

[34] Quoted in Boczek 1984.

continent including its wildlife. On the opposite side, oil companies would probably have become involved, pressuring leaders for access to potential underground or coastal petroleum deposits. As the negotiations took their usual twists and turns, the oil companies and the environmentalists would have taken their turns at being upset. C1 is relevant in this case given the nonfungibility of the issues. The zero-sum nature of the game between the environmentalists and the oil companies precludes compensation for the losing group: Environmentalists will not feel satisfied with something other than environmental protection. (A similar argument could be made about the anti-Communists given their ideological commitment.)

Furthermore, had the negotiations been open, all of these groups may have insisted on long-term guarantees in their particular realm of interest. This could have undermined the treaty in the following manner. One of the great achievements of international cooperation and law over the past fifty years, the Antarctic Treaty was a pragmatically designed agreement that smartly incorporated *flexibility* given the uncertainty regarding Antarctica at the time. This conforms to Koremenos' 2001 theory that predicts institutional flexibility in agreements that deal with issues of inherent uncertainty.[35]

In the end, the secretly negotiated Antarctic Treaty ingeniously contained no provisions regarding the environment or natural resources; they were deliberatively left to future agreements. However, no doubt these issues and more were discussed behind closed doors (See C2 on the sheer number of issues).[36] Had the proceedings been public, it is likely that interest groups would have mobilized and sabotaged the treaty by demanding special protections or privileges that were unacceptable to others. Instead, presented

[35] In fact, along these lines, the two follow-up agreements on mining, one negotiated behind closed doors and one with formal NGO presence, differ in this regard, with the latter not being as well designed for long-run stability.

[36] Citing Australian Parliamentary debates, Sahurie (1992: 433) writes: "Some countries sought actively to remove the mineral issue from the scope of the Treaty 'because it could easily have prejudiced the whole negotiations…'"

with a fait accompli, interest groups did not mobilize when the treaty was presented for ratification.

The Antarctic Treaty remains one of the more successful treaties in recent history. Over the years, the Treaty has borne out the Antarctic Treaty System (ATS), which can be roughly defined as governance based on cooperation and consensus decision-making allowing details to be fleshed out over time.

The International Criminal Court

The negotiations surrounding the International Criminal Court (ICC), officially the Treaty of Rome, intimate the problems that can potentially sabotage a Pareto-improving outcome when treaty negotiations are made public. During the summer of 1998, 160 countries participated in the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. Their goal was to create a criminal court to help end current ethnic conflicts, genocides, and other human rights abuses and to prevent them in the future by trying and punishing those who violate human rights (United Nations 2002: 1-4). The proceedings were entirely open to the public. Outnumbering the states themselves, over 200 NGOs participated. These NGOs formed a savvy and powerful coalition and exerted considerable influence on the negotiations. As Arsanjani (1999:23) states, "Throughout the Preparatory Committee's sessions and the Rome Conference, [NGO's] provided briefings and legal memoranda for sympathetic delegations, approached delegations to discuss their points of view, and even assigned legal interns to small delegations. On occasion, they increased pressure on unsympathetic delegations by listing them as such in the media." Truth be told, the NGOs were better funded and had greater marketing ability than many of the less wealthy state participants.

These groups (echoing many European states) insisted, despite US objections, on two central features of the ICC: that a case could be brought to the ICC as long as one permanent member of the Security Council is not opposed and that an independent ICC prosecutor be created. Leaders of 139 countries signed the treaty, including President Clinton – although his administration voted against adoption of the final text. According to many sources, Clinton signed it during the final hour because he believed the US could retain relatively more influence over the ICC as a non-ratifying signatory than as a

non-signatory.[37] Importantly, he considered it severely flawed and later advised President Bush not to send it to the Senate for ratification.[38]

Although 110 countries have ratified the treaty, which entered into force in July 2002, its future success is very unclear. Many of the world's most militarily and/or economically powerful countries have failed to ratify it (including the US, Russia, and Israel), and still others failed to sign it in 1998 (including China and India).[39] Perhaps most problematic for the ICC is the fact that the US made clear in May 2002 that it does not intend to participate in the treaty (UN 2002). This may or may not change under President Obama given the hurdle of the US Senate. Without the US' military, diplomatic, and economic power, it is unclear that the ICC will have the necessary power to punish current and deter future war criminals (Goldsmith 2003: 89).

Why has the US opposed the ICC? The primary reason the US has opposed the ICC is the fear that the US' distinct policing role in the world will expose it to politically motivated prosecutions before a court that is not democratically accountable.[40] That the treaty overrides the Security Council veto and creates an independent prosecutor implies that American soldiers and/or officials could be prosecuted for civilian deaths resulting from military strikes. There is no question that the US' unique role in the world renders its military personnel more vulnerable than that of any other state. Even when the US' military intervention is solely for humanitarian reasons (e.g., Bosnia), American soldiers remain vulnerable. According to Michael Scharf, "The rest of the world was in fact somewhat sympathetic to the United

[37] See, for example, http://www.iccnow.org/publications/update/iccupdate17.pdf and http://www.defenselink.mil/speeches/2002/s20020530-Haynes.html for transcripts of speeches making reference to this point.

[38] Houston Chronicle (January 6, 2001)

[39] http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp.

[40] I thank Jack Goldsmith for personal communication on this point.

States' concerns."[41] To help alleviate these concerns, the two-track system of jurisdiction provided those cases originating in the Security Council with greater enforcement power than those originating with individual states or the independent prosecutor. These provisions did allow other powerful countries, like the United Kingdom, France, and Russia, to vote in favor of the ICC. But according to Ambassador Scheffer, these provisions did not go far enough for the US (Scharf 1998).

How might the final outcome differed had the negotiations been held in secret? The independence of the prosecutor and the relative weakness of the Security Council were prominent features of the ICC to a large extent because of pressures from the hundreds of NGOs with access to the negotiations. Moreover, the coalition of NGOs was a proponent of the court's universal jurisdiction, that is, the treaty binds not only state parties but also states not party to the ICC.[42] Universal jurisdiction breaks with a fundamental principle of international law: Only states that are party to an agreement should be bound by its terms. Of course, one cannot assess whether these provisions would have been included in the absence of NGO participation, given that many of the states involved in the negotiations shared the NGOs' basic ideals. (In that sense, this case is over-determined.)

Unlike its portrayal by many in the NGO community, the US (under President Clinton) did not simply make objections to ICC provisions without providing realistic alternatives. According to Charney (1999: 454), "The United States actively participated in the negotiations and maintains that it would support an ICC statute differing only slightly, albeit in important respects, from that adopted at the

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[41] http://www.asil.org/insights/insigh23.htm

[42] For example, even though the United States has not ratified the Rome Statute, if the U.S. sends its soldiers on a UN peacekeeping mission to East Timor, a state that has acceded to the treaty, and East Timor accuses a U.S. soldier of committing a crime while on the mission, the Court may exercise jurisdiction. As long as at least one state involved is a party, the Court can exercise jurisdiction over any states, regardless of whether they have signed and ratified or acceded to the treaty. (See Article 12, Paragraph 2 of the Rome Statute, United Nations 2002.)

conference." For example, to combat the potential problems of universal jurisdiction, the US proposed an opt-out system that would create, "a ten-year transitional period following entry into force of the treaty during which any state party could opt out of the court's jurisdiction over crimes against humanity and war crimes." States would not be able to opt-out of genocide. As another example, the US suggested a provision to "shield nonparty states from the court's jurisdiction unless the Security Council were to decide otherwise."[43] And, in fact, an interview with a high official in Berlin indicates that Germany was sympathetic to the US' concerns. Nevertheless, during the course of the negotiations, the NGOs reported daily to the media, which in turn exerted great pressure on the German government not to accommodate the US.[44]

Returning to the theory laid out earlier, there is evidence to suggest that political pressure exerted by the NGOs resulted in an extremely far-reaching treaty. Why does this increase the probability of sabotage? The substance of the treaty reflects the NGOs' extreme preferences (C1) for the broadest possible criminal court, making it unacceptable to the US and to other countries such as the Russian Federation, China, and Israel.[45] Had the NGOs not had access to the treaty negotiations, they probably still would have mobilized, but the barriers would have been higher and many of their pressure tactics would have been precluded. In turn, it can be plausibly argued that the treaty outcome would have been less far-reaching from the standpoint of international justice, but would have been ratified and

[43] Scheffer 1999:18-19.

[44] Author interview in November 2005 with John Kornblum, former US Ambassador to Germany (1997-2001).

[45] According to the Canada-Israel Committee, Israel objects to the definition of war crimes which could include its settlement activity in the occupied territories (http://en.wikipedia.org/wiki/International_Criminal_Court).

implemented across a wider set of states, including the US.[46] The less far-reaching outcome would have been Pareto-improving and, importantly, like the Antarctic Treaty, could have evolved into something approaching the current regime. Snyder and Vinjamuri strongly agree when they argue for a path of pragmatism when it comes to the ultimate goal of international justice. They state, "…activists and legalists who follow the logic of appropriateness *too strictly* (emphasis mine) may undermine the institutionalization of justice rather than advance it" (2003:7).

Perhaps by going too far too quickly, what will continue (in practice) is essentially the status quo.[47] In fact, under Bush, the US waged a determined campaign against the ICC including pressuring 100 states to sign "Article 98" agreements wherein a state pledges not to seek the prosecution of U.S. citizens in the Court.[48] It has been only six years since the first ICC prosecutor was appointed in 2003, and so far there have been four formal investigations (Democratic Republic of Congo, the Central African Republic, Uganda, and Sudan); thus, most popular academic and newspaper articles on the subject seem to take more or less reserved positions about the success (or failure) of the ICC. Instead of judging whether it is effective or not, they point out what drawbacks the current ICC needs to solve to be more effective. Hence, in its current form, the ICC agreement could very well meet the same fate as the League of Nations and the Kellog-Briand Pact: They were too far-reaching to generate the necessary support to be

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[46] Few African states have drafted legislation to implement the Statute into law. See April 2005 International Criminal Court Monitor: "Implementation: African States Must Respect their Commitments." http://www.iccnow.org/publications/monitor/29/Monitor29_200504English.pdf. Incidentally, in Western Europe five states, including Denmark and Greece, have made little or no progress on even drafting the necessary legislation. (See the report by Human Rights Watch at http://hrw.org/campaigns/icc/docs/icc-implementation.pdf.)

[47] As Voltaire said, "The best is the enemy of the good."

[48] Romania was one of the first to sign such a bilateral agreement, and reluctantly the European Council of Ministers adopted a position allowing it.

successfully ratified and implemented. Had they called for more modest, feasible changes, the final outcomes may well have been Pareto-improving. Instead, we ended up with agreements whose ineffectiveness implied a continuation of the status quo.

5. CONCLUDING THOUGHTS

Transparency is one of the buzzwords of the 21st century (at least in political economy). Whether we are talking about good governance at home or exporting democratic ideals abroad, the new conventional wisdom is "the more transparency, the better." I argue that, under many conditions, secrecy can be efficient from a social welfare point of view.[49]

The crisis bargaining literature in international relations very compellingly illustrates certain circumstances under which transparency gives democracies an advantage. I have suggested other circumstances under which secrecy gives democracies an advantage. Given I arrive at a different conclusion from the crisis bargaining literature, it might be useful to examine where the difference originates. This paper differs from the crisis bargaining literature in three important ways. First, the theory applies to the *non-crisis bargaining* situations that characterize broad and fundamental areas of international cooperation and conflict and that are much more prevalent than crises. Crises by their nature are not planned events, and so negotiations under crisis conditions happen much more rapidly and are therefore more difficult for interest groups to observe. By examining non-crisis bargaining, my theory allows both for more monitoring by active interest groups and for the possibility of emerging veto players in response to ongoing negotiations. Second, my theory assumes that the *domestic audience is strategic* with *varying degrees of institutionalization* whereas the crisis bargaining literature sees it as an

[49] It is worth noting that, in the US Congress, conference committee meetings, used to resolve differences between the House and Senate, were officially secret until the reforms of mid 1970s; in practice, they are still secret. As Tsebelis and Money (1997: 233) note: "the meetings were open but the delegations have found ways of working around the openness requirements with few complaints."

exogenous parameter.[50] Third, my analysis assumes that democratic audiences are *not unitary*. Rather, I show that the diversity of interests in democracies results in a strategic situation in which individual interest groups have incentives to engage in behavior that may prevent social improvements. In fact, this is one of the issues Madison was grappling with at the time of the US' founding.

In the introduction, I simply touched upon normative considerations before turning to the positive analysis that occupies the bulk of this paper. I now broaden my analysis to address at least one normative consideration: Can secrecy at the international level help us come closer to Madisonian Republicanism?

In an important piece, Sunstein (1985) discusses how interest group influence on the political process has occupied many constitutional law scholars since the Revolutionary War. He explains, "To [James] Madison, the primary problem of governance was the control of faction, understood in his famous formulation as 'a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community'" (Sunstein 1985: 34). For Madison, representative government allowed public-minded officials to engage in deliberation aimed at the public good. An integral aspect of such deliberation is freedom from the local pressures of private interests. In this sense, Madison departed greatly from the classical republican understanding of direct participation by citizens.[51]

Sunstein himself introduces a Madison-influenced pluralist approach as a means by which the

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[50] Schultz comes the closest to modeling a strategic domestic group.

[51] Sunstein (1985: 31) writes, "The republican conception of human nature assumed people would abandon their private interests in pursuit of the public good, which would be discovered through political discussion and debate. This conception was flawed, however, because it failed to account for the possibility that corruption might undermine the system. Lack of civic virtue and pursuit of self-interest by political actors would cause political power to displace political discussion and debate as the means by which government process would come to make decisions."

political process can strive to achieve the true public good. Unlike a pure pluralist system in which there is a direct relation between constituent pressures and representative response, his approach calls for deliberation to reveal "objectionable or distorted preferences." He argues that preferences reflect at least partly the existing allocation of wealth, power, entitlements, etc. Deliberation can select out preferences that are not reflective of the public good (1985: 81-2). Of course, the notion of a distinctive common good could result in a tyrannical and/or incoherent political process, but Sunstein states "those who regard the transformative or deliberative function of politics as a central feature will have sympathy for Madisonian conceptions of governance" (1985: 82).

This article strives to outline one way in which the public good might be enhanced without compromising the broad tenets of democracy. Hence I have retained part of Wilson's famous phrase, i.e., "Open Covenants," because the political process must be checked. Still, like Sunstein, I come to the conclusion that shielding representatives from "constituent pressures, including interest groups, in the hope that they will deliberate more effectively on the public good" (1985: 34-5) is also optimal under certain conditions. In fact, this is what we do with judges – we remove pressures from them with life tenure so that they can deliberate in the name of public good (and we trust that they do) – and juries – it is hard to imagine fair-minded and honest jury deliberations if they were open to public (and media) scrutiny.

Moreover, according to Benvenisti (1999: 177), the influence of interest groups is much more unchecked at the international level that at the national one. He writes, "the laissez-faire nature of international law continues to enable small [privileged] groups to evade national regulations and exploit global commons." In fact, while we all like NGOs that support our own political values (and many of us donate to these very groups), there is nothing democratic about NGOs. They pursue agendas without the restraints posed by elections. Many democratic citizens dislike the fact that certain international agreements and organizations reflect in part the preferences of autocrats or dictators who are not speaking for their people. When NGOs influence the negotiated outcomes, the accountability problem is

exacerbated.[52] Thus the need for "Clandestinely Arrived At" is perhaps also more compelling at the international level.[53]

Of course, in this paper, I embrace a social welfare view of the world with an executive that can be trusted to maximize it. Future work should consider a model in which the executive is driven solely by campaign contributions to see which of the conjectures change.[54] Nonetheless, following the crisis bargaining literature, this paper assumes a social welfare maximizing executive and thereby provides a baseline case.

Future work should also consider all four main stages of international lawmaking, 1.) mobilization, 2.) negotiation, 3.) ratification, and 4.) implementation, and the role of nonstate actors, like NGOs, in each of the stages. For instance, NGOs may be critical to getting particular issues onto the international agenda. This was certainly the case with land mines and the eventual negotiation of the Ottawa Treaty. Even this role, however, must be problematized because, as Rutherford states, "Many of the statistics generated by NGOS … are inflated and, more significantly, regurgitated by the media and policymakers without proper fact-checking and research" (2000:89). With respect to the Ottawa Treaty

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[52] Interestingly, during the ICC negotiations, France proposed extending the jurisdiction of the court to include not just states but organizations as well. (Arsanjani 1999: 36) "Ironically," in a negotiation where NGOs outnumbered states, this proposal failed to receive sufficient support.

[53] Benvenisti comes to a very different conclusion, however. He outlines a transnational approach to international decisionmaking with even greater transparency and participation, heralding the International Labor Organization as a model. Hence, in some ways, we couldn't be further apart.

[54] It has been argued that the social welfare model can be more easily applied to chief executives (e.g., most have been pro-free trade, regardless of political party, although in presidential primaries, they often campaign differently) whereas the electoral/campaign contributions models are appropriate for legislators. But congressional incentives are also the subject of a debate; see, e.g., Muir 1982, Mayhew 1974, and Maass 1983 for the competing models.

negotiations, such statistics were not seriously questioned until it was too late in the process -- they had become like facts, with CNN using unverified statistics to attract public attention (2000: 90).[55] Another important issue to consider is the relationship among the four stages and whether the actors necessary to Stages 1, 3, and 4 will affect the optimal choice of secrecy or openness in the negotiation stage. It may be that if the agreement governs the actions of individuals, firms, or groups, having them on board at the negotiation stage may make for easier and more successful implementation down the road.

The main point of this paper is that transparency is not always good; rather, it is a *variable* of institutional design and should be treated as such. At the least, we are forced to consider that, like most conventional wisdom, the choice between secrecy and transparency is more complicated than we think.

[55] The US did not ratify the Ottawa Treaty because of security needs in South Korea. Still, the US has announced many pro-humanitarian land mine policies, some of which go further than the Ottawa Treaty, like those regarding anti-vehicle mines. But the US is still considered to be a pariah state by the NGOs when it comes to the broad issue and is forced to use an alternative forum for any pro-humanitarian land mine policies it wants to make.

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