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The Washington Agreement on Gold

Marcos A. Orellana

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1 Introduction

Gold has come to effect meaning to different dimensions of human social, economic, political, ritual, religious, and cultural dimensions. The Torah and Old Testament tell of God's anger at the sight of a gold figure crafted during Moses absence and rise to the mountain, in search for the Tables of the Law. In contrast, the Inca would adore the sun as supreme deity and would value the sun's reflection in golden figures.

Gold has also played an important role in the makeup of the social fibre in different cultural traditions, signalling status, wealth, and social position. Gold has also informed rituals, including wedding gifts, rings, and jewels. From the angle of politics and power, gold contributed to luring the thirst of the conquerors that invaded the New World, and it must be noted that gold is probably held in storage by European Central Banks today. In fact, from an economic perspective, gold has served as a unit of value and exchange since ancient times, and during most of the XXth Century, gold served as the unit of stability of the international financial architecture.

The Washington Agreement on Gold (WAG) dates from September 1999, when the Central Banks of most European countries agreed to maintain their reserves of gold. This piece will avoid duplication with a paper commissioned by the MMSD on "Central Banks and Gold". Thus, it will only focus and elaborate on the contents of the agreement, its legal status under international law, and will conclude with some lines on the need to incorporate relevant stakeholders in the process of its re-negotiation, scheduled for 2004.

2 Stakeholders

The gold industry and market accounts for the interaction of diverse social entities, including miners, bankers, NGO's, and others. The most important are the following (in random order):

- ***Mining Industry***: The mining industry would suffer the most intense impacts of the release of gold into the market. This would necessarily affect the income of developing countries, transnational corporations (TNCs), workers, and small-scale miners. The mining industry formed and funds the World Gold Council, which intends to stimulate demand in the global market.
- ***Bankers***: The private banking sector is sensitive to changes in the gold markets, given the impacts of gold on financial flows and figures, including interest rates, value of assets, collateral, reserves, exchange rates, etc.. .
- ***States:*** Central Banks of certain European States hold important gold reserves. Along with them, other particularly concerned States include Taiwan, Russia, China, India, Venezuela, and the Lebanon. Other two categories of particularly affected States are those dependent on gold mining for income and highly indebted States that may benefit from the debt relief programs of the IMF.
- ***International Monetary Fund***: The IMF holds important gold reserves and has recently engaged in off-market gold sales to finance its program for highly indebted developing countries. These transactions by the IMF are extremely sensitive to the market value of gold.
- ***Environmental NGOs***: Civil society's interest in the gold market stems from the severe environmental impacts of gold production around the world, including pollution of watercourses, destruction of wildlands, generation of hazardous waste, and others. NGO concerns in this area also account for human rights conditions of mine workers and of affected local communities, particularly indigenous peoples.

3 The WAG

At a time of increasing uncertainty regarding the future of gold reserves, which had introduced instability to the market and exerted considerable downward pressure on the price of gold, certain European central banks announced their agreement to freeze gold sales on 26 September 1999. Japan expressed its intent to follow the WAG the day after and the US later followed suit. The other key gold holder, the IMF, may sell gold only with the approval of 85% of the total voting power of its Executive Board, which gives the US an effective veto. (Article V of the IMF Articles of Agreement).

The WAG was concluded by the following Parties:

European Central Bank	Deutsche Bundesbank
Oesterreichische Nationalbank	Central Bank of Ireland
Banque Nationale de Belgique	Banca d´Italia
Suomen Pankki	Banque centrale du Luxembourg
Banque de France	De Nederlandsche Bank

Banco de Portugal
Banco de España
Sveriges Riksbank
Schweizerische Nationalbank
Bank of England

3.1 Contents

The following section will elaborate on the objectives and on the obligations of the WAG. Given the scant information available on this matter, the discussion is overtly hypothetical. This illustrates the urgency of introducing greater transparency into the re-negotiation process.

3.1.1 Objectives

The WAG's stated purpose is to maintain gold's role as an important element of global monetary reserves. However, the real objective of the agreement calls for speculation, given that the same entities had engaged and projected increasing their gold sales. In the realm of hypothesis, it may be that:

- Central banks wanted to avoid a race-to-the-bottom in their gold sales, as that would have negatively affected the value of their reserves.
- Central banks wanted to provide the IMF with a tool to finance its debt-relief program for highly indebted developing countries. In fact, the day after the WAG was announced, the IMF in turn announced its off-market gold sales to finance its debt-relief program. As the efficacy of these off-market sales depend on a high market value for gold, the IMF had vested interests in seeing the WAG come to terms.
- Central banks wanted to avoid overnight economic and social dislocation of gold dependent economies, particularly in developing countries, which could have introduced unnecessary political tensions to the commonwealth, the Lome Agreements, and other forums.
- Central banks wanted to avoid the press coverage associated with gold sales, which were becoming increasingly controversial. The WAG effectively placed the issue of gold sales, and its necessary link with gold production, beyond the sphere of public scrutiny (until now at least). This hide-and-seek strategy may not prove successful, in the light of emerging international standards regarding access to information and public participation.

3.1.2 Obligations

The WAG is structured upon four basic pillars, which account for the following obligations:

- The undersigned institutions will not enter the market as sellers, with the exception of already decided sales.
- The gold sales already decided will be achieved through a concerted programme of sales over the next five years. Annual sales will not exceed approximately 400 tons and total sales over this period will not exceed 2,000 tons.

- The signatories to the agreement have agreed not to expand their gold leasings and their use of gold futures and options over this period.
- The agreement will be reviewed after five years.

3.2 Status under International Law

The WAG is not an international treaty governed by international law. The relevant source of law in this ambit is the *Vienna Convention on the Law of Treaties* that defines a treaty as an "international agreement concluded between States in written form and governed by international law". The WAG does not conform to any of these characteristics, which confirms the conclusion presented above, but which also raises several questions on its legal status.

International treaties are normally negotiated and concluded by the Executive Branch of government and, depending on the constitutional arrangements of different countries, approved by Parliament and implemented by domestic law. Central banks are public entities governed by public law and accordingly, do not have the competence to enter into international agreements, save express grant of authority. In this line of inquiry, the creation of the European System of Central Banks (ESCB) and the European Central Bank (ECB) required the adoption of the *Protocol on the Statute of the European System of Central Banks and the European Central Bank* (ESCB Protocol) to the Amsterdam Treaty on the European Union, which poses its own set of issues. It is interesting to note that Article 14 of the ESCB Protocol deals with national central banks and provides that,

> 14.3. The national central banks are an integral part of the ESCB and shall act in accordance with the guidelines and instructions of the ECB. The Governing Council shall take the necessary steps to ensure compliance with the guidelines and instructions of the ECB, and shall require that any necessary information be given to it.
>
> 14.4. National central banks may perform functions other than those specified in this Statute unless the Governing Council finds, by a majority of two thirds of the votes cast, that these interfere with the objectives and tasks of the ESCB. Such functions shall be performed on the responsibility and liability of national central banks and shall not be regarded as being part of the functions of the ESCB.

Thus, according to the ESCB Protocol, central banks may perform functions other than those specified in the Statute, which would imply authority for central banks to enter into the WAG. In any case, a conclusive finding on the legality of the WAG would have to test domestic legislation of the countries involved, which escapes the scope of this paper.

What must be noted, however, is that the ESCB Protocol requires the ESCB to "act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources". In this regard, it is open to question whether the principle of a market economy with free competition is compatible with a decision by the holders of gold reserves, be they central bankers or other entities, to withhold their gold by agreement. This behaviour mirrors that of a cartel, which seeks to influence market price by controlling supply.

Perhaps more significantly, according to the ESCB Protocol, the ESCB is required to favour an efficient allocation of resources. It is highly questionable that the decision of central banks to maintain their gold reserves complies with this objective, given that scarce economic resources will continue to be injected into gold mining, in spite of the fact that central banks hold sufficient gold to cover the demands of the market for at least the following decade. Moreover, gold has lost its structural role in the international financial architecture, which means that gold reserves held by central banks remains an idle asset waiting for better days.

In synthesis, the central banks WAG creates an artificial scarcity of gold, which stimulates an industry with high social and environmental impacts. This evidence defeats the efficient allocation of resources, as a guiding principle of the ESCB Protocol. This evidence should be presented before the Governing Council of the ECB for formal deliberations.

4 Mechanisms for Re-Negotiation

The need to introduce greater transparency into the discussion of the scheduled review of the WAG stems from the serious impacts of the agreements on the interests and concerns of a number of relevant stakeholders. This discussion should focus on several issues, including the clarification of the legal basis of the agreement and the potential beneficiaries of a gold compensation fund. The lack of transparency during the negotiation process, the absence of a written, publicly accessible document containing the WAG, and the lack of a clear mechanism for civil society's involvement, all point towards serious questions on the legality of the WAG.

The following lines will expand on emerging international standards calling for the participation of relevant actors and civil society in the discussion of the WAG's review.

4.1 Public Participation and Access to Information.

The latter half of the XXth century witnessed a structural transformation in the international legal order. The emergence of human rights standards has delineated a new role for the governmental State apparatus, which is now defined as the means to the protection and promotion of fundamental human rights. The progressive development of international law has also witnessed the emergence of international duties for the protection of the global environment, premised on the recognition that the environment is a of common concern of humankind. Links between the international spheres of human rights and the environment have been drawn in substantive planes, ie. right to a healthy environment, and in procedural planes, ie. right to public participation and access to information.

Public participation has been recognised as an imperative of the democratic system of government, which finds its basis in the 1948 *Universal Declaration of Human Rights*, now accepted as declaratory customary international law. Originally conceived as a human rights standard relating to free and fair elections, public participation has evolved to require increased involvement by civil society in the discussion of public affairs. The 1992 *Rio Declaration on Environment and Development* provides further evidence on this emerging

international standard, in the context of the procedural approach to the human rights and environment debate. According to its Principle 10,

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

The right of the public to participate in the decision-making process that may affect the environment can only be realised through timely access to relevant information. A recent and crucial landmark step in safeguarding this right to access information was taken by the United Nations Economic Commission for Europe, under whose auspices the Ministerial Conference concluded the 1998 Aarhus *Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters*.

The Aarhus Convention is a new kind of environmental agreement that links environmental rights and human rights. The Aarhus Convention grants the public rights and imposes on Parties and public authorities obligations regarding access to information and public participation and access to justice. The Aarhus Convention also links government accountability and environmental protection by forging a new process for public participation in the negotiation and implementation of international agreements. In sum, the Aarhus is not only an environmental agreement, it is also a Convention about government accountability, transparency and responsiveness.

In this regard, the review process of the WAG should not be conducted in secrecy, behind the eyes of public scrutiny. The WAG touches upon several sensitive issues to concerned stakeholders and thereon must be reviewed under the light of emerging human rights standards and the principle of sustainable development, which can be achieved only through the involvement of all relevant stakeholders.

5 Recommendations

To finalise this paper, this section will present one procedural point and two substantive recommendations, which would contribute to the re-design of the WAG in accordance with the overarching goal of sustainable development:

- ***The Right Process:*** It is important for the WAG to be inclusive of relevant stakeholders in its review process. Different views and interests on the role of the WAG must be exchanged and confronted at a proper venue for debate, especially given that the WAG touches upon sensitive issues in contemporary world order: environment, equity, financial structure, mining, etc…
- ***Controlled Sales of Gold****:* The transformation of the international financial architecture, coupled with the advent of sustainable development, delineate a new role

for extractive industries of non-renewable natural resources. The case of gold stored in vaults represents an idle asset, an artificial creation of scarcity which distorts the market and offsets the efficient allocation of economic resources. The re-introduction of such stored gold into the global market would have the other positive advantage of reducing the high environmental impact of current rates of gold extraction. Such controlled sales, if implemented without the appropriate safeguards, could have detrimental effects for miners, industries, and developing countries dependent on gold. These potential negative impacts call for the establishment of a compensation fund.

- ***A Gold Compensation Fund:*** The review process of the WAG offers the opportunity to remedy past wrongs and to alleviate the transition of gold-dependent economies to lesser volumes of extraction.

  In fact, the gold accumulated in the vaults of central banks contains and symbolises the oppression and systematic denial of human rights around the world. In the Americas, gold was the stronger force driving conquest, which accounts for tens of thousands of Indians enslaved and driven into certain death by forced work in the gold mines. This pattern of production followed colonialism around the world. The Gold Compensation Fund would provide symbolic and material redress to the descendants of those who lost their lives for others' lure of gold.

  The Gold Compensation Fund could also provide relief to mine workers, industries, small-scale miners, and developing countries that would suffer economic dislocation in the transition towards less intensive degrees of extraction. The Fund could be designed to provide resources for productive investments with low environmental impacts, which could also contribute to diversify the focus of the economies. This features of the proposed fund would fulfil an imperative of equity.

6 Conclusions

1. On the legal status of the WAG:
   - The WAG is not an international treaty, as defined and governed by international law.
   - The WAG is a *sui generis*, gentleman's agreement among Central Bankers, of doubtful legality given the objectives and public law nature of Central Banks.
   - The WAG resembles a cartel that materially affects the supply of gold in the global market. In this regard, the WAG stretches the borders of antitrust legislation.

2. On spaces for civil society's participation:
   - The WAG was negotiated behind closed doors. Information was not provided to the public and relevant stakeholders were not afforded the opportunity to comment.
   - The WAG does not contain formal mechanisms for re-negotiation. Trends in international law regarding public participation and access to information should inform the re-negotiation process, scheduled for 2004.