

# 2 The creation of the multilateral trading system

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It is commerce which is rapidly rendering war obsolete, by strengthening and multiplying the personal interests which are in natural opposition to it. And it may be said without exaggeration that the great extent and rapid increase of international trade, in being the principal guarantee of the peace of the world, is the great permanent security for the uninterrupted progress of the ideas, the institutions and the character of the human race.

John Stuart Mill

*Principles of Political Economy with Some  
of their Applications to Social Philosophy* (1848)

## Introduction

Scholars and statesmen have long debated the truth of the sentiment that John Stuart Mill expressed on the peaceful nature of commerce. Whether or not he was right, one point is clear: he was not right immediately. Precisely a century would pass between the time he penned those words and GATT's entry into force,<sup>1</sup> and the intervening years witnessed two world wars, a great many other conflicts, and the beginnings of the lengthy Cold War whose intellectual roots reached back to other writings of 1848. The association between peace and commerce nevertheless survived the turbulent nineteenth century, as an aspiration if not always a fact, and was one of the principal objectives behind what would eventually become the WTO system. This chapter covers a period that begins immediately before Mill published his *Principles of Political Economy* (1848) and ends with the establishment of the WTO a century and half later. The chief emphasis here is on how countries moved from theory to practice, a process in which Mill's own land and its two former colonies in North America each played leading roles.

## The Pax Britannica and the Pax Americana

If one mistakenly wished to see the evolution of the multilateral trading system as a linear development, that would be easy enough to construct. Its beginning can be found in the unilateral, autonomous actions of one country eliminating trade barriers in a single sector, went from there to the negotiation of bilateral agreements that were concentrated in one region of the world and covered multiple sectors, then to the establishment of a multinational

**Table 2.1. Key events preceding the General Agreement on Tariffs and Trade (GATT)**

1846	Parliament repeals the protectionist Corn Laws in England, committing the country to free trade.
1860	The Cobden–Chevalier Treaty between Great Britain and France is the first in a series of market-opening treaties among the powers of Europe that are linked through most-favoured-nation clauses.
1876	The limitations of the existing system of trade treaties are demonstrated when Austria-Hungary unilaterally raises its tariffs. France, Germany and Italy soon do the same.
1883	Adoption of the Paris Convention for the Protection of Industrial Property, which becomes the oldest part of WTO law via its incorporation into the Agreement on Trade-Related Aspects of Intellectual Property Rights.
1919	The Versailles Treaty establishes the League of Nations.
1927	The Geneva Convention on Import and Export Prohibition and Restriction is the most ambitious trade initiative of the League of Nations, but does not achieve the requisite 18 ratifications.
1930	The US Congress enacts the protectionist Hawley–Smoot Tariff Act, which is soon followed by similarly restrictive measures in many other countries.
1933	The London Economic Conference fails to develop a collective response to the Great Depression.
1934	The (US) Reciprocal Trade Agreements Act delegates tariff negotiating authority to the executive, leading to bilateral agreements that become the template for GATT.
1941	President Franklin D. Roosevelt and Prime Minister Winston Churchill sign the Atlantic Charter, pledging “to further the enjoyment by all States ... to the trade ... needed for their economic prosperity.”
1944	Major conferences are held to develop plans for the United Nations (at Dumbarton Oaks) and the International Monetary Fund and World Bank (at Bretton Woods).
1945	Creation of the United Nations Organization at the San Francisco Conference.
1947	The 23 original contracting parties to GATT conclude their tariff negotiations.
1948	GATT provisionally enters into force on January 1; the Havana Charter for an International Trade Organization is signed in March but never enters into effect.

arrangement by which a growing number of states negotiated on an expanding range of issues, and culminated in the creation of a true international organization in which close to every country of the world makes commitments on a wide range of topics. That is a deceptively simple description that ignores the often difficult domestic and international struggles that attended these changes. In reality, the sequence was more ragged: countries sometimes negotiated and implemented landmark agreements and sometimes rejected or abrogated them, they engaged in a series of expansions and contractions in the scope of issues covered by trade agreements, and the transfer of initiative from one leader to another was neither quick nor tidy (see Table 2.1).

### *Repeal of the Corn Laws to the outbreak of the Second World War*

It would not be until 56 years after Adam Smith died, and 23 years after David Ricardo's death, that Great Britain took the first important step in the translation of their ideas into public policy. This came only after Richard Cobden and other practical men organized campaigns first to repeal protectionist laws and then to negotiate trade agreements with other countries. The Corn Laws were designed to protect grain producers in the United Kingdom of Great Britain and Ireland against competition from the cheaper foodstuffs that might be imported. The steep duties made imported grain prohibitively expensive even in times of famine. Cobden, who was both a manufacturer of calicos and a member of parliament,

appealed to the economic interests of consumers and exporters as well as the sentiments of peace-loving people who saw free trade as a critical step towards ending war in Europe.<sup>2</sup> That campaign, coupled with the pressures of the Great Famine in Ireland, ultimately led to repeal in 1846.

The next step was to move from autonomous to negotiated liberalization. European trade agreements in the latter half of the nineteenth century were linked through most-favoured-nation (MFN) clauses that tied separate agreements into a network. Great Britain had been reluctant to adopt the MFN principle prior to its achievement of industrial supremacy in Europe. Parliament rejected a commercial treaty with France that was concluded as part of the Peace of Utrecht (1713) – the principal objection being the fully fledged MFN clause in this treaty. Seventy-three years would pass before London and Paris concluded another agreement granting MFN treatment, this time in the Eden Treaty of 1786. However, that instrument was quickly overtaken by the Napoleonic Wars. The two former antagonists returned to true MFN treatment in the Cobden–Chevalier Treaty of 1860, after which an MFN clause became standard in most trade agreements between European states. This tariff-cutting treaty set the pattern for a long series of bilateral agreements that together formed a sort of distributed, sequential multilateralism. Because most countries in this system extended MFN treatment to most others, the concessions that they made in any one trade agreement were spread automatically throughout the system.

It was only later, when British hegemony was in decline, that discrimination entered the picture. London cemented the special economic relationship with its imperial and commonwealth partners through arrangements that it began to negotiate at the end of the nineteenth century, and this process accelerated with the collapse of the old order and the outbreak of the First World War. By the 1930s, the United Kingdom no longer had the commercial power, nor the United States the political will, to provide hegemonic leadership. When London negotiated a set of restrictive Imperial Preferences with its remaining and former colonies at the Ottawa Conference in 1932, this was nearly as great a blow to the global trading system as the enactment of the US Hawley–Smoot Tariff Act had been in 1930. For its part, the United States had surpassed its former colonial master in population, economy and military potential before the First World War. Many thought it then fell to the United States to take up the role that the United Kingdom had exercised, President Woodrow Wilson among them, but these expectations were dashed against the hard realities of domestic US politics.

Mr Wilson defined the US aims for the post-war world in the Fourteen Points that he proposed in 1918 as the basis for a peace settlement, with open markets an essential ingredient in his recipe.<sup>3</sup> His third point called for “[t]he removal, as far as possible, of all economic barriers and the establishment of an equality of trade conditions among all the nations consenting to the peace and associating themselves for its maintenance.” Coupled with other principles such as “Open covenants of peace, openly arrived at” (Point I) and the Grotian demand for “Absolute freedom of navigation upon the seas” (Point II), Wilson’s proposals set the tone for US participation in the war and the peace negotiations. The Treaty of Versailles, like the League

of Nations that it created, fell far short of Wilson's goal and was especially weak on trade. The victorious Allies did not build upon his Point III, nor did they take up John Maynard Keynes on his proposal that the defeated Central Powers should be compelled to enter into a European trade agreement that would eliminate tariffs on regional trade for at least ten years, but the Allies should join the same arrangement voluntarily.<sup>4</sup>

Even as simple a matter as a general MFN clause proved too difficult to work into the treaty. Germany was obliged to provide MFN treatment to the Allies, who were under no obligation to do the same for Germany or even one another. Article 23 provided only the vague assurance that "the Members of the League ... will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League." That limited objective was undermined when the United States failed to join the League, three other major powers either left it voluntarily (Germany and Japan) or were expelled (the Soviet Union)<sup>5</sup> and the remaining members repeatedly demonstrated their incapacity to negotiate meaningful agreements. The achievements of the League of Nations in the field of trade were limited to several conferences that sought to deal with what is today called "trade facilitation", including the adoption of toothless resolutions at conferences in Brussels (1920), Genoa (1922) and Geneva (1927).<sup>6</sup>

As weak as the Treaty of Versailles proved to be, a majority of the US Senate thought it too strong. Their rejection of the treaty<sup>7</sup> set the tone for nearly two decades of diplomacy, when the United States was reluctant to exercise the same leadership role that Great Britain had played for nearly a century. A long-standing policy of avoiding foreign entanglements, which sometimes expressed itself in protectionism, isolationism and even xenophobia, made it difficult for the country to adopt major international agreements, much less to take the lead in promoting them. And just like Great Britain before it, the United States first had to adopt a new approach to the MFN principle before it could begin to lead. Under the principle of conditional reciprocity that the United States had pursued since independence, the concessions made in the very few tariff-cutting treaties that presidents negotiated before the 1930s – and the even fewer that the Senate permitted to be ratified – were limited to the immediate partners and not extended to third parties. In 1923, the United States declared that henceforth it would include an unconditional MFN clause in all bilateral commercial treaties.

Congress switched gears from neutral to reverse when it enacted the Hawley–Smoot Tariff Act of 1930. Originally developed as a means of providing relief to distressed farmers suffering from crop failures and the Great Depression, thus being something like a revival of the Corn Laws, this measure raised tariffs on a wide range of agricultural and industrial products. Many other countries responded in kind, leading to an upward spiral in tariff rates and a further contraction in global trade. President Franklin D. Roosevelt sought to reverse this damage by using the authority that Congress granted him in the Reciprocal Trade Agreements Act (RTAA) of 1934, which allowed the president to negotiate tariff-cutting agreements that could go into effect through executive orders, but by that time countries were already lining up sides for the Second World War. Most of the trade agreements that the

Roosevelt administration negotiated under the RTAA authority were with Allied partners in Europe and the Americas.

### *War-time agreements, the ITO and GATT*

The modern trade system emerged from the ruins of the Second World War, and was principally the creation of the United Kingdom and the United States. Some of the same problems that plagued US policy after the First World War returned in the second, but the Roosevelt (1933-1945) and Truman (1945-1952) administrations were better able to manage them. From the start of the war, the US government engaged in a series of inter-agency, public-private and Anglo-American meetings to explore the likely problems and potential solutions in the post-war economic order.<sup>8</sup> Building upon the bilateral trade agreements that the United States had been negotiating since 1934, the UK and US negotiators worked out in broad terms a shared view of the rationale and structure for a proposed international organization devoted to trade liberalization.

Two interim agreements that they reached along the way helped to advance the pro-trade agenda. The fourth point in Atlantic Charter of 1941 provided that the signatories would “endeavor, with due respect for their existing obligations, to further the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity.” The Master Lend-Lease Agreement of 1942, which was the principal instrument through which the United States and the United Kingdom set the terms of US assistance during the war, provided in Article VII that the two countries would pursue an agreement “open to participation by all other countries of like mind ... [for] the elimination of all forms of discriminatory treatment in international commerce, and to the reduction of tariffs and other trade barriers.” These commitments in principle then led to a troika of economic and political conferences with the rest of the allied governments: the Bretton Woods Conference (July 1944) created the International Monetary Fund (IMF) and the World Bank, the Dumbarton Oaks Conference (August-October 1944) produced the United Nations Organization and the Havana Conference (November 1947-March 1948) fashioned the Havana Charter for an International Trade Organization (ITO).

The formal initiative came three months after the end of hostilities with the release in December, 1945 of the US State Department's Suggested Charter for an International Trade Organization of the United Nations. In seven chapters and 79 articles, the proposal envisioned an ITO that would reduce tariffs, eliminate quotas and preferences, discipline the use of other trade instruments, and deal with such diverse subjects as labour rights, boycotts, exchange controls, subsidies, restrictive business practices and commodity agreements. It would be two more years before the US proposal would be transformed, first in preparatory negotiations in the United Kingdom and then in Cuba, into the ill-fated Havana Charter.

**Table 2.2. Key events from the first Geneva Round to the start of the Uruguay Round**

1947	The General Agreement on Tariffs and Trade (GATT) is negotiated, with 23 original contracting parties. Countries cut tariffs on many goods in the first (Geneva) round of GATT negotiations.
1949	Second (Annecy) round of GATT negotiations leads to tariff reductions and ten new accessions, and adopts the Florence Agreement on cultural goods, negotiated jointly with the United Nations Educational, Scientific and Cultural Organization (UNESCO).
1950	President Truman withdraws the Havana Charter from congressional approval. The Third (Torquay) round of GATT negotiations is held.
1954-1955	An effort to establish an Organization for Trade Cooperation as a replacement for GATT fails when the US Congress objects.
1956	Fourth (Geneva) round of GATT negotiations.
1960-1962	Fifth (Dillon) round of GATT negotiations focuses primarily on issues related to the founding of the European Economic Community and its Common External Tariff.
1964	The first United Nations Conference on Trade and Development (UNCTAD) is held, creating a potential rival to GATT as a negotiating forum for North–South trade issues.
1964-1967	Sixth (Kennedy) round of GATT negotiations produces both tariff reductions and some non-tariff agreements. The United States fails to ratify the anti-dumping and customs valuation codes.
1973-1979	Seventh (Tokyo) round of GATT negotiations produces tariff reductions and several non-tariff agreements.
1974	The US Congress makes the first grant of “fast track” authority, a forerunner of the single undertaking that ensures it will treat the results of the next round expeditiously and indivisibly.
1975-1985	The Consultative Group of 18 (CG18), later expanded to become the CG22, serves as a kind of executive board for GATT.
1982	The United States fails to convince its partners at a GATT ministerial conference to launch a round built around the new issues of services, investment and intellectual property rights.
1986	After four years of persuasion and pre-negotiation, the Uruguay Round is launched.

The Havana Charter proposed rules governing a broad range of commercial issues. In addition to establishing an unconditional MFN principle among all signatories, the charter set disciplines on matters ranging from dispute settlement procedures and economic preferences for developing countries to investment and competition policy. Negotiators in Geneva also produced GATT in 1947 as a stopgap measure (see Table 2.2). The principal template for the substantive provisions of GATT, as well as much of the draft ITO Charter, came from the standard clauses of the RTAA agreements.<sup>9</sup> GATT was founded on the principles of unconditional MFN and national treatment, included provisions dealing with other topics in trade, and provided somewhat vaguely for settling disputes among contracting parties, but was otherwise a “bare bones” version of the charter (see Appendix 2.1).

The ITO never came into being because the US Congress did not approve the Havana Charter. President Truman had asked in 1948 that Congress enact a resolution approving the charter, but withdrew this request after two years of legislative inaction. The supposedly “temporary” GATT then took the place of the ITO, and this unhappy experience helped to shape the perceptions and expectations of negotiators for decades to come. Apart from a failed effort from 1954 to 1955 to replace the temporary and incomplete GATT with an Organization for Trade Cooperation, which ended when it became clear that the US Congress would not approve

the proposed reforms,<sup>10</sup> negotiators were highly reluctant to provoke Capitol Hill by proposing that the institutional weaknesses of GATT be corrected.

## The Uruguay Round and the transformation of the trading system

By the 1990s, few diplomats remained who had personal recollections of that earlier failure, but the institutional memory was strong. That is why many other GATT contracting parties reacted with disbelief in 1990, when Canada and the European Community began to moot their ideas for a “world” or, as the Europeans would prefer, a “multilateral” trade organization. If the US Congress had already prevented the United States from joining the ITO, not to mention the League of Nations before that, why should anyone expect this new proposal to fare any better? Some US negotiators shared those doubts, but others came to see the creation of a new institution as a price that Congress might be persuaded to pay if, in return, the country got much of what it sought on new issues such as intellectual property rights and services.

Originally planned to last four years, the Uruguay Round negotiations ran from their launch in September 1986 until December 1993, with the round formally concluding in April 1994 at the Marrakesh Ministerial Conference (see Table 2.3). The round managed to transform the nature of the multilateral trading system, and the replacement of the old GATT with the new WTO was only a part of that transformation. What is truly remarkable about the Uruguay Round is how the ambitions not only began high but actually grew from the start of the negotiations to the end. When negotiators left Punta del Este in 1986, they had already agreed not only to engage in the usual market access negotiations but also to bring entirely new issues to the table and to reform the dispute settlement system. Between then and the Marrakesh Ministerial Conference in 1994, they added to their already ambitious goals. From an institutional perspective, the three most important expansions in the scope of the negotiations concerned the decision not just to review the functioning of GATT but instead to create a wholly new international organization,

**Table 2.3. Key events in the Uruguay Round**

1986	Eighth (Uruguay) round of GATT negotiations is launched at Punta del Este in September.
1988	A mid-term review of the Uruguay Round begins at the Montreal Ministerial Conference in December, to be completed the next April, and produces an “early harvest” of agreements on institutional and substantive matters.
1990	Following up on ideas first floated by Canada, the European Union proposes the creation of a Multilateral Trade Organization (MTO). The ministerial held in Brussels in December is intended to be the closing session of the Uruguay Round, but ends in a deadlock.
1991	The Dunkel Draft of the Uruguay Round Final Act is completed in December, including a charter for the proposed MTO.
1992	Meeting in November at Blair House in Washington, DC, the United States and the European Union achieve a breakthrough on agriculture.
1993	The Quad countries (Canada, the European Union, Japan and the United States) reach agreement on a market access deal in a July summit meeting of the G7 in Tokyo. By December most negotiations are concluded.
1994	The Uruguay Round agreements are signed in Marrakesh, Morocco. These include numerous agreements that are all made part of a single undertaking.

to establish a Trade Policy Review Mechanism (TRPM) that went well beyond what many of the contracting parties had initially thought was achievable or advisable, and to redefine the single undertaking from a rule about the sequencing of negotiations to one about the substance of countries' commitments.

In some ways, the transition from GATT to the WTO came stepwise throughout the round rather than in a sudden leap at its end. One example is the TRPM, which members adopted in an "early harvest" and was fully operational six years before the WTO came into being. The transformation of the single undertaking was another important innovation, and one that happened over the course of the round without any formal decision being adopted. Yet another change was in the elevation of the role played by the director-general of the institution, which in the WTO has had a higher profile and status than it did in GATT. The office is shaped to a great degree by the person who occupies it, and Director-General Peter Sutherland – who served both as the last GATT director-general and the first WTO director-general – redefined the role and the links between that office and the leadership in the members in a way that gave him and his successors additional options for the conduct of negotiations.

It was Arthur Dunkel (see Biographical Appendix, p. 576) and not Mr Sutherland who was director-general at the start of the round, however, and he played a critically important role in launching those talks and moving them forward. Mr Dunkel promoted the new round at a time when there were growing concerns that the leading countries in the system were engaging in tit-for-tat protectionism and retaliation, to the detriment of both their own economies and the GATT system. One of his priorities throughout the round was to advance the surveillance role of GATT, and specifically its Secretariat, through a TRPM that would seek to constrain protection through exposure and peer pressure.<sup>11</sup> The new system enlarged and enhanced the Secretariat, but that seems to have been incidental to Mr Dunkel. Had he been an empire-builder, Mr Dunkel would have been an early and enthusiastic proponent of creating a wholly new institution. To the contrary, his initial reaction was to see the WTO proposal as a distraction from completion of the round. Mr Dunkel preferred instead an alternative by which the separate parts of the Uruguay Round would be stitched together through a new protocol without altering the basic structure of GATT.

While Mr Dunkel's own ambitions for the round were thus held within limits, some of the contracting parties had much grander aspirations. For the United States, these concerned the subject matter of the trading system, which Washington proposed be expanded to cover much more than tariffs and other traditional topics affecting trade in goods. Those ambitions were clear from the start, with the Ministerial Declaration on the Uruguay Round<sup>12</sup> that launched the round specifying that the negotiations would indeed cover intellectual property rights, investment and services (although that last topic was not fully incorporated into the round proper until the end). The Canadian and European interests in creating a wholly new institution did not emerge until four years after the round began, and at about the time that it was supposed to be concluded, but the round ultimately lasted twice as long as had been planned in Punta del Este. In that second half of the round, the contracting parties changed the system by agreeing not only to widen the scope of issues that fell within it but also to require that all



countries adopt all agreements negotiated in the round, to tie all of those agreements together in a unified dispute settlement system and to bring everything under the roof of a new international organization.

### *Widening the scope: the new issues in trade*

Perhaps more than any other development, it is the wider scope of trade rules that distinguishes the WTO from GATT. Some of the agreements negotiated in the Uruguay Round built incrementally upon what was already in either GATT 1947 or in agreements reached in previous rounds, especially those affecting cross-border trade in goods (e.g. with respect to sanitary and phytosanitary barriers as well as technical barriers to trade), while other agreements added entirely new issues. The most significant of these were services, intellectual property rights and investment. This widening was the principal reason why countries decided in the Uruguay Round to establish a wholly new body, as the institutional reform was considered necessary to ensure that all of the new issues and agreements were subject to the same set of dispute settlement rules.

The new issues that the system took on in the Uruguay Round, as well as the new institution that countries created in order to administer them, might be seen as a return to the original aims of the ITO. That was not a stated goal of the negotiators, many of whom had not even been born at the time of the Havana Conference, and its charter was a dead letter long before Punta del Este. It is nonetheless notable how some of those older issues refused to die. Appendix 2.1 elaborates on this point, categorizing the subject matter of the ITO, GATT and the WTO according to their treatment in these successive packages. The first group of issues consists of those that were shared in common by all three instruments. The items that carried over from the ITO to GATT, and from GATT into the WTO, include the core principles of MFN and national treatment as well as disciplines on such topics as quantitative arrangements, state trading and the general-exceptions clauses. These are to be distinguished from five issues found in both the ITO and the WTO but that were either not a part of GATT 1947 or were treated in a less expansive way in that agreement. Two especially important issues that meet this definition are investment and government procurement.<sup>13</sup> On another four topics (i.e. audiovisual services, anti-dumping and countervailing duties, safeguards, and geographic indications) the agreements in the WTO system build significantly upon the ITO/GATT precedents, and in four other areas – including the most important expansions achieved in the Uruguay Round – the WTO enters territory in which the ITO and GATT negotiators did not tread (i.e. agriculture, intellectual property rights, rules of origin and services). There nonetheless remain five other topics in which the drafters of the Havana Charter were more daring than their successors in the Uruguay Round. These include two high-profile subjects that have frequently been proposed by developed countries for negotiations in the WTO but have either been shot down entirely (labour rights) or taken up only provisionally (competition policy); it also includes employment, inflation and deflation, and commodity agreements.

The most important of the new issues that were brought to the table in the Uruguay Round had not made their way into either the Havana Charter or GATT. One was agriculture, a topic that was isolated from GATT in the 1950s and was the subject of failed negotiations in the Kennedy Round (1962-1967). Negotiators reincorporated agriculture into the system in the Uruguay Round, with countries making commitments affecting not only market access but also their production and export subsidies. The other significant additions in the Uruguay Round concerned services and intellectual property rights, with the General Agreement on Trade in Services (GATS) bringing a vast area of economic activity within the jurisdiction of the WTO and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) making a large body of existing international law enforceable within the WTO dispute settlement system.

Key developing countries had balked at both of these proposals. Policy-makers in Brazil, India and other countries feared that the industrialized countries' dominance in services would overwhelm their economies and threaten their capacity to control such sensitive areas as communications. It was only with great effort, and not a few threats, that the issue was brought to the table in the Uruguay Round. As for intellectual property rights, it was recognized from the start that this was an issue on which the interests of developed and developing countries diverged. The TRIPS Agreement ultimately became part of the final package, although one that would soon spark buyer's remorse on the part of developing countries and even some of the developed ones. The addition of investment issues was potentially as significant as the expansion into services and intellectual property, but in practice the Agreement on Trade-Related Investment Measures (TRIMs Agreement) proved to be less ambitious or consequential than the GATS or TRIPS Agreements. The inclusion of this issue in the Uruguay Round "came about as a result of a last-minute initiative on the part of the Americans in the Preparatory Committee" (Paemen and Bensch, 1995: 86). That experience was the opposite of what would happen in the Doha Round. In 1986, negotiators initially gave the issue little consideration but went on to conclude an agreement (albeit a weak one), but two decades later their successors debated the investment issue at length before ultimately taking it off the table.

### *Changing the conduct of negotiations: the single undertaking*

Negotiators not only concluded a greater array of agreements in the Uruguay Round than had their predecessors, but they also changed the rules about how countries would adopt agreements. In this round, countries could no longer take the *à la carte* approach, accepting some agreements but not others. In place of the Tokyo Round's cafeteria, the Uruguay Round produced a fixed-price menu for all participants.

The single undertaking, as it came to be understood, represents a major departure from the earlier practice of negotiating discrete agreements, an approach that had a long history in the GATT system. One early example is the Declaration Giving Effect to the Provisions of Article XVI:4, an agreement on export subsidies that entered into effect in 1962 but was adopted by only 17 of the 42 countries that were then contracting parties to GATT. The benefits of this

agreement were extended to all countries on an MFN basis. More notable were the results of the Kennedy and Tokyo rounds, which included a much larger number of significant agreements that were adopted by varying numbers of GATT contracting parties. Among the numerous stand-alone agreements reached in those negotiations were the Kennedy Round codes on anti-dumping and customs valuation and the Tokyo Round agreements on Government Procurement and Trade in Civil Aircraft.

Although GATT had 128 contracting parties at the end of its tenure, the number that signed on to the Tokyo Round codes were much fewer, ranging from 13 signatories to the Agreement on Government Procurement to 47 for the Agreement on Technical Barriers to Trade (Steger, 2000: 141). Some countries' refusal to adopt these agreements was a source of growing irritation to policy-makers in developed countries, who saw this as "free-riding" on the system. That irritation expressed itself in, for example, the US policy of not extending one of the benefits of the Tokyo Round subsidies code to countries that were not signatories to that agreement.<sup>14</sup>

The meaning of the single undertaking changed over the course of the Uruguay Round. When it was first provided for in the Punta del Este Ministerial Declaration of 1986, Paragraph I.B.2 stated that "[t]he launching, the conduct and the implementation of the outcome of the negotiations shall be treated as parts of a single undertaking." The term was not further defined in the document. The single undertaking was understood to refer solely to the way that the round itself would be conducted: all issues are to be negotiated simultaneously and nothing is agreed on any one topic until everything is agreed on all topics.<sup>15</sup> In the concluding years of the round, however, it was agreed first among the Quad countries (Canada, the European Union, Japan and the United States) and then among GATT contracting parties in general that the term referred not only to the sequencing of the negotiation but to the indivisibility of the final package: all WTO members would be required to adopt all of the agreements reached in the round,<sup>16</sup> plus some items reached in the prior (Tokyo) round.<sup>17</sup>

The revised meaning of the single undertaking emerged from the same set of concerns that would also produce the WTO. As discussed below, the principal reason that Canadian and European negotiators proposed a new institution was their worry that the GATT regime was too weak, fragmented and provisional to adopt and enforce disciplines on the new issues. Those same misgivings led US negotiators to propose an equally important, yet institutionally less complete, arrangement by which the numerous trade agreements then being negotiated would be brought within a unified package. This "protocol" approach did not require a new institution. They began arguing for an "Integrated Accord" in the months immediately after Canada and the European Community floated their proposals for a new institution (see below), issuing a non-paper on 21 September 1990 entitled "Ending the Uruguay Round and Implementation of the Results". In this document, the United States reiterated its frustration with the *à la carte* approach that developing countries had taken in the implementation of the Tokyo Round, stating that doing the same in the Uruguay Round would "not fully respect the decision reflected in the Punta del Este Ministerial Declaration (that the Round should be a 'single undertaking')."<sup>18</sup> The non-paper argued that these problems "could be addressed

effectively through a decision to integrate the results of the Uruguay Round with the existing General Agreement in a successor agreement” that “for the sake of discussion ... might be called the ‘Integrated Accord’.”<sup>19</sup> More precisely:

Under the Integrated Accord approach, the General Agreement would be fully preserved wherever [*sic*] its provisions were not the subject of Uruguay Round negotiations and agreements. Where existing GATT provisions were substantively negotiated (for example, in connection with rules on subsidies, antidumping, safeguards, agriculture, dispute settlement, etc.), it would be agreed that existing GATT provisions would be fully replaced by the texts of the new agreements. In other areas of the negotiations, supplementary provisions would be introduced into the Integrated Accord.<sup>20</sup>

In this way, the entirety of the round’s results would be packaged together in one protocol. The US negotiators would pursue variations on this formula in the remaining years of the round. They sometimes presented this revised meaning of the single undertaking as an alternative to the creation of a new institution, but came around to accepting the single undertaking as a complement to the WTO.

The single undertaking became one of the most controversial aspects of the WTO system. It got much of the praise for achieving an ambitious outcome of the Uruguay Round, but many analysts and negotiators later gave it much of the blame for the rigidities that developed in the Doha Round. One former US trade negotiator, Andrew Stoler (see Biographical Appendix, p. 594), expressed retrospective regret over this shift, which he deemed “our single biggest mistake” in the round (Stoler, 2008: 1). “The language [of the Punta del Este Ministerial Declaration] had really quite the opposite intention,” he observed, but in 1993 “the Quad countries decided that they could take advantage of the creation of the Multilateral Trade Organization (later the WTO) to force other Uruguay Round Participants to accept a different meaning of the single undertaking language.” Legal scholar John H. Jackson (see Biographical Appendix, p. 581), who holds the strongest claim to being father of the WTO (see below), concurred with this view. “The single undertaking was a serious mistake,” he later recalled, because it “really created some of the problems that we have with the trade system. And it was not all that necessary to have a total single undertaking.”<sup>21</sup> The misgivings over the single undertaking were not widespread until well into the next round, however, and (as discussed in Chapter 9) the costs and benefits of this approach to negotiations remain a matter of active debate between the proponents and opponents of the single undertaking.

Although this transformation was arguably among the most consequential decisions made in the half-century of GATT’s existence, it was never formally approved or recorded anywhere. When one considers the strenuous arguments that numerous developing countries made against the inclusion of the new issues during the maneuvering over the launch of the round, the seemingly casual way in which these topics passed from being elective to compulsory is nothing short of astounding. One explanation for this change is that it reflected the widespread acceptance at that time of the pro-trade, pro-market ideas that were commonly

summarized under the title of the Washington Consensus. An alternative or supplementary explanation points to the consequences of power politics. Despite the fact that the Quad gradually lost power throughout the post-war period, some argue that it enjoyed greater leverage over developing countries in the early 1990s than it had in the late 1970s. By this reasoning, the earlier, *à la carte* approach of the Tokyo Round was the outcome of a confrontational negotiation in which the developing countries got the better of the deal. Although “some senior U.S. trade officials ... threatened to exit GATT and conclude the codes on a non-MFN basis under a new ‘GATT-Plus’ regime,” this option was quashed by a State Department that “did not want to risk further alienation or ‘UNCTADization’ of the developing countries in a bipolar world” (Barton et al., 2006: 65). By contrast, the United States and the European Community were in a stronger position in the post-Cold War period that allowed them to conduct power-based bargaining, including the pursuit of a strict single undertaking in the Uruguay Round that required all countries to adopt all of the agreements reached in the round.

### ***Enforcing the rules: dispute settlement***

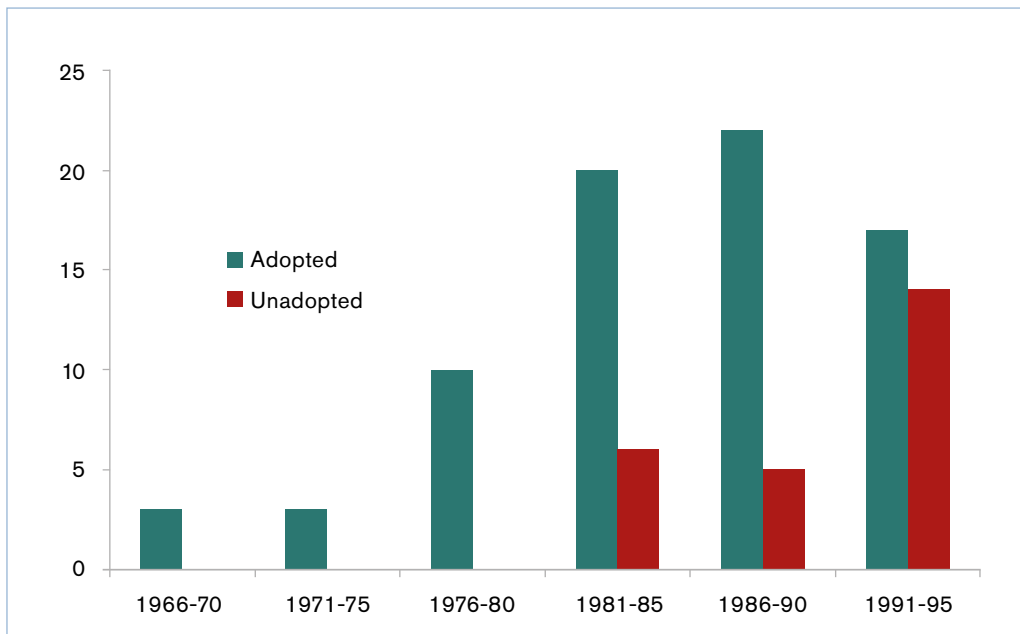
Wider rules require greater enforcement, and here the Uruguay Round also produced an important innovation. The Dispute Settlement Understanding (DSU) went far beyond the relatively weak rules of GATT, making the system much stricter and encouraging countries to bring a far greater number of complaints against one another. The GATT dispute settlement system had been based on the ambiguous language of GATT Article XXIII, which provided that if a party believed that another country’s policies nullified or impaired its trade benefits, it should first seek consultations with that country. If the two countries could not resolve the matter within a reasonable amount of time, it could then be brought to GATT for dispute settlement. Article XXIII did not actually define any specific procedures to be followed, but a system emerged in the early years of GATT that revolved around panels of experts. The institutional structure of GATT was not well equipped to reach or enforce definitive solutions. Problems multiplied when the scope of GATT expanded without a commensurate increase in the institution’s authority, as none of the special GATT codes in the Tokyo Round laid out identical rules for resolving disputes.

By the early 1980s, a series of bitter disputes between the United States and the European Union over agricultural trade, tax laws and other matters threatened to undermine support for the regime itself. GATT procedures were increasingly seen as cumbersome and time-consuming, not least because the participants had numerous opportunities to delay cases or to block them altogether. Under that system, the GATT Council had to reach a consensus decision to create a panel and also had to reach consensus to adopt whatever rulings that the panel made. This meant that the respondent had veto power, allowing it to block any step in the process: it could refuse to permit formation of a panel, reject panelists or delay an investigation. Even after a decision had been rendered, a contracting party, typically the respondent but sometimes the complainant, could prevent the panel report from being adopted.

Two of the knottiest problems in the latter years of GATT were the concern that countries could block panels and the concurrent US habit of taking unilateral action to enforce its rights. The data in Figure 2.1 show how the number of dispute settlement cases rose throughout the late GATT period, but so did the rate at which the results of these cases were blocked. From 1971 to 1975, for example, there were just three panel reports produced, all three of which were adopted. The adoption of interim reforms during the round was widely seen as a “down payment” on the broader package then being negotiated, with ministers agreeing in the 1988 ministerial (followed by a 1989 decision) that the formation of panels and the approval of its terms of reference would be virtually automatic (i.e. subject to a rule of reverse consensus). Fixing the way that cases started was not the same as fixing the way that they ended, however, and there matters actually got worse. Nearly half of all panel reports went unadopted from 1991 to 1995.

These rising rates of complaints and failures encouraged the United States to pursue disputes unilaterally. It would be difficult to exaggerate the priority that other participants in the Uruguay Round placed on ending the practice by which Washington defined and enforced its rights under its own “reciprocity” (i.e. retaliatory) laws rather than through GATT. This was a goal shared in common by developed and developing countries. In the early 1980s, the principal US reciprocity law was Section 301 of the Trade Act of 1974, which allowed the Office of the US Trade Representative (USTR) to threaten and, if necessary, impose retaliation

**Figure 2.1. GATT panel reports, 1966-1995**

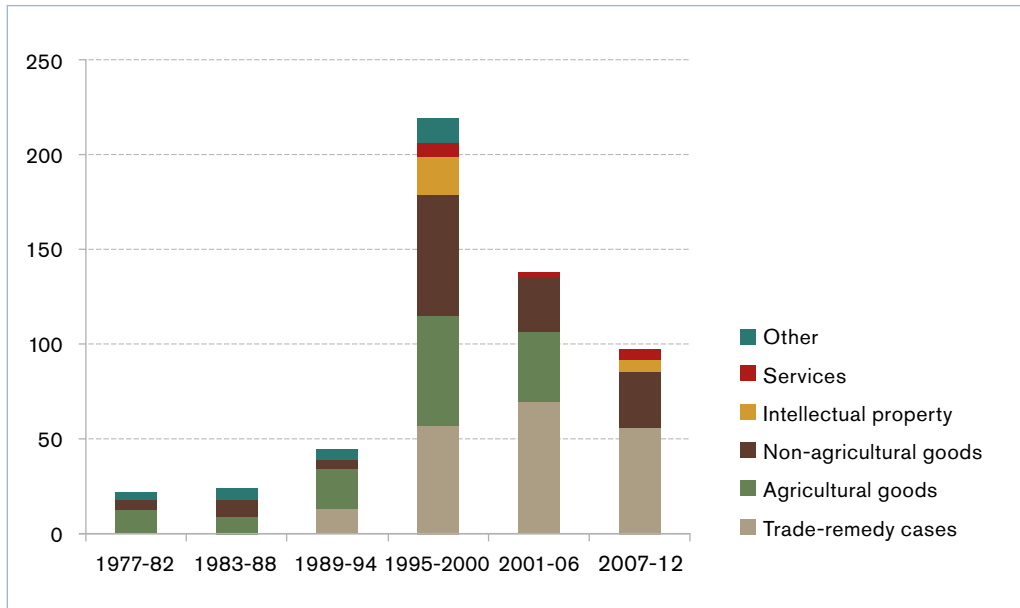


Source: Author's calculation from World Trade Law, "GATT Dispute Settlement and Working Party Reports".

on other countries that were found to violate US rights. Those included some self-proclaimed rights that were found only in US law and not in any agreements reached up to that point in GATT, such as in the fields of services, investment and intellectual property rights. Congress approved trade laws in 1984 and 1988 that supplemented Section 301 with other statutes on the same pattern, most prominently a “Super 301” law that set an annual process for the USTR to consider the self-initiation of cases and a “Special 301” law devoted specifically to the enforcement of intellectual property rights. By the time countries agreed to launch the Uruguay Round in 1986, the United States had threatened or imposed retaliation under these laws on a wide range of countries. Those actions violated the spirit and possibly the letter of the law, but the same shortcomings in the GATT legal system that the United States criticized also allowed it to block other countries’ efforts to have the US reciprocity law declared illegal by a GATT panel.

The dispute settlement rules of the WTO address the weakness of the GATT rules and the excessive strength of the US laws. Under the WTO dispute settlement system an individual country can no longer block the formation of a panel or the adoption of its report. These changes prompted the United States to scrap its reciprocity policy upon the conclusion of the Uruguay Round. With rare exceptions, such as cases involving the very few countries that are not yet WTO members, the matters that the United States used to pursue unilaterally under Section 301 and related statutes are now brought to the Dispute Settlement Body (DSB). Section 301 is still on hand to provide the legal authority for the president’s imposition of sanctions in the event that the United States wins a case in the DSB and opts to impose retaliation, but in that sense the law has been transformed from a substitute to a complement to the multilateral dispute settlement rules.<sup>22</sup>

The results of the Uruguay Round led to a huge increase in the number of dispute settlement cases that members bring against one another, although this result might be attributable more to the changes in the rules than to the addition of new issues. That is the implication of the data presented in Figure 2.2, which show the principal topics at issue in the complaints of the late GATT period and in the first 18 years of the WTO. There is no question about the increase in the caseload: whereas contracting parties brought 48 complaints against one another in the final six years of the GATT period, they made 219 complaints (4.6 times as many) in the first six years of the WTO period. The caseload dropped later and is discussed in Chapter 7. In absolute numbers, the new issues of services and especially intellectual property rights led to 40 new disputes from 1995 to 2012, or almost as many as the total number of disputes aired from 1977 to 1988 (44). If one reviews the subject matter in relative terms, however, there was little change. The traditional issues of trade-remedy cases and trade in goods (agricultural and otherwise) accounted for 86.2 per cent of all dispute settlement cases in the last 18 years of the GATT period, and for 88.2 per cent of all cases in the first 18 years of the WTO.<sup>23</sup>

**Figure 2.2. Subject matter of GATT and WTO disputes, 1977-2012**

Sources: Author's calculation. GATT cases from World Trade Law, "GATT Dispute Settlement and Working Party Reports". WTO cases from data at [www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm).

Notes: Number of requests for consultation dealing principally with the indicated topics.

## The FOGS negotiations and the creation of the WTO

The Punta del Este Ministerial Declaration of 1986 had neither anticipated nor mandated the establishment of anything like the WTO. The original aims of the negotiations on institutional reform were instead fairly modest, as expressed under the rubric of the Functioning of the GATT System (FOGS). According to the ministerial declaration (see Box 2.1), the negotiations on this subject were to develop understandings and arrangements regarding three specific issues: surveillance and monitoring; greater involvement of ministers; and further coherence through stronger relationships with other international organizations. All three topics were addressed by the elements of an "early harvest" that these negotiations reached at the Montreal Ministerial Conference of 5-9 December 1988.<sup>24</sup> GATT contracting parties agreed then to establish the TPRM, to provide for ministerial meetings once every two years, and to invite the IMF and the World Bank to explore with GATT ways to enhance coherence in global economic policy-making.<sup>25</sup> Nonetheless, there still remained another five years of the Uruguay Round, and in that period the FOGS negotiations were transformed from an exercise in institutional tweaking to one that produced a fundamental revision of the trading system.



### Box 2.1. Uruguay Round negotiations on the Functioning of the GATT System

*From the Punta del Este Ministerial Declaration, 20 September 1986.*

#### A. Objectives

Negotiations shall aim to:

[...]

(ii) strengthen the rôle of GATT, improve the multilateral trading system based on the principles and rules of the GATT and bring about a wider coverage of world trade under agreed, effective and enforceable multilateral disciplines;

(iii) increase the responsiveness of the GATT system to the evolving international economic environment, through facilitating necessary structural adjustment, enhancing the relationship of the GATT with the relevant international organizations and taking account of changes in trade patterns and prospects, including the growing importance of trade in high technology products, serious difficulties in commodity markets and the importance of an improved trading environment providing, inter alia, for the ability of indebted countries to meet their financial obligations;

(iv) foster concurrent cooperative action at the national and international levels to strengthen the inter-relationship between trade policies and other economic policies affecting growth and development, and to contribute towards continued, effective and determined efforts to improve the functioning of the international monetary system and the flow of financial and real investment resources to developing countries.

[...]

#### E. Functioning of the GATT System

Negotiations shall aim to develop understandings and arrangements:

(i) to enhance the surveillance in the GATT to enable regular monitoring of trade policies and practices of contracting parties and their impact on the functioning of the multilateral trading system:

(ii) to improve the overall effectiveness and decision-making of the GATT as an institution, including, inter alia, through involvement of Ministers;

(iii) to increase the contribution of the GATT to achieving greater coherence in global economic policy-making through strengthening its relationship with other international organizations responsible for monetary and financial matters.

Of the three topics that fell within the scope of the FOGS negotiations in the Uruguay Round, the efforts to promote greater involvement of ministers produced the least impressive results. During the three decades that preceded the Uruguay Round, GATT ministers met approximately once every three years. The decision to meet every other year, as eventually incorporated in Article IV:1 of the Agreement Establishing the World Trade Organization (WTO Agreement), thus represented a 50 per cent increase in the relative frequency of these gatherings. In actual practice, there appears on the one hand a preference for *formal* ministerial meetings that are not much more frequent than the earlier rate, accompanied on the other hand by *informal* gatherings that are sometimes much more frequent. Taking into

account the fact that there was no ministerial meeting in 2007, and putting aside the extraordinary meeting in 1998 (which involved more style than substance), there were eight formal ministerial conferences from 1995 to 2013. That works out to an average of once every 2.4 years, or something very close to splitting the difference between how often ministers used to meet (once every three years) and how often they believed in 1994 that they should meet in the future (every other year). The somewhat lower frequency of formal, full-dress ministerials may be deceptive, however, when one considers the proliferation of ministerial gatherings among subsets of countries that meet either in other institutional settings (e.g. in the Group of Twenty that acquired new status in the financial crisis of 2008) or in *ad hoc* “mini-ministerials”. Meetings of this sort can sometimes take place several times a year during periods of intense negotiation, especially in the run-up to regular ministerials. There have been a great many such meetings since the creation of the WTO, most of them in connection with the launching or conduct of the Doha Round, but they had nothing to do with any arrangements made in the FOGS negotiations.

Two other FOGS topics are discussed in other chapters. The origins and development of the TPRM are described more fully in Chapter 8. The mechanism provides for regular examinations of members’ trade policy regimes by the WTO Secretariat and the member under review, with opportunities for the membership at large to pose questions and make comments. This is a subject that the FOGS group took on early in the round and went beyond the modest aims articulated in the lead-up to the round. The negotiations over greater coherence among international organizations are discussed in Chapter 5.

The remainder of this chapter examines the development of the proposal to replace GATT with the WTO. None of the contracting parties had proposed anything of the sort in the run-up to the Punta del Este conference, and the declaration said nothing about it. The idea nevertheless emerged in the middle of the Uruguay Round, starting as an academic proposal and moving soon to formal negotiations. It eventually came to be a complement to the other innovations examined in this chapter, as the WTO provided the institutional roof under which would be housed all of the new agreements, the DSU and the TPRM.

### *Emergence of the idea*

The idea behind creating this new institution first emerged in 1990, when one informal and two formal proposals called for revising the terms of the multilateral trading system. The informal initiative merits first mention.

John H. Jackson, the noted legal scholar and former US official, had long written on what he termed the GATT’s “birth defects”, urging that these be corrected through the creation of a new institutional structure. Never intended to serve as a permanent organization, the supposedly temporary GATT filled in for the ITO after the US Congress failed to approve the Havana Charter. GATT depended for its existence on a Protocol of Provisional Application, the very title of which connoted impermanence,<sup>26</sup> and was hobbled by the grandfathering of non-compliant laws and a weak dispute settlement system. Mr Jackson and others had long

feared that the system could collapse altogether if major members decided to abandon it, and the proposed expansion of the system into new issue areas might only worsen the problem.

Mr Jackson moved from identification of these shortcomings to the development of a solution first in an article-length paper that then became a book. He wrote a paper for a conference that Chatham House sponsored on 18 January 1990, in which he presented the argument for replacing GATT with a true international organization. Mr Jackson was one of several experts to present papers at that conference, somewhat prematurely entitled “Uruguay Round Negotiations: The Last Lap”, which also featured speakers from the GATT Secretariat, government, private industry and the press.<sup>27</sup> He then went on to Geneva, where he repeated his call in a presentation to ambassadors and delegates at the GATT headquarters, and developed his paper into a book that Chatham House published later that year. In *Restructuring the GATT System*, Mr Jackson urged that the countries negotiating in the Uruguay Round devise “the organizational ‘constitution’ for an institution which could be variously named, but for which I will call (for simplicity’s sake) a World Trade Organization (WTO)” (Jackson, 1990: 94). The WTO charter “would not contain many substantive obligations,” but the GATT commitments would be maintained and “become ‘definitive’ rather than provisional” and be supplemented by a “number of other new agreements”. He further suggested that:

The WTO charter would not only provide the institutional structure for GATT and many other agreements, but would perform the role of an institutional agreement for service trade agreements and services sector agreements. Likewise, it would define the relationship of an intellectual property ‘code’. It would explicitly recognize the duty of this organization to provide service for these and other ‘new subjects’ of the Uruguay Round and later negotiations.

Mr Jackson went on to describe in greater detail the objectives of the proposed WTO, its voting procedures, the structure of its Secretariat and administration and other topics. His plan was not based on a single undertaking, or at least not on that concept as it eventually came to operate in the Uruguay Round (i.e. all members were required to adopt all agreements), but instead assumed that some new instruments would be “sheltered agreements” for which acceptance was optional. Perhaps the most important of his proposals was for a “common, unified, panel procedure which would become a part of each of the various dispute settlement procedures of the ‘sheltered treaties’ as well as dealing with issues arising under the WTO” (*ibid.*: 97).

When Mr Jackson had presented his proposals in Geneva his “ideas were received with respect,” Croome (1995: 272) noted, “but not widely seen as likely to come to fruition in the near future.” The notion of creating a new institutional structure could not advance until a GATT contracting party made such a proposal. Quite pointedly, it was not Mr Jackson’s own country that took up that role. Whereas the United States had been the principal *demandeur* on the new issues that gave economic substance to the round, it fell instead to Canada and the European Community to propose the new institutional and legal structures that would be needed to ensure that the resulting new rules could be properly housed under a common roof. Canada was the first GATT

contracting party to make a formal proposal along these lines, and Mr Jackson would later argue that Canada “was particularly well placed to put forward such a proposal because it was a member of the Quad,” and yet “was the smallest of that group, and the one least likely to meet ‘automatic’ objections to any rather novel proposal” (Jackson, 1998: 27).

Mr Jackson's proposals were perfectly in tune with the times, and soon moved forward on parallel tracks in both Brussels and Ottawa. Renato Ruggiero (see Biographical Appendix, p. 591), who was then the Italian trade minister and would become the first full-term WTO director-general, was an early proponent within the European Community.<sup>28</sup> Significantly, his advocacy of this idea coincided with Italy holding the rotating presidency. Even before then, the EC Legal Service prepared a draft paper on the institutional framework, and the European Community was already circulating this paper “informally to selected delegations in Geneva” early in 1990.<sup>29</sup> That draft EC paper proposed “that a convention or treaty be adopted establishing GATT as an ITO” under “an umbrella institutional structure similar to that of WIPO,”<sup>30</sup> as well as creation of a permanent panels for appeals of dispute settlement cases. It would later form the basis for the formal proposal that the European Community tabled in the FOGS negotiations that July.

Canada took the lead on the issue in the interim, and did so with real energy. “If there had not been a John Jackson,” the man himself would later recall, “they would have found one.”<sup>31</sup> The first negotiator to take up this idea was Debra Steger (see Biographical Appendix, p. 593), a lawyer then on assignment to the government of Canada. She had been a student of Mr Jackson's at the University of Michigan from 1980 to 1981, and he shared his book with her when it was still in manuscript. Mr Jackson worked with Ms Steger on this issue informally; the government of Canada eventually contracted with Mr Jackson to work with them on a consulting basis, but he refused to take any pay for this work. Like Mr Jackson, Ms Steger was troubled by the legal imperfections of the existing system. Drawing heavily on his scholarship, she wrote an internal paper in January 1990 supporting his idea and submitted it to Ottawa. The paper stressed the deficiencies of the GATT system, especially its provisional nature, the difficulties in amending agreements or reaching decisions, the imperfections of the dispute settlement system, and the lack of coherence in its relations with the IMF, the World Bank and other institutions. Ms Steger argued that these problems had to be addressed in light of the major political and economic changes then underway in the world, and when accessions to GATT might make it a universal institution. The initial reaction of Canadian officials was one that several others would repeat in the coming months: the US Congress and the Japanese Diet were never going to approve it, and “it wasn't part of [the round's] terms of reference ... so forget about it.”<sup>32</sup> Her paper nevertheless made it into Minister of Trade John Crosbie's (see Biographical Appendix, p. 575) office, and his senior policy advisor (and cousin), Bill Crosbie (see Biographical Appendix, p. 576), read it enthusiastically.

If one needed to set a concrete date for the transition of the WTO from academic speculation and internal deliberations to the tabling of a formal proposal, however brief, the earliest candidate would be 9 April 1990. That day John Crosbie sent letters to his counterparts in the Quad and to Mr Dunkel, the director-general, expressing his view that “a new world trade organization is required to cope with the rapidly changing international trading environment.” He

told his correspondents that he hoped “to seek a decision at the Brussels Ministerial Meeting in December to commence negotiations leading to the establishment of a world trade organization within the time allowed for approval by the United States’ Congress under the existing ‘fast track’ legislation.”<sup>33</sup> Two days later, he held a series of meetings in Geneva with Mr Dunkel and GATT ambassadors in an effort to step up progress in the Uruguay Round negotiations in general and to promote the WTO idea in particular. Mr Crosbie did not present a specific paper on the matter; the closest that Canada came to that was in the distribution of background materials that informed the press on the ideas that the minister presented verbally.

Mr Crosbie followed up his mission to the Geneva ambassadors by engaging his peers, presenting these ideas at series of ministerial meetings. The first of these came on 18-20 April in Puerto Vallarta, Mexico. This time he arrived armed with a five-page paper entitled “MTN: Strengthening the Multilateral Trading System”.<sup>34</sup> After reviewing the challenges that the multilateral trading system then faced, including protectionism, unilateralism, and the incorporation of new members and issues into the rules, the paper argued that: “These changes in the international trading environment make even more significant the importance of achieving major, substantive results in the Uruguay Round” and require “the establishment of an umbrella World Trade Organization.”<sup>35</sup> The paper proposed that “a draft of an umbrella framework” be brought forward around the time of the next meeting of the Trade Negotiations Committee in July, “when the profile of the overall, substantive MTN package should have emerged from the detailed negotiations in various negotiating groups.”<sup>36</sup> Canada underlined the importance of the link between this proposal and the need for reforms in the dispute settlement system by bundling the discussion paper on the WTO with another, more detailed discussion paper on dispute settlement.<sup>37</sup>

Canadian officials also advanced their proposal at other meetings among developed countries in 1990. The first formal expression of support for these ideas came at the Group of Seven (G7) summit meeting in Houston (9-11 July), which followed very shortly after the European Community presented a formal proposal in the FOGS negotiations (see below). “The wide range of substantive results which we seek in all these areas will call for a commitment to strengthen further the institutional framework of the multilateral trading system,” the G7 leaders stated in their communiqué, and “[i]n that context, the concept of an international trade organization should be addressed at the conclusion of the Uruguay Round.”<sup>38</sup> That construction was still somewhat ambiguous, however, as it was open to interpretation whether that meant an exploration of the concept or the actual conclusion of an agreement. Canadian officials also pressed the topic at ministerial meetings among the Quad in California (2-4 May) and among Asia-Pacific Economic Cooperation members that they hosted in Vancouver (10-12 September).

Ms Steger worked in concert with Christoph Bail of the European Commission in early 1990 on an early draft charter for an international organization. They approached Åke Linden in the GATT Secretariat in confidence to work with them, and together they formed the Friends of the GATT. Their goal was to incorporate some language in the final declaration of the Brussels 1990 Ministerial Meeting indicating an intention to create an international organization.

### *The EC proposal of 1990*

It was the European Community that made the first formal proposal for the FOGS group, presenting its paper to a meeting on 25-26 June 1990. The EC paper on the “Establishment of a Multilateral Trade Organization (MTO)” presented a principally legal argument for a new institution. The European Community urged in this four-page document that consideration “be given in the Brussels Ministerial to a decision in principle to establish a Multilateral Trade Organization,” stating that “it is necessary to deal with the strengthening of GATT as an institution in order to ensure that the future multilateral trading system will organizationally be able to administer the outcome of the Round in all areas effectively.” That included the ability of the MTO “to adopt dispute settlement procedures in principle applicable to all separate multilateral trade agreements” as well as “a sound institutional framework” and an “adequate institutional basis to co-operate in equal terms with other international organizations, in particular the International Monetary Fund and the World Bank, so as to ensure that trade policy is fully reflected in the continuous process of ensuring greater coherence in global economic policy-making.” The European Community expressed particular concern over difficulties –

in the context of trade disputes to which the General Agreement and a particular Code or several Codes may be relevant because there is no competent body to examine a matter in the light of all applicable multilateral agreements. In this respect a Multilateral Trade Organization would be able to implement common dispute settlement rules, negotiated within the Uruguay Round and in principle applicable to all multilateral trade agreements[.]<sup>39</sup>

Moreover, the paper argued, a new institution would be better able to carry out the mandate of the newly established TPRM and the multiplicity of agreements and commitments that the contracting parties were expected to produce in the round. Based on these considerations, the European Community proposed “that at the end of the Uruguay Round and to consolidate the results achieved in the Round, Ministers should consider the establishment of the new GATT as a Multilateral Trade Organization.” The main elements that the European Community proposed for this MTO were:

- provisions on membership and on a common organizational structure
- a legal basis for taking actions concerning the implementation of the results of substantive negotiations and in particular for adopting dispute settlement procedures, in principle applicable to all multilateral trade agreements
- the establishment of an international Bureau or Secretariat consisting of a Director-General and his staff
- budgetary provisions
- provisions on the legal capacity of the organization, privileges and immunities of its staff, relations with other organizations and final provisions (amendments, entry into force, etc.).

Establishing this organization “would not alter the substantive rights and obligations of contracting parties or signatories under the existing multilateral trade agreements,” the European Community argued, but would “provide the institutional and organizational

framework to ensure that questions of administration and implementation of the different agreements can be dealt with in an effective manner.<sup>40</sup>

The initial reaction to the European proposal at the FOGS meeting was cool, with many participants “emphasiz[ing] that such a grand political design should not be allowed to deflect attention from substantive results” in the round.<sup>41</sup> More pointedly, “the United States expressed particular reservations, noting that they could not expect Congress to ratify a Ministerial decision on this issue as part of the Uruguay Round package.”<sup>42</sup> The issue lay dormant for months thereafter, but in late 1990 both Canada and the European Community, now joined by Mexico, pressed the issue once again. The United States and Japan remained sceptical.

### *Relationship between institutional and substantive reforms*

One key issue in the ensuing negotiations concerned the relationship between the substance of the round and the institutional reforms that were being proposed. Participants in the process conceived of that relationship in three different ways, variously seeing the proposed institutional reforms as a potentially harmful distraction from the Uruguay Round's real work of opening markets, as a necessary complement to those initiatives or as a useful means of leveraging deeper commitments in those substantive negotiations.

Director-General Arthur Dunkel had a surprisingly ambivalent view on the proposal, and he veered at times into that first, most sceptical group. During 1990, his main objective was to complete the negotiations as planned at the Brussels Ministerial, and in that context he saw the proposal as a possible complication. This is not to say that Mr Dunkel believed that the GATT system as it stood needed no reform. He would often host dinners at his home or in Geneva-area restaurants to which he would invite GATT ambassadors, and at one such meeting around Easter in 1990, Mr Dunkel underlined the need for stronger machinery to deal with the wide-ranging issues then under negotiation as well as the institutional issues related to the TPRM.<sup>43</sup> Mr Dunkel was less certain that the two goals of substantive expansion and institutional reform could be pursued simultaneously, however, and whatever views he expressed in private<sup>44</sup> his public statements were fairly negative. In a speech he delivered in Tokyo on 1 June 1990, Mr Dunkel characterized the proposals then being mooted as “nebulous”. Declaring that “our first priority should be to ensure that the discussion of this idea does not distract us from the substance of the Uruguay Round negotiations,” Mr Dunkel noted that the contracting parties still had “a large number of difficult differences to sort out in a very limited period of time” and could “not afford to put the cart before the horse!”<sup>45</sup> Even Mr Jackson cautioned that the danger of distraction had to be avoided, underlining the point in a note to the government of Canada. “The substantive result of the Uruguay Round must be paramount,” he argued, “and an institutional restructuring should be viewed as ancillary and complementary to that.”<sup>46</sup>

The proponents were always careful to stress that they advanced these ideas as a complement to, rather than a substitute for, commitments across a range of issues. Mr Crosbie proposed that the new WTO be part of the larger package of reforms under discussion in the round, “based on the expectation of a substantial result from the Uruguay Round, which would

expand the scope and depth of the GATT system to include agriculture, services, intellectual property, investment, textiles, and improved dispute settlement procedures.<sup>47</sup> The first formal Canadian paper on the subject argued that there “would be little point in significant institutional reform” without substantive ambition, but a “major result in all areas ... will make it necessary to adopt measures that will facilitate the integration, overall management and stability of the multilateral trading system.”<sup>48</sup>

The US negotiators took an altogether different approach to this linkage. In the language of negotiators, they saw the substance of the Uruguay Round's new issues in offensive terms but initially took a more defensive approach to the institutional question. In time, they saw how concessions on the defensive side could help them to leverage a great deal more on their offensive interests, however, and devised a negotiating strategy that took full advantage of other countries' fears of Congress and the US reciprocity policy.

### *The US position on the new institution*

Multilateral trade negotiations typically face both a Geneva and a Washington problem. The Geneva problem requires that agreement be reached between countries; the Washington problem requires that agreement be reached within one. The same tensions between the executive and legislative branches of the US government that undid the Treaty of Versailles and the Havana Charter, not to mention other international agreements such as the customs valuation and anti-dumping codes of the Kennedy Round, could have done the same to the proposed new institution. The proposal for an MTO presented not just a challenge but an opportunity to the US negotiators, however, and while the challenge never disappeared altogether it was the opportunity that won out in the end.

The US negotiators had more at risk here than did their counterparts, because if history were to repeat itself the wrath of Congress would be coming down harder on them. They had good reason to fear that this might happen. “The first reaction of the US to these ideas was tremendous skepticism and resistance,” WTO Deputy Director-General Rufus Yerxa (see Biographical Appendix, p. 597) recalled, “because we thought that people wanted to create this MTO in order to constrain the US.”<sup>49</sup> There was also a concern that “we were going to translate into this new MTO all the defects of the GATT.” Moreover, the US team was “concerned that the formal organization might develop United Nations-type habits and practices,” observed Andrew Stoler, a former US trade negotiator, and thus might “become politicised over time and therefore less able to deal with trade on a business-like basis” (Stoler, 2003: 2). Members of Congress who visited Geneva were more worried about the associated reforms to the dispute settlement system than the creation of a new organization *per se*, with automaticity in the adoption of panel reports being a matter of special concern.<sup>50</sup> The US misgivings intensified after September 1991, when a GATT dispute settlement panel produced a report that found against US laws that restricted imports of tuna from countries that did not use dolphin-safe fishing practices. Although the tuna–dolphin panel report was never adopted, and the United States was not obliged to change its law, this and other cases



added to concerns that strict dispute settlement rules in international organizations could undermine sovereignty.

The opportunity came in the potential to leverage other countries' worries over how Congress might react. Would the legislature revert to the established pattern and reject an Uruguay Round deal if it were tied to a new international organization? While anti-institutional recidivism was indeed possible, the US negotiators were in a far better position than their counterparts to gauge the real extent of the danger. Knowing that the United States was a *demandeur* on the most critical issues in the round, especially services and intellectual property rights, and that these goals had the backing of industry associations and key members of Congress, they could treat the proposed new institution as part of a larger package. Thus the grand bargain: if the United States had its way on the new issues, it would be willing to give up the hated "reciprocity" policy, agree to a stricter dispute settlement system, and accept the establishment of a true international organization.

In this environment, any fears that Congress might reject the WTO could strengthen the US negotiators' position, allowing them to tell their counterparts that the best way to stave off potential disaster would be to tie the institution to a package of substantive commitments that was too attractive for Congress to kill. This episode thus joined many others in which the US side has played an effective game of "good cop, bad cop". That staple of police dramas is familiar to any viewer of US films and television: one policeman threatens harm to a suspect who is under interrogation, but his more sympathetic partner seeks to win the suspect's trust – and confession – by protecting him from the bad cop. In much the same way, negotiators in the executive branch can sometimes point to an apparently uncontrollable Congress in order to avoid making commitments that they say would be unacceptable on Capitol Hill, or to obtain commitments from other countries that they claim are the *sine qua non* to securing congressional approval for the final deal. While there are no doubt occasions when this posturing involves a degree of manufactured brinksmanship, the fact that Congress did indeed reject several important agreements in the past ensures that not all threats can be dismissed as bluffs.

US Trade Representative Carla Hills's (see Biographical Appendix, p. 580) first reaction to the proposal for a new organization was to offer support to her ministerial colleagues in private but to emphasize in public "the need to develop the new body of trade rules, with an emphasis on USA priority issues, before building the so-called 'court house.'"<sup>51</sup> One way to reconcile these differences, and to buy some time, was to approach the issue on a technical basis. At a meeting of Quad trade ministers in California during 2-4 May 1990, she proposed "that an Experts Group work to prepare the ground for a political decision by Ministers in December" when they met in Brussels. Ms Hills would later give her representatives in Geneva the authority to negotiate but not to agree to anything. She also told her fellow ministers that she would "engage in a detailed discussion of this matter with the United States Congress, given its sensitivities to having any international trade organization approved."<sup>52</sup>

The United States never expressed absolute opposition to the MTO or moved definitively to withhold consensus, but instead took a two-pronged approach. The first prong concerned the proposal itself, which the US negotiators sought to modify at the margins (as discussed below). The second prong concerned the place of this proposal in the larger Uruguay Round package. The fact that the United States reserved until the last moment its right to withhold consensus on this part of the package allowed the US negotiators to press other countries hard on the new issues. This was a risky negotiating strategy and the US team could not be sure that it would solve both of the traditional problems. As for the Geneva problem, the US negotiators initially had great doubts “that the support for and the pressure for a real MTO, with real rules and real dispute settlement, would be widespread enough that all these other countries would accept it,” Mr Yerxa would later recall. Concerning the Washington problem, the officials in Geneva also had to contend with “people back home who ... began to get very worried because they said, ‘I’m not sure [about] moving all this towards strict rule of law where we’re going to have to tell our Congress that we can’t stop a ruling against us.’”<sup>53</sup> They nonetheless were able to operate in the space that fell between these twin sets of misgivings.

The seriousness of a US threat to withhold approval of the institution was perceived very differently in some quarters than in others, especially at the later stages of the negotiations. While some of the negotiators who were involved in the institutional negotiations recall being worried about a US rejection right up to the end of the talks, Sir Leon Brittan (see Biographical Appendix, p. 575) did not share that concern in the endgame. By the time that he became the European trade commissioner in 1993, the Americans “knew, and we knew, that there was pretty much a consensus on the institutional reforms,” and an implied US threat to withhold consensus on these matters “wasn’t actually going to give them much leverage.” It “was a formality and pretty much an artificiality to claim that as a sort of lever.”<sup>54</sup>

In the end, the US negotiators’ strategy was vindicated in both Geneva and Washington. In Geneva, they managed to get much of what the United States sought on the new issues, with only the TRIMs negotiations producing a real disappointment. In Washington, the final vote in favour of the Uruguay Round Agreements Act of 1994 was wider than feared. It passed by 288 to 146 in the House of Representatives and 76 to 24 in the Senate, with some of the potential opponents in the upper chamber having been placated by the creation of a mechanism under which Congress might contemplate withdrawal from the WTO in the future. This outcome suggests that the Geneva community may have over-learned the lessons of the Havana Charter and the other agreements that Congress had rejected, and overestimated the likelihood that history might repeat itself. It also shows how the Bush and Clinton administrations succeeded in triangulating the twin problems of Washington and Geneva more successfully than had the Wilson and Truman administrations before them, devising an approach that played one town against the other.

### *Negotiations over the details*

Before that vote could come in Washington, as well as similar decisions in the capitals of other future WTO members, the precise terms of the agreement creating the new organization had to be settled. Here the concerns over a distraction from the real work of the round abated

after 1990. The failure in Brussels created more breathing room for the proponents of a new institution, as there was no longer a perception that negotiators could not afford to spend time creating a new institution when they still had so much heavy lifting to do on the other issues.

The development of the draft charter fell to the Institutional Group chaired by Ambassador Julio Lacarte (see Biographical Appendix, p. 583) of Uruguay. A living legend in the trade community, Mr Lacarte already had a long and distinguished career that included participation in all eight GATT rounds as well as stints as GATT deputy executive secretary from 1947 to 1948, ambassador from 1961 to 1966 and from 1982 to 1992, and chairman of the GATT Council. It is doubtful whether the proposal to create a new institution would have survived without Mr Lacarte's leadership and his strategically elastic approach to the interpretation of his terms of reference at different points in the negotiation. He would read those terms narrowly or broadly as the situation demanded. Early in the process, this meant rejecting the arguments of some countries that the MTO negotiations were going well beyond anything mandated by the Punta del Este Ministerial Declaration. Later, it meant rejecting a US proposal that would fall far short of creating a new institution by arguing that his terms of reference from Director-General Peter Sutherland had been to complete the MTO negotiations rather than to find an alternative.

This Institutional Group, known less formally as the Lacarte Group, produced the text on the MTO that was eventually folded into the interim agreement known as the Dunkel Draft. It was based largely on a Canadian–EC proposal that Mexico co-sponsored. Named after GATT Director-General Arthur Dunkel, the Dunkel Draft included compromise texts of all the agreements pending in the negotiations. Among the innovations in this December 1991<sup>55</sup> document was the first appearance of a draft charter for a new institution. Annex IV of the draft, entitled “Agreement Establishing the Multilateral Trade Organization”, tracked in its main points what eventually became the Agreement Establishing the World Trade Organization. Several changes were made between the draft and the agreement, however, many of them in response to concerns expressed by Japan, the United States and others.

The principal focus of the US negotiators in these institutional deliberations was on the decision-making rules. Consensus was already an established if unwritten practice, but the EC and Canadian proposals would build upon the then-moribund GATT provisions that called for voting. At their urging, the Dunkel Draft had provided that “each member of the MTO shall be entitled to one vote, and, except as otherwise provided for in this Agreement, decisions of the ministerial conference or the general council shall be taken by a majority of votes cast.” This article followed more or less the letter of GATT Article XXV (Joint Action by the Contracting Parties), paragraphs 3 and 4 of which provided that “[e]ach contracting party shall be entitled to have one vote at all meetings of the CONTRACTING PARTIES” and that “[e]xcept as otherwise provided for in this Agreement, decisions of the CONTRACTING PARTIES shall be taken by a majority of the votes cast.”<sup>56</sup>

Backed by India, Japan and others, which instead insisted that consensus be enshrined as the core decision-making rule, the United States won this fight. As finally approved, WTO Article IX

provides that “[t]he WTO shall continue the practice of decision-making by consensus followed under GATT 1947,” and that “the matter at issue shall be decided by voting” except “as otherwise provided” and in cases “where a decision cannot be arrived at by consensus.”<sup>57</sup> The major innovation was not in establishing the rule of consensus but in recognizing it explicitly and in elaborating upon it in a footnote that specified that “[t]he body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.” Only where consensus is not practicable may decisions be taken by majority voting.

Similar issues arose on the matter of amending the agreements, with comparable results. Canada and the European Community were alone in their desire to change the rules in order to make it easier to amend agreements, providing that amendments could be approved after a consensus decision had been taken to approve them but when only two thirds of the members had ratified the amendments. Article X instead provides for a much more complicated procedure for different types of amendments requiring different voting thresholds, but ratification by all members is required for most amendments other than those to the DSU. Some scholars contend that in practice the amendment procedures are almost impossible to utilize.

These were among several changes that the US negotiators obtained. They also had concerns “that the shift to an organization model might change our relationship with the Secretariat that, under GATT, had no real power of initiative,” according to Stoler (2003: 2), and wanted to ensure in the negotiations that “the trade body [would] remain a member-driven organization.” One issue on which the US side held its fire until the very last moment was the title of the organization; but for that intervention (see Box 2.2), the new institution’s place on the list of international organizations would have fallen alphabetically between the Multilateral Investment Guarantee Agency and the Nonaligned Movement rather than in its current place at the very end of that list.

The move from provisional to definitive application meant eliminating the non-conforming measures that had been grandfathered in GATT (i.e. pre-1947 measures that countries retained despite their incompatibility with GATT principles). However, the US negotiators insisted on retaining one such item that was for them the most sacrosanct of the sacred cows. Mr Stoler was “forced to spend an enormous amount of time and effort negotiating the preservation in the MTO Agreement of the exemption for American Jones Act restrictions” (Stoler, 2003: 1). The Jones Act provides for the strict enforcement of cabotage (i.e. coastwise shipping) rules.<sup>58</sup> The United States eventually won a special exemption for this in paragraph 3 of GATT 1994, which Mr Stoler would later refer to as “the ugly birthmark on the new-born baby” (*ibid.*). The European Community and Japan both strongly opposed continuation of existing grandfather rights under the new institution, at least as a general principle, though that did not prevent them seeking special dispensation of their own. The Europeans placed a high priority on retaining the “voluntary” export restraints that restricted Japanese automotive exports to their market, for example, although this differed from the Jones Act exclusion both in being more recent (dating from the late GATT period) and in being eliminated after four years rather than retained indefinitely.

### Box 2.2. The upside-down M: how the WTO got its name

In their 1990 proposals, both John Jackson and the government of Canada had suggested that the new institution be named the *World Trade Organization*, but that moniker was to last for only a few months. A few documents from the period, such as the Houston Economic Declaration of 11 July 1990, referred anachronistically to an *International Trade Organization*. From mid-1990 until the very final hours of the Uruguay Round, the proposed new body was instead called the *Multilateral Trade Organization* (MTO), as the European Community had originally proposed. The European preference for the term "multilateral" reflected a concern that the institution could not be deemed a world body as long as some of the largest economies were not members. This objection made more sense in the early 1990s than it would two decades later, following the accessions of such major economies as China, the Russian Federation, the Kingdom of Saudi Arabia and Viet Nam.

It was not until the endgame of the round that negotiators flipped the M back to a W, when the United States insisted that the term "world" was easier to explain and even to pronounce than "multilateral". The US negotiators made their plea for a change in the institution's name literally at the last minute. Considering that the United States had withheld its support for the institution altogether up to that point, the change in name seemed to the rest of the countries to be a very modest price to pay in order to achieve consensus.

In 1990 and 1994, few seemed aware that the new WTO was about to encroach on the intellectual property – or at least the initials – of another international organization. The designation of "WTO" had already been used by the Madrid-based World Tourism Organization since 1970. For a time, it appeared that the newborn WTO might find itself in the same bind that, a decade later, would oblige the World Wrestling Federation (which was found to have poached on the territory of the World Wildlife Fund) to change its name to World Wrestling Entertainment. The US mission was so concerned over this prospect that it had its intellectual property experts investigate the issue, but they concluded that there was little likelihood that the two institutions might be mistaken for one another. Just to be safe, however, a diplomatic solution was found. By referring henceforth to the new WTO as the WTO-OMC, with the latter three letters standing for the name of the organization in the other two official languages of French and Spanish, the distinction between the organizations was deemed to be great enough. The tourism organization sometimes supplements this differentiation by referring to itself as the UNWTO.

The United States suggested not just tweaks but alternatives, including a November 1993 proposal for a General Agreement on Trade (GAT) that would create a new and expanded protocol for the Uruguay Round agreements without establishing a wholly new institution. The officials who then led the negotiations have since characterized the GAT proposal as having been "a holding position" only, being part of the US tactic of concentrating on the substance of the Uruguay Round before agreeing to creation of the institution. That holding position had little chance of being adopted, as it was opposed by other countries, but it contributed to the tactical objective of reminding other parties that Congress might ultimately reject any agreement that did not deal ambitiously with the items of interest to the United States.

The only other notable differences between the MTO provisions in the Dunkel Draft and the final terms of the WTO Agreement concerned the details of the budget and contributions (Article VII) and the decision to tuck into this agreement – presumably because there was no better place where it might fit – a statement in Article XI.2 that "[t]he least-developed

countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities."

The final negotiations in the institutional group took place on 14 November 1993, one month and a day before the concluding session of the Trade Negotiations Committee. The critical issues at the end of the process centred on voting issues, and Mr Lacarte set out to bridge the gaps between the contending sides. This he did with a combination of proposals, pressure and pizza (see Box 2.3). The negotiations over the MTO – soon to be renamed the WTO – were done.

### **Box 2.3. Julio Lacarte's account of the final negotiations on institutional issues**

*Author's correspondence with Mr Lacarte on 18 February 2013.*

The conversations in the institutional and dispute settlement group had come to a standstill basically over the voting issues in the proposed WTO. This was a serious obstacle that had to be overcome. My analysis of the situation was that there were four delegations standing at opposite ends of the negotiating spectrum: they were the United States and the European Community on one side, and Brazil and India on the other. All other participants seemed to hold views that fell one way or the other, between these extremes.

I decided to break the deadlock, and I privately drafted four short texts that were contained in one page and covered the contentious issues. I did not endeavour to write down what my personal views were, but concentrated exclusively on what I felt was a reasonable and hopefully acceptable compromise among many differing opinions. Then, I proceeded to invite the four to share a pizza with me at lunch time in one of the WTO offices, and distributed my single page to them, warning that this was the only time I would make any move to bring together delegations and that if I failed then they could expect no more efforts from me. There ensued a silence while the four absorbed the significance of my proposal, and then they accepted it.

The group was meeting that afternoon, and I started by stating that I had a proposal to make covering the outstanding issues, that it was a take it or leave it without the change of a single comma, and that if it was not accepted then the group could expect no further contribution from me. As I was speaking, my proposal was being distributed among the delegates, and the representative of Morocco – who had made many good contributions to our work, but was somewhat highly-strung – when he saw the contents of the paper called out spontaneously "I cannot accept this!". This was a crisis in the making. I immediately took a strong line, interrupting my statement and asking him if he was interrupting me, if he was asking to take the floor, and adding that if this were the case, I would yield to him so he could say what he had in mind. Obviously, my words put him in a very awkward position, and he immediately withdrew.

I was nearly at the end of my statement, and there followed a long and deathly silence which I did nothing to break. I just sat there with a stone face. It was the moment of truth and everybody in the room was pondering what to do. Finally, Debra Steger – who had worked so constructively and intelligently at all times – asked for the floor and said in very brief words that Canada could accept the chairman's proposal. She was followed by the Japanese representative, who spoke in the same vein, and after that the rest gave their assent. The problem had been solved.

### *Completing and approving the Uruguay Round*

The end-game of the Uruguay Round began when three new leaders took office. In January 1993, Sir Leon Brittan became the European commissioner for trade and Mickey Kantor (see Biographical Appendix, p. 582) was sworn in as the new US trade representative. In the coming weeks, they both invited Mr Sutherland to be their candidate to replace Mr Dunkel at the head of GATT. Mr Sutherland was to take office on 1 July, and together with Sir Leon and Mr Kantor he worked to bring the round to a successful finish.

These three men played indispensable parts in bringing the round to a conclusion. It was essential that Mr Kantor and Sir Leon reached the compromises necessary for the negotiations to reach a critical mass. Their agreements alone could not solve the Uruguay Round, however, as this also required the engagement and agreement of other key participants among developed and developing countries. Mr Sutherland managed to mobilize support among these parties by reinvigorating the negotiations and engaging directly with political leaders and trade negotiators, and also by brokering compromises on issues that had stumped the negotiators. Taking the longer view, the conclusion of the Uruguay Round may be seen as the last hurrah of a system in which a trio of EC–US lawyers-turned-diplomats had it in their power to make or break a multilateral trade negotiation. It took some time for others in the WTO period to recognize that while the successors to these triumvirs continued to exercise great influence they would need to attain a much wider consensus to conclude any deal.

The replacement of Mr Dunkel as director-general, which was not entirely voluntary on his part, was a EC–US response to the sense that negotiators were stuck on disagreements over essentially technical points and had lost track of the larger rationale for completing the round. Mr Dunkel received great credit for having shepherded the negotiations to that point, and especially in putting together the 1991 draft that bore his name, but Sir Leon and Mr Kantor thought that new blood was needed to make the market access deals and clear the obstacles in that draft. There had been a breakdown of trust between Mr Dunkel and the major negotiators, and it was time to replace the detailed knowledge of a specialist with the instincts of a politician. Mr Sutherland's task would be to strike the bargain, marshal the arguments for ministers and the media, and ensure that the final terms were acceptable and accepted.

In early 1993, Sir Leon and Mr Kantor sounded Mr Sutherland out about the possibility of becoming the new director-general. They called him to Brussels to discuss the matter, where he had dinner one evening with Mr Kantor and breakfast the next morning with Sir Leon. Mr Sutherland knew Sir Leon well, having been his predecessor as the European commissioner for competition, but he had not previously met Mr Kantor. He doubted whether the job could be done, given the parlous state of the negotiations, but Mr Kantor persuaded him otherwise. "Look into my eyes," he later remembered Mr Kantor having told him. "I know, and President Clinton knows, that you don't go down in history books for failing to reach agreements."<sup>59</sup> Mr Kantor, who had only recently become a trade maven in a crash course of his own, also persuaded Mr Sutherland that political acumen was more vital to the job than an intimate knowledge of the intricacies of the subject. Mr Sutherland weighed the attractions of the challenge and its impact on his family, decided to take the plunge, and after he made the

rounds in Geneva and won a race against Julio Lacarte, the job was his. He came in on the understanding that he would do this solely for two years, which thus set a natural deadline for the conclusion of the talks.

Mr Sutherland's perspective was informed by his vision of governance and constitutional structure. He was a committed European integrationist from early on, being inspired by the ideas and achievements of Jean Monnet and having served as attorney general of Ireland during a period "when nationalism demonstrated the extremities to which it might bring events."<sup>60</sup> Although he claimed to know nothing about trade, that was not entirely true. After moving on to the European Community, he put his integrationist ideals into practice, becoming a member of the team in 1985 that developed the Europe 1992 programme providing for the free movement of goods, persons, capital and services. While serving as competition commissioner, he had deregulated airlines and telecommunications and when he also held the social portfolio for a year, he was instrumental in creating the Erasmus study-abroad programme, which promoted free movement of persons within the European Community. Mr Sutherland became interested in GATT and the round at the time he left the European Commission, and discussed the topic at meetings of the Bilderberg Forum, a transatlantic gathering of EU and US citizens and officials. There he became acquainted with both Mr Dunkel (who was to be his predecessor) and Mike Moore (who was to be one of his successors). By disposition, experience and reputation, he was thus well-positioned when he got the tap.

Mr Sutherland decided that he "had to hit the ground like a bomb or else it wouldn't work,"<sup>61</sup> as otherwise he ran the risk of being stuck in the same institutional lethargy that then enveloped the round. Employing tactics the likes of which had never been seen before in GATT and that (to his later consternation) would not be repeated when the Doha Round fell into an even longer funk, he worked to create the sense of unstoppable momentum. "You shape political events by creating public perceptions,"<sup>62</sup> Mr Sutherland would later say, and he set about using the press and research sections of the institutions more aggressively. The first member of the Secretariat staff with whom he met was press officer David Woods, telling him that "the only way we can win this is by playing a political game that's never been played before in this organization."<sup>63</sup> He mobilized a more aggressive public relations campaign than the staid GATT had ever before seen.

The Europe 1992 project had taught Mr Sutherland that setting a firm deadline, even if it is arbitrarily chosen, can focus negotiators' attention and give them a sense of urgency. He therefore set 15 December 1993 as the goal for concluding the round, implying that he might resign if this deadline were missed. That date dovetailed with a legal deadline in US trade law. The grants of "fast track" negotiating authority that Congress makes to presidents<sup>64</sup> always come with a two-part deadline, providing a date by which any agreements must be signed if they are to receive the special protections of this law, and further requiring that presidents give Congress advance notice 90 days before signing those agreements. At the end of June 1993 – at precisely the same time that Mr Sutherland took office – Congress enacted a bill<sup>65</sup> that renewed fast-track authority solely for the purpose of concluding the round, and covering



any agreements that might be signed before 16 April 1994. This renewed authority was necessitated by the expiration of the previous grant of fast-track authority on 31 May 1993.<sup>66</sup> Taking that 90-day notification into account, for purposes of US law the round's real deadline was precisely one month after 15 December. It would be unrealistic to expect negotiators to work over the Christmas and New Year's holidays, however, so mid-December made more sense than mid-January as the drop-dead date for the conclusion of the talks.

Mr Sutherland relied heavily on his three deputy directors-general. It had hitherto been a tradition in GATT to have both an American and an Indian deputy director-general, a custom that Mr Sutherland honoured with Warren Lavorel and Anwarul Hoda (see Biographical Appendix, pp. 584 and 581), respectively. He also increased the number to three, bringing on Jesús Seade (see Biographical Appendix, p. 593) of Mexico.<sup>67</sup> He told his deputies that whenever they agreed on any course of action, they could take his own assent as given, and thus act immediately without his formal clearance. Another key member of his team was Richard O'Toole (see Biographical Appendix, p. 588), who had been Mr Sutherland's *chef de cabinet* in the European Commission and joined him in this same capacity at GATT. Mr O'Toole also held the title of assistant director-general and became coordinator of the internal Secretariat Strategy Group, which advised the director-general on the conduct and progress of the negotiations. The other members of this group were the director-general, the three deputy directors-general and a floating membership of other Secretariat members who would attend for discussion of their areas of responsibility. Åke Linden participated in its discussions on legal and institutional aspects, including the WTO Agreement. "The group played an important role in helping the DG to analyse the evolution of the negotiations and the positions of key delegations," according to Mr O'Toole, "and thus enabled the DG to craft and target his messages to political leaders so as to move the negotiations forward."<sup>68</sup>

Mr Sutherland also took full advantage of the power to wield a gavel. He insisted that, like Mr Dunkel before him, he be made chairman of the Trade Negotiations Committee (TNC). The new director-general utilized the power of this office more aggressively than had his predecessor, introducing a new rule by which a text that was gavelled in the TNC was settled. Mr Sutherland also elevated the political level at which negotiations were conducted, or at least threatened to be conducted. "From the very beginning, I hit for the top," he would recall, meeting not just with ministers but with presidents and prime ministers, and "tried to keep the *amour propre* of the ambassadors under control, because many of them were prima donnas and wanted to feel that they were the ones who were running the show."<sup>69</sup> That could be done in part by maintaining the implied threat that he might go over their heads and contact their masters. He met with key political leaders throughout 1993, including UK Prime Minister John Major, French Prime Minister Édouard Balladur, German Chancellor Helmut Kohl, Japanese Prime Minister Morihiro Hosokawa and Indian Prime Minister P.V. Narasimha Rao.

The new director-general also pressed for conclusion of all of the negotiations that were then under way in the individual negotiating groups, including the institutional group that Mr Lacarte chaired. At the start of the round, Mr Lacarte had chaired the group negotiating in the allied field of dispute settlement rules; at the end of the round, his group dealt with this

topic as well as the proposed MTO. Mr Sutherland was especially eager for Mr Lacarte's group to consolidate and expand upon the gains that had been made in creating a more vigorous dispute settlement system, which he saw through a European lens. The European Court of Justice played a key role in enforcing the integration of Europe, and Mr Sutherland hoped that a strengthened Dispute Settlement Body could achieve much the same thing for the trading system. The other institutional issues were not as prominent in Mr Sutherland's plans, but the marching orders he issued to Mr Lacarte called for him to resolve the "unfinished business" in the Dunkel Draft and to complete the negotiations on the agreement establishing the MTO.

These issues were not prominent in the Brittan–Kantor–Sutherland bargaining. "The institutional issues were the easiest to deal with" at this stage of the negotiations, Lord Brittan would later recall. "The idea to create a new institution and for it to have more teeth than the GATT had was common ground."<sup>70</sup> At this stage, the transatlantic negotiations reverted to the traditional subject matter of trade negotiations, with the participants haggling over which tariffs would come down and by how much as well as how they would handle other sectoral issues (with audiovisual services being the most prominent point of conflict between Brussels and Washington). These negotiations were conducted initially on an EC–US basis, with other participants taking whatever bargains struck between these two largest contracting parties as the point of departure for any further commitments they sought.

The final negotiations on the MTO, as recounted earlier, were among several sessions that were completed in the days and weeks leading up to that 15 December deadline. Those committee deliberations, coupled with the many bargaining sessions between pairs of members who haggled over market access for goods and services, all came to an end with the closing ceremonies of the negotiations on 15 December. The next step was to bring back the ministers, with the last ministerial conference of the GATT system being held in Marrakesh, on 14–15 April 1994. That meeting, which was (not coincidentally) held immediately before the US grant of fast-track authority was due to expire on 16 April, was more of a signing ceremony than a negotiating session.

While the institutional issues had a low profile for most of the final negotiations in Geneva, they rebounded in importance when the locus shifted to Washington. Late in 1994, there was some nervousness about the possibility that Congress might reject the agreements. The debate over approval of the North American Free Trade Agreement in the previous year had been acrimonious and led to only a narrow victory. The congressional debate over the Uruguay Round agreements came in the immediate aftermath of the 8 November 1994 elections, in which Republicans recaptured control of both chambers of Congress, and while that party had been more pro-trade than the Democrats since the 1960s, it was also an opposition party. As such, it could not be assumed to provide automatic support agreements that a Democratic president had negotiated. Mr Sutherland was therefore called to Washington to meet with members of Congress. The key meeting was with Newt Gingrich, who was about to become the first Republican to serve as Speaker of the House since 1955.<sup>71</sup> In addition to agriculture, Mr Gingrich's main concerns were over sovereignty. Mr Sutherland responded with a detailed

description of how, in contrast to the rules of the European Community, there was no direct applicability of WTO law and hence no threat to the sovereignty of the United States. That explanation apparently satisfied the speaker-elect, who joined with the majority of his fellow Republicans to vote for the package. It won majorities from members of both parties and in both chambers. The Marrakesh agreements thus escaped the fate of the Treaty of Versailles and the Havana Charter.

The Uruguay Round agreements came into effect on 1 January 1995, the first day of the WTO period.

## Endnotes

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- 1 One might also note that Mill's observations came precisely a century after Montesquieu made substantially the same argument in *De l'esprit des lois* [*The Spirit of Laws*], in which he said that the "natural effect of commerce is to bring peace" because when two nations "negotiate between themselves [they] become reciprocally dependent, if one has an interest in buying and the other in selling" (Montesquieu, 1748: Book XX, Chapter 2).
- 2 A cynic might argue that the repeal of the Corn Laws affected war in Europe not by reducing its frequency but by redirecting its conduct. By moving from an inefficient but self-sufficient producer of food to a more efficient but vulnerable net food importer, Great Britain indirectly encouraged the German general staff to adopt the doctrine of submarine warfare that was central to its naval strategy in two world wars.
- 3 Wilson proposed the Fourteen Points in a speech to a joint session of Congress on 8 January 1918. See [http://avalon.law.yale.edu/20th\\_century/wilson14.asp](http://avalon.law.yale.edu/20th_century/wilson14.asp).
- 4 "A free trade union should be established under the auspices of the League of Nations of countries undertaking to impose no protectionist tariffs whatever against the produce of other members of the union," Keynes (1920: 265) suggested, and "Germany, Poland, the new states which formerly composed the Austro-Hungarian and Turkish empires and the mandated states should be compelled to adhere to this union for ten years, after which time adherence would be voluntary. The adherence of other states would be voluntary from the outset."
- 5 Germany and Japan both withdrew from the League of Nations in 1933. The Soviet Union did not join until 1934 and was expelled in 1939. The United States never joined, but did participate in the International Labour Organization from 1934 forward.
- 6 For more details on these efforts, see League of Nations (1942).
- 7 The Senate actually voted to approve the treaty, but only after approving a series of amendments that were deliberately designed to make the end result unacceptable to Wilson.
- 8 For a narrative and documentary history of these deliberations see United States Department of State (1949). For further details on the views of US policy-makers, as well as the positions taken by the United Kingdom, see the analysis and primary materials in Irwin et al. (2008).
- 9 This point is elaborated upon in Brown (1950: 20-22) and Jackson (1967).
- 10 The initiative is discussed in Hudec (1990: 72-73).
- 11 These efforts are discussed in greater detail in Chapter 8.
- 12 See *Ministerial Declaration on the Uruguay Round*, GATT document MIN.DEC, 20 September 1986.
- 13 As discussed in Chapter 10, government procurement was not a part of GATT 1947 but was covered in an agreement reached in the Tokyo Round.
- 14 The agreement in question provided for an injury test in countervailing duty (CVD) investigations, meaning that CVDs could not be imposed upon imports that are subsidized unless it was found that these imports caused or threatened to cause material injury to an industry in the importing country. The United States took the position that only those countries that signed the subsidies code, or that were otherwise legally entitled to it, had a right to the injury test. Countries that did not receive this protection were thus more vulnerable to CVD investigations. In the WTO system, the United States extends an injury test to all members, insofar as the agreement on subsidies and countervailing measures falls within the single undertaking and therefore all members are signatories. Other countries contested this US interpretation of its obligations under the Subsidies Code.

- 15 Note however that the Punta del Este Ministerial Declaration did allow, like its Doha Round successor, for early harvests.
- 16 Properly stated, there is a single WTO Agreement that encompasses many other agreements within its scope. The Agreement on Agriculture, the TRIPS Agreement and so forth are all part of that agreement rather than stand-alone instruments. It is nonetheless common to refer to each of these instruments as if they were indeed distinct agreements, a practice that is followed here.
- 17 The term “single undertaking” appears nowhere in either the Marrakesh Protocol or the Agreement Establishing the World Trade Organization. However, Article II.2 of the latter agreement specifies that all of the “Multilateral Trade Agreements” that are listed in Annexes 1, 2 and 3 of the agreement are “binding on all Members”.
- 18 See Government of the United States, *Ending the Uruguay Round and Implementation of the Results*, 21 September 1990, p. 2.
- 19 *Ibid.*, p. 3.
- 20 *Ibid.*
- 21 Author’s interview with Mr Jackson on 9 January 2013.
- 22 It may be more correct to deem this development a *return* of Section 301 as a complement to the multilateral rules on dispute settlement, as the original rationale for the predecessor statute to this law (Section 262 of the Trade Expansion Act of 1962) was to provide authority that presidents would need to impose retaliatory measures in GATT disputes.
- 23 These calculations depend in part on how one chooses to classify some disputes that might arguably fall within more than one category. That is especially notable in the case of a series of disputes arising over trade in bananas which appear in one respect to be a dispute over agricultural products (as shown here) but might alternatively be seen as a dispute over trade in distribution services.
- 24 The package of results produced at the mid-term meeting are contained in the untitled GATT document MTN.TNC/11 of 21 April 1989. These include among others adoption of the TPRM, agreement that ministers would meet at least once every two years, and steps to improve coherence in global economic policy making (e.g. by inviting the heads of GATT, the IMF and the World Bank to strengthen their relations).
- 25 See *The History of the Consultative Group of Eighteen*, GATT document MTN.GNG/NG14/W/5, 9 June 1987. For a review of the FOGS negotiations, see Chapter 9 of Yi-chong and Weller (2004).
- 26 The critics of GATT often focused on the brevity of the period allowed for withdrawal under the Protocol of Provisional Application, which provided in paragraph 5 that a government could withdraw upon giving 60 days’ notice. Withdrawal from the WTO is no more difficult, however, also being accomplished simply by giving notice. The only difference is that it now takes six months rather than two.
- 27 Among the other speakers were GATT officials Richard Blackhurst and Deputy Director-General Charles Carlisle, US Ambassador Julius Katz and Shigeo Muraoka of Japan’s Ministry of International Trade and Industry.
- 28 See, for example, Mr Ruggiero’s comments to the press in which he said that GATT must become an international institution *a pieno titolo*, on the same footing as the IMF or the World Bank. “Ruggiero Sul GATT ‘Troppi Poteri Alla Commissione’”, *La Repubblica*, 20 December 1990, accessed on-line.
- 29 See Debra Steger, “Institutional Framework for the GATT” (no date; early 1990), internal discussion paper in the Canadian Ministry for External Affairs and International Trade, p. 1.

- 30 *Ibid.*
- 31 Author's interview with Mr Jackson on 9 January 2013.
- 32 Author's interview with Ms Steger on 26 September 2012.
- 33 Letter from Mr Crosbie to Mr Dunkel on 9 April 1990, p. 2. Note that these letters to Mr Dunkel and the other three Quad ministers were preceded three days earlier by a letter that Mr Crosbie wrote to Canadian Prime Minister Brian Mulroney (copied to other relevant Canadian ministers) apprising him of these plans.
- 34 Canadian officials would later elaborate upon their proposal in a more detailed paper that was first unveiled at a Quad officials meeting in Geneva held on 21 July. The paper entitled "Proposal for a World Trade Organization; Concept and Perspective", together with its annexes, ran to 13 pages. The second annex laid out a possible outline of an agreement in six parts and 40 articles, and included some provisions that would instead be dealt with in separate WTO agreements (notably the suggested annexes on the TPRM and the dispute settlement procedures).
- 35 See "MTN: Strengthening the Multilateral Trading System", p. 3, appendix to Minister for International Trade, "Canada Crosbie Presents Detailed Proposal for Strengthening the GATT System," News Release No. 082, 19 April 1990.
- 36 *Ibid.*, p. 5. The paper did not suggest whether this be done by Canada alone or in concert with other countries, using instead the ambiguous construction "Canada would propose to come forward with a draft ..."
- 37 The paper entitled "MTN: Dispute Settlement" (10 April 1990) was nine pages in length and divided into sections entitled "Consistent Framework", "Review of Panel Reports", "Adoption", "Appellate Mechanism" and "Implementation". The paper stressed that an improved dispute settlement mechanism would "obviate the need for any contracting party to act unilaterally, outside the trading rules, to resolve trade disputes arising under trade agreements" (p. 1).
- 38 See Houston Economic Declaration of 11 July 1990, at [www.g8.utoronto.ca/summit/1990houston/declaration.html](http://www.g8.utoronto.ca/summit/1990houston/declaration.html).
- 39 See *Communication from the European Community*, GATT document MTN.GNG/NG14/W/42, 9 July 1990, p. 3.
- 40 *Ibid.*, p. 4.
- 41 See GATT Secretariat note on the FOGS meeting of 25-26 June 1990, 27 June 1990, p. 1.
- 42 *Ibid.* See also Croome (1995: 273).
- 43 Author's interview with John Weekes (19 December 2012).
- 44 In the 11 May 1990 draft of a letter from Mr Crosbie to Canadian Prime Minister Brian Mulroney, Mr Crosbie stated that Mr Dunkel and "some trade ministers" had not given support to the proposal publicly but "they have indicated their full support to me privately" (p. 4).
- 45 Untitled speech before the Ministry of International Trade and Industry, p. 15. Exclamation point in the original.
- 46 See "Restructuring the GATT," memorandum from John Jackson to Debra Steger, 30 April 1990, p. 1.
- 47 See Minister for International Trade, "Canada Proposes Strategy for Creation of a World Trade Organization," News Release No. 077, 11 April 1990, p. 1.
- 48 See "MTN: Strengthening the Multilateral Trading System", p. 3, appendix to Minister for International Trade, "Canada Crosbie Presents Detailed Proposal for Strengthening the GATT System," News Release No. 082, 19 April 1990.

- 49 Author's interview with Mr Yerxa on 28 September 2012.
- 50 Author's interview with Charles Carlisle on 7 July 1992.
- 51 Draft of a letter from Mr Crosbie to Prime Minister Brian Mulroney, 11 May 1990, p. 2.
- 52 *Ibid.*
- 53 Author's interview with Mr Yerxa on 28 September 2012.
- 54 Author's interview with Lord Brittan on 17 January 2013.
- 55 More formally, *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, GATT document MTN.TNC/W/FA, 20 December 1991.
- 56 When the term CONTRACTING PARTIES was written out all in capital letters in a GATT agreement or document, this signified an action or decision by the contracting parties as a group. One would use the plural in lower case (capitalizing only the first letters) when referring to some action taken by two or more contracting parties on their own.
- 57 See Chapter 6 for further details on the rules regarding decisions in specific matters such as amendments and interpretations of the WTO agreements.
- 58 Cabotage rules generally reserve coastwise shipping to vessels that are built, owned and crewed by citizens of the country in question. The Jones Act is a frequent irritant in US trade relations with the European Union.
- 59 Author's interview with Mr Sutherland on 18 January 2013.
- 60 *Ibid.*
- 61 *Ibid.*
- 62 *Ibid.*
- 63 *Ibid.*
- 64 See Chapter 6 for a more detailed description of the importance of the fast track (or trade promotion authority) for US trade negotiations and the multilateral system.
- 65 Public Law 103-49.
- 66 That grant of authority had been made by the Omnibus Trade and Competitiveness Act of 1988 (Public Law 100-418). The law provided authority for agreements through 21 May 1991, as well as a single, two-year renewal of that authority if requested by the president and not denied by Congress. For all of the dates on the enactment and expiration of this grant of authority, as well as those that came before or after it, see Smith (2006).
- 67 The creation of this third position and the selection of Mr Seade to fill it were part of a deal reached between Mr Lacarte and Mr Sutherland (see Chapter 14).
- 68 Author's correspondence with Mr O'Toole on 17 October 2012.
- 69 *Ibid.*
- 70 Author's interview with Lord Brittan on 17 January 2013.
- 71 The votes on the Uruguay Round Agreements Act took place in a special, "lame duck" (i.e. post-election) session of the outgoing Congress. The House of Representatives voted for the bill on 29 November 1994 and the Senate on 1 December 1994. The new Congress would be seated the next January.

## Appendix 2.1. Issue coverage of the multilateral trading system under different legal regimes

	<b>Havana Charter (1947)</b>	<b>GATT (1947)</b>	<b>Uruguay Round agreements (1994)</b>
<b>Provisions that are similar or identical across all three regimes</b>			
MFN treatment	Unconditional MFN required for all members, but some preferential agreements are grandfathered (Art. 16).	Same as the Havana Charter (Art. I).	Carried over from GATT 1947 into the WTO through GATT 1994.
National treatment	National treatment required on matters of internal taxation and regulation (Art. 18).	Same as the Havana Charter (Art. III).	Carried over from GATT 1947 into the WTO through GATT 1994.
Tariffs	Members are required to engage in tariff-reduction negotiations upon request on a bilateral, product-by-product basis (Art. 17).	First schedules of concessions annexed (Art. II); Art. XVIII bis is the same as the Havana Charter.	Carried over from GATT 1947 into the WTO through GATT 1994.
Quantitative restrictions	Quantitative restrictions are generally banned, with some exceptions (Art. 20), and any restrictions are to be non-discriminatory (Art. 22).	Same as the Havana Charter (Arts. XI and XIII).	Carried over from GATT 1947 into the WTO through GATT 1994.
Exchange arrangements	The ITO is to cooperate with the IMF on exchange arrangements and related matters (Art. 24).	Same as the Havana Charter (Art. XV).	Carried over from GATT 1947 into the WTO through GATT 1994.
State trading	State trading enterprises must be non-discriminatory (Art. 29), and disciplines are also required for marketing boards (Art. 30), export or import monopolies (Art. 31) and the liquidation of non-commercial stocks (Art. 32).	Same as the Havana Charter (Art. XVII).	Carried over from GATT 1947 into the WTO through GATT 1994.
Freedom of transit	Members are to provide freedom of transit to the goods of all other members (Art. 33); a special provision is made for measures affecting frontier traffic (Art. 43).	Same as the Havana Charter (Arts. V and XXIV).	Carried over from GATT 1947 into the WTO through GATT 1994.
General exceptions	Subject to limitations, members may make exceptions for measures relating to human and animal health and safety, etc. (Art. 45).	Same as the Havana Charter (Art. XX).	Carried over from GATT 1947 into the WTO through GATT 1994.
Security exceptions	An exception is provided for actions that a member takes in pursuit of its essential security interests (Art. 99).	Same as the Havana Charter (Art. XXI).	Carried over from GATT 1947 into the WTO through GATT 1994.
Regional trade arrangements	Customs unions and free trade agreements are allowed, subject to disciplines (Art. 44).	Same as the Havana Charter (Art. XXIV).	Carried over from GATT 1947 into the WTO through GATT 1994.
<b>Havana Charter and WTO both more expansive than GATT 1947</b>			
Investment	Provisions for the promotion of investment and negotiated liberalization as well as investment safeguard measures (Art. 12).	—	Agreement on Trade-Related Investment Measures; commitments under Mode 3 of GATS.
Government procurement	State enterprises are to act consistently with general principles of non-discriminatory treatment (Art. 29).	—	Agreement on Government Procurement.



	<b>Havana Charter (1947)</b>	<b>GATT (1947)</b>	<b>Uruguay Round agreements (1994)</b>
Transparency	Members are to publish trade-related laws, regulations, judicial decisions, and administrative rulings promptly (Art. 38), and will communicate statistics and other information to the ITO (Art. 39).	GATT Art. X is the same as Art. 38 of the Havana Charter; no equivalent to Art. 39.	Decision on Notification Procedures as well as the transparency provisions in numerous WTO agreements.
Economic development	Chapter III provides for several forms of domestic action and international cooperation to promote economic development, including promotion of foreign investment, governmental assistance, "non-discriminatory protective measure[s] affecting imports" imposed to promote infant industries and trade preferences for developing countries.	GATT Art. XVIII is much less expansive than Chapter III of the Havana Charter; GATT 1947 was amended in 1965 with a new Part IV dealing with developing countries.	Decision on Measures in Favour of Least-Developed Countries as well as special and differential treatment provisions in numerous WTO agreements.
Balance of payments	Members may take action to remove maladjustments in the balance of payments (Art. 4) and may impose restrictions to safeguard the balance of payments (Art. 21), with further exceptions in the post-war period (Art. 23).	GATT Art. XII is the same as Art. 21 of the Havana Charter; GATT Art. XIV is less expansive than Art. 23 of the Havana Charter.	Understanding on the Balance-of-Payments Provisions of GATT 1994.
<b>WTO provisions that build significantly upon the Havana Charter and GATT 1947</b>			
Audiovisual services	Screen quotas for cinematograph films permitted, subject to negotiated reduction (Art. 19).	Same as the Havana Charter (Art. IV).	Some members made commitments in this sector in their GATS schedules.
Anti-dumping and countervailing duties	Members are permitted, within specific limits, to impose anti-dumping and countervailing duties (Art. 34).	Same as the Havana Charter (Art. VI).	Agreement on the Implementation of Article VI of GATT 1994 and Agreement on Subsidies and Countervailing Measures.
Safeguards	Members may suspend concessions in case of injurious imports (Art. 40).	Same as the Havana Charter (Art. XIX).	Agreement on Safeguards.
Geographic indications	"[T]ariff descriptions based on distinctive regional or geographical names should not be used in such a manner as to discriminate" (Art. 36.6), and members will prevent "use of trade names ... to the detriment of the distinctive regional or geographical names of products of a Member country which are protected by the legislation of such country" (Art. 37.7).	GATT Art. IX.6 is the same as Art. 37.7 of the Havana Charter.	Articles 22-24 of the Agreement on Trade-Related Aspects of Intellectual Property Rights.
<b>WTO provisions not found in the Havana Charter or GATT 1947</b>			
Agriculture	—	—	Agreement on Agriculture and its schedules and the Agreement on the Application of Sanitary and Phytosanitary Measures.
Intellectual property rights	—	—	Agreement on Trade-Related Aspects of Intellectual Property Rights.

	<b>Havana Charter (1947)</b>	<b>GATT (1947)</b>	<b>Uruguay Round agreements (1994)</b>
Rules of origin	—	—	Agreement on Rules of Origin.
Services	—	—	General Agreement on Trade in Services.
<b>Havana Charter provisions not found in GATT 1947 or WTO</b>			
Employment	Members to cooperate in promoting full employment (Arts. 2-3).	—	—
Inflation and deflation	Members may take action "to safeguard their economies against inflationary or deflationary pressure from abroad" (Art. 6).	—	—
Labour rights	"[E]ach Member shall take whatever action may be appropriate and feasible to eliminate [unfair labour] conditions within its territory" (Art. 7).	—	—
Commodity agreements	Chapter VI provides for the negotiation of inter-governmental commodity agreements to stabilize prices and for other purposes, subject to certain disciplines.	—	—
Competition policy	Chapter V establishes disciplines on restrictive business practices, including the obligation to cooperate with the ITO in preventing restraints on competition.	—	—

*Notes:* This summary deals with substantive and not procedural matters. It does not cover the provisions of these agreement relating to the rules by which decisions are made, disputes are settled, the structure of the ITO and WTO, etc. Note that when an item in GATT 1947 is described as the "same" as a corresponding item in the Havana Chapter, this means that the coverage of the two agreements is similar. In many cases, there are small differences in the wording (e.g. referring to "members" rather than "contracting parties") and in some cases the substantive terms of the two agreements are different.