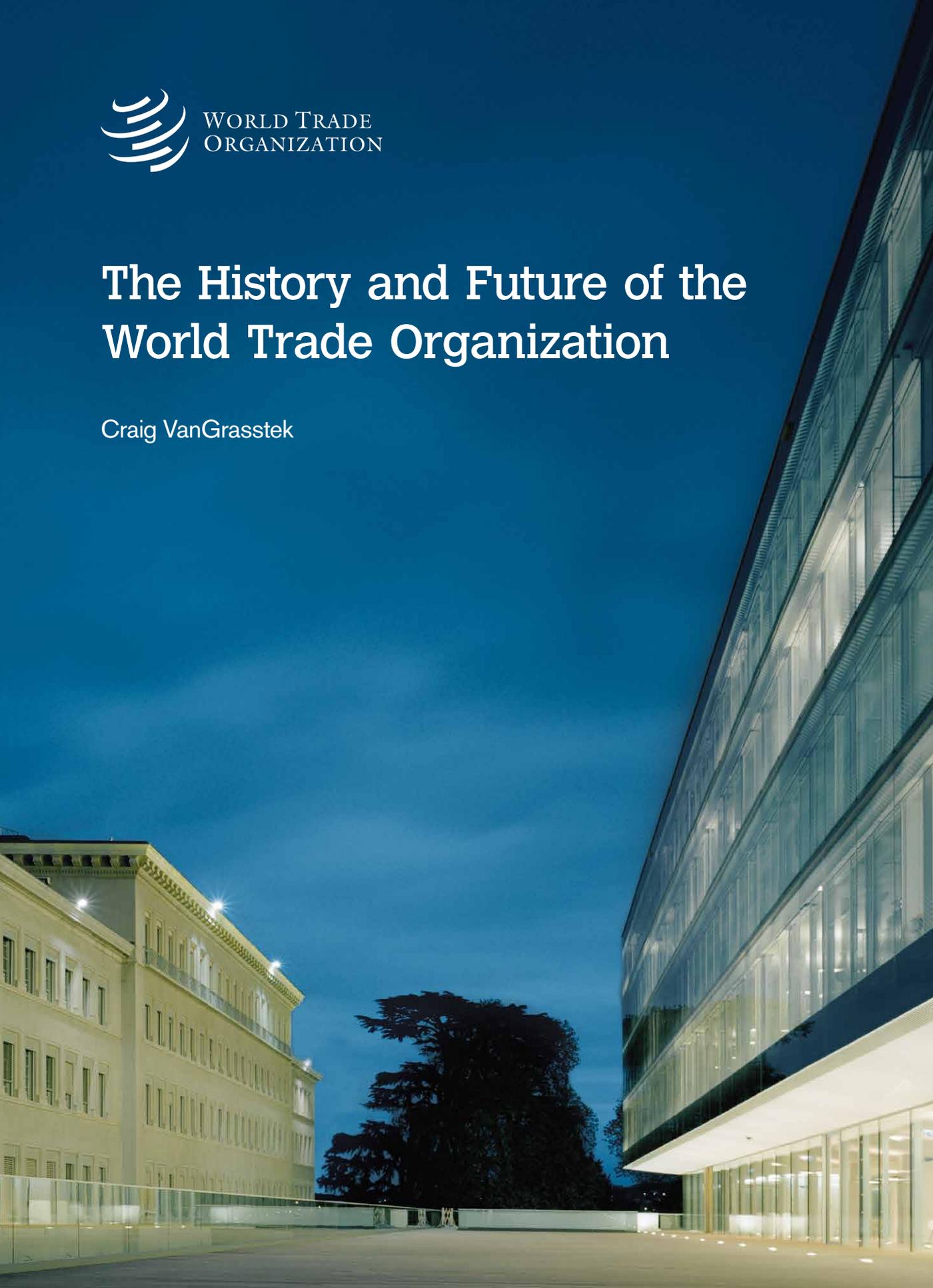




WORLD TRADE  
ORGANIZATION

# The History and Future of the World Trade Organization

Craig VanGrasstek



# THE HISTORY AND FUTURE OF THE WORLD TRADE ORGANIZATION

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**Craig VanGrasstek**



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*For Alma Crawford and Isidor Sherman,  
who both believed in education.*



## Preface by WTO Director-General Pascal Lamy

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“History,” wrote James Baldwin, “does not refer merely, or even principally, to the past. On the contrary, the great force of history comes from the fact that we carry it within us, are unconsciously controlled by it in many ways, and history is literally *present* in all that we do.” It is in this spirit that I have commissioned *The History and Future of the World Trade Organization*. The purpose of this work is to not only tell us about our past, but to explain our present and to inform our future.

The General Agreement on Tariffs and Trade (GATT) arose in 1947 out of the ashes of the Second World War, as did the International Monetary Fund and what we now know as the World Bank. It was the product of unprecedented international cooperation by an international community that was deeply scarred by the damage and destruction that endless warfare had brought about; an international community searching for an entirely new beginning and a new international order. While GATT certainly ushered in a new era of international cooperation, it nonetheless had to weather the aborted effort to create the International Trade Organization, pressures of numerous other national and regional conflicts, and the entire Cold War, before eventually morphing into the WTO. Over a decade and a half later, it is now high time for a history of the WTO – the successor organization that inherited GATT.

The recording and writing of history is no easy task and is subject to its own set of controversies. As many of you know, historians are in a constant quest for new perspectives, and would view this quest as the very lifeblood of historical understanding. However, the reinterpretation of history has sometimes been called “revisionism”, and it is frowned upon by some and even viewed with suspicion by others. But there can be no recounting of history without a point of view. Historian Eric Foner often recounts his conversation with an eager young reporter from *Newsweek*. “Professor,” she asked, “when did historians stop relating facts and start all this revising of interpretations of the past?” “Around the time of Thucydides,” he told her.

This does not mean of course that absolutely any account of our past can count as history. In writing *The History and Future of the World Trade Organization*, Professor Craig VanGrasstek adhered to the strictest professional standards which clearly demarcate truths from falsehoods. We must nevertheless accept that there exists more than one legitimate account of the history of this organization.

In constructing his narrative of the very complex past of the WTO, Craig not only explores the wide cast of characters and coalitions involved in *making* the WTO, but also walks us through the many different alleys of the organization – the well-known and the less well-known – that give us the story behind the story on numerous WTO agreements. In so doing, he opens our minds to new explanations of how the WTO has become what it is today. This also gives us a sense of where the WTO can go tomorrow.

To my mind, the problems underlying the Doha Round – which is an important part of the WTO's history of the past ten years – must be solved sooner or later, even if there is a less than complete outcome. This will preconfigure a future negotiating agenda. But the WTO is more than its negotiating arm. There is no doubt either that several new challenges lie at the doorstep of the multilateral trading system, whether they are part of WTO agreements or entirely new issues. In parallel, many members continue to liberalize their trade unilaterally or through preferential trade agreements between pairs or groups of countries, which move the bar higher. History shows that this is not new. The WTO is very much a response to a similar set of challenges with which the international community was confronted more than 20 years ago.

It is my sincere hope that *The History and Future of the World Trade Organization* will start a conversation about the WTO's future. The book will be translated into different languages and in addition to being made available through a variety of book-stores, it will be uploaded onto the WTO website for wider electronic dissemination. I am pleased that Craig, a historian at heart and an avid follower of the multilateral trading system, accepted this undertaking and wrote this publication in record time. The entire trade community has a debt of gratitude towards him.

Pascal Lamy  
WTO Director-General

## Foreword

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What chiefly makes the study of history wholesome and profitable is this, that you behold the lessons of every kind of experience set forth as on a conspicuous monument; from these you may choose for yourself and for your own state what to imitate, from these mark for avoidance what is shameful in the conception and shameful in the result.

Livy  
*The History of Rome*, preface (c. 27 BCE)

This book is a history in form but a biography in spirit. That term is technically inaccurate, as one cannot literally write the record of a life for something that does not live. To the extent that we can speak of the World Trade Organization (WTO) as if it were living, however, it is still young. In most of its members, the WTO would barely be of legal age to drink, drive and vote. It has nevertheless been around long enough to permit preliminary assessments of those events that have changed the composition of its membership and altered the ways that those members interact with one another. An underlying theme of this study is that the character of an international organization represents more than the sum of its parties, being the institutional embodiment of specific ideas and aspirations. The fact that the membership of the WTO is virtually identical to that of several other international organizations that deal with global economic issues does not mean that their members meet in these different institutions with identical aims or that they deal with one another in these forums in identical ways. In 18 years of practice, and in its inheritance from a half-century of the General Agreement on Tariffs and Trade (GATT) and two centuries of trade diplomacy before that, the WTO has received and developed a character that sets it apart from all other global institutions.

The main unifying element of this analysis is a focus on change over time. The presentation is more thematic than chronological, however, examining developments not in the sequential form of annals but instead by subject. Most of the information that follows is presented with a view towards either comparing the WTO with the GATT period or in illuminating the changes that have taken place over the WTO's own tenure. Reference is made throughout this book to the GATT period, which can be precisely defined as 1947 to the end of 1994, and to the late GATT period, which can less precisely be defined as starting sometime in the latter years of the Tokyo Round (1972-1979) or in the interval between that round and the Uruguay Round (1986-1994). There are some ways in which the WTO period resembles the late GATT period, and other respects in which they are quite different eras.

A few broad themes emerge in the story that follows. They concern the expanding scope of issues and associated controversies that are defined to fall within the trading system, the transformation of the WTO into a near-universal organization, the place of the WTO in the changing relations between its members, and the divergent evolution of the institution's legislative and judicial functions. Each of these themes entails continuity as well as change from the GATT period, but the changes outweigh the continuity. Those aspects of the WTO that appear superficially similar or even identical to GATT can be deceptive, lulling observers into a false impression that the WTO is just an incrementally wider and taller version of GATT. It is instead best seen as a greatly revamped order that reflects the profound economic and political changes that long ago left behind a world of import quotas, "voluntary" export restraints and unilateral enforcement, not to mention the revolutionary changes in the ways that words and ideas are communicated, goods and services are produced and traded, and states relate to one another. The WTO is a part of a global system in which countries are aligned very differently than they had been in the GATT period, both in trade and in other matters. Some that had once been outside the global market economy are now among its most active members, and others have moved from the periphery towards the centre. This is not your grandparents' multilateral trading system.

The most important development in the late GATT and WTO periods, and one from which so much else springs, has been the expanding scope of what we comprehend "trade policy" to be. For most of the GATT period, and for centuries before that, trade was understood to be principally or exclusively about the movement of goods across frontiers and trade policy was largely confined to initiatives affecting tariffs, quotas, and other border measures that tax, regulate or prohibit those transactions. That began to change late in the Tokyo Round, and especially in the Uruguay Round, when trade negotiators took on a much wider array of issues that vastly expanded the scope of the rules that they adopted. Trade now encompasses the cross-border movement not just of goods but of services, capital, ideas and even people. The expansion in what we understand trade policy to be all about was the principal reason for the transition from GATT to the WTO, as the earlier arrangement – which was more a contract than an institution – was considered to be too weak a vessel to contain the new issues. The creation of this new body did not put an end to the squabbles over what constitutes trade and trade policy, however, as WTO members continue to struggle over whether and in what ways the system might be stretched to deal with new issues. The potential scope of issues is quite broad, as the European Parliament demonstrated in 2011, when it approved a resolution identifying 15 other policy areas that "a modern trade policy is required to take into account."<sup>1</sup> These included not just the well-established matters of job creation as well as agricultural and industrial policy, together with development policy and foreign policy plus newer issues such as labour rights and environmental policy, but also (among others) the promotion of the rule of law, corporate social responsibility, protection of consumer interests and rights, and even neighbourhood policy.

Membership in the multilateral trading system grew in both the GATT and WTO periods, but in the latter period that expansion has been just as notable for the qualitative as it is for the quantitative changes. Acceding countries such as China, the Russian Federation and

Viet Nam not only dwarf most of the countries that joined in the late GATT period but also reflect fundamental changes in international relations. It is no mere coincidence that the GATT system and the Cold War had almost identical lifespans; GATT entered into force the year after the Marshall Plan began and a year before the North Atlantic Treaty Organization came into being, and the terms of the Agreement Establishing the World Trade Organization were reached two years after the collapse of the Soviet Union. One set of events did not create the other, but all of them can be seen as end-points in parallel political and economic systems. The statesmen who proposed the creation of this new organization in the early 1990s were acutely aware of the major changes then taking place in the world, and often cited them as reasons for remaking the legal and institutional basis of the multilateral trading system.

The changing relationships among WTO members are affected not just by the incorporation of former Cold War adversaries into the system but also by major shifts in the relative positions of other countries that have been in it from the beginning. A small circle of developed countries called the shots in the GATT period, but economic influence and political power are much more broadly distributed in the WTO period. The widening scope of membership, coupled with different rates of growth in developed and developing countries, can be seen in the relative decline of the Quad (Canada, the European Union, Japan and the United States) and the commensurate rise of emerging economies such as Brazil, China, India, Indonesia, Malaysia, Mexico, South Africa and Turkey. The politics within and between these groups, and their relationships with the remaining members of the WTO, are much more complicated and contentious than had been the case in the GATT period. This has altered the conduct of multilateral trade diplomacy, which once appeared to be something like a developed-country oligarchy that met in the green room but today bears a closer resemblance to a diverse, representative democracy that is principally conducted through coalitions.

Readers who see that this is a history of the WTO might expect it to be either broadly a history of the multilateral trading system (thus covering GATT in depth) or specifically a history of the Doha Round (thus covering only one aspect of the WTO in depth). It is neither. The principal focus of this history is on the creation of the WTO and its subsequent evolution during the first 18 years of this organization's existence. The coverage of GATT in general and the Uruguay Round in particular is limited to those aspects of the negotiations that led to the establishment of the new organization and its more prominent norms and features, including the single undertaking, the revised dispute-settlement system and the Trade Policy Review Mechanism. As for the Doha Round, it is treated here as one of several undertakings in the WTO period. I operate at something of a disadvantage on this point, as the round is – at the time of writing – in an uncertain but unenviable state. It is not yet clear whether the negotiations will ultimately be revived, replaced, fragmented or terminated. Until this round is definitively resolved, one way or another, it is difficult to place the negotiations in their proper, historical framework. This is not to say that the Doha Round is passed over in this book. Two chapters of this history are focused, respectively, on the launch and conduct of the round; other chapters are devoted in large measure to examining the modalities and coalitions of the round. It will be appropriate at some future juncture to examine in depth the *denouement* of those talks, and in that light the conduct of the negotiations will no doubt merit closer examination as well. At present, one can only

speculate on what the final outcome will be and when it will come. The only point that seems incontrovertible is that in the WTO period the relative strength of the legislative and judicial functions of the WTO have been reversed. Compared to the GATT period, when the effectiveness of the dispute settlement system was diminished by the ability of respondent countries to block action, its WTO successor is much stronger and more frequently utilized. At the same time, the membership of the WTO has found it more difficult to navigate through new negotiations than the earlier, smaller group of contracting parties had found in the GATT period.

A few points are in order regarding the methods and sources used in this study. Documentary sources are naturally high on the list, including both primary and secondary works. For GATT, that meant delving into archival resources that are still in the process of being catalogued, but other scholars will be pleased to know that the materials are in very capable hands and are on their way to being made more generally available. The primary documentary resources of the WTO are daunting, given both the proliferation of documents and the more transparent nature of the institution; there the researcher encounters an embarrassment of riches. As for the secondary sources, Birkbeck (2009: 13) understated the matter when she noted that “[t]he scope of the literature on WTO governance and institutional reform is vast.” Scholars have been studying the structure and decision-making processes of international organizations since the League of Nations and the early United Nations periods,<sup>2</sup> and the WTO has been under close scrutiny from its inception. The body of scholarship on this specific institution has grown since the failed ministerials first in Seattle (1999) and then Cancún (2003), two events that led to much soul-searching within the trade community and the launch of two formal commissions. A great deal of that literature has been devoted to problems and potential solutions for the WTO, notably including the labours of the Sutherland (2005) and Warwick (2007) commissions. I have relied on much of that literature, but readers will understand that this is not an exhaustive review. Space would not permit it.

This history is a deliberately eclectic undertaking that explores the WTO in several dimensions, especially the “big three” of law, economics and politics. As such, it draws on theoretical constructs and previous scholarship in each of these fields. It is a great irony that while the gains from trade are based on the all-important division of labour, in actual practice a good analyst in this field needs to violate that same principle routinely. Anyone who attempts to understand the workings of the WTO solely by way of a single discipline is bound to fail. I have instead attempted to show throughout that this organization stands at the cross-roads of these three paths, and some others as well, and that one needs to navigate the paper trails in all of them in order to understand how the organization operates. I concentrate on the presentation of facts rather than the shaping of those facts into a misleadingly linear progression, and try to keep the discussion both readable for laymen and revealing for specialists. As engaging as disputation over theories and minutiae may be for the advocates of differing intellectual perspectives, that exercise can all too quickly degenerate into the kind of arguments that have made many use the term “academic” as a synonym for “irrelevant”, “moot” or “tedious”. This study is not an attempt to support or undermine any theories in the allied fields of trade economics, law, political economy, negotiations theory or the many other academic disciplines that may be brought to bear in the study of how domestic actors,

negotiators, dispute settlement panels or international organizations behave. In the interest of full disclosure, it is, however, appropriate to acknowledge that I am by training and disposition a political scientist, and as such I may place a greater emphasis on political aspects of the subject than might be the case were I instead a lawyer or an economist.

This eclecticism may leave some readers wondering what assumptions are made here regarding the causes of the reported events. Entire forests have been cleared to print the books in which historians and philosophers have wrestled over the extent to which it is people, ideas, resources or chance that drive history. "A lot of this comes down to individuals," according to Peter Sutherland, as "there's no inexorable tide of human events."<sup>3</sup> That may well be true, and the history of the WTO could be explained principally as the product of key decisions made by a small circle of indispensable people. That would be too narrow a focus, however, and one would have to be a romantic on the scale of Byron to believe that the course of history is determined solely by individuals who take decisive action. The history of the WTO cannot be understood uniquely by way of a great man (or great person) conception of history, just as we would err in chalking it up entirely to the inspirational ideas of economists and legal theorists, or to see it only as an institutional superstructure that rests upon a materialist base, or as a merely random result of such exogenous shocks as the end of the Cold War; it is instead an "all of the above" process. I attempt in the story that follows to give individuals their due, but also to place the decisions that they have made – or failed to make – within a context that takes into account how it is that they were given the opportunity to make such choices in the first place.

Consider how these different factors affect two important developments described in this book, namely the creation of the WTO and the difficulties of the Doha Round. The opportunity to achieve that first success could not have arisen without the ideas and the actions of decisive individuals: there would be no WTO if US legal scholar John Jackson had not conceived it, Canadian statesmen had not translated his ideas into concrete proposals, and leaders such as Mr Sutherland had not shepherded the Uruguay Round to a successful conclusion. Their ideas and actions may have come to naught, however, if these thinkers and doers did not have the good fortune to operate in optimistic times in which developed countries celebrated the collapse of Communism, developing countries turned towards market-oriented solutions, and recessions seemed a thing of the past. The proposal also came in a period when the system as a whole was still willing to let a small number of its members provide the leadership. If ideas and individuals were all that mattered, we should expect the Doha Round to have been solved by now. It is structured along essentially the same lines as its Uruguay Round predecessor, and has seen its share of inspired and inspiring leadership, but comes at a time when caution trumps optimism and power is less concentrated. The negotiators in this round have encountered much higher hurdles than did their predecessors in the last one, some from outside the trading system and others of their own making, and have thus far been unable to clear them. Just as no one factor accounts for the success of the first period, the challenges in the second cannot be ascribed to any single cause.

One point that I know may exasperate some readers is the way that I have attempted throughout this book to avoid partisanship. Objectivity is a prime virtue in the academic tradition in which

I was raised, and as such I have never been comfortable with those studies that make little effort to distinguish analysis from advocacy. That vice of confusion may be more rigorously practised in studies of trade policy than in other fields, as the proponents of open markets are often so convinced of the rightness of their position, and feel so set upon by their critics, that they hate to pass up any opportunity they are given to advance the cause. The critics of free markets are equally given to larding their reportage with heavy doses of commentary, and may be somewhat more eager than their pro-market antagonists to do so in an *ad hominem* fashion. A history written from either of these opposite directions would take sides, critique the positions of specific countries or policy-makers, and assign credit and blame according to an implicit or explicit set of criteria regarding the correct prescription for public policy. That is not my aim. I am well aware that true objectivity is illusory, as none of us can entirely escape our biases (especially the ones about which we are not consciously aware), but I have nonetheless attempted to be as even-handed in my treatment of the facts, events, advocates and analysts as is consistent with my desire to present a factual and coherent narrative. The same comments apply to anyone who expects this book to heap opprobrium on specific individuals who might be singled out for criticism. In the course of interviewing many current and former negotiators, I found no shortage of people with firm ideas about who is most responsible for the apparent failure of the Doha Round, or for other perceived shortcomings in the management of the WTO or related matters. I also found that the objects of these criticisms varied greatly, with some commentators holding up for criticism some of the same people whom others praised and vice versa. I concluded that I could not hope to sort out the competing claims without running afoul of that broader rule against partisanship. Suffice it to say that while members of the Geneva policy-making community tend to be reticent about finding fault with their peer group – it is quite rare, for example, to hear one ambassador speak critically of another by name – they feel less reluctance when it comes to critiquing the higher-ups. That includes other countries' ministers, prime ministers and presidents, although generally not their own, as well as each of the men who have held the position of director-general of the WTO.

Honesty requires me to confess two points on which I lack objectivity. One concerns the home of the WTO, the Centre William Rappard. It is in my estimation one of only two truly beautiful buildings that serve as the headquarters of international organizations.<sup>4</sup> The other is the high regard in which I hold the trade policy community of Geneva, composed of hundreds of people, who, despite differences over matters of politics and policy, share a devotion to their field. Over the past few decades I have come to know and admire many of them, and have enjoyed those opportunities that my work affords me to dabble in what the anthropologists call participant observation. The typical member of this rarified diplomatic community can negotiate in at least two languages, converse in three, mutter imprecations in four and order dinner and drinks in five or more. Many of them master the art of looking fresh at 9:00 am meetings even when they are six time zones away from Geneva and their jet lag forced them awake just two hours after falling asleep. In ministerials or other key meetings they can, when necessary, negotiate around the clock for two or even three days at a stretch. Their walls are often festooned with framed copies of their credentials and commendations from their ministries, sometimes alongside collections of art for which the only unifying theme may be the owner's postings to the various countries of origin. In their desk drawers, the wrinkled

currencies from past missions are mixed in with jumbles of connector cables, adapter plugs, travel-sized toiletries, an assortment of frequent-flier gold cards and travel claim forms waiting to be completed. They keep close at hand the bulging passports that are filled with the perfunctory stamps of major travel hubs and the full-page, multicoloured, hologram-enhanced visas favoured by other countries that attract only the most dedicated diplomats and adventurous tourists. They are interesting to watch.

A note on names is in order. The titles employed in this book for people and places conform to those in use at the time of the events discussed. Thus, Hong Kong becomes “Hong Kong, China” from 1 July 1997. The same general rule applies to other states that once existed but have since been broken into smaller units, such as Czechoslovakia and the Soviet Union. In the case of the European Union, for the sake of simplicity the term “European Community” is used for references prior to when the European Union gained legal personality on 1 December 2009 (before which time formal references in the WTO were to the “European Communities”). As for persons, the titles by which they, too, are mentioned refer to their status at the time of the events. Those British statesmen who have advanced their ranks in Burke’s Peerage, such as Lord Brittan and Lord Mandelson, are identified by their current titles when reference is made to recent statements or writings but they are referred to by their earlier titles when the actual events are recorded.

As a history with a biographical bent, this study relies not only on the publicly available documents, the archives of the WTO, and secondary sources, but also on information obtained through interviews and correspondence with participants. My handling of the last of these sources requires some explanation. When Thucydides chronicled the Peloponnesian War he could not accurately record speeches because “it was in all cases difficult to carry them word for word in one’s memory,” so his practice was “to make the speakers say what was in [his] opinion demanded of them by the various occasions, of course adhering as closely as possible to the general sense of what they really said.”<sup>5</sup> The modern miracle that is the digital voice recorder, coupled with the tenets of academic integrity, prevent me from exercising that same sort of creativity. I have nonetheless employed some degree of discretion in the way that I render the words of my interviewees. This entails some cleanup of sentences to remove the ums and ahs, the false starts or repetitions, and the memory-searching filler words that are common to spoken language, and also corrections of the grammatical errors that are most frequently (but not exclusively) made by those for whom English is a second language. In an extreme and hypothetical example, a spoken sentence that might most precisely be recorded in a transcript as, “He was, you know, always complaining, always complaining about rules of origin and, um, about – [pause] what was it? oh yes – about tariffs escalation” would thus be rendered here as “He was always complaining about rules of origin and tariff escalation.” I have never added any nouns, adjectives or adverbs that the interviewee did not use, and the only changes I have made to verbs are to ensure their proper conjugation. As for the citation of sources, in nearly all cases I have indicated who and when, but for a small number of interviews I have opted either to make no mention of the specific interview or to cite it in a way that keeps the source anonymous. This was sometimes done to avoid embarrassment to the interviewee (some of whom can be remarkably frank even when that digital voice recorder is in plain sight) and sometimes to do the

same favour for the other persons to whom they referred. I have also given interviewees the opportunity to review and clarify any quotes, as I consider it more important to offer an accurate rendering of their memories and ideas than to make a precise transcription of their spoken words. In those cases where the changes that they made were more than minor tweaks, I have designated that shift by using the citation form “author’s correspondence with” rather than “author’s interview with”, and inserted the date of the subsequent correspondence rather than the date of the original interview.

Writing contemporary history means having more primary sources at hand, but that can be both a blessing and a curse. Anyone who has ever been trained in historiography (as I was four decades ago) or made the cross-over into the actual writing of history (as I have done for the past few years) will understand how living sources can sometimes fall into one of three problematic categories: those who are still engaged in the game and hence feel constrained to hew to the party line, especially while the outcome of the Doha Round remains in doubt; those who recently retired from the game and are eager to put a positive spin on their own participation, either claiming credit for advances or avoiding the blame for retreats; and those who left the game some time ago and may plead a poor memory – whether actually or tactically – when asked to reveal those deliberations that were internal to their countries or themselves. Thankfully, that cynicism is warranted only some of the time, and I am grateful to those many persons who have been generous with their time, memories and ideas. I am especially indebted to those interviewees who went beyond the immediate questions that I posed to them about the sequence of the events in which they were involved. The observations that Ujal Bhatia, Pascal Lamy and John Weekes made in my interviews with them each helped me to recast or redirect my inquiries in ways that I had not thought about prior to our discussion. Candour nonetheless obliges me to admit that not every interviewee proved to be equally forthcoming. Sometimes the most interesting things that a source had to say, either relaying events that are not common knowledge or sharing less than flattering opinions of their counterparts, were immediately preceded or quickly followed by a declaration that the statement was not for attribution. Not that the historian should take these things personally. If negotiators are savvy enough to know that they ought not to expect their partners to reveal their true bottom lines, and diplomats understand that what they say to one another is not always a full and frank declaration, a social scientist should not harbour unrealistically higher hopes.

Readers will also note the frequency with which I attempt to quantify trends. Wherever appropriate and possible I take my lead from Sir William Petty, who explained over three centuries ago that his method of “Political Arithmetick” was based not only on “comparative and superlative Words, and intellectual Arguments” but in expressing himself “in Terms of *Number, Weight, or Measure*; to use only Arguments of Sense, and to consider only such Causes, as have visible Foundations in Nature” (Petty, 1690: 244). It is in that spirit that I offer a variety of descriptive statistics on the underlying economic characteristics of WTO members and the ways that they relate to one another, typically in time-series that compare the WTO period with the GATT period, that distinguish between different phases within the WTO period, or both. I have deliberately restricted the presentation to descriptive statistics, however, and stayed away from inferential statistics. While I know there are several points at which I might more effectively argue for a statistical relationship by offering some regression that shows how a given

dependent variable relates to some set of independent variables, I also know that this is the quickest way to lose half the readership. Whenever I have been forced to choose between accessibility and analytical rigour, I have opted for the former.

I owe tremendous debts of gratitude to several people who have provided assistance to me in the research and writing of this study. I could not possibly have written the origins of the WTO without the unflagging help of Debra Steger, who shared her recollections and wisdom on this and other topics. She and Bill Crosbie also offered invaluable aid in arranging interviews and making Canadian archival material available to me. My debt to Julio Lacarte is as large as my admiration for his experience, skills and accomplishments. Thanks are due to the many members of the WTO Secretariat who have helped me to unearth facts, data, documents and photographs, or to review the manuscript for errors or omissions. Among those to whom I owe thanks are Rolf Adlung, Rob Anderson, Trineesh Biswas, Cathy Boyle, Maria Bressi, Antonia Carzaniga, Isabelle Célestin, Victor do Prado, Johann Human, Patrick Low, Hamid Mamdouh, Serafino Marchese, Juan Marchetti, Anthony Martin, Ross McRae, Anna Caroline Müller, Laoise NiBhriain, Maika Oshikawa, Peter Pedersen, Cedric Pene, Maria Pérez-Esteve, Paulette Planchette, Shishir Priyadarshi, Keith Rockwell, Martin Roy, Marta Soprana, Antony Taubman, Raul Torres, Lee Tuthill, Janos Volkai and Rufus Yerxa. Special thanks are owed to Maria Verastegui, without whom the Biographical Appendix would have been impossible. Ankur Mahanta kindly assisted me in the preparation of tables in Chapter 7. I have benefited from the comments and criticisms of Clem Boonekamp, Arancha González, David Hartridge, Bernard Hoekman, Alejandro Jara, Gabrielle Marceau and Ramon Torrent. Above all, I am grateful to Pascal Lamy for giving his consent and his support to this project. Any errors that remain are entirely my own.

I conclude by conveying my regret for the length of what follows. Trade negotiators sometimes define “services” as “anything that doesn’t hurt when you drop it on your foot”, and by that definition the hard-copy version of this book is no service. With apologies to the readers’ feet, I can only repair to Pascal’s lament, “I made this very long because I did not have the leisure to make it shorter.”<sup>6</sup>

Craig VanGrasstek  
Washington, DC  
June 2013

## Endnotes

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- 1 See *New Trade Policy for Europe under the Europe 2020 Strategy*, European Parliament resolution 2010/2152(INI), 27 September 2011.
- 2 See, for example, Koo (1947) and McIntyre (1954). For a review of the major theoretical trends in the first half-century of these studies, see Martin and Simmons (1998).
- 3 Author's interview with Mr Sutherland on 18 January 2013.
- 4 The only other headquarters building that meets this definition is the (otherwise unnamed) main building of the Organization of American States, in Washington, DC.
- 5 *The History of the Peloponnesian War* Book I, Chapter I, para. 22. Translation by Richard Crawley.
- 6 Blaise Pascal, letter to the Jesuits of 23 October 1656 (Letter XVI in his *Provincial Letters*).

# Part I

## The foundations of the WTO

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# 1 The theory and practice of the multilateral trading system

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The prejudice which would either banish or make supreme any one department of knowledge or faculty of mind, betrays not only error of judgment, but a defect of that intellectual modesty which is inseparable from a pure devotion to truth.

George Boole  
*An Investigation of the Laws of Thought* (1854)

## Introduction

The thought is the father to the deed, and the multilateral trading system could never have been built if it had not first been imagined. The World Trade Organization (WTO) is not the product of just one idea, however, or even one school of thought. It instead represents the confluence of, and sometimes the conflict between, three distinct areas of theory and practice. Law, economics and politics have each inspired and constrained the capacity of countries to work together for the creation and maintenance of a rules-based regime in which members with widely different levels of economic development and asymmetrical political power work together to reduce barriers to trade. It is therefore fitting to begin this history with a review of the intellectual prehistory of the WTO, as well as the contemporary debates surrounding each of these fields.

Three major developments were required before a multilateral trading order could be created, including the emergence of two ideas and the resolution of a paradox. The first idea is that countries are sovereign, and hence have control of their own destinies, but also that the best exercise of sovereignty is to enter into binding agreements with other states by which they place voluntary and mutual limits on their exercise of that sovereignty. International law thus needed to be devised and respected, including the forms and norms of diplomacy, protocol, treaties, conferences and eventually the establishment of international organizations. The first steps towards the creation of the modern legal system date from the seventeenth and eighteenth centuries, based on speculations about natural law, but a true regime of international law was not under way until states developed a comprehensive body of positive law based on actual treaties. The WTO is an expression of that idea, but must also contend with the fact that states have created other international organizations (thus posing problems of coherence) while also jealously guarding their own sovereignty (thus setting limits on how far they are willing to go in negotiating and enforcing commitments).

The second idea, and the one that is most important for this specific aspect of international order, was the notion that countries may extract mutual gains from freer trade. Policy-makers will not liberalize markets unless they believe it is in the individual and collective interests of their countries to take advantage of an international division of labour based on comparative advantage and economies of scale. In contrast to political science and law, the systematic study of economics is quite a recent development. Given that this field emerged more than two millennia after the Greeks pioneered the scientific study of history and politics, it is remarkable how quickly trade economists devised the core ideas of their discipline (see Table 1.1). The principal intellectual arguments in favour of open markets were developed in the late eighteenth and early nineteenth centuries and overwhelmed the prevailing mercantilist doctrines that saw wealth as interchangeable with power, treating trade as the conduct of international competition through means other than outright war. The chief objective of mercantilism had been to manage trade so as to maximize exports, minimize imports, and thus build up trade surpluses in order to accumulate specie (i.e. gold and silver). Those precious metals could then be converted, when needed, into armies, navies and other instruments of power. The emergence of more cooperative economic ideas, when coupled with the establishment of a rules-based state system, gave countries both the motive and the means to negotiate treaties for closer economic relations. While the intellectual rationale behind free trade is impressive, it does not persuade all critics. Proponents of open markets have had to deal with perennial challenges to the foundations and implications of their ideas.

The third development concerned power and its paradox. The legal and economic ideas that underlie the trading system each aim to create a world order in which power would play a lesser role and in which more powerful countries would be constrained either by law or by their recognition of mutual self-interest. Power nonetheless remained indispensable to the establishment of international order. But for the actions of two successive hegemonies, each of which employed their power to create and maintain a regime of market-opening trade agreements, it is doubtful that the legal and economic ideas on which the multilateral trading system is based would ever have moved beyond speculation and into practice. Great Britain played this part from the mid-nineteenth until the early twentieth century, followed by the United States after an unfortunately leaderless and turbulent period between the world wars. The system of linked, bilateral trade agreements that countries negotiated during the period of British hegemony was replaced under US leadership by the General Agreement on Tariffs and Trade (GATT), the precursor to the WTO. These two powerful states helped to establish and enforce rules that granted judicial equality and economic opportunity to other states that would, in earlier periods of history, have been subject to much more naked and one-sided exercises of power.

Each of these three developments, and the ways that they sometimes reinforce and sometimes undermine one another, are explored in this chapter. The analysis proceeds in three steps. The first is to examine the development of the foundations in law, economics and politics, in that order, and how they led to the creation of the trading system. Each of these centuries-long developments in theory and practice converged with the creation of GATT

**Table 1.1. Key events in the legal, economic and political foundations of a multilateral trading system**

c. 395 BCE	Thucydides' account of the Peloponnesian War inaugurates the Realist tradition in the theory and practice of statecraft, in which "the strong do as they will and the weak do as they must."
1532	Niccolò Machiavelli's <i>Il Principe [The Prince]</i> is the classic statement of realpolitik in the early modern era.
1625	Hugo Grotius's <i>De Jure Belli ac Pacis [On the Law of War and Peace]</i> is the first text on international law. Principally based on natural law rather than positive law, it argues for freedom of the seas.
1648	The Treaty of Westphalia ends the Thirty Years War and establishes the principle that states are sovereign and juridically equal.
1748	Montesquieu's <i>De l'esprit des lois [The Spirit of Laws]</i> argues for the pacific nature of commerce.
1758	Emer de Vattel's <i>Du droit des gens, ou Principes de la loi naturelle [The Law of Nations]</i> marks a shift from the emphasis on natural law to positive law as the foundation for international law.
1776	Adam Smith's <i>Inquiry into the Nature and Causes of the Wealth of Nations</i> is the first extended and coherent argument for the economic benefits of free trade.
1791	Alexander Hamilton's <i>Report on Manufactures</i> provides the first critique of free trade from a developing-country perspective.
1795	Immanuel Kant's essay <i>Zum Ewigen Frieden [On Perpetual Peace]</i> is the first call for international organizations.
1814- 1815	The Congress of Vienna is the first serious attempt in the modern world to establish a system of peace based on international law and organization.
1815	Established in Vienna, the Central Commission for the Navigation of the Rhine is arguably the first regional trade organization.
1817	David Ricardo's treatise <i>On the Principles of Political Economy and Taxation</i> develops the theory of comparative advantage, providing a universal rationale for free trade.
1865	The International Telegraph Union is the first modern international organization.
1899	The International Peace Conference is held in The Hague, producing the Convention for the Pacific Settlement of International Disputes and (in 1902) the Permanent Court of Arbitration.
1919	The League of Nations and the International Labour Organization are established, both with headquarters in Geneva.

in 1947, and remains critical to the development of the WTO. In the current environment, they may best be seen not as foundations but as challenges, however, and the second step in this analysis is to review the legal, economic and political challenges of the WTO. The review stresses that there is more change than continuity from the *ancien régime* to the new order, to the point where one is tempted to use instead the term disorder. The years since the creation of the WTO have been marked by rapid changes in the conduct of trade and in its consequences for the distribution of wealth and power. The third and final step is to give a quick preview of how the themes explored in this chapter are developed in the rest of the book.

This is necessarily an exercise in compression, reducing centuries of debate and development to a few pages. The discussion treats the legal, economic and political issues separately, but readers will note that the boundaries between these fields are frequently blurred in both theory and practice. Examples of creative cross-fertilization abound, especially among the intellectual pioneers in these three fields. Hugo Grotius, for example, was the first scholar of international law, but he was more prone to emphasize

justice than law and might be more accurately described as a liberal than a lawyer. Similarly, those who think of Adam Smith as the consummate liberal might be shocked by just how much this very political economist was a man of his warlike time. Nor can all political scientists be considered the intellectual descendants of Thucydides and Machiavelli. A great many of them see more cooperation than anarchy in international relations, and are by nature more liberal than realist in their outlook, while others invade the turf of lawyers by taking a public-law view of institutions. In brief, the lines that are supposed to separate these disciplines are not always respected. If they were, the WTO might never have come into being.

### *Legal and institutional foundations*

International organizations are, first and foremost, an expression of international law, and law is central to the WTO. “Most studies of WTO governance and institutional reform concur that a core purpose, if not the core purpose of the WTO,” according to one analysis (Birkbeck, 2009: 15), “should be to protect a stable, multilateral, rules-based approach to international trade.” Law provides greater certainty in relations between states and constrains what might otherwise be a chaotic and self-defeating pursuit of national interest. A country’s decision-makers should not be in doubt regarding either their own commitments or those made by their trading partners. For example, firms should know what tariff and non-tariff barriers they will need to clear in order to offer goods and services in a foreign market. That certainty rests upon the large and growing body of law generated first in the treaties that states negotiate and then in the decisions by which these agreements are interpreted and enforced.

States could theoretically liberalize trade without resorting to international law and the negotiation of binding agreements, with each of them having the option of opening their own markets autonomously. Bilateral deals could also be struck on the basis of tacit bargaining: Country B might respond in kind to the autonomous, liberalizing actions of Country A. These forms of liberalization were in vogue in mid-nineteenth century Great Britain, having been advocated in principle by the economist John Stuart Mill (1806-1873) and in practice by the industrialist and politician Richard Cobden (1804-1865). Mill argued that a country would be better off through the unilateral liberalization of trade even if its actions were not reciprocated by its partners, and Cobden found that policy-makers in other countries were more likely to open their own markets if this were not perceived as a concession to the English.<sup>1</sup> Great Britain’s unilateral repeal of the protectionist Corn Laws in 1846 was the first major step in the movement towards free trade in Europe and preceded the negotiation of the Cobden–Chevalier Treaty with France in 1860. That pivotal year of 1846 witnessed another, more complicated form of autonomous liberalization, with Canada and the United States engaging in a unique set of tacit negotiations by which each country enacted legislation that reduced tariffs on products of interest to its neighbour. This bargaining, which was done without any explicit agreement between the countries, preceded by eight years the negotiation of the first (and ultimately short-lived) free trade agreement between these North American partners.<sup>2</sup> The same point carries over to our own time: some countries opt to liberalize by reducing

tariffs on an autonomous basis, and these decisions may be strengthened by the widening supply chains of multinational production. As intriguing as these historical and contemporary examples are, the results of autonomous or tacit liberalization are only as secure as the continued willingness of individual countries to abide by decisions that they made freely. Any market-opening measures that are not laid down in solemn treaty obligations may prove to be ephemeral.<sup>3</sup>

### *The origins of international law*

The development of the state system and international law predated the emergence of modern economic ideas. Even so, one of the earliest motivations for the establishment of international law was to promote peaceful economic relations. Hugo Grotius (1583-1645) is generally credited as the founder of the study of international law, and – as an advocate for freedom of the seas – was an early contributor to the free-trade tradition. Writing at a time when international law was more of an aspiration than a fact, he based his arguments largely on the existence of natural law. Grotius's *De Jure Belli ac Pacis [On the Law of War and Peace]* (1625) got a head start on the economic rationale for open markets by a century and a half. Several other political commentators of his time similarly argued that free trade exercises a pacific influence on countries, associating open markets with peace and protectionism with war.<sup>4</sup>

Grotius died three years before his contemporaries concluded the Peace of Westphalia, a 1648 treaty that put an end to the religious struggles of the Thirty Years War while also advancing a new conception of state sovereignty. In the Westphalian system, all states are held to be independent and juridically equal, with each of them enjoying a fundamental right of self-determination and being free of intervention from foreign powers. Those same states also have the right to enter into treaties, of which the Peace of Westphalia was just one of many, by which they establish their legal obligations to one another. While that treaty is usually remembered for its provisions on matters of war and peace, it also aimed to restore trade. In Article LXIX, for example, the signatories to the treaty agreed as follows:<sup>5</sup>

And since it much concerns the Publick, that upon the Conclusion of the Peace, Commerce be re-establish'd, for that end it has been agreed, that the Tolls, Customs, as also the Abuses of the Bull of Brabant, and the Reprisals and Arrests, which proceeded from thence, together with foreign Certifications, Exactions, Detensions; Item, The immoderate Expences and Charges of Posts, and other Obstacles to Commerce and Navigation introduc'd to its Prejudice, contrary to the Publick Benefit here and there, in the Empire on occasion of the War, and of late by a private Authority against its Rights and Privileges, without the Emperor's and Princes of the Empire's consent, shall be fully remov'd; and the antient Security, Jurisdiction and Custom, such as have been long before these Wars in use, shall be re-establish'd and inviolably maintain'd in the Provinces, Ports and Rivers.

The treaty thus inaugurated a tradition by which the states of Europe would use the occasion of peace-making after a major conflict as an opportunity either to restore the commercial freedoms that had existed in the *status quo ante bellum* or even to achieve levels of openness not reached before the hostilities. They would be far less successful when negotiating the Treaty of Versailles after the First World War, but it is this same impulse that gave birth to GATT after the Second World War. Some see the later creation of the WTO as part of the “peace dividend” that came with the end of the Cold War.

International law developed into a more systematic discipline in the century that followed the negotiation of this treaty, as exemplified by Emer de Vattel's (1714-1767) widely read *Le droit des gens, ou Principes de la loi naturelle* [*The Law of Nations*] (1758). This text would remain a guidebook well into the nineteenth century. The underlying economic concepts were still primitive, however, with de Vattel aping the mercantilist views that were prevalent among the statesmen of his time. Writing 18 years before Adam Smith published his *Inquiry into the Nature and Causes of the Wealth of Nations*, de Vattel advised that:

The conductor of a nation ought to take particular care to encourage the commerce that is advantageous to his people, and to suppress or lay restraints upon that which is to their disadvantage. Gold and silver having become the common standard of the value of all the articles of commerce, the trade that brings into the state a greater quantity of these metals than it carries out, is an advantageous trade; and, on the contrary, that is a ruinous one, which causes more gold and silver to be sent abroad, than it brings home. This is what is called the balance of trade. The ability of those who have the direction of it, consists in making that balance turn in favour of the nation (Chapter VIII, Paragraph 98).

This passage illustrates an important point about the legal perspective on the trading system: lawyers may act as effective advocates for their clients in this field as in others, but the direction that their advocacy takes will depend on the client's aims. De Vattel's promotion of mercantilism merely reflected the ideas of his time. The system of laws and treaties that countries were then developing would prove adaptable to the new economic ideas that were to come in the next generation.

The form that trade agreements took, and the very language that negotiators employ to this day, owed more to mercantilism as interpreted by lawyers than to free trade as promulgated by economists. The commitments that countries make to reduce or eliminate tariffs are invariably called “concessions”, connoting that any reduction in the tariff wall means giving up something of value – albeit in exchange for reciprocal concessions from the partner countries. Were politically savvy economists to have their way, these mutual restraints to which countries agree in trade agreements might instead be deemed “investments”.

Some of the terminology that the lawyers employ has more ancient origins. When countries began to negotiate trade treaties they borrowed a key concept that had originally been developed between towns and visiting merchants. The origins of the most-favoured-nation

(MFN) clause date to the Middle Ages, when traders would obtain franchises from municipalities defining their rights and privileges. They would typically request the same rights and privileges that might be given to the “most favoured” traders. The doctrine was then incorporated in commercial treaties between sovereign states, providing that any concession made to one trading partner (especially the reduction of tariffs) would automatically extend to all other countries to which it granted MFN treatment, and would later become a pillar of the multilateral trading system. GATT Article I provides that “any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”

### *The creation of international organizations*

Having devoted great energy to developing and defending what were then the radical ideas of sovereignty and independence, legal theorists were not quick to adopt the related but seemingly contradictory notion that these same countries might subordinate their exercise of sovereignty to supranational organizations. It instead fell to a philosopher to broach that idea, with Immanuel Kant (1724-1804) calling in his 1795 essay *Zum Ewigen Frieden [On Perpetual Peace]* for a league aimed at “an end of all wars forever.” While revolutionary for his time, Kant’s proposal envisioned a more circumscribed role for international organizations than his intellectual heirs would later promote. His ideal institution would be narrowly aimed at securing peace, and the league would not have “any dominion over the power” of the member states and there would be no “need for them to submit to civil laws and their compulsion.”

It was not until the middle of the nineteenth century that states would begin to establish formal and permanent international organizations that had broader aims and a more intrusive approach to the negotiation of commitments. Fittingly, the first of these were the product of modern technology and trade. The International Telecommunication Union, founded in 1865 as the International Telegraph Union and acquiring its present name in 1934, is often cited as the first true international organization of the modern era. The Paris Convention for the Protection of Industrial Property (1883) was another important step in this direction, and would become (by way of its incorporation into the Agreement on Trade-Related Aspects of Intellectual Property Rights) the oldest part of WTO law. A few other bodies date from the nineteenth century, notably the Universal Postal Union (created in 1874), but only with establishment of the League of Nations after the First World War did international organizations begin to achieve the numbers and acquire the importance that they enjoy in our own time.

International law was not immediately extended to countries outside of Europe and its more economically advanced ex-colonies. Other regions first had to endure generations of colonialism, gunboat diplomacy and legal concepts that formalized inequality (e.g. extraterritoriality). Consider the experience of China in the century that preceded the outbreak of the Second World War. Starting with a bilateral tariff treaty that Great Britain compelled it

to sign in 1842, China lost autonomy in setting and even in collecting tariffs. The rates were fixed in the treaties that the Western powers (and eventually Japan) imposed, with the concessions in each new agreement being automatically extended to all of the powers through MFN clauses. Nor was the Chinese case unique; European powers and the United States imposed comparable treaties at various times on the Congo, Egypt, Morocco, Muscat (now Oman), Persia (now Iran), Samoa, Siam (now Thailand), Tunis and Turkey. Over the course of the twentieth century, however, the Westphalian concepts of sovereignty and the juridical equality of states were transformed into a universal practice. Henkin (1968: 42) observed that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time,” and while that may be a bit of an exaggeration, it is undeniable that adherence to law has become a more prominent feature of global relations in our own time than it was in the past.

The Second World War offered the Allied Powers an opportunity to remake the world, and the post-war system of international organizations that they devised resembles the structure of national governments. In addition to creating a legislature (General Assembly of the United Nations), a judiciary (International Court of Justice), and a central bank (World Bank and International Monetary Fund), the architects of the post-war order established the equivalents of the ministries of agriculture (Food and Agriculture Organization), education and culture (United Nations Educational, Scientific and Cultural Organization), health (World Health Organization), labour (International Labour Organization) and so forth. The proposed International Trade Organization (ITO) was thus intended to perform the functions of a global trade ministry. Idealists hoped that these institutions would form something like a world government, but a series of problems prevented anything of the sort from emerging. The most significant of these were the strong attachment that all countries have to their own sovereignty, as well as the tensions and divisions that soon emerged in the Cold War. Those concerns over sovereignty compelled the diplomats who devised the ITO to pursue rather modest goals. “Neither the ITO nor GATT said a word about free trade,” Diebold (1994: 336) would later recall, and he knew “of no one involved in working out the problems of international trade at the time who thought that free trade was a realistic goal or even a reasonable aspiration for a liberal economic system that had to be operated by sovereign states.” The negotiators worked numerous protections for those sovereign states into the terms of these agreements, but not enough to satisfy their critics.

The ITO was the first casualty of the post-war political environment, with the US Congress refusing to approve the Havana Charter to this institution. Countries instead fell back on the supposedly temporary GATT, which became the centre-piece of the trading system. GATT had been intended to serve as an interim arrangement before the new trade institution came into being, and if one takes the long view, that is precisely what happened. The interim period turned out not to be a few months but was instead close to half a century. This stripped-down version of the ITO grew along three dimensions over the ensuing decades, with the number of GATT contracting parties multiplying, their tariff commitments deepening and the range of issues gradually widening from border measures to behind-the-border laws. GATT hosted

eight rounds of multilateral trade negotiations from its establishment in 1947 until subsumed by the WTO in 1995.

GATT gradually evolved from an exclusive club to an essential attribute of global citizenship. Nearly all of the countries that were not yet contracting parties to GATT by the end of the Uruguay Round (1986-1994) were either in the process of accession or were seriously exploring that possibility. The body nonetheless had some notable imperfections, not least being the fact that it was not a *bona fide* international organization. GATT was a contract to which countries were parties rather than an organization in which they were members, and in that contractual arrangement their commitments were applied on a provisional rather than a definitive basis. These shortcomings threatened to be even more troublesome if, as the United States advocated, the multilateral trade regime were expanded in the Uruguay Round to cover new issues such as services, investment and intellectual property rights. Other developed countries came around to support the US proposals on these issues, but a few years into the round they proposed that the new issues be complemented by a change in the legal basis of the regime. As advanced by Canada and the European Community in 1990, and adopted after four years of negotiations, the new WTO would be a true international organization in which laws were applied definitively and enforced by a stronger dispute settlement mechanism.

### *International organizations after the Cold War*

The establishment of the WTO coincided with the end of the Cold War. This was seen in some countries as an opportunity to cash in the “peace dividend” and reduce the burdens of leadership, but some idealists more grandly proclaimed an “end of history” and saw an opportunity to devise a more cooperative world system. Some advocated greater reliance on international organizations as deliverers of “global public goods” (see Box 1.1). The Commission on Global Governance reflected this mood. In the same year that the WTO came into being, this UN-backed commission published its report on *Our Global Neighbourhood*, arguing that a “multifaceted strategy for global governance is required.” The authors observed that this would require “reforming and strengthening the existing system of intergovernmental institutions” and –

the articulation of a collaborative ethos based on the principles of consultation, transparency, and accountability. It will foster global citizenship and work to include poorer, marginalized, and alienated segments of national and international society. It will seek peace and progress for all people, working to anticipate conflicts and improve the capacity for the peaceful resolution of disputes. Finally, it will strive to subject the rule of arbitrary power – economic, political, or military – to the rule of law within global society (Commission on Global Governance, 1995: 5).

The report also hailed the establishment of the WTO as “a crucial building block for global economic governance” (*Ibid.*: 167).

**Box 1.1. The WTO and public goods: the legal, economic and political dimensions**

One concept that cuts across all three areas of thought examined here is the notion of public goods. This economic idea has important — although not always consistent — implications for the multilateral trading system. It helps to explain why open markets are difficult to establish, how that difficulty can sometimes be overcome as a general rule and what specific exceptions are then proposed.

As first described by Samuelson (1954), public goods share two key characteristics. The first is that they are non-excludable, meaning that no one can be prevented from enjoying them. Roads and national defence, for example, are available to everyone if they are available to anyone. Second, they are non-rivalrous in consumption, meaning that one person's use of that good does not diminish its availability to others. The information that one motorist receives from reading a road sign does not interfere with anyone else's ability to navigate. From the standpoint of public policy, the most important aspect of public goods is that they are highly susceptible to market failure. A rational, self-interested actor will normally perceive a great disincentive to supply a public good when other, equally rational and self-interested actors can "free ride" on that investment. This barrier to the provision of public goods by private parties thus becomes a rationale for the state to step in as a provider, acting on behalf of the community.

One school of thought applies public-goods reasoning to answer the "big picture" question of why global markets are sometimes relatively open and sometimes relatively closed, a conundrum that is — together with the question of why countries are sometimes at peace and sometimes at war — one of the two great topics in international relations. According to the theory of hegemonic stability, an open world market is a public good and hence tends to be under-provided, with each country pursuing its own self-interest through selective protectionism while also being prepared to free-ride on any other country's openness. The public good has historically been provided only when there is one large country that has both the motive (a competitive, export-oriented economy) and the means (military power, political prestige and economic leverage) to lead or coerce other countries (see Kindleberger, 1973; Krasner, 1976; and Gilpin, 1987). As discussed at length in Chapter 2, Great Britain played this role in the nineteenth century and the United States in the twentieth century.

Another school of thought applies similar reasoning to argue more broadly for global governance through international organizations. The advocates of global public goods stress the collective gains over the individual costs of cooperation, and contend that institutions such as the WTO need to be established and strengthened as a means of dealing with the world's problems. This will, they hope, provide a more enduring, equitable and cooperative basis for democratic global governance than reliance on hegemony. In this environment, states "will witness continuing erosion of their capacities to implement national policy objectives unless they take further steps to cooperate in addressing international spillovers and systemic risks" (Kaul et al., 1999: 451).

Public-goods concepts can also illuminate the domestic politics of trade, including the differing levels of activism on the part of pro-trade and trade-sceptical interests. If all interested parties felt the same incentive to act upon their interests we might expect trade liberalization to be a political "no-brainer" in most democracies, as consumers — the ultimate beneficiaries of an open market — would greatly outnumber the protectionist industries that conspire against their interests. Consumers face a public-goods problem to mobilization, however, just as the protection-seeking industries benefit from the organizational advantages of small numbers.

Consider the case of sugar. If millions of consumers are told that they can each shave US\$ 1 per week off their grocery bill if only they band together to fight the sugar lobby, and the half-dozen members of that lobby know that they each earn millions of dollars in rents from the inflated prices of a closed market, it should not surprise us if the few producers prove better able to overcome the public-goods barrier to organization than do the many consumers.

The logic of public goods also affects the willingness of countries to liberalize in sectors other than goods. Whereas there are few countries where government is directly involved in the production and sale of goods, states have been encouraged by public-goods considerations to become providers of health, education and other social services, as well as electricity, other utilities, postal services and transportation. That brings a new level of complexity to negotiations over trade in services, as these are sectors in which both workers and consumers are better able to overcome the public-goods barriers to organization. State-run enterprises tend to be more heavily unionized, and people who benefit from state-supplied social services were among the most active recruits for anti-globalization activists at the turn of the twenty-first century.

This rush of post-Cold War enthusiasm, which might be seen as the third attempt in the twentieth century to remake world order after hostilities end, did not fully achieve the desired redefinition of global society. Perhaps the most serious constraint it faced was the differing degree to which the member states of international organizations consider global governance to be desirable or feasible. As Sandler (1997: 13) noted, nations are loath “to empower a supranational body with the authority to collect taxes to regulate transnational externalities, to provide international public goods, to assign property rights or to redistribute income”. That loathing is more intense in some countries than it is in others, with the differing political cultures and traditions of the two most influential participants in the trading system being especially consequential.<sup>6</sup> Policy-makers in the European Union and the United States often demonstrate fundamentally diverging views of the value of international law and their willingness to cede some degree of sovereignty to regional or global institutions. As Petersmann (2007: 143) put it, US policy-makers are prompted “to oppose the idea of relying on international and international tribunals as means of changing domestic laws” by “the US conception of national constitutionalism, democratic self-government and self-sufficiency, and the US view of intergovernmental organizations as being irremediably anti-democratic.” By contrast –

European integration demonstrates that – in a globally interdependent world – individual and democratic self-determination, enjoyment of human rights across frontiers and peaceful international cooperation cannot be ensured without international law: a state open to international law is therefore not limiting its democratic life and national sovereignty, but rather realizes new dimensions of democratic self-government and democratic responsibilities in an interdependent world (*ibid*: 144).

These transatlantic differences influenced both the establishment of the WTO and its development as an institution. Whereas the European Union was among the earliest and most enthusiastic proponents of a new international institution to replace the outdated and

underpowered GATT, the United States was at times indifferent or even hostile to the notion of creating a new global body. And while Brussels was the principal advocate of launching what was to become the Doha Round, Washington has proven at some critical points to be less enthusiastic about the enterprise.

The differences in EU and US approaches to trade liberalization may also be traced to their distinct domestic experiences. Economic integration was the original motivation for union in both cases, but arose in different times and proceeded at different speeds. This was achieved in one fell swoop in the United States, with the Constitution of 1788 prohibiting internal barriers to commerce and establishing a common external tariff. The process of integration in Europe was much slower and politically difficult. Once Europeans achieved a common market, however, they tended to be even stronger advocates than their US counterparts had been.

Many European policy-makers see economic integration at the international level as a natural progression from their regional achievement. The same kinds of initiatives that have helped deliver peace and prosperity to the European continent, they hope, can do the same for the world if scaled up to that level. Problems can nevertheless arise when seeking to balance regional goals against international ones, especially on agriculture. Any European negotiator who is so bold as to offer significant concessions on agricultural matters within the WTO can expect to face difficult questions, or worse, from those EU member states that are most protective of the social contract that Europe has made with its farmers.

The expanding scope of trade policy exacerbated the problems of coherence and governance. While trade in most goods fell squarely in the jurisdiction of GATT, the WTO now deals with matters that impinge on the jurisdictions of other international organizations and agreements. The distinct authorities of these institutions can encourage “forum shopping” by national governments. Countries that wish to see the rules in a particular area remain voluntary, or not be strongly enforced, will generally argue that the topic should be left to some other, relevant international organization. This was why developing countries preferred in the 1980s that intellectual property rights be dealt with in the World Intellectual Property Organization rather than GATT, for example, and are equally insistent today that labour rights are handled in the International Labour Organization rather than the WTO. Conversely, *demandeurs* propose that the WTO have jurisdiction over issues that are new or imperfectly covered precisely because they want these disciplines to be backed by the power of the WTO dispute settlement system. This would mean promoting the role of the WTO over the United Nations Educational, Scientific and Cultural Organization in matters of cultural trade, and over the World Health Organization on issues related to trade in health-related goods and services, and so forth.

## The economic foundations

The three most remarkable things about trade economics are how long it took for this field of thought to emerge, how quickly its core ideas developed and how enduring those ideas have been. Alfred North Whitehead (1928: 39) vastly overstated the case when he asserted that

the “European philosophical tradition ... consists of a series of footnotes to Plato”, but one would be much better justified in making a similar claim with regard to trade economics after Adam Smith (1723-1790) and David Ricardo (1772-1823). Even so, the footnotes – or what might better be termed the corollaries, controversies, exceptions and elaborations – have had important implications for the development of the trading system. Economists disagree over the merits of discriminatory liberalization, for example, and on the advisability of extending the scope of trade rules into new subject matter. They have also had to contend with political, social and moral challenges to the foundations and implications of their theories.

### *The economic rationale for open markets*

Adam Smith's arguments for free trade were based on specialization and the absolute advantage that individuals or countries may enjoy in the production of goods. His thesis can be distilled by aggregating the opening of each of the first three chapters of *The Wealth of Nations*: “The greatest improvement in the productive powers of labour ... seem to have been the effects of the division of labour,” which stems from man's natural “propensity to truck, barter, and exchange one thing for another,” but “the extent of this division must always be limited by ... the extent of the market.” In short, by extending the scope of the market to reach across borders, we may exploit an international division of labour, allowing each country to specialize in those industries to which it is best suited and to trade these products with other countries specializing in their own *métiers*. Smith's concepts of the division of labour and absolute advantage offered about three quarters of the rationale for open markets, especially for those countries that have clear natural advantages in the production of certain goods.

Ricardo's concept of comparative advantage supplied the rest of that rationale, explaining why even countries that are the best at nothing can still gain by exporting those things in which they are comparatively more productive and importing those things that they produce least efficiently. As explained in his famous example of wine and cloth traded between England and Portugal (see Box 1.2), Ricardo demonstrated how trade could improve welfare in both countries. In Smith's conception, this bilateral trade would be advantageous if England were better at producing cloth and Portugal were better at producing wine. Ricardo explained why trade could make both countries better off even if Portugal were better than England at producing *both* goods, provided that there was a difference in each country's relative levels of productivity in cloth vis-à-vis wine.<sup>7</sup> Englishmen may be inefficient producers of cloth compared to the Portuguese, yet the English cloth-makers are more efficient by comparison with the hapless English vintners. If England moves out of wine and wholly into cloth, Portugal does just the opposite, and the two countries trade with one another, the net result will be more efficient production of both goods. This should enhance consumer welfare all around, with clothing and wine becoming more affordable in London as well as Lisbon. The concept of comparative advantage remains counter-intuitive for anyone who is instinctively mercantilist in orientation, viewing exports as good and imports as bad, but the mathematical logic is inescapable. It is arguably the most significant and influential idea ever developed in the social sciences.

**Box 1.2. Ricardo's illustration of comparative advantage: trading wine and cloth**

*From David Ricardo, On the Principles of Political Economy and Taxation, third edition (1821).*

If Portugal had no commercial connexion with other countries, instead of employing a great part of her capital and industry in the production of wines, with which she purchases for her own use the cloth and hardware of other countries, she would be obliged to devote a part of that capital to the manufacture of those commodities, which she would thus obtain probably inferior in quality as well as quantity.

The quantity of wine which she shall give in exchange for the cloth of England, is not determined by the respective quantities of labour devoted to the production of each, as it would be, if both commodities were manufactured in England, or both in Portugal.

England may be so circumstanced, that to produce the cloth may require the labour of 100 men for one year; and if she attempted to make the wine, it might require the labour of 120 men for the same time. England would therefore find it her interest to import wine, and to purchase it by the exportation of cloth.

To produce the wine in Portugal, might require only the labour of 80 men for one year, and to produce the cloth in the same country, might require the labour of 90 men for the same time. It would therefore be advantageous for her to export wine in exchange for cloth. This exchange might even take place, notwithstanding that the commodity imported by Portugal could be produced there with less labour than in England. Though she could make the cloth with the labour of 90 men, she would import it from a country where it required the labour of 100 men to produce it, because it would be advantageous to her rather to employ her capital in the production of wine, for which she would obtain more cloth from England, than she could produce by diverting a portion of her capital from the cultivation of vines to the manufacture of cloth.

While the argument is sound, it is not universally accepted, and the advocates of free trade perennially face objections that have taken similar forms ever since the time of Smith and Ricardo. The opposition of protectionist industries need not detain us here; the resolution of the struggles between free-traders and traditional protectionists fall more in the category of domestic political practice than international economic theory. The more difficult challenges come from critics who oppose or present alternatives to the ideas themselves. The advocates of multilateral free trade, both in the WTO period and before, are engaged in perennial debates with those who question the materialist basis of the doctrine, or object to the expanding scope of trade negotiations into other spheres of public policy, or contend that special provision must be made for developing countries, or argue instead for targeted and discriminatory approaches to trade liberalization.

***Objections to materialism and the market***

The most fundamental and recurring challenge comes from critics who object to the materialist assumptions that underlie modern economic thought and policy, questioning the

implicit assertion that the market is the best mechanism for deciding what goods and services will be produced and who will consume them. Modern economics in general, and trade in particular, often raise the hackles of those who associate its foundations with greed and exploitation, and who believe that unfettered markets perpetuate or exacerbate inequality within and between countries. The doctrine of free trade is more attractive to those who focus on the prospects for creating new wealth than it is to those whose principal concern is with how that wealth is distributed. Free trade arguments made little headway with conservatives and churchmen when they were first advanced, and in our own time they do no better with environmentalists for whom concerns over sustainability defy the casual assumption that more is always better.<sup>8</sup>

What is really at issue for many critics is not the transnational character of trade but the question of whether these exchanges should be conducted on a market basis in the first place. Groups that oppose the inclusion of new issues or sectors within the scope of market disciplines will typically urge that the item not be treated as a commodity. “Water is a basic human right,” according to an official of the Canadian Union of Public Employees, “not a commodity to be bought, sold and traded,”<sup>9</sup> just as Rosset (2006) insisted that “[f]ood is not just another commodity, to be bought and sold like a microchip, but something which goes to the heart of human livelihood, culture and society.” Critics also point out that a “cultural heritage is not a commodity” (SANGONeT, 2010), criticize newspapers that “report on education as a commodity” (Van Leeuwen, 2000), and opine that “information’s epiphenomenal character is fundamentally inconsistent with commodity treatment” (Babe, 1996: 303). The international bodies that have jurisdiction over these matters tend to adopt similar terms. The very first principle in the Declaration Concerning the Aims and Purpose of the International Labour Organization (a 1944 annex to the ILO Constitution) is that “labour is not a commodity.” Similarly, the World Health Organization stresses that “[e]ssential drugs are a public good and not simply just another commodity.”<sup>10</sup> Critics fear that bringing the more politically sensitive sectors within the orbit of international trade rules will lead to indiscriminate commodification, operate to the detriment of ordinary workers and consumers and reduce the extent to which the production and allocation of goods and services can be controlled by means other than a decidedly impersonal and possibly unfair market. These concerns are among the principal motivations for anti-globalization activists.

The range and intensity of these critiques rose with the establishment of the WTO and the expansion in the scope of trade rules. Until late in the GATT period the only recognized tradeables were tangible goods, “trade” meant only the movement of goods across borders, and the only available instruments of “trade policy” were tariffs, quotas and other measures that directly regulated these transactions at the border. Due both to advances in technology and to the demands of major players in the system, trade policy now deals with other articles of commerce such as the cross-border movement of services, capital (i.e. investment), ideas (i.e. intellectual property) and even people (i.e. the presence of natural persons as service providers). That expanding definition of trade means in turn that trade rules affect a much greater array of policy instruments and regulatory authorities, and non-tariff measures have gone from being supplementary to central issues in trade negotiations. Trade policy has also

come to be linked to many other issues, including some that are related to the production, distribution and use of goods (e.g. labour and environmental matters) and others in which the relationship is controversial and will be determined in large part by politics (e.g. the observance of human rights in the country of origin).

With these issues now on the table, there are more stakeholders who either demand a seat or hope to overturn that table altogether. Anti-globalization activists should not be confused with simple protectionists, as the basis for their criticism is not economic in the traditional sense. As Henderson (2000: 16) noted, what is significant about the newest participants in trade debates is that they stand “not for particular sectional interests, but for causes” and “are often given the tactically useful label of ‘public interest’ groups”. The self-styled consumer groups bear little or no resemblance to the idealized focus of liberal economists’ attention. If they were, one would expect these groups to be strong advocates of open markets that enhance consumer welfare through lower prices and broader choices. Eschewing a narrow focus on pocketbook issues, these groups focus instead on the deregulatory damage that they fear might be done if trade liberalization were to interfere with laws intended to protect workers, consumers and the environment. The General Agreement on Trade in Services (GATS), for example, is sometimes portrayed as a threat to the democratic provision of essential services. In this context, the term “democracy” connotes sectors that are heavily regulated or state-owned and hence are more answerable to government officials and organized interests – including labour unions and consumer organizations – than they are to corporate directors and shareholders.

The expanding scope of negotiations creates greater friction between WTO members who hold differing views about the role of the state, whether in the domestic or international form. The new issues raised the prospect that the goals of negotiators might move from the limited aim of liberalization at the border to the more ambitious objectives of privatization (i.e. getting government out of the business of providing goods and services directly) and deregulation (i.e. getting government out of the business of directing how private industry may produce and distribute goods and services). The debate over these options carries over to disputes about the proper role of international organizations. Whereas most of these institutions are devoted to building the capacities of governments either indirectly (through technical assistance and the funding of government policies) or directly (through the delivery of services by the organization itself), the principal function of the WTO is the negotiation and enforcement of commitments that generally reduce the state’s level of intervention.

### ***Trade, development and discrimination***

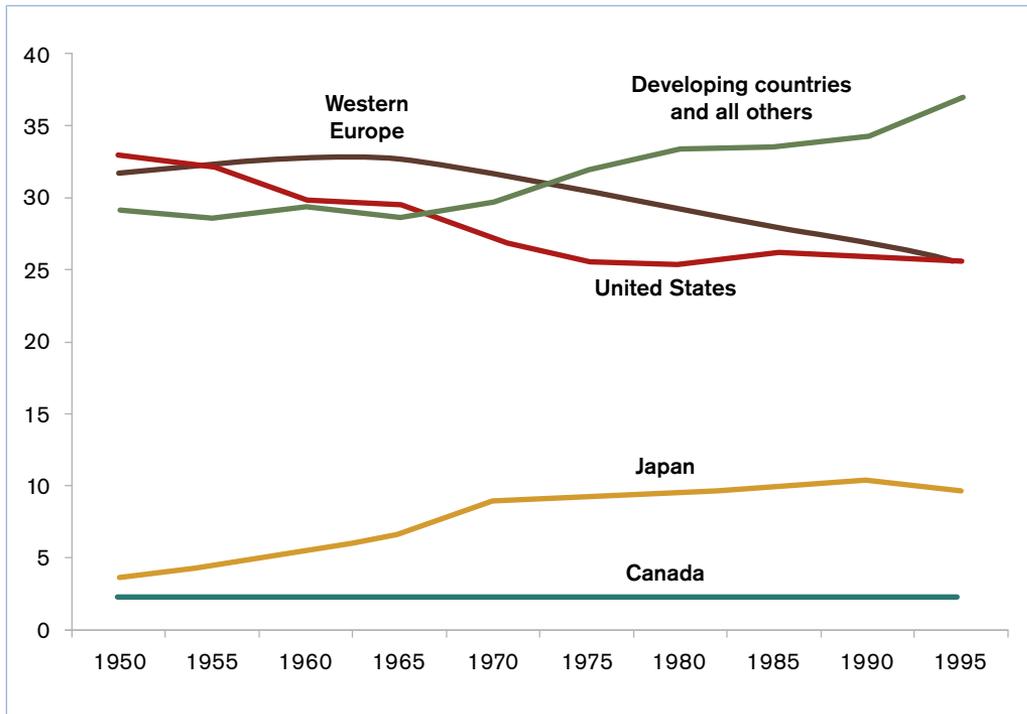
These questions concerning the proper role of the state are also a key part of the recurring controversy over the application of free-trade doctrine to developing countries. The field of development economics might appear to be relatively new, but can be traced at least as far back as the emergence of the very first developing country in our modern sense of that term.

The United States was the original post-colonial, trade-dependent, commodity-exporting, capital-poor country and, as such, it is not surprising that it spawned the first reasoned critique of classical economics. Writing just 14 years after Smith's *Wealth of Nations* – which happened to be published the year that the United States declared its independence – US Secretary of the Treasury Alexander Hamilton (1755-1804) anticipated in his seminal *Report on Manufactures* (1790) much of the rationale and the programme of developing country thinkers who came after him. More than a century and a half before Raúl Prebisch (1901-1986) and others developed the arguments in favour of import-substitution industrialization and called for a New International Economic Order, Hamilton pointed to the dangers of monocultural dependence, the declining terms of trade for exporters of primary commodities and the inability of infant industries to compete with well-established producers in larger, richer countries. Many of the specific steps he advocated, including import protection and a guiding role for the state, would be familiar to modern advocates of industrial policy.

The core question in the debate over trade and development is whether the received wisdom of trade economics applies equally to all countries at every level of economic and political development, or if the arguments in favour of open markets need to be modified by other considerations that perennially arise in developing countries. Policy-makers and opinion leaders in countries that are poor, dependent on trade and that often have legacies of colonialism are, like Hamilton, more prone than their counterparts in developed countries to have misgivings over the consequences of pursuing a development strategy that lets the market decide what will be produced, traded and consumed. Some fear that doing so means being consigned to the least attractive denominators in the global division of labour. These concerns have often led such countries to favour a much stronger role for government, both domestically (in the form of import protection and industrial policy) and internationally (in the form of foreign assistance, commodity cartels, and obligatory forms of special and differential treatment for developing countries, among others).

The rise of the developing countries elevated the significance of these arguments for the trading system. As can be seen from the data in Figure 1.1, the major participants grew unequally during the GATT period, with the relative shares of the global market economy that were controlled by North America and Western Europe gradually declining and those controlled by Japan and the developing countries gradually rising. Policy-makers in many developing countries perceived Japan to have benefited from an interventionist development strategy, and its success inspired emulation on their part in the 1960s and 1970s. The Japanese resurgence also frightened policy-makers in the United States and Western Europe into adopting protectionist policies in the 1970s and 1980s.

The mood of the early 1990s was quite different, being marked by the pro-market Washington Consensus. Named for the propinquity of institutions that favour a market-oriented approach to development, including the International Monetary Fund, the World Bank, the InterAmerican Development Bank, the US Treasury and think tanks, the Washington Consensus stressed

**Figure 1.1.** Shares of GDP of the global market economy, 1950-1995, in %

Source: Calculated from data in Maddison (2001).

Notes: Does not include Eastern Europe, China and the Soviet Union.

the value of open markets as an engine of growth (Williamson, 2004). Several trends contributed to the emergence of this consensus, including the sharp spike in oil prices, the Latin American debt crisis, a slowdown in Japanese growth, severe fiscal constraints and the collapse of the Soviet Union. It was also inspired by a reconsideration of what works, with the Asian “tigers” and other countries that had embraced trade having done better than those that tried to manage it (Harris, 2006). The consensus also coincided with a more activist approach on the part of developing countries that “began to perceive that the positive discrimination received under [special and differential] treatment had become outweighed by increasing negative discrimination against their trade,” and that turned towards “defend[ing] the integrity of the unconditional MFN clause, obtaining MFN tariff reductions, and strengthening the disciplines of GATT” (Gibbs, 2000: 75). These events led many developing countries to recognize that protectionism (under whatever name) had not served them well, and among the reforms that the consensus inspired were the negotiation of free trade agreements with developed countries, a new wave of accessions to GATT, and more active participation in the Uruguay Round. The pro-market reformation has since been followed by a statist counter-reformation in some countries, and the renewed popularity of interventionist policies has been

among the factors making the Doha Round more contentious than its predecessor. While the consensus might therefore have marked only a brief period in time, the WTO was one of its lasting products.

Another perennial debate among economists concerns the relative value of trade preferences and discriminatory trade agreements. The oldest view is that non-discriminatory free trade is the first-best option, and that countries should ideally reduce or eliminate their barriers to trade without favouring one set of partners over another. Others insist that developing countries ought to be given preferential access on either a non-reciprocal basis (as in the case of “one-way” arrangements such as the Generalized System of Preferences) or on a reciprocal basis (especially in free trade agreements). Whether preferences are granted through autonomous and non-reciprocal arrangements or negotiated through reciprocal agreements, they always imply two potential problems for the multilateral trading system. One is the economic problem of distortion. Discriminatory liberalization will create new trade by switching some purchases from less competitive producers at home to more competitive producers in the partner country, but may also divert trade by switching some purchases from more competitive producers in third countries (which remain subject to tariffs) to less competitive producers in the partner country (whose goods are now made cheaper by eliminating tariffs). Any agreement in which the amount of trade diversion exceeds the amount of trade creation will lead to a net reduction in global welfare. The other problem with discriminatory programs and agreements is that they may create a disincentive to multilateral liberalization, with countries being more focused on the need to preserve the margins of preference that they enjoy in these agreements than they are in negotiating new, non-discriminatory reductions in trade barriers.

Economists have debated the merits of discriminatory arrangements since the mid-twentieth century, but they have come to no consensus on whether, on the whole, these arrangements can best be seen as building blocks or stumbling blocks for the multilateral trading system (Lawrence, 1991). The only point on which there is absolute agreement is that discrimination proliferated far more rapidly in the WTO period than it did in the GATT period, with agreements expanding both in number and in significance. One especially notable development is the breaking of the “glass ceiling” that had long prevented the four largest members of the WTO from negotiating free trade agreements with one another. For decades China, the European Union, Japan and the United States had confined their discriminatory negotiations to other, smaller partners, but at time of writing some of the potential pairings between these countries are under negotiation or active consideration (see Chapter 13).

### *The political foundations*

If the multilateral trading system had to be reduced to a single sentence, it might be this: it receives its inspiration from economists and is shaped primarily by lawyers, but it must operate within the limits that the politicians set. The advocates of the legal and economic ideas discussed above were motivated by the desire to create a world in which relations between states were not conducted exclusively as exercises of raw power, and to some

degree both international law and free trade have succeeded in that enterprise. Asymmetrical power nonetheless remains a fundamental consideration in all areas of international relations, a point that is just as true for trade as it is for other questions that are reserved for presidents and prime ministers. Analysts who see the distribution of power as a critical variable in the international system often attribute the very existence of international organizations such as the WTO, as well as the rules they enforce and the outcomes that they promote, to the interests and objectives of the most powerful states in the system. That is a point shared in common by those who take a positive view of the largest states as well as those who see the most powerful states in less benign terms. Where some recognize enlightened leadership, others perceive self-interested bullying.

### *Trade, power and independence*

Scholars and practitioners who adopt a political view of the system differ from the disciplines reviewed above not so much in what they examine as in how they choose to see it. Where legal theorists and lawyers look for principles, and economists and business people see interests, political scientists and statesmen focus on power. The two most salient characteristics of power set it apart from the ways that lawyers and economists prefer to view the world. Power may be defined as the capacity of one actor (be that a person, party, country etc.) to compel another actor do something that it would not otherwise do. Power is also notable for its zero-sum distribution, such that whatever amount of power that one actor has can be measured only relative to that of other actors, and any increase in one actor's power necessarily comes at the expense of all others. These notions of compulsion and asymmetry set those who think in political terms apart from the lawyers who emphasize the concepts of juridical equality and justice, as well as from the economists who favour cooperation and positive-sum gains.

Power dominates political relations within countries and between them, whether or not they establish intermediary institutions such as the WTO to help manage these relations.<sup>11</sup> From this perspective, the creation and operation of an international organization that is intended to open markets is as much an exercise of power on the part of its members (and especially the most powerful ones) as it is a manifestation of international law and the embodiment of an economic idea. This point is exemplified by the theory of hegemonic stability, the basic premise of which holds that an open global market is a public good that tends to be underprovided unless there is someone willing to undertake that expensive task (see Box 1.1). Markets were more open, or were progressing in that direction, when Great Britain and the United States, respectively, were each at the height of their competitiveness and exercised their leadership.<sup>12</sup> Conversely, markets were more closed in the unhappy period that came between British and US hegemony. According to this theory, it is no mere coincidence that the creation of GATT in 1947 came when the United States was at the height of its economic competitiveness, military power and political influence. Realist premises also form the foundation of the Rational Design school, which starts from the assumption that states are rational and self-serving. This school of international political economy seeks to tease out the implications of the central proposition that "states use international institutions to further their own goals, and they design institutions accordingly" (Koremenos et al., 2001: 762).<sup>13</sup>

The economic control of borders, no less than their military security, is an exercise of sovereignty and an expression of power. An agreement that permits or encourages closer economic relations between states will always have implications for political relations between the parties to the agreement. This point might best be understood by considering the critical role that economic integration has played in stitching separate states into unified nations. The need for commercial unification inspired the US Constitution of 1788, as well as the establishment of customs unions that preceded and facilitated the creation of the Italian (1861), German (1871) and Romanian (1881) states. Economic integration also played a key role in promoting broader political cooperation and security in such diverse regions as Western Europe, East Africa, Central America and Southeast Asia. Conversely, the fear that trade liberalization may threaten political sovereignty can sometimes discourage countries from engaging in trade negotiations or adopting their results. Worries of this sort led the Canadian public to reject a trade agreement with the United States in 1911, for example, an experience that was nearly repeated in 1988, and have been a recurring issue in the expansion and consolidation of the European Union. The perceived challenges to independence are less severe in the case of multilateral liberalization, but these initiatives can still raise concerns in some quarters.

The fear of foreign domination through trade runs like a red thread through history, and has come in many varieties. These include the military concern that dependence on trade will sap a country's strength, a preoccupation shared by such diverse personalities as Lycurgus (the law-giver of ancient Sparta) and the Tokugawa shoguns of early modern Japan; or the economic challenge of tying one's destiny to decisions made in faraway capitals, as the Anglophobes of the nineteenth century and the *dependencia* theorists of 1960s-era Latin America expressed; or the cultural anxiety that a dominant foreign power could overwhelm one's own heritage and traditions, as seen in Jean-Jacques Servan-Schreiber's *Le Défi Américain [The American Challenge]* (1967) and as some of our contemporary globophobes assert.

A frequent subtheme in these critiques is the suspicion with which smaller and less competitive states view the enthusiasm of larger, richer states in promoting open markets. From the perspective of a sceptical, nationalist German such as Friedrich List, Great Britain's advocacy of free trade in the nineteenth century was an effort to "erect a universal dominion on the ruins of the other nationalities" (List, 1841: 294). Germany came under harsh criticism for its own use of trade as an instrument of power when Albert Hirschman used the example of Nazi commercial diplomacy to demonstrate "why and how relationships of dependence, or influence, and even of domination can arise out of trade relations" (Hirschman, 1945: 13). These objections were echoed in the 1950s and 1960s, albeit from a different political direction, when it became fashionable in post-hegemonic Great Britain to characterize the country's nineteenth century policies as the "imperialism of free trade".<sup>14</sup> Today critics describe as "kicking away the ladder" the sequence by which developed countries that once employed protectionist measures of their own now seek to prevent others from employing comparable policies.

### *Power and politics in GATT and the WTO*

Even the most casual observer will recognize the vast shifts in power among states and regions from the middle to the end of the twentieth century. Ford (2003: 68) argued that the creation of the WTO reflected this fundamental change in the international distribution of power, characterizing the institutional transference from GATT to the WTO as “a structural or cultural shift from limited multilateralism to superlateralism” in which the new regime “embodied new socio-economic and organizational norms, based on disembedded liberal principles and legalism”. She attributed that change largely to an erosion in the hegemonic role of the United States and to the founding of a new order in which other actors, and above all developing countries, stepped forward to help create a more cooperative, collective regime based on shared responsibilities.

Ikenberry (2001: 50-51) presented an altogether different view, portraying the end of the Cold War as an opportunity for a reinvigorated United States to remake the global order. This is part of a larger, recurring pattern in statecraft that Ikenberry saw in the historical aftermath of major wars, whereby the winning state has “opportunities to establish new basic rules and organizing arrangements that are likely to persist well into the future”. “In general,” he argued, “a leading state will want to bind weaker and secondary states to a set of rules and institutions of post-war order,” but “to get the willing participation and compliance of other states, the leading state must offer to limit its own autonomy and ability to exercise power arbitrarily.” This act of “strategic restraint” allows that country to conserve its power. It is in that context that, for Ikenberry, “creation of the WTO in 1995 is perhaps the clearest and certainly most controversial example in the post-Cold War era of the United States binding itself to an international institution” (*Ibid.*: 244). The WTO can thus be seen as a manifestation both of continued US power, with victory in the Cold War playing the same role here as victory in the Second World War did for creation of GATT, and also as an example of the calculated limits that victorious powers are well-advised to place on their exercise of authority.

Between the Ford thesis and the Ikenberry antithesis is Ostry's synthesis. By her account, the creation of the WTO was a shared enterprise in which both a diminished giant and its major partners had roles. Sylvia Ostry, a Canadian trade diplomat, observed shortly after the WTO came into being that “the end of the Cold War has greatly lessened the ‘high policy’ constraints on American trade policy” (Ostry, 1997: xvi), such that the “glue that bound the Western powers within a broad and consensual policy template has dissolved.” Those powers nonetheless managed to collaborate in the creation of a new, post-Cold War regime. “Without US leadership, the Uruguay Round would simply not have happened,” Ostry argued, “[b]ut the WTO would also not exist without the cooperative efforts of a number of middle powers and, in particular, the major power of the EU” (*Ibid.*: 238).

Political issues infuse the operation of the WTO, even if the economic and political spheres appear to be sharply demarcated in its day-to-day operations. While members generally seek to limit the degree of political interference with trade, it would be unrealistic to expect countries to subordinate all political concerns to the rules and norms of this economic institution. It would also be unwise to demand that they do so. If countries were prevented altogether from using trade as an instrument of foreign policy, they would be forced to choose

between WTO membership and the free exercise of their sovereignty, in which case there would probably be no WTO at all. This was explicitly understood in the negotiations over the Havana Charter. In Article 86, the prospective members recognized that the ITO “should not attempt to take action which would involve passing judgment in any way on essentially political matters,” and that no action taken for “the maintenance or restoration of international peace and security, shall be deemed to conflict with the provisions of this Charter.” There is no comparable provision in GATT 1947, which was expected to be only a stop-gap measure, but that agreement nonetheless contains two articles that carry over into the WTO regime. One provides an exemption from WTO rules for otherwise illegal, trade-restricting measures that states take in pursuit of their essential security interests (GATT Article XXI and GATS Article XIV *bis*). Another provision allows members to refrain from applying WTO treatment to specific members from which they are politically estranged (GATT Article XXXV, replaced by WTO Article XIII). These provisions help to demarcate the divisions between the high politics of diplomacy and security and the low politics of trade, but do not prevent them from meeting. All countries have interests that extend beyond trade policy, and many of them are attracted by the ways in which they might employ the hard edge of soft power.

## Legal, economic and political challenges for the WTO

The preceding review has focused primarily on the legal, economic and political foundations of the GATT system, much of which carries over into the WTO period. It would, however, be a serious error to see the WTO simply as a chronologically sequential and incrementally larger version of GATT. The new system represents more than just a higher stack of agreements, a widened base in the membership and a multiplication in the number of dispute settlement cases. The changes have been qualitative as well as quantitative, both for the trading system and for trade itself, and reflect the profound differences in the world as it was in the second half of the twentieth century versus the world as it is in the first half of the twenty-first century.

There are many ways that the apparent similarities between the WTO of today and the GATT of 1994 can be deceptive. One may start with the seemingly superficial matter of where they are housed. GATT and the WTO share the same address, and a hurried pedestrian on Geneva’s Rue de Lausanne might be forgiven for concluding from a quick glance that the building is little changed. Were that passerby to enter the grounds he would find not only that the WTO now occupies the entirety of the Centre William Rappard – of which the old GATT had only half – but that the much-renovated building has been modernized from top to bottom, expanded with a new wing, and complemented by a spacious new conference centre. Just as the WTO headquarters is superficially similar to but fundamentally different from its GATT predecessor, so too has the institution itself retained similar appearances while undergoing profound changes. The head of the organization goes by the same title as did his GATT predecessors, for example, but the WTO directors-general have higher profiles (if also shorter tenures) than did their forebears. Where the GATT directors-general were technocrats who came from the ranks of ambassadors and civil servants, the WTO directors-general up to mid-2013 were all politicians who had previously been ministers or prime ministers. That same

pattern in which the differences rest beneath a deceptively similar surface can be found in the structure and functions of the Secretariat, the composition of the membership, the conduct of its dispute settlement mechanism, the place that the institution holds in debates over globalization and – above all else – the issues that are taken up in the WTO.

The issues that arise in the WTO, whether in negotiation or litigation, range far beyond the simple border measures that dominated most of the GATT period. That reflects changes in the actual conduct of trade. John Maynard Keynes once waxed eloquent about the integrated world economy that existed immediately before the outbreak of the First World War, when “[t]he inhabitant of London could order by telephone, sipping his morning tea in bed, the various products of the whole earth, in such quantity as he might see fit, and reasonably expect their early delivery upon his doorstep” (Keynes, 1920: 11). For all that changed between 1914 and 1994, a latter-day Keynes could have used those very same words to describe a like transaction in the concluding year of the GATT system. That would no longer be true just two decades later. One may start with how the order is placed and the purchases are fulfilled. Today that recumbent shopper would use a smartphone or similar device rather than a plain old telephone, and that same piece of multitasking technology might even replace the doorstep as the delivery site – provided that the purchases in question can be digitized. Whether the merchandise is virtual or physical, it is more likely now than in the past to be the product of intricate and integrated supply chains whose operation and ownership stretch across more borders. Perhaps the most important change is in the consumer. In 1914, that picture of snug domesticity played out in Keynes’ London and a few other upmarket locales in Europe and North America, and by 1994 it had spread much farther among the developed countries, but in our own time those same luxuries are enjoyed by a rising middle class throughout the developing world. The share of the workforce in these countries whose livelihood is dependent on trade has also risen.

The gap between consumer welfare in Beijing and London has closed rapidly in the WTO period, as have the levels of productivity in their respective firms. The same may be said of the capacities and influence of the governments to whom these consumers and companies pay taxes. That point is true for the narrow field of trade policy as well as for the larger economic and political environment in which it is conducted. For all of the changes that had taken place in the global division of power from before the First World War to the end of the Cold War, most of it entailed a reshuffling in the relative positions of the same seven or eight countries, coupled with one consolidation that lasted (the European Union) and one that did not (the Soviet Union). Similarly, the main difference from the start to the end of the GATT period was a shift from one transatlantic “Group of Two” (G2) to another. What started as a G2 between the Great Britain and the United States was eventually replaced by a G2 between the European Union and the United States. The years since then have seen wealth and power diffuse into altogether new regions, a change that has been more fully reflected within the WTO than the changing balance of economic and political power had been in the GATT echo chamber. The G20 today has ten times as many members as the G2, and is composed of a much more diverse array of countries whose interests are not as easily reconciled.

These economic and political changes in the wider world place the WTO in a different position than was GATT and pose new difficulties for its members and the Secretariat. The three topics reviewed above each help to define the new environment, but have moved from foundations to challenges.

### *The legal challenge*

The WTO faces two sets of legal challenges. The first concerns its ability to fulfil the core task of bringing trade within the rule of law – an area in which GATT made a good but incomplete start. Related to this problem is the need to strike a proper balance between the legislative (negotiations) and judicial (litigation) functions of the institution, which will be a recurring theme throughout this book. The second challenge comes from the conflicts that may arise between trade law and other areas of theory and jurisprudence.

Scholars disagree on the extent to which the WTO has achieved the GATT objective of bringing trade within the rule of law. The negotiation of new agreements in the Uruguay Round and beyond has extended the scope of international law, but the meaning of those agreements has not always been clear. That is due in part to the common practice of “constructive ambiguity”, in which negotiators who find themselves stymied on some point may devise compromise language that manages to get them past the immediate problem but does not actually settle their differences. They sometimes try to resolve those ambiguities through quantification, but there too they can slip into vague formulations. This is one respect in which the WTO shows little change from its GATT predecessor. As one astute observer of the problem stated it:

Consider the centuries of controversy and debate over how to apply the injunctions: “Thou shalt not kill” and “Thou shalt not covet thy neighbor’s wife”. How more difficult the interpretation of the commandments would have been had Moses returned from Mount Sinai with something looking like: “Thou shalt seek to avoid to kill” and “Thou shalt not take more than an equitable share of thy neighbor’s wife taking into account shares during a previous representative period and not precluding shares for new participants” (Plank, 1987: 81).

These shortcomings were especially notable during the GATT period, but did not disappear with the advent of the WTO. Schropp (2009: 4-5) described the WTO as an incomplete contract, pointing to its “formal, *de iure* trade policy flexibility mechanisms” as well as “various informal, *de facto*, flexibility tools,” resort to which “is often in contravention of the letter of the law, or at least the spirit of the Agreement,” but that “happen more or less in the shadow of the law.”

Where negotiators are unable to resolve their differences they sometimes leave it to litigators to finish the job. Some stress what Davey (2012) termed the “judicialization” of the WTO, or Weiler (2001) called “juridification,” while others emphasize those aspects of WTO law that allow for discretion, exceptions and conflict. The most persuasive evidence for the greater

judicialization of the WTO is in the stronger dispute settlement rules of the new institution. That strength encouraged members to bring more cases against one another in the WTO than they had in GATT. The growing docket of the WTO Dispute Settlement Body is not troubling to some lawyers, but other observers do not fully share that optimistic interpretation. Many commentators note that the WTO's enforcement powers are now so strong, and negotiations have proven so difficult to conduct, that the judicial function of this institution can overshadow its legislative function.

The legal issues surrounding trade cannot be seen solely through the lens of trade law itself, as they face challenges from other areas of international law. Here Lang (2011: 243) identified "an emerging post-neoliberal legal imagination" that developed "as a result of the WTO's legitimacy crisis of the late 1990s". As he sees it:

In response to criticisms that the WTO disciplines on domestic regulation constitute overreaching and trespassing into value-sensitive areas more appropriately dealt with through domestic democratic institutions, this new legal imagination is self-consciously cautious and modest in the role that it seeks to define for the trade regime. It seeks to draw new boundaries around the operation of trade law and the trade regime, so as to ensure that WTO law does not become a mechanism for the global projection and entrenchment of a single form of state-market relations, and a single vision of appropriate and legitimate regulatory intervention.

This alternative legal vision, which challenges trade law and the WTO, necessarily brings one back to the political sphere. Only there can countries decide how far they wish to allow trade law to go in defining the relations between them. That is a topic to which we will return in Chapter 5, when examining the issues of coherence and relations with other international organizations. Countries also need to consider differing views of relations within states, and what roles they wish to assign to the state and to the market. That returns us to the economic side of the debate.

### *The economic challenge*

"The great events of history are often due to secular changes in the growth of population and other fundamental economic causes," Keynes once observed (Keynes, 1920: 14-15), which "escaping by their gradual character the notice of contemporary observers, are attributed to the follies of statesmen or the fanaticism of atheists." The rate of change during most of the GATT period was leisurely enough that one might easily have fallen into that bad habit of misattribution, especially at a time when participation in the system was limited, but not so in the WTO period. The speed with which the world changes has become far too rapid to escape notice, especially with respect to the relative decline of the developed countries and the concurrent rise of developing nations. Those shifts have made the WTO system more difficult to manage than its predecessor.

As summarized in Table 1.2, the combined share of global gross domestic product (GDP) of the Quad (Canada, the European Union, Japan and the United States) fell from three quarters to less than three fifths from 1995 to 2011. During that same period the eight emerging economies shown in the table grew from less than one tenth to over one fifth of the global economy. In 1995, the Quad as a whole was 8.1 times larger than these eight, and one country in the latter group was not yet in the system; the multiple had fallen to 2.7 by 2011, and all of them were members. To draw the most consequential comparison, the ratio of the US share of global GDP to that of China was just over ten-to-one at the start of the WTO period, but by 2011 it was just two-to-one.<sup>15</sup>

**Table 1.2. Shares of global GDP, 1995-2011, in %**

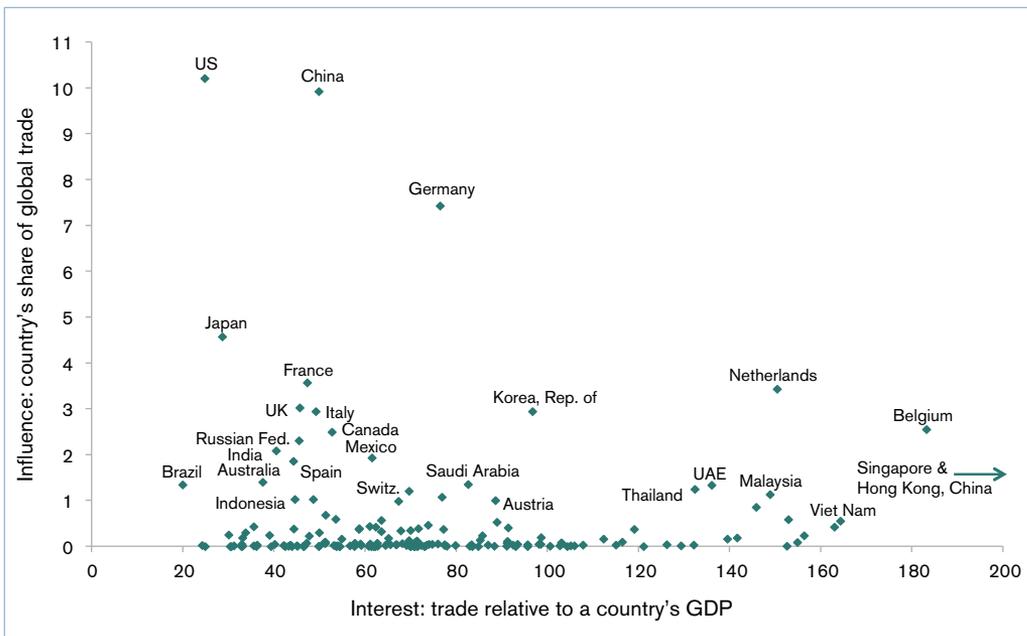
	1995	2000	2005	2010	2011
<b>Quad</b>	<b>75.4</b>	<b>73.7</b>	<b>70.1</b>	<b>59.7</b>	<b>57.4</b>
European Union	30.9	26.2	30.1	25.6	25.1
United States	24.6	30.6	27.5	22.9	21.4
Japan	17.9	14.6	10.0	8.7	8.4
Canada	2.0	2.2	2.5	2.5	2.5
<b>Selected countries</b>	<b>5.3</b>	<b>4.5</b>	<b>5.9</b>	<b>6.6</b>	<b>7.2</b>
Russian Federation	1.3	0.8	1.7	2.4	2.7
Australia	1.2	1.3	1.5	1.8	2.0
Korea, Republic of	1.7	1.6	1.8	1.6	1.6
Switzerland	1.1	0.8	0.8	0.8	0.9
<b>Emerging economies</b>	<b>9.3</b>	<b>11.0</b>	<b>13.0</b>	<b>20.4</b>	<b>21.5</b>
China	2.4	3.7	4.9	9.4	10.5
Brazil	2.6	2.0	1.9	3.4	3.5
India	1.2	1.5	1.8	2.7	2.6
Mexico	1.0	1.8	1.9	1.6	1.6
Indonesia	0.7	0.5	0.6	1.1	1.2
Turkey	0.6	0.8	1.1	1.2	1.1
South Africa	0.5	0.4	0.5	0.6	0.6
Malaysia	0.3	0.3	0.3	0.4	0.4
<b>Selected developing regions</b>	<b>5.3</b>	<b>6.1</b>	<b>6.2</b>	<b>8.2</b>	<b>8.6</b>
Other Latin America and Caribbean	2.5	2.6	2.3	3.2	3.2
Middle East and North Africa	2.3	2.9	3.2	4.0	4.4
Least-developed countries	0.5	0.6	0.7	1.0	1.0
<b>Rest of world</b>	<b>4.7</b>	<b>4.7</b>	<b>4.8</b>	<b>5.1</b>	<b>5.3</b>
<b>World</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>

Source: Calculated from World Bank data at <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD>.

One of the most serious problems in the multilateral trading system is the growing divergence between the interests and the influence of leading countries in that system. In the GATT period, the Quad, and especially the United States, had not only economic interests that motivated them to create and maintain the system but also the influence needed to achieve this aim. We have already seen how that influence has waned over time, as measured by their declining shares of the global economy. Developing countries have captured ever-greater shares of that economy, with trade playing no small role in their rise, but their willingness and ability to shoulder the burdens of the system remain uncertain.

The data in Figure 1.2 plot the importance of specific countries to the trading system (a measure of influence) and the significance of trade to those countries (a measure of interest). The first of those factors is gauged simply by countries' shares of global merchandise trade. The second factor is trade dependence, defined here as a country's trade relative to its GDP.<sup>16</sup> All other things being equal, we should expect there to be greater impetus for the system to move forward, and for new trade agreements to be negotiated, when the countries with the greatest amount of influence in the system also have high levels of interest. While there are indeed some examples that broadly fit that pattern, especially in Europe, for most of the prominent countries in the WTO their levels of interest are not commensurate with their influence.

**Figure 1.2. Relative values of countries' merchandise trade, 2011**



Sources: Shares of global trade calculated from WTO data on imports and exports of merchandise at <http://stat.wto.org/Home/WSDBHome.aspx?Language=E>. Merchandise trade as a percentage of GDP from World Bank data at <http://data.worldbank.org/indicator/TG.VAL.TOTL.GD.ZS>.

Notes: Countries' percentage shares of global trade in merchandise and trade in merchandise relative to countries' GDP.

The positions of the European Union and its member states are especially complex and represent in microcosm the larger problem of the trading system. The data on trade dependence show that Germany is, in addition to being the largest trader in the group and the third-largest in the world, also the median country in the trading system: at 76.4 per cent, its trade dependence is exactly equal to that of the global average. As a general rule, the other large EU member states tend to be less trade-dependent than Germany, as in the case of France, Italy and the United Kingdom, while smaller members such as Belgium, the Czech Republic, the Netherlands and the Slovak Republic are among the most trade-dependent countries in the world. With trade having been the original area of competence for the EU machinery, and having played such a central role in the bloc's existence, it is not surprising that the European Union places a higher priority on this area of public policy than the other large players do. The differing interests of EU member states nonetheless make for a sometimes unstable negotiating stance, not least on divisive and sensitive issues such as agriculture, and it is the larger and less trade-dependent members, such as France, that are more prone to apply the brakes even when smaller, more trade-dependent members would prefer to step on the accelerator.

Compared with their EU counterparts, US policy-makers place a lower priority on this subject. The United States is one of a handful of countries that are more important to the trading system than the trading system is to them. Whereas this country accounted for 10.2 per cent of global merchandise trade in 2011 (the highest of all), US trade in goods was the equivalent of just 24.8 per cent of the domestic economy (the third-lowest of all). The relative share of trade vis-à-vis the domestic economy was about three times greater in the average country than in the United States, and for many of them it exceeded 100 per cent. The situation of Japan is similar to that of the United States. Whereas this country was the fourth-largest trader in 2011, controlling 4.6 per cent of the total, trade was the equivalent of just 28.6 per cent of the Japanese economy.

Some of the more prominent emerging and transitional economies share that same characteristic of being more important to the trading system than the trading system is to them. Consider Brazil, China, India, the Russian Federation and South Africa. These five countries collectively controlled 16.3 per cent of global merchandise trade in 2011, and individually ranged from 0.6 per cent (South Africa) to 9.9 per cent (China), but for each of these countries the value of total trade in goods (imports plus exports) in 2011 was equivalent to a smaller share of GDP than the global average of 76.4 per cent. That point is especially notable in the case of Brazil. It was in fact the least trade-dependent country in the world in 2011, with merchandise trade being equivalent to just 19.9 per cent of its GDP. Trade-dependence was also below the 76.4 per cent global average in India (40.5 per cent), the Russian Federation (45.5 per cent), China (49.8 per cent) and South Africa (53.5 per cent). To be sure, not all emerging economies meet this description: Malaysia, for example, is among the most trade-dependent of all economies (148.8 per cent). On average, however, the largest emerging economies are, together with the United States and Japan, among the least trade-dependent.<sup>17</sup>

These figures are not meant to suggest that trade is unimportant to the largest emerging economies, nor to Japan and the United States. It is nonetheless reasonable to conclude that the perceptions of policy-makers in each of these countries might differ from those of their counterparts in smaller, more trade-dependent countries. It is less costly for these countries to walk away from any deal that is not to their liking, or even to abstain from trade negotiations altogether, just as each of them may be more attracted by the prospects of negotiating bilateral or plurilateral trade agreements in which smaller partners' desire for access to their markets can be leveraged for other *desiderata* (not all of them economic). They might also be more likely than others to use trade as a means of cementing alliances with other countries with whom their interests are compatible but not identical.

### *The political challenge*

The political challenge stems directly from the economic issues reviewed above. Economic and political power are more widely distributed in the WTO period than was the case in the GATT period, and the configuration of power in this system may be less conducive to multilateral liberalization than was the case in the old days of top-down leadership. While GATT owed its existence to the interests and influence of a few, large powers, shares of the global economy are more diffuse in the WTO era. That requires a much higher level of cooperation between countries not just with different interests, but also very different ideas about how the multilateral trading system ought to operate.

The European Union and the United States remain the two largest and most influential members of the WTO but have less sway in the organization than they did in GATT. There was a time when agreement between these two partners was both a necessary and a sufficient condition for bringing a round of trade negotiations to a conclusion. By the time of the 2003 Cancún Ministerial Conference, that condition appeared to remain necessary but no longer sufficient, as demonstrated by the revolt of two different blocs of developing countries against a proposal that these two members floated for the Doha Round agricultural deal. It is now an open question as to whether EU–US concurrence remains even a necessary condition. Some might contend that if China and the United States were to be in strong agreement over some new multilateral bargain, European negotiators might find it difficult to withhold their own approval – provided that the terms of that bargain were not blatantly unfair to European interests.

Power relations in the trading system today need to be seen through a wider-angle lens that takes in countries that have moved from the periphery of GATT to positions closer to the centre of the WTO. These rising powers include some that had long been nominal members of the system but did not begin to exercise their potential until relatively late in the GATT period, as well as others that did not accede until after the WTO was established. Prominent among the emerging countries in that first group are Brazil, India and South Africa, each of which were among the original GATT contracting parties of 1947, while the latter group includes China (which acceded in 2001) and the Russian Federation (which acceded in 2012). Each of these countries is highly influential within its own region, both economically and politically,

and either has or aspires to have a greater influence at the global level. Their local influence might most simply be measured by shares of regional GDP: South Africa accounts for 32.2 per cent of the sub-Saharan African economy, and the shares are higher still for China in East Asia and the Pacific (39.0 per cent), Brazil in Latin America and the Caribbean (42.7 per cent) and India in South Asia (81.3 per cent),<sup>18</sup> while the Russian Federation is the only country that is a big player on two continents. China and the Russian Federation are among the five permanent members of the UN Security Council; Brazil and India hope to win permanent seats on an expanded council. And while these countries' military capabilities are not directly relevant to trade negotiations, it is worth observing that all but South Africa are on the top-ten list of countries with conventional military forces, and all of them either have nuclear weapons (China, India and the Russian Federation) or at one time sought to develop them (Brazil and South Africa). These and other emerging economies, such as Chile, Malaysia, Mexico, Singapore and Turkey, take a much more active role in WTO deliberations than they did in the GATT period, sometimes approaching this institution as one of several in which they may exercise a rising degree of influence on world affairs.

The influence of the largest emerging economies was already evident in the endgame of the Uruguay Round. Peter Sutherland (see Biographical Appendix, p. 594), who served as the last GATT director-general and the first WTO director-general, would later observe that the round could not have been concluded without the strong support of the ambassadors from Brazil (Luis Felipe Lampreia, see Biographical Appendix, p. 583) and India (B.K. Zutshi). Each of them fought for their respective countries' interests, but Mr Sutherland could also appeal to their sense of commitment to the multilateral trading system.<sup>19</sup> By the same token, when General Council Chairman Stuart Harbinson (see Biographical Appendix, p. 580) worked throughout 2001 to get the Doha Round off the ground, he relied on his counterparts from Brazil and South Africa, later observing that: "The support of these two large and influential developing countries was absolutely instrumental in getting the round launched."<sup>20</sup> The clout of the emerging economies can also be felt in their rising ability to slow or halt initiatives to which they object. That had not been the case in the mid-1980s, when the concerns of countries such as Brazil and India did not prevent the Uruguay Round from being launched, and India was too isolated in 2001 to block the start of the Doha Round. However, these and other emerging economies have had a decisive influence on the subsequent conduct of that round.

At the other end of the continuum of developing countries, one finds a larger group of poorer, less powerful states in which policy-makers often have a less confident view of their countries' capacities to benefit from an open market. Chief among them are those the United Nations formally identifies as least-developed countries (LDCs).<sup>21</sup> This group forms a large and growing bloc within the WTO: 26 of the 49 LDCs were resident members of the WTO as of 2012, eight were non-resident members (i.e. did not have permanent missions in Geneva), and nine were still in the process of accession. The bloc of African, Caribbean and Pacific (ACP) countries includes most of the LDCs, as well as many other developing countries in which income levels are above the LDCs but remain very poor by any objective standard. Some of the ACP/LDC countries, which collectively form the Group of 90 (G90), tend to view trade liberalization as more of a

threat than an opportunity insofar as it might reduce the margins of preference that they currently enjoy in access to the markets of industrialized countries while also restricting their own “policy space”. They also insist that any new deals be complemented by expanded capacity-building programmes to assist them in meeting these obligations.

Many other developing countries and transitional economies fall in the middle of the continuum that is bracketed by these two extremes, being larger and wealthier than the G90 but not in the same league as the larger emerging economies. These countries differ tremendously in the size, diversity and competitiveness of their economies, and also in the degree of their ambitions for the multilateral trading system. The group includes some countries that take a very pro-market approach to development, favouring free trade and a relatively small role for the state, and others in which the outlook is closer to that of the typical G90 member. Whatever position they take or coalitions that they join, these countries are now more likely than they had been in the GATT period to be formal and active members of the multilateral trading system.

### **The legal, economic and political dimensions of WTO history**

The multilateral trading system is the joint product of legal, economic and political ideas, as well as real-world developments in each of these fields. There are times when the tensions between these three disciplines are held in abeyance. That was certainly the case in the early 1990s, when the political, economic and legal rationales for the establishment of a new international organization converged: the end of the Cold War promised a peace dividend and invited a large swath of the world to re-enter the global market; the rise of the Washington Consensus prompted a re-evaluation of development strategies and trade doctrines in developing countries; and the time seemed right to establish a new world order based on inclusiveness and the rule of law.

The planets came into alignment just long enough to produce a new World Trade Organization. Once that heady period had passed, the conflicts between these three schools of thought and action re-emerged, and grew especially heated as the Doha Round dragged on and the shortcomings of the system became more apparent. Lawyers, economists and politicians who look upon the trading system in general or specific issues that arise within it often appear something like the blind men of legend who were each asked to describe an elephant, with the results depending on which part they happened to grab. The problem worsens when these blind men move from description to prescription; fixing what ails the system is not made any easier when lawyers think that its trunk swings too freely, economists want the tusks removed and politicians say that its feet are too flat.

If the differences between these three disciplines were to be decided by the force of numbers, it is the lawyers who would win, a point that is apparent from the Biographical Appendix to this book. In it one finds details on all of the directors-general, deputy directors-general, chiefs of staff, chairmen of the WTO General Council and members of the Appellate Body from 1995 to

2012, together with selected ministers, ambassadors and other figures whose words or deeds from the late GATT period to the present are cited in this book. Of the 86 individuals in the Biographical Appendix for whom information on their educational background is available, 40 received degrees in law (46.5 per cent) versus 25 in economics or business (29.1 per cent); five held joint or distinct degrees in both law and economics (5.8 per cent), such that 81.4 per cent of these figures held degrees in either or both of these fields.<sup>22</sup> Only six (7.0 per cent) held degrees in political science, though every member of this community can be said to have been schooled in practical politics.

Those simple numbers do not tell the whole story, as it is the interaction between these three fields – sometimes creative and sometimes destructive – that makes for the dynamism of the trading system. The themes covered in this intellectual prehistory all figure prominently in the actual history that follows. The legal issues run throughout the narrative, as the WTO is now an institution that both embodies and belies the equality of states. In principle, the legal rights and status of all members are identical; countries such as Liechtenstein and Saint Lucia are on the same footing as China and the United States. In practice, however, it is an inescapable fact that vast asymmetries exist between countries, and it is inevitable that the larger countries in the system can deploy more resources and exercise greater influence.

The book examines these three themes from several angles. The political issues examined here fall principally into two categories. One concerns the relations between members that are conducted within the organization. These can be seen in the countries' decisions on whether they will accede to the organization, how they will be represented within it, and whether they will join specific coalitions (Chapter 3) and in the political issues that arise in negotiations over new members' accessions (Chapter 4). The book also explores the political issues surrounding the WTO itself, both in its relations with other organizations and civil society (Chapter 5) and in the leadership of the organization and management of the institution (Chapter 14).

The disparities among members are a recurring theme in the WTO, and are examined at several points in this book. In Chapter 6, we review how the rules and norms of the organization seek to balance the needs of the very different countries that comprise the WTO. The disparities between larger and smaller countries are more significant when dispute settlement cases come down to retaliation, as explored in Chapter 7. And if market access negotiations fall back on the principal supplier rule – that is, when only the principal suppliers of a product request tariff concessions on it – they cede the initiative to larger countries.<sup>23</sup> That is an issue discussed in Chapter 9.

The economic issues are also recurring and varied. Economists are sometimes frustrated by the WTO and its perceived shortcomings as an instrument of liberalization. This is one of the themes in Chapter 8, where we examine means other than dispute settlement through which the letter and the spirit of the system can be enforced. Chief among these is the Trade Policy Review Mechanism (TPRM), an instrument by which WTO members' regimes are examined in depth on a rotating basis. Many economists are dissatisfied with the TPRM insofar as it does not go nearly as far as they would like in identifying barriers and prescribing better policies.

They also tend to see the formulas and other approaches taken to liberalization, as discussed in Chapter 9, as imperfect half-measures. Economists are more divided on the question of discrimination, which we take up in Chapter 13, split as they are between those who see it as an acceptable – if second-best – way to open markets and those who see that as a very distant second.

Four other chapters are devoted to the historical development of the WTO and the negotiations that have been conducted in it. No one discipline dominates these narratives, where the legal, economic and political issues often blend together. These include the history of the creation of the multilateral trading system (Chapter 2), the negotiations that have been conducted within the WTO but outside of the Doha Round (Chapter 10), the negotiations leading to the launch of the Doha Round (Chapter 11), and the Doha Round itself (Chapter 12). The book concludes with a discussion in Chapter 15 of where the WTO may be headed in the future.

## Endnotes

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- 1 Bhagwati (2002b: 1) quoted Cobden as noting that in order to undercut the arguments of the protectionists abroad, the British free-traders "avowed our total indifference whether other nations became free-traders or not; but we should abolish Protection for our own selves, and leave other countries to take whatever course they like best."
- 2 The United States abrogated the 1854 trade agreement 13 years later, in no small part because of Union unhappiness over the Confederacy's use of Canada as a staging ground for raids during the Civil War.
- 3 Even so, these approaches have not disappeared altogether. Bhagwati (2002b) advocated a return to this approach as a supplement to multilateral negotiations, and several other authors have examined the use to which it has been put in recent decades by such diverse countries as Australia (Garnaut, 2002), Chile (Edwards and Lederman, 2002) and Japan (Hamada, 2002).
- 4 For example, see Émeric Crucé's *New Cyneas* (1623).
- 5 This specific article refers to trade within the confines of the Holy Roman Empire. Other articles in the treaty address commerce in and between other states of Europe.
- 6 This same point may be made with respect to other WTO members/former GATT contracting parties that, for varying reasons, are (like the European Union) more prone than the United States to be favourably disposed towards international organizations. That is notably the case for Canada, which has a long history of engagement in multilateral diplomacy (e.g. see the drafting history of the United Nations Charter) and for Japan (where the legal traditions place treaties ahead even of the constitution). The comparison made here between the European Union and the United States is thus the most prominent example, but not a unique one, of the frictions between political cultures in which policy-makers demonstrate very different degrees of attachment to sovereignty, world federalism, and other contending ideas and ideals.
- 7 Ricardo's logic also assumes that the added costs of transportation do not wipe out the efficiencies that result from specialization and trade. The validity of that assumption has grown over time as technology has reduced the costs and risks of transportation.
- 8 See Lang (2011), especially Chapter 3, on the emergence of the anti-globalization challenge to free trade.
- 9 See [www.cupe.ca/mediaroom/newsreleases/showitem.asp?id=87](http://www.cupe.ca/mediaroom/newsreleases/showitem.asp?id=87).
- 10 Originally stated by WHO Director General Gro Harlem Brundtland in 1999 and often repeated. See <http://apps.who.int/medicinedocs/en/d/Js2248e/7.html>.
- 11 Readers will note that the principal emphasis throughout this book is on trade relations at the state-to-state level, with reference made to the domestic politics of trade only when necessary. That is an omission made solely for reasons of practicality. Domestic considerations are often the key determinant of how countries approach the multilateral trading system, but space does not permit extensive examination of how these considerations have played out in the many countries that comprise this system. For the author's views on the domestic politics of trade in one country, see VanGrasstek (2013).
- 12 Some versions of theory of the hegemonic stability identify the Netherlands as the first country to play the role of the market-opening hegemon.

- 13 Several studies in this school have examined what its assumptions mean for institutions and their membership, scope, centralization, control and flexibility. Some of these studies have focused on important issues in the trading system, such as the escape clause (Rosendorff and Milner, 2001) and the negotiation of agreements that are linked through MFN clauses (Pahre, 2001).
- 14 See, for example, Gallagher and Robinson (1953). The theory and practice are more fully explored in Semmel (1970).
- 15 Note that the levels of GDP shown in Figure 1.1 and Table 1.2 were calculated on different bases, and while comparisons can be made within each set of data, one should not consider the table to be a continuation of the same time series shown in the figure.
- 16 Note that trade *relative to* GDP is not the same as trade *as a share of* GDP. Because GDP is calculated on the basis of net exports (exports minus imports), it is possible, as is the case for a great many countries, for total trade (exports plus imports) to be greater than 100 per cent of GDP.
- 17 None of this should be taken to mean that a country's level of activity is determined solely by its degree of trade-dependence. Australia is relatively less trade-dependent, with trade being equal to 37.5 per cent of its GDP, but is by any reasonable measure one of the most active members of the WTO. Conversely, there are many developing countries that are highly trade-dependent but are not very active in WTO deliberations. Some do not even have permanent missions in Geneva, as is the case for Belize (where trade is equal to 84.4 per cent of GDP), Maldives (88.3 per cent), Sierra Leone (91.0 per cent) and Papua New Guinea (92.4 per cent). In brief, trade dependence should be considered one factor among many that may affect the level of significance that a country attaches to trade.
- 18 Calculated from World Bank data on GDP in 2010. See <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD>.
- 19 Author's interview with Mr Sutherland on 18 January 2013.
- 20 Author's correspondence with Mr Harbinson on 30 January 2013.
- 21 While the specific benchmarks for LDC designation have evolved over the past generation, these criteria are based on three tests: weak human resources; a low level of economic diversification; and a low income, as measured by GDP per capita. The criteria are periodically examined to "graduate" countries from this status or, more commonly, to add new countries. As approved by the UN General Assembly in 1971, the original list of LDCs identified 24 countries. After numerous additions, a few graduations, and the merger of two countries into one, the list had more than doubled to 49 LDCs in 2012.
- 22 Other fields that are less prominently represented in this group are public administration, some received degrees in multidisciplinary programmes or in more than one field, and others received degrees in such diverse fields as anthropology, chemistry and sociology.
- 23 For an extended analysis of the meaning of the principal supplier rule for power relations in GATT and the WTO, see Kim (2010: 60ff).

# 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



The Preparatory Committee for the United Nations Conference on Trade and Employment meets at the Palais des Nations, in Geneva, on 10 April 1947. © United Nations



The United Nations Conference on Trade and Employment meets in November 1947 in Havana, Cuba, to draft the ill-fated Havana Charter for an International Trade Organization. © United Nations



Eric Wyndham-White, Executive Secretary and subsequently GATT Director-General, 1948 to 1968.  
© United Nations



Olivier Long (*right*), GATT  
Director-General, 1968 to 1980.  
© United Nations



Arthur Dunkel (*right*),  
GATT Director-General,  
1980 to 1993.

The original contracting parties to GATT hold one of their first sessions at the Palais des Nations, in Geneva, on 17 August 1948.  
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The second GATT round is held in Annecy, France, in 1949.  
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The inaugural meeting of the Dillon Round is held at the Palais des Nations on 1 September 1960.  
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The launch of the Tokyo Round  
in September 1973.  
© United Nations



The Uruguay Round  
is launched in  
Punta del Este on  
20 September 1986.



GATT Director-General  
Peter Sutherland presides in  
Geneva over the conclusion  
of the Uruguay Round on  
15 December 1993.  
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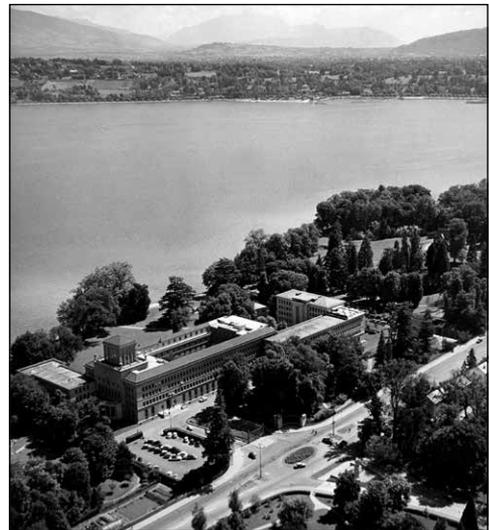
US Trade Representative Mickey Kantor signs the Final Act of the Uruguay Round at the Marrakesh Ministerial Meeting, on 15 April 1994.



The "green room" inside the Centre William Rappard, years after renovations rendered its title figurative rather than literal. Photo first published in *Le Temps* in 2008.  
© Eddy Mottaz/*Le Temps*



The Centre William Rappard, just before the official opening in June 1926. The building was originally headquarters to the International Labour Organization (ILO). *Below right* Wings at each end of the building were added in 1951. © ILO Historical Archives



Above "Irish Industrial Development" (1961) by Sean Keating, one of the many works of art in the Centre William Rappard.

*Right* The Delft panel (1926) by Albert Hahn Jr. reproduces part of the preamble of the ILO Constitution in four languages and can be found in the main entrance to the Centre William Rappard.





Above The conference centre adjacent to the Centre William Rappard was completed in 1998.



Left The Centre William Rappard in 2004.



Above Depictions of "Peace" (left) and "Justice" (right) (1924) by Luc Jaggi flank the main entrance to the home of the WTO.

The new atrium in the Centre William Rappard, inaugurated on 1 May 2012.



A new building adjoining the existing Centre William Rappard, inaugurated in 2013, brings all WTO staff under the same roof for the first time.  
© Brigida González

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***

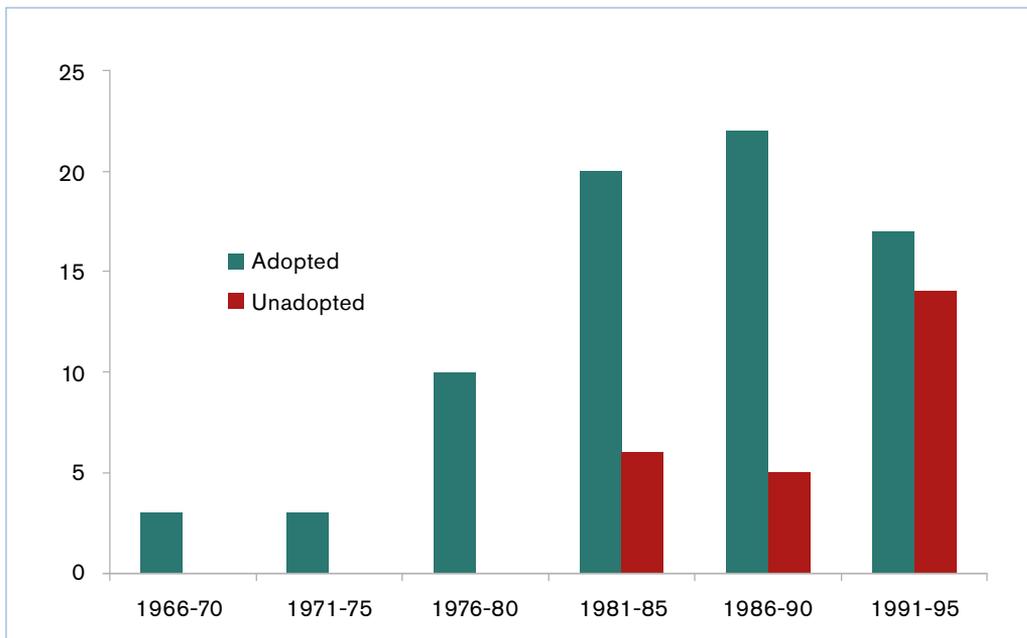
Wider rules require greater enforcement, and here the Uruguay Round also produced an important innovation. The Dispute Settlement Understanding (DSU) went far beyond the relatively weak rules of GATT, making the system much stricter and encouraging countries to bring a far greater number of complaints 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**

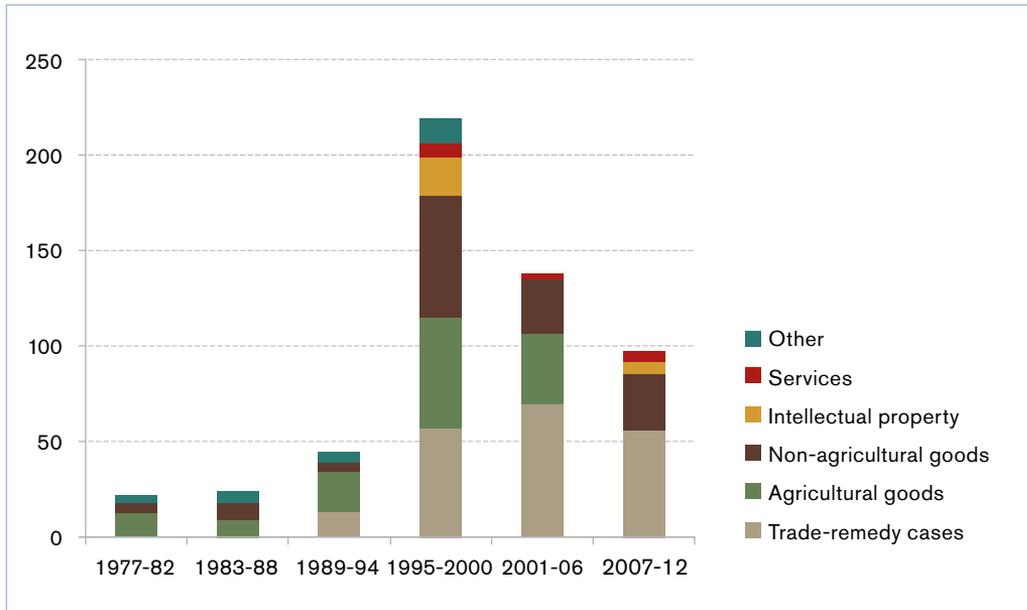


Source: Author's calculation from World Trade Law, "GATT Dispute Settlement and Working Party Reports".

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.

# Part II

## Membership and representation

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# 3 Members, coalitions and the trade policy community

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The theory of games shows how coalitions should be formed if there is an advantage in forming them and the rules do not forbid it. Any player, in fact, who fails to attempt a coalition in such circumstances will lose or, more exactly, will gain less. The rational player must make the pessimistic assumption that a coalition may be formed against him; and he must therefore attempt to form one himself.

John McDonald  
*Strategy in Poker, Business and War* (1950)

## Introduction

The ways that countries represent themselves in Geneva and coordinate action with other members have undergone important changes since the late GATT period. Four trends stand out: more countries have acceded (as discussed in Chapter 4), more of these members have established permanent missions in Geneva, more of those missions are dedicated exclusively to trade rather than to Geneva-based institutions in general, and the number of personnel assigned to both the dedicated missions and the general-purpose missions has risen. The net result was that the total diplomatic manpower that countries deployed in Geneva grew more than five-fold from 1982 to 2012. The composition of the Geneva negotiating community also evolved. Whereas the Quad (Canada, the European Union, Japan and the United States) had once dominated GATT, and were almost alone in having large and GATT-dedicated missions, many more negotiators now hail from developing countries. That is true not just for the largest emerging economies but also for several other developing country members that “punch above their weight” in the organization.<sup>1</sup>

The conduct of negotiations has also changed. In much of the late GATT and early WTO periods, a great deal of criticism focused on the so-called green room. Originally used in both a metaphorical sense (alluding to a tradition in the theater) and in an architectural reference (there being an actual room of that hue),<sup>2</sup> this became a generic term for any closed negotiation in which only a small number of countries were invited to participate. The few contracting parties allowed in the room cut the most important deals, provoking resentment from those left outside. Over time, WTO members came to rely more on coalitions as a device for mobilizing, communicating and negotiating, and nearly all members are now represented in multiple coalitions that are formed along geographic, sectoral or other lines. Green rooms have not been eliminated altogether, but those on the inside are now expected to keep in close contact with their coalition partners. The result is a system that bears a closer resemblance to representative democracy than to oligarchy.

## The Geneva trade policy community

Before delving into the representation of individual countries in the WTO, as well as their proclivities to form coalitions, it is appropriate to make a few observations on the trade policy community as a whole and the people who form it. In addition to the hundreds of diplomats who are accredited – some of them short-termers but others of whom become trade people for life – the group also includes hundreds of members of the WTO Secretariat and other institutions in the orbit of the WTO. Many of the people who work in these bodies were at one time posted to their countries' WTO missions. The members of this community often see themselves not solely as representatives of countries that are divided by their different interests and objectives but as individuals who are united by their similar backgrounds, perspectives and problems, as well as by their shared commitment to the system as a whole. The best comparison may be to a social club in which most of the members are salesmen. They may have very different wares to sell, and might even compete with one another in the same product lines and in the same sales territory, but that does not prevent them either from being social or from mixing business with pleasure.

People came to this community by varying paths in their professional careers. For a few of them, becoming a trade policy specialist was a lifelong ambition. One Latin American diplomat who eventually rose to become deputy director-general, for example, joined his country's foreign service with the express aim of being assigned to international economic issues and was prepared to leave government service if he was given any other responsibilities. Some of the economists have always concentrated on trade in their professional work, whether in the classroom or in government. Those cases are exceptional; most people interviewed for this history reported one form or another of accidental entry into the field. Some who became pillars of this community joined it because they were given a choice of several possible jobs at an early stage of their careers and thought that something about trade sounded intriguing, or were already in Geneva for one reason or another and simply needed a job, or were living elsewhere and looking for employment in an international organization, or were assigned to Geneva by their service, or followed an immediate superior who got the posting. Whatever route they took to the WTO, many of them decided to stay or return after that first experience. Sometimes that meant coming back to Geneva as ambassador after an earlier stint on one of the lower rungs of the diplomatic ladder; sometimes that meant moving laterally from their country's diplomatic service into the WTO Secretariat; and for others that meant finding a position in another Geneva-based international organization or in one of the trade-related think tanks, non-governmental organizations or schools that ring the city.

The shared experience in this community can be further reinforced by the similar backgrounds of its members. The members of this community tend to be well-educated: of the 93 people listed in the Biographical Appendix for whom data are available on the level of their degree,<sup>3</sup> 58 (62.4 per cent) hold either a law degree or some form of master's degree. Among the remaining 35, just over half (18) obtained doctorates<sup>4</sup> and 16 received bachelor's degrees; many of those with doctorates, master's degrees, or the equivalent obtained them from UK and US universities.<sup>5</sup> Part of their sense of community comes from the problems they share in

common. When the diplomats who handle trade meet to negotiate or socialize, with the line separating one activity from the other being indistinct, they may find themselves commiserating over comparable difficulties that they have in managing sometimes tense relationships with their respective countrymen. Preparing for negotiations on trade in services, for example, may require them to deal with capital-based regulators who object to the very notion of allowing negotiators in another ministry to make commitments affecting their areas of jurisdiction. They may also have similar experiences in dealing with newly assigned trade ministers, a position that in some countries – perhaps even in most of them – may be filled by politicians whose knowledge of the field is not nearly as complete as trade professionals would prefer. Happy is the WTO ambassador whose minister can learn the basics of trade policy quickly, has the political skills needed to deal with his counterparts at other trade-related ministries and has both political capital and a willingness to spend it on behalf of his ministry's interests and initiatives. All too often, they must deal with ministers who fall short on one or more of those points. In the late GATT period, many believed that one of the system's main problems was the infrequency of ministerial involvement. In the WTO period, there is more concern over the form than the frequency of ministers' participation. Some ministers are more prone to treat meetings with their peers as an opportunity to play to the crowd at home than as a chance to advance or conclude negotiations.

With some notable exceptions, the members of this community tend not to count among their number the people at the apex of the multilateral trade system. This is an area where the folkways of the WTO differ somewhat from those of GATT. The GATT director-general was not just the leading figure in the community but a very active part of it, a position achieved by dint of his personal and political skills, his familiarity with the minutiae of the field and sheer longevity in office.<sup>6</sup> The role of director-general underwent a change in the transition from GATT to the WTO. Peter Sutherland held this position in both bodies and, by force of personality, he elevated the office to one that could deal directly not just with ministers but with presidents and prime ministers. By all accounts, Mr Sutherland managed to strike a balance between that higher status and his connection to the Geneva community, being careful to ensure that ambassadors were either present when he met with heads of government or, failing that, were fully briefed on what transpired in the meeting. Some of his successors have been criticized for losing touch with their principal constituency. A similar sense of hierarchy and social distance prevents most trade ministers from being considered full-fledged members of this trade community. Unless the minister in question is among the few who previously served as an ambassador or in some other capacity in Geneva,<sup>7</sup> or held the portfolio longer than the few years that most have in this office, or is an especially empathetic person or a quick learner, trade ministers tend to be seen as outsiders. Even trade ministers who leave a real mark on the trading system may be short-termers. Of the 18 ministers included in the Biographical Appendix to this book, for example, ten held at least one other ministerial position before and/or after they took charge of trade.

Whether or not ministers are treated as true members of the Geneva community, they are the ones who give it direction. They can be called upon to break its impasses; sometimes they exacerbate its divisions or even undo its achievements. As is the case for ambassadors, the

personal chemistry between ministers can be crucial to the outcome of negotiations and the resolution of disputes. They form a policy-making community of their own, albeit one that is much smaller, has a higher rate of turnover, and whose members are in less frequent contact than their counterparts. Nowhere is the importance of personal chemistry more apparent than in the relations between the EU trade commissioner and the US trade representative. Some transatlantic pairings have been great catalysts, while other combinations have proven to be caustic. Sir Leon Brittan, who served as commissioner from 1993 to 1999, was on good terms with US Trade Representative Mickey Kantor (1993-1996) but his relationship with Charlene Barshefsky (see Biographical Appendix, p. 573) (1997-2000) was not nearly as productive. Cooperation was also said to be poor during the roughly overlapping tenures of Peter Mandelson (2004-2008) and Susan Schwab (2006-2009) (see Biographical Appendix, pp. 585 and 592). The one such pairing that is reputed to have worked best was between Pascal Lamy and Robert Zoellick (see Biographical Appendix, pp. 583 and 598) who held their positions from 1999 to 2004 and from 2001 to 2005, respectively. They worked together closely in the opening years of the Doha Round, from the launch through the Cancún Ministerial Conference and its aftermath, sometimes going so far as to look out for one another's interests when dealing with third parties. Even when the representatives of these two largest and most influential WTO members are on the best of terms, however, that does not guarantee that negotiations will be successful. In some cases, what EU and US policy-makers portray as cooperation on behalf of the community may appear to their counterparts as self-interested collusion. That was most clearly the case in the lead-up to the 2003 Cancún Ministerial Conference, when Mr Lamy and Mr Zoellick devised an agricultural deal that, had it been struck in an earlier round, would likely have been the beginning of the end-game in the negotiations. The negative reaction that this deal provoked on the part of different developing country blocs marked the start of at least a decade of crises, suspensions and just enough incremental progress to keep the negotiations alive.

## Membership, residency and participation

Imagine a country that starts with a blank page for a trade policy and must decide what role the WTO will play in its strategy. There are three questions that policy-makers must answer. First, will they join the WTO or remain outside the system? Second, if they do join the WTO, will they establish a permanent mission in Geneva or handle WTO matters from either the capital or another mission in some European capital? Third, if they do establish a permanent mission in Geneva, will that office be tasked with handling all of the country's business in the many Geneva-based international institutions or will it instead be a mission dedicated specifically to this one subject? The general trend over the course of GATT and WTO history has been for an ever-greater number of countries to accede, to follow up by establishing a permanent mission and eventually to convert that mission to one solely handling trade (with other issues being left to a separate mission). The net result has been a huge increase in the available diplomatic manpower in the Geneva trade community.

### *Membership and residency*

The vast majority of the world's countries are either WTO members or are seeking to join. GATT started with just 23 contracting parties, and had 128 when it transitioned to the WTO in 1995. By the end of 2012, there were 158 WTO members, another 25 countries that were still in the process of accession, and an observer not seeking accession (the Holy See) (see Appendix 3.1). That left just 14 members of the United Nations that had no relationship whatsoever to the WTO, being neither members nor observers and not in the process of accession. The largest of these is the Democratic People's Republic of Korea (better known as North Korea), with 24.6 million people. Other countries with populations of more than one million that fall in this category include Somalia (9.8 million), South Sudan (8.3 million), Eritrea (5.8 million), Turkmenistan (5.2 million) and Timor-Leste (1.1 million). The remainder consists of microstates located either in Europe (Monaco and San Marino) or the Pacific Ocean (Kiribati, the Marshall Islands, Micronesia, Nauru, Palau and Tuvalu), each of which has a population counted in the tens or hundreds of thousands. The hold-outs have a combined population of about 56 million persons, nearly the equivalent of Italy.

Non-residency was once a major problem, with as many as one fifth of the GATT contracting parties or WTO members being represented only intermittently (if at all) from the capital city or from a mission in Bonn, Brussels or London. The lack of a permanent mission in Geneva limited countries' ability to participate in, or even to monitor, negotiations and related activities conducted under the auspices of the WTO (Lamy, 2008), not to mention the other trade-related institutions that are based in Geneva.<sup>8</sup> The data in Table 3.1 show the sharp drop in the level of non-residency during the WTO period, which has fallen in both absolute and relative numbers. The phenomenon peaked in 1997, when 28 members (21 per cent of the total) did not have permanent missions in Geneva, but by 2012 only 18 (12 per cent) were non-resident. As of 2012, the most typical non-resident member was a small island state that was developing but usually above the income level of a least-developed country (LDC); the LDCs are eligible for Swiss government subsidies that offset the cost of office space. That profile fits for Antigua and Barbuda, Dominica, Fiji, Grenada, Maldives, Papua New Guinea, Saint Kitts and Nevis, Saint Lucia, and Saint Vincent and the Grenadines. It was also largely true for Samoa (an island LDC), and for Belize, Guyana and Suriname. The remaining five non-resident countries are all African LDCs: The Gambia, Guinea-Bissau, Malawi, Sierra Leone and Togo. These are generally countries that can afford to have only a handful of diplomatic missions anywhere in the world, and are often limited to (for example) one or two in neighbouring countries, one in the largest country in their region, one or two in other major world capitals, and one in New York (for the United Nations). Establishing a mission in Geneva might require them either to close a mission elsewhere or to find more elasticity in a foreign ministry budget that is already stretched thin. Countries in some regions can overcome this problem through cooperative arrangements such as the Caribbean Regional Negotiating Machinery and the Pacific Secretariat.

**Table 3.1.** The size and scope of GATT and WTO missions, 1982-2012

	Dedicated GATT/WTO missions			General-purpose missions			Total missions			
	Missions	People	Staff (average)	Missions	People	Staff (average)	Missions	People	Staff (average)	Non-resident CPs/members
<b>GATT period</b>										
1982	4	19	4.8	71	215	3.0	75	234	3.1	12 (13.8%)
1987	8	49	6.1	75	246	3.3	83	295	3.6	11 (11.7%)
1992	10	71	7.1	81	322	4.0	91	393	4.3	13 (12.5%)
<b>WTO period</b>										
1997	20	138	6.9	84	371	4.4	104	509	4.9	28 (21.2%)
2002	29	211	7.3	91	443	4.9	120	654	5.5	24 (16.7%)
2006	38	275	7.2	93	499	5.4	131	774	5.9	20 (13.2%)
2012	39	297	7.6	97	564	5.8	136	861	6.3	18 (11.7%)

Sources: GATT Secretariat; WTO Secretariat (telephone directories from 1982 to 2006 and the electronic directory of 2012). The 2012 data do not include all countries that acceded that year.

Notes: Some dedicated WTO missions include UNCTAD within the scope of that mission's responsibilities.

CPs: Contracting parties (the GATT equivalent of members).

A non-resident member can of course send people to Geneva as frequently as funds permit. Those experts can be especially important when the WTO takes up issues that are more technically difficult (e.g. specific service sectors or sanitary and phytosanitary measures). The countries that are not permanently on-site, however, find it challenging to keep up with even the basic operations of the organization, much less to participate in its deliberations on the more technically demanding ones.

### *Dedicated versus general-purpose missions*

In addition to deciding whether or not to become a WTO member, countries have both qualitative and quantitative choices to make regarding the nature of their representation. A member may have either a dedicated WTO mission<sup>9</sup> or a general-purpose mission that deals with both the WTO and Geneva-based UN agencies.<sup>10</sup> It seems reasonable to assume that the establishment of a dedicated WTO mission indicates a strong commitment to dealing with negotiations in that body, and that those missions solely devoted to the WTO are better equipped to participate actively and effectively in the deliberations of the institution.

The dedicated WTO missions differ from the general UN missions not just in the quantitative devotion to WTO matters, but may also have a qualitatively different orientation towards the

subject. These missions may be more likely than others to report directly to home-country officials devoted to trade policy in particular rather than to foreign policy in general, and are also more likely to be composed of people with wider and deeper knowledge of trade issues. In many cases, the ambassador or other officials in a dedicated mission will be economists or lawyers with specialized training and experience in the subject, and are better equipped than many of their counterparts to move from mere monitoring of what is happening in the WTO to active representation. A dedicated mission is more likely to be a real player in WTO deliberations than one that must also deal with the International Committee of the Red Cross (ICRC), the International Labour Organization (ILO), the International Telecommunication Union (ITU), the Office of the United Nations High Commissioner for Human Rights (OHCHR), the Office of the United Nations High Commissioner for Refugees (UNHCR), the World Health Organization (WHO), the World Intellectual Property Organization (WIPO), the World Meteorological Organization (WMO) and the rest of the organizations headquartered in Geneva.

The rise of the dedicated mission is the most important trend in the growing resources that countries devote to the WTO. In 1982, there were only four GATT contracting parties with dedicated missions, or 5.3 per cent of all missions. These were manned by an average of 4.8 people. By 1997, this had grown to 20 dedicated WTO missions (19.2 per cent of the total) with an average of 6.9 staffers, and by 2012 the numbers rose to 39 such missions (28.7 per cent) with 7.6 people each. General-purpose UN missions have also grown over the past 30 years, doubling to an average of 5.8 employees in 2012.

Dedicated missions used to be the exclusive province of the developed countries, apart from the special case of Hong Kong, China, but today many developing countries also opt to establish them (see Table 3.2). In 2012, developing economies accounted for 12 of the 20 largest dedicated WTO missions. Eleven of the 19 Latin American missions were of this type, as were nine of the 19 Asian developing country missions. Among African countries, however, there were just three such missions. Even relatively small developing countries have established this type of mission, which in their cases can be taken as especially strong indicators of the importance that they attach to the WTO. Costa Rica, for example, established a dedicated WTO mission in 1992. Costa Rican officials report that it was difficult to win approval for the upgrade at home, both because of the financial burden and because other ministries were dubious. The establishment of their dedicated WTO mission was nonetheless a logical progression in the elevation of national institutions that are devoted to trade. It came after the creation of a special office of foreign trade in the office of the presidency in the mid-1980s (a body that was later upgraded by being granted cabinet status), and not long after Costa Rica acceded to GATT in 1990. Costa Rica was not alone in its level of commitment. By 2012, Nicaragua was the only one among the five Central American countries that was still represented in the WTO by only a general-purpose mission. Southeast Asian countries have also invested in dedicated WTO missions, with the Philippines, Singapore and Thailand having some of the largest of all WTO missions.

**Table 3.2. Size of selected members' GATT and WTO missions, 1982-2012**

	GATT period		WTO period	
	1982	1992	2002	2012
United States	8	11	16	24
China	—	—	11	22
Brazil	[4]	[9]	[12]	20
Chinese Taipei	—	—	14	17
European Union	9	18	21	15
Singapore	[3]	[3]	[7]	14
Mexico	—	8	9	13
Thailand	—	[8]	13	13
Canada	[5]	[12]	[13]	12
India	[3]	[3]	7	11
France	4	5	6	10
Philippines	[3]	[4]	[8]	10
Turkey	[6]	[9]	12	10
Australia	[3]	7	9	9
Germany	[5]	5	7	9
Spain	[6]	[8]	[11]	9
Haiti	[1]	[2]	4	8
Norway	[3]	[4]	[8]	8
Ecuador	—	—	[9]	7
Hong Kong, China	3	5	7	7

Sources: Calculated from the printed telephone directories of the GATT and WTO Secretariats from 1982, 1992 and 2002, and the electronic directory of 2012.

Notes: Based on the 20 members with the largest dedicated WTO missions in 2012; [brackets] indicate general-purpose missions.

The question then arises as to whether having a dedicated or a general-purpose mission affects the quality of a country's representation. Veteran negotiators observe that in a dedicated mission, the ambassador may well be more involved in the trade negotiations than are their counterparts in general-purpose missions. The difference may not be as notable for other members of the delegation. An ambassador from a dedicated mission is, however, more likely to chair the more important bodies in the WTO (see Chapter 14) and countries with dedicated missions are also more likely to bring dispute settlement cases (see Chapter 7). These are only general rules for which one finds notable exceptions. A general-purpose mission is not necessarily less active or influential, especially if it happens to have many staff. There is no reasonable standard by which the general-purpose mission of Japan, which had 20 people as of 2012, would be considered small or unimportant. There may indeed be some advantages to having a general-purpose mission, including the cost efficiencies (especially when one considers the high price of office space in Geneva), the ability of such missions to reallocate diplomatic resources in response to the changing ebb and flow of subjects in the international community, and the greater ease of ensuring coherence in the positions that a country takes in different international organizations. As a general rule, however, most of the key players in WTO deliberations have opted over the years to establish missions that are dedicated solely to trade.

### *The size of missions and the negotiating community*

The total size of the Geneva negotiating community has grown steadily for decades, having numbered just 234 people in 1982 but expanding to 861 in 2012 (see Table 3.1).<sup>11</sup> The rate of growth is even more impressive if one weights the missions by type. If we were to assume that a typical, general-purpose UN mission devotes one third of its time to GATT or the WTO,<sup>12</sup> that means that in 1982 the missions in Geneva devoted 91 person-years to GATT matters (i.e. 19 actual person-years at the dedicated GATT missions and 72 calculated person-years at the others). Assuming that this one-third rule remains valid over time, the total rose to 178 in 1992, 359 in 2002 and 485 in 2012. In brief, over a 30-year period, the diplomatic manpower that missions devote to trade in Geneva has more than quintupled. This growth can be attributed to a variety of factors, including the accessions of new countries, the declining rate of non-residency among developing countries, the practice of moving from general to dedicated missions, and expanded staffing for both types of missions.<sup>13</sup>

The data in Table 3.2 show that the relative size of the most influential members' missions has changed radically over the past generation. That is most evident in the case of the European Union, which had long held the distinction of having the largest dedicated mission to GATT or the WTO. As recently as 2002, the EU mission was, at 21 people, notably bigger than that of the next-largest member. Just a decade later the staffing of the EU mission had declined in both absolute and relative terms, falling to fifth place. Even while the EU mission has declined, however, individual EU member states such as France, Germany and Spain have expanded their dedicated WTO missions. The combined weight of EU diplomatic talent in the WTO may thus remain as large as ever it was. As of 2012, the United States had surpassed the European Union *per se*, however, and was not the only member to do so. The changes wrought over recent decades are underlined by the fact that the second and fourth spots in 2012 were held by China and Chinese Taipei, two members that had not even been contracting parties at the end of the GATT period. As of 1982, the total representation of GATT contracting parties associated with China consisted of a dedicated mission of three people representing Hong Kong (then still a British colony).<sup>14</sup> By 2012, there were 51 people in the dedicated missions representing: China; Hong Kong, China; Macao, China; and Chinese Taipei. That amounted to 18.4 per cent of all representatives in dedicated WTO missions and was precisely equal to the number of people in the three Quad missions that are WTO-dedicated (i.e. Canada, the European Union and the United States). Nor were the qualitative and quantitative changes confined to the largest WTO members. No fewer than 18 developing countries each had dedicated missions staffed with at least five people. Most of the other members with dedicated WTO missions of this size in 2012 had been confined in the late GATT period to UN missions in which the complement rarely exceeded three people.

### **Coalition diplomacy**

Thomas Hobbes observed in *Leviathan* that while some men may be stronger than others, nature has so contrived that even the weakest among them can best the strongest "either by secret machination or by confederacy with others that are in the same danger with himself"

(Hobbes, 1651: 84). Much the same observation might be made regarding the power of small states in the WTO, especially in a system in which most decisions are made by consensus. Even the smallest and poorest countries can confederate or form coalitions in defence of their common interests. Coalitions are the hallmark of WTO diplomacy.

This represents an evolutionary change from the pattern of representation in the late GATT and early WTO periods. As Birkbeck (2009: 21) noted, whereas “proposals on WTO reform in the late 1990s focused on concerns about the exclusive nature of the ‘Green Room’ and called for formalization of negotiating process to enhance representation and transparency,” subsequent developments have led to “the expanding use of coalitions as tools for representation” and declining criticism of the green room. This is not to say that the style has changed altogether. The prior practice can be characterized as one in which coalitions played an important role in developing issues and options, but the most significant decisions – the final choice among those options – were finally made in the green room. This evolved into a system in which coalitions play a more prominent role, and in which green-room meetings usually allow members of the interested coalitions to be represented in the room. The practice of green-room diplomacy is examined in greater depth in Chapter 6.

### *Why members form coalitions*

“Coalitions allow greater voice to countries that would otherwise have no say at all in the small group meetings that underpin WTO negotiations,” according to Narlikar (2012: 4974), as they “allow members not only greater possibilities of representation but also a more informed participation in the negotiation process.” Smaller and weaker countries that might otherwise be voiceless can be represented in this way, while also lending greater legitimacy to the outcome. Informal networks “play an important role in facilitating the development of a consensus and the conclusion of international agreements,” in the words of a negotiator from Singapore (Desker, 2011: 44) because:

The successful negotiation of international agreements requires the development of shared interpretations of major issues, the establishment of mutual trust and confidence, a willingness to go beyond one’s own perspectives on an issue so that the concerns of other parties can be factored into the negotiating process and an awareness of whether preferred options are possible in the current negotiating environment.

The diplomat also pointed to “evidence that such informal groups can play the role of blocking coalitions, especially when they are composed of participants with shared perspectives opposed to trends in such negotiations” (*ibid.*). Coalitions may thus serve to impede as well as impel negotiations, depending on the circumstances.

Coalition diplomacy does allow countries to pool their limited resources, but is complicated by the fact that countries within a region will often have similar, but never identical, interests. In the case of east and southern Africa, for example, Bilal and Szepesi (2005: 389) found that “the regional dimension... has had little direct impact so far on the preparation and conduct of WTO negotiations” because groups such as the Common Market for Eastern and Southern Africa and

the Southern African Development Community “have too diverse a membership to allow for a meaningful co-ordination of their member countries’ positions on specific WTO issues.” That is not a universal perception; one diplomat from outside Africa observed that group dynamics in the region can sometimes reduce positions to what he called the “loudest common denominator”.<sup>15</sup> In a geographically based coalition, “the interests of the individual members often get submerged,” according to this veteran negotiator, such that “if Country X really cares about this, and the others don’t care so much, it becomes the [group] position.” By backing other members in the region on their selected issues, the rest of the members in a group know that they can expect the same sort of solidarity on some other issue for which their own interests are higher.

Coalition diplomacy predates the WTO. The Uruguay Round was notable for a pair of North–South blocs, which might more properly be called North–South–*East* blocs, in recognition that each had at least one member that was still on the other side of the Iron Curtain at the start of the round. The first of these was the Cairns Group of non-subsidizing agricultural producers that first came together a month before the launch of the round.<sup>16</sup> Its membership overlapped somewhat with the De la Paix Group of countries that cooperated on non-agricultural issues, so named for the restaurant of the lakeside Geneva hotel where they first gathered in 1987.<sup>17</sup> Both groups were comprised primarily of mid-sized, trade-dependent countries that wanted a deal. The De la Paix Group helped to broker some of the most important deals in the Uruguay Round on issues such as dispute settlement and the Trade Policy Review Mechanism.

One of the main trade-sceptical coalitions to emerge early in the history of the WTO was similar in composition to predecessors in the late GATT period. Under the leadership of India, the Like-Minded Group (LMG) initially brought together countries that opposed the placement of labour standards on the negotiating agenda in the 1996 Singapore Ministerial Conference (see Box 3.1). The original members included Cuba, Egypt, Indonesia, Malaysia, Pakistan, Tanzania and Uganda; later entrants were the Dominican Republic, Honduras, Jamaica, Kenya, Mauritius, Sri Lanka and Zimbabwe. As the negotiations progressed over whether to launch a new round and how to structure it, this group stressed the importance of implementation issues for developing countries, and favoured a more inclusive negotiating procedure over the domination of large countries in the green room. According to Jones (2010: 38), the LMG “was attempting to restrike the balance of negotiating power in the WTO in favour of the growing majority of developing countries by bringing the negotiating process more into the open, where the large and rich countries would have to leave their backroom machinations behind.” The members of this group ultimately had little to show for their efforts, however, as few of the group’s demands made their way into the terms of the Doha Ministerial Declaration. Narlikar and Odell (2006: 116–117) chalked this failure up to the group’s decision to pursue what they deemed a “strict distributive strategy,” this being “a set of tactics that are functional only for claiming value from others and defending against such claiming” from others, doing so in a way “that is not tempered by any integrative tactics, such as an offer to exchange concessions that would make each party better off than before.” Or to reduce it to the simplest terms, the LMG adopted a stonewalling strategy that produced no benefits in the short term. Nevertheless, one might argue that, to the extent that this stonewalling ultimately contributed to the impasse that is typical of such tactics, the group achieved much of what it set out to do.

**Box 3.1. The key of G: naming and numbering groups in the WTO**

Anyone trying to follow the large and bewildering array of blocs, coalitions and forums in the WTO can be easily confused by the ways in which these groups are denominated. That confusion stems from four quirks in the naming conventions of commercial diplomacy.

First, the names usually draw no distinction between true coalitions and temporary forums. A title such as the “Group of Six” (G6) might designate six countries that have banded together in common cause; alternatively, it might mean six influential countries that represent different viewpoints in the negotiations but have created a temporary forum in which they hope to strike a compromise that can then be brought to the membership at large.

Second, groups often choose uninformative titles, typically hiding behind the anonymity of numbers. The common practice of naming groups according to the size of their original membership gives no clue as to their purpose or composition. Names such as G5, G7 or G20 are more common, yet less descriptive, than revealing titles such as the Friends of Fish or the Tropical Products Group. Even when members choose a title other than one of the “Gs” they may prefer a name that says nothing about the group’s purpose, apart from another numerical designation such as the Five Interested Parties or the Dirty Dozen, or names that are redundant (e.g. any coalition is by definition a Like-Minded Group) or potentially confusing (e.g. the Invisibles Group could be mistaken for an archaic reference to trade in services). The Buick Group got its name from the décor of a car-themed restaurant in which it first convened.

Third, the preference for numerical titles is so strong that groups may retain their original name even after the number changes. The most notorious example is the G77 in UNCTAD, named for the 77 developing countries that formed the original coalition in UNCTAD I (1964). That title has survived even though the group comprised 132 countries in 2012. Members of the G20 that emerged in 2003 tried to keep up, only to confuse matters by variously calling themselves the G20, G21, G22 or G20Plus.

Fourth, unlike some sports franchises the community of trade diplomats appears disinclined to “retire a number”. There have been several groups going by the titles G5 and G10, for example. The G20 is especially confusing, as the G20 that coalesced before the Cancún Ministerial Conference remained active even after an entirely distinct G20 acquired a much higher profile in the financial crisis of 2008.

***Building and busting coalitions through side payments and threats***

The most obvious way to negotiate with a coalition is to bargain with it over the terms of the agreement at hand. If it is a group formed around agricultural issues, for example, one might seek to reach an agreement with its members on agriculture. In some instances, that may entail making proposals by which one’s own country or group might make common cause with a coalition vis-à-vis some other country or group. Another approach is to engage in coalition-busting, a practice through which one seeks to coerce or entice individual members of a coalition to leave the group.

Larger countries are often at pains to convince smaller countries either to join and remain in their coalitions or, failing that, to persuade them not to join other coalitions with opposing positions. The “smaller members from the developing world naturally tend to be more

risk-averse,” as Narlikar (2012: 4905-4911) noted, and while “a preponderance of small allies in a coalition may increase the legitimacy of the group [it] may also heighten the risk of fragmentation if these smaller members defect.” The other, larger countries that seek either to prevent or promote those defections may use side payments or threats in pursuit of that aim. This has long been a practice on the part of the larger developed countries, but one of the differences between the GATT and WTO periods is that the larger developing countries have also become adept at such linkage.

Positive inducements may be a more common means of persuasion than are threats, although the term “positive” does not necessarily connote a purely charitable and disinterested posture on the part of the country that makes the offer. As Wu (1952: 187) noted, “in the absence of a complete unity of political purpose, every act of conditional aid given by one country to another can be interpreted as coercion.” Imagine a not so hypothetical example in which a large country offers to negotiate a free trade agreement (FTA) with a smaller one, or pledges to provide some form of assistance, but either way makes that offer conditional upon the smaller partner adopting a more accommodating position in the multilateral trade negotiations. There is, for example, a close correlation between the launch of FTA negotiations between the United States and several Latin American countries and the departure of those same countries from the Cancún-era G20. Nor are trade policy coalitions the only ones that may be at issue. There is also a close correspondence between the list of partners with which the United States initiated FTA negotiations from 2003 to 2005 and membership in the Coalition of the Willing, which supported the US invasion of Iraq.

Developed countries are not alone in practicing the politics of linkage, and for much the same purpose. The leaders of that same G20 coalition used inducements of their own to assemble the group and keep it intact. To some degree, this could be accomplished through moral suasion and appeals to solidarity among developing countries. India was able to draw upon decades of close cooperation with other developing countries. “Among all the large, developing countries it is India that has consistently worked with the Africans, with the ACP [African, Caribbean and Pacific], with these smaller countries all across the world,” a former Indian ambassador observed, “and that is sort of an article of faith for us. On many occasions on several issues, India has had to subordinate its own national interest in the interest of that solidarity.”<sup>18</sup> Moral suasion can go only so far, however, and it may be necessary for the larger members of the coalition to offer side-payments to their smaller allies in order to reduce the risk of defection. “The G20 was able to do this effectively,” Narlikar (2012: 4905-4911) reported, because the “leaders offered concessions in the form of preferential market access for LDCs, and also regional trade arrangements (economic and political) with various members, such as the IBSA (India, Brazil, and South Africa) initiative and India’s Africa Forum.”

Perhaps the most controversial way that countries are alleged to deal with the opposition that they encounter from coalitions or specific partners in them is to go over the heads of a country’s negotiators in Geneva. This might be achieved, for example, by making representations to the foreign minister, prime minister or president, in which the suggestion is made that the diplomat in question does not see the issue in the fuller context of the two

countries' relationship. The success of such an approach depends primarily on how the political leadership in the developing country chooses to respond. An example of this form of manoeuvre comes from the mid-point of the Uruguay Round, when in early 1989 Hamid Mamdouh of Egypt (see Biographical Appendix, p. 585) rallied developing countries on issues related to TRIPS (trade-related aspects of intellectual property rights) and pharmaceutical patents. He had "gained considerable support from about 13 or 14 developing countries supporting the line taken by Egypt" on this issue, as Mr Mamdouh later recalled, but that support was not shared by developed countries. At that same time –

President Mubarak was visiting Washington to talk about much bigger things: the Middle East peace initiative at the time, US aid to Egypt and things like that. And the subject was mentioned to him, about Egypt's line taken in the TRIPS negotiations. And, you know, in diplomatic terms you don't need to go very far in something like this. So all of a sudden the mission here [in Geneva] received the instructions from the president's office to make a U-turn in the TRIPS negotiations ... [And] my ambassador here [in Geneva] said to me, "Please, you can go to the consultations but don't speak." So I went to the consultations and all those developing countries participating were supporting Egypt's proposal and the only developing country that didn't speak was Egypt.<sup>19</sup>

This was an experience that convinced Mr Mamdouh that the usefulness of his government service had come to an end. He left by the end of that year to join the GATT Secretariat as a legal adviser on dispute settlement, and soon moved from there to a distinguished career in the WTO Services Division.

Manoeuvres of this sort are not always successful. Similar efforts to bring pressure on other developing countries, as discussed elsewhere in this book, were blocked in one instance by close coordination between the president and the country's negotiating team (one member of which was his son), in another case, when the Geneva-based diplomat insisted that his role as chairman was distinct from his role as representative of his country, and in yet another instance by the unwillingness of coalition members to break ranks.<sup>20</sup> The haphazard nature of anecdotal evidence makes it difficult to know how frequently developed countries resort to such tactics, or whether it is these examples of successful resistance or the Egyptian case that is more representative of how countries typically respond. Jawara and Kwa (2003: 151) argued that these pressures are common, and allege that the United States has "a blacklist of ambassadors they would like to see removed," quoting one ambassador who said that because the majors will go to one's capital and "twist things around saying things like you are anti this and that", this is one reason why it is essential for developing country diplomats "to have a good rapport with the capital and it is also important that you refrain from reacting too quickly when you feel or suspect that you might be under threat." They also condemned a "bullying hierarchy" that included not just the Quad but also other upper- and even middle-income countries, arguing that "alliances with other developing countries" are strategically important to those latter countries, but –

they face a strong temptation to dance with the devil (the major players) and succumb to their divide-and-rule tactics; and reaping the potential benefits of doing so is generally uppermost on their agendas. One of the main bargaining chips they can offer in this process is the influence they can exert on other developing countries, particularly through regional and other groupings (*ibid*: 149).

Critics point to specific instances in which positive or negative inducements produced results, though the examples that they cite might be seen very differently by others who take a more favourable view of trade liberalization. Some countries' opposition to the launch of the Doha Round, for example, was reportedly muted or reversed as a result of deals made on other topics outside the WTO. Kwa (2003: 33) attributed a change in Pakistan's position to an aid package that was under negotiation in Washington, coupled with expanded preferences from the European Union, and linked Indonesia's change of heart to an investment agreement with Japan. She further implied (without providing specific evidence to support the claim) that similar arrangements may have been made to change the positions of Kenya, Malaysia, Nigeria and Tanzania. Narlikar and Odell (2006: 130) casted doubt on whether such arrangements affected positions in Doha, observing that "several of these payoffs seem to have been related more to support for the US war on terrorism than compliance with the Quad in the WTO". The strength of that argument depends on the degree to which one believes that countries' trade and foreign policies are distinct. If they are indeed separate undertakings, then Narlikar and Odell were correct in dismissing the claimed linkage. For countries that take a more integrated view of the relationship between trade and foreign policy, or are under pressure from other countries that want them to do so, the objection is founded upon a distinction without a difference.

## Blocs, coalitions and forums

Before examining the specific coalitions in the WTO that developed in the Doha Round, it is first useful to draw a distinction between three types of groups: the bloc, the coalition and the forum. A bloc may be defined as a group of countries with broadly congruent interests that form an association based on long-term or permanent similarities, which cooperate repeatedly across a range of issues and that come together in formal<sup>21</sup> or semi-formal groupings that are intended to be long-lasting. The clearest examples of blocs are those groups that have either permanent secretariats (e.g. the Group of 77) or are common markets that act as unified members (e.g. the European Union). Other examples of blocs include those regional groups among developing countries that may also have (or have aspirations to create) a common market among themselves; the Caribbean Community (CARICOM) is one such group. There is a trade-off in blocs between their size and their coherence. A group such as CARICOM is smaller than the G77, but it also stands a better chance of establishing a unified position among its less diverse membership. Blocs may be distinguished from coalitions or groups of countries with similar interests in narrowly defined matters that cooperate specifically on those topics.

Coalitions are usually temporary arrangements and rarely take formal shape. Examples include the “friends” groups in WTO negotiations (e.g. the Friends of Fish and the Friends of Antidumping Negotiations) and those “numbers” groups that are based on shared interests (e.g. the G33 and the Cancún-era G20). Where blocs may be of strategic significance, coalitions usually have a more limited, tactical aim. Both blocs and coalitions may be distinguished from negotiating forums, the members of which sometimes have important shared interests but in other cases are interested only in devising mutual solutions to shared problems. The WTO itself is a forum, as are the G20 that evolved in 2008 from a ministerial to a summit-level group (as opposed to the Cancún-era G20 coalition), the UN Security Council (and especially its permanent five, or P5, members), and other institutions in which countries seek to negotiate agreements, resolve disputes or handle crises. In addition to those forums that are formal and permanent, this term may be used to describe the temporary groupings that usually go by a numerical designation to reveal the limited number of members allowed in the room (G5, G7 etc.).

These distinctions are important to draw because the term “coalition” is sometimes used quite loosely, with some practitioners and analysts employing it to mean any of these three distinct phenomena. It is true that in practice the lines between these groupings can sometimes be blurry. The Organisation for Economic Co-operation and Development (OECD), for example, is primarily a forum in which its developed members discuss issues but sometimes acts like a bloc – or at least is perceived to do so – vis-à-vis non-members.<sup>22</sup> Similarly, when the Quad was active in the GATT period, it acted like a forum in which the leading countries settled matters between themselves, but also acted as a bloc with respect to its dealings with developing countries. This was partly a matter of sequencing: those issues on which the Quad negotiated within this circumscribed forum were, once they reached consensus among themselves, presented *en bloc* to the rest of the contracting parties. All blocs and coalitions involve some degree of internal negotiation and hence are partly forums, and the dividing line between the single-issue coalition and the multi-issue bloc can be hard to distinguish in some cases. As a general principle, however, the distinctions between these types are clear. It is especially important to recognize the differences between a bloc and a coalition, as this permits us to highlight some of the most important, long-term developments in the relationships between developed and developing countries. These include the decline of the Quad and the rise of the emerging economies, twin developments that have, in turn, manifested themselves in the emergence of the G20 as a forum.

The relative growth in blocs as compared with coalitions may also reflect, and perhaps be partly responsible for, the more challenging atmosphere of the WTO compared with GATT. “Twenty years ago, coalitions primarily formed around issues,” one veteran negotiator observed.<sup>23</sup> “And I always thought that was one of the strengths of the system, because the country who is in a coalition [against you] in a given issue might also at the same time be part of a coalition where you’re an ally.” When countries form coalitions “that conditions peoples’ behavior,” because “you don’t engage in a lot of take-no-prisoners approaches to things,” but when there are “more groups that are formed strictly on geographic lines” the WTO becomes “a little more UN-like.” This gradual movement from fluid, issue-based coalitions to a more

rigid system of regional or other blocs can make for a less cooperative negotiating environment. Coalitions exemplify the cliché that countries have no permanent friends or permanent enemies, only permanent interests; blocs can sometimes put that aphorism to the test.

### *The forums that look like coalitions*

The melding of green rooms with coalition diplomacy has also produced hybrid efforts that might be described as floating green rooms. These are small forums that sometimes develop during periods of a negotiation in which negotiators share a need for progress, but agree that the talks are in danger of reaching stalemate. A group of members may respond by forming groups that bring together a variety of participants, meeting outside the confines of the General Council or other formal settings to sound one another out and discuss potential ways forward. These are not so much coalitions as groups that are intended to explore ways that they might break the deadlock caused by the existing coalitions, and to that end may include one or more members that unofficially represent the views of the regional, sectoral or other coalitions of which they are members and often leaders.

One example is the Invisibles Group, a gathering that brought together senior, capital-based officials from some 15 to 20 members from 1995 to 1999. Originally convened by the United States and chaired by different Quad countries, the group incorporated developed and developing members as well as the WTO director-general and the chairman of the General Council. The membership included representatives from other regional or interest-based coalitions such as the Cairns Group, the newly industrialized economies, the Southern Common Market (MERCOSUR), the Association of Southeast Asian Nations (ASEAN) and others. Though not a decision-making body, it was a useful device for communication and planning: “the inputs during these discussions allowed delegates to take up these ideas at the General Council,” one participant recalled (Desker, 2011: 50), “aware of the sentiments of significant elements of the WTO membership, while it alerted the WTO director-general to the concerns of these members” and also “sensitized capital-based officials to the negotiating environment in Geneva.” The Invisibles Group neither prevented nor survived the disaster of the Seattle Ministerial Conference. A comparable initiative developed in the aftermath of the (also failed) Cancún Ministerial Conference. At a time when there were growing concerns over the ability of both the round and the institution itself to survive, key players came together in what was then called the Five Interested Parties (FIPs): Australia, Brazil, the European Union, India and the United States. “Through intensive meetings and a process of reaching out to others,” Harbinson (2005: 124) recalled, the FIPs managed to produce a framework for establishing modalities in agriculture. This became a key part of the “July Package” of 2004.<sup>24</sup>

### *Blocs and forums in and around the WTO*

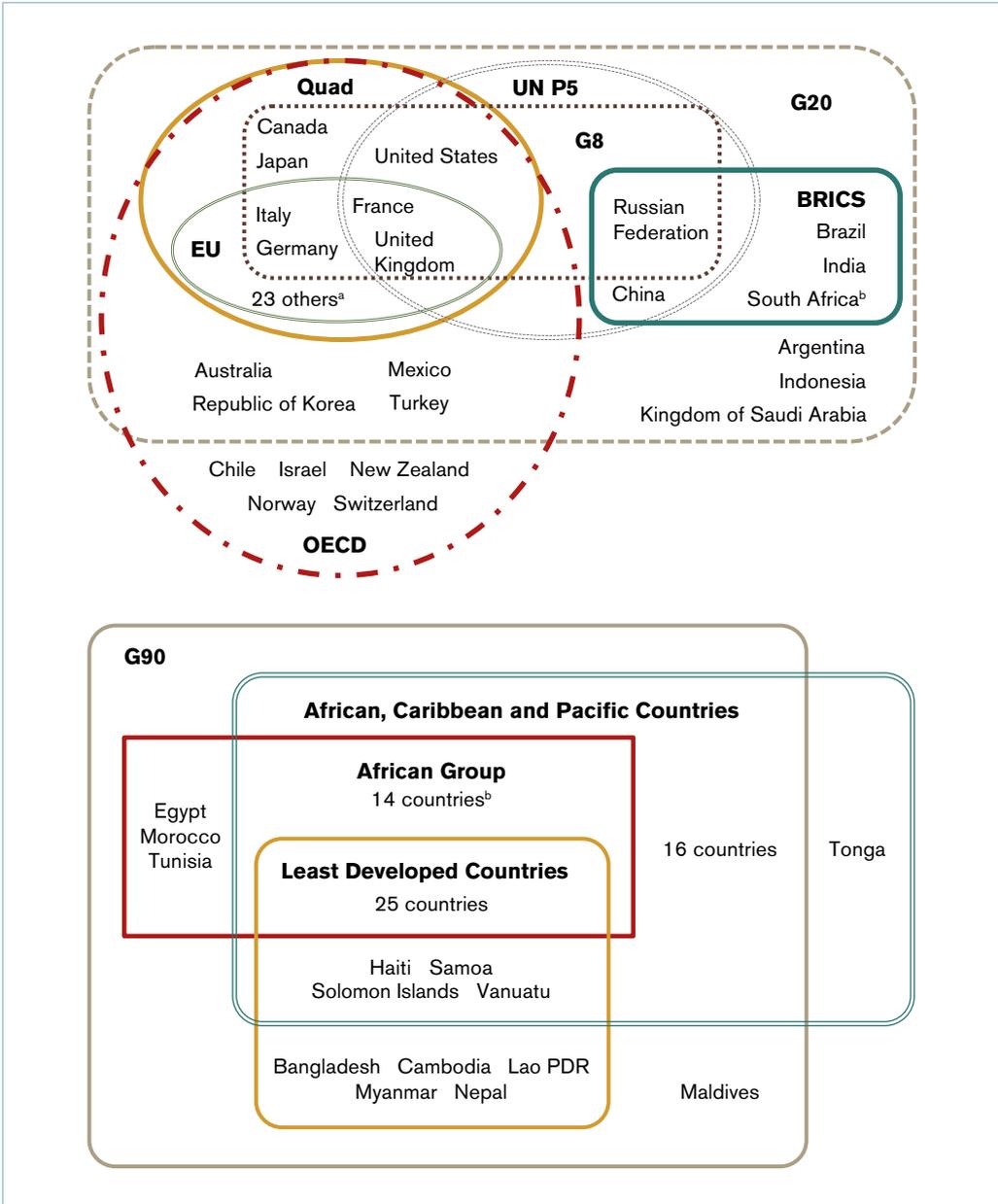
Even though states are juridically equal, the fact remains that – as George Orwell noted in *Animal Farm* (1945) – “Some animals are more equal than others.” That is just as true in the WTO period as it was in the time of GATT, although the alignments are more complex and

dynamic. Compared with the late GATT period, power is now more widely distributed, several key players that had been outside the system are now near its centre, the most influential members now participate in a greater number of blocs and forums and some of those groups that carry over from the GATT period have larger memberships than they once did.

In the international order that coincided with the GATT period, the centres of power could be imagined in a series of concentric circles. Those circles partly corresponded with, but were also different from, the key groupings in the GATT itself. The innermost circle during the Second World War and in the immediate post-war years was a G2 of the United Kingdom and the United States. The circle grew in later decades to become the G5 (with the addition of France, Germany and Japan) and then the G7 (when Canada and Italy joined). The next circle was the Quad, consisting of the G7 plus the remainder of the European Community (which grew to 12 countries by the end of the GATT period), followed by the larger circle of member states of the OECD. By the end of the GATT period, the OECD had two dozen member states, composed of the Quad plus Australia, New Zealand and several western European countries that were outside the European Community.

The Venn diagram at the top of Figure 3.1 illustrates the more complex relations between the leading groups and their members in the new international order. The WTO forms a part of that order, and there is now a closer correspondence between composition of the leadership groups inside and outside of the trading system. One change has come in the expanding access to the key forums and blocs: by 2012, the entry of the Russian Federation had transformed the G7 into the G8<sup>25</sup>; the European Union more than doubled from 12 to 27 members; and the OECD acquired ten new members. The power of the Quad has also declined as it lost relevance as a forum among its members. Whereas Quad meetings were a staple of GATT diplomacy, after the failed Seattle Ministerial Conference of 1999, the Quad never again met at the ministerial level. There are also some wholly new groupings. Chief among these is the G20, formerly a technical body that met at the ministerial level but was elevated to a summit-level forum during the financial crisis of 2008 to 2009.<sup>26</sup> The G20 bridges the gap between the inner circles of the GATT era and the new powers that form the BRICS. Taken together, the 47 countries that are clustered in various groupings at the top of the figure – including four EU member states that are sometimes represented independently and sometimes with the other members of their regional bloc – comprise huge shares of global population and trade. They still account for less than one third of the membership of the WTO, however, and less than one sixth if the European Union is counted as just one. Even if they could resolve the differences between themselves they could still not be certain that the remaining members would go along with any deal that they reach.

At the risk of over-simplification, the remaining 111 WTO members can be roughly divided into two groups. One is a bloc formed by the poorest countries in the G90, which consists of the overlapping membership of ACP countries and LDCs. The countries in this group tend to have greater concerns over the implications of trade liberalization for their development strategies and for the margins of preference that they enjoy in the markets of developed countries. This bloc of developing countries was created in 2003 largely as a reaction to the formation of

**Figure 3.1. Membership in selected blocs and forums**

Source: WTO Secretariat, [www.wto.org/english/tratop\\_e/dda\\_e/negotiating\\_groups\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm).

Notes: Groups that are principally blocs are inside solid lines; groups that are principally forums are inside dashed lines. <sup>a</sup>Bulgaria, Cyprus, Latvia, Lithuania, Malta and Romania are members of the European Union (and therefore the Quad and the G20) but not the OECD. <sup>b</sup>South Africa is a member of the African Group (and the ACP and the G90) as well as the G20.

another G20 coalition that is not to be confused with the forum shown in Figure 3.1. The Cancún-era G20 was composed of developing countries that demanded greater concessions from the European Union and the United States on agriculture (see Chapter 12). From the perspective of the G90 countries, this new group violated the solidarity that was expected of countries in the old G77 bloc, and the positions that they advocated were seen to prejudice the interests of ACP/LDC countries. The poorer developing countries therefore formed a bloc of their own in opposition to the G20 demands. Or to put it in the sometimes convoluted math of bloc diplomacy,  $G77 \text{ minus } G20 \text{ equals } G90$ .

There is a great diversity among the remaining 44 members of the WTO, all of which are either developing countries or in transition from non-market economies. They are eagerly sought as members of coalitions. These members vary greatly in demographic size, economic attainment, and development strategy, including some of the most open economies in world and others in which the state plays a large role. They are not shown here as members of any bloc, although most of them would (together with the G90 and some of the G20) be part of the G77 bloc. Some are members of other blocs that also include countries shown elsewhere in Figure 3.1.

## Coalitions in the Doha Round

Coalition diplomacy is a critical element in the Doha Round. Appendix 3.2 indicates which members are associated with eight blocs and 17 coalitions. As of early 2013, only five WTO members were not members of any blocs or coalitions. All of them were relatively small countries and four of them were in the Middle East. Another four were members only of the blocs for LDCs and the G90 (of which all LDCs are members). All remaining WTO members joined at least one of the issue-based coalitions in the Doha Round negotiations, and most members joined two or more of them. Mauritius holds the record, being a member of nine groups (three blocs and six coalitions), but it is not uncommon for members to be in six groups.

The appendix further divides WTO members according to the types of coalitions that they join. It shows that 56 members, including the European Union and its 27 member states, joined only those coalitions with offensive interests. That is a much larger number than the 12 members that joined only coalitions with defensive interests. The largest group of members, however, consists of the 76 with mixed interests. These countries that joined at least one offensive and at least one defensive coalition include almost all of the other WTO members that, beyond the European Union, are typically identified as global or regional leaders. Among this group are Australia, Brazil, Canada, China, Egypt, India, Japan, the Republic of Korea, Mexico, New Zealand, Norway, Pakistan, South Africa, Switzerland and the United States. This mixture of interests is a general pattern for the Doha Round, in which most countries have at least some offensive objectives but balance these against their own defensive interests. That pattern is especially notable in the case of agricultural trade, the most divisive topic in the round.

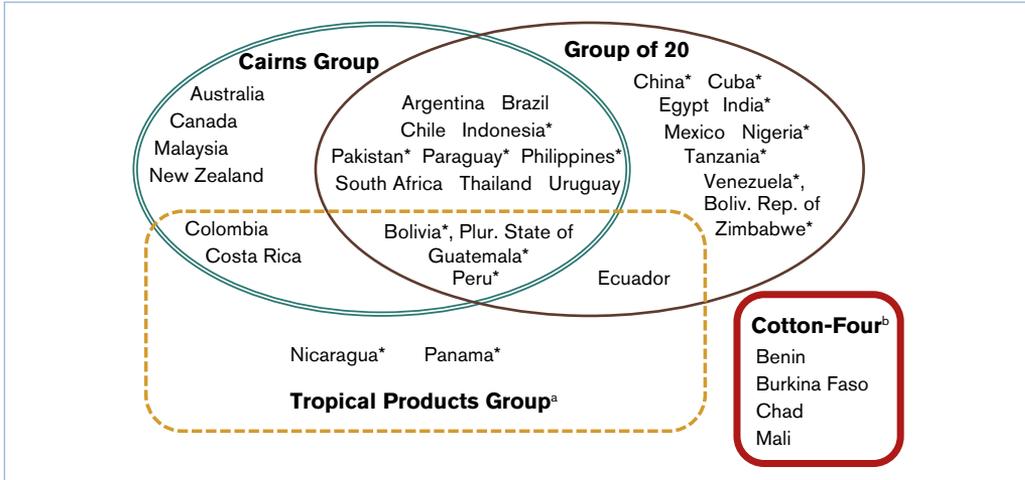
The analysis that follows is limited to a review of the membership of the main coalitions operating in the Doha Round. The ways in which these coalitions and their members have interacted in the round is discussed in Chapters 11 and 12.

### *Coalitions in the agricultural negotiations*

The differences between the negotiating dynamics of the Uruguay and Doha rounds are neatly summarized by the reformation of agricultural coalitions from one round to the other. The Cairns Group exemplified two of the defining characteristics of the Uruguay Round, being focused on offensive rather than defensive interests and bringing together a mix of developed and developing countries. In those respects, it was comparable to the aforementioned De la Paix group, and indeed these two North–South coalitions shared several members in common. That same Cairns Group remains in existence, if not a very active one, in the Doha Round. The relations between the developed and developing country members of this coalition were seriously strained in the run-up to the Cancún Ministerial Conference in 2003, when they disagreed over the best response to the deal that the European Union and the United States had proposed for agricultural issues in the round. While Australia favoured treating this proposal as the point of departure for the negotiations, hoping to extract more serious concessions from its authors, developing countries in the group insisted on taking a more confrontational and ambitious approach. Led by Brazil, these countries then formed a new G20 group composed wholly of developing countries. As shown in Figure 3.2, 14 of the 23 members of this group (as it stood in 2012)<sup>27</sup> were also members of coalitions with defensive interests on other aspects of the agricultural negotiations,<sup>28</sup> thus replicating in this subject the general pattern by which the offensive interests of the countries participating in the Doha Round tend to be diluted either by their own membership in defense-oriented coalitions or by their collaboration with other countries that have defensive or mixed interests.

That pattern can be better appreciated by comparing the memberships of the offensive coalitions illustrated in Figure 3.2 and the defensive coalitions illustrated in Figure 3.3. In the Doha Round, there are 35 countries in these four coalitions with offensive interests, versus 60 in the coalitions with defensive interests. The latter group outnumbers the former by 71.4 per cent. That disparity is magnified when one takes into account the cross-over between these two groups: 16 countries are in both types of coalitions, meaning that the number of WTO members with “pure” positions on agricultural trade is reduced to 19 with offensive interests and 45 with defensive interests; adjusted this way, the defence outnumbers the offence by more than two to one. Perhaps the best comparison to be made is between the Cairns Group and the G10. Both are North–South coalitions, which became a great rarity in the Doha Round, but whereas the Uruguay-era Cairns Group was offensive in its orientation, the Doha-era G10 is decidedly defensive.

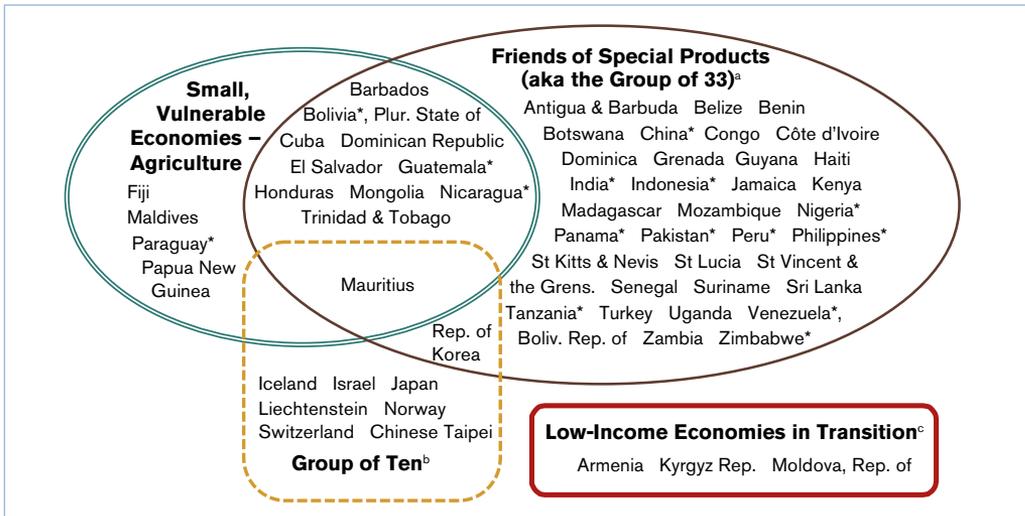
**Figure 3.2. Coalitions with offensive interests in the Doha Round agricultural negotiations**



Source: WTO Secretariat, [www.wto.org/english/tratop\\_e/dda\\_e/negotiating\\_groups\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm), accessed 6 June 2013.

Notes: \*Also a member of at least one of the coalitions with defensive interests in the Doha Round agricultural negotiations. <sup>a</sup>Countries with offensive interests in exports of tropical products. <sup>b</sup>Countries that oppose US subsidies in cotton production.

**Figure 3.3. Coalitions with defensive interests in the Doha Round agricultural negotiations**



Source: WTO Secretariat, [www.wto.org/english/tratop\\_e/dda\\_e/negotiating\\_groups\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm), accessed 6 June 2013.

Notes: \*Denotes a country that is also a member of at least one of the coalitions with offensive interests in the Doha Round agricultural negotiations. <sup>a</sup>Coalition seeking flexibility for developing countries to undertake limited market opening in agriculture. <sup>b</sup>Countries seeking to make agriculture be treated as diverse and special because of non-trade concerns. <sup>c</sup>Seek to secure the same treatment as least-developed countries.

These comparisons also highlight one of the more significant bilateral relationships within the Doha Round, in which Brazil and India have collaborated in the G20 despite the fact that Brazil has more offensive interests than India. India is among the countries that sit in both the offence-oriented G20 coalition and in the more defence-oriented Friends of Special Products (also known as the G33). This group is concerned only with special products that are so sensitive that they should be kept out of the negotiations, and with the special safeguard. In one sense, the position of the G33 does not conflict with that of the G20, insofar as the G33 is focused on market access and the G20 on subsidies, but in the larger scheme of the negotiations, it is apparent that the interests of these two groups are incompatible. The only ways to reconcile that incompatibility would be for those countries that are in both the G20 and the G33 either to adopt positions that place their defensive before their offensive interests or do just the reverse. Thus far in the Doha Round, these countries – together with many other WTO members – have leaned more in the direction of the first than the second option.

### *Coalitions in other goods-related negotiations*

In contrast to the agricultural negotiations, where the multiple issues on the table lead to the formation of multiple, overlapping offensive and defensive coalitions, the non-agricultural market access (NAMA) negotiations are relatively simple and produce correspondingly simple coalitions. They can generally be reduced to a North–South split in which the leading developed countries call for greater ambition and three coalitions of developing countries express their defensive demands in varying ways. The developed countries that seek to maximize tariff reductions in the NAMA negotiations formed a coalition known as the Friends of Ambition. In addition to the Quad, this group included Australia, New Zealand, Norway and Switzerland. As for the defensive developing countries, they included ten countries in the misnamed NAMA 11 group, 20 self-identified Small, Vulnerable Economies (SVEs), and a dozen Paragraph 6 countries (eight of them African) that sought exceptions for specific products. Table 3.3 shows that the 42 countries in these three coalitions do not have overlapping memberships.

The coalitions that emerged around the negotiations on geographical indications (GIs) offer a more complex example of how developed and developing countries can form diverse groupings on opposing sides of an issue. GIs are defined in Article 22.1 of the TRIPS Agreement as “indications which identify a good as originating in the territory of a member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.” Examples include specific types of wine (e.g. Champagne) or cheese (e.g. Gouda). At issue in the Doha Round are the rules by which GIs might be enforced on wine, an initiative that divides countries into two camps that defy the usual North–South divide. The European Union is among the sponsors of a paper known as W52 (shortened from WTO document number TN/C/W/52). The paper proposes a multilateral registry for wines and spirits and extending a higher level of protection beyond wines and spirits, as well as stricter rules of disclosure under which patent applicants would be required to disclose the origin of genetic resources and traditional knowledge used

**Table 3.3. Coalitions of developing countries with defensive interests in the Doha Round NAMA negotiations**

Group	Description	Members	
NAMA 11	Developing countries seeking flexibilities to limit market opening in industrial goods trade	Argentina Brazil Egypt India Indonesia Namibia	Philippines South Africa Tunisia Venezuela, Bolivarian Republic of
Small, Vulnerable Economies	Despite efforts to develop a formal definition, WTO members came to no consensus on what constitutes either smallness or vulnerability	Antigua and Barbuda Barbados Bolivia, Plurinational State of Dominica Dominican Republic El Salvador Fiji Grenada Guatemala Honduras	Jamaica Maldives Mongolia Nicaragua Papua New Guinea Paraguay Saint Kitts and Nevis Saint Lucia Saint Vincent and the Grenadines Trinidad and Tobago
Paragraph 6 countries	Countries with less than 35 per cent of non-agricultural products bound and which want to exempt some products	Cameroon Congo Côte d'Ivoire Cuba Ghana Kenya	Macao, China Mauritius Nigeria Sri Lanka Suriname Zimbabwe

Source: WTO Secretariat, "Groups in the WTO", updated 2 March 2013, [www.wto.org/english/tratop\\_e/dda\\_e/negotiating\\_groups\\_e.pdf](http://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.pdf).

in the inventions. As can be seen from the list in Table 3.4, most of the developing countries that joined the European Union in sponsoring W52 are also members of the ACP (principally consisting of countries that obtained independence from European countries in the 1950s and 1960s); the sponsors also include Brazil, Colombia, Ecuador, India and Peru. Most of the significant wine-producing countries outside of Europe, whether they are developed or developing, are opposed to the strict enforcement of Old World GIs. The members of the Joint Proposal group advocate –

a multilateral system of notification and registration of geographical indications for wines and spirits that facilitates the protection of wines and spirits GIs through a system that is voluntary, that preserves the existing balance of rights and obligations in the TRIPS Agreement, that preserves the territoriality of intellectual property rights for geographical indications, and that allows WTO Members to continue to determine for themselves the appropriate method of implementing the provisions of the TRIPS Agreement within their own legal system and practice.<sup>29</sup>

**Table 3.4. Coalitions of countries dealing with geographical indications in the Doha Round negotiations**

	Developed countries	Developing countries
<b>W52 sponsors</b>	European Union, Switzerland	Albania, Angola, Antigua and Barbuda, Barbados, Belize, Benin, Botswana, Brazil, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, China, Colombia, Congo, Côte d'Ivoire, Cuba, Democratic Republic of the Congo, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, Fiji, Gabon, The Gambia, Georgia, Ghana, Grenada, Guinea, Guinea Bissau, Guyana, Haiti, India, Indonesia, Jamaica, Kenya, Kyrgyz Republic, Latvia, Lesotho, Madagascar, Malawi, Mali, Malta, Mauritania, Mauritius, Moldova, Morocco, Mozambique, Namibia, Niger, Nigeria, Pakistan, Papua New Guinea, Peru, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Senegal, Sierra Leone, Solomon Islands, Sri Lanka, Suriname, Swaziland, South Africa, Tanzania, Thailand, former Yugoslav Republic of Macedonia, Togo, Tonga, Trinidad and Tobago, Tunisia, Turkey, Uganda, Zambia, Zimbabwe
<b>Joint proposal</b>	Australia, Canada, Japan, New Zealand, United States	Argentina, Chile, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Israel, Republic of Korea, Mexico, Nicaragua, Paraguay, Chinese Taipei, South Africa

Source: WTO Secretariat.

Notes: The Dominican Republic is in the ACP and South Africa is in the African Group, but each of these countries is also a sponsor of TN/IP/W/10/Rev.2 on geographical indications. Ecuador is a sponsor of both proposals.

In short, this is the one issue that has given rise to the largest pair of opposing coalitions, in which almost all of the most active and influential members of the WTO. There are very few bystanders on this subject, but also little prospect of resolving the two groups' differences in anything other than a large negotiation in which trade-offs are made between this topic and others.

A few other issues are notable for the North–South coalitions that they have inspired. One example is the Friends of Anti-dumping Negotiations, a group of countries that find themselves on the receiving end of anti-dumping investigations more often than they initiate such cases. Most of the 15 members are developing countries, but the group also includes Japan, Norway and Switzerland.<sup>30</sup> It notably does not include either the European Union or the United States; those two members may be said to be in an informal coalition that seeks to ensure that any commitments made on the anti-dumping laws do not seriously constrain their ability to use this instrument of trade defence. The Friends of Fish is another North–South coalition that merits mention. The members of this group, which seeks to reduce fisheries subsidies, include developed countries (Australia, Iceland, New Zealand, Norway and the United States) as well as developing countries (Argentina, Chile, Colombia, Ecuador, Pakistan and Peru). From time to time, other WTO members also identify themselves with this group. Conversely, a subgroup among the Small, Vulnerable Economies sponsored a proposal<sup>31</sup> with a very different view. All 15 members of this group are developing countries.<sup>32</sup>

## Endnotes

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- 1 See Appendix 3.1 for details on individual WTO members' status, including the year of their entry into GATT/WTO as well as the type and size of mission they have.
- 2 See Chapter 6 for a more detailed discussion of the origins of the term and the negotiating practice of the green room.
- 3 Many of the people providing information for the Biographical Appendix declined to specify the field in which they received a degree, so more information is available on the level (as reported here) than the discipline (as reported elsewhere).
- 4 This figure does not include the honorary doctorates that some of these individuals have received.
- 5 The more specific statistics on this last point are reported in Chapter 7, in the context of the disproportionate degree to which people from common-law countries are assigned to dispute settlement panels and members of the Appellate Body are graduates from law schools in common-law countries.
- 6 As is discussed in Chapter 15, the GATT directors-general served terms that were on average three times longer than those of their WTO successors.
- 7 There are some WTO ambassadors who go on to serve as ministers, notably including the Brazilians Luiz Felipe Lampreia, Celso Lafer and Celso Amorim (each of whom later became foreign minister) and Rubens Ricupero (who became finance minister); similarly, Tim Groser (see Biographical Appendix, p. 579) of New Zealand went from ambassador to trade minister. Sergio Marchi of Canada appears to be the only one whose path moved in the opposite direction, having gone from trade minister (1997-1999) in the government of Prime Minister Jean Chrétien to Canada's WTO ambassador (1999-2003). That move was prompted by what in many other cases is seen as an evasion or a cliché, the desire to spend more time with his family. Both ministers and ambassadors have hectic schedules, but the demands on ministers are usually much greater than those on ambassadors.
- 8 These include the International Labour Organization (ILO), the World Health Organization (WHO), the World Intellectual Property Organization (WIPO) and the United Nations Conference on Trade and Development (UNCTAD), among others.
- 9 Some dedicated WTO missions also represent a country in one or more of the other trade-related organizations in Geneva, especially UNCTAD and WIPO. In this sense, they might best be termed the "trade-dedicated" rather than the "WTO-dedicated" missions.
- 10 Some of the Geneva missions actually do triple-duty, representing their countries not just to the WTO and to other international organizations in Geneva but also to the Swiss capital, Bern.
- 11 Note that the numbers discussed here do not count the Secretariat staff, observers from other international organizations, or the various non-governmental organizations and academic institutions in and around Geneva that have relationships with GATT and the WTO.
- 12 This estimate is based on informal inquiries with diplomats from numerous general-purpose missions. They report a wide variation in the investment of time that a mission makes in the WTO versus other Geneva institutions, ranging anywhere from less than 20 per cent to over 50 per cent; the one third figure is thus a very rough midpoint. Diplomats also stress that the answer will vary according to what is "hot" at the time, such that the WTO may attract most or all of a mission's attention during intense periods of negotiations, and can fall close to zero time during "down" periods, but that the time available for WTO matters may also be affected by what is happening in other Geneva-based institutions.

- 13 These numbers may understate the actual amount of manpower available to some missions. They can sometimes enhance their capacity by drawing on the assistance of students from their home countries who might receive little or no pay but gain invaluable experience. Some of those students have gone on to have careers in this field. Ambassador Ronald Saborio of Costa Rica, who holds the record for the longest service as chairman of WTO bodies (see Chapter 14), offers a notable example of a such a career path.
- 14 Note that three missions – Hong Kong, China; Macao, China; and Chinese Taipei – are necessarily WTO-dedicated for the simple reason that these WTO members are not recognized in the United Nations as independent countries and hence cannot be represented as such in the Geneva-based UN agencies.
- 15 Interview with the author.
- 16 As originally constituted the Cairns Group included three industrialized countries (Australia, Canada, and New Zealand), nine developing countries (Argentina, Brazil, Chile, Fiji, Indonesia, Malaysia, the Philippines, Thailand and Uruguay), as well as one other country that was still in the non-market bloc but has since become a member of the European Union (Hungary).
- 17 The members of the De la Paix Group included at various times nine industrialized countries (Australia, Austria, Canada, Finland, Iceland, New Zealand, Norway, Sweden and Switzerland), eleven developing countries (Argentina, Chile, Colombia, Hong Kong, Korea, Mexico, Pakistan, Peru, Singapore, Uruguay, and the former Zaire), and two non-market countries (Hungary and Czechoslovakia).
- 18 Author's interview with Ujal Bhatia on 27 September 2012.
- 19 Author's interview with Mr Mamdouh on 25 September 2012.
- 20 The first of these cases is discussed in Chapter 13; see Chapter 10 for the latter two cases.
- 21 A formal bloc is understood to be one that takes on some of the characteristics of an international organization, such as an agreement laying out its objectives and rules, a headquarters and a secretariat. Semi-formal blocs may delegate organizational authority to individual members on a revolving basis, but do not have permanent headquarters or secretariats.
- 22 In the case of the OECD, it may be more appropriate to say that it is perceived to act like a bloc, in the sense that the term "OECD countries" is often used interchangeably with "developed countries" or "industrialized countries".
- 23 Interview with the author.
- 24 See *Doha Work Programme: Decision Adopted by the General Council on 1 August 2004*, WTO document WT/L/579, 2 August 2004.
- 25 The Russian Federation first became associated with the G7 in 1994 (i.e. the very end of the GATT period) and formally joined what became the G8 in 1997.
- 26 Note that throughout this book the term G20 is generally used to mean this group, while the other group that goes by the same name is so identified either by context or by explicitly calling it "the Cancún-era G20".
- 27 The fact that the so-called G20 had 23 members in 2012 illustrates the point that groups with numerical titles tend to indicate the original numbers of their membership rather than the current number (see Box 3.1). Similarly, the G33 had 45 members in 2012. The fact that the Group of Ten has ten actual members thus makes it almost unique among the numbered coalitions for the accuracy of its title.

- 28 Note that the only groups shown in Figures 3.2 and 3.3 are those specifically formed around agricultural issues *per se*. Some other groups (e.g. the Recently Acceded Members) also take positions on agricultural issues, among other topics.
- 29 See *Proposed Draft TRIPS Council Decision on the Establishment of a Multilateral System of Notification and Registration of Geographical Indications for Wines and Spirits*, WTO document TN/IP/W/10/Rev.4, 31 March 2011, p. 1.
- 30 The members include: Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Republic of Korea; Mexico; Norway; Singapore; Switzerland; Chinese Taipei; Thailand; and Turkey.
- 31 See *Small, Vulnerable Economies (SVEs): Statement on Key Aspects of Article III of the Fisheries Subsidies Annex*, WTO document TN/RL/W/226/Rev.5, 22 September 2008.
- 32 Barbados, Cuba, Dominica, the Dominican Republic, El Salvador, Fiji, Honduras, Jamaica, Maldives, Mauritius, Nicaragua, Papua New Guinea, Saint Lucia, Saint Vincent and the Grenadines, and Tonga.

## Appendix 3.1. Representation of WTO members, 2012

Member	Year of joining GATT	Means of joining GATT	Year of membership in the WTO	Type of delegation in 2012	Size of mission in 2012
Albania	–	–	2000	UN	3
Angola	1994	Succession	1996	UN	9
Antigua and Barbuda	1987	Succession	1995	Non-resident	0
Argentina	1967	Accession	1995	UN	7
Armenia	–	–	2003	UN	1
Australia	1948	Original	1995	WTO	9
Austria	1951	Accession	1995	WTO	4
Bahrain, Kingdom of	1993	Succession	1995	UN	6
Bangladesh	1972	Accession	1995	UN	6
Barbados	1967	Succession	1995	UN	7
Belgium	1948	Original	1995	UN	12
Belize	1983	Succession	1995	Non-resident	0
Benin	1963	Succession	1996	UN	9
Bolivia, Plurinational State of	1990	Accession	1995	UN	6
Botswana	1987	Accession	1995	UN	10
Brazil	1948	Original	1995	WTO	20
Brunei Darussalam	1993	Succession	1995	UN	6
Bulgaria	–	–	1996	WTO	2
Burkina Faso	1963	Succession	1995	UN	10
Burundi	1965	Succession	1995	UN	4
Cambodia	–	–	2004	UN	6
Cameroon	1963	Succession	1995	UN	9
Canada	1948	Original	1995	WTO	12
Cape Verde	–	–	2008	UN	2
Central African Republic	1963	Succession	1995	UN	3
Chad	1963	Succession	1996	UN	7
Chile	1949	Accession	1995	WTO	5
China	1948	Original**	2001	WTO	22
Colombia	1981	Accession	1995	WTO	6
Congo	1963	Succession	1995	UN	7
Costa Rica	1990	Accession	1995	WTO	4
Côte d'Ivoire	1963	Succession	1995	UN	15
Croatia	–	–	2000	UN	5
Cuba	1948	Original	1995	UN	11
Cyprus	1963	Succession	1995	UN	5
Czech Republic*	1993	Accession	1995	UN	3
Democratic Republic of the Congo	1971	Succession	1997	UN	2
Denmark	1950	Accession	1995	UN	4
Djibouti	1994	Succession	1995	UN	3
Dominica	1993	Succession	1995	Non-resident	0
Dominican Republic	1950	Accession	1995	UN	7
Ecuador	–	–	1996	WTO	7

<b>Member</b>	<b>Year of joining GATT</b>	<b>Means of joining GATT</b>	<b>Year of membership in the WTO</b>	<b>Type of delegation in 2012</b>	<b>Size of mission in 2012</b>
Egypt	1970	Accession	1995	UN	13
El Salvador	1991	Accession	1995	WTO	5
Estonia	–	–	1999	UN	4
European Union	–	–	1995	WTO	15
Fiji	1993	Succession	1996	Non-resident	0
Finland	1950	Accession	1995	UN	7
France	1948	Original	1995	WTO	10
Gabon	1963	Succession	1995	UN	8
The Gambia	1965	Succession	1996	Non-resident	0
Georgia	–	–	2000	UN	3
Germany	1951	Accession	1995	WTO	9 WTO, 2 UN
Ghana	1957	Succession	1995	UN	4
Greece	1950	Accession	1995	UN	5
Grenada	1994	Succession	1996	Non-resident	0
Guatemala	1991	Accession	1995	WTO	4
Guinea	1994	Succession	1995	UN	3
Guinea-Bissau	1994	Succession	1995	Non-resident	0
Guyana	1966	Succession	1995	Non-resident	0
Haiti	1950	Accession	1996	WTO	4
Honduras	1994	Accession	1995	WTO	3
Hong Kong, China	1986	Succession	1995	WTO	7
Hungary	1973	Accession	1995	WTO	4
Iceland	1968	Accession	1995	UN	4
India	1948	Original	1995	WTO	11
Indonesia	1950	Succession	1995	UN	8
Ireland	1967	Accession	1995	UN	7
Israel	1962	Accession	1995	UN	5
Italy	1950	Accession	1995	UN	5
Jamaica	1963	Succession	1995	UN	7
Japan	1955	Accession	1995	UN	20
Jordan	–	–	2000	UN	3
Kenya	1964	Succession	1995	UN	14
Korea, Republic of	1967	Accession	1995	UN	14
Kuwait, State of	1963	Succession	1995	UN	3
Kyrgyz Republic	–	–	1998	UN	2
Latvia	–	–	1999	UN	2
Lesotho	1988	Succession	1995	UN	4
Liechtenstein	1994	Succession	1995	UN	3
Lithuania	–	–	2001	UN	4
Luxembourg	1948	Original	1995	UN	2
Macao, China	1991	Succession	1995	WTO	5
Madagascar	1963	Accession	1995	UN	3
Malawi	1964	Succession	1995	Non-resident	0
Malaysia	1957	Succession	1995	WTO	5
Maldives	1983	Accession	1995	Non-resident	0

Member	Year of joining GATT	Means of joining GATT	Year of membership in the WTO	Type of delegation in 2012	Size of mission in 2012
Mali	1993	Accession	1995	UN	4
Malta	1964	Accession	1995	UN	3
Mauritania	1963	Accession	1995	UN	4
Mauritius	1970	Succession	1995	UN	7
Mexico	1986	Accession	1995	WTO	13
Moldova, Republic of	–	–	2001	UN	1
Mongolia	–	–	1997	UN	5
Montenegro	–	–	2012	UN	3
Morocco	1987	Accession	1995	UN	12
Mozambique	1992	Succession	1995	UN	2
Myanmar	1948	Original	1995	UN	3
Namibia	1992	Succession	1995	WTO	1
Nepal	–	–	2004	UN	2
Netherlands	1948	Original	1995	UN	8
New Zealand	1948	Original	1995	WTO	5
Nicaragua	1950	Accession	1995	UN	5
Niger	1963	Succession	1996	UN	6
Nigeria	1960	Succession	1995	WTO	6
Norway	1948	Original	1995	WTO	8
Oman	–	–	2000	UN	3
Pakistan	1948	Original	1995	WTO	6
Panama	–	–	1997	WTO	3
Papua New Guinea	1994	Succession	1996	Non-resident	0
Paraguay	1994	Accession	1995	UN	8
Peru	1951	Accession	1995	UN	8
Philippines	1979	Accession	1995	WTO	10
Poland	1967	Accession	1995	UN	4
Portugal	1962	Accession	1995	UN	3
Qatar	1994	Succession	1996	UN	7
Romania	1971	Accession	1995	UN	2
Rwanda	1966	Succession	1996	UN	3
Saint Kitts and Nevis	1994	Succession	1996	Non-resident	0
Saint Lucia	1993	Succession	1995	Non-resident	0
Saint Vincent and the Grenadines	1993	Succession	1995	Non-resident	0
Samoa	–	–	2012	Non-resident	0
Saudi Arabia, Kingdom of	–	–	2005	WTO	3
Senegal	1963	Succession	1995	UN	5
Sierra Leone	1961	Succession	1995	Non-resident	0
Singapore	1973	Succession	1995	UN	14
Slovak Republic*	1993	Accession	1995	UN	3
Slovenia	1994	Accession	1995	UN	2
Solomon Islands	1994	Succession	1996	Non-resident	0
South Africa	1948	Original	1995	WTO	6
Spain	1963	Accession	1995	WTO	9
Sri Lanka	1948	Original	1995	UN	1

Member	Year of joining GATT	Means of joining GATT	Year of membership in the WTO	Type of delegation in 2012	Size of mission in 2012
Suriname	1978	Succession	1995	Non-resident	0
Swaziland	1993	Succession	1995	UN	6
Sweden	1950	Accession	1995	WTO	3
Switzerland	1966	Accession	1995	UN	8
Chinese Taipei	–	–	2002	WTO	17
Tanzania	1961	Succession	1995	UN	9
Thailand	1982	Accession	1995	WTO	13
The former Yugoslav Republic of Macedonia	–	–	2003	UN	3
Togo	1964	Succession	1995	Non-resident	0
Tonga	–	–	2007	UN	2
Trinidad and Tobago	1962	Succession	1995	UN	7
Tunisia	1990	Accession	1995	UN	4
Turkey	1951	Accession	1995	WTO	10
Uganda	1962	Succession	1995	UN	4
Ukraine	–	–	2008	UN	5
United Arab Emirates	1994	Succession	1996	WTO	4
United Kingdom	1948	Original	1995	UN	6
United States	1948	Original	1995	WTO	24
Uruguay	1953	Accession	1995	WTO	5
Venezuela, Bolivarian Republic of	1990	Accession	1995	UN	11
Viet Nam	–	–	2007	UN	11
Zambia	1982	Succession	1995	UN	7
Zimbabwe	1948	Original	1995	UN	11

Sources: Data on countries' status under the GATT are from GATT (1995), *Guide to GATT Law and Practice*. Data on countries' status under the WTO are from the WTO website. Data on the type and size of countries' missions in Geneva are from the WTO's electronic telephone directory.

Notes: Myanmar was called Burma when it joined GATT, just as Sri Lanka was called Ceylon and Zimbabwe was called Southern Rhodesia. Chile was intended to be among the original 23 contracting parties but failed to complete its domestic approval procedures within the allotted time, and hence did not become a contracting party until early 1949. The Lebanese Republic and the Syrian Arab Republic were original GATT contracting parties that withdrew after dissolving their customs union in 1951; the Republic of Liberia acceded to GATT in 1950 but then withdrew in 1953. All three countries were in the process of accession as of early 2013. \*Czechoslovakia was among the original GATT contracting parties; its two successor states acceded individually after they separated. \*\*China withdrew from GATT in 1951.

WTO: A dedicated mission to the WTO.

UN: A mission to the WTO and to United Nations agencies in Geneva.

## Appendix 3.2. Blocs and coalitions of WTO members in the Doha Round

	Coalitions based on shared interests						Regional blocs & other
	Offensive interests			Defensive interests			
	NAMA	Agriculture	Other	NAMA	Agriculture	Other	
<b>Offensive interest-based coalitions (56 members)</b>							
Angola			W				9 A C L
Austria	O		W				E
Belgium	O		W				E
Bulgaria	O		W				E
Burkina Faso		4	W				9 A C L
Burundi			W				9 A C L
Central African Rep.			W				9 A C L
Chad		4	W				9 A C L
Colombia		G T	D F W				
Cyprus	O		W				E
Czech Republic	O		W				E
Dem. Rep. of Congo			W				9 A C L
Denmark	O		W				E
Djibouti			W				9 A C L
Estonia	O		W				E
European Union	O		W				E
Finland	O		W				E
France	O		W				E
Gabon			W				9 A C
The Gambia			W				9 A C L
Germany	O		W				E
Greece	O		W				E
Guinea			W				9 A C L
Guinea-Bissau			W				9 A C L
Hong Kong, China			D				P
Hungary	O		W				E
Ireland	O		W				E
Italy	O		W				E
Latvia	O		W				E
Lesotho			W				9 A C L
Lithuania	O		W				E
Luxembourg	O		W				E
Malawi			W				9 A C L
Malaysia		G					P
Mali		4	W				9 A C L
Malta	O		W				E
Mauritania			W				9 A C L
Morocco			W				9 A
Netherlands	O		W				E
Poland	O		W				E

Coalitions based on shared interests							
	Offensive interests			Defensive interests			Regional blocs & other
	NAMA	Agriculture	Other	NAMA	Agriculture	Other	
Portugal	O		W				E
Romania	O		W				E
Rwanda			W				9 A C L
Sierra Leone			W				9 A C L
Singapore			D				P
Slovak Republic	O		W				E
Slovenia	O		W				E
Solomon Islands			W				9 C L
Spain	O		W				E
Swaziland			W				9 A C
Sweden	O		W				E
Thailand		2 G	D W				P
FYR Macedonia			W				
Togo			W				9 A C L
United Kingdom	O		W				E
Uruguay		2 G					M
<b>Defensive interest-based coalitions (12 members)</b>							
Armenia					I	R	
Dominican Republic			[W]*	V	3 S	H J	9 C
El Salvador				V	3 S	H J	
Honduras				V	3 S	H J	
Jordan						R	
Macao, China				6			
Maldives				V	S	H	9
Mongolia				V	3 S	R	
Oman						R	
Saudi Arabia, Kingdom of						R	
Ukraine						R	
Viet Nam						R	P
<b>Offensive &amp; defensive interest-based coalitions (76 members)</b>							
Albania			W			R	
Antigua and Barbuda			W	V	3		9 C
Argentina		2 G	F	N		J	M
Australia	O	G	F			J	P
Barbados			W	V	3 S	H	9 C
Belize			W		3		9 C
Benin		4	W		3		
Bolivia, Pluri. State of		2		V	3 S		
Botswana			W		3		9 A C
Brazil		2 G	D W	N			M
Cameroon			W	6			9 A C
Canada	O	G				J	P
Cape Verde			W			R	9 A C
Chile		2 G	D F			J	P
China		2	W		3	R	P

Coalitions based on shared interests							Regional blocs & other
Offensive interests			Defensive interests				
NAMA	Agriculture	Other	NAMA	Agriculture	Other		
Congo			W	6	3		9 AC
Costa Rica		G T	D			J	
Côte d'Ivoire			W	6	3		9 AC
Croatia			W			R	
Cuba		2	W	6	3 S	H	9 C
Dominica			W	V	3	H	9 C
Ecuador		2 T	FW			JR	
Egypt		2	W	N			9 A
Fiji			W	V	S	H	9 C
Georgia			W			R	
Ghana			W	6			9 AC
Grenada			W	V	3		9 C
Guatemala		2 G T		V	3 S	J	
Guyana			W		3		9 C
Haiti			W		3		9 C L
Iceland			FW		1		
India		2	W	N	3		
Indonesia		2 G	W	N	3		P
Israel			D		1	J	
Jamaica			W	V	3	H	9 C
Japan		O	D		1	J	P
Kenya			W	6	3		9 AC
Korea, Republic of			D		1 3	J	P
Kyrgyz Republic			W		1	R	
Liechtenstein			W		1		
Madagascar			W		3		9 A C L
Mauritius			W	6	1 3 S	H	9 AC
Mexico		2	D			J	P
Moldova			W		1	R	
Mozambique			W		3		9 A C L
Namibia			W	N			9 AC
New Zealand		O	G	F		J	P
Nicaragua			T	V	3 S	H J	
Niger			W				9 A C L
Nigeria		2	W	6	3		9 AC
Norway		O	DF		1		
Pakistan		2 G	FW		3		
Panama		T			3	R	
Papua New Guinea			W	V	S	H	9 C P
Paraguay		2 G		V	S	J	M
Peru		2 G T	FW		3		P
Philippines		2 G		N	3		P
Saint Kitts & Nevis			W	V	3		9 C
Saint Lucia			W	V	3	H	9 C
Saint Vincent & the Grenadines			W	V	3	H	9 C

Coalitions based on shared interests							
	Offensive interests			Defensive interests			Regional blocs & other
	NAMA	Agriculture	Other	NAMA	Agriculture	Other	
Senegal			W		3		9 A C L
South Africa		2 G	[W]*	N		J	9 A C
Sri Lanka			W	6	3		
Suriname			W	6	3		9 C
Switzerland	O		D W		1		
Chinese Taipei			D		1	J R	P
Tanzania		2	W		3		9 A C L
Tonga			W			H R	C
Trinidad and Tobago			W	V	3 S		9 C
Tunisia			W	N			9 A
Turkey			D W		3		
Uganda			W		3		9 A C L
United States	O		F			J	P
Venezuela, Bolivarian Republic of		2		N	3		
Zambia			W		3		9 A C L
Zimbabwe		2	W	6	3		9 A C
<b>No interest-based coalitions (6 members)</b>							
Bangladesh							9 L
Brunei Darussalam							P
Cambodia							9 L
Myanmar							9 L
Nepal							9 L
Samoa							9 C L
<b>No coalitions (5 members)</b>							
Bahrain, Kingdom of							
Kuwait, State of							
Montenegro							
Qatar							
United Arab Emirates							

Source: WTO Secretariat, [www.wto.org/english/tratop\\_e/dda\\_e/negotiating\\_groups\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm), accessed 6 June 2013.

Notes: \*The Dominican Republic is in the ACP and South Africa is in the African Group, meaning that each is a sponsor of W52, but each of these countries is also a sponsor of TN/IP/W/10/Rev.2 on geographical indications.

#### Key to blocs:

9 = Group of Ninety

A = African Group

C = African, Caribbean and Pacific (ACP) countries

E = European Union

L = Least-developed countries (LDCs)

M = MERCOSUR (Southern Common Market)

P = Asia-Pacific Economic Cooperation (APEC) forum

**Key to coalitions:**

- 1 = Group of Ten (defensive interests on agriculture)
- 2 = Group of 20 (offensive interests on agricultural subsidies)
- 3 = Group of 33, aka "Friends of Special Products" (defensive interests on agricultural market access)
- 4 = Cotton-Four (offensive interests on cotton subsidies and tariffs)
- 6 = Paragraph 6 countries (defensive interests on agricultural market access)
- D = Friends of Anti-dumping Negotiations (offensive interests on rules)
- F = Friends of Fish (offensive interests on fisheries subsidies)
- G = Cairns Group (offensive interests on agricultural subsidies)
- H = Small, Vulnerable Economies – rules (defensive interests on fisheries subsidies)
- I = Low-Income Economies in Transition (defensive interests on agriculture)
- J = Joint Proposal (defensive interests on geographic indications)
- N = NAMA 11 (defensive interests on NAMA)
- O = Friends of Ambition (offensive interests on NAMA)
- R = Recently Acceded Members (RAMs)
- S = Small, Vulnerable Economies – agriculture (defensive interests on agriculture)
- T = Tropical Products Group (offensive interests on agricultural market access)
- V = Small, Vulnerable Economies – NAMA (defensive interests on NAMA)
- W = W52 Sponsors (offensive interests on geographic indications)



# 4 Accessions

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I sent the club a wire stating, "PLEASE ACCEPT MY RESIGNATION. I DON'T WANT TO BELONG TO ANY CLUB THAT WILL ACCEPT PEOPLE LIKE ME AS A MEMBER".

Groucho Marx, referring to the Friars Club of Beverly Hills  
*Groucho and Me* (1959)

## Introduction

Accessions have been one of the most active areas of negotiation in the WTO period. Thirty countries acceded to the WTO from 1995 to 2012, and another 25 countries were still seeking to accede at the end of the period (see Appendix 4.1). The completed accessions added an average of 1.7 new members per year, or slightly more than half the rate at which countries joined GATT from 1984 to 1994 (3.2). The new members that joined the WTO greatly outweighed the latecomers to GATT, including some of the world's largest economies. It could well be argued that the value of the accessions completed since the WTO came into effect equal or exceed any gains that might reasonably be had from a successful conclusion to the Doha Round. Once the pending accessions are completed, the WTO will come very close to comprising an organization with universal membership.

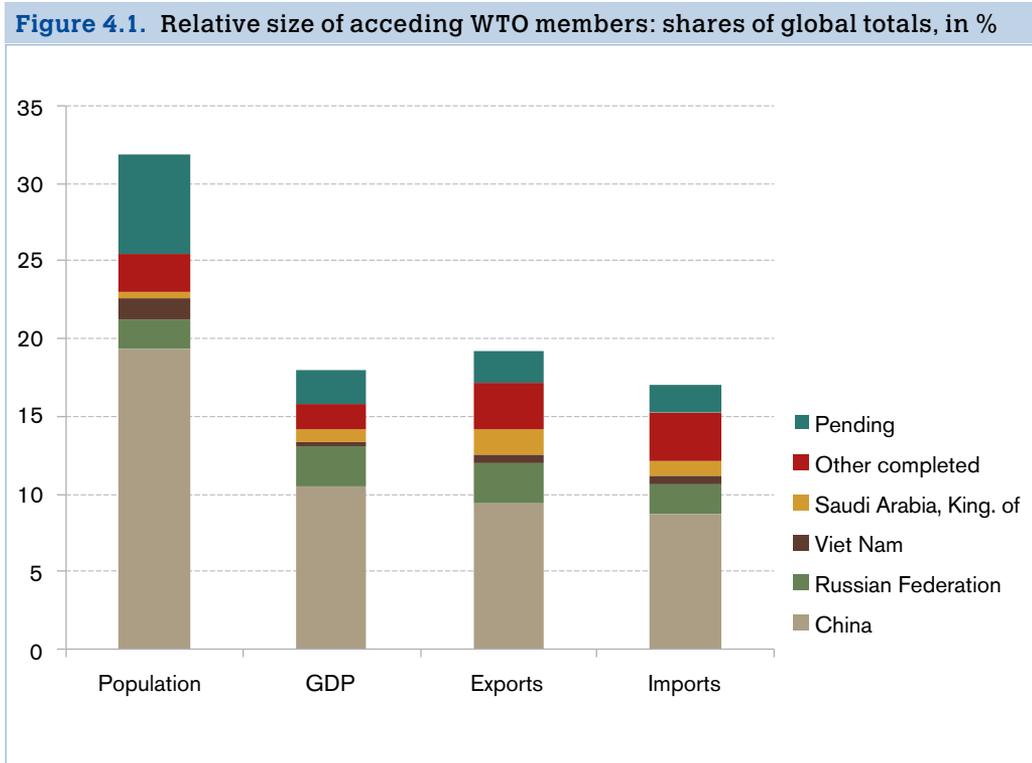
Three kinds of countries that had been marginalized in GATT predominate among the acceding countries in the WTO period. Nine of the 30 countries that acceded through the end of 2012 were formerly part of the Soviet Union, and another ten either had been or remained non-market economies; seven of the 25 countries that were then in the process of accession were similarly former Soviet or Yugoslav republics. The incorporation of these countries into the WTO marks one of the fundamental differences between the milieu of GATT and the WTO. Four of the countries that acceded, and nine of those still acceding in 2013, are classified by the United Nations as least-developed countries (LDCs). The third major category consisted of net oil-exporting countries, which accounted for three of those that acceded and seven of those still acceding. All but four of the countries that acceded by 2012 fell into one or two of these three categories of formerly marginalized countries, as did all but five of those still in accession. Put another way, these three categories encompassed 46 of the 55 countries that were in some stage of accession from 1995 to 2012.

Acceding to the WTO is far different from joining other international organizations, most of which operate under an implicit principle by which, in the absence of truly egregious political problems or especially intractable diplomatic difficulties, all sovereign states have a presumptive right of membership. There may be agreements to sign, dues to pay and other obligations to meet, but the process of accession is rarely burdensome or lengthy. It will generally involve little or no formal scrutiny of the country's existing laws and policies, and even fewer demands that changes be made as a condition of entry. Examples of such universalist institutions include the United Nations, the World Bank, the International Labour Organization, the International Monetary Fund and the World Health Organization. By contrast, joining the WTO is a lengthy process of examination and negotiation in which the acceding country is obliged to make extensive concessions. The bargaining is a deliberately one-sided affair, with all of the requests and demands coming from the existing members and the full burden of adjustment falling on the acceding country. The differences between the WTO and other international organizations can be seen from the example of China. Before that country began the process of acceding to GATT and then the WTO, it first re-entered the World Bank and the International Monetary Fund – two other institutions in which it had (prior to the 1949 revolution) been a founding member. By comparison with China's WTO accession, which would take 15 years to complete, re-entry to these two institutions was remarkably speedy: China filed its formal requests in February 1980, and three months later it was back in both of them.<sup>1</sup>

China's accession to the WTO, coupled with those of the Russian Federation, the Kingdom of Saudi Arabia, Viet Nam and 26 other new members, added 15.8 per cent of global gross domestic product (GDP) to the WTO membership (see Figure 4.1). They brought in a further 17.1 per cent of world exports, 15.3 per cent of imports and 25.5 per cent of the world's population. This expansion is dynamic, as some of the countries that acceded have since grown at a much faster pace than the original membership. As for the countries that were still in the process of accession at the end of 2012, they collectively account for a relatively small share of global GDP (2.2 per cent) as well as exports (2.1 per cent) and imports (1.7 per cent) but a higher share of the global population (6.4 per cent).

## How accessions are conducted

While there are a great many ways in which the WTO may be distinguished from GATT, the process of accession is one where the differences are in degree rather than kind. The accessions to the WTO cover a wider range of issues and tend to take much longer to complete, but the process is procedurally and politically quite similar to what it was in the late GATT period. Kim (2010: 12) found as much continuity as change when reviewing "the resilience in the rules of bargaining over trade and trade barriers in GATT and the WTO." Those rules, as exercised in negotiations over countries' accessions to the WTO, have permitted members that were dominant throughout the GATT period to wield undiminished authority in the new institution.



Source: World Bank data.

Notes: Data on exports and imports are for goods and services. Members as of 2012 based on 2011 data. "Pending" = aggregate data for all other members whose accessions were pending at the end of 2012. "Other Completed" = aggregate data for all other members that completed accessions by the end of 2012.

### Heritage from GATT

The first set of GATT accession negotiations was conducted in the Ancey Round in 1949, when ten new countries sought to join. The applicants were obliged in their protocols of accession to accept the rules of GATT, to abide by additional commitments that the contracting parties made at Ancey and to negotiate with existing contracting parties to establish their own schedules of concessions. The accessions negotiated in that round set two important precedents for the next four decades. One is that in the majority of the accessions the applicant's "entry fee" was negotiated concurrently with one of the eight rounds of multilateral trade negotiations conducted under the auspices of GATT. This eased the domestic politics of accessions for many countries, insofar as their negotiators could seek tariff concessions or other commitments from the existing countries as soon as their own accession negotiations were completed. Second, the concessions made by the Ancey Round applicants were not particularly onerous, involving relatively small numbers of tariff concessions. Most of the accessions through the end of the Tokyo Round (1973-1979) followed a similar pattern, and were comparatively easy for smaller applicant countries.

The multilateral system was roughly in balance between developed and developing countries at its inception, but over time came to incorporate more developing than developed countries. GATT began in 1948 to 1949<sup>2</sup> with 11 industrialized countries and 12 developing countries (see Table 4.1). Accessions and successions in 1949 and the 1950s maintained this broad parity, and in the 1960s eight developed countries joined. As of the 1960s, there were fewer developed countries left to accede and the end of colonialism spawned an ever-growing number of newly independent countries. Thereafter, the great majority of the additions to GATT consisted of developing countries. Nine countries joined in the 1960s that would be considered today as industrialized, but at the time they mostly were developing (Republic of Korea),<sup>3</sup> Communist (Poland and Yugoslavia), or still on the periphery of European development (Cyprus, Iceland, Ireland, Portugal and Spain). Switzerland was a special case: accession had been delayed by its tradition of diplomatic neutrality. All 30 of the other countries that joined in the 1960s were developing countries at that time, and from that point forward the developing world would comprise the bulk of the GATT contracting parties. The nine countries that joined in the 1970s were either Communist (Hungary) or developing, and another 11 developing countries joined in the 1980s. The first half of the 1990s saw a large wave of accessions and successions by 30 developing countries, while Liechtenstein was the final industrialized country to join (1994). That decade also witnessed the special case of the Czech and Slovak accessions: Czechoslovakia was an original GATT contracting party, but then the Czech Republic and the Slovak Republic re-acceded separately on 1 January 1993.

**Table 4.1. Key events in the growing membership of the multilateral trading system**

<b>GATT period</b>	
1940s	GATT begins in 1948 with 23 original contracting parties; 11 others accede in 1949.
1950s	Fifteen contracting parties accede, two succeed and four withdraw.
1960s	Twelve contracting parties accede and 21 succeed.
1970s	Nine contracting parties accede and four succeed.
1980s	Six contracting parties accede and five succeed.
1990s	Nine contracting parties accede and 20 succeed.
<b>WTO period</b>	
1996	Bulgaria and Ecuador accede.
1997	Mongolia and Panama accede.
1998	Kyrgyz Republic accedes.
1999	Estonia and Latvia accede.
2000	Albania, Croatia, Georgia, Jordan and Oman accede.
2001	China, Lithuania and Republic of Moldova accede.
2002	Chinese Taipei accedes.
2003	Armenia and the former Yugoslav Republic of Macedonia accede.
2004	Cambodia and Nepal accede.
2005	Kingdom of Saudi Arabia accedes.
2007	Tonga and Viet Nam accede.
2008	Cape Verde and Ukraine accede.
2012	Montenegro, the Russian Federation, Samoa and Vanuatu accede.
2013	Lao People's Democratic Republic and Tajikistan accede.

Notes: Accessions for 2013 are up to March.

The majority of developing countries that joined GATT did not actually accede but rather succeeded to GATT status. Many of the countries that gained their independence from colonial powers in the post-war period – including most of the Caribbean and Africa, as well as parts of Asia, the Middle East and even Europe – had the option of entering GATT under the special terms of Article XXVI:5(c). This provision, which now has no equivalent in the WTO, offered a very easy route by which former colonies of GATT contracting parties could acquire *de facto* GATT status upon independence. A country could then become a full contracting party by succession, a process that involved much less stringent scrutiny of its trade regime and fewer new commitments than did the ordinary accession process of GATT Article XXXIII. Precisely half (64) of the 128 countries that joined GATT did so through succession. Some countries succeeded to GATT shortly after gaining independence, while others waited years before taking this step.<sup>4</sup>

Several of the countries that were still negotiating by the time the WTO came into being might well have regretted not taking advantage of this option. Some of them rejected GATT and the succession route on ideological grounds, viewing both the institution and the rule as vestiges of colonialism. Most of the countries that succeeded were former colonies of France or the United Kingdom, although in some cases the path to independence from a mother country and succession to GATT was *sui generis*. Liechtenstein is one such example, having succeeded in 1994 on the basis of its earlier customs union with Switzerland. Singapore is another notable case, having succeeded to GATT in 1973, after gaining its independence from Malaysia in 1965, and is among several succeeding countries that became very active in GATT and then in WTO negotiations. The same may be said of: Hong Kong, China; Indonesia; and Jamaica. Succession was also the path taken to GATT entry by Cyprus and Malta, which following EU membership became part of the largest trading bloc in the WTO.

Many of the countries that acceded to GATT during the 1980s and early 1990s found the process to be more demanding than it had been in past decades. Negotiators from the major trading countries grew increasingly insistent upon using the GATT accession process as a means of ensuring that the country's trade regime was consistent with the rules and principles of the system. One need only observe the Mexican example to appreciate the differences between GATT accession practices before and after the change in policy. Mexico had originally negotiated for accession during the Tokyo Round, but then decided in 1980 not to implement the protocol of accession that it had concluded in 1979. The country changed direction once again in the mid-1980s, but the protocol of accession that it negotiated in 1985 was much more exacting than the one reached just six years earlier. Whereas the 1979 protocol consisted of little more than a list of tariff concessions and the obligatory pledge to comply with GATT rules, the latter agreement entailed binding the entire tariff schedule at 50 per cent, agreeing to 373 concessions on tariffs below this ceiling, and pledging to adhere to GATT codes relating to subsidies and countervailing measures, licensing procedures, anti-dumping, standards and customs valuation. The second protocol was also less permissive than the earlier document with respect to certain sectoral exclusions that Mexico sought. This set the pattern for the 12 developing country accessions that were concluded during the Uruguay Round, which were more difficult than those conducted during the 1949 to 1979

period but less comprehensive than accessions to the WTO. The principal difference is that the GATT regime had not yet incorporated the new issues that were under negotiation in that round, and hence the acceding countries were under no obligation to make commitments on services, intellectual property and investment or on agricultural issues other than tariffs.

### *The process of accession*

Accession negotiations are deliberately one-sided affairs, with all of the requests coming from the existing members and the full burden of adjustment falling on the acceding country. The applicant is not entitled to request tariff concessions or services commitments from the existing members. WTO Article XII and its predecessor, GATT Article XXXIII, establish a framework within which accession negotiations are conducted. The deliberately spare language of this article provides that “any state or separate customs territory possessing full autonomy in the conduct of its external commercial relations ... may accede to this Agreement, on terms to be agreed between it and the WTO.” The provision does not specify the precise commitments expected from acceding countries, nor does it establish clear standards for which compliance is sought or identify the scope and extent of demands that could be made. These developed only in actual practice and, given the paucity of language in the article, could evolve along new lines in the future.

To simplify, there are two stages in an accession negotiation. The first is a discovery process in which the applicant country first describes its economic and trade regime in a detailed document known as the foreign trade memorandum, and must then respond to the many questions that are posed by the existing WTO members. The second stage is a negotiation that has two components. It is partly a multilateral process in which the WTO membership collectively negotiates with the applicant country over multiple issues. There is also a bilateral component to the negotiations, in which individual WTO members negotiate with the applicant over very specific market access commitments. These are primarily on tariff rates for goods and commitments on trade in services.

The end result of the process is two documents. One is a very short protocol of accession, a two-page paper that follows a simple template providing for the accession of the country and that references the other, more substantive document. That is the report of the working party, which is far lengthier and very detailed. While that contract might appear on a quick reading to be merely descriptive, it will include many paragraphs that spell out the commitments of the acceding country.<sup>5</sup> Those parts usually come after several other paragraphs in which a given issue is discussed, including a summary of the views expressed on that matter by the applicant and the existing WTO members. Some statement will then be made regarding the actions that the acceding country pledges to take (or actions that it promises *not* to take), followed always by this sentence at the end of the paragraph: “The Working Party took note of these commitments.” And to make certain that no one is in any doubt as to where to find the more substantive parts of the document, all of the paragraphs that include such statements are enumerated at the end of the working party report. For example, the report of the working party on the Kingdom of Saudi Arabia's accession<sup>6</sup> ran to 136 pages, plus annexes that specified the more precise commitments made on goods and services. Fifty-nine separate

paragraphs in the report specified the Saudi commitments. Once the talks are concluded the protocol of accession is opened for signature by the acceding government and WTO members. The rules formally provide that a two-thirds majority is required for acceptance, but in actual practice accessions – like virtually all other WTO decisions – are conducted on the basis of consensus. This means that each of the existing members of the club has the ability to “blackball” any new applicant.

Most of the demands made on applicants come from a small circle of members. Both in the multilateral and the bilateral talks, a few developed members account for nearly all of the questions that are posed to the acceding countries and the demands that are made of them. This was evident in an observation that China’s chief accession negotiator made in an internal speech, observing that during a period of stalemate in that country’s negotiations “we thought that GATT accession negotiation was a multilateral negotiation.”

If the US did not talk to us, we could turn to other contracting parties, like EU, Japan, or our friends in the Third World. Surprisingly, the first question they asked us was the same: Have you talked to the US? Then we realized that the US was the absolute leading power in the organization. So if China was to break the impasse with the US, no other countries could help us to break it (cited in Liang, 2002: 702).

The diplomacy of accession has grown more contentious over time, with applicants and recently acceding countries having raised concerns over the process and its consequences. In a review of the debate among member countries over the accession process in 2000, some members “pointed out that the accession process was often lengthy and too demanding for certain acceding governments,” stated that the “fact finding stage, particularly, appeared to be unduly long, inquisitorial and frequently repetitive” and called for simplification of the process.<sup>7</sup> The average accession at that time took less than six years, but in the ensuing years that average nearly tripled.

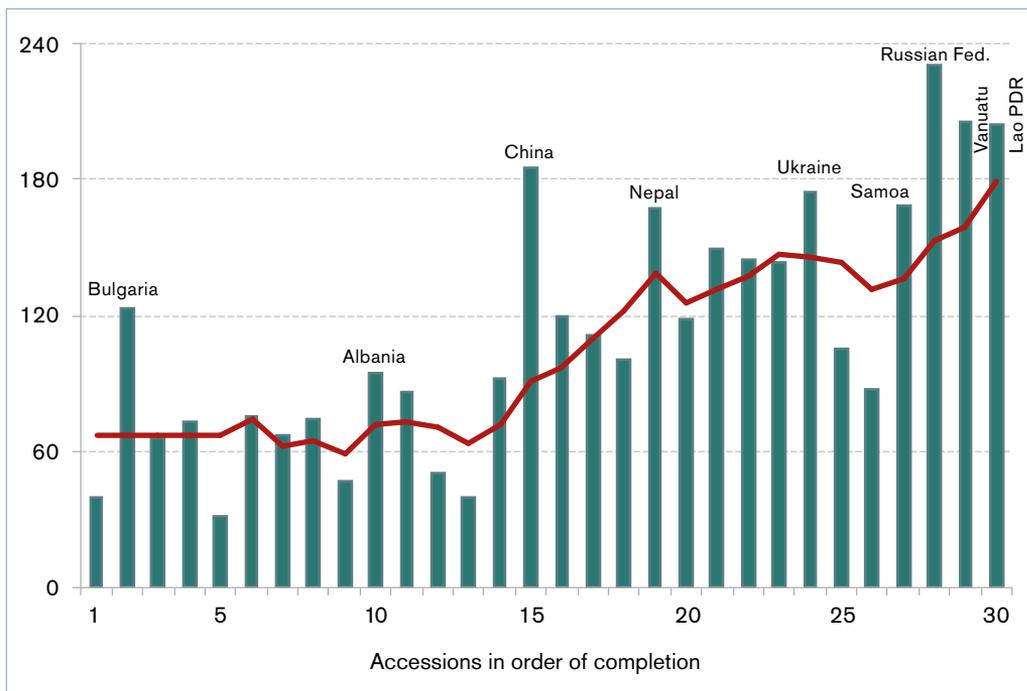
### *The declining frequency and rising duration of accessions*

The frequency of accessions has declined over time. Two dozen accessions that had been under way since the late GATT period carried over into the WTO period, with the applicants now being obliged to negotiate over a broader package of concessions that reflected the expanded subject matter of the new institution. Four of these hold-overs from the GATT period were still negotiating over their accession as of 2013. In the first five years of the WTO’s existence, another 17 countries applied for membership. Fifteen countries completed their accessions from 1996 to 2001, but after that initial surge came a decline in the rates at which existing negotiations concluded and new ones were initiated. Fourteen countries acceded from 2002 to 2012, achieving a pace that – at about one every ten months – was about half that of 1996 to 2001. There was at least one new applicant every year of the WTO’s existence from 1995 to 2007, apart from the exceptional year of 2002, but starting in 2008 there were five successive years without a single new applicant.

While applications have slowed the duration of the process has elongated. As can be seen from Figure 4.2, the average accession in the early years took a little over five years but began to creep up after the first 15 accessions. The briefest negotiations were with the Kyrgyz Republic, which were completed in December 1998 and took only two years, eight months; the longest have been with the Russian Federation, which lasted 19 years and two months. Even that last example may not set the record, for the negotiations over the accession of Algeria had, as of 2013, been underway for a quarter of a century and showed no sign of ending soon. Of the 25 countries that are still in the process of accession, 16 have already been at it for over 12 years (see Appendix Table 4.1B).

What accounts for the lengthening negotiations? There is only a vague relationship between the economic magnitude of an accession and the amount of time that it takes to complete. Whereas the accessions of large economies such as China, the Russian Federation and the Kingdom of Saudi Arabia have been among the lengthiest, the same may be said for those with Nepal, Samoa and Vanuatu. The length of accession negotiations are determined by at least three factors: the extent of the accommodations that a country may need to make in order to meet WTO standards, the severity of the demands that are made on it by the incumbent members, and the vigour with which it bargains over these matters with the WTO membership.

**Figure 4.2. Duration of WTO accession negotiations, 1996-2012**



Source: Author's calculation of data from [www.wto.org/english/thewto\\_e/acc\\_e/status\\_e.htm](http://www.wto.org/english/thewto_e/acc_e/status_e.htm) and [www.wto.org/english/thewto\\_e/acc\\_e/completeacc\\_e.htm](http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm).

Notes: Bars show individual accessions in number of months; line shows rolling average for the five most recent.

One explanation for the increasing length of the negotiations appears almost tautological. In a regression analysis for which the total length of a WTO accession was the dependent variable, Jones (2010: 69) found that the process has tended to grow longer for new applicants. He concluded that “for each additional WTO accession completed ... the elapsed time from application to formal accession increased by approximately 3.3 to 4.4 months, other things being equal.” That is not so much an explanation, however, as it is a measurement. This was the only variable Jones (2010) tested that consistently proved to be statistically significant. Some other variables supported the contention that accessions tend to take longer when there is more at stake for the incumbent WTO members, including the observations that negotiations are lengthier for countries that have relatively high tariffs before acceding and/or supply relatively large shares of goods to the leading industrialized countries, but here the evidence was less statistically convincing.<sup>8</sup> One contributing cause has been a greater level of participation from mid-sized countries in the negotiating process, which is no longer monopolized by the Quad.

### Terms agreed to in accessions

Countries have differing perspectives on the purposes of accessions. Applicants often start with the belief that WTO membership is now an essential attribute of statehood, much the same way that the membership of the United Nations is virtually universal, and that their accession should be treated as if they were joining a club in which membership is a right. The existing members, and especially those that take the lead in accession negotiations, will soon disabuse them of that notion. The WTO is not a UN organization<sup>9</sup> and membership is a privilege that must be paid for rather than a right that can be claimed. The negotiations are dominated by large countries that usually do not hesitate to drive hard bargains, even when the acceding country is small or poor. Or as Kim (2010: 57) put it, the WTO is a “path-dependent” institution in which “outcomes over time reproduce the power relations established in the earliest ‘rules’ of the institution.”

The Quad and a few other developed countries will sometimes treat these negotiations in a regime context, meaning that the commitments sought from each acceding country are viewed not just as opportunities to address specific problems with the country in question but in the broader framework of the rules that they want to see applied uniformly to all WTO members. This orientation sometimes leads negotiators to emphasize certain matters that may appear to be relatively unimportant in the bilateral relationship *per se*, but are instead of very great importance in relations with other countries that are either WTO members or are negotiating for their own accession. In some cases, it can also mean that the acceding country is caught between incumbent members with very different aspirations. Consider the case of audiovisual services such as recorded music, motion pictures and television, a sector in which the United States has significant offensive interests but one that France – and hence the European Union – argues should not be considered economic in the first place. It is instead, by this logic, to be treated as part of a cultural exception that excludes these sectors from the normal trade rules. In at least one case, an acceding country faced diametrically opposed demands from

Washington and Paris. France convinced Albania to withdraw audiovisual commitments that it had made to the United States by threatening to block the country's WTO accession, as French officials were reportedly concerned that the Albanian concession "could provide a back-door entry into Europe for US productions" (Evans, 1999). In other cases, an acceding country may be caught between the differing economic interests of the majors. The commitments that China made on financial services to the European Union complicated the later Chinese negotiations with Canada and the United States, for example, insofar as the country's commitments on insurance fit the needs of EU insurance providers much better than the North American providers in this sector.

Developing country applicants are especially concerned over the apparent invalidation of established principles of special and differential treatment in specific WTO agreements. Some aspects of the Uruguay Round agreements provide for preferential treatment for developing countries, but these rules are more limited in scope than the older GATT provisions. Many of the more substantive provisions of the WTO agreements allow for longer transition periods for developing countries and LDCs, but generally do not provide for permanent exemptions. Some offer two-year transitions (the agreements on sanitary and phytosanitary measures and import licensing), and others for five years (the agreements on customs valuation, trade-related investment measures and trade-related aspects of intellectual property rights). Developing and transitional countries in accession negotiations have generally found their partners extremely reluctant to permit them to use these transitional provisions.

### *Goods commitments*

The differences between the tariff bindings of recently acceded members and the original members of the WTO are summarized in Table 4.2. Developing countries often complain that they are obliged to give up much of their "policy space" in the WTO, with their commitments leaving them with little room to innovate or adjust. The data on countries' accessions may support this contention with respect to tariffs: taken as a whole, the members that acceded between 1995 and 2012 were required to bind a larger share of their tariffs and were left with less "water" (i.e. freedom to adjust tariffs upward) than incumbent members. Alternatively, one could see this as a process by which the developed countries that generally have less water in their own tariff schedules<sup>10</sup> avail themselves of the opportunity to ensure that the disparity between bound and applied rates is lower for the new members than it is for the older ones.

The most striking statistic is that all acceding members have been required to bind all of their tariffs, as compared to the 26.0 per cent of tariff lines that the average original member has kept unbound. For some products, the acceding countries have agreed to ceiling bindings that are far above any applied tariffs that they might ordinarily impose but, in general, the differences between the bound and applied tariffs is much lower for the acceding countries than it is for the rest. There are 35.8 percentage points of water in the average tariff of the average original member, meaning that such a country could more than quadruple its average

**Table 4.2. Binding coverage and simple average of final bound rates and applied rates for WTO members**

	All products			Agricultural products			Non-agricultural products			
	Binding coverage	Bound (A)	Applied (B)	Water (A-B)	Bound (A)	Applied (B)	Water (A-B)	Bound (A)	Applied (B)	Water (A-B)
Original members (I)	74.0	45.5	9.7	35.8	65.2	15.8	49.4	33.7	8.7	25.0
Completed accessions (II)	100.0	13.6	7.5	6.1	19.5	12.6	6.9	12.7	6.7	6.0
Difference (I-II)	-26.0	31.9	2.2	29.7	45.7	3.2	42.5	21.0	2.0	19.0

Source: Calculated from data supplied by the WTO Accessions Division.

applied tariff of 9.7 per cent without running afoul of its commitments. The countries that acceded during the WTO period could also raise their applied tariffs with some impunity, but not by nearly as much. The tariffs that they currently apply are also, on average, two percentage points lower than those of the incumbent members.

### *GATS commitments*

The commitments that countries make under the General Agreement on Trade in Services (GATS) are not as easily interpreted as their commitments on tariffs because they involve a more complicated set of modes and limitations.<sup>11</sup> That said, the available data all point to the same pattern for services as we already saw for goods: the newcomers are obliged to make more comprehensive commitments in their accession negotiations than the incumbents required of one another in the Uruguay Round.

One way of making these comparisons is by counting the number of sectors in which members make commitments, as Grynberg et al. (2002) did. They compared the levels of GATS commitments made by original versus the first 16 acceding members, broken down by income level, and found that acceding economies made substantially more commitments than did the incumbents. When disaggregated at the three-digit Harmonized System level, the number of sectors in which low-income acceding economies made commitments (105) was 4.6 times larger than the number of sectors in which low-income, original WTO members made commitments (23). The disparity was not nearly as large in other income categories, however, with the number of commitments for original versus acceding members being 37 and 101, respectively, for middle-income economies (i.e. 2.7 times) and 79 and 110, respectively, for high-income economies (i.e. 1.4 times). Put another way, their data showed that acceding economies tended to make commitments on more than 100 sectors at the three-digit level, irrespective of their income level, whereas the original WTO members made smaller numbers of commitments that generally rose with their levels of income.

An alternative way to measure the differing commitments that members make is to examine the more sensitive sectors. Table 4.3 shows the percentages of the existing and acceding members that made commitments in each of 18 sensitive sectors. In every one of these sectors, the

**Table 4.3. GATS commitments of acceding and original WTO members in selected sectors**

	<b>Original members</b> (n = 127)	<b>Acceding members</b> (n = 25)
Rental/leasing services	37 (29.1)	21 (84.0)
Research and development services	35 (27.6)	19 (76.0)
Courier services	32 (25.2)	22 (88.0)
Sewage services	27 (21.3)	22 (88.0)
Refuse disposal services	27 (21.3)	21 (84.0)
Secondary education services	21 (16.5)	20 (80.0)
Higher education services	20 (15.7)	22 (88.0)
Rail transport services	20 (15.7)	15 (60.0)
Real estate services	20 (15.7)	9 (36.0)
Primary education services	19 (15.0)	16 (64.0)
Audiovisual services	18 (14.2)	12 (48.0)
News agency services	14 (11.1)	13 (52.0)
Libraries, archives, museums and other cultural services	13 (10.2)	10 (40.0)
Internal waterways transport	12 (9.4)	6 (24.0)
Social services	8 (6.3)	10 (40.0)
Pipeline transport services	5 (3.9)	10 (40.0)
Postal services	5 (3.9)	8 (32.0)
Space transport	2 (1.6)	2 (8.0)

Source: Tabulated from data on the WTO Services Database at <http://tsdb.wto.org/default.aspx>.

Notes: Numbers and percentages of members in each category making commitments in a given sector; listed in descending order of commitments made by original members. Acceding countries do not include the five members that completed their accessions in 2012 and for which full data are not yet available.

acceding countries are at least twice as likely as the existing to have made commitments, and in most sectors the disparity was at least three-to-one. A few sectors may suffice to illustrate this point. One of the widest disparities is in postal services, a sector that in many countries is reserved to the state and where only 3.9 per cent of the existing WTO members made commitments in the Uruguay Round. By contrast, nearly one third of the acceding members made commitments in this sector. A similar pattern may be seen in the related field of courier services. The disparities are also wide in education services. Only 15.0 per cent to 16.5 per cent of the existing members made commitments here, varying according to the level of education at issue, whereas 64.0 per cent to 88.0 per cent of the acceding countries did so.

### *Least-developed countries*

WTO rules draw a distinction between the broad group of developing countries and the subgroup of LDCs, with the 34 WTO members (as of 2013) that are defined to fall in the latter category being exempted from some requirements or otherwise treated differently. That distinction is not as sharp in the case of accessions, however, with the process having been at least as lengthy and demanding for several LDCs as it has been for the other developing and transitional economies that acceded from 1996 to 2012. The commitments made by LDCs have often been as substantive as those demanded of other acceding members.

This is partly the consequence of a difference in the approach taken to accessions by the two most influential members. As a general rule, the European Union is more willing than the United States to make fewer demands on the LDCs, both in accessions and in other aspects of trade policy. The difference might be partly attributable to the fact that most LDCs seeking to accede are former European colonies that gained their independence in the 1950s to the 1970s and hence have a special relationship with some EU member states. Of the 51 LDCs (all but 17 of which are WTO members), five are members of the Comunidade dos Países de Língua Portuguesa, 12 of them are in the British Commonwealth and 23 are in the Organisation internationale de la Francophonie.

The European Community proposed in 1999 that a “fast-track” procedure be established to facilitate the accession of LDCs.<sup>12</sup> This proposal suggested that the accessions of LDCs “could be expedited by agreeing with other WTO Working Party Members on a range of minimum criteria” and a “flexible, streamlined approach” that would “spee[d] up the process for them all without discrimination.” It contemplated LDC tariff binding “at a level something like 30% across the board” with “a limited number of higher tariffs on ‘exceptional’ products;” higher bindings on agricultural products, and no commitments on domestic support and export subsidies. It also called for services commitments in at least three services sectors, with the European Community “attach[ing] great importance to good commitments in Mode 3 (commercial presence), in particular on foreign capital participation and employment requirements and in Mode 4 (movement of personnel).” The proposal provided for the “automatic applicability of transition periods agreed in the Uruguay Round for LDCs towards full compliance with WTO Agreements.”

The proposal did not get far at that time due to opposition from the United States. The only area in which the US negotiators seemed prepared to “cut some slack” for the LDCs was in the number of working party meetings, which they believed could be limited to two or three.<sup>13</sup> They otherwise insisted that these countries be required to provide all of the same information that other applicants submit, and that LDCs be obliged to make commitments bringing their regimes into conformity with WTO rules. Even in some areas where the WTO agreements explicitly provide for special treatment, such as the transition period for intellectual property rights or the exemption from commitments on agricultural subsidies, the US negotiators would often request that LDCs undertake disciplines that go beyond the letter of the WTO agreements.

A WTO Work Programme for LDCs was launched following the Doha Ministerial Conference, leading to the adoption by the General Council of the Guidelines for the Accession of LDCs in December 2002. In the guidelines, members agreed that negotiations for the accession of LDCs should be facilitated and accelerated through simplified and streamlined procedures. The guidelines stipulated that members were to exercise restraint in seeking market access concessions from acceding LDCs, but also that the LDCs were to offer reasonable concessions commensurate with their individual development, financial and trade needs. The actual results did not suggest much favouritism to the three LDCs that fully completed their accession to the WTO by the end of 2012, nor to the three that had completed most of the process by that time. On average, the accessions of Cambodia (completed in 2004), Nepal (2004), Samoa (2012), Vanuatu (2012) and the Lao People’s Democratic Republic (2013) took just over 15 years to complete.<sup>14</sup>

At the 2011 Ministerial Conference, ministers tasked the Sub-Committee on LDCs to develop recommendations to bolster and make more specific the 2002 guidelines. The new guidelines, which were then adopted in July 2012, are generally aimed at limiting the commitments that LDCs are obliged to make, while also providing for transparency in the negotiations and the provision of technical assistance.<sup>15</sup> The most precise parts of the guidelines establish principles and benchmarks for LDCs' market access commitments on goods and services. For goods commitments, they state that "some flexibility should be provided" and negotiations "should ensure the appropriate balance between predictability of tariff concessions of acceding LDCs and their need to address specific constraints or difficulties as well as to pursue their legitimate development objectives," while also "recogniz[ing] that each accession is unique" and tariff concessions "could vary depending on [the LDCs'] individual/particular circumstances."

Acceding LDCs are still required to bind all of their agricultural tariff lines, but may do so at an overall average rate of 50 per cent. On non-agricultural tariff lines, they are generally to bind 95 per cent of their tariff lines at an overall average rate of 35 per cent; alternatively they may undertake comprehensive bindings and in exchange will be afforded proportionately higher overall average rates as well as transition periods of up to ten years for up to 10 per cent of their tariff lines. On services commitments, the guidelines recognize "the serious difficulty of acceding LDCs in undertaking commitments, in view of their special economic situation and their individual development, financial and trade needs," and provide for "flexibility for acceding LDCs for opening fewer sectors, liberalizing fewer types of transactions and progressively extending market access in line with their development situation." They are not expected to offer full national treatment, nor are they required to undertake commitments "on regulatory issues which may go beyond their institutional, regulatory, and administrative capacities." The guidelines provide more specifically for reasonable offers from LDCs that are "commensurate with their individual development, financial and trade needs" and assurance that the LDCs will "not be required to undertake commitments ... beyond those that have been committed by existing WTO LDC members, nor in sectors and sub-sectors that do not correspond to their individual development, financial and trade needs." The guidelines also include additional provisions with respect to special and differential treatment and transitional periods.

At the end of 2012, eight LDCs were still in the process of accession, accounting for almost one third of the total then pending.<sup>16</sup>

### *Oil-exporting countries*

One of the anomalies of the multilateral trading system is that, for several decades, it was largely disconnected from global energy trade. This is a very large exception, especially since the rapid rise in energy prices in the 1970s. The past practice in GATT was exemplified by an unwritten, unacknowledged, yet nonetheless real "gentlemen's agreement" that largely kept oil outside of the system.<sup>17</sup> Both energy-importing and energy-exporting countries employed trade restrictions in pursuit of their economic, diplomatic or security objectives, and neither

side opted to use GATT rules to challenge their trading partners' major measures. It would be wrong to say that the oil and gas sector had been fully "carved out" of the system, as the rules theoretically apply to trade in all types of goods between the members. There are, nevertheless, three reasons why the rules first established in GATT in 1947, and then subsequently developed over decades of negotiation and practice, had much less impact on trade in energy than on trade in other sectors.

The first reason why oil and gas trade was not fully covered in the GATT/WTO system was that the main exporters of these products remained on the outside. The only original GATT contracting parties that came to export large quantities of oil were Canada, Norway and the United Kingdom, and they did not hit their respective gushers until well into the GATT period. It was not until the 1980s that some of the major producers joined the body, with Mexico leading the way in 1986. Other oil-exporters that acceded or succeeded in this period were the Bolivarian Republic of Venezuela (1990), Angola (1994) and the United Arab Emirates (1994). Some of the smaller Arab oil exporters had earlier succeeded to GATT upon achieving their independence from European countries, as did several African countries, but few of them participated very actively in the system.

Table 4.4 shows how the share of global oil controlled by countries in the multilateral trading system has grown rapidly. At the start of the WTO period the major, net-exporting members of this organization accounted for about one third each of global reserves and production. By the time that all of the pending accessions are completed, the oil exporters in the WTO will control the vast majority of reserves and nearly three quarters of production. Almost all of the remaining reserves and production will be in WTO members that are net oil importers; examples of major consumers that provide some of their own needs include such influential members as Australia, Brazil, China, India and the United States.

A second reason for the earlier isolation of oil trade is the parallel regime for trade in this sector. The Organization of the Petroleum Exporting Countries (OPEC) is founded on an altogether different basis than the WTO insofar as it is focused on just one set of commodities, it represents only the producers, and its principal objective is not free trade for mutual benefit but restricted production and trade in the interests of the members of the cartel. It was not until there came to be a major overlap in OPEC and WTO membership that experts in this area even began to consider whether and how the differences might be bridged. No dispute settlement panel has ever ruled on the question of whether a country that is a member of both organizations can meet its OPEC obligations and still be in compliance with its WTO commitments. The answer may pivot on a distinction between export restrictions (which are legally problematic) versus the production restrictions through which OPEC actually operates (which would likely be easier to defend). As a practical matter, however, it is doubtful whether the OPEC members' practices could be successfully challenged in the WTO dispute settlement process. In the event that a formal complaint were made, and if a panel were to find (and the Appellate Body were to affirm) that OPEC restrictions violate WTO obligations, the easiest way for a country to reconcile the contradictions would be to stay in OPEC and withdraw from the WTO.

**Table 4.4. Proven oil reserves and production in selected net oil-exporting countries, 1995 and 2010**

	1995		2010	
	Reserves	Production	Reserves	Production
<b>In GATT as of 1980</b>	<b>14.3</b>	<b>20.1</b>	<b>13.3</b>	<b>15.5</b>
Kuwait, State of*	9.4	3.1	7.3	3.1
Nigeria*	2.0	2.9	2.7	2.9
Canada	1.0	3.5	2.3	4.1
Norway	1.0	4.3	0.5	2.6
Indonesia	0.5	2.3	0.3	1.2
United Kingdom	0.4	4.0	0.2	1.6
<b>Joined 1981-1994</b>	<b>18.9</b>	<b>13.9</b>	<b>28.5</b>	<b>14.3</b>
Venezuela, Bolivarian Republic of*	6.4	4.3	15.3	3.0
United Arab Emirates*	7.1	3.5	9.5	3.5
Qatar*	0.4	0.7	1.9	1.9
Angola*	0.3	0.9	1.0	2.3
Mexico	4.7	4.5	0.8	3.6
<b>Acceded to the WTO</b>	<b>31.0</b>	<b>23.5</b>	<b>25.6</b>	<b>26.6</b>
Saudi Arabia, Kingdom of*	25.4	13.4	19.1	12.2
Russian Federation**	5.2	9.2	5.6	12.5
Azerbaijan**	0.1	0.3	0.5	1.3
Ecuador*	0.3	0.6	0.4	0.6
<b>Acceding to the WTO</b>	<b>25.4</b>	<b>12.5</b>	<b>26.3</b>	<b>16.2</b>
Iran*	9.1	5.5	9.9	5.2
Iraq*	9.7	0.8	8.3	3.0
Libya*	2.9	2.1	3.4	2.0
Kazakhstan**	2.3	0.6	2.9	2.1
Algeria*	1.0	1.9	0.9	2.2

Source: Calculated from *BP Statistical Review of World Energy*, June 2011, available on-line at [www.bp.com/statisticalreview](http://www.bp.com/statisticalreview).

Notes: Percentages of world totals. Countries arranged in descending order of proven reserves in 2010; accession status as of the end of 2012. \*Member of the Organization of the Petroleum Exporting Countries. \*\*Data for proven reserves in the former Soviet republics are not available for 1995. Estimates here for Azerbaijan, Kazakhstan and the Russian Federation are based on 1998 data.

The third reason is that there are several aspects of GATT rules that provide exceptions to, or tend to make ambiguous, the applicability of WTO rules to trade in energy. The national security exception provided under GATT Article XXI is one such loophole. This article allows countries to take actions that would otherwise violate GATT that they consider to be in their essential security interests. On the exporters' side, the general exceptions of GATT Article XX may provide a legal means for oil exporters to impose restrictions on their production and exports of oil. There are many legal arguments that arise over the relationships between these two exceptions clauses of the GATT/WTO system, as well as the general prohibitions that are provided elsewhere in WTO law on cartels, export quotas and subsidies.

The accession of the Kingdom of Saudi Arabia offered an opportunity to address the export practices of OPEC members, but only on one limited aspect of these restrictions. At issue

here is dual pricing in the energy sector, a practice by which governments keep domestic prices for inputs such as oil and gas lower (or export prices higher) than would be the case if they had been determined by market forces. The European Union argued in the accession negotiations with the Kingdom of Saudi Arabia that dual-pricing practices are incompatible with WTO rules and constitute a hidden subsidy to downstream products. Under the WTO Agreement on Subsidies and Countervailing Measures, a subsidy exists when there is a financial contribution by a government or public body, or where there is any form of income or price support that confers a benefit. The Kingdom of Saudi Arabia made a commitment by which producers and distributors of natural gas liquids will “operate, within the relevant regulatory framework, on the basis of normal commercial considerations, based on the full recovery of costs and a reasonable profit.”<sup>18</sup> Moreover, these operators must “fully recover their production and investment costs ... and make a profit in the ordinary course of business.” This essentially means that they can sell gas at a lower cost to any purchaser that is located within the Kingdom of Saudi Arabia than they sell the same product for export, but that the domestic price cannot be so low as to make those sales unprofitable.

The same issue arose in the accession of the Russian Federation, with the European Union again being the principal *demandeur*, but once more the talks produced a limited result. Although the Europeans asked the Russian Federation to align domestic and export prices of natural gas, the terms of the accession agreement require only that producers and distributors of natural gas operate on the basis of normal commercial considerations based on recovery of costs and profit. The Russian Federation's authorities are expected to come into compliance with the commitment by raising prices for domestic industrial users, reaching the long-run marginal costs of Gazprom, but may nonetheless continue to regulate prices for gas supplied to households and other non-commercial users based on domestic social policy considerations.

Five major oil-exporting countries were still in the process of accession at the end of 2012. They collectively account for over one quarter of global oil reserves, although a smaller share of current oil production.

## Political issues in WTO accessions

WTO members generally try to isolate the low politics of trade from the high politics of diplomacy, war and peace, but accessions are one of the processes in which that separation can be difficult to maintain. Incumbent members have three options for addressing the political issues that they may have with an acceding country. The most severe of these is simply to block that accession, which is quite easily accomplished in a system in which decisions are made by consensus. Second, a country can invoke “non-application” upon the accession of another country with which it has difficult political relations. Third, an existing member can seek commitments from the acceding country on political issues. Several such issues have arisen in WTO accessions. Two are carry-overs from the GATT period: relations between the United States and current or former Communist countries that are subject to a special sanctions law, and the issues surrounding the Arab League's multi-tiered boycott of

Israel. Other cases have been unique to specific relations between pairs of members, including China–Chinese Taipei, Turkey–Armenia and Georgia–Russian Federation. In all of these cases, the political tensions between incumbent and acceding members (and in one case between two acceding members) complicated the process by which accessions were negotiated, and raised the prospect of accessions being blocked altogether.

### *Non-application and the US Jackson–Vanik law*

The most frequent source of political tensions in accessions is also the oldest. The GATT system and the Cold War were coeval developments, and have intersected in US policy from the beginning. The connections carried over even after the Cold War ended and the WTO replaced GATT, with several acceding countries being subject to a 1974 US statute that conditions most-favoured-nation (MFN) treatment for certain countries to their observance of human rights. In both the GATT and the WTO periods, this law was responsible for the great majority of cases in which a country invoked the non-application clause.

Formerly provided under GATT Article XXXV and now Article XIII of the Agreement Establishing the World Trade Organization (WTO Agreement), the non-application clause allows countries to stipulate that GATT or WTO treatment will not apply between any pair of them if either party invokes the clause upon the new country's accession. Article XIII of the WTO Agreement differs from its GATT predecessor in only one important respect. GATT Article XXXV had provided that a country could not invoke the non-application clause if it had engaged in tariff negotiations with an applicant country; this proviso was included in order to prevent countries from using the threat of invocation as a means of applying additional pressure on an applicant in the tariff negotiations. There is no such prohibition in Article XIII of the WTO Agreement. As a practical matter, the principal consequence of non-application is that countries invoking it may not take one another to dispute settlement in the WTO. The fact that countries invoking this clause are free to discriminate against one another does not mean that they always do so. In some cases, a country that invokes non-application not only extends MFN treatment under the terms of some other agreement or policy, but will actually provide preferential treatment under the Generalized System of Preferences.

The United States has historically invoked this provision more frequently than any other member, as this is one of several ways that Washington treated non-market economies (NMEs) differently during and after the Cold War. Of the seven GATT contracting parties that were NMEs for at least part of the period 1947 to 1994, the United States effectively denied full GATT treatment to five of them. It variously did so through GATT-authorized withdrawal of MFN treatment (Czechoslovakia in the 1950s), an embargo combined with the unilateral withdrawal of MFN treatment (Cuba in the 1960s), the invocation of GATT Article XXXV upon a country's accession to GATT (Hungary and Romania in the 1970s), or the imposition of a trade embargo combined with the invocation of GATT Article XXI (Nicaragua in the 1980s). The only exceptions to this rule were Poland and Yugoslavia, both of which were granted special treatment for political reasons, but even these countries have been subject to US trade sanctions during periods of

martial law (Poland in the 1980s) or civil war (Serbia, Montenegro and the Serbian-held territory of Bosnia and Herzegovina in the former Yugoslavia in the 1990s).

The United States continues to invoke the non-application clause more frequently than any other member in the WTO period, with its policy being determined by the status of an acceding country under a provision of US law that imposes conditions on the extension of MFN treatment<sup>19</sup> to certain countries. Congress enacted a law in 1951 that generally required the denial of MFN treatment to Communist countries, and the Jackson–Vanik provisions of the Trade Act of 1974 built upon this statute by providing a means by which MFN might be extended on a conditional basis. The law applies to all countries that were still denied MFN treatment at the time of enactment of that law (i.e. what was then the Soviet Union, China and most Communist countries other than Poland and Yugoslavia) and that have not subsequently been “graduated” from this law (i.e. removed from its coverage by an act of Congress). It provides for the extension of MFN treatment to these countries via bilateral agreements, but also conditions that treatment on a country’s freedom-of-emigration practices. That conditionality, which came in response to congressional outrage over the Soviet Union’s restrictions on the emigration of Jews, is in direct conflict with the core rule of the multilateral trading system. GATT Article I requires that WTO members extend universal and unconditional MFN treatment to all other WTO members. Ever since Communist countries began negotiating for accession to GATT in the 1960s, the United States has repaired to the non-application clause in order to reconcile the conflict between the Jackson–Vanik law and its predecessor statutes<sup>20</sup> and US obligations under GATT Article I.

Several countries that are or have been subject to Jackson–Vanik have acceded to the WTO, and in most cases the United States has followed one of two different patterns in dealing with them. The most common is for the US executive to invoke non-application upon a country’s accession and then ask Congress to enact a law graduating the country from Jackson–Vanik, thus allowing the subsequent disinvocation of the clause. That is what happened in the accessions of Armenia, Georgia, the Kyrgyz Republic, the Republic of Moldova, Mongolia and Viet Nam. The United States also invoked Article XIII of the WTO Agreement with respect to Tajikistan in 2012 in anticipation of that country’s accession in 2013. The interval between the invocation and disinvocation could be anywhere from two months (in the case of Viet Nam) to nearly 12 years (in the case of the Republic of Moldova), with the duration being determined by the speed with which the US Congress granted the administration’s request that the country be graduated. Two other countries present *sui generis* cases. The United States graduated the Ukraine from Jackson–Vanik prior to its accession and, in the case of Romania, it carried over the invocation from the GATT period before later withdrawing that invocation.

The accession of China set a second pattern that was also followed, with a few innovations, in the accession of the Russian Federation. In this approach, the United States will grant permanent and unconditional MFN treatment, known in US law as permanent normal trade relations (PNTR), simultaneously with the country’s accession to the WTO. That is done through the enactment of a law that also sets special terms for the relationship between the United States and the acceding country, albeit in ways that do not violate the letter of GATT

Article I. In the case of China, Congress enacted a law in the final stages of the accession negotiations that gave the president the authority to grant PNTR to China while also reflecting in US law the special terms of China's accession (e.g. a selective safeguard) and providing for close and regular reviews of the US economic and security relationship with China. The Clinton administration had to invest a great deal of political capital in order to secure enactment of that bill in 2000, as MFN treatment for China had been a high-profile issue ever since the Tiananmen protests in 1989. The Jackson–Vanik law allows for congressional consideration of a president's decision to continue MFN treatment with a country that fell under the terms of the law, and for over a decade the annual debate over that decision had become a ritual in the domestic politics of US foreign policy. Extending PNTR to China meant bringing that process to an end.

In the case of the Russian Federation, the Obama administration would have preferred that Congress enact a “clean” bill allowing the president to grant PNTR simultaneously upon that country's accession, but it encountered opposition from members of Congress who were concerned over human rights in the Russian Federation. Legislators insisted upon replicating the pattern set in China's accession, enacting a law that replaced the Russian Federation's status under the Jackson–Vanik law with a new set of measures addressing specific economic and political concerns with the country in question. Congress attached to the PNTR bill a law that provides for financial sanctions and the denial of visas to Russian officials who are found to be responsible for extrajudicial killings, torture or other human rights violations committed against individuals seeking to promote human rights or to expose illegal activity. The law also includes reporting and other provisions that are comparable to those in the law enacted for the accession of China. This law did lead to the extension of PNTR to the Russian Federation, but only after considerable tensions between Washington and Moscow, and not until three months after the Russian Federation had completed its accession in August 2012. The case was also unique for the way in which non-application was invoked. In all other cases only one party invoked the clause, sometimes the acceding country but more often one of the existing members. In this case, both the Russian Federation and the United States invoked the clause with respect to one another when the terms of the Russian Federation's accession were concluded in 2011, and then mutually disinvoked non-application upon the extension of PNTR.

While the United States continues to be the principal user of the non-application clause it is not alone either in invoking this clause or in bringing political issues to the table in accession negotiations. Other cases in which countries threatened or invoked non-application, or even threatened to block accessions altogether, concerned the relations between China, Chinese Taipei and third countries; between Israel and members of the Arab League; between Turkey and Armenia; and between the Russian Federation and Georgia.

### *China and Chinese Taipei*

The accessions of China and Chinese Taipei were among the most economically consequential additions to the WTO membership, but were also the most politically complex. At issue here was not only the question of whether non-application might be invoked by

incumbent members but also the potential blocking of accession by either China or Chinese Taipei if one got in before the other.<sup>21</sup> As in the case of the US law and policy discussed above, these events demonstrate another way in which the Cold War and GATT came into the world together, but in which the political alignments carried on even after the Cold War ended and the WTO replaced GATT.

China was among the original contracting parties to GATT. The entry of this agreement into force coincided with the final stages of the Chinese Revolution, however, and the deposed Kuomintang government declared China's withdrawal from GATT after it took refuge on the island of Taiwan. There then followed decades in which the governments in Beijing and Taipei were both estranged from the multilateral trading system even while they remained active in different sets of global political institutions. Their struggle for recognition focused on the United Nations long before they turned to GATT and the WTO. Chairman Mao Zedong had supported creation of the United Nations in 1945 and, after the revolution succeeded, Foreign Minister Zhou Enlai sought to take China's seat in the United Nations. Cold War politics intervened, however, and Beijing would not achieve this end until 1971. For a quarter of a century, it was the Republic of China that was represented both in the General Assembly and on one of the five permanent seats in the Security Council.<sup>22</sup>

The political climate for Chinese Taipei's return to GATT would have been most accommodating during the time that its economic interest in doing so was lowest. By the time that Chinese Taipei adopted a more GATT-friendly trade and development strategy, the political barriers had grown high. The island based its economic strategy on import-substitution industrialization from the 1950s to the 1970s. Starting first with apparel and light manufactures, then turning to heavy industries such as petrochemicals and steel, this policy might have been undercut if Chinese Taipei were to make tariff commitments and adhere to GATT disciplines. The island underwent important political and economic changes in the 1980s that encouraged it to reconsider its GATT status, but by this time it had become more diplomatically isolated. The turning point came upon approval of UN Resolution 2758 in 1971, by which the People's Republic of China (PRC) replaced the Republic of China in the United Nations. That event also meant the end of Chinese Taipei's observer status in GATT, which it had held since 1965, and accelerated the process by which other countries transferred diplomatic recognition from Chinese Taipei to Beijing. In 1970, there were 66 countries that recognized the Republic of China, compared with just 47 that recognized the PRC; by 1975 only 27 countries recognized Chinese Taipei versus 106 for Beijing (Cho, 2002: 120).

The PRC also pursued economic policies in the 1950s to the 1970s that discouraged entry to GATT, but in its case both the economic and the political changes in later decades militated in favour of accession. Emerging from the Cultural Revolution in the 1970s, China pursued political and economic reforms that transformed it into one of the world's largest trading powers. China formally requested on 10 July 1986 that its status as a GATT contracting party be resumed. Resumption would have avoided any negotiations over the terms of accession, so the existing members insisted instead that China had to go through the full accession procedure. That formally began in 1987 and carried over into the WTO, with the Working Party on China's Status

as a Contracting Party meeting an unusually frequent 20 times. The terms by which China joined the WTO differed both in degree and in type from those reached with typical acceding countries. These included provisions for a selective safeguard and the continued treatment of China as a non-market economy for purposes of anti-dumping laws; the first of these measures was to be eliminated within 12 years of accession, and the other within 15 years. The working party issued its report on 1 October 2001 (the 52<sup>nd</sup> anniversary of the Chinese Revolution).

Chinese Taipei had made its own request to accede to GATT in 1990, but it took two years to work out tricky legal and political issues that were not made any easier by the concurrent negotiations with the PRC. Director-General Arthur Dunkel did not dare to proceed with the application until an informal understanding was reached both with the contracting parties and China, and the process was further complicated by the fact that neither the European Community nor the United States wanted China to accede ahead of Chinese Taipei. EC Ambassador Paul Tran (see Biographical Appendix, p. 595) broke the deadlock on this issue in 1992, in consultation with US Ambassador Rufus Yerxa and others. He proposed a deal by which the accessions would be essentially simultaneous but minutely sequential: China would come in just ahead of Chinese Taipei, and the questions of sovereignty and statehood would be sidestepped by having the latter accede not as an independent country but (as contemplated by GATT Article XXXIII) as a separate customs territory possessing full autonomy in the conduct of its external commercial relations. The terms by which these two accessions would be conducted – commonly called the Understanding – took the form of a statement read out by the chairman of the GATT Council of Members on 29 September 1992, providing for continued work by the already established working party on China's accession, the establishment of a new working party on Chinese Taipei's accession, and the principle by which "the Council should examine the report on the Working Party on China and adopt the Protocol for the PRC's accession before examining the report and adopting the Protocol for Chinese Taipei, while noting that the working party reports should be examined independently."<sup>23</sup> It would still take another nine years, and the transition from GATT to the WTO, before this was finally accomplished with the accession of China in December 2001 and the accession of Chinese Taipei the next month. The negotiations with Chinese Taipei had in fact advanced much faster than those with China, and the deal had to be put on hold until the conclusion of the talks with China. In the end, the two accessions were handled by the General Council on the same day, with China coming on the agenda just before Chinese Taipei and thus ensuring that neither one could block the other's accession.

There was also the very delicate matter of how the government in Chinese Taipei would be referred to in the WTO. While that government called itself the Republic of China, in the UN system it was known after 1971 as Taiwan, Province of China. Each of these designations would be unacceptable to one of the prospective members. Cho (2002) credited the International Olympic Committee (IOC) with providing the formula by which the issue of names and symbols could be finessed and both applicants could accede to international organizations. The PRC had withdrawn from Olympic competition in 1958, objecting to the IOC's "two-China" policy, and from then through the 1970s Chinese Taipei was the sole representative of China in Olympic competition. It was only the impending Moscow Olympics



China becomes the 143<sup>rd</sup> member of the WTO at the Fourth WTO Ministerial Conference, in Doha, in November 2001.

At the Eighth WTO Ministerial Conference in December 2011, ministers adopt the terms of accession for the Russian Federation (*right*) and Samoa (*below*).





The WTO Public Forum, the WTO's largest annual outreach event, focuses on the theme "Is Multilateralism in Crisis?" in September 2012.



Arancha González, WTO *chef de cabinet*, moderating a session at the 2012 WTO Public Forum.



The First Global Review of Aid for Trade at the WTO in November 2007: *left to right* IDB President Luis Alberto Moreno, UPU Director Edouard Dayan, IMF Managing Director Dominique Strauss-Kahn, ADB Managing Director General Rajat Nag, ITC Executive Director Patricia Francis, UNECA Executive Secretary Abdoulie Janneh, WTO Director-General Pascal Lamy, OECD Secretary-General José Ángel Gurría, WTO Deputy Director-General Valentine Sendanyoye Rugwabiza, UNDP Administrator Kemal Derviş, World Bank President Robert Zoellick, ILO Director-General Juan Somavia and AfDB President Donald Kaberuka.



Director-General Pascal Lamy and UN Secretary-General Ban Ki-moon at the Second Global Review of Aid for Trade in Geneva, in July 2009.



Members of the Appellate Body (with staff of the Appellate Body Secretariat) in March 2000: Julio Lacarte Muró (*fifth from left*), Florentino Feliciano (*sixth from left*), Said El-Naggar (*front centre*), James Bacchus (*sixth from right*), Claus-Dieter Ehlermann (*fifth from right*), Mitsuo Matsushita (*third from right*), Christopher Beeby (*far right*). Debra Steger, Director of the Appellate Body Secretariat, is front centre.



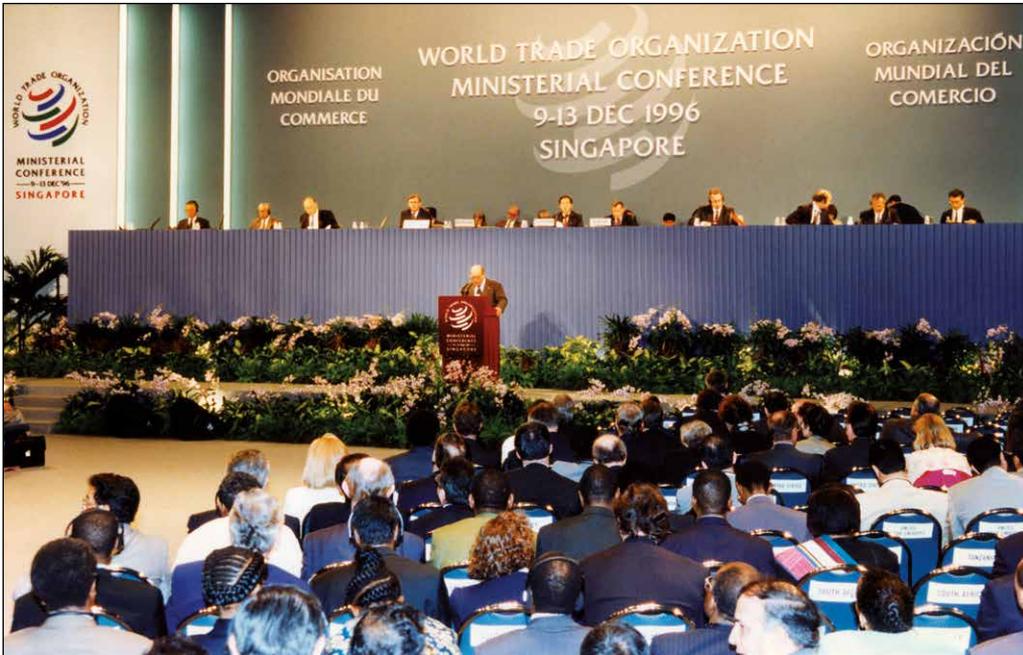
Appellate Body hearing in October 2002.



A dispute panel hearing is opened to the public for the first time through a video link on 12 September 2005.



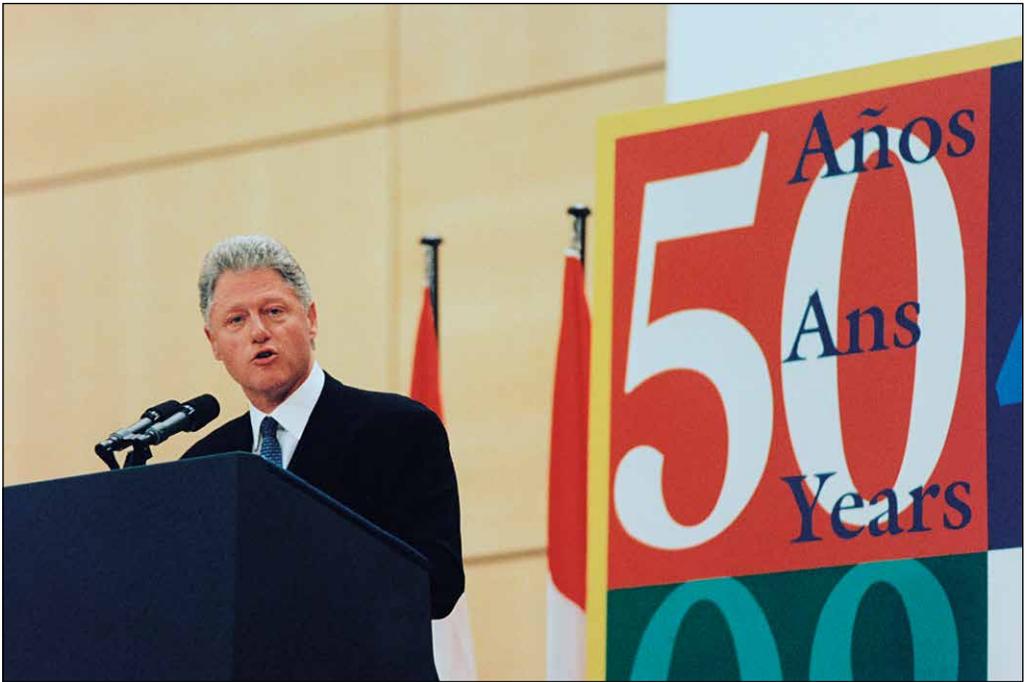
The European Union and 10 Latin American countries sign an agreement settling the banana case in November 2012, one of the longest-running disputes in the history of the multilateral trading system.



The First WTO Ministerial Conference is held in Singapore, 9 to 13 December 1996.



The Second WTO Ministerial Conference and 50<sup>th</sup> Anniversary Commemoration of the multilateral trading system is held at the Palais des Nations in Geneva, 18 to 20 May 1998.



Above US President Bill Clinton speaking at the 50<sup>th</sup> Anniversary Commemoration on 19 May 1998, held in Geneva during the Second WTO Ministerial Conference (*below*).





Speakers at the Second WTO Ministerial Conference, in May 1998, include South African President Nelson Mandela (*above*) and Cuban President Fidel Castro Ruz (*right*).



UK Prime Minister Tony Blair and Brazilian President Fernando Henrique Cardoso at the 1998 WTO Ministerial Conference.

of 1980 that forced Beijing to reconsider its position. Following some diplomatic manoeuvres in 1978 and 1979, the IOC approved a resolution by which both the Chinese Olympic Committee and the Chinese Taipei Olympic Committee would be granted recognition, although the latter committee's "anthem, flag, and emblem would have to be changed and be subject to prior approval of the IOC Executive Board" (Cho, 2002: 153). With suitable adjustments, comparable arrangements followed in other international bodies – including the WTO. The 1992 Understanding provided that the formal title by which Chinese Taipei would accede is the *Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*. In common usage, however, the simpler designation of Chinese Taipei is much more frequently used.

That formula facilitated the completion of the two accessions, but did not put an end to the two new members' concerns over names and titles. That was evident in an episode that began when Swiss authorities recognized the diplomatic titles used by delegates from Chinese Taipei, including terms that, from the PRC perspective, are not acceptable (e.g. "ambassador"), as well as the title of "Permanent Mission" for the delegation itself. The PRC mission protested the inclusion of those titles in the telephone directory that the Secretariat had routinely issued for years, leading to at least a year in which this "blue book" could not be updated. The matter was resolved in June 2005 when a new blue book was issued in which the only delegates from Chinese Taipei to bear diplomatic titles were the permanent representative and his deputy; the others were identified only as "Mr", "Mrs", or "Miss". The new blue book did however retain the title of "Permanent Mission" rather than "Trade Office"; the PRC mission had wanted Chinese Taipei's delegation to be known by that latter designation. The mission of Chinese Taipei responded by sending replacement pages with the preferred wording of their personnel titles to other delegations, giving them the opportunity to insert these pages into their copies of the blue book. That was no longer an option when the hard-copy version of the directory was discontinued and replaced by an online version. Another accommodation that the Secretariat made was to adopt the practice of placing Chinese Taipei on any alphabetical list (including seating charts) not between China and Colombia, but instead between Switzerland and Tanzania.<sup>24</sup> In the WTO even the alphabet is susceptible to constructive ambiguity, as this is where either the word "Taipei" or "Taiwan" would fit.

These frictions notwithstanding, the WTO members had managed to juggle the joint accessions of these two members without dropping any balls. No incumbent or acceding members blocked either party, and there was only minimal use of the non-application clause. As discussed above, the United States avoided that step by graduating China from the Jackson–Vanik law and enacting a new law that reflected the terms negotiated in Geneva. And while nearly two-dozen WTO members recognized Taipei rather than Beijing at the time of their respective accessions, El Salvador was the only one among them to invoke non-application with respect to the PRC. No members invoked non-application with respect to Chinese Taipei.

### *Israel, the Arab League boycott and the United States*

Ever since Israel joined GATT in 1962 there have been issues surrounding its relations with the Arab countries in the system. While it is possible under WTO rules for a country to be a

member and still engage in the Arab League boycott of Israel, both Israel and the United States have sought to use these countries' accessions as a means of pressuring them into the normalization of relations with Israel, or at least to reduce the severity of their application of the boycott. The Arab League boycott predates the establishment of both GATT and the State of Israel. In 1945, the Arab League Council adopted a resolution recommending that all Arab states establish national boycott offices to block trade with Jewish-owned businesses in Palestine. The participating countries took steps to strengthen enforcement of the boycott in the years that followed, including its application to third-country firms. In 1954, the Arab League formally established both a secondary embargo (i.e. a ban on trade with third-country companies that have economic or political ties to Israel) and a tertiary embargo (i.e. a ban on trade with third-country companies that have ties to companies found to violate the secondary embargo).

For most of the GATT period there were only rare opportunities for any of the interested parties to deal with the boycott as a GATT issue. Very few of the Arab states sought accession to GATT, and the United States had not yet adopted a very aggressive policy on this matter. Egypt managed to accede in 1970 without any change in its boycott policy, but the country could not prevent discussion of the matter. In fact, issues related to the boycott took up over one third of the report of the working party on Egyptian accession.<sup>25</sup> Egypt invoked GATT Article XXXV with respect to Israel, but later disinvoked this action when these two neighbours reached a separate peace. This set a precedent for Morocco and Tunisia upon their own accessions.<sup>26</sup> Both of these countries later allowed their invocations of GATT Article XXXV to expire, opting not to invoke Article XIII of the WTO Agreement when the new regime entered into effect in 1995. Similarly, Jordan did not invoke Article XIII when it acceded to the WTO in 2000, five years after it terminated the boycott against Israel.

The transition period from GATT to the WTO coincided with the adoption of a more vigorous US policy to eradicate all aspects of the boycott. The US aims had previously been limited to eliminating the secondary and tertiary aspects, but policy now aimed to eliminate the primary embargo as well. The Clinton administration took a series of steps towards linking this objective to accession. The first public declaration of linkage between the boycott and accession came in March 1994, in a hearing of the Committee on Foreign Affairs in the House of Representatives. In response to a question from a committee member, US Trade Representative Mickey Kantor declared that "we have made it quite clear to various Arab Ambassadors from Arab nations that GATT accession will not be supported by the United States until the *secondary and tertiary* boycotts are ended" (emphasis added).<sup>27</sup> He also contradicted the views expressed by a former Office of the US Trade Representative (USTR) official who had characterized as "nonbinding" the various "sense of the Congress" resolutions that the legislature had passed with respect to the boycott. Mr Kantor said that such a characterization did not "reflect the policy not only of this administration but [of] this Trade Representative."<sup>28</sup>

The policy acquired a more formal and expansive character later that year, when Congress wrote it into the implementing legislation for the Uruguay Round agreements. Section 133 of the Uruguay Round Agreements Act states the "sense of the Congress" that the USTR

“should vigorously oppose the admission into the World Trade Organization of any country which, through its laws, regulations, official policies, or governmental practices, fosters, imposes, complies with, furthers, or supports” the Arab League boycott. The USTR interpreted this provision to be a legally binding mandate from Congress that requires the agency to oppose the accession of any country that participates in any aspect of the Arab League boycott. The new policy thus went beyond Mr Kantor’s earlier insistence that a country eliminate only the non-primary aspects of its boycott.

The Kingdom of Saudi Arabia is the only Arab League member to have completed its accession since the adoption of the US policy. It did not invoke non-application with respect to Israel, and it did abandon the non-primary aspects of the boycott as part of the Israeli–Palestinian peace process, but it is still formally listed by the US Department of the Treasury as participating in the boycott.<sup>29</sup> As of 2013, that list also included three countries that joined GATT or the WTO prior to the adoption of the stricter US policy (the State of Kuwait, Qatar and the United Arab Emirates) as well as five countries that were still in the process of accession (Iraq, the Lebanese Republic, Libya, the Syrian Arab Republic and Yemen). This issue can therefore be expected to arise in the future.

The Arab League boycott, as well as Middle East peace in general, was also at issue in the three instances during the WTO period in which an existing member acted to block the accessions of would-be members. The rule of consensus means that any one incumbent member can prevent even the formation of a working party on another country’s accession. This is a step that the United States took in the GATT period with respect to Bulgaria and the Soviet Union, and has also done for three Middle Eastern countries in the WTO period. In each case, however, that objection was eventually lifted and a working party on accession was formed. Iran had first applied to become a WTO member in July 1996, for example, but the working party on its accession was not established until May 2005. The interval for Libya was from December 2001 to July 2004, and for the Syrian Arab Republic it lasted from October 2001 to May 2010.

The controversy over the Arab League’s boycott on Israel also carries over into the group’s efforts to secure observer status in the WTO, and the dispute over that matter has also affected the extension of observer status to other groups; see Chapter 5 on both points.

### ***Turkey–Armenia and Georgia–Russian Federation***

Two other *sui generis* cases of political issues in accessions merit attention. Both of them involve neighbouring states of the former Soviet Union, but in each case transcend the seemingly transitory issues of the Cold War. The tensions between the countries date back not just to the world before the WTO or even GATT, but to what it was before the League of Nations.

One is the special case of relations between Turkey and Armenia. Those relations have always been tense, with Armenia having been a part of the Ottoman Empire for centuries and the

events of 1915 to 1917 in Armenia being a matter of continuing political controversy. Turkey had been a contracting party to GATT since 1951, and when Armenia acceded to the WTO in 2003 (13 years after gaining its independence from the Soviet Union), Turkey invoked non-application. The invocation has not subsequently been withdrawn.

The other special case concerns Georgia and the Russian Federation. Georgia had been annexed by the Russian Empire in 1800 and also (after three years of independence) by the Soviet Union in 1921, then proclaimed its independence once again in 1991. In that process of gaining, losing and regaining its independence, the boundaries between Georgia and the Russian Federation remained subject to dispute. (Coincidentally, Georgia also has borders with Turkey and Armenia.) After it acceded to the WTO in 2000, Georgia was in a position to block the accession of the Russian Federation. The temptation to do so grew all the greater after the two countries fought a five-day war in 2008 over South Ossetia and Abkhazia. Citing disputes over customs checkpoints in these two areas, Georgia threatened in the 2011 endgame of the Russian accession negotiations to withhold its approval. The situation was eventually defused when Switzerland, both as mediator in the dispute and as host country to the WTO, agreed to act as a neutral third party to facilitate the operation of an agreement that Georgia and the Russian Federation reached in November 2011. This agreement brokered by former Swiss President Micheline Calmy-Rey establishes a mechanism of customs administration and monitoring of all trade in goods that enters or exits specific pre-defined trade corridors, and consists of an electronic data exchange system and an international monitoring system. As a result of this agreement, Georgia neither blocked the Russian Federation's accession nor invoked non-application.

## Endnotes

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- 1 See Kent (2007: Chapter 3).
- 2 The number and composition of the original set of contracting parties is complicated by the special case of Chile. This was intended to be among the original 23 contracting parties but failed to complete its domestic approval procedures within the allotted time, and hence did not become a contracting party until early 1949. Chile may thus be considered either the last of the original contracting parties (as is done for purposes of the count in this paragraph) or the first country to accede to GATT.
- 3 Note that the Republic of Korea is a special but not unique case, being one of five countries that declare developing-country status in the WTO and yet are also members of the OECD. The others are Chile, Israel, Mexico and Turkey.
- 4 The experience of countries under GATT Article XXVI:5(c) varied considerably. The Gambia succeeded to GATT just four days after achieving independence in 1965, while Lesotho allowed more than 11 years to pass between the acquisition of *de facto* GATT status and its succession to GATT. See *De Facto Status and Succession: Article XXVI.5(c): Note by the Secretariat*, GATT document MTN.GNG/NG7/W/40, 22 January 1988.
- 5 For the working party reports, see the accessions database at [www.acdb.wto.org](http://www.acdb.wto.org).
- 6 See *Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the World Trade Organization*, WTO document WT/ACC/SAU/61, 1 November 2005.
- 7 See *Technical Note on the Accession Process*, WTO document WT/ACC/7/Rev.2, 1 November 2000, p. 6.
- 8 The significance of some other variables that Jones tested achieved the 1 per cent level in at least some of the formulae into which they were plugged, but were less significant in others. These included the level of the applicant country's average applied tariff (those with higher tariffs took longer) and the applicant's market share of imports in the "core" accession reviewing countries of Australia, the European Union, Japan, Switzerland and the United States (those countries with high shares in these markets took longer). Another variable that was significant at either the 5 per cent or 10 per cent confidence level concerned whether the application was originally made to GATT and carried over into the WTO period; all things equal, those applications that were made only after the WTO came into effect took 21-31 months less than those carrying over from the GATT period.
- 9 See the discussion in Chapter 5 on the relationship between the WTO and the United Nations.
- 10 See Chapter 9 for a complete discussion of bound rates, applied rates and water.
- 11 See Chapter 9 for guidance on how to read a GATS schedule.
- 12 See *Preparations for the 1999 Ministerial Conference: Accessions to the WTO – Communication from the European Communities*, WTO document WT/GC/W/153, 8 March 1999.
- 13 Author's interviews with US accession negotiators in 1999.
- 14 Cape Verde graduated out of the LDC classification in 2007 prior to becoming a WTO member in 2008.
- 15 For full text of the draft Decision on the Accession of Least Developed Countries, see *Recommendations by the Sub-Committee on LDCs to the General Council to Further Strengthen, Streamline and Operationalize the 2002 LDC Accession Guidelines*, WTO document WT/COMTD/LDC/21, 6 July 2012.

- 16 Afghanistan, Bhutan, Comoros, Equatorial Guinea, Ethiopia, the Republic of Liberia, Sao Tomé and Príncipe, and Sudan.
- 17 For a more detailed examination of the relationship between WTO law and oil trade, see UNCTAD (2000).
- 18 See *Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the World Trade Organization*, WTO document WT/ACC/SAU/61, 1 November 2005, pp. 13-14.
- 19 Note that by US law, all references to MFN treatment have, since 1998, been changed to "normal trade relations" (NTR). The difference is only rhetorical; NTR and MFN treatment are substantively identical. The reason for this change is that members of Congress tired of having to explain to constituents that extending MFN treatment to China did not mean that this country was receiving unusually favourable treatment. US law further distinguishes between the conditional form of NTR treatment that is extended by way of the bilateral agreements reached with countries that are subject to the Jackson–Vanik law and the unconditional, permanent NTR (PNTR) that is granted to countries that have been graduated by Congress from the Jackson–Vanik law.
- 20 The Jackson–Vanik law is the successor statute to earlier laws enacted in 1951 and 1962. Those previous laws did not provide specific conditions with respect to the freedom of emigration, but rather were aimed more generally at denying MFN treatment to Communist countries.
- 21 The analysis here stresses the foreign policy aspects of China's accession to the WTO. For a closer examination of the domestic Chinese politics of accession, see Pearson (2001), who stressed "elite preference" (i.e. the insertion of top Chinese leaders into the process at decisive junctures) as a central explanation for why and how China acceded. Similarly, Feng (2006: 6) characterized the accession as "a state-led, leadership-driven, top-down political process in which a determined political leadership partly bypassed and partly restructured a largely reluctant and resistant bureaucracy". See also Yong (2002: 26-29).
- 22 For a review of these events, see Kent (2007: 36-57).
- 23 See *Minutes of Meeting Held in the Centre William Rappard on 29 September-1 October 1992*, GATT document C/M/259, 27 October 1992, p. 4.
- 24 Following the accession of Tajikistan, the alphabetical placement of Chinese Taipei is between this member and Switzerland.
- 25 See *Report by the Working Paper on the Accession of the United Arab Republic*, GATT document L/3362, 25 February 1970, pp. 33-43.
- 26 Israel did not invoke Article XXXV with respect to any of these countries.
- 27 See United States Congress, House of Representatives, Committee on Foreign Affairs (1994: 37).
- 28 *Ibid.*, p. 48.
- 29 See Department of the Treasury (2012).

## Appendix 4.1. Accessions to the WTO, as of February 2013

**Table 4.1A. Completed accessions in chronological order**

	Application	Membership	2011 global shares of (in %)			
			Population	GDP	Exports	Imports
Ecuador	September 1992	January 1996	0.21	0.09	0.11	0.12
Bulgaria	September 1986	December 1996	0.11	0.08	0.16	0.16
Mongolia	July 1991	January 1997	0.04	0.01	0.02	0.04
Panama	August 1991	September 1997	0.05	0.04	0.11	0.12
Kyrgyz Rep.	February 1996	December 1998	0.08	0.01	0.02	0.02
Latvia	November 1993	February 1999	0.03	0.04	0.07	0.08
Estonia	March 1994	November 1999	0.02	0.03	0.10	0.10
Jordan	January 1994	April 2000	0.09	0.04	0.06	0.10
Georgia	July 1996	June 2000	0.06	0.02	0.02	0.04
Albania	November 1992	September 2000	0.05	0.02	0.02	0.03
Croatia	September 1993	November 2000	0.06	0.09	0.12	0.12
Oman	April 1996	November 2000	0.04	0.10	0.22	0.13
Lithuania	January 1994	May 2001	0.05	0.06	0.15	0.16
Moldova, Rep. of	November 1993	July 2001	0.05	0.01	0.01	0.03
China	July 1986	December 2001	19.27	10.46	9.40	8.76
Chinese Taipei	January 1992	January 2002	0.10	0.72	1.26	1.30
Armenia	November 1993	February 2003	0.04	0.01	0.01	0.02
FYR Macedonia	December 1994	April 2003	0.03	0.01	0.02	0.04
Nepal	May 1989	April 2004	0.44	0.03	0.01	0.03
Cambodia	December 1994	October 2004	0.21	0.02	0.03	0.04
Saudi Arabia, Kingdom of	June 1993	December 2005	0.40	0.82	1.69	0.91
Tonga	June 1995	July 2007	<0.01	<0.01	<0.01	<0.01
Viet Nam	January 1995	January 2007	1.26	0.18	0.48	0.50
Ukraine	November 1993	May 2008	0.66	0.24	0.40	0.45
Cape Verde	October 1999	July 2008	0.01	<0.01	<0.01	0.01
Montenegro	December 2004	April 2012	0.01	0.01	NA	NA
Samoa	April 1998	May 2012	<0.01	<0.01	<0.01	<0.01
Russian Federation	June 1993	August 2012	2.04	2.65	2.59	1.91
Vanuatu	July 1995	August 2012	<0.01	<0.01	<0.01	<0.01
Lao People's Dem. Rep.	July 1997	February 2013	0.09	0.01	0.01	0.01

Sources: Calculated from World Bank data at <http://data.worldbank.org/>, supplemented by data for Chinese Taipei at <http://eng.stat.gov.tw/>.

Notes: <0.01 = less than 0.005 per cent.

**Table 4.1B.** Pending accessions in chronological order

	Application	2011 global shares of (in %)			
		Population	GDP	Exports	Imports
Algeria	June 1987	0.52	0.27	0.34	0.26
Belarus	September 1993	0.14	0.08	0.21	0.22
Sudan	November 1994	0.49	0.09	0.06	<0.01
Uzbekistan	December 1994	0.42	0.06	NA	NA
Seychelles	May 1995	<0.01	<0.01	<0.01	0.01
Kazakhstan	January 1996	0.24	0.27	0.42	0.24
Iran	September 1996	1.07	0.57	NA	NA
Andorra	July 1997	<0.01	0.01	NA	NA
Azerbaijan	June 1997	0.13	0.09	0.17	0.07
Lebanese Republic	January 1999	0.06	0.06	0.12	0.15
Bosnia and Herzegovina	May 1999	0.05	0.03	0.03	0.05
Bhutan	September 1999	0.01	<0.01	NA	NA
Yemen	April 2000	0.36	0.05	0.04	0.05
Bahamas	May 2001	<0.01	0.01	0.02	0.02
Tajikistan	May 2001	0.10	0.01	0.01	0.02
Syrian Arab Republic	October 2001	0.30	0.09	0.10	0.11
Ethiopia	January 2003	1.22	0.04	0.03	0.05
Libya	June 2004	0.09	0.11	0.06	0.07
Iraq	September 2004	0.47	0.16	0.37	0.24
Afghanistan	November 2004	0.51	0.03	NA	NA
Serbia	December 2004	0.10	0.07	0.07	0.11
Sao Tomé and Príncipe	January 2005	<0.01	<0.01	<0.01	<0.01
Comoros	February 2007	0.01	<0.01	NA	NA
Equatorial Guinea	February 2007	0.01	0.03	NA	NA
Liberia, Republic of	June 2007	0.06	<0.01	0.01	0.02

Source: Calculated from World Bank data at <http://data.worldbank.org/>.

Notes: <0.01 = less than 0.005 per cent. GDP: data for Andorra are from 2008; data for Libya and the Syrian Arab Republic are from 2009; data for Iran are from 2010. Exports: data for Sudan and the Syrian Arab Republic are from 2010. Imports: data for the Syrian Arab Republic are from 2010.

# 5 Relations with other organizations and civil society

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My objective when I came here was to get the WTO on the front page of the *New York Times*, my hometown paper, and I succeeded. But I just didn't in my wildest dreams imagine that it would be with a photo of policemen firing tear gas at kids dressed as turtles and dolphins.

Keith Rockwell, Director, Information and External Relations Division, WTO  
Correspondence with the author on 11 February 2013

## Introduction

The front-page treatment of the Seattle Ministerial Conference in 1999 symbolized the profound changes that had taken place in the scope and politics of trade over the preceding half-century. At the founding of the GATT system trade policy was confined to tariffs and quotas, and this field was the province of a very small set of decision-makers and stakeholders. The one global institution that dealt with the topic was so obscure that it could not even be described as an international organization; there were only a handful of countries that made significant commitments in GATT; those commitments concerned only a few government ministries, especially finance and foreign affairs; and the only domestic interests that cared were firms and workers in the affected industries. By 1999, the subject matter of trade negotiations and disputes had encompassed a far wider and growing array of laws and policies; the work of the WTO impinged on that of several other international organizations and vice versa; nearly every country in the world was in or seeking to get in; the operations of almost all government ministries were concerned by WTO rules, with commitments affecting their revenues, regulations and procurement; and ministerials became magnets for reporters, labour leaders, religious activists, “black bloc” anarchists, children adorned with butterfly wings and policemen in riot gear. The tear gas and the media scums did not become permanent features of WTO meetings, but the larger point remains: the days when this community was isolated and low-profile have long since passed. Trade ministries and the WTO Secretariat have had to learn how to communicate with the many other policy-makers, stakeholders and opinion leaders whose interests are affected by what they do.

The changes and challenges come not just in the widening of the WTO but in the general proliferation of international organizations. This is a process that accelerated in the 1960s, which saw the transformation of the post-war Organisation for European Economic Cooperation (principally a Marshall Plan administrator) into the Organisation for Economic

Co-operation and Development (OECD) in 1961 and the first United Nations Conference on Trade and Development (UNCTAD I) in 1964. Other global institutions have become more involved in trade policy, partly in response to the expanding subject matter and partly as a post-Seattle realization that they needed to address the development dimension of trade. This multiplicity of bodies, coupled with the widening scope of trade policy, creates both problems and opportunities. Despite the fact that all of these organizations are beholden to their members, and the memberships of these organizations are nearly identical, each of them has its own character and is prone to approach similar topics in dissimilar ways. There is a potential for conflict between international organizations that have overlapping jurisdictions and that might encourage countries to adopt conflicting policies, a problem that is usually defined as “coherence”. To the extent that the WTO can draw upon the expertise that is housed in another body, however, the two organizations might be able to devise a working relationship that takes best advantage of their respective strengths and capabilities.

The problem often looms larger than the opportunity. At its worst, a lack of coherence could spawn an outright conflict of laws. The commitments that countries make in one international organization could directly contradict those that they make in another. The International Monetary Fund (IMF) might oppose tariff cuts that threaten to reduce government revenue and contribute to budget deficits, for example, just as the World Health Organization (WHO) might promote restrictions on trade in tobacco and the United Nations Educational, Scientific and Cultural Organization (UNESCO) may be friendlier to a “cultural exception” for trade in motion pictures. A less severe but ever-present danger is that the multiplicity of institutions, meetings and agreements will lead to uncertainty or confusion over the objectives that countries seek and the proper forum in which they will pursue them. When the WTO handles issues affecting such diverse topics as, for example, agriculture, health care and tourism, and there already exist other specialized organizations that do so as well, which institution should take the lead?

While the problem of coherence often manifests itself at the level of international organizations, much of it originates at the national level. The expanding scope of trade policy-making can upset the often delicate relationships between different stakeholder groups and government ministries. It was one thing when a country's trade negotiators were given the responsibility to negotiate reductions in tariffs on imports, a task that usually required close coordination with the finance ministry (of which they may have formed a part). It is something else altogether for that same ministry to seek the authority to make binding commitments on behalf of other ministries and independent regulatory bodies.<sup>1</sup> If not managed properly, this may provoke “turf battles” between government bodies that can delay or even block the conduct of negotiations. Avoiding incoherence in what countries do in the WTO versus the IMF, the WHO and UNESCO, for example, may require that their ministries of trade, finance, health and culture cooperate much more closely than they are accustomed to doing.

Despite these challenges, or perhaps because of them, the WTO operates more transparently than did GATT. It makes most of its documents available over the Internet, and has closer ties to non-governmental organizations (NGOs), parliamentarians and the press.

## How the WTO relates to other institutions

Coordination with other international organizations is a higher priority in the WTO than it was in the GATT period. The prospects for incoherence and outright conflict have risen with the strengthening of the dispute settlement rules. GATT already had more enforcement power than did other international organizations, and the WTO Dispute Settlement Understanding (DSU) is both stricter and more frequently used than its GATT predecessor. The scope of issues in the WTO system is much wider than had been the case under GATT, in part because the proponents of the new issues preferred to bring agreements within the jurisdiction of these dispute settlement rules. In some cases, that meant negotiating wholly new agreements dealing with subjects that are also treated in other organizations; in others, the Uruguay Round negotiators cross-referenced or even incorporated the standards and agreements of those institutions within the agreements that they drafted. The only international organizations that the original GATT mentioned were the IMF and the United Nations, whereas WTO agreements make reference to these two plus the Codex Alimentarius, the Food and Agriculture Organization of the United Nations (FAO), the International Labour Organization (ILO), the International Plant Protection Convention (IPPC), the International Telecommunication Union (ITU), the International Trade Centre (ITC), the OECD, UNCTAD, the United Nations Environment Programme (UNEP), the World Bank, the World Customs Organization (WCO), the WHO, the World Organization for Animal Health (OIE) and the World Intellectual Property Organization (WIPO).

### *The problem of coherence*

The range of issues that are now dealt with in the WTO includes many that were either left out of GATT altogether or were handled less comprehensively under that regime. Table 5.1 illustrates the topics in WTO law that might lead to conflict with other institutions. This sampling of a dozen agreements from the Uruguay Round shows that there are at least two dozen other international organizations dealing with the same subject matter.

The negotiators in the Uruguay Round were well aware of the problem of coherence, having made this one of the main issues in the talks on the functioning of the GATT system (Chapter 2), and they approved several provisions that are intended to address these concerns. One was the Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking, which was part of the Uruguay Round package. In it, ministers recognized that “difficulties the origins of which lie outside the trade field cannot be redressed through measures taken in the trade field alone,” and underlined “the importance of efforts to improve other elements of global economic policymaking to complement the effective implementation of the results achieved in the Uruguay Round.” They then declared that:

The interlinkages between the different aspects of economic policy require that the international institutions with responsibilities in each of these areas follow consistent and mutually supportive policies. The WTO should therefore pursue and develop cooperation with the international organizations responsible for monetary

and financial matters, while respecting the mandate, the confidentiality requirements and the necessary autonomy in decision-making procedures of each institution, and avoiding the imposition on governments of cross-conditionality or additional conditions.

In particular, the ministers invited the WTO director-general to review with his counterparts at the IMF and the World Bank “the implications of the WTO’s responsibilities for its cooperation with the Bretton Woods institutions, as well as the forms such cooperation might take, with a view to achieving greater coherence in global economic policymaking.” Article III:5 of the Agreement Establishing the World Trade Organization (WTO Agreement) complemented that declaration by providing that: “With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the IMF and with the International Bank for Reconstruction and Development [the World Bank] and its affiliated agencies.” Other provisions in the Uruguay Round agreements called for similar initiatives with additional institutions. Article V:1 provides that the General Council “shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO.” Similarly, GATS Article XXVI states that: “The General Council shall make appropriate arrangements for consultation and cooperation with the UN and its specialized agencies as well as with other intergovernmental organizations concerned with services.”

**Table 5.1. Illustrative list of WTO agreements that address issues dealt with in other international organizations**

<b>Agreement</b>	<b>Other organization(s)</b>
Agreement on Agriculture	Common Fund for Commodities, FAO, International Grains Council, International Coffee Organization (among many other commodity groups)
Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994	WCO
Agreement on Rules of Origin	WCO
Agreement on Sanitary and Phytosanitary Measures	Codex Alimentarius Commission, FAO, International Union for the Protection of New Varieties of Plants, Office international des épizooties
Agreement on Technical Barriers to Trade	International Electrotechnical Commission, International Organization for Standardization
Agreement on Textiles and Clothing	International Textiles and Clothing Bureau
Agreement on Trade-Related Intellectual Property Rights	International Union for the Protection of New Varieties of Plants, WHO, WIPO
Agreement on Trade-Related Investment Measures	IMF, International Centre for the Settlement of Investment Disputes, World Bank
Decision on Measures in Favour of Least-Developed Countries	UNCTAD, UN Development Programme (UNDP)
General Agreement on Trade in Services	ILO, ITU, UNESCO, WHO, World Tourism Organization (among others)
Understanding on Rules and Procedures Governing the Settlement of Disputes	International Court of Justice, International Centre for Settlement of Investment Disputes
Understanding on Balance-of-Payments Provisions of GATT 1994	IMF, World Bank

Sources: Compiled from WTO agreements and the websites of other international organizations.

One way that the WTO carries out this mandate is through the director-general's participation in the Chief Executives Board for Coordination (CEB), comprised of the leadership of 28 member organizations and chaired by the UN secretary-general. These include the heads of the UN specialized bodies (the ILO, WHO etc.) and the other Bretton Woods institutions (the IMF and the World Bank).<sup>2</sup> The CEB's origins date back to 1946, when it was known as the Administrative Committee on Coordination.<sup>3</sup> Its members now hold regular retreats, with gatherings in October or November hosted in New York and those in March or April held at the headquarters of one of the other institutions. These are informal and leaders-only meetings in which note-takers are not allowed. Each meeting will focus on a specific topic of current interest, with the heads of these organizations dealing horizontally with the issue at hand, but the larger aim is to promote coherence among the institutions by ensuring that their chiefs are in regular contact with one another.

The issues taken up in the CEB can sometimes lead to more permanent collaboration between the member institutions. One prominent example is the UN High Level Task Force on the Global Food Security Crisis that the CEB created in 2008 to address the problem of rising food prices. Chaired by the UN secretary-general, with the FAO director-general as its vice chair, this group is comprised of the heads or other representatives of 22 international organizations, including the WTO director-general.<sup>4</sup> Food security is one of many topics on which the perspectives and institutional cultures of different international organization can come into conflict, as demonstrated by the discussion below on the exchanges between the WTO and the UN Special Rapporteur on the Right to Food.

The High Level Task Force on the Global Food Security Crisis is an example of one way that the WTO works with other organizations on collaborative projects, creating permanent, inter-agency bodies to deal with matters of joint interest and expertise. These activities are especially prominent in the area of trade and development, with the longest-running example being the International Trade Centre (ITC). This joint project of the WTO (and GATT before it) and UNCTAD is located at a Geneva site that is roughly equidistant between its parent institutions, and provides training and other assistance to policy-makers and exporters in developing countries. It is a successor to the International Trade Information Centre that GATT created in 1964, and became a joint GATT–UNCTAD institution in 1967.<sup>5</sup>

One of Director-General Pascal Lamy's first steps in 2005 was to launch the Aid for Trade initiative. It aims to foster coherence in trade capacity-building through collaboration with such partners as the OECD, the IMF, the ITC, UNCTAD, UNDP, the World Bank and regional development banks. The WTO is the host institution for the executive Secretariat of the Enhanced Integrated Framework (EIF), a coordinating body for the Aid for Trade initiative. Dating back to the Integrated Framework approved in 1997, the EIF was expanded in 2006. Starting in 2009, the WTO has hosted biennial Global Aid for Trade Reviews, fostering coherence by bringing together donors, beneficiaries, the private sector and civil society.

The WTO is also the host institution for the Standards and Trade Development Facility. A joint project with the FAO, the OIE, the WHO and the World Bank, this is a global partnership that supports developing countries in building their capacity to implement international sanitary and phytosanitary standards, guidelines and recommendations in order to improve their human, animal and plant health status, and to promote their ability to gain or maintain access to markets.<sup>6</sup>

The WTO and its counterparts have other options for promoting coordination and avoiding clashes. One is to provide observer status, with each institution allowing the other to witness its deliberations and, in some cases, to have a voice in them. Organizations sometimes take the further step of negotiating a memorandum of understanding that lays out the terms by which they might cooperate in such areas as the sharing of documents and the provision of technical assistance to their members. Another approach is either to incorporate the other's laws within one's own, or even to negotiate joint agreements on topics of shared interest and expertise. There are several WTO agreements that take the first of these routes, but the only example of the second dates from the early GATT period.<sup>7</sup>

Another way organizations can work jointly is at the level of research and analysis, and the WTO Secretariat has issued several publications developed in collaboration with its counterparts on issues of mutual interest. The *WTO Agreements & Public Health* report, issued by the WTO with the WHO in 2002, was the first in a growing series of such studies. Collaboration is not always easy: the drafting of that WHO/WTO volume was contentious, with at least one WTO official expressing concerns in internal correspondence over the wisdom of issuing a joint report on this subject prior to the Doha Ministerial Conference discussions on trade-related aspects of intellectual property rights (TRIPS) and public health.<sup>8</sup> Despite that early hiccup, the two organizations continue to collaborate. In 2013, they joined with WIPO to issue a joint study entitled *Promoting Access to Medical Technologies and Innovation: Intersections between Public Health, Intellectual Property and Trade*. Collaborations have been especially frequent with the ILO. Joint studies include: *Trade and Employment: Challenges for Policy Research* (2007), *Globalization and Informal Jobs in Developing Countries* (2009) and *Making Globalization Socially Sustainable* (2011). The ILO and the WTO are also among the numerous international organizations that came together in the International Collaborative Initiative on Trade and Employment (ICITE), initiated by the OECD in 2010. The WTO and the OECD jointly produce a series entitled *Aid for Trade at a Glance*, issuing volumes in 2007, 2009 and 2011. These reports follow current developments in the Aid for Trade initiative, highlighting both the successes and the failures. And as discussed in Chapter 8, starting in 2009 the WTO has worked jointly with the OECD and UNCTAD in producing regular reports that monitor countries' actions to restrict trade or bail out troubled industries.

The *Manual on Statistics of International Trade in Services* is something of a hybrid between a joint publication and an agreement, insofar as it sets standards for compiling and reporting on statistics. It was developed and published jointly by the WTO, the European Commission, the IMF, the OECD, UNCTAD and the United Nations, and makes recommendations that the six

organizations will promote in order to enable countries to expand and structure information on trade in services in an internationally comparable way.<sup>9</sup>

### *The multilateral trading system and the United Nations*

The WTO is not part of the UN system, but matters were more complicated in the GATT period. The International Trade Organization (ITO) was intended to be a specialized agency of the United Nations, as was specified in Article 86 of the Havana Charter, and in the meantime the contracting parties to the “temporary” GATT asked in Article XXV:2 that the UN secretary-general formally convene their first meeting. GATT nevertheless could not be considered a UN agency for the simple reason that it never rose to the level of a formal international organization, instead being a contract to which a secretariat was attached.

The Interim Commission of the International Trade Organization (ICITO), which formed the legal basis for the existence of the GATT Secretariat, was a UN agency. It was created by a resolution adopted at the Havana Conference – more formally entitled the United Nations Conference on Trade and Employment – with the intent of providing the link between GATT and the ITO until the latter came into effect. Over time the sense of a formal tie between GATT and the UN system was attenuated, with Secretariat staff and contracting parties thinking of this as an institution quite apart from the United Nations. One important step came in 1951, when the contracting parties decided to finance the Secretariat with their own contributions rather than from funds provided by the United Nations. The link was not fully broken until the transition between GATT and the WTO, and even then came in stages.

There are several respects in which the WTO’s legal instruments reflect the new institution’s independence from the UN system. Under paragraph 5 of the GATT Protocol of Provisional Application, for example, a country that wished to withdraw from GATT had to lodge its written notice with the UN secretary-general. By contrast, WTO Article XV:1 specifies that it is the WTO director-general who would receive any written notice of a country’s intention to withdraw. The only mentions made of the United Nations in the WTO Agreement come in the Article VIII:4 declaration that WTO officials and the representatives of its members have privileges and immunities *similar to* those stipulated in the UN Convention on the Privileges and Immunities of the Specialized Agencies, and a provision in Article XVI.6 stating: “This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.” That does not indicate subordination to the United Nations, as Article 102 applies to “[e]very treaty and every international agreement entered into by any Member of the United Nations.”

The WTO cut its ties to the United Nations at birth. During the transition from GATT to the WTO, the ICITO Executive Committee met on 9 December 1994 to approve a Decision on Transitional Arrangements: Transfer Agreement between GATT 1947, ICITO and the WTO. This measure, which was also approved by the Preparatory Committee for the WTO and endorsed by the newly constituted WTO General Council the next month, incorporated the Agreement on the Transfer of Assets, Liabilities, Records, Staff and Functions from the

Interim Commission of the International Trade Organization and the GATT to the World Trade Organization.<sup>10</sup> The agreement gave the director-general the authority to “appoint the members of the staff of the Secretariat of the WTO on or before 30 June 1995.” The WTO staff therefore remained UN employees in those first six months. Although the agreement provided that the ICITO would be dissolved “as of the date on which the members of the Secretariat of the WTO are appointed”, this was not actually accomplished until the WTO General Council and the ICITO Executive Committee finally adopted a decision (WTO document WT/L/282) on 16 October 1998, by which the ICITO ceased to exist as of 31 December. By that time the only practical consequence of the decision was to sever the last connection between the pay and pension programmes of the WTO and the UN system. The WTO members created a new and separate WTO Pension Plan in 1999 after withdrawing the institution from the UN Joint Staff Pension Fund.

Perhaps the most important distinction is that UN agencies are founded upon a principle of inclusiveness in which virtually all countries are assumed to have by right a place at the table and can accede with relatively little difficulty. Membership in the WTO is instead a privilege rather than a right, and applicants must pay for that privilege by negotiating what are often extensive commitments with the existing membership. Being a sovereign state is neither a sufficient nor even a necessary condition for being a member, as WTO Article XII specifies that accession is open not just to states but to any “separate customs territory possessing full autonomy in the conduct of its external commercial relations.” Three of its members, each of which has a special relationship with China, are not recognized in the United Nations as independent states: Hong Kong, China; Macao, China; and Chinese Taipei.

### *Relations between the WTO, UNCTAD and other UN agencies*

The WTO can sometimes come into conflict with UN bodies that deal with issues related to trade. UNCTAD is the one UN agency with which the WTO has the closest working relationship, but also one that could pose the greatest threat of incoherence if that relationship were to deteriorate.

There has long been a sense among many developing countries that the UN system is friendlier to their interests than is the multilateral trading system. The Havana Charter of the UN-affiliated ITO did make a number of compromises to the demands of developing countries (a group that did not yet include the many countries that gained their independence in later decades), while the ostensibly “temporary” GATT made very few such concessions. Developing countries devoted considerable energy in the ensuing decades to correcting that oversight. One proposed solution was to bypass the GATT system altogether and to rely instead upon alternative negotiating forums such as the UN General Assembly and then UNCTAD. The potential for creating a strong rival to GATT seemed especially large when it was decided at UNCTAD I in 1964, over the objections of developed countries, to make UNCTAD a recurring conference (every four years) to which would be attached a permanent secretariat.

If its founders had their way, UNCTAD would be where the North and South negotiated the terms of a “new international economic order” (NIEO) in which global institutions would play at least as important a role as the market in setting prices, regulating trade and determining outcomes. Key elements of that proposed order included commodity agreements that guaranteed high prices for developing countries’ raw materials, import protection for these countries’ infant industries, and open access to the industrialized countries markets’ for their manufactured exports. Few of these proposals gained much traction, apart from the creation of the Generalized System of Preferences (GSP) in the early 1970s; that concession to developing country demands required modification of GATT rules. These demands came to a head in 1974 with the UN General Assembly’s adoption of the Declaration for the Establishment of a New International Economic Order, which called for a variety of reforms that relied as much on states as on the market for improving the economic condition of developing countries.<sup>11</sup> The Brandt Commission report of 1980 can be seen as a mid-point in the evolution of this debate, advocating as it did the merging of UNCTAD and GATT into a new international organization (Brandt, 1980: 184-185). Far from consolidating the institutions or producing an NIEO, the 1980s instead saw the movement of ever more developing countries towards accessions to and active participation in GATT. The last time that developing countries made any effort to bring the trading system within the orbit of the United Nations came in the endgame of the Uruguay Round, when Egypt, Pakistan and others urged that the proposed new institution that was then still called the Multilateral Trade Organization (see Chapter 2) be made a specialized UN agency. Their efforts were too little and too late, facing determined opposition from developed countries and Director-General Peter Sutherland. Since that time, there has been more emphasis placed on reforming the trading system from within than on devising alternatives to it.

Relations between the WTO and UNCTAD can be strained by the differences in their institutional cultures. There is an undeniable tension that separates the officials in these two agencies, and these divisions are based not just on turf battles between potentially competing institutions but on philosophical differences between individuals. Both organizations are devoted to trade and development, but in UNCTAD those priorities are in alphabetical order and in the WTO it is the reverse. Some UNCTAD officials reflect the higher degree of trade-scepticism that one finds in many developing countries, a point that was exemplified by an incident at the Cancún Ministerial Conference in 2003. When the suspension of those negotiations was announced, Director-General Supachai Panitchpakdi (see Biographical Appendix, p. 594) – who would become secretary-general of UNCTAD two years later – observed the jubilant reaction of UNCTAD officials. He saw them grouped together with representatives of NGOs, and heard them shout: “Great!” That infuriated Mr Supachai. “I thought UNCTAD should have supported what we did because we were doing things that would have helped the cause of the developing countries,” he later recalled.<sup>12</sup> His own move up the hill from the WTO to UNCTAD was one of several changes in personnel that would help to bridge part of the gap between the two institutions. Another was the appointment in 2011 of Guillermo Valles (see Biographical Appendix, p. 596), formerly the Uruguayan ambassador to the WTO, as director of UNCTAD’s International Trade in Goods and Services and Commodities Division.

The relationship between UNCTAD and the WTO is now much more complementary than it had been in past decades. That complementarity is partly the result of much closer composition in their memberships. Most developing countries were not in GATT in the 1960s and 1970, many of those that joined were non-resident, and the few that participate actively would generally confine their participation to demands for exemptions, special and differential treatment and less than full reciprocity. The agreements negotiated in the Kennedy and Tokyo rounds were not part of a single undertaking, and thus not binding on the countries that opted not to sign them. That made it easy to think of GATT as the place where industrialized countries negotiated among themselves but UNCTAD as the place where they negotiated with developing countries. The differences in membership narrowed in the ensuing decades, however, when numerous developing countries acceded to GATT and the WTO.

UNCTAD and the WTO cooperate in several ways. One is their aforementioned joint sponsorship of the ITC. Much of the technical assistance that UNCTAD provides on its own is complementary to WTO initiatives, such as aiding countries in their WTO accessions and in the negotiation and implementation of their commitments. Most of the diplomats who represent their countries in the WTO are also accredited to UNCTAD and other UN agencies in Geneva. The top officials of the two institutions also have a good working relationship. The memorandum of understanding that UNCTAD and the WTO reached in 2003 aims to deepen and give practical effect to the strategic partnership between the parties for the purpose of the implementation of the Doha Round, "cooperating to ensure that trade serves development goals, and for assisting the beneficial integration of the developing and least developed countries into the global economy and the multilateral trading system."<sup>13</sup> It provides for meetings between the heads of the two organizations every six months as well as cooperation in the fields of technical cooperation, capacity-building, training, and research and analysis.

Two other UN agencies have dealt directly with the interface between trade and development. The United Nations Development Programme (UNDP) collaborates with the WTO on joint projects such as the EIF and the Aid for Trade initiative, but sometimes tends to take a more cautious view of the relationship between trade and development. That was evident in the UNDP report *Making Global Trade Work for People* (2003), which noted several aspects of the WTO system that, in view of the authors, might place greater restrictions on the policy space of developing countries than is in their best interests.

Comparable issues arose in a conflict over agricultural trade or, as viewed from a different angle, the relationship between trade and the right to food. The exchanges between WTO officials and the UN Special Rapporteur on the Right to Food, Olivier De Schutter, illustrate philosophical divides that could also be manifested in actual conflicts of law. In 2009 Mr De Schutter issued a report to the UN Human Rights Council based on consultations with Director-General Pascal Lamy, Secretariat staff and WTO ambassadors. He directly challenged the approach taken to agricultural trade negotiations in the WTO, stating that agricultural products should not be treated the same as other commodities. WTO agreements should instead be founded upon the human right to adequate food, as provided

for by the Universal Declaration of Human Rights that the UN General Assembly adopted in 1948, and more explicitly by the International Covenant on Economic, Social and Cultural Rights, which it adopted in 1966. The latter treaty commits its parties to work toward the granting of economic, social, and cultural rights to individuals, including “the fundamental right of everyone to be free from hunger” and “an equitable distribution of world food supplies in relation to need” (Article 11). According to Mr De Schutter’s report (2009: 5), “[t]he realization of the right to adequate food should guide the efforts aimed at the establishment of the multilateral trading system,” which “should not only refrain from imposing obligations which directly infringe upon the right to food” but “should also ensure that all States have the policy space they require to take measures which contribute to the progressive realization of the right to food under their jurisdiction.”

Mr De Schutter followed up two years later with another report entitled *The World Trade Organization and the Post-Global Food Crisis Agenda: Putting Food Security First in the International Trade System* (2011). Mr Lamy responded to that latter report with formal comments and a detailed letter in which he stated his fundamental disagreement “with the assertion that countries need to limit reliance on international trade to achieve food security objectives.”<sup>14</sup> The exchange between Mr Lamy and Mr De Schutter continued well into 2012, with the director-general explaining the approach that WTO members take towards negotiating on agricultural trade issues and the rapporteur arguing that the WTO is defending an outdated version of food security.

### **Observer status**

Article V of the WTO Agreement directed the General Council to “make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO.” The council built upon that directive in the Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council that it adopted in 1996, which provide that the “purpose of observer status for international intergovernmental organizations ... in the WTO is to enable these organizations to follow discussions therein on matters of direct interest to them.”<sup>15</sup> The council took a fairly narrow approach to granting this status, which gives a partner organization access not to the WTO as a whole but to specific bodies within it. An organization that seeks observer status must make that request “in writing to the WTO body in which such status is sought, and shall indicate the nature of the work of the organization and the reasons for its interest in being accorded such status.” The rules by which these requests are considered are reproduced in Box 5.1.

The data in Table 5.2 show that the IMF and UNCTAD are the only international organizations that have observer status in both the General Council and in all of the other major WTO bodies that grant this status. (The Dispute Settlement Body does not grant observer status to any international organizations, although the agreement with the IMF does provide for the possibility of IMF participation in cases.) Only six other international organizations have observer status in the General Council, each of which also has observer status in at least one

other WTO body. Ten other international organizations have observer status in one or more of the other major WTO bodies, either on a permanent or an ad hoc basis, and another 51 organizations have this status in one or more of the other WTO bodies.

**Box 5.1. Observer status for international intergovernmental organizations in the WTO**

*Partial text taken from Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council, WTO document WT/L/161, 25 July 1996, Annex 3.*

Requests for observer status shall be considered on a case-by-case basis by each WTO body to which such a request is addressed, taking into account such factors as the nature of work of the organization concerned, the nature of its membership, the number of WTO Members in the organization, reciprocity with respect to access to proceedings, documents and other aspects of observership, and whether the organization has been associated in the past with the work of the CONTRACTING PARTIES to GATT 1947.

In addition to organizations that request, and are granted, observer status, other organizations may attend meetings of the Ministerial Conference, the General Council or subsidiary bodies on the specific invitation of the Ministerial Conference, the General Council or the subsidiary body concerned, as the case may be. Invitations may also be extended, as appropriate and on a case-by-case basis, to specific organizations to follow particular issues within a body in an observer capacity.

Organizations with which the WTO has entered into a formal arrangement for cooperation and consultation shall be accorded observer status in such bodies as may be determined by that arrangement.

Organizations accorded observer status in a particular WTO body shall not automatically be accorded such status in other WTO bodies.

Representatives of organizations accorded observer status may be invited to speak at meetings of the bodies to which they are observers normally after Members of that body have spoken. The right to speak does not include the right to circulate papers or to make proposals, unless an organization is specifically invited to do so, nor to participate in decision-making.

Observer organizations shall receive copies of the main WTO documents series and of other documents series relating to the work of the subsidiary bodies which they attend as observers. They may receive such additional documents as may be specified by the terms of any formal arrangements for cooperation between them and the WTO.

If for any one-year period after the date of the grant of observer status, there has been no attendance by the observer organization, such status shall cease. In the case of sessions of the Ministerial Conference, this period shall be two years.

**Table 5.2. Organizations with observer status in the WTO**

	General Council	TPRB	Goods Council	Services Council	TRIPS Council	Other bodies
<b>Organizations with observer status in the General Council</b>						
Food and Agriculture Organization of the United Nations	◆	◆	◆		◆	◆
International Monetary Fund	◆	◆	◆	◆	◆	◆
International Trade Centre	◆			◆		◆
Organisation for Economic Co-operation and Development	◆	◆	◆		◆	◆
United Nations	◆		◆	◆	◆	◆
United Nations Conference on Trade and Development	◆	◆	◆	◆	◆	◆
World Bank	◆	◆	◆		◆	◆
World Intellectual Property Organization	◆				◆	◆
<b>Organizations with observer status in other major WTO bodies</b>						
European Bank for Reconstruction and Development		◆				
European Free Trade Association		◆				
International Civil Aviation Organization				□		
International Tele-communication Union				◆		
International Textiles and Clothing Bureau			◆			
International Union for the Protection of New Varieties of Plants					◆	
Universal Postal Union				◆		
World Customs Organization			◆		◆	
World Health Organization				□	□	
World Tourism Organization				□		
<b>Organizations with observer status in other WTO bodies</b>						
African, Caribbean and Pacific Group of States						Latin American Association for Integration
African Union						Latin American Economic System
Andean Community						Montreal Protocol
Arab Maghreb Union						Office international des épizooties
Basel Convention						Organization of American States
Caribbean Community Secretariat						Organization of the Islamic Conference
Central African Economic and Monetary Community						Pacific Islands Forum
Common Fund for Commodities						Permanent Secretariat of the General Treaty on Central American Economic Integration
Commonwealth Secretariat						Regional International Organization for Plant Protection and Animal Health
Convention on Biological Diversity						Rotterdam Convention
Convention on International Trade in Endangered Species of Wild Fauna and Flora						South Centre
Convention on Biological Diversity						Southeast Asian Fisheries Development Center
Cooperation Council for the Arab of States of the Gulf						Southern African Development Community
Economic Community of West African States						Stockholm Convention
Economic Cooperation Organization						United Nations Commission for Sustainable Development
FAO International Plant Protection Convention						United Nations Development Programme
FAO/WHO Joint Codex Alimentarius Commission (Codex)						United Nations Economic Commission for Africa
Inter-American Development Bank						United Nations Economic Commission for Europe
Inter-American Institute for Agricultural Cooperation						United Nations Economic Commission for Latin America and the Caribbean
Inter-Arab Investment Guarantee Cooperation						United Nations Economic and Social Commission for Asia and the Pacific
International Commission for the Conservation of Atlantic Tunas						United Nations Environment Programme
International Electrotechnical Commission						United Nations Framework Convention on Climate Change
International Grains Council						United Nations Industrial Development Organization
International Organization for Standardization						West African Economic and Monetary Union
International Organization of Legal Metrology						
International Plant Genetic Resources Institute						
Islamic Development Bank						

◆ = Permanent. □ = Ad hoc. TPRB = Trade Policy Review Body.

Source: Adapted from data at [www.wto.org/english/thewto\\_e/igo\\_obs\\_e.htm](http://www.wto.org/english/thewto_e/igo_obs_e.htm).

Notes: "other bodies" means that the organization has observer status in at least one additional body of the WTO, but not in all of them. Note that no international organizations have observer status in the Dispute Settlement Body.

Observer status generally implies a fairly passive role, but international organizations could participate more actively in WTO dispute settlement. That has been more of a hypothetical than an actual practice to date. As the Sutherland Report (2004: 39) pointed out, “the dispute settlement system of the WTO, due to its special characteristics and being self-contained in its jurisdictional responsibilities, offers no legal space for cooperation with other international organizations except on a case-by-case basis derived from the right of panels to seek information.” That observation did not trouble this commission, which endorsed “the maintenance of this policy”. While organizations *per se* do not participate in disputes, the agreements that they administer may, as discussed below, be considered or even incorporated into WTO law.

The WTO also enjoys observer status in other organizations, but is not in a good position to exercise that privilege frequently with respect to those that are located outside of Europe in general or Geneva in particular. As can be seen from the data in Table 5.3, 13 of the organizations in which the WTO is an observer are indeed based in Geneva. These include some with which the WTO works on a fairly regular basis, such as the ILO, WIPO and UNCTAD, as well as others for which trade is a marginal issue. There are another 21 corresponding organizations that are located either elsewhere in Europe or on other continents, and in most of them the WTO will rarely exercise its rights as an observer in any more active way than through the receipt of documents.

The WTO is unusual, though not unique, in having only a headquarters and no satellite offices in any other cities. In this respect it bears a closer resemblance to some regional institutions than it does to other international economic organizations that have numerous offices to liaise with national governments and other international organizations. The OECD has four such centres globally, for example, just as the ILO has offices in 40 countries, the IMF has 81 resident representatives and four regional offices, and the WHO has 147 country offices and six regional offices.<sup>16</sup> It is rare even for the topic of WTO satellite offices to be broached, as it was for example in internal Canadian discussions over the proposal to establish a WTO.<sup>17</sup> The only ways in which the WTO typically interacts with member governments or other stakeholders outside of Geneva are in the conduct of trade policy reviews or in the travels of top officials to participate in conferences, deliver speeches, or otherwise represent the organization.

### ***Controversy over observer status for the Arab League***

While most requests for observer status are handled as technical matters, the same cannot be said for the controversy over the League of Arab States (commonly called the Arab League). At issue here is not simply the extension of that status to the organization in question but also the blockage of requests for observer status from other intergovernmental organizations. This has created difficulties for cooperative work between the WTO and some organizations with which observer status has not been granted, requiring ad hoc arrangements to work around the problem.

**Table 5.3. Organizations in which the WTO has observer status****Organizations based in Geneva**

Basel Convention
Convention on International Trade in Endangered Species of Wild Fauna and Flora
European Free Trade Association
International Organization for Standardization
International Trade Centre
International Union for the Protection of New Varieties of Plants
Office of the United Nations High Commissioner for Human Rights
Rotterdam Convention
Stockholm Convention
United Nations Conference on Trade and Development
United Nations Economic Commission for Europe
World Health Organization
World Intellectual Property Organization

**Organizations based elsewhere in Europe**

African, Caribbean and Pacific Group of States	Brussels
Food and Agriculture Organization of the United Nations	Rome
International Commission for the Conservation of Atlantic Tunas	Madrid
International Grains Council	London
International Plant Genetic Resources Institute	Rome
Organisation for Economic Co-operation and Development	Paris
United Nations Commission on International Trade Law	Vienna
United Nations Educational, Scientific and Cultural Organization	Paris
United Nations Framework Convention on Climate Change	Bonn
United Nations Industrial Development Organization	Vienna
World Customs Organization	Brussels

**Organizations based in North America**

Convention on Biological Diversity	Montreal
International Monetary Fund	Washington, DC
United Nations	New York
United Nations Commission for Sustainable Development	New York
United Nations Development Programme	New York
World Bank	Washington, DC

**Organizations based in other regions**

Latin American Economic System	Caracas
Montreal Protocol	Nairobi
Pacific Islands Forum	Suva
United Nations Environment Programme	Nairobi

Sources: List of organizations from [www.wto.org/english/thewto\\_e/coher\\_e/wto\\_observership\\_e.htm](http://www.wto.org/english/thewto_e/coher_e/wto_observership_e.htm); locations from the websites of the organizations.

The Arab League first requested observer status for the Seattle Ministerial Conference in 1999. That same year it wrote to the director-general requesting observer status in the General Council and several of its subsidiary bodies. In October 1999, the chairman of the General Council proposed that any organizations requesting observership by a certain deadline be granted that status unless a member were to object. Two members lodged objections with the Secretariat, and while they were not officially identified at that time it was an open secret that these two members were Israel and the United States. They did so in opposition to the Arab League's continued sponsorship of the boycott on Israel (see Chapter 4; see also Reich, 2005). Substantially the same thing happened in advance of the Doha Ministerial Conference in 2001, the Cancún Ministerial Conference in 2003, the Hong Kong Ministerial Conference in 2005, and the Geneva Ministerial Conference in 2011. Throughout this period the Egyptian mission spoke on behalf of the Arab Group in favour of the request, and argued not only that the request be granted but that also, if the request were blocked, that in the interest of transparency the members objecting to the request should be identified. Starting in 2003, the Israeli and US representatives each confirmed that they had raised objections.

The Arab Group members took a more assertive position on the matter in 2005, taking the position that it would withhold consensus on the extension of observer status to other intergovernmental organizations until the request of the Arab League was granted. On 28 October 2011 the Arab Group also submitted a proposal on "Improving the Guidelines for Granting Observer Status to Intergovernmental Organizations in the WTO" (WTO document WT/GC/W/643). It argued that requests for permanent observer status should be evaluated only on the basis of the technical merits of such requests and that there should be objective and technical criteria in place to ensure the proper application of the existing guidelines.

## Relationship between WTO law and other organizations' laws

Often the initial negotiation on a subject concerns not the substance of the agreements that countries aim to conclude but the decision on where those talks should be conducted in the first place. Countries that promote the negotiation of enforceable commitments in a given area will favour the WTO as a negotiating forum. Conversely, the countries that prefer to keep a freer hand for national policy-makers will either oppose negotiations altogether or seek to bring the matter to an alternative international institution where the authority to enforce the rules tends to be weaker. "Forum shopping" by both the *demandeurs* and their opponents was quite evident in the 1980s, for example, when industrialized and developing countries differed over whether intellectual property rights should be dealt with in GATT or in WIPO, and since the 1990s, when squabbles erupted over whether labour rights should be handled in the ILO or the WTO.

This point should not be over-emphasized, as analysts err when they describe the WTO as the *only* international institution with strong dispute settlement provisions. Three examples may be cited on this point. Starting at the top, the UN Security Council has extraordinarily strong enforcement powers, all the way up to the authorization of military force. While it is difficult to imagine a scenario in which those powers may be employed in a trade dispute *per se*, the economic sanctions that the Security Council is empowered to impose can certainly affect trade. The ILO exemplifies an international organization in which the members have, at least on paper, agreed to a level of enforcement authority that is comparable to that of the WTO. Article 33 of the ILO Constitution provides that in cases where a member fails to carry out recommendations to correct a breach of an ILO convention “the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith.” That rather vaguely worded authority to impose sanctions has been employed only once to date, with the Governing Body deciding after years of consideration to authorize sanctions on Myanmar in 2000.<sup>18</sup> The IMF prohibits its members from engaging in currency manipulation, with Article IV(iii) of the IMF Articles of Agreement requiring that members “avoid manipulating exchange rates or the international monetary system.” This obligation is further reinforced in Article VIII. Neither the rules nor the culture of the IMF, however, are as bilaterally litigious or institutionally confrontational as the dispute settlement rules of the WTO. While it is thus not entirely accurate to portray the enforcement powers of first GATT and now the WTO as unequaled, they can justifiably be deemed special. The WTO is unusual in the number of disputes that it routinely handles, the manner in which they are treated and the frequency with which enforcement measures are authorized.

### *The status of other organizations’ laws in the WTO*

Some WTO agreements provide means through which the standards reached in other bodies may be enforced or recognized. The most significant example concerns the WIPO and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), as the latter brings within its terms the disciplines of several WIPO-administered conventions. These include the Conventions of Paris (industrial property), Berne (literary and artistic works), Geneva (phonograms) and Rome (performers, producers of phonograms and broadcasting organizations). Members are free to determine the appropriate method of implementing the TRIPS Agreement within their own legal system, but they must give to the nationals of other members the national treatment required in these various conventions, subject to the national treatment exceptions contained in these same treaties.

Other organizations’ laws or rulings are given safe harbour in WTO law. One example is the International Plant Protection Convention (IPPC) of the FAO, which sets standards for the prevention of plant pests and diseases. The IPPC “has its own, non-binding dispute resolution mechanism,” as Princen (2006: 61) noted, “but this has not been used actively in practice.” A more effective means of enforcing IPPC standards is by way of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), which provides that domestic regulatory standards are presumed to conform to the agreement if they are based on the IPPC. That same principle applies to the standards of the Codex Alimentarius

Commission, a joint undertaking of the FAO and the WHO that develops global food-safety standards. Similarly, the Agreement on Technical Barriers to Trade explicitly adopts the definitions used by the International Organization for Standardization in its publication on *General Terms and Their Definitions Concerning Standardization and Related Activities*, and several articles in the agreement provide for the adoption of international standards by WTO members. Article 2.4, for example, provides that:

Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

One point of recurring legal debate concerns the use of treaty law developed in other organizations as a guide for WTO dispute settlement panels. “Unlike domestic legal systems,” as Pauwelyn (2003: 488) observed, “in international law hierarchy of norms is not determined by the particular source of the norms in question” because all such law “in one way or another, derives from the same source, that is, state consent.” He therefore advocated “an examination of WTO law in the wider context of other norms of international law,” such that –

WTO law is but a branch of public international law. Hence, WTO law must, first of all, be *interpreted* in a way that takes account of other norms of international law, as long as these other norms represent the ‘common intentions’ of all WTO members. The normal restrictions of treaty interpretation apply, although ‘evolutionary interpretation’ can be safely said to be the rule rather than the exception given the ‘continuing’ or ‘living’ nature of the WTO treaty. Apart from the process of treaty *interpretation*, other rules of international law must also *apply* to the WTO treaty unless that treaty has ‘contracted out’ of those rules. In addition, before a WTO panel the ‘applicable law’ must include all relevant norms of international law binding on the disputing parties, even if the jurisdiction of panels is limited to claims under WTO covered agreements only (*Ibid.*: 490).

Marceau (2002: 804-805) took up the same point, arguing that WTO law needs to be interpreted consistently with international law, and especially in the area of human rights law. In her view, human rights law can be respected if WTO panels interpret and apply WTO provisions properly. She has also argued that greater coherence in international law must ultimately be achieved through the negotiation of agreements, and cannot rely indefinitely on dispute-settlement procedures to resolve any conflicts of law. “There is an obligation to interpret WTO provisions by taking into account other relevant rules of international law, including relevant human rights law dealing with the same subject-matter.” If there were to be a conflict of law, however, “the WTO is a specific subsystem of international law in which non-WTO law (including human rights law) cannot find direct application.”

Petersmann (2005c: 361) opined that “it seems only a matter of time” before “WTO dispute settlement bodies will have to respond to legal claims or questions” arising over potential conflicts between WTO agreements and the products of other international bodies that speak to issues of human rights. Article 3:2 of the DSU requires that the interpretation of WTO rules take into account “any relevant rules of international law applicable in the relations between the parties.” How might commitments affecting pharmaceutical patent protection and trade in health services relate to the 1966 UN Covenant on Economic, Social and Cultural Human Rights, Article 15 of which guarantees “the right of everyone” both to “enjoy the benefits of scientific progress and its applications” and also to “benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”? The potential for such disputes was demonstrated from 2009 to 2012, when, as was discussed earlier, a controversy broke out over the relationship between agricultural trade liberalization and the right to food.

## The WTO's relationship with specific organizations

GATT and the WTO have had formal relationships with other international organizations from the start, but those ties have grown more knotty with the proliferation of institutions and the widening of the trading system's issue base. Some of the organizations with which the WTO must deal most closely are discussed below, listed in roughly chronological order according to when the institutions were established.

### *International Labour Organization*

The ILO is the oldest of the organizations with which the WTO deals, being the sole institutional survivor from the League of Nations. It also shares a unique legacy with the WTO. The Centre William Rappard was the ILO headquarters building from its inauguration in 1926 until 1975, with GATT taking up residence there in 1977. This explains the somewhat anomalous appearance of some rooms in the building, such as the lighting fixtures in the library that are adorned with representations of workmen in different trades. The WTO is also graced with numerous works of art extolling the virtues of labour, many of them reflecting the styles of political art that were so prevalent in the years preceding the Second World War.

Their common architectural heritage notwithstanding, these two institutions have very different structures, aims and political cultures. Whereas the WTO follows the pattern of nearly all other intergovernmental organizations of allowing direct representation only by states, the ILO is notable for its unique trilateral nature. Every mission is composed of delegates from the member state's government, from an employer's organization and from labour unions. And while the principal aim of the WTO is to reach negotiated agreements by which at least some aspects of state intervention in the economy are reduced, the ILO is among those international organizations that are devoted to promoting certain forms of government regulation of the economy.

Many of the legal instruments and declarations of the ILO address trade issues directly or indirectly. Several of the 189 ILO conventions negotiated from 1919 to 2011 deal with trade-related issues or occupations that are heavily involved in trade; these include five conventions affecting dockworkers and 39 affecting seafarers. The work of the ILO starts from the premise, as stated in 1944 in the Declaration Concerning the Aims and Purpose of the International Labour Organization (also known as the Declaration of Philadelphia),<sup>19</sup> that “labour is not a commodity.” While that same declaration went on to support “a high and steady volume of international trade,” ILO pronouncements on the subject of trade will often include qualifying language that highlights its emphasis on how trade and other economic activity affect the interests of workers. In the Global Jobs Pact that the ILO approved in June 2009, for example, members called for cooperation among international organizations in “promoting efficient and *well-regulated* trade and markets that benefit all and avoiding protectionism” (ILO, 2009: 9, emphasis added). The role of the ILO in the debate over globalization, according to its Declaration on Social Justice for a Fair Globalization, is to evaluate the employment effects of trade and financial market policy “to achieve its aim of placing employment at the heart of economic policies” (ILO, 2008: 15). In so doing it neither promotes nor condones protectionism, stressing in that same declaration “that the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage and that labour standards should not be used for protectionist trade purposes” (*ibid.*: 11).

One of the most divisive issues in the trading system throughout the WTO period has been the proposed linkage between the commitments that countries make in the ILO and the use of the WTO Dispute Settlement Understanding as a means of enforcing them. This is essentially what was done in the case of intellectual property rights, in which the agreements administered by WIPO are, by way of the TRIPS Agreement, made enforceable in the WTO. The conventions negotiated in the ILO are essentially pledges of good behaviour at home that are subject to review through a supervisory system of reports and experts, but while the ILO rules provide for sanctions in actual practice the institution almost never brings to bear anything more than peer pressure on countries that are found not to meet these obligations.

This is in sharp contrast to the WTO, where violations of the rules can lead to the threat or imposition of retaliatory measures. It is only a slight exaggeration to say that in the ILO there are labour standards without “teeth”, while the WTO has teeth but almost no standards related to labour. The one departure from that general rule is found in GATT Article XX(e), which provides (subject to the *chapeau* language of that article) an exception for measures that countries may impose “relating to the products of prison labour.” The controversies surrounding the proposed links between ILO standards and WTO enforcement were especially intense in the Singapore Ministerial Conference (see Chapter 11). The two secretariats have cooperated since 2005 in collaborative studies, as discussed above, the results of which have been presented jointly to their respective memberships.

### *International Monetary Fund and the World Bank*

One anomalous aspect of the relationship between the WTO, the IMF and the World Bank is that all three of these bodies are officially deemed to be “Bretton Woods institutions”. That is not an historically accurate title, as the IMF and the World Bank were the only institutions to emerge from the United Nations Monetary and Financial Conference that was held in Bretton Woods, New Hampshire during July 1944. The conferences that produced GATT and the failed charter of the ITO were held years later in London and Havana. The application of this title to the WTO is nevertheless a nod to the original concept of where the ITO was supposed to fit among the international economic organizations, forming the trade corner in that triangle, and also underlines the fact that none of these institutions are formally a part of the UN system. When the heads of these bodies meet with their UN counterparts they are thus listed together under that bucolic heading. In common parlance, however, when people refer to the Bretton Woods institutions they typically mean only the IMF and the World Bank.

The Havana Charter of the ITO referred in several points to the IMF, and this language was largely replicated in GATT 1947. GATT Article XV (exchange arrangements) provided for cooperation with the IMF and required that countries “consult fully” with it and to “accept all findings of statistical and other facts presented by the Fund relating to foreign exchange, monetary reserves and balances of payments.” With an eye on the discredited practices of the 1930s, the GATT negotiators also made sure in Article XV to enjoin countries from using exchange action to “frustrate the intent of the provisions of” GATT or “the intent of the provisions of the” IMF Articles of Agreement. These constructions appear to assume an identity in intent between the aims and actions of the two institutions. The IMF was also given a role in determining whether countries were within their rights when invoking GATT Articles XII (restrictions to safeguard the balance of payments) or XVIII (governmental assistance to economic development), and the IMF was further referenced in GATT Articles II:6(a) (schedules of concessions), VII:4(c) (customs valuation), and XIV (exceptions to the rule of non-discrimination). In brief, the drafters of GATT 1947 went to great lengths to ensure the coherence of countries’ trade and monetary policies as pursued through the one institution and the other agreement.

The only reference to the IMF in the WTO Agreement comes in Article III:5, which states: “With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the” IMF, the World Bank and World Bank-affiliated agencies. That agreement was nonetheless expanded upon somewhat by a 1996 cooperation agreement under which the IMF’s observer status in the WTO is more solid than that of other international organizations. The Agreement between the International Monetary Fund and the World Trade Organization provides channels of communication between the two bodies and accords observer status in other’s decision-making bodies.<sup>20</sup> Paragraph 6 provides that “[t]he WTO shall invite the Fund to send a member of its staff as an observer to meetings of the WTO Dispute Settlement Body where matters of jurisdictional relevance to the Fund are to be considered,” and further allows the WTO to invite the IMF to send a member of its staff to the Dispute Settlement Body when “such a presence would be of particular common interest to both organizations.”

The IMF could have a greater role in support of trade liberalization if the Doha Round were to be completed. In 2004, it established the Trade Integration Mechanism (TIM) to support progress in the Doha Round. The TIM is available to all IMF member countries whose balance of payments positions might suffer as a result of multilateral trade liberalization. It aims to make resources under existing IMF facilities more predictably available to countries facing trade-induced adjustment problems.

The World Bank also supports trade liberalization in developing countries. It reached an agreement with the WTO in 1997 that likewise calls for improved communication between the two institutions through the exchange and sharing of information; access to their respective databases, and joint research and technical cooperation activities; the exchange of reports and other documents; as well as observer status for one another. The bank also adopted a ten-year trade strategy in 2011 that seeks to respond more effectively to increased demand by its clients for analysis, project identification and delivery in this field. The strategy is focused on four pillars, including trade competitiveness and diversification to support countries in developing policy environments conducive to nurturing private-sector development, job creation and sustainable poverty reduction; trade facilitation, transport logistics and trade finance to reduce the costs of moving goods internationally in terms of time, money and reliability; support for market access and international trade cooperation to create larger integrated markets for goods and services; and managing external shocks and promoting greater inclusion to make globalization more beneficial to poor households and lagging regions.<sup>21</sup>

In addition to working with these global financial institutions, the WTO also has ties to their regional counterparts. These are especially important in Aid for Trade, trade finance and capacity-building activities, with the WTO collaborating with them in devising and delivering training and other forms of assistance. Regional banks can also be partners in trade policy reviews. The Inter-American Development Bank and the Islamic Development Bank are among the institutions that have observer status in the WTO; other regional banks with which it has cooperated include the African Development Bank and the Asian Development Bank.

### ***United Nations Educational, Scientific and Cultural Organization***

UNESCO is one of several specialized UN agencies that were created at about the same time as GATT. It has demonstrated different relationships to the trading system over time. While in the early GATT period (which might also be deemed the early UNESCO period) this organization appeared to treat trade as part of the solution, in the WTO period it appears to have seen trade as part of the problem. The Florence Agreement on the Importation of Educational, Scientific and Cultural Materials is a 1950s-era pact that is intended to dismantle customs barriers to cultural goods. This early example of a “zero-for-zero” sectoral agreement was a collaborative effort of UNESCO and GATT.<sup>22</sup> It covers, among other things, books, works of art, and audiovisual material of an educational, scientific and cultural nature, and also offers a unique example of inter-institutional collaboration on matters of cultural trade. The initial proposals for this agreement were developed by UNESCO, which formed the basis

for negotiations by a GATT working party. The text of the agreement was then communicated to UNESCO for sponsorship and administration, and entered into force in 1952.

That cooperative experience stands in contrast to the negotiations over the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.<sup>23</sup> Under development since 2001, members adopted a toned-down version of this convention in 2005. While it was still under debate there was some prospect that the instrument might establish principles that could lead to direct conflicts with the commitments of some WTO members. A draft text from July 2004 that served as the initial basis for discussion began from the premise that while the processes of globalization “afford unprecedented conditions for enhanced interaction between cultures” they “also constitute a threat to diversity and carry with them a risk of impoverishing cultural expressions” (Preamble). It provided a series of principles and steps to be taken in order to safeguard cultural diversity, including the adoption of “measures which in an appropriate manner reserve a certain space for domestic cultural goods and services among all those available within the national territory” (Article 6.2(a)). Article 19 of the draft provided for rules on the relationship between this agreement and other instruments of international law, setting out two alternatives. One option would simply state that “[n]othing in this Convention shall affect the rights and obligations of the States Parties under any other existing international instruments.” The other option would provide that:

1. Nothing in this Convention may be interpreted as affecting the rights and obligations of the States Parties under any existing international instrument relating to intellectual property rights to which they are parties.
2. The provisions of this Convention shall not affect the rights and obligations of any State Party deriving from any existing international instrument, except where the exercise of those rights and obligations would cause serious damage or threat to the diversity of cultural expressions.

The language suggested that the instrument would not derogate from the TRIPS Agreement, but that other WTO agreements – including commitments made on goods and services – could potentially be subject to modification or reinterpretation under some circumstances.<sup>24</sup> One could well imagine, for example, the hypothetical case of a WTO member modifying or withdrawing a GATS commitment on audiovisual services on the grounds that doing so would allow it to avoid a threat to the diversity of cultural expression.

The final version of this instrument that UNESCO adopted in 2005 avoided any conflict with WTO law. Article 20 provides that parties “shall perform in good faith their obligations under this Convention and all other treaties to which they are parties.” While they are to “take into account the relevant provisions of this Convention” when they interpret and apply other treaties to which they are parties or when entering into other international obligations, the convention specifies that “[n]othing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.” The episode nonetheless offered one of the clearer examples of how problems of coherence could potentially lead to outright conflicts of laws.

### *World Health Organization*

The relationship between the WTO and the WHO is especially complex, given the range of issues in which their jurisdictions overlap. These include trade in medical goods and services, as well as trade in goods that are deemed harmful to human health. In each case, the discussions taking place in the WTO are more likely to focus on the economic than on the public health aspects of the issue, while those in the WHO will place those priorities in the other order.

One way that international organizations can work to avoid problems in coherence is to have their secretariats communicate with one another during the drafting process for new agreements. It was in that spirit that WTO Deputy Director-General Alejandro Jara (see Biographical Appendix, p. 581) held a meeting in October 2009 with WHO officials at a time when their institution was working on recommendations related to noncommunicable diseases. "I come in peace," Mr Jara told them, and explained that he was there precisely in order to help them avoid challenges.<sup>25</sup> Having reviewed a draft text that they were then developing, he explained that if they couched their initiatives in "trade language" that would spare them possible trouble in the future regarding coherence and legal challenges in the Dispute Settlement Body. Employing terms related to the GATT general exceptions, for example, could help provide "safe harbour" for the terms of their agreements. That would mean incorporating terms similar to those in the *chapeau* to GATT Article XX, which specifies that the exceptions provided for measures relating to human health and safety (among other matters) are "[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." Framing the language of an agreement in these terms, Mr Jara explained, would signal to the trade officials in national governments and in international organizations that the agreement was designed to coexist with the relevant trade rules. This advice helped to shape the terms of drafts that the WHO Secretariat prepared for agreements in trade-related areas.

These inter-secretariat consultations came at a time when the WHO was either developing or implementing several instruments that might have implications for trade. These included the Global Strategy on Diet, Physical Activity and Health (2004), the Framework Convention for Tobacco Control (2005), the 2008-2013 Action Plan for the Global Strategy for the Prevention and Control of Noncommunicable Diseases (2008), and the Global Strategy to Reduce Harmful Use of Alcohol (2010). Language from the last of these instruments may be cited as an example of how the potentially competing interests of public health and open markets can be reconciled. One section of the WHO alcohol strategy notes that "measures to reduce harmful use of alcohol are sometimes judged to be in conflict with other goals like free markets and consumer choice and can be seen as harming economic interests and reducing government revenues" (WHO, 2010: 7). While recognizing that policy-makers "face the challenge of giving an appropriate priority to the promotion and protection of population health while taking into account other goals, obligations, including international legal obligations, and interests," it goes on to observe that –

international trade agreements generally recognize the right of countries to take measures to protect human health, provided that these are not applied in a manner which would constitute a means of unjustifiable or arbitrary discrimination or disguised restrictions to trade. In this regard, national, regional and international efforts should take into account the impact of harmful use of alcohol.

There nonetheless remains the potential for conflicts between the laws and policies of the two organizations. Their differing perspectives can be seen in one area where WTO rules are more restrictive than WHO principles might prefer (i.e. pharmaceuticals), and another in which WHO rules may lead to restrictions that do not sit well with WTO principles (i.e. tobacco).

The enforcement of intellectual property rights for pharmaceuticals is one of the most contentious issues in trade, as reviewed in Chapter 10. From a public health perspective, the trade-off involved in strict patent enforcement is a matter of balancing two desirable but somewhat contradictory outcomes. Those drugs that already exist would undoubtedly be cheaper if patents were not enforced, but removing those protections would also mean eliminating the profit incentive for the development of new drugs. The WHO recognizes this trade-off, supporting the balance struck in the TRIPS Agreement as modified by the Declaration on the TRIPS Agreement and Public Health. The WHO guardedly endorsed that view in its 2008 Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property,<sup>26</sup> which observed the “crucial need to strengthen innovation capacity as well as capacity to manage and apply intellectual property in developing countries” but noted that this could be achieved in part through “the use to the full of the provisions in the TRIPS Agreement and instruments related to that agreement, which provide flexibilities to take measures to protect public health.”

Tobacco trade is an area where the coherence of WHO and WTO principles may increasingly be tested. In 2005, the WHO adopted a Framework Convention on Tobacco Control, and in 2012 it provisionally adopted the Protocol to Eliminate Illicit Trade in Tobacco Products. These WHO instruments, together with the organization’s advocacy for national adoption of laws to restrict tobacco, relate to topics in the WTO disputes: *United States – Measures Affecting the Production and Sale of Clove Cigarettes* (initiated in 2010) and *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (initiated in 2012). In this instance, one finds laws at the national level that were inspired by a WHO-like perspective on trade and public health but are being challenged in the WTO. The United States lost in the first of these cases, having been found to treat more favourably its domestically produced menthol cigarettes while banning the importation of like/similar clove cigarettes, and is obliged to bring its laws into conformity with WTO obligations. The disposition of the second case remains unresolved at the time of writing.

One project of joint WTO–WHO activity, together with the World Bank, the Food and Agriculture Organization of the United Nations, and the World Organization for Animal Health,

is the Standards and Trade Development Facility (STDF). This initiative aims to assist developing countries in establishing and implementing sanitary and phytosanitary (SPS) standards to ensure health protection and facilitate trade expansion, and to act as a forum for coordination and information-sharing on SPS-related technical assistance. The WTO also participates as an observer in the WHO Intergovernmental Working Group on Public Health, Innovation and Intellectual Property and in its International Medical Products Anti-Counterfeiting Task Force (IMPACT).

### *Organisation for Economic Co-operation and Development*

In the early 1960s, when the OECD made the transition from being the administrator of the Marshall Plan to becoming a permanent forum of the developed countries, its member countries were the same ones that dominated activity in GATT. Developing countries were not very active in GATT, where those with contracting party status limited themselves primarily to defensive aims, and none of them were members of the OECD. Both organizations have evolved since then, and their membership has grown. Today five of the OECD members – Chile, Israel, the Republic of Korea, Mexico and Turkey – continue to claim developing country status in the WTO. Despite these changes, the division of labour between the OECD and the WTO remains largely the same: the OECD is principally a research institution that occasionally serves as a negotiating forum among its members, and the WTO is a negotiating forum that also engages in some research.

There had been some prospect in the GATT period that the OECD might serve as a more active negotiating forum. From the Code of Liberalisation of Current Invisible Operations that was first negotiated in the 1960s through later agreements on shipbuilding subsidies and bribery, this institution has hosted negotiations in which the developed countries could conclude agreements on topics that, for whatever reason, were not taken up in GATT talks. Its role has been somewhat more circumscribed in the WTO period, however, with the one major negotiation that it undertook since 1994 having ended in failure.

The roles of the OECD and the GATT/WTO in negotiations are best seen as complementary rather than competitive, as the most notable successes have come when the members take best advantage of the two institutions' respective strengths. The comparative advantage of the OECD comes in the exploration of issues and the consideration of negotiating options; its personnel and other analytical resources are much larger than those available in-house at the WTO. As of 2012, the total staff of the OECD was almost four times greater than that of the WTO. And where some hundreds of the OECD staff are devoted in one form or another to research, many of them specifically in trade (with many more in trade-related areas), the researchers (as opposed to the statisticians) in the WTO Statistics and Research Division have never exceeded a dozen. As a negotiating forum, however, the OECD has two disadvantages vis-à-vis the WTO. The first is that its membership is not nearly as broad. Although the 34 countries that were members as of 2012 represented most of the world's industrialized economies, that group still leaves out nearly all of the developing countries.<sup>27</sup> The second disadvantage is that the OECD has nothing to compare to the Dispute

Settlement Body of the WTO, and hence is in no position to enforce any agreements that its members might reach in the same way that the WTO routinely does.<sup>28</sup>

The Tokyo Round's Government Procurement Agreement (GPA) offers an example of a fruitful collaboration between GATT and the OECD. The OECD was not the forum in which the GPA was negotiated, but it did play an important role in exploring the issue and the options before the negotiations began in earnest. There is no doubt that the negotiations *were not* concluded until the locus had moved from the OECD to GATT. Blank and Marceau (2006: 27) further argued that the negotiations *could not* have been completed without this move, due to advantages that GATT held over the OECD as a negotiating forum:

There would not be an international agreement on government procurement if the negotiations had not been transferred from Paris to Geneva. As a principle, such an agreement could not have taken place without providing rights for developing countries (although their participation turned out to be very low). Moreover such an agreement needed a dispute settlement mechanism to ensure its implementation and its evolution and such mechanisms are foreign to the OECD forum. In addition, only multilateral and horizontal negotiations made the agreement on lists and minimum thresholds possible.

Heydon (2011) made a similar point with regard to the OECD's work in the development of a Conceptual Framework for Trade in Services, the product of several years of consultation in the OECD Trade Committee.<sup>29</sup> Originally drawn up in 1985, this framework created much of the structure that subsequently became the GATS. The OECD "provided a forum where ideas and negotiating principles could be exchanged and developed, and then shared with the GATT," according to Heydon (2011: 234), "but where the actual process of negotiation was conducted in Geneva, not Paris." The development of the Trade Policy Review Mechanism offers another example of an idea that the OECD helped to develop before passing it along to the Uruguay Round negotiators, although in this instance it was only one of several institutions that promoted some form of surveillance or reporting of countries' trade measures (see Chapter 8).

If the pre-Uruguay Round experience with the conceptual framework can be deemed a qualified success, then the post-Uruguay Round negotiations for the Multilateral Agreement on Investment (MAI) may be called a qualified failure. Unlike the examples cited above, in the MAI negotiations the OECD served as the actual negotiating forum rather than as a think tank acting in support of negotiations. The aim was to produce an investment treaty that would supplement or even replace the collage of bilateral investment treaties that OECD members and others had been negotiating for decades, and also to clean up what many saw as unfinished business from the Uruguay Round. The Agreement on Trade-Related Investment Measures (TRIMs Agreement) was among the weakest instruments to come out of those talks, consisting of a prohibition on the use of certain kinds of investment performance requirements rather than a full-fledged agreement on the relationship between trade and investment. Initiated just one year after the end of the Uruguay Round, the MAI negotiations in the OECD aimed to go farther than the TRIMs Agreement. The talks went on for three years

until collapsing in 1998. The participants had hoped to produce a binding treaty that would be open to OECD and non-OECD members alike, and to that end eight developing countries did participate in the talks. Ironically, the divisions between OECD members over such matters as exceptions for security issues and culture proved to be at least as great as those between the industrialized and developing countries. "The MAI failed because of a lack of political will to address the substance of negotiation and a scaling down of ambition to the point where the game was not worth the candle," Heydon (2011: 231) insisted, "not because the OECD lacked credibility as a negotiating forum." It is nonetheless notable that the initiative in which the OECD's failure was greatest is also the one in which its members tried hardest to make the transition from research and discussion to negotiation.

The OECD continues to engage in research on matters that are directly and indirectly related to issues in the WTO. One such example is the International Collaborative Initiative on Trade and Employment (ICITE), an OECD-led project launched in 2011 through which this organization, the WTO, the ILO and seven other global and regional institutions seek a better understanding of how trade interacts with employment, promote discussion on these issues and develop policy-relevant conclusions. The OECD and the WTO also worked together on the "Made in the World" initiative discussed in Chapter 15. The OECD is active in other topics under negotiation in the WTO, from agricultural subsidies to trade in services.

### *World Intellectual Property Organization*

WIPO is in one sense among the oldest of the trade-related international organizations, yet its relationship with the WTO is among the newest. One of the treaties that WIPO administers is the Paris Convention for the Protection of Industrial Property, which was adopted in 1883 and would be incorporated into WTO law 111 years later via the TRIPS Agreement. Some of its laws thus predate nearly all other international organizations.<sup>30</sup> WIPO itself is a relatively new institution, however, having been established in 1970 and becoming a specialized UN agency in 1974. Its relationship with the WTO became important when the TRIPS Agreement entered into force in 1995.

Cooperation between the WTO and WIPO is especially close, with the latter institution offering the most significant example of the phenomenon in which the laws of another organization are incorporated into the terms of WTO agreements. The two institutions signed an agreement in late 1995 that provides for cooperation in the extension of technical assistance to members,<sup>31</sup> and they later launched joint initiatives to aid developing and least developed countries in meeting the 2000 and 2006 deadlines, respectively, for the implementation of the TRIPS Agreement. One expert observed that although the language of the cooperation agreement "was diplomatically couched as between two equal intergovernmental organizations," this document and later initiatives "were *de facto* recognition of the longer history, deeper experience and much larger capacity of WIPO's programme of support for developing countries" (Yu, 2011: 126).

## Representation and relations with other stakeholders

Although the WTO is formally an intergovernmental organization, and one in which some members insist that only governments should have any role in deliberations and decision-making, it has reached out more to non-state actors than did its GATT predecessor. This is partly a matter of combating the negative public image from which the WTO suffered at the turn of the century, especially after the 1999 Seattle Ministerial Conference, but remains a point of contention between developed and developing countries.

### *Transparency*

The happy coincidence by which the establishment of the WTO came at the same time as the rapid spread of the Internet allowed the new institution to make good on the intentions of bringing its agreements, deliberations, and studies into the open. In mid-1996, the General Council adopted the Procedures for the Circulation and De-Restriction of WTO Documents. This decision, which came at the same time as the guidelines discussed below on dealing with NGOs, applied retroactively to all WTO documents circulated after the date of entry into force of the WTO Agreement. It provided generally that “documents ... in any WTO document series shall be circulated as unrestricted with the exception of documents specified in” an appendix to the decision; those exceptions could later be derestricted. Among the exceptions were working documents in all series (which were then to be derestricted upon the adoption of the report), documents in the SECRET/- series (i.e. relating to modification or withdrawal of concessions pursuant to GATT 1994 Article XXVIII), minutes of meetings of WTO bodies (which were to be considered for derestriction six months after the date of their circulation)<sup>32</sup> and documents relating to working parties on accession (which were to be derestricted upon the adoption of the report of the working party).<sup>33</sup>

These guidelines were then replaced in 2002 by a new set.<sup>34</sup> The revised procedures, which remain in effect and cover all documents issued since their entry into force, provide as a general rule that “[a]ll official WTO documents shall be unrestricted.”<sup>35</sup> There then follow five modifications to this general rule, as summarized in Box 5.2. The procedures further provide for the expeditious translation of documents to the three official WTO languages (English, French and Spanish) and that, once translated, “all official WTO documents that are not restricted shall be made available via the WTO web-site to facilitate their dissemination to the public at large.”

Not all documents in the WTO system (broadly defined) are posted. One large and growing exception to the general rule is the “JOB document”, an unofficial WTO document that is usually restricted. Communications that are member-to-member are generally confidential. This category includes “non-papers”, these being proposals that a member will float informally before deciding whether to pursue the topic in the open. Similarly, “room documents” are intended to be distributed only within a room and are not formally recorded, distributed or posted. The requests and offers that members make of one another in GATS negotiations have a unique nature: the requests are considered confidential documents that are never to be posted – although that has happened in the case of leaks (see Chapter 9) – but the offers that come in reply are restricted on only a temporary basis.

**Box 5.2. Rules for the derestriction of WTO documents**

*Text taken from Procedures for the circulation and derestriction of WTO documents, WTO document WT/L/452, 16 May 2002.*

The five exceptions to the general rule that documents are unrestricted.

- (a) any Member may submit a document as restricted, which shall be automatically derestricted after its first consideration by the relevant body or 60 days after the date of circulation, whichever is earlier, unless requested otherwise by that Member. In the latter case, the document may remain restricted for further periods of 30 days, subject to renewed requests by that Member within each 30-day period. The Secretariat shall remind Members of such deadlines, and derestrict the document upon receipt of a written instruction. Any document may be derestricted at any time during the restriction period at the request of the Member concerned.
- (b) any WTO body when requesting a document to be prepared by the Secretariat shall decide whether it shall be issued as restricted or unrestricted. Such documents which are issued as restricted shall automatically be derestricted 60 days after the date of circulation, unless requested otherwise by a Member. In the latter case, the document shall remain restricted for one additional period of 30 days after which it shall be derestricted.
- (c) minutes of meetings (including records, reports and notes) shall be restricted and shall be automatically derestricted 45 days after the date of circulation.
- (d) documents relating to modification or renegotiation of concessions or to specific commitments pursuant to Article XXVIII of the GATT 1994 or Article XXI of the GATS respectively shall be restricted and automatically derestricted upon certification of such changes in the schedules;
- (e) documents relating to working parties on accession shall be restricted and shall be automatically derestricted upon the adoption of the report of the working party.

***Non-governmental organizations***

The recognition of NGOs<sup>36</sup> as actors in international relations predates the WTO and even GATT. Article 71 of the United Nations Charter authorized the Economic and Social Council to “make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence.” The Havana Charter of the ITO similarly provided for consultations with NGOs, with Article 87.2 stating: “The Organization may make suitable arrangements for consultation and co-operation with non-governmental organizations concerned with matters within the scope of this Charter.” That provision led the Interim Commission for the International Trade Organization (ICITO) to begin work towards the establishment of formal relations between the ITO and NGOs, including the

preparation of notes for the members on this topic and the identification of suitable candidates (e.g. the International Chamber of Commerce, the International Association for the Protection of Industrial Property, the World Federation of Trade Unions, among others).<sup>37</sup> All of this came to naught when the ITO collapsed. With no corresponding provisions in GATT 1947, apart from a weak link between its dispute settlement provisions and the UN Economic and Social Council,<sup>38</sup> GATT never established formal ties to any NGOs. It nonetheless came to engage in an informal and ad hoc fashion with some of them, especially in the final years of the institution. NGOs were never given direct access to meetings.

WTO members revisited the issue during the transition from GATT and in the early years of the new institution. The WTO Agreement deals much more explicitly with NGOs than did GATT 1947, but those provisions still left considerable room for manoeuvre and interpretation. The drafters of the WTO Agreement demonstrated a preference for dealing directly with other international organizations rather than NGOs. While Article VI:1 provides that the General Council “shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO,” Article VI:2 provides merely that it “may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO” (emphasis added).

As their predecessors had done in the mid-1940s, in the transition to the WTO the members of GATT asked the Secretariat to report to them on the practice in other international organizations. A 1994 Secretariat report observed that “NGOs have no negotiating status in UN conferences or in the preparatory process,” but that they “may be given an opportunity to briefly address preparatory sessions in plenary meetings, at the discretion of the Chairman, and they may at their own expense make written submissions to the preparatory sessions.” In UN conferences, they “are restricted by and large to a role of observership in plenary meetings, but that role may be extended on a formal or informal basis ... to observing also the proceedings of sub-groups of the conference, including negotiating groups.”<sup>39</sup> The report also described the varying ways that other organizations dealt with NGOs, several of which had created more formal ties than had GATT to date.

The provisions in the WTO Agreement were further fleshed out in mid-1996 when the WTO members adopted new Guidelines for Arrangements on Relations with Non-Governmental Organizations.<sup>40</sup> These guidelines provided that “to achieve greater transparency Members will ensure more information about WTO activities in particular by making available documents which would be derestricted more promptly than in the past,” and that the Secretariat’s interaction with NGOs –

should be developed through various means such as *inter alia* the organization on an *ad hoc* basis of symposia on specific WTO-related issues, informal arrangements to receive the information NGOs may wish to make available for

consultation by interested delegations and the continuation of past practice of responding to requests for general information and briefings about the WTO.

The guidelines acknowledged the “broadly held view” among the members “that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings.” It nonetheless suggested that closer consultation and cooperation could be achieved “through appropriate processes at the national level where lies primary responsibility for taking into account the different elements of public interest which are brought to bear on trade policy-making” (*ibid.*).

The guidelines did not go as far towards the involvement of NGOs as might be authorized under the legal instruments of the organization. “While the legal basis in the WTO Agreement is broad enough to allow for” the direct participation of NGOs in the activities of WTO bodies, according to Van den Bossche (2009: 314), “NGOs do not have consultative status in any WTO bodies.” NGOs nonetheless have many other options for interacting with WTO members and the Secretariat, including public symposia and forums on WTO-related issues, informal briefings, opportunities for information exchange, the Informal NGO Advisory Body and participation in dispute settlement cases as experts and friends of the court. Starting in May 2008, the Secretariat granted access to the WTO building for NGO representatives from Geneva and its wider region, with a view towards improving transparency and promoting closer working relations with the local NGO community. Through early 2013, the Secretariat had issued 59 badges granting access to individuals from 23 organizations. The badges are valid for one year, allowing the bearer to enter the Centre William Rappard without having to register or having a specific appointment.

Some proposals would expand the role of NGOs in the WTO. Lacarte (2005: 449) and others advocated the establishment of an Advisory Economic and Social Committee to the WTO that “would allow civil society to contribute to the furtherance of world trade and to its links with other areas of endeavor.” The function of such a group would be limited, and “[w]hatever proposals came out of any new NGO advisory body would certainly have to be just that: proposals that Members would take up if and when they saw fit” (*ibid.*).

The perennial disputes over the role of NGOs in the deliberations of the WTO are partly a manifestation of the split between developing and developed countries. While developed countries often urge that the institution be made more open to NGOs, developing countries generally oppose these proposals. “This deep resistance to proposals aimed at making the institution more responsive and responsible to the world community,” according to McGrew (1999: 200), “is not primarily the product of an anti-democratic impulse.” He instead attributes it to “reasonable fear that a WTO which is more open to the influence of private interests and NGOs will become even more Western dominated,” and that a “‘democratic’ WTO could thereby legislate the global application of Western standards, whether in the environmental or social domain, which would erode the competitive advantages of developing economies.”

That sentiment applies more to some NGOs than to others. Pérez-Esteve (2010) reported the results of two surveys circulated among NGOs. More respondents identified trade and the environment as an area of interest than any other, though four other issues – trade and development, trade in services, food security and agriculture – tied for a close second place. More significant were her findings regarding the preferred forum, with the NGOs “rat[ing] their success in influencing trade policy formulation at the multilateral level highest, followed closely by their achievements at the national level” (*ibid.*: 302). The least preferred forum is the preferential trade agreement (PTA):

They argue that the decision-making process within the WTO favours the diverse interests of developing countries in a more coherent way than in PTAs, where a lot of pressure ends up falling on the weakest participant. They also consider the negotiation of PTAs as being more secretive and thus limiting the ability to reach an interested audience. Furthermore, they note that the administration of multiple PTAs at the global level has become very complex and that a multilateral framework is likely to be more comprehensive (*ibid.*).

“Business organizations have been by far the most active in seeking to influence trade policy formulation at the multilateral since the establishment of the [GATT] in 1947,” according to Pérez-Esteve (2010: 285). One such organization is the Transatlantic Business Dialogue, a group that brings together the chief executive officers of European and US firms to coordinate activities on trade and regulatory matters. First convened in 1995 by the US Department of Commerce and the European Commission, it serves as the official dialogue between business leaders, US cabinet secretaries and EU commissioners.

Whereas it is no doubt true that NGOs representing business interests are usually better organized and funded in the developed than in the developing countries, there are also NGOs headquartered in developed countries that promote positions that are intended to be favourable to the developing countries. That is the case, for example, in the role that NGOs such as Health Action International, Oxfam, Médecins Sans Frontières and others played in helping developing countries to reframe the debate over pharmaceutical patents as a health issue rather than strictly as a matter of intellectual property rights (see Odell and Sell, 2006). NGOs and governments have both become more adept at playing the two-level game of modern trade negotiations, which often requires a relaxation of the previously solid barriers that prevented civil society in one country from dealing directly with, or even on behalf of, a government in another country. These tactical exceptions notwithstanding, as a general rule developing countries are more wary of involvement on the part of NGOs than are industrialized countries.

### ***NGOs, ministerial conferences and dispute settlement***

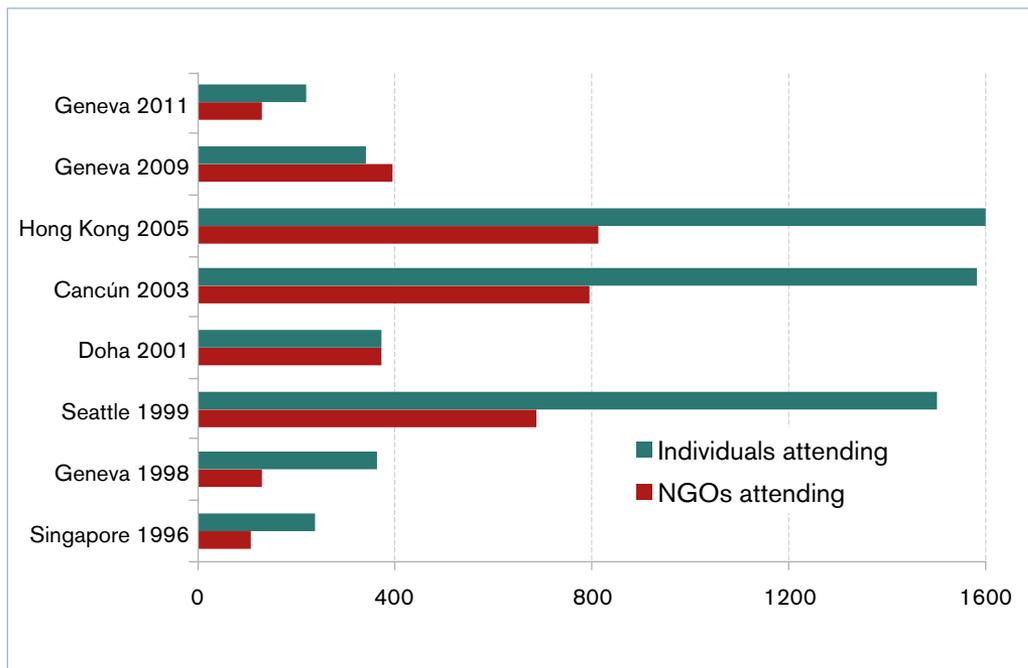
NGOs cannot participate directly in the deliberative portions of ministerial conferences, but that does not prevent them from seeking to exert some influence on the negotiations. The

spectrum of activities range from seminars in adjoining conference rooms to protests in nearby streets. It has been the practice at all WTO ministerial conferences to allow NGOs to attend the formal plenary sessions (which are more ceremonial than substantive) and to organize events in which they may participate (see Figure 5.1).

Apart from a downturn in the 2001 Doha Ministerial Conference, where facilities were limited and attendance was dampened by concerns over security, each ministerial from 1996 to 2005 saw an increase in the number of NGOs that are accredited (rising from 159 in 1996 to 1,596 in 2005) and attending (rising from 108 in 1996 to 812 in 2005). The numbers dropped off sharply in 2009 and 2011, however, by which time the Doha Round had receded and ministerials were less likely to deal concretely with issues of interest to NGOs.

The question of NGO participation in dispute settlement proceedings is a more sensitive topic. Article 13 of the Dispute Settlement Understanding provides that panels have “the right to seek information and technical advice from any individual or body which it deems appropriate.” The Appellate Body further provided in a 1998 decision in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* that panels are free to consider or

**Figure 5.1. NGOs and associated individuals participating in WTO ministerial conferences, 1996-2011**



Sources: Data for the first six ministerial conferences are reported in Van den Bossche (2009: 322); data for the 2009 and 2011 Ministerial Conferences are from the WTO Secretariat.

Notes: Data for individuals in attendance at the 1999 Ministerial Conference are approximate.

reject *amicus curiae* briefs. In this case, the United States had attached to its submission briefs from the Earth Island Institute, the Center for International Environmental Law and the Philippine Ecological Network, among other NGOs. Other parties to the case objected, but the Appellate Body ruled that “the attaching of a brief or other material to the submission of either appellant or appellee, no matter how or where such material may have originated, renders that material at least *prima facie* an integral part of that participant’s submission.”<sup>41</sup> The Appellate Body went further still, ruling not only that a panel may consider *amicus* material that makes its way into a case by way of a party’s submission, but also that unsolicited briefs may be accepted:

A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not. The fact that a panel may *motu proprio* have initiated the request for information does not, by itself, bind the panel to accept and consider the information which is actually submitted. The amplitude of the authority vested in panels to shape the processes of fact-finding and legal interpretation makes clear that a panel will not be deluged, as it were, with non-requested material, unless that panel allows itself to be so deluged.<sup>42</sup>

This is yet another issue that divided developed from developing countries. While developed countries have advocated a more transparent system that would open dispute arguments and proceedings to the public and set firmer guidelines for the consideration of *amicus curiae* submissions, many developing countries were “concerned that allowing direct submissions by non-parties (NGOs and business associations) to the panels or Appellate Body would weaken the inter-governmental nature of the WTO” (Mshomba, 2009: 69).

These disagreements extend to the opening of panels to the public. In September and October 2006, the panel in the twin cases of *Canada – Continued Suspension* and *United States – Continued Suspension* granted the request of the parties (Canada, the European Union and the United States) to provide a simultaneous, closed-circuit feed of two of its meetings. The proceedings were not webcast, broadcast or even recorded, but were instead beamed into a separate viewing room where the first 200 persons who requested passes were permitted to view them. “[D]espite the frequent calls by NGOs for increased transparency of dispute settlement proceedings,” Van den Bossche (2009: 329) wryly observed, “few actually ‘attended’ and the enthusiasm of those attending waned considerably after the first few hours (after the novelty had worn off).” Similar arrangements have been made in a few subsequent cases, but the great majority of the panels remain entirely closed to the public and the press.

### ***The Public Forum and submission of papers to the WTO***

A similar dynamic may be at work in the extent to which NGOs avail themselves of the opportunity to submit position papers to the WTO. The Guidelines for Arrangements on Relations with Non-Governmental Organizations that the General Council adopted in 1996

called for the Secretariat to “play a more active role in its direct contacts with NGOs” which “should be developed through various means” including “informal arrangements to receive the information NGOs may wish to make available for consultation by interested delegations.”<sup>43</sup> Among the steps that the Secretariat undertook in pursuit of this mandate was creation of a page on the WTO website where position papers from NGOs could be posted. Use of this opportunity started small, with just 11 such papers posted in late 1998, but the next year the number reached 74. It was still high in 2003, when the Secretariat posted 68 position papers received from NGOs, but the numbers fell sharply thereafter. There were just three such papers posted in 2011, and only one in 2012.<sup>44</sup>

Analysis of the papers submitted tends to confirm the view that giving greater voice to NGOs means providing yet another opportunity for developed country opinions and demands to be heard more than those of the poorer countries. Bown’s (2009: 182) tabulation of NGO position papers submitted from 1999 to 2007 shows that the most prolific groups were the International Chamber of Commerce (37 papers), the Union of Industrial and Employers’ Confederation (31) and the American Chamber of Commerce (21). With 20 papers, Greenpeace came in fourth place.

Starting in 2000, the WTO has sponsored an annual public forum<sup>45</sup> on current topics in the trading system. These two- or three-day events are organized around panel discussions, each of which is sponsored by NGOs, universities, think tanks or other institutions. The meetings open the WTO to the full community of trade and trade-related professionals and have become a regular part of the annual calendar. Attendance at these events rose rapidly in the first few years before stabilizing at around 1,500 people, with about 45 sessions held at each event in recent years (see Table 5.4).

**Table 5.4. The WTO Public Forum, 2001-2013**

Year	Theme	Sessions	Participants
2001	Symposium on Issues Confronting the World Trading System	12	NA
2002	The Doha Development Agenda and Beyond	18	782
2003	Challenges Ahead on the Road to Cancún	24	1,148
2004	Multilateralism at a Crossroads	32	1,325
2005	WTO after 10 Years: Global Problems and Multilateral Solutions	27	1,821
2006	What WTO for the XXI <sup>st</sup> Century?	36	1,377
2007	How the WTO Can Help Harness Globalization?	40	1,741
2008	Trading into the Future	42	1,335
2009	Global Problems, Global Solutions: Towards Better Global Governance	45	1,289
2010	The Forces Shaping World Trade	44	1,368
2011	Seeking Answers to Global Trade Challenges	46	1,523
2012	Is Multilateralism in Crisis?	44	1,359
2013	Expanding Trade through Innovation and the Digital Economy	36	TBD

Source: WTO Information and External Relations Division.

### *Parliamentarians*

Starting with Seattle in 1999, parliamentarians have held formal meetings in conjunction with the WTO ministerial conferences. Meeting in 2001 in Geneva, where one conveniently finds the headquarters of both the Inter-Parliamentary Union (IPU) and the WTO, the first global parliamentary meeting on international trade produced the Final Declaration that called for “a parliamentary dimension to international trade negotiations and arrangements.” Formal organization among parliamentarians advanced further at the Doha Ministerial Conference later that year, where the IPU and the European Parliament jointly sponsored a meeting. The ministers did not take up this group’s proposal that the Doha Ministerial Declaration explicitly provide for greater WTO transparency “by associating Parliaments more closely with the activities of the WTO,” but the legislators themselves created a Parliamentary Conference on the WTO. This IPU-affiliated group holds annual meetings, participates in side events at WTO ministerials, and has a steering committee that follows events more closely.

The involvement of parliamentarians is enthusiastically embraced in Europe. The European Parliament adopted a resolution in 1999 calling on the Commission and the Council “to examine the possibility of setting up WTO Parliamentary Assembly to achieve greater democratic accountability.”<sup>46</sup> Erika Mann (2005: 425), a Member of the European Parliament, noted some frictions:

The European Parliament and the IPU are the main drivers of parliamentary involvement. Considering the different histories, functions, structures, and decision-making procedures of the two organizations, it is more than understandable that the cooperation has not always been without difficulties. Political problems occasionally also arose from the lack of congruence between the respective memberships of the IPU and the WTO. Most prominently, Taiwan is a member of the WTO as a Separate Customs Territory without being a member of the IPU. By contrast, Iran is a member of the IPU but not of the WTO. Some WTO Members even lack a parliament or have one that is suspended.

There is little support for this process in the United States, where Congress already exercises considerable authority over trade policymaking and “many US congressional representatives believe that their constituents’ interests are best advanced when the USTR negotiates in a closed intergovernmental context” (Shaffer, 2005a: 398). When the IPU and the European Parliament formed a steering committee after the Doha Round, for example, with representatives from 22 countries and four international organizations, no one came forward to fill the two seats that were reserved for members of the US Congress (Mann, 2005: 425).

The interparliamentary option remains unpopular in some developing countries, due variously to “fear that the addition of a parliamentary dimension would add to [governments’] burden,” concerns that such an approach “would favour large countries with larger delegations” and “undermine their negotiating positions,” and worries that parliamentarians might undermine deals by “defend[ing] vested protectionist interests” (Shaffer, 2005a: 400). Shaffer nevertheless concluded that the benefits could outweigh the costs, and that

a "Consultative Parliamentary Assembly of the WTO would be an adequate instrument to channel the interests and aspirations of individuals into the decision-making process of the WTO" (*Ibid.*: 420).

### *The press*

While not a stakeholder *per se*, the press offers a vital link between the WTO, its members and civil society. The media can become indirect participants in negotiations, especially to the extent that their reporting may affect countries' negotiating positions by way of public opinion. Odell and Sell (2006: 86), for example, argued that "a developing country coalition seeking to claim value from dominant states in any regime will increase its gains if it captures the attention of the mass media" and if it "persuades the media to reframe the issue using a reference point more favourable to the coalition's position." In support of this contention they cited events in the Uruguay Round, in which –

powerful transnational firms and their governments had framed intellectual property protection as a trade issue. They argued that strong patent protection promotes trade and investment for mutual benefit and that the alternative is tolerating piracy. More recently, TRIPS critics attempted to frame intellectual property protection as a public health issue, arguing that strong protection could be detrimental to public health provision. Reframing in this case was a tactic in a distributive strategy (for gaining at the expense of the United States and other property owners' positions) (*Ibid.*: 86-87).

The press can also be a useful tool for trade negotiators, with the experience of WTO Director-General Peter Sutherland offering a case in point. The first step that he took once in office was to direct the press office to launch a more aggressive campaign, stressing the importance of the round and the concrete benefits that would accrue if it reached a successful conclusion. That press offensive was part of his larger plan to force the negotiators out of the slump into which they had fallen, and to increase the pressure on them from the outside.

Media relations are one of the areas in which the WTO is qualitatively different from GATT, although this change did not take place as a result of any formal decision on the part of the members. It was instead the product of an internal debate, and not always a calm one, in which Secretariat officials looked for ways to repair the damage that the Seattle Ministerial Conference had done to the image of free trade in general and the WTO in particular. A key participant in this process was Keith Rockwell (see Biographical Appendix, p. 590), formerly a reporter for the venerable *Journal of Commerce* who moved laterally into the directorship of the WTO Information and External Relations Division. Having been on the receiving end of the GATT's media relations, Mr Rockwell characterized the institution's relations with journalists as "based on a deep reticence around the house to divulge information."<sup>47</sup> He set out post-Seattle to encourage more direct engagement with the press and the NGOs on the part of both the institution and its members. Earlier efforts to provide journalists with timely information encountered sharp opposition from some members. This was particularly true

during the selection of the new director-general in 1999, when Mr Rockwell was ordered not to provide real-time information to journalists on the conduct of this process. The fiasco in Seattle decisively brought home to many delegations the importance of enhancing the institution's outreach to media and civil society.

The higher political profile of the WTO ensured that the older GATT practices were dead. Attention was especially intense in the most active period of the Doha Round, when the ranks of journalists in attendance at ministerials rose and fell in roughly the same pattern observed above for NGOs (see Figure 5.1). The approximate number of journalists in attendance at the 1999 Seattle Ministerial Conference reached 2,700, and rose still higher to 3,400 at the 2005 Hong Kong Ministerial Conference, but by the 2009 and 2011 Geneva Ministerial Conferences the numbers had plummeted to 209 and 226, respectively.<sup>48</sup>

Journalists have access to the Centre William Rappard. The Secretariat issues badges to any journalist who can provide a press card, and recognizes the badges issued to journalists by the United Nations Office in Geneva. As of early 2013, the Secretariat had issued another 55 yearly badges to journalists from around the world.

The Information and External Relations Division increased its outreach to media, persuading members that it was important to bring developing-country journalists to Geneva for intensive workshops on the WTO and its activities. Working with the Friedrich Ebert Stiftung (FES) the division organized 20 events in Geneva for developing-country journalists from 2003 to 2012. The WTO and the FES have arranged to bring 15 journalists from LDCs to every ministerial conference since Marrakech in 1994. Working with the FES and other foundations, the division organizes similar workshops around the world for NGOs and parliamentarians. These outreach activities are now funded out of the WTO technical assistance budget. Another of the division's initiatives was to hire information officers from outside the official languages of English, French and Spanish. It brought aboard Chinese and Arabic speakers in 2010 and 2012, respectively, to serve as spokesmen, and the 32-member staff also has Catalan, Dutch, Portuguese, Tagalog, Thai and Urdu speakers. It also began to engage new media in 2009, putting up a presence on Facebook and Twitter. As of early 2013, it had more than 17,000 "friends" on each of these social media outlets, primarily younger people.<sup>49</sup>

## Capacity-building, technical assistance and support

One of the consequences of the expanding scope of trade policy is a vast increase in the technical knowledge that is expected of negotiators and other trade policy-makers. For much of the GATT period the principal things a professional in this field needed to know in order to operate effectively concerned tariffs, other border measures, the conduct of diplomacy, and at least the rudiments of trade-remedy laws and dispute settlement procedures. Policy-makers in the field today need to have, or have access to, expertise in a much wider range of topics.

This is not to say that even the most traditional area of trade policy-making is easy. Preparing for and conducting tariff negotiations requires not only access to the raw numbers – bound tariffs, applied tariffs and data on imports and exports<sup>50</sup> – but also the capacity to “crunch the numbers” and relate actual or potential proposals to the effects that they may have on one’s individual industries and the economy as a whole. That can be hard enough to do in a static approach that identifies individual tariff lines that might be affected, much less in a dynamic model that forecasts how those changes might affect actual levels of production, trade, employment, consumer welfare and government revenue. Developed countries that have sophisticated research facilities at their disposal, whether in government agencies or in their academic/think tank communities, can routinely conduct both types of analysis. At the other extreme, the issue is moot for the least-developed countries (LDCs) that are generally exempt from making new commitments. The rest of the developing countries can be divided between the “haves” whose research capacities sometimes rival the developed countries and the analytical “have-nots”. This is one respect in which the use of formulas as an instrument of market access negotiations can add to the complexity of the task. The transition from linear to non-linear formulas (see Chapter 9) might be compared to moving from slide rules to spreadsheets, but that is an advance only if everyone owns a computer and is proficient in its use.

The analytical problems associated with the traditional issues of trade in goods may nevertheless be deemed simple when compared to the more complex issues that the system began to take on in the Uruguay Round. Trade in services is far more analytically complex than trade in goods, encompassing not just border measures but the whole array of laws and other instruments by which countries regulate and promote such diverse activities as law, medicine, accounting, tourism and education. When one adds to that such topics as intellectual property rights and investment, not to mention the subjects that can be tied to trade through dispute settlement or proposed new negotiations (e.g. environmental issues and competition policy), it is evident that not even a modern Renaissance person can master all of the topics that might arise in Geneva.

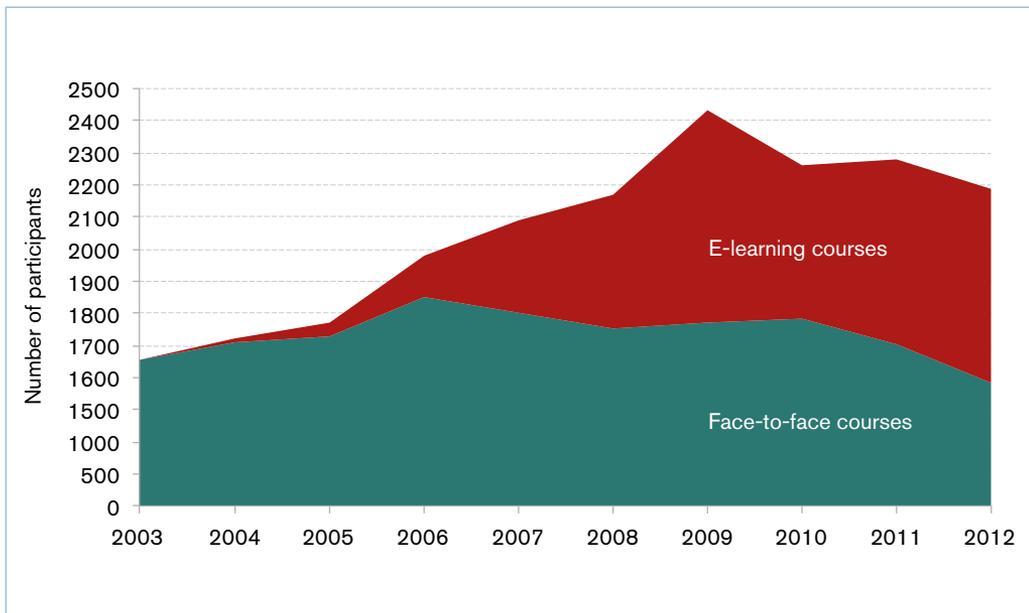
The most direct way for the WTO Secretariat to assist countries with these analytical problems is to provide the services to them. Any WTO member can request assistance from the Secretariat in determining how a given proposal might affect its tariffs and those of its trading partners, for example, and that aid can be indispensable in getting past the immediate problem. It also exemplifies the cliché about how giving a man a fish will feed him for a day but teaching him to fish will feed him for life. The capacity-building services that the WTO Secretariat provides, both on traditional matters such as market access negotiations and on the more complex subject matter that distinguish the WTO from its GATT predecessor, are even more useful in helping members to cope with the ever-growing demands for facts and analysis.

Trade policy-making requires not only that the trade ministries be ready to handle a wide range of issues but that they coordinate with all of the other governmental bodies whose “turf” is at issue. Capacity-building therefore requires more than the training of trade ministry officials. “The prime objective of the Enhanced Integrated Framework,” WTO Deputy Director-General Valentine Sendanyoye Rugwabiza (see Biographical Appendix, p. 592) observed, “is really less

about making people in a trade ministry understand what a specific multilateral agreement entails than about helping the ministry to bring together all the other agencies which one way or the other have something to do that will have an impact in trade policy."<sup>51</sup> The need to bring in an array of different ministries is matched by the need to call upon the expertise of an equally wide range of international organizations. One task of the WTO Secretariat is to promote capacity in the members, both by providing assistance itself and by coordinating activities with other organizations. The Enhanced Integrated Framework (EIF) that the WTO coordinates is a partnership with the IMF, the ITC, UNCTAD, the UNDP and the World Bank Group.

The main purpose of the Secretariat's trade capacity-building programmes is to provide direct support to the beneficiaries, enhancing their human and institutional capacities to confront the challenges of trade policy-making. Training is delivered in a variety of ways and in different sites, including courses in Geneva, in the members, and increasingly through Internet-based e-learning.<sup>52</sup> Figure 5.2 illustrates how this electronic pedagogy began in 2004 and rapidly came to be the leading form of training. The e-learning programme is based on the concept of progressive learning, and allows participants to move from basic to more advanced topics.<sup>53</sup> Another way that the WTO takes advantage of information technology as a tool of training and technical support is through the funding of reference centres that provide a dedicated, physical location where any relevant information on the WTO can be accessed via the WTO Internet site, on CD-ROMs, in print and in electronic format. There were reference centres in 86 countries as of 2011, including 35 LDCs and 14 members that did not have permanent missions in Geneva.<sup>54</sup>

**Figure 5.2. WTO technical assistance for government officials, 2003-2012**



Source: WTO Institute for Technical Cooperation and Training.

Notes: Data for 2012 are preliminary and incomplete.

The WTO also sponsors internship programmes that promote a learning-by-doing approach, especially for entry-level personnel from developing countries. These include the Missions Intern Programme (MIP) and the Netherlands Training Programme (NTP), each of which supports several individuals while assigning them to specific divisions in the WTO. Interns are given a stipend that is not much less than what a junior officer is paid, as well as health insurance. From 2005 to 2011, the MIP hosted interns from 38 developing countries (21 of which were LDCs), and the NTP hosted interns from 55 developing countries (35 of which were LDCs).<sup>55</sup> The internship programmes can contribute to more than just the improvement of specific persons' knowledge and skills, as they can also help to catalyse countries' decisions to move from non-resident to resident status. They have led some countries to follow up by establishing a mission and, in some cases, sending that former intern back as a delegate (in some cases as ambassador). One example is Benin, which helped to form the Cotton-Four coalition. Niger and Togo are other examples of the same phenomenon.<sup>56</sup>

This is not the only issue in residency, as many countries find it difficult to support a full-time mission in one of the most expensive cities in the world to work and live. Non-residency has nevertheless declined since the start of the WTO period, roughly halving from 1997 to 2012. That may be attributed in part to the assistance that the Swiss government provides to LDCs, as well as to aid that the British Commonwealth and other organizations offer to these and other developing countries. Non-residency thus tends to be more of a problem for the countries that are slightly richer than an LDC than it is for the LDCs themselves, and especially those that have small populations and thus very limited tax bases. LDCs are eligible for Swiss support that amounts to some Sfr 3,000 per month, which is about what is needed to pay the rent on office space in Geneva. Assistance from other sources can offset some of the other costs associated with operating a mission in Geneva.

Funding has generally not been a problem in the WTO trade-related technical assistance programmes, with Director-General Pascal Lamy having secured commitments to the Aid for Trade initiative at the Hong Kong Ministerial Conference in 2005. This could, however, become a problem area as a consequence of the financial crisis and tighter budgets. In 2011, for example, the incoming funds did not cover all of the expenses of the WTO technical assistance plan, requiring the cancellation or postponement of several projects.<sup>57</sup> This may be attributed in part to a decline in the contributions and pledges that members make to the Doha Development Agenda Global Trust Fund (DDAGTF), as shown in Table 5.5. The contributions and pledges to this trust fund totaled Sfr 19.7 million in 2009, but by 2011 these had declined to Sfr 15.1 million – a fall of 23.6 per cent. These reductions can sometimes be attributed to changes in the value of the Swiss franc; as is explained in Chapter 14, the general WTO budget is denominated in francs but contributions to the DDAGTF can be in any currency. The European Union and its member states provide about two thirds of the funding for the DDAGTF, but pledges and contributions declined from 2009 to 2011 for ten member states and from the European Union itself. The same may be said for the pledges and contributions of China, Japan, the Republic of Korea and the United States. The decline in the trust fund led to a similar reduction in technical assistance activities, as can be seen for example in the lower number of attendees in face-to-face courses (see Figure 5.2).

**Table 5.5. Contributions and pledges to the Doha Development Agenda Global Trust Fund, 2008-2011**

<b>Donor</b>	<b>Swiss francs ('000s)</b>	<b>Share of total (%)</b>
European Union and member states	45,281.8	65.2
<i>Sweden</i>	9,151.9	13.2
<i>Netherlands</i>	5,892.0	8.5
<i>European Union</i>	5,794.1	8.3
<i>Germany</i>	5,751.5	8.3
<i>Finland</i>	5,473.2	7.9
<i>France</i>	3,517.0	5.1
<i>Ireland</i>	3,313.4	4.8
<i>Spain</i>	1,973.3	2.8
<i>Luxembourg</i>	1,525.5	2.2
<i>Other EU members</i>	2,894.9	4.2
Norway	7,093.6	10.2
Australia	6,267.7	9.0
United States	3,913.3	5.6
Canada	1,805.0	2.6
Japan	1,755.2	2.5
Korea, Republic of	1,383.6	2.0
Switzerland	800.0	1.2
China	616.9	0.9
Chinese Taipei	184.2	0.3
Liechtenstein	160.0	0.2
New Zealand	158.0	0.2
Turkey	50.0	0.1
<b>Total</b>	<b>69,469.3</b>	<b>100.0</b>

Source: Calculated from *Annual Report on Technical Assistance and Training*, WTO document WT/COMTD/W/186, 25 June 2012, Annex 5.

## Endnotes

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- 1 For African perspectives on this universal problem, see Mbekeani (2005) and Odhiambo et al. (2005).
- 2 For reasons explained below, the IMF and the World Bank are properly called the “other” Bretton Woods institutions because, contrary to the common usage, the WTO falls within this same category.
- 3 For further information on the history, structure and activities of the Chief Executives Board for Coordination, see [www.unsceb.org/ceb/home](http://www.unsceb.org/ceb/home).
- 4 For further information on the task force, see [www.un.org/issues/food/taskforce/index.shtml](http://www.un.org/issues/food/taskforce/index.shtml).
- 5 For further information on the ITC, see [www.intracen.org/](http://www.intracen.org/).
- 6 For further information on the facility, see [www.standardsfacility.org/en/index.htm](http://www.standardsfacility.org/en/index.htm).
- 7 See the discussion below of the joint agreement negotiated in GATT and UNESCO in the 1950s.
- 8 For the text of a 2001 e-mail on this subject from Adrian Otten (see Biographical Appendix, p. 588), director of the Intellectual Property Division to Deputy Director-General Paul-Henri Ravier, which was inadvertently released as part of a WTO document and then posted to the Internet, see <http://lists.essential.org/pipermail/ip-health/2001-September/001900.html>. In this note, Mr Otten urged caution in the collaborative process and observed, among other things, that “there is a network which includes the leading non-governmental people, certain people in the WHO Secretariat, Mr Raghavan and his newsletter and many developing country delegates and nothing that is given to WHO can be relied upon to remain confidential.”
- 9 For further information on the manual, see [www.wto.org/english/res\\_e/statis\\_e/its\\_manual\\_e.htm](http://www.wto.org/english/res_e/statis_e/its_manual_e.htm).
- 10 The text of the transfer agreement is in *Transitional arrangements; Transfer Agreement between GATT 1947, ICITO and the WTO*, WTO document PC/W/12 and 6SS/W/1, 7 December 1994.
- 11 See *Declaration on the Establishment of a New International Economic Order*, UN resolution A/RES/S-6/3201, 1 May 1974.
- 12 Author’s interview with Mr Supachai on 27 September 2012.
- 13 The text of the MOU is posted at <http://unctad.org/sections/press/docs/mou.pdf>.
- 14 Letter of 14 December 2011 at [www.wto.org/english/news\\_e/news11\\_e/agcom\\_14dec11\\_e.htm#letter](http://www.wto.org/english/news_e/news11_e/agcom_14dec11_e.htm#letter).
- 15 See *Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council*, WTO document WT/L/161, 25 July 1996.
- 16 Data from the websites of the respective organizations.
- 17 Canadian officials considered proposing such an arrangement at the time that they developed their ideas for the transformation of GATT into the WTO. In an undated (c. 1990) note from Debra Steger to Bill Crosbie, one of the institutional reforms proposed for the purpose of promoting greater coherence between the new WTO, the IMF and the World Bank was “establishing a GATT liaison office in Washington” (p. 1). This is the only reference that the author has ever seen in any document that suggests any form of permanent presence for the WTO outside of Geneva.
- 18 On the enforcement powers of the ILO, see Harrison (2007: 87-92).
- 19 The text of the declaration is posted at [www.un-documents.net/dec-phil.htm](http://www.un-documents.net/dec-phil.htm).

- 20 The text of the agreement is posted at [www.imf.org/external/pubs/ft/sd/index.asp?decision=DN18](http://www.imf.org/external/pubs/ft/sd/index.asp?decision=DN18).
- 21 The strategy is posted at <http://siteresources.worldbank.org/TRADE/Resources/WBGTradeStrategyJune10.pdf>.
- 22 The initial proposals were developed by UNESCO, which formed the basis for negotiations by a working party in the third (Annecy) round of GATT negotiations in 1950. The text of the agreement was then communicated to UNESCO for sponsorship, and entered into force in 1952. See World Trade Organization (1995: 281).
- 23 The text of the convention, together with related documents, is posted at <http://unesdoc.unesco.org/images/0021/002148/214824e.pdf>.
- 24 For a fuller discussion of the development and terms of the draft convention, see VanGrasstek (2006).
- 25 Author's interview with Mr Jara on 23 February 2013.
- 26 See *Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property*, WHO document WHA61.21, 24 May 2008.
- 27 While the term "OECD country" is often used as a synonym for developed or industrialized that is more of a linguistic convenience than a legal rule, such that when people speak of the OECD countries aiming for one thing or another, they more often mean this as a shorthand reference to the developed countries rather than as a means of describing a formal initiative that the OECD *per se* has undertaken. Status as a developing country in the WTO remains a matter of self-declaration, for which there are no specific standards.
- 28 One could of course speculate that the OECD members, were they of a mind to do so, could replicate something like the Dispute Settlement Body as part of this institution. If they did so, however, that could be taken as a definite signal of interest in replacing the WTO as the principal forum for the negotiation and enforcement of agreements affecting trade and related economic matters.
- 29 See also Blair (1993) for case studies in the OECD negotiations on export credits and trade in agricultural goods, steel and ships.
- 30 Here the International Telegraph Union has pride of place as the first modern international organization, having been established in 1865 and later becoming the International Telecommunication Union (ITU). Like WIPO, the ITU is a specialized agency of the United Nations.
- 31 The text of the agreement is posted at [www.wto.org/english/tratop\\_e/trips\\_e/wtowip\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/wtowip_e.htm).
- 32 In an exception to this rule, the minutes of the Trade Policy Review Body were circulated as unrestricted documents. Similarly, trade policy review reports by the Secretariat and by the government concerned were to be derestricted upon the expiry of the press embargo.
- 33 See *Procedures for the Circulation and Derestriction of WTO Documents: Decision Adopted by the General Council on 18 July 1996*, WTO document WT/L/160, 22 July 1996.
- 34 See *Procedures for the Circulation and Derestriction of WTO Documents: Decision of 14 May 2002*, WTO document WT/L/452, 16 May 2002.
- 35 A footnote defines the term "official WTO document" to mean "any document submitted by a Member or prepared by the Secretariat to be issued in any one of the following WTO document series: WT-series (including reports of panels and the Appellate Body); G-series (except G/IT-series); S-series; IP-series; GATS/EL-series; GATS/SC-series; the Schedules of Concessions and TN-series."

- 36 Some analysts prefer the term "non-state actors" to describe groups that are not affiliated with governments. See for example Capling and Low (2010) and their collaborators. For the sake of consistency, the term NGO will be used here throughout.
- 37 See *Relations with Non-Governmental Organizations: Note by the Secretariat of the Interim Commission for the International Trade Organization*, GATT document ICITO/EC.2/11, 15 July 1948.
- 38 GATT Article XXIII.2 (Nullification and Impairment) provides that in dispute settlement cases the contracting parties could consult "with the Economic and Social Council of the United Nations ... in cases where they consider such consultation necessary." That provision makes no explicit reference to the association between this council and NGOs.
- 39 See *Arrangements for Relations with Non-Governmental Organizations in the United Nations, Its Related Bodies and Selected Other Inter-Governmental Organizations: Note by the Secretariat*, WTO document PC/SCTE/W/2, 11 October 1994, p. 4.
- 40 See *Guidelines for Arrangements on Relations with Non-Governmental Organizations: Decisions Adopted by the General Council on 18 July 1996*, WTO document WT/L/162, 23 July 1996.
- 41 See *United States – Import Prohibition of Certain Shrimp and Shrimp Products: AB-1998-4*, WTO document WT/DS58/AB/R, 12 October 1998, p. 31.
- 42 *Ibid.*, p. 38.
- 43 See *Guidelines for Arrangements on Relations with Non-Governmental Organizations: Decisions Adopted by the General Council on 18 July 1996*, WTO document WT/L/162, 23 July 1996.
- 44 Tabulated by the author from papers posted at [www.wto.org/english/forums\\_e/ngo\\_e/pospap\\_e.htm](http://www.wto.org/english/forums_e/ngo_e/pospap_e.htm), accessed 19 January 2013.
- 45 The term "public symposium" was used for the events held in 2001 to 2005.
- 46 See *European Parliament Resolution on the Communication from the Commission to the Council and the European Parliament on the EU Approach to the WTO Millennium Round*, document COM(1999) 331 – C5-0155/1999 – 1999/2149(COS), A5-0062/1999, 18 November 1999.
- 47 Author's correspondence with Mr Rockwell on 11 February 2013.
- 48 Data provided by the WTO Information and External Relations Division.
- 49 Author's correspondence with Mr Rockwell on 8 February 2013.
- 50 The author has found in his own experience as an adviser to numerous developing-country trade ministries that many of them lack this most basic set of data. Trade data are collected in the first instance by the customs department for one specific purpose (i.e. assessing value and collecting revenue on imports), and sharing the data with a different department of government is often not a high priority.
- 51 Author's interview with Mrs Sendanyoye Rugwabiza on 24 January 2013.
- 52 The web portal for the WTO e-learning system is <http://etraining.wto.org/>.

- 53 Courses are limited to verified government officials who have been approved by their ministries. They are accessed via user identification and password that are obtained when a user registers online and sends a note signed and stamped by the supervisor. Participants should generally be allowed to devote five to six hours a week to follow the course during normal working hours, and have up to three months to complete a course (after which the password expires). Each course is divided in a certain number of modules for which there is an end-of-module multiple choice questionnaire, followed by a final examination. Participants who correctly answer the required number of questions will receive a certificate and move up to a higher level of training. E-learning is also used to select participants for other advanced activities.
- 54 See *Annual Report on Technical Assistance and Training (1 January to 31 December 2011)*, WTO document WT/COMTD/W/186, June 2012, p. 31.
- 55 *Ibid.*, pp. 47-48.
- 56 Author's interview with Mrs Sendanyoye Rugwabiza on 24 January 2013.
- 57 See *Annual Report on Technical Assistance and Training*, WTO document WT/COMTD/W/186, 25 June 2012, p. 3.



# Part III

## Rules, norms and enforcement

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# 6 Rules and norms

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

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

## Introduction

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

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

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

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

## The rules for decision-making in the WTO

### *The exercise and derogation of sovereignty*

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

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

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

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

Notes: Shading indicates the options chosen by WTO members.

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

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

### *The green room and its critics*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### *Proposals for an executive board*

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

The GATT Council established the Consultative Group of Eighteen (CG18) in mid-1975.<sup>8</sup> From then to 1985, the group generally held three meetings each year. Its function was essentially consultative and not executive, but it sometimes made recommendations or suggestions to the General Council on matters of importance. The CG18 was not a green room because minutes were kept. Like the UN Security Council, which has its five permanent members and ten rotating members, the Consultative Group had both permanent and alternate members. It was much larger than the Security Council, however, with 18 permanent members and a rotating group of nine alternates. The number of permanent members was expanded to 22 in 1986. The group played an important part both in the endgame of the Tokyo Round and in the lead-up to the Uruguay Round. By the time that latter round was launched, there were some who believed that it had outlived its usefulness, as “it was variously felt to be too large to be effective or too small to be representative” (Croome, 1995: 155).

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

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

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

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

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

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

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

## How decisions are made: consensus versus voting

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

### *What GATT provided*

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

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

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

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

### *The WTO's decision-making rules*

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

**Box 6.2. Decision-making in the WTO**

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

1. The WTO shall continue the practice of decision-making by consensus followed under GATT 1947.<sup>1</sup> Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote. Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their member States<sup>2</sup> which are Members of the WTO. Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement.<sup>3</sup>  
[...]

*Footnotes:*

<sup>1</sup>The 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.

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

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

As summarized in Table 6.2, several provisions in the WTO Agreement provide for voting. Each requires some form of super-majority; a simple majority is never sufficient to reach a decision. There is nonetheless one possible exception to that rule, as discussed in Chapter 14. The director-general selection procedures that were approved in 2002<sup>14</sup> provide that, in the event that consensus cannot be reached on a single candidate, “[m]embers should consider the possibility of recourse to a vote as a last resort.” The procedures are deliberately vague on the share of votes that would be required in that eventuality, stating only that this vote would be conducted “by a procedure to be determined at that time.” Logic would however argue in favour of a majority vote in the event of a deadlock, as any threshold higher than that may simply perpetuate the deadlock.<sup>15</sup> Even if members were to fall back on voting to select the director-general, the procedures stress that this would “be understood to be an exceptional departure from the customary practice of decision-making by consensus, and shall not establish any precedent for such recourse in respect of any future decisions in the WTO.”

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

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

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

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

### *Consensus and voting in practice*

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

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

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

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

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

### *Proposals for voting*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### *How hold-outs are handled: peer pressure and expulsion*

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

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

The most extreme way to conduct negotiations is to threaten expulsion to any member that blocks the approval of an agreement that otherwise receives wide support, or that refuses to ratify an agreement approved by the rest of the membership. Expulsion is a heavy-duty power that international organizations rarely exercise. The most notable examples all stem from matters that are “above the pay-grade” of trade policy-makers: the League of Nations expelled the Soviet Union in 1939 for its invasion of Finland, and both the United Nations and the GATT contracting parties did essentially the same thing with respect to Serbia and Montenegro after the invasion of Bosnia and Herzegovina in 1992.<sup>23</sup>

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

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

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

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

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

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

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

### How agreements are approved: the significance of US negotiating authority

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

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

#### *The fast-track rules*

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

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

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

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

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

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

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

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

### *Revision of the fast track in 2007 to 2008*

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

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

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

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

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

### ***Will the European Parliament emulate the US Congress?***

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

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

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

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

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

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

## Endnotes

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

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

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



# 7 Dispute settlement

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Undoubtedly, a nation that excludes you from all commercial intercourse with her, does you an injury; robs you, as far as in her lies, of the benefits of external commerce; if, therefore, by the dread of retaliation, you can induce her to abandon her exclusive measures, there is no question about the expediency of such retaliation, as a matter of mere policy. But it must not be forgotten that retaliation hurts yourself as well as your rival; that it operates, not defensively against her selfish measures, but offensively against yourself, in the first instance, for the purpose of indirectly attacking her. The only point in question is this, what degree of vengeance you are animated by, and how much will you consent to throw away upon its gratification.

Jean-Baptiste Say  
*A Treatise on Political Economy* (1803)

## Introduction

Jean-Baptiste Say shared Adam Smith's view that countries were justified in retaliating against trading partners that excluded them from their markets, hoping that taking this step – or threatening to do so – would induce the partner to lift the restrictions. But while Smith was willing to leave it up “to the skill of that insidious and crafty animal, vulgarly called a statesman or politician” to determine whether retaliation is warranted in any given case,<sup>1</sup> Say was less enthusiastic about employing this option. He stressed both the costs that a country imposes upon itself when it retaliates and the disincentive that it might create to lifting those sanctions. In this respect, the dispute settlement system of the WTO might be said to reflect Say's thinking more than Smith's, for while it does ultimately rest on the prospect for retaliation, it is designed to make retaliation a last resort that members will employ only after exhausting all other options.

Dispute settlement is a more prominent feature of the WTO than it was in the GATT period. Whereas there were 101 dispute settlement cases that went through the entire process in just under a half-century of GATT's existence, or just over two per year, the docket of the WTO Dispute Settlement Body (DSB) swelled to an average of 25 complaints per year in its first 18 years. That huge increase may be attributed in part to the widening scope of subject matter that is covered by the WTO agreements (as discussed in Chapter 2), and in even greater part to the growing membership of the organization (as discussed below). Perhaps the largest cause of the increase,

however, has been the changed rules of the game. The GATT system had favoured defendants, and probably inhibited potential complainants from bringing cases in the first place. It had operated on the basis of consensus, thus giving all parties (including the respondent) the opportunity to block action at almost any stage. The WTO system provides no such opportunities. Based as it is on “reverse consensus”, which in practice means that cases are suspended only if the complainant agrees (e.g. when parties reach some settlement out of court), the WTO system is far more attractive to petitioners than was its GATT predecessor. The change was not just quantitative but qualitative, with the system gradually shifting from an adjunct arm of diplomacy to a more judicialized process. This twin evolution was already under way, but still incomplete, when the GATT gave way to the WTO. The reformed WTO system generally provides for more adjudication, but nevertheless retains a preference for consultation and mediation over legal confrontation.

This chapter begins with a discussion of the differences between negotiations and dispute settlement as options for handling the frictions between members, with an emphasis on how WTO members approach this choice from different political cultures and legal traditions, followed by a brief recap of the changes made in the operation of the system by and after the Uruguay Round. The analysis then reviews the experience thus far under the Dispute Settlement Understanding (DSU). That is done primarily by presenting the descriptive statistics of cases, examining the rise and fall in the level of complaints, the subject matter covered by them, and which countries are most prominent among the petitioners and respondents. Readers will note that this review focuses on the quantifiable aspects of the DSU experience; space does not permit a review of the more nuanced issues of WTO jurisprudence and the implications of the interpretations that panels and the Appellate Body have given to the WTO agreements. The chapter then concludes with an examination of just who those panellists and Appellate Body members have been, observing patterns in their nationalities as well as their background.

## Litigation, conciliation and negotiation

The dispute settlement procedures in the multilateral trading system have gradually evolved from an approach based upon mediation of disputes that were primarily between the members of a small circle of developed, like-minded countries towards a more rules-based process in which a larger circle of countries – but still much less than the full membership – takes an active part. There is no doubt that some members remain far more active than others in the system, such that a relatively small number are responsible for the great majority of the cases, and that about half of the membership is never involved in any more serious way than as third parties. Several different explanations may be offered for members’ varying levels of participation, ranging from the size of their economies (larger members are more likely to have a wider range of sectors and issues at stake) to their differing capacities (members with large and well-staffed missions are better able to pursue disputes). In addition to those and other practical considerations, it is also important to take into account the differences between members’ political cultures and legal traditions. Simply stated, policy-makers in some countries are more litigious than are their counterparts in other parts of the world.

Viewed at a high level of abstraction, there are two major distinctions that one might draw between the political cultures and legal traditions of WTO members. One is the distinction between what might be called litigious versus conciliatory cultures, with the first being marked by a widespread belief that disputes are normal and that the courtroom is the best place to resolve them, and the latter being driven by the concern that confrontation is destructive, leads to hard feelings between winners and losers, and ought to be avoided whenever possible. The other major distinction to be drawn is between those legal traditions that are based on the English common law, which emphasizes the importance of precedent, versus the code law or civil law traditions (sometimes coupled with other legal sources) that emphasize the terms of the specific law in question. The first of these major divisions helps to explain the differing degrees to which individual members utilize the dispute settlement system, such that the more traditionally litigious countries in Europe and the Americas (North and South) generally account for the larger number of complaints brought before the DSB, while members from Africa, the Middle East and Asia bring complaints infrequently. It is possible that the second of these divisions influences the outcome of those cases, although this point involves more inference than proof. Members with a common law legal tradition have contributed a disproportionately large number of the jurists in what we might broadly call the DSB bar. This can be seen in the nationalities of the panellists as well as the people who have held key directorships in the WTO, and in the legal educations of Appellate Body members.

In this section, we review the first of these distinctions, emphasizing the differences between the more litigious and the more conciliatory approaches to trade policy-making. Later in this chapter, we will return to the differences between the common law and code law subsets within that more litigious tradition.

### *Political culture and litigation versus conciliation*

The multilateral trading system has become more litigious over time, with the volume of cases in the WTO greatly exceeding those in GATT and with many observers noting that the judicial function of the WTO now overwhelms the legislative function. The shift from negotiation to litigation can be seen as either an advance or a decline, depending on one's expectations for the system, and those expectations may be influenced by the differing political cultures of the members. The traditional GATT perspective, which reflects the political and legal cultures of Europe and the Americas, sees legal disputes as natural and even healthy. "Frequent recourse to these WTO dispute settlement proceedings is a sign of well-functioning legal and judicial systems," according to Petersmann (2005b: 141), "rather than of socially harmful conflicts." Alternatively, those who believe that the system should be based on cooperation rather than confrontation tend to see disputes as undesirable signs that the system is not working. That view may be especially prevalent among members that either were not yet in the system during the GATT period or were not very active in it.

That latter perspective, in which conciliation is favoured over confrontation, is often associated with Asian countries. Director-General Supachai Panitchpakdi took a very dim view of disputes, believing that both the members that engaged in them and the system as a whole

would be better off if problems were handled through negotiation and mediation. "I tried to promote the possibility of having mediation" as head of the WTO, he observed, "but it was not very popular and people seemed to be critical of me trying to avoid going to dispute-settlement and they would think that I'm not making use of the DSU."<sup>2</sup> Noting instead that he wanted "to create an atmosphere of peace and collegiality," Mr Supachai also stressed that avoiding litigation "saves time, it saves costs, it saves a lot of confrontation." Members filed fewer complaints during Mr Supachai's time in office (27.3 complaints per year) than they had before his time (34.6 per year), but they also filed fewer in the time after his tenure (14.7 per year). The declining use of the system during his administration might therefore represent part of a long-term trend rather than the result of his efforts to promote alternative approaches.

It is ultimately the members rather than the director-general that determine the frequency with which complaints are filed, and here one also finds mixed evidence regarding a decreased propensity for disputes on the part of Asian members. Liyu and Gao (2010: 165) stressed the importance that Confucian thought places on the avoidance of litigation, which "causes irreparable harm to relationships and should be pursued only as a last resort." This and other historical factors have led Chinese judges to "prefer mediation to resolve disputes so as to avoid the disharmony of conflict in confrontational litigation." An anthropologist who studied China's use of the DSU also placed the issue in a cultural context, noting that before Beijing could become an active participant in the system, it first had to overcome a tradition in which the need to "save face" dissuaded entry into direct legal confrontation. Even if one were to dismiss the argument that culture poses a barrier to litigation, it is still necessary to take into account a very practical matter: with little domestic expertise in this field, and even less experience at the international level, it took years for China to develop the legal talent necessary to become a proficient and frequent participant in disputes. Cai (2011: 220) chronicled three stages in China's approach, such that from 2002 to 2003 "the idea that prevailed in the Chinese delegation was that disputes had to be settled amicably," but China became more active from 2003 to 2007, and since 2007 China has been a leading participant in litigation. In this new environment, China not only engages in disputes of its own, but takes part in those involving other countries:

With regard to disputes between Western countries, it is not necessary for China to intervene. In cases between emerging and development countries and developed countries, China can get on the side of the first, while in cases between emerging and developing, the only choice is to remain silent (*Ibid.*: 220).<sup>3</sup>

Nor are the cultural and practical barriers to litigation a uniquely Asian matter. "Although China and Africa similarly face all of these barriers," according to Kidane (2012: 66), "the African states are at a much more serious disadvantage." And whereas China eventually overcame its reluctance to bring disputes to the WTO, just as other WTO members overcame their reluctance to reciprocate (and then some), African and Middle Eastern countries have yet to file a single complaint.

These differences can be seen in Table 7.1, which shows the frequency with which various sets of members have brought complaints to the DSB. The data distinguish in the first instance between developed and developing countries, then between developing countries according to region, and further break each of these groups down according to the legal traditions of the countries in a group. These include some countries with a common law legal tradition (principally composed of former colonies of Great Britain), those that have a code law tradition (principally descended from Roman, Spanish or French legal systems) and those that are pluralist (a mixture of traditions). The first conclusion that one can draw from the data is that these distinctions between common, code law and pluralism are not significant for explaining different members' level of litigiousness. In any given economic or geographic group, the number of complaints brought by members adhering to one of these traditions was within the same order of magnitude as those of the other members in the same group. The more significant distinctions are between the groups themselves, rather than subset of legal traditions within a group. The developed countries are the most litigious, and among developing countries the spectrum is defined at one end by the relatively legalistic Latin American countries (all of which are from a code law tradition) and at the other by the African and Middle Eastern countries. The Asian and Pacific developing countries fall in the middle of this spectrum, as do the Caribbean countries and the former Soviet and Yugoslavian states.

**Table 7.1. Frequency of dispute settlement cases by complainants, 1995-2012**

	Number of members	Number of complaints	Complaints per member
<b>Developed</b>	<b>10</b>	<b>271</b>	<b>27.1</b>
Common law	4	150	37.5
Code law	6	121	20.2
<b>Latin America (code law)</b>	<b>20</b>	<b>119</b>	<b>6.0</b>
<b>Asia/Pacific</b>	<b>26</b>	<b>88</b>	<b>3.4</b>
Common law	10	28	2.8
Pluralist	3	19	6.3
Code law	13	41	3.2
<b>Ex-Soviet Union/Yugoslavia (code law)</b>	<b>7</b>	<b>4</b>	<b>0.6</b>
<b>Caribbean</b>	<b>11</b>	<b>1</b>	<b>0.1</b>
Common law	9	1	0.1
Pluralist	2	0	0.0
<b>Africa/Middle East</b>	<b>57</b>	<b>0</b>	<b>0.0</b>
Common law	2	0	0.0
Pluralist	10	0	0.0
Code law	45	0	0.0

Source: Summarized from data in Appendix 7.1.

Notes: The European Union is counted here as one member and classified as a code law legal system.

### *Economic interests and capacity*

The greater litigiousness of the developed countries may also reflect the twin facts that these countries have more trade to defend and have the legal expertise available to pursue cases. Similarly, the Chinese case suggests that economic growth may contribute to a country's perceived stakes in litigation, and its increasing familiarity with the system may likewise enhance its capacity to act upon these perceptions. An Asian political culture does not appear to have restrained Japan's interest in making the most of the dispute settlement system, and over time China has become more like Japan in several ways: in its growing share of global exports, in the size and sophistication of its trade policy-making community and in its willingness to file complaints against other members. That is not a universal rule, however, insofar as even large economies such as South Africa or the Kingdom of Saudi Arabia have never brought complaints to the DSB.

Part of the difference may be explained by resources and capacity, as there are numerous practical barriers to developing countries' participation in the dispute settlement system. Among the difficulties commonly cited are the complexity and cost of the system, a concern that developing countries (especially those outside Latin America) are not adequately represented on panels and the aim of the system is not development but legal compliance.<sup>4</sup> Another contributing factor to their reluctance is another matter of capacity: countries with dedicated WTO missions are more likely to bring cases. Twenty-six of the 36 members that brought complaints to the DSU from 1995 to 2012 had dedicated missions in 2012, while only one non-resident member had ever done so. Only about one quarter of all members have dedicated missions, but these members were responsible for about three quarters of all complaints. The line of causation also moves in the other direction, with the rising level of litigation being a contributing factor in the expanding size of missions.<sup>5</sup>

These problems are partly overcome by the assistance that developing countries may receive from the Advisory Centre on WTO Law (see Box 7.1), and also by the practice of bringing in outside counsel that might be paid for by the private sector. No amount of technical assistance, however, can change the fact that countries that account for small amounts of trade have less leverage in the event that a case comes down to retaliation. In the US gambling case, for example, the retaliation that Antigua and Barbuda was authorized to impose on the United States had little impact on Washington, but the retaliatory power given to Brazil in the cotton case (discussed below) was much more persuasive. The Cotton-Four African countries did not have the same potential "clout" as Brazil, which is one reason why they chose to negotiate when Brazil opted to litigate.

### *The choice between litigation and negotiation*

Even those members that come from more litigious cultures, or that have grown to the point where they overcome cultural barriers to litigation, still face the same choice when deciding how to deal with specific irritants: do we sue or negotiate? Several different factors go into answering that question.

### Box 7.1. The Advisory Centre on WTO Law

The Advisory Centre on WTO Law (ACWL) provides legal assistance to developing countries in dispute settlement cases. This institution was agreed to at the Seattle Ministerial Conference in 1999<sup>6</sup> and created in 2001 as an organization independent of the WTO. Its mission is to provide least-developed countries (LDCs) and other developing countries with the legal capacity they need to enforce their rights under the DSU. Beyond their membership dues, which are assessed on countries according to a sliding scale from the least developed (US\$ 50,000) to the industrialized countries (US\$ 1 million), advisory services are available to developing countries at rates that vary according to their levels of income. Among the services available are legal advice on WTO law (free to members and LDCs), support in WTO dispute settlement proceedings (ranging from US\$ 25/hour for LDCs to US\$ 350/hour for higher-income developing countries that are not members), seminars and internships. As of 2012, it had 12 counsel on staff, as well as arrangements for external counsel with 20 law firms and two individuals. Thirty developing-country members were entitled to ACWL services, as were 31 LDCs.

This institution is devoted much more to helping the beneficiaries play offense than to aiding in their defence. The ACWL's role in most of the first 41 cases in which it took part was to assist the complainant country; it helped the respondent just three times (calculated from ACWL 2012: 36-37). Having assisted the complainants 29 times it was more active on this front than all but three members (Canada, the European Union and the United States).

The ACWL has generally received favourable reviews. Some agree with Mshomba's (2009: 91) assessment that it "is a shining example of how technical assistance can and should be delivered". Bown (2009: 174) reaches a mixed verdict, concluding on the one hand that the ACWL "is improving enforcement in instances in which the market access at stake for exporters in poor countries is too small to make market-provided legal counsel a practical option," but observing on the other hand that "its effectiveness is also constrained by the services that it cannot offer." Those services include the gathering of information, organizing politically and inducing reform.

The sequence in the United States has been just the reverse of that in China, with policy-makers having become somewhat more restrained over time. The main difference between dispute settlement in the GATT and WTO periods, from the US perspective, comes in the switch from unilateral threats to multilateral litigation. As was discussed in Chapter 2, the US "reciprocity" laws were among the principal irritants in the late GATT period. These laws gave the Office of the US Trade Representative (USTR) the authority to investigate and retaliate against foreign acts, policies, and practices that it found to violate US rights, without first obtaining permission from GATT to impose retaliatory measures. The USTR often used this authority to promote US positions on what in the 1980s were called the "new issues" of services, investment and intellectual property rights. The United States thus chose litigation over negotiation, and litigation in which it played every part except the respondent; the USTR was the complainant, the judge and the enforcer. That at least was the tactical choice in specific cases, but in the larger picture this was part of an unstated but highly successful strategy of using this aggressive, unilateral form of litigation as a means of prodding negotiations. The grand strategy produced an equally grand bargain in the Uruguay Round:

the United States would forswear the reciprocity policy, and would henceforth bring its complaints to the DSB, but did so only because its partners agreed to approve substantive and enforceable agreements on the new issues. That deal was reiterated in the outcome of a challenge that the European Union brought in 1998 against the main US reciprocity law. The panel report in *United States – Sections 301-310 of the Trade Act 1974* agreed with the European Union that it is not for individual WTO members to determine whether another member's measures violate their WTO obligations. The panel nonetheless concluded that having the law on the books is "not inconsistent" with US obligations, even though the statutory language in itself constituted a serious threat of unilateral determinations, because the United States had pledged that it would render determinations in conformity with its WTO obligations. The panel further stipulated that, should the United States repudiate or remove in any way its undertakings, the finding of conformity would no longer be warranted.

While unilateral enforcement is now banned, when one member has a problem with another it still must choose whether to handle the problem through the legislative or the judicial functions of the WTO. Litigation and negotiation need not be seen as mutually exclusive choices, but can instead be employed sequentially in pursuit of the same goal. Viewed from a high enough altitude, these options may be mutually enforcing. John Weekes (2004: 1) observed that a "good agreement can persuade governments to accept a dispute settlement system capable of rendering impartial, definitive judgments in an expeditious manner" just as a "good dispute settlement system reinforces the obligations in the agreement and can contribute significantly to any renegotiation of that agreement." That positive outcome may be undermined, however, if the judicial function of the institution is seen to be out of kilter with its legislative powers. By one view, the judicialization of the WTO may make members less willing to produce agreements via the old practice of constructive ambiguity, by which negotiators were willing (although not eager) to settle on compromises that allowed each side to claim some victory but might leave the precise meaning in doubt. That has now changed. "No longer are people prepared to construct compromises with perhaps some ambiguity in them because they know that down the line a panel's going to make a decision which will be binding," Stuart Harbinson opined, "and they don't want their necks on the line."<sup>7</sup> Or to put it another way, there was a time when negotiators were willing to leave their own job half-done, with a view to taking up the issues again on their next go-around, but when they know that the litigators have the authority to pick up where they left off the negotiators may be more inclined to favour the safety of deadlock over the risks of an untidy resolution.

As one pair of experienced practitioners pose the choice, "multilateral trade negotiations seek to change the existing rules in order to build a global system based upon new principles (changes for the future)," whereas legal procedures "seek the application of the rules already in force but not respected by some members of the World Trade Organization" (Imboden and Nivet-Claeys, 2008: 127). Sometimes, the first step is to develop law through negotiation, and the next step is to perfect that law through selective litigation; at other times, the need for new negotiations may be highlighted by the imperfect results of litigation. In that same vein, Petersmann (2005b: 139) saw evidence of strategic linkage between litigation and negotiation when he observed that:

The timing and legal targets of WTO dispute settlement proceedings suggest that WTO complaints, panel, and appellate proceedings are also used for clarifying existing WTO obligations, identifying the need for additional WTO rules, improving the bargaining position of countries, or putting pressure on other WTO Members to engage in negotiations on additional rules and commitments.

The choice between these options may not be decided by some universally applicable principle, but instead come down to a tactical calculation regarding which one is most likely to obtain the desired objective for the potential litigants or negotiators within a specific context. In the case of US subsidies that prejudiced the interests of cotton producers in Latin America and Africa, for example, Brazil chose to litigate by alleging that these subsidies violate US commitments under the existing Agreement on Agriculture and the Cotton-Four LDCs in Africa chose instead to negotiate in the Doha Round. The LDC choice not to participate as co-complainants was based on several factors. Brazil had already begun litigation and the LDCs had nothing new to add to those proceedings. In the event that the case resulted in retaliation, the Cotton-Four had less leverage over the United States than a major country such as Brazil and a multilateral round was already underway and thus offered an opportunity for leverage. These options were not mutually exclusive. In choosing to negotiate, the LDCs retained the option of pursuing litigation if the negotiations proved unproductive.

## Operation of the Dispute Settlement Understanding

The DSU is a part of the grand bargain reached in the Uruguay Round. In that bargain, GATT would be replaced by the WTO, the jurisdiction of this new organization would extend beyond trade in goods to cover the new topics promoted by the United States, members would forswear the unilateral enforcement of their rights, and the dispute settlement system would be reformed to make it more efficient, less susceptible to blocking, and (by way of the Appellate Body) more consistent in its rulings. The new system did not represent a complete break from the past, however, as the fundamental legal principles were unchanged.

### *The fundamentals of dispute settlement*

The dispute settlement process typically begins when one or more WTO members formally challenge another member's measures that are alleged to violate that member's commitments. These claims of violation are often based on the contention that the measure in question contravenes, for example, either or both of the central principles of non-discrimination (see Table 7.4). Put in their most simple terms, most-favoured-nation (MFN) treatment (GATT Article I) prevents a country from discriminating between one trading partner and another at the border, while national treatment (GATT Article III) prevents a country from discriminating between its own products and those from another country behind the border. The MFN principle means, for example, that Australia must apply the same tariffs to imports of Norwegian salmon that it applies to imports of similar Chilean

salmon.<sup>8</sup> The national treatment principle means that Brazil cannot apply sales taxes or other barriers to French products that are more restrictive than those applied to goods of Brazilian firms.<sup>9</sup> Complaints will typically further allege that a member's measures violate WTO rules on some other subject covered by GATT 1994 or the many WTO agreements. It is common for a complainant to pursue several claims and cite numerous provisions from several different agreements when specifying how a partner's laws or policies are alleged to violate their commitments. It is also possible to base a claim on a non-violation complaint, in which a member argues that it has been deprived of an expected benefit because of another government's action even if such action is not *per se* WTO-inconsistent.

In addition to contesting the facts of the case, or the complainant's interpretation of the agreement(s) in question, a respondent will often argue that the measures in question are permitted under one or more of the general exceptions. These are provided in GATT Article XX or, in the case of services, in its GATS counterpart (Article XIV). The issues that fall within the scope of these exceptions include, among others, the following topics:<sup>10</sup>

- protection of public morals
- protection of human, animal or plant life or health
- products of prison labour
- protection of national treasures of artistic, historic or archaeological value
- conservation of exhaustible natural resources
- intergovernmental commodity agreements
- restrictions on exports of domestic materials
- products in general or local short supply.

Measures that are otherwise illegal under WTO rules can be justified under these exceptions, but they do not give an automatic "free pass" for countries to employ whatever restrictions they deem to be politically necessary and that they claim are related to one or more of these principles. The exceptions are instead limited by the language in the *chapeau* to Article XX, which specifies that the exceptions are "[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." Several of the incisions are further limited by a "necessity test" specifying that the measure must be necessary to achieve the stated objective and that no WTO-consistent or less trade-restrictive alternative is technically and financially available. The contention that a measure is justified by one or more of these exceptions is instead a rebuttable proposition that can be challenged by another WTO member and decided by a dispute settlement panel, based upon the arguments presented by both sides and the panel's reading of the WTO's laws and traditions.

Judgments that go against the respondent do not lead automatically to the invalidation of its laws. Rulings of a WTO panel are not comparable to (for example) decisions by a domestic court that has the power to strike down laws that it determines to be

unconstitutional. Dispute settlement provisions rely in the first instance on the willingness of the parties to abide by rulings. In the event that a panel finds a country's laws in violation of its GATT obligations, all panel and Appellate Body reports end with the same obligatory recommendation: it should bring the challenged measure into conformity with its WTO obligations. It is then up to the member in question to decide what course it will take. The preferred option is to bring its laws into conformity with the ruling, which might entail the law's repeal, amendment or replacement with some altogether new law. Only in extreme cases does the system contemplate that the injured party will request, receive and exercise the right to retaliate. In just one case prior to the Uruguay Round did the GATT contracting parties authorize one country to retaliate against another (i.e. a Dutch complaint against the United States in the 1950s), and the retaliatory measures were never employed. This hierarchy of preferred results is unchanged even under the reformed dispute settlement rules of the WTO. Despite the fact that there has been an explosion of cases in the WTO period, the total number of instances in which a petitioner was ultimately given leave to retaliate totalled just 17 through the end of 2012, or about one in 25 of all complaints filed through 2011. Not all members that receive this authorization choose to employ it. Some see a third option by which the country might compensate the injured parties (e.g. by reducing tariffs on some product that they export), but other jurists strongly reject the notion that this is a legitimate response when one has lost a case.

### *The Uruguay Round reforms*

The judicialization of the dispute settlement system is partly a product of the Uruguay Round, and the changes did not stop with the conclusion of the round and the inauguration of the new organization. The evolving jurisprudence of the panels and especially the Appellate Body have reinforced those trends, making for a system in which dispute settlement is treated more like independent adjudication than like the conduct of diplomacy in another guise. The negotiations over the DSU were nevertheless a key part of this process, and led to major changes in the way that the system operates. There was a widespread consensus at the start of the Uruguay Round that change was needed. No one took the position then that the dispute settlement system functioned well; the only differences were in the best way to address the well-recognized shortcomings of the system.

The main shortcoming of the GATT dispute settlement system was the opportunity it gave to countries to block cases. The problem with applying the rule of consensus to GATT disputes was rather obvious. Imagine how a similar rule would operate in a criminal proceeding if everyone present in the courtroom – including the accused and his lawyer – had the authority to halt the case at any stage. That respondents in GATT disputes came to abuse this privilege is less surprising than the decades that passed before they did so almost routinely. That systemic failing was already discussed in Chapter 2, as were the rising demands on the part of other contracting parties for disciplines on the US penchant to define and enforce its trade rights unilaterally. Those developments, coupled with the expanding scope of issues under negotiation in the Uruguay Round, made reform of the dispute settlement system one of the

principal objectives of that round. The negotiations produced a much stronger system that corrected many of the deficiencies of the GATT rules. In the DSU, a single country cannot delay or block action, no longer having the power to prevent the appointment of a panel, the adoption of a panel report or the granting of permission to retaliate. The process is also supposed to be swifter. Under the WTO procedures it should ordinarily take 12 and a half months from the time that a country brings a complaint until the adoption of a panel report, or 15 and a half months if there is an appeal to the new Appellate Body, followed by a reasonable period of implementation. In actual practice, cases tend to run somewhat longer than the DSU contemplated.

Like other aspects of the transition from GATT to the WTO, the Uruguay Round reforms came in stages. One stage was completed with the 1988 Montreal Ministerial Conference, when the GATT contracting parties adopted on a provisional basis a series of reforms that had been developed within the De la Paix group (see Chapter 3). The most important reform adopted then was reverse consensus for the establishment of panels. The contracting parties were not yet ready to agree to the application of the same principle to the adoption of panel reports. Among the other reforms were specific time-lines for stages of the dispute process, with a total time limit of 15 months; shorter time limits for cases involving perishable products; longer time limits for some aspects of cases involving developing countries; arbitration as an alternative to panels; an expanded list of non-governmental experts for use on panels; legal advice for developing countries and the implementation of panel findings was to be reviewed within six months (Weston and Delich, 2000). This was an “early harvest” of the low-hanging fruit, and left the more difficult issues to be taken up in the second half of the Uruguay Round. The most important of these concerned the ability of respondents to block the adoption of panel reports; the reformers wanted an end to the abuse of consensus, moving instead to automatic adoption. “That’s when the discussions began post-Montreal about the Appellate Body,” one Canadian negotiator recalled.<sup>11</sup> The key remaining issue was automatic adoption of panel reports, and “to get the big guys, particularly the Americans and the Europeans, to sign onto this. That’s how people came up with the Appellate Body. It was to ensure adoption of panel reports.”

### *The Appellate Body*

The Appellate Body represents one of the main differences between dispute settlement in the WTO versus GATT. It is composed of seven people serving four-year terms (each of which may be renewed once), all of whom have reputations for probity and integrity and are among the most experienced and trusted members of the trade community. When panel decisions are appealed, there are three Appellate Body members assigned by a random process, who then have a clear timeline of 90 days in which to render a decision. “That also forces us to be on the ball even before an appeal is filed,” according to Appellate Body Member Ujal Bhatia (see Biographical Appendix, p. 574), such that “when a report is available all of us, all the seven members, are expected to read all panel reports.”<sup>12</sup> They consult with the Appellate Body membership as a whole before they issue the ruling so as to avoid contradictions and to ensure consistency and collegiality. While the Appellate Body technically does not operate

under a rule of *stare decisis*, in actual practice its decisions have formed a consistent body of case law. “We are under a system of trade agreements,” to paraphrase something that US Supreme Court Justice Charles Evans Hughes said of the Constitution in 1907,<sup>13</sup> “but trade law is what the AB members say it is.”

Cases are assigned through randomization and rotation. Article 6 of the Working Procedures for Appellate Review provides for selection “on the basis of rotation, while taking into account the principles of random selection, unpredictability and opportunity for all Members to serve regardless of their national origin.” Said El Naggar (see Biographical Appendix, p. 587), who was one of the original Appellate Body members, worked out a method by which this random selection would be accomplished. Appellate Body members draw numbered chips out of a bag and record the number that is then used to identify them, and by which they are assigned to cases according to a mathematical scheme. This method ensures that no one knows in advance which cases they will be assigned or which of their six colleagues will be named to the same appellate panel. Once an assignment is made the only permissible reason for an Appellate Body member not to accept is for reason of a conflict of interest; being a citizen of one of the parties to the dispute is no bar to participation in the appellate panel for that case. An Appellate Body member cannot plead the press of other business. The retainer that the members receive is intended to ensure that whatever other duties they may take on elsewhere – teaching or serving on arbitration panels, among others – will not interfere with their availability to discharge their Appellate Body duties.

In contrast to the detailed direction that negotiators gave to panels, they did not include in the DSU much guidance for the Appellate Body with respect to its procedures, operation and functioning. The DSU states simply that the Appellate Body “shall be provided with appropriate administrative and legal support as it requires” (Article 17:7), the expenses of its members “shall be met from the WTO budget” (Article 17:8), and that its “[w]orking procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information” (Article 17:9). Debra Steger, who served as the first director of the Appellate Body Secretariat, recalls that there were many challenges in setting up the new body in 1995. Although a small budget had been allocated for it initially the WTO Secretariat expected that not many cases would be appealed and that the Appellate Body members would only occasionally be in Geneva. From the beginning, however, Ms Steger believed that it was necessary to create a separate secretariat for the Appellate Body in order to maintain and ensure its independence from the WTO Secretariat officials who worked with the panels. The procedures for swearing in the new Appellate Body members and the working procedures for Appellate Body review had to be developed very quickly because the first appeal was expected early in 1996.

When the Appellate Body was first proposed in the Uruguay Round the proponents thought that it would be called upon only in rare instances, such as allegations of improper influence being brought upon a panel or egregious failings in their interpretation of law. John Jackson

was an early advocate of such a mechanism (which he called an “appellate tribunal”), for example, but also urged that rules should be created to ensure “that not every case gets appealed” as the process would then risk “simply becoming prolonged, without substantial advantages.”<sup>14</sup> In retrospect, it is clear that the expectation was unrealistic: any trade minister who has to explain a loss in the DSB to the president or prime minister, not to mention cabinet colleagues, the legislature, and the affected industry groups, will want to demonstrate that the ministry took every available step to defend the country’s laws, especially if it is put in a position of asking parliament to repeal or revise one. Anything short of a vigorous and exhaustive defence would be politically untenable. That simple calculation seems to have evaded the DSU negotiators during the round.

The expectation that few cases would be appealed soon proved wildly inaccurate. In the early years every panel report was appealed and the legal issues were often novel, and as a result, the work of the Appellate Body multiplied. Its members were also called upon to act as arbitrators in the Article 21.3(c) “reasonable period of time” cases, supported by Appellate Body Secretariat staff. Because of the short time frames for appeals, and in order to deliberate and exchange views effectively with their colleagues, it was important that Appellate Body members spend time in Geneva working together on cases. While it is a “standing tribunal”, its members are compensated on a part-time basis. They are paid a retainer that compensates them for their availability throughout the year, and are also paid a daily rate for working on cases, together with *per diem* for their expenses while in Geneva. Some have opted to rent accommodation in Geneva for the duration of their appointments.

The Appellate Body has affected the jurisprudence in the WTO both directly and indirectly. The direct effects are the most obvious, coming via the decisions that it renders. These decisions reach judgments on the meaning of WTO agreements as well as on the conduct of disputes themselves, as is the case for its rulings regarding outside counsel and *amicus* briefs (see below). The presence of the Appellate Body has also indirectly affected cases by giving panellists an incentive to “appeal-proof” their decisions. In the WTO system, panellists are more likely to become invested in their decisions, and want to avoid the implied criticism of a reversal. This motivation may account for the expanding length and complexity of the decisions that panels render. Similar concerns also encourage countries to insist that at least one of the panellists appointed to cases in which they are involved be lawyers, and to prefer that the chairman also be a lawyer. In the GATT system, most panellists were from the local missions and were usually diplomats rather than lawyers (no matter what it might have said on their diplomas).

### ***Adjustments to the operation of the DSU***

The rules and procedures governing dispute settlement cases have been adjusted since the Uruguay Round through actual practice, especially in some landmark Appellate Body decisions, and through what is known as the Jara Process. The Appellate Body set an important precedent when it ruled that panels may consider *amicus curiae* (friends of the court) briefs. This is a principle that it stated in 1998 in the case of *United States – Import*

*Prohibition of Certain Shrimp and Shrimp Products*<sup>15</sup> and affirmed in several subsequent cases. The Appellate Body found that the panels' comprehensive authority to seek information from any relevant source (as provided in DSU Article 13) and to add to or depart from the Working Procedures in DSU Appendix 3 (as provided in DSU Article 12.1) permits panels to accept or reject information and advice even if it was unsolicited. This remains a contentious matter among WTO members, many of whom consider WTO disputes to be procedures purely between members and see no role for any other parties, stakeholders or experts, and are wary of any involvement on the part of non-governmental organizations. Developing countries in particular tend to take a cautious view on this point.

Even more significant was the Appellate Body's 1997 determination in *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (better known as *Bananas III*) that members can be represented by outside counsel. When Saint Lucia first tried to bring in private lawyers during the panel deliberations this was widely opposed and disallowed, but the Appellate Body permitted it and thus changed the nature of dispute settlement cases. It said that there were no provisions in the WTO Agreement, in the DSU, or in the Working Procedures "that specify who can represent a government in making its representations in an oral hearing of the Appellate Body," nor could it find any "previous [GATT] panel report which speaks specifically to this issue in the context of panel meetings with the parties." It further stated that –

representation by counsel of a government's own choice may well be a matter of particular significance – especially for developing-country Members – to enable them to participate fully in dispute settlement proceedings. Moreover, given the Appellate Body's mandate to review only issues of law or legal interpretation in panel reports, it is particularly important that governments be represented by qualified counsel in Appellate Body proceedings.<sup>16</sup>

This decision has led to trade lawyers in private practice becoming accredited to a member's WTO delegation for purposes of a case. This also provides an indirect means by which the WTO partially and indirectly relaxes the general rule that disputes are solely pursued state-to-state, without a private right of action. Private firms and trade associations still have no independent standing in the WTO, but they may nonetheless ask member governments to bring complaints on their behalf. When making such a request, they can now promise to underwrite the often considerable legal fees involved in a case. This may offer one reason why developing countries are less reluctant to bring formal complaints in the WTO. In the GATT period, such a country might not even have had a permanent mission in Geneva, much less one staffed with an experienced litigator, but matters are quite different when both the expertise and the bankroll can be outsourced.

The so-called Jara Process is yet another way that the system has been reformed. Named after Deputy Director-General Alejandro Jara, the process aims to make the dispute settlement process more efficient and less costly. At issue here are the burdens imposed by a more judicialized system, as measured both by the time that panellists must devote and the

budgetary costs of translating and even transporting the documents. Some panellists report that the paperwork they receive from the parties is excessive. "At times they play the lawyer's game," one panellist observed, "so they flood you with all kinds of irrelevant documents."<sup>17</sup> The Jara process aims to reduce that flood to manageable proportions, and to make other, complementary reforms to the process.

This is an example of how reforms and innovations may create demand for new changes. The reform of the DSU spawned an increase in cases; the creation of the Appellate Body encouraged petitioners, respondents, and panellists to take a more legalistic approach to cases; and the involvement of private lawyers did not lessen the interest in creating even longer paper trails. The net result has been a rise in the costs of individual cases and of the docket as a whole. Acting at the request of Director-General Pascal Lamy, Mr Jara began a process of fact-finding and consultations in 2010, seeking efficiency gains in the panel process so as to reduce the financial and human burdens. He solicited ideas widely, but stressed that any reforms had to be consistent with existing rules; changes could be contemplated only if they did not involve amending the DSU. He also insisted that changes should not undermine the reputation and output of the system. In this process, Mr Jara relied primarily on the flexibility afforded under DSU Articles 12.1 and 12.2, which require panels to follow the procedures in DSU Appendix 3 "unless the panel decides otherwise after consulting the parties to the dispute" and indicate that panel procedures "should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process."

One of the reforms to emerge is double-briefing, a process in which parties' first written submissions, as well as rebuttals and the submissions of third parties, are sent to a panel before the first hearing. This reform, Jara (2012) observed, "would probably delay the first hearing with the parties" but could also "speed up the panel process by moving forward the maturity of the parties' discussions on the relevant issues, thus probably eliminating some exchanges at the written question and answer phase." It might also obviate the need for a second hearing. Another reform is early (indicative) questions for the panel meeting. Panels generally use the first substantive meeting to determine basic factual and legal questions, and sometimes the parties are not prepared to answer panellists' questions at these meetings. It was therefore suggested that panels provide in advance a list of questions that might be posed. Another especially important reform allows for electronic filing. Among the others are time limits on oral statements, advance distribution of a proposed agenda or structure for the meeting, page limits for executive summaries, and reduction of annexes. In addition to speeding the process, these reforms have also reduced the number of pages that get filed and that must therefore (at great expense) be translated and sent to panellists. In a related initiative, in 2010 the WTO developed a digital database of information on all prior panel and appellate cases. The database is intended to facilitate research and access to dispute settlement reports and related documents.

## Use of the Dispute Settlement Understanding

In the pages that follow, we review the descriptive statistics of DSU cases. Before examining the numbers, it should first be stressed that the arithmetic of dispute settlement can be peculiar. The unit of measurement in all that follows is the complaint, the first formal step that a member – and sometimes a group of members acting in concert – will take in a case against another member. Not all complaints will be pursued through every stage of the process, from the filing of that motion to the formation of a panel, the release and adoption of that panel's report and (if either or both parties appeal the results) review by the Appellate Body. The mortality rate for cases is actually quite high, especially at the early stages of life. From 1995 to 2011, there were 427 requests for consultation, but only 232 of these cases led to a decision to establish a panel. This means either that the petitioner and the respondent were able to resolve the matter at this stage or that the petitioner (for whatever reasons) opted not to take the matter any further. In 29 of those 232 cases, the panel was never actually composed. Of the 204 cases in which a panel was formed, 96 matters led to mutually agreed solutions or to the withdrawal of complaints somewhere during the process, equal to 22.5 per cent of all complaints. In the end, only 146 panel reports were ultimately circulated, such that just over one third (34.2 per cent) of all cases went through the entire process from complaint through to the report.

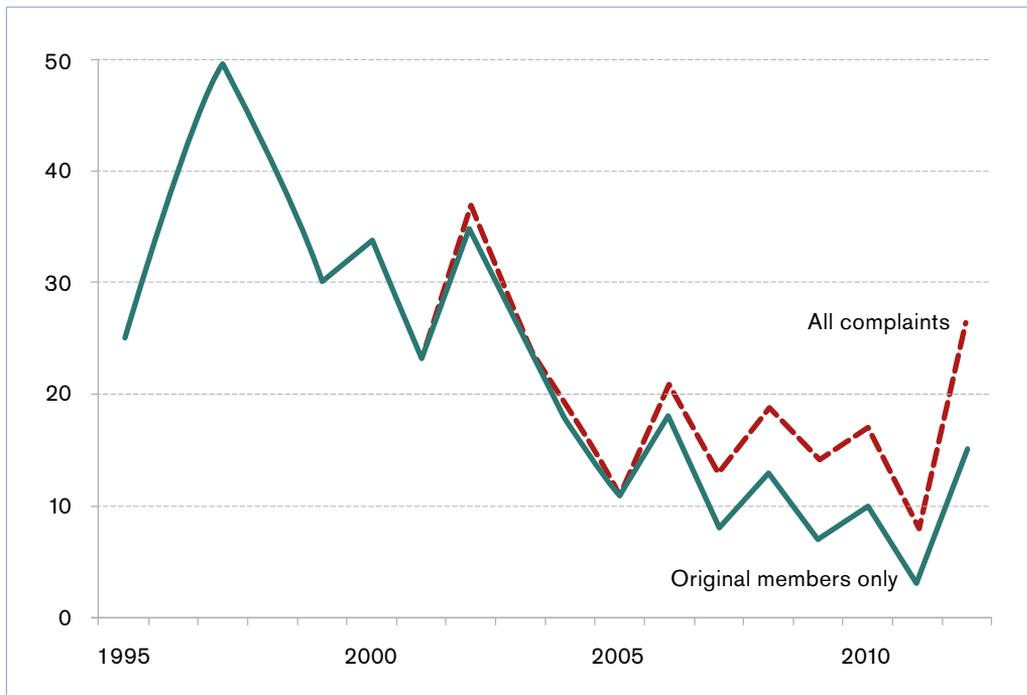
The numbers are further complicated by the multiplicity of cases that can be related to a single matter. Sometimes multiple members file a joint complaint against a single member, while in other instances more than one member files separate complaints against a member. In the latter instance, it is common for the complaints to be consolidated into a single case with a single panel. Sometimes one dispute will spawn others, especially if the complainant in the original case is dissatisfied with the steps that the respondent has taken to come into compliance with an unfavourable ruling. In the case of the European Union, it is also possible for one member to file several, similar complaints against more than one of its members, rather than a single complaint against the European Union as a whole. For all of these reasons, some matters loom larger in the statistics than do others. No effort has been made here to consolidate multiple proceedings into single cases, as there are simply too many reasons why apparently related matters will variously produce single or serial cases and no one decision rule can adequately compress them all. Readers should therefore be aware that, as is so often the case in reviews of descriptive statistics, the numbers reported below are best seen as a general representation of broad trends rather than a mathematically precise representation of reality.

It must also be stressed that no effort is made here to weight cases according to either their economic value or their legal significance. It is quite evident that some cases do involve larger flows of trade than do others. If one were to total all the billions of dollars and euros that have been at stake in the dispute between Boeing and Airbus, for example, the result might outweigh the combined value of most of the other cases that have been brought to the DSB. By the same token, some cases are more significant than others for the issues that are at stake and the precedents that might be set. Space does not permit a detailed analysis of such distinctions here.

### *The declining pace of complaints*

With those caveats in mind, we start from the observation that complaints have trended downwards since the early years in the WTO period. This can be appreciated from the data illustrated in Figure 7.1, which show that the complaints peaked in 1997 and declined sharply thereafter. In rough numbers, the level of disputes in the WTO started at an average of just over three complaints per month from 1995 to 2000, then fell to just under two per month from 2001 to 2006, and dropped still further to about one every five weeks from 2007 to 2012. Put another way, there were nearly as many complaints lodged in the six years from 1995 to 2000 as in the 12 years from 2001 to 2012. The decline is still greater if one focuses solely on cases brought by or against the countries that were original WTO members, and thus exclude the cases involving countries that acceded to the WTO. If we examine only the cases in which the original WTO members were the respondents or were among the complainants, and thus compare apples to apples, the rate at which complaints are filed fell from an average of 36.5 per year from 1995 to 2000 to 9.2 per year from 2007 to 2012. Acceding members Ukraine, Viet Nam and, above all, China have accounted for growing shares of the disputes, both as complainant and as respondents. They have taken up much of the slack that has set in among the original members.

**Figure 7.1. Complaints brought under the DSU, 1995-2012**



Source: Tabulated 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: "Original members only" excludes any cases in which the respondent or a sole complainant was a member that acceded to the WTO in 1996-2012.

The data also show a sharp jump in the number of complaints filed in 2012, almost half of them being brought by or against members that acceded since 1995 (especially China). That leap was so large as to require a reallocation of resources in the WTO Secretariat to handle the higher caseload. At the time of writing, it is far too early to know whether that one year represents an anomaly or the start of a new trend. For the time being, we may provisionally treat it as part of a longer period in which, on average, the amount of litigation is notably lower than it had been in earlier periods. In the statistical survey that follows, the numbers for 2012 are treated as part of the 2007 to 2012 period, and the data show that filings during those six years were, on the whole, below those for either of the previous six-year periods.

At least two reasons may be cited for this decline in litigation. As reviewed below, one is the much slower pace at which the European Union and the United States bring complaints against one another. That observation may only beg the question, however, as it is not immediately clear why these two largest members have been less active litigants. Another reason helps to explain why other members bring fewer cases against these two members: there has been a slowdown in the level of anti-dumping activity, both by them and by others, which has affected one of the principal causes for the complaints brought against Brussels and Washington.

### *Who brings complaints against whom*

Not all WTO members bring complaints to the DSB, or are complained against in that body. Fully 44 members of the WTO, or close to one third of the total membership, did not participate in a dispute settlement case in any capacity from 1995 to 2012 (see the data on countries' participation in Appendix 7.2). Another 35 members participated exclusively as third parties in at least one dispute settlement case in which they were neither a complainant nor a respondent. In some instances, they did so because of an identifiable national interest in the matter, and in some instances because they followed the advice of the WTO Secretariat that it is good to participate as a third party so as to get some practical experience in how disputes are conducted. China, for example, was a third party in 92 cases through 2012, a step it took in part to provide training for its officials. One side-effect of that decision is that it contributed to the paucity of Chinese citizens serving on panels. In sum, precisely half of the 158 total members had either little or no experience in the DSU.

The Quad (Canada, the European Union, Japan and the United States) accounts for the largest number of cases, so that is where we should look first for the explanation behind the decline. Here the logic of a tit-for-tat approach is compelling. If member A brings a complaint against member B, there is a fair chance that member B will respond in kind. Conversely, if the pace of member A's complaints against member B declines, the result may be multiplied by a reciprocal reduction in complaints from member B. That would appear to have been the case, for example, in the declining pace of litigation between the European Union and the United States. As shown in Table 7.2, the number of complaints that these two members brought against one another moved approximately in tandem across three periods, having been reciprocally high from 1995 to 2000 and then declining to a reciprocally low pace by 2007 to 2012.

**Table 7.2. Participation of the European Union and the United States in WTO dispute settlement cases, 1995-2012**

	1995-2000	2001-2006	2007-2012	Total
<b>EU-US cases</b>	<b>46 (21.0%)</b>	<b>15 (11.0%)</b>	<b>3 (3.1%)</b>	<b>64 (14.1%)</b>
EU complaints against United States	22 (10.0%)	9 (6.6%)	1 (1.0%)	32 (7.0%)
US complaints against the European Union	24 (11.0%)	6 (4.4%)	2 (2.0%)	32 (7.0%)
<b>Cases against other members</b>	<b>77 (35.2%)</b>	<b>22 (16.1%)</b>	<b>27 (27.6%)</b>	<b>126 (27.8%)</b>
EU complaints against other members	33 (15.1%)	12 (8.8%)	10 (10.2%)	55 (12.1%)
US complaints against other members	44 (20.1%)	10 (7.3%)	17 (17.3%)	71 (15.6%)
<b>Cases brought by other members</b>	<b>47 (21.5%)</b>	<b>57 (40.6%)</b>	<b>37 (37.8%)</b>	<b>141 (31.1%)</b>
Complaints against the European Union	19 (8.7%)	20 (14.6%)	15 (15.3%)	54 (11.9%)
Complaints against the United States	28 (12.8%)	37 (26.0%)	22 (22.4%)	87 (19.2%)
<b>EU/US involvement as third parties</b>	<b>18 (8.2%)</b>	<b>16 (11.7%)</b>	<b>15 (15.3%)</b>	<b>49 (10.8%)</b>
European Union alone in non-US cases	2 (0.9%)	1 (0.7%)	3 (3.1%)	6 (1.3%)
United States alone in non-EU cases	6 (2.7%)	3 (2.2%)	1 (1.0%)	10 (2.2%)
Both European Union and United States	10 (4.6%)	12 (8.8%)	11 (11.2%)	33 (7.3%)
<b>Total EU and/or US involvement</b>	<b>188 (85.8%)</b>	<b>110 (80.3%)</b>	<b>82 (83.6%)</b>	<b>380 (83.7%)</b>
As complainants and/or respondents	170 (77.6%)	94 (68.6%)	67 (68.4%)	331 (72.9%)
As Third Parties	18 (8.2%)	16 (11.7%)	15 (15.3%)	49 (10.8%)
<b>Cases with no EU or US involvement</b>	<b>31 (14.2%)</b>	<b>27 (19.7%)</b>	<b>16 (16.3%)</b>	<b>74 (16.3%)</b>
<b>Total cases</b>	<b>219 (100.0%)</b>	<b>137 (100.0%)</b>	<b>98 (100.0%)</b>	<b>454 (100.0%)</b>

Source: Tabulated 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: Based on the year in which a formal complaint is lodged. Data for the European Union include those cases in which the European Union as a whole acts as well as cases involving individual EU member states as respondents. EU member states have never been sole complainants. Some cases in which the European Union and/or the United States are complainants, whether against one another or third parties, also involve one or more other WTO members as complainants.

Perhaps most remarkable, and least coincidental, is the fact that the total number of complaints that the European Union brought against the United States was, at 32, precisely equal to the total number of cases that the United States brought against the European Union. The cases that these two members brought against one another accounted for over one fifth of the total in the first six years of the WTO's existence. This share was roughly halved in the next six-year period, and cut much more in the one after that. In absolute terms, the fall-off in filings was even greater. From 1995 to 2000, one of these two largest members brought a complaint against the other almost once every six weeks, but by 2007 to 2012 they were doing so only once every two years. All other things being equal, if these two members had brought as many cases against one another from 2007 to 2012 as they had from 1995 to 2000, the total number of complaints lodged in the WTO in the latter period would have been 140 rather than 98. These 42 "missing" EU-US cases explain about one third of the reduction in WTO litigation.

While the United States and the European Union bring fewer cases against one another, that does not mean that they are less active in litigation overall. Taken together, these two major members have been involved with 80 per cent to 85 per cent of all dispute settlement cases throughout the WTO period, but over time their involvement has shifted from transatlantic cases (comprising 21.0 per cent of the total from 1995 to 2000 versus 3.1 per cent from 2007 to 2012) and against third parties (35.2 per cent from 1995 to 2000 versus 27.8 per cent from

2007 to 2012) to a rising share as third-party interveners in other members' disputes (8.2 per cent from 1995 to 2000 versus 15.5 per cent from 2007 to 2012). Another major shift in the direction of disputes has been a reorientation from transatlantic to transpacific cases. A turning point came in March 2004, when the United States filed its first dispute settlement complaint against China. Prior to that, 17.2 per cent of all dispute settlement cases in the WTO were direct confrontations between the United States and the European Union (in either direction). Between then and the end of 2012, complaints that the United States brought against China or (less often) vice versa have accounted for 11.4 per cent of all cases.

### *The subject matter of complaints by topic and agreement*

What are the predominant issues in WTO dispute settlement cases? As was already pointed out in Chapter 2, the introduction of new issues into the system has not had as large an impact on disputes as one might expect. As shown in Table 7.3, traditional issues involving trade in goods still account for the great majority of cases. With the trade-remedy laws producing over one third of all complaints, and issues affecting trade in agricultural and non-agricultural goods each accounting for just over one quarter of the complaints, these three topics collectively produced 88 per cent of all cases in the first 18 years of the WTO.

The subject matter varies according to the respondent. The single largest source of complaints from 1995 to 2012 was the trade-remedy laws of the United States, especially the anti-dumping law; over one in six of all cases concerned this one member and issue. The second-highest cause of complaint was the agricultural policy in the European Union. These two subjects thus represent real continuity with the pattern of disputes in the GATT period. China was not a member from 1995 to 2000 and was engaged in few disputes from 2001 to 2006, but was a frequent target of complaints by 2007 to 2012. The largest number of complaints against China in that later period concerned trade in non-agricultural goods, accounting for one in nine of all WTO disputes in the most recent six-year period. The large group of "other developing countries" (i.e. all but China) were the respondents in just over one third of all cases, divided almost equally between those involving trade-remedy cases, agricultural goods and non-agricultural goods. Just four countries – Argentina, India, the Republic of Korea and Mexico – were the respondents in over two fifths of these cases.

The subject matter of cases can also be broken down according to specific agreements and, more precisely, the articles in those agreements that are cited in complaints. The data in Table 7.4 provide only a glimpse of the total picture here, presenting the statistics on a selected number of the provisions that have been at issue. One interesting observation is that more cases are based on grounds of national treatment than on MFN treatment, a pattern that holds true for both the goods sector (there are more cases citing GATT Article III than GATT Article I) and the services sector (there are more cases citing GATS Article XVII than GATS Article II). The data also show how cases involving market access for goods have greatly outnumbered those for access in services sectors. It is no surprise that the trade-remedy laws are frequent causes of complaint, but there are actually more complaints concerning members' alleged shortcomings with respect to the publication and administration of trade regulations (generally as a supplementary complaint on some other matter) than any single provision of the trade-remedy laws.

**Table 7.3. WTO dispute settlement cases by subject matter and respondent, 1995-2012**

	1995-2000	2001-2006	2007-2012	Total
<b>Trade-remedy and related</b>	<b>57 (26.0%)</b>	<b>69 (50.3%)</b>	<b>31 (31.6%)</b>	<b>157 (34.6%)</b>
China	–	0 (0.0%)	6 (6.1%)	6 (1.3%)
European Union	3 (1.4%)	6 (4.4%)	4 (4.1%)	13 (2.9%)
United States	29 (13.2%)	37 (27.0%)	13 (13.3%)	79 (17.4%)
Other developed	2 (0.9%)	2 (1.5%)	0 (0.0%)	4 (0.9%)
Other developing	23 (10.5%)	24 (17.5%)	8 (8.2%)	55 (12.1%)
<b>Non-agricultural goods</b>	<b>64 (29.2%)</b>	<b>29 (21.2%)</b>	<b>29 (39.6%)</b>	<b>122 (26.9%)</b>
China	–	4 (2.9%)	11 (11.2%)	15 (3.3%)
European Union	10 (4.6%)	8 (5.8%)	5 (5.1%)	23 (5.1%)
United States	12 (5.5%)	4 (2.9%)	2 (2.0%)	18 (4.0%)
Other developed	11 (5.0%)	2 (1.5%)	2 (2.0%)	15 (3.3%)
Other developing	31 (14.2%)	11 (8.0%)	9 (9.2%)	51 (11.2%)
<b>Agricultural goods</b>	<b>58 (26.5%)</b>	<b>37 (27.0%)</b>	<b>26 (26.5%)</b>	<b>121 (26.7%)</b>
China	–	0 (0.0%)	3 (3.1%)	3 (0.7%)
European Union	18 (8.2%)	12 (8.8%)	6 (6.1%)	36 (7.9%)
United States	4 (1.8%)	3 (2.2%)	8 (8.2%)	15 (3.3%)
Other developed	11 (5.0%)	8 (5.8%)	1 (1.0%)	20 (4.4%)
Other developing	25 (11.4%)	14 (10.2%)	8 (8.2%)	47 (10.4%)
<b>Intellectual property rights</b>	<b>20 (9.1%)</b>	<b>1 (0.7%)</b>	<b>7 (7.1%)</b>	<b>28 (6.2%)</b>
China	–	0 (0.0%)	2 (2.0%)	2 (0.4%)
European Union	9 (4.1%)	0 (0.0%)	2 (2.0%)	11 (2.4%)
United States	1 (0.5%)	1 (0.7%)	0 (0.0%)	2 (0.4%)
Other developed	4 (1.8%)	0 (0.0%)	3 (3.1%)	7 (1.5%)
Other developing	6 (2.7%)	0 (0.0%)	0 (0.0%)	6 (1.3%)
<b>Services</b>	<b>7 (3.2%)</b>	<b>1 (0.7%)</b>	<b>4 (4.1%)</b>	<b>12 (2.6%)</b>
China	–	0 (0.0%)	4 (4.1%)	4 (0.9%)
European Union	3 (1.4%)	0 (0.0%)	0 (0.0%)	3 (0.7%)
United States	0 (0.0%)	1 (0.7%)	0 (0.0%)	1 (0.2%)
Other developed	2 (0.9%)	0 (0.0%)	0 (0.0%)	2 (0.4%)
Other developing	2 (0.9%)	0 (0.0%)	0 (0.0%)	2 (0.4%)
<b>Other</b>	<b>13 (5.9%)</b>	<b>0 (0.0%)</b>	<b>1 (1.0%)</b>	<b>14 (3.1%)</b>
China	–	0 (0.0%)	0 (0.0%)	0 (0.0%)
European Union	5 (2.3%)	0 (0.0%)	0 (0.0%)	5 (1.1%)
United States	4 (1.8%)	0 (0.0%)	0 (0.0%)	4 (0.9%)
Other developed	2 (0.9%)	0 (0.0%)	0 (0.0%)	2 (0.4%)
Other developing	2 (0.9%)	0 (0.0%)	1 (1.0%)	3 (0.7%)
<b>Total</b>	<b>219 (100.0%)</b>	<b>137 (100.0%)</b>	<b>98 (100.0%)</b>	<b>454 (100.0%)</b>
China	–	4 (2.9%)	26 (26.5%)	30 (6.6%)
European Union	48 (21.9%)	26 (19.0%)	17 (17.3%)	91 (20.0%)
United States	50 (22.8%)	46 (33.6%)	23 (23.5%)	119 (26.2%)
Other developed	32 (14.6%)	12 (8.8%)	6 (6.1%)	50 (11.0%)
Other developing	89 (40.6%)	49 (35.7%)	26 (26.5%)	164 (36.1%)

Source: Tabulated 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: Data for the European Union include the group as a whole as well as its individual EU member states. Cases are listed according to the first category shown here into which they fall. Anti-dumping cases involving agricultural products, for example, are counted here in the trade-remedy category rather than agriculture, just as the cases involving bananas are classified as agricultural rather than services disputes.

**Table 7.4. Frequency with which selected provisions of WTO agreements are at issue in dispute settlement cases, 1995-2012**

	1995-2000	2001-2006	2007-2012	Total
<b>Non-discrimination</b>				
National treatment (GATT Art. III)	68 (31.1%)	41 (29.9%)	10 (10.2%)	149 (32.8%)
MFN treatment (GATT Art. I)	59 (26.9%)	36 (26.3%)	24 (24.5%)	119 (26.2%)
Services: National treatment (GATS Art. XVII)	9 (4.1%)	3 (2.2%)	6 (6.1%)	18 (4.0%)
Services: MFN treatment (GATS Art. II)	9 (4.1%)	1 (0.7%)	1 (1.0%)	11 (2.4%)
<b>Market access and related</b>				
Quantitative restrictions (GATT Art. XI)	57 (26.0%)	26 (19.0%)	24 (24.5%)	107 (23.6%)
Schedule of concessions (GATT Art. II)	42 (19.2%)	26 (19.0%)	17 (17.3%)	85 (18.7%)
Agriculture: Market access (Art. 4)	31 (14.2%)	13 (9.5%)	6 (6.1%)	50 (11.0%)
Import Licensing: Non-automatic licensing (Art. 3)	22 (10.0%)	5 (3.6%)	4 (4.1%)	31 (6.8%)
Customs Valuation (GATT Article VII)	9 (4.1%)	3 (2.2%)	5 (5.2%)	17 (3.7%)
Services: Market access (Art. XVI)	7 (3.2%)	1 (0.7%)	6 (6.1%)	14 (3.1%)
<b>Trade-remedy laws and subsidies</b>				
Anti-dumping and countervailing (GATT Art. VI)	21 (9.6%)	44 (32.1%)	25 (25.5%)	90 (19.8%)
Anti-dumping: Determination of dumping (Art. 2)	25 (11.4%)	27 (19.7%)	16 (16.3%)	68 (15.0%)
Anti-dumping: Evidence (Art. 6)	24 (11.0%)	25 (18.2%)	16 (16.3%)	65 (14.3%)
Anti-dumping: Initiation and investigation (Art. 5)	23 (10.5%)	26 (19.0%)	12 (12.2%)	61 (13.4%)
Anti-dumping: Determination of injury (Art. 3)	24 (11.0%)	24 (17.5%)	12 (12.2%)	60 (13.2%)
SCM: Prohibited subsidies (Art. 3)	24 (11.0%)	18 (13.1%)	13 (13.3%)	55 (12.1%)
Anti-dumping: Imposition and collection (Art. 9)	11 (5.0%)	20 (14.6%)	15 (15.3%)	46 (10.1%)
<b>Other</b>				
Publication and administration of trade regulations (GATT Art. X)	35 (16.0%)	37 (27.0%)	28 (28.6%)	100 (22.0%)
TBT: Technical regulations (Art. 2)	23 (10.5%)	9 (6.6%)	11 (11.2%)	43 (9.5%)
SPS Measures: Basic rights and obligations (Art. 2)	17 (7.8%)	12 (8.8%)	10 (10.2%)	39 (8.6%)
SPS Measures: Assessment of risk (Art. 5)	17 (7.8%)	11 (8.0%)	10 (10.2%)	38 (8.4%)

Source: Tabulated 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: Data for the European Union include those cases in which the European Union as a whole acts as well as cases involving its member states. The table does not include references to those articles of agreements that concern the incorporation of commitments in schedules and agreements, such as WTO Article XVI:4 or Article 3 of the Agreement on Agriculture, or those that cover an agreement broadly (e.g. Article 1 of the Anti-Dumping Agreement).

Filings also vary according to the complainant, and here there are some important differences in the approaches that the developed and developing countries take. Bown (2009) examined cases according to the level of "observability" in the measure that a complainant alleged to be WTO-inconsistent, ranging in a four-part spectrum from the most obviously observable measures (i.e. anti-dumping and countervailing duty orders) to the least observable (e.g. subsidies, other domestic measures, and export restrictions). He found two interesting patterns in the data. The first was that the European Union and the United States concentrate on the less observable measures, with the bulk of the complaints that they filed from 1995 to 2008 being directed against those of low or medium observability. This would suggest their use of the DSU as a means of defining the scope of countries' commitments, including the

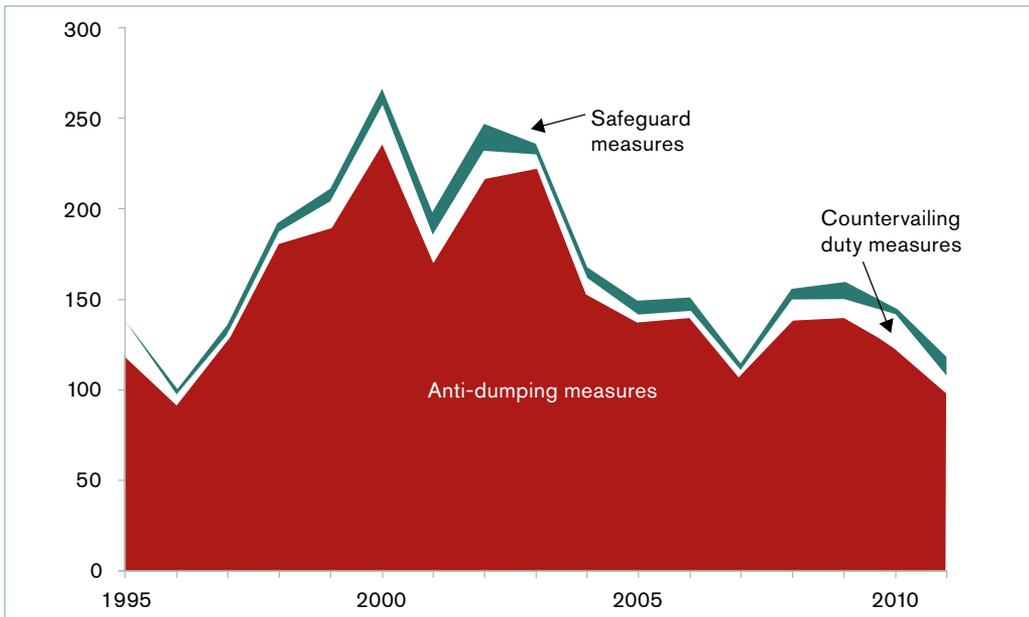
resolution of ambiguities in the “grey zones”. That is one way of using litigation as a follow-up to negotiation. By contrast, developing countries were more likely to file complaints in cases involving measures in either the “obvious” or medium levels of observability. Their use of the DSU tends to focus less on systemic objectives than on the need to address specific irritants that arise in their trade relations with specific partners.

### *Disputes about disputes: cases based on trade remedies*

As noted above, fully one third of all dispute settlement cases concern the anti-dumping (AD), countervailing duty (CVD) and safeguard laws. These are collectively termed the trade-remedy laws, although they might alternatively be called the unfair trade laws<sup>18</sup> (a designation with double meaning) or mechanisms of contingent protection. Each of them allows the temporary imposition of restrictions on imports: AD orders may be imposed to compensate for the degree to which goods are sold at less than fair value, CVDs may be imposed to correct for subsidies, and safeguards allow for the imposition of tariffs on imports that cause serious injury to domestic industries. No matter what one chooses to call these laws, they were a major means by which developed countries and a few developing ones restricted imports in the GATT period, and have come to be employed more frequently by developing countries in the WTO period. That rise in use by the developing countries can be attributed in part to the restrictions that were placed in the Uruguay Round on their recourse to the balance-of-payments provisions in GATT Articles XII and XVIII:B.<sup>19</sup> With their access to those protections now constrained by the terms of the Understanding on the Balance-of-Payments Provisions of GATT 1994, and also with an increase in their own level of imports (especially from other developing countries), they have fallen back on other means of dealing with injurious and allegedly unfair imports. It may also be attributed in part to the “blowback” that followed some countries’ liberalization at the wholesale level (by freeing up exchange rates) and at the retail level (in sectors that had previously been restricted).

The number of disputes arising as a result of trade-remedy cases generally tracks the actual use of these laws. As can be seen from the data in Table 7.3, the number of WTO disputes in this category rose from 57 from 1995 to 2000 to 69 from 2001 to 2006 before declining to 31 from 2007 to 2012. That is roughly the same pattern that one can see in Figure 7.2. Combining these three types of measures together, WTO members went from taking action an average of 155.4 times per year from 1995 to 1999 to 223.4 per year from 2000 to 2004 (a 43.8 per cent increase), but by 2005 to 2009 the average had fallen to 146.2 (5.9 per cent below the 1995 to 1999 level). That pattern of rising and then falling usage held true for all three types of measures. The data thus confirm the general expectation that activity in the DSB will reflect activity in the world outside.

**Figure 7.2. Measures taken by WTO members under the trade-remedy laws, 1995-2011**



Sources: Calculated from WTO data posted at [www.wto.org/english/tratop\\_e/adp\\_e/AD\\_MeasuresByRepMem.xls](http://www.wto.org/english/tratop_e/adp_e/AD_MeasuresByRepMem.xls) (antidumping), [www.wto.org/english/tratop\\_e/scm\\_e/scm\\_e.htm](http://www.wto.org/english/tratop_e/scm_e/scm_e.htm) (countervailing duties), and [www.wto.org/english/tratop\\_e/safeg\\_e/SG-Measures\\_By\\_Reporting\\_Member.xls](http://www.wto.org/english/tratop_e/safeg_e/SG-Measures_By_Reporting_Member.xls) (safeguards).

The more intriguing and complex question is whether this dual decline suggests causation in one direction or the other. That is, do we have fewer complaints in the DSB because the number of trade-remedy cases is down, or have trade-remedy cases declined because of rulings made in the DSB? Space does not permit an exhaustive review of this question, but the descriptive statistics presented below offer a reasonably strong *prima facie* case that action under the safeguard laws has been dampened by the operation of the DSU, and especially for the invocation of safeguards by developed countries. In the case of the anti-dumping and countervailing duty laws, however, the data seem to imply that it is the use of those laws that drives the number of disputes more than the other way around.

### **Anti-dumping and countervailing duty laws**

The AD law is by far the most utilized of the trade-remedy statutes, both by developed and developing countries. The data in Appendix 7.3 summarize the use of this mechanism by 11 selected WTO members during the late GATT and WTO periods. The actual level of orders imposed by these countries was almost identical in the two periods. If we leave China out of the equation, considering the fact that it did not even have an AD law prior to 1997, the countries shown in the table took action 98.5 times per year from 1989 to 1994 and 98.6 times per year from 1995 to 2010. When China is added the rate in the WTO period rises to 107.7 per year. The

distribution of that action changed significantly, however, with the four developed countries imposing 89.8 per cent of the orders in the late GATT period but just 38.7 per cent in the WTO period. All of the developed countries in the table experienced a decline in the annual rate of AD filings and orders. In the case of the European Union, for example, the rate of filing declined from 36.7 per year from 1989 to 1994 to 26.0 from 1995 to 2010, and the rate of orders imposed fell from 20.7 to 15.4 in the same periods. Both rates also declined for Australia, Canada and the United States. Rates also fell for Mexico, but that country offers the exception that proves the rule: all of the other developing countries saw their rates rise for filing and (in most cases) the imposition of orders.

That rise was especially high for China and India. After inaugurating its law in 1997, China became the fifth-largest user of this mechanism in the WTO period. India went from being one of the least-frequent users of the AD law in the late GATT period to the most frequent in the WTO period. The rising use of AD laws by the developing countries “was absolutely predictable”, in the view of Stuart Harbinson. He had handled AD negotiations for Hong Kong in the Uruguay Round, when the developed countries retained this option for themselves – and hence for everyone – while dampening the use of other protective mechanisms that had previously been favoured by the developing countries. “There had been a concerted series of actions by the developed users of AD against emerging economies and the latter had learned the lesson. But the developed users still refused to countenance the need for serious reform.”<sup>20</sup> The net result was not so much the removal as the redirection of protectionist initiatives.

The raw data offer mixed messages on the effect that the Uruguay Round agreements had on countries’ recourse to the AD laws. It is possible that the disciplines imposed by the Anti-Dumping Agreement (more formally the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994) explain part of the decline in developed countries’ use of the law. The ban on “voluntary” export restraints (VERs) in the Agreement on Safeguards might also indirectly suppress AD activity in the United States, to the extent that it forestalls the once-favoured tactic of flooding the system with AD and CVD petitions in hopes of forcing the overextended investigators to seek VERs instead. In the case of the developing countries, however, the reform of the balance-of-payments provisions may (for reasons already discussed) have had the unintended consequence of shifting activity to AD laws. It is also worth highlighting that whatever else may have been achieved by the Anti-Dumping Agreement, petitioners have actually been more successful after the Uruguay Round than they were before it. The data show that in the average country less than half (47.1 per cent) of the AD petitions filed in the late GATT period resulted in the imposition of orders, but that over three fifths (62.7 per cent) of them were successful from 1995 to 2010. That rate of success rose in both developed and developing countries.

For our present purposes, the most notable statistics in the table concern the share of the AD orders that ended up being challenged under the DSU. Despite the fact that trade-remedy cases are the single largest source of complaints, in the WTO period just 3.9 per cent of all AD orders imposed by these ten members have been challenged in this way. That is actually a considerable increase from the late GATT period, when only 0.8 per cent were challenged, but still means that a successful petitioner under one of these laws had less than one chance in

25 of facing the additional cost and uncertainty of having to defend (or rely upon the government to defend) their victory in the DSB. This one statistic casts serious doubt on the expectation that the new dispute settlement rules may have dampened activity under the AD law.

That observation needs further qualification in the case of the United States, and on two grounds. One is that a much higher share of AD orders imposed by the United States get challenged. Only 1.4 per cent of the US orders were brought to dispute settlement in the late GATT period, but precisely ten times that share have been challenged in the WTO. Second, some of the findings in WTO dispute settlement cases have led to major changes in US trade-remedy law. One example is the Byrd Amendment, a 2000 statute under which the revenue raised in AD or CVD cases would be directed to the aggrieved industry. This law, which greatly incentivized filings, was ruled WTO-illegal by a dispute settlement panel in September 2002. While the US Congress did not actually repeal the amendment until February 2006 (and even then the Byrd Amendment remained in effect until 1 October 2007) that ruling demonstrated that congressional tinkering with the trade-remedy laws was subject to WTO review. The same may be said for another finding in April 2004 against the US practice of “zeroing”, in which negative dumping margins are eliminated from the dumping calculation. It once again took years for the United States to come into compliance with the ruling, with the Department of Commerce announcing in February 2012 that it would generally end the practice of zeroing not just for AD investigations but also in administrative reviews of existing orders.

The net effect is thus mixed. In the case of the United States, one might argue that the correlation moves in both directions: there are fewer cases brought to the DSU because there have been fewer AD petitions and orders, and there may be fewer petitions filed because some of the more important cases decided in the DSB have forced changes in US law. For the WTO membership as a whole, however, the data show an increased success rate for petitioners, no net reduction in the number of AD orders imposed, and a low rate at which AD orders are challenged in the DSU. Action under these laws declined after 2003, and so therefore did the number of DSB cases concerning these laws, but it is difficult to argue that the net effect of the Uruguay Round agreements was to suppress the use of the AD law.

The CVD laws are not nearly as consequential as the AD laws. The average number of CVD orders imposed by the nine WTO members shown in Table 7.5 was, at 8.1 per year, well below the level of AD action. Unfortunately the data are not nearly as complete for these laws as they are for their AD counterpart, and hence it is difficult to make the same sort of comparisons over time. It is, however, notable that while countries use the CVD law less frequently, when they do use it they are more likely to be challenged in the DSU. Fully one fifth of the orders imposed by these countries have been brought to dispute settlement. One might speculate that this higher challenge rate may be attributed to the fact that CVD orders are aimed at the unfair trade practices of governments versus the unfair trade practices of firms that are at issue in AD cases. The United States is the largest user of this law, accounting for nearly half (47.7 per cent) of all cases, and over one quarter of the CVD orders imposed by the United States have been challenged. The observations made above on the impact of the Uruguay Round agreements and the DSU on AD activity in the United States generally apply, *mutatis mutandis*, to the CVD law as well.

**Table 7.5.** Use of countervailing duties by selected members and related dispute-settlement cases in WTO, 1995-2011

	<b>Cases initiated</b>	<b>Orders imposed</b>	<b>Leading to orders (%)</b>	<b>Challenged in WTO</b>	<b>Orders challenged (%)</b>
Argentina	3	3	100.0	2	66.7
Australia	13	4	30.8	0	0.0
Brazil	3	2	66.7	2	100.0
Canada	25	17	68.0	0	0.0
Chile	6	2	33.3	0	0.0
China	4	4	100.0	2	50.0
European Union	57	30	52.6	2	6.7
South Africa	13	5	38.5	0	0.0
United States	113	63	55.8	18	28.6
<b>Total</b>	<b>237</b>	<b>130</b>	<b>54.9</b>	<b>26</b>	<b>20.0</b>
<b>Rate per year</b>	<b>14.8</b>	<b>8.1</b>		<b>1.6</b>	

Sources: Chad P. Bown "Global Antidumping Database", available at <http://econ.worldbank.org/ttbd/gad/>; WTO cases tabulated from Chad P. Bown available at <http://econ.worldbank.org/ttbd/dsud/>.

Notes: Based on the year in which a formal complaint is lodged. The 1995 starting date is dictated by the availability and consistency of data of the major users listed.

### *Safeguards*

Safeguards are the one form of trade-remedy law that seems to be most affected by the Uruguay Round agreements and the DSU. That is true at least for the invocation of this law by developed countries, a practice that has nearly disappeared since early in the WTO period. The reason here is simple: challenges to members' invocation of the safeguard law have invariably succeeded, to the point where prospective petitioners in the developed countries see little benefit to utilizing this option.

The key distinction to be drawn here is between the developed and the developing countries, as these two groups face very different levels of challenge. As can be seen from the data in Table 7.6, safeguard cases have been initiated during the WTO period in all four Quad members, but only in the European Union and the United States did these lead to the actual imposition of restrictions on imports. All but one of the nine EU and US safeguard actions were then challenged in the DSB, and all eight challenges were successful. This has effectively meant the end of an instrument that has been a part of US trade law since 1942, when it first appeared in a bilateral agreement with Mexico, and was later incorporated directly into US law and GATT. The last time that the United States invoked the safeguards law was in 2001, when the Bush administration used it to restrict imports of steel. Fifteen other WTO members challenged those restrictions in eight separate complaints, and ever since the panel and the Appellate Body found against the United States in the consolidated case of *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, there have been no more safeguard petitions filed in that country.

**Table 7.6.** Use of global safeguard laws by selected members and related dispute settlement cases in the WTO, 1995-2012

	Cases initiated	Safeguards imposed	Leading to safeguards (%)	Challenged in WTO	Safeguards challenged (%)
<b>Quad</b>	<b>21</b>	<b>9</b>	<b>42.9</b>	<b>8</b>	<b>88.9</b>
United States	10	6	60.0	5	83.3
European Union	5	3	60.0	3	100.0
Canada	3	0	0.0	0	—
Japan	3	0	0.0	0	—
<b>All other</b>	<b>219</b>	<b>105</b>	<b>47.9</b>	<b>12</b>	<b>11.4</b>
India	28	12	42.9	0	0.0
Indonesia	18	10	55.6	0	0.0
Jordan	16	7	43.8	0	0.0
Turkey	16	13	81.3	1	7.7
Chile	13	7	53.8	5	71.4
Czech Republic	9	5	55.6	0	0.0
Philippines	9	7	77.8	0	0.0
Ukraine	9	2	22.2	0	0.0
Venezuela, Bolivarian Republic of	9	0	0.0	0	—
Rest of world	92	42	45.7	6	14.3
<b>Total</b>	<b>240</b>	<b>114</b>	<b>47.5</b>	<b>20</b>	<b>17.5</b>

Sources: Safeguard cases tabulated from <http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/0,,contentMDK:22574935~pagePK:64214825~piPK:64214943~theSitePK:469382,00.html>; WTO cases tabulated 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: Based on the year in which a formal complaint is lodged.

While safeguard actions in the Quad countries are almost invariably challenged, developing countries and smaller developed countries have generally been able to use this mechanism with impunity. Table 7.6 shows that only about one in ten (11.4 per cent) of the safeguards imposed by countries other than the Quad have led to complaints in the DSB. Trade lawyers seem unanimous in their opinion that panels interpret the Agreement on Safeguards in a way that makes it virtually impossible for a member to use this mechanism, but that point is rendered moot in those cases where the affected countries opt not to bring a complaint.

In addition to these global safeguard cases, 11 WTO members initiated at least one case each from 2001 to 2012 under a special safeguard mechanism that applies to imports from China. Only four of these countries appear<sup>21</sup> to have taken these cases all the way to final, affirmative injury determinations: the Dominican Republic (on lavatories and washbasins), India (on soda ash and aluminium flat rolled products and aluminium foil), Turkey (on float glass), and the United States (on tires). The last of these cases is the only one that led to a challenge by China in the DSB; both the panel and the Appellate Body found against China in its claims against the United States. The Chinese special safeguard is thus an exception to the general rule concerning the demise of safeguards, but it is limited in time. The terms of China's accession specified that this mechanism is to last for only 12 years, meaning that it will terminate at the end of 2013.

## The composition of dispute settlement panels and the Appellate Body

If it is judges who decide what the law is, we had best know more about who those panellists and Appellate Body members are. Panellists are usually selected from a roster that the Secretariat maintains but, if the parties cannot agree on the panellists within 20 days, either party may request that the director-general appoint them. From 1995 to 2012, there were 245 people serving on dispute settlement panels, often doing so for two or more panels. These individuals came from 61 different countries, many of them supplying just one or two panellists but others contributing as many as 12 (Chile), 15 (Switzerland), 16 (Australia) or 20 (both Canada and New Zealand).

Those contributions do not appear to be random, however, as they are heavily influenced by two determinants. One is a simple matter of practicality: because of the need to avoid undue influence, panellists never come from countries that are parties to a dispute. The frequency with which a WTO member is a party to disputes is inversely related to the extent of its nationals' service as panellists.<sup>22</sup> The European Union is often a complainant or a respondent, and even when it is not directly involved it may well be a third party (see Table 7.2). One consequence of this litigiousness is that EU citizens rarely serve on panels. From 1995 to 2012, there was only one panellist each from Austria, France, Germany, the Netherlands and Portugal. Only a few other EU member states have contributed more than that (1.6 per cent came from Sweden, 1.0 per cent from Belgium and 0.4 per cent from Italy); and several other EU member states have never contributed a single panellist. The United Kingdom and Ireland present partial exceptions to the general rule against panel service by EU nationals, being home to 1.4 per cent and 0.6 per cent, respectively, of all panellists. These are the only two common-law countries in the European Union. The other determinant, as suggested by the fact that three former British colonies rank at the top of that list of panellists' home countries, is an apparent bias towards one legal tradition. These two factors together make for a system that, at some risk of exaggeration, might best be described as one in which jurists from mid-sized countries that variously inherited their legal systems from Rome, Paris and especially London now sit in judgment of the European Union and other large members from North America and Asia.

The decision-rules by which panellists are chosen would appear to have a preference for those who come from countries in which English common law is the prevailing legal system. This point is evident from the data shown in Table 7.7. Thirteen of the WTO members that have supplied panellists are common-law countries. Despite the fact that these 13 comprise less than one twelfth of the total membership of the WTO they have contributed close to two fifths of all of the panellists. That disparity is even greater if one concentrates on six of them, including three developed countries (Australia, Canada and New Zealand) and two developing economies (Hong Kong, China; and India). These five members, collectively accounting for just 3.2 per cent of the WTO membership, were home to 28.3 per cent of all panellists from 1995 to 2012. Or to zero in on the single country from which the largest number of panellists have hailed, nearly one in ten of all panels have included a member – and not infrequently a chairman – from New Zealand. Twenty different New Zealanders served on panels during this period, one of them (Crawford Falconer; see Biographical Appendix, p. 577) 13 times. When they served they often chaired: eight of these twenty New Zealanders chaired at least one panel, and altogether they chaired no fewer than 18 of the 44 WTO dispute settlement panels on which they served from 1995 to 2012.

**Table 7.7. Nationality of WTO dispute settlement panellists, 1995-2012, in %**

	1995-2000	2001-2006	2007-2012	Total
<b>Common law legal systems</b>	<b>37.4</b>	<b>41.1</b>	<b>34.8</b>	<b>38.3</b>
New Zealand	10.6	8.3	6.7	9.1
Australia	6.9	8.9	4.5	7.2
Canada	6.0	2.8	12.4	6.0
India	2.8	5.0	0.0	3.1
Hong Kong, China	5.1	1.7	0.0	2.9
Other developing	2.3	7.2	11.2	5.7
Other developed	3.7	7.2	0.0	4.3
<b>Pluralist legal systems</b>	<b>9.6</b>	<b>9.5</b>	<b>15.7</b>	<b>10.7</b>
South Africa	4.1	5.6	5.6	4.9
Other developing	5.5	3.9	10.1	5.8
<b>Civil law or other legal systems</b>	<b>56.9</b>	<b>49.4</b>	<b>49.5</b>	<b>51.0</b>
Latin America	16.5	30.6	30.4	24.3
<i>Chile</i>	3.2	5.6	4.5	4.3
<i>Brazil</i>	5.5	2.8	3.4	4.1
<i>Other Latin American</i>	7.8	22.2	22.5	15.9
Switzerland	9.7	3.9	7.9	7.2
Other developed	21.6	10.0	5.6	13.9
Other developing	6.2	4.9	5.6	5.6
<b>Total</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>
<i>Memo:</i>				
<i>All developing</i>	42.7	58.9	62.9	52.4
<i>All developed</i>	57.3	41.1	37.1	47.6

Source: WTO Secretariat.

Notes: Percentage of panellists serving through September 2012 by country of citizenship; panellists counted for each panel on which they served. Other developing countries with common law legal systems from which panellists have come are Bangladesh, Jamaica, Malaysia, Pakistan and Singapore. Other developed countries with common law legal systems from which panellists have come are Ireland, the United Kingdom and the United States. Other developing countries with pluralist legal systems from which panellists have come are Israel, the Philippines and Thailand. Other Latin American countries from which panellists have come are Argentina, Colombia, Costa Rica, Ecuador, Mexico, Panama, Peru, Uruguay and the Bolivarian Republic of Venezuela. Other developed countries with civil law or other legal systems from which panellists have come are Austria, Belgium, Bulgaria, the Czech Republic, Finland, France, Germany, Hungary, Iceland, Italy, Japan, the Netherlands, Norway, Poland, Portugal, Slovenia and Sweden. Other developing countries with civil law or other legal systems from which panellists have come are China, Egypt, Indonesia, the Republic of Korea, Mauritius, Morocco, Chinese Taipei and Zambia.

What accounts for this disparity? We may start by considering the pool from which panellists are chosen. The Biographical Appendix to this book offers some guidance here, for while it is not explicitly intended as a guide to dispute settlement panellists, it does offer a sense of the types of people who are prominent in the multilateral trading system and therefore might be asked to serve on a panel. It is notable that many of the 93 people in the appendix for whom educational details are available went to school in North America or the United Kingdom, many of them to study law. Five are graduates of Harvard Law School, five from Michigan Law School, three from Georgetown Law School<sup>23</sup> and 11 from other US law schools. Two studied law in a British university and one in Canada. Taken together, 29.0 per cent of the leading figures in this field studied law in either North America or the United Kingdom. The pattern changes a bit if citizens

from Canada, the United Kingdom or the United States are excluded from this count. Of the 66 people from other countries for whom information is available, 13 (19.7 per cent) studied law in one of these three countries, and 23 others (34.8 per cent) studied a subject other than law in a North American or British university. Taken together, 37 out of 93 people (39.8 per cent) studied in the United States, 19 (20.4 per cent) did so in the United Kingdom and three (3.2 per cent) did so in Canada, such that nearly three out of four of the leading figures in the WTO have an alma mater in one of these three countries. In short, the Anglo-American origins of the GATT and WTO system are still reflected in the schooling of its leaders.

The same point emerges when we look to the key personnel in the WTO Secretariat's legal sections. Four people served as director of the Legal Affairs Division from 1995 to 2012, three of whom were either a Canadian or US citizen. Similarly, two of the three people who have served as director of the Appellate Body division came from Canada. North Americans held these two directorships for 25 of the 36 years between 1995 and 2012.

Countries with a civil (or code) law tradition accounted for over half of all panellists. Within this group, the Latin American countries are particularly active, providing nearly one quarter of all panellists (24.3 per cent) from 1995 to 2012, and close to half (44.5 per cent) of all panellists from countries without a common law system. The great majority of the remaining panellists came from European countries that either have not joined the European Union or were not EU members at the time that the panellists in question were serving. Switzerland is the most prominent non-EU member in this respect, having supplied 7.2 per cent of all panellists. It is reasonable to suppose that proximity is one of the factors accounting for the high frequency of Swiss jurists' participation. Other non-EU countries that contributed appreciable (although not very large) numbers of panellists include Norway (1.8 per cent) and Iceland (0.6 per cent). Several panellists came from countries that were in the process of accession to the European Union at the time of their service, but whose countries supplied few or no panellists after completing that process. From 1995 to 2000, for example, there were several panellists serving from the Czech Republic (3.7 per cent of all panellists in that period) and Poland (2.8 per cent), but both of these countries then acceded to the European Union in 2004. From 2007 to 2012, there were no Czech or Polish panellists. Similar patterns of pre- and post-accession activism can be found in the contributions of Bulgaria, Hungary and Slovenia to the pool of panellists.

The corresponding data for the individuals appointed to the Appellate Body show that common-law countries are not as heavily over-represented at this level. As shown in Table 7.8, less than one third of the Appellate Body members from 1995 to 2012 were from countries with common law legal systems. That connection is attenuated somewhat by the rule that members of this body are quite explicitly "unaffiliated with any government," although the membership is intended to "be broadly representative of membership in the WTO" (Article 17.1 of the Dispute Settlement Understanding). Perhaps more significantly, the educational background of the members of this body may have introduced common-law concepts by the back door. Of the 20 Appellate Body members for whom this information is available, no fewer than 15 either obtained degrees from or (in one case) served as a research fellow at a US law school, and two others received law degrees from UK universities. Altogether, 85.0 per cent of the Appellate Body members for

**Table 7.8. Nationality of Appellate Body members, 1995-2012**

	<b>Number</b>	<b>Share (%)</b>
<b>Citizens of countries with common law legal systems</b>	<b>12</b>	<b>30.8</b>
United States	5	12.8
India	3	7.7
Australia	2	5.1
New Zealand	2	5.1
<b>Citizens of countries with pluralist legal systems</b>	<b>5</b>	<b>12.8</b>
Philippines	3	7.7
South Africa	2	5.1
<b>Citizens of countries with civil law legal systems</b>	<b>22</b>	<b>56.4</b>
Japan	5	12.8
Egypt	4	10.3
Brazil	2	5.1
China	2	5.1
Germany	2	5.1
Italy	2	5.1
Uruguay	2	5.1
Belgium	1	2.6
Korea, Republic of	1	2.6
Mexico	1	2.6
<b>Total</b>	<b>39</b>	<b>100.0</b>
<i>Memo:</i>		
<i>All developing</i>	20	51.3
<i>All developed</i>	19	48.7

Source: Tabulated from data at [www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_members\\_descrp\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm).

Notes: Appellate Body membership calculated by the number of terms.

whom the information is available studied law in one of these two major countries in the common law tradition. In several cases, this came in later stages of their legal education, however, and thus may not have had the same formative impact as their original schooling.

This all begs the question, do these different legal traditions matter? Will a panellist or Appellate Body member who comes from a common law legal tradition approach the issues, the laws (national and international) and the implications of their rulings in a different manner than one from a code law tradition? At least one close observer of the process believed that this was the case in the late GATT period. Plank (1987: 81) observed how the differences between panellists' backgrounds could affect their approaches to individual cases and the system as a whole:

[T]here are those who are more “expansionist” in their legal interpretation. Looking at the general purposes of the specific provisions of the GATT, and the trend in GATT case law, they seek to adapt the provisions if necessary to new circumstances in the interest of trade creation and elimination of trade-distorting

measures. On the other hand, there are those who are more “strict constructionist”, carefully weighing the specific wording of the General Agreement. If this is ambiguous, they consider that it is not for jurisprudence to take over the job from the drafters.

It might be speculated that panellists who come from civil law countries may be more likely to concentrate on the specific terms of the laws and agreements that are in dispute, while those who either come from or were educated in common law countries might be more prone to supplement or even supplant this aspect of their deliberations by an eye on the precedents set in other cases considered by panels and the Appellate Body. Simply stated, a panellist or Appellate Body member with a common-law outlook may be more predisposed to consider how a given decision might contribute to or detract from the broader goals of the multilateral trading system. There is however no hard evidence one might cite to support or refute that hypothesis. The deliberations in panels and the Appellate Body are highly confidential, so it is not possible to interview jurists in the detail necessary to determine whether those from one set of countries appeared to approach cases from a different angle.

There are also several points that argue against the contention that the legal traditions of panellists may influence their manner of deliberation and the outcomes of their panels. One is that not all panellists are lawyers, meaning that the influence of these distinct traditions may not be transmitted to all of the individuals who actually serve. Another point is that the panels in the WTO period operate under a different set of rules than did their GATT predecessors, such that the observations that Plank made in 1987 may be more in the nature of an historical than a contemporary description. “The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system,” according to DSU Article 3.2, and it “serves to ... clarify the existing provisions of [WTO] agreements in accordance with customary rules of interpretation of public international law.” Some lawyers read this language as explicitly sanctioning a move away from the common law traditions that were prevalent in GATT jurisprudence, towards the alignment of WTO law with international law and its traditional stress on code law interpretation. Others see elements of common law in the rulings of the Appellate Body. “The reality of World Trade Organization (WTO) Appellate Body adjudication is that *stare decisis* operates in a *de facto*, but still not *de jure*, sense,” according to Bhala (1999: 151), referring to the key common law principle (i.e. “to stand by things decided”).

## Endnotes

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- 1 Smith did go on to note that when “there is no probability” that a retaliation can force a trading partner to open its market “it seems a bad method of compensating the injury done to certain classes of our people, to do another injury ourselves, not only to those classes, but to almost all the other classes of them.” See *The Wealth of Nations* Book IV, Chapter 2.
- 2 Author’s interview with Mr Supachai on 27 September 2012.
- 3 Author’s translation of the French original.
- 4 See, for example, Mshomba (2009: 46-59).
- 5 Consider the case of the United States. The US mission had just one attorney in the GATT period, and much of that person’s time was spent on matters other than disputes. As of 2013, the mission had three attorneys and two full-time support staff devoted entirely to dispute settlement. That is a level of commitment to disputes that most developing countries cannot afford.
- 6 The text of the Agreement Establishing the Advisory Centre on WTO Law is available at [www.acwl.ch/e/documents/agreement\\_estab\\_e.pdf](http://www.acwl.ch/e/documents/agreement_estab_e.pdf).
- 7 Author’s interview with Mr Harbinson on 24 January 2013.
- 8 Note that there are many exceptions to these general rules. If Australia has a free trade agreement with Chile, for example, it is not obliged to grant to Norway the concessions that it made to Chile.
- 9 The national-treatment obligation of GATT Article III applies only to the issues that are specifically identified in the article, especially sales taxes and regulations affecting internal sales. Later agreements negotiated in the Uruguay Round provided for national treatment in other areas, such as trade in services (GATS Article XVII) and trade-related investment measures (Article 2 of the TRIMs Agreement).
- 10 The language here is shortened and simplified. See Article XX for the full text.
- 11 Author’s interview with Elaine Feldman on 19 December 2012.
- 12 Author’s interview with Mr Bhatia on 27 September 2012.
- 13 Original quote at [www.bartleby.com/73/328.html](http://www.bartleby.com/73/328.html).
- 14 See “GATT Dispute Settlement – Appeals Procedure”, memorandum from John Jackson and Eric Canal – Forgues to “Interested Persons”, 29 August 1990, p. 1.
- 15 See *United States – Import Prohibition of Certain Shrimp and Shrimp Products: Report of the Appellate Body*, WTO document WT/DS58/AB/R, 12 October 1998.
- 16 See *European Communities – Regime for the Importation, Sale and Distribution of Bananas: Report of the Appellate Body*, WTO document WT/DS27/AB/R, 9 September 1997, p. 7.
- 17 Author’s interview with Elbio Rosselli on 20 December 2012.
- 18 Properly speaking, this term applies to the AD and CVD laws but not to safeguards, as the latter law is meant to deal with injurious imports whether or not they are alleged to be unfairly traded.
- 19 For an African perspective on the changing opportunities to employ the balance-of-payments provisions to restrict imports, see Oyejide et al. (2005).

- 20 Author's correspondence with Mr Harbinson on 30 January 2013.
- 21 The term "appear" is key here, as data are missing on the final disposition of several cases in Chad P. Bown's "China-Specific Safeguards Database" available on the World Bank's website at <http://econ.worldbank.org/ttbd/csgd/>. Other members that initiated investigations under this special safeguard, leading either to negative determinations or to results that are missing from the database, include Canada, Chinese Taipei, Colombia, Ecuador, the European Union, Peru and Poland. There were altogether 30 such investigations initiated from 2001 to 2012.
- 22 This statement applies only to those WTO members that are involved in at least *some* disputes. Another general rule is that those members that are *never* involved as either complainants or respondents tend to supply zero panellists.
- 23 It is worth noting that John Jackson is one of the Michigan Law School graduates, and that he taught trade law there before moving to Georgetown. Several of the graduates of these two law schools who went on to distinguished service in the field of trade were students of his.

## Appendix 7.1. WTO members' complaints in dispute settlement cases, 1995-2012

	Number of members	Number of complaints	Complaints per member
<b>Common law</b>	<b>25</b>	<b>179</b>	<b>7.2</b>
Developed	4	150	37.5
North America	2	136	68.0
<i>United States</i>	1	103	103.0
<i>Canada</i>	1	33	33.0
Pacific	2	14	7.0
<i>Australia</i>	1	7	7.0
<i>New Zealand</i>	1	7	7.0
Developing	21	29	1.4
Asia/Pacific	10	28	2.8
<i>India</i>	1	21	21.0
<i>Pakistan</i>	1	3	3.0
<i>Others</i>	8	4	0.5
Caribbean	9	1	0.1
Africa/Middle East	2	0	0.0
<b>Pluralist</b>	<b>15</b>	<b>19</b>	<b>1.3</b>
Caribbean	2	0	0.0
Africa/Middle East	10	0	0.0
Asia/Pacific	3	19	6.3
<i>Thailand</i>	1	13	13.0
<i>Philippines</i>	1	5	5.0
<i>Sri Lanka</i>	1	1	1.0
<b>Code law</b>	<b>91</b>	<b>285</b>	<b>2.4</b>
Developed	6	121	20.2
Europe	5	104	20.8
<i>European Union</i>	1	87	87.0
<i>Others</i>	*	17	*
Japan	1	17	17.0
Developing	85	164	1.9
Latin America	20	119	6.0
<i>Brazil</i>	1	25	25.0
<i>Mexico</i>	1	23	23.0
<i>Argentina</i>	1	18	18.0
<i>Chile</i>	1	10	10.0
<i>Others</i>	16	43	2.7
Former Soviet Union/Yugoslavia	7	4	0.6
Asia/Pacific	13	41	3.2
<i>Korea, Republic of</i>	1	15	15.0
<i>China</i>	1	11	11.0
<i>Others</i>	11	15	1.4
Africa/Middle East	45	0	0.0

Sources: Classification of members' legal systems based on data at [http://en.wikipedia.org/wiki/List\\_of\\_national\\_legal\\_systems](http://en.wikipedia.org/wiki/List_of_national_legal_systems). Data on complaints from Appendix 7.2.

Notes: \*Includes four European Free Trade Association members plus those EU member states that acceded from 1996 to 2012. Those acceding member states are not counted separately in the totals for "Europe", "Developed" or "Code Law".

## Appendix 7.2. WTO members' participation in dispute settlement cases, 1995-2012

	Complainant	Respondent	Third party	Total
<b>Have been both complainants and respondents</b>				
United States	103	119	97	319
European Union and member states	87	98	126	311
European Union	87	73	126	286
Individual member states	0	25	0	25
<i>France</i>	0	4	0	4
<i>Belgium</i>	0	3	0	3
<i>Ireland</i>	0	3	0	3
<i>Netherlands</i>	0	3	0	3
<i>United Kingdom</i>	0	3	0	3
<i>Germany</i>	0	2	0	2
<i>Greece</i>	0	2	0	2
<i>Spain</i>	0	2	0	2
<i>Denmark</i>	0	1	0	1
<i>Portugal</i>	0	1	0	1
<i>Sweden</i>	0	1	0	1
Japan	17	15	130	162
Canada	33	17	84	134
China	11	30	92	133
India	21	21	80	122
Brazil	25	14	73	112
Mexico	23	14	67	104
Korea, Republic of	15	14	69	98
Australia	7	13	74	94
Argentina	18	22	44	66
Thailand	13	3	57	73
Chile	10	13	34	57
Turkey	2	9	46	55
Colombia	5	3	40	48
Guatemala	8	2	23	33
Ecuador	3	3	19	25
Peru	3	4	14	21
Philippines	5	6	9	20
Venezuela, Bolivarian Republic of	1	2	16	19
Indonesia	6	4	8	18
Nicaragua	1	2	13	16
Pakistan	3	2	9	14
Panama	6	1	6	13
Dominican Republic	1	7	4	12
Uruguay	1	1	8	10
Hungary (pre-EU accession)	5	2	2	9
Malaysia	1	1	3	5
Poland (pre-EU accession)	3	1	1	5

	Complainant	Respondent	Third party	Total
Ukraine	3	1	0	4
Czech Republic (pre-EU accession)	1	2	0	3
Moldova, Republic of	1	1	1	3
<b>Have been complainants but not respondents</b>				
Chinese Taipei	3	0	71	74
Norway	4	0	46	50
New Zealand	7	0	34	41
Honduras	8	0	19	27
Costa Rica	5	0	15	20
Viet Nam	2	0	16	18
El Salvador	1	0	14	15
Hong Kong, China	1	0	13	14
Switzerland	4	0	8	12
Singapore	1	0	8	9
Sri Lanka	1	0	3	4
Bangladesh	1	0	1	2
Antigua and Barbuda	1	0	0	1
<b>Have been respondents but not complainants</b>				
Egypt	0	4	7	11
South Africa	0	3	2	5
Trinidad and Tobago	0	2	3	5
Slovak Republic (pre-EU accession)	0	3	0	3
Romania (pre-EU accession)	0	2	0	2
Armenia	0	1	0	1
Croatia	0	1	0	1
<b>Have been third parties only</b>				
Cuba	0	0	15	15
Paraguay	0	0	15	15
Saudi Arabia, Kingdom of	0	0	15	15
Iceland	0	0	8	8
Jamaica	0	0	8	8
Mauritius	0	0	6	6
Barbados	0	0	4	4
Belize	0	0	4	4
Côte d'Ivoire	0	0	4	4
Israel	0	0	4	4
Madagascar	0	0	4	4
Malawi	0	0	4	4
Dominica	0	0	3	3
Fiji	0	0	3	3
Guyana	0	0	3	3
Kenya	0	0	3	3
Saint Kitts and Nevis	0	0	3	3
Saint Lucia	0	0	3	3
Swaziland	0	0	3	3
Tanzania	0	0	3	3
Senegal	0	0	2	2

	<b>Complainant</b>	<b>Respondent</b>	<b>Third party</b>	<b>Total</b>
Bahrain, Kingdom of	0	0	1	1
Benin	0	0	1	1
Bolivia, Plurinational State of	0	0	1	1
Cameroon	0	0	1	1
Chad	0	0	1	1
Ghana	0	0	1	1
Grenada	0	0	1	1
Kuwait, State of	0	0	1	1
Namibia	0	0	1	1
Nigeria	0	0	1	1
Oman	0	0	1	1
Saint Vincent and the Grenadines	0	0	1	1
Suriname	0	0	1	1
Zimbabwe	0	0	1	1

Source: Tabulated from data posted at [www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm).

Notes: The following WTO members are not listed above insofar as they have never been involved as a complainant, a respondent, or a third party: Albania, Angola, Botswana, Brunei Darussalam, Burkina Faso, Burundi, Cambodia, Cape Verde, the Central African Republic, Congo, the Democratic Republic of the Congo, Djibouti, Gabon, The Gambia, Georgia, Guinea, Guinea-Bissau, Haiti, Jordan, the Kyrgyz Republic, Lesotho, Macao, China, the former Yugoslav Republic of Macedonia, Mali, Mauritania, Mongolia, Montenegro, Morocco, Mozambique, Myanmar, Nepal, Niger, Papua New Guinea, Qatar, Rwanda, Samoa, Sierra Leone, the Solomon Islands, Togo, Tonga, Tunisia, Uganda, the United Arab Emirates and Zambia. Note that this count does not include the individual EU member states, most of which have participated in the DSU solely through the regional body.

### Appendix 7.3. Use of the anti-dumping laws by selected members and related dispute settlement cases in the GATT and WTO, 1989-2010

	GATT period (1989-1994)					WTO period (1995-2010)				
	Cases initiated	Orders imposed	Leading to orders (%)	Challenged in GATT	Orders challenged (%)	Cases initiated	Orders imposed	Leading to orders (%)	Challenged in WTO	Orders challenged (%)
<b>Developed</b>	<b>933</b>	<b>434</b>	<b>46.5</b>	<b>4</b>	<b>0.9</b>	<b>1,236</b>	<b>667</b>	<b>54.0</b>	<b>45</b>	<b>6.7</b>
Australia	287	90	31.0	0	0.0	209	74	35.4	1	1.4
Canada	111	75	67.6	0	0.0	155	97	62.6	1	1.0
European Union	220	124	56.4	2	1.6	416	246	59.1	8	3.3
United States	315	145	46.2	2	1.4	456	250	54.8	35	14.0
<b>Developing</b>	<b>323</b>	<b>157</b>	<b>48.6</b>	<b>1</b>	<b>0.6</b>	<b>1,514</b>	<b>1,056</b>	<b>69.7</b>	<b>22</b>	<b>2.1</b>
Argentina	74	44	59.5	0	0.0	259	166	64.1	4	2.4
Brazil	62	22	35.5	0	0.0	212	126	59.4	2	1.6
China <sup>a</sup>	–	–	–	–	–	189	145	76.7	5	3.4
India	12	12	100.0	0	0.0	615	477	77.5	3	0.6
Korea, Republic of	25	10	40.0	1	10.0	119	70	58.8	1	1.4
Mexico	145	65	44.8	0	0.0	103	63	61.2	6	9.5
Philippines	5	4	80.0	0	0.0	17	9	53.0	1	11.1
<b>Total</b>	<b>1,256</b>	<b>591</b>	<b>47.1</b>	<b>5</b>	<b>0.8</b>	<b>2,750</b>	<b>1,723</b>	<b>62.7</b>	<b>67</b>	<b>3.9</b>
<b>Rate per year</b>	209.3	98.5				171.9	107.7			

Sources: Chad P. Bown, "Global Antidumping Database", available at <http://econ.worldbank.org/tbtd/gad/>; GATT cases tabulated from data at [www.wto.org/english/tratop\\_e/dispu\\_e/gt47ds\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm); WTO cases tabulated from data at [www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_agreements\\_index\\_e.htm?tid=AG#selected\\_agreement](http://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?tid=AG#selected_agreement).

Notes: Based on the year in which a formal complaint was lodged. The 1989 starting date is dictated by the availability of data, which are available from that year forward for all countries shown here (and earlier for some). <sup>a</sup>China did not have an AD law prior to 1997, nor was it a contracting party to the GATT during the period shown.



# 8 Notifications, trade policy reviews and monitoring

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Quis custodiet ipsos custodes? [Who watches the watchmen?]

Juvenal  
*Satire VI*, lines 347–348 (c. 100 AD)

## Introduction

One of the functions of the WTO is to collect, assess and disseminate information about members' trade policies. It does so principally through three mechanisms: the notifications that members are required to make about their own laws and policies, the reviews conducted by the Trade Policy Review Body (TPRB) and the monitoring activities that the Secretariat revived when the financial crisis broke in 2008. These activities can be arrayed along a spectrum of Secretariat activism and analysis, such that the notifications are principally the responsibility of the members themselves and are strictly factual and narrowly focused; the trade policy reviews (TPRs) are comprehensive investigations conducted cooperatively by the members and the WTO Secretariat, and involve some degree of judgment of the members' policies; and the monitoring activities are conducted cooperatively with other international organizations, and are explicitly aimed at identifying any "backsliding" by members.

These activities serve two and possibly three different purposes. The principal purpose is to promote transparency and compliance. Each of these activities is, to varying degrees, a relatively low-pressure form of enforcement that relies on moral suasion rather than the threat of retaliation. Together they provide a means of determining whether members are abiding by the commitments that they make in the WTO while also revealing the extent to which they utilize the "policy space" permitted within the terms of the agreements and their schedules. This can be as important to the member in question as it is to that member's trading partners. It is quite possible that legislators or other policy-makers in a country might unknowingly enact laws or otherwise pursue policies that run afoul of their commitments. That can be an especially large problem in those areas that were not traditionally part of the GATT system (e.g. services). When members are required to report on their own measures, and are also subject to periodic reviews and regular monitoring, both they and the larger community in which they form a part may be more likely to catch potential violations of commitments either before they take place or, if they have been enacted, before some trading partner feels compelled to raise the matter in the Dispute Settlement Body. The Trade Policy Review

Mechanism (TPRM) and the monitoring activities undertaken since 2008 occupy something of a middle ground between notification (self-surveillance) and dispute settlement, entailing a more active, investigative role for the Secretariat and implying the possibility that members with non-conforming measures will be named and shamed. The links between TPRs and the Dispute Settlement Understanding are nevertheless attenuated by the rule specifying that the reports produced in this process cannot be cited in disputes.

A second function is to provide more information to and about the trading system. Notifications, TPR reports and monitoring all add to the sum of facts and analysis available to negotiators, policy-makers, journalists and scholars. Some types of information are more useful to certain groups than they are to others. Notifications on such matters as sanitary and phytosanitary (SPS) measures or changes in a country's non-preferential rules of origin are unlikely to be of interest, or even comprehensible, to anyone who is not an expert in those fields, but TPR and monitoring reports are more accessible to the lay reader. TPR reports are an especially useful reference work, and have come to be considered required reading for anyone seeking to familiarize themselves with the trade and other economic policies of a given country. The monitoring reports may be the most reader-friendly of all, and receive more press coverage – and thus presumably attract more attention from policy-makers – than the other instruments.

The third, and most controversial, function that these activities might perform is to influence policy-making. The aim here would be to go beyond the limited goal of ensuring compliance to the more ambitious aim of guiding countries into adopting better policies. This is something that members might be persuaded to do on an autonomous basis, in which they might be urged to view their commitments as floors rather than ceilings. This is one of those issues that lays bare the division between lawyers and diplomats on the one hand and economists on the other, especially in the case of the TPRs. These reports are principally factual accounts and contain the kinds of information that lawyers and negotiators find useful. The TPRs also engage, to a limited degree, in economic diagnosis. That is not the same as prognosis, however, and is farther still from prescription. To committed free-traders, that might seem like a lost opportunity to counsel members on the more active steps that they might take to open their markets, reduce government intervention in the economy or otherwise improve their laws and policies. TPRs have moved a bit in that direction over the years, but going as far as some critics suggest would require a major departure from the established limits within which the membership allows the WTO Secretariat to operate.

This chapter reviews the experience with each of these instruments, proceeding in a chiefly chronological manner. The notification requirements are the oldest of the mechanisms, being an inheritance from the GATT period. The only important difference in the WTO period, apart from the greater accessibility of the notifications in the Internet age, is in the larger number of topics that fall within the system and hence a greater number of notifications that countries are required to make. The TPRM straddles the late GATT and WTO periods, having been provisionally established in 1988 as part of the somewhat misnamed “mid-term review” of the Uruguay Round. It has evolved ever since then, the most important change being the

emergence of the WTO Secretariat report as the principal focus of TPRB activity and the downgrading of the reports prepared by the members themselves. The monitoring programme is the newest of these activities, being a product of the crisis atmosphere of 2008.

## Notifications

Notifications have been a part of the multilateral trading system since its inception. Another historical constant for notifications is the failure of many GATT contracting parties and now WTO members to comply fully with these requirements. While most developed countries appear to file most of the required notifications most of the time, and the same can be said for some of the developing countries, the record is less encouraging among developing countries in general and especially among the poorer and smaller ones.

Notification is a complement to the general requirement for transparency and the publication of measures, obliging countries not only to make their measures known via government gazettes or other domestic outlets but that they also provide information to their trading partners via the WTO. A notification will typically consist of a short statement that follows a standard format in which the member identifies the law, regulation or action that is at issue, the precise content of which varies according to the agreement and topic involved. This document is filed with the WTO and made available to other members and the public. Specific agreements may also require that members take other steps to promote transparency. The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), for example, requires not only that members publish all SPS measures and notify changes that are made to them, but further requires that they identify a single central government authority responsible for the notification requirements (i.e. the National Notification Authority) and establish a National Enquiry Point responsible for answering questions from other members about SPS measures and related issues.

Transparency has always been recognized as a cardinal virtue in the multilateral trading system. It is encouraged by GATT Article X (Publication and Administration of Trade Regulations), which provides in Paragraph 1 that “[l]aws, regulations, judicial decisions and administrative rulings of general application” on matters related to trade “shall be published promptly in such a manner as to enable governments and traders to become acquainted with them.” Paragraph 2 further provides that “measure[s] of general application” affecting duties, or “imposing a new or more burdensome requirement, restriction or prohibition on imports” or payments cannot “be enforced before such measure has been officially published.” The article also requires, among other things, the publication of “[a]greements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party,” thus providing the trade policy complement to the Wilsonian principle of “open covenants openly arrived at.”

Other GATT articles supplemented this general principle of transparency and publication by requiring the notification of certain types of measures. For example, GATT Article XVI:1 provided in part that any contracting party that offered subsidies to its industries had to notify

GATT in writing “of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary.” Other notification requirements in GATT 1947 are found in articles XVII:4 (state-trading enterprises), XVIII:7 and XVIII:14 (governmental assistance to economic development), and XXIV:7 (customs unions and free trade areas). The scope of notifications expanded with the agreements negotiated in later rounds, as well as with the horizontal requirement set by the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance.<sup>1</sup> This Tokyo Round instrument provided that “to the maximum extent possible” a GATT contracting party had to –

notify the CONTRACTING PARTIES of their adoption of trade measures affecting the operation of the General Agreement, it being understood that such notification would of itself be without prejudice to views on the consistency of measures with or their relevance to rights and obligations under the General Agreement. Contracting parties should endeavour to notify such measures in advance of implementation. In other cases, where prior notification has not been possible, such measures should be notified promptly *ex post facto*. Contracting parties which have reason to believe that such trade measures have been adopted by another contracting party may seek information on such measures bilaterally, from the contracting party concerned.

The contracting parties thus had an extensive experience with notifications by the time that the Uruguay Round commenced in 1986, but not always a satisfactory one. While the topic was not explicitly included in the list of issues that the ministerial declaration laid out for the Functioning of the GATT System (FOGS) negotiations it arose in that group’s deliberations. In March 1988, for example, the European Community noted the “widespread concern that the level of compliance leaves much to be desired and that the notification system continues to be excessively fragmented,” and stressed that “[n]otification of trade measures is a basic transparency requirement and provides the backbone for effective surveillance.”<sup>2</sup>

One consequence of the improvement in information technology in the years since the Uruguay Round is a shift in the perceived nature of the problem with the notification system. At the start of the round one of the principal problems that contracting parties observed concerned the retrieval of notifications that had been made. Declaring that the GATT system for handling notifications was “decentralized and unwieldy,” the United States proposed that “the GATT could institute and maintain a central repository of all notifications of measures subject to GATT surveillance” that would be copied on any notifications that were made to the relevant committees for those notifications.<sup>3</sup> Other participants in the FOGS negotiations expressed similar concerns, including the European Community, Jamaica and New Zealand. That proposal for a central registry came at a time when all manner of information was still submitted, stored and disseminated either exclusively or primarily in hard copy, a medium that is inherently more costly and time-consuming to manage than electronic documents. The problem was only worsened by the fragmentation of the GATT system. These concerns were addressed by the Uruguay Round Decision on Notification Procedures, one provision of which established a Central Registry of Notifications. The larger solution to the problem developed outside the GATT/WTO, as the Internet itself is a central repository on a

scale and degree of user-friendliness that trade negotiators could only imagine in the late 1980s. In the GATT period, a trade ministry received a regular blizzard of documents from Geneva that would soon be lost or buried if they were not properly catalogued in a well-maintained library. In the WTO period, which happens to coincide precisely with the Internet age,<sup>4</sup> those same documents are far more easily searched, downloaded and used. Creation of the Central Registry of Notifications became almost a moot point with the rapid spread of the Internet and the virtual centralization of all electronic information about activities in the WTO.

The more enduring problem concerns not the storage, dissemination and access to notifications but their generation in the first place. This is a problem that rests with the members rather than the Secretariat, as there are many among them that do not keep up with the notifications that are required by the Uruguay Round agreements. To cite an example, Annex B of the SPS Agreement provides in part that:

Whenever an international standard, guideline or recommendation does not exist or the content of a proposed sanitary or phytosanitary regulation is not substantially the same as the content of an international standard, guideline or recommendation, and if the regulation may have a significant effect on trade of other Members, Members shall ... notify other Members, through the Secretariat, of the products to be covered by the regulation together with a brief indication of the objective and rationale of the proposed regulation. Such notifications shall take place at an early stage, when amendments can still be introduced and comments taken into account.

Article 2.9 of the Agreement on Technical Barriers to Trade includes very similar language with respect to “relevant international standard[s].” To cite another example, Article 16.4 of the Anti-dumping Agreement<sup>5</sup> provides that:

Members shall report without delay to the Committee [on Anti-Dumping Practices] all preliminary or final anti-dumping actions taken. Such reports shall be available in the Secretariat for inspection by other Members. Members shall also submit, on a semi-annual basis, reports of any anti-dumping actions taken within the preceding six months. The semi-annual reports shall be submitted on an agreed standard form.

Article 25.11 of the Agreement on Subsidies and Countervailing Measures establishes substantially the same obligation with respect to countervailing duty investigations.

One horizontal product of the Uruguay Round was the Decision on Notification Procedures. Noting the members' desire “to improve the operation of notification procedures,” and hearkening back to the understanding reached in the Tokyo Round, this decision reiterated and extended that understanding while also providing an Indicative List of Notifiable Measures (see Box 8.1). Even that list underestimates the number of requirements; there are altogether more than 200 provisions in WTO agreements requiring notifications, most of them related to non-tariff measures.<sup>6</sup> The decision also called for a working group to undertake a

“thorough review of all existing notification obligations ... with a view to simplifying, standardizing and consolidating these obligations to the greatest extent practicable, as well as to improving compliance with these obligations.” That working group issued a report in 1996 that reviewed concerns over duplicative notification requirements across some pairs of agreements (e.g. between the Agreement on Agriculture and the Agreement on Subsidies and Countervailing Measures), the provision of technical assistance to developing countries in carrying out these obligations, and the simplification and standardization of formats. It declined to make recommendations on some of these matters but did so on others, including its suggestion that “a comprehensive listing of notification obligations and the compliance therewith by all WTO Members be maintained on an ongoing basis and be circulated semi-annually to all Members.”<sup>7</sup> That recommendation was not followed in its entirety, insofar as there is no single document one may consult in order to identify which members have or have not made which notifications, but specific committees of the WTO do periodically issue reports providing that information with respect to the notification requirements under their purview. Those reports suggest that compliance with these obligations is not only spotty but may be declining over time.

### **Box 8.1. Indicative list of notifiable measures**

*Taken from WTO, Annex to the Decision on Notification Procedures.*

In the Decision on Notification Procedures reached in the Uruguay Round, members agreed “to be guided, as appropriate, by th[is] annexed list of measures” in fulfilling their notification obligations:

- Tariffs (including range and scope of bindings, GSP provisions, rates applied to members of free-trade areas/customs unions, other preferences)
- Tariff quotas and surcharges
- Quantitative restrictions, including voluntary export restraints and orderly marketing arrangements affecting imports
- Other non-tariff measures such as licensing and mixing requirements; variable levies
- Customs valuation
- Rules of origin
- Government procurement
- Technical barriers
- Safeguard actions
- Anti-dumping actions
- Countervailing actions
- Export taxes
- Export subsidies, tax exemptions and concessionary export financing
- Free-trade zones, including in-bond manufacturing
- Export restrictions, including voluntary export restraints and orderly marketing arrangements
- Other government assistance, including subsidies, tax exemptions
- Role of state-trading enterprises
- Foreign exchange controls related to imports and exports
- Government-mandated countertrade
- Any other measure covered by the Multilateral Trade Agreements in Annex 1A to the WTO Agreement

Two examples may be cited to illustrate the decline in members' compliance with notification requirements and the types of countries with the least complete history of filings. Article 25.1 of the Agreement on Subsidies and Countervailing Measures requires that members make their subsidy notifications no later than 30 June of each year. Article 25.6 further provides that "Members which consider that there are no measures in their territories requiring notification under paragraph 1 of Article XVI of GATT 1994 and this Agreement shall so inform the Secretariat in writing." This requirement thus offers a good test of the overall level of compliance with notification requirements, insofar as all members are supposed to make a filing each year, regardless of whether or not they provide subsidies. In 1995, when there were 132 WTO members, 58 of them notified subsidies and 27 made a "nil" notification of no subsidies; that left 47 members (35.6 per cent) of the total that failed to meet the obligation to notify. In later years, the number of subsidy notifications rose (reaching 62 in 2009), while the number of "nil" reports declined (down to 10 in 2009), but the greatest rate of growth was in the number and share of members who made no notification. By 2009, this group had grown to 81 members, or 52.9 per cent of the 153 members that year. For several years, about half of all members, sometimes a bit more and sometimes a bit less, failed to make any sort of notification.<sup>8</sup>

Table 8.1 offers a more detailed look at different members' levels of compliance with another notification requirement. As noted earlier, the SPS agreement requires that members notify certain changes in their measures. Unlike the subsidy notifications discussed in the previous paragraph these notifications are not required on an annual basis, but instead are filed as needed. Given the fact that many WTO members have made at least one such notification per year since the start of the system, often making several of them, it is reasonable to suppose that in most WTO members in most years there is likely to have been at least one action taken or contemplated on an SPS measure that might have required notification. As can be appreciated from the data in the table, however, there are only 23 members that notified SPS measures in all or nearly all years from 1998 to 2011. All but two of the developed countries achieved this level of frequency, as did 16 of the developing countries. Counting all EU member states as one,<sup>9</sup> these 23 members comprised less than one fifth of the total membership as of 2011. The members that never filed even one notification during that period comprise a much larger group (49).

What explains the frequency with which different countries file these SPS notifications? In some cases, the country may not have taken any action requiring notification, but it would strain credulity to suppose that this would be the case for 14 years in a row. The principal explanation would appear to be capacity: notifications rise in tandem with the size and income of a country, such that those developing countries that make notifications in most or all years tend to have relatively high incomes and large economies. The frequency generally declines in direct proportion to income and size, to the point where the members that have never filed a single notification are among the smallest and poorest. Over half (25) of the 49 members that did not file a single notification from 1998 to 2011 were located in Africa, and 22 of the members that made no notifications were least-developed countries (LDCs). These are general rules to which one finds exceptions. Poverty and a relatively small size did not prevent Nepal from achieving one of the higher levels of SPS notification among developing countries; conversely, while Nigeria, Pakistan and Tunisia are larger and have higher incomes than Nepal, they were each among the members that did not make a single notification.

**Table 8.1. Frequency of members' filings of SPS notifications, 1998-2011**

	1-29%	30-59%	60-89%	90-100%
<b>Developed countries</b>			Norway	Australia
			Switzerland	Canada
				European Union*
				Japan
				New Zealand
			United States	
<b>Developing countries</b>	Antigua and Barbuda	Albania	Costa Rica	Argentina
	Barbados	Armenia	Ecuador	Brazil
	Belize	Bahrain, Kingdom of	Guatemala	Chile
	Benin	Saudi Arabia, Kingdom of	Honduras	China
	Bolivia, Plurinational State of	Dominican Republic	India	Colombia
	Brunei Darussalam	Egypt	Kenya	El Salvador
	Cuba	Israel	Malaysia	Hong Kong, China
	Fiji	Jamaica	Mexico	Indonesia
	The Gambia	Jordan	Nepal	Korea, Republic of
	Georgia	Mauritius	Nicaragua	Peru
	Kuwait, State of	Morocco	Panama	Philippines
	Macao, China	Oman	South Africa	Singapore
	Madagascar	Paraguay	Sri Lanka	Chinese Taipei
	Malawi	Turkey		Thailand
	Mongolia	Uruguay		Ukraine
	Qatar			Viet Nam
	Saint Vincent and the Grenadines			
	Senegal			
	Swaziland			
	Tanzania			
	Former Yugoslav Republic of Macedonia			
	Uganda			
	United Arab Emirates			
	Venezuela, Bolivarian Republic of			
	Zambia			
	Zimbabwe			

Notes: Percentage of years that a member filed a notification in the G/SPS/N Series; adjusted for acceding members' length of membership. \*Some EU member states file SPS notifications of their own but most do not. None of them are shown here. The 49 WTO members not shown here did not file a single notification during the period 1998 to 2011. This number does not include the countries that acceded in 2012.

Members and the Secretariat have addressed the problem of incomplete notifications from two directions. One approach views the number and complexity of the requirements as the root of the problem, with some members – especially developing countries – proposing that

the burden be reduced. At the 1996 Singapore Ministerial Conference, for example, Brunei Darussalam said that notification requirements impose a serious burden on small countries, Malaysia called for streamlining them and Saint Lucia commended the Secretariat's efforts to simplify the procedures. The ministerial declaration noted that compliance with notification requirements has not been fully satisfactory. While inviting members who have not submitted timely or complete notifications to renew their efforts, it also called for the simplification of procedures. These concerns, which have continued to be expressed in subsequent years, led to several steps intended to simplify or clarify the process of notification. One example is the publication of the *Procedural Step-by-Step Manual for SPS National Notification Authorities & SPS National Enquiry Points*, a 126-page guidebook with detailed instructions on how to meet the notification requirements of the SPS Agreement.<sup>10</sup> Some committees have also worked to simplify procedures for the notifications that fall within their purview. In 2009 and 2010, for example, the Committee on Agriculture explored "best practices" for improving the timeliness and completeness of notifications. While this exercise produced enough recommendations from members to fill a ten-page note by the Secretariat, the members did not agree on which of these objectives – timeliness or completeness – merited the higher priority.<sup>11</sup>

The other response to this problem has been for the Secretariat to provide greater assistance to developing countries in complying with these obligations. This is, together with accessions and scheduling, one of the highest priorities in the technical assistance that the Secretariat offers to members. The results-based management approach in the WTO technical assistance and training plans aims to improve members' compliance in this area, as described in the 2012 to 2013 plan. "Baselines will be established using the information from previous years' reports," and "if a country has had some difficulties in complying with its notification obligations, the programme is designed in such a way that after its completion the country would be in a position to fulfil its notification obligations."<sup>12</sup>

## The Trade Policy Review Mechanism

Where notifications must ultimately rely on the ability of the individual member to monitor and report on its own trade-related activities, the TPR process is a joint product of the member under review, the Secretariat and the other members participating in the TPRB. Both the member and the Secretariat prepare reports that are scrutinized and discussed by the members, but over time the national report has receded in importance. Virtually all of the attention in TPRB meetings – apart from the customary expressions of diplomatically mandatory appreciation for the words of a visiting minister or vice minister – is devoted to a discussion that revolves around the Secretariat report. This is a surveillance exercise that covers a wide range of issues in the conduct of a member's trade policy, including the economic environment in a country, the structure and procedures of its policy-making bodies, its laws and policies on trade and related matters, sectoral laws and policies, and the actual composition of its trade, among other matters.

The origins, purpose and significance of the TPRM cannot be understood without taking note of the environment in which both it and the Uruguay Round were launched. The decision to start those negotiations “was taken against a background of large external imbalances in the major industrial economies, instability in the international monetary system, [and] growing protectionist pressures,”<sup>13</sup> as ministers would later observe at the 1988 Montreal Ministerial Conference. The period between the end of the Tokyo Round in 1979 and the launch of the Uruguay Round in 1986 was especially difficult, as summed up in Bergsten’s “bicycle theory” of trade liberalization: if the system is not moving forward with new market-opening initiatives, it may fall over into protectionism. That is precisely what appeared to be happening then, with developed countries resorting to the use of safeguards, anti-dumping, and other trade-remedy laws to restrict imports, developing countries invoking balance-of-payments measures with that same end in mind, and the proliferation of “voluntary” export restraints and other grey-area measures in such key sectors as steel and automobiles. There was then a widespread concern that the multilateral trading system itself was in danger, and that steps had to be taken to dissuade policy-makers from erecting barriers to trade.

One idea promoted in several quarters, not least in the office of GATT Director-General Arthur Dunkel, was that protectionist policies were less likely to be adopted if the process by which they were advanced was open to greater public scrutiny. Closer and more active surveillance of members’ policy-making processes was thought necessary not just to keep a country’s trading partners informed on what it might be up to, but also in hopes that the citizens of the country itself might know – and oppose – costly and self-defeating initiatives. Those proposals eventually made their way into the FOGS negotiations of the Uruguay Round, with the TPRM being one of several items approved in an “early harvest” at the 1988 Montreal Ministerial Conference.

The TPRM that emerged from these negotiations was less ambitious in one respect than some of the earlier proposals. The Secretariat’s reports are generally more descriptive than analytical; they neither explicitly pass judgment on the compliance of members’ laws nor make detailed prescriptions for their policies. The TPRM is also more ambitious in another respect, however, insofar as it involves more active on-site investigation on the part of the Secretariat than members were initially willing to contemplate. The TPRM is the premier example of a function in which the members have vested greater responsibility in the WTO Secretariat than they had been willing to cede to its GATT predecessor. The proposals that were floated in the years before this mechanism was created were primarily based on self-examination by countries, with little or no role having been proposed for the GATT as a whole or its Secretariat in particular.

### *Proposals floated prior to the Uruguay Round*

It is unlikely that the TPRM would have been established without the leadership of Mr Dunkel. He made the creation of this mechanism a priority, having promoted it in concept in the early 1980s and in practice later in the decade. Mr Dunkel believed in the value of peer pressure and publicity as a means of ensuring that countries listened to the better angels of their

natures and did not succumb to the temptations of protectionism. He also appears to have been inspired by the greater powers that the International Monetary Fund (IMF) exercised in this area. The IMF conducts surveillance of individual members in order to highlight possible risks to stability and to advise on needed policy adjustments. Mr Dunkel's interest in having GATT perform a comparable function was evident in 1990 when he hired Clemens Boonekamp (see Biographical Appendix, p. 574), then an IMF staffer who knew the surveillance process, to work on TPRs. "Dunkel wanted somebody with an understanding of the IMF approach to writing staff reports,"<sup>14</sup> Mr Boonekamp would later recall. Mr Dunkel was adamant that staff visits to countries were necessary, and although the notion was initially opposed by most contracting parties, he was able to force the issue.

Mr Dunkel took a strategic approach, working for several years to prepare the way for the TPR process. The first step came in 1983, when he appointed an "eminent persons group" to identify the fundamental problems then affecting the world trading system. Among the topics that he asked the Leutwiler Committee to address were "the factors underlying protectionism, and what can be done to improve the commercial policy making process at the national level?"<sup>15</sup> The group was to explore the ways that increased transparency might improve the policy-making process, including:

- (a) To what extent does publicizing protectionist policies (including estimates of their costs) reduce their chances of being adopted?
- (b) What means are available to increase the public discussion of the costs of protection – who gains, who pays, what are the repercussions of border measures and subsidy programmes affecting trade?
- (c) What other kinds of "leverage" are available to resist protectionist demands (e.g. impact of subsidy programmes on government budget deficits, threat of foreign retaliation, etc.)?<sup>16</sup>

Chaired by a Swiss banker, Fritz Leutwiler, the body produced a report in 1985 entitled *Trade Policies for a Better Future: Proposals for Action*, which called for formal scrutiny of protection. It proposed that "trade policy should be brought into the open" and that to this end more information should be made available to analyse the costs and benefits of both existing and prospective trade actions. "Private and public companies should be required to reveal in their financial statements the amount of any subsidies received," and:

Any proposal for protective action should be systematically analyzed. This could be done by what might be called a 'protection balance sheet'. Such statements, similar in aim to the 'environmental impact' statements now required for construction projects in some countries, would allow periodic appraisal of existing measures and informed judgements on proposed new measures. They would set out the benefits and costs to the national economy of protectionist measures, as compared with withholding protection and/or providing adjustment assistance (GATT, 1985: 35).

This proposal was much less ambitious than what would become the TPRM, limited as it was to transactional reports that would be prepared by a domestic institution. The only role that the committee proposed for GATT was the further development of this idea by the Secretariat, “possibly in the form of a technical handbook available to policy makers and the public” (*Ibid.*).

The Organisation for Economic Co-operation and Development (OECD) took up a similar idea. “Member governments should undertake ... as systematic and comprehensive an evaluation as possible of proposed trade and trade-related measures as well as of existing measures when the latter are subject to review,” according to a recommendation that the OECD Council adopted in 1986, using an Indicative Checklist for the Assessment of Measures as the basis for these evaluations.<sup>17</sup> It further provided that countries should “respond as positively as possible to requests for consultations by other Member countries which express concern about the impact on competition in their markets of measures.” That checklist consisted of 13 questions, ranging from “Is the measure in conformity with the country’s international obligations and commitments?” to “What could be the expected economic effects of the measure on other sectors of the economy, in particular, on firms purchasing products from, and selling products to, the industry in question?”

Yet a third proposal came from the London-based Trade Policy Research Centre, which commissioned a high-level study group chaired by former GATT Director-General Olivier Long (1968-1980). This was the first such proposal to draw a link between a review mechanism and GATT (and by implication its successor), yet did so in only a tentative way. Explicitly seeking “to minimize objections to placing domestic procedures on the GATT agenda” and “avoid needlessly arousing political and institutional sensitivities,” it proposed the establishment within each country of an independent body to prepare annual reports to their governments on public assistance to industries. More specifically, the reports of such a domestic body –

should be prepared both on request and on its own initiative and they should cover all forms of public assistance, including measures under laws on ‘unfair trade’ practices, to all industries. The reports should be made public so that they are a vehicle for public scrutiny of industry support (Long et al., 1989: 51).

The report further provided that this information “would be available to GATT member countries and could assist them in understanding and evaluating the policies of governments as presented in international negotiations” (*Ibid.*: 52).

All three of these proposals provided for systems of review that were voluntary and conducted at the national level, and all but the Long report proposed scrutiny of specific initiatives (e.g. individual safeguard cases or draft legislation) rather than conducting assessments of the totality of the country’s regime. The proposals were also primarily economic in their orientation, rather than legal or political. If we take them as an accurate barometer of the intellectual climate of the time, it is all the more remarkable that the FOGS negotiators took up, and ultimately approved, an approach to reviews that would instead be obligatory,

conducted by the Secretariat of an international organization and comprehensive, covering legal and institutional as well as economic issues.

### *The Uruguay Round FOGS negotiations*

As discussed in Chapter 2, one of the agreed aims of the FOGS negotiations was “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.” This rather spare language in the Uruguay Round Ministerial Declaration of 1986 left undefined the meaning of “surveillance” and “regular monitoring”, not to mention the scope of what constituted “trade policies and practices”. The declaration provided no further guidance on such key questions as what form the surveillance would take, which countries might be targeted and on what basis, how frequently they would be under scrutiny, what would be the scope of issues subject to investigation, what the roles of the other contracting parties and the Secretariat would be in the exercise, whether information would be gathered solely in Geneva or through visits to the countries, how the information developed in the course of this surveillance would relate to the dispute settlement procedures, where the review itself would take place (e.g. in Geneva or in the capital city of the country being reviewed), whether the facts that were unveiled and the conclusions that were reached would be made public and so forth. It thus fell to the FOGS negotiators to put a great deal of flesh on the rather bare bones they received from the ministers.

The most important question at the start of the negotiations concerned whether the form of surveillance would be the “hard” type favoured by Japan and the United States or the “soft” form that the European Community preferred. The first of these positions was based on “surveillance as a mechanism for applying pressure on countries to comply with their GATT obligations and as something that contracting parties should submit to individually,” as opposed to the EC notion that “surveillance is really about ... transparency and increasing understanding among trading partners of each other’s trade policy environment.”<sup>18</sup> Yet a third view, as espoused by developing countries such as India and Jamaica, was that additional surveillance was not needed if the real problem lay with the major trading nations, and “there was not much point in tinkering with the surveillance system if the requisite political will to make the system work was absent.”<sup>19</sup> That last argument made little headway, as there was a general acceptance among those same, major trading nations that some form of enhanced surveillance was needed in order to promote greater compliance. The final result of the negotiations leaned more towards the soft than the hard form of surveillance, being explicitly dissociated from dispute settlement procedures and taking the form of broad reviews rather than search-and-destroy missions that sought to unearth specific examples of gross non-compliance.

The main points of debate then focused not on whether surveillance was needed but on how it should be done. What roles should be assigned in these reviews to the countries that were under scrutiny, the other contracting parties and the Secretariat? Which of these parties would take the lead in the process? The proposals seemed to draw upon existing precedents in other GATT activities. One would be to base reviews principally upon the individual country’s reporting on its

measures, thus being something like an expanded form of the notification procedures reviewed above. Another option would be for the review to be conducted principally by a small group representing the other contracting parties, which might be formed as a panel (a term that brought to mind the GATT dispute settlement system) or a working party (which might be compared to the way that accession negotiations were conducted). Yet a third option was to follow the models of the IMF and the OECD, both of which provided for detailed examination of their member states' policies by their respective secretariats. That last option seemed to be the most radical at the time, and the proposals that gave a larger role to the GATT Secretariat faced the strongest resistance (especially but not exclusively from developing countries), and yet this is where the TPRM eventually headed. That was a slow process, however, and one that depended as much on the evolution of the TPRM in actual practice as it did on the terms agreed to in principle. As originally approved in the Uruguay Round, the mechanism provided roles for all three participants: the country under review would prepare a report on its own practices, this would be supplemented by a report prepared by Secretariat staff, and both reports would be reviewed by a designated discussant and by the rest of the contracting parties meeting as the TPRB. It took some years for the system to evolve into one in which the Secretariat report would become the star of the show and the country's own report would be relegated to a minor, supporting role.

The first step towards the translation of the fairly vague language of the Uruguay Round Ministerial Declaration into the TPRM came with a paper that Australia tabled in March 1987. Like the pre-round proposals summarized above, the Australian proposal would rely more on self-assessment by the contracting parties, but also provided for the compilation of reports by the Secretariat for more extensive review of the trade policies of the larger countries.<sup>20</sup> Other proposals followed in June, with Switzerland calling for establishment of a Trade Policy Committee to monitor contracting parties' trade policies<sup>21</sup> and Japan proposing that the major developed and developing countries be subject to review on a rotational basis (the reviews to be conducted by two or three contracting parties with assistance from the Secretariat).<sup>22</sup>

Among these early proposals it was the US offering that most closely resembled what the TPRM would eventually become. The United States advocated reviews by the Secretariat of individual contracting parties' trade policies and practices.<sup>23</sup> The US ideas may have gotten greater traction in part because former US Assistant Secretary of State Julius Katz (see Biographical Appendix, p. 582), "whose unorthodox ways ... earned him the sobriquet of 'GATT's 96<sup>th</sup> Contracting Party',"<sup>24</sup> chaired the FOGS group at the start of the Uruguay Round. He took a leading role in translating the ideas that his own and other countries put forward in the FOGS negotiations into a discussion paper, then negotiating with his peers and the Secretariat to move those ideas from concept to proposal to an early harvest.

The principal negotiations over the shape of the TPRM took place from late September 1987 through late October 1988, and centred on the development of a progressively more detailed draft that became the basis for the decision adopted in an "early harvest" at the Montreal Ministerial Conference in December 1988. The original draft for this paper, dated 29 September 1987, bore neither a title nor an author's name. With some relatively minor changes, it formed the basis for the discussion paper that Mr Katz issued the next month.

Drawing on the ideas presented thus far in the FOGS meetings, Mr Katz's draft provided for reviews of all contracting parties through self-reporting by the countries in an agreed format, and reviews that "might last three or four days" that would focus "on a paper by the secretariat taking into account the information supplied by governments." This review "would be carried out by a body composed of a small number of government representatives with experience in trade policy questions," and the actual review – as opposed to the research for the paper that would form the basis of the review – would be conducted "in capitals, to the extent feasible." The proposal then specified that the review body would –

draw up a report on each review which would summarize the questions raised, the answers given and any other points made, and would propose conclusions. It would be forwarded to a supervisory body – the GATT Council or a new body such as a Trade Policy Committee – which would provide an opportunity for all contracting parties to make statements, and would adopt the report. The reports would be made public.<sup>25</sup>

The FOGS negotiations focused on several of these points over the ensuing year, with parallel discussions taking place within the GATT Secretariat. The lines separating the negotiations between contracting parties and the deliberations within the Secretariat were rather blurry, with Director-General Arthur Dunkel taking a close interest in the matter. Among the more important points of contention concerned the role of the Secretariat in the reviews, a subject that came up in internal meetings that the director-general held on 16 July and 1 October 1987. Mr Dunkel noted with approval in the latter meeting that the Katz proposals "in many ways marrie[d] with the views already developed by the secretariat," but also observed that "in one or two respects they presented major differences."<sup>26</sup> Other staff present at the meeting suggested that because Mr Katz had not yet circulated the draft there was still time for discussing with him "the possibility of amending some of the proposals in it."<sup>27</sup> That may have included the question of how active the role of the Secretariat would be in reviews. Despite the reluctance that some countries expressed, the Secretariat appears to have been advocating a role for itself from the start. Whereas in Mr Katz's draft the Secretariat would be limited to "prepar[ing] a draft of appropriate questions for the review body,"<sup>28</sup> the internal note instead suggested that "reports by governments would form one basic input for fuller reports which would be prepared by the secretariat." Taking this approach "would have substantial staffing and budgetary implications for the secretariat" (*Ibid.*: 2).

Over the course of the next several months, the FOGS negotiators moved progressively towards a system that gave more investigative authority to the Secretariat and relied less on the initiative of the member governments. That progression was only hinted at in the October discussions, where one view "was that the Secretariat should merely be a postbox for information supplied by governments," but "[o]thers were willing to concede a more substantive rôle to the Secretariat."<sup>29</sup> The proposed level of Secretariat activism rose in subsequent versions of the discussion draft. The 7 January 1988 text still provided that the reviews would be conducted by governmental representatives, but specified that the "information reported by contracting parties" would be "supplemented by a factual background paper by the Secretariat."<sup>30</sup> By the time of the second revision the next month, the text

referred to reviews being based on annual reports from the contracting party itself and “a report, to be drawn up by the Secretariat, based on these annual reports and on discussions between a ‘review team’ of Secretariat and governmental experts” who would travel to the capital to pose their questions.<sup>31</sup> In a FOGS meeting the next month, “Switzerland argued convincingly against mixed government–Secretariat review teams,” with “the general feeling [then] moving toward purely Secretariat teams.”<sup>32</sup> The discussion had matured to a point in late April where brackets could be inserted into the text of the third revision, thus suggesting both what was approved and what was not. It called for the report “to be drawn up by the Secretariat, based on the information provided by the contracting party or parties concerned and on discussions between a [Secretariat] [information gathering] team and officials of the contracting party under review.”<sup>33</sup> By May, those brackets had disappeared, with the fourth revision of the text specifying that it was the Secretariat that would draw up the report.<sup>34</sup>

The disappearance of the brackets did not signal an end to debate, however, as the role of the Secretariat remained a point of dispute well into 1988. Representatives of the developed countries had concluded that the Secretariat report needed to be independent and analytical, so as to avoid what Mr Katz called “leaving the goats to mind the cabbages.”<sup>35</sup> Canada and Sweden were among the principal advocates of an active Secretariat role, although at least as late as March 1988, Japan still held the view that the “review team might be Secretariat plus representatives of two or three countries.”<sup>36</sup> Developing countries continued to express concerns about granting new powers to the Secretariat, however, especially with respect to on-site investigations. Brazil, India, Malaysia and Yugoslavia were all identified as “hard liners” in opposition to site visits, and proposed that the text provide that “[a]n individual contracting party *may invite* the Secretariat to *assist in* the task of information-gathering *on a voluntary basis* in the relevant capital.”<sup>37</sup>

The conflict over this matter was so deep that a number of developed countries that insisted upon on-site investigation said they were “prepared to give up the TPRM if this [were] not agreed.” The De la Paix Group of developed and developing countries (see Chapter 3) helped to smooth over these differences. As finally approved in paragraph C(v)(b) of the TPRM agreement, one aspect of the review – in addition to a report by the member being reviewed – was to be a report “drawn up by the Secretariat on its own responsibility, based on the information available to it and that provided by the Member or Members concerned.” Beyond providing that the Secretariat “should seek clarification from the Member or Members concerned of their trade policies and practices,” the agreement did not further specify what this report would contain or how it would be produced.

Several other points occupied the FOGS negotiators. One concerned the degree to which the results would be made public, with Japan proposing that only press releases be issued and that the report itself remain unpublished. In keeping with the broader objective of transparency for both the country under scrutiny and the trading system itself, the negotiators eventually agreed to make public all of the documents: the Secretariat report, the government report and the minutes of the meeting in which they were discussed.

The Secretariat also dealt in greater detail with technical matters such as the format and content of the reports that contracting parties would submit on their policies, as well as the

cycle by which contracting parties would come up for review. Both of these topics were addressed by a six-page internal memorandum prepared for Mr Dunkel on the same day that Mr Katz issued the first version of the chairman's discussion draft. In one point that remained in place from that day forward, in broad principle if not in the specifics, this note of 6 October 1987 proposed a three-tier cycle in which the frequency of reviews would be determined by the size of the member. The 1987 proposal would cover the seven to ten largest countries every 18 to 24 months, and an undefined middle group would be reviewed every three to four years, but for the rest of the countries – which the paper referred to as “the marginals” – examinations “would be rare.”<sup>38</sup> As finally agreed to in Article C(ii) of the TPRM agreement, the four largest trading entities (measured by their share of world trade in a recent representative period), and counting the European Community as one, are subject to review every two years. The next 16 are to be reviewed every four years, and other members every six years, “except that a longer period may be fixed for least-developed country Members.”

## Use of the Trade Policy Review Mechanism

The agreement establishing the TPRM, as approved at the Montreal mid-term review of the Uruguay Round in 1988, was later incorporated as Annex 3 of the Agreement Establishing the World Trade Organization (WTO Agreement) and remains the basis of the system to this day. There was still preparatory work to be done before the first reviews could be conducted. At Montreal, the contracting parties tasked Deputy Director-General Madan Mathur with chairing a technical group on the format of the reviews, which he proceeded to do in coordination with Frank Wolter (see Biographical Appendix, pp. 585 and 597), the first head of the TPR Division. By 1989, it was under way. The TPRB itself was not yet in place during those final years of the late GATT period, so its functions were instead filled in the early years by the GATT Council of Representatives.

### *TPRs, the members and disputes*

Mr Wolter insisted that these reports be prepared on the Secretariat's own responsibility and needed to be kept independent. Unlike the reports prepared by some other intergovernmental organizations, these were not negotiated documents whose content was the product of haggling between the Secretariat and the member. A government that did not like the content of the report could write what it wished in its own report and raise objections in the council, but the staff would not dicker with them over the content of the Secretariat report. Despite the fact that this was agreed to in principle in the FOGS negotiations, it took some time for governments to become comfortable with the notion of being investigated and critiqued by international civil servants. The preparation of these reports by the Secretariat under its own responsibility represented a fundamental break from the past practice in which the role of the GATT staff was strictly limited and almost exclusively of a clerical, logistical or technical nature. The countries' concerns over that first point are illustrated by one senior official's recollection of the first time that he went on mission to a particular developing country, when he received an unusual summons:

I was in my robe at ten o'clock in the evening and I was called down to the front desk and went down in flip-flops. Two soldiers were waiting for me at the door of the lift. I stepped out of the lift and these soldiers took me by the arm and said, "Come with us." They took me to a car and there was the president, and he said, "Explain to me what the TPR is." And I did. Thereafter we got all the information we needed for the Secretariat's report.<sup>39</sup>

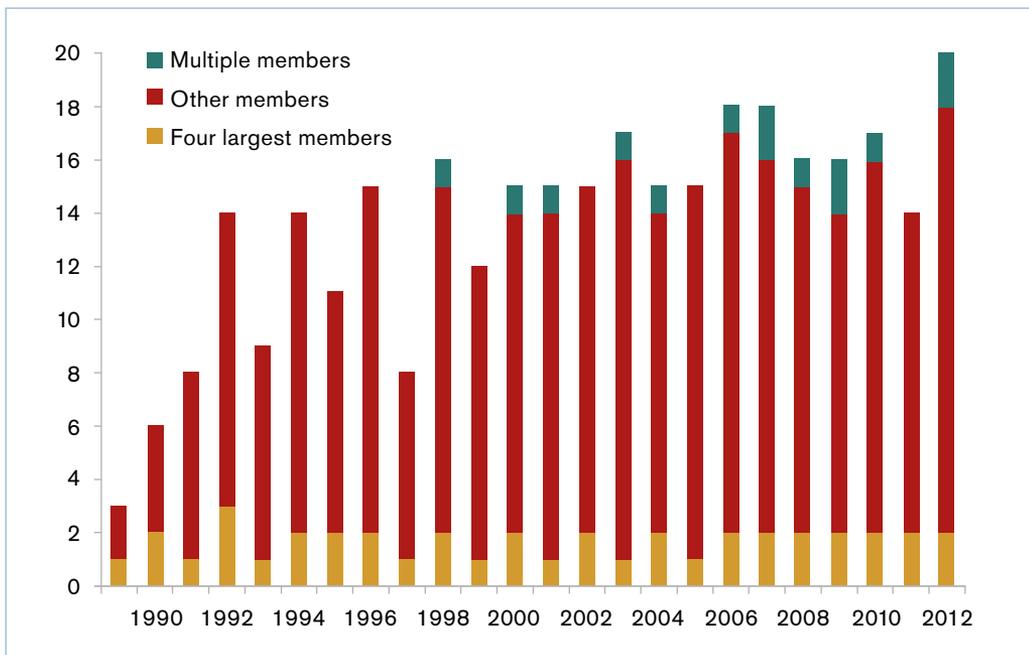
The relationship between the TPRM and the Dispute Settlement Understanding (DSU) is complex and delicate. The results of these reviews can help to identify areas where a country's laws and policies may need to be brought into compliance, but is (according to TPRM Article A) explicitly "not ... intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures, or to impose new policy commitments on Members." This is a point that Secretariat staff frequently stress when on missions to members, assuring officials that nothing cited in a TPR can, by itself, form the basis of a complaint under the Dispute Settlement Understanding. This is not to say that when a measure is mentioned in a TPR report, it somehow enjoys safe harbour; a measure that is so listed may give a "heads-up" to other members, and if they wish to pursue the matter in dispute settlement they need only verify the information through some other source. It is impossible to know how often, if ever, TPR reports have brought a matter to the attention of a future complainant for the first time. In a comparison of the content in TPRs and the subsequent filing of formal disputes, Ghosh (2008: 21) found that in 53 per cent of the cases brought to the dispute settlement system the law or policy in question was mentioned, highlighted or analysed in a Secretariat TPR report prior to the initiation of the dispute. In only a quarter of the cases, however, "did future complainants send in advance questions to the party under review," thus suggesting that "member states did not consider the TPR process to be the effective forum for applying pressure."

Although the TPR reports are a surveillance exercise and are intended in part to uncover any areas in which a member is out of compliance with its obligations, these documents involve no direct criticism of members' policies and measures. In particular, they never directly state whether a given policy (actual or proposed) is either compliant with or in violation of any WTO agreement or commitment. Strict free-traders would prefer prescription over description, and would want the reports explicitly to identify not only those measures that are WTO-illegal (thus asking the TPR Division to arrogate to itself a function reserved for the Dispute Settlement Body) but also to highlight those policies that may be WTO-legal but are ill-advised. The system is instead based on a less provocative approach. As Laird and Valdes (2012: 10526-10532) observed, "one of the strengths of the TPRM is its role as a forum where policies can be explained and discussed, where information can be sought, and concerns can be expressed on a largely non-legalistic (and non-confrontational) basis." Some analysts take a less favourable view of the relationship. The TPRs "are partially the result of a process that is influenced by political considerations," in Bown's opinion (2009: 219-220), "and thus they are written so as not to provoke disputes or to provide useful evidence in litigation."<sup>40</sup>

### *The quantity and quality of reports*

It took several years for the TPRs to be produced in relatively large numbers, as may be appreciated from the data illustrated in Figure 8.1. In its first year of operation, just three TPRs were conducted, all of them culminating at the end of the year. In a series of special meetings on 12-14 December 1989, the GATT Council conducted TPRs of Australia, Morocco and the United States (in that order). Ambassador Rubens Ricupero (see Biographical Appendix, p. 590) of Brazil presided over these meetings in his capacity as chairman of the council, and Ambassador Hassan Kartadjoemena of Indonesia served as lead discussant for the first TPR. In those early years, the government and Secretariat reports had roughly equal weight and even approximately the same page lengths. For Australia and the United States, both the government and Secretariat reports were in the range of 125 to 200 pages each; the Secretariat report on Morocco was 106 pages, as compared to a 70-page government report. In later years it was established that, in principle if not always in practice, Secretariat reports would aim to be no longer than 100 pages. The capacity and the productivity of the division rose in the years that followed. In 1990, which was the first full year of operation for the TPRB, the Secretariat allocated one director, nine professional posts, and three general service posts. That year, the TPRs focused on Canada, the European Community, Hong Kong,<sup>41</sup> Hungary, Indonesia, Japan, New Zealand and Sweden.

**Figure 8.1. Trade policy reviews conducted, 1989-2012**



Sources: Tabulated from data at [www.wto.org/english/tratop\\_e/tpr\\_e/tp\\_rep\\_e.htm#chronologically](http://www.wto.org/english/tratop_e/tpr_e/tp_rep_e.htm#chronologically) (for 1995-2012) and from GATT annual reports and press releases (for 1989-1994).

Notes: Multiple members = TPRs in which more than one member is reviewed in a single exercise. Data shown are for numbers of TPRs rather than numbers of members covered by them. Four largest members = Canada (to 2003), China (since 2006), the European Union, Japan and the United States.

It was not until years later that the pace of TPRs achieved the level needed in order to meet the schedule implied by the agreement. Every year the TPRB should review two “majors” (i.e. the four largest members that are each done every two years), as well as four countries in the middle tier (i.e. the 16 countries that are each done every four years), plus a variable and growing number of members that are each done every six years. The formula is thus six large and mid-sized members plus one sixth of the remaining members (not counting the EU membership) from the 21<sup>st</sup> largest onward. By the end of the GATT period, when there were 128 contracting parties (12 of which were EC members), the TPRB would need to consider 20 reviews per year in order to meet the quota. It was then operating at about half that level in the average year. The task became more difficult as the number of members rose. At the start of 2012, there were 155 members (27 of them in the European Union), meaning that if the TPRB reviewed each member separately it would have to do 24 reports per year (i.e. four more than at the start of the WTO period). That task has been eased somewhat by the practice of doing some reports on a regional basis, with two or more members included in a single report. In 2012, for example, the TPRB considered one report that covered Burundi, Kenya, Rwanda, Tanzania and Uganda, and another that covered Côte d’Ivoire, Guinea-Bissau and Togo. When combined with the 18 single-member reports that same year, the TPRB considered reports in 2012 that reviewed 26 members. That was actually two more than needed to meet the full quota. It was also a considerable increase over 2011, a year in which there were no multiple-member reports and only 14 members were examined. On average, from 2008 to 2012 the TPRB considered 16.6 reports per year covering 19.4 members. In 2013, the TPRB is scheduled to consider 15 reports covering 20 members.<sup>42</sup>

The quality of reports is more important than the quantity, and in that area the TPRM evolved over time. Within the first decade of its operation there were growing concerns over the operation of the TPRB, and when Mr Boonekamp became director of the division in late 1998, he instituted several reforms. Perhaps the most important reform, and one in keeping with the pattern by which the membership came to entrust the Secretariat with ever more responsibility in carrying out the TPRM mandate, was to persuade members to move from a system in which their own reports were given equal consideration to one in which the government and Secretariat reports had different aims. This reform responded to a practice on the part of many members to use the Secretariat report as a template for their own, submitting a parallel document that differed only in its “spin”. Mr Boonekamp instead built upon a precedent that Canada had set in 1996, when it kept its own report down to a concise statement regarding the aims and priorities of its trade policy. He urged other members to follow this practice, and since then the government reports have been brief (generally 10-15 pages) policy declarations that help to set the tone of the TPRB meeting rather than factual reviews that form the basis for the examination. Another reform was to shorten the Secretariat reports and consolidate their structure from six to four chapters, and to introduce a greater degree of analysis into them by stressing the importance of the summary observations.

The scheduling of TPRB meetings was also a concern. Members had fallen into the bad habit of postponing and rescheduling TPRB meetings, often leading to many being held in a short

period that precluded adequate examination of the reports. Mr Boonekamp worked with members to set and keep to a strict timetable for the preparation and completion of each TPR and the annual programme as a whole, with the TPRB meetings spread out more evenly across the year. The emphasis on improving quality also meant that, for a short time, quantity would be sacrificed. In 1999, there were just 12 TPRs prepared, down from 16 the year before. One way that resources were deployed better was through the preparation of TPRs in which more than one country in a regional group was covered. This was first done in 1998 and has been the way that one or two reports have been done in most years thereafter. The WTO also expanded the staffing of the TPR Division and, with support from the Dutch and the German governments, established a Sfr 500,000 annual fund that allowed Mr Boonekamp to bring in consultants and eventually increase the number of TPRs. That fund also allowed the division to adopt what became the standard practice of conducting two in-country missions for most reviews of developing countries, the first mission being devoted to an introduction to the TPRM process and the initial research and the main business of the second being a review of the Secretariat's initial draft and the filling-in of blanks.

### *Assessments of the Trade Policy Review Mechanism*

The TPRM offers an example of the watchers being watched, to return to Juvenal's famous turn of phrase. It has been under scrutiny from the start, with both the WTO members and academic critics offering their views. Several of the issues that were controversial in the negotiation of the TPRM remain so in critiques of the programme. The agreement itself provides for periodic appraisals of the TPRM, four of which have been conducted to date. They have resulted in a number of procedural changes, subsequently incorporated in revised Rules of Procedure for Meetings of the TPRB. As Laird and Valdes (2012: 10725-10738) summarized the reforms proposed in these reviews:

They called for, among other things: priority to be given to reviewing all members at least once as soon as possible; improvements in the focus and readability of reports; greater use of grouped reviews; the reports by the Secretariat and the member under review to be distributed, and advance questions to be sent to the member under review, five and two weeks, respectively, before a review meeting; the member under review to provide written answers at the start of the first session; and the Secretariat reports to highlight the changes to policies and measures during the period under review. The appraisals also concluded that steps should be taken to make the review meetings more interactive.

The fifth appraisal of the TPRM is to be prepared in 2013 for the Bali Ministerial Conference.

The reviews of the TPRM in the scholarly community, especially among economists, range from the constructively critical (Keesing, 1998; François, 1999; and Grammling, 2009) to the scathing (Stoeckel and Fisher, 2008). What is at issue in these reviews is not so much the way that the Secretariat executes the TPRs as it is the underlying purpose of the exercise as approved by the members. Comparing the TPRM with the review processes of other

institutions, Stoeckel and Fisher (2008: 71) called it “the poorest of all transparency exercises of trade policy.” They based this conclusion on the assertion that the “reviews contain no economic analysis at all – let alone economy-wide analysis,” and “there is no indication of what policy changes would be in the national interest.” Zahrnt (2009: 21) made similar criticisms and concluded that “the TPRM should be redesigned from scratch.” He urged that reports –

should follow a standardized analytical grid that improves readability, allows easy comparison across time and countries, and asks all countries of similar levels of development the same tough questions. Using studies from scientifically reputable sources, it should rigorously analyze trade and welfare effects – including non-economic repercussions on broader sustainability objectives. It should also inspect policymaking processes, applying best practice benchmarks and again relying on pre-existing in-depth studies. To improve the quality of its reports, the Secretariat should receive additional resources and independence. The process of writing reports should become more transparent and participatory.

More provocatively, he also suggested that “TPRs should be resolutely aimed at shaping domestic politics” (*ibid.*: 2). This could be done, he argued, “by focusing the attention of domestic constituents and the media on their country’s trade policies” in order to “convince readers of the benefits of liberal reform and serve as a reference in domestic policy debates.” He thus returned to the spirit of the original proposals made in the 1980s.

As suggested earlier, the view one takes of the TPR depends heavily on one’s perspective. The information presented in the Secretariat reports is more of a legal and political nature than economic *per se*, and the purpose is more descriptive than prescriptive. That is the content that the WTO membership has opted to commission from the Secretariat. Carmichael (2005: 71) recognized that point when, after offering criticisms of his own, he acknowledged that the TPRM “cannot now be turned into an agent of domestic reform” because the “WTO charter recognises that the sovereignty of individual member countries is absolute and inviolate.” He called for reforms in the domestic policy environments of the countries themselves.

### **The monitoring programme adopted in the financial crisis**

The Secretariat had originally been tasked not just with writing the TPRs but also preparing an annual overview of developments in the international trading environment that affect the multilateral trading system. These overviews were suspended after 2005, however, out of concern that they duplicated work already underway in other WTO publications (e.g. the *Annual Report* and the *World Trade Report*). Just a few years later, the outbreak of a global financial crisis inspired the Secretariat to take a broader view once again and to assign this task to the Trade Policies Review Division.

The outbreak of the financial crisis in September 2008 set off alarms in the trade community. Facing the widest and deepest downturn since the Great Depression of the 1930s, many feared that the dark spectre of protectionism would soon return. The association between downturns and protectionism is at least as old as the panic of the 1890s, and was solidified by the role that the Hawley–Smoot Tariff Act of 1930 played in deepening, spreading, and prolonging the Great Depression. From 1929 to 1930, the problems began in one section of the US economy (agriculture) and spread from there to the stock market before the US Congress made matters worse through the enactment of protectionist legislation. It was widely expected that the only difference this time would be in the sector that started the cycle of destruction, which in 2008 was housing rather than agriculture. These fears led economists to warn that the “political pressures demanding import protection to protect employment are surfacing with increasing intensity around the world” (Gamberoni and Newfarmer, 2009) and that “the risk of a devastating resurgence of protectionism is real” (Dadush, 2009a: 1). Many policy-makers shared these concerns.

In retrospect, those fears now appear to have been overblown. “*Ex post*,” one collection of studies concludes, a “fundamental distinction between the Great Depression and the Great Recession is that the 2008-9 global economic contraction did not result in a massive wave of new protection” (Bown, 2011: 1). This begs the question of why countries did not react as many expected. One argument is that it is the commitments that countries had made in generations of GATT and WTO negotiations that stayed their hands. That is a difficult point to argue, however, when one considers the considerable leeway that countries are left in their commitments. Many countries have a great deal of “water” in their tariffs, such that they could raise their applied rates far above the levels that prevailed just before the crisis broke; many tariff lines are entirely unbound, meaning that a country could raise its tariffs on those items to confiscatory levels without breaking its commitments. Countries also had at their disposal several other WTO-legal instruments by which they could have acted to restrict trade, including anti-dumping and other trade-remedy laws. One cannot convincingly argue that protectionism was held at bay solely by the commitments that members made in WTO agreements and other trade instruments, because it would have been quite easy for them to shut down much of world trade without ever running afoul of the letter of their obligations.

Imposing new restrictions would have been contrary to the spirit of members’ commitments in the WTO, however, and it is here that this organization and other bodies in the global economic community may have helped to avert a worsening spiral. Formal organizations such as the WTO, acting in concert with the less formally constituted Group of Twenty (G20) and with individual countries, worked together to promote a sense of collective economic security and the need for restraint. That was achieved in part through the “soft law” of communiqués issued by leaders and ministers, and in part through the monitoring that the WTO and other institutions conducted. They mobilized their resources to report on steps that countries might take to restrict their markets or bail-out industries, with a view to naming and shaming – and, in the process, deterring countries from backsliding. The World Bank inaugurated a new Temporary Trade Barriers Database,<sup>43</sup> for example, and provided support for the Global Trade Alert project.<sup>44</sup> The highest-profile action of any international group during this period came at

the G20 summit on 14-15 November 2008. There the assembled leaders approved a “standstill” pledge in which they rejected protectionism and declared that for the next year –

we will refrain from raising new barriers to investment or to trade in goods and services, imposing new export restrictions, or implementing World Trade Organization (WTO) inconsistent measures to stimulate exports. Further, we shall strive to reach agreement this year on modalities that leads to a successful conclusion to the WTO’s Doha Development Agenda with an ambitious and balanced outcome. We instruct our Trade Ministers to achieve this objective and stand ready to assist directly, as necessary. We also agree that our countries have the largest stake in the global trading system and therefore each must make the positive contributions necessary to achieve such an outcome.<sup>45</sup>

By the time that the G20 met, the monitoring work in the WTO had already been under development for a month. Its first step came on 14 October 2008, when Director-General Pascal Lamy reported to the General Council that he had “constituted a Task Force within the Secretariat to follow up the effects of the financial crisis on our different areas of work.”<sup>46</sup> He suggested that WTO members “keep the situation under review, and be ready to act as necessary.” Members asked that any information developed in the WTO’s monitoring operations be shared, hoping to restrain protectionist impulses among themselves and their partners. On 12 November 2008, the director-general convened an informal heads-of-delegation meeting in order to de-brief members on trade finance issues discussed in the expert group. The Secretariat took the language that the G20 approved in Washington three days later, as well as existing language in the TPRM agreement calling for an annual report on developments in the trading system, as a mandate for active reporting. Mr Lamy informed the General Council at its 17 December 2008 that the first monitoring reports would be ready the next year.

Mr Lamy presented the first of what would become quarterly reports to an informal meeting of the TPRB on 9 February 2009. On releasing the report he reassured the members “that the seeds for this initiative were not sown in Davos, nor in the G20,” but that it was instead “a home-grown initiative that started in the WTO and ... should continue in the WTO as long as the global economic situation justifies it.”<sup>47</sup> Two weeks before the release of the second such report on 14 April 2009, however, the G20 leaders met once again and called “on the WTO, together with other international bodies, within their respective mandates, to monitor and report publicly on our adherence to these undertakings on a quarterly basis.”<sup>48</sup> Still one more WTO report came out on 13 July, before the fourth report in the series, as issued 14 September, was truly a joint undertaking. Prepared together with the OECD and the United Nations Conference on Trade and Development (UNCTAD), this report – which preceded yet another G20 leaders meeting in Pittsburgh later that month – found no “widespread resort to trade or investment restrictions as a reaction to the global financial and economic crisis.” It nonetheless found that there had “been policy slippage since the global crisis began.” The heads of these three organizations cited new non-tariff measures, trade defence mechanisms, the re-introduction of agricultural export subsidies and higher tariffs:

These measures, along with reports of additional administrative obstacles being applied to imports, are creating “sand in the gears” of international trade that may retard the global recovery. The fiscal and financial packages introduced to tackle the crisis clearly favour the restoration of trade growth globally, but some of them contain elements that favour domestic goods and services at the expenses of imports. It is urgent that governments start planning a coordinated exit strategy that will eliminate these elements as soon as possible.<sup>49</sup>

Although issued as a joint report of the three institutions, the report followed essentially the same format as the second and third monitoring reports that the WTO had issued.<sup>50</sup> These included current economic data, illustrative lists of measures that countries had adopted to facilitate or restrict trade, tables on specific initiatives such as anti-dumping cases, and detailed annexes on specific actions taken by countries. The three institutions continued thereafter to produce these reports on a joint basis, but at the crisis itself abated the pace decelerated. The reports remained on a quarterly basis from September 2009 to June 2010, but beginning with the November 2010 report they have instead been issued twice a year.

The Secretariat had to exercise special care in how it worded the summation of actions taken by members, especially in the earliest and most critical months of the crisis. There was on the one hand the need to provide assurance that countries were not engaged in a headlong race towards 1930s-style protection, so as not to place trade ministers around the world in the position of trying to explain to their cabinet colleagues, to legislators, and to the public why they alone seemed to be resisting an obvious temptation. On the other hand, it was also necessary to identify the actual cases in which members were taking action that appeared to violate the letter of their commitments or, in some cases, merely the spirit of the trading system; to do otherwise would have given licence to those who were so engaged. Neither of these competing needs could dominate the requirement that they compile as accurate and comprehensive a record as they could of the steps that countries were in fact taking.

Has the monitoring made a difference in policy outcomes, or has it merely served to record and report those outcomes? The answer to this question depends in part on whether the concept in physics known as the “observer effect” is applicable to the world of trade policy. This refers to changes that the act of observation itself will make on a phenomenon that is being observed. To a physicist, this means (for example) moving an object ever so slightly when shining a flashlight upon it, as the photons from that instrument act upon the item under observation. In trade policy, this might mean moving policy-makers, or perhaps making them less eager to move in a given direction, when they know that the light of scrutiny will illuminate their actions.

This was the original inspiration for Mr Dunkel and others in the early 1980s, when they proposed what was to become the TPRM. The peer pressure and publicity that they hoped would make politicians think twice about imposing new restrictions on trade, or providing new subsidies to domestic industries, were inspired by that same notion of an observer effect. The

TPR reports are too infrequent to have much of an effect in a crisis atmosphere, being at most biennial, but the monitoring reports that Mr Lamy inaugurated in 2009 and that the WTO continues to issue with its partners come out more regularly. They are emblematic of an international organization that takes a more active role than its GATT predecessor was permitted, and in which its members have placed more trust.

## Endnotes

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- 1 See *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, GATT BISD 26S/210, 28 November 1979.
- 2 See *Communication from the European Community*, GATT document MTN.GNG/NG4/W/20, 22 March 1988, p. 3.
- 3 See *Communication from the United States*, GATT document MTN.GNG/NG14/W/9, 23 June 1987, pp. 2-3.
- 4 There is no one date or year that can be identified as the "start" of the Internet, the antecedents for which date to the early 1960s, but the key events in the transformation of the Internet from a closed system used by US government-affiliated bodies to a global instrument of communication came during 1993 to 1995. That corresponds precisely to the end-game of the Uruguay Round and the transition from GATT to the WTO. See the timeline at [www.zakon.org/robert/internet/timeline/](http://www.zakon.org/robert/internet/timeline/).
- 5 The agreement is more formally known as the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.
- 6 See Bacchetta (2012: 33).
- 7 See *Report of the Working Group on Notification Obligations and Procedures*, WTO document G/L/112, 7 October 1996, p. 14.
- 8 See *Notification Requirements under the Agreement on Subsidies and Countervailing Measures*, WTO document G/SCM/W/546/Rev.3, 12 April 2012, p. 4.
- 9 Some EU member states file SPS notifications on a regular basis (e.g. the Netherlands), and some do so occasionally (e.g. France), but many do so rarely or never.
- 10 Written by Sally Jennings of the New Zealand Ministry of Agriculture and Forestry with contributions from the WTO Secretariat and the Australian Department of Agriculture and Forestry Biosecurity, this 2011 publication of the WTO is posted at [www.wto.org/english/res\\_e/booksp\\_e/sps\\_procedure\\_manual\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/sps_procedure_manual_e.pdf).
- 11 See *Improvement of Timeliness and Completeness of Notifications: Members' Suggestions of "Best Practices"*, WTO document G/AG/W/73/Rev.2, 6 September 2010.
- 12 See *Biennial Technical Assistance and Training Plan 2012-2013*, WTO document WT/COMTD/W/180/Rev.1, 3 February 2012, p. 10.
- 13 See *Mid-Term Meeting*, GATT document MTN.TNC/11, 21 April 1989.
- 14 Author's interview with Mr Boonekamp on 24 September 2012.
- 15 The terms of reference for the group are contained in an 11 October 1983 proposal for funding that Mr Dunkel submitted to the Ford Foundation. The quote above is from Annex I, "Background Notes for Use in Preparing the Study Group's Terms of Reference", p. 1.
- 16 *Ibid.*, p. 8.
- 17 See *Recommendation of the Council for Co-operation between Member Countries in Areas of Potential Conflict between Competition and Trade Policies*, OECD document C(86)65/FINAL, 23 October 1986.

- 18 GATT Secretariat note on the second FOGS meeting (30 June 1987), p. 1. The EC concerns over the TPRM were also motivated by an interest in ensuring that the GATT reviews "be clearly focused on trade policies and practices and on their impact on the functioning of the GATT system" insofar as anything beyond that "would raise problems, for example of Commission/Member State competence." Paraphrasing of comments made by EC Ambassador Paul Tran at the 29 September 1987 FOGS meeting, in a GATT Secretariat note (6 October 1987), pp. 1-2. The EC position was also complicated in later discussions by the insistence of Japan that individual EC member states' policies must be examined in the reviews.
- 19 *Ibid.*
- 20 See *Communication from Australia*, GATT document MTN.GNG/NG14/W/1, 3 April 1987.
- 21 See *Communication from Switzerland*, GATT document MTN.GNG/NG14/W/7, 18 June 1987.
- 22 See *Communication from Japan*, GATT document MTN.GNG/NG14/W/8, 23 June 1987.
- 23 See *Communication from the United States*, GATT document MTN.GNG/NG14/W/9, 23 June 1987.
- 24 See "Foggy Outlook for FOGS?", SUNS, 10 November 1987, at [www.sunsonline.org/trade/process/during/uruguay/fogs/11100087.htm](http://www.sunsonline.org/trade/process/during/uruguay/fogs/11100087.htm).
- 25 See "Trade Policy Review Mechanism/Chairman's Discussion Paper", 6 October 1987. Numbers omitted from the paragraphs (paragraphs cited here are numbers 3 and 5).
- 26 Mr Dunkel's comments paraphrased in a GATT Secretariat note, "Strengthening Surveillance in GATT: Summary of internal discussion of 1 October 1987", 7 October 1987, p. 1.
- 27 *Ibid.*
- 28 This observation applies to paragraph 4 of both the 29 September draft (which was the version discussed at the Secretariat's 1 October meeting) and the 6 October version as distributed by Mr Katz to his peers.
- 29 GATT Secretariat note, 19 October 1987, p. 2. The note does not associate these views with any specific countries.
- 30 "Trade Policy review mechanism, Chairman's Discussion Paper, Revision", 7 January 1988, p. 2.
- 31 "Trade Policy Review Mechanism, Chairman's Discussion Paper, Second Revision", 12 February 1988, p. 2.
- 32 Memorandum from John Croome to the Director-General, "FOGS meeting 21-23 March", 23 March 1988, p. 2.
- 33 "Trade Policy Review Mechanism, Chairman's Discussion Paper, Third Revision", 25 April 1988, p. 2.
- 34 "Trade Policy Review Mechanism, Chairman's Discussion Paper, Fourth Revision", 5 May 1988, p. 3.
- 35 Quoted by Peter Tulloch, "Confidential Note on Meeting of 24-28 October 1988", 8 November 1988, p. 2.
- 36 GATT Secretariat, "Compendium of comments made in discussion of Chairman's discussion paper (second Revision) in formal and informal meetings in March 1988", 27 April 1988, p. 4.
- 37 *Ibid.*, emphases in the original.
- 38 Memorandum from Robin Davies to the Director-General, "Surveillance/Format for Country Reports", 6 October 1987, p. 2.
- 39 Correspondence with the author.

- 40 Bown's critique focused on the potential utility of the TPR in uncovering WTO-inconsistent measures that might then be brought into line by way of dispute settlement cases. He proposed instead that an outside body, which he called the Institute for Assessing WTO Commitments, be established to perform this role. Its role would be to monitor WTO compliance actively and to assist developing countries to be more effective litigators. The focus would "be on institutionalizing much of the prelitigation provision of economic, legal, and political support about potential cases," he proposed (Bown, 2009: 230), in order "to help remedy the market failure by generating information on potential cases to pursue that the private sector does not provide."
- 41 Hong Kong was not yet reunited with China at this time.
- 42 Mongolia and Tonga had been scheduled for 2013 but, in view of the difficulty of scheduling TPRB meetings in December 2013, those meetings were postponed to early 2014.
- 43 The database is available online at <http://data.worldbank.org/data-catalog/temporary-trade-barriers-database>.
- 44 The Global Trade Alert is another monitoring programme that emerged in the immediate aftermath of the financial crisis and the G20 standstill pledge. This database is an initiative of the Centre for Economic Policy Research and is funded by the World Bank and donors in Canada, Germany and the United Kingdom. It allows users to search measures by the implementing jurisdiction, the affected jurisdictions, sectors involved, type of measure, among others, and is accessible at [www.globaltradealert.org](http://www.globaltradealert.org).
- 45 See *Declaration: Summit on Financial Markets and the World Economy*, 15 November 2008, pp. 4-5.
- 46 Report by the Chairman of the Trade Negotiations Committee, posted at [www.wto.org/english/news\\_e/news08\\_e/tnc\\_chair\\_report\\_oct08\\_e.htm](http://www.wto.org/english/news_e/news08_e/tnc_chair_report_oct08_e.htm).
- 47 Comments posted at [www.wto.org/english/news\\_e/news09\\_e/tpr\\_09feb09\\_e.htm](http://www.wto.org/english/news_e/news09_e/tpr_09feb09_e.htm).
- 48 See *London Summit: Leaders' Statement*, 2 April 2009, p. 7.
- 49 See OECD/UNCTAD/WTO, *Report on G20 Trade and Investment Measures*, 14 September 2009, preface.
- 50 The first of the reports had a different format and was never made public. The second and all subsequent reports are posted at [www.wto.org/english/news\\_e/archive\\_e/trdev\\_arc\\_e.htm](http://www.wto.org/english/news_e/archive_e/trdev_arc_e.htm).



# Part IV

## Negotiations

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# 9 Modalities, formulas and modes

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Mathematicians who are only mathematicians have exact minds, provided all things are explained to them by means of definitions and axioms; otherwise they are inaccurate and insufferable, for they are only right when the principles are quite clear.

Blaise Pascal  
*Pensées* Section I, "Thoughts on Mind and on Style" (1660)  
Translation by W.F. Trotter (1910)

## Introduction

The conduct of trade negotiations in the WTO shows both continuity and change from the GATT period, but even the two main points of continuity have come under challenge. One is the use of multi-issue, multi-year rounds as the main organizing principle of negotiations, which was the general rule throughout the GATT period. The other is the practice of bundling all of the issues in these rounds into a single undertaking, which was an innovation from the final (Uruguay) round of the GATT period. Members reiterated both of those principles when they launched the Doha Round in 2001, but after more than a decade of desultory negotiations, those principles are increasingly questioned. Some issues have been handled outside of the round, as is discussed in Chapter 10, and both rounds and the single undertaking face critical scrutiny from analysts and some practitioners.

Another point of continuity from the late GATT period is an emphasis on formulas as the principal modality for market access negotiations. These take the form of equations that appear on the surface to be mathematically objective but are in reality the product of a highly subjective process of calculation and negotiations. It is in the devising of those formulas, as well as the exceptions and other flexibilities that modify and supplement them, that modern negotiators most closely resemble the mercantilists that they were supposed to replace. Even the language that negotiators employ carries overtones of the mercantilism that dominated the trade policy of Pascal's seventeenth century, when commerce was treated as the economic adjunct to war: countries have offensive interests (i.e. the improved market access that they aim to achieve in the markets of their trading partners) and defensive interests (i.e. the protective barriers in their own markets that the affected industries demand be preserved). The only important departure from the mercantilist past comes in shifting the focus from results to opportunities. Whereas the objective under mercantilism was to build up a trade

surplus by promoting exports and restricting imports, the objective in modern tariff negotiations is to trade off the least reduction of one's own barriers for the greatest reduction in the barriers of one's partners. Even that distinction shrinks if the changes in opportunities are expected to produce changes in outcomes; it virtually disappears if countries devise and trust econometric forecasts that project the actual results that a given formula may produce for trade, employment and economic growth.

The principal departure from most of the GATT period comes in the new issues that are under negotiation, including market access for services and restrictions on agricultural production subsidies. Both of these issues were introduced in the Uruguay Round, and while that round achieved little actual liberalization in these areas, it did design the basic architecture by which countries might do so in the future. Negotiations on trade in services are conducted according to a request–offer approach that is a carry-over from the way tariff negotiations used to be done, but is also adapted to the multifarious ways in which services may be traded. Negotiations over agricultural production subsidies are conducted according to formulas, but their results have generally not been “binding” (in the sense that economists use that term) and leave even more space than do tariff negotiations for countries to decide how they will implement their commitments. Where tariff commitments are made at the product level, the commitments on production subsidies in the Uruguay Round were sector-wide and allowed considerable leeway in the allocation of the subsidies to specific products.

This chapter is less of an historical presentation than preparatory material for others that follow. Its purpose is to provide a basic introduction to the actual conduct of trade negotiations, and to review the controversies surrounding the ways that negotiations are structured. Like the earlier review of coalition diplomacy, it aims to explain the building blocks of negotiations before we turn to the actual launch and conduct of the Doha Round and other initiatives in the WTO.

### **How negotiations are conducted: rounds versus separate initiatives**

The practice of negotiating in rounds developed at the very start of the GATT period, but it was not inevitable that talks would be organized in this way. In the Anglo-American consultations held during the Second World War, the United Kingdom advocated that future trade negotiations be conducted bilaterally and that the resulting agreements be multilateralized through a universal most-favoured-nation (MFN) principle. This approach would thus globalize the method by which Great Britain and other European countries negotiated a network of bilateral treaties during the latter half of the nineteenth century. The US officials instead favoured multilateral negotiations and maintained that position in the talks that produced GATT and the International Trade Organization (ITO) Charter. In one sense, the UK proposal prevailed for decades, however, insofar as the request–offer approach to tariff negotiations in the early GATT rounds were held in clusters of simultaneous but essentially bilateral exchanges.

The conduct of rounds, and their underlying logic, changed significantly when the scope of these negotiations moved beyond tariffs and other border measures. When there is only one major issue on the table the only possible trade-offs are within that subject, but when there are multiple issues in play, one may make trade-offs between them. One discrete negotiation on protection for intellectual property rights might not advance very far on its own, for example, and another negotiation might get stuck if it is only concerned with market access for textile and apparel products, but a great deal more might be accomplished if these two topics are brought together. That had been the experience in the Uruguay Round, which included such grand bargains as the ten-year phase-in of greater protection for intellectual property (as developed countries demanded) and a ten-year phase-out of protection for textiles and apparel (as developing countries had demanded).

Sir Leon Brittan had that same goal in mind when he began to promote the idea of a new round early in the early WTO period. “Whether it was true or not was debatable,” he would later recall, “but the idea was that if you had ten things you wanted, as opposed to two, there was a higher chance [negotiating this way] that you were going to be able to say, ‘Well, I’ve got four of them.’ It wasn’t much more sophisticated than that.”<sup>1</sup> Neither he nor most other negotiators suspected in the early WTO era that what had worked so well in the last round might prove troublesome in a new one. With the benefit of that infallible wisdom that comes with hindsight, however, one can see now how there were at least hints then that rounds were not necessarily the only or best way to package negotiations.

### *Criticism of rounds*

The problem with rounds that was obvious even in the late GATT period is that each one has become longer than its predecessor. None of the first five rounds in the GATT period lasted as long as a year, and on average they took just over seven months. Thereafter, the negotiations grew much longer: the Kennedy Round (1962-1967) took 37 months, the Tokyo Round (1972-1979) lasted precisely twice as long (74 months) and the Uruguay Round (1986-1994) went on for just over a year more than its predecessor (87 months). The growing length of rounds affects not only the speed with which liberalization is delivered multilaterally, but may also affect countries’ willingness to deliver it unilaterally or bilaterally. On the one hand, a country may be less likely to undertake autonomous liberalization immediately before or during a round because this might be taken as a form of unilateral disarmament for which it will receive no credit in the negotiations. On the other hand, policy-makers may be under increasing pressure during an apparently interminable round to handle the pent-up demand for liberalization through concurrent negotiations at the bilateral, regional or plurilateral levels. Lengthy rounds might thus not only delay liberalization on an MFN basis, but also push countries towards more discriminatory options that, once in place, create further disincentives for the conclusion of a round that would reduce the margins of preference that countries enjoy under their new free trade agreements (FTAs).

Several authors find additional fault with rounds. Relying on this approach is “fraught with problems,” according to Barfield (2001: 39), insofar as they “occur infrequently” and “the big package deals negotiated at the end of trade rounds necessarily contain numerous gaps, ambiguities and even contradictions.” Or as Dadush put it (2009b: 5-6), “experience demonstrates conclusively that a good way *not to* [produce enforceable rules] is to have a big, comprehensive trade round.” One experienced WTO practitioner argued that “[t]he world of international trade may have become too complex for traditional ‘rounds’” (Harbinson, 2009: 20). He suggested instead that “[n]ew negotiating paradigms have to be found,” and that:

A possible avenue for exploration could involve a mode of permanent, manageable, non-comprehensive negotiation with subjects under current negotiation being linked together less formally than in the outdated “round” format. Informal balances would have to emerge, with new subjects coming on to the agenda as others are dealt with. Progress should be gradual and incremental. The needs of economies at different stages of development should be taken into account. “Variable geometry”, plurilateral and “critical mass” techniques should be considered. WTO Members should attempt to accommodate different perspectives and different speeds while maintaining the overall integrity of the system.

There is ample precedent for negotiations that are conducted outside of a round and that produce discrete agreements. As is discussed in Chapter 10, the bargains reached during the time of the “built-in agenda”, which lasted between the creation of the WTO and the start of the Doha Round, were each negotiated on the basis of a critical mass. The instruments dealt with such diverse subject matter as tariffs on information technology products and alcohol, and the regulation of financial and basic telecommunications services. None of these agreements would be made retroactive parts of the single undertaking. They were ultimately applied on an MFN basis, but no member was obliged to adopt them.

Doing away with rounds would be a radical step. A less jarring move would be to rely more upon “early harvests” in a round, meaning the adoption (provisionally or definitively) of agreements on some matters that can be resolved before the other matters are settled. Several aspects of the Uruguay Round were handled on this basis, including interim reforms in dispute settlement procedures (see Chapter 7) and the Trade Policy Review Mechanism (see Chapter 8). Paragraph 47 of the Doha Ministerial Declaration of 2001 provided that, apart from matters affecting the Dispute Settlement Understanding, “the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking.” Even so, it further stipulated that “agreements reached at an early stage may be implemented on a provisional or a definitive basis” and that these “shall be taken into account in assessing the overall balance of the negotiations.”

The main support for rounds and a single undertaking comes from countries, or from interests within countries, that believe that the offensive objectives they pursue face strong resistance and the only way they are likely to get satisfaction from other countries is by packaging

commitments in a larger basket. Any given group's attachments to specific negotiating strategies may be situational, however, and might shift according to changes in the economic and political environment.

## How agreements are packaged: the single undertaking versus discrete pacts

Two basic questions must be answered when devising the structure of a negotiation. First, will it deal with a single issue or with more? Second, if the negotiation deals with more than one issue how will those distinct elements be related? The answers to these questions can be arrayed in a two-by-two matrix (see Table 9.1), although in reality only three of those options can be considered practical. All three of those options have been tried at various times in the GATT and WTO periods. The sequence by which negotiations moved from one approach to another was a three-step process: the Kennedy and Tokyo Rounds introduced new issues but allowed countries to decide whether they would sign on to the resulting agreements, the Uruguay Round was based on a single undertaking in the stronger sense of that term (as explained below), and the period that fell between the Uruguay and Doha rounds saw the negotiation of numerous, separate agreements that were reached among a "critical mass" of members, but the benefits of which were extended on an MFN basis to the WTO membership as a whole. The Doha Round then returned to the Uruguay Round pattern. The only one of the four possible combinations that has never been tried would be to make subsequent, discrete agreements a compulsory part of the single undertaking. This would mean obliging all of the members to adopt all new agreements as they are completed, even if they object to these instruments, something that could be done only if the WTO were to abandon the rule of consensus decision-making and the principle of sovereignty.<sup>2</sup> It is impossible to conceive of the WTO taking that direction, but each of the other three options remains, at least hypothetically, viable.

**Table 9.1.** A taxonomy of approaches to the negotiation of trade agreements

	Discrete negotiations	Multi-issue rounds
<b>Separate agreements</b>	This approach was taken between the Uruguay and Doha rounds, when several negotiations were conducted discretely on a "critical mass" basis, but the concessions were extended on an MFN basis to all WTO members.	Contracting parties could pick and choose among the codes negotiated in the Kennedy and Tokyo rounds. A further distinction may be drawn here between the plurilateral agreements and others for which benefits are extended on an MFN basis.
<b>Single undertaking</b>	Hypothetical only: if all members are required to adopt all new agreements it would be necessary to deal with countries that do not adopt or implement the new agreements (perhaps including expulsion from the WTO).	The Uruguay Round was conducted on the basis of a single undertaking, as has the Doha Round; all members adopt all new agreements.

*Notes:* The single undertaking as presented here is in the stronger sense of the term (i.e. requiring that all members adopt all agreements in a negotiation) rather than the limited sense (i.e. nothing is decided until everything is decided).

### *The single undertaking*

The term “single undertaking” is one of many used in the WTO that can have a different meaning in different contexts. We may distinguish its original meaning from the later, stronger one, with the term originally referring to the way that negotiations are sequenced and later being used to defined how the results of negotiations are packaged and adopted.

Multi-issue rounds have almost always been conducted by the principle of a single undertaking as that term was originally conceived, meaning that no one part of the final package is definitively settled until all other aspects of the negotiations are finished. The principle that “nothing is agreed to until everything is agreed” is one form of what negotiations theorists call a sequencing strategy. It is to be distinguished from such alternatives as gradualism, a strategy in which the mediator attempts to move the parties from simpler to more complex issues; the boulder-in-the-road approach, in which the more complex issues are handled first; and the agreement-in-principle approach, in which a general agreement is sought early in the process so that the details can be decided at a later stage.<sup>3</sup> Each of these approaches is recognized to have their strengths and weaknesses. This approach, and indeed the specific phrase (“nothing is agreed ...”), is a mantra that one hears in a great many different negotiating contexts. It has been used, for example, in such diverse forums as the Copenhagen climate-change negotiations, the peace process between Palestinians and Israelis and negotiations within the US Senate over the terms of domestic labour law.

First in the Tokyo Round and then in the Uruguay Round, two major innovations were designed to ensure a greater consistency in the adoption and application of rules. The innovation of the Tokyo Round was the “fast track” approach to the approval of trade agreements in the United States. As discussed at greater length in Chapter 6, the fast-track rules are a set of domestic procedures by which certain trade agreements are eligible for expedited approval by the US Congress. The fast track has significance beyond US trade politics for two reasons. One is that it provides greater confidence to other countries that might otherwise be reluctant to negotiate with the United States in the WTO or elsewhere. The fast track also provided a demonstration effect, ensuring not only that the US legislative branch would give quick consideration to the approval to the various agreements that come out of a round but that it would also accept or reject them as a unified package. It was thus different from the Kennedy Round, when Congress jettisoned two of the codes (on anti-dumping and customs valuation) that the Lyndon B. Johnson administration submitted for its approval. That aspect of this Tokyo Round-era rule was later multilateralized in the single undertaking of the Uruguay Round, primarily because by the 1980s the United States and other developed countries objected to what they saw as the free-riding of developing countries that accepted the benefits of the multilateral trading system without taking on enough of its burdens. That could be best be remedied by tying the full range of agreements in a round into an indivisible deal.

The main advantage that is claimed for this stronger version of the single undertaking is that bundling agreements into one package may reinforce the way that rounds promote trade-offs

across distinct issue areas. This is especially true when several parties to the negotiations have widely different perceptions of which agreements pose risks and opportunities, but have the confidence to stress the opportunities over the risks. The single undertaking thus acted in the Uruguay Round as a confidence-building measure that lent greater credibility to commitments. These reforms made it possible for the round to produce a unified, “something for everyone” package that responded to the developed countries’ demands on the new issues, the developing countries’ demands for the dismantling of non-tariff barriers to products in which they have strong comparative advantage, the Cairns Group’s demands for agricultural trade reforms and so forth.

The early reviews of the Uruguay Round experience were very favourable, and led some analysts to suggest that the single undertaking must be a permanent feature of the system. “Packaging advantages into one bundle is a promising approach,” according to Siebert (2000: 158), “in order to find acceptance for an international institutional framework in cases in which an agreement on [separate issues] cannot be reached.” One former Canadian diplomat was adamant in stating that “[t]he WTO inevitably must be understood as a Single Undertaking” because “[t]here is no other mechanism to ensure an appropriate aggregation of issues and participants, with a forcing mechanism to ensure that at some point countries large and small accept the best deal on offer” (Wolfe, 1996: 696–697). Krueger (1998a: 495–406) argued that issue-by-issue negotiations are undesirable not only because “policymakers may be unable to cut ‘cross-sector’ deals” but also because “the political support for further trade liberalization may diminish” if negotiations are restricted to areas in which only a few countries have export interests.

The single undertaking has not appeared to have the same salutary effect in the Doha Round as it did in the last one. The value of this approach may be situational, such that it works well when pursued in an ambitious atmosphere, but can worsen matters when negotiators play defense. In the Uruguay Round, there was a widely shared view that the pursuit of offensive interests was more important than the safeguarding of defensive interests, and there the single undertaking helped to achieve a three-fold gain: it advanced liberalization by encouraging agreements that were both wide and deep, it enhanced fairness by reducing the prospects for free-riding, and it promoted clarity by ensuring that all countries understood what agreements they needed to adopt. In the Doha Round, however, these positive attributes seem more questionable. Some analysts go beyond the argument that the single undertaking has failed to be the solution to the bolder position that it may be one of the problems. If every country knows that it must adhere to every agreement, it may devote more attention to its defensive than its offensive interests. “[I]nstead of encouraging bold deals by causing each country to focus on those parts of the package that they most dearly desire,” according to VanGrasstek and Sauvé (2006: 858), “the single undertaking might promote timidity by causing each country to focus on those things that they most fear.” That could lead not only to efforts to dilute agreements individually but also make countries more reluctant to enter the end-game if they foresee it producing some undesirable agreements that they could be obligated to adopt.

One negotiator from Singapore argued that the utility of the single undertaking is partly a function of the number of countries in the system. In the Uruguay Round, “it made a lot of sense to look at the issues on the negotiating agenda in a holistic manner,” but in the Doha Round with an enlarged WTO membership “it has aggravated matters by allowing the negotiating process to be held hostage by members unwilling to liberalize or wanting to do so only if they can extract a concession in a different sector of the negotiations” (Menon, 2011: 96). Numerous commissions and authors have made recommendations regarding the single undertaking. Both the Warwick Commission and the Sutherland Report addressed the topic with some caution. The Warwick Commission came out not in favour of an across-the-board replacement of the single undertaking by a critical-mass approach to negotiations, but instead suggested seven points to be considered when deciding whether a given agreement should be negotiated on this basis. One of the more important points was that benefits should be extended to all members, with the commission thus explicitly rejecting a return to the code reciprocity approach.

### *Optional agreements: plurilaterals, critical mass and early harvests*

The meaning of “plurilateral,” unlike other terms such as “critical mass” and “variable geometry”, has a formal status in the WTO. That comes only through enumeration rather than definition, however, as the agreements listed in Annex 4 of the Agreement Establishing the World Trade Organization are formally called the “Plurilateral Agreements”. These include two agreements that still remain in effect (the Agreement on Government Procurement and the Agreement on Trade in Civil Aircraft) and two others that were scrapped in 1997 (the International Dairy Agreement and the International Bovine Meat Agreement). Beyond that specific meaning in WTO law the word is often used to denote other agreements reached either inside or outside the WTO that are more than bilateral but less than global; the Trans-Pacific Partnership, for example, is intended to be a plurilateral *regional* trade arrangement but would not be a plurilateral in the WTO sense of the term. It is not always clear when this label is applied whether the intended meaning concerns the way that an agreement is being negotiated, the scope of the countries that are expected to adopt it, or both.

WTO members can be roughly categorized in three groups vis-à-vis the three most important optional agreements, with half of them not signing any of these agreements, most of the others adopting a few and only a handful approving all of them. In addition to the two remaining plurilateral agreements we may include here the Information Technology Agreement (ITA). The ITA is not a plurilateral agreement,<sup>4</sup> but shares in common with them the quality of being a “critical mass” agreement that is not a part of the single undertaking. Appendix 9.1 shows that as of 2012 only 34 of the 158 WTO members (21.5 per cent) adhered to the Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement and the ITA; the European Union and its 27 member states accounted for the great majority of these exceptional cases. By contrast, 80 of the members (50.6 per cent) adhere only to the minimum required by the single undertaking, not signing on to any of the plurilaterals. The remaining 43 countries, accounting for 27.2 per cent of the membership, adhere to either one or two of the three optional agreements. Depending on one’s expectations for the system, these numbers could be read either pessimistically (i.e. noting the infrequency of members’ adoption of

commitments when they are not mandatory) or optimistically (i.e. the WTO membership has a high tolerance for free choice in the adoption of commitments).

The question then arises as to whether the system as a whole would be improved if plurilaterals or other “critical mass” agreements were to make a comeback, being the preferred mode over multi-issue rounds and a single undertaking. The Sutherland Report took a cautious approach to this issue. Rather than lay out a specific reform, it tentatively proposed that:

Possible plurilateral approaches to WTO negotiations should be re-examined – outside the context of the Doha Round. There should be particularly sensitive attention to the problems [identified in the report]. If there is political acceptance of the principle it is suggested that an experts group be established initially to consider and to advise on the technical and legal implications (Sutherland Report, 2004: 66).

This consultative board also suggested that “[i]n certain circumstances, a GATS approach would be an appropriate alternative – in developing new disciplines – to a plurilateral negotiation” (*Ibid.*: 67).

Other authors have been more direct in calling for a return to plurilateralism or a critical mass approach. Low (2009: 12) argued for critical mass because it allows for “more efficient differentiation in the levels of rights and obligations among a community of highly diverse economies” and serves “as a mechanism for promoting greater efficiency at lower cost in multilaterally-based negotiations on trade rules, and perhaps, sectoral market access agreements.” Among the other authors who have expressed support for a plurilateral approach over a strict single undertaking, one finds former negotiators such as Stoler (2008), former international civil servants such as Dadush (2009b) and journalists such as Blustein (2009). The single undertaking nevertheless appeals to those *demandeurs* who expect that it would be difficult or impossible for them to win support for their proposed issue if the topic were to be handled on its own. It may also appeal in a cynical way to countries that do not want a deal to be reached and count on the single undertaking to promote the desired deadlock. Conversely, this approach is least attractive to those who believe that an agreement on their chosen issue could be achieved more rapidly if it were not tied to a larger outcome. The view that a particular group takes towards this issue may thus be more a matter of short-term tactics than permanent strategy.

Early harvests are something of a compromise between the single undertaking and plurilaterals. They allow for the temporary separation of specific negotiations from the round, permitting them to be concluded and to enter into effect before other matters are settled. Once the rest of a round is concluded, however, any items that were in an early harvest become part of the final package. One may nonetheless question whether the dynamics of a round will permit an early harvest for anything that matters more to some members than to others. If any one member or group of members were to identify Agreement X as an item of

real significance to them, and one that has thus far not encountered real resistance from other members, that very identification of interests could create the resistance. This then becomes an invitation to others to use approval of that agreement as leverage to obtain something else. This may be why the experience with early harvests has so far been limited to agreements that are systemic in nature, rather than beneficial to specific sectors or members. In the case of the Uruguay Round, the only items on which an early harvest was achieved were in the Functioning of the GATT System talks and the Dispute Settlement Understanding. Similarly, the only significant early harvest to come out of the Seattle Ministerial Conference was agreement to support the creation of the Advisory Centre on WTO Law, which provides legal assistance to developing countries in dispute settlement cases (see Chapter 7); even that accomplishment is best seen as one that ran parallel to, but was not formally a product of, negotiations in the WTO.

### **How tariff negotiations are conducted: request–offer and formulas**

The principle of the single undertaking should not be mistaken for uniformity in countries' commitments. Members schedule their specific commitments separately, not just for tariffs on goods (agricultural and non-agricultural) and the more complex measures affecting trade in services but also in other, quantifiable areas such as agricultural subsidies. A country's schedules might specify such precise commitments as a bound tariff on automobiles of 5 per cent (among thousands of similarly specific tariff concessions), a commitment to impose no restrictions on foreign banks (among many dozen similarly specific services concessions), a cap of US\$ 10 billion on its agricultural production subsidies and so forth. As long as specific commitments are scheduled, and the schedules of individual members are produced through the give-and-take of negotiations, there will always be an element of critical-mass bargaining in WTO negotiations. That is to say, all members may be obliged to sign on to all of the agreements on the basis of a single undertaking, but the specific commitments that they make will be tailored in a process that does not demand that all members be subject to identical obligations. Some developing countries are asked to provide less than full reciprocity (perhaps with a greater deal of "water" separating their bound from their applied rates) and still others are exempt from binding commitments altogether. The final result may be based on the single undertaking in principle but significant parts of it will be more like plurilateralism in practice.

There are several different ways that tariff negotiations might be structured. The main questions are: whether they aim merely to reduce tariffs or to eliminate them altogether; whether they will make some products or sectors subject to deeper or shallower cuts; and whether developing and developed countries will be obliged to make the same degree of cuts. No matter how each of these subsidiary questions are answered, the single most important structural question is whether the principal form of bargaining is the bilateral exchange of requests and offers, or if negotiations will instead be based on the application of formulas (the results of which might then be adjusted through some process of negotiation).

In addition to deciding what to cut, and by how much, countries also have to determine how quickly the cuts will be made. It is unusual for all cuts to take effect upon an agreement's entry into force, and phase-ins are commonly employed. Even Adam Smith recognized their necessity, noting that in lifting protection for specific products "[h]umanity may ... require that the freedom of trade should be restored only by slow gradations" lest "cheaper foreign goods of the same kind might be poured so fast into the home market as to deprive all at once many thousands of our people of their ordinary employment and means of subsistence."<sup>5</sup> Phase-ins are typically set at a ten-year period, as was the case in the Uruguay Round, but might be shorter or longer for some products. A schedule will often provide for equal annual cuts during the phase-in period, but might also specify that some products are subject to the full cut upon the agreement's entry into force, while others might not be cut until much later or even all at once in the very last stage (what is known as a "back-end loaded" approach).

### *Bound rates, applied rates and water*

One point that is easily misunderstood by those who are not conversant in the often arcane nature of trade negotiations is that commitments typically concern not countries' *applied* tariffs (i.e. those actually imposed on imports) but rather their *bound* tariffs (i.e. the maximum they are permitted to impose). Or to put it another way, negotiations focus not on precise definition of what countries' policies will be but rather on the range within which their policies may be set. The only time that an applied tariff must by definition be equal to the bound tariff is when the latter is set at zero; any other number leaves at least a little room for manoeuvre. While some countries will opt to set most or all of their applied tariffs at the bound rate, others will exercise that room for manoeuvre by setting most or all of their applied tariffs somewhere below the bound rate. The difference between the bound and applied rates is generally referred to as the "water" in a country's schedule, such that (for example) if a country has a bound rate of 25 per cent, but an applied rate of 10 per cent, there are 15 percentage points of water in its schedule.

Not all tariffs in a country's schedule need be bound; while the countries that accede to the WTO are obliged to bind their entire schedule, most of the incumbent members have at least some (and often many) unbound tariff lines in their schedules. When tariffs on a given product are unbound, a country is legally free to impose any tariff that it wishes. For example, the applied US tariff on crude oil is very low, being just 5.25¢ or 10.5¢ per barrel (depending on the grade), but the tariff is also unbound in the WTO. This means that the United States would be free in some future contingency to impose a high surcharge on oil imports, which might variously be done for reasons of energy, environmental, fiscal or foreign policy. Developed countries generally have only a small number of unbound tariff lines in their schedules, but developing countries often have kept large swaths of their schedules unbound.

Tariff negotiations in the WTO are generally based on the bound rate. Depending on the amount of "water" in a country's bindings, this often means that commitments that appear to

be substantial have little or no impact on the applied rate, limiting only what the country might do in the future. For example, imagine that a country has a bound rate of 10 per cent on product X, but its applied rate on that same product is just one per cent. The country could cut its tariff by as much as 90 per cent and still do nothing more than take out the “water” in the binding. Only a reduction of more than 90 per cent would actually oblige the country to reduce the applied rate below one per cent. Some analysts (especially economists) argue that commitments that merely take out the water are insignificant, while others (especially lawyers) take the view that such a commitment amounts to liberalization insofar as it reduces uncertainty regarding a country’s potential tariff rates in future.

Appendix 9.2 summarizes the tariff structures for the Quad (Canada, the European Union, Japan and the United States), emerging economies and several other members that are more or less representative of regional and income groups in the WTO as a whole. The data show the average bound and applied tariffs, as well as the water between them, for agricultural, non-agricultural and all products. Three generalizations may be made on the basis of these numbers. First, tariffs tend to be much higher in developing than in developed countries, whether one looks at agricultural or non-agricultural products. Second, tariffs on agricultural products tend to be higher than those on non-agricultural products, whether one looks at the bound or the applied. Third, developing countries tend to have more water in their schedules than do the developed. There are notable exceptions shown in the table for all three of these generalizations. No WTO member has lower tariffs than Hong Kong, China, for example, protection is lower on agricultural than on non-agricultural products in Australia and Brazil, and there is very little water in the schedules of China and the Kingdom of Saudi Arabia. All of these considerations, including the generalizations as well as the exceptions, influence the positions that countries have taken in the Doha Round.

One factor affecting the level of water in a country’s schedule is the time elapsed since its accession. As a general rule, those countries that either acceded to the WTO or acceded in the late GATT period were obliged to bind 100 per cent of their tariff lines, had to make extensive commitments in their tariff schedules and were left with much less water in their schedules than most of the incumbent members. A “recently acceded member” such as China, for example, had close to zero water left in its schedule when the Doha Round reached a critical point in 2008. By contrast, Brazil – which was among the original GATT contracting parties – had a great deal of water left. This meant that the deals then on the table would affect these two members differently. Both countries would be obliged to reduce their bound tariffs, but Brazil would likely be obliged to change few if any of its applied tariffs while China might have had to cut a great many of them (depending on the exceptions allowed).

### *Request–offer and sectoral negotiations*

Request–offer is the oldest approach to the conduct of tariff negotiations, having been the practice in centuries of bilateral tariff negotiations, and it was used in the first several GATT rounds. It entails the exchange of commitments on a product-by-product basis between two countries. For example, Japan might offer to reduce its MFN tariff on wine while requesting that

New Zealand reduce its MFN tariff on televisions. The items that one country places on the request list it submits to the other party might number in the dozens or even the hundreds, and working their way from those lists to a final agreement might involve numerous rounds of requests and offers. If these two countries ultimately struck a bargain, they would extend the concessions made to one another to all other GATT contracting parties on a non-discriminatory basis, as required by the MFN principle of GATT Article I. From the late 1940s to the early 1960s, each GATT round consisted primarily of multiple bilateral bargaining sessions of this sort, all of which would be bundled together in a package of national schedules that identified not just the products and the new rates but also which countries had negotiated for the reduction or had otherwise been granted the “initial negotiating rights” (INRs) of the concession. That last point is an important consideration in the event that the country making a concession were later to seek to renegotiate its commitment, as the INRs determine which partners are eligible for compensation.

The request–offer approach to negotiations is often portrayed as being too slow and time-consuming for modern trade negotiations, considering the much larger number of countries that are now in the WTO and the growing array of products that countries trade. From the original GATT in 1947 to the WTO in 2012, the membership grew nearly seven-fold, and negotiating on a request–offer basis in the much larger WTO membership would be more difficult. There are nonetheless three ways in which this approach has carried over from the early GATT period. One is as a back-up or supplement to the formula approach to negotiations that is discussed below. That was the case in the Uruguay Round, for example, in which countries aimed to conduct negotiations on the basis of formula cuts but in some cases ultimately fell back on the old-fashioned, “hand-made” agreements. The agreed procedure in that round was to target a 30 per cent average reduction on industrial products, but the distribution among tariff lines was then negotiated bilaterally on a request–offer basis. Second, the request–offer approach remains the principal means by which negotiations are conducted over trade in services; GATS negotiations are described later in this chapter. Third, request–offer lives on, albeit in modified and plurilateralized form, in the negotiation of sectoral deals.

Sectoral tariff negotiations, which are also called zero-for-zero negotiations when their ambitions are sufficiently high, aim to reduce or eliminate tariffs in a specific product or sector. The method here is not based on the bilateral exchange of concessions across a heterogeneous range of products but is instead a negotiation in which a group of countries eliminate tariffs in a narrower range of goods. This approach developed in the late GATT period, with the Tokyo Round producing deals such as the Agreement on Trade in Civil Aircraft, just as the Uruguay Round led to the Pharmaceutical Agreement and other sectorals. These deals can come in different levels of formality. Some produce explicit, signed agreements that may go beyond country schedules to include additional rules that (for example) provide for the accession of new countries to the agreement or later rounds of negotiation in the same sector. The Information Technology Agreement (ITA) is just such a deal. Zero-for-zero agreements can also be reflected simply in the results of countries' tariff schedules without any additional rules or even a formal acknowledgement that the products in question had been the subject of a special negotiation. That was the case for Uruguay

Round negotiations conducted on agricultural equipment, beer, chemicals, construction equipment, distilled spirits, medical equipment, paper, steel and toys. These agreements were primarily reached between developed members such as Canada, the European Union, Japan, Norway, Switzerland and the United States. There are some developing economies that signed onto them, as Egypt, Georgia and Chinese Taipei did for the aircraft agreement and Macao, China did for the pharmaceutical agreement. The negotiations over these sectoral packages are generally conducted on the basis of a “critical mass”, with the participating countries aiming to obtain commitments from countries that together account for some agreed, minimum percentage of global trade in the products in question. In the case of the ITA, for example, the goal was to reach an agreement with members that accounted for 90 per cent of trade in the covered products. The benefits of these deals are then extended on an MFN basis to all WTO members, with other countries urged to join as well.

The Doha Round also saw numerous sectoral initiatives. Among the sectors for which some members placed especially high priority were chemicals, industrial machinery, electronics and electrical products, forest products, raw materials and gems and jewellery. Like the rest of the round, however, those negotiations stalled over disagreements regarding the level of commitments that emerging economies should make.

The request–offer method was relatively easy to conduct as long as the number of countries and products remained small, but as the system grew and diversified along both of these dimensions the negotiations became increasingly difficult. Bilateral deal-making was a time-consuming and fairly random way of producing commitments, and relied heavily on the initiative of individual countries. It also left relatively little role for countries that were small or developing, insofar as only the principal supplier of any given product was supposed to make requests. That rule is especially unattractive to smaller countries that might not be the principal supplier of anything. Even a country that is heavily dependent on exports of one or two goods might still be only the tenth or twentieth largest supplier worldwide, and can thus be relegated to the sidelines if the principal supplier rule is vigorously enforced.

### *Linear and non-linear formulas*

The formula approach to tariff-cutting is more efficient and inclusive than request–offer, provided that it is relatively easy to reach agreement over the terms of the formula. It also has the virtue of being, or at least appearing to be, more mathematically objective. First used in the Kennedy Round (1962-1967) of GATT negotiations, the formulas facilitate matters by subjecting most or all tariffs to an equation that specifies the cut. The main questions then are: (1) how the formula should be devised; (2) what means might be established for either accelerating or (more often) decelerating or exempting specific products from the basic formula; and (3) whether some countries or groups of countries might be asked to provide less than full reciprocity or even be exempt from making commitments. Those exemptions or reduced burdens might be devised for developing countries in general, least-developed countries in particular, or other subsets of the membership that share some characteristic that merits special

consideration (e.g. a particular type of vulnerability). Negotiators also need to decide what they will do for tariff lines that are not bound, or for which quotas or tariff-rate quotas are in place.

The simplest formula is known either as a linear cut or a horizontal cut, and consists of a straight percentage reduction. The basic Kennedy Round formula was a 50 per cent cut for industrial products, but also allowing for negotiated exceptions, with the goal being an overall average reduction of 30 per cent. The advantage of this approach is that it is conceptually and computationally simple; the disadvantage of such cuts is that they do not do well in reducing “peak” tariffs. The only way they could do so would be to set the coefficient of reduction (i.e. the percentage) at an especially high level. There is no universally agreed definition as to what constitutes a peak, but they are often quite apparent when one sees them. In some countries’ schedules there may be a great many items that are duty-free on an MFN basis, and average tariffs on dutiable products may be somewhere in the 3 per cent to 6 per cent range, but there are other, exceptional products on which tariffs might be 25 per cent, 50 per cent, 75 per cent or even higher. If one starts with a tariff that is (for example) 50 per cent and applies a seemingly ambitious linear cut of 50 per cent, the resulting tariff will still be 25 per cent. That means going from one level of peak tariff to another that is, by any reasonable definition, still a peak tariff.

The principal method adopted for the Tokyo Round (1972-1979) was the Swiss formula, the main virtue of which is that it attacks the peak tariffs aggressively. This approach to formula cuts is expressed as:

$$T_1 = \frac{a \times T_0}{a + T_0}$$

where  $T_1$  is the new tariff,  $T_0$  is the base rate, and  $a$  is the coefficient of reduction. The Swiss formula that negotiators agreed upon for industrial products in the Tokyo Round had a coefficient of 16. For example, if one started with a tariff of 50 per cent, the Swiss formula would, with an  $a$  coefficient of 16, produce the following results:

$$T_1 = \frac{16 \times 50}{16 + 50} = \frac{800}{66} = 12.1\%$$

While by some standards the resulting 12.1 per cent tariff might still be considered a peak, it is not an insuperable one, and the 75.8 per cent cut is significantly more ambitious than the roughly 30 per cent to 50 per cent cuts that negotiators made when they relied either on request-offer or on linear formulas.

For those who are not mathematically inclined, there are two very simple rules of thumb for understanding the effects of the Swiss formula. The first is that this is a formula in which ambitions rise as the coefficient falls: the lower the  $a$  value, the deeper the cuts will be from the base rates. An  $a$  coefficient of 5, for example, is significantly more ambitious than 10. In this way, the Swiss formula is just the opposite of a linear cut, where ambitions move in the same direction as the coefficient of reduction (e.g. a 50 per cent cut is more ambitious than a

25 per cent cut). The second rule concerns the maximum rate that will remain in place after a cut is made: the value of the  $a$  coefficient is the highest value that will ever be yielded by the formula, no matter how high the base rate. When  $a$  is 10, for example, all of the tariffs subject to this cut will end up less than or (if they start from a high enough level) equal to 10 per cent. Even a base rate of 1,000 per cent will lead to a new tariff rate of 9.9 per cent if the  $a$  coefficient is set at 10; if the base rate is 10,000 per cent the new tariff rate will be 9.99 per cent (which rounds up to that maximum rate of 10 per cent).

The differences between a linear (straight percentage) and non-linear Swiss cut can be seen in Table 9.2. The illustrative cuts show how the Swiss formula makes a very modest reduction to a low tariff rate such as 2.5 per cent, even when the  $a$  coefficient is very ambitious (e.g. 5), and has a negligible impact on a very low base tariff rate such as one per cent. At those low levels, even a relatively modest linear cut makes a bigger difference than does the Swiss formula. The higher the base rate is, however, the larger the reduction. The cuts that the Swiss formula makes to peak tariffs at the 50 per cent and 100 per cent levels are especially impressive, even when the  $a$  coefficient is modest (e.g. 20), but a seemingly ambitious linear cut of 50 per cent still leaves peak tariffs in place when one starts at that high a base rate. The overall result of a choice between one type of formula and another is thus situational and depends on one's objectives. Suppose for example that Country A is a developed country that has generally low and fairly uniform tariffs, and trades with Country B, a developing country that has a great many peak tariffs. Country A is likely to favour a Swiss formula because it would serve both its defensive interests (leaving much of its own tariffs largely intact) and its offensive interests (lowering the peak tariffs in Country B), while Country B would prefer a linear formula that allows it to retain those peaks and that might also make deeper cuts in Country A's tariffs.<sup>6</sup>

**Table 9.2. Tariff cuts under linear, Swiss and tiered formulas, in %**

Base rate	Linear cuts		Swiss formula		Tiered formula		
	25	50	$a = 20$	$a = 5$	% cut	Result	
1.0	0.8	0.5	1.0	0.8	50	0.5	
2.5	1.9	1.3	2.2	1.7	50	1.3	
5.0	3.8	2.5	4.0	2.5	50	2.5	
10.0	7.5	5.0	6.7	3.3	50	5.0	
25.0	18.8	12.5	11.1	4.2	57	10.8	
50.0	37.5	25.0	14.3	4.6	57	21.5	
100.0	75.0	50.0	16.7	4.8	66	34.0	
Unweighted average	27.6	20.8	13.8	8.0	3.1	–	10.8
Average % cut	–	25.0	50.0	71.0	88.7	–	60.9

Notes: The tiered formula illustrated here is the one in the 2008 draft of the NAMA modalities. Values are rounded.

The tiered cut is yet a third approach, and can be seen both structurally and practically as a compromise between the linear and Swiss formulas. In this type of formula, tariffs are cut by a percentage that rises with the level of the base rate, such that relatively low tariffs are cut by a

certain percentage and higher tariffs are cut more aggressively. A tiered formula may stack the tiers at whatever dividing lines the negotiators might choose, and they can assign whatever level of linear cut to each tier that they wish. The example shown in Table 9.2 is based on a tiered cut proposed in 2008 for the agricultural tariffs of developed countries in the Doha Round. This proposal called for a cut of 50 per cent on all tariffs that were 20 per cent or less, a 57 per cent cut in tariffs greater than 20 per cent but less than or equal to 50 per cent, a 64 per cent cut for those in the range above 50 per cent but less than or equal to 75 per cent and a cut of either 66 per cent or 73 per cent for those above 75 per cent. That last value was bracketed in the text (i.e. negotiators had not definitively decided to use it), but for purposes of this illustration, we may use the 66 per cent figure.

As in any formula, the actual ambition of the cuts will depend both on the base rate and the level of the coefficient of reduction, but in this instance one can see that the results do indeed fall between those of the selected linear and Swiss examples shown here. The unweighted average in the example is cut to 10.8 per cent, which is higher than the levels that the two Swiss examples would produce, but lower than the results one would get from the two linear cuts. The results for the highest tariff are also a compromise, in which the cuts are deeper than one gets from a straight percentage, but not nearly as deep as in even a modest Swiss formula.

Because these cuts are made to the bound rate, they will not always lead to reductions in the actual rates that are applied on imports. If one applies a formula that is not very ambitious against a schedule of concessions that is full of water, it is possible that the negotiations will result in no actual change in the level of applied tariffs, serving only to limit the ability of a country to raise its tariffs in the future by “boiling off” some of the water in the tariff. This point can be understood by examining the hypothetical cases shown in Table 9.3, which are based on proposals under consideration in the Doha Round non-agricultural market access (NAMA) negotiations. One option would subject the bound tariffs of developing countries to a Swiss formula with an a coefficient of 20 and the bound rates of developed countries to an a coefficient of 8. In both cases there would be further flexibilities to exempt, or otherwise treat on a special basis, some types of products, but for the purpose of illustration we may suspend consideration of the exceptions or variations in order to concentrate on the general rule.

Table 9.3 shows what these formulas and coefficients would do to the bound rates of developing countries at various levels, and what the result would be in cases where the tariff in question variously has a lot of water (the country has a “ceiling binding” of 100 per cent), a moderate amount of water (between 5 and 25 points in this example), or no water at all (the applied and bound rates are equal). The illustration further assumes that countries will reduce their applied rates only if they are obliged to do so as the result of a new binding that is below the level of the current applied rate. We can see that in several scenarios the developing countries would not be required to reduce their applied rates. The question of whether and by how much they need to reduce those tariffs depends on the level of ambition in the formula and the amount of water in the tariff. As for the developed countries that are subject to the a coefficient of 8, the fact that many of them have little or no water in their tariffs – a description that is generally more accurate for non-agricultural than for agricultural tariffs – means that the deal on the table would lead to actual reductions in most or all of their applied rates.

**Table 9.3.** Illustration of the Swiss formula's effects on bound and applied tariffs

	<b>Bound (A)</b>	<b>Applied (B)</b>	<b>Water (A-B)</b>	<b>New bound (C)</b>	<b>New applied (D)</b>	<b>Applied change (B-D)</b>
<b>High water, <math>a = 20</math></b>						
Example A-1	100.0	25.0	75.0	16.7	16.7	8.3
Example A-2	100.0	15.0	85.0	16.7	15.0	*
Example A-3	100.0	10.0	90.0	16.7	10.0	*
Example A-3	100.0	5.0	95.0	16.7	5.0	*
	<i>Unweighted average: 13.8</i>		<i>New unweighted average: 11.7</i>			
<b>Moderate water, <math>a = 20</math></b>						
Example B-1	30.0	25.0	5.0	12.0	12.0	13.0
Example B-2	30.0	15.0	15.0	12.0	12.0	3.0
Example B-3	30.0	10.0	20.0	12.0	10.0	*
Example B-4	30.0	5.0	25.0	12.0	5.0	*
	<i>Unweighted average: 13.8</i>		<i>New unweighted average: 9.8</i>			
<b>No water, <math>a = 20</math></b>						
Example C-1	25.0	25.0	0.0	11.1	11.1	13.9
Example C-2	15.0	15.0	0.0	8.6	8.6	6.4
Example C-3	10.0	10.0	0.0	6.7	6.7	3.3
Example C-4	5.0	5.0	0.0	4.0	4.0	1.0
	<i>Unweighted average: 13.8</i>		<i>New unweighted average: 7.6</i>			
<b>No water, <math>a = 8</math></b>						
Example D-1	25.0	25.0	0.0	6.1	6.1	18.9
Example D-2	15.0	15.0	0.0	5.2	5.2	9.8
Example D-3	10.0	10.0	0.0	4.4	4.4	5.6
Example D-4	5.0	5.0	0.0	3.1	3.1	1.9
	<i>Unweighted average: 13.8</i>		<i>New unweighted average: 4.7</i>			

Notes: \*Because the resulting bound rate is equal to or greater than the applied rate, there is no change made to the applied rate. Examples assume that in cases where the new bound rate remains above the current applied rate the country makes no changes in that applied rate.

### *The consequences of formulas*

Like almost any other tool, formula cuts are neither inherently good nor bad, but instead depend on the use to which they are put. The use of formulas has simplified market access negotiations in one respect but complicated them in two others.

One problem is that formulas can be computationally difficult, especially if they go beyond the conceptually simple linear cut. Much depends on the capacity of a country to figure out how a given formula would affect its own tariffs and those of its trading partners. Some trade ministries have the capacity to perform sophisticated, computable general equilibrium forecasts in-house, or can call on the expertise of some cooperating government or academic agency that has this

capacity. This is especially true in developed countries and in the larger and more analytically sophisticated emerging economies. Their counterparts in many other developing countries are limited to static, back-of-the-envelope calculations of how specific tariff lines would be affected, and some are entirely in the dark and know only what outside analysts tell them. The same point might be made regarding individual policy-makers, especially those who, by training or disposition, are not very comfortable with numbers and formulas. Anyone who has ever bargained over the price of a car or a house can understand the basics of request-offer, but the Swiss formula – even though it is no more complex than a simple quadratic equation in a high school algebra course – can strike fear in the heart of an arithmophobic lawyer or politician.<sup>7</sup> This is one way that the increasing sophistication of trade negotiations has contributed to the need for capacity-building in trade ministries (see Chapter 5), and has also increased the risk of widening the distance between specialists and the policy-makers whom they are tasked to advise.

A second and less soluble problem with formulas is that the haggling over their structure and terms can become just as elongated as was the case for request-offer negotiations, or even more so. Even if they agree in principle to negotiate on the basis of a formula, negotiators can then wrangle for years over questions both large and small. Will it be a linear or a non-linear formula? If it is non-linear, will it be Swiss, tiered or something else? What coefficients will be used, and will there be different coefficients used for different types of countries (primarily developed versus developing)? Will any credit be given to those members that have acceded during or just before the round and hence made commitments more recently than the incumbent members? Negotiators will start from the assumption that the formula deals with bound rather than applied rates, but what basis is to be used for items on which the member has no binding? How will *ad valorem* equivalents be calculated for products that are subject to specific or compound tariffs?<sup>8</sup> What allowance will be made for either exempting certain products or subjecting them to a less ambitious formula? Will any sectoral negotiations be conducted outside the scope of this formula, either in zero-for-zero deals or other forms?

With all of those seemingly technical issues to decide, it is quite easy for negotiators to get bogged down for years. Matters are only made worse when some of the participating countries use every available opportunity to safeguard their defensive interests, sometimes to the point that they may be unwilling to contemplate any actual cuts in their current applied rates, and others are so unenthusiastic that they may favour delay or even defeat of the entire enterprise. Concerns of this sort led one key participant in the Doha Round to pin part of the blame for the stall in these negotiations on the use of formulas. “[T]he framework of rigid formulas and ill-defined, largely non-negotiable flexibilities,” according to former US Trade Representative Susan Schwab (2011: 110), “put all the negotiators in a defensive posture from the outset” and led them “to assume that their own import-sensitive constituencies would face severe tariff cuts” while leaving them “unable to point to the kind of concrete gains in market access necessary to build domestic support.”

### *Agricultural production subsidies*

WTO negotiators treat agricultural products differently than their non-agricultural cousins in several ways, although arguably the real difference comes down to one: this sector is more

socially and politically sensitive in most countries, and leads negotiators and their masters to be more cautious about making commitments that may prove unpopular with powerful constituencies. That caution is principally expressed in two ways. One is that agricultural products are isolated from the non-agricultural goods in market access negotiations, and are generally subject to less ambitious formulas such as linear cuts or a tiered formula. (This point is elaborated upon in Chapter 12.) The second is that production subsidies in this sector are permitted but subject to commitments that are aimed (in theory if not necessarily in practice) at their reduction or elimination. That latter distinction is highlighted here.

A third pillar of the agricultural negotiations concerns export subsidies. These are discussed in Chapter 12.

In the Uruguay Round, negotiators agreed to a framework by which production subsidies can be quantified, capped and reduced. Little or no actual reduction was achieved in that round, however, as there was a great deal of water in the commitments that most countries made. These results were “binding” in one sense but not in another: they are legally binding commitments in the way that lawyers mean that term, but they were not practically binding in the sense that economists mean (see Box 9.1).

The Uruguay Round agreement on domestic support (i.e. agricultural production subsidies) had three components. The first was to create a taxonomy of subsidies that distinguished between four types, based on the degree to which they are said to distort markets; each of these categories is then subject to different types of commitments. The second was the definition of the quantitative commitments that would be imposed on one category of subsidies, which would be based on the aggregate measurement of support (AMS). The third was the scheduling of individual members’ commitments by which they were limited in the AMS they could provide in any year. Each of these points merits closer examination.

The Uruguay Round negotiators mixed their metaphors by providing for what is either called the “semaphore system” or the “boxes” of agricultural support (summarized in Table 9.4). Both of these images referred to the colour-coding of support programmes according to their degree of distortion and hence their status under the Agreement on Agriculture’s scheme of commitments and restrictions. At one end of this rainbow spectrum are the red-coloured subsidies that members are prohibited from offering, but this is a purely theoretical construct. Although it was agreed in principle that members may outlaw certain types of subsidies, in the Uruguay Round they opted not to place anything in this red box. At the other end of the spectrum are the blue and green boxes, each of which contain the exempt forms of support. These are two categories of programmes that the Uruguay Round negotiators determined to be less distorting and thus outside the scope of commitments. Between the red and the blue-green parts of the spectrum lies the amber box, and it is here that the commitments matter most. These are the trade-distorting forms of support that were made subject to caps and reduction in the Uruguay Round.

**Box 9.1. The multiple meanings of the term “binding”**

In order to understand the restrictions that WTO members place on their agricultural production subsidies, one must first grasp a potentially confusing matter of terminology. The term “binding” is one of those words that, like “reciprocity”, has different meanings when used by different specialists and can lead to confusion if one is not clear about the sense in which it is being employed. When used by tariff negotiators, the word “binding” is a noun and a synonym for “bound rate”. It might be employed in a sentence such as, “the country’s binding on fresh apples is 5 per cent.” When used by lawyers, it is an adjective that describes any commitment that is legally obligatory, as in the example, “the country made a binding commitment not to subsidize its exports.” The term is also an adjective when used by economists examining quantitative restrictions such as quotas or (as used here) disciplines on subsidies. Where lawyers use the word in an absolute sense (a commitment either is or is not binding), economists see a quantifiable spectrum.

To an economist, a restriction is binding if the country might have done something else but for the presence of this rule. A quota or other restriction is typically deemed to be binding if a country utilizes at least 90 per cent of what it is allowed. This is an admittedly arbitrary benchmark that nonetheless permits us to distinguish strict commitments from those that have only a hypothetical or contingent significance. Consider the hypothetical statement, “the quota that Country A imposed on apparel imports from Country B appears to be binding, insofar as Country B shipped 98 per cent of what it was allowed and could presumably have shipped more.” (This is a point to which we will return in the discussion of textile and apparel quotas in Chapter 13.) Country B not only “left money on the table” by not shipping that last 2 per cent but, we may conjecture, might also have been able to ship much more than that.

For an example that is pertinent to the present discussion, consider the following sentence: “the commitments that Country C made on its production subsidies for wheat are not binding, as it has never utilized more than 30 per cent of what it is allowed.” Limits on subsidies that are set far above the level that a country actually provides to its producers, or that it might reasonably provide in the foreseeable future, are directly comparable to “water” in the tariff. In Country C’s case, there were 70 percentage points of water in the commitments it made on production subsidies. If it had provided 90 per cent or more of what it was allowed, however, we might assume that policy-makers in Country C were constrained by the limits to which they had agreed.

Twenty-eight of the participants in the Uruguay Round provided non-exempt (i.e. amber box) domestic support during the base period, and thus had reduction commitments specified in their schedules; several of the countries that subsequently acceded to the WTO also made commitments on domestic support.<sup>9</sup> These reduction commitments were expressed as a total AMS that included in one figure all product-specific support and non-product-specific support. Developed members had to reduce support by 20 per cent over six years and developing members by 13.3 per cent over ten years, after which their AMS caps would remain in effect until further modification (e.g. as the result of a new round of negotiations).

**Table 9.4. The semaphore system of agricultural production subsidies**

	<b>Definition</b>	<b>Examples</b>	<b>Uruguay Round commitments</b>
<b>Red box</b>	Prohibited policies that are illegal.	No forms of domestic support are currently in the red box.	Not allowed.
<b>Amber box</b>	Non-exempt, trade-distorting policies that are subject to review and reduction over time.	Market price support, direct payments and import subsidies.	<i>De minimis</i> supports were allowed up to certain limits; caps were set on the support of members that historically had above <i>de minimis</i> levels, which were then subject to reduction by 20 per cent for developed members over five years and by 13.3 per cent for developing members over ten years.
<b>Blue box</b>	Exempt forms of support, including payments made in conjunction with production-limiting programmes.	Production is required in order to receive the payments, but the actual payments do not relate directly to the current quantity of that production.	No limits.
<b>Green box</b>	Exempt policies that are not subject to limitations.	"Decoupled" payments not linked to production decisions, research or training, pest and disease control, inspection services, marketing and promotion services, certain food aid etc.	No limits.

Source: WTO Secretariat.

To what extent did these Uruguay Round commitments reduce subsidies? One way to answer that question is to look at actual AMS usage. Appendix 9.3 shows in relative terms the domestic support that ten members gave to their producers, expressed as percentages of what they were permitted under their commitments. The data are marked up in the table to indicate which members in which years provided 90 per cent or more of what they were permitted; any amount in that range means that the commitments of the member in question would meet the economists' definition of a "binding" constraint (see Box 9.1). There are 145 data points shown in the table (the other five being empty due to late notifications), but only nine of them (6.2 per cent) fell within that binding range. The Republic of Korea provided support at 90 per cent or more of its AMS level during eight of the first ten years of the WTO period, but its support fell rapidly thereafter (due principally to the elimination of a single programme providing support to rice farmers). Among the remaining nine members, South Africa was the only one to provide support in the binding range, and then only in one year. The data are further coded to highlight years in which members provided support in the 50 per cent to 89.9 per cent range. They did so in 41 of these 145 member-years (28.3 per cent); Mexico is the only one of these members never to have reached that level. Taken as a whole, these ten members provided less than half of their allowable subsidies just about two thirds (65.5 per cent) of the time, and were below the binding level 93.8 per cent of the time. The commitments that members made in the Uruguay Round were thus far more important in principle and potential than they were in actual practice.

The changes in members' support levels over time are also interesting. Some countries did increase their levels of subsidization in the years between the end of the Uruguay Round and

the start of the Doha Round, notably the United States but also Australia and Canada (both of which are Cairns Group members), while others reduced their subsidies either modestly (e.g. the European Union and Switzerland) or very substantially (e.g. Japan and South Africa). Taken as a whole, the subsidy problem as measured by AMS levels was higher when the Doha Round was launched in 2001 than it was either before or since. At that time, one major country subsidized at greater than the 90 per cent level (the Republic of Korea) and five (including the European Union and the United States) at the 50 per cent to 89.9 per cent level. For all of the debate over the levels at which these members might subsidize with or without a new deal, by 2008 – which was the last year (at the time of writing) that the round appeared close to being resolved – none of these members were in that highest category of subsidization and only one broke the 50 per cent barrier.

There are three different influences that affect these levels of support. One is the numerical limits that members agreed to in the Uruguay Round. The strength of this influence is questionable, given the fact that members not only “left money on the table” but, in most years, left a great deal of it there. A second influence is global price levels for commodities. There is in general an inverse relationship between commodity prices and countries’ domestic support programmes, such that policy-makers will want to help farmers more when prices fall but are less prone to spend the taxpayers’ money when farmers are doing well. Much of the decline in AMS usage in the most recent years shown in the table may be attributed to the higher prices that commodities have fetched during this period.

The third influence on these AMS levels is box-shifting. This is a practice by which a member responds to the restrictions imposed by the Agreement on Agriculture not by reducing subsidies but by reforming them. This may be achieved by eliminating or reducing the funding for programmes that are classified in the amber box while also creating or providing increased funding for programmes that are classified in the blue or green boxes. For example, a member that has hitherto provided most of its support to farmers by way of market price supports (amber box) might shift instead towards a programme of payments that are “decoupled” from farmers’ production decisions (green box). In this way, it is possible for a country to provide as much or even more support to farmers than it did before, and for the apparent level of subsidization (as measured by the AMS) to drop to as low as zero. The practice of box-shifting might be seen through any one of three lenses. Some may see in it a step towards reform, insofar as the terms of the Agreement on Agriculture have at least prompted countries to move away from those programmes that most heavily distort agricultural markets. Others see in it a cynical means of gaming the system, allowing countries to put on the appearance of reform while still maintaining high subsidies. Still others look to the domestic sphere and see a practice that may not be politically sustainable, insofar as decoupled payments may be perceived as a potentially corrupt system in which people who own farmland (but might no longer be called farmers) are paid not to grow anything.

It is difficult to sort out the degree to which these three different influences might account for the general trend towards relatively lower levels of AMS usage. What is certain is that the compromises reached in the Uruguay Round came under criticism from both non-subsidizing countries and from some of the subsidizers, both of which hoped that more could be achieved

in the Doha Round. As is discussed in Chapter 12, in the new round the AMS became the basis for a concept known as Overall Trade-Distorting Domestic Support, which represents a further sharpening of the distinction between types of subsidies. It is calculated according to a formula that takes the AMS as its base.

## Trade in services

The General Agreement on Trade in Services (GATS) closely mimics the principles and structure of the goods-oriented GATT. Trade in services is nonetheless conceptually far more complex than trade in goods. To begin with, the way in which commitments are negotiated and expressed is entirely different. Compared to goods, where countries are assumed to trade via just one mode (cross-border trade) and make simple commitments in the form of numerically precise tariff bindings, the GATS is based on a wider range of transactions (four modes of supply) and commitments can be made in more nuanced ways. As a result, the negotiation of commitments is a more time-consuming process not just of bargaining between negotiators but of consultation between those negotiators and the experts in their regulatory agencies.

Before considering the modalities by which commitments are negotiated and recorded in GATS, it is important to draw a larger distinction. Commitments in GATS are made on the basis of a “positive list”, meaning that a member makes commitments only in those sectors that are explicitly listed in its schedule. This is to be distinguished from the approach taken in some free trade agreements that are based on a negative list. In those agreements, a party makes commitments across-the-board in all sectors except those for which exceptions are listed. The positive-list method is generally considered to be less ambitious than the negative-list method, but substantially similar results can be obtained in both methods if one takes a precise and comprehensive approach to scheduling the commitments and exceptions.

GATS distinguishes between four “modes” under which services are traded. As shown in Table 9.5, the four modes might be compared to the means by which goods are exchanged: what is formally termed cross-border supply (Mode 1) is analogous to the ordinary way that goods are traded; consumption abroad (Mode 2) occurs when consumers travel to the point of supply; commercial presence (Mode 3) means foreign direct investment; and in movement of natural persons (Mode 4) the individual suppliers travel to the customer. In each case the same type of service is provided – in this example, Australian students learn a language from Japanese teachers – but the different ways that the service gets delivered may be subject to different types of regulations and thus may be subject to different types of commitments. These four modes allow countries to specify any restrictions that they wish to make on their commitments. For any given service, a country can set limits mode-by-mode with regard to its market access and national-treatment commitments. In other words, countries have eight separate opportunities to indicate how they will treat foreign service providers in any given sector (i.e. two types of reservations in each of four modes of delivery).

**Table 9.5. An illustration of the four modes of supply for international trade in services**

	Definition	Examples
<b>Mode 1</b> Cross-border supply	The supply of a service “from the territory of one Member into the territory of any other Member.” The service crosses the border, but both the provider and the consumer stay home. This mode is comparable to the export of a good.	Japanese language teachers provide training to Australian students via an on-line “distance learning” programme.
<b>Mode 2</b> Consumption abroad	The supply of a service “in the territory of one Member to the service consumer of any other Member.” The consumer physically travels to another country to obtain the service.	Australian students travel to Japan to receive language lessons.
<b>Mode 3</b> Commercial presence	The supply of a service “by a service supplier of one Member, through commercial presence in the territory of any other Member” (i.e. investment through the establishment of a branch, agency, or wholly-owned subsidiary).	A Japanese language school establishes training centres in Australia.
<b>Mode 4</b> Presence of natural persons	The supply of a service “by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.” Private persons temporarily enter another country to provide services.	Individual Japanese teachers travel to Australia to tutor students.

*Notes:* In this scenario teachers of foreign languages who currently live in Japan seek to market their services to prospective students in Australia.

Countries may decline to make any commitments in a given sector, which is most easily indicated by simply excluding any reference to that sector from their schedules, or may limit commitments only to certain modes of supply. If a country makes commitments in a sector but wants to limit those commitments – for example, if it wishes to retain the authority to restrict the provision of services in that sector by foreign firms that seek to establish a permanent presence in their markets – it may do so by entering the term “unbound” in Mode 3. In any mode of supply in which it wishes to make a full commitment it will instead use the term “none”, meaning that it commits to impose no restrictions on foreign providers in that sector. The use of that term is counter-intuitive, as one might naturally think that “none” means “no commitments”, but it instead means “no limits on the extent of the member’s commitments”.<sup>10</sup> A country’s schedule may also list almost anything in-between those extremes of “unbound” (no commitments) and “none” (full commitments).<sup>11</sup> For example, the country might establish limitations on foreign investment, or set limits on the number of service suppliers, the total value of service transactions or assets, or the total number of natural persons employed in a particular sector. Members also make “horizontal” commitments that apply to all services across-the-board. For example, many countries have listed horizontal limitations on the commitments for the movement of persons.

These schedules are produced through a process of negotiation. A member might want its own schedule to leave it with a great deal of “policy space”, which might variously be achieved by leaving a sector out of the schedule altogether, by inserting “unbound” in most of the cells, or defining the commitments in a way that is less liberal than the applied laws and policies. That same member might have offensive interests of its own in services, however, and will want other members either to reduce the policy space allowed in their schedules or, more ambitiously, to make commitments that require actual liberalization. As in the case of tariffs

on goods, it is the interplay between the offensive and defensive interests of members that shapes the schedules and determines whether and to what degree they achieve actual liberalization. The two main differences between negotiations on goods and services are that the services negotiations are still conducted on the basis of request–offer negotiations, and the GATS negotiations result far less often in actual liberalization (i.e. commitments in the bound schedule that require changes in the applied measures).

It is more difficult in services than it is in goods to gauge whether and to what degree a country's commitments actual does achieve liberalization. Unlike trade in goods, where it is easy to determine whether there is any difference between a country's bound and applied tariffs, knowing the "applied rates" for a service sector would require that one compare all of the relevant laws, regulations and policies against a commitment. Looking at a members' GATS schedules, one cannot readily tell if a given commitment is more liberal than its current practices, is bound at the levels at which measures are already applied, or sets a binding above that level of restrictiveness and thus would permit a country to become more restrictive than it presently is (i.e. there is water in the schedule). Analyses in this field are sometimes limited to crude measures, such as counting the sheer number of sectors in which commitments have been made. That can yield deceptive results, as it is possible (for example) that Country A made commitments in only ten sectors but all of them required actual liberalization, versus Country B's commitments in 50 sectors that each contained a great deal of water.

Matters are further complicated by the fact that there is no universally accepted nomenclature for services. In the case of goods, all WTO members adhere to the Harmonized System (HS) nomenclature, meaning that apples (HS item 0808.10) are apples and oranges (HS item 0805.10) are oranges for everyone, no matter whose tariff schedule is compared to whose. Many members use the Central Product Classification (CPC) for classifying services, but unlike the mandatory HS for goods the CPC is neither compulsory nor universally applied. The way one member defines a specific services sector for purposes of its commitments may be broader or narrower than the definition employed by another member. Consider the case of legal services, which is typically the first sector listed in any schedule. Israel's commitment under CPC 861 covers "legal services" pure and simple, without any further language to limit or qualify that commitment. Many other members, however, have made commitments under CPC 861 that are then defined in narrower terms in their schedules (sometimes following the "861" with one or more asterisks that indicate that only a portion of that sector is covered by the commitment). Among the ways that other members define the scope of their commitments in this sector variously relate to the type of law being practiced or the type of legal practitioner, as in Australia's "home country law, including public international law," Norway's "legal advice on foreign law" and Japan's "legal services supplied by a lawyer qualified as *Bengoshi* under Japanese law." These distinctions tend to be blurred over in the summaries that are made of countries' commitments, despite the fact that the Israeli commitment covers a much wider range of legal services than do the Australian, Norwegian or Japanese commitments.

Negotiating on trade in services is also made more complicated by the fact that even the most economically advanced countries' statistics on trade in services are at best incomplete. Whereas most countries' data on trade in goods allow one to determine the value and volume of the precise goods that they trade with specific partners, most statistics on trade in services are aggregated at a high level of abstraction, typically cover only some of the modes through which services are traded and may miss many of the transactions that are made in the covered modes.

## Endnotes

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- 1 Author's interview with Lord Brittan on 17 January 2013.
- 2 In such a system, the members would thus be in a position similar to EU member states that are outvoted on matters that are approved by the rest of the common market, or US states that object to laws adopted by Congress.
- 3 See Weiss and Rosenberg (2003).
- 4 The ITA was negotiated in a plurilateral fashion and is outside the scope of the single undertaking, but its benefits are extended on an MFN basis to all members.
- 5 See Smith (1776), Book IV Chapter 2.
- 6 These calculations are made more complicated when one takes into account the preferences that countries extend to one another under agreements and programmes. That is a complication that we will hold in abeyance for now, to be taken up in Chapter 13.
- 7 The author bases this statement on several years of experience in teaching the Swiss formula and related subjects to professionals and would-be professionals in this field. It is not at all uncommon for otherwise confident and intelligent people to approach with great dread a mathematical operation that actually requires only three, simple steps: one addition, one multiplication and one division.
- 8 A specific tariff is one denominated according to a given quantity, such as US\$ 1 per liter, € 1 per dozen and so forth. A compound tariff has both an *ad valorem* and a specific component (e.g. ¥ 10 per kilogram plus 5 per cent). *Ad valorem* equivalents can be readily calculated for these rates by plugging in prices, but one must first agree on what source will be used for the price data, using what base years, what further types of adjustments might be made to these values, among others. In the Doha Round, it took years for members to agree on just how this would be done.
- 9 Ten of those original participants are shown in Appendix 9.3. The other members that have made domestic support commitments include eight that later acceded to the European Union and hence fall within its limits (Bulgaria, Cyprus, the Czech Republic, Hungary, Lithuania, Poland, the Slovak Republic and Slovenia). Those EU-wide commitments were, through a process of negotiation, expanded to account for the AMS values that had earlier accrued to its newly acceded members. The other WTO members that have AMS commitments are: Argentina, Colombia, Costa Rica, Croatia, Iceland, Israel, Jordan, the Republic of Moldova, Morocco, New Zealand, Norway, Papua New Guinea, the Kingdom of Saudi Arabia, Chinese Taipei, Thailand, the former Yugoslav Republic of Macedonia, Tunisia, Ukraine, the Bolivarian Republic of Venezuela and Viet Nam.
- 10 In at least a few instances, negotiators have reportedly mistaken these terms and made unlimited commitments in a sector in which they had intended to specify no commitments at all.
- 11 A guide to reading the GATS schedules of specific commitments can be found at [www.wto.org/english/tratop\\_e/serv\\_e/guide1\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm).

## Appendix 9.1. Signatories to optional agreements in the WTO, 2012

Signatories to the Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, and the Information Technology Agreement

	None		One or two		All three	
Developed countries	—		Australia		Canada	
			New Zealand		European Union*	
			Iceland		Norway	
			Liechtenstein		Switzerland	
					United States	
					Chinese Taipei	
Angola	Cyprus	Malta	Sierra Leone	Albania	Kyrgyz Rep.	
Antigua and Barbuda	Dem. Rep. of the Congo	Mauritania	Solomon Islands	Armenia	Macao, China	
Argentina	Djibouti	Mongolia	South Africa	Aruba**	Malaysia	
Bangladesh	Dominica	Montenegro	Sri Lanka	Bahrain, King. of	Mauritius	
Barbados	Ecuador	Mozambique	Suriname	China	Moldova, Rep. of	
Belize	Fiji	Myanmar	Swaziland	Colombia	United Arab Emirates	
Benin	Gabon	Namibia	Tanzania	Costa Rica	Morocco	
Bolivia, Pluri. State of	The Gambia	Nepal	Fmr Yugoslav Rep. of Macedonia	Dominican Rep.	Nicaragua	
Botswana	Ghana	Niger	Togo	Egypt	Oman	
Brunei	Grenada	Nigeria	Tonga	El Salvador	Panama	
Burkina Faso	Guinea	Pakistan	Trinidad and Tobago	Georgia	Peru	
Burundi	Guinea-Bissau	Papua New Guinea	Tunisia	Guatemala	Philippines	
Cambodia	Guyana	Paraguay	Uganda	Honduras	Russian Fed.	
Cameroon	Haiti	Qatar	Uruguay	Hong Kong, China	Saudi Arabia, King. of	
Cape Verde	Jamaica	Rwanda	Venezuela, Boliv. Rep. of	India	Singapore	
Central African Republic	Kenya	St Kitts and Nevis	Zambia	Indonesia	Thailand	
Chad	Lesotho	St Lucia	Zimbabwe	Israel	Turkey	
Chile	Madagascar	St Vincent and the Grenadines		Jordan	Ukraine	
Congo	Malawi	Samoa		Korea, Rep. of	Viet Nam	
Côte d'Ivoire	Maldives	Senegal		Kuwait, State of		
Cuba	Mali					

Notes: Signatories to the Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, and the Information Technology Agreement. \*The signatory status of the European Union extends to all 27 of its member states (some of which were signatories to one or more of these agreements prior to joining the European Union. \*\*The Netherlands is a signatory to the Agreement on Government Procurement for Aruba.

### Appendix 9.2. Average bound and applied tariffs of selected WTO members, in %

	Agricultural products		Non-agricultural products		All products				
	Applied (A)	Bound (B)	Water (B-A)	Applied (A)	Bound (B)	Water (B-A)	Applied (A)	Bound (B)	Water (B-A)
<b>Developed</b>									
European Union	12.8	12.3	-0.5	4.0	3.9	-0.1	5.1	5.0	-0.1
United States	4.9	4.8	-0.1	3.3	3.3	0.0	3.5	3.5	0.0
Japan	17.3	20.9	3.6	2.5	2.5	0.0	4.4	4.9	0.5
Switzerland	27.2	48.2	21.0	1.9	2.0	0.1	5.2	8.1	2.9
Canada	11.3	16.7	5.4	2.6	5.3	2.7	3.7	6.8	3.1
Australia	1.3	3.4	2.1	3.0	11.0	8.0	2.8	10.0	7.2
Norway	49.4	131.0	81.6	0.5	3.1	2.6	7.0	20.1	13.1
<b>Emerging economies</b>									
China	15.6	15.7	0.1	8.7	9.2	0.5	9.6	10.0	0.4
South Africa	9.0	39.5	30.5	7.5	15.8	8.3	7.7	19.0	11.3
Brazil	10.3	35.4	25.1	14.2	30.7	16.5	13.7	31.4	17.7
Mexico	21.5	44.2	22.7	7.1	34.9	27.8	9.0	36.1	27.1
India	31.8	113.1	81.3	10.1	34.6	24.5	13.0	48.7	35.7
<b>Other developing</b>									
Hong Kong, China	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Saudi Arabia, Kingdom of	5.6	15.4	9.8	4.7	10.5	5.8	4.8	11.1	6.3
Egypt	66.1	95.2	29.1	9.6	27.7	18.1	17.0	36.7	19.7
Jamaica	17.8	96.9	79.1	5.9	42.4	36.5	7.5	49.6	42.1
Nigeria	15.5	150.0	134.5	11.2	48.6	37.4	11.7	119.1	107.4
<b>Least developed</b>									
Haiti	8.0	21.1	13.1	4.2	18.2	14.0	4.7	18.7	14.0
Nepal	14.1	41.1	27.0	12.0	23.7	11.7	12.3	26.0	13.7
Angola	10.0	52.9	42.9	6.9	60.1	53.2	7.3	59.2	51.9
Mozambique	13.8	100.0	86.2	9.5	11.3	1.8	10.1	97.5	87.4
The Gambia	16.5	104.3	87.8	13.7	57.6	43.9	14.0	102.6	88.6

Source: Tabulated from WTO data accessed from [www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm).

Notes: Bound rates are from 2011, applied rates are from 2009 or 2010. Data arranged within categories by levels of water. It is not clear from the source whether the case of negative values for water (thus meaning that average applied rates were above average bound rates) was the result of rounding and other computational quirks or whether it indicates some degree of non-compliance with tariff commitments.

### Appendix 9.3. Utilization of allowable aggregate measurements of support by selected WTO members

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Australia	26.6	26.2	24.8	23.4	12.6	45.3	65.4	45.1	44.0	43.8	43.8	43.9	43.8	0.0	0.0
Brazil	0.0	0.0	8.3	0.0	0.0	0.0	0.0	0.0	0.0	12.8	0.0	37.5	57.1	32.1	29.5
Canada	15.0	12.3	10.8	16.7	20.2	19.7	65.7	80.2	36.9	31.6	18.5	13.9	19.7	39.2	32.4
European Union	63.8	67.0	68.0	65.4	69.3	65.4	58.7	42.6	46.0	46.5	42.3	36.9	17.1	16.3	12.1
Japan	73.1	71.8	70.9	17.8	18.1	17.8	16.8	18.4	16.2	15.3	14.9	14.4	10.5	13.1	14.2
Korea, Republic of	95.1	93.4	95.5	80.1	82.8	94.1	94.8	94.3	97.1	97.9	2.2	65.4	2.5	2.2	–
Mexico	4.8	0.0	0.8	0.9	0.8	1.3	4.0	2.6	2.5	1.9	3.6	–	–	–	–
South Africa	67.4	82.4	97.0	37.6	37.6	21.8	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Switzerland	83.3	73.8	71.9	71.0	62.3	72.6	64.7	64.8	64.6	71.5	55.1	55.5	59.2	69.4	60.6
United States	26.9	26.5	29.0	50.2	84.7	88.2	75.8	50.4	36.4	60.9	67.7	40.5	32.8	32.7	22.3

Source: Calculated from data notified by each member in the G/AG/N/ series.

Notes: Actual AMS as a percentage of maximum allowed under a member's commitments; members providing 50.0 per cent to 89.9 percent of the allowable AMS shown in blue shade; members providing 90.0 per cent or more of the allowable AMS shown in grey shade. – Data not available. China is not included in the table because, as noted in WTO document G/AG/N/CHN/21, "China's AMS commitment is nil in the Schedule made in its accession. All domestic support measures are provided through measures that are exempt from reduction according to the Agreement on Agriculture." India is not included in the table because, as noted in WTO document G/AG/N/IND/7, "India has no specific total AMS reduction commitments in its schedule" and "[a]ll support is covered by the domestic support categories which are exempt from reduction commitments under the Agreement on Agriculture."



# 10 WTO negotiations conducted outside the Doha Round

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We should explore what new type of trade negotiating round is best suited to the new economy. We should explore whether there is a way to tear down barriers without waiting for every issue in every sector to be resolved before any issue in any sector is resolved. We should do this in a way that is fair and balanced, that takes into account the needs of nations large and small, rich and poor. But I am confident we can go about the task of negotiating trade agreements in a way that is faster and better than today.

President Bill Clinton  
Speech to the World Trade Organization (18 May 1998)

## Introduction

Rounds are a more controversial topic in the WTO period than they were in the GATT period. The eight that were conducted from the first Geneva Round in 1947 through the Uruguay Round of 1986 to 1994 provided the venues in which the great majority of all multilateral bargains were reached in the GATT system. That is true even for many of the accession negotiations, for while those talks were technically held outside the scope of a round, they often dovetailed with the larger initiative; acceding countries were permitted to engage in the multilateral negotiations, and the terms of their own accessions were often finalized as the end of a round. In the WTO period, by contrast, rounds have come under challenge in two ways. One is through the successes achieved outside of this structure, especially in the sectoral and other deals reached in the period that fell between the end of the Uruguay Round and the launch of the Doha Round. The other is through the apparent (though not definitive) failure of that latter round.

When President Bill Clinton addressed the WTO at the Second Ministerial Conference in 1998, he proposed that members explore alternatives to multi-year, multi-issue rounds as the principal model for multilateral trade negotiations. His somewhat oblique criticism of the single undertaking was soon forgotten by most other members, as just one year later his own country hosted a ministerial conference that aimed to launch what might have been called the Clinton Round. The Seattle Ministerial Conference was instead a disaster, due in part to the president's own divisive comments on the issue of trade and labour rights (see Chapter 11), but that did not deter WTO members from trying again. They succeeded two years later at the Doha Ministerial Conference, launching a round that

was (according to the ministerial declaration) supposed to be concluded by 1 January 2005. At the time of writing, it has gone on for a dozen years and has as yet no end in sight. Several of the participants in the Doha conference have since come to see their accomplishment in launching the round as a tactical success but a strategic failure. In retrospect, the multilateral trading system might be better off if its members gave greater heed to what Mr Clinton told them about rounds in 1998 than what he said to the press about labour in 1999.

The WTO has nevertheless managed to conduct some negotiations outside the structure of the Doha Round. These variously include talks that have taken place before the launch of the round, or concurrently with but apart from the round, or in negotiations that were originally part of the round but for which some of the members propose the conclusion of agreements outside the scope of the single undertaking. These various extra-round negotiations might best be seen in relationship to the Uruguay Round, the components of which achieved differing levels of success and completion. While some of the issues taken up in that round were resolved definitively (e.g. the outlawing of “voluntary” export restraints), most bargains involved some degree of ambiguity or incompleteness and the topics carried over in one way or another to post-round negotiations. At some risk of oversimplification, these carry-overs can be categorized in the taxonomy shown in Table 10.1. In a few cases, the new negotiations aimed to fill in some very large blanks that negotiators had left in their agreements, such as their inability to draft language in the General Agreement on Trade in Services (GATS) concerning such key issues as subsidies and safeguards. In other cases, the reviews or negotiations were to deal with more arcane questions, typically areas where language had been approved in an agreement but for which further review was now sought. In still other cases, there soon emerged a sense of buyer’s remorse over the bargains that had been struck in the Uruguay Round, typically on the part of developing countries but also among some of the developed, and proposals were made to slow the implementation or revise the terms of the agreements in question. Some of those issues were taken up in the period that fell between the old and the new round, with a few of these negotiations beginning when the signatures on the Marrakesh Final Act were barely dry, while others were held in abeyance until a new round (or its functional equivalent) might be launched.

This chapter reviews several of the negotiations (other than accessions) that have been conducted in the WTO but outside the scope of the Doha Round. Most of these took place during the period between the rounds, and most of those may be classified under the broad rubric of the built-in agenda. A few of them emerged spontaneously, most notably in the case of the Information Technology Agreement (ITA), while others have taken place during the same time as, but not as part of, the Doha Round. A few other topics that fall within this general category of negotiations outside the round are taken up in other chapters, especially in the area of discrimination (Chapter 13).

**Table 10.1. Post-Uruguay Round negotiations in the WTO**

Category	Description	Principal examples and results
Unfinished business from the Uruguay Round	Issues that were not fully resolved in the Uruguay Round and for which negotiators set a built-in agenda, either in the agreements or in separate decisions calling for further negotiations.	See Appendix 10.1 for a list of the principal items in the built-in agenda. Most provided for reviews that might lead to recommendations for changes in agreements, but some provided for the completion or initiation of substantive negotiations on either rules or market access commitments (both types being prominent in GATS).
Architectural foundations for future negotiations	Agreements that set the basic terms of obligations and provided for individual commitments, but achieved relatively little actual liberalization.	The Agreement on Agriculture included scheduled commitments on domestic support and GATS included commitments on service sectors, but in both cases there was considerable "water" in the schedules negotiated in the Uruguay Round. Both agreements provided for new negotiations to start in 2000.
Incremental progress on market access	Tariff negotiations continue from one round to the next for all lines that have not yet reached bound rates of zero.	Negotiations in most sectors awaited the start of a new round, but in the interim members also initiated new negotiations for the Information Technology Agreement and in a few other sectors.
Buyer's remorse over Uruguay Round agreements	Agreements and commitments in areas that some members came to regret approving and hoped to revise.	Developing countries sought modifications to three types of Uruguay Round agreements: TRIPS provisions concerning pharmaceutical patents and public health, the phase-out of textile and apparel quotas and the issues collectively known as "implementation".

As is the case for many other key terms used in the WTO, different meanings might be given to the term "built-in agenda". The narrowest usage covers two major items that carried over from the Uruguay Round, with articles in both the Agreement on Agriculture and the GATS providing for the launch of new negotiations on these issues in the year 2000. Sometimes when people speak of the built-in agenda they mean only these two negotiations, and only in the sense of these talks as an alternative to a larger round. In Article 20 of the Agreement on Agriculture the members agreed that "negotiations for continuing the process [of reform] will be initiated one year before the end of the implementation period" (i.e. by the start of 2000). These negotiations were to focus, among others, on "what further commitments are necessary to achieve the ... long-term objectives" of "substantial progressive reductions in support and protection resulting in fundamental reform." Similarly, GATS Article XIX provided for "successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement [i.e. by the start of 2000] and periodically thereafter, with a view to achieving a progressively higher level of liberalization." Those provisions did not specify how the negotiations were to be conducted, but negotiators clearly intended that the two topics be taken up simultaneously – whether in a *pas de deux* or as part of a larger round<sup>1</sup> – and thus allow for productive trade-offs between them.

A somewhat wider sense of the term, and the one that is most typically meant, covers not just these two "big-ticket" items but also many others that were provided for in Uruguay Round agreements and decisions. There are 27 such items enumerated in Appendix 10.1. Some of these items had no fixed date. For example, under GATS Article XV members agreed to "enter into negotiations with a view to developing the necessary multilateral disciplines to avoid [the]

trade-distortive effects” of subsidies in services, noting that the “negotiations shall also address the appropriateness of countervailing procedures,” but provided no guidance on when these talks were to commence or conclude. That stands in contrast, for example, to the GATS provisions on government procurement (which specified when negotiations were to begin) and safeguards (which stated when the results of negotiations were supposed to enter into effect). GATS Article VI was also vague on the timing of negotiations on domestic regulation, providing only that “the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines” in this area. In the end, these differing levels of sequential specificity proved to be distinctions without a difference for several of the items. Whereas most of the items listed in Appendix 10.1 were resolved within a few years of the WTO entering into effect, and two appear never to have been addressed, several others were ultimately folded into the Doha Round.

The broadest definition of the “built-in agenda” would be based not on whether the negotiations were mandated by Uruguay Round instruments but whether they took place between that round and its successor. That would mean defining the ITA, which is arguably the most significant trade agreement to be achieved during the entire period between the rounds, as part of the single undertaking. That would be a misnomer, however, as the Uruguay Round negotiators did not contemplate anything like the ITA when they were completing their work.

A final horizontal comment is in order before turning to the individual items negotiated outside the round. Several of them exemplify both the possibilities and the limitations of what can be achieved when one follows Mr Clinton’s recommendation that negotiations be conducted piecemeal and outside of a formal round, which also implies working within the limitations of the existing US mandates. The type of negotiation he proposed would allow US negotiators to operate without a grant of fast-track negotiating authority. These delegations of power provide special rules for congressional consideration of the implementing legislation for trade agreements (see Chapter 6) and are the US complement to the single undertaking (see Chapter 9). When Mr Clinton spoke to the WTO the last such grant had already expired in 1994. The US negotiators were not sure if, or when, their fast-track powers would be renewed and they opted to concentrate on those deals that could be made within the scope of other authorities. The simplest of these is the inherent authority of the president to enter into agreements that impose no new obligations and thus require no action by the US Congress.<sup>2</sup> The agreements discussed below on telecommunications services, financial services and global electronic commerce were all important, but none of them required any action by Congress because they did not make any changes in US law. In working around the limitations placed on them, the US negotiators were also able to “get something for nothing” from their trading partners. They also made use of a residual authority that Congress had granted in Section 111 of the Uruguay Round Agreements Act. It gave the president the power to proclaim changes in tariffs on certain products if “the United States agrees to such modification or staged rate reduction in a multilateral negotiation under the auspices of the WTO.” The authority, which has no expiration date, applies only to those product sectors that were subject to “zero-for-zero” offers during the Uruguay Round.<sup>3</sup> The Clinton administration

used this authority to implement the ITA, a pharmaceutical agreement, the Tariff Initiative on Distilled Spirits with the European Union and the US–Japan Agreement on Distilled Spirits.

## GATS protocols

Negotiations over services are the most significant constant in the WTO period, having been under way on a more or less continuous basis since the immediate aftermath of the Uruguay Round and the entry into force of GATS. These negotiations can be roughly divided into three phases, starting with negotiations over sectoral protocols and other matters that took place in the period of the built-in agenda, followed by the GATS 2000 negotiations that were eventually folded into the Doha Round, and then yet a new turn in 2012 and 2013, when several members began negotiations over a proposed plurilateral agreement outside of the Doha Round. Those third negotiations, which aim to produce an International Services Agreement, are not covered here as they remain at the time of writing in an early stage of development.<sup>4</sup> It is not even certain whether they will be formally conducted inside or outside the WTO. The discussion that follows thus focuses on the first of these phases, with the GATS 2000/Doha Round services negotiations taken up in Chapter 12.

GATS was arguably both the most significant expansion in the scope of the trading system to emerge from the Uruguay Round as well as the least complete agreement to be produced by those negotiations. Its principal accomplishments were to affirm that trade in services is as much a part of the multilateral trading system as is trade in goods, to establish the basic architecture by which countries may make binding commitments in this area and to incorporate the first set of scheduled commitments from countries. Those achievements must be balanced against three areas in which the negotiations fell short. One was in the failure to complete negotiations on GATS rules regarding subsidies, safeguards, government procurement and domestic regulation.<sup>5</sup> Provisions in GATS call for further negotiations on each of these issues, some of which set deadlines (none of which were met) and others of which did not; these are listed in Appendix 10.1. Second, the Uruguay Round negotiators failed to complete the talks they had begun on the financial, telecommunications and maritime transportation sectors, as well as on the movement of natural persons, approving instead four decisions calling for the completion of each of these negotiations. The incomplete nature of the GATS negotiations is demonstrated by the fact that these various decisions and GATS articles providing for further negotiations account for ten of the 27 items listed in Appendix 10.1.

The third area in which the GATS negotiators came up short is in the actual liberalization of services sectors. Despite the fact that all WTO members scheduled GATS commitments, the great majority of the items in these schedules consisted either of binding their measures at the applied level or including “water” in their schedules that would allow them to impose more restrictive measures in some future regulatory initiative or contingency. In their quantitative comparison of GATS schedules, Doha Round offers, and applied measures Gootiiz and Mattoo (2009) showed that on average the GATS commitments countries made in the Uruguay Round and in the period of

the built-in agenda were 2.3 times more restrictive than the actual policies in place at that time. Nor was this a uniquely Uruguay Round phenomenon. Their analysis shows that the offers that members had submitted up until that time in the Doha Round would remain, on average, 1.9 times more restrictive. Commitments that lock in the status quo should not be dismissed altogether. Reforms that are enshrined in this way can be enforced through dispute settlement, but that is not the case for autonomous reforms and *de facto* liberalization. That distinction may be important not just to one's trading partners, but also to prospective foreign investors, as a government that inscribes its reforms in a treaty obligation by way of GATS schedules and other WTO commitments can provide a more effective guarantee that the regime will be stable and predictable. That said, the GATS has been less successful as an instrument of liberalization than as a means of "locking in" the reforms that countries undertook prior to or during the negotiations.

The unfinished sectoral negotiations were taken up immediately after the Uruguay Round ended. These were talks that relied heavily on regulators and experts. "The trade guys were there," recalled Stuart Harbinson, "but the people who were really involved and calling the shots were the regulators from capitals."<sup>6</sup> The results of these negotiations, as expressed in the scope of members' commitments, are summarized in Appendix 10.2. Readers should note that this tally is limited to a simple dichotomy that indicates whether a member did or did not schedule a commitment in one of the sectors at issue. The width and depth of those commitments vary considerably from one member to another.

Note also that we start below with the second protocol because, in an odd bit of WTO accounting, there is no "first protocol". This designation had originally been reserved for an instrument that was intended to incorporate commitments received after the round from LDCs, but it was then decided not to package the schedules of these LDCs into a separate protocol. By the time that decision was made the first of the instruments discussed below had already come to be numbered as they are.

### ***Second and fifth GATS protocols: financial services***

The Second Annex on Financial Services and the Decision on Financial Services provided for extended negotiations in this sector in the first half of 1995. The negotiations went on for a month longer than originally planned, producing an interim agreement at the end of July. The United States objected to the limited market-opening offers by some members and announced that it would make binding commitments only for existing operations of foreign financial firms. Washington also took a broad most-favoured-nation (MFN) exemption with regard to new entry and operations for all financial services. The European Community proposed that the offers made to date be preserved, thus leading to the interim agreement on financial services. Other members agreed to maintain their existing offers and return for a second round of negotiations.<sup>7</sup> Twenty-nine WTO members (counting the 15 members of the European Community as one) improved their schedules of specific commitments and/or removed, suspended or reduced the scope of their MFN exemptions in financial services.<sup>8</sup> Those improved commitments were annexed to the Second Protocol to the General

Agreement on Trade in Services. The Second Protocol, and the commitments annexed to it, were adopted 21 July 1995 and entered into force on 1 September 1996.

Negotiations then reopened in April 1997. These led to a new and improved set of commitments in financial services that December in the Fifth Protocol to the GATS, so numbered because two other protocols had been produced in the meantime. It had annexed a total of 56 schedules of commitments, representing 70 members<sup>9</sup> and 16 lists of MFN exemptions (or amendments).<sup>10</sup> Members adopted this protocol on 14 November 1997, which was open for ratification and acceptance until the end of January 1999. Fifty-two members accepted the protocol by the due date, and put it into force on 1 March 1999. The total number of WTO members with commitments in financial services rose to 104. India, Thailand and the United States<sup>11</sup> withdrew their broad MFN exemptions based on reciprocity, and a few members submitted limited MFN exemptions or maintained existing broad MFN exemptions.

The actual results of these negotiations were limited. “[F]ew developing countries made sweeping commitments to market access and national treatment in the 1997 FSA negotiation,” summarized Dobson (2007: 308). “Latin American and Asian economies were among the most reluctant to open their insurance and core banking sectors, with Eastern Europeans and Africans ahead of them in their commitments.” Several countries used the opportunity to let their commitments catch up to liberalization that they had achieved autonomously in the few years that passed since the round, notably in Eastern Europe:

Several (like the Czech Republic, Slovak Republic and Slovenia) gave up the possibility of discretionary licensing in banking based on economic needs, while others (like the Czech Republic in air transport insurance) eliminated monopolies in certain areas of insurance. Several countries (like Bulgaria in insurance) allowed commercial presence through branches while others liberalized cross-border trade and consumption abroad (like Poland with respect to insurance of goods in international trade). Liberalizing trends were also visible in other regions: some countries (like Brazil) replaced prohibitions on foreign establishment with a case-by-case authorization requirement and some liberalized cross-border trade (for instance, the Philippines with respect to marine hull and cargo insurance) (*ibid.*: 310).

Rajan and Sen (2002: 30) also found that the commitments that Indonesia, Malaysia and Thailand made on financial and telecommunications services “have been at status quo or below it.”

What kind of impact does liberalization of financial services have on trade and welfare? The answer depends in part on how one poses the question. Viewed at a global level the potential gains seem small. “The share-weighted average of financial services in total production costs for the world as a whole is 8.8 per cent,” Verikios and Zhang (2001: 44) noted, but the potential gains are not on that same order of magnitude. “Removing all barriers to trade in financial services,” they calculate (*ibid.*: 46), “increases world real GNP by 0.09 per cent.” The

attractions for individual countries can be much higher. Using GATS commitments as one measure of financial sector openness, Francois and Eschenbach (2002: ii) found “a strong positive relationship between financial sector competition/performance (meaning foreign bank access to domestic banks), and between growth and financial sector competition/performance.” Hoekman (2006: 27) concluded in his survey that the “literature tends to find a positive link between financial sector openness and economic growth performance.” Countries with open financial and telecommunications sectors have average growth rates about one percentage point higher than other countries, according to the calculations of Mattoo et al. (2006) (see also Wang et al., 2008).

### *Third GATS protocol: movement of natural persons*

The movement of natural persons, more commonly called Mode 4, is the most controversial aspect of services negotiations between developed and developing countries. This division was not bridged during the period of the built-in agenda nor indeed in the Doha Round negotiations that followed. While Mode 4 commitments might in principle offer more opportunities to exporters in populous developing countries in actual practice these commitments tend to be structured in ways and concentrated in sectors that are of greater interest to developed countries. The negotiations over the Third Protocol to the General Agreement on Trade in Services did not deviate from that broader pattern. Most of the commitments in these renewed negotiations were made by developed countries, and in terms that were primarily of interest to countries in that same group. India was the only developing country to make commitments in this protocol.

“Within a given sector,” according to a WTO Secretariat (2002: 3) analysis, “trade conditions for mode 4 tend to be significantly more restrictive than conditions for other modes.” Moreover:

Members' schedules are mostly biased in favour of “intra-corporate transferees”, hence making the economic value of such commitments dependent on access conditions for mode 3. Such commitments are of limited interest to Members which, given their level of economic development, are not significant foreign investors. Schedules are also more open for highly skilled labour, where developing countries tend to be net importers, as their comparative advantage lies with relatively unskilled labour-intensive services. It is also widely acknowledged that Members' mode 4 commitments do not generally reflect actual entry conditions for natural persons, as Members have bound less than the access granted in practice (*Ibid.*: 4).

Negotiators agreed in the Decision on the Negotiations on Movement of Natural Persons at the end of the round to improve commitments on the movement of natural persons in the six months after the WTO came into force. A Negotiating Group on Movement of Natural Persons supervised the bilateral negotiations on Mode 4, which concluded on 28 July 1995. As a result, six members improved their commitments on the movement of natural persons: Australia, Canada, the European Community and its member states, India, Norway and

Switzerland. The improvements mostly concern access opportunities for additional categories of service suppliers (usually independent foreign professionals in a number of business sectors) or the extension of their permitted duration of stay. These upgraded commitments were attached to the Third Protocol to the General Agreement on Trade in Services, which entered into force on 30 January 1996. The Third Protocol provides for the annexation of the new commitments to the Uruguay Round services schedules of the six members concerned.

#### ***Fourth GATS protocol: basic telecommunications***

The negotiations on basic telecommunications produced more actual liberalization than did most of the other GATS talks after the Uruguay Round. Some governments made commitments in the Uruguay Round on value-added telecommunication services, but very few did so for basic telecommunications. Basic telecommunications services, usually supplied by monopolies and less commonly open to competition, were at the time distinguished from the more liberalized value-added or enhanced services such as e-mail, voice mail, online information and database retrieval, data processing, and electronic data interchange. The Decision on Negotiations on Basic Telecommunications that ministers adopted in Marrakesh on 15 April 1994 set a tight schedule. Negotiations began in the very next month, initially with the participation of 33 members, under the auspices of the Negotiating Group on Basic Telecommunications. The decision directed the negotiations to conclude by the end of April 1996. By that time 53 members were participating fully, and another 24 governments (including some in the process of accession) had observer status.

Negotiators agreed that the talks would cover both basic telecommunications services as well as those provided through resale. That meant that they went beyond negotiating market access commitments on the cross-border supply of basic telecommunications to cover commercial presence relating to the ability of foreign firms to own and operate telecommunications networks and infrastructure. Negotiators opted not to develop a definitive listing of what constituted basic telecommunications, but agreed that the talks would deal with any and all telecommunications services that involve real-time transmission of customer supplied information (i.e. without adding value). These included (among others) domestic and international voice telephony, mobile services, data transmission, facsimile, private leased circuits, satellite services and video transport services.

The talks produced offers from 48 governments by the deadline, but the scheduled commitments did not achieve the “critical mass” that the major trading countries sought. WTO Director-General Renato Ruggiero wished to preserve the results achieved so far, and suggested attaching them to a protocol and setting a one-month period early in 1997 for participants to re-examine their positions on market access and MFN treatment. Participants accepted the director-general’s proposal in a decision that the Council for Trade in Services adopted on 30 April 1996, establishing 15 February 1997 as the closing date. Talks resumed in July 1996, and starting in August 1996 participants met monthly and held numerous bilateral negotiations on market access. They also maintained informal contacts at the Singapore Ministerial Conference in December 1996.

This time the critical mass was met. Sixty-three of the 69 governments submitting schedules included commitments on regulatory disciplines by the February 1997 deadline, 57 of which committed to the associated Reference Paper. That was a significant increase over the results in April 1996, when 44 out of the 48 governments submitting offers included commitments on regulatory disciplines and just 31 committed to the Reference Paper. The numbers that signed on to these commitments grew in later years, with 109 WTO member governments having GATS commitments on telecommunications and 80 committing to the Reference Paper. Most of those additional commitments came as a result of accessions; all countries that have acceded since the conclusion of this paper have signed on to it. Members typically made “technology-neutral” commitments that apply to any technologies that exist or later become available to supply the committed services. By way of example, a technologically neutral commitment on data transmission would include, unless otherwise stated, data transmitted by copper wire, satellite, Internet protocol, or fibre-optic networks and all forms of mobile technologies. For this reason, new commitments do not need to be secured on, for example, broadband data services.

The Reference Paper sets out basic legal principles for a regulatory framework to underpin the market access commitments. The commitments cover competition and interconnection safeguards and rules to promote transparent and fair mechanisms for licensing, universal service and allocation of scarce resources such as radio spectrum. The Reference Paper also requires that a member have a regulator that is independent of the entities that operate telecom networks or otherwise supply the services. One example is the requirement that members provide “cost-oriented interconnection.” Section 2.2 of the Reference Paper provides that “[i]nterconnection with a major supplier will be ensured at any technically feasible point in the network,” and that:

Such interconnection is provided ... in a timely fashion, on terms, conditions ... and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided[.]

This is a key aspect of reform, and even some governments that have made no commitments in this sector have used the Reference Paper as a blueprint for telecommunications reform and implemented cost-oriented interconnection on an autonomous basis. “Interconnection policy is the bedrock for regulating the transition to competition,” as Cowhey and Aronson (2007: 408) noted, because the “interconnection policy requires incumbents with essential facilities to share network economies with new entrants on economically efficient terms.” Participants also elaborated in the Reference Paper a set of principles covering such matters as competition safeguards, interconnection guarantees, transparent licensing processes, and the independence of regulators. The Fourth Protocol and its annexed documents entered into force on 5 February 1998.

The question arises as to how much of a difference these commitments make in the real world. That question is especially relevant in light of the “water” that may remain in many members’ schedules. In a study that controlled for geographical region and income level, Bressie et al. (2005: 20) found that “countries that have made GATS commitments in basic telecommunications tend to outperform those countries that have not made GATS commitments in basic telecommunications with respect to fixed and mobile penetration as well as sector revenues.” Their results supported “the hypothesis that companies are more likely to make significant investments in countries that have made GATS commitments in basic telecommunications.”

The negotiations may also have had a dynamic effect in domestic policy-making. Many governments used the impetus of the negotiations and the pressure of a WTO deadline to push domestic reform along more quickly than they might otherwise have been able to move. Some of them took advantage of this opportunity to privatize their telecommunications monopolies or otherwise to overcome entrenched opposition from entities that had grown accustomed to being free of competitive pressure. These included some developing country members who were enthusiastic about liberalization; some of them moved faster toward full competition than some developed members who had liberalized earlier, but only partially (e.g. Australia and Canada had not yet liberalized infrastructure, and the United States has not yet liberalized local phone services). At the outset of the negotiations the European Community was not yet sure whether or not it would maintain existing monopolies on the underlying infrastructure. The ambitions of both developed and developing governments grew over the course of the negotiations.

### *Maritime services*

While the negotiations on financial and especially telecommunications services can be deemed successes, the negotiations on maritime services failed to produce a new protocol. The negotiations in this sector instead got folded into the Doha Round GATS talks and, as a result, have not produced results at the time of writing. The only source of new commitments in this sector comes by way of accessions. Members made fewer commitments in this sector than they have in many others, as can be appreciated from the data in Appendix 10.2, but that does not necessarily mean that actual practices in this sector are more restrictive. To the contrary, a WTO Secretariat background note observed that “maritime transport is generally considered as one of the most highly liberalized services.”<sup>12</sup> The note speculated that the gap between what members commit to and what they actually do may indicate that “commitments simply reflect legislation or international agreements that may still exist, but are no longer applied, such as the United Nations Code of Conduct for Liner Conferences.”

The sector as a whole may be more open than others but sharp differences remain between the *demandeurs* and a few countries with notoriously tight restrictions. The former group includes a heterogeneous mix of developing and developed economies, with the composition determined in large part by geography: the *demandeurs* include several members that are either islands (Australia, Iceland, Japan, New Zealand and Chinese Taipei) or nearly so (Hong

Kong, China), and others have long coasts (Canada, the Republic of Korea, Mexico and Norway) or a particular interest in shipping (Panama). Their number also includes Switzerland, a landlocked country that is nonetheless the headquarters for large shipping countries. The European Union, whose membership includes traditional maritime states such as Greece and the United Kingdom, is also a *demandeur*. Groups such as the European Communities Shipowners Association and the Council of European and Japanese Shipowners Associations were among those hoping that renewed negotiations in this sector would help them to overcome such barriers as restricted/regulated access to port and port services, preferential cargo allocation, restrictions on establishment of owned branch offices, discriminatory measures favouring the use of national carriers, cumbersome procedures or personal harassment during port calls, abusive tariffs for services (some of which are not even rendered) and unrealistic and unjustifiable liability claims by customs agents.<sup>13</sup>

On the other side, this is an especially sensitive sector for some members. Just as many developing countries had cited security concerns when they opposed negotiations on communications services in the 1980s, the United States objected on grounds of national security to concessions on maritime transportation services. This followed a long tradition of treating maritime services as a special sector, reaching at least as far back as Adam Smith's contention that because "defence ... is of much more importance than opulence, the Act of Navigation is, perhaps, the wisest of all the commercial regulations of England" (1776: 464-465). The restrictions that the United States imposes on maritime transportation, especially the reservation of cabotage (coastwise shipping) to domestic ships, descend from that very law. As was noted in Chapter 2, the United States secured a special exemption for its cabotage laws in GATT 1994. A provision in Paragraph 3 of that agreement covers certain measures that prohibit "the use, sale or lease of foreign-built or foreign-reconstructed vessels in commercial applications between points in national waters or the waters of an exclusive economic zone." The exemption is subject to review and even potential retaliation through "mirror" legislation.<sup>14</sup> The US negotiator who secured this special treatment would later call it "the ugly birthmark on the new-born baby" (Stoler, 2003: 1), and other countries that attended that birth have subsequently tried to have it removed or, failing that, to secure greater commitments in this sector from the United States and other members.

One halting step in that direction began with approval of the Decision on Negotiations on Maritime Transport Services at the end of the Uruguay Round. This decision established a Negotiating Group on Maritime Transport Services, with its first negotiating session to be held in May 1994, and a goal of concluding negotiations no later than June 1996. Those negotiations failed to reach agreement on a package of commitments by the agreed deadline, and the talks were suspended in July 1996 until a new round of comprehensive negotiations on trade in services was mandated to begin in 2000. Like the rest of the services negotiations, it then became a part of the Doha Round.

Despite the best efforts of the *demandeurs*, the maritime services negotiations in the Doha Round have not gone any further than did those attempted in the period of the built-in agenda. More than 50 members issued a Joint Statement on the Negotiations on Maritime Transport

Services on 3 March 2003 (WTO document TN/S/W/11).<sup>15</sup> It called for meaningful liberalization and a broad coverage of this sector in the negotiations and in the WTO/GATS framework. After the Hong Kong Ministerial Conference in 2005, the *demandeurs* recommended the use of a “maritime model schedule.”<sup>16</sup> This model proposed the elimination of cargo reservation and restrictions on foreign equity participation, plus the right to establish a commercial presence both for international freight transport and for maritime auxiliary services. It also called for additional commitments on access to/use of port services and multimodal transport services as well as for the elimination of MFN exemptions. The model requested commitments on international freight transport (CPC 7212) – significantly not including cabotage – in Modes 1, 2, and 3, including elimination of cargo reservations, restrictions on foreign equity, restrictions on the right to establish a commercial presence, nationality requirements of board members and any other preferential treatment.

## The Information Technology Agreement

The ITA eliminated tariffs on a wide range of information and communication technology products, including computers and computer peripherals, telecommunications equipment, semiconductors, software, photocopiers, fax machines, cash registers, calculators, scientific and measuring devices, loudspeakers and digital cameras, among others. The agreement eliminated all duties that ITA signatories imposed on these products by 2000, with some exceptions allowed for developing countries through 2005. It is arguably the most significant accomplishment of the period between the rounds,<sup>17</sup> and rivals or exceeds many of the achievements of the Uruguay Round or agreements that might potentially be reached in the Doha Round. WTO data show that in 2011, global exports of office and telecommunications equipment amounted to 9.4 per cent of world merchandise trade, or slightly more than agricultural trade (9.3 per cent) and significantly greater than the value of textile and apparel trade (3.9 per cent).<sup>18</sup>

The agreement did not originally develop within the WTO, having instead been initiated among US computer manufacturers in the Information Technology Industry Council (ITI) and then progressing through a series of other private and public institutions. Frustrated by the failure to eliminate tariffs in the Uruguay Round, in 1995 the ITI developed a “Proposal for Tariff Elimination” that called for a plurilateral Information Technology Agreement to eliminate tariffs on hardware and software by the year 2000. The ITI then worked with the Information Technology Association of Canada, the European Association of Manufacturers of Business Machines and Information Technology Industry and the Japanese Electronic Industry Development Association, calling on the Group of Seven (G7) governments to remove all barriers to trade and investment in this sector. The next step came in the endorsement by EC and US business groups in the TransAtlantic Business Dialogue.

While the initiative thus moved rapidly in the private sector, governments were slower to act. According to the WTO’s history of the initiative, at this stage:

The US Administration was initially reluctant about the proposal because it did not want to antagonize the European Union after it had refused to join a sectoral initiative on electronics only a few years earlier. Industry successfully lobbied, and by the beginning of April 1995, the US Trade Representative, Mr Mickey Kantor, announced that the Clinton Administration would pursue the negotiation of an information technology agreement. By 1995, both the governments of Canada and the US firmly supported the idea of negotiating an ITA. However, the initiative was initially resisted by the European Union and Japan, which considered that the results of the Uruguay Round were “big enough to digest” (WTO, 2012: 11).

European reluctance was overcome by year's end, with the European Community and the United States formally endorsing the initiative at a summit on 3 December 1995 between President Jacques Santer of the European Commission, Spanish Prime Minister Felipe González and US President Bill Clinton.

There then followed a shifting series of negotiations that were at least partly within the WTO, with the negotiating parties treating the December 1996 Singapore Ministerial Conference as an action-forcing event that provided them with a useful deadline. Talks also took place in various bilateral, trilateral and other configurations. Among the sticking points that negotiators had to deal with were the scope of product coverage, the question of whether the agreement would go beyond tariffs to cover non-tariff barriers and the relationship between the proposed agreement and a US–Japanese semiconductor agreement that was due to expire in mid-1996.

Even while the negotiators for the Quad (Canada, the European Union, Japan and the United States) debated principles and haggled over product lists, they also agreed that the negotiations needed to include a broader range of countries if they were to achieve the needed level of “critical mass”. This could best be done, they decided, by bringing the initiative to the Asia-Pacific Economic Cooperation (APEC) forum. APEC had the virtue of including some economies that were not yet in the WTO, most notably China and Chinese Taipei, as well as other major players such as the Republic of Korea and Hong Kong, China. This expansion in the talks naturally required that the agreement address the needs of developing countries. Some APEC members nonetheless remained sceptical, and “[o]nly after the personal intervention of various political leaders, such as US President Bill Clinton and Japanese Prime Minister Ryutaro Hashimoto, did APEC decisively endorse the ITA” (*Ibid.*: 15). The APEC Leaders' Declaration of 25 November 1996 called for the conclusion of the ITA by the Singapore Ministerial Conference (due to convene two weeks later) and endorsed the elimination of tariffs by the year 2000.

The negotiations did pivot on the Singapore ministerial, as the negotiators had intended, but did not end there. The Ministerial Declaration on Trade in Information Technology Products that 29 countries signed in Singapore was a near-final draft of an agreement, and a mandate to conclude it, rather than the finished product. Its entry into force was contingent on the ITA

members accounting for 90 per cent of world trade in information technology products by 1 April 1997; the original signatories' coverage was only 83 per cent. The ministerial declaration laid out modalities for the final stages of the negotiations and a timetable to achieve them. In the next several months, they worked both to resolve the final questions of product coverage and to bring the requisite number of other parties on board. It was clear by March 1997 that a sufficiently large number of additional countries had signed on, and the participants then commenced a schedule of phased duty reductions on an MFN basis. As shown in Table 10.2, the original signatories included 23 developed countries (most of them EC members) and six developing economies. In later years, another 14 developed countries signed on (primarily as a consequence of accessions to the European Union), as did 32 more developing and transitional economies.

The average bound tariff rates that developed countries imposed on ITA products prior to this agreement were 4.9 per cent. Some developing-country signatories started from much more substantial bindings, notably Turkey (24.9 per cent), Thailand (30.9 per cent), and India (66.4 per cent). Applied tariffs were generally lower, but for several of the developing countries they were still above 20 per cent to 30 per cent before the ITA.<sup>19</sup> One study found that from 1996 to 2008, total ITA products trade (imports and exports) expanded by 10.1 per cent annually, rising from US\$ 1.2 trillion to US\$ 4.0 trillion; during that same period, global trade in all manufactures increased at 7.1 per cent (US International Trade Commission, 2010: 9). It is nonetheless difficult to determine what share of the above-average rate of growth might be attributable to trade liberalization and what share might simply represent increased demand.

**Table 10.2. Signatories to the Information Technology Agreement**

	<b>Developed</b>	<b>Developing and transitional economies</b>
1996	Australia; Austria; Belgium; Canada; Denmark; Finland; France; Germany; Greece; Iceland; Ireland; Italy; Japan; Liechtenstein; Luxembourg; Netherlands; Norway; Portugal; Spain; Sweden; Switzerland; United Kingdom; United States	Chinese Taipei; Hong Kong, China; Indonesia; Republic of Korea; Singapore; Turkey
1997-2000	Croatia; Cyprus; Slovenia; Czech Republic; Estonia; Latvia; Lithuania; New Zealand; Poland; Romania; Slovakia	Albania; Costa Rica; El Salvador; Georgia; India; Israel; Jordan; Kyrgyz Republic; Macao, China; Malaysia; Mauritius; Oman; Panama; Philippines; Thailand
2001-2005	Bulgaria; Hungary; Malta	Kingdom of Bahrain; China; Egypt; Republic of Moldova; Morocco; Nicaragua
2006-2012	—	Colombia; Dominican Republic; Guatemala; Honduras; State of Kuwait; Peru; Russian Federation; Kingdom of Saudi Arabia; Ukraine; United Arab Emirates; Viet Nam

Source: WTO Secretariat, [www.wto.org/english/tratop\\_e/inftec\\_e/itscheds\\_e.htm](http://www.wto.org/english/tratop_e/inftec_e/itscheds_e.htm).

In a related area, WTO members also approved a “standstill” commitment in order to keep open electronic commerce. One of the few substantive accomplishments of the Geneva Ministerial Conference in 1998 was the adoption of a Declaration on Global Electronic Commerce<sup>20</sup> providing for “a comprehensive work programme to examine all trade-related issues relating to global electronic commerce” and also “declar[ing] that Members will continue their current practice of not imposing customs duties on electronic transmissions.” In Paragraph 34 of the Doha declaration ministers agreed to “maintain their current practice of not imposing customs duties on electronic transmissions until the Fifth Session,” and “to continue the Work Programme on Electronic Commerce” while also instructing the General Council “to consider the most appropriate institutional arrangements for handling the Work Programme, and to report on further progress to the Fifth Session of the Ministerial Conference.” This commitment was subsequently reconfirmed in later ministerials, including the Geneva Ministerial Conference in 2011. There, ministers adopted a decision by which members “will maintain the current practice of not imposing customs duties on electronic transmissions until” the 2013 Ministerial Conference.<sup>21</sup>

*Demandeurs* have sought to expand the coverage of the ITA, both in its membership and in its product coverage, ever since the original agreement entered into effect. This included an attempt to make an ITA-2 part of an “early harvest” at the Seattle Ministerial Conference, but those efforts failed with the rest of that conference. In 2012, the United States proposed new negotiations, submitting a concept paper on behalf of itself as well as Canada, Japan, the Republic of Korea, Singapore and Chinese Taipei. This group was later joined by Costa Rica and Malaysia. The concept paper urged that ITA participants “accelerate consultations with domestic stakeholders to grasp their needs for the expansion of the product coverage.” The types of goods that they urged be covered by the ITA include products capable of processing digital signals, products that can send or receive digital signals with or without line, manufacturing equipment, and related components, attachments and parts. The paper also urged that the ITA Committee “take concrete steps to advance the important ongoing work under the Non-Tariff Measures (NTMs) Work Programme, to further facilitate international trade in this important sector.”<sup>22</sup> At the time of writing, the negotiations are still under way. Twenty-two members had submitted product lists in this new round of ITA negotiations by early 2013.<sup>23</sup>

## Implementation issues

“Implementation” is yet another of the words used in the WTO that have different meanings to different users, although in this instance it is not one term applied to multiple phenomena but differing perspectives that users have on the same phenomenon. To many developing countries, the Uruguay Round agreements placed new strains on governments by restricting their policy space and requiring that they meet new substantive and procedural obligations. Much of their worries centred on trade-related aspects of intellectual property rights (TRIPS) and textiles agreements, but they also had concerns over the agreements on subsidies, agriculture, sanitary and phytosanitary measures, anti-dumping and trade-related investment measures (TRIMs). These pacts did not adequately reflect developing countries’ interests, they argued, and hence had to be re-balanced. Nor was the problem limited to the Uruguay

Round agreements *per se*, as the single undertaking in those negotiations had also required developing countries to adopt some agreements from the Tokyo Round. They were thus retroactively subject to rules that they had no hand in writing, and that therefore were not crafted in ways that addressed the special needs of developing countries. These burdens of one round upon another made implementation of their obligations difficult, and required some combination of technical assistance or revision of the requirements. While policy-makers in developing countries presented these as legitimate concerns that required urgent attention, their counterparts in some developed countries saw the demands on implementation as a disingenuous effort to prevent further liberalization in a new round, or even to undo what had been achieved in the last one. Some of them interpreted “implementation” to mean “revision”.

When ministers met at the Geneva Ministerial Conference in 1998, they agreed that implementation must be an important part of future work at the WTO, taking note of “the problems encountered in implementation and the consequent impact on the trade and development prospects of Members.” In Paragraph 8 of the Ministerial Declaration they committed to “pursue our evaluation of the implementation of individual agreements and the realization of their objectives” when they met the next year in Seattle, while also reaffirming – as developed members insisted – their “commitment to respect the existing schedules for reviews, negotiations and other work to which we have already agreed.”

Prior to the Seattle Ministerial Conference, a group of developing countries presented the General Council a list of some 150 elements for consideration on the implementation agenda. The eight pages of elements included issues to be decided before Seattle, as well as issues to be agreed within one year of the conference. The general mayhem at Seattle prevented further progress on this initiative, but in Geneva ambassadors revived the discussions on implementation. On 8 May 2000, the General Council created the Implementation Review Mechanism (IRM), including special sessions of the General Council meeting exclusively on this question. Following special sessions of the IRM in June, July and October, the General Council adopted a decision on implementation measures on 15 December 2000.<sup>24</sup> Its main features may be paraphrased as follows:

- Members were to ensure that their tariff-rate quota regimes are administered in a transparent, equitable and non-discriminatory manner;
- The Committee on Agriculture was to examine possible means of improving the effectiveness of the implementation of the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries;
- The relevant international standard-setting organizations were urged to ensure the participation of members at different levels of development and from all geographic regions, throughout all phases of standard development;
- The Customs Valuation Committee was encouraged to continue its examination and approval of requests from Members for extension of the five-year delay period of the Agreement on the Implementation of Article VII of GATT 1994;

- Members were to expedite the remaining work on the harmonization of non-preferential rules of origin;
- The Director-General was asked to take appropriate steps to include Honduras in Annex VII(b) to the Agreement on Subsidies and Countervailing Measures;
- The Committee on Subsidies and Countervailing Measures to examine all issues relating to Articles 27.5 and 27.6 of the SCM Agreement (i.e. those provisions relating to the phase-out of export subsidies by developing countries that have achieved competitiveness), including the possibility to establish export competitiveness on the basis of a period longer than two years;
- The SCM Committee was to examine the issues of aggregate and generalized rates of remission of import duties and of the definition of “inputs consumed in the production process”, taking into account the particular needs of developing-country members.

Many other implementation issues of concern to developing countries remained unsettled, so ministers agreed on a two-track approach. Those issues for which there was an agreed negotiating mandate in the declaration would be dealt with under the terms of that mandate, but those implementation issues where there was no mandate to negotiate would be taken up as “a matter of priority” by relevant WTO councils and committees. Ministers also directed that “all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational.” Additional special sessions of the General Council devoted to implementation took place on 27 April 2001 and 3 October 2001. The October session was set to reach agreement on a roster of issues laid out by General Council Chairman Stuart Harbinson. Informal heads of delegation meetings revealed that members could not agree on that roster, however, so the formal special session was suspended after only a few minutes. This signalled that the implementation debate had gone as far as the ambassadors could take it without “kicking it upstairs” for a ministerial decision. From that point forward the implementation agenda became a part of the Doha Round, as discussed in Chapter 12.

## TRIPS and public health

More than any other topic taken up in the Uruguay Round, the relationship between the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and public health, also known as the right to medicine, provoked buyer’s remorse on the part of many WTO members. At issue here is the question of enforcing patent rights for pharmaceuticals, especially those used to treat deadly diseases and to prolong life. The debate is sometimes portrayed as a struggle between the economic interests of pharmaceutical companies and the human rights of people stricken with life-threatening diseases, or “profits versus people”, and seen in that light the rules of the WTO – which are in turn derived from those of the World Intellectual Property Organization (WIPO) – became one of the rallying cries for anti-globalization advocates. The arguments can be reduced to a few harsh words that easily fit on a bumper sticker or a handheld banner, but a closer examination of the issues reveals a more nuanced debate that is rooted in different conceptions of how to promote the development and dissemination of medicines. That debate is conducted as much within countries as it is between them.

### *The political economy of pharmaceutical patents*

The essential problem is easily stated but not so simply resolved. For centuries, the competing needs to develop and disseminate new inventions have been balanced by a system that rewards inventors with a temporary monopoly, after which the innovation is in the public domain. In the pre-TRIPS era, for pharmaceuticals that usually meant a 15 to 20 year period during which the developer enjoyed a monopoly, but once that expired the drugs may be produced and sold generically. TRIPS made the term of patents 20 years from the date of patent application. Some argue that the strict enforcement of pharmaceutical patents will result in higher prices for drugs throughout the period of the legal monopoly, to the point where these drugs may be priced out of the reach of some individuals and national health services. Conversely, failure to enforce pharmaceutical patents may prevent the development of new drugs altogether. Patents “added the fuel of interest to the fire of genius,” as Abraham Lincoln is often quoted, and nowhere is that fuel more necessary than in pharmaceutical research. The development and testing of new drugs is a supremely expensive, time-consuming and risky undertaking, and it would likely come to a halt if pharmaceutical companies were denied the revenue stream from existing drugs as well as the promise of temporary monopoly rents for future drugs. Many economic studies show that the pharmaceutical sector is particularly dependent on patents for appropriating returns from research and development (see, for example, Cockburn, 2009).

The logic of patents can be harder to defend in the face of a public health crisis, especially when there are few efficacious drugs and these remain within the patent term. That can lead to calls for the breaking or easing of patents, among other proposed solutions (e.g. government subsidies or price controls). The domestic politics of this issue can undo the usual pattern by which consumers tend to be less involved than producers in debates over public policy. For reasons discussed in Chapter 1, small numbers of producers with intense interests usually find it easier to band together and lobby the government than do the large number of consumers with diffuse interests. When the stakes involve not just prices but lives, however, the communities that represent (for example) people living with HIV/AIDS are in an entirely different position than consumers who cannot be bothered to canvass against sugar import quotas.

The missing advocates in this instance were the potential consumers of future drugs, and here the dynamics were comparable to that of trade liberalization. Debates over trade policy sometimes pit well-organized groups that favour the status quo against less organized groups, or even groups that have yet to exist, that would favour change. When governments propose to remove trade barriers the objections that they hear from the industries that are currently protected by those barriers may be louder than the support they get from actual or potential export-oriented industries that may not yet be aware of the new opportunities they could enjoy in an enlarged market. Similarly, when patent protection is at issue, the communities of people who seek greater access now to existing drugs may be more visible and vocal than the people who may suffer in the future from diseases that they have not yet contracted, and could benefit from drugs that have not yet been developed. The public interest groups that get involved in the TRIPS and public health debates usually place greater emphasis on the need to disseminate existing drugs than on the need to develop new drugs. To the extent that they deal with the latter

issue, they are more likely to call for increased levels of government-funded research than to incentivize pharmaceutical companies through the strict enforcement of patents.

These differing interests are represented within the WTO by member states that fall into three principal groups. One consists of those industrialized countries with leading-edge pharmaceutical industries that rely on strict enforcement of patents to retain and profit from that edge. The United States is the most active member in this group, which also includes Japan, some EU member states and Switzerland. Where those countries tend to represent producer interests, developing countries in Africa and elsewhere represent consumer interests. Health care is very expensive in poor countries that have high rates of infection for diseases such as HIV/AIDS and tuberculosis, and the strict enforcement of pharmaceutical patents has heavy consequences for public health and government budgets. Yet a third group consists of those developing countries that have the technological capacity to produce generic versions of pharmaceuticals, especially Brazil, China and India. A relaxation of the rules affecting pharmaceutical patents would aid these countries in two ways, both by reducing their own health-care costs and by expanding the market for their pharmaceutical companies' exports. Their preferred solution is through compulsory licensing, a practice by which the owner of a patent is required by law to license the use of their rights to another producer or seller. A compulsory licence can be obtained without seeking the rights holder's consent, and the right holder is paid on terms that are set by law or determined through arbitration rather than by negotiation between a buyer and a willing seller.

The Dispute Settlement Body was the principal forum in which these competing interests played out in the early years of the WTO, where the United States brought complaints against both India and Pakistan in 1996. The case of *Pakistan – Patent Protection for Pharmaceutical and Agricultural Chemical Products* was settled “out of court” in a mutually agreed solution that the parties reached in 1997, but the case of *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* led to rulings against India by both the panel and the Appellate Body and, in 1999 the enactment of new legislation to bring Indian practice into conformity with these rulings.

The WTO Secretariat also studied the issue and held a workshop in cooperation with the World Health Organization in April 2001. The participants “clearly approached the issues from different points of view,” said Adrian Otten (see Biographical Appendix, p. 588), director of the WTO Intellectual Property Division, but there was also recognition that “differential pricing could play an important role in ensuring access to existing drugs at affordable prices ... while the patent system would be allowed to continue to play its role in providing incentives for research and development into new drugs.”<sup>25</sup>

### ***The Declaration on the TRIPS Agreement and Public Health***

The issue moved thereafter from dispute settlement to negotiations, with developing countries seeking adjustments to the terms of the TRIPS Agreement as it affects pharmaceutical patents. Their principal objective, which would serve the interests both of

those developing countries that have the capacity to produce pharmaceuticals as well as those with public health crises, was to modify the TRIPS rules to allow more compulsory licensing. The United States and other industrialized countries with major pharmaceutical industries opposed these efforts, and had attempted in the months preceding the ministerial to break up the developing country coalition that proposed these changes. Odell and Sell (2006a: 103) noted that this coalition “faced, and effectively resisted, efforts to divide and conquer” in which the United States tried to tempt some of the coalition’s members with side payments:

In the fall USTR Zoellick made two lesser offers to subgroups presumably in the hope of splitting the coalition and burying their proposal. He offered to extend TRIPS transition periods for pharmaceutical products until 2016 for least developed countries. This would have practical and legal benefits for those countries but would do nothing to increase supplies of medicines where they were lacking. And it would not apply to Brazil, India, or eighteen African countries including the largest and most active in the WTO. Second, Zoellick offered to observe a moratorium on TRIPS dispute actions against all sub-Saharan African countries for measures they took to address AIDS.

While this offer may have held some attraction for African countries, it did not achieve the intended result, as none of these countries’ ambassadors in Geneva broke ranks with the coalition.

By the time the Doha Ministerial Conference met in November 2001, the memberships and positions of the contending sides had hardened, with two different options being proposed for the ministerial declaration. The language preferred by the developing countries was known as Option 1. It would ease the obligations under the TRIPS Agreement in the following terms:

Nothing in the TRIPS agreement shall prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we reaffirm that the agreement shall be interpreted and implemented in a manner supportive of WTO members’ right to protect public health and, in particular, to secure access to medicines for all.

These terms stressed the exceptions rather than the disciplines of the TRIPS Agreement, but the pharmaceutical industries of the developed countries preferred the reverse emphasis. They supported Option 2, which read:

We affirm a member's ability to use, to the full, the provisions in the TRIPS Agreement which provide flexibility to address public health crises such as HIV/AIDS and other pandemics, and to that end, that a member is able to take measures necessary to address these public health crises, in particular to secure affordable access to medicines. Further, we agree that this declaration does not add or diminish the rights and obligations of members provided in the TRIPS agreement.

At Doha, the facilitator for TRIPS consultations was the Mexican Trade Minister Luis Ernesto Derbez. The way that Mexico's WTO ambassador, Eduardo Pérez Motta, and, through him, Mr Derbez came to have leading roles in this issue illustrates how mid-sized countries often come to have important parts in WTO deliberations. This was not a responsibility that Mexican officials had actively sought, their country not falling squarely into any one of the three camps, but that is precisely why Mexico was seen as an "honest broker" on the subject that could help to bridge the gaps between the contending countries. Secretariat officials approached Mr Pérez Motta shortly before the Doha Ministerial Conference was to start, asking him to see whether the minister would be willing to take on the task. An apparently last-minute request of that sort might seem to the uninitiated like bad planning, but there is an underlying reason for this approach: because this request was made only a few days before the ministerial, there was no time left for the minister to be "captured" by the proponents of any position.

The key to these negotiations, as well as the subsequent development of the agreement that ministers mandated at Doha, was that the United States was committed to launching a new round. Taken by itself, the TRIPS and public health issue was a loser for Washington: almost any conceivable change in the existing terms of the TRIPS Agreement would prejudice the interests of the US pharmaceutical industry. The strategy that Mr Zoellick pursued in Doha, however, was based on giving every other member of the WTO a stake in the round, and – as discussed in Chapter 11 – he succeeded with everyone other than India. Doing so required that he make a series of strategic retreats, and this was one of them. By moving in the direction of Option 1 at Doha, and later by easing US opposition to the terms of the agreement that this mandate produced, he helped to achieve the larger goal of launching the round and keeping it alive.

The breakthrough in the Declaration on TRIPs and Public Health came when delegates agreed on a new paragraph 4 reflecting developing countries' interests. Brokered by Brazil and the United States, the text is reproduced in Box 10.1. The language that they drafted for this paragraph was an amalgamation of options 1 and 2, but borrowed more from the former than from the latter.

The approval of this declaration was only an interim solution, as it provided in paragraph 6 for the negotiation of an expeditious solution to the problems arising from countries' "difficulties in making effective use of compulsory licensing." The membership once again turned to Mexican diplomats to help find the solution. Mr Pérez Motta did not know at the time of the ministerial that he would be made the chairman of the TRIPS Council the next year, with a mandate to conclude the negotiations on this issue within one year. He devoted most of his time to this problem in 2002, engaged in a bottom-up process that involved ambassadors more than ministers. It also required him to fend off efforts that Washington made to influence the negotiations by way of Mexico City. That aspect of the process is described in Chapter 14, where we take up the role of chairmen in WTO negotiations.

**Box 10.1. Declaration on the TRIPS Agreement and Public Health**

*Excerpt from WTO document WT/MIN(01)/DEC/2, 20 November 2001.*

4. We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all.

In this connection, we reaffirm the right of WTO members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.

5. Accordingly and in the light of paragraph 4 above, while maintaining our commitments in the TRIPS Agreement, we recognize that these flexibilities include:

- a. In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.
- b. Each member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted.
- c. Each member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.
- d. The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4.

6. We recognize that WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002.

The negotiations Mr Pérez Motta led ultimately produced the Decision on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, as adopted by the General Council on 30 August 2003. This agreement clarified the rules affecting the compulsory licensing for the export of pharmaceuticals. Paragraph 2 of the decision (WTO document WT/L/540) provided that when terms set out in the decision are met:

The obligations of an exporting Member under Article 31(f) of the TRIPS Agreement shall be waived with respect to the grant by it of a compulsory licence to the extent necessary for the purposes of production of a pharmaceutical product(s) and its export to an eligible importing Member(s).

Those terms required (among other things) that the eligible importing member notify the TRIPS Council providing the information required to establish eligibility for this waiver, and the exporting member notify the conditions set for the compulsory licences. The decision also provided for a waiver to importing countries on the TRIPS requirement to pay adequate remuneration for compulsory licences, and added a requirement that eligible importing members to “take reasonable measures within their means ... to prevent re-exportation of the products that have actually been imported into their territories under the system,” and largely reiterated TRIPS language on the promotion of transfer of technology and capacity-building.

The waiver for this agreement is not intended to provide a permanent solution, which is instead intended to come via amendment to the TRIPS Agreement. On 6 December 2005, WTO members approved changes that would make these changes permanent, but the amendment will not be formally built into the TRIPS Agreement until two thirds of the members have accepted the change. Even then the amendment will take effect only for those members that accept it; the waiver will continue to apply for each of the remaining members until they accept the amendment and it takes effect. Members originally set themselves the deadline of 1 December 2007 to reach the two-thirds level; that deadline was later extended to 31 December 2009 and then to 31 December 2013. As of early 2013, just 72 members had adopted the amendment,<sup>26</sup> constituting less than half of the total membership.

These results appear to have brought peace to the issue. It is notable that, despite the high-profile character of TRIPS and public health, there were no further dispute settlement cases filed in the WTO involving pharmaceutical patents after 2001. The terms of the deals reached at and after Doha received a somewhat mixed reception from public health advocates. NGOs such as Médecins Sans Frontières (MSF) were satisfied with the balance struck in this agreement; a 2003 MSF study argues that “[e]ach country must be able to design and operate its patent system in its own best national interest, using the flexibilities of the TRIPS Agreement” (Boulet et al., 2003: 24). The principal concerns they expressed were not with the status quo in WTO law, but instead with further modifications that were then under consideration in WIPO. Noting that “in many countries, patents hamper the public’s access to life-saving medicines,” such that “profits are being put before public health,” the study observes that “[t]his trend may be worsened by WIPO’s ongoing negotiations aiming at developing a ‘Substantive Patent Law Treaty’, a global treaty that is very likely to be based on patent standards used in wealthy countries” (*Ibid.*). That treaty remained under negotiation for another two years in WIPO, but negotiations were eventually suspended in 2006 when it was clear that countries’ differences would not be overcome.<sup>27</sup> Other voices in the public health community took a more cautious approach to interpreting the results of the WTO negotiations. “[T]he Doha Declaration and Paragraph 6 decision have not resolved the problem of access to affordable medicines,” according to Kerry and Lee (2003), who called for “a simplification of their content, to enable actual implementation” and urge that “public health protections under TRIPS must be recognised as taking precedent over measures subsequently adopted under other trade agreements.”

## Revision of the Government Procurement Agreement

The issue of government procurement has a much longer tenure than most of the others reviewed here, having been gradually yet incompletely integrated into the GATT system over the half-century that preceded the creation of the WTO. The one constant has been the plurilateral character of the agreement, making it more of a holdover from the pre-Uruguay Round GATT practices than part of the single undertaking of the WTO period. The European Union had hoped to change that in the Doha Round, pressing this as one of the Singapore issues that would become part of the single undertaking in that round, but (as discussed in Chapter 12) that effort failed. Although it has undergone numerous changes, including refinements in its rules and expansions in its membership, the Government Procurement Agreement (GPA) remains an instrument whose burdens and benefits are restricted to those members.

Government procurement might appear on its surface to be simply about opportunities to make sales, but it has a much greater significance. When governments make commitments on their procurement procedures they are also dealing with issues of governance, preferences for domestic suppliers in general and disadvantaged communities in particular, and even corruption. In that sense, the decades-long efforts to bring procurement rules within the disciplines of the multilateral trading system might be seen as one of the earliest debates over the relationship between trade, transparency, governance and social issues.

Like many other issues that eventually reached fruition in the Uruguay Round, government procurement had been on the table as far back as the US proposals to the Havana Conference in 1946.<sup>28</sup> The proposed Article 8 (MFN treatment) and Article 9 (national treatment) in the US draft for the ITO charter covered, respectively, “the awarding by Members of governmental contracts for public works” and “laws and regulations governing the procurement by governmental agencies of supplies for public use other than by or for the military establishment.” This is among the areas where the final draft of the Havana Charter was less ambitious than the opening US position, with representatives of other governments (particularly the United Kingdom) having raised objections. Government procurement was not explicitly covered in the provisions of the draft establishing MFN treatment (Article 16) or national treatment. To the contrary, the national treatment provision (Article 18) explicitly stated that its disciplines did “not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes.” The closest that the Havana Charter came to bringing government procurement into the disciplines of the proposed trade regime was a passage in the provisions on state trading (Article 29) that rather vaguely required “fair and equitable treatment” for “imports of products purchased for governmental purposes.” This ITO Charter, as discussed in Chapter 2, survived the international negotiations but not the domestic politics of the United States.

The very limited provisions on government procurement in GATT 1947 followed the pattern set in the Havana Charter. Article III (national treatment) explicitly states in paragraph 8(a) that:

The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

Similarly, the provisions on state-trading enterprises in Article XVII.2 stated that the disciplines of this article “shall not apply to imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods for sale.” The closest that GATT 1947 came to liberalizing government procurement practices was a repetition in Article XVII.2 of the Havana Charter formula, providing once more that “each contracting party shall accord to the trade of the other contracting parties fair and equitable treatment” with respect to imports of goods for governmental use.

While Washington had earlier been the *demandeur* and London the original sceptic, by 1962 the tables had turned. After the United States increased the level of national preference in defence procurement from 6 per cent to 50 per cent, it was the United Kingdom (together with Belgium) that raised objections, bringing its complaint to what was still the post-war Organisation on European Economic Co-operation (OEEC). The next year, after the OEEC had been transformed into the Organisation for Economic Co-operation and Development (OECD), the reborn institution began to undertake analytical work in this field. Its original aim was to reconcile the differing practices of the United States and what was then still the European Economic Community, at a time when the latter bloc was beginning to open up government procurement practices among its member states. The OECD’s analysis was slowed by the many differences not just in the practice but the very terminology of procurement. Progress had nonetheless gone far enough by the late 1960s for the United States once again to propose a formal agreement on government procurement. Negotiations proceeded in the OECD through the mid-1970s, leading to a draft OECD instrument, but the talks bogged down over the details. The inability of the OECD countries to resolve their differences, coupled with the expressed interests of some developing countries that saw prospects for increased exports, led to the transfer of these talks from the OECD to the Tokyo Round in mid-1976. To a considerable degree, the GPA produced in those GATT negotiations was based on the incomplete OECD Draft Instrument on Government Purchasing Policies, Procedures and Practices. In the end, it was largely an OECD agreement, in practice if not in form, as most OECD members signed on to it but few other GATT contracting parties followed.

The GPA has been in a frequent state of evolution since the Tokyo Round. The evolution has sometimes taken place during rounds but not within them. The GATT contracting parties amended the GPA in 1986, expanding its coverage to include not just outright purchase but all forms of procurement (e.g. leasing and rental), lowering the threshold value, strengthening the rules of non-discrimination and enhancing the disciplines on tendering procedures. Negotiations over more serious reforms were initiated that same year, although technically they were not a part of the concurrent Uruguay Round. That is a distinction of more than procedural importance, because if the new GPA negotiations were organically a

part of the round that would have brought the results within the scope of the single undertaking and thus ended the status of the GPA as a plurilateral agreement. These talks nonetheless proceeded apace with the rest of the round, and ultimately led to a new Agreement on Government Procurement that was signed at the Marrakesh Ministerial Conference in 1994 by the parties to the original agreement plus the Republic of Korea.<sup>29</sup> This new instrument is often mistaken for the earlier agreement, not least because it remains a plurilateral agreement, it began with largely the same group of signatories (see Table 10.3), and is commonly referred to by the same initials (GPA).

The new GPA entered into force at the start of 1996. It went beyond central government purchasing of goods to cover procurement of services (including public works and public utilities) and procurement by sub-central levels of government. The exact coverage for each member is determined by the national schedules of purchasing entities and of services that are attached to the Agreement. The GPA applies to contracts above certain thresholds, with central government purchases of goods and services being covered above 130,000 Special Drawing Rights (SDRs), around US\$ 176,000 as of 1996. Thresholds are higher for sub-central government entities, (generally around 200,000 SDRs), utilities (around 400,000 SDRs) and construction contracts (generally 5 million SDRs).

**Table 10.3. Parties to the Agreement on Government Procurement**

	<b>Original parties under the Tokyo Round GPA</b>	<b>New party upon the Uruguay Round GPA's entry into force</b>	<b>Members acceding to the GPA during 1997-2012</b>	<b>Members in the process of accession as of 2013</b>
<b>Developed</b>	Austria* Canada European Communities and its member states Finland* Japan Norway Sweden* Switzerland United States	–	Bulgaria (2007)* Cyprus (2004)* Czech Rep. (2004)* Estonia (2004)* Hungary (2004)* Iceland (2001) Latvia (2004)* Lithuania (2004)* Malta (2004)* Poland (2004)* Romania (2007)* Slovak Rep. (2004)* Slovenia (2004)*	New Zealand
<b>Developing</b>	Israel	Korea, Rep. of	Armenia (2011) Hong Kong, China (2007) Singapore (1997) Chinese Taipei (2001)	Albania China Georgia Jordan Kyrgyz Rep. Moldova, Rep. of Oman Panama Ukraine

Source: WTO Secretariat, [www.wto.org/english/tratop\\_e/gproc\\_e/memobs\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm).

Notes: \*Country that later joined the European Union. All countries that were parties to the Tokyo Round GPA were also parties to the Uruguay Round GPA upon that agreement's entry into force.

Just as the GPA was revised concurrently with the Uruguay Round, the signatories to this plurilateral agreement also revised it in negotiations that ran parallel to the Doha Round. The United States had long pressed for reforms to the GPA, with the European Union and Japan resisting this initiative. Confidence in the integrity of government procurement decisions would be enhanced, according to the United States, if all WTO members agreed to basic standards of transparency and due process. The first steps in this direction came at the Singapore Ministerial Conference in 1996. Some developing countries expressed cautious support for this idea at the Ministerial Conference, with India promoting the limited aim of a procedural agreement providing for transparency and Suriname favouring a working group to study and develop guidelines for multilateral tendering rules. The Philippines called for an examination of whether there are net benefits to members who do not adhere to the GPA. Others that either opposed negotiations in this area or advocated exemptions included Indonesia, Papua New Guinea, Saint Kitts and Nevis, and the Southern African Development Community. The ministers compromised by establishing a working group on “government procurement practices, taking into account national policies.” That qualifying language in the Singapore Ministerial Declaration regarding national policies met the Japanese concerns.

The inclusion of this topic among the Singapore issues meant not only the prospect for further reforms to the GPA but, more significantly, the extension of its disciplines to all WTO members by way of the single undertaking. That was not to be. As discussed in Chapter 12, this was one of the Singapore issues that were taken off the table in the aftermath of the Cancún Ministerial Conference.

In paragraph 26 of the Doha Declaration, the ministers provisionally agreed to negotiations that would “build on the progress made in the Working Group on Transparency in Government Procurement.” The negotiations would be “be limited to the transparency aspects and therefore will not restrict the scope for countries to give preferences to domestic supplies and suppliers,” and would also be complemented by “adequate technical assistance and support for capacity building both during the negotiations and after their conclusion.” In a proviso that tracked the language on the other Singapore issues, however, the declaration specified that the negotiations were to take place after the next (i.e. Cancún) ministerial conference “on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations.” The issue did not survive the debacle at Cancún, out of which only one of the Singapore issues – trade facilitation – would survive intact.

Director-General Supachai Panitchpakdi had hoped to bring government procurement into the Cancún package. He faced strong opposition from Malaysia, which has long used preferences in procurement to improve the economic standing of native Malays (McCrudden and Gross, 2006), and despite numerous attempts to win over Kuala Lumpur he was unable to convince them to lift their opposition. Mr Supachai believed in retrospect that the package could have been successful if government procurement could have been kept on the table, because if that were in the negotiations (together with trade facilitation), it would provide a good basis for launching a new round.<sup>30</sup>

While the issue was thus off the table in Doha it could still be addressed in talks that ran concurrently with, but quite apart from, the round. One way was through attracting new signatories. As can be seen in Table 10.3, four new members acceded to the agreement from 1997 to 2012, and another nine (including China) were in the process of accession. GPA signatories also fell back on the built-in agenda, with GPA Article V.14 having provided for a review of the agreement's operation. The review, which started in 1997, aimed for expansion of the agreement's coverage and the elimination of discriminatory measures and practices. Following negotiations that were conducted on and off after 1997, the Committee on Government Procurement adopted a revised GPA in March 2012. This was an essentially technical step following the final "legal scrub," as required by a decision at the Geneva Ministerial Conference in December 2011. The revised text incorporated new flexibilities for parties regarding procedural commitments, while also strengthening the role of the GPA as a tool of governance in the government procurement sector, and aims to ease the accession of developing countries.

The terms of the GPA have not been clarified by any significant dispute settlement cases. There had been just four such cases involving the GPA through 2012 (two of which involved the same issue), making this one of the least contentious of agreements within the WTO. All of these cases were brought from 1997 to 1999. In chronological order, they included an EC complaint regarding a Japanese procurement tender for the purchase a multi-functional satellite, joint EC and Japanese complaints against the United States regarding a Massachusetts state sanctions law aimed at Myanmar<sup>31</sup> and a US complaint concerning the procurement practices of the Korean Airport Construction Authority. The first case was settled out of court, the second was rendered moot when a Federal court in the United States struck down the state law on constitutional grounds, and the United States failed to prove its case against the Republic of Korea.

## Endnotes

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- 1 Note that while GATS Article XIX did refer to "rounds" it is clear from the context that these were meant to be rounds dealing specifically with services and not necessarily other topics (although neither was that possibility excluded).
- 2 This has been a point of perennial dispute in US law, with some members of Congress contending that any commitments made by the executive to other countries – whether or not existing law is in compliance with those commitments – are legitimate only if approved by Congress.
- 3 As enumerated in the Statement of Administrative Action that accompanied the law, these sectors are agricultural equipment, construction equipment, distilled spirits, electronics, furniture, medical equipment, non-ferrous metals, oilseeds and oilseed products, paper and paper products, pharmaceuticals, scientific equipment, steel, toys and wood products. The law further provides that the president must obtain advice from private-sector advisory committees and the US International Trade Commission before entering into agreements, and must report on the results to the congressional trade committees. Those committees have 60 days in which to raise any objections, but if they do not object during the lay-over period the agreements can go into effect without further action.
- 4 The members participating in the ISA negotiations, collectively known as the "Real Good Friends of Services", are: Australia; Canada; Chile; Colombia; Costa Rica; the European Union; Hong Kong, China; Iceland; Israel; Japan; the Republic of Korea; Mexico; New Zealand; Norway; Pakistan; Panama; Peru; Switzerland; Chinese Taipei; Turkey; and the United States.
- 5 It should be noted that some negotiators and Secretariat officials involved in these talks take the position that they did not fail to conclude these aspects of the talks, but instead that they were not given sufficient time to do so.
- 6 Author's interview with Mr Harbinson on 24 January 2013.
- 7 These events are discussed in Key (2005).
- 8 The 29 include Brazil, but that member never ratified the commitments that it had signed.
- 9 The EU15 is counted as one member.
- 10 Submitted by Australia, Canada, Honduras, Hungary, India, Mauritius, Nicaragua, Pakistan, Peru, the Philippines, Senegal, Switzerland, Thailand, Turkey, the United States and the Bolivarian Republic of Venezuela.
- 11 The United States submitted a limited MFN exemption in insurance, applicable in cases of forced divestiture of US ownership in insurance service providers operating in WTO member countries.
- 12 See *Maritime Transport Services: Background Note by the Secretariat*, WTO document S/C/W/315, 7 June 2010, p. 39.
- 13 See *Maritime Transport Services: Background Note by the Secretariat*, WTO document S/C/W/62, 16 November 1998, p. 8.
- 14 One provision in that paragraph states: "A Member that considers that this exemption operates in such a manner as to justify a reciprocal and proportionate limitation on the use, sale, lease or repair of vessels constructed in the territory of the Member invoking the exemption shall be free to introduce such a limitation subject to prior notification to the Ministerial Conference."

- 15 The sponsors were: Australia; Canada; Chile; China; Croatia; Cyprus; the Czech Republic; the Dominican Republic; Estonia; the European Communities and their member states; The Gambia; Georgia; Guatemala; Hong Kong, China; Iceland; India; Japan; the Republic of Korea; the Kyrgyz Republic; Latvia; Lithuania; Malaysia; Malta; Mexico; New Zealand; Nigeria; Norway; Pakistan; Panama; Papua New Guinea; Peru; Poland; Romania; Singapore; Slovenia; Switzerland; and Chinese Taipei.
- 16 This plurilateral request is not published in any WTO document but is available online at <http://commerce.nic.in/trade/Plurilateral%20Requests%20on%20Maritime%20Transport%20Services%20and%20Model%20Schedule.pdf>.
- 17 It could alternatively be argued that the terms of China's accession to the WTO were as or even more significant than the ITA, but China's accession might also be considered to have been completed in the (very early) period of the Doha Round.
- 18 Data posted at [www.wto.org/english/res\\_e/statis\\_e/its2012\\_e/section2\\_e/ii01.xls](http://www.wto.org/english/res_e/statis_e/its2012_e/section2_e/ii01.xls).
- 19 Data from US International Trade Commission (2010).
- 20 See *Declaration on Global Electronic Commerce*, WTO document WT/MIN(98)/DEC/2, 20 May 1998.
- 21 See *Work Programme on Electronic Commerce*, WTO document WT/L/843, 19 December 2011.
- 22 See *Concept Paper for the Expansion of the ITA: Communication from Canada, Japan, Korea, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Singapore and the United States*, WTO document G/IT/W/36, 2 May 2012, p. 2.
- 23 The members submitting lists included Australia; the Kingdom of Bahrain; Canada; China; Costa Rica; Croatia; the European Union; Hong Kong, China; Israel; Japan; the Republic of Korea; Malaysia; Mauritius; Montenegro; New Zealand; Norway; the Philippines; Singapore; Switzerland; Chinese Taipei; Thailand; and the United States.
- 24 See *General Council: Implementation-Related Issues and Concerns*, WTO document WT/L/384, 19 December 2000.
- 25 Quoted at [www.wto.org/english/news\\_e/pres01\\_e/pr220\\_e.htm](http://www.wto.org/english/news_e/pres01_e/pr220_e.htm).
- 26 The members agreeing to the amendment included Albania; Argentina; Australia; the Kingdom of Bahrain; Bangladesh; Brazil; Cambodia; Canada; China; Colombia; Costa Rica; Croatia; Egypt; El Salvador; the European Union and its member states; Honduras; Hong Kong, China; India; Indonesia; Israel; Japan; Jordan; Macao, China; the former Yugoslav Republic of Macedonia; Mauritius; Mexico; Mongolia; Morocco; New Zealand; Nicaragua; Norway; Pakistan; Panama; the Philippines; the Republic of Korea; Rwanda; the Kingdom of Saudi Arabia; Senegal; Singapore; Switzerland; Chinese Taipei; Togo; Uganda; the United States; and Zambia.
- 27 See WIPO at [www.wipo.int/patent-law/en/harmonization.htm](http://www.wipo.int/patent-law/en/harmonization.htm).
- 28 For a more detailed examination of the negotiations on government procurement from 1946 through the Uruguay Round see Blank and Marceau (2006). The discussion in this section owes much to that analysis. See also Brown-Shafii (2011).
- 29 Hong Kong, China was the only other new economy that was expected to sign the new GPA in Marrakesh, but opted not to do so "in protest of the introduction of sectoral non-application provision[s] and reciprocity provisions in services by a number of participants" (Blank and Marceau, 2006: 45). It later acceded in 1997.
- 30 Author's interview with Mr Supachai on 27 September 2012.

- 31 The principal issue in this case was not government procurement *per se* but the larger question of whether the sanctions that one country imposes on trade and investment with another for political reasons can be applied in an extraterritorial fashion on the firms of another country.

## Appendix 10.1. Elements of the built-in agenda

Year	Instrument	Objective	Results
1995	Decision on Financial Services	By mid-year, members were to improve, modify or withdraw all or part of their commitments in financial services, and finalize their positions relating to MFN exemptions in this sector	Financial services protocols were concluded in July 1995, and again in November 1997
	Decision on Negotiations on Movement of Natural Persons	By mid-year, members were to conclude negotiations "on further liberalization of movement of natural persons for the purpose of supplying services"	Negotiations concluded on 28 July 1995, with several members improving their commitments
1996	Decision on Negotiations on Basic Telecommunications	The final report of the Negotiating Group on Basic Telecommunications was due on 30 April 1996	Telecom Reference Paper was concluded April 1996; Basic Telecom Services Agreement was concluded April 1997
	Decision on Negotiations on Maritime Transport Services	Talks on "international shipping, auxiliary services and access to and use of port facilities, leading to the elimination of restrictions" were to end in June	Negotiations were suspended to 2000, later made part of the Doha Round
	Decision on Trade in Services and the Environment	Committee on Trade and Environment to report to the ministerial conference "on the relationship between services trade and the environment ... [and] the relevance of inter-governmental agreements on the environment and their relationship to" GATS	The committee adopted its report on 8 November 1996 and forwarded it to the Singapore Ministerial Conference
1997	GATS Article XIII	Negotiations on government procurement of services were to begin no later the start of the year	Made a part of the Doha Round
	Decision on Notification Procedures Article III	A working group was to undertake a review of notification obligations and procedures and make recommendations to the Council for Trade in Goods within two years	The working group issued its report in October 1996
	Technical Barriers to Trade Agreement Article 15.4	Review of the operation and implementation of the agreement was to begin by the end of the year	The review was completed in November 1997
	Government Procurement Agreement Article XXIV.7(b)	By the end of the year negotiations were to begin to improve the agreement and achieve "the greatest possible extension of its coverage among all Parties on the basis of mutual reciprocity"	The Government Procurement Agreement was revised in 2012
	Preshipment Inspection Agreement Article 6	The Ministerial Conference was to review the provisions, implementation and operation of the agreement by the end of 1997	On 1 December 1997, a working party adopted recommendations to enhance implementation of the agreement
1998	GATS Article X	The results of negotiations on "emergency safeguard measures based on the principle of non-discrimination" were to enter into effect not later the start of the year	Made a part of the Doha Round
	Government Procurement Agreement Article V.14	A "major review" of the agreement was to begin by the start of the year, including examination of whether exclusions should be modified or extended	Negotiations were initiated; later made a tentative part of the Doha Round

Year	Instrument	Objective	Results
	Sanitary and Phytosanitary Agreement Article 12.7	Review of the operation and implementation of the agreement was to begin by the start of the year	The report on the review was adopted in March 1999
	Agreement on the Implementation of Article VI of GATT 1994, Article 17.6	Review of the provision on dispute settlement in the Anti-dumping Agreement was to begin by the start of the year "with a view to considering the question of whether it is capable of general application"	There appears to have been no follow-through on this item
	Rules of Origin Agreement Article 9.2(a)	A work programme on harmonization of rules of origin was to be "initiated as soon after the entry into force of the WTO Agreement as possible and will be completed within three years of initiation"	Work on harmonization of non-preferential rules of origin could not be completed by the deadline due to the complexity of issues
	Decision on the Application and Review of the Dispute Settlement Mechanism	By the end of the year, a review of the DSU was to be conducted, and ministers were to "take a decision ... after the completion of the review, whether to continue, modify or terminate such dispute settlement rules and procedures"	Review's mandate expired without consensus; later made a part of the Doha Round and the Jara Process
<b>1999</b>	TRIPS Article 27.3(b)	Members were to review "the protection of plant varieties, either by patents or by an effective <i>sui generis</i> system or by any combination thereof"	Doha Declaration Paragraph 19 expanded the review to include the UN Convention on Biological Diversity and the protection of traditional knowledge and folklore
	TRIMs Agreement Article 9	Review of the operation of the agreement and consideration of whether it should be complemented with provisions on investment policy and competition policy was to begin by the end of the year	The Singapore Ministerial Conference established a working group on trade and investment "having regard to the ... built-in agenda"
<b>2000</b>	Agreement on Agriculture Article 20	New negotiations were to begin at the start of year in pursuit of the "long-term objective of substantial progressive reductions in support and protection resulting in fundamental reform"	Made a part of the Doha Round
	GATS Article XIX	New negotiations were to begin by the start of the year "with a view to achieving a progressively higher level of liberalization"	Made a part of the Doha Round
	Trade Policy Review Mechanism Article F	An appraisal of the operation of the mechanism was to begin by the start of the year	The appraisal took place; no change was made
	Understanding on the Interpretation of Article XXVIII of GATT 1994	Tariff bindings: a review was to begin on the definition of "principal supplier" having negotiating rights under GATT Article XXVIII	The Council for Trade in Goods did not find grounds for changing the standards
	TRIPS Article 71	The first of two-yearly reviews of the implementation of the agreement was to begin at the start of the year	There appears to have been no follow-through on this item
	GATT 1994 Article 3	Ministerial conference to review the US exemption for its cabotage (coastwise shipping) laws	The issue is raised in each biennial Trade Policy Review of the United States

<b>Year</b>	<b>Instrument</b>	<b>Objective</b>	<b>Results</b>
<b>No date</b>	GATS Article VI.4	Services Council to develop any necessary disciplines relating to qualification requirements and procedures, technical standards, and licensing requirements	Made a part of the Doha Round
	GATS Article XV	Members to develop necessary multilateral disciplines to avoid the trade-distortive effects of service subsidies and also address the appropriateness of countervailing procedures	Made a part of the Doha Round
	TRIPS Articles 23 and 24	Negotiations on geographical indications for wines were to establish a multilateral system of notification and registration	Made a part of the Doha Round

## Appendix 10.2. Members making commitments in sectors subject to post-Uruguay Round GATS negotiations

	Insurance and insurance-related services	Banking and other financial services	Telecommunication services	Maritime transport services
Albania	◆	◆	◆◆	◆
Angola		◆		
Antigua and Barbuda	◆		◆◆	◆
Argentina	◆	◆	◆◆	
Armenia	◆	◆	◆◆	
Australia	◆	◆	◆◆	◆
Austria	◆	◆	◆	
Bahrain, Kingdom of	◆	◆	◆	
Barbados	◆		◆◆	
Belize			◆◆	
Benin		◆		◆
Bolivia, Plurinational State of	◆	◆	◆	
Brazil	◆	◆		
Brunei Darussalam	◆	◆	◆◆	
Bulgaria	◆	◆	◆◆	
Cambodia	◆	◆	◆◆	◆
Canada	◆	◆	◆◆	◆
Cape Verde	◆	◆	◆◆	◆
Chile	◆	◆	◆◆	
China	◆	◆	◆◆	
Colombia	◆	◆	◆◆	◆
Costa Rica		◆	◆	
Côte d'Ivoire	◆	◆	◆◆	
Croatia	◆	◆	◆◆	◆
Cuba	◆	◆	◆	◆
Cyprus	◆	◆	◆◆	
Czech Republic	◆	◆	◆◆	
Djibouti			◆	
Dominica	◆		◆◆	
Dominican Republic	◆	◆	◆◆	
Ecuador	◆	◆	◆	
Egypt	◆	◆	◆◆	◆
El Salvador		◆	◆◆	
Estonia	◆	◆	◆◆	◆
European Union*	◆	◆	◆◆	◆
Finland	◆	◆	◆	◆
Gabon	◆	◆		
The Gambia	◆	◆	◆	◆
Georgia	◆	◆	◆◆	◆
Ghana	◆	◆	◆◆	◆

	Insurance and insurance-related services	Banking and other financial services	Telecommunication services	Maritime transport services
Grenada	◆		◆◆	
Guatemala	◆	◆	◆	
Guyana	◆	◆	◆	
Haiti	◆	◆		
Honduras	◆	◆	◆*	
Hong Kong, China	◆	◆	◆◆	◆
Hungary	◆	◆	◆◆	◆
Iceland	◆	◆	◆◆	◆
India	◆	◆	◆	
Indonesia	◆	◆	◆◆	◆
Israel	◆	◆	◆◆	
Jamaica	◆		◆◆	◆
Japan	◆	◆	◆◆	◆
Jordan	◆	◆	◆◆	◆
Kenya	◆	◆	◆◆	
Korea, Republic of	◆	◆	◆◆	◆
Kuwait, the State of		◆		
Kyrgyz Republic	◆	◆	◆◆	◆
Latvia	◆	◆	◆◆	◆
Lesotho	◆	◆	◆	
Liechtenstein	◆	◆	◆	
Lithuania	◆	◆	◆◆	◆
Macao, China	◆	◆		
Malawi		◆		
Malaysia	◆	◆	◆	◆
Malta	◆	◆	◆◆	◆
Mauritius	◆	◆	◆	
Mexico	◆	◆	◆◆	
Moldova, Republic of	◆	◆	◆◆	◆
Mongolia	◆	◆	◆	
Montenegro			◆*	
Morocco	◆	◆	◆◆	
Mozambique		◆		
Myanmar				◆
Nepal	◆	◆	◆◆	
New Zealand	◆	◆	◆◆	◆
Nicaragua	◆	◆	◆	
Nigeria	◆	◆	◆	◆
Norway	◆	◆	◆◆	◆
Oman	◆	◆	◆◆	◆
Pakistan	◆	◆	◆◆	
Panama	◆	◆	◆	
Papua New Guinea		◆	◆◆	◆
Paraguay	◆	◆		
Peru	◆	◆	◆◆	◆

	Insurance and insurance-related services	Banking and other financial services	Telecommunication services	Maritime transport services
Philippines	◆	◆	◆	◆
Poland	◆	◆	◆◆	
Qatar	◆	◆		
Romania	◆	◆	◆◆	
Saint Kitts and Nevis			◆	◆
Saint Lucia	◆			◆
Saint Vincent and the Grenadines	◆			◆
Saudi Arabia, Kingdom of	◆	◆	◆◆	◆
Senegal	◆	◆	◆◆	◆
Sierra Leone	◆	◆		◆
Singapore	◆	◆	◆◆	◆
Slovak Republic	◆	◆	◆◆	
Slovenia	◆	◆	◆◆	◆
Solomon Islands	◆	◆		
South Africa	◆	◆	◆◆	
Sri Lanka	◆	◆	◆◆	
Suriname			◆◆	
Sweden	◆	◆	◆	
Switzerland	◆	◆	◆◆	
Chinese Taipei	◆	◆	◆◆	
Thailand	◆	◆	◆	◆
The former Yugoslav Republic of Macedonia	◆	◆	◆	
Tonga	◆	◆	◆◆	◆
Trinidad and Tobago	◆		◆◆	◆
Tunisia	◆	◆	◆	
Turkey	◆	◆	◆	◆
Uganda			◆◆	
Ukraine	◆	◆	◆◆	◆
United Arab Emirates		◆		
Uruguay	◆	◆		
United States	◆	◆	◆◆	
Vanuatu			◆*	
Venezuela, Bolivarian Republic of	◆	◆	◆	◆
Viet Nam	◆	◆	◆◆	◆
Zimbabwe		◆	◆	

Sources: Compiled from data on the WTO Services Database (<http://tsdb.wto.org/Default.aspx>) and from information supplied by the WTO Services Division.

Notes: Data not available for the Lao People's Democratic Republic, the Russian Federation and Samoa. \*Some EU members made commitments of their own, but these generally are countries that acceded to the European Union after 1995.

◆ = The member made a commitment in the sector.

◆◆ = The member made a commitment in the telecommunications sector and also adopted the Reference Paper.

◆\* = The member adopted the Reference Paper but otherwise made no commitments in the telecommunications sector.

# 11 The launch: from Singapore to Doha, with a detour in Seattle

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It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way – in short, the period was so far like the present period, that some of its noisiest authorities insisted on its being received, for good or for evil, in the superlative degree of comparison only.

Charles Dickens  
*A Tale of Two Cities* (1859)

## Introduction

Seattle and Doha are two very different cities in which equally different dramas played out in 1999 and 2001. For free-traders the Seattle Ministerial Conference was the worst of times, fittingly held in a winter of despair. Delegates en route from their hotels to the Washington State Convention and Trade Center had to navigate streets filled with foolishness and tear gas, and the harsh words spoken in and around that venue drowned out the usually polite exchanges between diplomats. They left town before they could launch a new round of multilateral trade negotiations. Doha would seem by contrast like the best of times, if not an age of wisdom then at least one of greater hope and experience. The concerns over security in sun-drenched, post-9/11 Doha were much higher than they had been in Seattle, and some delegates may indeed have wondered whether they might be on their way to Heaven or the other way, as Dickens so delicately put it, but in the end they accomplished what they had set out to do. In place of the Seattle draft, with its seemingly endless square brackets (see Box 11.1) and points of friction, they crafted and approved a ministerial declaration that launched a new round.

The Doha Ministerial Declaration followed in the best GATT traditions of constructive ambiguity. Just as the declaration that launched the Uruguay Round had left unclear the precise place of trade in services in the new round, so too did the Doha Declaration provide an uncertain footing for the Singapore issues of investment, government procurement, competition policy and trade facilitation. It also took constructively ambiguous approaches to such topics as agricultural trade and the anti-dumping laws. But unlike the Uruguay Round, where countries' confidence grew over the negotiations, the Doha Round negotiators showed more caution than ambition.

They would later jettison three of the four new issues that were provisionally adopted at Doha and progress slowly on the more traditional fare of multilateral trade negotiations. In time, some participants and observers would come to see the Doha Ministerial Conference as a great tactical success within a strategic failure, admiring the skill with which the agreement to launch was secured but questioning the advisability of having gone down that way in the first place. Others with a more optimistic outlook see in the Doha Ministerial Conference a model that later negotiators would do well to emulate, showing that it is indeed possible for the members of this organization to devise deals that offer wins for all of them.

### Box 11.1. Square brackets and strike-throughs

When negotiators see square brackets in a text, they are looking at their “to-do list” of items yet to be decided. Square brackets sometimes contain only ellipses, as in [...], meaning that there is as yet no proposed language. That is especially common in the earliest stages of a text’s development, when the drafters are concentrating more on the overall structure than the detailed content of the document. Later those brackets might be filled with one set of words or numbers, indicating that the language is proposed but not yet agreed. Brackets might also come in series of two or more that each have their own texts, with paired choices such as [3] [4] and [negotiations] [consultations].

One simple but significant example comes from the penultimate draft of the Doha Ministerial Declaration. A sentence in the agricultural paragraph provided that: “Building on the work carried out to date, we commit ourselves to comprehensive negotiations aimed at: substantial improvements in market access; reductions of [, with a view to phasing out,] all forms of export subsidies; and substantial reductions in trade-distorting domestic support.” The European Community consented to a major increase in the round’s level of ambition when it agreed to erase those brackets and accept the language within them.

As another example, consider these fragments from a draft Doha text on non-agricultural market access. One provision would provide flexibilities to five African countries on their commitments, stating that they “shall have recourse to [6][8] additional percentage points in the flexibility” that “shall be used only in respect of tariff lines falling within the clothing [and footwear] sectors” for which these countries “shall benefit from a grace period of [3][5] years.” There are thus three ways in this one section by which the flexibility being offered might be higher or lower in significance, wider or narrower in coverage, and shorter or longer in duration, depending on which of the bracketed options are chosen.

A text may employ other conventions to indicate that different versions are in play. Sometimes whole paragraphs will be given in different versions without square brackets, but the versions are either separated by the word “or” or identified as “Alt.1” and “Alt.2”.

A draft may also use ~~strike-throughs~~ to indicate language that is deleted and underlines to indicate new language. The 2008 anti-dumping text, for example, provides that: “Sufficient advance notice shall ~~should~~ be given to the firms in question before the visit is made.” That typically indicates not that there had been adjoining brackets with these two words as options, but that “should” had previously been in the text (without brackets) and negotiators agreed to replace it with the stronger “shall”.

The focus of this chapter is on the tactical success, leaving discussion of the strategic doubts for Chapter 12. The Doha Ministerial Conference redeemed an institution that only two years earlier had faced its greatest crisis. It demonstrated the value of careful preparation by the Secretariat and the members, as well as the need to develop a coherent negotiating strategy that is adaptable, pragmatic and balances the interests of the various factions within the membership.

Before either Seattle or Doha came Singapore, site of the First WTO Ministerial Conference, and a city-state that lent its name to the aforementioned quartet of nettlesome issues. This chapter covers the events from that first through the fourth ministerial, but skips past the second. The Geneva Ministerial Conference of 1998 was largely for show, being an occasion to mark the 50<sup>th</sup> anniversary of the multilateral trading system, although it did also feature some substance. It was the site at which ministers signed the Declaration on Global Electronic Commerce and made advances in the talks over implementation, both of which were discussed in the previous chapter. For the sake of continuity, however, it is not a part of the story in this chapter.

## The debate over launching a round

Before reviewing the path from Singapore to Doha it is first useful to consider the larger issue. The members of this new organization faced two related questions in the years following the Uruguay Round. First, should they undertake new negotiations that would go beyond those already provided for in the built-in agenda? Second, if they were to undertake new negotiations, what issues should be on the table? The answers that they eventually developed were that new negotiations were indeed desirable and these should be organized on the same model as the Uruguay Round, with the issues in a new round including the usual fare plus the Singapore issues. The apparent consensus on these points was neither universal nor stable, however, as would become apparent in the subsequent conduct of the round.

The European Community was the principal proponent of a new round, and Sir Leon Brittan was, as EC trade commissioner from 1993 to 1999, the principal advocate within Europe. “My reasons were extremely simple,” he would later recall. “We had achieved in the Uruguay Round the greatest single liberalization ever,” but there was room to go considerably further:

In negotiating and working towards that it was very plain to me that there was a hell of a lot more liberalization which had not been achieved and which was not on the table. Therefore, the conclusion – very plain, very simple – is, “Let’s do some more.” And the mechanism to doing some more in those days was to have a new round.<sup>1</sup>

Sir Leon had not gone to the EC member states first to get clearance for the plans to launch a new round. He acted instead *à titre personnel* and without significant interference, being “neither constrained nor conflicted with the member states.”<sup>2</sup>

The European Community was by no means alone in promoting a new round, as several trade-dependent and emerging economies also advanced the idea. Starting in 1998, an informal group of 15 medium-sized WTO members came together as The Friends of a New Round. In addition to five developed countries (Australia, the Czech Republic, Hungary, New Zealand and Switzerland) its members included representatives of Latin America (Argentina, Chile, Costa Rica, Mexico and Uruguay) and Asia (Hong Kong, China; the Republic of Korea, Singapore and Thailand) as well as Morocco. Brazil and South Africa were not in this group, but their support was crucial. These two emerging economies “played hugely important roles in promoting the launch of [the Doha] round,” Harbinson (2009: 5) would later recall, “both in Geneva and at the ministerial level.”

Most of the other developed countries supported the launch of a new round, although to varying degrees and at varying times. The position of the United States was sometimes ambivalent or even enigmatic, being influenced by changes in government, presidents’ relationships with the US Congress and domestic constituencies, and by the links between trade and other objectives in foreign policy. Those factors affected not just whether the United States wanted new negotiations but whether it wanted these talks to be structured in the traditional form of a round. Japan also took a cautious approach to a new round, in large part out of concerns over what might be demanded on agriculture.

The principal objections to a new round came from those developing countries that feared any changes in the status quo might operate to their disadvantage. They had concerns over implementation of the results of the previous rounds, the likelihood that MFN liberalization in the developed countries would erode the margins of preference that they enjoyed in those markets, and the prospect of losing more of the “policy space” that they enjoy in trade-related fields. India emerged as the leading critic of the proposals for a new round, and was backed by other members of the Like-Minded Group. The group’s membership shifted somewhat, but at its founding included four Latin American countries (Cuba, the Dominican Republic, El Salvador and Honduras), three Asian countries (Indonesia, Malaysia and Sri Lanka), two Middle Eastern countries (Egypt and Pakistan) and two African countries (Nigeria and Uganda).<sup>3</sup> The members of this group questioned both the wisdom of launching a new round and the means by which its proponents sought to advance the initiative.

If a new round were to be launched, what issues would be on the table and what would the main objectives be for them? Here the European Community also took the lead, proposing several topics that, after a process of attrition and refinement, became known as the Singapore issues. These were competition policy, investment, government procurement

and trade facilitation. Other issues that the European Community promoted, most notably labour rights, did not make the cut. The EC position had defensive as well as offensive components, most importantly in the area of agriculture. This issue was the *sine qua non* for a great many other members, with the European Community thus providing both lift and drag to the round.

That apparent contradiction in the EC position was replicated throughout the system, with all of the key players and coalitions having both offensive and defensive interests. This greatly complicated the efforts to devise a round, as it is supremely difficult to put together a winning combination of positions and players when any one member's drink is another member's poison. Or as Blustein (2009: 68) succinctly summarized the conflicting line-ups:

The Europeans wanted a pledge to launch a new round that would include the Singapore issues – which was anathema to the developing countries. The United States, Australia, and the big farm exporters of Latin America wanted the agenda for negotiations to include proposals that would significantly open up agriculture markets and eliminated certain farm subsidies – which was anathema to the Europeans, the Japanese, the Koreans, the Norwegians, and the Swiss. Another group of countries, led by Japan, wanted the round to consider rules restricting the rights of countries to impose antidumping duties – which was anathema to the United States. The Americans wanted the WTO to begin dealing with the issue of labor rights, at least by creating a working group to study the trade-labor relationship – which was anathema to the developing countries. The developing countries wanted to change some of the terms of the Uruguay Round – which was anathema to the Americans, the Europeans, and the Japanese.

That particular configuration best described the lay of the land as of 1999. Some of the positions that key players took at that time shifted later, as in the case of labour rights for the United States. Even so, the essential point remains valid: the WTO members were divided in the first instance between those who favoured and those who opposed a new round, and even among the proponents one finds major differences over what the round should seek to accomplish. The general trajectory discussed below is one in which those differences were aired in Singapore, contributed to a disastrous collapse in Seattle, but were then resolved in Doha. One reason why Doha succeeded where Seattle failed is that in that earlier ministerial the ambassadors in Geneva had merely compiled and passed along their disagreements to the ministers, whereas in Doha the text was streamlined and ministers were asked to resolve a manageable number of conflicts. That streamlining came at a cost, however, as it produced some formulations that would eventually prove to be more ambiguous than they were constructive.

## The Singapore Ministerial Conference

The First WTO Ministerial Conference met on 9-13 December 1996, almost precisely three years after the climax of the Uruguay Round. Unlike the meetings of 1999 to 2013, neither this ministerial nor the circumscribed one to follow in 1998 were directly associated with the launch or conduct of the Doha Round. The talk of a new round was already in the air, however, with Chile calling for the initiation of discussions to prepare for a new round of negotiations on agriculture. One Chilean negotiator would later characterize this as a “forward position” that was not intended to produce immediate results, but rather to lay the groundwork for later moves towards a new round.<sup>4</sup>

The most memorable aspect of this ministerial is that it lent its name to what would henceforth be known as the Singapore issues, even though these topics were not so bundled or identified at that time. Debate also centred on core labour standards and the implementation of the Uruguay Round agriculture and textile agreements. Other achievements of the conference were the near-completion of the Information Technology Agreement, as discussed in Chapter 10, as well as adoption of the Comprehensive and Integrated Plan of Action to assist least-developed countries (LDCs) and the signing of a cooperation agreement with the International Monetary Fund. The principal theme to emerge from the ministerial was the division between developed and developing countries. While there were differences within each of these groups, and efforts on the part of some countries to bridge the divides, members tended to line up in predictable North–South patterns on nearly all of the subjects under discussion.

Singaporean officials also had to deal with a diplomatic dust-up with the United States (see Box 11.2) and with protests by trade-sceptical non-governmental organizations (NGOs). It was clear in the run-up to the event that NGOs would use the occasion to protest against globalization in general, and the WTO in particular, and host country officials deliberated over how best to manage the problem. One possibility that they considered but rejected was “to put the NGOs in Johor Bahru so as to create logistical problems for them” (Kesavapany, 2011: 160), this being a city in adjoining Malaysia. Officials reasoned instead that “NGOs responded positively if they were treated well and given a fair hearing” (*Ibid.*), so they opted to house the NGOs in a hotel a kilometre away from the venue, to arrange for briefings by WTO officials and to provide access to delegations. That approach proved successful, as the protests accompanying this event were far more manageable than those in the next two ministerials. The government of Singapore also “employed its military to ensure that security for the event was tightly controlled,” including “individually assigned vehicles with military drivers for each attending dignitary” (Seattle Police Department, 2000: 9).

### Box 11.2. How two ministerials were almost moved

A diplomatic *contretemps* that erupted between the United States and the host country almost prevented the ministerial from being held in Singapore. This imbroglio was farcical by comparison with the much higher levels of concern over the personal safety of delegates that would be associated with the ministerials in 1999 and especially 2001.

It began when Michael Fay, a young American citizen, was convicted on 3 March 1994 of vandalizing cars and stealing road signs in Singapore. His sentence included caning, a practice that is common in Singapore but contrary to US penal traditions that bar corporal punishment. President Bill Clinton had made a plea for clemency on Fay's behalf, and Singapore President Ong Teng Cheong commuted the caning from six to four strokes. That was not acceptable to US Trade Representative Mickey Kantor, who announced he would oppose Singapore's hosting of the ministerial. The US ambassador to the WTO, Booth Gardner, reportedly informed his Singapore colleagues "that he had personally gone to Mr Kantor's office on three occasions to get him to reverse his decision" but that the US trade representative "would have none of it and threw him out of the office" (Kesavapany, 2011: 158). There then followed a flurry of activity by Singapore, seeking support from all other delegations and culminating in a late 1995 meeting with Mr Gardner in which his Singapore counterpart "informed him that I would be tabling a proposal on the matter at the last meeting of the General Council for that year." The two ambassadors had since become good friends, so Gardner "told me to go ahead and table the proposal and he would look the other way. This is, in fact, what occurred and the motion was passed" (*Ibid.*).

The stakes were much higher for the Doha Ministerial Conference, which was scheduled to begin less than two months after the terrorist attacks of 11 September 2001. That assault raised concerns over the safety of the delegates, as a gathering of global economic leaders would make a tempting target for Al Qaeda. The United States attempted once again to relocate a ministerial. Ironically, this time the leading candidate for a back-up site was none other than Singapore. Like the Singaporeans before them, the Qataris resisted these entreaties and eventually persuaded the United States to cease its efforts to move the ministerial. By one account, the matter was settled in a phone call between the emir of Qatar and Vice President Richard Cheney in which "the emir, in only slightly veiled terms, used as leverage the air base in his country that the Pentagon regarded as a crucial asset in the war against terror" (Blustein, 2009: 100).

### *The original and the eventual Singapore issues*

The Singapore issues as we know them today are investment, government procurement, competition policy and trade facilitation. These four topics, which came to be closely associated with the goals of the European Union in the Doha Round, were not packaged together or by that *demandeur* at the start. Their association with the Singapore Ministerial Conference was instead the product of a more gradual process of advocacy and attrition.

Europe did come to Singapore with four objectives, but in a different configuration. Speaking on behalf of what was still known as the European Community, Sir Leon told his peers that

“there are four key areas of work we need to address” in the ministerial.<sup>5</sup> The most immediate task was completion of the Information Technology Agreement and the telecommunications negotiations. Second, financial services must be made “a permanent part of the WTO’s disciplines.” Only third on his list was the insistence that the WTO “must also pick up the new subjects like investment and competition,” thus conflating into one a pair of topics that would later form half of the Singapore issues. His fourth point was that “labour standards and environmental protection remain important.” Government procurement and trade facilitation, which were later to round out the list of Singapore issues, were not yet in the European Community’s top-four.

Labour was the most controversial of the proposed new issues. A great deal of ink had already been spilt on the relationship between trade and labour rights, and not a few voices raised above the usually polite levels of diplomacy, prior to Singapore. The issue had been inherited from the endgame of the Uruguay Round, with most ministers who spoke at the Marrakesh Conference in 1994 having expressed a view on it. Not much changed between that valedictory GATT ministerial and this inaugural WTO ministerial, although both the International Labour Organization (ILO) and the Organisation for Economic Co-operation and Development (OECD) had taken up the issue of trade and labour standards in the interim. The former explored the possibility of including a “social clause” in the WTO, and the latter reviewed the relationship between core workers’ rights and international trade.

Norway and the United States were also strong proponents of bringing labour rights to the table. In the run-up to Singapore, these two *demandeurs* had separately proposed that ministers approve a work programme on promoting core labour standards, with the results to be reported back to the 1998 conference. They argued that the right to bargain collectively, freedom of association, forced labour and certain types of child labour are all matters for consideration in the WTO. Both of these proposals said that the objective was to reach a common understanding among WTO members on how to reinforce the mutually supporting nature of increased trade and improving labour standards. Other developed members such as Austria and Denmark supported WTO work in this area. Several European countries acknowledged the primacy of the ILO on core labour standards, but suggested that the two international organizations should cooperate with one another. Some industrialized countries argued that the WTO should study labour standards as a first step toward bringing core labour standards into the organization.

Most developing countries took the position that the WTO is not the appropriate forum to address labour rights, and a few developed countries such as Australia and the United Kingdom shared this view. Singapore’s fellow members of the Association of Southeast Asian Nations even threatened to boycott the conference if labour were to be negotiated. Their principal concern was that both labour standards and environmental concerns would be used as a pretext for protectionism. Many of them agreed with the comments of Minister Luiz Felipe Lampreia of Brazil, who said that he failed “to see how a rules-oriented organization such as the WTO could tackle the issue of ensuring the observance of labour standards.”<sup>6</sup> He stressed Brazil’s “serious concern with the possibility that the protection of core labour standards, which is in itself an ultimate goal to be pursued by all, be utilized as a ‘scapegoat’ to deal with

the problem of structural unemployment in the developed economies.” Like many others, Mr Lampreia urged that “the International Labour Organization is the appropriate locus to address the issue of observance of core labour standards and that any statement on this issue by this Ministerial Conference should not envisage any follow-up of this issue within the WTO.”<sup>7</sup>

When Sir Leon addressed the ministers, he stated that “we have the makings of an understanding” on trade and labour standards “which I hope will provide the basis for some WTO continuity beyond Singapore in this discussion.”<sup>8</sup> The latter part of his statement on labour proved to be more correct than the first. The language that emerged from Singapore did indeed outlive the ministerial, but not in the way that the advocates had hoped. In that sense, this experience foreshadowed what was to happen with most of the Singapore issues in the years following the Doha Ministerial Conference, although the removal of three of those issues from the negotiating table would not be nearly as quick. The labour issue was not settled until the last night of negotiations, when the ministers worked out the following formulation:

We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.

The reference to the collaboration between the two secretariats was somewhat premature, as this came at a time when there was no significant cooperation between the ILO and the WTO. That was to change years later, however, when they began to work together on a series of studies on the trade–labour nexus (see Chapter 5). The chairman’s concluding remarks appeared to be even firmer in rejecting future WTO work in labour than was the language of the ministerial declaration. Minister Yeo Cheow Tong observed that the ILO is the competent body to deal with these issues, rejected the use of labour standards for protectionism and assured delegations that the text would not lead to further work in the WTO on the relationship between trade and core labour standards.

The issue of trade and the environment, which is often paired with the topic of labour as the two highest-profile “trade and ...” issues, was also on the table in Singapore. The environmental issue has nevertheless encountered less severe opposition in the WTO than has labour. In Singapore, developed countries argued that it was necessary to ensure legal compatibility between the multilateral environmental agreements (MEAs) and the WTO system, with Japan, Sweden and Switzerland raising this question, and Iceland urging that the rules be clarified in order to avoid conflicts of laws between the MEAs and the WTO. Several

developing countries responded by raising concerns over “green protectionism”, with Malaysia pointing to the indiscriminate use of labelling schemes as a means of undermining developing countries’ exports. Others argued that the best means of addressing both labour and the environment was indirectly, through greater economic growth, rather than through direct instruments that might be abused for protectionist purposes. Poverty is the most significant cause of environmental degradation, the Nigerian delegate said, while Mexico observed that trade can contribute to environmental protection through economic growth.

Despite these divisions, the ministerial declaration took a more accommodating approach to the environment than it did to labour issues. The ministers agreed to establish the Committee on Trade and Environment as a permanent body of the WTO, recognizing that “[t]he breadth and complexity of the issues covered by the Committee’s Work Programme shows that further work needs to be undertaken on all items of its agenda.” Paragraph 16 further noted that the ministers “intend[ed] to build on the work accomplished thus far, and therefore direct[ed] the Committee to carry out its work, reporting to the General Council, under its existing terms of reference.”

### *Developed country issues: investment and competition policy*

Investment is one of the issues in which the results of the Uruguay Round had not met the expectations of the *demandeurs*. The Agreement on Trade-Related Investment Measures (TRIMs Agreement) consists of little more than a ban on certain performance requirements. The most important Uruguay Round provisions on investment were instead the Mode 3 (commercial presence) commitments that members made under the General Agreement on Trade in Services (GATS). Dissatisfaction over the results of the TRIMs Agreement led developed countries to pursue a Multilateral Agreement on Investment in the OECD, and those talks were still underway at the time of the Singapore Ministerial Conference. They would collapse two years later.

The subject of competition policy was more intellectually complex. Negotiators lacked a single, accepted definition of what the subject meant, even though it was not an entirely new issue for the trading system. The topic had been covered by the ill-fated Havana Charter for an International Trade Organization, when it was known instead as “restrictive business practices”. The issue was also tentatively taken up in the late 1950s in GATT, and later by both the United Nations Conference on Trade and Development (UNCTAD) and the OECD. It made its way into the WTO by way of GATS and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), both of which contain provisions relating to fair conditions of competition and international cooperation to facilitate the control of anti-competitive practices.

The North–South divisions were not quite as firm on competition policy as they were on other topics. Some developed countries expressed cautious views on the subject, such as Japan’s statement that it was appropriate to initiate an educational process as long as it did not prejudice the future course to be taken. This was not far off from Malaysia’s position that a

working group to study competition policies might be welcome, provided that this did not lead to negotiations within the WTO. Lesotho favoured the exchange of information on anti-competitive practices and the negotiation of clear multilateral rules to address them, while Indonesia said that discussions in this area should focus on restrictive business practices and anti-dumping. The Southern African Development Community was more direct in stating that it was premature to address competition policy. Germany favoured multilateral trade and competition rules in order to eliminate further impediments to market access. The United States was reluctant for the WTO to do anything more than study this issue. Much of Washington's concerns stemmed from the expectation that countries would seek to use this issue as a means of restricting use of the anti-dumping laws. The US position might also be attributed to displeasure over the application of EC competition law, as well as concerns that international rules on competition policy could require that the US Federal Trade Commission – an independent agency – give up some of its autonomy.

Ministers agreed to set up new working groups to examine the relationship between trade and these new issues. They stated in paragraph 20 that “on the understanding that the work undertaken shall not prejudice whether negotiations will be initiated in the future,” they would establish working groups “to examine the relationship between trade and investment” and “to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework.” The provision specified that the General Council would “keep the work of each body under review, and will determine after two years how the work of each body should proceed,” but that “future negotiations, if any” would “take place only after an explicit consensus decision is taken among WTO Members regarding such negotiations.” On government procurement they agreed in paragraph 21 to establish a working group “to conduct a study on transparency in government procurement practices” and “to undertake exploratory and analytical work, drawing on the work of other relevant international organizations, on the simplification of trade procedures in order to assess the scope for WTO rules in this area.” These decisions were not merely “kicking the can down the road,” but providing a basis on which substantive negotiations might be launched in the future.

There was some disagreement over the meaning of language in the declaration stating that the reviews would be conducted with “regard to the existing WTO provisions on matters related to investment and competition policy and the built-in agenda in these areas, including under the TRIMs Agreement.” This text had been inserted at the request of India, which later said that the language necessarily restricted the analysis to only that work already mandated in TRIMs Article 9. That article provided for a review of the agreement's operation within five years, in the course of which the Council for Trade in Goods was to “consider whether the Agreement should be complemented with provisions on investment policy and competition policy.” Others disagreed with India's interpretation.

### *Developing country issues: textiles and apparel and the integrated framework*

The Singapore Ministerial Conference came at a time when few developing countries perceived that the phase-out of the existing system of apparel quotas would lead to a consolidation of the global industry. In the Uruguay Round, most apparel-exporting countries anticipated that they would be better off without the quotas, and in the early phases of implementation exporters remained concerned over the slow pace of liberalization under the Agreement on Textiles and Clothing (ATC). Developing economies that called for more rapid liberalization included some that were then in the process of exiting this industry (e.g. Hong Kong, China), some that would come to hold greater shares of global exports (e.g. India), and still others that would later find themselves under greater competitive pressure (e.g. Kenya, Nicaragua and the Philippines). Beyond the question of the quota phase-outs, Indonesia stated its concerns over the anti-dumping and safeguard investigations that some members were then conducting against developing countries. Jamaica had been more wary during the negotiations, and was now arguing that the balance of interests that had been carefully built into the ATC must be preserved. Over time, the caution that the Jamaican delegation expressed would be shared by a widening circle of the developing countries, as is discussed in Chapter 13. In paragraph 15 of their declaration, the ministers confirmed their commitment “to full and faithful implementation of the” ATC, and stated that the “use of safeguard measures in accordance with ATC provisions should be as sparing as possible.”

Ministers also took up preferences for the least-developed countries (LDCs), which at this time were still occasionally called the LLDCs.<sup>9</sup> They adopted the Draft Comprehensive and Integrated WTO Plan of Action for LLDCs, although some criticized this instrument as being much weaker than the proposals that Director-General Renato Ruggiero put forward in June 1996 at the G7 meeting in Lyons. Mr Ruggiero had proposed full and rapid implementation of the Marrakesh Declaration on the Least-Developed Countries, improving their market access by working towards the elimination of all tariff and non-tariff barriers faced by their exports, helping to improve their investment climate, especially by negotiating multilateral rules on investment, and helping build human and institutional capacity by improving the effectiveness and coordination of technical cooperation.

The final proposal was more in the nature of a best-endeavours clause than a binding commitment. Some of the concerns over the instrument's shortcomings were addressed the next October when the High-Level Meeting on Integrated Initiatives for Least-Developed Countries' Trade Development adopted the Integrated Framework.<sup>10</sup> This Integrated Framework provided for institution-building to handle trade policy issues, as well as strengthening of export supply capabilities, trade support services and trade facilitation capabilities. It also covered training and human resource development and assistance in the creation of a supportive trade-related regulatory and policy framework that will encourage trade and investment.<sup>11</sup> The related issue of implementation is covered in Chapter 10.

## The 1999 Seattle Ministerial Conference

By the time that delegates arrived in Seattle for the Ministerial Conference, which took place 30 November to 3 December, it was already evident that the planned launch of the new round would be a heavy lift that the ministers might be unable to shoulder. It was also anticipated that the protests would be far more disruptive than those at the Singapore or Geneva ministerials of 1996 and 1998, although few would guess that they would be as large and as poorly managed as they turned out to be.

Several factors conspired to make this a most challenging ministerial. One of them was the consequence of the long and enervating struggle over who would succeed Mr Ruggiero as director-general. This contest, which is recounted in Chapter 14, eventually produced a rather unhappy compromise by which former New Zealand Prime Minister Mike Moore would hold the post for three years and former Thai Deputy Prime Minister Supachai Panitchpakdi would have it for another three. The ill feelings that the selection process had engendered between the members that had backed Mr Moore (primarily in the developed countries) and those that had backed Mr Supachai (primarily in the developing countries) exacerbated the already wide divisions between the richer and poorer members.

Even if those ruffled feathers could be smoothed the extended campaign left the WTO without a leader for several months preceding the ministerial, leading to fundamental problems of logistics, coordination and even basic introductions. Mr Moore took office on 1 September, only three months before Seattle, a schedule that gave him precious little time to organize and prepare. Even his newly chosen deputy directors-general had not yet met each other before they arrived in Seattle. The same could be said for the ministers themselves. Mr Moore “was taken aback that the US Trade Representative, the EU representative, the Canadian, and the Australian ministers had never been to a ministerial, and they didn’t know each other.”<sup>12</sup> The key players had not spent enough time together and were not prepared to cut the deal.

Matters were only made worse by the sometimes half-hearted or even conflicted approach that the host country took to the ministerial. There were divisions within the US government over the advisability of a new round in the first place, with US Trade Representative Charlene Barshefsky having been sceptical from the start. The US State Department and the National Security Council won the internal argument, and in the White House there were hopes that, as President Kennedy had done a generation earlier, President Clinton might lend his name to the round. One difference between the trade politics of Mr Kennedy’s time versus those of Mr Clinton’s was in the role that labour played. When Mr Kennedy proposed a new round of GATT negotiations in 1962 he still had the support of the US labour unions, which had been key members of the pro-trade coalition since the United States first began negotiating market-opening agreements in the 1930s. Those days were long past, as was shown in the bruising fight over approval of the North American Free Trade Agreement in 1993. Mr Clinton hoped that he could still square the circle by appealing to both the labour and the trade

communities. He also hoped to avoid new fights with the US Congress by crafting a round for which the results could be secured without requiring significant new bargaining with Capitol Hill. The competing demands of the administration's domestic and international goals would ultimately prove too difficult to balance, and when Mr Clinton was forced to choose he went with the domestic rather than the international option.

Political diversity and divisions were not unique to the WTO members, as the NGOs and others who came to protest in Seattle were also a heterogeneous bunch, but in their case diversity seemed a strength rather than a weakness. Some joined Cooper (1999) in marvelling over the "phantasmagorical mix of tens of thousands of demonstrators," in which "husky red-jacketed steelworkers march[ed] alongside costumed sea turtle impersonators, environmentalists and miners, human rights activists and family farmers" to stand "against the WTO, delaying its opening sessions and thrusting the once-obscure issue of fair trade onto the political center stage." Others instead saw in Seattle something like the poet's lament over the consequences that ensue when "The best lack all conviction, while the worst // Are full of passionate intensity."<sup>13</sup>

### *The preparatory work*

The work towards a new round began less than half a year after the Singapore Ministerial Conference, when the Friends of a New Round held an informal ministerial meeting in Budapest in May 1999. They invited Brazil, Canada, the European Community, India, Japan and the United States, as well as General Council Chairman Ali Mchumo of Tanzania. Most of these key players agreed in principle that a new round was in order, and the next ministerial would provide an obvious target date for its launch, but there the agreements ceased. The different objectives of the major players and coalitions, including the diametric opposition of their offensive and defensive interests, were all too apparent.

Members had very different notions of what must or must not be on the agenda of a new round. The best way that official Geneva knew how to handle these conflicting demands was to start by cataloguing them and then, to the maximum extent possible, reducing the differences to clear choices for ministers to make in Seattle. That is usually done by developing a draft ministerial declaration in which the ambassadors aim to minimize the number of brackets. This was the chief task of the General Council in the months leading up to Seattle, but the result looked worse with each new iteration of the draft. Instead of shrinking, it grew, to the point where the version sent to ministers ran to 33 pages and contained 402 pairs of square brackets.<sup>14</sup> Far from being a consensus document, it averaged about one pair of brackets for every two centimetres of text. It was as if the Geneva ambassadors had prepared a multiple-choice examination for the ministers, and this is a test that they would collectively fail.

Several members had ideas of their own regarding the proper wording of the declaration. The European Community, Hungary, Japan, the Republic of Korea, Switzerland and Turkey released on 30 November a 17-page draft ministerial declaration. Its provisions on investment

and competition policy reflected earlier European proposals. While the draft was ambitious on the new issues, it was defensive on the oldest issue of all. Article 20 of the Agreement on Agriculture had provided for new agricultural negotiations by the year 2000: “Recognizing that the long-term objective of substantial progressive reductions in support and protection resulting in fundamental reform is an ongoing process.” Those negotiations were to take into account “non-trade concerns,” which the European Community referred to as the “multifunctional” nature of agriculture,<sup>15</sup> but would also pursue the objective of “establish[ing] a fair and market-oriented agricultural trading system” and “special and differential treatment to developing country Members.” Article 20 thus had a “something for everyone” quality to it, and European negotiators wished to preserve that. Their draft therefore called for agricultural negotiations to be based on Article 20, and not simply *taking that article into account*, in order not to terminate the special treatment of agriculture within the WTO.

The host country had its own objectives, a point that – as discussed in Chapter 14 – was controversial in itself. Ms Barshefsky and other officials repeatedly stressed their interest in producing agreements as soon as possible. Their ideas reflected the same notions that Mr Clinton had expressed the year before in Geneva (see Chapter 10), and for the same reason: the type of disaggregated round that the United States advocated could be achieved using the limited negotiating authorities that the executive then had in hand, and might not require a renewal of the president’s fast-track authority. The US negotiators made a virtue of necessity, arguing that an accelerated round could deliver meaningful results in three years. This duration would split the difference between the first three GATT rounds, each of which were completed in less than a year, and the nearly decade-long Tokyo and Uruguay rounds.

The four priority areas for the United States were the Information Technology Agreement (ITA) II, which was to add new products to the sectors already covered by the first ITA; extension of the declaration not to assess duties on electronic transmissions; an agreement on transparency in procurement; and negotiations to eliminate or harmonize tariffs on chemicals, energy equipment, environmental goods, fish and fishery products, gems and jewellery, medical equipment and scientific instruments, toys and forest products. They hoped that agreements on some of these matters might be finalized in Seattle. By contrast, the United States insisted that acceleration of its textile liberalisation commitments was off the table, that the anti-dumping laws were also sacrosanct, and the TRIPS Agreement already had sufficient flexibility to deal with essential medicines and the patenting of life forms.

### *The outside battle of Seattle*

Once considered plums for the host city, international meetings have come to be seen as white elephants. The Seattle experience played no small role in that transformation. The Washington Council on International Trade had begun campaigning for the ministerial in May 1998, lobbying the Office of the US Trade Representative (USTR), the State Department and the WTO Site Selection Team. “Washington State is known to be the most trade-dependent region in the United States,” a post-mortem report observed, and officials hoped that hosting the ministerial “would not only provide an infusion of visitor dollars into the local economy, but

also a rare political opportunity to perhaps influence future decisions affecting the region" (R.M. McCarthy & Associates, 2000: 5-6). The local leaders did not suspect when the USTR announced Seattle's selection in January 1999 that before the year was out their city would be plunged into chaos. For all of the efforts that they put into preparing for the ministerial itself and showcasing their city, the local planners gave short shrift to conference security. The WTO Secretariat "worked closely with both the Federal Government and [Seattle Host Organization] during their planning for the meetings in Seattle," the Seattle Police Department (2000: 11) noted in its after-action report, "but by the WTO's own request, did not participate in security planning" because this "was the executive responsibility of local law enforcement."

The opponents of globalization devoted at least as much effort in their preparations to disrupt the meeting as the city spent in organizing it. Dozens of groups found fault with the WTO, whether out of traditional concerns over import competition or because of the trading system's foray into such new topics as the environment and pharmaceuticals. They included such diverse organizations as the Alliance for Sustainable Jobs and the Environment, Amazon Watch, the Anarchist Action Collective, Christian Aid, Consumers International, the Earth Justice Legal Defense Fund, the French Peasants Confederation, Friends of the Earth, Greenpeace, the Humane Society, the Institute for Local Self-Reliance, Oxfam International, the Ruckus Society, the Sierra Club, the Third World Network and United Students Against Sweatshops. Some of these same groups might be on opposing sides of other issues, but those differences did not matter: the enemy of their enemy was their friend, and for all of them that enemy was the WTO. They converged on Seattle just as the ministers and their entourages arrived, and soon set about occupying the streets and airing their grievances. The protests took place between 29 November and 3 December, with the most intense activity coming on 30 November. The largest event that day was a march organized by the American Federation of Labor-Congress of Industrial Organizations, in which over 40,000 people participated, but "several thousand of the marchers broke from the route and continued into the downtown core in the vicinity of the Pike Street area where these added numbers exacerbated the problems already occurring there" (Seattle Police Department, 2000: 41).

The protests forced a delay in the WTO opening ceremonies and provoked the mayor of Seattle, Paul Schell, into declaring a state of emergency. He ordered a curfew and, with the governor's assistance, called in the National Guard and the Washington State Patrol to maintain order. The mayor also issued a civil emergency order creating a militarized zone in the core of downtown Seattle, with police patrolling the borders of this no-protest zone and restricting entry. What has since been deemed the Battle of Seattle is seen as a turning point both in the anti-globalization community and in policing, with activists looking back on it as their greatest triumph. These protests inaugurated the "black bloc" tactic of dark-clad protestors who conceal their identities with bandanas or masks and carry on the most kinetic forms of protest, such as smashing windows, overturning cars and directly confronting police. It was also the first major protest event in the age of mobile phones and the Internet, two iconic instruments of the global economy that protestors used effectively to organize the disorganizers. For the law-enforcement community, these events shattered

years of post-1960s complacency about the potential for violent and disruptive street actions, and became a textbook case for police academies and crisis-management specialists.<sup>16</sup>

The Seattle chief of police, despite his remarkably Dickensian name of Norm Stamper, had at least as much sympathy for the views of the legitimate protestors as he had contempt for the trouble-makers among them and the wishful thinking and poor planning of the higher-ups in the local, state and Federal governments. He would later write that what began with a “sea of sea turtles and anti-WTO signs, choruses of chanting, and street theater performances, replete with colorfully costumed actors on stilts playing out the various points of opposition to globalization” soon turned to chaotic street scenes in which his officers were “being pelted with an amazing array of missiles: traffic cones, rocks, jars, bottles, ball bearings, sticks, golf balls, teargas canisters, chunks of concrete, [and] human urine shot from high-powered squirt guns” (Stamper, 2005: 340, 344). Police responded with clubs, tear gas, rubber bullets and jail cells. An independent assessment commissioned by Seattle found fault with the city and public safety officials in their planning and execution, noting that the police department leadership “either did not believe ... or chose to ignore” substantial pre-incident indicators that large and violent protests could be expected and criticizing the incremental response once incidents occurred (R.M. McCarthy & Associates, 2000: 19). Mr Stamper summed up the experience by offering advice to his colleagues in law enforcement and to the elected officials to whom they must answer:

We learned many lessons from the Battle, foremost of which are: (1) line up as much help in advance as you possibly can, then find more; (2) plan for “force multipliers” (i.e., volunteers), but don’t become overreliant on them; and (3) keep demonstrators at a much greater distance from official venues. No matter how much they bitch about it.

And finally, my gift to every police executive and mayor in cities the size of Seattle’s: Think twice before saying yes to an organization whose title contains any of the following words: *world, worldwide, global, international, multinational, bilateral, trilateral, multilateral, economic, monetary, fiscal, finance, financial, fund, bank, banking, or trade* (*Ibid.*: 351).

Mr Stamper took full responsibility and resigned immediately after the ministerial. Mr Schell was defeated in a primary election in September 2001, the first incumbent mayor of that city to suffer such a fate in 54 years. The American Civil Liberties Union brought a lawsuit against Seattle officials for violating the free-speech rights of protestors, leading in 2006 to a settlement in which the city paid US\$ 62,500 to one person who had been detained because he was talking about WTO policies on a downtown street and US\$ 12,500 to another from whom a police officer had confiscated a sign because of its content.<sup>17</sup> The next year the city agreed in a settlement to pay US\$ 1 million to about 175 protestors who had been incarcerated and to clear their arrest records (Young, 2007).

### *The inside battle of Seattle: labour rights*

Labour rights had not even been on the agenda before the ministerial met, but that soon changed. Partly in response to the events on the streets and partly in accommodation to the host country, the organizers hastily put together a group to explore the options for negotiations on this subject. Ironically, this is one of the groups that came closest to reaching a consensus before the whole ministerial collapsed.

Before the ministerial, the European Community and the United States had both tabled papers proposing that a group be established to examine the relationship between trade and labour, but neither suggestion was included in the ministerial draft texts. Both parties were careful to express their objectives cautiously. Ms Barshefsky told delegates that sanction-backed labour provisions was only a long-term policy goal, and the European Community proposed that a Joint ILO/WTO Standing Forum on Trade, Globalisation and Labour examine a broad range of issues. That same caution was noticeably lacking at the top. In an interview that he granted during the height of the protests, and that was published in the 1 December *Seattle Post-Intelligencer*, Mr Clinton went considerably farther than his subordinates had:

What we ought to do first of all is to adopt the United States' position on having a working group on labor rights within the WTO, and then that working group should develop these core labor standards, and then they ought to be part of every trade agreement, and ultimately I would favor a system in which sanctions would come for violating any provision of a trade agreement (cited in Blustein, 2009: 76).

That interview surprised and upset most delegates, not least those from the United States. Taken together with the protests, however, it convinced the conference organizers that something had to be done to address the issue.

The conference set up a working group to decide whether the declaration should create a labour standards working group within the WTO, or a body operated jointly by a number of international organizations, to look at the issues. Costa Rica was chosen to chair this group because, as then-Deputy Minister for Trade Anabel González (see Biographical Appendix, p. 578) would later recall, “[t]hey were looking for a country that would be neutral on this.” The initial idea was that the minister would take on this task, but the minister “preferred that I would take the job because he was a business person and he was not really involved in the intricacies of that kind of thing.”<sup>18</sup> Ms González managed to hold two meetings, the first one being a general session at which all countries were free to speak and the second bringing together a smaller group that aimed to reach agreement on language for the ministerial declaration. “I’ve never been in a more acrimonious meeting of the WTO” than that first one, she later said. “Delegates were absolutely furious,” according to Ms González, “because they did not want a group to be created, because they did not want to discuss the issue altogether.”<sup>19</sup> Here is where the breakdown in trust and even civility among the membership, already heated by the lengthy fight over the director-general selection and agitated further by the protests outside, reached a boiling point. Many of the delegates vented their frustration at the process, and some directly at Ms González. Nor was she the only target: the creation of the labour group provoked a bitter reaction from some

developing countries that saw it as a hijacking of the ministerial by the United States and perhaps a plot by Mr Moore, himself a former Labour Party politician, to put something over on them.

A smaller group then moved to another room after taking statements, aiming to produce a paragraph that would define the relationship between the WTO and the ILO and create a working group on this issue in the proposed new round. While the negotiations remained difficult “it actually started to sort of come together, in a way,” and at about 4:00 a.m. this smaller group produced “a text that all delegates but India, which was on the sidelines, thought was a reasonable sort of thing.”<sup>20</sup> At this stage the negotiations in the ad hoc group seemed to have succeeded beyond what might reasonably be expected. Ms González then went back to her hotel to sleep, planning to present the agreed language when the ministerial deliberations resumed later that morning. About an hour or so after getting to her room she was called back to the convention centre and, after making it through the chaos in the streets, discovered that her work was for naught. “So I got back and I was very happy coming with my text and everything, because I thought that we had made it very reasonable,” she recalled, “and then they basically tell me, ‘We’re going to pull the plug.’”<sup>21</sup> The ministerial was coming to an end without a decision, and the language that her small group had produced never saw the light of day.

### *The other issues*

Labour was by no means the only polarizing on the table, and the rancour over the other subjects under negotiation could have been sufficient to sink the conference even without the added weight of this most divisive matter. Chief among these other topics were the related issue of the environment, as well as agriculture and the Singapore issues.

The environmental issue made for some coalitions that were mixed, tacit or even unintentional. “Green” groups outside the conference centre opposed the elimination of tariffs on forestry products, and Japan urged that negotiations should establish a set of rules and disciplines to contribute to the sustainable utilization of forest and fishery resources.<sup>22</sup> Other members that favoured the elimination of subsidies to fisheries, forestry, or both included Australia, Iceland, New Zealand, the Philippines and the United States. One of the more contentious issues in the negotiations, as well as in the streets outside, was biotechnology. Canada and United States proposed the establishment of a biotechnology working group. Both were members of the Miami Group of biotechnology exporters, a group that sought to keep any potential trade restrictions out of the Biotechnology Protocol. Similarly, the European Community proposed the establishment of a working party with a fact-finding mandate on the relationship between trade, development, health, consumer and environmental issues in the area of modern biotechnology. This proposal caught EC environmental authorities off-guard, after they had worked hard to finalize the Cartagena Protocol on Biosafety. The environment ministers of Belgium, Denmark, France, Italy and the United Kingdom objected that this approach could potentially subordinate the Biosafety Protocol negotiations to other issues in the round, thereby setting a precedent for the WTO’s relationship with other multilateral environmental agreements.

The environment nevertheless offered one of the few opportunities for a real accomplishment at the ministerial. The executive-director of the United Nations Environment Programme, Klaus Töpfer, and WTO Director-General Mike Moore met on 29 November to discuss the two organizations' working relationship. They signed an agreement providing for "the provision and exchange of relevant non-confidential information, including access to trade-related environmental databases, and reciprocal representation at meetings of a non-confidential nature" and "to work for complementarity in technical cooperation with the aim of improving cooperation across the board and making better use of available resources."<sup>23</sup>

The agricultural discussions at the Seattle Ministerial Conference took place five years after the end of the Uruguay Round and four years before Cancún, and the alignments of members on this issue bore a closer resemblance to the previous round than they did to the next one. The Cairns Group was still an active coalition of both developed and developing agricultural exporters, and urged that agriculture not be treated in a new round any differently than other sectors. It argued that there is no justification for maintaining export subsidies, that market access opportunities for agricultural products should be on the same conditions as those applying to other goods and should be commercially viable, and that all trade-distorting domestic subsidies must be eliminated with only non-distorting forms of support permitted.<sup>24</sup> Other developing countries expressed concern over issues of food security and unfair competition from the protected and subsidized farmers in developed countries. See for example the proposals made by India<sup>25</sup> and by Cuba, the Dominican Republic, Egypt, El Salvador, Honduras, Sri Lanka, Uganda and Zimbabwe.<sup>26</sup> The European Community took a more cautious approach on all three pillars, and especially domestic support, arguing for the need to consider the "multifunctional" nature of agriculture and non-trade concern. Progress on trade issues, according to the EC view, must not do damage to public goods such as the environment and the sustained vitality of rural areas.<sup>27</sup> The Japanese position was also cautious.<sup>28</sup> The US position was something of a compromise, calling for deep reductions in support and protection while also encouraging non trade-distorting approaches for supporting farmers and the rural sector.<sup>29</sup> Taking these and other proposals as a whole, the postures that members struck on agriculture in the run-up to Seattle were largely a reiteration of the positions they had held in the previous round.

On the third day of the conference, the chair of the agriculture working group, George Yeo of Singapore, presented a new draft. He sought to strike a compromise between the Cairns Group, the European Community, the United States and other members. This draft dropped all references to multifunctionality but still noted the need to take into account non-trade concerns such as food security and rural development. It proposed that market access negotiations should aim for the broadest possible liberalization, particularly for products of interest to developing countries, as well as reductions in domestic support. The inherent difficulties in reconciling the positions of members can be appreciated from the draft's somewhat tortuously crafted language on export subsidies, providing for "substantial reductions in all forms of export subsidies, and equivalent action in respect of the subsidy component of other forms of export assistance, in the direction of progressive elimination of export subsidies."<sup>30</sup> This was the only working group that would actually produce a draft.

The Singapore issues group dealt primarily with investment and competition, devoting less time to trade facilitation, the environment and government procurement. As was the case in Singapore, the European Community was the main *demandeur* on these two issues. It urged that the WTO establish a multilateral framework of rules governing international investment, aiming for a stable and predictable climate for foreign direct investment world-wide. This would focus on foreign direct investment rather than short-term capital movements, and preserve the ability of host countries to regulate the activity of foreign and domestic investors while also taking into account civil society concerns regarding investors' responsibilities.<sup>31</sup> Other members that supported negotiations in this area included not just developed members such as Japan and Switzerland but also developing members such as: Costa Rica; Hong Kong, China; and the Republic of Korea. Other developing countries opposed taking up this issue, although Kenya was the only one to submit a formal paper in opposition in advance of the ministerial.<sup>32</sup> Kenya also submitted a paper on behalf of the African Group in the area of competition policy, where the group favoured only continued study and technical assistance.<sup>33</sup> As in the case of investment, the European Community called for the WTO to begin negotiations on a basic framework of binding principles and rules on competition law and policy.<sup>34</sup> Other members supporting this call included Japan, the Republic of Korea, Norway and Turkey. The United States had not submitted proposals on either of these topics. The ministerial reached no decisions on these or other Singapore issues.

Ministers also grappled with the more standard fare of trade negotiations, although without coming to resolution. The working group on market access tackled the modalities, with countries variously calling for zero-for-zero sectorals, across-the-board formulas, and an Accelerated Tariff Liberalisation (ATL) initiative. The ATL initiative aimed for an early harvest in eight sectors of non-agricultural goods. The United States was the principal advocate of this approach; European Commissioner for Trade Pascal Lamy preferred to put all industrial tariffs on the table without prioritizing any particular sector. The European Community was also concerned that the early harvest could take some of the issues out of the round before it was concluded.

If the ministerial had been successful, it may have produced early results in favour of least-developed countries (LDCs). The European Community tried to introduce an Everything But Arms proposal, an idea that it had shopped around to developing countries and Japan, but the US authorities were quite displeased that their EC counterparts had not told the host country that they intended to make this proposal. Both the European Community and Japan pledged to provide duty-free access to essentially all products imported from LDCs by the end of the round, with "essentially all" being understood to mean 98 per cent to 99 per cent of LDC exports.

### *The collapse*

Participants and analysts have differing views of the impact that the battle outside had on the battle inside. The negotiators generally agree that the protests *per se* did not force a shutdown of the talks, but they did affect negotiations in at least three ways. First, the action on the streets – coupled with Mr Clinton's comments – helped to bring about the establishment of the ad hoc

group on labour rights. While the group actually performed better than might be expected, its very creation generated ill will in the ministerial. Second, the general atmosphere of chaos and danger contributed to the frayed nerves and short tempers of delegates. The toll may have been the highest on the conference chairman herself. This is a position that is exhausting even in the best of times, and is not made any easier when a conference crosses the line into a true crisis. The third impact was on time: the protests delayed the start of the conference, left fewer working hours each day, and ultimately prevented the host country from even contemplating an extension. The mayor and the police chief wanted their nightmare to end as soon as possible, and were in no mood to contemplate even one hour more than had been scheduled. They conveyed that message in no uncertain terms to WTO Deputy Director-General Andrew Stoler when, at the request of Mr Moore, he sounded them out on the possibility of extending the time. It is impossible to know whether that additional time might have helped the delegates to overcome their divisions, but it is certain that the authorities were not about to permit a test of that proposition.

Many of the participants in the negotiations believe that the ministerial would have failed, although perhaps not as spectacularly, even if there had not been a single protestor. The WTO members were simply too far apart on the issues that they had planned to take up, not to mention the one that got added on the fly, to hope that they could bridge their differences in four days of debate between ministers. Although negotiators managed to make progress in some areas, by the late afternoon of 3 December it was apparent that there was too much distance to the goalpost and too little time to reach it. Blocs of Latin American, Caribbean and African countries opposed what they saw as an undemocratic process, and were all threatening to withhold consensus from any agreements that might be produced. Ms Barshefsky told ministers at the concluding plenary session that it was the “collective judgment, shared by the director-general, the Working Group chairs and co-chairs, and the membership generally, was that it would be best to take a time out, consult with one another, and find creative means to finish the job.”<sup>35</sup> This formula contemplated informal discussions over the weeks to come, with the WTO General Council scheduled to meet on 17 December when “after Seattle” issues were on the agenda.

Despite all of the noise of the ministerial, both inside and out, there was nonetheless one incongruously hopeful sign. “In the middle of all this chaos,” Deputy Director-General Miguel Rodriguez Mendoza (see Biographical Appendix, p. 590) would later recall –

the minister from Qatar asked for a meeting with Mike Moore ... to offer Doha as the venue for the next conference. And Mike looked at him as if to say, “This man is crazy. How could a country want to host a meeting such as the one we’re having here? He may be out of his mind.” But he said, “Well, of course we’ll take your proposal to the members.”<sup>36</sup>

On 8 February 2001, when most of the members were still engaged in recriminations over who was most at fault for the debacle, the General Council accepted an offer by the government of Qatar to host the next ministerial conference.

## Between the ministerials: setting the development agenda

The WTO was still just shy of five years old at the time of the Seattle Ministerial Conference, and by Doha it would be seven. If international organizations went through the same stages of cognitive development that Jean Piaget attributed to children, it is in this interval that we might expect the institution to demonstrate greater reasoning skills, to acquire the ability to understand that others may have different perspectives on the same problem, and to begin learning from one's own mistakes. That is precisely what the institution, its leadership, and its members did between the ministerials. Seattle was, in some respects, a learning experience that the members brought on themselves, and also a public rebuke to the trading system itself. That inspired many of the key players to correct their mistakes in time for the next round.

The first step came in acknowledging that it was not the NGOs that had stopped the members from launching a round. While the chaos in the streets did not make things any easier, it was the lack of preparation inside the WTO itself that caused the greatest damage. "The work hadn't been done," Director-General Mike Moore would later acknowledge, "and when we got to Seattle we were essentially just too far apart."<sup>37</sup> Working with the members, and especially with the next two General Council chairmen, Mr Moore set about doing better next time.

### *Bringing the developing countries on board*

One fundamental problem, as Mr Moore recognized even before the ministerial began, was that the planning and pre-negotiations had not been inclusive. When he attended a mini-ministerial shortly before Seattle, Mr Moore "was gob-smacked that there was no least developed country there and the configuration wasn't right."<sup>38</sup> He resolved to correct this deficiency by addressing the needs of developing countries in general and the LDCs in particular. It was here that the notion of a development round first emerged. That concept would come to be much maligned by developed and developing countries alike, but was part of a concerted plan on Mr Moore's part to reach out to those members that had been most excluded and to whom the WTO seemed less relevant and helpful.

In 2000 and into 2001, Mr Moore travelled frequently to Africa and the Caribbean, and would later remember that: "I went to the ACP [African, Caribbean and Pacific group] in Brussels more than I went to the European Union to explain what we were doing and why they should trust us."<sup>39</sup> He also put more resources into capacity-building, spent time securing funds from the major donors and helped regional groups such as the African and Arab caucuses in organizing. The director-general spent all of his weekends engaged in that hybrid of politicking and socializing that is the hallmark of WTO diplomacy, holding parties and barbecues to help the ambassadors build confidence in each other. He also worked to provide more services to the non-resident members to make sure they were kept informed and did not feel isolated from the system.

One ancillary benefit of dealing directly with capitals was that the director-general developed superior intelligence about countries' actual positions. Because he had direct lines of

communication to the capitals, Mr Moore could determine when ambassadors were being more adamant in their opposition to a round than were their ministers. This was especially important in dealing with members of the Like-Minded Group, several of which were more disposed towards cooperation at the ministerial than at the ambassadorial level. The knowledge also gave him the confidence to expect that, as indeed would happen at Doha, most of these countries – apart from India – would be willing to make accommodations and allow the round to proceed.

### *Preparatory work in Geneva*

If much of 2000 was spent in mending fences with the members, some of that year and all of the rest was devoted to devising a draft ministerial declaration that would avoid the pitfalls that had trapped the last one. The work in Geneva proceeded on both formal and informal tracks. At the formal level, they held a great many General Council meetings, pursuing an approach of “negotiation by exhaustion”.<sup>40</sup> Informally, the chairmen of the General Council consulted widely with the members, finding out their offensive and defensive needs and looking for the spaces in-between where deals might be made. The WTO planners faced a deadline of July 2001, when a serious assessment was made of the prospects for launching a round. This was seen as the point by which a “go or no go” decision should be made on whether the objective of Doha would indeed be to launch a round and what issues should be incorporated in its scope. They also had to prepare for contingencies, including the possibility that yet another ministerial might fail. When asked in the spring of 2001 whether the Secretariat had a Plan B on hand, Mr Moore observed that “[w]e had best be prepared for plans B through G.”<sup>41</sup> The director-general and his staff worked from the assumption that a new grant of US negotiating authority would not be in hand by Doha, and that the ambitions of the US negotiators would be commensurately narrow. The problem then became how one could reconcile the comparatively modest US ambitions with the EC demand that the negotiations cover a wide range of topics, and the even greater degree of scepticism on the part of many developing countries.

The main work in putting together a package fell to General Council Chairman Stuart Harbinson of Hong Kong, China. Born in the same year as GATT, Mr Harbinson would be instrumental in the development of the WTO. He shared the director-general’s principal objective of getting the round launched, and to that end he continued the consultations that Chairman Kåre Bryn of Norway (see Biographical Appendix, p. 575) had started in 2000. Mr Harbinson held a long series of open-ended meetings among heads of delegation, in an informal, “bottom up” process. It soon came to centre on a checklist of subjects for possible inclusion in the discussions that Mr Harbinson offered to members on 20 April 2001. This was a *demandeur*-driven approach in which member governments held meetings outside the formal General Council process to determine the levels of support on such issues as non-agricultural market access, investment, competition policy, trade and the environment, fisheries subsidies and reform of the Dispute Settlement Understanding. The approach “discouraged formal proposals such as those which had been tabled before Seattle,” Harbinson (2009: 4) later wrote, with a “broad understanding among Geneva-based Representatives ... that at Doha their Ministers should be presented with a manageable text

and that, to this end, the General Council chairman would, at a certain stage in the preparatory process, need to be given some room for manoeuvre.”

The situation as of July was still unsettled. The General Council met on 30-31 July to debate how to move beyond an impasse, and the meeting produced general acknowledgement that progress on the implementation issue was critical. Returning to work after the August break, Mr Harbinson told the General Council on 4 September that delegations could not expect ministers to arrive in Doha with issues still unresolved. That approach, he warned, would work no better at Doha than it had at Seattle, and so he told the ambassadors they could soon expect a draft ministerial text. On 26 September, he circulated a draft<sup>42</sup> that was just nine pages long with six singular or paired square brackets (or the functional equivalent of “or”), and a draft decision on implementation-related issues and concerns<sup>43</sup> that was eleven pages long with seven sets of square brackets. The draft did not yet include solid language on agriculture, however, providing only bullet points on what that might cover. This was a serious *lacuna*, as Mr Moore and Mr Harbinson both considered agriculture the make-or-break topic for the round. “I always saw the deal as this,” the director-general later recalled: “If we could turn agriculture into a development issue that would bring us the Latins and most of the Africans.”<sup>44</sup> Getting Brazil and South Africa to support the launch of a new round was especially crucial for Mr Harbinson, and “what drove [them] to support the launch of the round was agriculture.”<sup>45</sup> South African Trade Minister Alec Erwin, for example, was important in rallying African opposition to the dumping of European agricultural products on the continent.

“[T]he test of a first rate intelligence,” F. Scott Fitzgerald (1936) once observed, “is the ability to hold two opposed ideas in the mind at the same time, and still retain the ability to function.” By that standard, there are sections of the Doha Ministerial Declaration that show flashes of genius. While negotiators sought to reduce ministerial decisions to a minimum they could not reconcile or paper over all of the differences in members’ positions. One way around that problem was not to force ministers to make a choice between stark alternatives but instead to craft language that would reflect the diversity of views. The objective here was to get past the immediate problem of launching the round. It would then be the task of the negotiators to find the trade-offs and compromises that would allow them to patch up the apparent contradictions in the marching orders that the ministers gave them. The clearest example of that phenomenon was the agricultural paragraph. The same may be said for the language negotiated in Doha on anti-dumping laws.

After holding a series of confessionals on agriculture, Mr Harbinson set out to devise whatever language on this subject would allow a round to be launched. Working with veteran Secretariat staffer Frank Wolter in late September, he drafted a paragraph “which had everybody’s little key word in it but without over-committing to any particular point of view,” he later recalled. “It was very carefully constructed, and all these code words were in it.”<sup>46</sup> Assembling some 15 to 18 delegations into Room F – the same one in which the final institutional negotiations of the Uruguay Round had been held (see Chapter 2) – Mr Harbinson dictated the paragraph to them. “I didn’t even dare to put it on a piece of paper,” requiring that they “scribble it down” by hand.<sup>47</sup> For those seeking fundamental reforms it called for “comprehensive negotiations

aimed at: substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support.” In response to the European Community’s demands for a “multifunctional” approach to agricultural trade it took note “of the non-trade concerns reflected in the negotiating proposals submitted by Members and confirm[ed] that non-trade concerns will be taken into account in the negotiations as provided for in the Agreement on Agriculture.” To developing countries it promised that special and differential treatment “shall be an integral part of all elements of the negotiations and shall be embodied in the schedules of concessions and commitments and as appropriate in the rules and disciplines to be negotiated,” taking into account “their development needs, including food security and rural development.”

In brief, the text recapitulated without reconciling the differing positions of the members, yet did so in a way that left no one feeling excluded. When Mr Harbinson asked the assembled delegates for comments:

There was total silence, which is extremely unusual for agriculture. And I think they realized that if one of them said something then somebody on the other side of the aisle would have to, and the whole thing would just go down the drain. So they just shut up. So I said, “Thanks very much.” And then later I put it on a piece of paper, and not a word was changed.<sup>48</sup>

The deal survived essentially intact from then through the final approval of the ministerial declaration. The only significant negotiations over the terms of that paragraph concerned the level of ambition over export subsidies, a subject on which the European Community made a large concession in the final hours of the ministerial (see Box 11.1). This new paragraph on agriculture was then distributed to the members as an addendum to the 26 September draft,<sup>49</sup> and was fully incorporated into the revised version on 27 October. That draft was distributed together with a new draft decision on intellectual property and access to essential medicines.<sup>50</sup> The chairman and the director-general forwarded the drafts to ministers on their own responsibility, without seeking approval as agreed texts but presenting them as bases for discussion in Doha.

### *Attack on the World Trade Center*

In the midst of these deliberations came an exogenous shock that would reorder positions and priorities on trade and much else. On the morning of 11 September 2001, a team of 19 Al Qaeda terrorists executed an attack on the United States in particular and against Western values in general. They hijacked four passenger jets, directing two of them as missiles against the World Trade Center in New York and one against the Pentagon. The passengers aboard a fourth plane overpowered their captors before crashing into a field in Pennsylvania. Nearly 3,000 people were killed that day, most of them Americans, but the victims also included citizens from 114 other countries. It was anti-globalization taken to its most illogical extreme.

The most immediate impact of 9/11 on the WTO was to inspire an abortive effort to relocate the ministerial conference from Doha (see Box 11.2), but the strategic response to the attacks was far





The Fourth WTO Ministerial Conference is held in Doha, 9 to 14 November 2001.



Mexican President Vicente Fox inaugurates the Fifth WTO Ministerial Conference, in Cancún, 10 September 2003.



The Sixth WTO Ministerial Conference is held in Hong Kong, China, 13 to 18 December 2005.



Ministers speaking for the Group of Ninety hold a press conference on 16 December 2005, at the Sixth WTO Ministerial Conference in Hong Kong, China.



Members gather in a mini-ministerial in Geneva that aims, but fails, to bring the Doha Round to a successful conclusion, 21 to 29 July 2008.



US Trade Representative Susan C. Schwab speaks at a press conference on 22 July 2008, at the start of the mini-ministerial.



Journalists surround Keith Rockwell, WTO spokesman, at a briefing during the mini-ministerial on 25 July 2008.



European Commissioner for Trade Peter Mandelson speaks with journalists on 26 July 2008, following a meeting of the Trade Negotiations Committee.



The Seventh WTO Ministerial Conference is held in Geneva, 30 November to 2 December 2009.



US Trade Representative Ron Kirk (*right*) and Chen Deming (*left*), China's Minister of Commerce, at the Seventh WTO Ministerial Conference on 30 November 2009.



Anand Sharma (*centre*), Commerce and Industry Minister of India, holds a press conference at the Seventh WTO Ministerial Conference, accompanied by Ambassador Ujal Bhatia (*right*), on 2 December 2009.



The Eighth WTO Ministerial Conference is held in Geneva, 15 to 17 December 2011.



Anthony Mothae Maruping of Lesotho, former chair of the Enhanced Integrated Framework Board, addresses members at the Eighth WTO Ministerial Conference on 16 December 2011.



The Ninth WTO Ministerial Conference is to be held in Bali, Indonesia, 3 to 6 December 2013.

more significant than the logistics of where it would be held. In the short term, these events gave the United States and its WTO partners an additional rationale for launching a round, and elevated its importance to the United States from desirable to indispensable. This was a time when "... or else the terrorists win" became a predicate appended to all manner of objects in public policy, and "we need to launch a new round in the WTO ..." was one of them. Within days of the terrorist attacks, US Trade Representative Robert Zoellick advanced the argument that multilateral trade liberalization was a weapon in the war on terror. Even in these extraordinary times, however, the two traditional barriers to multilateral trade agreements that were discussed in Chapter 2 – the Washington problem of negotiations with the US Congress and the Geneva problem of negotiations with the trading partners – still had to be addressed. Mr Zoellick went about solving the two problems in sequence. The Washington problem took longer to fix, with nearly a year passing before enactment of the Trade Act of 2002 would give US President George W. Bush a new grant of negotiating authority.<sup>51</sup> The Geneva problem, which soon relocated itself to Doha, was solved in two months of intense bargaining before and at the ministerial.

The first step was to seek that new grant of authority. The previous one had run out on the final day of the Uruguay Round, and the Clinton administration had ultimately given up in 1997 after spending two years trying to convince Congress to give him another. Mr Zoellick had already asked Congress to renew this power, which he insisted be called "trade promotion authority" (TPA) rather than the fast track,<sup>52</sup> but after 9/11 he ramped up the campaign. He stressed its importance in an opinion piece that the *Washington Post* published just nine days after the attacks, urging that legislators "send an unmistakable signal to the world that the United States is committed to global leadership of openness and understands that the staying power of our new coalition depends on economic growth and hope" (Zoellick, 2001: A35). That required, in addition to approving several other trade initiatives then pending, a new grant of authority "so America can negotiate agreements that advance the causes of openness, development and growth" (*Ibid.*). After many more months of bargaining and cajoling, Congress would indeed produce a TPA grant that covered any bilateral or multilateral trade agreements that might be concluded by mid-2007.<sup>53</sup>

Getting a new grant of negotiating authority was not just a procedural matter of internal US politics but was instead an integral part of Mr Zoellick's plan for tackling the Geneva problem. His strategy for launching the round was to give every member a stake in its success, and that could be achieved only if the United States were prepared to make serious concessions. That would require putting sacred cows such as the anti-dumping laws on the table, something the United States could not credibly do so without reversing the course that Mr Clinton and Ms Barshefsky had set. Their approach had been to accommodate the US negotiating objectives to the terms of the limited negotiating authority that the president had in hand, and to shape a round that fit within those restricted contours. Mr Zoellick instead proposed to go big, and to do that he needed a mandate from Congress.

Mr Zoellick worked closely with his EC counterpart, Pascal Lamy, in promoting the new round. While some transatlantic pairings of trade ministers are better compared to bad marriages than to good partnerships, the Lamy-Zoellick alliance worked exceptionally well. They had

already begun working on this issue months before, having declared in July their “shared goal ... to remove the stain of the failed Seattle trade talks, and help to launch a new round of global trade negotiations” (Lamy and Zoellick, 2001: A17). Both men were committed to the round and the strategy by which it could be launched, and worked together to help secure the support of other members through a combination of persuasion, inducements and strategic retreats from their established positions. The European Community had yet to secure renewal of the waiver needed to continue its preferential treatment of imports from former colonies, had a banana issue to solve with Latin American countries and might also be prepared to make concessions on agricultural export subsidies. These issues each gave Mr Lamy leverage with specific constituencies, allowing him to connect the resolution of these matters to the launch of a round, just as Mr Zoellick had potential concessions on pharmaceutical patents and anti-dumping laws in his back pocket.

The higher priority that the United States attached to the multilateral negotiations after 9/11 offers part of the answer to the question that is often posed, “What impact did these attacks have on the launch of the Doha Round?” Any speculation on the relationship between 9/11 and the Doha Round necessarily implies consideration of the counter-factual, yet it is impossible to test the proposition that the round would not have been launched but for the attacks. It is, however, reasonable to suppose that if the event had not taken place the United States may have been unlikely to place as high a priority as it did on the launch, that Mr Zoellick in particular may not have pressed as hard as he did for a solution and that securing congressional approval for a new grant of negotiating authority may have been more difficult.<sup>54</sup>

The United States had already been moving closer to acceptance of a new round in the months preceding 9/11, but the attacks heightened US interest and the priority that Mr Zoellick attached to it. In one of the mini-ministerials that took place earlier that year, Mr Zoellick reportedly told his counterparts that the United States wanted a new round, but in the event that the initiative failed they should not seek US support for a number of years because the country would otherwise be occupied with free trade agreement (FTA) negotiations. Within two years, those bilateral and regional options would once again be central to US trade strategy, and many of them were also tied to the war on terror. That was evident in 2003 when Mr Bush proposed that a US–Middle East Free Trade Area be established by 2013, and began negotiations with individual Arab countries as a first step towards that goal. Mr Zoellick insisted that there was no contradiction between these negotiations and the Doha Round, as they were all part of a strategy of competitive liberalization. That is a controversy to which we will return in Chapter 13.

What of the other WTO members? Opinions vary widely on the degree to which, individually and collectively, their approach to Doha was a response to the attacks on 9/11. Some suggest that it had only a marginal impact, offering an additional systemic reason to launch. It thus supplemented the other systemic argument that a new round was needed to undo Seattle and restore the reputation of the WTO. Others suggest that it had a positive impact on the positions taken by specific countries such as Egypt, Malaysia and Pakistan, each of which developed new partnerships with the United States. As a general rule, the positions that

commentators take on the relationship between 9/11 and the launch of the Doha Round seem to be a function of their own perception of whether the round should have been launched at all. Positions can shift over time: several proponents of the round added the foreign-policy argument to their appeals in the days leading up to the ministerial, but once the round was under way pro-trade observers typically argued that the economic rationale had been strong enough on its own to ensure a successful launch. Many critics cried foul, and trade-sceptics sometimes portray the connection in negative or even sinister terms. Minister Murasoli Maran of India complained at Doha that the United States was seeking to exploit 9/11 (Blustein, 2009: 113), and one anonymous developing country negotiator would later lament “the economic benefits that were extracted by the industrialized countries out of this disaster,” declaring that “if September 11 had not happened, the Doha ministerial declaration would not have contained even half of its obligations” (quoted in Kwa, 2003: 13). That characterization might be readily challenged on one point – the inclusion of an item in the ministerial declaration is better termed a commitment to negotiate for possible obligations in the future rather than a new obligation *per se* – but there is anecdotal evidence to suggest that some ministers adopted a more accommodating stance on some issues than they might otherwise have taken as a result of the atmosphere in which the ministerial was held.

## The Doha Ministerial Conference

Compared to the Seattle Ministerial Conference two years earlier, the Doha Ministerial Conference, on 9-13 November 2001, had several advantages. The WTO Secretariat and the ministers themselves were better organized and prepared, and would deal with a concise draft that was cluttered with fewer brackets. Divisions remained among the members over the same issues that had dogged them since Singapore, but there was now a greater willingness on the part of key players to make accommodations and trade-offs. The trade ministers of the European Community and the United States worked well with one another, and each was committed to a strategy that would bring others on board. That included the smaller, poorer members whom Director-General Mike Moore had courted for the past two years. The Doha Ministerial Conference also enjoyed a luxury that was lacking in Seattle, and would be missing again in Cancún: an accommodating host government that was willing to grant extra time on the closing day. The one notable disadvantage was that the concerns over the delegates' safety were now much greater. Whereas in Seattle they had to navigate around angry protestors and risked the odd whiff of tear gas, in Doha there was a widespread fear of a terrorist attack. None ever surfaced, but these concerns seemed all too real in a time of suicide bombers and anthrax scares.

The first order of business was to appoint the ministers who would act as “friends of the chair” and facilitators on specific issues. One such friend was Mexican Secretary of Finance Luis Ernesto Derbez, who would have a much higher-profile role in the next ministerial conference. He acted in this meeting as the facilitator for intellectual property issues (see Chapter 10). The other facilitators included the Singaporean Minister for Trade and Industry George Yeo, who took on agriculture; the Swiss Minister of Economic Affairs Pascal Couchepin, facilitator

for implementation; the Chilean Under Secretary for Foreign Affairs Heraldo Muñoz Valenzuela, dealing with environmental issues; the South African Minister of Trade and Industry Alec Erwin, who took charge of rule-making; and the Canadian Minister of International Trade Pierre Pettigrew, facilitating discussion on new issues. LDCs objected that informal consultations over these appointments discriminated against them because none of their representatives had been selected as facilitators. In response to these complaints, the chair appointed Botswana's Minister of Trade, Industry, Wildlife and Tourism Tebelelo Seretse, as a seventh friend of the chair to carry out consultations on such issues as labour standards, TRIPS and biodiversity, and reform of the dispute settlement system.

### *The highest-profile issue: agriculture*

The paragraph that Mr Harbinson developed formed the basis for the agricultural negotiations in Doha. The fact that ministers were willing to accept a draft that was so clearly unclear may offer the best evidence of their collective interest in succeeding at Doha, and their willingness to adopt a declaration that would put off many of the difficult decisions for a later day. For agriculture, that was especially notable in the case of countries that are normally die-hards on the subject. Japan, the Republic of Korea and Norway indicated that they would accept the draft, leaving the European Community alone in its opposition. Brussels still objected to the phase-out of export subsidies, but ultimately – on the last night of the conference – accepted part of Mr Harbinson's original language specifying the objective of achieving “reductions of, with a view to phasing out, all forms of export subsidies.” This was one of several strategic retreats that Mr Lamy and Mr Zoellick were each prepared to make in support of a “go big or go home” approach to the round.

The ministers ultimately approved in paragraph 13 the language that Mr Harbinson developed, with a few adjustments. The substantive part of the paragraph read as follows:

Building on the work carried out to date and without prejudging the outcome of the negotiations we commit ourselves to comprehensive negotiations aimed at: substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support. We agree that special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall be embodied in the schedules of concessions and commitments and as appropriate in the rules and disciplines to be negotiated, so as to be operationally effective and to enable developing countries to effectively take account of their development needs, including food security and rural development. We take note of the non-trade concerns reflected in the negotiating proposals submitted by Members and confirm that non-trade concerns will be taken into account in the negotiations as provided for in the Agreement on Agriculture.

The schedule set for the negotiations in paragraph 14 was ambitious. The draft sent to ministers had not specified any dates, but the language they approved called for modalities to

“be established no later than 31 March 2003.” Participants were to “submit their comprehensive draft Schedules based on these modalities no later than the date of the Fifth Session of the Ministerial Conference” – that is, before the Cancún Ministerial Conference of 2003 – and the negotiations were to be “concluded as part and at the date of conclusion of the negotiating agenda as a whole.”

### *Developed country issues: the Singapore issues, labour and the environment*

All of the issues that the European Community had been working on since Singapore were in the draft sent to ministers, but with differing degrees of solidity. The draft had called for negotiations to begin right away on government procurement and trade facilitation but took a more cautious approach to investment and competition policy. For each of those topics it specified that at the next ministerial “a decision will be taken on modalities of negotiations in this area.” The draft made no commitment on labour negotiations, and provided for continued work on four environmental issues. Several developing countries were opposed to negotiations on each of these topics, with the degree of opposition being greatest on labour. The divisions between developed and developing countries on some of these issues were not resolved until the very last minutes of the conference, as is discussed later.

The investment issue is often framed in North–South terms, yet the divisions over the topic can be more complex. As was already seen in the run-up to Seattle, there were several developing countries that promoted negotiations on this issue. The same was true at Doha, where Chile, Costa Rica and the Republic of Korea favoured more ambitious language on investment and other Singapore issues. They remained the exceptions, with India and Malaysia being more typical in their opposition to negotiations on investment altogether. ACP countries took the position that capacity-building needed to take place before developing countries could agree to negotiations on investment and competition.

The environmental issue made for complex relations. The European Community called for negotiations to clarify the WTO–MEA relationship, provide for eco-labelling and adopt the precautionary principle. Japan, Norway and Switzerland backed the EC position but developing countries, Canada and the United States were opposed. Botswana, Egypt, Guatemala, Malaysia and Zambia spoke out against the EC proposal at the heads-of-delegation meetings. Developing countries were especially concerned that negotiations on the environment could undo their gains in market access for agricultural concessions.

Mr Lamy and Mr Zoellick acted collaboratively in dealing with other countries on several issues, but when it came to the environment they had to negotiate with one another. The green movement held more sway in Europe than it did in the new Republican administration, and the two men were also divided by the different interests of their constituents. The United States was (together with Iceland and the Philippines) one of the *demandeurs* for negotiations on fisheries subsidies. The European Community (together with Japan and the Republic of Korea) had resisted the demands for negotiations on this subject, arguing that any further

talks under the Agreement on Subsidies and Countervailing Measures should apply to all sectors and that the fisheries issue was already under discussion in other forums. This is an issue on which the US position prevailed, with paragraph 28 of the ministerial declaration calling for negotiations. For its part, the United States was willing to accommodate European demands on other environmental issues. Members agreed to launch negotiations on the relationship between WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs), albeit without prejudice to “the WTO rights of any Member that is not a party to the MEA in question”; on procedures for regular information exchange between MEA secretariats and the relevant WTO committees, and the criteria for the granting of observer status; and on the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.

Labour was once again on the table, but not for long. The language that trade unions preferred was, “We support the work begun in the International Labour Organisation on the social dimensions of globalisation, and we commit the WTO to working effectively with the ILO in a permanent working forum.” The European Community proposed this language, with the support of Canada, New Zealand and South Africa, but the change of government in the United States meant that this issue lost one of its chief *demandeurs*. In the end, the ministerial declaration merely reiterated the established position, with paragraph 8 “reaffirm[ing] our declaration made at the Singapore Ministerial Conference” and taking “note of work under way in the International Labour Organization (ILO) on the social dimension of globalization.” That had been the position in the draft sent to ministers. Labour was effectively off the table in the round from that point forward, with the proponents – a group that the United States would rejoin after another change in government – recognizing that any negotiations that might be proposed in the WTO could only be contemplated as part of a post-Doha agenda.

### ***Developing country issues: TRIPS, Cotonou, bananas and implementation***

Developing countries came to Doha with offensive interests of their own. One of them, which led to approval of the Declaration on TRIPS and Public Health, has been examined in Chapter 10. The willingness of the United States to approve this text was the most immediate evidence of Mr Zoellick’s seriousness about seeking a balance of concessions that would give all members a stake in the round. That down-payment helped to secure support in Africa and Latin America.

Most developing regions had interests in two other initiatives that put them at odds with the European Community and with one another. One was a WTO waiver for the Cotonou preferential market access arrangement, an agreement by which former colonies in the ACP region enjoyed preferential access to the EC market. The other was resolution of the banana issue, another preferential arrangement for ACP countries. Both the Cotonou and the banana issue divided the ACP beneficiaries from those developing countries in Latin America and Asia that did not benefit from the programmes. Cotonou was highly unpopular in Latin America and South-East Asia, as it gave advantages to imports of products such as bananas and canned tuna from (for example) Dominica and Mauritius that might otherwise come from

(for example) Honduras and Thailand. Similarly, the EC banana policy favoured the “euro bananas” of Africa and the Caribbean over the “dollar bananas” of Colombia, Costa Rica, Ecuador, Honduras and Panama.

The resolution of these issues offer a good example of how disputes need not always produce negative results, but may instead generate currency that can be spent for other purposes. In both instances, Mr Lamy was able to tie the results to the launch of the round and give yet another set of countries a stake in the larger initiative. The requested waiver for the Cotonou initiative had been bogged down in the Council for Trade in Goods for over a year, and while it could have been resolved there, it was instead deferred to the ministerial. The opponents of this waiver threatened to bring the conference to a standstill, but this issue – when coupled with resolution of the banana case – attracted more supporters than opponents to the round. The members granted the waiver on the final day of the ministerial, and by that same instrument they approved an arrangement by which the waiver would be suspended if the European Community failed to maintain the current market access for imports of non-ACP bananas. The commitment to phase out the import quotas on bananas and replace them with tariffs by 2006 won over Latin American banana-exporting countries, although some members (notably Costa Rica, Ecuador, Honduras, Panama and especially Thailand and the Philippines) continued to have concerns. “[I]t was unclear to the very last moment whether the Philippines and Thailand would block the Cotonou waiver request,” according to a contemporary account, “due to objections raised by the countries over the EC’s preferential treatment of canned tuna imports from the ACP within the Cotonou framework” (ICTSD, 2001).

The meeting produced two documents that established the mandate for negotiations on implementation issues and on special and differential treatment for developing countries. The Doha Ministerial Declaration reaffirmed that “provisions for special and differential treatment are an integral part of the WTO agreements” (paragraph 13) and declared the agreement of the ministers that “all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational” (paragraph 44). The declaration also provided for expanded funding for technical assistance, and expressed the non-binding objective of duty-free, quota-free access for products originating from LDCs. This mandate was further elaborated in the Decision on Implementation Issues and Related Concerns. The ministerial set a two-track process of negotiation on these matters. One track consisted of the regular negotiations, which were to be conducted on the basis of a standard round, while the Committee on Trade and Development – Special Session appeared to be on a separate track that could produce an “early harvest” of improvements on the S&D principles.

### *Anti-dumping*

The anti-dumping laws divide not only developed from developing but also some developed members from others. The European Community and especially the United States have the greatest interest in preserving these laws, while their control or elimination is a top priority for Canada, Chile, Japan and others. The fact that Mr Zoellick was willing to place this and other

trade-remedy laws on the table, even if in a very restricted fashion, demonstrates how far he was prepared to go in order to secure more support for the launch. With the possible exception of cabotage (see Chapter 2) and the immigration laws, there is perhaps no cow more sacred in US trade policy. Although seen by many trading partners as a form of administered protectionism, the law enjoys deep and bipartisan support in Congress.

The Friends of Anti-dumping Negotiations had been meeting at the Japanese mission in Geneva for some time, hoping to leverage reforms on this issue in the new round. This had long been a goal of countries such as Canada and Chile, each of which had found it difficult to make headway on the topic in FTAs with their partners – except, that is, for the one that they reached with one another in 1996. They hoped for a broader solution to their problem, with multilateral disciplines that would reduce the frequency with which their exports faced costly litigation and heavy penalty duties. As an interim step in that direction, they won inclusion in the draft declaration calling for negotiations to clarify and improve the disciplines of the agreements on anti-dumping and on subsidies and countervailing measures.

The subsequent development of the text in the Doha Ministerial Declaration illustrates two complementary, yet contradictory, themes in how the round was launched. One of those themes was the Zoellick strategy of placing even sacred cows on the block in order to give everyone a stake in the round and demonstrate the seriousness of the United States. The other was the Harbinson strategy of artfully crafting language that would not prejudge the outcome of negotiations on sensitive subjects, but would instead reflect the views of both the *demandeurs* and their interlocutors. Those two themes were complementary in the sense that they each contributed to the launch of the round, but contradictory insofar as the second theme could ultimately undercut the first. Members were willing at the Doha Ministerial Conference to concentrate on the complementarities; the contradictions would be more prominent when they reconvened in Cancún.

The draft declaration had already taken a partial walk down that road of constructive ambiguity, having provided for negotiations on anti-dumping and countervailing measures “while preserving the basic concepts and principles underlying them.” The new language, as worked out between the *demandeurs* and Grant Aldonas, the under secretary for international trade at the US Department of Commerce, put still more qualifying words into that declaration. What they finally agreed to, and that became part of paragraph 28, provided not just for the preservation of those basic concepts and principles but also of their “effectiveness” and “objectives,” and referred not just to the agreements but also to “their instruments.” Or to read paragraph 28 in its entirety:

In the light of experience and of the increasing application of these instruments by members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 [i.e. the anti-dumping code] and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements

and their instruments and objectives, and taking into account the needs of developing and least-developed participants.

The real difficulty came not in working out this language but in convincing the Japanese delegation to accept this formulation. Other members of the Friends of Anti-dumping Negotiations were at pains to persuade their disappointed colleague to go along with the deal.

### *The resolution*

The net effect of these deals was to move members who had previously been opposed or sceptical into support of the launch, some of them enthusiastically and some of them reluctantly. Several deals and strategic retreats were made in the final hours of the conference, notably the European Community's agreement that the negotiations would aim for the elimination of agricultural export subsidies and the US approval of the TRIPS and public health declaration.

The principal opponents in those last hours were African countries and India. Mr Moore and his staff were closely involved in dealing with these holdouts, and here his travel over the previous two years paid off. When African delegates left the green room at 3:00 am on the final day they were strongly opposed to negotiations on the Singapore issues, and some among them were determined to block consensus over the launch. They then asked for a meeting with Mr Moore, at which they told the director-general that that they opposed talks on the new issues, but then offered, "We believe in you because you know us."<sup>55</sup> They trusted him sufficiently to start the negotiations on most issues, while putting off to the next ministerial a final decision on how those new issues would be handled.

That same point was key to the negotiations with India, which was now alone in its opposition. Even a single member has a veto in an organization that is run on the basis of consensus, but exercising that right in the face of otherwise unanimous support would have put India in a very uncomfortable position. Here again, Mr Moore's travels and connections put him in a position to play another card. He asked another prime minister to call their Indian peer in order to ask that he instruct Mr Maran to withdraw his objections. That could be done only if India were given a face-saving compromise. This came in the form of language that India proposed, requiring explicit consensus before negotiations could begin on any of the four Singapore issues and not just the two (investment and competition policy) for which the draft had already contemplated a delayed start. "But while that was being hammered out the closing session had already started," Mr Harbinson recalled, "so people like Pierre Pettigrew of Canada did a thirty-minute intervention talking about how wonderful the weather was in Doha and all sorts of things." Other ministers stepped in with time-filling interventions of their own, running out the clock by another 20 minutes here or a quarter hour there in order to allow sufficient time to clear every letter and comma in the new wording. "And then eventually we got the signal that everything was agreed, and the text was adopted."<sup>56</sup>

This deal provided that in each of the four paragraphs calling for negotiations on the Singapore issues “negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations.” A quick reading of that language might lead the uninitiated to believe that all that was at issue were the modalities, but the language made clear that there was as yet no consensus to negotiate on these issues at all. The conference chairman confirmed this point. When Qatari Finance, Economy and Trade Minister Yousef Hussain Kamal (see Biographical Appendix, p. 581) introduced the ministerial declarations at the closing plenary session on 14 November, he took special note of the fact “that some delegations have requested clarification concerning paragraphs 20, 23, 26 and 27 of the draft declaration” (i.e. those laying out a work programme for the Singapore issues). He said that –

with respect to the reference to an ‘explicit consensus’ being needed, in these paragraphs, for a decision to be taken at the Fifth Session of the Ministerial Conference [i.e. in 2003], my understanding is that, at that session, a decision would indeed need to be taken by explicit consensus, before negotiations on trade and investment and trade and competition policy, transparency in government procurement, and trade facilitation could proceed. In my view, this would also give each member the right to take a position on modalities that would prevent negotiations from proceeding after the Fifth Session of the Ministerial Conference until that member is prepared to join in an explicit consensus.<sup>57</sup>

This was yet one more example of an item on which the members opted to postpone the resolution of their differences, and would prove to be another case in which a manoeuvre that worked in the late GATT period would not do as well in the WTO period. The ministerial declaration that launched the Uruguay Round had gaps and constructive ambiguities of its own, including the uncertain standing in which it left the huge new issue of trade in services. Then too India was among the doubters, and the sceptics insisted that the topic be isolated from the rest of the round. Over time their concerns abated and GATS was fully incorporated into the new WTO system. Not so with the Singapore issues. In the two years that separated Doha from Cancún, the gap would widen between the *demandeurs* and their opponents.

The final order of business at Doha was to christen the new round, a prerogative that had always been extended to the director-general. Here, Mr Moore made a choice that underlined the importance he attached to developing countries, but also one that immediately sparked controversy. The round would not go by that traditional designation, but would officially be entitled the Doha Development Agenda (DDA). There were two elements that went into that naming exercise, the most obvious – but also the most criticized – being the decision to include the word “development”. That came under criticism both from developed countries that thought it placed too much emphasis on the developing countries as well as from developing countries that thought it smacked too much of a public relations exercise. As for the “agenda” part, Mr Moore would later observe that there were “ministers who arrived in Doha who had told their parliaments that they would not launch a new round.” By calling it an

agenda he could tell them, “I’ve already said that we’re not going to have a round. That’s why it’s called a development agenda, not a round.”<sup>58</sup> That title has since continued to be used in formal documents, either in full or with the initials DDA, but in common parlance the negotiations are almost always called the Doha Round.

## Endnotes

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- 1 Author's interview with Lord Brittan on 17 January 2013.
- 2 *Ibid.*
- 3 Jamaica, Kenya, Tanzania and Zimbabwe later joined the group.
- 4 Author's interview with Alejandro Jara on 23 September 2012.
- 5 See *Commission of the European Communities: Statement by Sir Leon Brittan Q.C. Vice-President of the European Commission*, WTO document WT/MIN(96)/ST/2, 9 December 1996.
- 6 See *Brazil: Statement by H.E. Mr Luiz Felipe Lampreia Minister for External Relations*, WTO document WT/MIN(96)/ST/8, 9 December 1996.
- 7 *Ibid.*
- 8 See *Commission of the European Communities: Statement by Sir Leon Brittan Q.C. Vice-President of the European Commission*, WTO document WT/MIN(96)/ST/2, 9 December 1996. Lord Brittan would later say that he had expected this issue to be taken off the table because it "was just not going to be acceptable to a sufficient number of countries." He had nonetheless decided to put the issue forward "because that was what the Europeans wanted," especially those with labour governments. Author's interview with Lord Brittan on 17 January 2013.
- 9 The acronym LLDC, rather than LDC, was a carry-over from previous decades when this group was sometimes called the lowest-level developing countries. WTO usage changed from LLDC to LDC in 1998. The extra "L" in LLDC was definitively removed from references to *least-developed* countries when this same acronym came to be used to define the *land-locked developing* countries. This more recent category of LLDCs dates from the International Ministerial Conference of Landlocked and Transit Developing Countries and Donor Countries and International Financial and Development Institutions on Transit Transport Cooperation held in Almaty in August 2003.
- 10 The full title of this initiative was the Integrated Framework for Trade-Related Technical Assistance, including for Human and Institutional Capacity-Building, to Support Least-Developed Countries in Their Trade and Trade-Related Activities. It would later be replaced by the Enhanced Integrated Framework, as discussed in Chapter 5.
- 11 See *An Integrated Framework for Trade-Related Technical Assistance, including for Human and Institutional Capacity-Building, to Support Least-Developed Countries in Their Trade and Trade-Related Activities*, WTO document WT/LDC/HL/1/Rev.1, 23 October 1997.
- 12 Author's interview with Mr Moore on 20 February 2013.
- 13 William Butler Yeats, "The Second Coming" (1919).
- 14 See *Preparations for the 1999 Ministerial Conference – Ministerial Text: Revised Draft*, WTO document JOB(99)/5868/Rev.1, 19 October 1999.
- 15 The Friends of Multifunctionality, which dated from the Uruguay Round, included the European Community, Japan, Mauritius, Norway and Switzerland. See Moon (2012) on the multiple meanings of multifunctionality to different groups.
- 16 See, for example, Narr et al. (2006). For an opposing view, see Gillham and Marx (2000).

- 17 The sign said “Is the WTO in Control of Seattle Also?” on one side and “I Have a Right To Non-Violent Protest” on the other. See [www.aclu.org/free-speech/seattle-settles-aclu-lawsuit-over-violation-free-speech-rights-during-wto-protests](http://www.aclu.org/free-speech/seattle-settles-aclu-lawsuit-over-violation-free-speech-rights-during-wto-protests).
- 18 Author's interview with Ms González on 26 September 2012.
- 19 *Ibid.*
- 20 *Ibid.*
- 21 *Ibid.*
- 22 See *Preparations for the 1999 Ministerial Conference – Negotiations on Forestry and Fishery Products: Communication from Japan*, WTO document WT/GC/W/221, 28 June 1999.
- 23 The text of the agreement is posted at [www.wto.org/english/news\\_e/pres99\\_e/pr154\\_e.htm](http://www.wto.org/english/news_e/pres99_e/pr154_e.htm).
- 24 See *Preparations for the 1999 Ministerial Conference: Communication from Australia*, WTO document WT/GC/W/156, 24 March 1999.
- 25 See *Preparations for the 1999 Ministerial Conference – Proposals Regarding Food Security in the Context of Paragraph 9(a)(ii) of the Geneva Ministerial Declaration: Communication from India*, WTO document WT/GC/W/342, 29 September 1999.
- 26 See *Preparations for the 1999 Ministerial Conference – Proposals under Paragraphs 9(a)(i) and 9(a)(ii) of the Geneva Ministerial Declaration: Communication from Cuba, Dominican Republic, Egypt, El Salvador, Honduras, Sri Lanka, Uganda and Zimbabwe*, WTO document WT/GC/W/374, 15 October 1999.
- 27 See *Preparations for the 1999 Ministerial Conference – EC Approach on Agriculture: Communication from the European Communities*, WTO document WT/GC/W/273, 27 July 1999.
- 28 See *Preparations for the 1999 Ministerial Conference – Negotiations on Agriculture: Communication from Japan*, WTO document WT/GC/W/220, 28 June 1999.
- 29 See *Preparations for the 1999 Ministerial Conference – Negotiations on Agriculture: Communication from the United States*, WTO document WT/GC/W/186, 20 May 1999.
- 30 Cited in ICTSD, *Bridges Daily Update* #4, 3 December 1999, at <http://ictsd.org/i/wto/wto-mc3-seattle-1999-wto/bridges-daily-updates/19090/>.
- 31 See *Preparations for the 1999 Ministerial Conference – EC Approach to Trade and Investment: Communication from the European Communities*, WTO document WT/GC/W/245, 9 July 1999.
- 32 See *Preparations for the 1999 Ministerial Conference – Contribution to the Preparatory Process: Communication from Kenya*, WTO document WT/GC/W/233, 5 July 1999.
- 33 See *Preparations for the 1999 Ministerial Conference – The Interaction Between Trade and Competition Policy: Communication from Kenya on behalf of the African Group*, WTO document WT/GC/W/300, 6 August 1999.
- 34 See *Preparations for the 1999 Ministerial Conference – EC Approach to Trade and Competition: Communication from the European Communities*, WTO document WT/GC/W/191, 2 June 1999.
- 35 Quoted on [www.wto.org/english/thewto\\_e/minist\\_e/min99\\_e/english/about\\_e/resum03\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/resum03_e.htm).
- 36 Author's interview with Mr Rodriguez Mendoza on 26 September 2012.

- 37 Author's interview with Mr Moore on 20 February 2013.
- 38 *Ibid.*
- 39 *Ibid.*
- 40 Author's interview with Mr Moore on 20 February 2013.
- 41 Author's interview with Mr Moore on 9 April 2001.
- 42 See *Draft Ministerial Declaration*, WTO document JOB(01)/140, 26 September 2001.
- 43 See *Draft Decision on Implementation-Related Issues and Concerns*, WTO document JOB(01)/139, 26 September 2001.
- 44 Author's interview with Mr Moore on 20 February 2013.
- 45 Author's interview with Stuart Harbinson on 24 January 2013.
- 46 *Ibid.*
- 47 *Ibid.*
- 48 *Ibid.* Citations of the text are from paragraph 13 of the Doha Ministerial Declaration.
- 49 See *Draft Ministerial Declaration*, WTO document JOB(01)/140/Add.1, 8 October 2001.
- 50 See *Draft Declaration on Intellectual Property and [Access to Medicines][Public Health]*, WTO document JOB(01)/155, 27 October 2001.
- 51 Mr Bush signed the Trade Act of 2002 into law on 6 August 2002. The round had been under way for nine months before Congress approved this grant of authority, but that was not unusual. The same happened in both the Tokyo and Uruguay rounds, except that in each of those rounds the interval between the launch and the enactment of the negotiating authority was two years.
- 52 One cannot help but see a parallel between Mr Moore's preference for "agenda" over "round" and Mr Zoellick's for "trade promotion authority" over "fast track", with each of them dealing with constituencies that had become dissatisfied with the way business had been done in the past. The concern over the title "fast track" was the implication that it would allow the executive to railroad a bill through Congress without consultation or debate.
- 53 The initial grant was through mid-2005, with a further two-year extension allowed if the president requested it and Congress did not deny the request.
- 54 That part of the argument depends as well on other items that were included in the Trade Act of 2002. Some members of Congress may have been more attracted to the bill for its expanded preferences to Colombia and other trading partners, which was seen as a way of supporting an ally in the fight against narco-terrorism.
- 55 Author's interview with Mr Rodriguez Mendoza on 26 September 2012.
- 56 Author's correspondence with Mr Harbinson on 30 January 2013.
- 57 See [www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/min01\\_chair\\_speaking\\_e.htm#clarification](http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_chair_speaking_e.htm#clarification).
- 58 Author's interview with Mr Moore on 20 February 2013.

# 12 The conduct of the Doha Round

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Aye, and I saw Tantalus in violent torment, standing in a pool, and the water came nigh unto his chin. He seemed as one athirst, but could not take and drink; for as often as that old man stooped down, eager to drink, so often would the water be swallowed up and vanish away, and at his feet the black earth would appear, for some god made all dry. And trees, high and leafy, let stream their fruits above his head, pears, and pomegranates, and apple trees with their bright fruit, and sweet figs, and luxuriant olives. But as often as that old man would reach out toward these, to clutch them with his hands, the wind would toss them to the shadowy clouds.

Homer  
*The Odyssey* (Book 11)  
Translation by A.T. Murray (1919)

## Introduction

The myth of Tantalus speaks to the trials of trade negotiators in the Doha Round, for whom the events since 2001 have been a long series of vexing temptations. The deal has seemed within reach more than once, only to be pulled away cruelly. And like the fruits that stretched out before Tantalus, forever alluring yet always beyond his grasp, nothing has tantalized and frustrated negotiators more than the prospects for liberalized trade in agriculture.

These negotiations have played out at more than one level. To shift to another watery metaphor, one might think of trade negotiations as being similar to the navigation of ships through a river or canal. Depending on the nature of the waterway, this process may involve either one or two levels of navigation. The entirety of the Suez Canal is at sea level, and a ship that enters it at one end can steam directly to the other without help or hindrance. In that same sense, a few of the issues that are taken up in Geneva have relatively low political profiles and can be handled almost entirely by the missions there without requiring more than routine guidance and clearance from capitals. By contrast, passages such as the Panama Canal that traverse more difficult landscapes require that ships pass through locks. Those locks lift or lower the ships so as to move them between sections of a waterway that are at different levels. In the same way, some trade negotiations require the periodic intervention of ministers, whose principal task is to get the talks past those major decision-points that stymie the ambassadors and other representatives in Geneva.<sup>1</sup> Ambassadors can take the talks only so far before they must ask ministers to break the logjams and raise or lower the ambitions of the negotiations. Like the Panama Canal, the main locks in a round are at

the start and the end of the journey; a round cannot be launched without the decision of the ministers on its overall shape, and it cannot be concluded without their agreement on its final terms. Negotiators might prefer that the involvement of ministers be limited to those two tasks, but a round will typically require additional intervention at various points throughout the process, whether in the biennial ministerials or in periodic mini-ministerials. The difficulty of a round might be measured by the number of times that ministers are called upon to do this heavy lifting. Any round that resembles the Mississippi River, which has 27 locks between its origins in Minnesota and its terminus in New Orleans, may demand too much of ministers and run the risk that their participation will become more a hazard than an aid to navigation.

This distinction between the levels is not absolute, as the lines between them can get blurred. The ambassadors are typically in attendance when the ministers gather, especially when those meetings are held in Geneva. In this age of modern communications, the ministers will be figuratively looking over the shoulders of the ambassadors much of the time. It would also be misleading to suggest that the only progress that the ambassadors can make is incremental. They can achieve breakthroughs on their own, both in the drafting of individual texts and in the bundling of multiple texts into a larger package. By the same token, ministers can sometimes deal with agreements at a granular level. As a general rule, however, the events discussed in Chapter 11 show why it is advisable to maintain a division of labour in which the ambassadors handle the details and the ministers are brought in only when there is a manageable number of judgment calls and trade-offs to be made.

A truly comprehensive history of the Doha Round would exhaustively cover all issues and events at both of these levels. That is not a practical goal for the present book. Doing true justice to the negotiations in Geneva would require that each of several topics on the table be given chapter-length reviews, covering the competing proposals and the evolving chairman's texts in detail. Space does not permit that kind of treatment. Nor does time: at the time of writing, the state of the round is uncertain, being neither very active nor certifiably dead, and only with the passage of more time will we have the perspective needed to identify the key events and issues that led to its final *denouement* – whatever that might be. For want of that perfect hindsight, the approach taken here is to seek a balance in coverage of the ambassadorial and ministerial levels.

The first half of the chapter reviews the development of the negotiating texts in Geneva. It offers some detail on the evolution of the texts for goods and services, but the rest of the presentation focuses more on the content of the texts from 2008 to 2012 than on the steps by which they reached that point. The second half turns to the ministerial level. Depending on the meetings that one wishes to count, trade ministers may have gathered as many as 32 times from 2001 to 2012.<sup>2</sup> This analysis focuses on two especially consequential points when ministers were asked to intervene. These include one ministerial that had been planned as a mid-term review but became a debacle (Cancún in 2003), and a mini-ministerial that Tantalus would recognize (Geneva in 2008), when the deal got maddeningly close to completion before it was once again yanked away. Ministers met on several other occasions throughout this period, including full-dress ministerials in Hong Kong, China (2005) and Geneva (2009 and 2011) and several other mini-ministerials of varying levels of formality and attendance, but for the sake of clarity those meetings are not reviewed at length here. The Hong Kong Ministerial Conference did make two very important

contributions, first by reviving the round post-Cancún and second by making further advances in the development of the texts. Much of what was accomplished in that second category represents a continuation and an elevation of the Geneva negotiations discussed in the first half of this chapter, however, and hence is not discussed at length separately. As for the other ministerial meetings, their accomplishments on other topics are discussed elsewhere in this book.

In addition to considering the conduct of the negotiations at the ambassadorial and ministerial levels, it is also important to situate these talks within the larger global picture. The Uruguay Round already demonstrated how developments in the high politics of war, peace and diplomacy can affect ambitions in the low politics of trade. Those negotiations started during the endgame of the Cold War and finished with China and the states of the former Soviet Union applying for membership in the new WTO. In the case of the Doha Round, however, the developments in the world at large seem to have complicated rather than facilitated the conduct of the round. The turning point for many of the events discussed below is 2003. While there had been considerable slippage in meeting deadlines during the first two years of the negotiations, those delays were not unusual for the trading system. The Cancún Ministerial Conference that September was a much larger setback from which negotiations have never fully recovered. It would go too far to suggest that the specific outcome in Cancún, or the course of the round thereafter, can be attributed to the larger issues affecting relations between the key players, but those issues clearly have not helped matters.

In contrast to the mood immediately following the 9/11 attacks, when the launch of the new round may (to a debatable degree) have been facilitated by a sense of global solidarity in opposition to terrorism, 2003 witnessed new divisions and the scrambling of once-rigid alliances. An important step in that direction came in the rancorous debate of the United Nations Security Council that preceded the invasion of Iraq in March. Among the 31 members of the US-led Coalition of the Willing, one found more former members of the Warsaw Pact than original members of the North Atlantic Treaty Organization, together with several Asian, African and Latin American countries. After Cancún, when the United States stepped up its negotiation of free trade agreements (FTAs), several of its new FTA negotiating partners were also members of that coalition. In June 2003, Brazil hosted a meeting with India and South Africa, a step towards the formation of the Group of Twenty (G20) in the WTO and, outside the confines of trade policy, also towards the creation of the BRICS (Brazil, the Russian Federation, India, China and South Africa). Although that latter group does not function in the WTO, its formation was emblematic of the new alignments emerging in the post-Cold War world. Like other leading members of the trading system, these countries have also shown at times a willingness to subordinate their interests in trade to their objectives in other areas.

One should also consider the changes in the leadership of the WTO and its member states over the course of the round. There were three WTO directors-general from 2001 through 2012, as well as four trade ministers each in Brazil, China and the United States; six EU trade commissioners; nine trade ministers in Japan; and many other changes of government in WTO members both large and small. Several of those positions, including the WTO director-general, will have changed hands once again in 2013. An optimist might point out that every churn in the composition of the key players offers the chance to reinvigorate talks, but a realist might note that some of the ministers who arrived after 2003 appeared to place a lower priority on the conclusion of the round than had those ministers who invested so much in its launch.

## The Geneva negotiations

This section reviews the development of the principal negotiating texts in the Doha Round, which take the form of “chairman’s drafts”. For a few of the topics discussed below, we consider the evolution of the texts over time, especially in the case of the negotiations on non-agricultural market access (NAMA), the three pillars of agricultural trade and trade in services. WTO negotiations now encompass a far wider range of issues than market access, but the topics that drove the Uruguay Round still receive the closest attention at the ministerial level. The discussion of other texts focuses primarily on their content through the end of 2008. To the extent that these texts have been refined since then, most of the changes have been at the margins. Space does not permit a detailed examination of the steps by which those still-incomplete texts were developed in the years from 2001 to 2008.

The presentation in this section is thus more thematic than chronological. The principal events that helped to shape the content of these texts are summarized in Table 12.1, including the three ministerial events that are discussed at greater length in the second half of this chapter. The principal purpose of the presentation that follows is to set up that latter review, showing the main decisions that ministers were asked to make on these topics.<sup>3</sup>

**Table 12.1. Key events in the Doha Round**

14 November 2001	The round is launched by the Doha Ministerial Declaration.
1 February 2002	The Trade Negotiations Committee (TNC) agrees on how to organize the negotiations; chairs for the negotiating groups are chosen two weeks later.
31 March 2003	Members miss deadlines in the agricultural and services talks.
13 August 2003	The European Community and the United States release a joint agricultural text that is soon criticized sharply by other agricultural exporters.
August, 2003	The G20 forms in opposition to the joint EC–US agricultural proposal.
10-14 September 2003	The Fourth Ministerial Conference in Cancún ends in failure, with agriculture and the Singapore issues being the most controversial topics.
2 August 2004	The “July Package” creates a partial framework for the conclusion of the round.
1 January 2005	The original deadline for completing the round is missed.
13-18 December 2005	The Sixth Ministerial Conference in Hong Kong produces agreement to eliminate agricultural export subsidies but other agricultural issues are stalled.
30 April 2006	Negotiators miss the NAMA and agriculture deadlines set in Hong Kong.
24 July 2006	Director-General Pascal Lamy suspends the negotiations after a G6 fails to break an impasse on agriculture.
31 January 2007	Mr Lamy calls for a full resumption of negotiations at a meeting of the TNC.
12 April 2007	G4 talks begin in Delhi focusing on concrete priorities and sensitivities.
21 June 2007	The G4 process breaks down at a meeting in Potsdam.
8 February 2008	The chairs of the NAMA and agriculture negotiating groups issue revised drafts.
21-29 July 2008	A mini-ministerial in Geneva comes close to solving the round but fails when the Indian and US ministers disagree on an agricultural safeguard and other issues.
6 December 2008	The chairs of the negotiating groups issue revised drafts.
21 April 2011	The chairs of the negotiating groups issue status reports.

### *Non-agricultural market access*

The market access negotiations in a round, whether they focus on NAMA, agricultural goods or services, can be reduced to a three-stage process. The first stage is the preparation and launch of the round. As was examined in Chapter 11, the ministerial declaration that emerges from that process will identify the issues that are to be negotiated and will define in very broad strokes what the negotiations will aim to achieve, how members will go about reaching these goals and when the results (and some interim steps) are expected. The second stage is the development of modalities, or the main formulas or principles by which (for example) tariffs on specific products will be reduced or eliminated. As was discussed in Chapter 9, for goods these modalities will typically revolve around mathematical formulas that are modified with various types of exceptions or flexibilities. The third stage is scheduling, in which the modalities are then applied line-by-line and member-by-member to develop the precise schedules of commitments on goods and services. Scheduling is partly a technical exercise and partly a continuation of the negotiations. The entirety of the Doha Round market access negotiations through 2012 have been stuck in that middle part of the process, coming close to agreeing on the modalities but never making the transition from that stage to the scheduling of commitments.

Tariffs on goods, and especially on the non-agricultural variety, are the original issue around which the multilateral trading system was built. This is an area where one might perceive Zeno's paradox to be at work. Zeno of Elea pointed out in the fifth century BCE that before something can travel from point A to point B it must first travel half of that distance (let us say to point  $A_1$ ), and before it can get from point A to point  $A_1$ , it must travel half of that distance.<sup>4</sup> That kind of salami-slicing can go on forever, there being an infinite number of half-way points that must be crossed before one can get to the final destination, and if Zeno was right that point may never be reached. Although Zeno's paradox was perhaps presented in philosophical jest, even its modest cuts of ever-diminishing magnitude exceeded the achievements in the successive rounds of tariff-reduction negotiations. The percentages by which the GATT negotiators cut tariffs in any round never rose as high as 50 per cent. Each of these cuts were made not to the original wall but to what the negotiators received from the round that came before them, such that a cut of any given percentage made in the Uruguay Round would, all things equal, be a far smaller accomplishment than a cut at that same percentage in the Geneva Round of 1947. The underlying cause for these modest gains is not philosophical geometry but political economy, with nearly every country having entrenched interests that demand protection from the results of market access negotiations. Each round cut or eliminated tariffs on many other goods, but it was the exceptional items that remained protected, sometimes with peak tariffs that are far above a country's average. Peaks are often concentrated in agricultural sectors, but they can also be found in labour-intensive, industrial products in developed countries, and in the infant industries of developing countries.

The challenge for the Doha Round NAMA negotiations was to do better than failing once more to halve the distance between the remaining tariffs and zero. That goal is difficult to reach when several of the participants in these negotiations – perhaps the great majority of them – prize the defensive objective of avoiding significant reductions in their own applied

tariffs more highly than the offensive interest of obtaining reductions in the applied tariffs of their trading partners. The NAMA talks picked up from the tariff bindings that the WTO inherited from the Uruguay Round, as adjusted by a few post-1995 sectoral negotiations, with the ministerial declaration mandating negotiations “by modalities to be agreed, to reduce or as appropriate eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs and tariff escalation, as well as non-tariff barriers, in particular on products of export interest to developing countries.” The declaration further specified that “[p]roduct coverage shall be comprehensive and without *a priori* exclusions,” and that the “negotiations shall take fully into account the special needs and interests of developing and least-developed country participants, including through less than full reciprocity in reduction commitments.” Unlike agriculture and services, where the ministerial declaration set a matched pair of target dates for initial steps (see below), in Doha the ministers did not specify when the NAMA modalities were due. With the ministers having decided that the entire round should be completed by the start of 2005, however, the talks would have had to reach the scheduling stage no later than early 2004.

### *The proposed modalities*

The negotiations over modalities started in 2002, when members proposed various formulas that might be used. The only members to present clearly defined formulas early in the negotiations were China, the European Community, India, Japan, the Republic of Korea and the United States. While they differed significantly in the details, these proposals shared certain characteristics. As summarized by a WTO Secretariat review:<sup>5</sup>

- All proposals reduce higher rates by proportionately more than lower rates. Some proposals include continuous increases in reduction rates, others provide for threshold levels after which higher reduction rates apply. This is accomplished through different specifications;
- All proposals have similar effects at higher levels of tariffs, although with different absolute impacts due to different parameters;
- Some proposals take into account the diversity of the members’ profiles via an explicit provision in the functional design of the formula for the current level of base rates and;
- The treatment of the lower tariff rates differs significantly among the proposals.

Based on Laird et al.’s (2003) projections of the effects that these different proposals would have on applied tariffs, the US approach was the most ambitious for both developed and developing countries, while the least ambitious were the Korean proposal (for developed countries) and the Indian proposal (for developing countries). The proposals can be classified in three pairs of roughly comparable types.

China and the European Community each proposed variations on the Swiss formula, the principal difference being that the Chinese proposal would diminish the ambition of this formula (allowing for a differentiated application according to countries’ existing average tariffs) while the EC proposal<sup>6</sup> was more ambitious (providing a “compression mechanism” for

peak tariffs). The Indian and Korean proposals were each based on linear reductions, again with differing levels of ambition: under the Indian proposal developing countries' cuts would be at two thirds the level of the developed countries' cuts, while the Korean proposal combined linear cuts with minimum cuts per tariff line. The latter approach would aim for a 40 per cent reduction of the trade-weighted average tariff rate, with all bound tariffs being cut by at least 20 per cent.

The Japanese and US proposals were each eclectic. Japan's "hybrid approach" provided for a target average tariff rate that varied according to each WTO member's level of development. The US proposal<sup>7</sup> was a very ambitious scheme that would take a two-phase approach to eliminating all tariffs on all products imported by all parties. In the first phase (which was then proposed to be 2005 to 2010), tariffs would be eliminated on all products that were then subject to rates of 5 per cent *ad valorem* or less. A Swiss formula with a coefficient of eight would be applied to all other products; as was explained in Chapter 9, this means that a maximum tariff of 8 per cent would be imposed by the end of the period, and most products would be subject to tariffs that are substantially less than 8 per cent. The proposal would also eliminate tariffs on several specific sectors during this first phase (not including textiles and apparel). In the second phase (2010-2015), all remaining tariffs would be completely eliminated through linear cuts.

Chairman Pierre-Louis Girard (Switzerland) of the Negotiating Group on Market Access put forward a proposal of his own that would be applied differently depending on countries' characteristics.<sup>8</sup> The chief element of this proposal was a Swiss formula in which the maximum coefficient would be equal to a country's simple average tariff multiplied by a common factor that was to be negotiated. Like the Chinese and Japanese proposals, this approach would tend to produce less ambitious cuts for countries that were less developed or had higher average tariffs (often the same thing).

Coalitions of developing countries made NAMA proposals that were based not on formulas but on the flexibilities that might modify the application of these formulas. The composition of three such coalitions was summarized in Table 3.3. Members of the NAMA-11 group such as Brazil, India and South Africa were concerned that if ambitious coefficients were plugged into the formulas they would be required to cut their bound tariffs by deeper margins than rich countries, thus violating the Doha mandate for "less than full reciprocity" in reduction commitments. Other developing countries joined either the Small, Vulnerable Economies (SVEs) group or the coalition of Paragraph 6 countries, both of which sought further flexibilities for poorer countries.

The members began bargaining over an agreed approach once these modalities were on the table. An important step in that direction came in a joint proposal that Canada, the European Community and the United States made for the NAMA negotiations just prior to the Cancún Ministerial Conference. These three members proposed what they termed "a simple, ambitious, harmonisation formula applied on a line-by-line basis (e.g. Swiss Formula), with a single coefficient." This proposal did not specify what the coefficient would be. The joint paper

also proposed “sectoral initiatives ... in particular for products of export interest to developing countries.” As an example, it suggested “harmonisation or elimination for textiles and apparel.”<sup>9</sup> Several elements of this proposal anticipated the draft modalities that would be developed over the coming years.

Despite all the debate over sometimes exotic variations on formula cuts, the NAMA negotiations slowly gravitated towards a consensus that the principal modality would be the familiar Swiss formula. The texts moved to that position from the unadopted Cancún Ministerial Declaration of 2003 to the July Package of 2004, and then to the Hong Kong framework of 2005. There then followed three major questions, as well as several subsidiary ones.<sup>10</sup> First, what coefficient of reduction (i.e. the *a* coefficient, as explained in Chapter 9) would be plugged into the formula? Second, would that *a* coefficient and other aspects of the formula differ for developed and developing countries, and if so to what degree? Third, what kinds of products or members might be subject either to less ambitious reductions (e.g. by providing exemptions or other flexibilities) or to more ambitious reductions (e.g. by being treated in separate zero-for-zero negotiations)?

### *The Rev.3 document*

It took two more years for the answers to these questions to become solid enough to take the shape of an evolving series of chairman’s drafts. Following an earlier modalities paper of 17 July 2007, Chairman Don Stephenson of Canada issued a 60-page document on 8 February 2008 (WTO document TN/MA/W/103), which – three revisions later – became the 126-page version of 6 December 2008 (WTO document TN/MA/W/103/Rev.3). Each new iteration in this series represented an advance towards greater specificity from the one that came before it, but even in that last version one may find up to three brackets on a page. For the sake of simplicity, we may skip past each of the earlier versions of the deal to review the main outlines of what is commonly called Rev.3. That version includes some refinements that came in or after the crucial mini-ministerial of July 2008, which is discussed later in this chapter, but its basic contours reflect what was under negotiation in that high-level meeting.

Rev.3 is based on a Swiss formula with separate coefficients for developed and developing countries. The *a* coefficient for developed members would be 8, as the United States had proposed, and developing members would have a menu of options under which the coefficient might be 20, 22 or 25. Developing countries would be permitted to choose among these coefficients, and would be granted greater flexibilities if they opted for the lower numbers.<sup>11</sup> The tariff reductions would be implemented gradually over a period of five years for developed members and 10 years for developing members. Rev.3 includes an anti-concentration clause that would prevent members from excluding entire sectors from tariff cuts. It provides that the full formula tariff reduction must apply to at least 20 per cent of the tariff lines, or 9 per cent of the value of imports, in each tariff chapter. This provision answers concerns of the European Community and the United States, and was put in against the opposition of developing countries such as Argentina, China and India.

Many members would receive special treatment under Rev.3, ranging from marginal adjustments in the standard flexibilities to outright exemptions. Some of these provisions relate to broad categories of members, while others enumerate one or more specific members that would receive that treatment. Least-developed countries (LDCs) would be entirely exempt from tariff reductions, and the draft also includes special provisions for the SVEs and for a dozen developing countries with low levels of binding. The poorer developing economies (other than LDCs) would, however, be required to increase the number of bindings and reduce the water in their tariff schedules. Rev.3's treatment of tariff erosion is especially delicate. On the one hand, it aims to ameliorate preference erosion by slowing the phase-down of tariffs on certain products of interest to countries that benefit from preferential access to developed markets. On the other hand, these adjustments are themselves adjusted by accelerating on a preferential basis the reduction of tariffs on the same products when imported from five countries that are disproportionately affected by the preferences extended to other developing countries.<sup>12</sup> These five "disproportionately affected countries" are all in Asia, including three LDCs (Bangladesh, Cambodia and Nepal) and two others (Pakistan and Sri Lanka). Recently Acceded Members (RAMs) sought provisions reflecting the fact that they made tariff commitments more recently than did the original WTO members. Rev.3 would exempt 11 RAMs from new tariff reductions.<sup>13</sup> It would also give China, Croatia and Chinese Taipei another three years to phase in their NAMA commitments, and Oman would not be required to reduce any bound tariff below 5 per cent after applying the modalities. Other provisions in the draft would either offer or (pending the adoption of bracketed language) might offer one form or another of special treatment to Argentina, the Plurinational State of Bolivia, Botswana, Brazil, Fiji, Gabon, Lesotho, Namibia, Paraguay, South Africa, members of the Southern African Customs Union, Swaziland, Uruguay and the Bolivarian Republic of Venezuela.

Rev.3 observed that further work was required in sectoral negotiations, where some members envisaged deeper reductions or even zero-for-zero deals. The 14 sectors under consideration for these deeper cuts included automotive and related parts; bicycles and related parts; chemicals; electronics/electrical products; fish and fish products; forestry products; gems and jewellery products; raw materials; sports equipment; health care, pharmaceutical and medical devices; hand tools; toys; textiles, clothing and footwear; and industrial machinery. Participation in the sectoral initiative would be voluntary, but some members wanted others to participate in order to achieve a balance in the overall level of ambition. Sectorals require a "critical mass" of members to be adopted.

The draft also included an annex that compiled, but did not choose among, a series of proposals for dealing with non-tariff barriers.

### *Environmental goods and services*

The ministerial declaration of 2001 also provided for special attention to an undefined category that it entitled "environmental goods and services". Without further specifying what types of goods and services fall within this rubric, paragraph 31 (iii) provided for the "reduction or, as appropriate, elimination of tariff and non-tariff barriers" on them.

The WTO Committee on Trade and Environment in Special Session (CTESS) has not, at the time of writing, agreed what should be included within the definition of “environmental goods.” Several members submitted proposals to the CTESS proposing candidates for the list, naming a total of 480 products. The goods proposed for inclusion fall within a broad range of environmental categories, such as air pollution control, renewable energy, waste management, and water and waste-water treatment. Some of these products are also relevant to climate change mitigation; they include products generating renewable energy, such as wind and hydropower turbines or solar water heaters. The coalition of mostly developed members known as the Friends of Environmental Goods<sup>14</sup> negotiated among themselves to produce a consolidated, joint proposal<sup>15</sup> in early 2007. It constituted a much-reduced list of 153 items. Members submitted six lists of environmental goods by the end of 2011, covering 411 tariff lines at the six-digit level. That year the chairman of the negotiations reported that “a number of technical difficulties remain,” with further work needed by delegations and their experts.<sup>16</sup>

This is an area where, like trade in services, the failure to reach a multilateral consensus leads some members to consider alternative approaches to the negotiation. At the Seventh Ministerial Conference in 2009, Australia, the European Union, Japan, New Zealand, Qatar and the United States proposed negotiations to liberalize trade in “green” goods and services outside the framework of the Doha Round. The issue is also under consideration in the Asia-Pacific Economic Cooperation forum.

### *Agriculture: the three pillars*

The agricultural negotiations are more complicated than the NAMA talks for two reasons. One is the greater political and social sensitivity of agriculture in most member states. This leads negotiators to adopt a more cautious approach, to devise formulas that are less likely to result in significant reforms, and to seek a greater range and number of exceptions or special treatment. The other way in which agriculture differs from NAMA is that three distinct types of commitments are at issue here, usually called the “pillars”. Members agreed in the Doha Ministerial Declaration to comprehensive negotiations dealing with each of the three pillars: “substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support.” These three topics are dealt with in sequence below.

Members did not make much progress in translating the broad principles of the Doha Ministerial Declaration into actual modalities until well past the deadline. Paragraph 14 of that declaration specified that modalities “shall be established no later than 31 March 2003.” Stuart Harbinson, who was to chair the agriculture negotiations first as the permanent representative from Hong Kong, China in 2002 and then as Director-General Supachai Panitchpakdi’s *chef de cabinet* in 2003, circulated draft modalities in February and March 2003, but these were not adopted. The period between the Cancún and Hong Kong Ministerial Conferences then intervened, with three years passing before the new chairman, Crawford Falconer of New Zealand, circulated a series of reference papers and then produced

a new modalities paper in July 2006. Five revisions followed, four of them in 2008 alone. The 6 December 2008 version of that text (Rev.4) is discussed below.

One of the main causes for the failure in Cancún was the sharp disagreement that arose over a joint paper that the European Community and the United States issued on agriculture just before that ministerial. Some aspects of that 13 August 2003 text<sup>17</sup> would later make their way into the successive drafts of the (unadopted) Cancún Ministerial Declaration, the work programme approved in Hong Kong, and ultimately the Rev.4 draft of 2008, while others would not survive the process. The proposal as a whole was heartily condemned by other agricultural exporters immediately after it was released. It is also credited with exacerbating the divisions between the developed and developing members of the Cairns Group and the resulting creation of the G20.<sup>18</sup> The G20's first act was to issue a counter-proposal to the EC-US paper just a week after that draft's release. In a sign of the group's desire to engage in negotiations, the G20 framework proposal tracked the format of the chairman's proposal on agriculture. Where the draft ministerial text largely reflected the EC-US positions, the G20 paper called for much more ambitious cuts in agricultural subsidies. The reaction that the EC-US paper provoked on the part of the G20 developing countries then inspired a counter-reaction from another group of developing countries, with the African, Caribbean and Pacific (ACP) countries joining with the least-developed countries to form the G90 (see Chapter 3). Where the G20 thought that the transatlantic proposal did not go far enough in the reduction of domestic support, the G90 members believed that it went too far in the reduction of MFN tariffs and, therefore, in the margins of preference that they enjoyed in the developed country markets.

### *Market access and safeguards*

Although they are usually dealt with as distinct subjects, the issues of market access (i.e. tariff concessions) and safeguards (i.e. temporary restrictions on injurious imports) were eventually blended together in agricultural negotiations at the ministerial level (see Table 12.2).

Market access for agricultural products is handled separately from NAMA negotiations in the WTO because many members have higher and more complex tariffs on agricultural goods,<sup>19</sup> as well as far greater sensitivities in this sector. Members with import sensitivities in agriculture would generally prefer that any formulas used to reduce tariffs be less aggressive in their structure (e.g. favouring a linear over a Swiss formula), have less ambitious coefficients of reduction, and be modified with more generous flexibilities; members with offensive interests in this sector have just the opposite set of preferences. The Rev.4 draft splits some of the differences between the objectives of these contending factions.

**Table 12.2. Proposed modalities for agricultural market access and safeguards in the Doha Round**

	<b>Developed members</b>	<b>Developing members</b>
Tiered formula for tariff cuts	Tiered reductions in four tiers that start at a 50 per cent cut for tariffs in the 0-20 per cent range and rise to 70 per cent cuts for those $\geq 75$ per cent	Tiered reductions in four tiers that start at a 33.3 per cent cut for tariffs in the 0-30 per cent range and rise to 46.7 per cent cuts for those $\geq 130$ per cent
Average cut	Minimum of 54 per cent	Maximum of 36 per cent
Phase-in period	Six steps over five years	Eleven steps over ten years
Tariff quotas	New access opportunities as a percentage of domestic consumption	Two thirds of what the developed countries must do
Sensitive products (deviations of one to two thirds from the formula)	Up to 4 per cent of tariff lines	Up to 5.3 per cent of tariff lines
Special products	None	Up to 12 per cent of lines may be self-selected, of which 5 per cent will not be cut; overall cut of 11 per cent
Special Agricultural Safeguard (SSG)	1 per cent of tariff lines, eliminated in seven years	2.5 per cent of lines; for SVEs this is reduced to 5 per cent over 12 years
Special Safeguard Mechanism (SSM)	None	Higher tariffs may be imposed when either the specified volume or price triggers are exceeded

Source: WTO document TN/AG/W/4/Rev.4, 6 December 2008.

Notes: LDCs are exempt from making these cuts.

In their pre-Cancún joint paper, the European Community and the United States proposed a bracket-filled “blended formula” in which tariff lines would be subject to three different types of cuts. The proposal suggested that certain percentages of tariff lines could be designated to these three types of cuts, but left those percentages in empty brackets. The most import-sensitive lines would face a minimum cut, others would be reduced by a Swiss formula and still others would be made duty-free. In those first two categories, the text left blank the spaces that would specify the coefficients of reduction. The text also provided that: “For the tariff lines that exceed a maximum of [ ]% Members shall either reduce them to that maximum, or ensure effective additional market access through a request:offer process.”<sup>20</sup> It would thus set a cap that no tariffs could exceed, but once more left the specific number in brackets. The G20 alternative was no more specific than was the EC–US paper. It closely matched the structure of that earlier paper, with the same three categories of cuts and the same empty brackets, although it did include a few innovations such as additional (if unspecified) cuts in the case of tariff escalation and a requirement that “developed countries ... provide duty-free access to all tropical products.”<sup>21</sup>

The Rev.4 option strikes a compromise between the peak-killing Swiss formula and less ambitious modalities by providing instead for a tiered cut, and further modifies the deal to account for special and sensitive products. As discussed in Chapter 9, tiered cuts are structured like a linear formula, but can operate something like a restricted version of the Swiss formula by specifying higher cuts for higher tariffs. As summarized in Table 12.2, the

Rev.4 cuts would rise from 50 per cent to 70 per cent for developed countries as one moves up the tiers, and from 33.3 per cent to 46.7 per cent for developing members. These cuts would have to result in a minimum average reduction of 54 per cent for developed members; developing members would not be required to exceed a maximum average of 36 per cent.

The modalities would also provide flexibilities for sensitive and special products. These provisions, which were developed in what Blustein (2009: 252) termed an “orgy of loophole creation”, would permit some products to be protected from full cuts or, in some cases, from any cuts at all. Members could deviate from the formula for sensitive products, a category that was created at the insistence of developed countries with restricted agricultural markets (e.g. the European Community, Japan and Switzerland). Rev.4 gives no definition of what constitutes a sensitive product, leaving it up to the members to decide which products they will designate and on what basis. Members would have to provide tariff quotas for these items in order to ensure at least some access to the market. The cuts on goods that are so designated would deviate from the formula by one third, one half or two thirds of the cut, with the tariff quota adjusted in relation to the deviation. Developed members could specify up to 4 per cent of their tariff lines for this treatment (half of the 8 per cent that the European Community had demanded), and the developing countries could do so for 5.3 per cent.

While the sensitive product flexibility is available to both developed and developing members, only the latter would have the right to designate an additional category known as special products. These come in response to demands from the Friends of Special Products, or more simply the G33, a group that sought the right to exclude certain products from liberalization. In 2005, the G33 made a proposal based on concerns over food and livelihood security. These include –

the importance of particular products for the subsistence strategies of the rural poor and small and vulnerable farmers; the importance that a product may represent a source of livelihood for the population of a disadvantaged region; the significance of a crop or product for the consumption profile of a country; the potential structural effects of an import substitute in the consumption profile of the country and the contribution of a product to the economy as a whole.<sup>22</sup>

The G33 did not propose a precise definition as to what constitutes a special product. Like sensitive products, these are left to the member in question to designate. Rev.4 would permit developing countries to designate up to 12 per cent of their tariff lines in this category, with up to 5 per cent of the tariff lines being exempt from cuts altogether.

Another issue that became a key point of contention in 2008 was special safeguards for agricultural products. The negotiations on this point in the Doha Round came to differ in two fundamental respects from one of the original purposes of safeguards, which is to serve as a confidence-building measure for negotiators. As first developed in a 1942 agreement between Mexico and the United States and later incorporated in GATT Article XIX, the underlying aim of a safeguard (or “escape clause”) was to give negotiators in the importing country the confidence to make substantial tariff cuts. It did so by assuring them that, in

exceptional cases in which liberalization led to an injurious surge of imports, they could temporarily suspend those concessions. In the Doha Round, however, the agricultural safeguard had just the opposite effect on negotiators: it made exporting countries worry that their counterparts might utilize this option to the maximum extent possible, treating it more like a form of contingent flexibility in the market access commitments than as a mechanism reserved for exceptional cases, perhaps to the point that their markets would be more restricted after the negotiations than they had been before. Far from building confidence, in this instance the safeguards became a point of suspicion and mistrust – especially between the United States and China.

Rev.4 provides for two types of agricultural safeguard. Both of these differ from the traditional safeguard insofar as they do not require a showing that a domestic industry has been injured by rising imports; each of these safeguards could instead be imposed on the basis of “triggers” (i.e. higher import volumes or reductions in market prices that are taken as *prima facie* evidence of sharply rising imports). The less controversial of these is the Special Agricultural Safeguard (SSG), with Rev.4 modifying provisions in the existing Agreement on Agriculture. Under Article 5 of that agreement safeguard duties can be triggered automatically when import volumes rise above a certain level or if prices fall below a certain level; it is not necessary to demonstrate that serious injury is being caused to domestic producers. The SSG can be used only on products that were tariffied (i.e. their quotas were converted to tariffs) in the Uruguay Round, and even then only on products that members designated for this treatment. Thirty-nine WTO members reserved the right in that previous round to use a combined total of 6,156 special safeguards on agricultural products, ranging from as few as two products (Uruguay) to as many as 961 (Switzerland–Liechtenstein).<sup>23</sup> Rev.4 would revise Article 5 to require that developed members reduce to 1 per cent of scheduled tariff lines the number of items eligible for this treatment, and eliminate them altogether within seven years. For developing members the coverage would be reduced to 2.5 per cent of tariff lines, and to 5 per cent for SVEs.

The Special Safeguard Mechanism (SSM) is much more controversial. It differs from the SSG in three respects: it is an innovation that had not been in the Uruguay Round agreement, it would be available only to developing countries, and it would cover all agricultural products. The safeguard could be triggered by either high volumes or low prices. The volume-based SSM in Rev.4 would be applied on the basis of a rolling average of imports in the preceding three-year period. The additional duties applied would rise according to the level by which this base volume is exceeded. When the volume of imports in any year is 110 per cent to 115 per cent of the base imports, the maximum additional duty that could be imposed on applied tariffs may be up to 25 per cent of the current bound tariff or 25 percentage points, whichever is higher. Note that this may be much larger than a 25 per cent increase over the applied tariff, especially if – as is the case for the agricultural tariffs of many developing countries – the bound rates are well above the applied rates. The additional duties would be higher for imports in the 115 per cent to 135 per cent range (40 per cent or 40 percentage points) or above 135 per cent (50 per cent or 50 percentage points). A price-based SSM would apply when the import price of the shipment entering the customs territory of a developing member falls below a trigger price equal to 85 per cent of the average monthly MFN-sourced price for that product for the most recent three-year period.

This remedy would apply on a shipment-by-shipment basis, with the additional duty not exceeding 85 per cent of the difference between the import price and the trigger price.

The SSM was a key point of contention in the July 2008 negotiations, as discussed later in this chapter. When the chair incorporated a revised SSM into the Rev.4 paper five months later he characterized the proposal as “uneven” and “fragile”, and not “ready for inclusion in the text per se because it is utterly untested.”<sup>24</sup>

### *Export subsidies*

In what may be the clearest and most important concession made in the round by a single WTO member, the European Community agreed to the elimination of agricultural export subsidies. The commitment covers not just outright subsidies but other programmes such as export credits, state trading enterprises and food aid that can have the equivalent result. That concession did not come immediately. Although the Doha Ministerial Declaration provided for the elimination of these subsidies the EC–US agricultural proposal of 2003 would have walked back from that commitment. The proposal called for the elimination of export subsidies only for an unspecified group of “products of particular interest to developing countries,” while for the remaining products members would “commit to reduce budgetary and quantity allowance for export subsidies”<sup>25</sup> and agree to other disciplines that appeared to limit but not eliminate these subsidies. This proposed retreat produced sharp protests and contributed to the formation of the G20 in opposition to the EC–US proposals. The G20 instead urged in its paper that members “commit to eliminate over a [x] year period export subsidies for the products of particular interest to developing countries” and “eliminate over a [y] year period export subsidies for the remaining products.”<sup>26</sup>

After Cancún, the issue moved back towards the position in the Doha Ministerial Declaration. In the July 2004 framework agreement, the European Community accepted a commitment to eliminate these subsidies by a date to be agreed. The issue was fully back on track by the Hong Kong Ministerial Conference (December 2005), with the European Community agreeing to end all subsidies by 2013. The 2008 draft would eliminate half of all export subsidies by the end of 2010, and the rest by the end of 2013. It also included revised provisions on export credit, guarantees and insurance, international food aid (with a “safe box” for emergencies), and exporting state trading enterprises.

### *Domestic support*

The level of production subsidies offered by key WTO members has declined in the years since the Uruguay Round negotiators created the “semaphore” system of colour-coding and reductions, as was discussed in Chapter 9, but it does not necessarily follow that it was the WTO disciplines that led to the reductions. It is more plausible to argue that higher prices for agricultural commodities have reduced the perceived need to provide support to farmers. Critics also suggest that some of that reduction may represent box-shifting (i.e. changes in the composition and labelling of subsidies) and thus exaggerate the degree to which members

have actually reformed their practices. Both of these concerns inspired plans to devise a new way to quantify and limit subsidies. The main conceptual change in the Doha Round has been to shift the focus from the four-colour semaphore system of the Uruguay Round, in which only the amber-box subsidies were subject to real restrictions,<sup>27</sup> to a targeting of the trade-distorting subsidies. These subsidies include, but are not limited to, those in the amber box.

The EC–US Joint Text of 2003 implied that trade-distorting subsidies should be treated differently than others, but did so in a way that sparked criticism from the G20 countries. It called for a deal that would “[r]educe the most trade-distorting domestic support measures in the range of []% - []%,”<sup>28</sup> but the empty brackets left doubt as to just how ambitious these cuts might be. The doubts were further encouraged by the draft’s suggestion that “Members may have recourse to less trade distorting domestic support,” setting conditions that would allow the use of these subsidies:

- (i) for direct payments if:
  - such payments are based on fixed areas and yields; or
  - such payments are made on 85% or less of the base level of production; or
  - livestock payments are made on a fixed number of head.
- (ii) support under 1.2.(i) shall not exceed 5% of the total value of agriculture production by the end of the implementation period.
- (iii) the sum of allowed support under the AMS, support under 1.2.(i) and de minimis shall be reduced so that it is significantly less than the sum of de minimis, payments under Article 6.5, and the final bound AMS level, in 2004.<sup>29</sup>

This proposal left some members with the impression that the European Community and the United States were more interested in devising a deal that would allow them to retain the domestic-support programmes that they already had in place than in negotiating a deal that would impose real disciplines on production subsidies.

The G20 proposed a more aggressive approach to the issue. It sought elimination of the blue box altogether, a cap and strict criteria for the green box, and timelines for reducing amber box subsidies. It also proposed that “products benefiting from domestic support which are exported and which have accounted ... for more than [%] of world exports of that product the domestic support measures shall be subjected to the upper levels of reduction, with a view to elimination.”<sup>30</sup>

In the negotiations that followed the failed Cancún Ministerial Conference, the focus on trade-distorting subsidies eventually produced a concept known as Overall Trade-Distorting Domestic Support (OTDS). This approach emerged in July Package of 2004, which provided for separate and complementary reduction formulas in overall support and its components. This measurement builds upon the existing system of colour-coded subsidies and uses the AMS as its foundation, but covers a wider range of subsidies. The base value for any member’s OTDS is calculated by adding three components: (1) the Final Bound Total AMS specified in a

member's schedule; (2) a share of their total agricultural production (10 per cent for developed using 1995 to 2000 as the base, 20 per cent for developing from 1995 to 2000 or from 1995 to 2004); and (3) the higher of average blue box payments as notified to the Committee on Agriculture, or 5 per cent of the average total value of agricultural production, in the 1995 to 2000 base period. This provides a base value that is then subject to cuts.

The Rev.4 draft provides for tiered cuts in OTDS, with higher cuts for those members with higher levels of subsidies. The European Union would cut by 80 per cent, the United States and Japan by 70 per cent and all others by 55 per cent. Cuts would be made over five years for developed countries or eight years for developing countries, and a down-payment of 33 per cent for the European Union, Japan and the United States, and 25 per cent for all others. Within these cuts, members would have to reduce their AMS levels by 70 per cent for the European Union, 60 per cent for Japan and the United States and 45 per cent by all others. The per-product amber box support would be capped at the average notified support from 1995 to 2000, with some variations allowed. For *de minimis* supports, developed countries would cut to 2.5 per cent of production immediately and developing countries would make two thirds of the cut over three years to 6.7 per cent of production (with exceptions for programmes mainly for subsistence or resource-poor farmers). Blue box supports would be limited to 2.5 per cent of production for developed and 5 per cent for developing countries, with caps per product and modified flexibilities for more vulnerable countries. As for the green box, reforms would seek to ensure that these payments truly are decoupled from production levels, and with tighter monitoring and surveillance on developing countries' food stockpiling.

### Cotton

The inclusion of an issue in the Doha Ministerial Declaration did not guarantee that the topic would remain on the table, as was shown by the experience of three of the four Singapore issues, nor did the exclusion of an issue from that declaration prevent it from becoming part of the round. That is what happened in the case of cotton subsidies, which the Cotton-Four members (Benin, Burkina Faso, Chad and Mali) succeeded in bringing to the table.<sup>31</sup> The process by which this was done is discussed in the ministerial section of this chapter; here we review the provisions of Rev.4 that deal with cotton.

Cotton has appeared in draft modalities in all three pillars since July 2004, with a formula that results in deeper subsidy cuts for this commodity than for other products. The Rev.4 draft would require that AMS support for cotton be reduced by the following formula:

$$R_c = R_g + \frac{(100 - R_g) \times 100}{3 \times R_g}$$

$R_c$  = Specific reduction applicable to cotton as a percentage.

$R_g$  = General reduction in AMS as a percentage.

The formula would be applied to the base value of average support that members notified for cotton from 1995 to 2000. While the formula might appear arcane, it actually has a very simple result: it virtually guarantees that AMS support for cotton would be reduced by more than 80 per cent. The construction of the formula is such that no number above zero that is “plugged into”  $R_g$  will yield a reduction of less than 82 per cent, and any value for  $R_g$  that is between 41 per cent and 83 per cent will reduce cotton subsidies in the 80 per cent to 90 per cent range. The draft provides that the blue box limit for cotton will be one third of the product-specific limit that would otherwise have resulted from this methodology.

The draft further requires that the development aspects of cotton be addressed as provided for in paragraph 12 of the Hong Kong Ministerial Declaration. That paragraph endorsed the efforts of the director-general to secure support for cotton producers from bilateral donors and multilateral and regional institutions, and “urge[d] the development community to further scale up its cotton-specific assistance.”

### *Geographical indications for wine and spirits*

The issue of geographical indications (GIs) for wine and spirits falls under the rubric of intellectual property rights, but merits discussion in close proximity to the agricultural negotiations because the products at issue fit within the WTO definition of agriculture. This topic is a carry-over from the Uruguay Round. Article 23.4 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) had mandated that:

In order to facilitate the protection of geographical indications for wines, negotiations shall be undertaken in the Council for TRIPS concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system.

Members committed in paragraph 18 of the Doha Ministerial Declaration to complete these negotiations. While that TRIPS provision set no deadline for completing these negotiations the ministerial declaration called for them to be finished by the Fifth Ministerial Conference in 2003. The negotiators missed that deadline and there is little reason to expect that they will make up for that oversight in the foreseeable future. As was reviewed in Chapter 3, this is an issue on which there are large and opposing coalitions that take sharply different positions. The divisions here are best seen not as North–South but as Old World (and allies) versus New World, with wine-producing countries outside of Europe generally opposing a registry with mandatory effects. The divisions are apparent in a Draft Composite Text of April 2011, which is replete with square brackets from the title through the last paragraph.<sup>32</sup>

Paragraph 18 of the Doha Ministerial Declaration also provided less specifically for discussion to address “issues related to the extension of the protection of geographical indications ... to products other than wines and spirits.” These discussions, which could affect other products such as cheese, similarly tend to divide Old World from New World interests.

## Services

The Uruguay Round negotiators left a great deal of unfinished business on services, as was reviewed in Chapter 10, and the political landscape for completing this work did not become easier in the early years of the WTO period. The General Agreement on Trade in Services (GATS) agreement instead became one of the principal targets of anti-globalization activists in the late 1990s of the WTO, some of whom charged that liberalization of social services sectors would lead to the forced privatization of such sectors as education and health care and thereby endanger universal access to these services.<sup>33</sup> This became a theme in the French press at the turn of the century,<sup>34</sup> for example, and in the medical and education communities of some countries. As quickly as the spotlight turned to the GATS, however, it moved on almost as quickly thereafter. By the time that the Doha Round was fully under way one rarely heard much criticism of this agreement from that quarter. The focus may nonetheless have affected the ambition that some GATS negotiators showed during the period when the contours of the coming negotiations were being determined, especially with respect to politically sensitive sectors such as social services.

During the time when members were not certain whether new services negotiations would be conducted on their own (dubbed the GATS 2000 negotiations) or as part of a new round they set a schedule and developed guidelines that could be used in either format. By setting up three pre-Doha negotiating sessions and two post-Doha sessions (December 2001 and March 2002), negotiators were prepared to treat the latter two meetings as a fall-back in the event that the round was not launched. The Special Session of the Council for Trade in Services issued in March 2001 its “Guidelines and Procedures for the Negotiations on Trade in Services.” These guidelines provided for progressive liberalization, flexibility for individual developing-country members and special priority for LDCs, no *a priori* exclusion of any service sector or mode of supply and negotiation by request-offer.<sup>35</sup> The same guidelines could form the basis for either GATS 2000 or Doha Round negotiations.

Members ultimately did launch the round, with GATS negotiations forming an integral part of the package. Paragraph 15 of the Doha Ministerial Declaration confirmed the guidelines and provided that the negotiations “shall be conducted with a view to promoting the economic growth of all trading partners and the development of developing and least-developed countries.” The ministers called for initial requests for specific commitments by 30 June 2002 and, after a nine-month gestation period, initial offers by 31 March 2003.

One may only speculate on what may have happened with the GATS negotiations if the Doha Round had not been launched. On the one hand, the fate of these negotiations would not be directly tied to the rest of the round. A recurring theme in the discussion below is that at several points when the services negotiations were doing well they were stymied by problems in other topics. On the other hand, the level of ambition for services negotiations might be higher in a successful round that allows for trade-offs across topics than in negotiations that are devoted solely to services. Even in the absence of a larger round, however, the fate of the services negotiations may have depended on the progress in negotiations on agriculture. The built-in agenda inherited from the Uruguay Round had linked future negotiations on service to agriculture by setting matching schedules for the start of new negotiations in 2000.

The sectoral scope of the GATS negotiations was shaped in the first instance by the negotiating proposals that members tabled during that period between the rounds and later by the requests that members made of one another. The guidelines repeated the basic principle that there are no *a priori* exclusions, but as a practical matter a sector would be subject to negotiations only if a member pursued it. Ten WTO members tabled proposals in the first phase of the negotiations, as summarized in Table 12.3. The Quad (Canada, the European Union, Japan and the United States) plus Australia collectively accounted for the great majority of the papers, with Norway and four developing countries submitting the rest. The two sectors with the largest numbers of submissions were financial and telecommunications services, even though these had just recently been the subject of GATS protocols (see Chapter 10). Other high-visibility sectors included tourism, energy and distribution.

**Table 12.3. Sectoral coverage of proposals for the GATS 2000 negotiations**

	Canada	European Community	Japan	United States	Australia	Others
Financial	◆	◆	◆	◆	◆	◆
Telecommunications	◆	◆	◆	◆	◆	◆
Tourism	◆	◆	◆	◆		◆
Energy/oil and gas	◆	◆		◆		◆◆
Distribution	◆	◆	◆	◆		
Other business	◆	◆	◆			◆
Environmental	◆	◆		◆		
Other professional	◆	◆	◆			
Computer	◆	◆	◆			
Construction		◆	◆		◆	
Maritime transport			◆			◆◆
Postal/courier	◆			◆		
Legal				◆	◆	
Accounting				◆	◆	
Audiovisual			◆	◆		
Air transport			◆			◆
Architectural					◆	
Engineering					◆	
Education				◆		
Land transport			◆			
Transport (general)		◆				
<i>Other topics:</i>						
Mode 4 issues	◆	◆		◆		◆
Regulatory transparency	◆					
Small/medium enterprises	◆					
	13	12	12	12	7	8

Source: Adapted from a 29 March 2001 checklist prepared by the WTO Secretariat.

Notes: Listed in declining order of sectoral frequency. "Others" includes Norway (six proposals), Dominican Republic (one proposal), India (one proposal), Hong Kong, China (one proposal) and the Bolivarian Republic of Venezuela (one proposal).

Trade negotiations in the WTO are generally conducted in an open fashion, but that general rule does not apply to the first half of the request–offer negotiations for services. While members' offers are lodged with the WTO and (after a period of restriction) are eventually made public, the requests that precede these offers are delivered directly to one another; they neither pass through the WTO nor are typically made public. The only insight into what types of requests that the members make, and what those requests look like, thus come by way of leaks. The Polaris Institute is an NGO based in Canada that obtained copies of the 109 EC requests in 2003 and shared them with the Netherlands-based GATSwatch. The latter group then posted all of these requests to its website.<sup>36</sup> The commitments that the European Community sought from the larger developing countries and the developed countries were generally similar. Its requests to Brazil, Canada, India, Japan and the United States, for example, were each in the range of 32 to 35 pages and covered 11 to 12 sectors, although the composition of the sectoral lists varied from one partner to another. Among the sectors in which the European Community sought new or improved commitments were business services, construction and related engineering services, distribution services, educational services, energy services, environmental services, financial services, postal and courier services, professional services, telecommunication services, tourism and travel related services and transport services. Its requests to smaller developing countries or LDCs, however, were generally shorter. In its request to Antigua and Barbuda, for example, the European Community sought commitments in nine sectors, but from Zambia it sought only four. For want of similar leaks from the requests that other *demandeurs* made, we can only speculate on what the others looked like.

The request-offer process was informally suspended after the Cancún Ministerial Conference. There then followed a series of efforts to reinvigorate negotiations, with mixed success. The July Package adopted in mid-2004 set a May 2005 target for the submission of revised offers and adopted a set of recommendations by which members that had not yet submitted initial offers would do so as soon as possible. It also called for targeted technical assistance to developing countries to assist them in participating effectively. The revised offers came in 2005, but by this time only a fraction of the developing members were actively engaged in the negotiations. A total of 71 members made initial offers (counting the European Community as one), of which 31 followed up with revised offers. As can be seen from the data in Table 12.4, only 21 developing members did so.

The quality of members' offers matter at least as much as the sheer quantity. In 2005, the chair of the services negotiating group characterized the quality of initial and revised offers as "poor," noting that for "most sector categories, a majority of the offers do not propose any improvement" in the existing schedules.

If the current offers were to enter into force, the average number of sub-sectors committed by Members would increase only from 51 to 57. Likewise, less than half of the schedules would contain commitments of any kind in sectors such as distribution, postal-courier or road transport. There is thus no significant change to the pre-existing patterns of sectoral bindings. As well, less than half of the offers envisage improvements to horizontal commitments on mode 4.<sup>37</sup>

**Table 12.4. WTO members making revised offers in the Doha Round services negotiations**

Developed	Developing	
Australia	Bahrain, Kingdom of	Korea, Republic of
Canada	Belize	Macao, China
European Communities	Brazil	Malaysia
Iceland	Chile	Mexico
Japan	China	Peru
Liechtenstein	Colombia	Singapore
New Zealand	Egypt	Suriname
Norway	Honduras	Chinese Taipei
Switzerland	Hong Kong, China	Thailand
United States	India	Turkey
		Uruguay

Source: Data provided by the WTO Services Division.

Notes: All offers were received in 2005 except for that of Belize, which came in 2008. One offer not shown is that of the Plurinational State of Bolivia, which was withdrawn in 2006.

By that time the members had developed numerous “friends” groups built around specific sectors, comprised in each case of members that had export interests in the sector in question. Groups such as the Friends of Financial Services and the Friends of Legal Services, among others, began to define the levels of ambition that they would collectively seek from other members in the negotiations.

The Hong Kong Ministerial Declaration of December 2005 reaffirmed key principles and objectives of the services negotiations and called on members to intensify the request-offer process and conclude the rule-making negotiations. Annex C of that declaration established a framework for offering new or improved commitments under each mode of supply, treating MFN exemptions, and the scheduling and classification of commitments. That same annex also set out common market access objectives for each mode of supply and introduced plurilateral negotiations as a new process to complement bilateral bargaining. That approach is based on collective requests in which the friends groups seek commitments from other members. Members conducted two rounds of plurilateral negotiations in early 2006, based on 21 collective requests that were primarily sectoral. The results of these plurilateral and bilateral negotiations were expected to produce a second round of revised offers, but these hopes were frustrated when the Doha Round as a whole was suspended that July as a result of stalemates in the NAMA and agricultural negotiations. The round resumed again in early 2007, but another year passed before there was significant progress in the services negotiations.

Based on consultations conducted with members, the chair of the Council for Trade in Services in Special Session issued a report on 26 May 2008 with a draft services text. This formed the basis for a “signaling conference” that members held in conjunction with the mini-ministerial of July 2008. The event was something like the functional equivalent of eliciting revised offers, with the ministers participating in the conference indicating how their services

offers might be improved in response to the requests they had received. These signals were not intended to represent the final outcome of the negotiations, but to enable members to assess the state of the request–offer negotiations while preparing new draft schedules. While some of the participants in this exercise considered it to be a useful step forward, others saw the signals that members made as vague and general pronouncements that did not yet indicate a real willingness to move into a more serious phase of bargaining. Once again the opportunity to capitalize on the advances was held back by stalled talks on other topics. The mini-ministerial failed, as discussed later in this chapter.

Members renewed the services negotiations once more on 15 April 2011, holding a round of plurilateral request-offer talks in the Special Session of the Council for Trade in Services. The sectors in which members explored plurilateral options included accounting services; air transport services; architecture, engineering and integrated engineering services; audiovisual services; computer-related services; construction services; distribution services; energy services; environmental services; financial services; legal services; logistics and related services; maritime transport services; postal and courier services, including express delivery; private education services; services related to agriculture; telecommunication services; and tourism services.

The Doha Round negotiations also aimed to fill in some blanks left in the GATS itself. On GATS rules, the Council for Trade in Services adopted a decision in 2000 setting a target of 15 March 2002 to complete the negotiations on safeguards under GATS Article X, and the guidelines adopted in 2001 aimed to finish the negotiations under articles VI:4 (Domestic Regulation), XIII (Government Procurement) and XV (Subsidies) “prior to the conclusion of negotiations on specific commitments.”<sup>38</sup> Members missed all of those deadlines, and the chairman reported in 2011 his “general assessment ... that the proponents had found it difficult to convince the Membership of the need for new disciplines” in government procurement, subsidies, or safeguards.<sup>39</sup> He did, however, observe “notable progress” on domestic regulation, “even if disagreement persists on important and basic issues.”<sup>40</sup>

One area where members did reach agreement is in providing special and differential treatment to the LDCs, both for these members’ commitments and their access to developed markets. The Hong Kong Ministerial Declaration provided that these members are not expected to undertake new GATS commitments in the Doha Round. At the Geneva Ministerial Conference in December 2011, the members adopted a waiver allowing them to deviate from their MFN obligations in order to extend preferential treatment to services and service suppliers from LDCs. As of early 2013, there were no concessions extended to LDCs by way of this preference, for the simple reason that none of the LDCs actually made requests of the other members.

### *Trade facilitation*

Paragraph 27 of the Doha Ministerial Declaration mandated the negotiations on trade facilitation. As was the case for the other three Singapore issues, this paragraph stated

that negotiations would take place only after the adoption of a decision “by explicit consensus ... on modalities.” The work that Geneva ambassadors had done on those other three issues in 2002 and 2003 was later rendered moot when no such decision was made, as discussed later in this chapter. Trade facilitation was the sole survivor among these Singapore issues.

The ministerial declaration recognized “the case for further expediting the movement, release and clearance of goods, including goods in transit, and the need for enhanced technical assistance and capacity building in this area.” It directed the Council for Trade in Goods to “review and as appropriate, clarify and improve relevant aspects” of GATT articles V (Freedom of Transit), VIII (Fees and Formalities Connected with Importation and Exportation) and X (Publication and Administration of Trade Regulations), and to “identify the trade facilitation needs and priorities of members, in particular developing and least-developed countries.” It also provided for “adequate technical assistance and support for capacity building in this area.”

While trade facilitation was considered to be the least controversial of the Singapore issues, and also an area that can deliver real benefits to countries at all levels of economic development, that does not mean that it is one in which consensus is widespread and easily secured. The Draft Consolidated Negotiating Text on trade facilitation issued on 21 April 2011 has more than 800 square brackets,<sup>41</sup> averaging over 20 per page and with at least one bracket – and usually a great deal more – in each of its 15 articles. One extreme, but not unique, example is found in the proposed language for Article 7.2, which concerns rules governing the determination and payment of customs duties, taxes, fees and charges:

[Each Member [shall] [is encouraged to] adopt or maintain procedures [providing][allowing] an importer [or its agent] [the opportunity] to obtain the release of goods prior to final determination and payment of customs duties, taxes, fees and charges, upon provision of sufficient guarantee [as determined by the Member itself] [where these are not determined at or prior to arrival] [where there is delay in the final determination of customs duties, taxes, fees and charges].]

The entire paragraph is within brackets, indicating that there is no agreement that any part of it should be adopted, and at four different points in the paragraph there are either two or three alternate texts or phrases.

Not every item in the draft is riddled with brackets. Among the uncluttered provisions are those providing that: “Members are encouraged to make available further trade-related information through the internet,” “Each Member shall, as appropriate, provide for regular consultations between border agencies and traders or other stakeholders within its territory,” and “Each Member shall periodically review its fees and charges with a view to reducing their number and diversity, where practicable.”<sup>42</sup>

The intent behind some of these brackets may be as much tactical as substantive. It is in the interest of some members to ensure that the Doha Round is conducted strictly as a single undertaking, as only then can they maintain maximum pressure for concessions on issues of interest to them, and to that end it may be inconvenient to their negotiating strategy if any of the other topics under negotiation were to appear ripe for an early harvest or be eligible for treatment outside the scope of the single undertaking. That calculation may lead some of these members to find more fault, or raise more questions, than would be the case for a subject that might otherwise be seen in a more technical and non-controversial light. In the view of Anthony Mothae Maruping (2011: 6), the ambassador of the Kingdom of Lesotho, trade facilitation offers an example of how the dynamics of the single undertaking may lead to “useful and agreeable elements” of a Doha Round deal being “held hostage” in order to produce leverage on other topics.

### *Rules: trade-remedy laws and fishery subsidies*

The broad category of rules negotiations in the Doha Round covers two subjects that bear at least a distant relationship to one another and a third that does not. Fishery subsidies and the trade-remedy laws are related in the sense that subsidies are addressed by one of the three principal instruments that fall within that category (i.e. countervailing duty laws), but the topic of regional trade arrangements was grouped with these others simply for the sake of convenience. That subject has not loomed large in the rules negotiations of the Doha Round but, as is discussed in Chapter 13, RTAs are an important part of the larger policy-making environment in which the round is conducted.

Ambassador Guillermo Valles Galmés of Uruguay became chair of the Negotiating Group on Rules in mid-2004 and led these discussions for the next six years.<sup>43</sup> He circulated on 19 December 2008 new negotiating texts on anti-dumping and horizontal subsidies disciplines, together with a conceptual “roadmap” on fisheries subsidies.<sup>44</sup> The anti-dumping section of the text had 12 brackets, covering such subjects as the causation of injury, material retardation of an industry in establishment, sunset reviews and a public-interest clause. One especially controversial topic in these negotiations was subsequently resolved through the dispute settlement process. In *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)*, first a panel (in 2005) and then the Appellate Body (in 2006) ruled that “zeroing”, or excluding from the calculation of dumping margins those sales that were not below fair value, violates WTO anti-dumping rules. The United States agreed to do away with this practice in 2012 (see Chapter 7), thus rendering the negotiations on this issue moot.

Consensus has been elusive for other issues covered by this negotiating group. Chairman Dennis Francis of Trinidad and Tobago stated somewhat euphemistically in 2011 that “the amount of un-bracketed text in the area of subsidies and countervailing measures is limited,” and on fisheries subsidies “there is too little convergence on even the technical issues, and indeed virtually none on the core substantive issues, for there to be anything to put into a bottom-up, convergence legal text.”<sup>45</sup>

### *The horizontal issues of S&D treatment and implementation*

All of the issues discussed above relate to specific sectors or subjects, but special and differential (S&D) treatment and implementation have a horizontal coverage across subjects in the WTO. As was already discussed in Chapter 10, members managed to resolve some of the concerns over implementation during the period of the built-in agenda. They did so principally by adopting a decision on implementation measures in late 2000.<sup>46</sup> That decision still left a large number of matters that needed ministerial direction, as provided by paragraph 12 of the Doha Ministerial Declaration. It stated that ministers “attach[ed] the utmost importance to the implementation-related issues and concerns raised by members and are determined to find appropriate solutions to them,” and adopted the Decision on Implementation-Related Issues and Concerns<sup>47</sup> in order to address a number of implementation problems faced by members. This paragraph set out the following plan to address these issues in further negotiations:

- (a) where we provide a specific negotiating mandate in this declaration, the relevant implementation issues shall be addressed under that mandate; (b) the other outstanding implementation issues shall be addressed as a matter of priority by the relevant WTO bodies, which shall report to the Trade Negotiations Committee ... by the end of 2002 for appropriate action.

The paragraph also specified that the results of these negotiations would be subject to the round's single undertaking, but also fell within the early harvest principle in paragraph 47 by which “agreements reached at an early stage may be implemented on a provisional or a definitive basis” and such “[e]arly agreements shall be taken into account in assessing the overall balance of the negotiations.”

The general breakdown in negotiations at Cancún prevented progress on these issues, but they returned to the forefront in the 2004 to 2005 efforts to rescue the round. In paragraph 1(d) of the July Package, the General Council “instruct[ed] the Committee on Trade and Development in Special Session to expeditiously complete the review of all the outstanding Agreement-specific proposals and report to the General Council, with clear recommendations for a decision, by July 2005,” while also “instruct[ing] all WTO bodies to which proposals in Category II<sup>48</sup> have been referred to expeditiously complete the consideration of these proposals and report to the General Council, with clear recommendations for a decision, as soon as possible and no later than July 2005.” The Council also “welcome[d] and further encourage[d] the improved coordination with other agencies, including under the Integrated Framework for [trade-related technical assistance] for the LDCs (IF) and the Joint Integrated Technical Assistance Programme (JITAP)”, and “reaffirm[ed] the mandates Ministers gave in paragraph 12 of the Doha Ministerial Declaration and the Doha Decision on Implementation-Related Issues and Concerns, and renew[ed] Members’ determination to find appropriate solutions to outstanding issues.”

Progress on these issues is largely tied to the fate of the round as a whole, though members have also considered an additional element. A monitoring mechanism for S&D treatment

has been under consideration since the General Council approved a decision in July 2002 on the subject. The purposes of the proposed mechanism are to evaluate the utilization and effectiveness of these provisions and to propose actions to strengthen and improve them. The mechanism would apply to all S&D provisions in WTO agreements as well as ministerial and General Council decisions. According to a draft text issued in 2011, the mechanism would not be “a negotiating body” but “this does not preclude recommendations or proposals for initiating negotiations in other WTO Bodies on S&D provisions reviewed in the Mechanism.”<sup>49</sup> After more than a decade of negotiations on the matter, however, members had yet to come to agreement on the actual establishment of this mechanism.

Implementation is an issue that attracted less attention over time. Some of the demands that were being made upon countries in the early implementation period of the Uruguay Round commitments, which coincided in part with the launch and initial conduct of the Doha Round, seemed less onerous as members gained more experience with the agreements and took advantage of capacity-building assistance. It remained a matter of importance to members, but for many of them it increasingly came to be seen as more of a technical than a political matter.

## The 2003 Cancún Ministerial Conference

The texts discussed above developed in Geneva at varying degrees of intensity during 2001 to 2012. This was mostly the work of ambassadors and experts in Geneva, but their negotiations were punctuated throughout by numerous ministerial meetings. In this second half of the chapter we review the two most important points of ministerial involvement, the Cancún Ministerial Conference of 2003 and the mini-ministerial of 2008. The first of these was intended to serve as the mid-term review of the round, which would then be concluded two years later, but these talks collapsed. The second of these meetings had higher ambitions, aiming to bring the round to a successful completion, but it too ended in defeat.

In one sense, the Cancún Ministerial Conference of 10–14 September 2003 might be considered a bigger setback than the Seattle Ministerial Conference was four years earlier, for while the outside protestors may get some of the blame for the collapse in Seattle the failure in Cancún was entirely the product of the members themselves. The conference got hung up on three sets of issues, each of which divided countries along North–South lines. The first set consisted of the three pillars of agricultural trade. Although the European Community and the United States attempted to narrow their own differences on this make-or-break topic, in so doing they provoked opposition from a diverse array of developing countries; some protested that the reforms were too modest, and others said they went too far. A second and related issue was cotton, especially production subsidies for US producers and their impact of developing countries in Africa. This issue had not originally been on the Doha Round agenda but became an increasingly important concern for African countries and another source of North–South friction. The third topic, which provided the proximate cause for the final breakdown, consisted of the four, now-familiar Singapore issues.

Several of the key players in this ministerial had participated in the previous one. Luis Ernesto Derbez, who had served as facilitator for intellectual property issues at Doha, had since become Mexican Foreign Secretary. Now the conference chairman, he faced the daunting task of closing the gaps that had widened over the previous two years. The ministers representing Canada, Egypt, the European Community, the Republic of Korea, Malaysia, New Zealand, Norway, Singapore, South Africa, Thailand and the United States, among others, were the same ones in Cancún as in Doha. The only newcomer with a prominent role was Director-General Supachai Panitchpakdi. This would be the only ministerial held during his tenure. Unlike his predecessor and his successor, each of whom had little time to prepare for their first ministerial after taking office, Mr Supachai took office more than a year before the ministers convened in Cancún. Mr Supachai did not play as prominent a role in the overall management of this ministerial as Director-General Mike Moore had in his two, but he did take on the difficult task of managing the cotton issue. Mr Supachai did not second-guess the decisions of the conference chairman, and did not step in to persuade Mr Derbez to reconsider or reverse his decision to end the conference early.

The negotiations were organized in five working groups, each of them led by a facilitator working closely with the chair and holding confessionals with ministers. These included agriculture (George Yeo Yong-Bon, Singapore), non-agricultural market access (Henry Tang Ying-yen, Hong Kong, China), development (Mukhisa Kituyi, Kenya), Singapore issues (Pierre Pettigrew, Canada) and miscellaneous issues (Clement Rohee, Guyana). The working groups held open-ended meetings in which all members were free to participate, each represented by a minister with a maximum of two support staff.

### *The US–EU agricultural proposal and emergence of the G20*

The transatlantic disputes over agricultural trade give new meaning to the adage that generals are always prepared to fight the last war. The negotiators on both sides of the Atlantic thought they had come up with the best solution in 2003, when they devised a deal that would make modest reductions in both EC and US subsidies, but that plan did not replicate the Blair House dynamic of the Uruguay Round. That is the title given to the November 1992 agreement between the European Community and the United States by which they settled the major agricultural issues in the Uruguay Round, and that marked the beginning of the endgame of those negotiations. While that accord is remembered fondly in Brussels and Washington, it has much less happy connotations for agricultural exporting countries that wanted deeper reforms out of the round. It is also, like the term “green room”, sometimes used as a way of describing a negotiating style that leaves little room for players other than this G2.

Just before Cancún, the European Community and the United States produced a joint agricultural draft at the request of the other members, having been asked to do so at a July mini-ministerial meeting in Montreal. “You work together and you provide us with an US–EU agreement,” Pascal Lamy would later recall the others having requested, “and then we will build from that because there is no way we can build anything without that.”<sup>50</sup> Brussels and

Washington had considerable difficulty in reconciling their own differences but eventually succeeded. They unveiled a three-page paper on 13 August, the terms of which were discussed earlier in this chapter, “[a]nd of course when we tabled the thing people started screaming.”<sup>51</sup> While several aspects of this proposal would be reflected in the modalities that were developed from 2004 to 2008, when it first came out other agricultural exporters viewed the paper in a much more negative light. Far from seeing the joint proposal as a necessary step towards true agricultural liberalization, for the G20 it confirmed that the two largest subsidizers were collaborating to maintain the status quo. The step back from the elimination of export subsidies was especially unpopular, as was its attempt to preserve the US countercyclical payments by placing them in the blue box and thus beyond the reach of reduction commitments.

The EC–US Joint Text had a galvanizing effect on the countries that would now form the G20. Brazil took the leadership of this coalition, persuading other developing countries in the Cairns Group to join the new grouping. These included six other Latin American countries (Argentina, the Plurinational State of Bolivia, Chile, Guatemala, Paraguay and Peru)<sup>52</sup> together with four Asian members of Cairns (Indonesia, Pakistan, Philippines and Thailand) as well as South Africa. India had heretofore been more aligned with the defensive posture of the European Community than with the offensive position of Brazil, but was persuaded to join this southern alliance in opposition to the transatlantic position. Nine other developing countries that had not been in the Cairns Group also joined the G20, notably including China. Together they made a formidable coalition. The group became known as the G21 when Egypt joined. Still other countries later entered its ranks, even as some of the original members dropped out. By the end of the ministerial, it was variously referred to as the G20, G21 or the G20-Plus.<sup>53</sup>

The emergence of the G20 represented the confluence of two trends at different levels of Brazilian statecraft. The narrow explanation can be found in rising frustration within the Cairns Group over Australia's leadership. Where Canberra was disposed to treat the EC-US paper as a starting point for negotiations, Brazilian negotiators favoured a more confrontational response. Minister Celso Amorim (see Biographical Appendix, p. 572) would later explain that he set out to ensure that the “[a]ttempts by major trading powers to dilute the Doha mandate on agriculture did not prosper,” arguing that:

The question here is not whether a modest outcome would have been better than the absence of results. The real dilemma that many of us had to face was whether it was sensible to accept an agreement that would essentially consolidate the policies of the two subsidizing superpowers – with very modest gains and even some steps backward (the new, broader definition of “blue box” subsidies to accommodate the U.S. for instance) – and then have to wait for another 15 or 18 years to launch a new round, after having spent precious bargaining chips (Amorim, 2003).

At the level of high politics, this issue came at a time when Brazil began asserting greater leadership among developing countries on a wider range of issues. That had already been

demonstrated in a meeting of foreign ministers in which Mr Amorim hosted his counterparts from India (Yashwant Sinha) and South Africa (Nkosazana Dlamini-Zuma). The Brasilia Declaration of 6 June 2003 stated joint positions on numerous political, social and economic issues. In addition to addressing such matters as terrorism and other forms of armed conflict, the need to strengthen the United Nations and Security Council, and global warming, the ministers decried the protectionism of major trading partners and stressed –

the need to fully carry out the Doha Development Program and emphasized how important it is that the results of the current round of trade negotiations provide especially for the reversal of protectionist policies and trade-distorting practices, by improving the rules of the multilateral trade system.<sup>54</sup>

Brazilian policy-makers so valued the creation of an alliance with other developing countries, and hence a strong counterbalance to the transatlantic oligopoly that had hitherto dominated multilateral negotiations, that they were willing to make compromises with other countries for whom defensive objectives were more important than offensive. If it was necessary to lower Brazilian ambitions in order to find common ground with the new partners, then this was a concession they were prepared to make, out of concerns that pressing too hard on market access demands “could isolate Brazil in the negotiations, jeopardize efforts to build a coalition around the Brazilian paper, and compromise the objective – most valued by the Brasilia authorities – of attracting some of the most important developing countries to this new coalition” (Da Motta Veiga, 2005: 112).

Robert Zoellick and Pascal Lamy reacted very differently to the formation of the G20. While Mr Zoellick dismissed it as an unnatural alliance that could not survive its internal contradictions, Mr Lamy treated the new coalition as a player. “The G20,” he would later observe, “was born from BRICS and emerging countries being invited to the G8 and sitting in the waiting room before having their tea session with the big guys.”<sup>55</sup> He demonstrated this conviction by participating in the G20’s December 2003 ministerial meeting in Brasilia, just months after it had so forcefully rejected the EC–US deal. For his part, Mr Zoellick’s chief objective was to break this bloc apart. The United States used a variety of incentives to persuade countries not to associate themselves with either the G20 or the other developing country coalition in opposition to the deal (see below), including the initiation of FTA negotiations with countries that agreed to leave the G20.

The secretary-general of the United Nations Conference on Trade and Development (UNCTAD), Rubens Ricupero, observed at the start of the Cancún Ministerial Conference that failure to address the G20 countries’ concerns would doom the meeting. Mr Ricupero, who had been a leader among developing countries when he was Brazil’s ambassador to GATT, stressed that this new group differed in two fundamental respects from earlier “die-hard” groups such as the G10 of the early Uruguay Round. First, it represented a far more diverse array of countries. Where the G10 might be characterized as the left wing of GATT, with its members generally committed to state-centric approaches to economic development, the

G20 countries represented a wide spectrum of political philosophies and development strategies. Second, Mr Ricupero stressed that the aims and approaches of the G20 were vastly different from the old G10. Where the G10 attempted simply to block the initiation of a new round, the G20 instead pursued what was then called a “positive agenda” based upon offensive objectives for which it was willing to negotiate.<sup>56</sup> On this latter point, however, the members of the G20 – and especially Brazil and India – were to experience some rough patches in the future when their shared offensive interests came into conflict with India’s defensive interests.

### *Cotton and the ACP*

If the G20 thought that the EC–US proposals did not go far enough, several of the African, Caribbean and Pacific (ACP) countries believed that they might go too far in reducing MFN tariffs and thus eroding their margins of preference. Those concerns, coupled with the transatlantic interest in maintaining agricultural subsidies – especially the US subsidies on cotton – angered and frustrated many of the poorest WTO members.

The cotton issue was the highest-profile subject for several of these countries, and its inclusion on the agenda was a victory for them. An Oxfam study had found that US cotton farmers received more subsidies than the entire gross domestic product (GDP) of Burkina Faso, where more than two million people depend on cotton production, and that these subsidies cost Burkina Faso 1 per cent of its GDP and 12 per cent of its export earnings. Oxfam urged that “[n]orthern governments ... agree to major reforms of their agricultural policy during the current WTO round” (Oxfam, 2002: 4), but this topic had not originally been a part of the Doha Round. That changed after Burkina Faso approached Mr Supachai in advance of Cancún, saying that “they wanted to single out cotton away from agriculture,” to which the director-general initially replied that they “should have done this at the Doha meeting.”<sup>57</sup> But when President Blaise Compaoré of Burkina Faso called and offered to make a personal appeal in Geneva, Mr Supachai thought it was “a noble idea to have a leader of a country come and talk about trade negotiations and to propose something which is not demanding more subsidies. He was just coming here and he gave a long lecture demanding elimination of subsidies.”<sup>58</sup> Mr Compaoré spoke to the Trade Negotiations Committee on 10 June 2003. In response to the president’s pleas, the members gave unanimous support to incorporating this issue in the round.

The problem was, who would manage this issue in Cancún? When the friends of the chair were being selected, “[t]here was no one that would accept to do cotton,” Mr Supachai would later recall, and so “automatically I had to accept it because there was no one to do cotton. And I was by some countries blamed for having cotton in the round.”<sup>59</sup> Mr Supachai soon found himself in an untenable position. US officials were especially unhappy with this decision, and criticized the director-general for accepting a responsibility that put his impartiality in question, but the Cotton-Four countries and their supporters were displeased with Mr Supachai for advancing a text on cotton that was (in their estimation) too close to the US position.

Mr Zoellick was disinclined even to meet with the Cotton-Four countries at Cancún, but finally relented and held a meeting with them on 9 September. The discussion did not go well, with the African countries objecting to the US proposal that they diversify their production away from cotton and towards textiles. The United States stressed that textile products enjoyed preferential market access under the African Growth and Opportunity Act. Australia and Canada each supported the US initiative, but other ACP countries took this proposal as evidence that the United States did not take their concerns seriously.

### *The Singapore issues*

The Singapore issues drove a wedge between the developing countries and the developed, and in this instance it was the European Community that received the sharpest criticism. It was the principal *demandeur* on these topics, joined by others such as Japan and the Republic of Korea. The position of the United States was more ambivalent. In response to US demands, the aims for government procurement negotiations were downgraded from market access to transparency concerns, and US officials were concerned over the potential for negotiations on competition policy to become a backdoor means of attacking the anti-dumping laws.

The debate over the Singapore issues centred not just on the substance but on the procedure, with the opponents underlining the Doha Ministerial Declaration's assurance that negotiations on these subjects could begin only with "explicit consensus". Members disagreed on what that phrase meant. In a notable departure from the usual norms of WTO diplomacy, India took the position that it meant a roll-call vote. No matter how one might propose to count or express consensus, it was obvious that consensus on the Singapore issues was conspicuous for its absence.

The manoeuvres over these issues were especially intense during the final 18 hours of the conference, and led the EC Council of Ministers to approve a major concession. The European Community would agree to drop three of these issues altogether if only there would be agreement to begin immediate negotiations on trade facilitation – the least controversial item in the bunch. This concession was made very late in the game, and many of the developing countries that most strongly opposed the Singapore issues were not even aware of it in the concluding hours of the talks. Several of the participants in these negotiations would later observe that the concession might have helped if it were made earlier, but that when it did come the opposition was too entrenched to be persuaded.

### *The collapse and the aftermath*

Unlike the Doha Ministerial Conference, which followed the GATT tradition of negotiating up to and beyond the final hour, these talks would end early and abruptly. The chairman, Mr Derbez, had conducted marathon talks throughout the night that preceded the final day, but by the late afternoon of that day he, and the ministerial along with him, would be finished.

That final day's meetings began at 8:30 am, giving delegates only a few hours' sleep from the previous night's sessions. When the delegates assembled that morning Mr Derbez surprised them by starting with the Singapore issues. He had heard speech after speech in the latest heads of delegations meeting about these issues, and believed that they needed to be resolved before moving on to other business. This struck many participants as an error in sequencing, as developing countries had linked the outcome of the Singapore discussions to the agricultural negotiations. They were not likely to show much flexibility on these issues without knowing whether the agricultural issues would be resolved in their favour. Mr Derbez proposed that the participants in the green room consult with their groups on the question of whether they might accept some subset of the Singapore issues and, if so, which ones. He made clear to the ministers that failure to reach a consensus on the Singapore issues would compel him to end the meeting because that might lead to a further hardening of defensive positions agricultural issues. When they returned to the meeting it was clear that there was no consensus, and Mr Derbez announced that he had decided to close the ministerial. Some countries objected, insisting that a *tour de table* be conducted on agriculture before terminating the meeting. Mr Derbez consented and asked ministers to begin their discussions on agriculture, but members of the G10 group indicated that, with the rejection of all four Singapore issues, they were even more insistent upon their defensive position on agriculture. Mr Derbez then brought the meeting to a close. He reported this decision at the heads of delegations meeting at about 4:00 pm, with the formal close coming at 5:55 pm.

The only accomplishment of the conference was the approval of a brief ministerial statement<sup>60</sup> in which the ministers instructed their officials –

to continue working on outstanding issues with a renewed sense of urgency and purpose and taking fully into account all the views we have expressed in this Conference. We ask the Chairman of the General Council, working in close co-operation with the Director-General, to coordinate this work and to convene a meeting of the General Council at Senior Officials level no later than 15 December 2003 to take the action necessary at that stage to enable us to move towards a successful and timely conclusion of the negotiations. We shall continue to exercise close personal supervision of this process.

Whoever coined the saying that victory has a thousand fathers but defeat is an orphan never had to sort out the aftermath of the Cancún Ministerial Conference. No one came forward to take the blame personally, but a great many fingers pointed at others to whom the paternity might be ascribed. Some blamed Mr Lamy and Mr Zoellick, whose willingness to make selected and strategic retreats at Doha gave way here to more rigid positions. Cancún saw a belated EU willingness to make accommodations on the Singapore issues and a US refusal to yield on cotton. Mr Derbez also came in for much of the criticism. Some delegations believed he had been too hasty in concluding that their positions as of Sunday morning were their true bottom lines, and hence he overestimated the degree of difficulty in forging a consensus. Several delegates believed that success might have been achieved if the talks had continued

to the customary wee hours.<sup>61</sup> Indian and Malaysian delegates hinted immediately after the collapse that their position of absolute opposition to the Singapore issues was a bargaining stance rather than a bottom line. They might have been willing to accept negotiations on trade facilitation, and India may have been willing to do so on government procurement as well. It would be a huge gain for them to lock in the EC promise that investment and competition policy would be permanently off the table in the WTO. It is impossible to say whether these are accurate assessments or merely attempts to shift collective blame to one individual, but Mr Derbez insisted that his decision to call a halt was not “rash” but “rational”. Another line of speculation is that it was the United States that had made the decision, with Mr Derbez acting as agent rather than principal. Some who advanced this conspiracy theory pointed to the presence of the US senators in town, especially those whose main concern was with cotton. These allegations seem somewhat far-fetched when one considers the active role that Mexico played in the G20. Mexico City would never have joined that group if it were doing Washington’s bidding.

Others blamed not individuals, countries or blocs, but instead attributed the results to the rules and the process. “The failure at Cancun can be ascribed in part to poor communications,” Harbinson (2009: 8) later concluded, observing that the “European Union delayed showing flexibility on Singapore issues until too late” and the “Chairman of the Conference did not signal sufficiently clearly in advance his intention to call a halt to proceedings.” He did not assign blame to anyone, however, noting that finding “a static point of equilibrium across a range of complex issues was a virtually impossible task.” Similarly, Mr Lamy blamed the procedures and rules of the WTO. “The WTO remains a medieval organisation,”<sup>62</sup> he said, echoing an opinion that he had voiced two years earlier in Seattle. Zoellick (2003: 1) blamed the results of the Ministerial on developing countries. “The United Nations General Assembly has its role,” he wrote soon thereafter, “but it does not offer an effective model for trade negotiations.” Both Mr Lamy and Mr Zoellick seemed to take particular offense at the tone of comments that some developing country ministers had made in a heads of delegations meeting on 13 September. For their part, developing countries were highly critical of the industrialized countries’ refusal to make significant concessions to their demands.

## From 2003 to 2008

While the Cancún Ministerial Conference had been a failure, it did make a few advances in the texts, and some parts of the unadopted draft Derbez text<sup>63</sup> would find their way into the July package of 2004.<sup>64</sup> This 20-page agreement formed the basis for subsequent negotiations. One of its most notable features was the final confirmation that three of the four Singapore issues were being dropped. Paragraph 1(g) of the framework provided for further negotiations on trade facilitation, but also stated that on the relationship between trade and investment, the interaction between trade and competition policy and transparency in government procurement “the Council agrees that these issues ... will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round.”

There were hopes during much of 2005 that the July framework might be transformed into an actual deal at the Hong Kong Ministerial Conference, on 13-18 December 2005, putting the round back on track and completing the negotiations only a year after the original deadline. Director-General Pascal Lamy, who took office on 1 September 2005, hoped that the issues dividing members could be approached as technical matters that were within the competence of ministers to sort out and solve. By November, however, it had become clear that too much remained to be done, and that the expectations for the conference had to be lowered. Several governments shifted their sights for Hong Kong to delivering a “development package”. One concrete accomplishment was the formal launch of the Aid for Trade initiative, financing improvements in developing countries’ capacity to trade. Other items in the hoped-for development package proved to be too problematic. Members were unable to agree on the five agreement-specific LDC proposals for enhanced special and differential treatment in the draft declaration. The draft text provided for “developed-country Members, and developing-country Members declaring themselves in a position to do so” to grant duty-free, quota-free (DFQF) access to LDC exports by the end of the round, which LDCs hoped could be made part of a Hong Kong “early harvest”. The United States remained cautious on DFQF access, especially in the textile sector.

The ministerial did help to close the gap on some issues that had stalled the negotiations over modalities. The Hong Kong Ministerial Declaration built on the July package, producing 44 pages (mostly in detailed annexes) that further outlined the shape of these negotiations. Members set themselves a series of deadlines, with modalities due by 30 April 2006. By 31 July 2006, they were to submit comprehensive draft schedules based on these modalities for NAMA and agriculture, and to submit revised offers on services. None of these deadlines were met. The European Community definitively committed to the elimination of export subsidies, and the United States expressed a willingness to consider accelerated implementation of cotton subsidy phase-outs. Both of these concessions, however, were contingent on reaching an overall agricultural deal.

The post-Hong Kong negotiations hit low points in the summers of both 2006 and 2007. Mr Lamy reported to the Trade Negotiations Committee in July 2006 that “the gap in level of ambition between market access and domestic support remained too wide to bridge,” and that he believed “the only course of action I can recommend is to suspend the negotiations across the Round as a whole to enable the serious reflection by participants which is clearly necessary.”<sup>65</sup> In 2007 for the first and (thus far) only time, members opted not even to convene the ministerial conference that, according to the biennial schedule set in Article IV of the Agreement Establishing the World Trade Organization, they were due to hold that year.

### The July 2008 mini-ministerial

Members tried again in a meeting on 21-29 July 2008, and this time they came closer than ever to completing the round. The negotiations took the form of a mini-ministerial. The prefix “mini” does not connote trivial, but instead one that is held out of the usual sequence of

full-dress ministerials that are supposed to take place every two years. Two aspects of this meeting were far from mini: at nine days,<sup>66</sup> it was about twice as long as the typical biennial ministerial conference, and expectations for a breakthrough were higher than at any other event in the round. "Billed as a last chance to save the Doha Round," Harbinson (2009: 9) observed, "the meetings at various stages looked doomed, then very positive, with a clear chance for a breakthrough, before becoming stalemated." This was the third collapse in three successive summers.

The negotiations took place at multiple levels. Some 70 members sent delegations, and about 30 of these were present in the green room sessions, but the principal negotiations took place in even smaller groups. A G7 of Australia, Brazil, China, the European Union, India, Japan and the United States tried to hammer out a deal, and in some meetings it was, in the absence of China and Japan, an even smaller G5. Much of their negotiations centred on a "Lamy Draft" for the Doha Round deal. Unlike the Dunkel Draft of 1991, which presented full draft texts for all of the agreements under negotiation (minus the schedules), this text fit on a single page. That page was a distilled and modified version of the texts that the chairmen of the NAMA and agriculture negotiating groups had been developing in the first half of the year.

The latest versions had come two weeks earlier, when on 10 July Chairmen Crawford Falconer of New Zealand (agriculture) and Don Stephenson of Canada (NAMA) produced the latest revisions of the negotiating documents. Mr Lamy then worked with Mr Falconer, Mr Stephenson and General Council Chairman Bruce Gosper (see Biographical Appendix, p. 579) of Australia to boil down their principal line items, with some modifications, and put them on the page that is reproduced in Box 12.1. The main features of that one-page draft are discussed earlier in this chapter, and were later adopted in the Rev.3 (NAMA) and Rev.4 (agriculture) texts. Mr Lamy presented this one-page to the G7 ministers in a meeting on 25 July.

In a repeat of the dynamics at the end of the Doha Ministerial Conference, the members had a text that was least minimally acceptable to every country in the room except India. Each of the other six ministers in the green room indicated that they could live with it, with varying degrees of resignation or enthusiasm, but the Indian Trade Minister Kamal Nath initially rejected it out of hand. His colleagues and Mr Lamy persuaded him not to walk out of the negotiations, however, and for a time it did appear to the US negotiators that Mr Nath had given his acquiescence to the one-page deal. "During the nine days we were there," US Trade Representative Susan Schwab would later recall, "there were really only 24 or 36 hours where we actually thought a deal might be doable."<sup>67</sup> They allowed themselves a little celebration for that day or so, but it was soon over. As the small G7 circle and the larger circles around it began to deal with the numbers and the principles, they soon returned to their now habitual patterns of debate, deadlock, collapse and recriminations.

**Box 12.1. The one-page “Lamy Draft” of 2008**

US OTDS 70% cut

EU OTDS 80% cut

Cut tariff top band 70%

Developed country tariff lines above 100% only for sensitive products +1% allowance with payment as per text

Developed country number sensitive products 4% + 2% with payment as per text

Developed country expansion TRQs 4% of domestic consumption

One tier of 12% of tariff lines as special products with an average cut overall of 11%

RAMs do an overall average cut of 10% with a total number of 13% of tariff lines

Within that tier 5% of tariff lines take a zero cut

SSM for above bound rate trigger is 140% of base imports

Remedy for above bound is applicable with a ceiling of 15% of current bound tariff or 15 *ad valorem* points, whichever is the greater

That remedy is not normally applicable if prices are not actually declining

Maximum number of tariff lines for above bound 2,5% in any year

Developed countries SSG to be eliminated. Starting point maximum 1% of lines. Maximum phase out 7 years. No rate above UR bound rates during phase out

NAMA Developed coefficient 8

Developing country coefficient and flexibilities

20	7 (a)(i)	14% of tariff lines 16% volume of trade
	7 (a)(ii)	6.5% of tariff lines 7.5% volume of trade
22	10% / 5%	
25	0	

Anti-concentration clause: 20% of lines, 9% value

Sectorals: insert in para 9 of text: “Recognising the non-mandatory nature of sectoral initiatives, at the time of establishment of modalities, the Members listed in Annex Z have committed to participate in negotiating the terms of at least two sectoral tariff initiatives likely to achieve critical mass. Other Members are encouraged to participate in order to assist in reaching critical mass. Any developing country Member participating in final sectoral initiatives will be permitted to increase its coefficient (in such increment as will be determined no later than 2 months from the date of establishment of these modalities) commensurate with its level of participation in sectoral initiatives.”

### *The water in the schedules*

For all of the other topics at issue in the Doha Round, in these July negotiations the principal focus was on the marquee numbers affecting trade in goods. More precisely, the G7 countries and the rest of the participants devoted much of their time dealing with the terms of market access for agricultural and non-agricultural goods, plus the related issues of agricultural safeguards and domestic support. No other issues made their way onto the one-page proposal.

One of the more remarkable aspects of these failed negotiations is that much of the bargaining was not over deals that would affect members' *actual* tariffs and subsidies but instead their *potential* policies. When reviewing the numbers on the page, it is important to recall that WTO negotiations focus not on members' applied measures but on their bound measures, and those bindings can contain a great deal of water. Brazil, India and the United States were less likely to be obliged to change their more sensitive economic policies as a result of the deals that were on the table than were China and the European Community. The most sensitive item for Brazil and India was their non-agricultural tariffs, but they had 16.5 and 24.5 percentage points of water, respectively, separating their average bound and applied tariffs.<sup>68</sup> The most sensitive defensive interests for the United States were in agricultural domestic support, but as of 2008 it provided only 32.7 per cent of what was permitted in its schedule.<sup>69</sup> Or, to put it another way, the water left in these three countries' commitments would allow India and the United States to cut two thirds of their bound tariffs and subsidies, respectively, and Brazil to cut its bound tariffs in half, before they were in any danger of those commitments having an immediate impact on their applied measures. In China and the European Community, by contrast, there was little or no water left in their bound non-agricultural and agricultural tariffs, respectively, so practically any deal that they made on these sensitive topics would – unless it also allowed for substantial flexibilities – take a palpable and immediate bite.<sup>70</sup>

It is therefore ironic that India and the United States, the two leading members whose most sensitive defensive objectives were least at risk, appeared to have the highest levels of concern over the draft. That seeming paradox is more readily understood when one considers two points. First, what mattered most for the United States was that the draft failed to deliver much on the offensive side. Second, Indian defensive sensitivities were so high as to reject almost any deal that might require changes in national laws, however slight. Concerns over rural poverty have always made India take a defensive position on agriculture. "The issue is not about economics or the water in its tariffs," according to Ujal Bhatia, the former ambassador to the WTO, but instead "has to do with electoral politics in a democracy where the largest constituencies are those involving poor agricultural workers or small farmers."<sup>71</sup> In short, India least wanted to give what the United States most wanted to get. Ms Schwab listened to the agricultural and other exporters in the United States who demanded more, and Mr Nath listened to the Indian producers whose preferences were just the reverse. The combined cacophony of their domestic constituencies made it difficult for either of these negotiators to hear the other voices in Geneva that were proposing ways to reconcile their competing national interests.

### *Agricultural support, market access and safeguards*

The disconnect between the numbers on the page and the actual policies in place can be understood by considering the case of US agricultural production subsidies. The draft text called for the United States to cap its overall trade-distorting domestic support (OTDS) at US\$ 13.0 billion to US\$ 16.4 billion. The United States offered US\$ 15.0 billion, which was well below the US\$ 22.5 billion limit that it had previously tabled, and also below the US\$ 17.0 billion figure it informally offered. At a time when the actual level of trade-distorting support that the US government provided to farmers was in the US\$ 7 billion to US\$ 8 billion range, however, it was clear that these numbers mattered only in a contingent fashion. A US\$ 15.0 billion limit would require no change in actual US subsidies, and would allow those subsidies to double before the water ran out.

Turning from domestic support to agricultural market access, the most difficult aspect of these negotiations came from an unexpected quarter. The Special Safeguard Mechanism (SSM) had not previously been a high-profile topic, but came to be closely associated with the proposed tariff cuts on agricultural products. As discussed earlier in this chapter, the chief US concern was that this mechanism would become a fallback by which developing countries, and above all China, might undo whatever liberalization was achieved through tariff reductions. The concept of an SSM in principle was not at issue, but the specific rules – and especially the trigger mechanism – very much were. “Those who feared that the safeguard would lead to a disruption of normal trade wanted this trigger as high as possible,” said Mr Lamy. “Those who feared that the safeguard would not be operational if it was too burdensome wanted a lower trigger.”<sup>72</sup> The proposal that Chairman Falconer developed, and that became part of Mr Lamy’s draft, would have allowed safeguard tariffs of up to 15 per cent or 15 percentage points above the base rates whenever import volumes rose by 40 per cent over a three-year average, provided that prices were also declining. Such tariffs could be imposed on up to 2.5 per cent of a country’s tariff lines.

Neither side was happy with this formulation. China, India and the other G33 countries argued that this trigger was too high, and proposed instead that the highest remedies be triggered by increased import volumes of 10 per cent. They also wanted safeguard duties to be capped at 30 per cent or 30 percentage points above bound levels, twice what the Lamy draft provided. The United States wanted to ensure that the total duty not exceed pre-Doha bound tariff levels. If a remedy could go beyond the existing bindings, the US negotiators argued, the net result could put agricultural exporters in a worse position after the round than they had been in before it. Mr Lamy responded to these objections by proposing a mechanism without either numerical triggers or remedy caps, based instead on “demonstrable harm” to food and livelihood security and rural development needs. Use of this mechanism would be subject to expert review. India accepted this proposal, but the United States rejected it. Negotiators floated several other variations of such a formula, seeking to find a “sweet spot” acceptable to both the advocates and the opponents of the SSM. The United States, however, would not move from its position that a 40 per cent increase in import volume was the lowest acceptable trigger level for any tariffs that would go beyond the pre-Doha tariff ceilings. These differences over the magnitude of import surges that would trigger safeguards proved to be irreconcilable.

The negotiating dynamics among the developing countries in this G7 were unusual. Those who had portrayed the G20 as an unnatural alliance found vindication in the SSM negotiations, where Brazil's offensive interests collided with the defensive interests of China and India. The relationship between China and India was also unusual. While it was India that argued most strenuously for the SSM, it was China that would appear more likely to utilize the mechanism. India still had plenty of water left in its agricultural tariffs, and could thus respond to import pressure by raising its applied tariffs, but for China the SSM might be the only recourse in any effort to restrict imports. According to Mr Bhatia, the alliance between Brazil, China and India "was based on a clear understanding that Brazil would respect the defensive interests of the other two and the G20 would largely focus on the subsidies and market access issues involving developed economies." The G20 therefore "never took a position on the SSM beyond that of general support, because doing so would risk a fracture within the grouping."<sup>73</sup>

The Indian position was also shaped by its relations with the wider developing world in Asia, Africa and Latin America, "based on shared colonial histories and shared economic situations" that translate into "Indian positions which always reflect the concerns of smaller developing countries."<sup>74</sup> Mr Nath saw the SSM as "the test of India's role as the spokesman for the smaller countries with similar defensive interests in agriculture." He was also concerned that if the deal on the table were adopted, this –

would mean the truncating of the Doha Round into limited outcomes on these issues and that other issues which developed countries, including the US were defensive about, would be abandoned. These included cotton, TRIPS amendments, Mode 4, Implementation issues relating to the Uruguay Round and the like.<sup>75</sup>

At times there were signs of progress. "When you talked to the Chinese about how they were going to exercise their flexibility under the one-pager," according to Ms Schwab, "we hoped we would be able to negotiate the details to the point of neutrality and maybe some wins."<sup>76</sup> American officials were especially keen on ensuring that the tariff deals and the SSM not be structured in such a way as to restrict US access to the Chinese soybean market. Chinese officials seemed equally dedicated to preserving their options for this commodity, but may also have been happy to allow India to be out ahead on this issue.

The seven countries represented in the green room were not the only participants in the negotiations, of course, and other members had strong views of their own. Competitive exporters such as Uruguay sided with the US position, arguing that if safeguard duties exceeded current tariff bindings it would upset the balance of rights and obligations agreed to in the Uruguay Round. Ambassador Guillermo Valles pointed out that the SSM in the draft agricultural text could be triggered even by normal rates of growth, and a 10 per cent trigger could lead to safeguards on 82 per cent of China's food imports and 64 per cent of India's (ICTSD, 2008). Other developing countries were concerned that the G7 was not addressing agricultural issues of interest to them. Kenya's Deputy Prime Minister Uhuru Kenyatta, speaking on behalf of African members, complained that "most of the key issues of interest to the African continent were not even discussed" (quoted in Coulibaly, 2008). The failure to

resolve the cotton problem was especially troubling. The negotiations over tropical products also pitted the interests of Latin American exporters against the ACP, the former seeking market access and the latter fearing preference erosion.

The mini-ministerial did produce agreement on one long-standing irritant. Director-General Lamy, who had been asked to mediate between the European Community and Latin American banana exporters to settle the banana dispute, convened a separate green room with ACP ministers as well as those representing Latin American exporters. Mr Kenyatta represented the ACP's views, and Peruvian Trade Minister Mercedes Araoz spoke for the Latin American camp. Discussions focused on a handful of tropical products that were sensitive to both sides, and long hours of negotiating line by line produced a tentative deal agreeable to both sides. This deal complemented an agreement negotiated in a separate room that settled the banana case, primarily through deeper cuts to banana tariffs over longer implementation period, as well as a package of development assistance that the European Community would provide to ACP countries. The banana agreement survived the collapse of the 2008 deal, ultimately bringing a lengthy dispute to a final settlement in 2012.

### *The collapse and the blame*

On 29 July, after nine days of ultimately fruitless negotiations, Mr Lamy told the Trade Negotiations Committee that the talks had failed. They had been tantalizingly close to finalizing modalities in agriculture and NAMA, and for "a wide range of problems which had remained intractable for years we have found solutions," but the negotiations ultimately ran into a wall over the SSM. He said that "perhaps the dust needs to settle a bit" before deciding on how to proceed with Doha, but urged members to preserve the progress made in agriculture and NAMA and other areas.<sup>77</sup>

Mr Lamy asked the ambassadors not to engage in the blame game, but recriminations were inevitable and in this instance were especially deep. When diplomats and other politicians wish to express the idea that they have come to an impasse but remain on friendly terms they will often say that they "agreed to disagree." That expression of cordiality is missing from participants' recollections of what happened in July 2008, as key players in those failed negotiations disagree about what made them disagree. Those disagreements are rooted in *Rashōmon*-like recollections that are filtered through the participants' highly subjective perceptions.

Most of the participants who blame specific people focus on either Ms Schwab or Mr Nath. Indian officials noted that it would not be useful for them to agree to a deal that the United States was not likely to accept. They also thought that Mr Lamy was asking too much of them and too little of the United States, while also providing too little on the special safeguard. Like their US counterparts, Indian negotiators also point to issues of personal chemistry in the negotiations. Mr Nath reportedly had a good, working relationship with Rob Portman (see Biographical Appendix, p. 589), who held the position of US trade representative between the departure of Mr Zoellick in 2005 and the arrival of Ms Schwab in 2006. They also perceived

Mr Portman, who had served in the US House of Representatives from 1993 to 2005, as being better positioned to clinch a deal and sell it to Congress. From the Indian point of view Ms Schwab, who had served as a congressional staffer and as a USTR negotiator before getting the top job, seemed too beholden to US industry groups, the American Farm Bureau Federation, and Congress.

Not surprisingly, US officials viewed things the other way around. "The Chinese were being obstructionist," one of them recalled, "but it was the Indians that killed the thing."<sup>78</sup> The Americans concluded they could accept the one-page deal, and for a day or two they believed that the bargain was in hand. Their Indian counterparts sought changes, however, and when the US delegation concluded that the deal was not stable they lost confidence in the process and their partners. "It became very, very clear that there was zero chance that the Indians were ever going to let us do a deal," Ms Schwab would later recall, "and that every time we responded to an Indian concern they'd move the goal-posts."<sup>79</sup>

Rather than choose between Ms Schwab and Mr Nath, Mr Lamy saw them both – or the "Schwab-Nath coefficient," as he put it – as a leading problem. In his estimation, neither of these ministers were as prepared to close the deal as their respective leaders would have been. "Had Bush and Singh been there," he believed, "there would have been a deal. But Schwab was less inclined to lead than Bush, and Kamal Nath was less inclined to lead than Singh, Schwab for technical reasons and Kamal Nath for political reasons."<sup>80</sup>

Another problem relates to a fundamental insight from game theory. "The essence of a game," as Dixit and Nalebuff (2008) observed, "is the interdependence of player strategies." The payoff that a player can expect from a given strategy is not immutable but depends on the strategies that other players adopt. Player A's strategy may do well against Player B, but A might have a very different experience if either B changes strategy or if A tries the same strategy with Player C. The same logic might be applied to the role of a mediator, in which the strategy that a mediator adopts may help Group 1 find a deal based on mutual gains but may fail with Group 2. This set of negotiations followed the well-established WTO model of the confessional, in which a chairman or, in this case, the director-general seeks to mediate a solution by exploring in depth each participant's positions and discovering the zones of possible agreement. That requires an exploration of each party's sensitivity as well as judgment calls by the chairman. As Mr Lamy described his approach:

The spirit of the confessional is, "Give me your red lines so that I don't over-step them, but don't you cheat me [by] telling me it's a red line where it's a blue line." And they all try to hide their red lines, the red lines are behind where they say, and it's for the one in the confessional to guess that they know full well at the end of the day once they express their red lines the name of the game is that I can put something on the table that doesn't breach red lines. It's a question of trust: "I know you, you will tell me, 'This is my red line,' and I will step fifteen percent beyond that red line, because I know you gave me a number which is fifteen percent above what you can accept."<sup>81</sup>

That is a logical way to proceed, and has been a tried and true method throughout the history of the multilateral trading system, but trouble may arise if a mediator perceives more “give” in a negotiator’s position than that negotiator meant to convey. Ms Schwab believed that she had gone as far as she could, arriving at a point where “the only person I was negotiating with at that point was myself,” but the director-general believed otherwise. “Give me your bottom line,” Mr Lamy would ask, but “I had literally given him my bottom line, and he was back asking me to give him my bottom line, and I’d done that in good faith.”<sup>82</sup>

### *A counter-factual speculation*

Could the deal that was then on the table resolve the round? Ms Schwab would have to get past two familiar difficulties: the Washington problem (negotiating with Congress) and the Geneva problem (negotiating with the other members). She might have resolved the Geneva problem by accepting the deal, but she believed that in so doing her Washington problem would be insuperable. This deal, in her estimation, ran a serious risk of becoming the biggest trade agreement that Congress had rejected since the Havana Charter to the ITO. It would be difficult to second-guess Ms Schwab’s estimation of the chances. She knew Congress well, having worked there for years, and throughout the mini-ministerial she was in constant contact with the Capitol Hill, the White House and the many representatives of the US private sector who were on hand in Geneva. It is nonetheless intriguing to speculate on what might have happened in both Washington and Geneva if she and her counterparts had been able to strike a deal.

Had the negotiators gone down this road they would soon have come across an entirely different sort of Washington problem. What no one then negotiating could have known was that the first indicators of the impending financial crisis were emerging across the Atlantic at the very time these negotiations were under way in Geneva. One early warning sign came on 15 July 2008 – the week before the Geneva negotiations began – when the Securities and Exchange Commission issued an emergency order temporarily prohibiting naked short selling in the securities of the housing finance agencies known as Fannie Mae and Freddie Mac. The full magnitude of the crisis was not apparent until two months later, when the Federal Housing Finance Agency placed these two agencies in government conservatorship (7 September), Lehman Brothers filed for bankruptcy protection (15 September) and the stock market began a plunge that would continue for the next half-year. Throughout the next few weeks there was a new sign of economic calamity coming out of Washington, New York, and other political and financial capitals almost every day. The Dow Jones Industrial Average offered a fairly accurate barometer of the damage. It had fallen from 11,378 at the end of July to 9,325 by the end of October (down 18.0 per cent), and would hit 6,547 the next March (42.5 per cent below the July level) before it began to rebound.<sup>83</sup>

Had a deal been struck in July the WTO negotiators would likely return in September to begin the months-long process of scheduling specific commitments and finalizing the agreements. They would thus be starting the most detailed part of the negotiations just when the crisis broke. One could spin out a scenario in which that crisis would make them redouble their

efforts, fearing that global markets would take any retreat from the deal as a very negative sign. Another outcome, perhaps more likely, would be near-paralysis. Consider as well that a wholly new US team would come in after the presidential and congressional elections of 4 November 2008. There is a tradition of multilateral trade rounds carrying over from one US administration to the next, even when party control of the White House changes hands; both the Tokyo and Uruguay rounds were started under Republican presidents and finished under Democrats. In the special circumstances of the 2008 to 2009 presidential transition, however, which took place under the cloud of the Great Recession, the chances for delay or disruption were much greater.

One can only speculate on how all of these factors would ultimately have played out, should the mini-ministerial have been successful. There is strong reason to suspect, however, that if the deal were done in July, it would face much more severe challenges in the months to come than the negotiators could reasonably have anticipated at the time.

## Endnotes

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- 1 Note that throughout this chapter the term “ambassadors” encompasses those diplomats of any rank or title who are resident in Geneva, and is used generically to distinguish them from the deputy ministers and ministers who are less frequently involved in the negotiations.
- 2 This count includes annual gatherings along the margins of meetings in the OECD (Paris) and the World Economic Forum (Davos), the five biennial ministerial conferences of the WTO (2001, 2003, 2005, 2009 and 2011), and at least 13 mini-ministerials. That latter group of meetings peaked in frequency at mid-decade, there having been one in 2002 (November in Sydney), three in 2003 (February in Tokyo, June in Egypt, July in Montreal), one in 2004 (July in Geneva), five in 2005 (March in Kenya, May in Paris, June in Livingston [Zambia], July in China, November in the Republic of Korea), one in 2006 (Geneva), and just one each in 2008 (July in Geneva) and 2009 (September in India). This does not count smaller meetings (e.g. of the G4 or G5 variety) or teleconferences that can be arranged by the WTO for small numbers of ministers. The year 2007 was unusual both for missing the scheduled ministerial conference and for having no mini-ministerials, although some ministers did meet that year in smaller gatherings.
- 3 Note that the discussion here assumes that readers are familiar with the issues of scheduling and formulas that were covered in Chapter 9.
- 4 Zeno's paradox of motion is related and refuted in Book VI, Chapters 8-9 of Aristotle's *Physics*.
- 5 For a detailed and comparative summary of the formulas proposed by these members, see *Formula Approaches to Tariff Negotiations: Note by the Secretariat*, WTO document TN/MA/S/3/Rev.2, 11 April 2003, p. 11.
- 6 See *Market Access for Non-Agricultural Products: Communication from the European Communities*, WTO document TN/MA/W/11, 31 October 2002.
- 7 See *Market Access for Non-Agricultural Products: Communication from the United States*, WTO document TN/MA/W/18, 5 December 2002.
- 8 See *Draft Elements of Modalities for Negotiations of Non-Agricultural Products*, WTO document TN/MA/W/35, 16 May 2003.
- 9 See *Market Access for Non-Agricultural Products: Non-Agricultural Market Access – Modalities*, WTO document TN/MA/W/44, 1 September 2003.
- 10 For the sake of clarity, this discussion elides past some important but highly technical questions such as how the negotiations would deal with items for which members did not have bindings and how *ad valorem* equivalents would be calculated for specific or compound tariffs, among others.
- 11 For example, a developing member opting for an a coefficient of 20 would be entitled to make smaller or zero cuts in 14 per cent of its most sensitive industrial tariff lines, up to 16 per cent of the total value of its NAMA imports. Alternatively, the member could keep 6.5 per cent of its tariff lines unbound or exclude them from tariff cuts, provided they do not exceed 7.5 per cent of the total value of its NAMA imports. At the other extreme, a member applying the a coefficient of 25 would have to apply it to all products without exception. The flexibilities for an a coefficient of 22 would approximately split the difference between these options.
- 12 In other words, during a transition period there would be three different tariffs applied on these imports: the preferential rate for imports from certain developing countries, a less-than-MFN rate on imports from the disproportionately affected countries, and the declining MFN rate on imports from all other sources.

- 13 These RAMs are Albania, Armenia, Cape Verde, the Kyrgyz Republic, the Republic of Moldova, Mongolia, the Kingdom of Saudi Arabia, the former Yugoslav Republic of Macedonia, Tonga, Ukraine and Viet Nam.
- 14 The members of this group were Canada, the European Union, Japan, the Republic of Korea, New Zealand, Norway, Switzerland, Chinese Taipei and the United States. Hong Kong, China also supported the proposal without officially being a co-sponsor.
- 15 The designation of this "non-paper" is JOB(07)/54, dated 27 April 2007. It is available at [www.mfat.govt.nz/downloads/NZ-WTO/wto-doha-ministerialdeclaration27apr07.pdf](http://www.mfat.govt.nz/downloads/NZ-WTO/wto-doha-ministerialdeclaration27apr07.pdf).
- 16 See *Committee on Trade and Environment in Special Session: Report by the Chairman, Ambassador Manuel A. J. Teehankee, to the Trade Negotiations Committee*, WTO document TN/TE/20, 21 April 2011, p. 2.
- 17 The proposal was entitled "EC-US Joint Text – Agriculture." It is posted at [http://trade.ec.europa.eu/doclib/docs/2003/october/tradoc\\_113884.pdf](http://trade.ec.europa.eu/doclib/docs/2003/october/tradoc_113884.pdf), and is cited hereinafter as the EC–US Joint Text.
- 18 All references in this chapter to the G20 refer to this coalition that first emerged in the Cancún negotiations, and not to an entirely different group by the same name that became a summit-level global forum in 2008.
- 19 Tariffs on agricultural products can be more complicated than those on non-agricultural products due to: (i) a higher incidence of specific or compound (as opposed to *ad valorem*) tariffs; (ii) the prevalence in some countries of seasonal tariffs for fruits and vegetables (i.e. higher rates applying to imports that enter during a country's own harvest season); and (iii) the use of tariff-rate quotas (i.e. lower rates for imports up to a specified level and higher rates for any amount thereafter). Those issues are not discussed here.
- 20 EC–US Joint Text, paras. 2.1 and 2.2.
- 21 See *Agriculture: Framework Proposal*, WTO document WT/MIN(03)/W/6, 4 September 2003, para. 2.5. Note that this was a reissue of a restricted document (JOB(03)/162) that had originally been distributed 20 August 2003.
- 22 Cited at [www.twinside.org.sg/title2/twninfo220.htm](http://www.twinside.org.sg/title2/twninfo220.htm).
- 23 See *Special Agricultural Safeguard: Background Paper by the Secretariat*, WTO document G/AG/NG/S/9/Rev.1, 19 February 2002.
- 24 See *Revised Draft Modalities for Agriculture*, WTO document TN/AG/W/4/Rev.4, 6 December 2008, p. 3.
- 25 EC–US Joint Text, para. 3.1.
- 26 See *Agriculture: Framework Proposal*, WTO document WT/MIN(03)/W/6, 4 September 2003, para. 3.1.
- 27 As discussed in Chapter 9, the Uruguay Round negotiators also prohibited any subsidies that are placed in the "red box" but then declined to place any subsidies in this box.
- 28 EC–US Joint Text, para. 1.1.
- 29 EC–US Joint Text, para. 1.2.
- 30 See *Agriculture: Framework Proposal*, WTO document WT/MIN(03)/W/6, 4 September 2003.
- 31 It is notable that both the subtraction of the Singapore issues and the addition of cotton reflected positions promoted by developing countries.

- 32 Although a restricted document, the text of JOB/IP/3/Rev.1 is included as an annex to *Multilateral System of Notifications and Registration of Geographical Indications for Wines and Spirits: Report by the Chairman, Ambassador Darlington Mwape (Zambia) to the Trade Negotiations Committee*, WTO document TN/IP/21, 21 April 2011.
- 33 GATS Article I.3(b) defines "services" to include "any service in any sector except services supplied in the exercise of governmental authority." This exception is further refined in I.3(c), which specifies that "a service supplied in the exercise of governmental authority" means "any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers." The provision thus carves out a potentially wide category from the scope of GATS rules. It does not precisely define the scope of this category, however, a lacuna that propagandists exploited.
- 34 See, for example, "La santé et l'éducation pris dans l'engrenage du libre-échange?", *Le Monde*, 3 October 2000, and "WTO denies claims it is trying to abolish public services", *Agence France-Presse*, 6 October 2000.
- 35 See *Guidelines and Procedures for the Negotiations on Trade in Services: Adopted by the Special Session of the Council for Trade in Services on 28 March 2001*, WTO document S/L/93, 29 March 2001, p. 1.
- 36 The requests may be accessed at [www.gatswatch.org/requests-offers.html#outgoing](http://www.gatswatch.org/requests-offers.html#outgoing).
- 37 See *Special Session of the Council for Trade in Services: Report by the Chairman to the Trade Negotiations Committee*, WTO document TN/S/20, 11 July 2005, p. 1.
- 38 See *Guidelines and Procedures for the Negotiations on Trade in Services: Adopted by the Special Session of the Council for Trade in Services on 28 March 2001*, WTO document S/L/93, 29 March 2001, p. 1.
- 39 See *Negotiations on Trade in Services: Report by the Chairman, Ambassador Fernando de Mateo, to the Trade Negotiations Committee*, WTO document TN/S/36, 21 April 2011, p. 12.
- 40 *Ibid.*, p. 1.
- 41 See *Draft Consolidated Negotiating Text: Revision*, WTO document TN/TF/W/165/Rev.8, 21 April 2011.
- 42 See Articles 1.2.3, 2.3.1 and 6.1.6.
- 43 Mr Valles' approach to these negotiations is discussed in Chapter 14.
- 44 See *New Draft Consolidated Chair Texts of the AD and SCM Agreements*, WTO document TN/RL/W/236, 19 December 2008.
- 45 See *Communication from the Chairman*, WTO document TN/RL/W/254, 21 April 2011, p. 1.
- 46 See *General Council: Implementation-Related Issues and Concerns*, WTO document WT/L/384, 19 December 2000.
- 47 See *Implementation-Related Issues and Concerns: Decision of 14 November 2001*, WTO document WT/MIN(01)/17, 20 November 2001.
- 48 Per WTO document JOB(03)68, Category II consists of "proposals made on areas in which mandated negotiations are ongoing or which are otherwise being considered in the respective WTO bodies."
- 49 See Annex 1 of *Special Session of the Committee on Trade and Development: Report by the Chairman, Ambassador Shahid Bashir (Pakistan), to the Trade Negotiations Committee*, WTO document TN/CTD/26, 21 April 2011, p. 4. For the background, see *Report to the General Council*, WTO document TN/CTD/3, 26 July 2002.

- 50 Author's interview with Mr Lamy on 28 September 2012.
- 51 *Ibid.*
- 52 Uruguay was a seventh Latin American member of the Cairns Group that would eventually join the G20 but did not do so in its early stages. This reticence, which stemmed from the desire of General Council Chairman Carlos Pérez del Castillo (Uruguay) to retain a neutral stance during a crucial phase of the negotiations, would be a source of friction between Brazil and Uruguay (see Chapter 14).
- 53 See Figure 3.2 for the composition of this group as of late 2012.
- 54 The text of the Brasilia Declaration is available at [www.dfa.gov.za/docs/2005/ibsa\\_brasilia.htm](http://www.dfa.gov.za/docs/2005/ibsa_brasilia.htm).
- 55 Author's interview with Mr Lamy on 28 September 2012.
- 56 Author's interview with Mr Ricupero on 11 September 2003.
- 57 Author's interview with Mr Supachai on 27 September 2012.
- 58 *Ibid.*
- 59 *Ibid.*
- 60 The statement is posted at [www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/min03\\_14sept\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm).
- 61 The characterizations of delegates' positions in this paragraph are based on the author's interviews in Cancún.
- 62 "Press Conference closing the World Trade Organisation 5<sup>th</sup> Ministerial Conference" 4 September 2003 posted at [http://europa.eu/rapid/press-release\\_SPEECH-03-409\\_en.pdf](http://europa.eu/rapid/press-release_SPEECH-03-409_en.pdf).
- 63 The draft as circulated on 13 September 2003 is posted at [www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/draft\\_decl\\_rev2\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min03_e/draft_decl_rev2_e.htm).
- 64 See *Doha Work Programme: Decision Adopted by the General Council on 1 August 2004*, WTO document WT/L/579, 1 August 2004.
- 65 See *Chairman's Introductory Remarks, Informal Trade Negotiations Committee Meeting at the Level of Heads of Delegation*, informal document reference JOB(06)231, 24 July 2006.
- 66 The meeting was originally intended to last no longer than five days.
- 67 Author's interview with Ms Schwab on 10 January 2013.
- 68 See Appendix 9.2.
- 69 See Appendix 9.3.
- 70 See Appendix 9.2.
- 71 Author's correspondence with Mr Bhatia on 25 March 2013.
- 72 Author's interview with Mr Lamy on 28 September 2012.
- 73 Author's correspondence with Mr Bhatia on 25 March 2013.
- 74 *Ibid.*
- 75 *Ibid.*

76 Author's correspondence with Ms Schwab on 10 January 2013.

77 Comments posted at [www.wto.org/english/news\\_e/news08\\_e/meet08\\_chair\\_29july08\\_e.htm](http://www.wto.org/english/news_e/news08_e/meet08_chair_29july08_e.htm).

78 Interview with the author.

79 Author's interview with Ms Schwab on 10 January 2013.

80 Author's interview with Mr Lamy on 28 September 2012.

81 *Ibid.*

82 Author's correspondence with Ms Schwab on 10 January 2013.

83 The relative level of these declines would be even higher if calculated from 9 October 2007, when the Dow Jones closed at its pre-recession high of 14,164. The declines experienced between then and mid-2008 were unrelated to the financial crisis *per se*, however, and the most appropriate point of comparison is in 2008 rather than 2007. The stock market would not recover to the October 2007 levels until early 2013.



# 13 Discrimination and preferences

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Whether used as mere incantation against the evils resulting from present-day economic policy or vigorously prosecuted [customs unions] will in either case be unlikely to prove a practicable and suitable remedy for today's economic ills, and it will almost inevitably operate as a psychological barrier to the realization of the more desirable but less desired objectives of the Havana Charter – the balanced multilateral reduction of trade barriers on a non-discriminatory basis.

Jacob Viner  
*The Customs Unions Issue* (1950)

## Introduction

Two constants mark the theory and practice of discrimination in trade relations. The first is that it has always been controversial among economists, many of whom share the misgivings that Adam Smith (1776: 460) expressed when he compared preferential trading arrangements to “[t]he sneaking arts of underling tradesmen” who “make it a rule to employ chiefly their own customers.” In an anticipation of the argument that these arrangements are a second-best alternative to the first-best option of non-discriminatory liberalization, he declared “a great trader purchases his goods always where they are cheapest and best, without regard to any little interest of this kind.” Viner (1950: 44) elaborated upon that argument when he distinguished between the trade-diverting and trade-creating effects of customs unions, each of which originated in a discriminatory agreement’s twin effects of “shift[ing] sources of supply ... either to lower- or higher-cost sources.”

The other constant is that discrimination remains a favoured tool of statecraft. For two centuries, political leaders have employed bilateral, regional and even extra-regional trade agreements as a means of shoring up alliances, promoting regional peace and stability, and rewarding or inducing cooperation in fields other than commerce. The desire to maintain that option led the architects of GATT to “grandfather” existing preferential schemes and to permit countries to negotiate new ones. Political objectives also led them in later decades to approve waivers for programmes that extend preferential treatment to developed countries’ imports from developing countries.

Viner's (1950) seminal study of customs unions inaugurated a third tradition, the perennial debate over the impact that discriminatory agreements and arrangements may have on the multilateral trading system itself. A committed multilateralist, Mr Viner viewed deviations from MFN treatment with great suspicion. His analysis is now dated in two respects – GATT and then the WTO would take the place of the Havana Charter, and free trade agreements (FTAs) would become more significant than customs unions – but the basic principles are unchanged. He was thus the first in a long line of economists to express the concern that customs unions and FTAs would be, in Lawrence's (1991) terms, "stumbling blocks" to multilateral agreements. Others with a more optimistic turn of mind instead see these arrangements as "building blocks" for multilateral agreements, creating precedents as well as momentum for new liberalization.

The debate over the relationship between discrimination and multilateralism may be the single most important controversy in the WTO age. One of the ironies of the establishment of this organization is that it culminated a half-century of progress towards a multilateral trade regime, but did so just at the point when its members began negotiating discriminatory agreements in earnest. Almost all WTO members have devoted at least as much attention to the negotiation of bilateral and regional agreements as they have to the multilateral talks. Some argue that the trading system today is multilateral in name only, such that in recent years "trade liberalization has occurred everywhere *except* Geneva" (Dadush, 2009b: 3). That is more than a bit of hyperbole, ignoring the progress achieved in some WTO agreements reached before and during the Doha Round, but also contains more than a grain of truth.

Some terminology is in order before beginning this review, especially the distinction between discriminatory agreements and preferential arrangements. The former generally take the form of treaties, and may range in depth from partial scope agreements to common markets (see Box 13.1). The two major types are FTAs and customs union, both of which eliminate barriers between their members but differ in the treatment they extend to imports from third parties. Whereas the members of an FTA will each retain their own sets of tariffs to third-country goods, the members of a customs union will have a common external tariff. All of these reciprocal agreements are collectively referred to here as regional trade agreements (RTAs). Some authors alternatively call these instruments preferential trade agreements, but the acronym PTA is better used to mean preferential trade arrangements (i.e. those autonomous programmes that work solely on a one-way basis). The Generalized System of Preferences (GSP) is the principal example of a preferential arrangement, but other preferences extend more generous benefits to selected regions or partners. RTAs and PTAs differ in several respects, as discussed below, but both categories comprise significant exceptions to the general rule of most-favoured-nation (MFN) treatment in the WTO system.

### Box 13.1. The taxonomy and terminology of regional trade agreements

The category of RTAs covers five different types of agreements, the most important being FTAs and customs unions. FTAs are defined in GATT Article XXIV:8(b) to be “a group of two or more customs territories in which the duties and other restrictive regulations of commerce ... are eliminated on substantially all the trade between the constituent territories in products originating in such territories.” They are to be distinguished from customs unions, which are defined in paragraph 8(a) of that same article to be “the substitution of a single customs territory for two or more customs territories, so that” not only are duties eliminated on substantially all the trade but also “substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union.” Or in the simplest terms, a customs union is an FTA with a common external tariff.

Three other types of RTAs exist. One is the economic integration agreement (EIA), defined in GATS Article V to be an agreement on services that has “substantial sectoral coverage” and provides for the “elimination of existing discriminatory measures, and/or ... prohibition of new or more discriminatory measures.” In practice, it is not a distinct pact: virtually all agreements that are designated as EIAs are FTAs or customs unions that cover services as well as goods. Another category for which there exists no formal definition is a “partial scope agreement,” or something that is similar to an FTA but covers only certain products. The Enabling Clause permits developing countries to reach partial scope agreements, and also subjects South–South RTAs in general to less strict scrutiny than North–South or North–North RTAs.

The deepest form of integration is a common market, which goes beyond a customs union to provide for the free movement of factors of production (i.e. capital, labour etc.). A common market may also feature a single currency, the harmonization of laws, and even the melding of national and regional institutions. There is no definition of a common market in WTO law, however, which treats such arrangements as customs unions.

The actual titles by which RTAs are known do not necessarily match these definitions. Some FTAs go under names intended to distinguish them from simple tariff agreements. Japan and the European Union prefer the sobriquet “economic partnership agreements”, for example, and the United States styles some of its pacts as “trade promotion agreements”. Some agreements that are called customs unions or common markets are more aspirational than actual, as they often exclude numerous items or entire sectors from the common external tariff.

## The economics of RTAs

Harry Truman, who was president of the United States at the time that Viner (1950) wrote his seminal study of customs unions, famously yearned for a one-armed economist because he was tired of being told contrary things first on the one hand and then on the other. Viner himself reached clear conclusions about the consequences of customs unions for the multilateral trading system, but en route to those conclusions he devised a two-sided paradigm that spawned generations of study and debate: on the one hand RTAs create new trade, and on the other hand they divert trade. More than half a century of theoretical and empirical studies have failed to reach definitive conclusions about which hand carries the heavier weight.

Viner (1950: 43) noted that *trade creation* occurs when “one of the members of the customs union will now newly import [an item] from the other but which it formerly did not import at all because the price of the protected domestic product was lower than the price at any foreign source plus the duty.” In other words, trade is created when the country switches from the inefficient output of its own protected domestic industries to the more efficient production of the trading partner. Conversely, commodities are subject to *trade diversion* when “one of the members of the customs union will now newly import [the items] from the other whereas before the customs union it imported them from a third country, because that was the cheapest possible source of supply even after payment of duty” (*Ibid.*). In this case, the two-tiered tariff structure encourages importers to switch from the more efficient producers in some third country to the less efficient (but now cheaper) producers in the partner country. From an economic standpoint, the key consideration is whether the trade created outweighs the trade diverted. Viner (1950: 44) argued that “whether a particular customs union is a move in the right or in the wrong direction depends ... on which of the two types of consequences ensue” from the arrangement:

Where the trade-creating force is predominant, one of the members at least must benefit, both may benefit, the two combined must have a net benefit, and the world at large benefits; but the outside world loses, in the short-run at least, and can gain in the long-run only as a result of the general diffusion of the increased prosperity of the customs union area. Where the trade-diverting effect is predominant, one at least of the member countries is bound to be injured, both may be injured, the two combined will suffer a net injury, and there will be injury to the outside world and to the world at large.

The basic outline of Viner's argument is elegantly simple but as yet there is no consensus among economists on whether discriminatory agreements offer a net benefit to the trading system. Some of the arguments for and against RTAs focus on the indirect effects that these agreements may have, such as providing model agreements that might be taken up multilaterally (thus contributing to the system) or by creating disincentives to the negotiation of multilateral deals that would erode the margins of preference in RTAs (thus detracting from the system). Those issues are explored later in this chapter.

The more direct and still-unresolved disagreement among economists concerns which half of this Vinerian paradigm predominates. Does the amount of trade created outweigh the trade diverted? The only way to get a clear answer to that question would be to confine one's reading to a few carefully selected authors, and then to ignore their refutations of what other scholars have to say. “[A]s the proliferation of PTAs increased in the 1990s,” Eicher et al. (2008: 3) observed, “so did the number of theories predicting either increasing or decreasing trade flows among (non)members.” Similarly, Clausing (2001: 678) noted that the empirical work has not answered “even the most basic issue regarding preferential trading agreements: whether trade creation outweighs trade diversion.” While Adams et al. (2003) found that a majority of the RTAs that they studied are trade-diverting, Hufbauer

and DeRosa (2007) concluded instead “that the majority of preferential trade agreements in force today are, on balance, trade-creating rather than trade-diverting.”

One way that economists attempt to resolve the issue is by distinguishing between types of RTAs. Some advance a “natural trading partner” hypothesis, arguing that RTAs between neighbours with significant bilateral trade are more likely to be net trade-creating (see, for example, Krugman, 1995; and Wonnacott and Lutz, 1989). Magee disagreed (2004: 15-16), finding that “while nearby countries are more likely to sign preferential trade deals, the agreements do not lead to more trade creation or less trade diversion” (see also Krishna, 2003). Frankel (1997: 229-230) gave a conditional answer, finding that “if the level of trade barriers against outsiders is left unchanged” in a regional arrangement then “the harmful effects of trade diversion are likely to outweigh the beneficial effects of trade creation.” For this reason: “Policymakers should seek to maximize the likelihood that regional arrangements will help global liberalization.”

That point leads to the all-important question of whether the parties to an RTA design it as a complement or a substitute for multilateral liberalization or, to use the jargon, whether it is an instrument of open regionalism or closed regionalism. Again, Viner spotted the pattern long ago. He noted that the tariff unification movement of the nineteenth century and beyond –

was primarily a movement to make high protection feasible and effective for limited areas going beyond the frontiers of single states, and to promote self-sufficiency for these larger areas because self-sufficiency for single states was clearly impracticable or too costly; it was not a movement to promote the international division of labor (Viner, 1950: 68).

That same description may apply to some, although certainly not all, of the RTAs negotiated during the GATT and WTO periods. Several of the customs unions that developing countries created in the 1960s and 1970s were founded more upon a regional concept of import-substitution industrialization (ISI) than they were upon true free trade, and were intended to reduce the inefficiencies associated with ISI by providing for an expanded internal market. The original aims may change, as was shown by the transformation of the Andean Pact (founded in 1969) to the Andean Community in 1988. Whereas the original group was based on ISI and closed regionalism, the reformed organization reflected the Washington Consensus and represented a move to open regionalism. Other RTAs among developing countries have demonstrated varying degrees of attachment to these two different models.

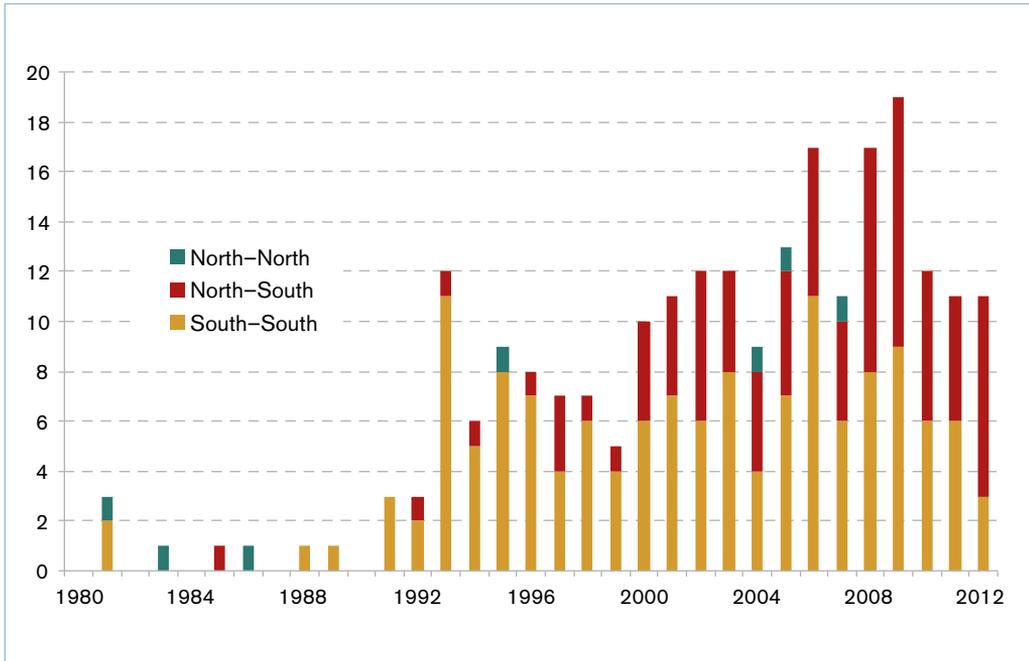
The rules of origin (ROOs) in RTAs and PTAs are another, more specific concern for economists. These rules are principally of statistical importance in non-preferential trade, determining the country to which imports should be attributed, but in preferential trade they decide whether or not imports will receive the benefits of the agreement or arrangement. ROOs can be designed in a way that deliberately exacerbates the problem of trade diversion,

with the parties to an agreement (or the designers of an autonomous programme) manipulating them in ways that are intended to discourage trade with third parties. The ROOs for goods that are produced in transnational supply chains, for example, might be written in a way that reserves most or all of the processes and inputs to the members of an RTA. That practice is especially notable in the case of textile and apparel trade, as discussed later in this chapter. Beyond the problems that might arise in the ROOs of a specific agreement or arrangement, there is a collective concern: when multiple arrangements each have their own rules it can be difficult for multinational producers to access them all with the same production mix. Critics typically invoke the clichéd image of the spaghetti bowl (or sometimes the noodle bowl) to describe this problem, likening the multiplicity of rules to a tangle of pasta.

### Discrimination in the GATT and WTO periods

Analysts and policy-makers may have very differing views about the consequences of discriminatory agreements and arrangements for the multilateral system, but one fact is indisputable: the number and significance of RTAs has grown rapidly. As can be seen in Figure 13.1, these agreements were scarce in the years prior to the Uruguay Round, but the rate picked up rapidly at the very end of those negotiations. The pace at which RTAs entered into effect rose from 2.1 per year in the late GATT years (1980-1994), most of them coming at the end of that period, to 9.0 per year from 1995 to 2003 and 13.3 from 2004 to 2012.<sup>1</sup> Nineteen RTAs entered into force in 2009 alone, or more than all the RTAs notified from 1980 to 1992.

The composition of the RTAs also changed as countries moved from agreements that were predominantly among immediate neighbours to negotiations that were extra-regional or between countries at very differing levels of size and income. The South-South agreements accounted for 78.1 per cent of the RTAs that entered into effect from 1980 to 1994, but then fell to 69.1 per cent from 1995 to 2003 and precisely half of those that entered into effect from 2004 to 2012. During those same three periods, the share of North-South RTAs rose from 12.5 per cent (1980-1994) to 29.6 per cent (1995-2003), and then to 47.5 per cent (2004-2012). North-North agreements remain a small minority of the total, but the few that are negotiated can cover large shares of global trade. The European Union is the biggest customs union in the world; even when one excludes intra-EU trade from the calculation this bloc accounted for 14.9 per cent of global exports and 16.2 per cent of global imports in 2011.<sup>2</sup> The FTA that Canada and the United States reached in 1988 was the largest bilateral FTA, but it was soon replaced by a North-South RTA when Mexico joined the trilateral North American Free Trade Agreement (NAFTA).

**Figure 13.1. Regional trade arrangements notified to the WTO, 1980-2012**

Source: Calculated from data in the WTO Regional Trade Agreements Information System at <http://rtais.wto.org/UI/PublicAllRTAList.aspx>.

Notes: Years in which RTAs entered into effect. The database does not include some RTAs that were in effect during part of the GATT period but were either abrogated or superseded by other arrangements.

North-North = RTAs in which all parties are developed.

North-South = RTAs in which at least one party is developed and at least one party is developing or transitional.

South-South = RTAs in which all parties are developing or transitional.

Table 13.1 shows that customs unions are far less common than FTAs. That is a simple function of geography: almost any pair or grouping of countries might negotiate an FTA, even if they are separated by vast distances, but customs unions tend to be concluded only by countries that are either contiguous or in the same vicinity. FTAs may therefore proliferate in absolute numbers, and could theoretically number in the thousands, but customs unions grow by accretion and face stricter natural limits to their number and size. Whether they are notified under GATT Article XXIV or the Enabling Clause (as explained below), customs unions account for almost precisely one tenth of all RTAs notified to the WTO. The share drops to 7.4 per cent if one leaves out the accessions to existing customs unions and FTAs.

Most of the customs unions still in effect date back to the GATT period or even earlier. The oldest of these are the Southern African Customs Union (established in 1910) and the Switzerland-Liechtenstein Customs Union (1924), though most are from the 1960s to the mid-1990s. Elements of the European Union originated in the European Coal and Steel Community (1951) and evolved through a series of treaties and accessions thereafter.<sup>3</sup> The

**Table 13.1. RTAs notified to the WTO up to the end of 2012**

	<b>Accessions</b>	<b>New RTAs</b>	<b>Total (share in %)</b>	
<b>GATT Article XXIV</b>	<b>7</b>	<b>209</b>	<b>216</b>	<b>(85.7)</b>
Free trade agreements	1	199	200	(79.4)
Customs unions	6	10	16	(6.3)
<b>Enabling Clause</b>	<b>2</b>	<b>34</b>	<b>36</b>	<b>(14.3)</b>
Partial scope agreements	1	14	15	(6.0)
Free trade agreements	0	12	12	(4.8)
Customs unions	1	8	9	(3.6)
<b>Total</b>	<b>9</b>	<b>243</b>	<b>252</b>	<b>(100.0)</b>

Source: Adapted from information on the WTO Regional Trade Agreements Information System at <http://rtais.wto.org/UI/publicsummarytable.aspx>.

Notes: Another 111 notifications were made under GATS Article V for RTAs that covered services as well as goods. These notifications are not shown here separately.

extant customs unions in the Americas began with the Central American Common Market (1961), followed by the Andean Pact (1969), the Caribbean Community (1973) and the Southern Common Market or MERCOSUR (1991). Two more African common markets came into being at the very end of the GATT period: the Economic Community of West African States in 1993 and the Common Market for Eastern and Southern Africa in 1994. African countries have also been active in creating new customs unions during the WTO period. These include the Economic and Monetary Community of Central Africa (1997), the Southern African Development Community and the West African Economic and Monetary Union (both in 2000), and the East African Community (2010). The only other new customs unions established since the start of the WTO period are the Eurasian Economic Community (1997), the Gulf Cooperation Council (2003) and the Customs Union of Belarus, Kazakhstan and the Russian Federation (2010). There are no other customs unions in Asia and the Pacific, although the level of economic coordination is high in the Association of Southeast Asian Nations, which was founded in 1967 and produced an FTA in 1992.

The real growth is in FTAs, which collectively account for 84.1 per cent of all notified RTAs (or 86.8 per cent if accessions are not counted). Table 13.2 shows how quickly RTAs have proliferated among selected WTO members, especially by comparison with the slow rates of growth in most of the GATT period. As of 1965 only three of the 20 future members of the WTO shown in the table had RTAs, but just before the start of the Uruguay Round over half of them did; by 2005 they all had at least one. The data show that the rate of increase stepped up after the WTO came into effect, with the average number of RTAs among these members more than doubling from 1985 to 1995, and then more than tripling from 1995 to 2005. They concluded more new RTAs in the seven years from 2005 to 2012 than in the preceding ten years.

**Table 13.2.** Cumulative notified RTAs of selected members, 1965-2012

	GATT period			WTO period		
	1965	1975	1985	1995	2005	2012
European Union	1	5	5	8	25	34
Switzerland	1	2	2	5	15	28
Chile	0	0	1	1	9	19
Singapore	0	0	0	1	9	18
Turkey	0	0	0	1	7	18
India	0	0	0	0	3	15
United States	0	0	1	2	8	14
Japan	0	0	0	0	2	13
Mexico	0	0	1	4	13	13
China	0	0	0	0	4	11
Peru	0	0	1	2	2	11
Korea, Republic of	0	0	0	0	1	10
Thailand	0	0	0	2	5	10
Australia	0	0	2	2	5	8
Costa Rica	1	1	2	3	6	8
Canada	0	0	0	1	4	7
Colombia	0	0	1	3	3	7
Israel	0	0	1	2	6	6
South Africa	0	0	0	0	3	4
Brazil	0	0	1	2	2	3
<b>With RTAs</b>	<b>3</b>	<b>3</b>	<b>11</b>	<b>16</b>	<b>20</b>	<b>20</b>
<b>Average</b>	<b>0.2</b>	<b>0.4</b>	<b>0.9</b>	<b>2.0</b>	<b>6.6</b>	<b>12.9</b>

Source: Tabulated from data in the WTO Regional Trade Agreements Information System at <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>.

Notes: Includes FTAs and customs unions in effect at year's end; some RTAs cover multiple partners. Agreements providing for the enlargement of existing customs unions are not included. Some of the countries shown in the table were not contracting parties or members for all years shown. RTAs are classified here according to the year in which they came into effect rather than the year in which they were notified to GATT or the WTO.

From a regime standpoint, two other points are more significant than the raw number of RTAs. One, as discussed later in this chapter, is the content and coverage of the RTAs. Another, as discussed here, concerns who is negotiating these RTAs with whom. It is one thing when small- or mid-sized trading countries strike bargains with their immediate neighbours, sometimes in the form of partial scope agreements that contain numerous exceptions, and something altogether different when those countries negotiate comprehensive, extra-regional agreements with the biggest players. The most consequential change comes when the largest players start to negotiate RTAs with one another.

To summarize the patterns of RTA negotiations in rough periods, we may discern three and possibly four phases. The first lasted from the start of the GATT system through the early 1980s, when RTAs remained rare exceptions that were largely confined to the negotiation of partial scope agreements, FTAs, or customs unions among countries in the same region. These were common both to the developing countries and, in the case of Western Europe, the developed countries. The second phase, which roughly coincided with the period of the Uruguay Round, saw an increase in



with several of the others was Hong Kong, China, a special case whose economy is already the most open in the world. In 2012, there was at least a hint of a possible EU–Australia FTA negotiation (Markovic, 2012), leaving only three other potential agreements among these ten biggest traders that had yet to reach even the stage of formal (acknowledged) study: the US–India, EU–China and US–China configurations. Those are the only shards left in the glass ceiling.

The point is sharper still if one looks only at the four largest members in this group. China, the European Union, Japan and the United States collectively accounted for 44.1 per cent of global merchandise exports in 2011 and 49.6 per cent of imports,<sup>4</sup> and also have outsized influence in determining the direction of the multilateral trading system. These four, sometimes called the “new quad”, have distinct histories of negotiating RTAs. The European Union and its predecessor arrangements came first, starting in the early 1950s. It began to negotiate FTAs with other partners in the 1970s, starting first in Europe and then going extra-regional. The United States then followed in the 1980s, as did China and Japan in the 2000s. All four of them thus had numerous agreements already in effect by 2013, averaging over 17 each, and sometimes with the same partners, but had hitherto been highly reluctant to negotiate with one another. Their cut-off point has been drawn at the next largest set of trading powers, with Australia, Canada and the Republic of Korea each having reached or launched negotiations with three of these four largest members. By about 2010, however, each member of this new quad began to consider other, bigger plans. The most significant developments came in 2013, which saw the initiation of Japanese negotiations with China, the European Union, and (by way of the Trans-Pacific Partnership negotiations) the United States, as well as negotiations between the European Union and the United States for either an FTA or its functional equivalent. Four of the six possible configurations among new quad were at some stage of development by early 2013, and the only two arrangements that policy-makers had yet to broach are those aforementioned US–China or EU–China agreements.

### *Preferences for developing countries*

Special and differential (S&D) treatment is one of the most essential yet most contentious aspects of the global trading system. The concept of S&D treatment has developed gradually over several generations. In its more passive and protectionist form, this approach merely posits that countries at lower levels of economic development should not be obliged to open their markets at the same pace as more advanced competitors. This version of S&D treatment is at least as old as the late eighteenth century, when Alexander Hamilton devised the “infant industry” argument for protection. The German Historical School of economic analysis took up this same line of argument in the next century, which it elevated into a general law of economic statesmanship (see List, 1844). In the twentieth century came more active and affirmative forms of S&D treatment, especially preferential and non-reciprocal access to industrialized countries’ markets.

Preferential trade programmes have some points in common with RTAs but differ in other respects. The most significant legal similarity is that they provide for discriminatory access to selected countries, and hence require leave for countries to deviate from the MFN requirement of GATT Article I. The legal differences are two-fold: preferences are one-way rather than

reciprocal, and they last only as long as the preference-giving country wishes to maintain this special treatment (and is given permission to do so via a WTO waiver). RTAs generally take the form of reciprocal treaties that are rarely abrogated, except in cases where one agreement is later replaced by a more comprehensive one, but most preferential programmes are based on the domestic law of the preference-giving country and are subject to expiration, repeal, amendment and administrative changes. In economic terms, the principal difference is in the product coverage. Most preferential programmes cover only certain products, and are comparable to partial scope agreements rather than FTAs. Often the excluded products or sectors are import-sensitive goods that can be subject to high MFN tariffs. This means that the items for which a developing country might most benefit from preferential treatment are also the ones that are least likely to be covered. The preferences extended under these programmes may be either complete, duty-free treatment or only a partial margin of preference, depending on how the preference-giving country chooses to structure the lists. Preferential programmes may be subject to rules that allow for the restriction or removal of products on either a global or a country-specific basis, or countries' graduation from the programme on economic grounds. Beneficiaries might also lose some or all of their preferences if they have economic or political disputes with the preference-giving country. For all of these reasons, preferential programmes are generally considered to be less comprehensive, permanent, generous and beneficial than are RTAs.

An RTA is more demanding of a developing country than is a preferential programme, insofar as it requires that country to reciprocate by opening up its own market, but that can be a benefit as well as a cost. An RTA has the twin benefits of enshrining the countries' market access in solemn treaty commitments, and also doing the same for any economic reforms to which the developing country commits in the agreement. That may result in a business climate that is, from the potential investor's perspective, more inviting and secure than one based on the autonomous economic policies of the developing country and the equally autonomous preferences of the developed country.

The evolution of what became the Generalized System of Preferences (GSP) illustrates how countries work around the sometimes fine line that can separate preferential treatment from managed trade. The original proposal for the GSP came at the first United Nations Conference on Trade and Development (UNCTAD I), where countries considered a plan by which "*quantitative targets* should be set for their entry into the industrial countries' market" in which "the industrial countries could establish a quota for admitting manufactured goods from the developing countries *free of duty*."<sup>5</sup> These preferences in results encountered strong objections from the industrialized countries, but were eventually negotiated down to less ambitious preferences in access. The developing countries won a commitment in principle for tariff preferences at UNCTAD II in 1968. Several more years passed before the programme entered into effect. One legal hurdle was the incompatibility of this programme with GATT Article I, which requires universal MFN treatment (i.e. generally prohibits discrimination). The GATT contracting parties originally granted a ten-year waiver for the GSP in 1971. Eight years later came the Enabling Clause, more properly known as the decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries.<sup>6</sup> It

provided (among other things) that, “[n]otwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties.” By that time, all of the major developed countries had instituted GSP programmes under the 1971 waiver. The European Community, Japan and Norway did so in 1971, followed by New Zealand and Switzerland in 1972 and Australia and Canada in 1974. The United States was the last of the major developed countries to institute its GSP programme, coming on line in 1976. Iceland and Turkey began programmes of their own in 2002.

Several countries also instituted special preference programmes for specific regions, sub-regions, or even individual partners. These programmes generally provide for more generous treatment than does the GSP, and are typically devoted to regions where the preference-giving country has historic ties or other political interests. Each of these programmes has required a separate waiver from GATT or the WTO, as discussed in the next section. The first of these came in 1981, when Australia and New Zealand concluded the South Pacific Regional Trade and Economic Cooperation Agreement. The United States has regional preferences for three sets of beneficiaries: the Caribbean Basin Economic Recovery Act (since 1984), the Andean Trade Preference Act (since 1991), and the African Growth and Opportunity Act (since 2000). The European Union has special trade preferences for the Western Balkans (since 2000), the Republic of Moldova (since 2008) and Pakistan (since 2012). Canada’s Commonwealth Caribbean Countries Tariff, or CARIBCAN, has been in effect since 1986.

Nor are the developed countries alone in providing preferential treatment beyond the GSP. In a side event at the Seventh WTO Ministerial Conference in Geneva (2009), representatives from 22 developing countries agreed to a framework deal to cut tariffs and other barriers to each other’s exports in order to boost South-South trade. This built upon the existing Global System of Trade Preferences among Developing Countries (GSTP), an arrangement reached under UNCTAD auspices that entered into force in 1989. The negotiations over the 2009 expansion of the programme first began at UNCTAD XI (2004), in São Paulo. The GSTP is considered in WTO terms to be an RTA, or more specifically a plurilateral, partial scope agreement. At the time of writing, it has 43 participants, including some countries that are not members of the WTO.<sup>7</sup>

### ***Duty-free, quota-free treatment for the least-developed countries***

The issue of duty-free, quota-free (DFQF) treatment for imports from least-developed countries (LDCs) is at the sometimes-difficult crossroads between WTO and UN rules. The UN system developed the DFQF pledge in principle as one of the Millennium Development Goals (MDGs), and several countries (developed and developing) have put DFQF programmes of their own in place, but this MDG has yet to be adopted as a binding commitment in the WTO. The most that has been accomplished at the time of writing is the approval of a waiver that makes countries’ DFQF programmes WTO-legal, and the development of a text that could be a part of a final Doha deal. Until then, the DFQF pledge remains an option that countries are free to provide on an autonomous basis, but are not required to do so.

The DFQF commitment dates back to a year before the launch of the Doha Round. In September 2000, at the United Nations Millennium Summit, world leaders agreed to a set of time-bound and measurable goals and targets for combating poverty, hunger, disease, illiteracy, environmental degradation and discrimination against women. The summit's Millennium Declaration enumerated the MDGs, one of which called on the industrialized countries to adopt, preferably by early 2001, "a policy of duty- and quota-free access for essentially all exports from the least developed countries."<sup>8</sup> At the Third United Nations Conference on the Least Developed Countries in mid-2001, the assembled countries declared their aim to "improv[e] preferential market access for LDCs by working towards the objective of duty-free and quota-free market access for all LDCs' products in the markets of developed countries."<sup>9</sup> WTO members adopted this same commitment later that year at the Doha Ministerial Conference, where the trade ministers endorsed in paragraph 42 of their declaration "the objective of duty-free, quota-free market access for products originating from LDCs."

Since then the issue has faced two related divisions. One is between the preference-giving countries, some of which view the DFQF commitment as a suitable object of early-harvest treatment in the Doha Round and have implemented programmes of their own in advance. Others treat it as an item that may be included in the final results of a round; the United States is the principal advocate for holding back a definitive commitment on DFQF until the round as a whole is completed. The second division is among the LDCs themselves, some of which already enjoy a closer approximation of DFQF access to the US market than do others. Most sub-Saharan African LDCs receive duty-free treatment for most of their exports to the United States under the African Growth and Opportunity Act, and Haiti receives it under both the Caribbean Basin Initiative and special programmes, but Asian LDCs still face high MFN tariffs on nearly all of their exports of apparel to the US market. While all LDCs are committed in principle to the extension of DFQF treatment to all of them by all developed countries, in practice those LDCs that already have DFQF-like access to the US market are opposed to initiatives that would extend the same treatment to the other LDCs.

These differences are reflected in the Hong Kong Ministerial Decision on Duty-Free, Quota-Free Market Access. The ministers struck a compromise by agreeing that "developed-country Members shall ... [p]rovide duty-free and quota-free market access on a lasting basis, for all products originating from all LDCs by 2008 or no later than the start of the implementation period." That commitment thus accommodated both those members that wanted to extend DFQF immediately and those that wanted it to be part of the overall deal. It was also restricted by a further proviso that "[m]embers facing difficulties at this time to provide market access as set out above shall provide duty-free and quota-free market access for at least 97 per cent of products originating from LDCs."<sup>10</sup> That 97 per cent figure is counted by tariff lines and not on a trade-weighted basis, meaning that a member implementing this commitment could exclude potentially large volumes of trade, especially import-sensitive apparel products.

Some countries have undertaken DFQF programmes on an autonomous basis. The European Union created an "Everything But Arms" (EBA) programme in 2001 that provides DFQF

treatment to all qualifying products imported from all LDCs other than weapons and ammunition. Other members that instituted programmes for LDCs from 2000 to 2010 included not just developed countries such as Australia, Canada and New Zealand, but also developing members China, India, the Republic of Korea, the Kyrgyz Republic, Morocco, Singapore and Chinese Taipei. The United States has no DFQF programme for LDCs *per se*, but the aforementioned programmes for Haiti and sub-Saharan African countries extend this treatment to the majority of the LDCs. Asian LDCs receive preferential access to the US market under the GSP, and the US version of that programme covers a wider range of products for LDCs than for other developing countries. The main *lacuna* remains preferential access to the US market for apparel exported by Asian LDCs, an issue to which we turn below.

WTO members have also approved a waiver allowing the extension of preferential treatment to the LDCs for trade in services. This waiver, as approved at the 2011 Ministerial Conference, allows members to grant LDCs greater access to their services markets even if in so doing they deviate from the MFN principle.<sup>11</sup> Any such preferences must be extended to the entire LDC group. This benefit remains more potential than actual, however, with no concessions having been requested or provided through early 2013.

### *The phase-out of textile and apparel quotas*

Textiles and apparel traditionally offers the most important sector for preferential treatment of developing countries' exports to developed countries. This was an unintended consequence of the strict import quotas that countries first imposed in the early 1960s and evolved into the Multi-Fibre Arrangement (MFA) of 1974. Those quotas, coupled with high tariffs, protected apparel industries in the European Community, the United States and other developed countries from the output of low-wage developing countries. The quotas were more important than the tariffs for two reasons. The first is the economic principle that, all things being equal, quotas are more restrictive than tariffs. The second is that the quotas were distributed on a country-specific basis, and for countries that might not otherwise be competitive in this area the quotas were more in the nature of guaranteed access to a restricted market than limits on their access to an open one.

Over time, a system that was originally intended to provide protection to the textile and apparel industries in developed countries – and continued to serve that purpose until the final phase-out of the quotas – also developed the ancillary purpose of providing a hybrid form of managed trade and foreign assistance. That allowed the importing countries to allocate quotas to favoured partners, and by the mid-1980s they were supplementing this policy with special, preferential arrangements. Whether extended under programmes such as the (US) Caribbean Basin Initiative (CBI) or the FTA with Central America and the Dominican Republic that replaced that programme, these initiatives included ROOs that encouraged co-production. Preferential quota and tariff treatment on finished apparel products imported from the Caribbean Basin would be contingent upon the incorporation of US fabric in those goods. The United States had similar programmes in place with the beneficiary countries of the African Growth and Opportunity Act and the Andean Trade Preferences Act. Similarly, the

European Union's EBA programme for LDCs also included strict ROOs. If the apparel quota programmes had become a form of foreign assistance, these rules were the equivalent of tied aid.

The Agreement on Textiles and Clothing (ATC) is a Uruguay Round instrument that replaced the MFA and phased out its quota system from 1995 to 2005. The elimination of those quotas greatly reduced the value of the preferential treatment extended to developing countries under programmes such as the EBA and the CBI, as well as the RTAs that the European Union and the United States negotiated in the late 1980s and early 1990s. Those initiatives still extend preferential tariff treatment, which can be very significant for products that would otherwise be subject to tariffs of 15 per cent to 20 per cent or more, but with the end of the quotas the outcomes are determined much more by countries' underlying competitiveness than by the quota access they are granted. In some cases complying with the terms of a preferential agreement or arrangement may actually make imports from the partner country less competitive; that can happen if the difference between the price of inputs meeting the ROOs versus those sourced freely is greater than the margin of preference between the MFN tariff and the preferential rate.

Table 13.3 shows how the phase-out of the MFA quotas led to a consolidation of the global clothing market. It reports the shares of the market that leading providers held five years before the MFA phase-out began (1990), in the middle of that process (2000), and five years after it was complete (2010). The economies in the table accounted for 47.0 per cent of global clothing exports in 1990, 58.3 per cent in 2000, and 64.9 per cent in 2010. As of 1990, no one country held as much as 10 per cent of the global clothing market. Some of the higher-income developing economies in Asia were already losing market share by that time, this being a labour-intensive industry in which countries with higher wage rates are at a disadvantage. The sharpest drop came in Hong Kong, China, which went from being the second-largest supplier (after China) in 1990 to a negligible share of the global market in 2010. Other producers that had relatively high shares of the market in 1990 lost much of that share, either over the next ten years or after 2000, and still others retained approximately stable shares throughout the period. A small number of Asian countries saw their exports grow rapidly in absolute and relative terms. China's share of the global clothing market doubled from 1990 to 2000, and then doubled again over the next decade.

This consolidation of the clothing market contributed to a rift between different groups of LDCs. As discussed above, most sub-Saharan African LDCs receive DFQF-like access to the US market under the African Growth and Opportunity Act, and Haiti does under other programmes, but the United States does not extend preferential treatment to apparel imported from Asian LDCs such as Bangladesh and Cambodia. Proposals to extend DFQF to all products that the United States imports from all LDCs, whether they take the form of negotiations in Geneva or in legislative initiatives in Washington, divide African developing countries (and especially the LDCs in the region) from Asian LDCs. The textile and apparel sector is no longer subject to the same degree of management as it was when the MFA quotas system was still in effect, but it nonetheless remains a field that inspires zero-sum calculations and manoeuvres.

**Table 13.3.** Clothing exports of selected WTO members, 1990-2010

	1990		2000		2010	
	Value US\$ m	Share %	Value US\$ m	Share %	Value US\$ m	Share %
<b>Rising shares</b>						
China	9,669	8.9	36,071	18.3	129,838	36.9
Bangladesh	643	0.6	5,067	2.6	15,660	4.5
Turkey	3,331	3.1	6,533	3.3	12,760	3.6
India	2,530	2.3	5,965	3.0	11,246	3.2
Viet Nam	–	–	1,821	0.9	10,839	3.1
<b>Stable shares</b>						
Pakistan	1,014	0.9	2,144	1.1	3,930	1.1
Malaysia	1,315	1.2	2,257	1.1	3,880	1.1
Tunisia	1,126	1.0	2,227	1.1	3,043	0.9
Six African countries <sup>a</sup>	627	0.6	1,580	0.8	1,983	0.6
<b>Declined 2000-2010</b>						
Indonesia	1,646	1.5	4,734	2.4	6,820	1.9
United States	2,565	2.4	8,629	4.4	4,694	1.3
Mexico	587	0.5	8,631	4.4	4,363	1.2
Sri Lanka	638	0.6	2,812	1.4	3,491	1.1
Cambodia	970	0.9	3,014	1.5	3,041	1.0
Honduras	64	0.1	2,275	1.2	2,915	0.8
El Salvador	184	0.2	1,673	0.8	1,697	0.5
<b>Declined 1990-2010</b>						
Thailand	2,817	2.6	3,759	1.9	4,300	1.2
Korea, Republic of	7,879	7.3	5,027	2.5	1,610	0.5
Chinese Taipei	3,987	3.7	3,015	1.5	963	0.3
Hong Kong, China <sup>b</sup>	9,266	8.6	9,935	5.0	417	0.1

Source: Calculated from WTO data at [www.wto.org/english/res\\_e/statis\\_e/its2011\\_e/section2\\_e/ii70.xls](http://www.wto.org/english/res_e/statis_e/its2011_e/section2_e/ii70.xls). Some data include WTO Secretariat estimates and/or significant exports from processing zones.

Notes: Shares are percentages of total global exports. <sup>a</sup>The six African countries are Botswana, Kenya, Lesotho, Madagascar, Mauritius and Swaziland. <sup>b</sup>Includes only domestic exports, not re-exports. "Stable" is defined here as a change (up or down) of no more than 0.2 percentage points from one period to the next.

## Legal issues in discrimination

The legal issues in discrimination start from a simple premise: these agreements and programmes are fundamentally incompatible with the core rule of the WTO system. GATT Article I requires unconditional and universal MFN treatment among all members, but the negotiators of GATT 1947 were political realists who built in four "political" provisions to the agreement that allow countries to deviate from Article I and other rules. These provisions allow an exception for measures taken in pursuit of a country's security interests (Article XXI); permit a country to withhold recognition of another's status in the GATT/WTO (GATT Article XXXV,<sup>12</sup> now WTO Article XIII); "grandfather" in the preferential arrangements that

existed in 1947 (listed in annexes A-F in GATT); and provide for the negotiation of new preferences in the form of FTAs or customs unions (Article XXIV).

RTAs are now permitted, and subject to disciplines, under a series of WTO rules, agreements and decisions. In addition to the inherited GATT Article XXIV and the Enabling Clause these include the Uruguay Round Understanding on the Interpretation of Article XXIV of the GATT 1994, GATS Article V (the services equivalent to GATT Article XXIV), and – as discussed below – the Transparency Mechanism inaugurated in 2006. Beyond these permanent elements of the WTO legal system, members may also grant waivers for specific preferential programmes.

The ambivalent views that economists express on discrimination, as noted above, have their equivalent in the law and diplomacy of RTAs. On the one hand, the instruments listed above set the standards that RTAs must meet, and subject them to transparency and surveillance. On the other hand, neither the GATT contracting parties nor the WTO members have ever found an RTA to be out of conformity with the parties' obligations, or required them to abrogate, adjust or renegotiate an agreement. Simply stated, in the WTO every member is prepared to raise questions about every other member's RTAs, but none of them want to set a precedent by which those questions might lead to the actual rejection of an RTA – either their own or anyone else's.

### *The requirements that RTAs must meet*

The terms of GATT Article XXIV establish the legal framework that reconciles RTAs with the general GATT principles from which they depart. RTAs are permissible if they meet two requirements. The less controversial of these provides that tariffs and commercial regulations on third countries that are “imposed at the institution of” an RTA “shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable” before its formation. In practice, this provision affects only customs unions. These arrangements can sometimes result in tariffs being increased on imports from third countries, such as when a new country accedes and raises tariffs on some items that had previously been below the level of the common external tariff.<sup>13</sup> Third parties must be compensated for any increased tariffs through the reduction of some other tariffs in the customs union's CET. Negotiations over this type of compensation have taken place after each new enlargement of the European Union, for example, with the union as a whole “paying for” the accession of a new member.

The more controversial requirement in GATT Article XXIV:8 is that FTAs and customs unions must eliminate “duties and other restrictive regulations of commerce ... with respect to substantially all the trade between the[ir] constituent territories.” The problem is that the text does not provide any definitions or standards for determining what “substantially all” means. While proposals have been made at various times in GATT and WTO history to clarify this provision by establishing stricter criteria that are stated in either qualitative rather than quantitative terms – specifying, for example, a certain percentage of tariff lines that must be covered, or a percentage of total trade, or some mix of product sectors – none of these have been formally adopted. RTAs have, therefore, been examined on a case-by-case basis, without any overriding guidelines having been set beyond the plain language of Article

XXIV:8. The most that one can say with real confidence is that the imprecise phrase “substantially all” allows for some exceptions. These same observations apply to the corresponding provision of GATS Article V.

Two very general rules seem to govern the positions that countries take on the review of RTAs. The first is that countries that did not negotiate RTAs at all were more likely to take a “strict constructionist” view of the Article XXIV requirements, and to be critical of (for example) wholesale exclusions of agriculture or other sectors from the product coverage. That general rule is less relevant now that every WTO member either has, or is in the process of negotiating, at least one RTA. The second general rule remains valid: members tend to interpret the rules in ways that accommodate the types of agreements that they negotiate, but may take a stricter view of third-party agreements that deviate from their own models. Beyond these generalizations, Crawford and Lim (2011: 8) summarized the positions of key players:

[S]ome Members had pressed for a stricter interpretation of existing GATT disciplines while others have advocated a looser approach. Australia, Japan, Hong Kong China, India, New Zealand and to a lesser degree Korea (i.e. Asia and Australasia) were advocates of strict regulation, while Canada, the EC, Argentina, Brazil and Turkey tended to take a more flexible view. The US, while favouring enhanced scrutiny of all RTAs, has generally taken the position that GATT Article XXIV and GATS V already provide a balanced set of rights and obligations and should remain unchanged.

Members do scrutinize, question, and criticize one another’s RTAs, but only to a point. GATT and WTO rules do not require that these arrangements be given formal approval, yet neither do they explicitly allow for the rejection of agreements that do not meet these rules. “During the GATT years only the agreement between the Czech Republic and Slovakia was unanimously considered to be in line with Article XXIV,” as Lacarte noted (2011: 79), although “other agreements were approved with reservations.” Nor have matters improved under the WTO, in which “not one single agreement has been found to be in line with Article XXIV, leaving them in a legal limbo pending the approval that never comes” and “[t]acitly, governments have agreed to refrain from disputing each others’ agreements” (*ibid.*).

### ***The Transparency Mechanism***

WTO members have not departed from the GATT practice of leaving RTAs in a kind of limbo, neither explicitly approved nor formally condemned, but have taken a more regular approach to collecting and reviewing information on these agreements. The Transparency Mechanism (TM), which the General Council approved in late 2006,<sup>14</sup> provides for the early announcement of any RTA negotiation, notification of the RTAs that result from these talks, and their review by members. It makes the process of review more regular. The old system had required the establishment of a new working party for each RTA and for which the main source of information was the parties to the agreement. In this new arrangement the Secretariat prepares information on each new RTA for consideration by a permanent committee.

This mechanism had been mandated by paragraph 29 of the Doha Ministerial Declaration and is the only “early harvest” to come out of the round. It is thus analogous in more ways than one to the Trade Policy Review Mechanism (TPRM), which was an early harvest from the Uruguay Round's mid-term review (see Chapter 8). Like the TPRM, the TM aims to provide fuller information to the membership at large about specific members' trade practices. This newer arrangement, which might be deemed a TPRM without the PR, differs from the TPRM in being focused more narrowly on one type of policy and in being invoked only as required rather than on a rotating basis. Both of these mechanisms demonstrate that members tend to confine any early harvests in a round to systemic matters, rather than to agreements that directly affect trade.

The TM process begins when the parties to an RTA notify the Secretariat of an agreement, followed by the Secretariat's preparation of a factual presentation. That presentation forms the basis for a review in the Committee on Regional Trade Agreements (CRTA).<sup>15</sup> Members may submit questions in writing to the parties to the agreement, and the parties are expected to provide written answers in advance of the CRTA meeting. They are further required to notify changes affecting the implementation of an RTA, such as the accession of a new member. If the agreement also covers trade in services, the members must make an additional notification under Article V of the GATS.<sup>16</sup> Parties are also to submit to the WTO a report on the realization of the liberalization commitments contained in the RTA at the end of the agreement's implementation period.

The transparency mechanism provides for review and revision of its terms. In 2011, Chairman Dennis Francis (Trinidad and Tobago) of the Negotiating Group on Rules reported on the negotiations over the proposed changes in its operation. Most of the proposals concerned marginal issues such as whether notifications should be made jointly by the parties to an RTA and what time should be allowed for specific steps in the process.<sup>17</sup> The review did not suggest any fundamental alterations in the purpose and operation of the mechanism itself.

The TM is complemented by the WTO Regional Trade Agreement Information System (RTA-IS), a comprehensive database of all notified RTAs.<sup>18</sup> Launched in 2009, this online resource allows users to search and export available information on any notified RTA, as well as on the consideration process of a particular RTA. The WTO followed up with a similar initiative in 2012, the Database on Preferential Trade Arrangements.<sup>19</sup> It too includes details on the preferential treatment that members provide under the GSP and other programmes.

### *Waivers and challenges to preferential treatment*

The legal basis for preferential trade programmes is different from that of RTAs. Whereas GATT Article XXIV is an organic and permanent part of the WTO system, preferential programmes are based on waivers. The most important of these is the Enabling Clause of 1979, which provides a permanent waiver for the GSP. Other preferential programmes receive time-bound waivers. As summarized in Table 13.4, these include seven waivers from the GATT and early WTO periods that had expired by 2013, and another ten that were still in effect. Some of those waivers are extensions of earlier instruments that had originally been approved as far back as 1948.

**Table 13.4. WTO waivers for preferential trade arrangements**

	<b>Decision</b>	<b>Expiry</b>
<b>Active</b>		
Preferential Tariff Treatment for Least-Developed Countries	15 June 1999	30 June 2019*
Preferential Treatment for Services and Service Suppliers of Least-Developed Countries	17 December 2011	17 December 2026
Canada – CARIBCAN	14 October 1996	31 December 2013*
European Union – The ACP–EU Partnership Agreement	14 November 2001	***
European Union – Application of Autonomous Preferential Treatment to the Western Balkans	8 December 2000	31 December 2016*
European Union – Application of Autonomous Preferential Treatment to Moldova	7 May 2008	31 December 2013
United States – African Growth and Opportunity Act	27 May 2009	30 September 2015
United States – Andean Trade Preference Act	14 October 1996	31 December 2014*
United States – Caribbean Basin Economic Recovery Act	15 November 1995	31 December 2014*
United States – Former Trust Territory of the Pacific Islands	8 September 1948	31 December 2016*
<b>Expired</b>		
European Community/France – Trading Arrangements with Morocco	14 October 1996	**
European Community – Fourth ACP–EC Convention of Lomé	14 October 1996	29 February 2000
European Community – Transitional Regime for the EC Autonomous Tariff Rate Quotas on Imports of Bananas	14 November 2001	31 December 2005
European Community Preferences for Albania, Bosnia and Herzegovina, Croatia, Serbia and Montenegro, and the former Yugoslav Republic of Macedonia	28 July 2006	31 December 2011
South Africa – Paragraph 4 of Article I of the GATT 1994	14 October 1996	31 December 1997
Switzerland – Preferences for Albania and Bosnia-Herzegovina	18 July 2001	31 March 2004
Turkey – Preferential Treatment for Bosnia-Herzegovina	8 December 2000	31 December 2006

Source: WTO Secretariat.

Notes: Most of these waivers concern GATT Article I:1, but some additionally or alternatively waive GATT articles I:4, XIII, XIII:1, and XIII:2. \*The original waiver expired; the expiry date shown is for a subsequent renewal. \*\*Until entry into force of EU–Morocco RTA. \*\*\*December 31, 2007 or upon entry into force of new EU tariff regime.

Where WTO members hesitate to challenge one another's RTAs directly, they are not quite as reticent in the case of preferential trade programmes. In addition to the differing views among LDCs over preferential access to the US apparel market, as discussed above, two other controversies may be cited to illustrate the dynamics. For several years, the United States was technically out of compliance with its WTO obligations due to a delay in granting its requests for new or renewed waivers on three preferential trade programmes: the African Growth and Opportunity Act (AGOA), the Andean Trade Preferences Act (ATPA) and the Caribbean Basin Economic Recovery Act (CBERA). A waiver for the CBERA expired at the end of 2005, one for the ATPA expired at the end of 2001, and the AGOA had not yet been covered by a WTO waiver. It was not until 24 March 2009 that the Council on Trade in Goods agreed to grant these waivers. The principal difficulty had been Paraguay's insistence that it be included among the ATPA beneficiary countries. This would require a change in US law, which provided only for the designation of the Plurinational State of Bolivia, Colombia, Ecuador and Peru to this programme. In 2008, a change of government in Paraguay led to a

decision to withdraw its objections. The Plurinational State of Bolivia also raised objections after it was removed from the ATPA programme in 2008, and for a time it threatened to block the approval of these waivers unless its ATPA status was restored, but ultimately joined the consensus.

Another and more confrontational dispute arose over the EC GSP programme, which includes provisions intended to promote compliance with environmental, labour and drug policies. The 1999 to 2001 GSP regulations<sup>20</sup> provided incentives to reward Central and South American countries that cooperate in fighting drug-trafficking, as well as incentives to any GSP beneficiary that were contingent upon a government incorporating into its laws the standards laid down in International Labour Organization conventions on the right to organize and to bargain collectively and on the minimum age of admission to employment. The regulations also provided for reduced benefits for countries that permitted slavery or forced labour, the export of goods made by prison labour, shortcomings in customs controls on drug trafficking, failure to comply with international conventions on money laundering, or infringement of the objectives of international conventions on the conservation and management of fishery resources, among other objectives.

India brought a complaint to the Dispute Settlement Body in 2002, stating that the conditions created undue difficulties for India's exports and violated EC commitments under the Enabling Clause. The dispute settlement panel report found against the EC GSP scheme in 2003, and in 2004 the Appellate Body upheld part of the panel's findings. On the one hand, the Appellate Body agreed that the drug arrangements were not justified under the Enabling Clause because the measure did not set out any objective criteria that would allow other developing countries that are similarly affected by the drug problem to be included as beneficiaries. On the other hand, it also found that not every difference in tariff treatment of GSP beneficiaries necessarily constituted discriminatory treatment, as the Enabling Clause allows the granting of different tariff preferences to products originating in different GSP beneficiaries when the relevant tariff preferences respond positively to a particular development, financial or trade need and are made available on the basis of an objective standard to all beneficiaries that share that need. The European Community repealed the special arrangements to combat drug production and trafficking in 2005 and promulgated a new regulation that complied with the DSB's recommendations and rulings. India expressed doubts and reserved its right to return to this matter in the future.

One analyst cautiously observed that "it is difficult to predict to what extent this case may signify the beginnings of a more intrusive approach by WTO dispute settlement bodies regarding the use of unilateral trade measures," as the decision "only has direct ramifications for the EU GSP scheme" (Harrison, 2007: 117). He nonetheless speculated that it may represent "the beginning of a legal 'test' by which the legitimacy of human rights conditionality in GSP schemes could be gauged," and one in which "human rights conditionality in GSP schemes would be more likely to be considered to be legitimate if preferences were granted, reviewed and withdrawn on the basis of international human rights conventions" (*Ibid.*: 116).

## The politics of RTAs

Patterson (1966: 4) observed in his classic study of the early GATT period that the “more persistent” arguments in favour of RTAs and other forms of discrimination in his day “were essentially political rather than economic.” The same could be said of RTAs in the WTO period. All forms of discrimination are inherently more political than non-discriminatory initiatives. RTAs range from the subtly to the overtly political, and the strategic objectives that inspire their negotiation can range from the cooperative to the coercive.

This is not to say that only RTAs are political and that the multilateral trading system itself is dissociated from the larger international order of which it forms a part. As was discussed in Chapter 2, one cannot understand the establishment and development of the GATT system or its later replacement by the WTO without taking high politics into consideration. The rise of discrimination in the trading system may nevertheless be seen as further evidence of the changes in the global distribution of power. Here one finds a similarity in the trajectories that the trading system followed during the UK and US hegemonies, with each going through a comparable evolution in the way they structured their bilateral agreements. The treaties that the British started to negotiate in 1860, and the tariff-reduction agreement the United States began pursuing in 1934, each included MFN clauses that formed the foundation of the multilateral systems in their respective eras. Each of these hegemonies later turned to discriminatory alternatives when their competitiveness declined. Beginning in the late nineteenth century and culminating in the set of restrictive Imperial Preferences negotiated at the Ottawa Conference in 1932, the United Kingdom went from negotiating bilateral agreements on a non-discriminatory basis to discriminatory commonwealth agreements that threatened to undo that accomplishment. The United States in turn began to negotiate FTAs during a period when there were serious doubts over the US competitive position vis-à-vis Japan, and some see the proliferation of RTAs over the past few decades as a sign of declining US interest in supporting the multilateral system.

The relationship between the relative decline of the United States and the rise of discrimination in the system has long been a matter of active debate among political scientists, a group whose collective take on RTAs can be just as ambivalent as those of the economists and the lawyers. “Although the available evidence suggests that [preferential trade arrangements] did become more pervasive as hegemony eroded,” Mansfield and Milner (1999: 620) noted in a review article early in the WTO period, “what underlies this relationship, how it bears on regionalism’s welfare consequences, and whether receding hegemony affected prior episodes of regionalism remain matters of dispute.” Subsequent scholarship has not resolved that question, the answers to which may have as much to do with one’s assumptions about the way the world works as they do with specific empirical evidence.

### *RTAs as instruments of high politics*

The differences between FTAs and customs unions go well beyond the tariffs that they impose on third parties. At first glance, a customs union appears to be just an FTA that has taken the additional step of ringing a CET around its members. From that one point, however,

spring more and greater differences. Establishing a CET can be a first step towards closer integration of the members' trade policies, which may lead them to operate as a bloc in negotiations with third parties. In some cases, a customs union may be the precursor to consolidation into a single country. Economic and political unification can come either simultaneously (as was the case in the US Constitution of 1788)<sup>21</sup> or sequentially (as was the case for the German *Zollverein* in the nineteenth century).<sup>22</sup> The European Union can be seen as part of a similar process by which economic unification is a precursor to a gradual, if incomplete, political consolidation.

There are a few historical constants in the approaches that one finds towards RTAs in different regions. These have always had their proponents in Europe and in Latin America, and for a long time as well in the Middle East, but for decades were viewed with greater reluctance by the United States and are a very new phenomenon in Asia. France repeatedly proposed European economic integration before the Second World War, with a view towards alleviating both economic and political conflicts, and French officials even maintained their interest while the war was raging and they were in exile (United Nations, 1947: 22-24). At a time when one might have thought that other matters crowded out considerations of low politics, the French government requested in 1944 that the League of Nations (also in exile) undertake a study of the customs union problem (*ibid.*: v). Latin American countries explored the RTA option on and off in the decades following independence, especially in the inter-war period. Argentina and Chile made numerous proposals for regional unions in the 1920s and 1930s, and several groups of countries in the region reached bilateral or sub-regional agreements from 1933 to 1943. As for the Middle East, RTAs have been seen as an instrument of pan-Arab solidarity since the dissolution of the Ottoman Empire.

The US stance on discrimination throughout much of the twentieth century stemmed from its opposition to the Ottawa system. Apart from an exceptional trio of preferential arrangements that carried over from the Spanish-American War of 1899 (i.e. with Cuba, the Philippines and Puerto Rico), and one new responsibility that it took on in the immediate aftermath of the Second World War (i.e. the Trust Territory of the Pacific Islands), the United States conducted its trade on the basis of strict MFN treatment in the early years of the GATT system. "Throughout the entire history of the negotiation of the [Havana] Charter and the [GATT]," Brown (1950: 279) noted, "United States leadership was directed towards the elimination of preferences."

When countries assembled after the war to negotiate the Havana Charter and GATT they thus came to the table with different experiences and expectations of the role that discriminatory arrangements might play in the post-war world. France, Latin American countries and the Lebanese Republic hoped to promote regional integration programmes, and each pressed for provisions that would permit regional arrangements. Discrimination was as bad as protection, from the US negotiators' point of view, and hence they argued in favour of a strict MFN provision. Debate centred primarily on the well-established notion of a customs union, but "the Lebanese delegation opened up a quite different line of approach" when it "proposed that members be allowed to set up 'free trade areas' within which there

would be almost complete free trade between the participants, but which would not maintain a single common tariff against other countries.” The FTA concept “was warmly supported by France since the French desired to see arrangements of the same sort developed in Europe,” and the “general principle was agreed to by the United States” (Brown, 1950: 155-156). Chile was a leading advocate for regional exceptions in the diplomacy that produced the Havana Charter and GATT, where it “pressed hard for a general exception to the rule of most-favored-nation treatment that would allow Latin American countries to continue to grant particular advantages to their neighbors” (*Ibid.*: 72).

Another and related issue concerns the efforts on the part of great powers not just to negotiate RTAs of their own but to encourage economic integration in regions where they hope to promote prosperity and stability. That was the case for the United States after the Second World War, for example, when the imperatives of the early Cold War trumped the long-standing US opposition to discriminatory trade arrangements. Despite the fact that integration in Western Europe might come at some economic cost to itself, the United States had strong political reasons to support the steps that France, Germany and their neighbours were taking towards economic unity. For their own part, statesmen from the European Union have since encouraged countries in other regions to emulate the approach they took towards peace and political union through economic integration.

The end of colonialism provided another rationale for the negotiation of North–South RTAs, prompting former metropolitan countries to conclude agreements with their former colonies. The RTA with the Republic of Korea, which entered into force in 2011, is the sole exception to a general rule by which all of the agreements that the European Union negotiated through 2012 were either with other countries in Europe (all of which are actual or potential candidates for EU membership) or with former colonies, protectorates or mandate territories of one or more EU member states. Whether they were once part of the Belgian, British, French, Portuguese or Spanish empires, the majority of the RTA negotiating partners of the European Union enjoy special relationships with their former mother countries and, through them, the union as a whole. At the start of 2013, however, that pattern appeared to be broken by the planned negotiations with Japan and the United States.<sup>23</sup> For its part, Japan’s decision to negotiate an FTA with Peru was undoubtedly influenced by the presence of a large diaspora community in that country.

RTAs can be an instrument not just of peace but of alliances. When the United States began negotiating tariff-reduction agreements in the 1930s it dealt principally with countries that would join or support the Allies in the coming war, and during that conflict Washington and Ottawa explored the possibility of a free trade agreement. FTA negotiations have a long association with the cluster of US goals in the Middle East, which combines the promotion of peace in the region with opposition to terrorism and the pursuit of US energy security.<sup>24</sup> The very first FTA that the United States negotiated was with Israel, and Jordan was (after Canada and Mexico) the fourth US FTA partner. The profile of RTAs in US policy towards this region rose when President George W. Bush (2003) proposed “the establishment of a US-Middle East free trade area within a decade.” This policy led to FTAs with the Kingdom of Bahrain, Morocco and Oman, as well as failed talks with the United Arab Emirates<sup>25</sup> and the exploration of negotiations with Egypt and the

State of Kuwait. Even FTA negotiations with countries outside the Middle East became linked to these issues, having been a factor both in the negotiation of the FTA with Australia and in the endgame of the US–Chile FTA.<sup>26</sup> Siracusa (2006: 45), for example, observed that the US–Australia FTA was “widely viewed as a reward for Australian loyalty in the war on terrorism.”<sup>27</sup> Nine of the 14 countries with which the United States negotiated FTAs from 2003 to 2006 were part of the Coalition of the Willing in Iraq; three of the remaining five were moderate Arab or majority-Muslim countries that were seen to be partners in the Middle East peace process.

The RTAs that China and Chinese Taipei negotiated before 2010 were also caught up with the question of these two WTO members’ diplomatic recognition. That competition was especially intense in Latin America (see Erikson and Chen, 2007). China’s FTA negotiation with Costa Rica, for example, “was formally kicked off only one year after the tiny Latin American country switched alliances to China by breaking up with Taiwan” (Gao, 2010: 9). These issues also arose in Chinese Taipei’s efforts to negotiate an FTA with Paraguay in 2004. The fact that Paraguay recognizes Chinese Taipei but its MERCOSUR partners recognize China complicated the efforts to conclude an FTA (Bishop, 2004). The cross-straits competition over RTAs subsided with the conclusion of the Economic Cooperation Framework Agreement between Beijing and Taipei City in 2010. In addition to being an FTA, this initiative offers a framework through which China is expected no longer to object to Chinese Taipei’s negotiations of FTAs with third parties (Jennings, 2010).

### *Leverage and linkage in RTAs*

There is a compelling logic to the largest economies’ concentration on smaller countries as RTA partners. From the perspective of a small and relatively trade-dependent country, a trade agreement is fundamentally that: an agreement about trade. The most attractive partners for a small country will generally be either their immediate neighbours or the largest markets in the region or the world. For large and less trade-dependent countries, however, by-passing the players that are in the same league fits with a fundamental precept of economic statecraft: a country’s ability to leverage RTAs for non-economic ends will be greater when the relationship is asymmetrical. Again, Jacob Viner spotted the differences early. In his review of the history of customs unions he observed that:

Of the more serious movements which involved a great power and a small country or number of small countries, it appears to have been the case without exception for the great power that political objectives were the important ones, while the economic consequences of customs unions were regarded without enthusiasm or even accepted only as the necessary price which had to be paid to promote a political end. For small countries considering customs unions with great powers, on the other hand, only the economic consequences as a rule were regarded as attractive, while the political aspects were thought of as involving risks which might have to be accepted for the sake of the economic benefits with which they were unfortunately associated (Viner, 1950: 91-92).

Even before Viner, Albert Hirschman emphasized that discrimination can be a tool by which larger states deliberately seek to increase smaller states' dependence upon them. In his classic examination of Nazi Germany's trade policy he generalized from the particular to argue that in a "world of many sovereign states it [is] an elementary principle of the power policy of a state to *direct its trade away from the large to the smaller trading state*" (Hirschman, 1945: 31; emphasis in the original). The increase in the smaller country's dependence on the larger is not merely a mundane fact of economic life, in this view, but something that the larger state will seek to magnify economically in order to exploit politically.

These encounters between high politics and low politics sometimes involve major issues at the strategic level and can sometimes play out in briefer, tactical exchanges. That can be illustrated by one episode from the Doha Ministerial Conference, where Chile and the United States had very different positions on the proposed negotiations over anti-dumping rules (see Chapter 11). The US negotiators hoped that the US–Chile FTA, which was then still under negotiation, would give them leverage over their Chilean counterparts. There had already been a few shouting matches over the anti-dumping issue between Ambassador Robert Zoellick and the Chilean and South African delegations, at which point Mr Zoellick told one of his officials to deal with it. As Alejandro Jara would later recall, this US official –

proceeded to call the ambassador of Chile in Washington, who proceeded to call ... President Lagos [of Chile], saying, "This is what's happening, Chile's taking a very vocal position, that the United States does not agree with it, they're seeking too much on anti-dumping, etc. etc. etc., and this is putting into risk a free trade agreement between the US and Chile." And it so happens that ... one main person of the team was Lagos' son, who then talked to his father in my presence and explained it to him. His father laughed, and he said, "Oh, so this is it?" "Yeah." "Okay. No problem. Carry on. And send Alejandro my regards and tell him not to be afraid." *Voilà!* So we negotiated the mandate.<sup>28</sup>

The same two countries clashed again at the Cancún Ministerial Conference, this time over agricultural issues, but this confrontation came two months after the US Congress had already approved the implementing legislation for the FTA and President Bush had signed it into law.<sup>29</sup> Chile was then a member of the G20 coalition that opposed the EU–US position on agriculture (see Chapter 12), and Mr Zoellick made it a priority to bust that coalition. One approach he took was to propose FTA negotiations with members of this group, and did so with some success: Colombia, Costa Rica and El Salvador each took up the US offer while also leaving the G20 coalition.<sup>30</sup> The United States also hoped to persuade both Chile and Mexico to leave that group, but Mexico already had its FTA in hand and Chile very nearly did. These two countries were thus in a stronger position to deflect any persuasion or pressure. The twin episodes from 2001 and 2003 suggest that even while FTA negotiations may provide an opportunity for the larger partner to exercise leverage over the smaller, the results are not always a foregone conclusion, and that moreover the window of opportunity is limited to the period in which the agreement is under negotiation and awaiting approval. Once the agreement enters into effect, the threat to abrogate it is not likely to be credible in anything

other than a major confrontation. If Hirschman is correct about discrimination leading in the long term to a higher level of dependence of the smaller on the larger party, however, the negotiation of an RTA may – if it does lead to a higher level of trade and investment between the partners – have a subtler effect over time by shifting the smaller country's perceptions of its interests and options.

### **The relationship between RTAs, preferences and the multilateral system**

For over half a century, economists, lawyers, political scientists, negotiators and policy-makers have argued over the impact that discriminatory agreements have on multilateralism. On the positive side, RTAs may constitute down payments that countries might later incorporate, in whole or in part, in their commitments at the multilateral level, while also establishing precedents for the inclusion of new issues within the scope of trade policy. On the negative side, the proliferation of RTAs may contribute to a balkanization of the trading system, the multiplication of competing rules of origin, and the creation of captive markets favoured by national constituencies that are more interested in preserving the existing preferential arrangements than in promoting new global deals. Some political economists conclude that on balance the discriminatory agreements contribute more than they detract from the trading system, and that RTAs are therefore beneficial; for example, see Schott (1989). Others argue that discrimination can serve to advance issues that might otherwise stagnate (Oye, 1992; Rhodes, 1993), and to make agreements more enforceable (Yarbrough and Yarbrough, 1986). Critics nevertheless charge that the economic benefits of discriminatory liberalization run a distant second to multilateralism (Bhagwati and Panagariya, 1996), and some contend that the potential for abuse makes the very term “bilateralism” a virtual synonym for “protectionism” (Krueger, 1995). Some detractors associate discriminatory forms of trade policy with exploitation of the small and poor by the large and wealthy, the deepening of dependency and even economic warfare (Hirschman, 1945; Diebold, 1988).

### ***Competitive liberalization***

Competitive liberalization is a strategy that treats bilateral, regional and multilateral negotiations as progressive steps towards the shared objective of open markets. It can be pursued in either of two ways. One is the more cooperative, “bandwagon” variant in which a country encourages its trading partners to climb aboard in order to enjoy the best access to the largest market at the earliest time. There is no promise here that the preferential access of an RTA will be exclusive; its margins of preference will be diluted by the subsequent negotiation of like agreements at the regional level, and further eroded by the hoped-for multilateral agreements. The other approach is more confrontational, threatening actual or potential partners that if they do not negotiate the issues and agreements that the country proposes at the multilateral level they may find themselves left behind when this spurned suitor turns instead to bilateral and regional alternatives.

The stricter version of this strategy dates from the late GATT period, and was part of the US efforts to advance what were then known as the “new issues” of services, intellectual property rights and investment. It is no coincidence that the negotiations over the US–Canada FTA (begun in 1986 and concluded in 1988) and then NAFTA (begun in 1991, concluded in 1992 and revised in 1993) came during the start- and end-games, respectively, of the Uruguay Round. The first of these FTAs was intended by US policy-makers not only to govern the world’s largest bilateral trade relationship, but also to set significant precedents for the multilateral system; the second FTA demonstrated that these same issues can be negotiated in a North–South agreement. The first step in the US strategy was to respond to the preoccupation of Canadian trade officials over Washington’s apparent move towards protectionism, as manifested in the increasing use of the trade-remedy laws, by agreeing to negotiate an FTA as long as it met US terms. “The US Administration has indicated it is prepared to consider our key concerns” on trade-remedy laws and other matters, the Canada Department of External Affairs (1985: 5) noted, “as long as we are prepared to consider their key objectives” on issues such as services. Launching those bilateral talks signalled to other GATT countries that the United States was prepared to “go bilateral” if the proposed new round did not include the new issues. The Uruguay Round was in fact launched four months after the bilateral talks began in May 1986.

James Baker, who served as US treasury secretary in the Reagan administration and secretary of state in the George H.W. Bush administration, reiterated the threat to rely on bilaterals after the US–Canada negotiations ended in 1988. He wrote that:

If possible, we hope this follow-up liberalization will occur in the Uruguay Round. If not, we might be willing to explore a “market liberalization club” approach, through unilateral arrangements or a series of bilateral agreements ... Other nations are forced to recognize that the United States will devise ways to expand trade – with or without them. If they choose not to open markets, they will not reap the benefits (Baker, 1988).

Mr Zoellick initially pursued the more cooperative, bandwagon version of the competitive liberalization strategy when he became the US trade representative. He said in 2002 that the United States sought to “creat[e] a competition in liberalization, placing America at the heart of a network of initiatives to open markets” by proceeding “with countries that are ready” and putting pressure on the rest to follow (quoted in Destler, 2005: 299–300). This approach appealed to free-traders who approved of the upward cycle of negotiations. “[T]he North American Free Trade Agreement preferences in the US market induce other Latin American countries to create a Free Trade Area of the Americas,” as Bergsten (2002) observed, just “as an FTAA would in turn spur the Doha round.”

The United States kept the strategy in place after the Doha Round suffered a setback in the 2003 Cancún Ministerial Conference, but now it had a sharper edge. Mr Zoellick distinguished between what he called the “can-do” and the “won’t-do” countries, expressing his disgust with “the transformation of the WTO into a forum for the politics of protest.” After two years of

pushing “to open markets globally, in our hemisphere, and with sub-regions or individual countries,” he warned, the United States would not wait any longer, but would instead “move towards free trade with can-do countries” (Zoellick, 2003: 3). It was at that point that the pace of US FTA negotiations accelerated. The United States had FTAs in place or under development with just five partners at the start of 2003; over the next three years, it would initiate negotiations with 22 countries and conclude them with 14.

How did the strategy of competitive liberalization fare? There is evidence to suggest that bilateral agreements do encourage more of the same. Solís and Katada (2009: 15), for example, advanced a “diffusion” hypothesis with two variants, one being emulation (“[c]ountries will copy the FTA policies of their socio-cultural peers”) and the other being competition (“[c]ountries will counteract the FTA policies of their competitors”). The evidence is much weaker on the question of whether these smaller agreements effectively encourage larger ones at the regional and then the multilateral levels. As time went on, negotiations floundered. The FTAA negotiations ground to a near-halt by 2003, the progress in the Asia-Pacific Economic Cooperation forum also slowed, and the Doha Round went into a lower gear at about the same time. Criticism of the strategy then mounted. “[I]f multilateralism and leading regional trade initiatives remain stalled,” Evenett and Meier (2007: 27) observed, “then Competitive Liberalization may amount to little more than bilateral opportunism masquerading as high principle with an apparently compelling narrative.”

It can be difficult to disentangle the viability of the strategy from the challenging times in which it was pursued. The consequences can depend greatly on how the smaller partner in an RTA views the purpose of the agreement, and there are numerous examples of countries that actively pursue an “all of the above” approach to trade negotiations. Consider the case of Canada in the late GATT period, which did not by any means view the RTAs with its neighbour as a substitute for multilateralism: Ottawa proposed the creation of the WTO during the interval between its bilateral and trilateral negotiations with the United States (see Chapter 2). Diplomats from other countries that negotiate multiple RTAs insist that they see these agreements and the WTO as complementary. They stress that they need the protection of the WTO because it provides a more certain legal environment than would be the case if their relations with larger partners were determined solely by the terms of their FTAs; that they hold out hope that the WTO can be the site for new commitments on issues that cannot be effectively addressed in bilateral deals, such as agricultural subsidies and reform of the trade-remedy laws; that support for the WTO demonstrates their commitment to developing countries; and because of a philosophical commitment to the concepts of international law and governance in general, and the multilateral trading system in particular.

That positive view is more common in mid-sized developed countries such as Canada and Switzerland and in middle-income countries such as Chile, Costa Rica, Mexico and Singapore than it is in poorer, smaller countries. There multilateralism and non-discrimination are often seen as substitutes rather than complements for RTAs and PTAs, and for poorer and less competitive countries those discriminatory options are usually preferred over global deals. Preference erosion is typically a top concern for these countries, where policy-makers worry

that when multilateral agreements reduce MFN tariffs they also reduce the margins of preference that their exporters enjoy under programmes and agreements. That is a point to which we will return shortly.

### *RTAs as precedents and fall-backs*

FTAs are not simply scaled-down versions of multilateral trade agreements, but will of necessity take qualitatively different approaches to several of the issues that they cover. On some topics an RTA can do more than the WTO, and on others it may do less; still other issues may appear in an RTA even though they are not yet part of the WTO system.

For the most traditional issue, an RTA is by definition WTO-plus: where the multilateral system works to reduce most tariffs and to eliminate some, an RTA eliminates substantially all of them. Market access commitments for services are more complex, given the great amount of water that one finds in GATS schedules. The concessions that countries make in RTAs are often more liberal than what they commit in the GATS, both because they tend to be GATS-plus and may be negotiated in a different fashion,<sup>31</sup> but it can be difficult to determine whether the difference is nominal or real.<sup>32</sup> It can be unclear whether the liberalization offered to RTA partners is restricted to them. For practical reasons, regulators may find it necessary to extend to service providers from all parties, albeit on a *de facto* basis, whatever liberalization is agreed to in an RTA. Other issues are much better handled in a multilateral agreement than in an RTA. That is most clearly the case for agricultural production subsidies, and is a simple function of how they operate: whereas it is quite simple to discriminate among partners in the application of tariffs on imports, there is no practical way to restrict the impact of production subsidies to some countries while exempting others.

A third set of issues are those that the WTO membership as a whole may be unwilling to take up in multilateral negotiations but that can be addressed by a subset of these members in RTA negotiations. There are several variations on this theme. One option is for the *demandeur* on a new issue to use RTAs as a “policy laboratory”, demonstrating to other members how the issue might be handled if it were taken up multilaterally. In another variation, the *demandeur* that has been rebuffed at the multilateral level may repair instead to bilateral and regional negotiations, seeking from selected partners the satisfaction that it was denied at the global level. That second variation does not preclude a return to the first. It is possible that the resistance in the WTO may abate, allowing the precedents set in the RTA negotiations to be taken up in a global deal. Yet another approach is to pursue these initiatives in a complementary fashion, setting one level of commitments in the WTO but then establishing stricter, WTO-plus commitments in the RTA.

The first of these sequences is best demonstrated by the approach that the United States took in the 1980s towards what were then the new issues of investment, services and intellectual property rights. While the US–Israel trade relationship in 1985 was relatively small, the precedents set by the FTA negotiated that year were large. This was the first agreement covering the new issues, and preceded the launch of the Uruguay Round by a year. Subsequent US RTAs expanded greatly on its toeholds, as shown in Table 13.5, and also set

**Table 13.5. Issue coverage of selected FTAs of the European Union and the United States**

	FTAs of the European Union				FTAs of the United States			
	Andorra 1991	Tunisia 1995	Chile 2002	Korea, Rep. of 2010	Israel 1985	NAFTA 1993	Chile 2003	Korea, Rep. of 2007
<b>Uruguay issues</b>								
Intellectual property	–	●	●	●	◐	●	●	●
Services	–	●	●	●	◐	●	●	●
<b>Singapore issues</b>								
Competition policy	–	●	●	●	–	●	●	●
Government procurement	–	◐	●	●	◐	●	●	●
Investment	–	◐	◐	●	◐	●	●	●
Trade facilitation	–	◐	◐	●	–	●	●	●
<b>Other issues</b>								
Labour rights	–	–	◐	◐	–	●	●	●
Environment	–	◐	◐	●	–	●	●	●
Electronic commerce	–	–	◐	●	–	–	●	●
Geographical indications	–	○	○	◐	–	◐	◐	◐

Notes: Years indicate date of signature.

● = Full chapter, annex, appendix or other section or side agreement devoted to the issue.

◐ = One or more full articles devoted to the issue.

○ = Other coverage of the issue (e.g. language within the terms of an article dealing with a related issue).

– = No coverage.

precedents of their own on other new issues. The expansion in the EU RTAs is even clearer, with the issue coverage of sequential agreements increasing both in width and in depth. The data in Table 13.4 show how RTAs offered Brussels an alternative means of promoting the so-called Singapore issues of competition policy, government procurement, investment and trade facilitation after taking three of these issues off the table in the Doha Round. Most of the FTAs that the European Union and the United States reached after Cancún include not only the Singapore issues but also other topics that never made it onto the table in Doha, especially labour and the environment.

What implications do these WTO-plus commitments have on the WTO itself? The answer depends in part on how one views the specific issues at hand. As was discussed in Chapter 10, the issue of Trade-Related Aspects of Intellectual Property Rights (TRIPS) and public health is one of the most divisive topics in contemporary trade policy. One way that it plays out is in the TRIPS-plus provisions that the United States seeks in its FTAs. The TRIPS-plus provisions in the FTAs of the United States include rules that (among other things) bring more subject matter within the terms of intellectual property protection, have stronger enforcement mechanisms, and weaken the flexibilities and special and differential treatment granted to developing countries (Mercurio, 2006). This is a practice that led Bhala (2007) to label the US strategy of “competitive imperialism”. Shaffer (2005b: 133-34) described the strategy less provocatively:

The United States and EU enhance their leverage in WTO multilateral negotiations through forum-shifting. They play countries off each other through engaging in simultaneous bilateral and regional negotiations, thereby threatening to deny benefits to some countries that they offer to others. Weaker states may agree to US and EU demands under a bilateral agreement so as to gain or retain access to US and EU markets, and, in the process, obtain an advantage over developing country competitors.

Other trade specialists present a more positive view of the ways that WTO and RTA agreements can strengthen disciplines. Cernat and Laird (2005) observed that multilateral rules may act as a “policy anchor” that constrains the degree of discrimination and backsliding in RTAs, and RTAs may further act as “policy transfer mechanisms” towards the multilateral system by introducing new or more far-reaching rules that had not been on the WTO agenda. “[I]nvestment and competition policy are areas where RTAs have moved ahead of the WTO system,” they note, “while developments on services at the WTO level were influenced by progress in NAFTA and the EU” (*Ibid.*: 73).

Much depends on how ambitious a given RTA is, with North–North agreements generally being deeper, and hence less susceptible to backsliding, than South–South agreements. On this point, former US Trade Representative Susan Schwab criticized “the negotiation of often lower-quality bilateral and regional trade agreements” that “eroded support and political will for the pursuit of a strong multilateral deal among other countries” (Schwab, 2011: 112). By this argument, it is the quality and not the quantity of RTAs that most affect the integrity of the multilateral trading system. The negotiators for the Trans-Pacific Partnership (TPP) thus call their undertaking a “twenty-first century trade agreement”, hoping that it will set new precedents to be taken up either in the WTO or in other bilateral and regional agreements. One of them is former WTO Director-General Mike Moore, once a critic of discriminatory agreements who came to believe that with the Doha Round stalled his country had “to do what you have to do.” He hopes “that with TPP we’ll drive up some models that can go back to Geneva on [state-owned enterprises], on intellectual property, on a whole series of matters, on trade facilitation, that can be useful to the WTO.”<sup>33</sup>

The position that developing countries take on new issues in the WTO can be affected by the RTAs that they negotiate. A country that may have bargained hard on new issues when an RTA was still under negotiation but was ultimately persuaded to adopt commitments, whether by the force of arguments or the inducement of concessions on other issues, may be less inclined thereafter to oppose the inclusion of the issue in multilateral negotiations. “Once a developing country agrees to such demands,” Shaffer (2005b: 133-34) observed, “it will more likely favor their multilateral application, such as over intellectual property protection, so that it is not disadvantaged against developing country competitors in that particular domain.” That appears to have been the case for countries such as Chile and Mexico, for example, which took somewhat different views before and after concluding FTAs with the European Union and the United States.

### *Preference erosion*

Not all countries see complementarity between discrimination and multilateralism, and some are more devoted to maintaining the margins of preference that they enjoy under RTAs and preferential programmes than they are to negotiating new agreements in the WTO. Countries that undertake preferential trade initiatives “are in pursuit of the economic rents resulting from the trade diversion associated with trade preference (or discrimination),” Andriamananjara (2003: i) observed, and because “multilateral trade liberalization reduces those rents [it] is likely to be resisted by members of trade-diverting preferential blocs.” Officials in some developing countries see multilateralism as a threat to their margins of preference, and conversely their efforts to retain those margins can constitute a threat to the multilateral negotiations. These concerns are especially high among those smaller and poorer countries that generally negotiate few RTAs outside of their own regions, but rely on preferential programmes for their access to developed markets. Preference erosion is an especially important concern for the G90 countries.

Studies disagree on the seriousness of the problem. Bouët et al. (2005) found that the threat of preference erosion from the Doha Round is real insofar as trade preferences play a key role in the world trading system, and especially in rich countries' pro-poor policies. Others look at the specific sectors at issue and find a less daunting challenge. “Relatively few countries face potentially high losses,” according to Milner et al. (2009: 8), “and these are typically related to specific products.” Low et al. (2005) concluded that the sectors most susceptible to preference erosion are textiles and clothing, fish and fish products, leather and leather products, electrical machinery and wood and wood products.<sup>34</sup> Several other studies conclude that preference erosion is a less serious problem for preferential programmes than it is for RTAs for the simple reason that the benefits of these programmes tend to be small. Francois et al. (2005) found that administrative burdens result in preferences being underutilized, thus significantly reducing their value and the magnitude of erosion costs. Amiti and Romalis (2007) argued that actual preferential access for many developing countries under existing preferential programmes is less generous than might appear because of low product coverage and complex rules of origin, and that lowering tariffs on an MFN basis is likely to offset the losses from preference erosion and lead to a net increase in market access. One way to deal with preference erosion is to provide some form of compensation to the countries that are most affected. Hoekman and Prowse (2005: 21) suggested that while the problem of preference erosion requires a multilateral solution “in the sense that the financial transfers that are called for are best allocated through existing multilateral aid mechanisms” (e.g. along the lines of the Enhanced Integrated Framework), the funding should be determined bilaterally.

## Endnotes

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- 1 Note that all data on RTAs presented here are based on the WTO Regional Trade Agreements Information System at <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>, which is in turn based on the information that members provide to the Secretariat. It does not include any RTAs that, for whatever reason, may not have been notified.
- 2 WTO data at [www.wto.org/english/res\\_e/statis\\_e/its2012\\_e/section1\\_e/i08.xls](http://www.wto.org/english/res_e/statis_e/its2012_e/section1_e/i08.xls).
- 3 Some agreements between the European Union and its partners take the form of customs unions (e.g. with Turkey). Note also that the European Free Trade Association (established in 1960) is an FTA rather than a customs union.
- 4 Calculated from WTO data at [www.wto.org/english/res\\_e/statis\\_e/its2012\\_e/section1\\_e/i08.xls](http://www.wto.org/english/res_e/statis_e/its2012_e/section1_e/i08.xls).
- 5 See UNCTAD (1964: 143-44). Emphasis in the original.
- 6 See GATT document LT/TR/D/1, adopted 28 November 1979.
- 7 The GSTP participants are Algeria, Argentina, Bangladesh, Benin, the Plurinational State of Bolivia, Brazil, Cameroon, Chile, Colombia, Cuba, the Democratic People's Republic of Korea, Ecuador, Egypt, Ghana, Guinea, Guyana, India, Indonesia, Iran, Iraq, the Republic of Korea, Libya, Malaysia, Mexico, Morocco, Mozambique, Myanmar, Nicaragua, Nigeria, Pakistan, Peru, the Philippines, Singapore, Sri Lanka, Sudan, Tanzania, Thailand, the former Yugoslav Republic of Macedonia, Trinidad and Tobago, Tunisia, the Bolivarian Republic of Venezuela, Viet Nam and Zimbabwe.
- 8 Part of MDG III.15, as recorded in *United Nations Millennium Declaration*, UN document A/RES/55/2, 18 September 2000.
- 9 See paragraph 6 of the *Brussels Declaration*, UN document A/CONF.191/12, 2 July 2001.
- 10 See *Doha Work Programme: Ministerial Declaration*, WTO document WT/MIN(05)/DEC, 22 December 2005.
- 11 See *Preferential Treatment to Services and Service Suppliers of Least-Developed Countries*, WTO document WT/L/847, 19 December 2011.
- 12 Note that GATT Article XXXV was not part of the original agreement, but was instead an amendment approved in 1948.
- 13 Another scholar has argued more recently that the origins of GATT Article XXIV can be traced to the brief and ultimately failed efforts of the United States and Canada to conclude a free trade agreement immediately after the Second World War. Citing archival evidence, Chase (2006) showed that the evolving US position on relatively lax GATT/ITO policing of free trade agreements versus relatively strict rules on customs unions may be traced to the fact that, at the time, the United States was interested in pursuing the former but not the latter with its northern neighbour.
- 14 See *Transparency Mechanism for Regional Trade Agreements*, WTO document WT/L/671, 18 December 2006.
- 15 RTAs that are notified under the Enabling Clause are considered by the Committee on Trade and Development.
- 16 If an agreement covered only services, the notification under GATS Article V would be the only one required, but in practice all RTAs that cover services have also covered goods.

- 17 See *Negotiations on Regional Trade Agreements: Transparency Mechanism for Regional Trade Agreements*, WTO document TN/RL/W/252, 21 April 2011.
- 18 The database is accessible at <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>.
- 19 The database is accessible at <http://ptadb.wto.org/?lang=1>.
- 20 See Council Regulation (EC) No 2820/98 of 21 December 1998 applying a multiannual scheme of generalised tariff preferences for the period 1 July 1999 to 31 December 2001, *Official Journal* L 357, 30 December 1998, pp. 0001-0112.
- 21 One of the major concerns that led to the Constitution was the concern that the loosely confederated American states were erecting barriers to trade with one another. The Constitution banned internal trade barriers and established a common external tariff.
- 22 It should also be noted that this sequence is not universal, and that sometimes political unification may precede the economic variety. Both Canada and Italy achieved their respective confederations in the 1860s, for example, but each of them took much longer (decades in Italy and more than a century in Canada) to bring the country's level of economic unity in line with its political counterpart. The break-up of Czechoslovakia in 1993 was a *sui generis* case, as it was accompanied by the simultaneous creation of the Czech and Slovak Customs Union.
- 23 Even in the case of an EU–US RTA, one could see this as a negotiation with a former colony, albeit one whose independence dates back to the year that Smith published his *Wealth of Nations*. By that standard, the only exceptions to the rule would be the actual RTA with the Republic of Korea and the one with Japan for which negotiations began in 2013.
- 24 For more details on the role of RTAs in US Middle East policy, see VanGrasstek (2003).
- 25 The FTA negotiations with the United Arab Emirates were suspended in 2006, due in part to a political dispute over the proposed operation of US ports by Dubai Ports World.
- 26 The debate over approval of the FTA in the US Congress coincided with Chile's tenure on the United Nations Security Council and the deliberations over a US invasion of Iraq. The resulting friction between the United States and Chile did not ultimately prevent the approval of the FTA by Congress, but did produce concerns and delays. For accounts of how these matters came to be linked, see *El País* (2007), Muñoz (2008) and Weintraub (2004: 91).
- 27 See also Galasso (2011).
- 28 Author's interview with Mr Jara on 23 September 2012.
- 29 The signing of this bill into law was not the same as the entry into force of the agreement; that is a later step that was authorized, but not automatically accomplished, by enactment of the bill.
- 30 This was not the only issue related to these countries' negotiation of an FTA with the United States, as was already discussed above in relation to the Coalition of the Willing; each of these three countries also became a member of that coalition. It should also be noted that not all of the original G20 members with which the United States negotiated FTAs in 2003 to 2006 left that coalition.
- 31 As explained in Chapter 9, while services commitments in the GATS are made on the basis of a positive list in some RTAs they are negotiated through negative lists.

- 32 Roy et al. (2008: 80-81) found that "in terms of the breadth of commitments, [RTAs] have provided for spectacular advances" in services commitments vis-à-vis GATS. They also find that RTAs "often induce 'real' liberalization, as exemplified by a number of commitments providing for the phasing out of restrictions in place" (*Ibid.*: 104). They nevertheless acknowledged that "further empirical research would seem warranted so as to better assess the economic consequences flowing from the implementation" of RTAs (*Ibid.*: 107).
- 33 Author's interview with Mr Moore on 20 February 2013.
- 34 See also Rahman and Shadat (2006).



# Part V

## The organization, the institution and the future

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# 14 Leadership of the organization and management of the institution

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[Institutions] evolve incrementally, connecting the past with the present and the future; history in consequence is largely a story of institutional evolution in which the historical performance of economies can only be understood as a part of a sequential story. Institutions provide the incentive structure of an economy; as that structure evolves, it shapes the direction of economic change towards growth, stagnation, or decline.

Douglass C. North  
“Institutions” (1991)

## Introduction

In a happy coincidence of theory and practice, Douglass North wrote his seminal essay on “Institutions” at almost precisely the same time that the WTO was first proposed. “Institutions are the humanly devised constraints that structure political, economic and social interaction,” he wrote (1991: 97), and “consist of both informal constraints (sanctions, taboos, customs, traditions, and codes of conduct), and formal rules (constitutions, laws, property rights)” that human beings have devised throughout history “to create order and reduce uncertainty in exchange.” That is as good a definition as any of the purposes of the WTO, which may be further distinguished according to its two halves. The WTO is at once an institution staffed by international civil servants and an organization to which members belong. While it is the organizational half of the WTO that is chiefly responsible for writing new rules, the institutional half not only facilitates those negotiations but also administers agreements, monitors the members’ compliance with the rules, and promotes the capacity of the developing members to participate more effectively in the organization and to take advantage of the opportunities that a more open market affords.

Both halves of the WTO are integral to the multilateral trading system. The institution is subordinate to the organization, as the WTO would never exist but for the will of its members, and those members rarely pass on the opportunity to remind the Secretariat that the WTO is a member-driven body. The organization could not function, however, without the institutional support. The services that the Secretariat delivers to the members range from meeting such quotidian needs as providing a space and rendering trilingual interpretation, to the technical expertise of the staff and the political judgment of the director-general. While it is normally the organization that directs the institution, there are times when the

institution goes beyond the mere servicing of the demands that are made upon it, taking a more active role in crafting agreements and resolving disputes.

The organization and the institution of the WTO each exemplify the differences between the old and new multilateral trading systems. As discussed in Chapter 2, GATT was an agreement to which countries were contracting parties rather than an organization in which they were members, and one of the principal differences between the old and new orders is that the WTO is a *bona fide* and permanent international organization. That organizational transition was complemented by an institutional transformation. The GATT had a secretariat, as does the WTO, but the institutional structure of the new order is broader in two senses. One is that it constitutes a larger number of elements: the institution includes not just the WTO Secretariat but also the semi-autonomous Appellate Body Secretariat, and partly incorporates other bodies for which the WTO is a joint sponsor and the host (i.e. the Standards and Trade Development Facility and the Executive Secretariat of the Enhanced Integrated Framework; see Chapter 5).<sup>1</sup> The more significant difference is that the members vest greater confidence, resources and responsibility in the institution of the WTO than they had in the predecessor GATT Secretariat. We already saw in Chapter 8 how the role of the Secretariat evolved from one that rather passively received notifications to one that more actively examines members' policies. As discussed below, the greater trust that the members place in the institution can also be seen in the elevated status of the directors-general, including representation of the WTO in the G20 and other high-level gatherings. The precise role of the director-general nevertheless remains a matter of some dispute, illustrating the struggles that sometimes take place between the organization and the institution.

## The perennial tensions in the WTO

There are three perennial tensions in the leadership and management of the WTO. The broadest tension is common to the organization and the institution, both of which need to strike a balance between respecting the ideal of impartiality and pursuing the achievement of the WTO's stated aims. The other two are the tensions between the organization and the institution, most particularly between the ambassadors and the director-general, and the intra-organizational tensions between members of different sizes and capacities.<sup>2</sup>

The WTO *per se* has no interests or will apart from those of its members. The members nonetheless chose to embody in this organization a set of ideals, to create rules and norms by which those ideals can be translated into concrete objectives, and to establish twin structures that are tasked with achieving those ends. Chairmen of the committees and councils provide the leadership in the organization, while in the institution it is the director-general, the deputy directors-general and the division directors who lead. All of these delegates and officials are expected to operate within diplomatic norms that prize impartiality, but not to the point of inactivity. "The chairman, or the director-general, or the heads of any unit should be neutral vis-à-vis the members," in the view of Chilean Ambassador Mario Matus, "but should not be neutral vis-à-vis the objective of either the group or the institution. From that perspective the

chair, or the general council, or the director-general, should push the system ahead, even cornering countries or people to try to achieve what they should be doing.”<sup>3</sup> That view is widely but not universally shared, as not all members are equally eager for the WTO to build upon its achievements in the opening of markets and the enforcement of its rules. Their differing perspectives on this point contribute to the two tensions discussed below.

### *The organization and the institution*

The twin halves of the WTO are structured along parallel yet partly intersecting lines. The highest body of the organization is the ministerial conference that meets every two years, but for normal operations in Geneva the organization’s apex is the General Council. Beneath that body are numerous other councils, committees and (as needed) negotiating groups and working parties, each of them chaired by representatives of members on a rotating basis. The divisions of the institution are parallel to this organizational structure, each of them run by a director who reports to the director-general either directly or, more typically, through one of the four deputy directors-general. Some divisions in the institution correspond directly to a related body in the organization, such that there is (for example) a Trade Policies Review Division servicing the Trade Policy Review Body and a Market Access Division assisting the Council on Trade in Goods. Other parts of the Secretariat serve horizontal functions, such as the Human Resources Division and the Languages Documentation and Information Management Division.

Relations between the twin halves of the WTO sometimes demonstrate a degree of dynamic tension, with the Secretariat seeking to play a more active role and the members often, but not always, resisting that impulse. The two sides have roughly equal numbers. As discussed in Chapter 3, as of 2012 there were 861 people assigned to members’ missions, but if one adjusts those numbers downward for the general-purpose missions it may be more like 485 people. In that same year, 677 people worked in the Secretariat. Taken together, there are more than 1,200 people who comprise the formal WTO community, roughly half of them in the missions and half in the Secretariat.<sup>4</sup> All of them are dedicated to the broad objectives of the multilateral trading system, but they often have very different views about which of its objectives should be given priority, how the WTO should be steered in that direction and who should be holding the steering wheel.

The differing roles of the organization and the institution are exemplified by the resources that they devote to the negotiation of new rules. The legislative function dominates the organization, taking up much – perhaps most – of the time that the members devote to the WTO. By contrast, the line item for “Facilitating Negotiations” represented a mere 3 per cent of the cost allocation for the Secretariat’s 2012 budget, or less than one tenth as much as Aid for Trade and less than one seventh of the resources devoted to “Administering Agreed WTO Rules”.<sup>5</sup> The role of the institution in negotiations can sometimes belie the impression that these raw figures may give. The director-general chairs the Trade Negotiations Committee, for example, and may propose compromises or actual drafts or even bargain directly with ambassadors and ministers. The division of labour can also be blurry in the judicial functions

of the WTO. Disputes are member-driven insofar as they alone may bring complaints against one another or resolve these matters “out of court”, and the members also supply the panellists (many of whom are appointed by the director-general), but the institution provides the expertise of the Secretariat’s lawyers, the authority of the Appellate Body and the good offices of the director-general when mediation is requested.

Relations between the Secretariat and the members, and especially between the director-general and the ambassadors in Geneva, can lead to friction and even outright confrontation. Directors-general will sometimes seek to enhance the authority of the institution in general, and their own offices in particular, but members tend to resist these initiatives. That was especially evident in the very early years of the WTO. Members conceded that it had been necessary in the final days of the Uruguay Round to have a director-general with Peter Sutherland’s drive and temperament, but once those negotiations were over there was, in Stuart Harbinson’s recollection, “a definite feeling amongst the ambassadors that they had to stamp their authority on the organization.”<sup>6</sup> This led them to give less leeway to Director-General Renato Ruggiero, with ambassadors insisting that they had “to make it very clear right at the beginning that this is a member-driven organization” and were determined “to put the DG in his place.” Directors-general were not restored to the chairmanship of the Trade Negotiations Committee until the Doha Round got under way, and have never been given the chairmanship of the ministerial conferences. Mr Ruggiero chafed at the way members restricted his authority. “When I go to Paris or I go to Washington I see prime ministers and presidents,” he once complained to Mr Harbinson. “But when I’m in Geneva I have to ask permission to go to the toilet, and the members say, ‘Yes, but only two minutes!’”<sup>7</sup>

The constraints that members place on the director-general also affect the institution as a whole. Although members have respect for the expertise and impartiality of the Secretariat staff, they are careful to ensure that it operates within limits. Two unwritten rules are paramount: the initiative for any new undertakings will always rest with the members themselves, and apart from the special case of the trade policy reviews and monitoring (see Chapter 8), the staff must never be directly critical of the members or their policies. The Secretariat is on hand to assist the members in logistical and technical matters, and to carry out those functions that the members mandate, but not to propose to the members what they ought to do or to rebuke them for the choices they have made. Members are especially sensitive about any issues relating to foreign policy. In a few incidents where staffers in the Economic Research and Statistics Division and the Information and External Relations Division have made even indirect references to issues involving the political or security interests of members they received dressing-downs from the members involved.

### *The capacities and activities of large and small members*

Beyond the substantive disagreements between members that have conflicting offensive and defensive interests, or the differing perspectives of the rich and poor, members are further divided by their varying sizes and capacities. This is a horizontal distinction that transcends their levels of economic development. Even poor countries can, if they are large enough,

afford to field dedicated missions staffed by knowledgeable and experienced diplomats, and are thus in a better position to defend their interests and to influence outcomes than are members that are either non-resident or have relatively small and general-purpose missions. In this sense, Liechtenstein and Saint Lucia may have more in common with one another than they do, respectively, with the European Union and Brazil. These concerns manifest themselves not only in the positions that members take in negotiations, but also in the individuals chosen to lead the organization and the institution and in the rules by which the organization operates. The one advantage that smaller and poorer members have is their sheer numbers, and that advantage would be enhanced if the system were to operate like a parliamentary democracy. If numbers alone were decisive, the G90 would greatly outnumber small configurations such as the Quad or G7 that have traditionally exercised the greatest power.

The actual operation of the WTO resembles neither a democracy (rule by the many) nor a monarchy (rule by the one), although in some respects its GATT predecessor operated much like an oligarchy (rule by the few). The WTO as it now exists is instead something like a republic in the classic sense of that term, namely a system of government that combines elements of democracy, oligarchy and monarchy. The democratic elements of the organization are the most obvious, and are best demonstrated by its rule of consensus (which might in fact be considered hyper-democratic) as well as the broad participation of small and especially mid-sized countries in the civic duties of chairing committees and rendering jury duty (i.e. serving as panellists in dispute settlement cases). We already saw in Chapter 7 that the most active members in disputes are necessarily less active in supplying panellists, and that panellists will therefore come more often from countries such as New Zealand, Chile and South Africa than from China, the European Union or the United States. A similar dynamic is at work when it comes to leading committees and councils. As discussed below, one finds more chairmen from Norway than from Germany, more from Canada than from the United States and more from Hong Kong, China than from China.

The elements that most resemble oligarchy are the higher posts in the institution. One cannot say that the largest members monopolize the positions of director-general, deputy director-general, and seats on the Appellate Body, but neither could one claim that those offices are distributed randomly. There are instead well-established traditions by which one citizen of the United States always serves as an Appellate Body member and another one as a deputy director-general, and the other major regions and members are represented in the distribution of the remaining Appellate Body and director-general/deputy director-general positions. The closest that the WTO gets to monarchy, and then only for very brief periods, comes in the ministerial conferences. Then the trade minister of the host country is vested by his or her peers with extraordinary authority. That includes the power to extend the proceedings or to bring them to a close, something that may sound trivial but contributed both to the success in Doha (see Chapter 11) and the failure in Cancún (see Chapter 12). The conference chairman also has great leeway in organizing the meeting and appointing friends of the chair, although in practice this is done in close coordination with the Secretariat and in consultation with the membership.

**Table 14.1.** Participation in WTO activities by member size, 1995-2012

	Share of WTO membership	Activities in which the large members participate less		Activities in which the large members participate more	
		Dispute settlement panellists	Chairmanships of WTO bodies	Appellate body members	Directors-general and deputy directors-general
<b>Eight large members</b>	5.1	13.2	10.9	48.7	56.5
Five large developed <sup>a</sup>	3.2	5.8	7.1	30.8	37.0
Three large emerging <sup>b</sup>	1.9	7.4	3.8	17.9	19.6
<b>All other members</b>	94.9	86.8	89.1	51.3	43.5
Other developed	19.4	41.9	35.5	17.9	17.4
Other developing	75.5	44.9	53.6	33.3	26.1
<i>Memo:</i>					
All developed	22.6	47.7	42.6	48.7	54.3
All developing	77.4	52.3	57.4	51.3	45.7

Sources: Tables 7.7 and 7.8, Table 14.2 (based on the composite measure), and their original sources, as well as [www.wto.org/english/thewto\\_e/dg\\_e/ddgs\\_e.htm](http://www.wto.org/english/thewto_e/dg_e/ddgs_e.htm) and [www.wto.org/english/thewto\\_e/dg\\_e/exdgs\\_e.htm](http://www.wto.org/english/thewto_e/dg_e/exdgs_e.htm).

Notes: Percentage of positions filled by representatives of members by type. Appellate Body membership and senior management both calculated by the number of terms. Share of WTO membership based on the 155 members at the start of 2012. Percentages may not add precisely due to rounding. <sup>a</sup>France, Germany, Japan, the United Kingdom and the United States. <sup>b</sup>Brazil, China and India.

Eight large members = Five large developed + Three large emerging.

The distinction between the democratic and the oligarchical aspects of WTO governance is statistically supported by the data in Table 14.1, which distinguish eight large members from the rest of the membership. By the start of 2012, these five developed members and three emerging members represented only 5.1 per cent of the membership, but had far larger demographic and economic footprints: they collectively accounted for 41.4 per cent of the world's exports of goods and services, 49.2 per cent of its population, and 59.2 per cent of its gross domestic product.<sup>8</sup> Their contributions as dispute settlement panellists and as chairmen are on the same order of magnitude as their share of the total membership, but their share of the higher offices in the institution (i.e. Appellate Body members and the directors-general/deputy directors-general) is about the same as their proportions of global wealth and population.<sup>9</sup> By way of analogy, the activities in which these larger members are less active resemble the UN General Assembly and other committees and councils in the United Nations, and the activities in which these larger members participate more resemble the UN Security Council. That comparison is all the more apt when one considers that half of these eight large members are among the five permanent members of that Security Council, and that winning seats on an expanded council is a high priority for both Brazil and India.

## Leading the organization: chairmanships

Much of the work in the WTO is done in councils, committees, working parties and negotiating groups. Most of the regular bodies are chaired by members on one-year rotations, but in the

interest of continuity the chairmanships of negotiating groups and working parties (e.g. on accessions) will often retain the same chairman for several years in succession. Chairmanships are assigned to specific persons rather than their missions, usually to ambassadors for the higher-level bodies and to either ambassadors or other diplomats for the rest.

### *Who chairs, and who chooses chairs*

The formal principles and procedures for the selection of chairmen are summarized in Box 14.1. The last thing that a General Council chairman has to do before leaving office is to consult over the slate of chairmanships for the following year. Stuart Harbinson “found that the most distasteful task [he] did throughout the whole year,” because there were –

lots of egos to balance. You have some people who are desperate for chairmanships because they don't want to get sent back home. You have the good-citizen types who are a bit more flexible, obviously. But then you also have all sorts of petty rivalries and jealousies that seem to come into the equation, in addition to having to construct a subtle regional balance.<sup>10</sup>

The three largest WTO members are conspicuous for their absence from the chairmanships of the major bodies. There is an unwritten but widely understood norm by which China, the European Union and the United States will refrain from seeking the chairmanship of the General Council, the Dispute Settlement Body, or the other major WTO committees and councils. This is a carry-over from GATT. “It would create conflicts and a lack of confidence in the membership” for them to chair any major bodies, Rufus Yerxa observed.<sup>11</sup> We might draw a comparison here to other posts in the international community such as the secretary-general of the United Nations, which is traditionally held by diplomats from mid-sized countries: Norway, Sweden, Burma (now Myanmar), Austria, Peru, Egypt, Ghana and the Republic of Korea. There has never been a UN secretary-general from any of the five permanent members of the Security Council (China, France, the Russian Federation, the United Kingdom and the United States), and those same P5 countries have been equally reticent when it comes to chairing the major bodies of the WTO.

These most influential WTO members will sometimes chair the less prominent committees. France and the United Kingdom are fairly active in such bodies, but even there the majority of those two countries' chairmanships have been by people below the head of delegation level who lead on technical matters at, for example, the Working Group on the Interaction between Trade and Competition Policy (chaired by the same French expert from 1997 to 2003) and the Committee on Customs Valuation (on which three British diplomats have served as chairman). And while representatives from other EU member states have chaired WTO bodies, the head of the EU delegation has never done so. China and the United States have been only a little more active in this respect, having chaired just three and five bodies, respectively, from 1995 to 2012. None of those were among the six major bodies. Four of the five chairmanships by US diplomats were on the Committee on Sanitary and Phytosanitary Matters, and the Chinese service in chairmanships has also tended to be on technical topics.

### Box 14.1. How WTO chairmen are selected

*Sourced from Guidelines for the Appointment of Officers to WTO Bodies, WTO document WT/L/510, 21 January 2003.*

The General Council adopted in late 2002 a set of Guidelines for Appointment of Officers to WTO Bodies. The guidelines provide that “Members should regard the appointments exercise as a relatively routine annual ‘housekeeping’ function, with the principle of rotation as its norm,” the purpose of the exercise being “to ensure that the Organization continues to be able to handle its business in a smooth and seamless way.” The procedures call for a five-step process:

- The selection process starts with an announcement by the chair at the General Council meeting held in December each year;
- The General Council chair and colleagues (i.e. the chair of the Dispute Settlement Body and any former GC chairs still in Geneva) hear the views and suggestions, if any, of members, individually and/or in groups;
- Following any further consultations, the chair and colleagues then devise a balanced slate in accordance with the guidelines and based on the comments they have received;
- An open-ended informal heads of delegation meeting is held in late January or early February, providing an opportunity for general dissemination and discussion of the slate; and
- The slate is to be proposed and agreed at the February regular General Council meeting.

In addition to providing that chairpersons must be representatives of members, and that representatives of members that have been financial arrears for over a year cannot be considered for appointment (as discussed later in this chapter), the guidelines specify that the “choice of a chairperson should primarily reflect the capacity and the availability of that person to undertake the special responsibilities required of such posts in the WTO system.” Chairmen are expected to be impartial and objective, to ensure transparency and inclusiveness in decision-making and the consultative processes, and should aim to facilitate consensus. “Appointments must be acceptable to the membership as a whole and not only to regions or groupings that may have proposed them,” the guidelines specify, but there should also be a “balance which reflects the overall membership of the WTO.”

These are the rules that apply to major bodies such as the Council for Trade in Goods. The chairman of that council will then select chairmen for the 11 subsidiary bodies that report to this council (e.g. those dealing with agriculture, market access, subsidies, anti-dumping measures, etc.); the same principle applies to the councils on services and intellectual property. All of those selections to subsidiary bodies are made with a view towards regional balance.

Table 14.2 provides details on the chairmanships of the 28 WTO members that have been most active in this area, divided into two classes of WTO bodies. One consists of the six most significant bodies in the organization: the General Council, the Dispute Settlement Body, the Trade Policy Review Body, and the councils devoted to goods, services and intellectual property. The other consists of all remaining bodies. For each of these categories, Table 14.2 shows the number of years that diplomats from a given country have chaired WTO bodies, as well as a member’s share of the total person-years of all such chairmanships from 1995 to 2012. The data are arranged according to a composite score for countries’ chairmanships, representing the average for the two shares.

**Table 14.2.** Frequency of members' chairmanships of WTO bodies, 1995-2012

	Six major bodies <sup>a</sup>		All other bodies		Composite
	Years	Share	Years	Share	
<b>Developed countries</b>	<b>45.0</b>	<b>41.7</b>	<b>252.0</b>	<b>43.6</b>	<b>42.6</b>
Norway	10.0	9.3	9.5	1.6	5.5
Canada	6.0	5.6	22.5	3.9	4.7
New Zealand	3.0	2.8	32.5	5.6	4.2
Japan	4.0	3.7	19.0	3.3	3.5
Switzerland	1.0	0.9	25.0	4.3	2.6
Australia	3.0	2.8	12.0	2.1	2.4
Hungary	3.0	2.8	7.0	1.2	2.0
Finland	3.0	2.8	5.0	0.9	1.9
Sweden	2.0	1.9	8.5	1.5	1.7
Ireland	3.0	2.8	2.0	0.3	1.6
Czech Republic	1.5	1.4	9.0	1.6	1.5
France	0.0	0.0	17.0	2.9	1.5
Belgium	1.5	1.4	5.0	0.9	1.2
United Kingdom	0.0	0.0	13.0	2.2	1.1
All other developed	4.0	3.7	65.0	11.2	7.5
<b>Developing countries</b>	<b>63.0</b>	<b>58.3</b>	<b>326.0</b>	<b>56.4</b>	<b>57.4</b>
Hong Kong, China	6.0	5.6	16.0	2.8	4.2
Singapore	5.0	4.6	12.0	2.1	3.4
Nigeria	6.0	5.6	7.0	1.2	3.4
Chile	4.5	4.2	11.5	2.0	3.1
Uruguay	4.0	3.7	12.0	2.1	2.9
Colombia	4.0	3.7	10.0	1.7	2.7
Brazil	2.5	2.3	16.0	2.8	2.5
Pakistan	2.0	1.9	16.0	2.8	2.3
Kenya	4.0	3.7	2.5	0.4	2.1
Korea, Republic of	2.5	2.3	10.0	1.7	2.0
Malaysia	3.0	2.8	7.0	1.2	2.0
Philippines	1.0	0.9	16.0	2.8	1.8
Costa Rica	1.0	0.9	15.0	2.6	1.8
Thailand	1.0	0.9	14.5	2.5	1.7
All other developing	16.5	15.3	160.5	27.8	21.5
<b>Total</b>	<b>108.0</b>	<b>100.0</b>	<b>578.0</b>	<b>100.0</b>	<b>100.0</b>

Source: WTO Secretariat.

Notes: Number of years bodies were chaired by representatives of a member. <sup>a</sup>Includes: General Council, Dispute Settlement Body, Trade Policy Review Body, Council for Trade in Goods, Council for Trade in Services, and the Council for TRIPS. The data do not include working parties on WTO accession. For any year in which a body was chaired by two persons in succession a value of 0.5 was assigned to each.

Composite = Average value for the two shares.

If all chairmanships were randomly assigned and all members bore an equal burden, the average WTO member would chair one body every four years. The participation of individual members and their ambassadors in chairmanships instead varies quite widely. At one end of the spectrum is the large number that never chaired a single WTO body in the organization's first 18 years of existence. That was the case for fully 73 WTO members, or very nearly half of the total membership. In addition to the aforementioned special case of the European Union, this group includes several relatively populous countries such as Angola, Cuba, the Dominican Republic, the State of Kuwait, Portugal, the United Arab Emirates and Viet Nam. Most of the remaining members that have never chaired a WTO body are non-resident or very small countries.<sup>12</sup> At the other end of the spectrum is the unique case of Ambassador Ronald Saborio of Costa Rica (see Biographical Appendix, p. 592), who served as chairman of a committee every year from 1998 to at least 2013. The ten most active members, developed and developing, collectively provided close to half (48.8 per cent) of the chairmanships of the six major bodies and 28.4 per cent of the other chairmanships.

The concentration of chairmanships in some developed countries is a simple function of small-number mathematics: chairmanships are usually divided equally between developed and developing countries, but the European Union and the United States generally do not chair, which leaves very few remaining developed countries to fill slots. As a consequence, diplomats from Australia, Canada, Japan, Norway, New Zealand and Switzerland are kept quite busy. Or as one developed country ambassador put it, "it's a small gene pool."<sup>13</sup> If the chairmanship of the General Council were rotated among all of the members, no one country would chair it more than once in a century; in the eighteen years from 1995 to 2012, Canada and Norway each held this position three times. John Weekes (see Biographical Appendix, p. 596) of Canada holds the distinction of being the only ambassador ever to serve as chairman of both the GATT Council (1989) and the WTO General Council (1998).

More than just mathematics is at work in determining which developing country ambassadors become chairmen. This is partly a matter of demand, with some members or regions actively campaigning for their share. The principal purpose of the Latin American and Caribbean Group, commonly known as the GRULAC, is to ensure that its members are adequately represented in chairmanships. It is also partly a matter of capacity. A chairmanship is virtually impossible for a non-resident member, and is impractical for those with general-purpose missions that have small staffs. The fact that Hong Kong, China has chaired more often than any other developing member is readily understandable if one considers that it is not an independent country with separate representation in other international organizations, and its diplomats can devote themselves exclusively to WTO matters.<sup>14</sup> Seven of the next ten developing countries on the list had dedicated WTO missions as of 2012, generally with staff complements of at least five persons. Those members could afford the opportunity cost of having the ambassador devote large blocks of time to a chairmanship; that same service would impose a greater burden on a mission staffed by just two or three people who must cover all Geneva-based international organizations. Another factor is a country's length of time in the system. Those that recently acceded are less likely to have had numerous chairmanships, both because the opportunities have been fewer and because they need time to develop an understanding of how this organization operates.

For both the developed and the developing members, it is not the largest countries that chair the most committees. Brazil, Pakistan and Nigeria are partial exceptions to this general rule, being the sixth, seventh and eighth most populous WTO members (if one counts the European Union as one), but it is more significant that one does not find China, India and Indonesia – the first, second and fifth most populous members – prominent in the list of chairmanships. It is instead countries such as Singapore and Uruguay that are near the top among the developing country membership, just as countries such as Norway and Canada take the lead among the developed. The system as a whole appears to be more comfortable when bodies are chaired by ambassadors from countries that are large enough to afford well-staffed missions, but not so large as to be among the most outspoken *demandeurs*.

### *The functions and styles of chairmen*

Does it matter who chairs the WTO bodies? The answer would be negative if we assumed that chairmen were simply facilitators, playing a role similar to that of a speaker of the house in a Westminster-style parliament. That is manifestly not the case in the WTO, however, which follows the established GATT tradition by which the chairman is expected not merely to facilitate debate but to build consensus, and to take an active role in developing texts and “getting to yes”. Two characteristics of the ideal chairman are worth highlighting: the obligation to act on behalf of the system as a whole rather than as an advocate for one’s own country, and the need to balance impartiality towards the members with the responsibility to advance negotiations by proposing texts, breaking deadlocks and achieving consensus. A diplomat in the WTO is expected to engage in creative compartmentalization, placing the chairman’s obligation to the system ahead of the national representative’s duty to promote specific objectives. Or, to put the matter in the language of negotiations theory, a chairman is supposed to concentrate on creating value for the community as a whole rather than on claiming value for one’s own country.

The conduct of the negotiation on trade-related aspects of intellectual property rights (TRIPS) and public health illustrates the distinction. Towards the end of those talks in December 2002, Ambassador Eduardo Pérez Motta of Mexico was putting together the final draft of what would become the Decision on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health (see Chapter 10). “The Americans were very nervous about the outcome,” he later recalled, concerned that the text would go against their position on some key points. Mr Pérez Motta received “calls from the Mexican capital sending me messages from the US, and I said, ‘Well, I’m sorry but ... I’m not playing this role as an ambassador, so I’m not going to get any information or instructions on this.’” His interlocutors in Mexico City then knew there was no point in trying to pressure him into taking one position or another. This exchange between the ambassador and the capital depended on a certain understanding of the chairman’s ethos. According to Mr Pérez Motta’s view of this responsibility –

if you have that role, as a head of a working group [in Geneva] your role is on a personal basis. You are not representing your country. Your delegation will be representing your country at the table there, and you have to hear your delegation like any other delegations. But sometimes that is a role that is not clearly perceived or clearly understood by capitals, and you have to send clear signals.<sup>15</sup>

Not all ambassadors will have either the inclination or the ability to make such a distinction, and many of them might, were they in Mr Pérez Motta's position, have received those instructions as orders and acted accordingly. This is one of many points on which the political culture and traditions of member states differ, and can also depend critically on the personalities involved. As an ideal, however, the approach that Mr Pérez Motta took is what the system expects of a chairman.

Chairmen must meet the competing expectations that they be impartial as well as effective. Being an honest broker requires that the chairman be respectful of the views of all members, not siding with their own countries' interests or those of any coalition or faction with which they might be associated, and they certainly must not show any hostility to the positions or persons of other members and groups. Like many other virtues, however, if impartiality is taken too far it becomes a vice. "A chairman has to be both firm and flexible," according to Ambassador Julio Lacarte, "according to circumstances."<sup>16</sup> He or she "has to grasp the sense of the meeting, take advantage of the moments when a text can be pushed through, and not hesitate to proceed accordingly."<sup>17</sup> Odell (2005: 475) classified the tactics that chairs might adopt along a spectrum from relatively passive to relatively interventionist. "The most passive WTO mediation tactics," he observed, "consist of observation, diagnosis, and communication." More frequently, WTO chairs will seek more actively to formulate a consensus. A chair may even adopt "decisive or manipulative tactics that attempt to give the process or individuals a push in a particular direction" (*Ibid.*: 487). The choice among these alternatives is determined by the circumstances and the person. The role of a chair "depends very much on the negotiation," according to Ambassador Ronald Saborio, such that –

there are moments in which a chair must allow the members to perform a very important role themselves and allow things to rise from the bottom. When there is high interest in the results of a negotiation, when interests are being proposed, it is important to allow the forces to play and members to dance. And then a very active role of the chair can be disturbing, in situations like that. There are other situations when negotiations are not moving in which the chair probably has to be active and be the one proposing things. This is more difficult, and it is more risky not just for the chair who might burn his fingers but even worse, he can derail a negotiation.<sup>18</sup>

Some members are uncomfortable with the degree of initiative that chairmen take in the development of texts. In 2002, the Like-Minded Group (LMG) proposed changes in the operation of the WTO that would have altered the role of the chairman. The 13 countries in this group<sup>19</sup> advocated "effective participation by all the Members in the negotiations" through a process that "should engender transparency and consensus-based decision making."<sup>20</sup> That would mean reducing the degree of authority and discretion exercised by the director-general and the chairmen of negotiating groups by (among other things) giving the chairmanship of the Trade Negotiations Committee to a member rather than the director-general, electing this and all other chairmen "by consensus from Geneva based Ambassadors," and restricting the authority of the chairmen to develop negotiating texts on their own authority. Any reports or draft decisions "should be agreed upon in the concerned negotiating body by consensus," the LMG urged, and in

the absence of consensus the “differing views of members, with alternate suggestions for decision, should be reflected in the drafts to be sent up to higher bodies for decision.”<sup>21</sup>

No matter how passive or assertive a chairman may be, all must start with the process of gathering information on members' positions and, if the topic is technically challenging, developing their own expertise on the subject. Their consultations go beyond simply compiling the views of the most active members, both on the offensive and defensive sides, but also require that they sound out members to determine the intensity of their views and their willingness to consider compromises and accommodations. A chairman must interpret, because members “don't show the cards,” according to Mr Saborio. “You can guess what their cards are, you can make your own mathematics, and you receive signals that are very codified.”<sup>22</sup>

The most common device is the “confessional,” a one-on-one meeting to review issues and positions. The practice itself likely dates back to pre-GATT days, but the specific title of the confessional was an innovation by Julio Lacarte, the ambassador from Uruguay. In Mr Lacarte's confessionals during the Uruguay Round, he “would invite the Heads of Delegation to meet with me individually and under conditions of strict confidentiality, gauge their real aims, disabuse them on demands that were doomed to fail, and prepare the ground for agreements acceptable to all.”<sup>23</sup> This would often require multiple meetings. Participants will start from their maximum positions, but the chairman can sometimes bring them individually closer to their bottom lines. Taken together, the information collected in this process allows the chairman to define not only the technical issues (generally in consultation with the Secretariat) but also to map out the zone of possible agreement. That latter task is based on the chairman's own intuition, as well as the discussions he or she may hold with other chairmen, the director-general, Secretariat staff or other trusted persons.

The transition from information-gathering to deal-brokering can be gradual. Mr Pérez Motta characterized the case of the negotiations on TRIPS and public health as “a process of many discussions, so that every part of the table would understand what were the reasons and the arguments of the other side.” A chairman needs to find “the small windows of opportunities that each side are opening, even without knowing that they are opening those windows.”

You have to start understanding what possibilities you would have to put on the table a document that in the end has to keep everyone relatively uncomfortable. So everybody has to go out of the room at the end relatively unhappy. Because if you have a group very happy and the other very unhappy then things are not balanced. But if everyone is unhappy and everyone blames you as the origin of their problems there then you're right, you're doing your job.<sup>24</sup>

Ambassador Guillermo Valles of Uruguay faced the difficult task of shepherding the negotiations on trade-remedy laws and fisheries subsidies when he chaired the Doha Round Negotiating Group on Rules from 2004 to 2010. Both of these subjects involved their own substantive and political complexities; the same members that might be *demandeurs* on trade-remedy laws could

strike a defensive stance on fisheries subsidies and vice versa. This required that he work closely with experts in the Secretariat and in numerous missions, cataloguing the positions of the members and mapping the options. "My strategy," he said, "was to reach a point in which the members would acknowledge that they by themselves wouldn't be in a position as to identify the trade-off."<sup>25</sup> The drafting of a chairman's text is the most critical task, requiring that the chairman make judgment calls about what to include, what to exclude, what to place within brackets and how specific a draft text ought to be. Mr Valles managed to develop a series of texts that defined the options, but a chairman can take that process only so far when the positions of members are irreconcilable. There will come a point at which there are no further trade-offs that might be made within a single text, but members might be persuaded to make trade-offs across them. That will typically require a political decision at the ministerial level.

### *The General Council and ministerial conference chairmen*

Two types of chairmen hold a special place in the WTO system. One is the chairman of the General Council, the pinnacle of the system of regular committees and councils. Like other top chairmanships, this one is held only for one year at a time on a rotating basis. The other is the chairman of the ministerial conference, a position that is always held by the trade minister of the host country or, in the case of those ministerials that are held in Geneva, by the trade minister of the country whose ambassador is then serving as General Council chairman.<sup>26</sup>

Two traditions dominate the selection of a General Council chairman. One is that the person who holds the post in any given year will normally be whoever chaired the Dispute Settlement Body (DSB) in the previous year. This is the only respect in which the WTO system replicates the Roman concept of the *cursus honorum*, or the sequence of offices that one is expected to follow in the path towards the highest post; there is no specific series of chairmanships that an ambassador should hold prior to becoming the DSB chairman. The practical result is that when members decide in one year who will chair the DSB they have effectively decided who, in the absence of some unanticipated development (e.g. if the ambassador were to be reassigned), will be the General Council chairman the next year. The second tradition is that there is a pair of regional rotations in offices, such that the General Council chairman will be from a developing country one year and from a developed country the next year, and in those years that the position is filled by a developing country diplomat there is a further rotation between the three developing regions. The sequence of General Council chairmen in the odd years from 1995 to 2011 was three cycles of Asia–Latin America–Africa, in the following order: Singapore–Brazil–Tanzania–Hong Kong, China–Uruguay–Kenya–Malaysia–Chile–Nigeria. The sequence began again in 2013 with a General Council chairman from Pakistan. In those same years, the DSB chairmanship was held by a developed country diplomat.

The General Council chairmanship is an unusual position that is in some respects like a bridge between the membership and the Secretariat. It is the only chairmanship that comes with an office in the WTO headquarters building, together with access to support staff. That is an innovation that dates to Mike Moore's tenure as director-general. He established this arrangement so that the leaders of the institution and the organization could remain in regular

communication with one another in those critical months preceding the launch of the Doha Round. Mr Moore's relationship with General Council Chairman Stuart Harbinson was especially close and productive. "We were seamless," he later observed. "I had his back and he had my back."<sup>27</sup> There were some in the secretariat staff who did not like this new development, as it violated their sense of the proper division between the legislative and executive branches of the institution. Mr Moore did not agree with that strict view of separation. "You've got to be able to walk into each other's office and bang the table and vent,"<sup>28</sup> he said.

The role of the General Council chairman varies according to the individual holding that position, the personality of the director-general, and the relationship between them. "The Director-General and the chairman of the General Council have to try to develop a sort of complementary relationship," according to Mr Harbinson, "so that one is doing things that the other is not doing."<sup>29</sup> The significance of the General Council chairmanship is in direct proportion to the importance of the issues being considered during his or her tenure. When negotiations are at critical phases, the General Council chairman may play a key role in moving them forward, helping to break deadlocks, advance solutions, and promote consensus, but in times when negotiations are slowed or stalled the duties are commensurately diminished. The General Council chairman also acts as a communications medium, conveying messages between the members and the Secretariat. Sometimes that involves acting as a trouble-shooter or even mediating personality disputes. General Council chairmen have also suggested that they should speak for the WTO in external affairs, such as when it is represented at meetings of the G8 or the G20, but that honour is reserved for the director-general.

The WTO Agreement was silent about who would chair the ministerial conferences. Mr Ruggiero had hoped to exercise this power at the first ministerial in 1996, but the members instead reserved this prerogative for the trade minister of the host country. The actual division of labour between a conference chairman and a director-general can be finessed, however, as was the case at the Doha Ministerial Conference. Minister Yousef Hussain Kamal chaired the plenary sessions, which consisted primarily of formal speeches, but the real deal-making took place in the green room that Mr Moore ran. That arrangement saved the ministers "at least five hours of negotiating time, by allowing each minister to go out, say his piece to camera for the record, then get back down to business" (Moore, 2003: 128).

Like the chairmen of the regular WTO bodies, the ministerial conference chair is expected to focus on the needs of the organization and to demur on matters of parochial national interest. That may be too much to ask of a chairman who represents one of the major players, as was the case at the Seattle Ministerial Conference in 1999. Some members were concerned that Ambassador Charlene Barshefsky could not distinguish between the two responsibilities of representation and facilitation. This may have been not a personal failing as much as it was an error in the decision to bring the ministerial to a major country, and explains why the hosting of ministerials is another one of the tasks that the system prefers be assigned to mid-sized rather than large powers. Another recurring theme in the accounts of the ministerial conferences, especially those associated with the launch or the conduct of the Doha Round, is the sheer exhaustion from which the conference chairman will typically suffer. Acting as host to the world is

a demanding task in the best of times, and is made even more difficult when the chair is asked to put out figurative fires, mediate between hostile camps and make judgment calls about how the conference should be conducted and closed. That fact alone may help explain why the chairmen of the Seattle and Cancún ministerial conferences made some questionable decisions.

## Leading the institution: directors-general and deputy directors-general

The director-general holds the most visible post in the WTO and is the most prominent trade policy-maker in the world. It can also be a thankless job. As Mr Moore put it, a director-general can quickly find that “you’re not a director nor are you a general.”<sup>30</sup> Sometimes the same members who expect the most from a director-general will be the least willing to cede more power to that office.

“A starting point for a discussion of the role of the DG,” Blackhurst (2012: 3790-91) observed, “is to note that the member countries have never provided the DGs with a specific job description.” Neither the Agreement Establishing the World Trade Organization nor any other document precisely lay out the functions and powers of the director-general. Article VI of that agreement provides that ministers “shall appoint the Director-General and adopt regulations setting out the powers, duties, conditions of service and term of office of the Director-General,” but apart from admonishing the director-general “not [to] seek or accept instructions from any government or any other authority external to the WTO” the agreement is silent. The regulations called for in that agreement have never been drafted, although the members did offer a few more clues about the ideal director-general when they described the qualifications for this post in the 2002 Procedures for the Appointment of Directors-General. This document states that “[i]n broad terms, candidates should have extensive experience in international relations, encompassing economic, trade and/or political experience; a firm commitment to the work and objectives of the WTO; proven leadership and managerial ability; and demonstrated communications skills.”<sup>31</sup> The elevated status of the office can also be seen in the headquarters agreement, or more formally the Agreement between the World Trade Organization and the Swiss Confederation. This 1995 instrument provides (among other things) for the treatment that the host country extends to persons associated with the WTO. The agreement specifies that both the director-general (Article 30.1) and other senior officials (Article 31.1) “enjoy such privileges and immunities as are granted to diplomatic agents in accordance with international law and usage”, but further distinguishes the director-general by providing that he “shall enjoy such facilities as are granted to Heads of Missions” (Article 30.2).<sup>32</sup>

The principal functions of the office have developed through tradition and practice, and sometimes through trial and error. “[I]n the real world the DG carves out his role,” Ambassador Julio Lacarte observed, “according to his charisma, professional strengths, ability to interpret governmental trends and interests, and personal relationship with the accredited ambassadors.”<sup>33</sup> That process is still underway.

Directors-general enjoyed long periods of service in GATT (see Annex 2, p. 599). Prior to the relatively short and unique career of Peter Sutherland, who served as the last director-general of GATT (1993-1994) and the first of the WTO (1995), the institution had just three heads. The most long-lived among them was Eric Wyndham-White (1948-1968).<sup>34</sup> Moving into Britain's Ministry of Economic Warfare not long after graduating from law school in 1938, he also participated in the ill-fated Havana Conference and, after the ITO failed to come into being, spent the rest of his career in the GATT Secretariat. He was followed by Olivier Long (1968-1980) and Arthur Dunkel (1980-1993), both of whom were Swiss. Mr Long was Switzerland's ambassador to the United Kingdom prior to becoming director-general; Mr Dunkel represented Switzerland in GATT and other economic institutions from 1971 until his appointment. The 46-year tenure of these three GATT heads spanned a period in which the world saw five popes, six secretaries-general of the United Nations, six German chancellors, ten US presidents, 11 British prime ministers and 19 Japanese prime ministers. The only major world figures who enjoyed greater job stability than GATT directors-general were royalty.<sup>35</sup>

The tenures of WTO directors-general after Mr Sutherland have been much shorter. Renato Ruggiero (1995-1999), Mike Moore (1999-2002), Supachai Panitchpakdi (2002-2005), and Pascal Lamy (2005-2013) served an average of fewer than five years each, compared to an average of more than 15 years each for their GATT predecessors. The rules provide for a four-year term and eligibility for a second term, with "no expectation of automaticity in the reappointment,"<sup>36</sup> but only Mr Lamy managed to serve two full terms. Each of his predecessors saw the number or the length of their terms truncated by deals made in the selection process.

### *How directors-general are selected*

One important difference between GATT and the WTO is the ease with which directors-general are chosen. The process in GATT was comparatively quiet, brief and infrequent. Starting with Mr Ruggiero's selection in 1994 to 1995, the recruitment process in the WTO has been elongated in time and deepened in controversy, sparking conflict among and between the major developed and developing countries. The resulting struggles undermined the authority of a figure who should be seen as an impartial manager, an honest broker and, in special moments, as a deal-maker.

Although they could not yet be sure of it, the contracting parties who chose the last director-general of the GATT were also choosing the first director-general of a new organization that they were about to create. The 1993 race began when Mr Dunkel was asked not to seek reappointment. Some negotiators felt that he had been unceremoniously sacked, in part because aspects of his 1991 draft had irritated both the European Community and the United States; others felt that he had become too married to his own draft, and was less capable of making the adjustments needed to do the deal. Brussels and Washington both favoured Mr Sutherland as a replacement (see Chapter 2), and after a brief contest with Mr Lacarte (see Box 14.2), Mr Sutherland had the job. He would hold the position for only 22 months, just four of them as WTO director-general.

**Box 14.2. The recurring Latin campaign for director-general**

A feature of every race for the director-general position from 1993 to 2013 is the candidacy of a Latin American or, starting in 1994, at least two candidates from that region.

Julio Lacarte ran against Peter Sutherland for the post of GATT director-general in 1993. When the time came for a vote, Mr Lacarte had concluded that Mr Sutherland held the majority, and "felt that it was the moment to respect the GATT tradition of electing DGs by unanimity and not through a vote."<sup>39</sup> Mr Lacarte therefore withdrew and supported Mr Sutherland after arranging for the appointment of a Latin American deputy director-general (see below).

The struggle over who would become the first full-term WTO director-general inaugurated the tradition by which two or more Latin American candidates vie for the position, and in the process they usually diminished the likelihood that either one of them would succeed. In 1994 to 1995, the two candidates were Rubens Ricupero, the former Brazilian ambassador to GATT who was then serving as Finance Minister, and President Carlos Salinas de Gortari of Mexico. The regional rivalry did not last long this time, as Mr Ricupero dropped out before Mr Salinas did.

There were no Latin nominees at the start of the 1998 to 1999 race, although for a time Canadian Trade Minister Sergio Marchi (see Biographical Appendix, p. 585) put forward Chilean Foreign Minister José Miguel Insulza as a compromise candidate. The US trade representative showed some interest in this idea, but the White House would not switch its support from Mike Moore. Mr Insulza would instead go on to serve as secretary general of the Organization of American States, beating out Mexican Foreign Minister Luis Ernesto Derbez for that job.

The Latin split returned with a harder edge in 2005. Two of the three candidates who unsuccessfully opposed Pascal Lamy, the European commissioner for trade, that year were Carlos Pérez del Castillo of Uruguay (see Biographical Appendix, p. 588) and Luiz Felipe de Seixas Corrêa of Brazil. Brazil was a leader among the Cancún-era G20, and while Uruguay's interests were congruent with this group's position on agricultural subsidies Mr Pérez del Castillo believed that he had to be even-handed as General Council chairman. His decision to keep Uruguay out of the G20 angered Brazilian Minister of Foreign Relations Celso Amorim, and Uruguayan officials believe Brazil's decision to put forward its own nominee late in the campaign was expressly intended to sabotage the candidacy of Mr Pérez del Castillo.

In 2013, when an unprecedented nine candidates ran for the position, fully one third of them were from Latin America. They included WTO Ambassador Roberto Azevêdo of Brazil, Costa Rican Minister of Foreign Trade Anabel González and former Mexican Secretary of Commerce and Industry Herminio Blanco. The third and final round of consultations in that race came down to a contest between Mr Azevêdo and Mr Blanco, with Mr Azevêdo emerging as the sixth director-general of the WTO.

The first race for a full-term director-general to the new organization began even before the WTO came into being. By the end of 1994, the race had become a three-way contest in which each candidate had the backing of a bloc: President Carlos Salinas de Gortari of Mexico had the support of the United States and Latin America, Japan and most Asian countries favoured Trade Minister Kim Chulsu (see Biographical Appendix, p. 582) of the

Republic of Korea, and the European Community, together with the African, Caribbean and Pacific countries, backed former Italian Minister of Foreign Trade Renato Ruggiero. The manoeuvring was well under way in the final weeks of 1994, and lasted into the first quarter of 1995. It is difficult to know what might have happened if Mexico did not then descend into an economic crisis. That development, coupled with a scandal that led to the arrest of his brother, prompted Mr Salinas to drop out of the race by the start of March. The United States eventually, and reluctantly, came around to supporting Mr Ruggiero. In a deal that the European Community reached with the Clinton administration, he was limited to a single, four-year term; it was also agreed that his successor would not be a European.

Another recurring issue that arose in the 1994 to 1995 race concerned the appropriate *curriculum vitae* for a director-general. During the GATT period, it was quite sufficient for the nominee to have been an ambassador or other mid-level official; in the WTO period the typical candidate has been either a sitting or former trade minister or, in a few cases, a former president or prime minister. That transition began with Mr Sutherland, who as EC competition commissioner had been of the same rank (although not the same position) as a trade minister. Mr Salinas was the first candidate to have been a head of government, but for some Geneva diplomats that was not a welcome innovation. "Ambassadors fear Salinas would be forever going over their heads direct to the heads of states and not working through the existing process," one of them told a journalist at the time. Characterizing the WTO as "a relatively informal agency," the ambassador said that Mr Salinas "wouldn't have the security, the entourage and the kind of office he is used to in the presidential palace in Mexico."<sup>37</sup>

The next struggle began as Mr Ruggiero's tenure ended in 1999, with members promoting four competing candidacies. The two leading contenders were former New Zealand Prime Minister Mike Moore and former Thai Deputy Prime Minister Supachai Panitchpakdi. This race was more ideological, extended and bitter than the one before it, with Mr Moore being associated with labour and Mr Supachai being supported by the Like-Minded Group. The other candidates included a former Canadian Trade Minister, Roy MacLaren, and a Moroccan trade envoy, Hassan Abouyoub. The European Community was split: while Mr Abouyoub had the support of France and the African countries, the United Kingdom joined Australia, Japan, Malaysia and Kenya in supporting Mr Supachai. The United States was initially non-committal,<sup>38</sup> but eventually gave its backing to Mr Moore because of his support for a trade-labour link. When Mr Abouyoub's candidacy faded, several of his key supporters went over to Mr Moore's camp. Matters then settled into a stalemate. Mr Moore may have enjoyed a very narrow lead, but this could not be confirmed without breaking the general taboo against formal voting in the WTO.

The extended contest that year damaged the institution, the victor, and the prospects for a new round in the near term. Mr Ruggiero left office on 1 May 1999, and for the next five months David Hartridge led the institution as officer in charge. The vacancy was "both tragedy and farce," in the words of *The Economist* (1999), which observed that the stalemate was "hampering preparations for a big WTO summit in Seattle in November" and added to the "growing risk that the Seattle summit will be a failure." The publication joined in the brief rally behind Chilean Foreign Minister José Miguel Insulza (see Box 14.2).

The compromise came in a proposal that Thai Foreign Minister Surin Pitsuwan made to US Secretary of State Madeleine Albright in mid-June (Blustein, 2009: 63-64). This deal gave Mr Moore the position from 1999 to 2002, and Mr Supachai would be director-general from 2002 to 2005. The solution of non-renewable, three-year terms might appear Solomonic in purely mathematical terms, but from an institutional perspective the results were far from ideal. Mr Moore took office just weeks before the Seattle Ministerial Conference, and the sore feelings from the selection process did not heal in that brief interim. "There was a continuous attitude between the selection of the DG and the preparations for Seattle,"<sup>40</sup> Deputy Director-General Rodriguez remembered, with the LMG members, in particular, raising many objections along the way. The only advantage that this process gave Mr Moore, and a very slim one at that, was that being denied the option of seeking re-election gave him a certain sense of freedom.

### *Director-general selections after 1999*

The extended and self-defeating recruitment struggles of 1994 to 1995, and especially 1998 to 1999, inspired members to adopt in 2002 the Procedures for the Appointment of Directors-General. These rules provide for a more formal process that is less likely to result in a stalemate. The process is conducted by the chairman of the General Council in consultation with members, assisted by the chairs of the Dispute Settlement Body and the Trade Policy Review Body. The procedures direct these three facilitators to "encourage and facilitate the building of consensus among Members, and assist them in moving from the initial field of candidates to a final decision on appointment,"<sup>41</sup> but also allow for the possibility of a vote in the event of a deadlock.

Sergio Marchi, who had moved in 1999 from being the Canadian trade minister to WTO ambassador, made the development of these selection procedures a top priority during his stint as chairman of the General Council in 2002. Knowing that it would be three years before a new selection process would begin, and hence there were no declared or even anticipated candidates yet whose standing might be helped or hindered by any specific set of rules, Mr Marchi believed this was the ideal time to pursue a reform. He spent much of his tenure devising and winning approval for a new set of procedures. Among the issues that proved difficult were adapting these rules to the tradition of rotation between developed and developing countries and the even longer and stronger tradition by which members avoid voting. He resolved the first problem by leaving the decision to the membership in any given campaign and handled the second one by falling back on the GATT/WTO tradition of constructive ambiguity.

The procedures specify that the appointment process begins nine months prior to the expiry of the incumbent's term and is intended to last six months, thus allowing a three-month transition period. The schedule contemplates one month for nominations "submitted by Members only, and in respect of their own nationals" followed by three months in which the candidates may campaign for the post (which is more diplomatically described in the procedures as "mak[ing] themselves known to Members" and "engag[ing] in discussions on

the pertinent issues facing the Organization”). During this period, candidates will appear before the General Council “to make a brief presentation, including their vision for the WTO, to be followed by a question-and-answer period.” They make direct appeals by visiting ambassadors in their missions and trade ministers in their capitals, and will also present themselves in other settings such as the World Economic Forum meetings in Davos.

There then follows a process that might be described as voting without votes. The three facilitators will consult all members one-by-one in a series of confessionals to “assess their preferences and the breadth of support for each candidate,” the aim being “to identify the candidate around whom consensus can be built.” The outcome of these consultations are to be reported to the membership at each stage, and “the candidate or candidates least likely to attract consensus shall withdraw” (with the number of withdrawals at each stage to “be determined according to the initial number of candidates, and made known in advance”). The field is thus narrowed in successive stages as the members seek to build consensus around one candidate. At the end of this process the facilitators “submit the name of the candidate most likely to attract consensus and recommend his or her appointment by the General Council.”<sup>42</sup>

One of the chairmen who served on this selection panel in 2005 described the experience. These three facilitators met together in the office of the General Council chairman with each of the WTO ambassadors in turn, in an order determined by a sign-up sheet, and sounded them out on their preferences for the position. Some of the ambassadors would state their views very directly, either emphasizing the one candidate whom they strongly favoured or presenting a hierarchical list, while others would speak in diplomatic circumlocutions; that would then require the three chairs to confer as to what they believed they had actually been told. The facilitators then processed the information they received in order to determine the breadth of support for each candidate. That estimation of the breadth of support was not simply a matter of adding up votes, but was a qualitative assessment that took into account “the distribution of preferences across geographic regions and among the categories of Members generally recognized in WTO provisions: that is, [least-developed countries], developing countries and developed countries.”<sup>43</sup> Once the members of this troika had heard from all of their peers they would conclude which candidate had the least support, approach that person with an implicit or (if necessary) explicit suggestion to withdraw, and then start all over with the now-reduced slate. There being four candidates in 2005, they had to go through this process three times with the full membership.

This method is a more formal version of the approach that was taken in the very first race for director-general. In the 1994 to 1995 process, it fell to Chairman András Szepesi (Hungary) of the GATT Contracting Parties to canvass the other delegations. The first difference comes in the expansion of the review body from one to three persons, thus eliminating any concerns that the individual in question may have misread or even misrepresented the actual breakdown of members' positions (as some would allege was the case in the 1999 race). In the 1994 to 1995 episode, it was hoped that the two candidates with the least support would graciously withdraw once Mr Szepesi found that one candidate had built a commanding lead. That first selection

process dragged on several months longer than would be ideal, however, with the most intense phase lasting about five months. Things only got worse in the next race, and if that same process remained the sole means of selecting a director-general, it could happen again. The second and more significant innovation in the procedures was therefore to provide for a Plan B option in which the members will resort to voting if a consensus candidate does not emerge. In the event that “it has not been possible for the General Council to take a decision by consensus by the deadline,” according to the procedures, then “Members should consider the possibility of recourse to a vote as a last resort by a procedure to be determined at that time.”<sup>44</sup> This was Mr Marchi’s constructive ambiguity at work, leaving unsaid whether that voting would require a simple or a super-majority, whether it would be on a one-member, one-vote basis or in some form of weighted voting, among other options.

The procedures got their first try-out in 2005, when four candidates competed for the post. That process went much more smoothly than had the two prior contests, and was all over by 26 May. No vote was required. That gave Director-General-elect Pascal Lamy three months to make an equally smooth transition into office, including the selection of his deputy directors-general. Mr Lamy ran unopposed for a second term in 2009. When the campaign for his successor began at the end of 2012, it attracted an unprecedented nine candidates, including three Latin American candidates, two Africans and contenders from Indonesia, Jordan, the Republic of Korea and New Zealand. It would be impractical to go through the full process of consultations with the membership in eight successive rounds, so the three facilitators decided in this race to eliminate four candidates in a first round and three candidates in the second round, keeping the full process down to three rounds of consultations.<sup>45</sup>

### *Leadership styles of the directors-general*

Each director-general is unique, taking a different approach to defining the role of the office and the style by which he will pursue his goals. To simplify, one might identify four general approaches: leadership-by-trust, knocking heads, gentle persuasion and institution-building. While most directors-general have engaged in each of these styles to one degree or another, they can be associated principally with one exemplar among the directors-general. They are presented below in chronological order.

Leadership-by-trust was practised more in the GATT era than in the WTO period, and fit well with that smaller and more homogeneous system. Eric Wyndham-White may be cited as the principal practitioner of leadership that is exercised through the trust that the community places in the director-general. That style is illustrated by one incident related by Mr Lacarte, who described how Mr Wyndham-White resolved “a very big argument” among the contracting parties:

Nobody could agree on anything on this particular issue, opinions were sharply divided and a new meeting was called to try to find a solution. At the beginning of

the meeting, Wyndham White patted his pocket and he said 'I've got the solution right here.' Everybody clamoured 'Well go on, say it.' And he replied 'I'll say it, provided you agree beforehand you'll accept it.' Without dissent, everybody complied with his condition. He pulled out the piece of paper, read it, and that was the end of the problem (Lacarte, 2011: 15).

This approach to leadership depends as much on the willingness of the community to be so led as it does on the ability of the director-general to provide that leadership. In the final years of GATT, that willingness could be attributed in no small measure to the enforcement of norms by EC Ambassador Paul Tran (see Biographical Appendix, p. 595), who was famous for instructing all incoming ambassadors on the commandments (see Box 14.3). Their exact content varied somewhat from time to time, but one item that they always included was the injunction that the ambassadors must honour the director-general. That is a custom that has been honoured at least as much in the breach as in the observance in the years since Mr Sutherland left the WTO in 1995 and Mr Tran retired in 1994.

#### **Box 14.3. The “Ten Commandments” of the GATT and WTO**

Paul Trân Van-Thinh, also known to his colleagues as Paul Tran, served as the European Community's ambassador to the GATT from 1979 to 1994. He famously instructed all newly appointed ambassadors to the GATT on what he deemed the Ten Commandments. At his farewell speech on 26 January 1994, he updated these commandments to cover the new organization that he helped to bring into being.

1. Thou shalt do nothing to endanger the Lord thy GATT/WTO, for which there is no alternative and without which there shall be no salvation.
2. Thou shalt not discriminate, creating free trade areas and customs unions only in strict accordance with the laws of the Lord thy GATT/WTO.
3. Thou shalt tariffy thy trade barriers, bind them and reduce them progressively, yea until no more shall remain.
4. Thou shalt ensure fair conditions of competition both on thy domestic market and on the world market.
5. Thou shalt administer thy trade policies transparently, in the full light of the day.
6. Thou shalt grant special and differential treatment to developing countries so long as they remain so.
7. Thou shalt strive to extend the domain of the Lord thy GATT/WTO even until it shall encompass relations between trade and environment.
8. Thou shalt be tolerant and loyal to others in all circumstances, even in negotiations.
9. Thou shalt do nothing to politicize the work of the organization for, in order that it may live and flourish, it must not fall into the ways of the United Nations.
10. Thou shalt commit no disrespect towards the Director-General for thou shouldst honour thy shepherd even as thou honorest the Chairman of the General Council and the myriad other officers of the Organization.

The GATT community of the early 1990s was still prepared to give some degree of deference to the director-general in helping to move beyond an impasse, as demonstrated by the evolution of the Dunkel Draft into the final deal, but one cannot imagine them approving something of that magnitude sight unseen. Even when they took Mr Dunkel's 1991 draft as a new point of departure, it still required three more years of negotiations to transform it into a final deal. The key players decided over the course of those talks that they needed new blood in the office of the director-general. The trading community still places trust in the director-general in the WTO era, as demonstrated by the leading members' willingness to use the one-page "Lamy Draft" of mid-2008 as the starting point for what might have been the endgame of the Doha Round (see Chapter 12). Those negotiations ultimately collapsed, although their failure can be attributed more to the fundamental inability of members to bridge their differences than to failings in the draft itself. For our present purpose what matters most is that the key players were still willing to let a director-general advance a solution.

Mr Sutherland, who picked up the Uruguay Round where the Dunkel Draft left off, exemplified an altogether different approach to leadership. The imagery that diplomats from that time employ to describe his style typically invokes knocking heads or putting on hobnail boots. That approach was already described in Chapter 2, and another example of the Sutherland style is offered in the next section. Mr Sutherland was not the last director-general to take an assertive approach to the job, but when his successors pushed they sometimes found a membership more willing to push back. Mr Lamy, for example, acknowledged that many members of the WTO believed he had been "too direct a leader, too pushy, too voluntary, and that we need a DG that's more subtle."<sup>46</sup>

If the Sutherland style defines one end of the spectrum from passivity to activism, that of Director-General Supachai Panitchpakdi defines the other. "When they criticized me for some of the work I've done," Mr Supachai would later recall, "they said, 'You don't knock heads.'" For him this was "a very barbaric way of doing negotiations." The role of a director-general is defined not just by what the members expect of the director-general, but also by what the director-general expects of the members, and cultural traditions as well as academic training had instilled in Mr Supachai a belief in the harmony of members' interests. He saw his role as encouraging them to act on their shared interests in order to open markets. Rather than knocking heads, he was instead –

in favour of preparing the negotiation as well as possible, having people talking to me, talking to each other, going to the depth of issues to see what it is really that you want, and can I then put up a package so that you can really be satisfied with it. Not to say that, "I'm giving away something" or "I'm taking this".<sup>47</sup>

He could not reconcile himself to the idea that ambassadors might be looking out only for the interests of their own countries. Mr Supachai's approach was to see negotiations as "a collective exercise" in which "we all are trying to create something for the world," rejecting the notion that countries might have offensive and defensive interests.<sup>48</sup> That made him something of an herbivore in a system that the carnivores had long dominated.



Peter Sutherland,  
GATT and WTO  
Director-General,  
1993 to 1995.

Peter Sutherland congratulates  
Renato Ruggiero, his successor as  
WTO director-general.



Renato Ruggiero,  
WTO Director-General,  
1995 to 1999.

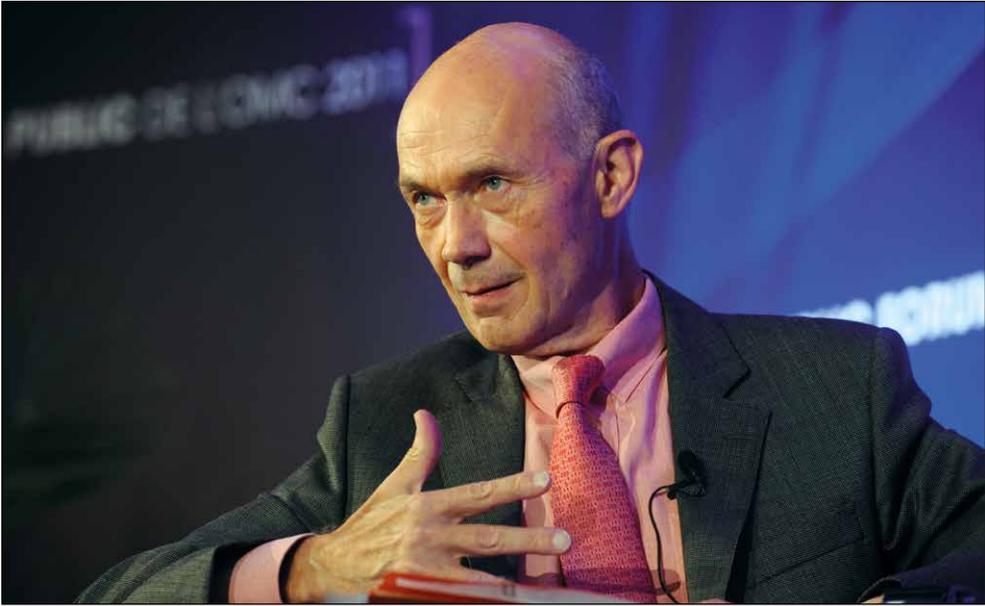


Mike Moore,  
WTO Director-General,  
1999 to 2002.

Outgoing Director-General  
Mike Moore welcomes  
Supachai Panitchpakdi as  
the new director-general.



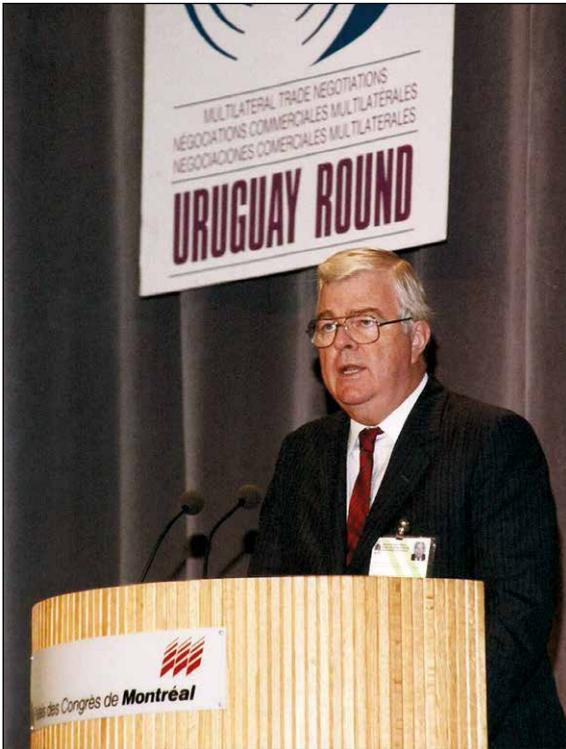
Supachai Panitchpakdi,  
WTO Director-General,  
2002 to 2005.



Pascal Lamy, WTO Director-General, 2005 to 2013.

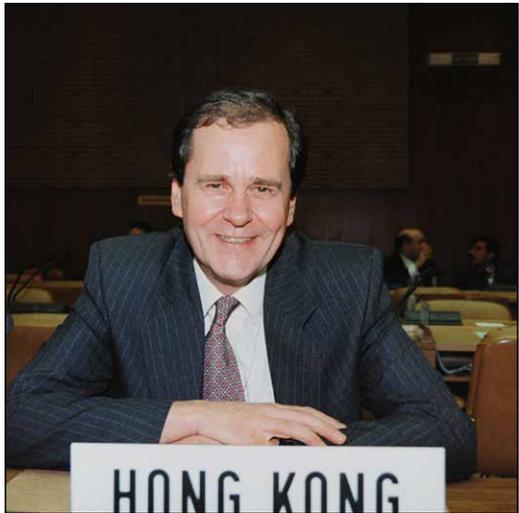


Roberto Carvalho de Azevêdo will become the sixth WTO Director-General on 1 September 2013.



Canadian Minister for International Trade John Crosbie hosts the Montreal Ministerial Conference of GATT in December 1988.

Sir Leon Brittan, European Commissioner for Trade, 1993-1998.



Stuart Harbinson was elected chairperson of the Council for Trade-Related Aspects of Intellectual Property Rights at the first meeting of the WTO General Council on 31 January 1995.

Professor John H. Jackson, "father" of the WTO, of Georgetown University School of Law speaks at a symposium on competition policy at the WTO in April 1999.

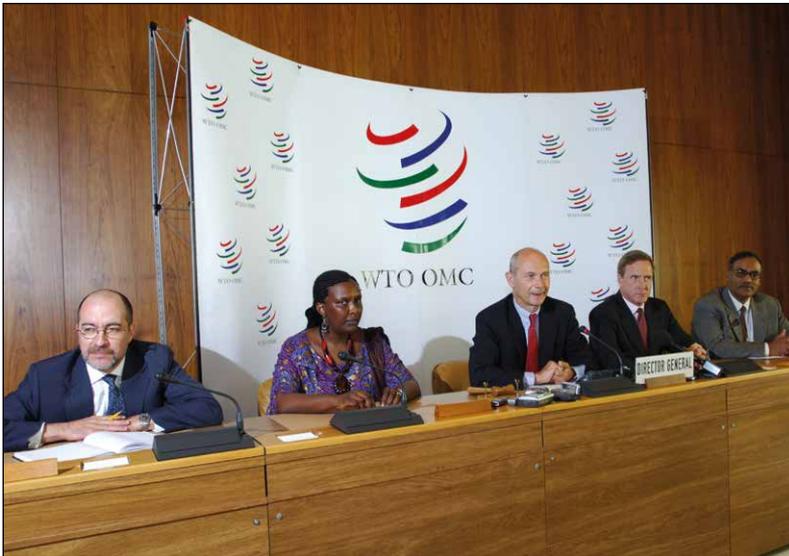




WTO Director-General Mike Moore with US Trade Representative Robert Zoellick in May 2001.

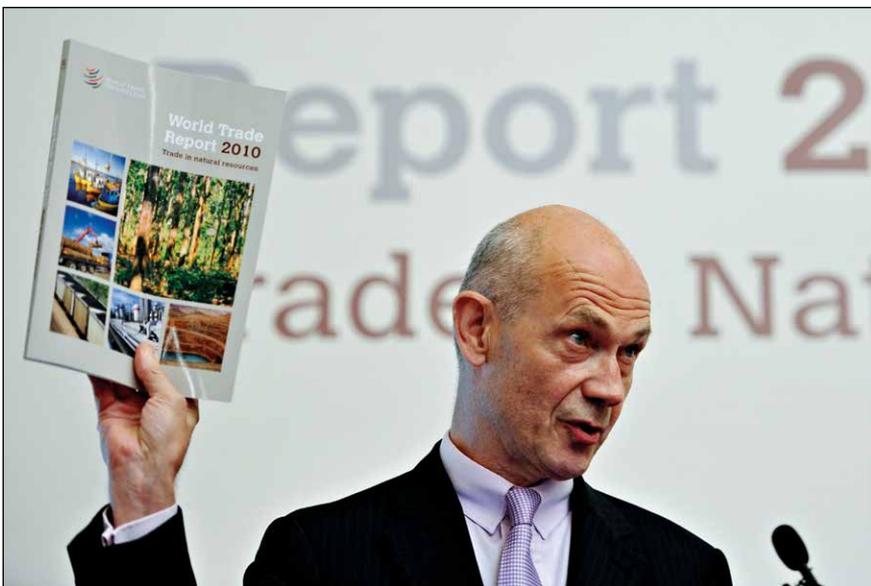
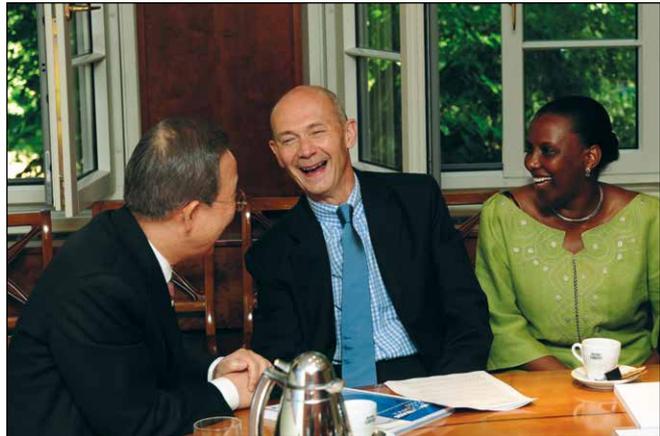


A heads of delegation meeting at the WTO in July 2004. *Left to right* European Agriculture Commissioner Franz Fischler, US Trade Representative Robert Zoellick, Brazilian Foreign Minister Celso Amorim, European Trade Commissioner Pascal Lamy, and Indian Minister for Commerce and Industry Kamal Nath. © Reuters/Denis Balibouse



Pascal Lamy began his four-year term as WTO director-general on 1 September 2005. He selected Alejandro Jara of Chile (*far left*), Valentine Sendanyoye Rugwabiza of Rwanda, Rufus Yerxa of the United States and Harsha Singh of India (*far right*) as his four deputy directors-general.

*Left to right* UN Secretary-General Ban Ki-moon, Director-General Pascal Lamy and Deputy Director-General Valentine Sendanyoye Rugwabiza meet in the green room inside the Centre William Rappard during the Second Global Review of Aid for Trade in Geneva, in July 2009.



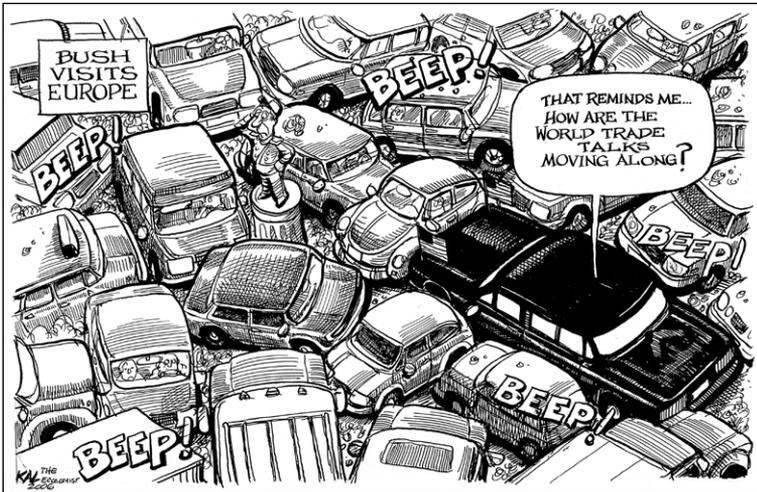
Director-General Pascal Lamy launching the WTO's flagship publication, the *World Trade Report*, in Singapore in 2010. © AFP



The WTO opens its doors to the public for the first time on 19 September 2009, attracting some 5,000 visitors to the Centre William Rappard.



A Chinese-style garden at the entrance to the WTO grounds is formally opened on 13 February 2013 at a ceremony conducted by WTO Director-General Pascal Lamy and China's Ambassador to the WTO, Yi Xiaozhun.

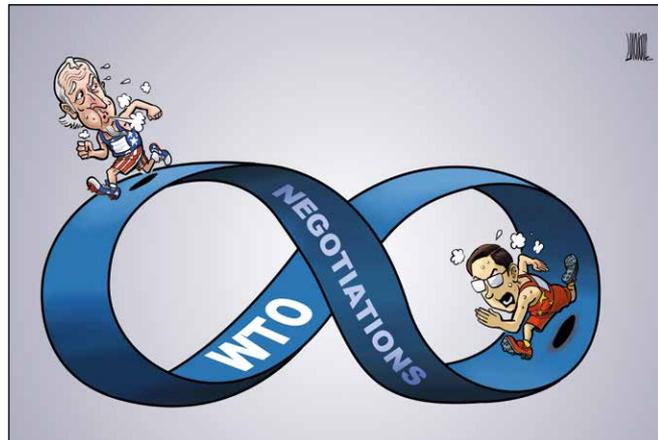


Frustrations over the pace of progress in trade negotiations are a universal theme for editorial cartoonists, whether in the United Kingdom (*left and bottom right*) or China (*below*).

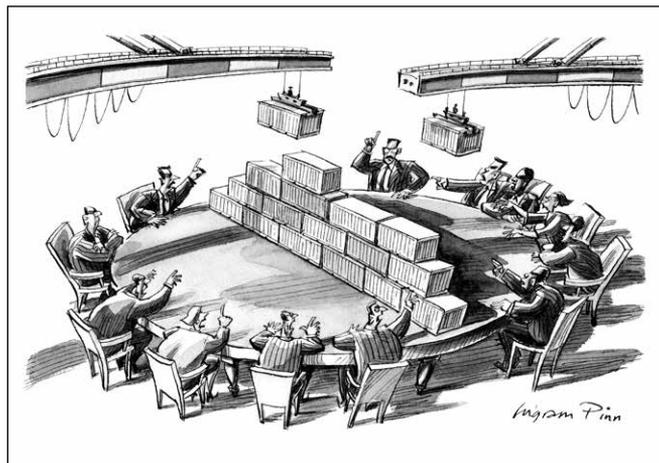
Published in 2006.  
© Kevin Kallauger/  
*The Economist*



“Too much money, too few fish”, a poster used by Oceana in a campaign in Geneva in 2007 to draw attention to fishing subsidies and overfishing.  
© Oceana



Published in July 2012. © 罗杰 Luo Jie/*China Daily*



Published in August 2008. © Ingram Pinn/*Financial Times*

Where Mr Sutherland vested great authority in the director-general, and Mr Supachai left the initiative to the organization and its members, an alternative would rely on the institution and the expertise of the Secretariat. Mr Lamy, who grew up in a system where the states of Europe entrusted ever-greater authority in a sequence of regional institutions, would naturally see in the European Union a model for a global institution such as the WTO. He also saw how the members of other international organizations left greater initiative to their secretariats. Those institutions relied less on the initiatives of members *per se* and more on impartial experts to develop solutions and to draft texts. “The role of the DG,” he would conclude, “is to grow the stable part of the system, which is the institution.”<sup>49</sup> When Mr Lamy took office he saw three aspects of WTO decision-making that hobbled the legislative function, namely the single undertaking, the rule of consensus, and the bottom-up (i.e. member-driven) process of negotiations, but concluded that the third was the most troublesome. He thus set out to strengthen the capacity and role of the institution, hoping to reform the process by de-emphasizing the member-driven organization and promoting the ability of the institution to drive the members.

Mr Lamy's leadership style thus placed a high priority on building the capacity of the institution, and through that institution the capacities of its members. The institution has important tasks to perform even when the organization is not actively engaged in negotiations, from the administration of the existing agreements to the adjudication of disputes over their meaning and application. One clear example of his enhancement of the institution's authority came in the monitoring programme that the WTO adopted during the financial crisis of 2009, a step that built the capacity of the institution to enforce not just the letter but also the spirit of agreements by encouraging peer pressure and discouraging backsliding (see Chapter 8). Mr Lamy also stressed the need to bring the entirety of the Secretariat under one roof, and (as discussed below) shelved plans for a second building in favour of an expansion of the existing headquarters. Other initiatives that he undertook enhanced the capacities of the institution to conduct and disseminate research and to make data and analysis available not just to members but to civil society. His attention to the WTO budget and the problem of arrearages also fits this pattern. Having begun his career in public service as a tax inspector, Mr Lamy took it upon himself to call ministers or even presidents and prime ministers to ensure that their dues got paid. As discussed later in this chapter, this approach reduced the magnitude of the arrearages and put the institution on a more stable financial footing. He also reformed the budget process to allocate resources according to functions. These steps fall short of transforming the WTO from a member-driven organization to an institution that has both the capacity and the mandate to drive the debate, but they move the WTO in that direction.

### *The multiple levels of directors-general dealings with members*

All directors-general deal directly with members, but not necessarily in the same ways and at the same level. This was done in the GATT period almost exclusively through ambassadors; ministers were so rarely involved in negotiations and decision-making that encouraging their greater participation was one of the principal aims of the Uruguay Round negotiations on the Functioning of the GATT System (see Chapter 2). John Weekes had a meeting with Mr Dunkel to present his credentials when he was first appointed as Canada's ambassador to GATT, and

there the director-general told him that “his most important relationship with the contracting parties was through the permanent representatives in Geneva because these were the people whom their governments had appointed to work on GATT matters all the time,” Mr Weekes recalled. “His second and distinct relationship with the contracting parties was with senior officials in capitals, and the third was with people at the political level.”<sup>50</sup> Although Mr Dunkel was prepared to operate at all three levels, he was most comfortable in dealing with the ambassadors, and rarely dealt with heads of government.

Compared to their GATT predecessors, WTO directors-general feel less constrained about “going over the heads” of the Geneva diplomatic corps in direct appeals to ministers and, on occasion, to the very top. That is an innovation that dates to the Sutherland administration but has continued, to varying degrees, with each of his successors. From Mr Sutherland’s first day in office, he was meeting with UK Prime Minister John Major, and he would soon meet with all of the G7 leaders except US President Bill Clinton. The objective was not to negotiate directly with these heads of government or to ask that they change the instructions to their negotiators, but instead to raise awareness and to set up the lines of communication that Mr Sutherland might later need to activate – or threaten to activate – when dealing with the ambassadors. He usually made sure that the ambassadors were present when he met with the chiefs, and in those cases where (at the insistence of the president or prime minister) the ambassador was excluded the director-general made sure to keep the ambassadors informed as to what transpired in the meeting. When tactically necessary, however, Mr Sutherland was prepared to treat ambassadors more roughly.

One episode at the very end of the Uruguay Round illustrates the approach that Mr Sutherland took. Ambassador Minoru Endo of Japan approached Mr Sutherland to tell him that he could not give his consent to the anti-dumping language that had been gavelled the night before in the green room. Mr Endo’s earlier approval was based on acceptance of the language by one of the interested Japanese ministries, but now another ministry was raising objections. Mr Sutherland decided to play the capital card, asking the ambassador to give him the prime minister’s telephone number. The ambassador said that he did not have the number, “so I was stumped for a second,” the director-general later recalled. With that manoeuvre blocked, he fell back instead on a Geneva gambit. “Do you know what I’m going to do now?” he asked the ambassador:

I’m going to go into the Trade Negotiations Committee, and I’m going to say that last night at three in the morning we agreed the anti-dumping text. And I’m going to say, “Does anybody want to raise their hand and object to it?” And if anybody raises their hand and objects to it, I’m going to say, “Well that does it, we can’t conclude the round.”

Mr Sutherland did as he said he would, although he could not be certain just how the ambassador would respond. "And I looked straight down at him, and he didn't move." *Bang!* went Mr Sutherland's gavel, who "knew we had it then," and that the round was over.<sup>51</sup>

Dealing with the ambassadors while retaining the authority to go over their heads is "a delicate balancing act," as Blackhurst (2012: 3856) observed, "that some DGs have been better at than others." Ambassadors may object to this tactic on two levels, not just resenting this form of pressure but also objecting that ministers lack the necessary time and expertise to resolve difficult matters. "Negotiations are more likely to succeed if you leave only simple things for ministers to decide at the end," according to Chilean Ambassador Mario Matus. "They need to be given binary choices."<sup>52</sup> Tim Groser of New Zealand, who served both as ambassador to the WTO and then as trade minister, concurs on the need to calibrate decisions to the proper level. In his view it is absurd to hear highly experienced negotiators say "[w]e need some political guidance from our ministers," but then when "the ministers come to town they read out a speech that's been written for them by the people who claim that they need political guidance." Mr Groser once chaired a meeting with the trade and agricultural ministers from the five largest members, "and they were being asked to define a formula for converting non-*ad valorem* tariffs into *ad valorem* equivalents." Questioning whether "any of them even understood what the question was, let alone what the answer was," he argues that ministers need to be given a basis for making the decisions that are presented to them. "They've got to be shown the political choice, the judgment, the trade-off that they are making, and if they can't see that they can't take a decision."<sup>53</sup> The director-general is the one policy-maker who needs to be able to work at both the technical and political levels.

### *The deputy directors-general and the chefs de cabinet*

The principal task of deputy directors-general is to assist the director-general in any capacities that they may be assigned, including advisor and trouble-shooter, and in helping the director-general to understand the interests and sensitivities of the regions and countries from which they come (see Annex 2, p. 599). They also administer those areas that fall within their responsibility, as assigned by the director-general, exercising authority over the directors of divisions in their respective areas. In the administration of Mr Lamy, for example, one deputy director-general was assigned the divisions dealing with accessions, economic research and statistics, legal affairs and rules; another to development, technical cooperation and trade policy reviews; yet another to agriculture and commodities, trade and environment and services; and one to market access, information technology solutions, intellectual property, administration and general services, and languages documentation and information management.<sup>54</sup> Beyond those formal lines of command, individual deputy directors-general also take the lead in those areas in which they have special expertise. We have already seen, for example, how in the Lamy administration Deputy Director-General Valentine Sendanyoye Rugwabiza promoted Aid for Trade (see Chapter 5), just as Deputy Director-General Alejandro Jara led the eponymous Jara Process of reform in the dispute settlement system (see Chapter 7). In that same administration, Deputy Director-General Harsha Vardhana Singh (see Biographical Appendix, p. 593) bore much of the responsibility for dealing with other international organizations and ensuring coherence in the

area of food security (see Chapter 5), and Deputy Director-General Rufus Yerxa led the project to renovate and expand the WTO headquarters building (see below).

One fairly steady trend across both the GATT and WTO periods has been a growth in the total number of deputy directors-general. While there was only one such position from 1947 to 1967,<sup>55</sup> and the post actually lay vacant in the years between the endgame of the Kennedy Round and the start of the Tokyo Round, it doubled to two deputy directors-general from 1973 to 1993. Mr Sutherland created a third position during his transitional term from GATT to the WTO, and Mr Ruggiero increased it to four. The rising number of deputy directors-general is disturbing to some old hands, for whom both the proliferation of positions and the notion of regional representation are unwelcome. Traditionalists prefer to see the deputy director-general as a highly qualified civil servant whose only affiliation with any country or region should be seen as an accident of birth, and who places the needs of the institution ahead of any other consideration.

As was discussed earlier in this chapter, these positions tend to be filled primarily by the citizens of larger countries. From the GATT period, it has been traditional for one of the deputy directors-general to be a US citizen, six of whom served as such in GATT or the WTO up to the end of 2012.<sup>56</sup> India has contributed three deputy directors-general across both periods.<sup>57</sup> The division of labour in the latter half of the GATT period generally assigned administrative matters to one deputy director-general (typically the one from the United States) and negotiations to the other. Most terms have run concurrently with those of the director-general who selected them, but that is not a hard and fast rule. Madan Mathur of India served from 1973 to 1991 under the Long and Dunkel administrations, Mr Ruggiero kept on the three whom Mr Sutherland selected, and Mr Yerxa of the United States served under both the Supachai and Lamy administrations. Mr Yerxa holds the record for longevity in the WTO period, having served for 11 years, but that falls well short of Mr Mathur's 18-year run. Ironically, the briefest tenure as deputy director-general was that of Mr Lacarte (1947-1948), a man whose longevity as a leader in the trade policy community is never likely to be bested.

Mr Lacarte was also responsible for restoring the tradition of a "Latin seat" among the deputy directors-general. This dates to his manoeuvring in the 1993 race with Mr Sutherland to replace Mr Dunkel. When Mr Lacarte had decided to withdraw from the race –

I spoke to Swiss Ambassador William Rossier [see Biographical Appendix, p. 591], who was managing Peter's campaign, and told him I would withdraw provided it was agreed there would be a new post of DDG for Latin America. William immediately interpreted I wanted that new position for myself, so I told him I was a candidate for DG, but not for DDG, and that the Mexican Ambassador Seade would be a good choice. In a few minutes William came back with agreement from his group, and we all voted for Peter Sutherland.<sup>58</sup>

Ever since then one of the deputy directors-general has been from a Latin American country, with these positions having been filled by diplomats from Brazil, Chile, Mexico and the Bolivarian State of Venezuela. The other director-general and deputy director-general

positions have followed a fairly predictable geographic pattern in every administration since that of Mr Ruggiero, with one from the United States, one from a European country (France, Ireland and Italy), and at least one from another developing country (Burkina Faso, India, Kenya, the Republic of Korea, Rwanda and Thailand). The only person who did not fit neatly into this regional distribution was Mr Moore of New Zealand.

The deputy director-general selection process in the WTO period remains identical to the GATT tradition in one respect – the director-general has the final say – but also underwent important changes. What had once been a process in which candidates campaigned for the position, or (as illustrated in the anecdote above) engaged in horse-trading, became one in which applicants interview for a job. This change can be illustrated with the experiences of two men who sat in the Latin seat. Miguel Rodriguez Mendoza, who held this position during the Moore administration, was not actually the candidate of his own country. The Bolivarian Republic of Venezuela had then undergone a change in government and was en route to further constitutional evolution, and Mr Rodriguez – who had negotiated for the country's accession to GATT – was seen in Caracas as too closely associated with the previous government. He was nonetheless the favoured candidate of Latin American capitals other than Caracas and Havana, and was also supported by Washington (which had earlier promoted Moore's candidacy). The Venezuelan government eventually relented and joined in backing the Rodriguez candidacy. When he was called in to have a meeting with Mr Moore, that job interview turned out to be little more than one question: "When can you start?" Within minutes the newly appointed deputy director-general was chairing a preparatory committee for the impending Seattle Ministerial Conference.

The incoming Lamy administration had changed the process entirely by the time that Alejandro Jara took the Latin seat. During the period that Mr Lamy was the director-general-designate, he issued an announcement that the four deputy directors-general positions would be filled through an open application process, inviting applicants to submit their names to the director of the WTO Human Resources Division by 10 July 2005. Although an experienced and well-connected diplomat who was then serving as the Chilean ambassador, Mr Jara did not know about the process until a friend of the family told him she had seen it posted on the WTO webpage. The announcement noted that the selection would "take into account the need to ensure adequate gender and geographical balance,"<sup>59</sup> meaning that there was every reason to expect that one seat would be reserved for Latin America. Mr Jara was one of several Latin American candidates who interviewed for the job; among the others were Elbio Rosseli of Uruguay (then serving as ambassador to Belgium and Luxembourg) and Esperanza Durán of Mexico (then the executive director of the Agency for International Trade Information and Cooperation). Mr Lamy announced his selection of Mr Jara and the three other deputy directors-general on 29 July, thus giving them two full months to make the transition before their terms began on 1 October.

The switch in the process of appointing the deputy directors-general had the effect of enhancing the independence of the director-general vis-à-vis the members. The growing number of deputy positions, coupled with the closer association between these deputies and their regions, had created an environment in which some might question whether a given individual felt a greater sense of loyalty to the institution as a whole (as personified in the

director-general) or to the members and regions that had supported them for the position. Such questions seem less pertinent when the hiring decision is dissociated from campaigning and bargaining, and is more clearly the choice of the director-general.

Another change Mr Lamy made in the administrative machinery of the WTO came in the transformation of the *chef de cabinet* (or chief of staff) position. The job was largely that of speech-writer and facilitator during the GATT period, acting more like a principal private secretary to a minister than as an administrator, policy-maker or negotiator. It was usually filled by experienced Secretariat personnel, who either had already or would soon serve as director of one of the divisions. That description also applies to some who filled this post in the WTO period, such as Evan Rogerson (who held the job in the Ruggiero administration; see Biographical Appendix, p. 591) as well as Patrick Low and Patrick Rata (both in the Moore administration; see Biographical Appendix, pp. 584 and 589). Starting with the endgame of the Uruguay Round, however, the job description and its qualifications have become more elastic, being redefined by successive directors-general and their *chefs de cabinet*.

Mr Sutherland introduced a new style when he brought Richard O'Toole along with him to serve in this post. Mr O'Toole, who also held the title of assistant director-general, played a key role in Mr Sutherland's campaign to conclude and then secure passage of the results of the Uruguay Round. Like Mr Sutherland, he came from outside the trade community and left WTO service after the job was done. Two other people who held this job also broke out of the established mould. One was Stuart Harbinson, who moved into it laterally from his post as permanent representative<sup>60</sup> for Hong Kong, China. He came into this position with extensive experience, having chaired a long succession of WTO bodies before serving as chairman of the General Council in the pivotal year of 2001. It was a matter of some controversy when, during Mr Harbinson's service as chief of staff to Director-General Supachai (2002-2005), he continued to chair the agricultural negotiations. This put him in the unique position of being, together with the director-general (who traditionally chairs the Trade Negotiations Committee), one of only two WTO chairmen who did not represent a member. Mr Harbinson stayed on to be special adviser to Mr Lamy from 2005 to 2007. Arancha González, who held this position throughout the Lamy administration, also departed from the usual pattern of a *chef de cabinet*. Like Mr O'Toole, she came to the WTO along with her boss, although in her case she already had experience in trade negotiations. Ms González had participated in several EC negotiations from 1996 onward, and was an advisor to Mr Lamy when he was the EC trade commissioner (2002-2004). Ms González established her own style, and one in which the director-general lodged considerably more authority than had most of his predecessors.

### *The Secretariat*

Steger and Shpilkovskaya (2009: 145) characterized the WTO staff as "probably the leanest secretariat of any international organization." With 677 staff in 2012, the WTO was less than one third as large as the Organisation for Economic Co-operation and Development (OECD) or the International Monetary Fund (IMF), about one fifth the size of the International Labour Organization (ILO), and less than one tenth as big as the World Health Organization. The WTO Secretariat was nevertheless larger than the 420-person United Nations Conference on

Trade and Development (UNCTAD).<sup>61</sup> Members are universal in their praise for the knowledge and technical expertise of these staffers. The days are long past when members would joke that the functions of the Secretariat should be limited to booking the rooms and making the coffee. There nevertheless remains a recurring concern on the part of some delegations that if the Secretariat staff were given too much leeway they might become something like, depending on one's cultural reference point, the Praetorian Guard of ancient Rome or the palace eunuchs of the Forbidden City. This is partly a left-handed compliment, reflecting the views that knowledge is power and the Secretariat is collectively more knowledgeable about the issues than are most members, but it is also an expression of some members' concern that a proper balance must be maintained between the authority of the members and the powers they grant to the institution. No member is prepared to delegate sovereignty to an international organization, and certainly not to its staff. In the same way that the membership views with caution any proposals that might enhance the power of the director-general, so too do they scrutinize any proposals to expand the budget, staffing or mandates of the Secretariat as a whole. If the Secretariat is lean, that is because the members want to keep it that way.

These concerns notwithstanding, members rely greatly on the Secretariat for information, analysis and guidance. "The most successful members of the Secretariat are the ones that know how to whisper the right piece of advice in the right ear at the right moment," according to US negotiator Dave Shark, and are those who "know just how to facilitate bringing people together."<sup>62</sup> Their ability to perform that function depends critically not just upon the staffer's substantive knowledge but also their personal credibility and the discretion to know where to draw the line. The key to the relationship, in the words of one prominent delegate-turned-staffer, is –

that they trust you, they can come to you with their secrets, and they know that you will deal with it professionally in a way that does not compromise them. And it's very important that they also realize that professionally you know the parameters of what you're offering them. You're offering them advice on substance, on the legalities of what they're trying to do, on the background and the institutional history behind it. You're helping them decide on what they want and helping them do what they want. But you don't have an agenda yourself. You're not trying to tell them what's good for them. That's their job. I don't make policy choices for you. I give you advice on what needs to be considered in order to make informed choices and how to organize a negotiation.<sup>63</sup>

One function of the Secretariat that merits special attention is its research and statistics. The statistical services are indispensable in helping members understand the meaning of proposed deals, backstopping the Trade Policies Review Division in the preparation of its reports and generally providing an empirical basis by which the members, the Secretariat and the outside world can gauge the place and direction of the trading system. Research is a more complex matter, both substantively and politically. The research staff of the WTO is very small by comparison with its counterparts in other organizations. Many of the 2,500 people who work at the OECD are devoted to research, for example, where the Trade and Agriculture Directorate alone had a staff of 120 in 2012. Only ten people work on research in the WTO, barely up from the six or seven in

1997. As in the case of the Secretariat as a whole, the size of the research staff reflects the members' preference for a lean institution with a limited mandate. It is also based on the concern that pure objectivity can be elusive, and that while facts and ideas are of paramount importance in this field, they might also be manipulated or "spun" for political purposes.

Directors-general have taken different approaches towards the use of statistics and studies, each according to their own styles of leadership and management. Mr Sutherland used the product of Richard Blackhurst's (see Biographical Appendix, p. 574) research as a selling point for the Uruguay Round, showing politicians and the press what the world might miss if it did not conclude these talks and open markets. Mr Supachai saw the research arm of the WTO as a means of promoting closer cooperation among the members. He instituted the annual *World Trade Report* because he thought "diplomats should be educated not [just] in the art of negotiation ... but in the economic sense of international trade," and "so that people will be as clear as possible actually what they need."<sup>64</sup> Mr Lamy worked to enhance the capacity of the institution to collect, analyse and disseminate statistical data and research, especially through online resources such as the Integrated Trade Intelligence Portal (as discussed in Chapter 15). He sees the flagship *World Trade Report* as "an excellent vehicle to share this wealth of knowledge and provide forward thinking to our stakeholders," being "ahead of the curve in looking at issues of importance for the future of global trade such as trade in natural resources and non-tariff measures."<sup>65</sup>

Researchers in the WTO must operate within the limits of what the members will tolerate. "We have gotten more independence gradually over time in terms of what we can do," according to Patrick Low, "as long as we obey certain rules." The trick comes in not being excessively self-censoring, but still recognizing that "there are certain things that if you start getting involved in you will have a very adverse reaction which could inhibit your capacity to do anything." The research cannot be overtly critical of any particular country's policies, and "you shouldn't choose a topic which is in front of everyone's mind as a negotiating issue unless you are going to do that in a way to elucidate the issue rather than to say, 'This is the obvious answer.'"<sup>66</sup> The members do not like being told what they ought to do, but do appreciate data and analysis that help them to identify the nature of the current problems, the range of solutions that might be considered, and at least general indications of what the economic consequences might be of going down one path or another.

The staffing in the WTO and the GATT before it has grown in three phases. Figure 14.1 shows that the size of the Secretariat rose geometrically during the early GATT period, growing at an average rate of 14.7 per cent per year from 1952 to 1972; briefly declined in the period between the end of the Kennedy Round and the initiation of active negotiations in the Tokyo Round;<sup>67</sup> and then rose arithmetically during the late GATT and WTO periods, adding an average of about one new position per month from 1974 to 2012. The rate of growth did not change much in the transition from the GATT to the WTO. The range of issues dealt with in the new organization was wider than had been the case in its GATT predecessor, but, as discussed in Chapter 2, in some respects that transition and growth came in a gradual process throughout the Uruguay Round rather than as a sudden change upon its conclusion. The GATT Secretariat had already taken on some of the new responsibilities (e.g. preparing the trade policy review reports) and the new issues (e.g. intellectual property rights and trade in services) that would come to distinguish the WTO from its predecessor, so the growth in personnel remained incremental rather than radical.

**Figure 14.1. Staffing levels in the GATT and WTO, 1952-2012**

Source: Calculated from the Geneva Office cantonal de la statistique, *Enquête sur les organisations internationales* (various years).

The face of the Secretariat staff is not the same as it was in the GATT days. It is still the case that Europeans hold the majority of the posts, and that the higher positions tend to be held by men, but both of those points are changing. Women exercised greater authority in the Lamy administration than had been the case in past administrations, as demonstrated by the selection of Valentine Sendanyoye Rugwabiza as the first female deputy director-general and Arancha González as the first female *chef de cabinet*. As can be seen from the data in Table 14.3, women already held a majority of the positions as of 2000, and their share grew slightly by 2011. The rise in employment of women from developing countries is especially large, having almost doubled in absolute numbers from 2000 to 2011. That growth is more notable if one focuses only on the professional positions,<sup>68</sup> where the share of posts held by women rose from 30.2 per cent in 1994 to 47.3 per cent in 2011.<sup>69</sup> And while dispute settlement panels are part of the organization rather than the institution it is notable that there, too, one finds a growing role for women. Whereas just 6.8 per cent of the panellists appointed in 1996 to 1998 were women, by 2010 to 2012 the share had risen to 21.1 per cent.<sup>70</sup>

The nationalities represented in the Secretariat have also changed. Mr Lamy pledged at the start of his second term to “adhere to the principles of expertise, merit and diversity,” noting that in his first term the WTO had “increased the number of nationalities of our staff” by “add[ing] eight new nationalities from developing and Least Developed Countries.”<sup>71</sup> These years saw a decline in the share of staff coming from developed countries in general and from Europe in particular, though by 2011 developing countries still accounted for slightly less than one quarter of all personnel. One point that requires explanation is the very high and growing percentage of Secretariat staff whose nationality is French. It is normal for a large share of the staff in any international organization to be nationals of the host country, and in this case France might be considered something like an unofficial co-host. The border between France and Switzerland is only a short drive from the WTO headquarters, and many of the Secretariat

**Table 14.3.** WTO Secretariat staff by nationality and sex, 2000 and 2011

	2000				2011			
	Men	Women	Total	Share	Men	Women	Total	Share
<b>Developed</b>	<b>195</b>	<b>246</b>	<b>441</b>	<b>82.6</b>	<b>210</b>	<b>299</b>	<b>509</b>	<b>75.2</b>
Europe	159	216	375	70.2	175	263	438	64.7
<i>France</i>	63	68	131	24.5	80	108	188	27.8
<i>United Kingdom</i>	15	60	75	14.0	17	52	69	10.2
<i>Spain</i>	14	15	29	5.4	14	29	43	6.4
<i>Switzerland</i>	16	27	43	8.1	15	23	38	5.6
<i>Italy</i>	10	10	20	3.7	7	8	15	2.2
<i>Other Europe</i>	41	36	77	14.4	42	43	85	12.6
United States	8	15	23	4.3	10	19	29	4.3
Canada	17	8	25	4.7	16	8	24	3.5
Australia	5	5	10	1.9	5	5	10	1.5
Japan	2	1	3	0.6	2	2	4	0.6
New Zealand	4	1	5	0.9	2	2	4	0.6
<b>Developing</b>	<b>57</b>	<b>36</b>	<b>93</b>	<b>17.4</b>	<b>98</b>	<b>70</b>	<b>168</b>	<b>24.8</b>
Americas	23	19	42	7.9	44	28	72	10.6
<i>Colombia</i>	4	0	4	0.7	7	3	10	1.5
<i>Brazil</i>	1	3	4	0.7	6	3	9	1.3
<i>Argentina</i>	2	4	6	1.1	6	3	9	1.3
<i>Other Americas</i>	16	12	28	5.2	25	19	44	6.5
Asia	19	13	32	6.0	31	24	55	8.1
<i>India</i>	7	3	10	1.9	10	3	13	1.9
<i>Philippines</i>	2	4	6	1.1	6	5	11	1.6
<i>China</i>	0	0	0	0.0	4	6	10	1.5
<i>Other Asia</i>	10	6	16	3.0	11	10	21	3.1
Africa	15	4	19	3.6	23	18	41	6.1
<b>Total</b>	<b>252</b>	<b>282</b>	<b>534</b>	<b>100.0</b>	<b>308</b>	<b>369</b>	<b>677</b>	<b>100.0</b>
<b>Share</b>	<b>47.2</b>	<b>52.8</b>	<b>100.0</b>		<b>45.5</b>	<b>54.5</b>	<b>100.0</b>	

Sources: Calculated from the WTO annual reports of 2000 and 2012.

staff – French citizens as well as expatriates from many other countries – make that commute every working day.<sup>72</sup> French citizens provide much of the support staff for the institution; Switzerland itself is only the fourth-largest source of Secretariat staff. Apart from those two, special cases, the countries with the largest numbers of citizens working in the WTO are (in descending order) the United Kingdom, Spain, the United States, Canada, Italy and India.

As was discussed in Chapter 5, during the GATT period the Secretariat was technically a part of the United Nations system. Those ties were then severed in the first years of the WTO period, with the Secretariat of the new organization having its own system of pay, benefits and pensions. There were disputes for a time between the staff and management over the level of pay, with WTO staffers insisting shortly after the new institution came into being that their compensation should be identical to that of the other Bretton Woods institutions (or what are called the “coordinated organizations” for budgetary purposes); the pay levels at the World Bank and the International Monetary Fund are significantly higher than they are in the UN system. These demands were settled by establishing a formula whereby the WTO pay-scale would be based 70 per cent on UN levels and 30 per cent on Bretton Woods levels.

## *Budget*

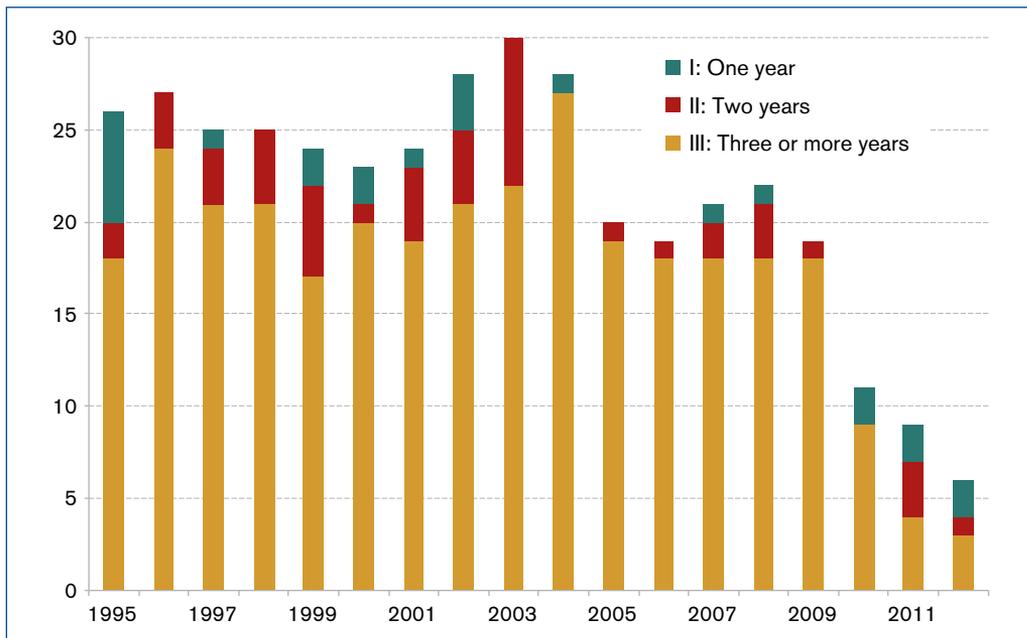
The budget of the WTO is many times the level of its GATT predecessor, but nonetheless remains well below those of most other international organizations. The GATT budget did not reach the US\$ 1 million level until 1961. It then rose to about US\$ 25 million by 1980 (by which time it was denominated in Swiss francs) and over US\$ 70 million in 1994.<sup>73</sup> From 2001 to 2011, the total WTO budget rose from Sfr 132.9 million to Sfr 194.3 million. In 2011, this institution was around half as costly as the administrative budget of the OECD and less than one tenth that of the World Bank.<sup>74</sup> The average annual increase in the WTO budget from 2001 to 2011 was 4.2 per cent. That increase was either higher or lower for some members, however, depending on their currencies. The foreign-exchange risk in this system is borne by the members rather than the institution, such that the amount of Swiss francs that a given member owes will be fixed each year but the figure may rise or fall in terms of dollars, euros, pesos, yen or other currencies. Certain special funds are treated differently; if a member pledges a contribution in its own currency to the Doha Development Agenda Global Trust Fund, the actual value received by that fund could change in response to the fluctuating value of the franc. Those fluctuations can sometimes be wild, as was the case in 2011, and whenever the value of the Swiss franc rises that can increase the real cost of members' contributions to the general budget, while also decreasing the real value of their contributions to the trust fund.

Members scrutinize the budget closely. The strictest "budget hawks" are naturally the ones that make the largest contributions, with the United States at the top of that list. The shares that each member contributes to the annual operating budget is established on the basis of that member's share of all trade of WTO members, calculated for the last three years for which data are available. The figures take into account trade in goods (excluding gold held as a store of value), services and intellectual property rights, as reported in IMF balance of payments statistics. See Appendix 14.1 for the contributions of members in 2001 and 2011. As of 2011, the eight largest members provided just under half of the budget. A minimum contribution of 0.03 per cent was originally applied to those members whose share of trade is less than 0.03 per cent; in 1999 this was halved to 0.015 per cent. The budget contributions from the EU member states come individually rather than as a group, and are calculated on the basis of their shares of total trade rather than the European Union's share of extra-EU trade. If trade within the European Union were excluded from the calculation, these 27 countries' collective contribution to the WTO budget would be much lower.

The accession of new members, especially those that account for large shares of trade, has relieved some of the budgetary burden on the incumbent members. In 2011, for example, China, the Kingdom of Saudi Arabia and Chinese Taipei together contributed 9.5 per cent of the total budget. As a consequence, most other members saw their contributions fall in relative terms, and to rise by less in absolute terms than would otherwise be the case. The only members whose share of the total budget increased from 2001 to 2011 were those whose share of global trade increased rapidly in the first decade of the twenty-first century; most countries fitting that description were smaller EU members, oil exporters and emerging economies such as India.

Some members fail to make their contributions. This is a problem inherited from the GATT period, when failure to pay the assessed contributions had become a common practice on the part of some contracting parties that were non-resident, had succeeded rather than acceded to GATT, or both. By the start of the WTO period in 1995, fully one fifth of the members were in arrears; one in ten members had failed to make their payments for more than three years. Figure 14.2 shows the number of members falling into each of three categories of arrearages, based on the length of the period in which they have failed to make their contributions. A sliding scale of penalties applies to these members according to the length of their non-payment. One of the consequences of being placed in Category I (an arrearage of one year), for example, is ineligibility for nomination to preside over WTO bodies. The penalties rise when a member moves into Category II (e.g. access to the members-only section of the WTO website is discontinued) and Category III (e.g. denial of access to most training or technical assistance and identification of a member's inactive status when its representatives take the floor in the General Council). The main improvement came in the Lamy administration, when the director-general made it a personal priority to ensure that all members paid their dues. The total number of members in arrears had peaked at 30 in 2003 (22 of them for three or more years), but declined thereafter to just six in 2012 (only three of them for three or more years). The financial impact of these arrearages on the institution is limited, insofar as most of the members with persistent difficulties in making their payments owe the minimum amount assessed on any member (i.e. 0.015 per cent of the total), but budget officials and other members nonetheless consider it important as a matter of principle for all members to meet their obligations.

**Figure 14.2. Arrearages in member contributions to the WTO, 1995-2012**



Source: WTO Secretariat.

## The WTO headquarters and relations with the host government

The relations between the WTO and the host government are laid out in the Agreement between the World Trade Organization and the Swiss Confederation.<sup>75</sup> Assistant Director-General Richard O'Toole and Chairman András Szepesi of the GATT Contracting Parties represented the GATT (soon to be the WTO) in the negotiations with Bern, securing an agreement that provides better terms for the WTO than GATT had enjoyed under the predecessor arrangement. Examples of the superior privileges and immunities extended under this agreement are the broader tax exemptions and a spousal-employment provision, both of which ease the burden of living and working in one of the most expensive cities in the world.

One reason why Switzerland was willing to offer better terms to the WTO was the prospect that the headquarters might move elsewhere. The German city of Bonn made a strong bid to host the WTO during the transition from GATT to the WTO. Whether or not the members were seriously interested in moving to Bonn, this offer gave them greater leverage in their negotiations with the Swiss government. "The former West German capital on the banks of the Rhine had been out of work since German reunification," as a WTO history of the headquarters building noted, because when the wall came down in Berlin most of the Federal Republic's institutions relocated. Bonn had –

buildings, housing, working conditions and a tax system that were difficult to beat. And yet Geneva had one thing Bonn did not: the professional environment, the accumulated know-how, the dense network of international cooperation activities that attracted what it needed. Switzerland was well aware of this fact, and accepted what were now the going rates in order to maintain and develop that advantage (WTO, 2011: 11).

Much of this history has been devoted to an examination of the evolving institutional architecture of the trading system, but not all WTO architecture is metaphorical. Like its GATT predecessor, this institution is housed in the Centre William Rappard (CWR) on land that the Swiss Confederation had donated to its original occupant, the ILO. The building is fittingly named after William Emmanuel Rappard (1883-1958), a Swiss diplomat and professor of economic history. Born in New York and schooled in Europe and the United States, he represented Switzerland in both world wars and at the 1919 peace negotiations. He is credited with convincing the "Big Four" Allied leaders to choose Geneva over other European cities as the headquarters for the League of Nations and its subsidiary.

The building that would later bear Rappard's name has the classical lines of a Florentine villa, combining a stately grace with functionality. It is a remarkably airy structure in which every office has at least two windows that open either to the outside or to the South courtyard; the most coveted offices are those with lakeside views. Designed by George Épitau and inaugurated in 1926, it was enlarged in 1937, 1938 and again in 1951. By the 1960s, the ILO's need for office space greatly exceeded the capacity of the site. The ILO shelved plans in

1964 for a major expansion on the site when it became clear that the municipal authorities would not grant their approval. After the ILO flirted with an offer from Turin, which would have accommodated the entire organization free of charge, the federal government in Bern set up the Building Foundation for International Organizations (FIPOI) to develop Geneva as an international hub. Among its many projects was a larger home for the ILO, which vacated the premises in 1975; two years later, GATT moved down the hill from the old Villa le Bocage to this site. The CWR then housed not just the GATT Secretariat, but also the High Commissioner for Refugees and the library of the Graduate Institute for International Studies.

The WTO treats its architectural and artistic inheritance differently than did GATT. Whereas GATT Director-General Olivier Long considered the labour-themed elements of the building “unsuitable for its new occupants” and “set out to remove all traces” of them (WTO, 2011: 11), Mr Lamy highlighted the works that the ILO had commissioned from artists and artisans. When he became director-general, the only public evidence of the original inhabitant was “The Dignity of Labour”, a fresco by Maurice Denis that the Christian trade unions had donated in 1931. At the insistence of FIPOI, this mural continued to grace the main staircase after the ILO departed. Victor do Prado (see Biographical Appendix, p. 576), as chairman of the WTO Construction Project Committee, had responsibility for overseeing not just the renovation and expansion of the CWR but also the restoration of its artistic heritage. Under Mr Lamy’s direction he brought out of storage, or had uncovered from earlier renovations, many other works. These included a Delft panel by Albert Hahn Jr. reproducing in four languages the preamble of the ILO Constitution; painted murals by Gustave-Louis Jaulmes entitled “In Universal Joy”, “Work in Abundance” and “The Benefits of Leisure”; a Dean Cornwell mural portraying professions that the American Federation of Labor had donated; and Spanish artist Eduardo Chicharro y Agüera’s “Pygmalion”.

Like the ILO before it, the WTO began to outgrow the CWR. By the time Mr Lamy took office in 2005, there were plans to construct an additional building (called WTO II) elsewhere in Geneva, which would mean isolating some parts of the institution – including hearing rooms and member offices for the Appellate Body – from the rest. Mr Lamy insisted instead that a coherent institution required that the whole staff be under one roof. After giving consideration to building a new headquarters on some other site in Geneva, the WTO opted in 2008 to expand in place. The institution then had to negotiate with the Swiss government to undo the agreements that had been reached to construct an adjunct building, conclude a new memorandum of understanding on the terms by which they would build the new facilities, and – after some members of Geneva’s Municipal Council expressed concerns that the project jeopardized public access to the park along the lake – win approval for the new plans in a public referendum. The WTO guaranteed the public that it would still have access to the grounds even after a new security fence went up, and that neither the lake nor the trees would be affected by the project. The Secretariat campaigned for the expansion by opening its doors to visitors. Voters passed the referendum on 27 September 2009, with 61.8 per cent giving their approval.

The physical plant of the WTO is now far larger than was its GATT predecessor. In addition to occupying the entirety of the original CWR, plus the new wing, it is complemented by a new

conference building inaugurated in 1998 and built as a Greek-style amphitheatre. The Swiss agreed to build that conference centre as part of the 1995 headquarters agreement. The new wing added 12,000 more square meters to the CWR, making it about half again as large as what the WTO inherited in 1995. The renovation created the spacious new atrium, expanded the CWR's meeting room space and equipped new meeting rooms with state-of-the-art technology. It also produced a new administrative building with a restaurant on the lake, enhanced the support facilities (i.e. print shop, data centre and central archives), and built a security perimeter around the whole campus. The entire project cost about Sfr 150 million in direct costs and about another Sfr 30 million to Sfr 40 million of indirect costs amortized over the budget in a seven-year period. Most of the Sfr 150 million came from the Swiss government in a Sfr 70 million grant and a Sfr 60 million loan on 50-year, interest-free terms (thus costing the members Sfr 1.2 million a year). The renovation made the building much more energy-efficient. The WTO also received a garden pavilion as a gift from China upon the tenth anniversary of its accession, completed in 2013.

## Endnotes

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- 1 The institutional structure of the WTO system also includes the International Trade Centre (ITC), but this does not represent a change from the GATT period. The ITC dates back to 1964 (when the predecessor International Trade Information Centre was established) and 1968 (when the centre took its present form). The ITC is jointly sponsored by the WTO and the United Nations Conference on Trade and Development.
- 2 Yet a fourth issue would be the tensions within the institution, either horizontally (i.e. between different divisions) or more often vertically (i.e. between levels of authority within the Secretariat). While this is a subject about which many current and former Secretariat staffers have decided views, as do some current or former diplomats, it falls outside the scope of the present study.
- 3 Author's interview with Mr Matus on 23 January 2013.
- 4 These numbers could be further adjusted to account for the fact that many of the personnel in both the WTO and the missions are support staff. If one were to concentrate solely on the professionals whose sole or primary focus is on trade policy *per se*, the total size of the WTO community in Geneva would probably be something in the range of 500 to 700 people.
- 5 Information provided by the WTO.
- 6 Author's interview with Mr Harbinson on 24 January 2013.
- 7 *Ibid.*
- 8 Data are from 2011, calculated from World Bank data at <http://data.worldbank.org/indicator/SP.POP.TOTL> (population), <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD> (GDP) and <http://data.worldbank.org/indicator/BX.GSR.GNFS.CD> (exports).
- 9 One might speculate that these eight members' shares of the Appellate Body and deputy director-general posts might be higher still if China had been a member for all 18 of these years rather than just 12.
- 10 Author's correspondence with Mr Harbinson on 30 January 2013.
- 11 Interview conducted by Gabrielle Marceau available at [www.wtcreation.org/en/videos?video=30495229](http://www.wtcreation.org/en/videos?video=30495229).
- 12 In addition to those already named, the other members that chaired no WTO bodies from 1995 to 2012 include: Albania; Antigua and Barbuda; Armenia; the Kingdom of Bahrain; Belize; Benin; the Plurinational State of Bolivia; Botswana; Brunei Darussalam; Bulgaria; Burkina Faso; Burundi; Cambodia; Cameroon; Cape Verde; the Central African Republic; Chad; Congo; Croatia; the Democratic Republic of the Congo; Djibouti; Dominica; Fiji; The Gambia; Georgia; Grenada; Guinea; Guinea-Bissau; Guyana; Haiti; Jordan; the Kyrgyz Republic; Liechtenstein; Luxembourg; Macao, China; Madagascar; Malawi; Maldives; Mali; Malta; Mauritania; the Republic of Moldova; Montenegro; Mozambique; Myanmar; Nepal; Niger; Oman; Papua New Guinea; Qatar; Rwanda; Saint Kitts and Nevis; Saint Lucia; Saint Vincent and the Grenadines; Samoa; the Kingdom of Saudi Arabia; Sierra Leone; the Solomon Islands; Sri Lanka; Suriname; Swaziland; Tanzania; the former Yugoslav Republic of Macedonia; Togo; Tonga; Ukraine; and Vanuatu.
- 13 Interview with the author.
- 14 These factors make it possible but not inevitable for a member to be active; the missions of Chinese Taipei and Macao, China are in similar circumstances as Hong Kong, China but are far less active in chairing committees.

- 15 Author's interview with Mr Pérez Motta on 24 September 2012.
- 16 Author's correspondence with Mr Lacarte on 18 February 2013.
- 17 *Ibid.*
- 18 Author's interview with Mr Saborio on 28 September 2012.
- 19 In addition to India, they included Cuba, the Dominican Republic, Honduras, Indonesia, Jamaica, Kenya, Malaysia, Pakistan, Sri Lanka, Tanzania, Uganda and Zimbabwe.
- 20 See *Organization of Negotiations Envisaged in the Doha Ministerial Declaration*, WTO document TN/C/W/2, 29 January 2002, p. 1.
- 21 *Ibid.*, p. 2.
- 22 *Ibid.*
- 23 Author's correspondence with Mr Lacarte on 18 February 2013.
- 24 Author's interview with Mr Pérez Motta on 24 September 2012.
- 25 Author's interview with Mr Valles on 29 September 2012.
- 26 This is a rule developed in 2009, the year that Ambassador Mario Matus of Chile chaired the General Council. If not for that rule, the chairman of the ministerial conference would, by default, have frequently been the trade minister of Switzerland. The other possibility would have been to give that position to the director-general, an option that the ambassadors preferred not to choose.
- 27 Author's interview with Mr Moore on 20 February 2013.
- 28 *Ibid.*
- 29 Author's interview with Mr Harbinson on 24 January 2013.
- 30 Author's interview with Mr Moore on 20 February 2013.
- 31 *Ibid.*, p. 2.
- 32 See *Agreement Between the World Trade Organization and the Swiss Confederation*, WTO document WT/GC/1, 17 May 1995.
- 33 Author's correspondence with Mr Lacarte on 18 February 2013.
- 34 Prior to 1965, when the position of director-general was created, Mr Wyndham-White's title was executive secretary; the title of the deputy director-general position was deputy executive secretary.
- 35 From 1948 to 1994, there was one monarch in Thailand and two each in Denmark, Japan, the Netherlands and the United Kingdom.
- 36 See *Procedures for the Appointment of Directors-General*, WTO document WT/L/509, 20 January 2003, p. 3.
- 37 Quoted in Nash (1994).
- 38 The impartiality that the United States sometimes demonstrates in the early stages of the director-general selection process can be more apparent than real, as it is often felt to be a disadvantage for a contender to be seen as close to Washington. A candidate for this position may prefer that the United States soft-pedal its support until a later stage in the campaign.

- 39 Author's correspondence with Mr Lacarte on 18 February 2013.
- 40 Author's interview with Mr Rodriguez Mendoza on 26 September 2012.
- 41 See *Procedures for the Appointment of Directors-General*, WTO document WT/L/509, 20 January 2003, p. 1.
- 42 *Ibid.*, p. 3.
- 43 Quoted in *Appointment of the Next Director-General – Further Process Informal General Council Meeting at the Level of Heads of Delegations*, WTO document JOB/GC/39, 19 March 2013, p. 2.
- 44 See *Procedures for the Appointment of Directors-General*, WTO document WT/L/509, 20 January 2003, p. 3.
- 45 See *Appointment of the Next Director-General – Further Process Informal General Council Meeting at the Level of Heads of Delegations*, WTO document JOB/GC/39, 19 March 2013.
- 46 Author's interview with Mr Lamy on 28 September 2012.
- 47 Author's interview with Mr Supachai on 27 September 2012.
- 48 *Ibid.*
- 49 Author's interview with Mr Lamy on 28 September 2012.
- 50 Author's interview with Mr Weekes on 19 December 2012.
- 51 Author's interview with Mr Sutherland on 18 January 2013.
- 52 Author's correspondence with Mr Matus on 23 January 2013.
- 53 Author's interview with Mr Groser on 22 March 2013.
- 54 Some directors report directly to the director-general. In the administration of Mr Lamy, for example, these included the directors of the Office of the Director-General, the Council and Trade Negotiations Committee Division, the Human Resources Division, the Office of Internal Audit, and the Information and External Relations Division.
- 55 Note that prior to 1965, the top positions in the GATT were entitled executive secretary and deputy executive secretary.
- 56 The US deputy directors-general during the GATT period were Gardner Patterson (1973-1980), William Kelly (1980-1986) and Charles Carlisle (1986-1993). Warren Lavorel (1993-1999) held the post in the transition from GATT to the WTO, and was followed by Andrew Stoler (1999-2002) and Rufus Yerxa (2002-2013).
- 57 In addition to Mr Mathur, the Indian deputy directors-general in the GATT and WTO periods were Anwarul Hoda (1993-1999) and Harsha Vardhana Singh (2005-2013).
- 58 Author's correspondence with Mr Lacarte on 18 February 2013.
- 59 The text of the 27 June 2005 vacancy announcement is posted at [www.wto.org/english/thewto\\_e/vacan\\_e/vn\\_e/ddg\\_vacancy\\_e.pdf](http://www.wto.org/english/thewto_e/vacan_e/vn_e/ddg_vacancy_e.pdf).
- 60 The title "ambassador" is reserved for members that are independent countries.
- 61 Calculated from data at the websites of the respective organizations.

- 62 Author's interview with Mr Shark on 23 January 2013.
- 63 Author's correspondence with Mr Mamdouh on 7 January 2013.
- 64 Author's interview with Mr Supachai on 27 September 2012. Mr Supachai took the annual *World Development Report* that UNCTAD produces as a model for this WTO publication.
- 65 Author's correspondence with Mr Jara on 26 March 2013, with Mr Jara quoting Mr Lamy.
- 66 Author's interview with Mr Low on 27 September 2012.
- 67 The Tokyo Round was formally launched in 1972 but the negotiations were not very active prior to 1974.
- 68 The professional positions were defined in the GATT system (based on UN classifications) as P1 to D2 and in the WTO system as grades 6 to 12.
- 69 Calculations provided by the WTO.
- 70 Calculated by the author from data compiled by WorldTradeLaw.net and posted on [www.worldtradelaw.net/dsc/database/panelistgender1.asp](http://www.worldtradelaw.net/dsc/database/panelistgender1.asp).
- 71 Address to the General Council of April 29, 2009 at [www.wto.org/english/news\\_e/news09\\_e/tnc\\_chair\\_report\\_29apr09\\_e.htm](http://www.wto.org/english/news_e/news09_e/tnc_chair_report_29apr09_e.htm).
- 72 Note that while a great many of the WTO Secretariat staff live in France, and especially those in support positions, the diplomats assigned to missions typically live in Switzerland.
- 73 Calculated from data in Yi-chong and Weller (2004: 89).
- 74 Calculated from data on the websites of these two organizations.
- 75 See *Agreement Between the World Trade Organization and the Swiss Confederation*, WTO document WT/GC/1, 17 May 1995.

### Appendix 14.1. Members' contributions to the WTO budget, 2001 and 2011

	2001		2011	
	Swiss francs	Share (%)	Swiss francs	Share (%)
United States	20,773,599	15.631	24,135,946	12.422
Germany	12,912,564	9.716	17,207,208	8.856
China	–	–	13,363,954	6.878
Japan	9,519,627	7.163	9,643,109	4.963
United Kingdom	7,962,039	5.991	9,406,063	4.841
France	7,663,014	5.766	8,722,127	4.489
Italy	6,244,971	4.699	7,268,763	3.741
Netherlands	4,571,760	3.440	6,281,719	3.233
Canada	5,172,468	3.892	5,869,803	3.021
Korea, Republic of	3,387,621	2.549	5,216,955	2.685
Hong Kong, China	4,791,045	3.605	5,110,090	2.630
Spain	3,291,933	2.477	5,084,831	2.617
Belgium	3,686,646	2.774	4,731,205	2.435
Singapore	3,059,358	2.302	4,278,486	2.202
Mexico	2,607,498	1.962	3,604,265	1.855
Chinese Taipei	–	–	3,248,696	1.672
India	1,100,412	0.828	2,933,930	1.510
Switzerland	2,154,309	1.621	2,607,506	1.342
Sweden	2,049,318	1.542	2,556,988	1.316
Austria	2,022,738	1.522	2,461,781	1.267
Australia	1,717,068	1.292	2,312,170	1.190
Ireland	1,265,208	0.952	2,308,284	1.188
Malaysia	1,946,985	1.465	2,242,222	1.154
Saudi Arabia, Kingdom of	–	–	2,183,932	1.124
Thailand	1,503,099	1.131	2,075,124	1.068
Poland	944,919	0.711	2,040,150	1.050
Brazil	1,391,463	1.047	1,985,746	1.022
United Arab Emirates	708,357	0.533	1,981,860	1.020
Denmark	1,330,329	1.001	1,896,368	0.976
Turkey	1,113,702	0.838	1,836,135	0.945
Norway	1,231,983	0.927	1,740,928	0.896
Czech Republic	707,028	0.532	1,534,970	0.790
Indonesia	1,234,641	0.929	1,472,794	0.758
Finland	944,919	0.711	1,259,064	0.648
Hungary	526,284	0.396	1,257,121	0.647
South Africa	749,556	0.564	1,088,080	0.560
Greece	437,241	0.329	983,158	0.506
Portugal	826,638	0.622	981,215	0.505
Israel	736,266	0.554	880,179	0.453
Luxembourg	394,713	0.297	818,003	0.421
Ukraine	–	–	790,801	0.407

	2001		2011	
	Swiss francs	Share (%)	Swiss francs	Share (%)
Philippines	881,127	0.663	749,998	0.386
Chile	445,215	0.335	730,568	0.376
Venezuela, Bolivarian Republic of	445,215	0.335	722,796	0.372
Slovak Republic	283,077	0.213	705,309	0.363
Argentina	709,686	0.534	691,708	0.356
Romania	241,878	0.182	681,993	0.351
Viet Nam	–	–	681,993	0.351
Nigeria	295,038	0.222	637,304	0.328
Kuwait, State of	287,064	0.216	598,444	0.308
Egypt	360,159	0.271	551,812	0.284
New Zealand	385,410	0.290	460,491	0.237
Colombia	337,566	0.254	411,916	0.212
Qatar	83,727	0.063	396,372	0.204
Angola	81,069	0.061	388,600	0.200
Slovenia	235,233	0.177	374,999	0.193
Pakistan	260,484	0.196	359,455	0.185
Morocco	216,627	0.163	351,683	0.181
Bulgaria	131,571	0.099	334,196	0.172
Croatia	205,995	0.155	328,367	0.169
Peru	196,692	0.148	310,880	0.160
Lithuania	–	–	275,906	0.142
Oman	139,545	0.105	275,906	0.142
Tunisia	183,402	0.138	242,875	0.125
Bangladesh	136,887	0.103	200,129	0.103
Ecuador	122,268	0.092	192,357	0.099
Estonia	82,398	0.062	188,471	0.097
Bahrain, Kingdom of	99,675	0.075	184,585	0.095
Panama	175,428	0.132	169,041	0.087
Dominican Republic	159,480	0.120	163,212	0.084
Costa Rica	126,255	0.095	159,326	0.082
Latvia	67,779	0.051	157,383	0.081
Jordan	94,359	0.071	149,611	0.077
Macao, China	85,056	0.064	149,611	0.077
Cuba	71,766	0.054	141,839	0.073
Guatemala	79,740	0.060	137,953	0.071
Sri Lanka	127,584	0.096	137,953	0.071
Cyprus	91,701	0.069	134,067	0.069
Côte d'Ivoire	98,346	0.074	112,694	0.058
Trinidad and Tobago	62,463	0.047	112,694	0.058
Honduras	50,502	0.038	101,036	0.052
El Salvador	69,108	0.052	95,207	0.049
Kenya	69,108	0.052	95,207	0.049
Iceland	59,805	0.045	91,321	0.047
Ghana	46,515	0.035	89,378	0.046
Uruguay	90,372	0.068	83,549	0.043

	2001		2011	
	Swiss francs	Share (%)	Swiss francs	Share (%)
Jamaica	79,740	0.060	79,663	0.041
Malta	66,450	0.050	77,720	0.040
Paraguay	99,675	0.075	77,720	0.040
Brunei Darussalam	61,134	0.046	73,834	0.038
Cameroon	38,541	0.029	71,891	0.037
Cambodia	–	–	69,948	0.036
Botswana	51,831	0.039	64,119	0.033
Democratic Republic of the Congo	33,225	0.025	62,176	0.032
Mauritius	58,476	0.044	60,233	0.031
Tanzania	35,883	0.027	60,233	0.031
Former Yugoslav Republic of Macedonia	–	–	56,347	0.029
Bolivia, Plurinational State of	35,883	0.027	54,404	0.028
Congo	34,554	0.026	54,404	0.028
Albania	19,935	0.015	50,518	0.026
Georgia	21,264	0.016	48,575	0.025
Zambia	29,238	0.022	48,575	0.025
Liechtenstein	37,212	0.028	46,632	0.024
Chad	19,935	0.015	44,689	0.023
Namibia	41,199	0.031	42,746	0.022
Nicaragua	23,922	0.018	42,746	0.022
Gabon	47,844	0.036	40,803	0.021
Myanmar	43,857	0.033	40,803	0.021
Senegal	31,896	0.024	40,803	0.021
Mozambique	19,935	0.015	38,860	0.020
Moldova, Republic of	–	–	34,974	0.018
Uganda	25,251	0.019	34,974	0.018
Papua New Guinea	51,831	0.039	33,031	0.017
All other members*	19,935	0.015	29,145	0.015
<b>Total</b>	<b>132,900,000</b>	<b>100.000</b>	<b>194,300,000</b>	<b>100.000</b>

Source: Calculated from WTO budget data at [www.wto.org/english/thewto\\_e/secre\\_e/past\\_contr\\_e.htm](http://www.wto.org/english/thewto_e/secre_e/past_contr_e.htm) and [www.wto.org/english/thewto\\_e/secre\\_e/contrib\\_e.htm](http://www.wto.org/english/thewto_e/secre_e/contrib_e.htm).

Notes: \*In 2011, each of the following members was assessed a contribution of Sfr 29,145, or 0.015 per cent of the total budget: Antigua and Barbuda, Armenia, Barbados, Belize, Benin, Burkina Faso, Burundi, Cape Verde, the Central African Republic, Djibouti, Dominica, Fiji, The Gambia, Grenada, Guinea, Guinea-Bissau, Guyana, Haiti, the Kyrgyz Republic, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania, Mongolia, Nepal, Niger, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Sierra Leone, the Solomon Islands, Suriname, Swaziland, Togo, Tonga and Zimbabwe. Most of them were also assessed the same percentage in 2001.

# 15 The future of the WTO

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I have but one lamp by which my feet are guided, and that is the lamp of experience.  
I know no way of judging the future but by the past.

Patrick Henry  
*Speech in the Virginia Convention (1775)*

## Introduction

At the risk of sounding facetious, one might ask where the trading system will be in 2048. If there is anything to numerology, that is when it is next due to take a new turn. That would continue a progression that began in 1648, when the Treaty of Westphalia inaugurated a new era in international law, was followed by influential declarations on the pacific nature of trade in both 1748 (in Montesquieu's *De l'esprit des lois*) and 1848 (in Mill's *Principles of Political Economy*), and seemed to culminate in 1948 with GATT's entry into force. That most recent of the '48s was no end-of-history moment, however, as was apparent when the WTO replaced GATT less than half a century later.

Rather than attempt the fool's errand of guessing where the world and its trade organization will be a generation hence, this chapter instead identifies the principal questions that the members of this organization will need to answer in the years to come. While any answers to those questions will necessarily be preliminary and speculative, we can, as Patrick Henry suggested, allow history to illuminate our inquiry. These questions are divided into three areas, each of which relate to recurring themes we have seen throughout this history. They are explored below in rough order of immediacy, starting with the most pressing matters and progressing towards the longer term.

## Negotiations

Before considering the problems associated with negotiations, it should be emphasized that the choice is not the classic one of free trade *versus* protection. Nearly all WTO members engage to one degree or another in backsliding, sometimes through the use of legal but restrictive measures (e.g. raising tariffs up to the bound rate or employing the trade-remedy laws) and sometimes imposing measures that are found to violate their WTO commitments. At no time during the WTO period, however, have large numbers of them engaged in widespread

restrictions of the 1930s variety. That did not happen even in the darkest hours of the Great Recession of 2008 to 2009. What is at issue is not a choice between opening or closing markets, but instead in where and how members will pursue their market-opening ambitions. Most of the progress in new negotiations since 2001 has been in bilateral, regional and plurilateral initiatives, and some fear that if present trends continue the role of the WTO could be confined to the administration, surveillance and enforcement of existing multilateral agreements rather than the drafting of new ones.

It must be stressed that this history is written at a time when the development of the Doha Round to date is known, but its final fate is not. Here the usual advantage of the historian is lost, as the gift of flawless hindsight belongs not to him but to readers in the future – perhaps a very near one – who will know which path those negotiations finally took. The discussion that follows thus summarizes the state of the debate at one point in time, but does so at the acknowledged risk of being outrun by events. It is unclear whether members will succeed in reviving those negotiations in more or less the same form in which they started (minus three of the four Singapore issues), put an end to the talks altogether, craft some sort of “Doha Light” package or fragment the negotiations into separate initiatives. At the time of writing, some combination of the last two alternatives seems more likely than either the first or the second. No matter how the round itself is resolved, members must also decide whether future multilateral negotiations will be conducted in the form of rounds or in separate initiatives, what role plurilateral agreements may play in the WTO system and how the multilateral system will adapt to the proliferation of discriminatory agreements.

### *Resolving the Doha Round*

The first WTO round has always been in the shadow of the last GATT round. Although it did not seem so to all participants and observers at the time, the Uruguay Round came closer to an ideal outcome than had any of its predecessors. It achieved significant reductions in tariff and non-tariff barriers (especially quotas), extended the range of issues well beyond tariffs into such topics as services and intellectual property rights, saw many of the hold-out countries join the multilateral system, and made lasting reforms in the institutional structure and dispute-settlement rules of the system. By comparison, the Doha Round started with fewer new ambitions, dropped most of those within a few years, got bogged down early and remained in a stalemate for years.

The relationship between the Uruguay and Doha rounds can be conceived in three different ways. One is the “filling in the blanks” view, by which the principal purpose of the Doha Round is to build upon and finish what its predecessor left undone. That includes starting from the previous round’s innovative but incomplete agreements on services and agriculture and filling them in with true, liberalizing commitments. The task has proven to be more difficult than it had appeared when the negotiations were first launched, and gave rise to the “tough act to follow” argument. As advanced by Lord Brittan,<sup>1</sup> this view emphasizes not what the Uruguay Round left undone but how very much it did accomplish. Having picked not just the low-hanging fruit but some of what had been hard to reach, all that was left were the items in the

topmost branches; those branches have not bent any lower in the ensuing years. It is in that sense that, from Lord Brittan's perspective, the success of the previous round offers the principal explanation for the apparent failure of the Doha Round.

Yet a third view attributes the differences between these rounds to the different "spirit of the times" in which they existed. The concept of the *zeitgeist* may appear to be the most vaporous explanation, and perhaps even tautological, and yet it also has an inherent appeal. There are times when statesmen can indeed be caught up in a cooperative spirit. By one account that is what happened with the launch of the Uruguay Round at the Punta del Este Ministerial Conference in September 1986. This "was a real 'happening'" where "[s]ome of the toughest problems were settled just like that – as if by magic – thanks to the 'spirit' of Punta del Este" (Paemen and Bensch, 1995: 43). Other ministerials in that round would be much less positive, and the Uruguay Round did suffer its share of delays and setbacks, but all in all it was a more hopeful and ambitious undertaking than the Doha Round. Developed and developing countries alike shared higher levels of confidence, the former group inspired by the end of the Cold War and hopes for a "peace dividend," the latter group by a Washington Consensus that export-led development strategies had done much better than import protection. Both of those effects had dissipated by the early years of the Doha Round.

Another perspective points to the declining utility of the negotiations model that the WTO inherited from GATT. It is often said that the definition of insanity is doing the same thing again and expecting to get a different result, but members have had just the opposite problem in the WTO: so many of the elements that seemed to contribute to the success of the Uruguay Round fail to perform the same trick in the WTO period. From the Kennedy Round through the Uruguay Round, negotiations were based on the idea that having multiple issues on the table will encourage ambition even on the most difficult issues by promoting trade-offs across subjects. The Uruguay Round took the further step of bringing all of these issues together in a single undertaking. The Doha Round was also based on the general concept of multi-issue trade-offs and the specific bargaining device of the single undertaking, but doubts have since arisen on whether the same formula that worked in the GATT period can produce similarly ambitious results in the Doha Round. In those earlier, headier days, this approach gave countries the confidence to make such trades as the elimination of textile and apparel quotas in exchange for the adoption of stricter enforcement of intellectual property rights. In the far more cautious environment of the Doha Round, when countries at all levels of economic development tend to be more focused on their defensive than on their offensive interests, the bundling of topics may actually impede progress. Some negotiators on trade in services, for example, believe that tying their topic to the round means that it can progress only as fast and as far as negotiations on the knottier problems of agriculture, and some negotiators on trade facilitation feel that their subject, too, might advance farther if it were handled on a separate track. The agricultural *demandeurs* take an entirely different view, believing that the only way they might get satisfaction is by keeping everything in the same basket.

As discussed in the next section, some proposed solutions to the round are based on the fragmentation of its issues into new configurations. Whether through early harvests or

plurilateral negotiations, these proposals would revise or replace the round as originally designed. The High Level Trade Experts Group (2011: 10) argued against these temptations, urging that the members finish what they had started in 2001. This group warned that any effort “to re-launch a WTO agenda around new negotiating objectives would be extremely unlikely to succeed.” The round is based on a “delicate balance of issues and interests,” according to this group co-chaired by former Director-General Peter Sutherland and Jagdish Bhagwati, and if picked apart –

the chance of consensual agreement retreats rather than advances. While tariff reductions and the dismantling of non-tariff barriers can of course be achieved in bilateral negotiations, the multiplier effect of a multilateral agreement is considerably higher. Agricultural subsidy reform will be agreed multilaterally or not at all (*Ibid.*).

In place of a deal that breaks up the Doha package, the group would have “the G20 level political leaders ... set themselves a deadline” to complete the talks that would be “inflexible and bind all players at the level of Heads of Government,” taking the current drafts as the foundation for final negotiations. This is a point on which the sceptics sometimes join the advocates of ambition, albeit for very different reasons. Indian Trade Minister Kamal Nath resisted calls to dismantle the Doha Round when he left the mid-2008 mini-ministerial. “The WTO is not a buffet that you pick up what you want and go,”<sup>2</sup> he declared. The single undertaking reduces negotiations to an all-or-nothing choice, a binary division that is equally attractive to ambitious optimists and to the sceptics who favour the status quo.

### ***Plurilaterals and regional trade agreements***

With the multilateral option apparently on hold, members look to alternative ways to negotiate. The main options have one thing in common: each would involve some fragmentation of the talks by issue or partner. These are controversial proposals. Proponents see plurilateral or regional undertakings as complements to multilateralism that can be pursued either in a form of “variable geometry” within the WTO or, if done on the outside, can produce useful precedents for multilateral deals. Opponents see these as alternatives to a multilateral deal, in which the Plan A of multilateral liberalization is made less attainable when each country has its own Plan B, and those alternatives also make it less likely that issues requiring a multilateral approach – especially agricultural production subsidies – will be effectively addressed.

The relationship between multilateralism, plurilateralism and discriminatory agreements is more complex than may at first appear. What might seem like diametrically opposed alternatives can instead be arrayed along a spectrum that recognizes a series of distinctions, both in the legal structure and in the animating spirit of the options. The initiatives that one finds along different points in the spectrum imply differing degrees of countries' interest in the multilateralization of any deals that they might reach. From the most to the least discriminatory, the main approaches are:

- A customs union or common market that is inspired by “closed regionalism”, with the parties to the agreement maintaining a high common external tariff and resisting efforts to negotiate it down in multilateral negotiations. Example: some developing country regional trade agreements (RTAs) dating from the 1960s or 1970s fit this description.
- A free trade agreement (FTA) in which the members are similarly inclined to resist reductions in their most-favoured-nation (MFN) tariffs. Example: while the North American Free Trade Agreement (NAFTA) was generally a product of “open regionalism”, it included a few provisions of this nature.<sup>3</sup>
- An RTA, whether in the form of a customs union or FTA, that the members treat as “open regionalism”. The parties to an RTA may engage in simultaneous or sequential negotiations in the WTO to reduce their MFN tariffs, and some benefits of the RTA may also be extended on a *de facto* basis to third countries (e.g. in service sectors where regulators opt not to distinguish between providers in RTA member countries versus all others). Example: the European Union takes this approach.
- Plurilateral agreements or preferential trade arrangements reached outside the WTO for which the benefits are not extended on an MFN basis. These will normally require approval of a waiver if the agreement deals with subjects that fall within the scope of existing WTO agreements and disciplines. Example: this approach is more commonly used for preferential programmes than for RTAs, such as the programmes by which Canada, the European Union and the United States extend special preferences to developing regions such as Africa and the Caribbean Basin.
- Plurilateral agreements that are adopted in the WTO on the basis of “code reciprocity”, meaning that only the signatories receive its benefits and only they are subject to its disciplines. Example: the Government Procurement Agreement and the Agreement on Trade in Civil Aircraft.
- Sectoral agreements reached in the WTO that are negotiated among a “critical mass” under the terms of existing agreements and for which the benefits are extended on an MFN basis. Example: the Information Technology Agreement (ITA) and the sectoral protocols to the General Agreement on Trade in Services (GATS).
- Multilateral agreements concluded in a round that are made part of the single undertaking.

The prospects for creative exchanges between “pure” multilateralism and other forms of negotiations increase as one moves closer to the bottom of this list. Even those near the top can make a contribution if one adheres to the doctrine of competitive liberalization and sees a progression from bilateral to regional to multilateral negotiations. The participants in the Trans-Pacific Partnership (TPP) negotiations, for example, often speak of how these talks may set precedents for “twenty-first century agreements” in the WTO or elsewhere. Competitive liberalization is less in vogue today than it was a decade ago, with the plurilateral options now attracting more attention. Whether they are used to create precedents, leverage or a variable geometry within the WTO, plurilateral negotiations are proposed or under way in several areas.

WTO rules show an ambivalent view towards plurilateral agreements. They are recognized by Article II.3 of the Agreement Establishing the World Trade Organization (WTO Agreement),

which provides that plurilateral agreements are part of the overall WTO agreement “for those Members that have accepted them, and are binding on those Members,” but the article specifies that these agreements “do not create obligations or rights for Members that have not accepted them.” Adopting plurilaterals into the body of WTO agreements can be difficult. Article X:9 provides that members may adopt them upon the request of the parties, but this decision may be made “exclusively by consensus.” Some proponents of plurilaterals suggest that alternative routes to approval should be allowed, such as adoption by the granting of waivers under Article IX:3 (Hufbauer and Schott, 2012)<sup>4</sup> or making them subject to the same two-thirds rule that applies to accessions (Hoekman and Mavroidis, 2012).

One question concerns the scope of issues that might be handled in a plurilateral. “When existing disciplines are at stake,” according to Rodriguez (2012: 29), “the entire WTO membership should be involved from the beginning to the end” because the “rules of the system cannot be modified without the acquiescence of the whole membership.” For new subjects, however, he advocated “plurilateral plus” agreements in which “the benefits of the agreements would be extended to all WTO members, while their obligations would bound only the initial members of the agreements and others as they join it.” He would thus build on the model of the ITA. Any decision to allow group negotiations of this sort “should be taken by a consensus decision of all WTO Members, independently of which Members subsequently join in the negotiations,” but proceed plurilaterally thereafter (*ibid.*: 30).

The sequence of plurilaterals is another important question, as it determines whether they are viewed as WTO-plus complements or as substitutes for a round. The Global Agenda Council on Trade of the World Economic Forum recommended that the WTO become a “club of clubs”, but proposed that this be done only after the round itself is completed:

**After the successful completion of the Doha Development Agenda negotiations,** a majority of the Members of the Global Agenda Council on Trade believe that more new clubs, if properly structured under the aegis of the WTO, could enable the organization to better meet the challenges of the 21<sup>st</sup> century. What they advocate is a future agenda that would supplement the core WTO commitments to which all members subscribe – as embodied both in the Uruguay Round Agreement and the Doha Development Round Agreement (once concluded) – with additional agreements to which only some members would subscribe if meaningful groups are willing to do so (2010: 3; emphasis in the original).

Hufbauer and Schott (2012: 3) proposed instead a more complex approach whereby the plurilaterals would be part of a grand bargain to resolve the round. That bargain would start with an early harvest of what they deem the “five easy pieces”, namely trade facilitation, phase-out of agricultural export subsidies, a commitment not to impose export controls on food, reforms to the dispute settlement system, and duty-free, quota-free treatment for least-developed countries (LDCs). Their plan would also give a green light for members to negotiate for three years on plurilateral agreements on an enumerated list of subjects, and further

provide that any “dissatisfied countries [would] be permitted to ‘snap back’ their NAMA and agricultural concessions in the event that the concluded plurilateral is not granted a waiver by three-fourths of the WTO members.”<sup>5</sup> The strategy would thus open with a cooperative approach to the least difficult topics in the round but fall back on leverage at a later stage.

The plurilateral option is, at the time of writing, most advanced for the proposed International Services Agreement. The manoeuvring over this pact was still in the transition from planning to actual negotiations in early 2013, but the precise relationship between these negotiations, the WTO and the Doha Round had yet to be determined. While the 20 members engaged in the negotiations<sup>6</sup> hope to bring any results to the WTO, the initiative faces opposition from other members.

Plurilateral agreements might thus be pursued either inside or outside of the WTO, but RTAs are by definition a wholly separate undertaking. Their only connection with the WTO is through the precedents that they might set for new multilateral agreements. Whether or not the WTO membership picks up on the precedents, these alternative negotiations show no sign of abating. This is not to say that RTAs are immune from the difficulties that have plagued the Doha Round. The Free Trade Area of the Americas and the Asia-Pacific Economic Cooperation negotiations were both launched in 1994 with the aim of establishing free trade across wide geographic expanses, but each of these mega-regional negotiations failed. They then fragmented into smaller initiatives, with many of the partners in the Americas and the Pacific Basin negotiating separate agreements with one another; some of those talks then coalesced into the TPP. Despite some setbacks, RTA negotiations have grown both in number and in magnitude over the course of the WTO period. Reconciling these negotiations with multilateralism is arguably the greatest challenge for the WTO membership, and the future of the trading system depends to a great degree on how they handle that challenge.

### *New issues*

There is no stable definition of what constitutes “trade policy”. The scope of issues that are defined to fall within the scope of the trading system is wider in the WTO era than it was in most of the GATT period, but the expansion is not steady, irreversible or finished. Some issues that negotiators included in the scope of the Havana Charter for an International Trade Organization were left out of GATT but then reappeared in later decades; other issues covered by that charter remain outside the jurisdiction of the WTO. Nor did that dynamism end with the establishment of this organization, as demonstrated by the on-and-off treatment of the Singapore issues in the Doha Round. As in the past, so in the future: the shape of the trading system will continue to be determined by the shifting definition of what trade means. This point was demonstrated in 2013 when the Panel on Defining the Future of Trade – as discussed later in this chapter – issued its report. The report is notable not just for the multiplicity of issues that the panellists identify as relevant to trade policy, but also for their evident disagreements over how and even whether individual topics might be taken up in the WTO.<sup>7</sup> These include competition policy, international investment, currencies and international

trade, trade finance, labour, climate change and trade, corruption and integrity, aid for trade, and the coherence of international economic rules.

More is at stake here than the economic magnitude of the issues that *demandeurs* bring to the table. Whenever the trading system incorporates new subject matter, it also brings along new actors, including institutions of government and related interest groups that might previously have abstained from debates over trade policy. Sometimes that means attracting new participants to the pro-trade coalition in a country, as was the case for the new issues of the Uruguay Round. Redefining trade to cover services, investment and intellectual property rights gave capital- and knowledge-intensive industries a reason to support trade negotiations and to weigh in against the protectionist initiatives that were so common in the early and mid-1980s. New issues can also complicate the task of liberalization by raising new concerns and attracting new opponents. The expanding issue base can provoke worries in developing countries over constrictions on their “policy space”, raise objections from government ministries and regulatory bodies who might see this as the trade ministry’s invasion of their “turf”, and lead to a backlash from a host of civil society groups that see trade rules as a threat to social, environmental or other policies that might run afoul of the expanded trade rules. New issues can also raise questions over the division of labour between levels of government, whether that means the powers of the EU member states relative to the European Commission or the authorities of sub-national units of government relative to central or federal governments in administratively complex countries such as Australia, Brazil, Canada, China, India, Switzerland and the United States. In short, any expansion in the scope of issues that are under negotiation or subject to dispute settlement will widen the range of actors inside and outside of government that have a stake in the outcome, and that are in a position either to promote or oppose new negotiations.

Members may choose not to negotiate multilateral agreements on new issues such as labour or competition policy, but ignoring these topics will not make them go away. They can instead crop up in any or all of three other ways: members may take them up in other negotiations outside the WTO, especially in their RTAs; the issues may be handled in domestic laws or arise in any domestic debates over approval of trade agreements (multilateral or otherwise); and they may come up in dispute settlement cases. That last option can be the fall-back option for defining the relationship between new issues and WTO law, as the initiative does not lie exclusively in the hands of negotiators; any blanks that they leave in their agreements might be filled in by the litigators.

Some of the more prominent expansions in the scope of the trading system came by way of decisions in the Dispute Settlement Body and its GATT predecessors, especially in politically sensitive areas such as the environment, public health and even morals. The exceptions clauses of GATT Article XX and GATS Article XIV, as modified by the *chapeau* language to those articles and as interpreted by panellists and the Appellate Body, can define the relationship between trade rules and other fields of public policy. This is one area where the trading system runs a risk of not keeping up with the times, for the wording of the GATT exceptions has not changed since 1947 and some of its provisions reflect even older laws and

principles. GATT Article XX(e), which offers a general exception for countries' laws that exclude imports of the products of prison labour, dates back to a US law that had been on the books since 1890. The only provision of WTO law affecting labour rights thus came by way of one law in one party that was already over a century old when the WTO entered into effect. Other exceptions clauses in the WTO reflect the views that negotiators held in the mid-1940s, or inherited from lawmakers in prior decades, on such topics as culture, conservation and human health. It is doubtful that, had the negotiators in the Uruguay Round started from a blank page, they would have devised the same general exceptions that their predecessors had at mid-century. When the system interprets the relationship between these issues and trade via GATT Article XX, it may fall back on terms and concepts that have been preserved in legal amber for generations, and that do not necessarily reflect the changes that have since occurred in social and scientific ideas.

This question relates to another recurring theme in this history: the concern over an imbalance between the judicial and legislative functions of the WTO. Or to put it another way, members sue one another too often and reach new agreements too rarely. This is a widely held view, although it is difficult to know what might be the optimum number of disputes in which the system as a whole should be engaged. One can easily imagine two undesirable extremes. At one end of this spectrum would be agreements that generate no disputes at all. While this might seem to be the most peaceful outcome possible, it would also suggest that the commitments that countries had made in WTO agreements – whether of the horizontal, systemic variety or in the specific goods and services schedules of individual members – were not ambitious enough either to oblige countries to change existing practices that restrict trade or to impose meaningful constraints on their enactment of new, restrictive measures. At the other end of the spectrum would be a number of disputes so large that it causes a breakdown in the system or a backlash among members. The system now in place seems to have navigated some sort of middle course between these extremes, but the weight of opinion among commentators suggests that if the system errs it does so in the direction of too many rather than too few disputes. That judgment is based on the relative importance that members have placed on the judicial rather than the legislative function of the WTO. The obvious, if difficult, solution to that quandary is not to impose restrictions on members' rights to enforce the commitments of their partners, but to promote the negotiation of new commitments. In some cases, that may mean taking up wholly new topics, although members would be well advised to consider not just the economic benefits, but the potential political costs of incorporating new issues into the body of WTO law.

The future of the trading system will therefore be determined in part by how it deals with such subjects as competition policy, investment, government procurement, state-owned enterprises, labour rights, the environment, the relationship between exchange rates and trade, and other topics that are either outside the current scope of WTO law or for which the current rules are arguably incomplete. Even if members do not conclude new multilateral disciplines on these issues, they may still deal with them in one form or another of negotiation, legislation or litigation.

## Sovereignty, democracy and the market

Taking the long view, the problems that the trading system faces today are only the latest manifestation of a centuries-long debate over three Enlightenment ideals. The principal theme of European thought in the late seventeenth and eighteenth centuries was freedom and the rebellion against central control, and the leading lights of the time advanced three ideas that each trusted countries and individuals to make choices for themselves: sovereign states should be independent of emperors, popes or stronger neighbours; people should be free to choose their own leaders and legislators; and producers and consumers should decide for themselves what they will make, buy, and sell. These ideas were not adopted universally or immediately, nor did they advance from theory to practice at the same pace. All three ideas have nonetheless come down to the present time as foundations of modern international society, and to which all members of that society are at least rhetorically devoted. Two of these three concepts are indispensable to the multilateral trading system: there could be no WTO without sovereignty and international law, and it would have no purpose without market economics. Those two ideas can be in conflict, especially in disagreements over the degree to which countries should restrain their exercise of sovereignty for the sake of opening their markets, but the principal difficulties arise in connection with democracy. Both at the national and the international levels, this Enlightenment ideal stands in creative tension with the others.

The conflicts are more prominent in the WTO era than they were in the GATT period, and give rise to two questions for the future. First, how will WTO members handle the continuing redistribution of economic and political power in the world? Can a system that had depended for its forward momentum on leadership from the few adjust to a new environment in which power is more widely distributed? Second, how will the democracies that gather in this organization handle the issue at home, especially in light of the incorporation of new issues and the growing association between trade and other high-profile political topics?

### *Democracy between members: leadership and burden-sharing*

International society is democratic in principle, as exemplified by the juridical equality of states, but in practice it is impossible to erase the differences between its members. Nor does everyone agree that it is always desirable to do so. While many developing countries have long urged that the multilateral trading system be made to operate more like the United Nations, or even be brought under UN auspices, that proposal is anathema to developed countries. The question is relevant not just to practical politics but to political theory: if one accepts the premise of the theory of hegemonic stability, as discussed previously (see Box 1.1), open markets are a public good that tends to be underprovided unless there is one country with the motive and the means to supply it. Great Britain rendered this service in the latter half of the nineteenth century, and the United States did so in the latter half of the twentieth century. One problem that international society faces in this first half of the twenty-first century is how to handle a multilateral trading system in which there is no longer a clear hegemon. The facile solution would be to rely on the democracy of nations, hoping that in this supposedly more

enlightened age we may expect countries to understand and act upon their shared interest in maintaining a system of open markets. That demands a great deal of sovereign and self-interested states.

This is partly a matter of numbers. Using the same logic that Parkinson (1957) employed in his speculations on the inverse relationship between the size and the effectiveness of a group, and that Olson (1968) developed more formally in his theory of collective action, many see the near-universal membership of the WTO as a challenge. GATT began with just under two dozen contracting parties, but as of 2013 the WTO has seven times as many members; it will have grown eight-fold when the pending accessions are complete. The practice of coalition diplomacy helps to manage the problem but can create difficulties of its own. Compared to the GATT period, regional and other blocs have come to play a more prominent role than did single-issue coalitions. Where coalitions were once fluid enough in their membership to encourage cooperation and trade-offs, blocs can harden the lines between groups. By contrast with the Uruguay Round, a defining characteristic of the Doha Round is the paucity of North–South coalitions. Not all observers believe that larger numbers pose an insuperable problem. Gilligan (2004) called into question the common belief that there exists a trade-off in international organizations between the breadth of their membership and the depth of the agreements that they can reach; Kahler (1992) also offered an essentially optimistic view on the ability of international organizations to operate effectively, even with a large membership. The collective wisdom of experienced negotiators nevertheless suggests that relations are more difficult to manage among WTO members than they were among GATT contracting parties, and that the membership will need to address this problem in the years to come.

The problem appears more daunting when one looks past the simple numbers and considers three related challenges that the wider and more diverse membership poses for the multilateral trading system. One is that power is more diffuse than it had been throughout the GATT period, making it impractical for the system to rely on the leadership of one or a few members. Second, several of the participants in this system that are either new to it, or have long been a part but are newly powerful and active, do not share the same historical and cultural ties that were common to the leaders in the *ancien régime*. Third, the rivalries between the old leaders and the emerging economies extend beyond the economic sphere. The future of the WTO may be defined to a considerable degree by the state of relations between China and the United States, a G2 across the Pacific that replaces its transatlantic predecessor. The biggest problem that GATT negotiators faced was in bridging the differences between the European Union (in its earlier incarnations) and the United States, but that task was facilitated by the congruent perspectives of these partners on trade and much else. Economic and security relations reinforced one another: GATT and NATO were two very different entities that nevertheless came into being at roughly the same time, and were both led by the same countries. The members of the WTO are not divided by the old antagonisms of the Cold War, but neither are they united by them.

One recurring problem is the declining US interest in providing leadership in multilateral negotiations. That was already apparent in the years preceding the launch of the Doha Round,

when Washington took an ambivalent approach to a new round and allowed Brussels to act as the chief *demandeur*. The US priorities changed in the immediate aftermath of 9/11, and many observers believe that the launch of the Doha Round would not have been accomplished but for the leadership that Ambassador Robert Zoellick provided. In the years that followed 2003, however, the United States has either emphasized bilateral and regional negotiations or, for a few years following the financial crisis of 2009, appeared to lose interest in trade policy altogether. When that interest revived, it focused on the TPP and the launch of negotiations with the European Union. If the strategy of competitive liberalization is valid, these two initiatives are good signs for the multilateral trading system. Strict multilateralists fear that they portend just the opposite. The direction taken in these latest RTA negotiations underlines the differences in the approaches that Washington takes towards Brussels and Beijing. Whereas one of them is aimed at cementing transatlantic relations, from the US perspective the TPP is defined as much by one country that is not a party to the talks (China) as by the 12 that are.<sup>8</sup>

China is increasingly more active in the WTO, with its role in the system having progressed since accession from a “rule taker” that “passively accepts existing rules imposed by other countries” to a “rule shaker” that “tries to exploit the existing rules to its advantage,” and then to a “rule maker” that “is making new rules that reflects its own interests” (Gao, 2012: 76). The mid-2008 mini-ministerial was a failure, but one of its more lasting effects was the debut of China in the inner circle of G7 negotiators. China has also come to be a more frequent litigant in the Dispute Settlement Body. The capacity constraints and cultural inhibitions against legal disputes both broke down in response to changes in China’s interests and experiences, to the point where the former dominance of EU–US cases on the docket has been replaced by Chinese–US cases. The future of the dispute settlement system in the WTO will be determined in part by whether that trend continues or, as was the case in transatlantic litigation, these two parties find other ways to deal with the frictions in their trade relationship. China is also actively negotiating agreements outside of the WTO. As of early 2013, it had nine bilateral or regional FTAs in effect, five more in negotiation and four others under study.

The flows of trade and investment between China and the United States are large, but the levels of cooperation and coordination in this new G2 remain much lower than was the case for its predecessor. The relationship is also burdened by competition in other areas of public policy. If Washington is not inclined to provide the leadership, Beijing is not yet in a position to do so, and the two of them are not predisposed to act in unison, can the system instead proceed in a more democratic fashion? Developments inside and out of the WTO suggest that members wish to try. That can be seen outside the WTO in the creation of the summit-level G20, which is more inclusive than its G5, G7 or G8 predecessors, and is also demonstrated inside the WTO by the evolution of the green-room process. Entry into this room is still restricted, but some of the new entrants are expected to represent their regions or other groups. This transition from something like oligarchy to something that is more like representative democracy is one way that the system seeks to handle the always difficult trade-off between the ideals of inclusiveness in representation and efficiency in bargaining.

The stalemate in the Doha Round nonetheless shows that members have yet to work out the proper division of the burdens, with developed countries and emerging economies having very different views of how much each of them should bear. The wider membership demonstrates less of the *affectio societatis*, or commitment to a shared sense of purpose, than did the tighter-knit GATT society. The diversity of membership may also exacerbate the problem of “bounded rationality”, a phenomenon by which “agents are rational in the sense that they aim to achieve objectives as effectively as they are able, but their rationality is bounded” insofar as they “lack not only complete information but also the ability to perform the computations needed to optimize” (Odell, 2006a: 9). A negotiator that acts within the confines of bounded rationality may have more trouble comprehending the way that his or her partner thinks. Determining the difference between a bluff and a true bottom line can be hard enough even when dealing with someone from a similar cultural, economic and language background, but becomes more challenging in a larger and more diverse group of members with different historical and cultural backgrounds.

### *Democracy in members: parliaments and the private sector*

Democracy at the national level is as important a factor in the trading system as it is at the international level, and offers another example of how the political economy of the WTO system is more challenging than was its GATT predecessor. For much of that earlier period this issue manifested itself in what we have called the Washington problem, in which US presidents and trade negotiators are only agents acting on behalf of congressional principals. The most democratic branch of the US government has long been a gate-keeper in the trading system, from the Havana Charter (which the US Congress refused to approve) through the deal that was on the table in mid-2008 (which US officials feared might suffer the same fate). No other legislative body exercises as much control over trade and foreign policy as does Congress, but its counterparts in other countries may come to exercise greater scrutiny than before and may even reject the agreements that are submitted for their approval.

The world is a more democratic place today than it was for most of the GATT period, and the significance of democracy for trade policy-making has expanded along three dimensions. One is the spread of democracy and freedom overall: by Freedom House’s standards, the share of free countries in the world rose during the late GATT period from 31.5 per cent in 1980 to 39.8 per cent in 1995, and then to 46.2 per cent in 2012. Or to employ a less exacting standard, 117 out of 195 countries (60.0 per cent) were electoral democracies in 2012, up from 69 out of 167 (41.3 per cent) in 1989.<sup>9</sup> Second, even some WTO members with long democratic traditions are only now extending greater authority to their legislative branches in matters of foreign policy in general or trade policy in particular, revising or reversing long-standing traditions of deference to the executive in this field. That is most clearly evident in the case of the European Parliament, which under the Lisbon Treaty is now more powerful vis-à-vis the European Commission than in the past. The Inter-Parliamentary Union urges legislatures in other countries to follow suit. The third trend may lead to still greater involvement on the part of legislative bodies: the subject matter of trade policy now includes issues that have higher political profiles than tariffs, quotas and the like, and initiatives are

bound to attract more attention from the public and its elected representatives when negotiations or disputes involve such topics as pharmaceutical patents and the environment. The experience with the Anti-Counterfeiting Trade Agreement, a WTO-plus agreement that failed to win approval in most of its signatory states, demonstrated the readiness of national parliaments to question the pacts that their executives conclude.

Some members of the trade community take a cautious view of democratic procedures. Negotiators will commonly time their work to avoid concluding agreements in election years, for example, and attention from the press is not always welcome. These concerns underlay one explanation that the High Level Trade Experts Group (2011: 5) offered for the reluctance that members have shown to bringing the Doha Round to a conclusion. The group suggested that surveillance can inhibit or intimidate negotiators:

What is regarded as sound economic policy when it is conducted unilaterally or bilaterally becomes intensely difficult when it is reframed as a series of political concessions of market access to be traded in a multilateral setting. This is especially so given the fact that this is done under the close scrutiny of both the media and defensive domestic constituencies.

It has not always been so. The rationale behind the surveillance proposals that academics and international organizations advanced in the early 1980s, and that produced the Trade Policy Review Mechanism, was based on a more confident perception of public opinion: people will oppose protectionism if they know what it costs, and it is therefore important to shine a bright light on market-restricting initiatives. A less hopeful view starts from the premise that democratic debates over trade are stilted by the public-goods barriers to organization. While it is economically rational for small numbers of producers to band together in support of continued protection, there is little incentive for large masses of consumers to organize in counterpoise to the protectionists. The problem is exacerbated by the fact that when consumer groups do overcome these barriers they tend to focus on just one side of the trade issue. These organizations are rarely involved in promoting the tariff-cutting agreements that would deliver wider choices and lower prices to consumers, but will protest against decisions in the Dispute Settlement Body that find fault with the environmental and safety regulations that they favour.

Some governments have been more active and effective than others in coordinating policy with the private sector, and the spread of democracy can offer not just a challenge but an opportunity. When Shaffer et al. (2010: 99) sought to explain how Brazil became so effective in the development and pursuit of its objectives, they pointed to “the rise of pluralist interaction between the private sector, civil society and the government” in which the “institutionalization of a legalized and judicialized system of international trade relations, combined with Brazilian democratization and a shift in Brazilian development policy, has catalyzed the formation of new public-private trade policy networks.” That coordination between the public and private sectors may be more difficult to accomplish on some issues, however, as policy-makers tend to be less successful in their interactions with those domestic interests that are outside the

trade ministry's natural constituency. "At the national level," as Deere-Birkbeck (2012: 128) noted, internal coordination needs "to engage a broader range of domestic political actors – beyond trade technocrats – such as parliamentarians, the private sector, trade unions and civil society."

The WTO itself has greatly expanded its outreach to non-governmental organizations in the years since Seattle. One of the largest challenges that trading policy-makers face is thus more in their national capitals than it is in Geneva. The future of the multilateral trading system depends in part on the ability of negotiators and political leaders to demonstrate the value of trade liberalization to legislators and representatives of civil society.

## The institution, information and ideas

The last set of questions for the future is more horizontal in nature. At issue are the changes the members might make in the WTO as an institution, how they might make better use of the information that the system generates, and what new ideas may develop for the trading system.

### *Institutional reforms*

The WTO had barely started to function before participants and observers began to suggest ways that its structure or procedures might be improved. The number of proposals grew after each setback for the system, most especially the disastrous ministerials of 1999 and 2003 and the general slowdown in the negotiations thereafter. By the time Deere-Birkbeck and Monagle (2010) mapped the proposals, they filled 177 pages. The highest profile of these exercises in institutional reform was the Sutherland commission. Appointed by Director-General Supachai Panitchpakdi and headed by former Director-General Peter Sutherland, this consultative board issued its report upon the tenth anniversary of the WTO in 2005. Although this report was rather cautious on some topics, either declining to propose radical changes or couching recommendations in delicate terms, some academics have dared to go where commissions fear to tread. The issue has also been taken up by a series of studies and reports from other individuals and institutions. Among the possible reforms that these various commissions and authors have proposed are changes in the institutional structure, management and resources of the WTO; greater transparency and closer consultation with legislatures and non-governmental actors; more accommodations to the needs of developing countries; and addressing the relationship between the WTO and regional trade arrangements.

The latest of these initiatives began in 2012, when Director-General Pascal Lamy appointed a WTO Panel on Defining the Future of Trade. Reminiscent of a "Wise Men's Group" put together in the mid-1980s at a time of uncertain direction in the GATT system, the group was charged with examining and analysing challenges to global trade opening in the twenty-first century. The twelve panellists, who represented numerous regions and walks of life,<sup>10</sup> were asked to

look at the drivers of today and tomorrow's trade, to look at trade patterns and at what it means to open global trade, bearing in mind its role in contributing to sustainable development, growth, jobs and poverty alleviation. Mr Lamy expressed the hope that the group's analysis "will spark debate and open new channels of thinking on how we can best confront the stumbling blocks that today's rapidly evolving world has strewn in our collective path."<sup>11</sup>

The report identified a series of challenges confronting the WTO, each of which are manifestations of the "convergence" problem. The WTO must promote not only convergence among its members in trade negotiations, according to the panellists, but also between the multilateral trading system and other regimes, between trade and domestic policies, and between trade and public policy non-tariff measures. One way that the report proposes to address these problems is through enhancement of the institutional capacities of the WTO, with the members delegating greater authority and initiative to the Secretariat. The panellists observe that while the "WTO is an organization driven by its Members" and that by tradition "it is also only Members who table proposals for action through a bottom up process," the report states that:

We believe that permitting the Secretariat to table proposals, as is done in some other member-driven international organizations, could speed up deliberative processes and facilitate consensus by providing technical information and fresh ideas. This would in no way compromise the exclusive right of members to decide (Panel on Defining the Future of Trade, 2013: 32).

The report calls the Secretariat "a vital lubricant of this member-driven organization," and urged that members "support a stronger Secretariat, with sharpened expertise across the WTO's range of activities, and stronger research capacity." The panellists believe that the Secretariat "has considerable scope for contributing to effective communication and fostering deliberations," and that "[t]hese activities should be encouraged because they can facilitate the work of the membership." Averting that the Secretariat "can never replace members," they nevertheless observe that "members cannot deliver without a strong, efficient, neutral and well-funded Secretariat."

### *Information*

One of the vices of the trading system is that it does not always take full advantage of the information that it generates. The best example of this can be seen in some developing countries where the customs service produces data that are not properly exploited. Customs officers will classify every shipment that crosses the border, their sole aim being the assessment and collection of any duties that may be owed, but in the process they collect vital information on the country's imports and exports. In a well-run system, the data will be aggregated, analysed and disseminated, to the benefit of the trade ministry, the private sector and academic researchers. That opportunity is wasted in some countries, however, whether for lack of capacity or because of turf battles between ministries.

The WTO has already moved to rectify a comparable problem at the international level. In the course of executing its legislative, judicial and executive functions, the WTO generates vast amounts of information and analysis about members' laws and policies, most of which is made available online but, until recently, had been difficult to access. The problem here is akin to what one often hears about intelligence agencies whose main problem is not obtaining information but in organizing, prioritizing and analysing the massive amounts that are already available through open and other sources. The WTO took several steps in the Lamy administration to make its data more accessible and user-friendly not just to the governments of members, but to the private sector, the press, academics, non-governmental organizations and any other parties interested in trade and related issues. One was a general revamp of the WTO website, which includes numerous finding aids that allow users to access information by subject (e.g. separate pages for each member, each subject, etc.) and type (e.g. different pages and tools for various types of documents and statistics). Several other innovations aggregate data in specific areas or with particular users in mind. Two that were already discussed in Chapter 13 are the Regional Trade Agreements Information System (inaugurated in 2009) and the Database on Preferential Trade Arrangements (2012). A few other initiatives, each of which is especially useful for the private sector, merit special attention.

One such innovation is the Integrated Trade Intelligence Portal (I-TIP)<sup>12</sup> developed in 2011, expanded in 2012, and formally launched for the public in 2013. This service gathers the wealth of data generated in members' notifications to the WTO and through other sources to provide a "one-stop shop" providing practical information on a wide range of issues affecting specific products and sectors. With information on over 25,000 measures, as of early 2013 the service covered tariff and non-tariff measures affecting trade in goods, as well as information on trade agreements and the accession commitments of WTO members. It will be expanded to include data on import licensing, quantitative restrictions, agricultural notifications, state trading and safeguard measures. The system permits users to search by country applying or affected by a measure, by products and sectors and by type of measure.

The WTO Made in the World Initiative (MIWI)<sup>13</sup> is a platform that promotes the exchange of projects, experiences and practical approaches in measuring and analysing trade in value added. Launched in 2010 to 2011, the project brings together the work done by numerous national and international agencies that are working on modernizing the statistical systems. The WTO Secretariat cooperates closely with national agencies such as the Institute of Developing Economies-Japan External Trade Organization (IDE-JETRO) and the US International Trade Commission and international statistical agencies such as the Organisation for Economic Co-operation and Development (OECD). The first fruits of these collaborative efforts were a book of conference proceedings on *Globalization of Industrial Production Chains and Measurement of Trade in Value Added* (2010), published in coordination with the Finance Commission of the French Senate and a joint WTO publication with IDE-JETRO on *Trade Patterns and Global Value Chains in East Asia: From Trade in Goods to Trade in Tasks* (2011). In 2013, the WTO and the OECD issued the preliminary results of a joint database in trade in value added (TiVA) project, covering a large share of world trade, and will add data from other countries as they become available.<sup>14</sup>

The WTO launched a new International Trade and Market Access tool in late 2012. It presents all WTO data on merchandise and commercial services trade as well as selected market-access indicators from World Tariff Profiles, a co-publication produced jointly with United Nations Conference on Trade and Development (UNCTAD) and the International Trade Centre. The tool is accessed through the WTO website ([www.wto.org/stats](http://www.wto.org/stats)) and connects users to data on the leading traders by commodity group, sector and year; the evolution of trade between a selected partner and different countries, regions and economic groups; and statistics on market access for goods. Users are able to export the data underlying the graphics. In 2013, the WTO also inaugurated a new web page ([www.wto.org/business](http://www.wto.org/business)) for business in order to make key information for the private sector, such as trade statistics and trade monitoring news, easily accessible in one dedicated area. It also issued the first online *Newsletter for Business*, offering business-focused trade news. It will be circulated electronically to all business representatives who have registered on the WTO online database.

The WTO Chairs Programme is another initiative that the Lamy administration inaugurated in order to spread information and ideas. This programme streamlines the WTO's academic cooperation activities by providing dedicated support to beneficiary institutions, offering up to Sfr 50,000 per year per school for up to four years. It started in 2010 with 14 projects chosen through a competitive selection process.<sup>15</sup> The chairs have sponsored papers and conferences on such topics as governance, global value chains for services, retaliatory measures, and sustainable development.

### *Ideas*

This history began with a review of the philosophical and intellectual currents that came together to create the multilateral trading system, and it is fitting to return to them at its conclusion. This is a field in which ideas matter, there being no better demonstration of that point than how the WTO itself came into being. It would be too grand a claim, and involve too much compression of the facts, to draw a short and straight line between John Jackson's publication of *Restructuring the GATT System* (1990) and the creation of the WTO five years later. That line did not get very long or very crooked, however, and Mr Jackson is too modest in suggesting that if he had not existed the Canadians who first proposed the WTO would have invented him. In his case, the times and the book matched perfectly. Generations passed before the ideas of Hugo Grotius became principles of statecraft, and for Adam Smith and David Ricardo that transition from theory to practice took decades, but for John Jackson there were just months separating the book from the formal proposal, and then only a few more years between that proposal and the WTO's entry into force. The mark of his ideas is clear throughout the legislative history of what would become the Agreement Establishing the World Trade Organization.

Sometimes the problem for the trading system comes not from a lack of ideas but from a surfeit of them. The field of trade policy lies at the intersection of politics, economics and law,

and the theorists and practitioners in these three disciplines do not always understand one another. Lord Salisbury warned that:

If you believe doctors, nothing is wholesome: if you believe the theologians, nothing is innocent: if you believe the soldiers, nothing is safe. They all require their strong wine diluted by a very large admixture of insipid common sense.<sup>16</sup>

The same might be said of the lawyers for whom no agreement is sufficiently clear, the economists for whom it is never sufficiently open, and the politicians who will always demand wiggle room. One can never fully satisfy all three groups, but must instead fall back upon common sense in resolving the three groups' sometimes contradictory advice. Considering the fact that trade agreements are usually negotiated by lawyers who must answer to politicians, the general trend is for the preferences of those two groups – and perhaps the politicians above all – to be privileged over those of the economists. This has made for a system in which the exceptions often outnumber the rules, but in which the rules do matter and the economic consequences are significant. It also means that observers can have very distinct views of what ails the trading system, and may propose radically different solutions.

We cannot know where the multilateral trading system will be in another generation, nor in the interim how well it will answer the questions posed here. The lawyers, economists and politicians who comprise this field will no doubt continue to disagree over what the main problems are and how they might best be solved. The system has proven to be adaptive and resilient, however, drawing strength from the diverse perspectives and ideas of its members, and there is every reason to expect that it will still be here in 2048 and beyond.

## Endnotes

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- 1 Author's interview with Lord Brittan on 17 January 2013.
- 2 "Kamal Nath explains how the Geneva talks failed", *TWN Info Service*, (31 July 2008) at [www.twinside.org.sg/title2/wto.info/twninfo20080754.htm](http://www.twinside.org.sg/title2/wto.info/twninfo20080754.htm).
- 3 For example, in Annex 308.2 the NAFTA members agreed that for ten years none of them would make cuts in their MFN tariffs on colour television picture tubes.
- 4 Article IX:3 allows waivers from WTO obligations either by consensus or, failing that, by a three-quarters vote. To date all waivers granted under this provision have related either to preferential trade arrangements between developed and developing or transitional countries (see Chapter 13) or exemptions for some members' laws or policies that do not conform to WTO obligations.
- 5 Article IX:3 of the WTO Agreement provides that "[i]n exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements." Waivers may be granted by consensus, but can also be secured by a three-quarters vote.
- 6 The "Really Good Friends of Services" are: Australia; Canada; Chile; Colombia; Costa Rica; the European Union; Hong Kong, China; Israel; Japan; the Republic of Korea; Mexico; New Zealand; Norway; Pakistan; Panama; Peru; Switzerland; Chinese Taipei; Turkey; and the United States.
- 7 Observing that "this Panel is a reflection of the membership of the WTO," the report states that in their deliberations "many issues were raised by different panel members because they regarded them as important" but that the "priorities attached to these topics varied considerably among the individual panellists." Panel on Defining the Future of Trade (2013: 33).
- 8 It is important to emphasize that this perspective is not shared by all of the TPP countries, many of which have or are in the process of negotiating RTAs with China.
- 9 Calculated from data posted at [www.freedomhouse.org/report/freedom-world/freedom-world-2013](http://www.freedomhouse.org/report/freedom-world/freedom-world-2013).
- 10 The members of the group were: Talal Abu-Ghazaleh, chairman and founder, Talal Abu-Ghazaleh Overseas Corporation (Jordan); Sharan Burrow, secretary-general, International Trade Union Confederation; Helen Clark, administrator, United Nations Development Programme; Frederico Pinheiro Fleury Curado, president and CEO, Embraer S.A. (Brazil); Thomas J. Donohue, president and CEO, US Chamber of Commerce; Yoshiaki Fujimori, president and CEO, LIXIL Group Corporation and LIXIL Corporation (Japan); Victor K. Fung, chairman, Fung Global Institute (Hong Kong, China), honorary chairman of the International Chamber of Commerce; Pradeep Singh Mehta, secretary-general, CUTS International (India); Festus Gontebanye Mogae, former president (Botswana); Josette Sheeran, vice chairman, World Economic Forum; Jurgen R. Thumann, president, BUSINESSEUROPE; and George Yeo, former foreign minister (Singapore), vice chairman of Kerry Group Limited (Hong Kong, China).
- 11 See [www.wto.org/english/news\\_e/pres12\\_e/pr659\\_e.htm](http://www.wto.org/english/news_e/pres12_e/pr659_e.htm).
- 12 See <http://i-tip.wto.org/Default.aspx>.
- 13 See [www.wto.org/english/res\\_e/statis\\_e/miwi\\_e/miwi\\_e.htm](http://www.wto.org/english/res_e/statis_e/miwi_e/miwi_e.htm).
- 14 See [www.oecd.org/industry/ind/measuringtradeinvalue-addedanoecd-wtojointinitiative.htm](http://www.oecd.org/industry/ind/measuringtradeinvalue-addedanoecd-wtojointinitiative.htm).

15 The original beneficiaries of the programme were: Facultad Latinoamericana de Ciencias Sociales (Argentina); University of the West Indies (Barbados); Universidad de Chile; Universitas Gadjah Mada (Indonesia); University of Jordan; University of Nairobi; University of Mauritius; Instituto Tecnológico Autónomo de México; Mohammed V University-Souissi (Morocco); University of Namibia; Shanghai Institute of Foreign Trade; St Petersburg State University; University Cheikh Anta Diop (Senegal); and Vietnam National University. In 2011, the National University of Singapore joined the programme.

16 See <http://quoteocean.com/expert-quotes>.



## Annex 1: Biographical appendix

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The 106 people listed in this directory played leading roles in creating the WTO, participating in its negotiations, adjudicating its disputes, and managing the institution. Included here are all directors-general, deputy directors-general, *chefs de cabinet*, chairmen of the WTO General Council, and members of the Appellate Body from 1995 to 2012, together with selected ministers, ambassadors, directors and other figures cited in the text.

The biographical information presented here is based primarily on data provided by the individuals themselves. All living persons listed here were given the opportunity to edit their entries.

**Roderick Abbott** (born 1938) of the European Union and the United Kingdom was a deputy director-general from 2002 to 2005. He received a BA from the University of Oxford in 1962, and since retiring has held visiting fellowships at the London School of Economics (LSE), at the European University Institute, in Florence, and at Western University in London, Ontario. During a 40-year career, first with the Board of Trade in London, later with the European Commission in Brussels, he was posted several times to the United Kingdom and EC delegations in Geneva. From 1968 to 1971, after the Kennedy Round, then from 1975 to 1979 as deputy chief negotiator for the Tokyo Round, and again from 1996 to 2000 as ambassador and head of delegation. A participant in the Tokyo Ministerial Conference that launched the Tokyo Round in 1973, he was attached to the EC delegation in Geneva for those negotiations with special responsibility for non-tariff barriers, quantitative restrictions, and safeguard measures. In the 1980s and 1990s, he was the lead negotiator for Article XXIV:6 tariff negotiations after EC enlargements, and a regular participant in the meetings of the Quad Trade Ministers. During the Uruguay Round (1987-1993), he was again the EC deputy chief negotiator, working from Brussels, with oversight of all areas of the negotiations; and in the final stages he was the lead negotiator for the tariff negotiations. As ambassador from 1996, he was a central player in the First WTO Ministerial Conference in Singapore, and later in Seattle and in Doha. In 2003, he attended the Ministerial Conference in Cancún as a deputy director-general at the WTO. Following his service in the WTO, he has worked with the London School of Economics and the European Centre for International Political Economy (ECIPE), a leading trade-policy think tank in Brussels. He has successively worked with several consultancies in Brussels (GPlus Europe, APCO Worldwide, and Kreab & Gavin Anderson). He has taken a number of teaching assignments and worked with the World Trade Institute, in Bern, and with the International Centre for Trade and Sustainable Development, in Geneva. He has written working papers and policy briefs at ECIPE (on WTO dispute settlement and on the Doha Round) as well as a history of the international commercial banana trade from 1870 to 1930.

**Georges Michel Abi Saab** (born 1933) of Egypt served on the Appellate Body from 2000 to 2008. He graduated in law from Cairo University and pursued his studies in law, economics and politics at the Universities of Paris, Michigan (MA in economics), Harvard Law School (LLM and SJD), Cambridge and Geneva (Docteur es Sciences Politiques). He also held numerous visiting professorships at Harvard Law School, the universities of Tunis, Jordan, the West Indies (Trinidad), as well as the Rennert Distinguished Professorship at NYU School of Law and the Henri Rolin Chair in Belgian Universities. Mr Abi Saab is honorary professor of International Law at the Graduate Institute of International Studies in Geneva; honorary professor at Cairo University's Faculty of Law; and a member of the Institute of International Law. He served as consultant to

the secretary-general of the United Nations for the preparation of two reports on *Respect of Human Rights in Armed Conflicts* (1969 and 1970), and for the report on *Progressive Development of Principles and Norms of International Law Relating to the New International Economic Order* (1984). He represented Egypt in the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law (1974-1977), and acted as Counsel and advocate for several governments in cases before the International Court of Justice (ICJ) as well as in international arbitrations. He has also served twice as judge ad hoc on the ICJ, as Judge on the Appeals Chamber of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, and as a Commissioner of the United Nations Compensation Commission. Mr Abi Saab is the author of numerous books and articles, including *Les exceptions préliminaires dans la procédure de la Cour internationale: Etude des notions fondamentales de procédure et des moyens de leur mise en oeuvre* (1967), *International Crises and the Role of Law: The United Nations Operation in Congo 1960-1964* (1978), *The Concept of International Organization* (as editor) (1981; French edition, 1980); and of two courses at the Hague Academy of International Law: "Wars of National Liberation in the Geneva Conventions and Protocols" (Recueil des cours, vol. 165 (1979IV)) and the "General Course of Public International Law"(in French) (Recueil des cours, vol. 207 (1987VII)).

**Yonov Frederick Agah** (born 1956) of Nigeria served as chairman of the General Council in 2011. He has also served as chairman of the following WTO Bodies: Dispute Settlement Body in 2010; Council for Trade in Services in 2009; Trade Policy Review Body in 2008; Council for TRIPS in 2007; and Council for Trade in Goods in 2006. He is presently the chair of the Council for TRIPS, Special Session. Mr Agah holds a BSc and an MSc in economics from Ahmadu Bello University, Zaria; an MBA and PhD in international trade from the University of Jos; and an LLB from the University of Abuja. He previously worked as a lecturer at Kaduna Polytechnic, Kaduna (1979-1981); senior features writer/circulation manager, Benue Printing and Publishing Corporation (1982-1984); sales manager, Benue Bottling Company (1984-1987); field manager, UTC Plc. (1990-1991); deputy director (Multilateral) (1991-2001); and director (External Trade) (2002-2005). He was appointed as Nigeria's ambassador to the WTO in 2005. Mr Agah has contributed to various publications and trade issues, including books and journal articles.

**Celso Luiz Nunes Amorim** (born 1942) of Brazil was minister of foreign relations from 1993 to 1994 under President Itamar Franco and again from 2003 to 2010 under President Luiz Inácio Lula da Silva. He graduated in 1965 from the Rio Branco Institute, an undergraduate school of international relations run by the Ministry of External Relations, and obtained his post-graduate degree in International Relations from the Diplomatic Academy of Vienna in 1967. He was a Portuguese language professor at the Rio Branco Institute, as well as political science and international relations professor at the University of Brasília. He is a permanent member of the Foreign Affairs Department of the University of São Paulo Institute of Advanced Studies. In 1987, he was appointed secretary for international affairs for the Ministry of Science and Technology. He served in that position until 1989, when he was selected to be the director-general for cultural affairs in the Ministry of External Relations. Mr Amorim became director-general for economic affairs in 1990, and in 1993 he was promoted to the position of secretary-general of the Brazilian foreign-affairs agency. From 1991 to 1993, he served as head delegate of Brazil to GATT and other international organizations in Geneva. While minister of foreign relations, in 1994, he signed the Marrakesh Agreement on behalf of Brazil. From 1995 to 1999 he was Brazil's permanent representative to the United Nations in New York. In 1999, he was again named as Brazil's permanent representative to the WTO and the United Nations in Geneva, and served for two years before taking assignment as the ambassador to the United Kingdom in 2001. He became minister of defence under President Dilma Rousseff in 2011.

**Lady Catherine Ashton** (born 1956) of the United Kingdom served as European Commissioner for Trade from 2008 to 2009. She graduated with a BSc in sociology in 1977 from Bedford College. From 1977 to 1983, Lady Ashton worked for the Campaign for Nuclear Disarmament as an administrator. From 1979 to 1981, she was business manager of The Coverdale Organisation, a management consultancy. As of 1983, she worked for the Central Council for Education and Training in Social Work. From 1983 to 1989, she

was director of business in the community, working with business to tackle inequality, and established the Employers' Forum on Disability, Opportunity Now, and the Windsor Fellowship. For most of the 1990s, she worked as a freelance policy adviser. She was made a Labour life peer as Baroness Ashton of Upholland in 1999, under Prime Minister Tony Blair. Lady Ashton was appointed Leader of the House of Lords and Lord President of the Queen's Privy Council in Prime Minister Gordon Brown's first Cabinet in 2007. As well as Leader of the Lords, she held responsibility in the House of Lords for equalities issues, and was instrumental in steering the EU Treaty of Lisbon through the House of Lords. In 2009, she became the High Representative of the Union for Foreign Affairs and Security Policy.

**James Bacchus** (born 1949) of the United States served on the Appellate Body from 1995 to 2003. He received a BA degree from Vanderbilt University, magna cum laude and Phi Beta Kappa, with High Honors in History (1971) and an MA degree from Yale University (1973). He graduated with High Honors from the Florida State University College of Law, where he was editor in chief of the *FSU Law Review* in 1978. He has received honorary doctorates from Rollins College, Sierra Nevada College, and the University of Central Florida. Mr Bacchus has taught and lectured extensively on international law and on international trade law in the United States and elsewhere. Before his appointment to the Appellate Body, he served for two terms as a Member of the Congress of the United States, from Florida, from 1991 to 1995. Previously, he served as a special assistant to the US Trade Representative in the Executive Office of the President of the United States from 1979 to 1981. In addition, he has a broad experience in the private practice of public and private international law. He currently practises law with the firm of Greenberg Traurig LLP and is also a professor of law at Vanderbilt University Law School.

**Luiz Olavo Baptista** (born 1938) of Brazil served on the Appellate Body from 2001 to 2009. He obtained his law degree from the Catholic University of São Paulo, pursued postgraduate studies at Columbia University Law School and The Hague Academy of International Law, and received a PhD in international law from the University of Paris II. He was visiting professor at the University of Michigan (Ann Arbor) from 1978 to 1979, and at the University of Paris I and the University of Paris X from 1996 to 2000. Mr Baptista has been an arbitrator at the United Nations Compensation Commission in several private commercial disputes and investor–state proceedings, as well as in disputes under the Southern Common Market (MERCOSUR) Protocol of Brasilia. In addition, he has participated as a legal adviser in diverse projects sponsored by the World Bank, the United Nations Conference on Trade and Development, the United Nations Centre on Transnational Corporations, and the United Nations Development Programme. He has been a member of the Permanent Court of Arbitration at The Hague from 1996 to 2003, and of the International Chamber of Commerce Institute for International Trade Practices and of its Commission on Trade and Investment Policy since 1999. In addition, he has been one of the arbitrators designated under MERCOSUR Protocol of Brasilia since 1993. Mr Baptista is also senior partner at the LO Baptista Law Firm, in São Paulo, Brazil, where he concentrates his practice on corporate law, arbitration and international litigation. He was professor of international trade law at the University of São Paulo Law School until 2012. Mr Baptista has published extensively on various issues in Brazil and abroad.

**Charlene Barshefsky** (born 1950) of the United States served as the US trade representative from 1997 to 2001, having been deputy US trade representative from 1993 to 1996. She graduated from the University of Wisconsin-Madison with a BA double majoring in English and Political Science in 1972. She earned her JD from the Columbus School of Law of the Catholic University of America in 1975. She is Senior International Partner at the law firm of Wilmer Cutler Pickering Hale and Dorr. Ms Barshefsky has written and lectured extensively on both US and foreign trade laws and public procurement regimes.

**Lilia R. Bautista** (born 1935) of the Philippines served on the Appellate Body from 2007 to 2012. She earned her LLB and an MBA from the University of the Philippines and was conferred an LLM by the University of Michigan as a Dewitt Fellow. Her long career in the Philippine Government also included posts as legal officer in the Office of the President, chief legal officer and subsequently governor and chair of the Board of Investments, and acting trade minister from February to June 1992. From 1992 to 1999, Ms Bautista was the

Philippine permanent representative in Geneva to the United Nations, WTO, WHO, ILO and other international organizations. During her assignment in Geneva, she chaired several bodies, including the WTO Council for Trade in Services. From 1999 to 2000, she served as senior undersecretary and special trade negotiator at the Department of Trade and Industry in Manila. Ms Bautista was the chairperson of the Securities and Exchange Commission of the Philippines from 2000 to 2004. She is currently dean of the Law School of the Jose Rizal University and professorial lecturer of Philippine Judicial Academy, which is the training school for Philippine justices, judges and lawyers. She is also a member of several corporate boards.

**Christopher Beeby** (1935-2000) of New Zealand served on the Appellate Body from 1995 to 2000. Having gained law degrees from Victoria University of Wellington and the London School of Economics, he joined the Legal Division of the Department of Foreign Affairs in 1963, where he worked as the legal adviser to his government's delegation that negotiated the New Zealand–Australia Free Trade Agreement. He became divisional head in 1969. In 1976, he was appointed head of the Economic Division and held that position until he was posted abroad as ambassador to Iran and Pakistan from 1978 to 1980. Upon returning to Wellington, he served first as assistant secretary and from 1985, as deputy secretary, supervising the Legal and Economic Divisions. In 1992, he became New Zealand's ambassador to France and Algeria, and permanent representative to the Organisation for Economic Co-operation and Development.

**Ujal Singh Bhatia** (born 1950) of India was appointed to the Appellate Body for the term of 2011 to 2015. He holds an MA in economics from the University of Manchester and from Delhi University, as well as a BA in economics, also from Delhi University. He joined the Indian Administrative Service in 1974. From 2004 to 2010, Mr Bhatia was India's ambassador and permanent representative to the WTO. During his tenure as ambassador and permanent representative, he was an active participant in the dispute settlement process, representing India in a number of dispute settlement cases both as a complainant and respondent in disputes relating to anti-dumping, as well as taxation and import duty issues. He also served as a WTO dispute settlement panellist. Mr Bhatia previously served as joint secretary in the Indian Ministry of Commerce, where he worked on a range of international trade issues. Mr Bhatia was also joint secretary of the Ministry of Information and Broadcasting and held various positions in the government of the Indian state of Orissa as well as in industrial management in Orissa. He is a frequent lecturer on international trade issues, and has published numerous papers and articles in Indian and foreign journals on a wide range of trade and economic issues.

**Richard Blackhurst** (born 1937) of the United States served as director of Economic Research and Analysis at the GATT and WTO from 1985 to 1997. He received a BS in business administration from the University of California–Los Angeles in 1959 and a doctorate in economics from the University of Chicago in 1968. After teaching at the University of Chicago (1965-1967), Rutgers College (1967-1970) and the University of Waterloo (1972-1974), he joined the GATT Secretariat in 1974. Mr Blackhurst was also scholar in residence at the US Tariff Commission from 1968 to 1969, an adjunct professor at the Graduate Institute of International and Development Studies in Geneva from 1974 to 2002, and was founding editor of the *World Trade Review* from 2001 to 2004. Since 2004, he has been an adjunct professor at the Fletcher School at Tufts University. He is the author of numerous journal articles and book chapters.

**Clemens Boonekamp** (born 1945) of the Netherlands was director of both the Trade Policies Review Division (1998-2009) and the Agriculture Division (2009-2012). He received a BCom (Hons.) from Rhodes University in South Africa (1967), an MA in economics from Simon Fraser University in Canada (1972) and a PhD in economics from Brown University in the United States (1976). After teaching economics at the University of British Columbia (1976-1980), he became a senior economist at the International Monetary Fund (1980-1991). His career at the WTO started in 1991 as a counsellor in the Trade Policies Review Division and then the External Relations Division. Since 2012, he has worked as a consultant. He is the author of numerous journal articles and papers on portfolio choice, uncertainty, voluntary export restraints, industrial policy, and other topics in trade and economics.

**Lord Leon Brittan** (born 1939) of the United Kingdom served as European Commissioner for Trade from 1993 to 1999. He was educated at the Haberdashers' Aske's Boys' School and then Trinity College, the University of Cambridge, where he was president of the Cambridge Union Society and chairman of Cambridge University Conservative Association. He was elected to parliament in 1974 and became an opposition spokesman in 1976. He was made a Queen's Counsel in 1978. From 1979 to 1981, he was minister of state at the Home Office, and then was made chief secretary to the Treasury. He was home secretary from 1983 to 1985, and was then moved to secretary of state for Trade and Industry. He was made European commissioner for competition at the European Commission early in 1989, resigning as a Member of Parliament to take the position. In 1995, he became European commissioner for trade and European commissioner for external affairs, also serving as vice-president of the European Commission. He was knighted in 1989, and was created Baron Brittan of Spennithorne in the County of North Yorkshire in 2000. He is vice-chairman of UBS AG Investment Bank, non-executive director of Unilever, and member of the international advisory committee for Total SA. He has been vice-chairman of UBS Investment Bank since 2000 but took leave of absence from September 2010 until February 2011 to serve as trade adviser to the Prime Minister. He has written two books on Europe and a number of papers and pamphlets, and has honorary degrees from a number of universities.

**Kåre Bryn** (born 1944) of Norway served as chairman of the WTO General Council in 2000. He graduated from the Norwegian School of Economics and Business Administration in 1968 and started working for the Norwegian Ministry of Foreign Affairs in 1969. After serving in the Norwegian diplomatic posts in London, Belgrade and Geneva, he was promoted to deputy under-secretary of state in 1989. He remained there until 1999, when he became Norwegian ambassador to the WTO and the European Free Trade Association (EFTA). From 2003 to 2006, he served as the Norwegian ambassador to the Netherlands. He then became secretary-general of EFTA (2006-2012).

**Seung Wha Chang** (born 1963) of the Republic of Korea was appointed to the Appellate Body for the term of 2012 to 2016. He holds an LLB and an LLM from Seoul National University School of Law, and an LLM as well as an SJD in international trade law from Harvard Law School. Mr Chang began his professional academic career at the Seoul National University School of Law in 1995, and was awarded professorial tenure in 2002. He has taught international trade law at Harvard Law School, Yale Law School, Stanford Law School, New York University, Duke Law School and Georgetown University, among others. In 2007, Harvard Law School granted him an endowed visiting professorial chair title, Nomura Visiting Professor of International Financial Systems. He had been a Seoul district court judge, handling many cases involving international trade disciplines. He also practised as a foreign attorney at an international law firm in Washington, DC, handling international trade matters, including trade remedies and WTO-related disputes. He served on several WTO dispute settlement panels. He has also served as chairman or member of several arbitral tribunals dealing with commercial matters. In 2009, he was appointed by the International Chamber of Commerce as a member of the International Court of Arbitration. Mr Chang has published many books and articles in the field of international trade law in internationally recognized journals. In addition, he serves as an editorial or advisory board member of the *Journal of International Economic Law* and the *Journal of International Dispute Settlement*. Mr Chang is currently professor of law at Seoul National University, where he teaches international trade law and international arbitration.

**John Crosbie** (born 1931) of Canada served as trade minister from 1988 to 1991. He studied political science and economics at Queen's University in Kingston, Ontario, and graduated in 1956 from Dalhousie Law School in Halifax, Nova Scotia. He undertook postgraduate studies at the Institute for Advanced Legal Studies of the University of London and the London School of Economics from 1956 to 1957 and was called to the Newfoundland Bar in 1957. Mr Crosbie first entered politics as a member of the St. John's City Council, where he served until appointed to the provincial cabinet of Liberal Premier Joey Smallwood in 1966. He left provincial politics in 1976, the year he won a seat in the Canadian House of Commons. Mr Crosbie was named minister of justice in 1984, minister of transport in 1986 and minister for international trade in 1988, shortly after the Canada-US Free Trade Agreement was negotiated. Mr Crosbie finished his career as minister

of fisheries and oceans in 1993. In 2008, Governor General Michaëlle Jean appointed him as lieutenant governor of Newfoundland and Labrador.

**William R. Crosbie** (born 1955) of Canada was policy adviser on trade negotiations to Minister for International Trade John Crosbie from 1988 to 1991, at the time that Canada made the original proposal to establish the WTO. From 1993 to 2000, he held various management positions responsible for Canada's participation in trade meetings and organizations (APEC, the FTAA, NAFTA, OECD, WIPO, the WTO, etc.) and trade negotiations in areas of services, investment, intellectual property, electronic commerce, telecommunications and cultural industries. Later postings included minister-counsellor for economic and trade policy at the Canadian Embassy in Washington (2000-2004); director-general North America, DFAIT (2004-2007); ADM Consular Services and Emergency Management (2007-2009); Canadian ambassador to Afghanistan (2009-2011); and ADM Consular Services and Emergency Management (2011-2012). Since 2012, he has been ADM North America, Consular and Emergency Management and Chief Security Officer.

**Karel De Gucht** (born 1954) of Belgium has served as European commissioner for trade since 2010. He received a law degree from Vrije Universiteit Brussels in 1976. Mr De Gucht was a member of the European Parliament from 1995 to 1999 and a member of the Flemish Parliament from 1999 to 2003. He also served as Belgium's minister of foreign affairs from 2004 to 2009 and then European commissioner for development and humanitarian aid from 2009 to 2010. Among his publications are *Time and Tide Wait for No Man: The Changing European Geopolitical Landscape* (1991) and *De toekomst is vrij: over het liberalisme in de 21ste eeuw* (2002).

**Luis Ernesto Derbez** (born 1947) of Mexico served as secretary of economy (2000-2002) and secretary of foreign affairs (2003-2006) of the government of Mexico. He holds a BA in economics from the Universidad Autónoma de San Luis Potosí (1970), was awarded a Fulbright-Haynes Scholarship and completed an MA in economics from University of Oregon (1974), and finished a PhD in economics at Iowa State of Science and Technology (1980). In his professional and academic career, he worked or taught at the World Bank Group, the Inter-American Development Bank, Johns Hopkins University's School of Advanced International Studies, and the Instituto Tecnológico de Monterrey. He also did consulting work for some of Mexico's leading private sector companies. In 2001 and 2002, he was Chairman of the Board for Exportadora de Sal, SA and Transportes de Sal, SA, joint ventures between the Mexican Government and the Mitsubishi Corporation. He previously served in the cabinet of President Vicente Fox as secretary of economy, from 2000 to 2003. Since 2007, he has been the general director of the Centre for Globalization, Competitiveness and Democracy at the Instituto Tecnológico de Monterrey, Campus Santa Fe, and secretary for international affairs of the Partido de Acción Nacional. He is currently the president of the Universidad de Las Américas Puebla.

**Victor do Prado** (born 1961) of Brazil served as deputy *chef de cabinet* in the Lamy administration (2005-2012), chairman of the WTO Construction Project Committee (since 2007) and as director of the Council and Trade Negotiations Committee Division (since 2012). He graduated from the Faculdade de Direito da Universidade de São Paulo in 1984, then received an MA in international relations (graduating first in his class) from the Instituto Rio Branco (the Brazilian diplomatic academy) in 1999. He was also a visiting researcher in the law of economic integration at the London School of Economics (1991). Joining the Ministry of External Relations in 1990, he was posted to the Permanent Mission of Brazil in Geneva from 1993 to 1997. After serving as Trade and Economic Assistant to Minister of External Relations Luiz Felipe Lampreia (1997-2001) and in the Brazilian Embassy in Berlin (2001-2002), he joined the WTO Secretariat. Mr do Prado worked as a counsellor in the Rules Division from 2002 to 2005. He is the author of several articles on issues in trade policy and dispute settlement.

**Arthur Dunkel** (1932-2005) of Switzerland (Portuguese-born) was GATT director-general from 1980 to 1993. He held a degree in economic and commercial sciences, University of Lausanne. In the Federal Office for Foreign Economic Affairs (Department of Public Economy), he was successively head of the sections for Organisation for Economic Co-operation and Development matters (1960), for cooperation with developing

countries (1964) and for world trade policy (1971). In 1973, he was appointed permanent representative to GATT with the rank of minister plenipotentiary. In 1976, Mr Dunkel was promoted delegate of the Federal Council for Trade Agreements, ambassador plenipotentiary. In this capacity, in charge of world trade policy matters, multilateral trade and economic relations with developing countries, industrialization, trade in agriculture and primary products, bilateral trade relations with various partners. Head or acting head of the Swiss delegations to the Tokyo Round negotiations, United Nations Conference on Trade and Development (UNCTAD) IV and V, United Nations Industrial Development Organization and Commodities Conferences, among others. Among his other posts were to the Intergovernmental Group on Supplementary Financing (1968); Rapporteur of UNCTAD Board (1969); chairman of Balance-of-Payments Committee of GATT (1972-1975); and chairman of the United Nations Conference on a new Wheat Agreement (1978).

**Claus Dieter Ehlermann** (born 1931) of Germany served on the Appellate Body in 1995 to 2001. In 1961, Mr Ehlermann joined the Legal Service of the European Commission and rose to become its head in 1977. He served as director-general of the Legal Service for 10 years until 1987, when he was appointed spokesman for the Commission and Special Adviser to the President on institutional questions. From 1990 to 1995, he was director-general of the Directorate-General for Competition, which brought him into close contact with competition authorities in the United States (within the framework of the bilateral US-EU Cooperation Agreement, negotiated in 1990 and 1991), and in Japan, Australia and New Zealand. He also assisted the fledgling competition authorities in the transition economies of Central and Eastern Europe. Since 1972, Mr Ehlermann has also pursued an academic career, teaching Community law in Bruges, Brussels, Hamburg and Florence. He has held the chair of economic law at the European University Institute in Florence and is honorary professor at the University of Hamburg. He has written more than 200 publications, which, since 1991, have dealt primarily with competition law and policy, industrial policy and international cooperation. He also serves as a member on several academic advisory bodies, in particular with respect to law reviews. Mr Ehlermann joined the Brussels office of Wilmer, Cutler and Pickering in 2002.

**Crawford Falconer** of New Zealand was ambassador to the WTO and chair of the Agriculture Negotiations Committee from 2005 to 2009, and was a panellist in 13 dispute settlement panels. He is a former chair of the Organisation for Economic Co-operation and Development (OECD) Trade Committee, the GATT Subsidies Committee and a past board member of the New Zealand Pacific Economic Cooperation Council. From 1995 to 2000, he worked for the OECD Secretariat, first as division head in the Trade Directorate and then as its deputy director. He left the New Zealand Ministry of Foreign Affairs and Trade in 2012 as New Zealand's vice-minister (deputy secretary) for international trade (2009-2012) with responsibility for managing New Zealand's multilateral and bilateral trade and economic negotiations. He returned to the OECD in 2012, managing its projects to catalogue, analyse and measure barriers to services trade and to develop the trade policy implications of the OECD work on trade in value added. He has authored several trade publications.

**Florentino Feliciano** (born 1928) of the Philippines served on the Appellate Body from 1995 to 2001. Having graduated in law from the University of the Philippines, he went on to earn an LLM and SJD from Yale University. He taught in the Faculties of Law of the University of the Philippines and of Yale University. A member of the Institut de Droit International, he has lectured at The Hague Academy of International Law and serves as a member of the Curatorium of the Academy. He served as senior associate justice of the Supreme Court of the Philippines and vice-chairman of the Academic Council of the Institute of International Business Law and Practice of the International Chamber of Commerce in Paris. Before joining the judiciary in 1986, Mr Feliciano had been a member, and then managing partner and chairman of the executive committee, of the law firm SyCip Salazar Feliciano and Hernandez since 1962, where he worked on trade and corporate law cases and transactions concerning antidumping, intellectual property rights, banking and insurance services, shipping and telecommunications. He rejoined SyCip Salazar Hernandez and Gatmaitan as senior counsel. Feliciano also has extensive experience with international investment, commercial and trade law arbitrations at the International Centre for Settlement of Investment Disputes in Washington, at the International Chamber of Commerce (ICC), in Paris, under the North American Free Trade Agreement, and the Arbitration Institute of

the Stockholm Chamber of Commerce. He served as a member of the ICC International Court of Arbitration, in Paris. He has been on the Arbitrators Panel of the American Arbitration Association in New York, a member and then president of the Asian Development Bank Administrative Tribunal, and a member and then vice-president of the World Bank Administrative Tribunal. Mr Feliciano has written and published on various aspects of international business law and public international law.

**Arumugamangalam Venkatachalam Ganesan** (born 1935) of India served on the Appellate Body from 2000 to 2008. He holds an MA and an MSc from the University of Madras. He was appointed to the Indian Administrative Service, a premier civil service of India in 1959, and served in that service until 1993. He held a number of high level assignments, including joint secretary (Investment), Department of Economic Affairs, Government of India (1977-1980); inter-regional adviser, United Nations Centre on Transnational Corporations, United Nations Headquarters, New York (1980-1985); additional secretary, Department of Industrial Development, Government of India (1986-1989); chief negotiator of India for the Uruguay Round of Multilateral Trade Negotiations and special secretary, Ministry of Commerce, Government of India (1989-1990); civil aviation secretary of the Government of India (1990-1991); and commerce secretary of the Government of India (1991-1993). From 1989 to 1993, he represented India at various stages of the Uruguay Round negotiations. After his retirement from civil service, Mr Ganesan served as an expert and consultant to various agencies of the United Nations system, including the United Nations Conference on Trade and Development (UNCTAD), the United Nations Industrial Development Organization (UNIDO) and the United Nations Development Programme (UNDP). Until his appointment to the Appellate Body of the WTO in 2000, he was a member of the government of India's High Level Trade Advisory Committee on Multilateral Trade Negotiations. He was also a member of the Permanent Group of Experts under the WTO Agreement on Subsidies and Countervailing Measures. Mr Ganesan has written numerous newspaper articles and monographs dealing with various aspects of the Uruguay Round Agreements and their implications. He is also the author of many papers on trade, investment and intellectual property issues for UNCTAD and UNIDO, and has contributed to books published in India and abroad on matters concerning the Uruguay Round, including intellectual property right issues.

**John Gero** of Canada served as chairman of the WTO General Council in 2010. An economist who joined the Canadian government in 1975, he served at Canadian missions in Nairobi and Geneva. He was the Canadian GATT and NAFTA negotiator on intellectual property. From 1996 to 2000, Mr Gero was director-general of the Trade Policy Bureau responsible for the trade policy aspects of investment, competition policy, government procurement, services and intellectual property issues. He then served as assistant deputy minister for international business and chief trade commissioner (2000-2003), then was assistant deputy minister for trade policy and negotiations and chief negotiator for the WTO (2003-2008).

**Eirik Glenne** (born 1946) of Norway served as chairman of the WTO General Council in 2006. He holds an MA in economics from University in Oslo. His past positions include Norwegian ambassador to Malaysia (1988-1992), deputy under-secretary (1993-1995), deputy secretary-general, Ministry of Foreign Affairs (1995-1999), ambassador to Sweden (1999-2003) and to the WTO and EFTA (2003-2008).

**Anabel González C.** (born 1963) of Costa Rica was appointed minister of foreign trade in 2010. She has a law degree from the University of Costa Rica and an LLM from Georgetown University. Prior to her current position as minister she worked as senior adviser on trade and integration at the Inter-American Development Bank (2009-2010); director of the WTO Agriculture Division (2006-2009); chief negotiator of the Central America–United States–Dominican Republic Free Trade Agreement (CAFTA-DR) (2002-2004); director-general of the Costa Rican Investment Board (2001-2002); vice-minister of foreign trade (1998-2001); international adviser (1997-1998); director of trade negotiations and chief of staff of the Foreign Trade Minister's Office (1991-1997 and 1989-1990, respectively). She has lectured and published extensively on trade and investment issues. Among her publications are: *La implementación de acuerdos comerciales en América Latina: la experiencia de implementación del CAFTA-RD en Costa Rica* (2009); "Revitalizing the US Trade Agenda in Latin America: Building on the FTA Platform", *Journal of International Economic Law* (2009);

*El proceso de negociación de un tratado de libre comercio con Estados Unidos: la experiencia del Tratado de Libre Comercio entre Centroamérica, Estados Unidos y República Dominicana* (2006); and *La aplicación multilateral del CAFTA y sus implicaciones para la profundización del MCCA* (2005).

**Aranha González L.** (born 1969) of Spain served as *chef de cabinet* in the office of Director-General Pascal Lamy from 2005 to 2013, and in that capacity as director-general representative (Sherpa) at G20 meetings. She holds a degree in law from the University of Navarra and a postgraduate in European law from the University Carlos III (Madrid). Ms González served as associate with a major German law firm (Bruckhaus Westrick Stegemann) in Brussels. In 1996, she joined the European Commission, where she held several positions in the area of international trade, including negotiations for trade agreements between the European Communities and Algeria, Iran, the Gulf Cooperation Council and the Southern Common Market (MERCOSUR). From 2002 to 2004, she was the European Union spokeswoman for trade and adviser to EU Trade Commissioner Pascal Lamy.

**Bruce Gosper** (born 1957) of Australia served as chairman of the WTO General Council in 2008. Before joining the Department of Foreign Affairs and Trade, he worked for the Department of Primary Industries and Energy, and served overseas as minister-counsellor (Agriculture) at the Australian embassy in Tokyo (1989-1992), and worked for the Department of Trade and Resources (1980-1987). He was also an adviser to the minister for trade (1996-1998), and assistant secretary, Agriculture Branch, Department of Foreign Affairs and Trade, Canberra (1995). He served as minister (Commercial) at the Australian embassy in Washington (1998-2000) and then as first assistant secretary, Office of Trade Negotiations (2000-2005). He was ambassador and permanent representative to the WTO from 2005 to 2009. He was appointed deputy secretary of the Department of Foreign Affairs and Trade in 2009.

**Thomas R. Graham** (born 1942), a citizen of the United States, was appointed to the Appellate Body for the term of 2011 to 2015. He holds a BA in international relations and economics from Indiana University and a JD from Harvard Law School. Mr Graham is the former head of the International Trade Practice at the global law firm of King & Spalding, and a former adjunct professor of law at the Georgetown Law Center, in Washington, DC. As deputy general counsel in the Office of the US Trade Representative, Mr Graham represented the US government in dispute settlement proceedings under GATT, was instrumental in the negotiation of several Tokyo Round agreements, including the Agreement on Technical Barriers to Trade, and participated in the enactment and implementation of the US Generalized System of Preferences for Developing Countries. Earlier in his career, Mr Graham served in Geneva as a legal officer of the United Nations. He is the author of several articles and monographs on international trade law and policy, and has been a guest scholar at the Brookings Institution and a senior associate at the Carnegie Endowment for International Peace.

**Tim Groser** (born 1950 in the United Kingdom) of New Zealand became minister of trade, minister for climate change issues, and associate minister foreign affairs in 2008. He previously served as ambassador to the WTO (2002-2005), when he was chair of the Rules Negotiating Group (2002-2003) and of the Agriculture Negotiating Group (2003-2005). Mr Groser graduated in 1973 from Victoria University, Wellington with a BA in economic history. He entered government service in 1973 as a junior investigating officer in the New Zealand Treasury. Among his other government positions have been negotiator, Australia–New Zealand Closer Economic Relations Trade Agreement (1979-1982); foreign affairs adviser, Department of Prime Minister and Cabinet (1982-1984); minister (Economic) New Zealand Mission to the GATT and chief agriculture negotiator (1986-1990); chief negotiator in the Uruguay Round (1990-1994); ambassador to Indonesia (1994-1997); principal economic adviser, New Zealand Ministry of Foreign Affairs and Trade (1997-1999); and chief executive of the Asia–New Zealand Foundation (1999-2002).

**Stuart Harbinson** (born 1947) of Hong Kong served as chairman of the WTO General Council in 2001 as well as *chef de cabinet* to Director-General Supachai Panitchpakdi (2002-2005) and special adviser to Director-General Pascal Lamy (2005-2007). He has an MA from the University of Cambridge in archaeology and anthropology, with a major in social anthropology (1969). In the late 1980s and early 1990s, he served as a senior official in the Hong Kong government, in which capacity he took part in many trade negotiations, including numerous bilateral textiles negotiations. He served from 1999 to 2002 as chairman of the International Textiles and Clothing Bureau. He represented Hong Kong and the Hong Kong Special Administrative Region of the People's Republic of China at ambassadorial level in the WTO, in Geneva, from 1994 to 2002. In addition to chairing the General Council, he at various times led the negotiating group responsible for the formative Doha negotiations on agriculture, the Dispute Settlement Body, the TRIPS Council and the Council on Trade in Services, as well as serving on various WTO dispute settlement panels. After leaving international service, he became senior trade policy adviser in the Geneva office of the law firm of Winston & Strawn LLP and, subsequently, Sidley Austin LLP. He is currently an independent trade policy consultant, based in Geneva.

**David Hartridge** (born 1939) of the United Kingdom was *chef de cabinet* of the GATT director-general from 1980 to 1985 and also served as acting director-general of the WTO from May to September 1999. He received an MA in politics, philosophy and economics from the University of Oxford in 1960. Mr Hartridge had previously been director of the GATT Office for Multilateral Trade Negotiations at the General Agreement on Tariffs and Trade, which was responsible for the launch of the Uruguay Round and subsequently for the negotiation of the WTO Agreements on Trade and Intellectual Property Rights, Trade and Investment and Government Procurement. Mr Hartridge served as director of the Services Division from 1993 to 2001. He is a senior WTO counsellor in the Geneva office of White & Case LLP.

**Jennifer Hillman** (born 1957) of the United States served on the Appellate Body in 2007 to 2011. She has a BA and an ME from Duke University and JD from Harvard Law School. From 1993 to 1995, she was responsible for negotiating all US bilateral textile agreements prior to the adoption of the Agreement on Textiles and Clothing. From 1995 to 1997, she served as the chief legal counsel to the Office of the US Trade Representative, overseeing the legal developments necessary to complete the implementation of the Uruguay Round Agreement. From 1998 to 2007, Ms Hillman served as a member of the US International Trade Commission. She also served as a fellow and adjunct professor of law at the Georgetown University Law Center's Institute of International Economic Law. She is now a senior transatlantic fellow at the German Marshall Fund of the United States, where she focuses on transatlantic trade and investment, global governance and international economic issues.

**Carla A. Hills** (born 1934) of the United States served as US Trade Representative in 1989 to 1993 in the administration of George H.W. Bush. She received a bachelor's degree from Stanford University, a law degree from Yale University and studied at the University of Oxford. Before entering government she was a partner at Munger, Tolles, Hills, and Rickershauser in Los Angeles (1962-1974), and also served as adjunct professor at the University of California at Los Angeles Law School teaching antitrust law. Previous positions included secretary of housing and urban development and assistant attorney general, Civil Division, US Department of Justice, in the Ford Administration. Over the years, Ms Hills has served on a number of publicly traded corporate boards and currently sits on one. She also serves on a number of not-for-profit boards including as chair of the National Committee on US-China Relations and of the Inter-American Dialogue; co-chair of the Council on Foreign Relations; member of the Executive Committee for the Peterson Institute for International Economics and of the Trilateral Commission, co-chair of the Advisory Board of the Center for Strategic and International Studies and member of the board of the International Crisis Group. She is chair and chief executive officer of Hills & Company, and she now serves on international advisory boards for American International Group, the Coca-Cola Company, Gilead Sciences, Inc., J.P. Morgan Chase and Rolls Royce as well as the board of the US-China Business Council. She is co-author of *The Antitrust Advisor* (1971).

**Anwarul Hoda** (born 1938) of India was a deputy director-general of GATT from 1993 to 1995 and of the WTO from 1995 to 1999. He was educated at Patna University (India) from where he obtained an MA degree in English language and literature in 1960. In 1962, he was appointed to the Indian Administrative Service. In 1974, he joined the Ministry of Commerce in the government of India. Under the ministry, he held two assignments overseas: member, Indian delegation to the Conference on International Economic Cooperation in Paris (1976) and resident representative to the United Nations Conference on Trade and Development and GATT in Geneva (1977). As a director and later joint secretary in the Ministry of Commerce (1978-1981), his duties included tariff negotiations at Geneva and policy formulation in the capital on non-tariff measure agreements during the Tokyo Round of multilateral trade negotiations. From January 1985 to July 1993, he held senior positions (including special secretary in the rank of permanent secretary) in the Ministry of Commerce, government of India with responsibility for the GATT negotiations. He was the main policy coordinator in the government of India for the Uruguay Round and a senior member of the Indian delegation at the negotiations. From 2004 to 2009, Mr Hoda was a member of the Planning Commission with the rank of a minister of state in the government of India. He is the author of *Developing Countries in the International Trading System 1987* (1987), and *Tariff Negotiations and Renegotiations under the GATT and the WTO* (2001), and a co-author of *WTO Negotiations on Agriculture and Developing Countries* (2007).

**Yousef Hussain Kamal** of Qatar has been serving as minister of finance since 1998 and minister of economy and finance since 2008 and was chairman of the Doha Ministerial Conference in 2001. He holds a BA in business administration from Cairo University and several public financial courses from the International Monetary Fund and various US universities.

**John H. Jackson** (born 1932) of the United States served as general counsel for the Office of the President's Special Representative for Trade (1973-1974) and in 2003 was appointed by Director-General Supachai Panitchpakdi to a WTO Consultative Board chaired by Peter Sutherland. He received an AB from Princeton and a JD from the University of Michigan and holds honorary doctorate (LLD) degrees from Hamburg University, Germany (2003) and the European University Institute, Florence, Italy (2008). He has taught at the Georgetown University School of Law since 1998. He has also been the Hessel E. Yntema Professor of Law at the University of Michigan, a visiting faculty member at the University of Delhi and the University of Brussels, a research scholar at GATT headquarters, a Rockefeller Foundation fellow in Brussels, and associate vice-president for Academic Affairs at the University of Michigan. He is currently director of the Institute for International Economic Law, at Georgetown University Law Center. Mr Jackson has served as a member of the board of editors for the *American Journal of International Law*, *Law and Policy in International Business*, *International Tax & Business Lawyer*, *Fordham International Law Journal* and the *Maryland Journal of International Law & Trade*. He is a member of the editorial board for *The World Economy* and a past member of the editorial boards for the International Bar Association and the *Journal of World Trade Law*. He is the editor-in-chief and a founding editor of the *Journal of International Economic Law*. Among his books are: *Sovereignty, the WTO, and Changing Fundamentals of International Law* (2006); *The Jurisprudence of the GATT and the WTO: Insights on Treaty Law and Economic Relations* (2000); *The World Trade Organization: Constitution and Jurisprudence* (1998); *Legal Problems of International Economic Relations* (co-authored, 2002); *The World Trading System* (1997); and *Implementing the Uruguay Round* (co-authored, 1997).

**Merit E. Janow** (born 1958) of the United States served on the Appellate Body from 2003 to 2007. She grew up in Tokyo. She was deputy assistant US trade representative for Japan and China (1990-1993), and worked as a corporate lawyer specializing in mergers and acquisitions with the law firm Skadden, Arps, Slate, Meagher & Flom in New York (1988-1990). She has been professor in the Practice of International Economic Law and International Affairs at the School of International and Public Affairs of Columbia University since 1994. Ms Janow is the author of several books and has contributed chapters to more than a dozen books.

**Alejandro Jara P.** (born 1949) of Chile was a deputy director-general from 2005 to 2013. He obtained his law degree from the Universidad de Chile (1973) and pursued graduate studies at the Law School, University of California at Berkeley (1975-1976). In 1976, he joined the Foreign Service of Chile, where he specialized in

international economic relations, serving in the Delegation of Chile to GATT (1979-1984) and then seconded to the Latin American Economic System (SELA) in Caracas as coordinator for trade policy affairs. Mr Jara was appointed director for Bilateral Economic Affairs (1993-1994), director for Multilateral Economic Affairs (1994-1999), senior official to the Asia-Pacific Economic Cooperation (1996-1997) and director-general for International Economic Relations (1999-2000). From 2000 to 2005, he served as ambassador and permanent representative of Chile to the WTO, and was chairperson of the Committee on Trade and Environment (2001) and of Trade in Services negotiating group (2002). He is the author of numerous articles and papers on international trade.

**Elin Østebø Johansen** (born 1955) of Norway served as chairman of the WTO General Council in 2012. She holds an MA in development economics from the University of Oslo. Among her previous postings were as junior professional officer in the United Nations Development Programme, Manila; executive officer, Trade and Development first in the Norwegian Ministry of Trade and then in the Norwegian Ministry of Foreign Affairs; first secretary, Norwegian Embassy in Bern; senior adviser on trade policy, Royal Norwegian Ministry of Foreign Affairs; and assistant director-general, Department for Administrative Affairs, Norwegian Ministry of Foreign Affairs. In 1998, she became counsellor in the Permanent Mission of Norway to the WTO, and minister counsellor the next year. After serving in several further posts in the Norwegian Ministry of Foreign Affairs, she was appointed in 2008 ambassador and permanent representative to the WTO and EFTA.

**Michael (“Mickey”) Kantor** (born 1939) of the United States served as the US trade representative from 1993 to 1996 and as secretary of commerce from 1996 to 1997. He received a BA in business and economics from Vanderbilt University in 1961. He served as an officer in the navy for four years, then earned a JD from Georgetown University in 1968. After working for the Legal Services Corporation, providing legal assistance to migrant farm workers, from 1976 to 1993, he practised law with the Los Angeles law firm of Manatt, Phelps, Phillips & Kantor. He practises law at the Washington office of Mayer Brown, an international law firm based in Chicago.

**Julius Katz** (1925-2000) of the United States chaired the negotiations on the Functioning of the GATT System at the start of the Uruguay Round. Mr Katz served in the army in the Second World War and later graduated from George Washington University. From 1950 to 1968, he served in several positions at the Department of State, including director of International Trade, director of International Commodities, and economic adviser in the Office of Eastern European Affairs; deputy assistant secretary of state for international resources and food policy (1968-1974); senior deputy assistant secretary of state (1974-1976); and assistant secretary of state for economic and business affairs at the Department of State (1976-1979). Outside of government service, he worked with Donaldson, Lufkin and Jenrette Futures, Inc., formerly ACLI International Commodity Services, Inc., in several capacities (1980-1985) and as vice-president for the Consultants International Group, Inc. (1985-1987). In his service as deputy US trade representative (1989-1993), he was also a chief negotiator of the North American Free Trade Agreement and the lead negotiator in a trade pact between the United States and the Soviet Union that President George H.W. Bush signed in 1990.

**K. Kesavapany** of Singapore served as chairman of the WTO General Council in 1995. He holds degrees from the University of Malaya and the School of Oriental and African Studies, University of London. Mr Kesavapany is the director of the Institute of Southeast Asian Studies (ISEAS), Singapore. Prior to his appointment to the directorship of ISEAS, Mr Kesavapany was Singapore's high commissioner to Malaysia from 1997 to 2002. In his 30-year career in the Foreign Service, he served as permanent representative to the United Nations in Geneva and was concurrently accredited as ambassador to Italy and Turkey. Mr Kesavapany was elected as the first chairman of the WTO General Council in 1995.

**Kim Chulsu** (born 1941) of the Republic of Korea was a deputy director-general from 1995 to 1999. He received a degree in political science from Tufts University in 1964, and earned a doctorate in political science at the University of Massachusetts. He subsequently taught at Smith College and St. Lawrence University. His career in the Korean government centred on trade policy making and international trade negotiations. He

was appointed minister of trade, industry and energy for the government of the Republic of Korea in 1993. In 1994, he was appointed ambassador for international trade. In his capacity as assistant minister from 1984 to 1990, Mr Kim served as the chief international trade negotiator for the Republic of Korea. From 1987 to 1990, he chaired the Uruguay Round's Negotiating Group on MTN Agreements. In 1991, he was appointed president of the Korea Trade Promotion Corporation.

**Ronald Kirk** (born 1954) of the United States served as the US trade representative from 2009 to 2013. He graduated from Austin College and earned a law degree at the University of Texas School of Law. He served two terms as mayor of Dallas, Texas, from 1995 to 2002. Following a failed race for the Senate in 2002, he returned to the law firm of Gardere Wynne Sewell in Dallas, and was briefly a candidate for chairman of the Democratic National Committee. After the 2004 election, Mr Kirk practised law as a partner in the international law firm, Vinson & Elkins, LLP.

**Julio Lacarte M.** (born 1918) of Uruguay served on the Appellate Body from 1995 to 2001. He is a career diplomat who has been involved with the GATT/WTO trading system since its creation and participated in all eight rounds of multilateral trade negotiations under GATT. He served as the deputy executive secretary of GATT from 1947 to 1948 and returned to GATT as Uruguay's permanent representative in 1961 to 1966 and 1982 to 1992, during which periods he served as chairman of the Council, the Contracting Parties, several dispute settlement panels, and the Uruguay Round Negotiating Groups on dispute settlement and institutional questions. Mr Lacarte has also served as the deputy director of the International Trade and Balance of Payments Division of the United Nations and as the director of Economic Cooperation among Developing Countries of United Nations Conference on Trade and Development. He has also been Uruguay's ambassador to several countries, including the European Community, India, Japan, the United States and Thailand. In his academic career, Mr Lacarte has been professor at the International Association of Comparative Law and at Strasbourg University. He has written several publications.

**Celso Lafer** (born 1941) of Brazil chaired the Dispute Settlement Body in 1996 and the General Council in 1997. He received an LLB from the University of São Paulo in 1964, followed by an MA (1967) and PhD (1970) in political science from Cornell University. He also served on two dispute settlement panels and as a member of the Sutherland Commission. He was head of the Brazilian delegation to the Doha Ministerial Meeting of the WTO (2001). His government positions included foreign minister (1992) in Fernando Collor's presidency, as well as minister of development, industry and trade (1999) and foreign minister (2001-2002) in Fernando Henrique Cardoso's presidency. He is a full professor of the Law School of the University of São Paulo, where he taught public international law and jurisprudence (1971-2011) and has been an emeritus professor since 2012. Since 2007, he has been president of FAPESP (the State of São Paulo Foundation for the Advancement of Research). Mr Lafer is a member of the Brazilian Academy of Letters (2006), of the Brazilian Academy of Sciences (2004) and of the Permanent Court of Arbitration as of 2002. His publications include: *A OMC e a regulamentação do comércio internacional: uma visão brasileira* (1997); *Comércio, Desarmamento, Direitos Humanos - reflexões sobre uma experiência diplomática* (1999); *La identidad internacional de Brasil* (2002); *A Internacionalização dos Direitos Humanos - constituição, racismo e relações internacionais* (2005); and "A Inserção do Brasil no sistema de solução de controvérsias da OMC", forthcoming in the *Liber Amicorum*,

**Luiz Felipe Lampreia** (born 1941) of Brazil was minister of state for foreign relations from 1995 to 2001. He studied sociology at the Catholic University in Rio de Janeiro and graduated from the Brazilian Diplomatic Academy. He has held a number of government positions, including permanent representative to the international organizations in Geneva (1993-1994), chief negotiator for Brazil in the Uruguay Round, secretary-general of the ministry of foreign relations (1992-1993), and under-secretary-general for political affairs (1988-1990). He is vice-chairman of the Brazilian Center for International Affairs.

**Pascal Lamy** (born 1947) of France served as director-general from 2005 to 2013. He holds degrees from the Ecole des Hautes Etudes Commerciales, in Paris, from the Institut d'Etudes Politiques and from the Ecole Nationale d'Administration. He began his career in the French civil service at the Inspection Générale des

finances and at the Treasury, then became an adviser to Finance Minister Jacques Delors, and subsequently to Prime Minister Pierre Mauroy. In Brussels from 1985 to 1994, Mr Lamy was chief of staff for President Jacques Delors of the European Commission, and his representative as sherpa in the G7. In 1994, he joined the team in charge of rescuing Credit Lyonnais, and later became CEO of the bank until its privatisation in 1999. From 1999 to 2004, he was commissioner for trade at the European Commission. He then spent a short sabbatical period as president of "Notre Europe", a think tank working on European integration, as associate professor at the Institut d'Etudes Politiques, in Paris, and as advisor to Poul Nyrup Rasmussen (president of the European Socialist Party). Among his publications are: *La démocratie mondiale: pour une autre gouvernance globale* (2004), *L'Europe en première ligne avec Erik Orsenna* (2002), *L'Europe de nos volontés* (2002) and *Monde-Europe* (1993).

**Warren Lavorel** (1935-2011) of the United States was a deputy director-general of the GATT from 1993 to 1995 and of the WTO from 1995 to 1999. He received a BA in history and psychology from University of California at Berkeley and an MA in economics from Stanford University. He began his government career as an economist with the Central Intelligence Agency, then served as a foreign service officer in Manila, Paris, Luxembourg and Brussels. He participated in the Tokyo Round as a member of the US delegation resident in Geneva, when his activities covered not only the negotiations themselves but also the implementation phase. Mr Lavorel later served as US trade representative deputy chief of mission in Geneva from 1981 to 1987, then as the US coordinator for the Uruguay Round of Multilateral Trade Negotiations from 1987 to 1993.

**John S. Lockhart** (born 1935) of Australia served on the Appellate Body from 2001 to 2006. He was executive director at the Asian Development Bank (ADB), in the Philippines, from July 1999 to 2002, working closely with developing member countries on the development of programmes directed to poverty alleviation through the promotion of economic growth. His other duties for the ADB included the development of law reform programmes and assisting in the provision of advice on legal questions, notably the interpretation of the ADB Charter, international treaties and United Nations instruments. Prior to joining the ADB, Mr Lockhart served as judicial reform specialist at the World Bank focusing on strengthening legal and judicial institutions and working closely with developing countries and economies in transition in their projects of judicial and legal reform. After graduating in arts and law from the University of Sydney in 1958, Mr Lockhart's professional experience has included judge, Federal Court of Australia (1978-1999); president of the Australian Competition Tribunal (1982-1999); deputy president of the Australian Copyright Tribunal (1981-1997); and Queen's Counsel, Australia and the United Kingdom Privy Council (1973-1978). He was appointed an officer of the Order of Australia in 1994 for services to the law, education and the arts.

**Olivier Long** (1915-2003) of Switzerland was director-general of GATT from 1968 to 1980. He received doctorates in law from the University of Paris and in political science from the University of Geneva. After military service from 1939 to 1942, he worked for the International Red Cross first in Geneva (1943) and then London (1944-1946), before holding a series of diplomatic positions for Switzerland in Bern, Washington, the United Kingdom and Malta. Mr Long was the head of the Swiss delegation to the European Free Trade Association from 1960 to 1966. He was also a professor at the Graduate Institute of International Studies in Geneva. He headed the eponymous commission that produced the report *Public Scrutiny of Protection: Domestic Policy Transparency and Trade Liberalization* (1989). Among his other publications were *Reflections on the Changes in International Trade* (1970), *International Trade Under Threat: A Constructive Response* (1978) and *Law and Its Limitations in the GATT Multilateral Trade System* (1985).

**Patrick Low** (born 1949 in Kenya) of Spain served as Director-General Mike Moore's *chef de cabinet* from 1999 to 2000, and as WTO chief economist from both 1997 to 1999 and from 2000 to the present. He holds a BA in economics from the University of Kent and a PhD in economics from Sussex University. He worked at the GATT Secretariat from 1980 to 1987, taught economics at El Colegio de México in Mexico City from 1987 to 1990, and from 1990 to 1994 he worked as a senior economist in the World Bank's International Trade Division. He has been with the WTO since its creation in 1995, working on trade in services for two years before his appointment as chief economist. He is also a senior fellow of the Fung Global Institute, where he

is involved in research on supply chains, and an adjunct professor of international economics at the Graduate Institute of International and Development Studies, Geneva. He has written on a range of trade issues.

**Hamid Mamdouh** (born 1952) of Egypt has served as the director of the Trade in Services Division of the WTO since 2001. He entered the diplomatic service of Egypt in 1976, with postings as representative of Egypt to GATT in Geneva in 1985 as well as trade policy adviser to the minister of economy and foreign trade of Egypt, commercial attaché of the Egyptian Embassy in Canberra (Australia), and Egypt's representative to the United Nations Economic Commission for Africa in Addis Ababa (Ethiopia). During the Uruguay Round negotiations his responsibilities included legal matters relating to the drafting of GATS. Other positions in GATT include assistant to the deputy director-general of GATT, legal adviser on GATT dispute settlement and senior counsellor in the Services Division.

**Lord Peter Mandelson** (born 1953) of the United Kingdom served as European commissioner for trade from 2004 to 2008. He read philosophy, politics and economics at St Catherine's College, the University of Oxford (1973-1976). He worked as a television producer at London Weekend Television on Weekend World before Labour Party leader Neil Kinnock appointed him as director of communications in 1985. He was elected to the House of Commons in 1992. In 1998, he joined the Cabinet of Prime Minister Tony Blair as secretary of state for trade and industry. After ten months out of Cabinet in 1999, he was appointed secretary of state for Northern Ireland. In 2008, he left his post as trade commissioner to return to UK politics, becoming business secretary, a life peer and gaining a seat in the House of Lords. In 2010, he became chairman of Global Counsel LLP, a consultancy firm, and published his memoirs, entitled *The Third Man: Life at the Heart of New Labour*.

**Sergio Marchi** (born 1956) of Canada served as chairman of the WTO General Council in 2002. He holds a BA from York University, Toronto. First elected as a Toronto city councillor in 1982, he later moved into the House of Commons as a member of parliament in 1984, where he represented the Toronto riding of York West for 15 years. Mr Marchi served as minister for three different portfolios: citizenship and immigration, environment and international trade. In 1999, he became Canadian ambassador to the WTO and United Nations Agencies in Geneva, where he served for five years. He was also chair of the WTO Services Committee. After leaving government service, he became co-chair of APCO Worldwide International Advisory Council. He currently serves as director of Jeeves Group Switzerland, a family-owned group of financial services firms. He also is an adjunct professor at the US Webster University in Geneva, in the International Relations Department.

**Madan Mathur** (1924-1996) of India served as deputy director-general of GATT from 1973 until his retirement in 1991. After studying economics and literature at the University of India, he passed the competitive exam to become an officer in the Indian Administrative Service, and held several posts in the Indian ministries of finance and international trade. He was among the first group of officials who were awarded fellowships from the United Nations Technical Assistance Administration to follow a training course at the GATT Secretariat in 1956, at which time he was under-secretary in the Ministry of Commerce. Mr Mathur joined the GATT Secretariat in 1964 as director of the Department of Trade and Development, where his tasks included coordination with the United Nations Conference on Trade and Development (UNCTAD) of the GATT/UNCTAD International Trade Centre. Upon his appointment as deputy director-general at the start of the Tokyo Round, his principal responsibility was to direct GATT activities on the trade and development problems of developing countries. He chaired several negotiating groups during the Tokyo and Uruguay rounds, including the Uruguay Round Surveillance Body. Upon his retirement, he served as special adviser to the United Nations Conference on Environment and Development.

**Mitsuo Matsushita** (born 1933) of Japan served on the Appellate Body from 1995 to 2000. Having gained a PhD from Tulane University, United States, and a DJur from Tokyo University, Mr Matsushita went on to become widely acknowledged as one of the most authoritative Japanese scholars in the field of international economic law. In his academic career, he has held professorships at Sophia University and

Tokyo University. He has been a visiting professor at Harvard University, Georgetown University, University of Michigan, Columbia University, and at the College of Europe in Bruges, Belgium. In his public career, Mr Matsushita has been attached to the Ministry of Finance and the Ministry of International Economics and Trade as a member of various councils dealing with telecommunications, customs and tariffs, export and import transactions, and industrial property. He served as a member of the Office of the Ombudsman of Trade and Investment, a special office of the Japanese government which dealt with market access issues. He is professor emeritus at Tokyo University and counsel to Nagashima, Ohno & Tsunematsu, a leading international law firm in Tokyo. He has written many publications on various aspects of international trade and competition and investment law.

**Mario Matus** (born 1956) of Chile served as chairman of the WTO General Council in 2009. He has a law degree from Universidad de Chile and studied law, economics and international politics at the University of Oxford, Queen Elizabeth House, St. Edmund Hall. From 1994 to 1999, he was minister in charge of trade at the embassy of Chile to the United States. His other posts have been trade adviser to the Undersecretary of Foreign Affairs (1992-1993) and delegate to the GATT during the Uruguay Round negotiations (1987-1991). He served before as director for bilateral and multilateral economic affairs of the Ministry of Foreign Affairs, chief trade negotiator of the Chilean FTAs with China, the European Union, EFTA, the Republic of Korea, Trade Coordinator for Chile-US and Free Trade Agreement of the Americas, as well as Asia-Pacific Economic Cooperation Senior Official (2004-2005) and chair of various groups. Since 2005, he has been ambassador and permanent representative to the WTO, WIPO and UNCTAD. He has been professor and visiting professor of law and international relations in various universities in Chile and the United States.

**Ali Said Mchumo** of Tanzania served as chairman of the WTO General Council in 1999. He holds an MA in political economy from the University of London and an LLB from the University of East Africa, in Dar es Salaam. His other positions in government service included ambassador in Mozambique, Japan, the United Kingdom and the United Nations in Geneva; deputy minister for home affairs; and minister of trade. During his time in Geneva, he served as chairman of the UN High Commissioner for Refugees, of the Governing Council of Common Fund for Commodities, and as president of the Trade Development Board of the United Nations Conference on Trade and Development. He also served as the deputy secretary-general for finance and administration in the East African Community and as managing director of the Common Fund for Commodities.

**Amina Mohamed** (born 1961) of Kenya served as chairman of the WTO General Council from 2005 to 2006. Prior to that position she chaired the Dispute Settlement Body in 2004 and the Trade Policy Review Body in 2003. An international lawyer and a career Kenyan Foreign Service Officer, she was educated in several countries and several institutions, including the Center for International Relations, International Law and International Trade Law of Kiev State University and the University of Oxford. Ms Mohamed was an international law fellow at the United Nations Institute for Training and Research. Her work experience includes the drafting of by-laws at local and regional government level in Kenya, international and bilateral instruments at the Legal Division of the Ministry of Foreign Affairs and International Co-operation, the Permanent Mission of Kenya to the United Nations in New York, legal adviser in the Ministry of Foreign Affairs, and represented the government of Kenya at various international meetings and conferences. She has been a member of the Executive Boards and Committees of the World Health Organization, the United Nations High Commissioner of Refugees, the World Intellectual Property Organization, the International Labour Organization (ILO), the United Nations Conference on Trade and Development and UNAIDS. She has coordinated and been the spokesman for the African Group in Geneva in various areas, including at the Human Rights Commission, the International Organization for Migration, ILO as well as the WTO. She has served twice as the chairman of the African Group in Geneva. From 2000 to 2006, she was the permanent representative of Kenya to the United Nations in Geneva. From 2008 to 2011, she served as the permanent secretary in Kenya's Ministry of Justice, National Cohesion and Constitutional Affairs before she was appointed assistant secretary-general and deputy executive director of the United Nations Environment Programme.

**Mike Moore** (born 1949) of New Zealand was director-general from 1999 to 2002. He was educated at the Bay of Islands College and Dilworth School. Mr Moore worked as a printer, meat worker, construction worker, social worker and trade union researcher before he became the youngest member of parliament ever elected in New Zealand in 1972. He served as prime minister of New Zealand for two months in 1990, followed by a decade of service as leader of the Labour Party in opposition (1990-1993) and as opposition spokesperson on foreign affairs and overseas trade (1993-1999). Among his prior positions were six ministerial stints, several of them in trade-related positions: minister of overseas trade and marketing (1984-1990), minister of external relations and trade (1988-1990) and minister of foreign affairs (1990). He advanced the Australia–New Zealand Closer Economic Relations Trade Agreement and promoted a trade treaty with small, vulnerable South Pacific Island nations that needed special and differential treatment into the New Zealand market. He played a leading role in launching the Uruguay Round as minister of overseas trade and marketing, and was at the ministerial meetings in Punta Del Este (1986), Montreal (1988), Brussels (1990) and Marrakesh (1994). He is the current New Zealand ambassador to the United States.

**Said El Naggar** (1920-2004) of Egypt served on the Appellate Body from 1995 to 2000. Mr El Naggar graduated from the Faculty of Law at Cairo University in 1942 and completed graduate studies in economics at London University, where he obtained an MA in 1948 and a PhD in 1951. He also was a research fellow at the University of Michigan (Ann Arbor), and a visiting professor at Princeton University (New Jersey). He was professor emeritus of economics at Cairo University and combined his academic expertise with public service for more than 30 years. After a teaching career at Cairo University, Mr El Naggar joined the United Nations Conference on Trade and Development in 1965 as deputy director of the Research Division, a post he held for six years until he was appointed director of the United Nations Economic and Social Office in Beirut, Lebanon. From 1976 to 1984, he served as executive director of the World Bank, representing the Arab countries, before returning to Cairo University as professor emeritus. Since 1991, he also was president of the New Civic Forum, a nongovernment organization dedicated to economic, political and social liberalization in Egypt. He was the author of several books and papers on international trade and finance, economic development and the Egyptian economy.

**Dato' Muhamad Noor** (born 1951) of Malaysia served as chairman of the WTO General Council in 2007. He obtained a BA in economics from the University of Malaya and an MA in public policy from the University of Wisconsin, Madison. He also attended the Advanced Management Program at Harvard Business School. He held several senior positions within the Malaysian public service, including deputy secretary-general in the Ministry of Women, Family and Community Development; head of planning and policy research and chief information officer for the Ministry of Human Resources; and principal assistant secretary with the Ministry of Plantation Industry and Commodities. Mr Noor was Malaysia's permanent representative to the WTO from 2003 to 2009. After leaving Geneva, he became the executive director of the Secretariat of the Asia-Pacific Economic Cooperation, based in Singapore.

**Shotaro Oshima** (born 1943) of Japan served as chairman of the WTO General Council in 2004 and on the Appellate Body from 2008 to 2012. He is a law graduate from the University of Tokyo, with 40 years of experience as a diplomat in Japan's foreign service, most recently as ambassador to the Republic of Korea. From 2002 to 2005, Mr Oshima was Japan's permanent representative to the WTO, during which time he served as chair of the General Council and the Dispute Settlement Body. Prior to his time in Geneva, Mr Oshima served as deputy foreign minister responsible for economic matters and was designated as Prime Minister Koizumi's personal representative to the G8 Summit in Canada in 2002. In the same year, he served as the Prime Minister's personal representative to the UN World Summit on Sustainable Development in South Africa. From 1997 to 2000, Mr Oshima served as director-general for economic affairs in the Ministry of Foreign Affairs, responsible for formulating and implementing major policy initiatives in Japan's external economic relations. He is currently special representative of the government of Japan in charge of consultations toward participating in the Trans-Pacific Partnership negotiations with the countries concerned. Among his publications is "Wrapping the July (2004) Package" in *Managing Multilateral Trade Negotiations: The Role of the WTO Chairman*.

**Richard O'Toole** (born 1947) of Ireland was GATT/WTO assistant director-general from July 1993 to June 1995 and served as Peter Sutherland's *chef de cabinet*. During the Uruguay Round negotiations he was co-ordinator of the director-general's internal Secretariat Strategy Group which advised the director-general on the development and conduct of the negotiating process. Mr O'Toole was educated at St. Ignatius College, Galway, and at the National University of Ireland, Galway, where he graduated in 1972 with an MSc in Chemistry. He commenced his career at the Irish Department of Foreign Affairs and served in various diplomatic posts. He was special assistant to the executive director of the International Energy Agency of the Organisation for Economic Co-operation and Development (1976-1979), and was *chef de cabinet* in the European Commission (1985-1989). He is a former managing director at Goldman Sachs and previously served in senior management or Board level positions at a number of companies including GPA Group, ABB Group, Esat Telecom, SonaeCom, Island Capital and Hutchison Whampoa Europe, and has had active roles on both nomination and audit committees. He was chairman of the Policy Committee of the European Services Forum, a director of Goldman Sachs Bank Europe, and has provided strategic advice and consultancy services to governments and international companies.

**Adrian Otten** (born 1950) of the United Kingdom served as director of the Intellectual Property Division of the WTO Secretariat from 1993 to 2008, the responsibilities of which included intellectual property, government procurement, and competition policy. He is a graduate of the University of Cambridge in economics. After posts with the Commonwealth Secretariat in London, working on international trade questions, and with the Swaziland Government in Brussels, assisting them in their negotiations with the European Community in the context of the first Lomé Convention, he joined the GATT Secretariat in 1975. He held a variety of posts within the GATT Secretariat. From 1986 to 1993, he was secretary of the Uruguay Round Negotiating Group on Trade-Related Aspects of Intellectual Property Rights.

**Ablassé Ouedraogo** (born 1953) of Burkina Faso was a deputy director-general from 1999 to 2002, the first African to hold this position. He received a PhD in economics from the University of Nice, in France, in 1981. He worked for the United Nations Development Programme (UNDP) from 1982 to 1994, with postings in the field including among others UNDP deputy representative to the Organization of African Unity and deputy chief Liaison Office with Economic Commission for Africa in Addis Ababa, deputy resident representative and resident representative a.i. in Brazzaville, Congo, deputy resident representative in Kinshasa, Zaire (1991-1993) and director of the Regional Office for East Africa of the United Nations Sudano-Sahelian Office (1993-1994). He was the foreign minister of Burkina Faso from 1994 to 1999. In 2003, he was appointed as special adviser for Africa to the president of the African Development Bank in Tunis. In 2007, he was appointed special adviser to the president of the Economic Commission for West Africa (ECOWAS) for trade negotiations with a special focus on the Economic Partnership Agreement between the EU and African States. In 2009, he was appointed special envoy of the president of the African Union Commission for Madagascar. Among his publications are *Réflexions sur la crise industrielle en France* (1979) and *Les firmes multinationales et l'industrialisation des pays en voie de développement* (1981) and articles in the fields of economics and politics, among others "*le leadership en Afrique*". He is currently an international consultant and general manager of the consulting firm "ZODO International". He created in September 2011 the political party Le Faso Autrement.

**Carlos Pérez del Castillo** (born 1944) of Uruguay served as chairman of the WTO General Council in 2003. He obtained a BA in economics from the Australian National University of Canberra and a diploma in agricultural science from Dookie Agricultural College, Victoria, Australia. Following two years as a field officer in the Bureau of Agricultural Economics of the Australian Department of Primary Industries, he served as economic and agricultural advisor at the embassy of Uruguay in Canberra from 1969 to 1971. During 1971 and 1972, he worked in the UNCTAD/GATT International Trade Centre in Geneva on trade promotion activities. From 1973 until 1982, he was a senior economics affairs officer in the Commodities Division of the United Nations Conference on Trade and Development (UNCTAD). In 1982, he was appointed coordinator of the International Economics Programme of the UN Economic Commission for Latin American and the

Caribbean, in Santiago, Chile. From 1985 to 1987, he held the post of director-general for economic affairs at the Ministry of Foreign Affairs of Uruguay and was directly involved in the multilateral process, as well as the national preparation, for the successful launching of the Uruguay Round. In 1987, he was elected permanent secretary of the Latin American Economic System based in Caracas, the Bolivarian Republic of Venezuela. From 1992 to 1995, he was a senior partner and director-general of CPC Consultora Internacional, an economic consultancy firm based in Montevideo. He was vice-minister for foreign affairs of Uruguay from 1995 to 1998. For extended periods during these years, he also was acting foreign minister, including on several official visits abroad.

**Rob Portman** (born 1955) of the United States served as the US trade representative from 2005 to 2006. Mr Portman graduated from Cincinnati Country Day School in 1974, where he had served as treasurer of his class, and went on to attend Dartmouth College, where he majored in anthropology and earned a BA in 1979. Mr Portman then entered the University of Michigan Law School, earning a JD in 1984. He moved to Washington, DC, where he became a trade law expert and lobbyist for the firm Patton Boggs, then an associate at Graydon Head & Ritchie law firm in Cincinnati. In 1993, he was elected to the US Congress, representing the Second District of Ohio. In 2005, he left Congress to serve as US trade representative. Following his tenure at the Office of the US Trade Representative, he served as director of the Office of Management and Budget. He was elected to the Senate in 2010.

**Ricardo Ramírez Hernández** (born 1968) of Mexico was appointed to the Appellate Body for the term of 2009 to 2013. He holds an LL.M. degree in international business law from the Washington College of Law of the American University, and a law degree from the Universidad Autónoma Metropolitana. He was deputy general counsel for trade negotiations of the Ministry of Economy in Mexico for more than a decade. In this capacity, he provided advice on trade and competition policy matters related to 11 free trade agreements signed by Mexico, as well as with respect to multilateral agreements, including those related to the WTO, the Free Trade Area of the Americas, and the Latin American Integration Association. Mr Ramírez also represented Mexico in complex international trade litigation and investment arbitration proceedings. He acted as lead counsel to the Mexican government in several WTO disputes. He has also served on North American Free Trade Agreement panels. He holds the chair of International Trade Law at the Mexican National University, in Mexico City.

**Kiphorir Aly Azad Rana** of Kenya was a deputy director-general from 2002 to 2005. He received an MA in political science (1975) and a PhD from the University of California, in Los Angeles (1990). After serving as deputy head of mission in Tokyo (1993-1996) he was appointed deputy permanent representative to the United Nations in New York and alternate delegate/coordinator of the Kenyan delegation to the UN Security Council (1997). He returned briefly to Nairobi in 1998 to serve as permanent secretary, office of the president, Development Coordination, before being appointed ambassador and permanent representative to the United Nations in Geneva (1998-2000). From 1999 to 2001, Mr Rana served as coordinator of African delegations to the WTO; leader of the Group of Experts from Africa to the WTO Ministerial Meeting in Seattle, the United States; leader of the delegation to the Kenya Trade Policy Review at the WTO; and senior trade policy adviser to the minister for trade and industry.

**Patrick Rata** (born 1962) of New Zealand served as WTO *chef de cabinet* under Mike Moore in 2002. He received an MA from Auckland University. A career diplomat, he completed postings to the New Zealand Permanent Mission to the United Nations in New York and to the New Zealand High Commission in London. Mr Rata worked for ten years as a senior WTO official. In 2012, he became New Zealand ambassador to the Republic of Korea, cross-accredited to the Democratic People's Republic of Korea.

**Paul Henri Ravier** (born 1948) of France was a deputy director-general from 1999 to 2002. After receiving an MA in law he spent two years in the post-graduation course at the Ecole Nationale d'Administration (1973-1975), during which he was posted to Washington. He then joined the civil service in the Trade Department, in charge of the bilateral trade relations with South-East Asia, and then, for another two years, was responsible

for the relations with the Middle East. In 1980, he was appointed as adviser for international economic issues to the Prime Minister (and former EU Commissioner) Raymond Barre. On his return to the Trade Department, Mr Ravier was promoted for three years as head of the unit in charge of the Trade Finance Policy, and participated in the Organisation for Economic Co-operation and Development negotiations on disciplines on aid and export credits. For five years (1985-1990), he was responsible for the management of bilateral trade relations with Eastern Europe, Asia, the Pacific and the Middle-East. As deputy-secretary of the Trade Department from 1991 to 1999, he participated in and managed negotiating teams in a number of trade negotiations dealing with settlement of trade disputes, definition and conduct of export promotion strategies, and management of trade finance schemes.

**Rubens Ricupero** (born 1937) of Brazil served as secretary-general of the United Nations Conference on Trade and Development (UNCTAD) from 1995 to 2004. He earned a BA in law from the University of São Paulo in 1959, and also studied at the Rio Branco Institute, a branch of the Brazilian Ministry of Foreign Relations. From 1979 to 1995, he taught courses in international relations at the University of Brasília and also taught the history of Brazilian diplomatic relations at the Rio Branco Institute. His diplomatic postings included ambassador and permanent representative to the United Nations in Geneva (1987-1991), ambassador to the United States (1991-1993), and ambassador to Italy (1995). He was GATT Council of Representatives' chairman in 1990 and the chairman of the GATT Contracting Parties in 1991. Mr Ricupero also served as minister of the environment and the Amazon (1993-1994) and minister of finance (1994). He is currently the dean of the Faculty of Economics at FAAP, a private foundation in São Paulo. Among his many publications are *O Brasil e o dilema da globalização* (2001), *Beyond Conventional Wisdom in Development Policy: an Intellectual History of UNCTAD 1964-2004* (2004), *A ONU no século XXI: perspectivas* (2006), and *A abertura dos portos* (2007).

**Keith Rockwell** (born 1958) of the United States became director of the WTO Information and Media Relations Division in 1996. The division merged with the External Relations Division in 2009 and was renamed the Information and External Relations Division. He holds a BA in history and political science from Tufts University (1980) and an MBA from George Washington University (1991). Mr Rockwell was a reporter with the *Journal of Commerce* (New York) from 1980 to 1996, becoming chief of its European bureaus (1991-1995) and then chief of its Washington bureau (1995-1996). He is the author of *1992 and Beyond: How to Prosper in the World's Biggest Market* (1990).

**Miguel Rodriguez Mendoza** (born 1948) of Bolivarian Republic of Venezuela was a deputy director-general from 1999 to 2002. After obtaining a law degree at the Central University of Venezuela, he completed a Postgraduate Course in Economic Development at the University of Manchester and subsequently attended the Ecole des Hautes Etudes en Sciences Sociales (1975-1977) in Paris. After serving in the Venezuelan Foreign Service (1978-1981), he was director for consultation and coordination at the Latin American Economic System (1982-1988). Subsequently, he was special adviser to the president on international economic affairs from 1989 to 1991, and was appointed as chief negotiator for Venezuela's accession to the GATT. From 1991 to 1994, he was minister of state, president of the Institute of Foreign Trade, Bolivarian Republic of Venezuela's governmental body responsible for the country's trade policies. He became president of the Commission of the Cartagena Agreement, the policy decision body of the Andean Community, in 1993. From 1994 to 1998, he was chief trade adviser at the Organization of American States, where he established the organization's Trade Unit and played an important role in the preparatory process as well as the negotiations of the Free Trade Area of the Americas. He edited *Trade Rules in the Making: Challenges in Regional and Multilateral Negotiations* (1999); *The Andean Community and the United States: Trade and Investment Relations in the 1990s* (1998); *Growth or Recession: The IMF and the World Bank in Latin America* (1987), and *A Difficult Co-Existence: Latin America and US Economic Policies* (1987).

**Frieder Roessler** (born 1939) served as director of Legal Affairs in GATT and the WTO from 1989 to 1995. He holds a PhD in law from the University of Freiburg, in Germany, and an MA in law and diplomacy from the Fletcher School, in the United States. After completing his legal training in Germany, he worked for the

World Bank and then for GATT and the WTO. His main task as director of Legal Affairs was to advise dispute settlement panels and to prepare drafts of their reports or supervise their preparation by his staff. He was also closely involved in the legal aspects of the Uruguay Round negotiations and participated in the legal drafting process at the end of the Round. After leaving the WTO, Mr Roesler joined the faculty of law of Georgetown University, in Washington, DC, where he gave courses and seminars on international economic law, the external relations and trade policies of the European Community, WTO dispute settlement procedures, and trade and the environment. He has also been an adjunct professor at the Jean Moulin University of Lyon and has taught at the universities of St Gallen and Minnesota. Mr Roesler served as executive director of the Advisory Centre on WTO LAW (ACWL) from its inception in 2001 until mid-2012. In this capacity, he played a significant role in establishing and developing the ACWL as a new intergovernmental organization providing legal assistance to developing countries in the field of WTO law. Since stepping down from his position as executive director, he has continued to serve as senior counsel at the ACWL in a part-time capacity. He has published extensively in the field of international trade law. In addition to numerous journal articles and book chapters his publications include *The Legal Structure, Limits and Functions of the World Trade Order* (2000).

**Evan Rogerson** (born 1952) of New Zealand served as director of the director-general's office under Renato Ruggiero from 1995 to 1999. He was educated Auckland Grammar School and Auckland University and joined the Ministry of Foreign Affairs in 1976 with postings to Brussels and London. After serving as manager of external relations for the New Zealand Dairy Board in London (1985-1986), he joined the GATT Secretariat in 1986. His posts in the WTO were initially in the Agriculture Division, then from 1993 in the Office of the Director-General, followed by a succession of directorships in three divisions: Ministerial Sessions (1999-2002), Council and Trade Negotiations Committee (2002-2012), and Agriculture and Commodities (since 2012).

**William Rossier** (born 1942) of Switzerland served as chairman of the WTO General Council in 1996. He holds a degree in economics from the University of Lausanne and joined the foreign economic service of Switzerland in 1970. His first posting to Geneva as head of the diplomatic secretariat of the Conference on Security and Cooperation in Europe from 1972 to 1973 was followed by the participation to various international negotiations including the Organisation for Economic Co-operation and Development (OECD), the Conference on International Economic Cooperation, and the European Community. From 1981 to 1988, he was head of the Division in Charge of Relations with Countries of Eastern Europe and the People's Republic of China, and of the Section in Charge of the Economic Commission for Europe. He headed the Swiss delegation to the East-West Working Party of the Trade Committee of the OECD, the Economic Commission of the Conference of Security and Cooperation in Europe, the Paris Club negotiations on rescheduling the external debt of the countries of Central and Eastern Europe, and the negotiations on an investment protection agreement with China. He also chaired the United Nations Economic Commission for Europe (UNECE) Committee for the Development of Trade and the OECD Working Party on East-West Trade. Mr Rossier was subsequently appointed head of the Division in Charge of Economic Relations with Western Europe, heading the Swiss delegation in numerous negotiations with Western European countries. In 1988, he was appointed as plenipotentiary ambassador of Switzerland in Geneva and head of the Swiss Mission to the WTO, the European Free Trade Association (EFTA), the UNECE and the United Nations Conference on Trade and Development (UNCTAD). In the course of his activities in Geneva, he also served as chairman of the EFTA Council and chairman of the Economic Commission for Europe. From 2000 to 2006, he served as secretary-general of EFTA.

**Renato Ruggiero** (born 1930) of Italy took office as the first director-general in 1995, holding this position until 1999. He graduated in law from the University of Naples in 1953. He served as a diplomat in São Paulo, Moscow, Washington, Belgrade and Brussels. He worked at the European Commission from 1969 to 1978, and from 1978 to 1987 he held a series of senior positions in the Italian diplomatic service. He negotiated Italy's entry into the European Monetary System and served as diplomatic adviser to the prime minister and as *chef de cabinet* of two successive foreign ministers. In 1980, he was appointed ambassador and permanent

representative of Italy to the European Community in Brussels. Returning to Rome four years later, he served first as director-general for economic affairs (1984-1985) and then as secretary-general (1985-1987) at the Foreign Ministry. During this period he also served as the personal representative of the prime minister at seven G7 Economic Summits, and as chairman of the Executive Committee of the Organisation for Economic Co-operation and Development. He served as foreign trade minister from 1987 to 1991.

**Valentine Sendanyoye Rugwabiza** (born in 1963) of Rwanda was a deputy director-general from 2005 to 2013. Her responsibilities during her tenure covered development issues, monitoring of trade policies; trade facilitation as well as aid for trade, in particular training and technical cooperation. She holds an MSc. Before joining the public service, she had a long career in the private sector, at national and international level, where she occupied several senior management positions, including in a Swiss multinational where she worked for eight years. She was also a member of the Economic and Social Council of the President of Rwanda, a founding member of the Rwandan Women's Caucus, the association of women entrepreneurs, and the Rwandese federation of the private sector. She served for three years as ambassador of Rwanda to the United Nations in Geneva and Switzerland. During her tenure as Rwanda's ambassador, she was coordinator of the African Group in the WTO and initiated, together with the then ambassador of Sweden, the WTO work programme on aid for trade.

**Ronald Saborio** (born 1961) of Costa Rica has served as ambassador and permanent representative of Costa Rica to GATT and WTO since 1992. In 1986, he received his Licenciatura en Derecho from the University of Costa Rica School of Law, he studied at the Hague Academy of International Law (1988), and did graduate studies in international law at the Graduate Institute of International Studies in Geneva (1986-1989). He was in private practice for several years before joining the Costa Rican government to focus on international trade policy issues. Mr Saborio then served as special adviser for trade as part of the Delegation of Costa Rica to GATT (1989), and later as minister counsellor in the Mission of Costa Rica to the United Nations and other agencies in Geneva (1990-1992), responsible for GATT and the Uruguay Round negotiations. During the Uruguay Round, he was Costa Rica's negotiator on tariffs, non-tariff barriers, agriculture, dispute settlement and services. Since 2006, he has served as chairman of the WTO Dispute Settlement Body, Special Session. He has also served as chairman of the Committee on Regional Trade Agreements (2004-2005), the Working Group on Transparency and Government Procurement (1999-2004), the Council for Trade in Goods (1998), and Chairman ad interim of the Committee of Participants of the Expansion of Trade in Information Technology Products (1998).

**Giorgio Sacerdoti** (born 1943) of Italy served on the Appellate Body from 2001 to 2009. After graduating from the University of Milan with a law degree *summa cum laude* in 1965, he gained an MA in comparative law from Columbia University Law School as a Fulbright Fellow in 1967. He was admitted to the Milan bar in 1969 and to the Supreme Court of Italy in 1979. His public sector posts have included vice-chairman of the Organisation for Economic Co-operation and Development Working Group on Bribery in International Business Transactions, as well as consultant to the Council of Europe, the United Nations Conference on Trade and Development and the World Bank in matters related to foreign investments, trade, bribery, development and good governance. In the private sector, he has often served as arbitrator in international commercial disputes and at the International Centre for Settlement of Investment Disputes. Mr Sacerdoti has published extensively on international trade law, investments, international contracts and arbitration. He has been a professor of international law and European law at Bocconi University, Milan, since 1986. He is a member of the Committee on International Trade Law of the International Law Association.

**Susan C. Schwab** (born 1955) of the United States served as the US trade representative from 2006 to 2009. She holds a BA from Williams College, an MA from Stanford University and a PhD from George Washington University. Her first job was as an agricultural trade negotiator in the Office of the US Trade Representative. She spent most of the 1980s as a trade policy specialist and then legislative director for Senator John C. Danforth. Ms Schwab also served as assistant secretary of commerce and director-general of the US and Foreign Commercial Service during the Administration of George H.W. Bush. She worked in the

private sector for Motorola, Inc. in the early 1990s. She served as dean of the University of Maryland School of Public Policy from 1995 to 2003 and as president of the University System of Maryland Foundation from 2004 to 2005. From 2005 until her confirmation as US trade representative, she served as deputy US trade representative. Ms Schwab is professor of public policy at the University of Maryland, and a strategic adviser in the law firm of Mayer Brown LLP. Among her publications are: *Trade-Offs: Negotiating the Omnibus Trade and Competitiveness Act* (1994), "After Doha", *Foreign Affairs* (2011), along with several other articles and op-eds on trade policy and politics.

**Jesús Seade** (born 1946) of Mexico was a deputy director-general of GATT from 1993 to 1995 and of the WTO from 1995 to 1999. He earned a BSc in chemical engineering from the Mexican National University, in Mexico City, and a BPhil and DPhil in economics from the University of Oxford, and served as professor and director of the Economics Department at El Colegio de México (1980-1983) and professor of public economics and director of the Development Economics Research Centre at the University of Warwick, United Kingdom (1984-1986). He was also an adviser to various bodies of the Mexican government, including the central bank, the Ministry of Finance and the Ministry of Trade and Industry. Mr Seade subsequently worked at the World Bank, first as senior economist in the Public Finance Division (1986-1987) and then as the principal economist at the Bank's Brazil Department (1987-1989). He served as ambassador of Mexico, permanent representative to GATT and chief negotiator to the Uruguay Round Negotiations from 1988 until his appointment to GATT, where he was part of the new senior management team led by Peter Sutherland that helped steer the Uruguay Round to a successful conclusion, where in particular he chaired a process of negotiation to expand benefits and flexibilities for least-developed countries in 1994. He left the WTO in 1998 to join the International Monetary Fund (IMF) as assistant director for policy development and review, where he headed the policy formation and approval process for major emerging markets then in capital account crisis and for debt relief for over a dozen heavily-indebted poor African countries, and subsequently moved to the IMF Fiscal Affairs Department as senior adviser responsible for transparency policy and work. In 2007, he joined Lingnan University, Hong Kong, China as its chair professor of economics and became the university's vice-president in 2008. Mr Seade is a member of the advisory bodies of the Financial Services and the Trade and Industry Departments of the Hong Kong, China government and an honorary professor at several universities and colleges in China, the United Kingdom and Hong Kong, China. He has published extensively in a range of areas of economics in leading theory journals and policy outlets and is an active lead speaker in trade and financial forums in Hong Kong, China and Asia.

**Harsha Vardhana Singh** (born 1956) of India was a deputy director-general from 2005 to 2013. He completed his MA in economics from the University of Delhi and went to the University of Oxford as a Rhodes Scholar from India to obtain his MPhil. and PhD in economics. He worked as consultant with the Bureau of Industrial Costs and Prices (Government of India) in New Delhi, and the International Labour Organization and the United Nations Conference on Trade and Development in Geneva before joining the GATT Secretariat in June 1985. Mr Singh worked for 12 years in the GATT/WTO Secretariat, including the Office of the WTO Director-General (1996-1997), the Trade and Environment and Technical Barriers to Trade Division (1995-1996), the Rules Division (1991-1995), the Trade Policy Review Division (1989-1991) and the Economic Research and Analysis Unit (1985-1989). In June 1997, Mr Singh joined the Telecom Regulatory Authority of India (TRAI) as economic advisor and was secretary of the TRAI from 2001. He has interacted with a number of policy and research bodies. He was an honorary professor at the Indian Council for Research on International Economic Relations, a member of the visiting faculty at the TERI School of Advanced Studies for their masters programme in Regulatory Studies, and adjunct professor at Jawaharlal Nehru University, New Delhi. He has authored a number of papers on trade policy and regulatory issues.

**Debra Steger** (born 1952) was the first director of the Appellate Body Secretariat of the WTO from 1995 to 2001. She received her BA in history from the University of British Columbia, her LLB from the University of Victoria and her LLM from the University of Michigan. During the Uruguay Round, she was the senior negotiator for Canada on dispute settlement and the establishment of the WTO as well as the principal

counsel to the government of Canada for all of the Uruguay Round agreements. She also served as general counsel of the Canadian International Trade Tribunal. From 1988 to 1994, she taught international trade law as an adjunct professor, and in 1995 held the Hyman Soloway Chair in Business and Trade Law at the University of Ottawa. She has served as chair of a WTO dispute settlement panel, has acted as counsel in WTO disputes and has served on dispute settlement rosters. She joined the Faculty of Law at the University of Ottawa in 2004, teaching and conducting research on international trade, investment, dispute settlement, international arbitration and the governance of international organizations. She is a senior fellow with the Centre for International Governance Innovation. Ms Steger is a member of the editorial advisory board of the *Journal for International Economic Law* and on the board of advisers to the United Nations Conference on Trade and Development project on Building Capacity through Training in Dispute Settlement in International Trade, Investment and Intellectual Property. She is the author of *Peace Through Trade: Building the WTO* (2004), the editor of *Redesigning the World Trade Organization for the Twenty-First Century* (2010, Chinese version 2012) and is currently writing a book on the WTO Subsidies and Countervailing Measures Agreement. She has authored or edited 8 other books and over 120 articles, book chapters, reports and papers.

**Andrew Stoler** (born 1951) of the United States was a deputy director-general from 1999 to 2002, during which time he was responsible for budget and administration, trade in services, industrial market access and legal affairs. He received an MBA in international business from George Washington University and a BSc in international economic affairs from Georgetown University's School of Foreign Service. He served in the Office of International Trade Policy at the US Department of Commerce from 1975 to 1979, during which time he was a member of the US delegation to the Tokyo Round. Joining the Office of the US Trade Representative (USTR) in early 1980, his first assignment was as director for Canada, Australia and New Zealand. Mr Stoler served as MTN codes coordinator in the Geneva USTR office from 1982 to 1987. In this capacity, he represented the United States in the Committees and Councils established for the Tokyo Round non-tariff codes. From 1988 to 1989, he served as deputy assistant US trade representative for Europe and the Mediterranean in the Washington office of the USTR, then from 1989 to 1999 as deputy chief of mission at the USTR Geneva mission. During the Uruguay Round of Multilateral Trade Negotiations, he was principal US negotiator for the Functioning of the GATT System negotiations, the agreements on Rules of Origin and Pre-shipment Inspection, the final stages of the negotiations on the Dispute Settlement Understanding and the Agreement Establishing the World Trade Organization.

**Supachai Panitchpakdi** (born 1946) of Thailand was director-general from 2002 to 2005 and served as secretary-general of the United Nations Conference on Trade and Development from 2005 to 2013. He received a PhD in economic planning and development at the Netherlands School of Economics (now known as Erasmus University), in Rotterdam. His dissertation supervisor was Professor Jan Tinbergen, the first Nobel laureate in economics. He then served at the Bank of Thailand from 1974 to 1986 before running for parliament. Mr Supachai became deputy prime minister in 1992, entrusted with oversight of the country's economic and trade policy-making. He represented Thailand at the signing ceremony of the Uruguay Round Agreement in Marrakesh. Following the change of government in November 1997 in the wake of Thailand's financial crisis, Mr Supachai was appointed deputy prime minister in charge of economic policies, and minister of commerce.

**Peter Sutherland** (born 1946) of Ireland led the GATT in its last year and a half before serving as WTO director-general in its first four months. He graduated with an honours Bachelor of Civil Law degree from University College Dublin, where he was later a tutor and adjunct professor. He was admitted to the Irish Bar (Kings Inns), the English Bar (Middle Temple) and the New York Bar. He was also admitted to practice before the Supreme Court of the United States of America. Serving as attorney general of Ireland from 1981 to 1984, he then became commissioner for competition in the European Community. He also held the portfolio for education for 1985 and relations with the European Parliament for 1986 to 1988. On leaving the WTO, he became Chairman of BP plc from 1997 to 2010 and chairman of Goldman Sachs International from 1995 to date. He has been chairman of the London School of Economics and Political Science since 2007 and has

served on the boards of various corporations in Europe and the United States of America.

**Yasuhei Taniguchi** (born 1934) of Japan served on the Appellate Body from 2000 to 2007. He obtained a law degree from Kyoto University in 1957 and was fully qualified as a jurist in 1959. His graduate degrees include LL.M., the University of California at Berkeley (1963) and J.S.D., Cornell University (1964). He taught at Kyoto University for 39 years and has been professor emeritus since 1998. As such, he has also taught at Teikyo University (1998-2000), Tokyo Keizai University (2000-2006) and Senshu University Law School (2006-2009). Outside of Japan, he has taught as visiting professor of law in the United States (chronologically, at the University of Michigan, the University of California at Berkeley, Duke University, Stanford University, Georgetown University, Harvard University, New York University, the University of Richmond, the University of Hawaii and Santa Clara University), in Australia (at Murdoch University and the University of Melbourne), at the University of Hong Kong and at the University of Paris XII. Mr Taniguchi is former president of the Japanese Association of Civil Procedure and former vice-president of the International Association of Procedural Law. He has been an active arbitrator with various arbitral institutions and is a fellow of Chartered Institute of Arbitrators. He is currently President of the Japan Association of Arbitrators and special adviser to Japan Commercial Arbitration Association. He is associated with a Tokyo law firm, Matsuo & Kosugi. Mr Taniguchi has written numerous books and articles in the fields of civil procedure, arbitration, insolvency, the judicial system, legal profession as well as international trade law. His writings have been published in Chinese, English, French, Italian, German, Japanese and Portuguese.

**Francisco Thompson-Flôres** of Brazil was a deputy director-general from 2002 to 2005. He has a degree in philosophy from the University of Poitiers and a degree in economics from the London School of Economics. He joined the Ministry of External Affairs in 1959, specializing in economic and trade affairs, and was appointed under-secretary-general of the Ministry from 1985 to 1988. He has served as a diplomat at the Brazilian embassies in London (1961-1964), Brussels (1964-1967) and Washington (1973-1976), and as ambassador in Buenos Aires (1988-1992), in Bonn (1992-1995), to the Holy See (1995-1998), and in Montevideo since 2000. From 1979 to 1999, he also served as secretary for Economic and Technical International Cooperation, Secretariat of Planning, Presidency of the Republic (1979); coordinator of international affairs, Ministry of Agriculture (1979-1983); and personal representative of the President of the Republic on matters concerning the Latin-America and the Caribbean-European Union Summit (1998-1999). He was a founding member of the Cairns Group; chief negotiator within the framework of the negotiating process between Argentina, Brazil, Paraguay and Uruguay, leading to the creation of the Southern Common Market (MERCOSUR)(1985-1988); member of the Advisory Committee for Integration Affairs of the Presidency of Inter-American Development Bank; member of the Advisory Board of the MERCOSUR Economic Research Network; and chairman of the Negotiating Group on Agriculture within the framework of the Free Trade area of the Americas (1999-2000).

**Paul Trần Văn-Thinh** (born 1929 in Viet Nam) of France was head of the Permanent Delegation of the European Union to the International Organisations in Geneva and ambassador-permanent representative to GATT from 1979 to 1994. After fighting the French army in Viet Nam, he devoted to himself as a French citizen to peace through democracy and justice via European integration, and negotiated 82 agreements over his career. He joined The World Citizens of Gary Davis in 1948. He received his diploma of the Institut des Sciences Politiques of the University of Paris in 1953, and his doctorate in law and economics of the University of Paris in 1956. From 1958 to 1961, he served as assistant to André Philip, French minister of economy, finance and budget. Thereafter, he held a series of posts in the European Commission, starting as principal administrator in charge of trade policy with developing countries (1961-1972). From 1972 to 1973, he was head of Specialised Unit Commodities from the developing countries – International agreements – the United Nations Conference on Trade and Development (UNCTAD) Affairs in the Directorate-General for Development, where he was in charge of negotiating international agreements on coffee, cocoa, olive oil and rubber. From 1973 to 1977, he was head of Division General and Multilateral Affairs – Generalised Tariff Preferences in the Directorate-General for External Relations, where he drew up and put into effect the first EC scheme for granting generalized preferences to developing countries and was in charge of negotiating the

UNCTAD Integrated Programme on Commodities (1976-1977). European Community special representative for textiles negotiations from 1977 to 1979, he was named head of the EC delegation in Geneva, where he was the Geneva negotiator of the GATT Uruguay Round agreements on behalf of the European Community and its 12 member states. Following his retirement from government service in 1994, he was member of the board of directors of the European Institute Inc., Washington, DC; founder and member of the China–Europa Forum.

**David Unterhalter** (born 1958) of South Africa was appointed to the Appellate Body for the term of 2006 to 2013. He holds degrees from Trinity College, the University of Cambridge, the University of the Witwatersrand and University College Oxford. Mr Unterhalter has been a professor of law at the University of the Witwatersrand in South Africa since 1998, and from 2000 to 2006, he was the director of the Mandela Institute, University of the Witwatersrand, an institute focusing upon global law. Mr Unterhalter is a member of the Johannesburg Bar; as a practising advocate he has appeared in a large number of cases in the fields of trade law, competition law, constitutional law, and commercial law. His experience includes representing different parties in anti-dumping and countervailing duty cases. He has acted as an adviser to the South African Department of Trade and Industry. In addition, he has served on a number of WTO dispute settlement panels. Mr Unterhalter has published widely in the fields of public law and competition law. He practises as a barrister at the London Bar from Monckton Chambers.

**Guillermo Valles Galmés** (born 1955) of Uruguay served as the chair of the Rules Negotiating Group for the Doha Round from 2004 to 2010. He graduated from the School of Law of the Universidad de la República in Uruguay with the title of doctor in diplomacy in 1976. He joined the Uruguayan foreign service in 1976 and had postings in Japan, Argentina and China. As ambassador, he served in China, the European Union, Belgium and Luxembourg. In 2004 to 2010, he was the Uruguayan ambassador to the WTO and other international organizations in Geneva. Mr Valles participated in numerous bilateral and multilateral trade negotiations including those leading to the establishment of the Southern Common Market (MERCOSUR), the conclusion of the Uruguay Round, the launching of the MERCOSUR–EU trade talks as well as the Doha Round. He was deputy foreign minister of Uruguay from 2000 to 2004. Since 2011, he has been director for International Trade in Goods and Services and Commodities at the United Nations Conference on Trade and Development.

**Peter Van den Bossche** (born 1959) of Belgium was appointed to the Appellate Body for the term of 2009 to 2013. He holds a doctorate in law from the European University Institute, Florence, an LL.M. from the University of Michigan Law School, and a Licentiaat in de Rechten magna cum laude from the University of Antwerp. He is a member of the board of editors of the *Journal of International Economic Law*. Mr Van den Bossche acted as a consultant to many developing countries, and from 1997 to 2001 was counsellor and subsequently acting director of the WTO Appellate Body Secretariat. From 1990 to 1992, he served as a référendaire of Advocate General W. van Gerven at the European Court of Justice in Luxembourg. He is currently professor of international economic law at Maastricht University, the Netherlands. He also serves on the faculty of the College of Europe, Bruges, the World Trade Institute, Bern, the IELPO master programme of the University of Barcelona, the IEEM Academy of International Investment and Trade Law, Macao, China and the China–EU School of Law, Beijing. His writings include *The Law and Policy of the World Trade Organization* 2<sup>nd</sup> edition (2008).

**John Weekes** (born 1943) of Canada served as chairman of the WTO General Council in 1998. He graduated with a BA in political science and economics from the University of Toronto. He was Canada's ambassador to the WTO from 1995 to 1999. He chaired the Committee on Regional Trade Agreements from its creation until 1998 and the Working Party on the Accession of the Kingdom of Saudi Arabia to the WTO from 1996 until 2002. From 1991 to 1993, Mr Weekes was Canada's chief negotiator for the North American Free Trade Agreement. From 1993 to 1995, he served as senior assistant deputy minister in the Department of Foreign Affairs and International Trade with responsibility for managing Canada's relations with the United States and the implementation of the North American Free Trade Agreement. Mr Weekes was Canada's ambassador to

GATT during the Uruguay Round of multilateral trade negotiations and chaired the GATT Council in 1989 and then the GATT Contracting Parties in 1990. He also chaired the GATT Articles Negotiating Group. Mr Weekes was a member of Canada's negotiating team to the Tokyo Round of GATT negotiations in the 1970s. In 2005, Mr Weekes chaired the special ad hoc WTO arbitration under the Annexe to the Doha Ministerial Decision on the ACP–EC Partnership Agreement (which ruled on the EC's proposed MFN tariff for bananas). Earlier he also chaired the WTO dispute panel on the Indian automotive measures case. In 1999, he joined APCO Worldwide in Geneva as the chair of the firm's Global Trade Practice and opened their Geneva office. From 2003 until 2009, he was senior international trade policy adviser in the Geneva office of the law firm, Sidley Austin LLP. Since 2010, he has been a senior business adviser in Ottawa at the Canadian law firm Bennett Jones LLP.

**Frank Wolter** (born 1943) of Germany served as the first director of the Trade Policies Review Division in the GATT Secretariat (1989-1991) and as director of the Agriculture and Commodities Division in the GATT and WTO Secretariats (1991-2005). He received an MA (Diplom-Volkswirt) in 1969 and a PhD in economics (Dr.rer.pol.) from the University of Kiel in 1974. He worked as a researcher in the Kiel Institute for World Economics from 1969 to 1983, was a consultant to the European Community, the Organisation for Economic Co-operation and Development, the United Nations Industrial Development Organization, and the International Labour Organization, and directed a research project for the German Research Foundation from 1977 to 1979. In 1983, Mr Wolter joined the GATT Secretariat as a counsellor in the Economic and Analysis Unit, where he worked until 1989.

**Eric Wyndham-White** (1913-1980) of the United Kingdom served as the first executive secretary (1948-1965) and the first director-general (1965-1968) of GATT. He was educated at the Westminster City School in London and then studied law at the London School of Economics (LSE). Prior to his service in GATT, he practiced as a member of the English Bar and was an assistant lecturer at the LSE, joined the Ministry of Economic Warfare in the Second World War, and held diplomatic posts at the British Embassy in Washington and the United Nations Relief and Rehabilitation Administration. In 1946, Trygve Lie, the first secretary-general of the United Nations, seconded him to serve as executive secretary of the International Conference on Trade and Employment. After that conference produced the Havana Charter, he stayed on as executive secretary of the Interim Commission for the International Trade Organization and then GATT. He was the author of *GATT as an International Trade Organization: Some Structural Problems of International Trade* (1961).

**Rufus H. Yerxa** (born 1951) of the United States was a deputy director-general from 2002 to 2013. He holds a BA in political science from the University of Washington, a JD degree from the Seattle University School of Law and an LLB in international law from the University of Cambridge. Having been ambassador to GATT, and subsequently as the deputy US trade representative in Washington, he played a major role in negotiating and securing congressional approval of both the Uruguay Round/WTO Agreement and the North American Free Trade Agreement accord. Prior to these appointments, he was with the Committee on Ways and Means of the US House of Representatives, where he served as staff director of the Subcommittee on Trade. He guided the drafting and enactment of several major pieces of trade legislation. His private-sector experience includes both law practice and a senior corporate role. He was a resident partner in the Brussels office of Akin, Gump, Strauss, Hauer & Feld, where his practice focused on international trade matters and European regulatory affairs. He subsequently joined Monsanto Company, a leading producer of agricultural input products, where he was in charge of the law, government affairs and public affairs departments for Europe and Africa. He later served as Monsanto's international counsel in Washington.

**Yuejiao Zhang** (born 1944) of China was appointed to the Appellate Body for the term of 2008 to 2016. She has a BA from the China High Education College and Rennes University of France and an LLM from Georgetown University Law Center. She is an arbitrator on China's International Trade and Economic Arbitration Commission and International Chamber of Commerce. She practises law as a private attorney. Ms Zhang also serves as vice-president of China's International Economic Law Society. From 1998 to 2004, Zhang held various positions at the Asian Development Bank, including as assistant general counsel, co-chair of Appeal

Committee, Director General. Prior to this, Ms Zhang held several positions in government and academia in China, including as director-general of law and treaties at the Ministry of Foreign Trade and Economic Cooperation (1984-1997), where she was involved in drafting many of China's trade laws such as the Foreign Investment Law, Contract Law and the Foreign Trade Law. From 1987 to 1996, Ms Zhang was one of China's chief negotiators on intellectual property, and was involved in the preparation of China's patent law, trade mark law and copyright law. She also served as the chief legal counsel for China's GATT resumption. She was China's negotiator on bilateral treaty for investment protection with many countries. From 1982 to 1984, Ms Zhang worked as a legal counsel at the World Bank. She was a governing council member of UNIDROIT from 1987 to 1999. She is professor of law at Tsinghua University and Shantou University in China.

**Robert B. Zoellick** (born 1953) of the United States served as the US trade representative from 2001 to 2005. He graduated from Swarthmore College in 1975 and earned a JD magna cum laude from Harvard Law School and an MPP from the Kennedy School of Government in 1981. He lived in Hong Kong on a fellowship in 1980. From 1985 to 1993, he served with Secretary James A. Baker at the Treasury Department (from deputy assistant secretary for financial institutions policy to counselor to the secretary); State Department (undersecretary of state for economic and agricultural affairs as well as counselor of the department with undersecretary rank); and briefly deputy chief of staff at the White House and assistant to the president. From 1993 to 1997, he as an executive vice-president of Fannie Mae, the housing finance corporation. In 2005 to 2006, he served as the deputy secretary of the US State Department. He was vice-chairman, International of the Goldman Sachs Group, managing director, and chairman of Goldman Sachs' Board of International Advisors from 2006 to 2007. He was president of the World Bank Group from 2007 to 2012.

## Annex 2: GATT/WTO senior management, 1948-2013

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<b>Executive Secretary (1948-1965)</b> Deputy Executive Secretary (1947-1948) Deputy Executive Secretary (1948-1961)	<b>Eric Wyndham-White (United Kingdom)</b> Julio Lacarte Muró (Uruguay) Jean Royer (France)
<b>Director-General (1965-1968)</b> Deputy Director-General (1962-1967)	<b>Eric Wyndham-White (United Kingdom)</b> Finn Olav Gundelach (Denmark)
<b>Director-General (1968-1980)</b> Deputy Director-General (1973-1980) Deputy Director-General (1973-1980)	<b>Olivier Long (Switzerland)</b> M.G. Mathur (India) Gardner Patterson (United States)
<b>Director-General (1980-1986)</b> Deputy Director-General (1980-1986) Deputy Director-General (1980-1986)	<b>Arthur Dunkel (Switzerland)</b> M.G. Mathur (India) William B. Kelly (United States)
<b>Director-General (1986-1989)</b> Deputy Director-General (1986-1989) Deputy Director-General (1986-1989)	<b>Arthur Dunkel (Switzerland)</b> M.G. Mathur (India) Charles R. Carlisle (United States)
<b>Director-General (1989-1993)</b> Deputy Director-General (1989-1991) Deputy Director-General (1989-1993)	<b>Arthur Dunkel (Switzerland)</b> M.G. Mathur (India) Charles R. Carlisle (United States)
<b>Director-General (1993-1995)</b> Deputy Director-General (1993-1995) Deputy Director-General (1993-1995) Deputy Director-General (1993-1995)	<b>Peter Sutherland (Ireland)</b> Anwarul Hoda (India) Jesús Seade (Mexico) Warren A. Lavorel (United States)
<b>Director-General (1995-1999)</b> Deputy Director-General (1995-1999) Deputy Director-General (1995-1999) Deputy Director-General (1995-1999) Deputy Director-General (1995-1999)	<b>Renato Ruggiero (Italy)</b> Anwarul Hoda (India) Jesús Seade (Mexico) Warren A. Lavorel (United States) Kim Chulsu (Korea, Rep. of)

**Director-General (1999-2002)**

Deputy Director-General (1999-2002)  
Deputy Director-General (1999-2002)  
Deputy Director-General (1999-2002)  
Deputy Director-General (1999-2002)

**Director-General (2002-2005)**

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**Director-General (2005-2009)**

Deputy Director-General (2005-2009)  
Deputy Director-General (2005-2009)  
Deputy Director-General (2005-2009)  
Deputy Director-General (2005-2009)

**Director-General (2009-2013)**

Deputy Director-General (2009-2013)  
Deputy Director-General (2009-2013)  
Deputy Director-General (2009-2013)  
Deputy Director-General (2009-2013)

**Director-General (2013-)**

From 1 September 2013

**Mike Moore (New Zealand)**

Andrew Stoler (United States)  
Ablassé Ouedraogo (Burkina Faso)  
Paul-Henri Ravier (France)  
Miguel Rodríguez Mendoza (Venezuela, Bol. Rep. of)

**Supachai Panitchpakdi (Thailand)**

Roderick Abbott (United Kingdom)  
Kipkorir Aly Azad Rana (Kenya)  
Francisco Thompson-Flôres (Brazil)  
Rufus H. Yerxa (United States)

**Pascal Lamy (France)**

Alejandro Jara (Chile)  
Valentine Sendanyoye Rugwabiza (Rwanda)  
Harsha Vardhana Singh (India)  
Rufus H. Yerxa (United States)

**Pascal Lamy (France)**

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Harsha Vardhana Singh (India)  
Rufus H. Yerxa (United States)

**Roberto Azevêdo (Brazil)**

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# Abbreviations

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<b>ACP</b>	African, Caribbean and Pacific
<b>ACWL</b>	Advisory Centre on WTO Law
<b>AD</b>	anti-dumping
<b>ADB</b>	Asian Development Bank
<b>AGOA</b>	African Growth and Opportunity Act
<b>AMS</b>	aggregate measurement of support
<b>APEC</b>	Asia-Pacific Economic Cooperation
<b>ASEAN</b>	Association of Southeast Asian Nations
<b>ATC</b>	Agreement on Textiles and Clothing
<b>ATL</b>	Accelerated Tariff Liberalisation
<b>ATPA</b>	Andean Trade Preferences Act
<b>BCE</b>	Before the Common Era
<b>BRICS</b>	Brazil, the Russian Federation, India, China and South Africa
<b>CAFTA–DR</b>	Dominican Republic–Central America–United States Free Trade Agreement
<b>CARICOM</b>	Caribbean Community
<b>CBERA</b>	Caribbean Basin Economic Recovery Act
<b>CBI</b>	Caribbean Basin Initiative
<b>CEB</b>	Chief Executives Board for Coordination
<b>CET</b>	common external tariff
<b>CG18</b>	Consultative Group of Eighteen
<b>CG22</b>	Consultative Group of Twenty-Two
<b>CPC</b>	Central Product Classification
<b>CTESS</b>	Committee on Trade and Environment in Special Session
<b>CTG</b>	Council for Trade in Goods
<b>CTS</b>	Council for Trade in Services
<b>CVD</b>	countervailing duty
<b>CWR</b>	Centre William Rappard
<b>DDA</b>	Doha Development Agenda
<b>DDAGTF</b>	Doha Development Agenda Global Trust Fund
<b>DFQF</b>	duty free, quota free
<b>DSB</b>	Dispute Settlement Body
<b>DSU</b>	Dispute Settlement Understanding
<b>EBA</b>	Everything But Arms

<b>ECIPE</b>	European Centre for International Political Economy
<b>ECOWAS</b>	Economic Commission for West Africa
<b>EIA</b>	economic integration agreement
<b>EIF</b>	Enhanced Integrated Framework
<b>EFTA</b>	European Free Trade Association
<b>FAO</b>	Food and Agriculture Organization of the United Nations
<b>FIPs</b>	Five Interested Parties
<b>FIPOI</b>	Building Foundation for International Organizations
<b>FOGS</b>	Functioning of the GATT System
<b>FTA</b>	free trade agreement
<b>FTAA</b>	Free Trade Area of the Americas
<b>G2</b>	Group of Two
<b>G90</b>	Group of 90
<b>GAT</b>	General Agreements on Trade
<b>GATS</b>	General Agreement on Trade in Services
<b>GATT</b>	General Agreement on Tariffs and Trade
<b>GDP</b>	gross domestic product
<b>GI</b>	geographical indication
<b>GRULAC</b>	Latin American and Caribbean Group
<b>GSP</b>	Generalized System of Preferences
<b>GSTP</b>	Global System of Trade Preferences
<b>HOD</b>	head of delegation
<b>HS</b>	Harmonized System
<b>ICC</b>	International Chamber of Commerce
<b>ICITE</b>	International Collaborative Initiative on Trade and Employment
<b>ICITO</b>	Interim Commission of the International Trade Organization
<b>ICJ</b>	International Court of Justice
<b>ICRC</b>	International Committee of the Red Cross
<b>ICSID</b>	International Centre for Settlement of Investment Disputes
<b>ICTSD</b>	International Centre for Trade and Sustainable Development
<b>IDE-JETRO</b>	Institute of Developing Economies-Japan External Trade Organization
<b>ILO</b>	International Labour Organization
<b>IMF</b>	International Monetary Fund
<b>IMPACT</b>	International Medical Products Anti-Counterfeiting Task Force
<b>INRs</b>	initial negotiating rights
<b>IOC</b>	International Olympic Committee
<b>IPPC</b>	International Plant Protection Convention
<b>IPU</b>	Inter-Parliamentary Union
<b>IRM</b>	Implementation Review Mechanism
<b>ISEAS</b>	Institute for Southeast Asian Studies
<b>ISI</b>	import-substitution industrialization

<b>ITA</b>	Information Technology Agreement
<b>ITC</b>	International Trade Centre
<b>ITI</b>	Information Technology Industry Council
<b>ITO</b>	International Trade Organization
<b>ITU</b>	International Telecommunication Union
<b>LDC</b>	least-developed country
<b>LMG</b>	Like-Minded Group
<b>LSE</b>	London School of Economics
<b>MAI</b>	Multilateral Agreement on Investment
<b>MDG</b>	Millennium Development Goal
<b>MEA</b>	multilateral environmental agreement
<b>MERCOSUR</b>	Southern Common Market
<b>MFA</b>	Multi-Fibre Arrangement
<b>MFN</b>	most favoured nation
<b>MIP</b>	Missions Intern Programme
<b>MIWI</b>	Made in the World Initiative
<b>MSF</b>	Médecins Sans Frontières
<b>MTO</b>	Multilateral Trade Organization
<b>NAFTA</b>	North American Free Trade Agreement
<b>NAMA</b>	non-agricultural market access
<b>NATO</b>	North Atlantic Treaty Organization
<b>NGO</b>	non-governmental organization
<b>NIEO</b>	new international economic order
<b>NME</b>	non-market economy
<b>NTP</b>	Netherlands Training Programme
<b>NTR</b>	normal trade relations
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>OECC</b>	Organisation on European Economic Co-operation
<b>OHCHR</b>	Office of the United Nations High Commissioner for Human Rights
<b>OIE</b>	World Organization for Animal Health
<b>OMOV</b>	one-member-one-vote
<b>OTDS</b>	Overall Trade-Distorting Domestic Support
<b>PNTR</b>	permanent normal trade relations
<b>PRC</b>	People's Republic of China
<b>PTA</b>	preferential trade agreement
<b>Quad</b>	Canada, the European Union, Japan and the United States
<b>RAM</b>	Recently Acceded Member
<b>ROOs</b>	rules of origin
<b>RTA</b>	regional trade agreement
<b>RTAA</b>	Reciprocal Trade Agreements Act
<b>RTA-IS</b>	Regional Trade Agreement Information System

<b>S&amp;D</b>	special and differential
<b>SDR</b>	Special Drawing Right
<b>SELA</b>	Latin American and Caribbean Economic System
<b>SPS</b>	sanitary and phytosanitary
<b>SPS Agreement</b>	Agreement on the Application of Sanitary and Phytosanitary Measures
<b>SSG</b>	Special Agricultural Safeguard
<b>SSM</b>	Special Safeguard Mechanism
<b>STDF</b>	Standards and Trade Development Facility
<b>SVE</b>	Small, Vulnerable Economy
<b>TIM</b>	Trade Integration Mechanism
<b>TiVA</b>	trade in value added
<b>TM</b>	Transparency Mechanism
<b>TNC</b>	Trade Negotiations Committee
<b>TPA</b>	Trade Promotion Authority
<b>TPP</b>	Trans-Pacific Partnership
<b>TPR</b>	trade policy review
<b>TPRB</b>	Trade Policy Review Body
<b>TPRM</b>	Trade Policy Review Mechanism
<b>TRAI</b>	Telecom Regulatory Authority of India
<b>TRIMs Agreement</b>	Agreement on Trade-Related Investment Measures
<b>TRIPS</b>	trade-related aspects of intellectual property rights
<b>TRIPS Agreement</b>	Agreement on Trade-Related Aspects of Intellectual Property Rights
<b>UNCTAD</b>	United Nations Conference on Trade and Development
<b>UNCTC</b>	United Nations Centre on Transnational Corporations
<b>UNDP</b>	United Nations Development Programme
<b>UNECE</b>	United Nations Economic Commission for Europe
<b>UNEP</b>	United Nations Environment Programme
<b>UNESCO</b>	United Nations Educational, Scientific and Cultural Organization
<b>UNHCR</b>	Office of the United Nations High Commissioner for Refugees
<b>UNIDO</b>	United Nations Industrial Development Organization
<b>USTR</b>	Office of the US Trade Representative
<b>VER</b>	voluntary export restraint
<b>WCO</b>	World Customs Organization
<b>WHO</b>	World Health Organization
<b>WIPO</b>	World Intellectual Property Organization
<b>WMO</b>	World Meteorological Organization
<b>WTI</b>	World Trade Institute
<b>WTO Agreement</b>	Agreement Establishing the World Trade Organization

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The *History and Future of the World Trade Organization* draws on a wealth of human, documentary and statistical sources to examine in depth the economic, political and legal issues surrounding the creation of the WTO in 1995 and its subsequent evolution. Among the topics covered are the intellectual roots of the trading system, membership of the WTO and the growth of the Geneva trade community, trade negotiations and the development of coalitions among the membership, and the WTO's relations with other international organizations and civil society. Also covered are the organization's robust dispute settlement rules, the launch and evolution of the Doha Round, the rise of regional trade agreements, and the leadership and management of the WTO. It reviews the WTO's achievements as well as the challenges faced by the organization, and identifies the key questions that WTO members need to address in the future.

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