

**The London School of Economics and Political Science**

*Lawmaking in the Multilateral Trading System*

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A thesis submitted to the Department of Law of the London School of Economics  
and Political Science for the degree of Doctor of Philosophy

London, September 2013

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## **Abstract**

The thesis provides an analysis of multilateral trade lawmaking in the GATT and the WTO from the late 1940s to the current Doha Round negotiations. It investigates the discourses, practices, techniques, and legal concepts that have come to define what it means to make trade law. These elements are essential to multilateral trade lawmaking insofar as they provide trade negotiators with a way to frame their arguments and to go about negotiating, and with the tools to construct trade policy disciplines and to record them in legal form. On the other hand, they are also limiting, in that they endorse certain ways of going about trade lawmaking as normal, and delimit what negotiators and their audiences perceive as reasonable, legitimate, and realistic arguments in the lawmaking process. The aim of the thesis is to destabilise these elements of trade lawmaking by revealing their contingent and often contested origins, and by showing how they foreclose alternative conceptions of the objectives, means, and possibilities of trade lawmaking. While the dissertation does not provide a full-fledged normative critique of the elements of lawmaking, it attempts to elucidate the discursive, practical, technical, and legal underpinnings of trade lawmaking that any such reform effort will, of necessity, confront.

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## **List of Abbreviations**

AMS – Aggregate Measurement of Support

ASP – American Selling Price

CAP – Common Agricultural Policy

DCER – Documents on Canadian External Relations

DSU – Dispute Settlement Understanding

EC – European Communities

EEC – European Economic Community

EU – European Union

FAO – Food and Agriculture Organization

FOGS – Functioning of the GATT System

FRUS – Foreign Relations of the United States

GATS – General Agreement on Trade in Services

GATT – General Agreement on Tariffs and Trade

ITO – International Trade Organization

LDC – Least Developed Country

MFN – Most-Favoured Nation

MTN – Multilateral Trade Negotiations

MTO – Multilateral Trade Organization

NAMA – Non-Agricultural Market Access

NFIDC – Net Food-Importing Developing Country

OECD – Organisation for Economic Co-operation and Development

PSE – Producer Subsidy Equivalent

RAM – Recently Acceded Member

RTAA – Reciprocal Trade Agreements Act

SCM – Subsidies and Countervailing Measures

SSM – Special Safeguard Mechanism

SVE – Small Vulnerable Economy

TNC – Trade Negotiations Committee

TRIPS – Trade-Related Intellectual Property

UK – United Kingdom

UN – United Nations

UNCTAD – United Nations Conference on Trade and Development

US – United States

USTR – United States Trade Representative

WIPO – World Intellectual Property Organization

WTO – World Trade Organization

## Introduction

On the second day of the World Trade Organization's Ministerial Conference held in Cancún in 2003, the then-United States Trade Representative Robert Zoellick met for the first time with a recently formed group of developing countries, the G-20.<sup>1</sup> Sitting at a table facing the G-20 delegates, Zoellick listened to their presentations and wrote down their demands. When they were finished, Zoellick asked them to continue. The G-20 representatives did not understand. Zoellick pointed out that, given that this was a trade negotiation, it was not sufficient to present a range of demands. They would also have to indicate what they were prepared to offer in return. Silence ensued, and Zoellick left the meeting. For him, the meeting had fulfilled its purpose: he had made the point that the G-20 were not playing by the rules of the game.

Zoellick asserted what many would regard as a 'truth' about international trade lawmaking: that "trade negotiations are based on reciprocal exchange".<sup>2</sup> This assertion is not problematic in itself. As a social practice, multilateral trade lawmaking is dependent on such truths, that is, on a set of relatively enduring conceptions of what it means to go about that practice. Reciprocity is just one of a whole range of concepts, formulas, principles, narratives and techniques that have come to define what it means to make trade law.<sup>3</sup> These elements are essential to multilateral trade lawmaking insofar as they provide trade negotiators with a way to frame their arguments and to go about negotiating, and with the tools to construct trade policy disciplines and to record them in legal form. They represent the know-how of the trade negotiator, and make up her or his discursive, practical, technical, and legal repertoire. In short, they are "accomplishments"<sup>4</sup> that render trade lawmaking thinkable and doable.

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<sup>1</sup> This episode is recounted in Blustein 2009, 147-148.

<sup>2</sup> As Wilkinson puts it matter-of-factly; Wilkinson 2004, 151.

<sup>3</sup> Throughout this introduction, I will use the terms "truths" or "elements" of multilateral trade lawmaking as shorthand for these concepts, formulas, principles, narratives and techniques, or what could be called the "social structure" (in Giddens's sense; see Giddens 1984, 16-28) of multilateral trade lawmaking. The slightly polemical connotations of the term "truth" are intended, for reasons that I hope will become clear shortly. Note that not all of the elements of trade lawmaking that I discuss are explicitly articulated; some are just tacitly drawn upon and enacted in the day-to-day of multilateral trade lawmaking.

<sup>4</sup> In the sociological (if not necessarily normative) sense; see Giddens 1993, 8, for whom "all social life is an active accomplishment"; see also *ibid.* 6 (routines as "contingent and potentially fragile accomplishments"); and Wendt 1999, 313 (social structures as "ongoing accomplishments of practice").

As crystallisations of what it means to make trade law, however, these elements are also prone to be reified – to be seen as natural, obvious, and immutable.<sup>5</sup> Zoellick certainly treated the status of the principle of reciprocity in trade negotiations as self-evident in this way, in need of no further explanation or justification. Why was it, though, that the G-20 representatives did not challenge this notion, or at least question the peculiar interpretation of reciprocity that Zoellick was implicitly invoking? After all, the G-20's demands concerned an area of trade law in which obligations are seen to be heavily tilted in favour of developed countries, namely, that of export subsidies and other trade-distorting subsidies on agricultural products.<sup>6</sup> Given this context, it could have been plausible for the G-20 representatives to argue that developed countries should reduce their subsidies without asking for 'payment' from the developing countries.

I suspect that the reason that Zoellick's invocation of reciprocity left his counterparts speechless was the perceived status of the principle as a 'truth' about what it means to make trade law – a status that the G-20 representatives were not willing or able to contest.<sup>7</sup> It was this status that made Zoellick's put-down so devastating: He wasn't simply saying that the G-20's position was unreasonable or unacceptable. What he was saying was that the G-20 representatives were either not serious or were clueless about what they were doing. He was asserting, in effect, that the G-20 had failed to understand what trade negotiations *are*.

The truths of international trade lawmaking, then, are limiting, as well as enabling.<sup>8</sup> They are constraints, as well as accomplishments. They teach the negotiator what he or she needs to know in order to engage in trade lawmaking, but also what to forget, dismiss and not think about in the first place.<sup>9</sup> These truths thus circumscribe what negotiators and their audiences perceive as reasonable, legitimate, and realistic arguments in the lawmaking

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<sup>5</sup> One could also say: they come to be seen as "truisms" about trade lawmaking, i.e., as "trivially true"; see Giddens 1993.

<sup>6</sup> The Uruguay Round Agreement on Agriculture granted allowances for these kinds of subsidies only to those who had historically been subsidising (mostly developed countries), while others were barred from using export subsidies and employing trade-distorting agricultural support beyond a *de minimis* threshold. As a result, the Agreement on Agriculture has been characterized as "institutionalizing inequality" (Gonzales 2002) and "bestow[ing] special and differential treatment on developed rather than developing countries"; G/AG/NG/W/13, 2.

<sup>7</sup> See Blustein 2009, 148, on some delegates' reactions to the episode.

<sup>8</sup> This will come as a surprise to few, if any, social theorists; see in particular Giddens 1984, 25.

<sup>9</sup> Andrew Lang makes a similar observation about the "cognitive infrastructure" of actors working in finance; see Lang 2013, 169.

process. While they do not determine the outcome of negotiations, they tend to delimit the terms in which it is conceived.

The aim of the present dissertation is to destabilise the truths of international trade lawmaking. My method is to reveal the contingent and often contested origins of these truths, and to show how they foreclose alternative conceptions of the objectives, means, and possibilities of trade lawmaking. The dissertation does not provide a full-fledged normative critique of the elements of lawmaking, nor does it offer a blueprint for reform. However, it attempts to elucidate the discursive, practical, technical, and legal underpinnings of trade lawmaking that any reform effort will, of necessity, confront.

In this introduction, I will first describe how I plan to implement my method and highlight some of the challenges that it confronts. I will then give a brief account of how the dissertation relates to other work on trade negotiations, and in particular to the debates about the legitimacy and effectiveness of WTO lawmaking. Finally, I will give an overview of the chapters.

## I. What Kind of History?

Histories of multilateral trade lawmaking tend to follow the rhythm of negotiating rounds, or to trace the evolution of particular subfields of trade law.<sup>10</sup> In the present dissertation, I am neither primarily interested in the factors that account for the successes and failures of negotiating rounds, nor in a simple exegesis of the development of international trade law *per se*. Rather, my units of analysis are the "knowledge practices"<sup>11</sup> of trade negotiators. I distinguish four such practices: *Discourses* reflect the trade negotiator's knowledge of how to think and talk about multilateral trade lawmaking. *Practices* (in a narrower sense) manifest the trade negotiator's knowledge of how to organise a trade negotiation – with whom to negotiate and when, whether and with whom to ally, what role to accord to the

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<sup>10</sup> For histories of the first kind, see: for the GATT/ITO negotiations: Wilcox 1949; Brown 1950; for the Kennedy Round: Evans 1971, Preer 1970; for the Tokyo Round: Winham 1986; for the Uruguay Round: Oxley 1990; Paemen/Bensch 1995; for the Doha Round: Blustein 2009; Jones 2010. For histories of the second kind, see the Oxford Commentaries on GATT/WTO Agreements; Hoekman/Kostecki 2001; Van den Bossche/Zdouc 2013. Some histories are of a more comprehensive scope and combine elements of the two: Jackson 1969; Curzon 1965; Dam 1970; Trebilcock/Howse 2005.

<sup>11</sup> I borrow this term from Annelise Riles; see Riles 1999. Adler/Pouliot 2011 define "practices" as "competent performances" (4), whereby "competence" refers to knowing what is implicated in a practice and "skill" (7) in executing it. The extent to which social action implicates "skill" is also emphasised by Giddens 1993, 20, who describes "[t]he production of society" as a "skilled performance". (emphasis omitted)

chair, and how to take decisions.<sup>12</sup> *Techniques* refer to the trade negotiator's knowledge of how to translate the objectives of multilateral trade regulation into legal text. And the *use of law* implicates the trade negotiator's understanding of why, when, and how to use law in the first place. While the boundaries between these elements of multilateral trade lawmaking are not always clear cut, each implicates the trade negotiator's know-how in distinctive ways. To illustrate this, consider how the 'truth' that "trade negotiations are based on reciprocal exchange",<sup>13</sup> manifests itself at the level of discourses, practices, techniques, and in the use of law.

At the level of *discourses*, this truth is reflected in what is said, and how it is said. A trade negotiator knows, for example, to think of, and refer to, the assumption of legal commitments in trade negotiations as 'payments', and to evaluate an agreement in terms of 'balance'. A trade negotiator further knows that, to the extent that developing countries are not willing or able to assume reciprocal commitments, they will have to claim a 'special' status and ask for 'special and differential treatment' in trade negotiations. At the level of *practices*, in turn, this truth manifests itself in how negotiations are organised – who is allowed to participate in negotiations, how decisions are made, which role the chairs plays, and so forth. A trade negotiator knows, for instance, how to manage the participation in negotiations so that those who are unwilling to reciprocate commitments are excluded from meaningful participation and from the benefits of the resulting agreement. Lawmaking *techniques* represent ways of generating legal commitments. At the level of techniques, the imperatives of reciprocity manifest themselves in the design of the modalities that govern the assumption of legal commitments, such as tariff reduction formulas. Apart from their knowledge of specific lawmaking techniques, negotiators also have a more general conception of why, when, and how to *use law*. At this level, the ramifications of reciprocity are reflected in the notion that trade law should be modelled on the private law contract, the idea that only payment entitles to 'hard' law, and a particular conception of what kinds of subject matters are fit for legal regulation in the trading system.

My aim in telling the history of these knowledge practices, and of the ways in which certain truths about multilateral trade lawmaking have become embodied in them, is

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<sup>12</sup> See also Giddens' distinction between discursive and practical consciousness as relating to "differences between what can be said and what is characteristically simply done"; Giddens 1984, 7.

<sup>13</sup> Wilkinson 2004, 151.

not primarily to give a historically more accurate account of trade lawmaking for its own sake. Rather, in keeping with my aim to destabilise these truths, what I seek to produce are histories that are thicker and messier than the streamlined accounts that make it into the speeches of trade policy officials and that any academic trade lawyer can recite off the top of their heads. One central way in which the history that I tell differs from other accounts is that, for the purposes of my story, proposals that were ignored, formulas that were not adopted, and ideas that were not pursued are just as relevant as the proposals, formulas, and ideas that were ultimately embodied in the law: These failures and dead-ends reveal the contingent and often contested origins of the truths of trade lawmaking; they bring the trade-offs embodied in the choices that were ultimately made into sharp relief; and they broaden our sense of the potentials of trade law.

At the same time, the history offered here is not an alternative history in the sense that it primarily seeks to reveal things that were previously undiscovered.<sup>14</sup> In fact, one problem that any account that seeks to destabilise the know-how involved in a particular practice confronts is that it must, to some extent at least, reproduce that knowledge.<sup>15</sup> Practitioners who employ that knowledge in their day-to-day work may find that this reproduction does not offer anything "new".<sup>16</sup> That is true in the sense that, given that what I seek to describe is actually existing knowledge, it is, by definition, "known". However, the way in which the account offered here attempts to generate new insights is by presenting this knowledge in a new and different context, in the hope that the reader will come to "know" it in a different way – as contingent, contested, and partial, rather than natural and necessary. Thus, many people "know" that the principle of payment is foundational to international trade lawmaking; but that knowledge may acquire a different

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<sup>14</sup> The reader may note that I have used the adverb "primarily" repeatedly in describing my objectives. I have done so consciously to indicate that, in addition to my "primary" interest, I *also* hope to illuminate the factors that account for the successes and failures of negotiating rounds, shed new light on the development of international trade law, give a historically more accurate account of trade lawmaking, and reveal things that were previously undiscovered. However, given that these objectives are not the *raison d'être* of my thesis, I accept that I can only achieve them in an uneven and limited way.

<sup>15</sup> See Giddens 1993, 21:

[A] grasp of the resources used by members of society to generate social interaction is a condition of the social scientist's understanding of their conduct in just the same way as it is for those members themselves.

<sup>16</sup> See Giddens 1993, 20, on this problem generally in social theory, and sociology in particular:

The objection which lay members of society frequently have to the claims of sociology is ... that its 'findings' tell them nothing which they did not already know – or worse, dress up in technical language that which is perfectly familiar in everyday terminology.

flavour if one considers that the adoption of the bilateral method of tariff bargaining for the multilateral trade regime, from which this principle stems, did not reflect the considered choice of the trade negotiators of the time, but was the result of the refusal of leading US Congressmen to embrace a horizontal reduction formula for the 1945 renewal of the Reciprocal Trade Agreements Act – a decision that was met with a mixture of resignation (on the part of US negotiators), and shock and despair (on the part of UK and Canadian negotiators), who considered the method anachronistic, unworkable, and harmful in its effects on the political economy of trade. Similarly, it is widely "known" that developing countries have a "special" status in multilateral trade lawmaking, a status that some have portrayed as having been opportunistically embraced by these countries in order to evade legal obligations. This status will arguably appear in a different light if we take into account that it originated in the decision by the major powers to confine the developing countries' preferred trade policy instruments to a series of 'exceptions' to the general rules embodied in their draft, and that it was adopted by developing countries only after years of failed efforts to have their difficulties in expanding their export earnings addressed as a structural problem of the trading system outside the context of reciprocal bargains. The developing countries' interests became "special", then, only because certain features of the GATT – its preference for tariffs as a protective instrument, and for lawmaking on the basis of reciprocity – were established as "normal". Finally, it may be widely known that trade law is to be conceived of on the image of the private law "contract". But are we equally comfortable in that knowledge if we think through the effects of this conception, if we consider the subject matters that have been deemed unfit for legal regulation in the trading system because they could not be easily moulded into "contractual undertakings", and if we contemplate what it means to imagine sovereign states negotiating their public policy in the image of self-interested economic actors pursuing their own individual gain?

I am not suggesting that it would be easy to change the knowledge practices of multilateral trade lawmaking and dispense with its truths.<sup>17</sup> After all, they only appear as truths because they are so deeply ingrained in the world view, language, and assumptions of trade negotiators that they appear hardly amenable to change. We thus need to guard against "false contingency", i.e., the suggestion that, just because social structures are not

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<sup>17</sup> Nor am I arguing that this would necessarily be desirable. I will return to this point in my conclusion.

natural and necessary, they are easy to change.<sup>18</sup> While the truths of trade lawmaking, just as social structures more generally, only exist as "instantiations" in the knowledge practices of trade negotiators and "as memory traces orienting" negotiators' conduct,<sup>19</sup> this does not mean that they do not "stretch ... away, in time and space, beyond the control of any individual actors."<sup>20</sup> The episode recounted at the beginning of this introduction illustrates the risks of simply ignoring these truths: it is the risk of not "making sense" to one's counterparts,<sup>21</sup> the risk of losing the sense of "ontological security" that one gains by following widely accepted assumptions,<sup>22</sup> the risk of opening oneself up to the charge of not being "competent".

The truths of trade lawmaking, then, confront the individual participant in trade lawmaking as something with which she or he has to engage in one way or another. This engagement – whether in form of an invocation of the truth, or an attack on it – will tend to confirm and reproduce the truth-status of the element in question. It is in this sense that the truths of trade lawmaking are "both medium and outcome of the practices they recursively organize".<sup>23</sup> At the same time, every "instantiation" of a truth is "an interpretation of it"<sup>24</sup> and thus represents a chance for its more or less subtle development.<sup>25</sup> In fact, such evolution will often be necessary to adapt the principle, narrative, or technique in question to changing subject matters and circumstances.<sup>26</sup> The story I will be telling in this thesis is in large part the story of the gradual evolution of the elements of multilateral trade

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<sup>18</sup> See Marks 2009.

<sup>19</sup> This sentence is adapted from Giddens 1984, 17:

To say that structure is a 'virtual order' of transformative relations means that social systems, as reproduced social practices, do not have 'structures' but rather exhibit 'structural properties' and that structure exists, as time-space presence, only in its instantiations in such practices and as memory traces orienting the conduct of knowledgeable human agents.

See also ibid. 26: "Structure has no existence independent of the knowledge that agents have about what they do in their day-to-day activity."

<sup>20</sup> Ibid. 25.

<sup>21</sup> See Eagleton-Pierce 2013, 120, who notes that even "the heretic has to 'make sense' to orthodoxy".

<sup>22</sup> Giddens 1984, 23: "deviant responses or acts ... disturb ... the sense of ontological security of the 'subjects' by undermining the intelligibility of discourse".

<sup>23</sup> Giddens 1984, 25.

<sup>24</sup> See Giddens 1984, 23: "The discursive formulation of a rule is already an interpretation of it".

<sup>25</sup> For example, the gradual move from linear formulas to harmonisation formulas for tariff reductions during the 1960s and 1970s, discussed in Chapter 1, represented such an evolutionary change in the conception of reciprocity.

<sup>26</sup> See, for example, the discussion of the adaption of reciprocity to the services context in Chapter 1.

lawmaking, of how they have been sustained, re-interpreted, brought to bear and "made to work"<sup>27</sup> in an ever changing environment.<sup>28</sup>

The history of multilateral trade lawmaking has also seen its share of more radical breaks. The use of new lawmaking techniques in the Tokyo and particularly the Uruguay Round, and the reconfiguration of the practices of participation in trade negotiations through the Uruguay Round 'single undertaking' are perhaps the most prominent examples. While I identify continuities between some of these breaks and long-running patterns in GATT/WTO lawmaking, I do not attempt to make any general claims about the conditions under which they are likely to occur – an ambition that I believe is impossible to fulfil, not least because, after each such break, lawmaking will go on under fundamentally changed premises, *both* with respect to the element of lawmaking affected by the break *and* with respect to the participants' awareness of and adaptation to the circumstances under which such breaks can be made to happen.<sup>29</sup> Consider the example of the single undertaking: One effect of the adoption of the principle that 'nothing is agreed until everyone has agreed to everything' was to change the dynamics of participation in the Doha Round as compared to previous trade negotiations. However, that was not the only effect. Arguably, the developing countries' experience of the choice that they faced at the close of the Uruguay Round – to accept this principle or remain outside the multilateral trading system – has deeply transformed these countries' attitude in multilateral trade negotiations<sup>30</sup> and thereby altered the conditions under which future changes of this magnitude can conceivably happen. This episode in the history of multilateral trade lawmaking provides a good example of how

the reflexive nature of human social life subverts the explication of social change in terms of any simple and sovereign set of causal mechanisms. ... The circumstances in which generalizations about what 'happens' to agents hold are mutable in respect of what those agents can learn knowledgeably to 'make happen'.<sup>31</sup>

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<sup>27</sup> I borrow this phrase from Andrew Lang (personal communication).

<sup>28</sup> My use of the term "evolution" is not meant to imply any kind of necessary or irreversible development; such a position would be untenable on the theoretical premises of this thesis (cf. Giddens 1984, chapter 5), and moreover finds no support in the historical record; for an illustration, see the reversal to bilateral request-and-offer bargaining in the Uruguay Round tariff negotiations.

<sup>29</sup> Giddens 1984, xix.

<sup>30</sup> The emergence of developing country coalitions such as the G-20 can in large part be attributed to their fear of being faced with another such *fait accompli*. The G-20 was formed after the US and EU presented a joint paper on agriculture in the Doha Round negotiations; see Bluestein 2009, 139-144, for a vivid description, and Harbinson 2005, 123, for the perspective of the chair of the agricultural negotiations at the time.

<sup>31</sup> Giddens 1984, 237 and xix.

It is through this ultimately unpredictable process of reflexive appropriation that the truths of multilateral trade lawmaking are perpetuated, but it is also through this process that they can be transformed.

## II. Relationship to the Literature

Since the founding of the WTO, there have been two major waves of scrutiny of lawmaking in the multilateral trading system. The first, triggered in large part by the failed 1999 Ministerial Conference in Seattle, inquired into the legitimacy of multilateral trade lawmaking.<sup>32</sup> The second, which started to gain force in the aftermath of the equally failed 2003 Ministerial Conference in Cancún and took on increased urgency after the "suspension" of the Doha Round in 2006 and the failure of the 2008 mini-ministerial in Geneva, has been more concerned with the effectiveness of the WTO lawmaking process.<sup>33</sup>

It is difficult to generalise about this literature,<sup>34</sup> and I will limit myself to highlighting a few respects in which the project that I undertake differs from the way in which this literature approaches the analysis of trade lawmaking. To begin with, this literature, on its own terms, is motivated by particular perceived problems of the WTO lawmaking process, namely, its (lack of) legitimacy and effectiveness, and the questions that authors ask about the elements of trade lawmaking are naturally tailored to these problems. They ask, for example, to what extent the consensus principle contributes to the legitimacy of WTO law,<sup>35</sup> and whether it hinders the effectiveness of WTO negotiations,<sup>36</sup> and they answer these questions against the backdrop of an explicit or implicit normative yardstick for what legitimate and effective lawmaking would look like.<sup>37</sup> The ambition of the current thesis is at the same time broader and more limited: it is broader in that I trace

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<sup>32</sup> See Howse 2001; Krajewski 2001; Esty 2002; Howse/Nicolaïdis 2003; Steger 2003; Zampetti 2003; Kapoor 2004; Bacchus 2005; Cho 2005; Chimni 2006; Elsig 2007; for a critique of a subset of this literature for taking the current constellation of power as their starting point, see Lamp 2010.

<sup>33</sup> See Jackson 2001; Wilkinson 2001; Ehlermann/Ehring 2005; Howse 2005; Martin/Messerlin 2007; Steger 2007; Deere-Birkbeck 2009; Steger 2009.

<sup>34</sup> See Hoekman 2012 for a recent overview of reform proposals, and Deere-Birkbeck/Monagle 2009 for a comprehensive documentation.

<sup>35</sup> The best discussion is Howse 2001, 359-362. I should note that the concern of contributors to the legitimacy debate is not limited to the legislative branch of the WTO, but extends to the judicial side as well; see *ibid.* 374-394; Steger 2003, 120-134.

<sup>36</sup> See Weiss 2002; Ehlermann/Ehring 2005; Tijmes-Lhl 2009; Hoekman 2012, 751-753.

<sup>37</sup> As Hoekman notes, whether one regards the WTO as effective depends on the objectives that one thinks the WTO should pursue; Hoekman 2012, 745.

the evolution of the elements of trade lawmaking throughout the history of the trading system and attempt show how they delimit what trade law can achieve. But it is also more limited in that I do not systematically evaluate these elements in the light of a normative yardstick.

Another aspect of writings exploring the legitimacy and effectiveness of WTO lawmaking that the present thesis seeks to avoid is that they typically focus their attention on a limited number of variables, most often of an institutional kind, and take other aspects of multilateral trade lawmaking as given. Thus, the attention particularly of legal scholars has been focused on procedural conventions such as the consensus principle, the single undertaking, transparency, the WTO's relationship to civil society, and the negotiation of package deals in "rounds". It is natural that authors who are primarily concerned with reforming the WTO lawmaking process would focus on those elements which appear most consequential or amenable to change. There is certainly a trade-off between the comprehensiveness of change that one advocates and the likelihood that it can be realised. However, there is also an evident danger that such an approach will normalise those aspects of lawmaking that are not selected as candidates for reform.<sup>38</sup> In this thesis, I hope to question the knowledge practices of multilateral trade lawmaking on a broader basis; in fact, I will pay particular attention to those elements of trade lawmaking that appear so deeply entrenched that they are rarely seen as candidates for a quick or even medium term fix of the WTO's legislative dysfunction.

### **III. Brief Overview of the Structure of the Thesis**

The four chapters of the thesis are devoted to problematizing the four types of knowledge practices in multilateral trade lawmaking identified above: discourses, practices, techniques, and the use of law. Chapter 1 discusses three discourses: the reciprocity discourse, the discourse of special and differential treatment, and the development discourse. Chapter 2 is solely devoted to the practices of participation in multilateral trade lawmaking. Other important practices, such as those relating to representation, decision-

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<sup>38</sup> It is for this reason that I will avoid giving a discrete list of the 'truths' of trade lawmaking. While it will probably be apparent which elements of trade lawmaking I consider of most concern in this regard, I do not want to prejudge the respects in which a reader may find the elements of trade lawmaking that I analyse to be promising, unremarkable, or troubling.

making, and chairing, are not discussed primarily for reasons of space, but also because they are already subject to an extensive literature. Chapter 3 analyses the techniques of trade lawmaking and the narratives that trade negotiators employ to make sense of these techniques. I identify five such techniques and their attendant narratives, namely, reduction techniques ("liberalisation"), levelling techniques ("fairness"), managing techniques ("stability"), minimising techniques ("necessity"), and regulating techniques ("good governance", "harmonization", and others). The discussion focuses on the first three techniques, which have been most widely used in multilateral trade lawmaking. Chapter 4 explores the use of law in the trading system, and in particular the questions of why law was chosen for the regulation of international trade, what kind of law trade negotiators have deemed suitable for the trade regime, and how law shapes the process of its own making.

Each chapter uses a piece of writing that provides an unfamiliar angle of attack, from the perspective of which the chapter then scrutinises the knowledge practice at issue. With the exception of the last chapter, these pieces of writing are from outside the trade context: MacKinnon developed her critique of the Aristotelian conception of equality in the context of her feminist theory of domestic law; Cohen analyses the complementarities of the negotiation literature and the "new governance" approach; and Cover explores the relationship between law and narrative in the context of a discussion of the US Supreme Court's 1982 term. Hudec's article, though written in the trade context, investigates the role of law in the trade regime in the 1960s, an epoch that today, more than 40 years later and after 15 years of a WTO dispute settlement system with compulsory and exclusive jurisdiction, can seem very far away. Despite their distance from the (current) trade context, or rather, because of this distance, each of these articles prompts us to ask difficult questions of the trade regime: how did the most basic principles of the trade regime, such as the principle of reciprocity or the privileging of tariffs as a protective instrument, become established? How did some countries become "special"? What is the trade regime's relationship to the past? Which techniques do trade lawmakers use, and what is the rationale for these techniques? Why have trade negotiators always insisted on making "hard law" even though they were often not prepared to enforce it? These are just some of the questions that I will explore in the following pages, in the hope that, at the end of the exercise, the reader will be left with a greater awareness of the contingent and often contested origins of the truths of multilateral trade lawmaking, with a more acute sense of

the trade-offs embodied in these truths, and with a broader appreciation of the potentials and limitations of trade law.

## Chapter 1: Discourses

In her article "Reflections on Sex Equality Under Law", Catharine MacKinnon recounts the struggle of women to engage with and transform a legal system that had for centuries been authored, adjudicated and enforced exclusively by men. Initially the focus of these struggles was on demanding legal inclusion for women "on the same terms as men".<sup>39</sup> The aim was to extend to women the same rights that men enjoyed, on the basis that women were equal to men. Underlying these efforts was a conception of equality that demanded "treating likes alike and unlikes unalike".<sup>40</sup> MacKinnon questions this conception of equality in several respects: Why is it, she asks, that white men should set "the point of reference for sameness"?<sup>41</sup> Are women truly equal when they gain access "on the same terms" to a legal system that is shaped by the experience of men, for example in its treatment of sexual violence and reproductive issues? Can the unequal treatment of women still be justified under this conception to the extent that women are not "like" men? And how does a conception of equality that focuses on the "likeness" of persons or situations take account of the fact that some respects in which women are not "like" men are the result of historical discrimination?

MacKinnon's questions present a useful entry point to the analysis of the "architecture of distinctions"<sup>42</sup> of the multilateral trading system. A number of parallels spring to mind. Just as women had no role in the authorship of most domestic legal systems, the multilateral trade regime did not come into being as a system of 159 members, nor arguably of the 23 original members of the GATT, but was shaped by the practices of a few states, whom others joined, through "accession" to the GATT or the WTO. MacKinnon's questions about the "point of reference for sameness", about who, or what, is regarded as "normal" or the "standard" in such a dynamic of exclusion and subsequent inclusion are thus highly pertinent to the evolution of the trading system.

Moreover, MacKinnon's analysis draws attention to "how difference is socially created or defined", and to the fact that it is often defined in light of what are regarded as

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<sup>39</sup> MacKinnon 1991, 1286.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid. 1287: "Why should anyone have to be like white men to get what they have, given that white men do not have to be like anyone except each other to have it?"

<sup>42</sup> Luhmann 1995/2004, 371/330.

"normal" characteristics and practices.<sup>43</sup> Again, these questions are highly relevant to the trading system. One could note that while the majority of WTO members are "developing countries", this is deemed to be a "special" status. The standard condition of a participant in the trading system – or at least the condition that everyone aspires to – is being a "developed" country. Pursuing the questions posed by MacKinnon might thus help to elucidate and destabilise distinctions such as the one between "developed" and "developing" countries in the trading system. In particular, MacKinnon prompts us to ask what other distinctions this distinction precludes, or, as Niklas Luhmann might put it, from what this distinction is itself distinct.<sup>44</sup>

Third, MacKinnon emphasises the relationship between the definition of equality/difference and time. In her view, the conception of equal treatment as the like treatment of situations that are alike does not take account of how differences have been produced in the first place. This problem is most acute when it comes to the most deep-rooted dimensions of inequality, since "the worse the inequality is, the more like a difference it looks."<sup>45</sup> The result is "dominance essentialized as difference".<sup>46</sup> Time, or "history", arguably plays a crucial role in the architecture of distinctions of the multilateral trading system. A large majority of the "developing" members of the trading system used to be colonial subjects of some of the "developed" members; many of the "developing" countries were just emerging from colonial occupation at the time the multilateral trading system was established in the late 1940s, and some did not gain independence until decades later. Yet the distinction between "developing" and "developed" countries is future-oriented; instead of problematising the history of the members of the trading system, it conceptualises their relationship in terms of future convergence.

In the present chapter, I will use the conceptual angles of attack that MacKinnon employs in her critique of the conception of equality as like treatment for an analysis of the discourses of multilateral trade lawmaking. As I will argue in the first section, the dynamic of inclusion/exclusion is crucial to understanding how a particular principle, namely the principle of reciprocity, came to be accepted as the 'normal' way of making trade law.

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<sup>43</sup> MacKinnon 1991, 1290: "Society defines women as such according to differences from men ... Then equality law tells women that they are entitled to equal treatment mainly to the degree they are the same as men."

<sup>44</sup> Luhmann 1995/2004, 370-372/329-330.

<sup>45</sup> MacKinnon 1991, 1296.

<sup>46</sup> Ibid. 1297.

According to the reciprocity discourse, a participant in trade negotiations can only be expected to make 'concessions', in the form of tariff cuts or other changes in its trade policy, if its counterpart is prepared to 'pay' for them with substantially equivalent 'concessions' of its own. This idea has its origins in US trade policies of the 1930s, and in the particular dynamics of US domestic politics. As a result of these dynamics, the US could participate in a multilateral trading system only on its own terms. Its international position at the end of the Second World War forced other countries to accept these terms, and in particular the conception of trade negotiations as an exchange of reciprocal concessions, as the foundational principles of lawmaking in the emerging multilateral trading system.

After briefly recalling the circumstances under which these principles of lawmaking were adopted for the multilateral trading system, I will analyse the effects of the conception of international trade lawmaking that is inherent in the reciprocity discourse. In particular, I will argue that the reciprocity discourse conceives of international trade lawmaking as being akin to a series of commercial transactions rather than as an exercise in public policymaking. I argue that this conception of the trade regime as essentially a market for the reciprocal exchange of concessions precludes considerations of equity and common purpose. I will also consider alternative conceptions of trade lawmaking that might have set the trading system on a different course. Finally, I will analyse the evolution of the reciprocity discourse from the early years of the trading system to the current Doha Round negotiations.

In the second section, I will show how the demands and aspirations of "developing" countries in the trading system came to be conceptualised as "special". I will first analyse the preparatory negotiations of the GATT, in the course of which the US and other developed countries decided to accommodate the "less-developed" countries' desire to reserve a greater role for the state in the management of international trade through "exceptions", rather than by modifying the basic structure of their design. I will then argue that the first attempts of the GATT contracting parties to address the problems that the "less-developed" countries encountered in their trade relied on a cooperative approach to international trade lawmaking, in which considerations of reciprocity played virtually no role. This cooperative approach rested on the expectation that the GATT's contracting parties would undertake all efforts to eliminate obstacles to the exports of "less-developed

countries", a shared goal to which the contracting parties had repeatedly committed themselves. At the core of the cooperative approach were the identification, analysis, and discussion of these obstacles, and the attempt to persuade the industrialised countries to eliminate them. As I argue, it was the failure of the cooperative approach that forced the "less-developed" countries to seek accommodation within the dominant reciprocity discourse – by arguing for "special and differential treatment". The discourse of "special and differential treatment" differed profoundly from the cooperative approach; instead of conceptualising the obstacles confronting developing countries as a structural problem of the trading system, it merely modified the exchange rate between concessions by developed and developing countries. In the language of the market metaphor, the discourse stipulated that developed countries would "sell" concessions to developing countries at a discount, but it did not oblige them to sell them anything in the first place. Thus, the discourse of "special and differential treatment" did not fundamentally alter the logic of payment underlying trade negotiations; in fact, by claiming "special" status, the discourse arguably reinforced the status of reciprocity as the "normal" way of trade lawmaking.

In the third section, I will examine the wider challenges that the idea of "development" posed to the US vision of the multilateral trading system. As I will argue, the development discourse tells a story about the temporality, teleology and relationality of the trading system that fundamentally differed from the US vision. To begin with, it rested on a different theory of history. While the US sought to portray the founding of the trading system as a "release" from an anarchic past of untrammelled protectionism, the development discourse appraised the significance of the trading system primarily in terms of a future goal, namely whether it would assist or hinder the "less-developed" countries to industrialise. Even though many "developing" countries arguably also had a formative "past" experience to overcome, namely, the history of colonial subjugation, the development discourse was exclusively future-oriented: Whereas the US narrative dramatised the past, the development discourse did not admit of a past, or, rather, imagined a generic state of underdevelopment in its stead.

The US narrative and the development discourse also posited different aims for the trading system. Reciprocal trade liberalisation, which was at the heart of the US project, represented no more than a means to an end for those countries primarily concerned with industrialisation. Finally, the two discourses imagined the relationship between the

members of the trading system in different ways. Whereas the US sought to preserve the formal equality of all "contracting parties" to the GATT, the idea of "development" encouraged the differentiation between members according to their "stage" of development. I conclude that the development discourse has played a paradoxical role in international trade lawmaking in that the idea of development, on one hand, naturalised the subordinate and dependent position of the poorer members of the trading system – in MacKinnon's words, it essentialised dominance as difference –, but on the other hand expressed an emancipatory ambition for a clear break with the trading patterns entrenched under colonial rule.

## I. The "Reciprocity" Discourse

As is well known, the "move to institutions"<sup>47</sup> at the end of the Second World War almost faltered in the field of international trade. By 1950 it was clear that the Charter for an International Trade Organization (ITO), which had been adopted at the 1948 United Nations Conference on Trade and Employment in Havana, would never enter into force.<sup>48</sup> What survived was a provisional and, from an institutional perspective, incomplete agreement called the General Agreement on Tariffs and Trade (GATT).

The GATT was concluded at the second preparatory meeting for the Havana Conference held in Geneva in 1947. It consisted of three parts. The first part incorporated schedules of tariff bindings and barred the parties from charging customs duties on products imported from other parties in excess of those specified in their respective schedules. It also included the most-favoured nation (MFN) clause, which prohibited discrimination among like products from different members. The provisions in the second part concerned non-tariff barriers and were for the most part portrayed as "anti-circumvention" provisions, i.e. rules designed to protect the value of tariff concessions.<sup>49</sup> The third part contained administrative and organisational provisions, carefully designed not to give the GATT the character of an international organisation, which would have

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<sup>47</sup> I borrow this phrase from David Kennedy; see Kennedy 1987; see also Kennedy 1994.

<sup>48</sup> For context, see Diebold 1994.

<sup>49</sup> The report of the first preparatory meeting in London had recommended that the GATT contain "general provisions ... considered essential to safeguard the value of tariff concessions and such other provisions as may be appropriate"; E/PC/T/33, 51.

made it incompatible with the US trade legislation under which it was designed to come into force.<sup>50</sup>

In a memorandum to US President Truman requesting approval of the results of the negotiations, the head of the US delegation to the preparatory meeting characterised the GATT as follows:

The General Agreement is, for the most part, an elaboration of familiar provisions of our trade agreements, adapted to the economic conditions of today and to the fact that it will be a multilateral agreement among twenty-three countries.<sup>51</sup>

The US trade agreements that he was referring to were 32 bilateral agreements that had been concluded by the United States under the Reciprocal Trade Agreements Act (RTAA) of 1934.<sup>52</sup> In fact, the substantive provisions of the GATT did embody some compromises with other contracting parties, principally the United Kingdom, which had used extensive bilateral consultations on commercial policy since 1943 to influence the thinking of US trade officials.<sup>53</sup> In large part, however, the GATT mirrored the standard provisions of the reciprocal trade agreements negotiated by the US.<sup>54</sup>

The US experience under the Reciprocal Trade Agreements programme provided the template not only for the structure and many substantive provisions of the GATT. It also shaped *how* the tariff concessions embodied in the GATT had been negotiated and how future trade negotiations under the auspices of the GATT were supposed to occur. The negotiation of the GATT marked the wholesale importation of the principles and practices of US trade lawmaking into the emerging multilateral trade regime. In order to appreciate the significance of this development, it is necessary to give some background on these principles and practices and to analyse the circumstances of their adoption for the GATT (A). I will then discuss the effects of the reciprocity discourse on the conception of

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<sup>50</sup> See Hudec 1975, 45.

<sup>51</sup> FRUS 1947, 1017-1018; see also *ibid.* 1021:

Part II [of the GATT, N.L.] reproduces many of the commercial-policy provision of the draft Charter for an International Trade Organization, which in turn have been largely drawn from, or developed on the basis of, provisions customarily included in past United States trade agreements.

Dam 1970, 12, characterises the GATT as

a sufficiently direct expression of U.S. views on the appropriate form of concerted international action in the commercial policy area that it cannot be understood without an examination of those views.

<sup>52</sup> For the "standard provisions" included in those agreements, see FRUS 1935, 536-549.

<sup>53</sup> For an account of these discussions, see Irwin/Mavroidis/Sykes 2008, chapter 1.

<sup>54</sup> *Ibid.* 12.

lawmaking in the emerging trade regime (B). Finally, I will analyse the evolution of the reciprocity discourse through the current Doha Round (C).

### **A. The Origins of the Reciprocity Discourse**

Reciprocity had been an element of US trade policy long before the Reciprocal Trade Agreements Act was adopted in 1934. In the 19<sup>th</sup> century, US trade legislation had authorised the President to impose punitive tariffs on imports from countries which discriminated against US exports or provided less access to their market than the US President deemed to be "fair".<sup>55</sup> This system preserved the autonomy of Congress in setting US tariff levels. The President's authority was limited to *increasing* tariff levels on specified grounds. At this time, reciprocity was thus understood as providing the basis for retaliation against trading partners, rather than for mutual tariff reductions. The US tariff remained non-negotiable and the sole preserve of Congress.

The Reciprocal Trade Agreements Act, adopted against the backdrop of the escalating protectionism in the wake of the Great Depression, marked a sea change in US trade policy. It for the first time authorised the President to reduce tariffs in exchange for reciprocal tariff reductions by a trading partner.<sup>56</sup> The authority of the President, however, was heavily circumscribed. In order to assuage fears that the tariff reductions would hurt US producers, the President could only reduce tariffs by a certain percentage. An elaborate institutional infrastructure for the preparation of trade negotiations was established.<sup>57</sup> Before entering into negotiations, the Administration would conduct detailed analyses of the competitive position of the US on products on which tariff concessions might be offered. A Committee for Reciprocity Information would then conduct public hearings on the proposed offers, which would often be amended in response to concerns voiced by US producers.<sup>58</sup>

A second key element of US trade lawmaking was the unconditional most-favoured nation (MFN) principle. This principle had been adopted as US policy in the Tariff Act of 1923, and initially attracted little attention: US tariffs were so high at the time that it had

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<sup>55</sup> Goldstein 1993, 205-206; Rhodes 1993, chapter 2.

<sup>56</sup> The literature on the Reciprocal Trade Agreements Act is voluminous; see Haggard 1988; Goldstein 1993; Bailey/Goldstein/Weingast 1997; Hiscox 1999.

<sup>57</sup> See Tasca 1938, chapter 4.

<sup>58</sup> Ibid. 53-54; Wilcox 1947, 15-16. [References in *italics* indicate that the reference is to be found in the "Other Official Documents, Speeches, and Publications" section of the bibliography.]

little practical impact. In conjunction with the principle of reciprocity, however, it acquired considerable significance: The US would now have to extend concessions that it granted in a reciprocal trade agreement to all other countries with which it had concluded such agreements, without receiving anything in return. In order to minimise the impact of this constellation, the US developed the practice of negotiating tariff concessions on a particular product only with the principal supplier of the product in question.<sup>59</sup>

The principles of reciprocity and MFN, in conjunction with the practice of only negotiating on tariff items of which the counterpart was the principal supplier, thus formed the fundamental elements of US trade lawmaking when the US started consultations with Britain and Canada on the shape of the post-war international economic order. That these elements would also inform the negotiation of a future multilateral agreement, however, was by no means a foregone conclusion. In the 1930s, Hull had considered the negotiation of "multilateral trade arrangements" on the basis of the principles of the Reciprocal Trade Agreements Act a possibility, and had stated that the United States

welcome[d] such arrangements, provided they have for their object the liberalization and promotion of international trade in general, rather than the creation of closed areas of special preference.<sup>60</sup>

However, when British, American and Canadian economists and state officials started discussing the shape of the post-war economic order in the early 1940s, they did not take the principles of the US Reciprocal Trade Agreements programme as their starting point. It was particularly the British and the Canadians who pressed the view that the post-war trading system should have a multilateral character and who argued that in the post-war trading system, tariff reductions should be negotiated through a multilateral procedure,

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<sup>59</sup> *Hull 1936*, 15:

Our rule is that the duty reductions granted to each individual country are restricted to those commodities of which the particular country is the chief supplier to the United States. If it should happen, however, that, under existing abnormal conditions, some other country at any later stage profits unduly from the benefit of the concession, we retain the right, when such contingency arises, to modify the original grant.

See also Oral History Interview with John Leddy, 9; Hawkins 1951, 81-82; Evans 1971, 6.

<sup>60</sup> *Hull 1936*, 15:

Our interpretation of the most-favored-nation principle is sufficiently flexible to permit the negotiation of multilateral trade arrangements.

Reportedly US trade officials had considered a multilateral approach as an alternative to bilateral agreements in the early 1930s, but had found it to be "hopeless" given the "intricate complexities of foreign trade and the differing commercial policies of various nations at the time"; *Sayre 1936*, 5; see also Evans 1971, 6.

rather than the bilateral requests and offers characteristic of the negotiations of US reciprocal trade agreements.

The first British proposals for the post-war international economic order stressed the importance of multilateral trade for Britain. In his "Proposal for an International Commercial Union", James Meade, who was an economist at the War Cabinet Secretariat at the time, argued that Britain would stand to gain "above all other countries ... from a removal of those discriminations and rigidly bilateral bargains which remove the opportunities for multilateral trading".<sup>61</sup> An interdepartmental committee tasked with developing a consensus position on international commercial policy on the basis of Meade's proposal suggested reducing tariffs through the application of a horizontal reduction formula applied to all rates, combined with a maximum "ceiling" that the resulting tariffs could not exceed, and a "floor" under which tariffs would not have to be reduced.<sup>62</sup> This method of tariff reduction would remain the UK's preferred option throughout the negotiations with the US.

In early conversations with the US, Canadian officials similarly envisioned that multilateral agreements would replace bilateral agreements in the post-war period.<sup>63</sup> One Canadian official argued for "bold", even "heroic" action after the war, and expressed his view that the "old methods of trade negotiation" were "too cumbersome and should be abandoned".<sup>64</sup> Specifically, he suggested the conclusion of a "broad multilateral agreement under which each nation would agree to a progressive reduction in all tariffs or in certain categories of tariffs".<sup>65</sup> At the same time, Canada expressed interest in supplementing such a multilateral agreement with a bilateral agreement with the United States in order to achieve further liberalisation of its trade with the United States than would be possible in a multilateral context.<sup>66</sup>

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<sup>61</sup> *Meade Proposal 1942*, 214; on the proposal, cf. Irwin/Mavroidis/Sykes 2008, 27-37; Cairncross/Watts 1989, 100-101.

<sup>62</sup> Cairncross/Watts 1989, 101; the original proposal even specified exact numbers: all tariff rates would be reduced by 25 per cent, with a ceiling of 25 per cent and a floor of 10 per cent. The Cabinet-approved brief with which the UK delegation went into negotiations with the US in late 1943 contained the same formula, though the specific numbers had been replaced with placeholders (x, y, z); *ibid.* 103.

<sup>63</sup> FRUS 1943, 1101.

<sup>64</sup> *Ibid.* 1104. He later reiterated his opinion that "negotiation under [the US reciprocal] trade agreements program was too cumbersome and too limited in scope to make it interesting for Canada to enter upon further trade negotiations with [the United States]"; *ibid.* 1105.

<sup>65</sup> *Ibid.* 1105.

<sup>66</sup> *Ibid.*

In September 1943, a British delegation traveled to Washington for exploratory talks on post-war commercial policy and to formulate an agenda for more formal and high-level consultations between the two nations.<sup>67</sup> The comparative effectiveness of multilateral and bilateral methods of tariff reductions was one of the many subjects of discussion.<sup>68</sup> A joint statement adopted at the end of the discussions outlined five different methods of tariff reductions and briefly presented the advantages and disadvantages of each.<sup>69</sup> The first four options were multilateral reduction formulas, whereas the fifth mirrored the US practice under the Reciprocal Trade Agreements programme.<sup>70</sup> The US and the UK agreed that "if a workable multilateral tariff-reduction formula acceptable to a large number of nations providing for a drastic reduction of tariffs without nullifying exceptions and reservations can be found, it would be superior".<sup>71</sup> In addition, Britain expressed the view that it would "not be possible to obtain adherence to a multilateral convention prohibiting quantitative restrictions and limiting the use of other protective devices unless it includes a satisfactory formula for multilateral tariff reductions".<sup>72</sup> This reflected the fact that Britain could only envisage giving up the imperial preferences – one of the principal goals of the US – if it could be assured that the US would significantly reduce its high pre-war tariffs.<sup>73</sup>

In December 1943, a Special Committee on the Relaxation of Trade Barriers in the US State Department issued a report in which it reiterated the view that the adoption of a multilateral tariff-reduction formula would be superior.<sup>74</sup> The Committee announced that it would continue to study a number of multilateral reduction formulas "from the viewpoint of their equity and technical soundness", though it would also consider "provisions whereby

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<sup>67</sup> On these discussions, see Irwin/Mavroidis/Sykes 2008, 37-41; Gardner 1969, 103-109.

<sup>68</sup> FRUS 1943, 1119-1120. The reason I am focusing on the negotiating method for tariff reduction here is that this method would eventually become paradigmatic for trade lawmaking generally.

<sup>69</sup> *Anglo-American Discussions 1943*, 222-225.

<sup>70</sup> The fifth option is described as follows: "... each country would agree to negotiate with its principal supplier bilateral agreements for tariff reductions on its major dutiable imports"; *ibid.* 225.

<sup>71</sup> *Ibid.* 222.

<sup>72</sup> *Ibid.*

<sup>73</sup> Irwin/Mavroidis/Sykes 2008, 38-39; Gardner 1969, 108; see also FRUS 1945, 135: "in the minds of the [British public] the Ottawa measures in 1932 [i.e., the system of imperial preferences, N.L.] are regarded largely as a response to the Smoot-Hawley Tariff in 1930", which had increased US tariffs considerably.

<sup>74</sup> Quoted in Irwin/Mavroidis/Sykes 2008, 42; a summary of the report is reproduced in *Notter 1950*, Appendix 45, 622-624; the Executive Committee on Economic Foreign Policy held the same view: "the multilateral-horizontal procedure ... is superior on its merits to all alternatives which have been presented"; FRUS 1945, 76.

each nation would agree to negotiate bilateral tariff-reduction agreements" – "either as a necessary substitute for a multilateral tariff reduction formula or as a supplement to it".<sup>75</sup>

On the basis of the joint statement adopted by the United States and the United Kingdom in October 1943, the United States held similar exploratory talks with Canada during February and March 1944. The US and Canada agreed on a horizontal reduction formula with a floor of 10 percent as a "tentative basis" for further discussions.<sup>76</sup> The Canadian group agreed with the view that had been expressed by the British that "a definite commitment to abolish quantitative restrictions should be accompanied by an equally precise commitment to effect substantial reductions in tariffs". The Canadian suggested that the "overall reduction should be of the order of, say, 50% in most-favoured-nation rates".<sup>77</sup> It was this formula – a 50 percent reduction of tariff rates with a floor of 10 percent – that was incorporated in a draft convention drawn up by an interagency group led by the US State Department in October 1944.<sup>78</sup> It was also reflected in a draft resolution for the renewal of the Reciprocal Trade Agreements Act that the US Administration submitted to Congress for consideration in early 1945 and through which it hoped to gain Congressional advance authorisation for the tariff negotiations that would form part of a multilateral accord.<sup>79</sup>

In March 1945, however, the prospects for the adoption of a multilateral reduction formula dimmed. The State Department had consulted with House leaders and described their initial reaction to the proposal of a horizontal tariff reduction as "very discouraging".<sup>80</sup> While the Congressmen had not closed the door to a horizontal approach entirely, the State Department officials "came away with the feeling that the leaders felt very strongly that it should be dropped".<sup>81</sup> After some handwringing, the State Department decided to follow this advice, and narrowly secured the passage of the Act through the House and the Senate

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<sup>75</sup> Notter 1950, 623.

<sup>76</sup> DCER 11, 72.

<sup>77</sup> DCER 11, 71; for British objections to this formula, see *ibid.* 62-63.

<sup>78</sup> *Proposed Multilateral Convention 1944*, 240; Irwin/Mavroidis/Sykes 2008, 50; Gardner 1969, 151; see also FRUS 1945, 26, which mentions "the substantial reduction of import duties by means of a formula applied horizontally to the tariffs of all countries" as an element of the draft.

<sup>79</sup> The draft resolution had three elements. Section 1 proposed the renewal of the negotiating authority of the President for three years. Section 2 changed the baseline for the 50 percent tariff cut which the President was authorised to make from 1934 to 1 January 1945. Section 3 proposed the extension of the authority to cover horizontal reductions, as opposed to the selective, item-by-item reductions that had been authorised under the 1934 RTAA; FRUS 1945, 27, fn 59; cf. Irwin/Mavroidis/Sykes 2008, 56-57.

<sup>80</sup> FRUS 1945, 27.

<sup>81</sup> FRUS 1945, 27.

in May and June 1945, respectively.<sup>82</sup> The Reciprocal Trade Agreements Act tied the hands of the US government, since any future tariff reductions would have to be negotiated and implemented under its authority.<sup>83</sup>

The reaction from the British and Canadian negotiators to the new realities was fierce. British negotiators described the "multilateral bilateral approach" to which the Americans were now committed – which called for a number of bilateral negotiations conducted simultaneously whose results would be generalised through the MFN rule – as "a nightmare conception", and announced that the abandonment of the multilateral approach "would be the end of all we hope to achieve" and the "end of everything worth having".<sup>84</sup> The Canadians pointed out that they were "deeply disappointed and dismayed by the change in the American position", and that they viewed any selective method of tariff reduction as "'hopelessly inadequate' to the needs".<sup>85</sup>

The British and Canadian negotiators objected to the incorporation into the future multilateral trading system of the tariff negotiation methods required by the Reciprocal Trade Agreements Act both on pragmatic and normative grounds. A first concern raised by the British was the time that would be required to negotiate "a multiplicity of bilateral agreements", and the associated capacity constraints.<sup>86</sup> This was in line with earlier Canadian complaints that the bilateral, selective method was "too cumbersome".<sup>87</sup> The British also complained about the lack of transparency and predictability of a number of simultaneous bilateral negotiations: Negotiators would be required to "enter into a sea of general commercial policy obligations without knowing where they will, in fact, land", and "[y]ou could never tell where you stood or where you would come out".<sup>88</sup> They also emphasised the psychological advantages associated with the horizontal, multilateral

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<sup>82</sup> For a review of the Congressional debate, see Irwin/Mavroidis/Sykes 2008, 56-60; Gardner 1969, 151, comments: "When it came to the decisive test the Administration's promises of a bold foreign economic programme were quickly dissipated by the hard domestic political realities"; see also FRUS 1945, 78, where US officials explain to their British counterparts that the policy change was "required ... by practical realities which we faced on the Hill".

<sup>83</sup> Cf. FRUS 1945, 45.

<sup>84</sup> FRUS 1945, 57-58: "the UK would go into it with no heart and no expectation of anything worthwhile coming out of it."

<sup>85</sup> FRUS 1945, 67; DCER 11, 100.

<sup>86</sup> FRUS 1945, 57; the British noted that the UK had "only enough trained personnel to negotiate one commercial treaty at a time"; FRUS 1945, 59, 90-91, 95.

<sup>87</sup> FRUS 1943, 1104; the Canadians were also of the view that the approach proposed by the US would "take many years to complete"; FRUS 1945, 64.

<sup>88</sup> FRUS 1945, 57-58.

method: as they put it, it was "psychologically ... essential to make a comprehensive reduction where all parties will make sacrifices at once".<sup>89</sup> These latter concerns could be described as going to the (moral) intelligibility of negotiating results. The different negotiating formulas had often been discussed in terms of their equity, an assessment that would be much harder to make with regard to the outcomes of bilateral, selective negotiations.<sup>90</sup> The Canadians emphasised the significance of this appearance of equity for the wider dynamics of trade negotiations. Apart from the magnitude of the tariff cut that had been contemplated under the horizontal formula, they opined that "the fact that it would deal with all tariffs in all countries with an even hand would ... weaken the vested minority interests in every country", whereas "[s]elective tariff reduction ... tends to emphasize the sanctity of protectionism".<sup>91</sup> The Canadian negotiators evidently feared that the adoption of the bilateral method would have the effect of universalising the mercantilist logic of the Reciprocal Trade Agreements programme by forcing other countries to emulate the political economy of American trade politics. They pointed out that the

selective method of tariff reduction, as carried out by the United States under the Trade Agreements Act, had tended to strengthen the belief that trade barriers should be reduced only under the bargaining process and to obscure the truth that trade barrier reduction is also of benefit to the country doing the reducing.<sup>92</sup>

If the selective method was adopted for the multilateral regime, other countries would "inevitably adopt the same careful and cautious attitude toward the reduction or removal of tariffs and other restrictions against United States exports" that the United States was adopting towards their exports.<sup>93</sup> By way of example, the Canadian officials pointed out that "it was virtually becoming impossible for the Canadian Government to reduce its

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<sup>89</sup> Ibid. 57.

<sup>90</sup> Ibid. 59: "the only effective position would be to say 'let's all agree to a common code and all make substantial reductions at once'."

<sup>91</sup> FRUS 1945, 63; cf. Evans 1971, 20, who notes that "both the limitations on presidential authority and the item-by-item negotiating technique" embodied in the RTAA "were manifestations of deeply rooted attitudes, in the United States and elsewhere, toward the value of tariff protection".

<sup>92</sup> FRUS 1945, 63; Harry Hawkins, who was a member of the US delegation to the negotiations when the Canadians voiced these concerns, later confirmed that this effect had already materialized:

The inauguration of the program of tariff negotiations by the United States in 1934, under the authority of the Trade Agreements Act, gave a strong impetus throughout the world to tariff reduction by negotiation rather than by unilateral action. The impetus in this direction was proportionate to the size of the American market and to the importance of this country in world economic affairs. Any country contemplating a reduction in its tariff, extensively or on particular items, was likely to postpone the action in the hope of securing by negotiation benefits for its exports in return for the contemplated reductions. (Hawkins 1951, 97-98)

<sup>93</sup> FRUS 1945, 63.

duties unilaterally even though many of them should be reduced in the best interests of Canada."<sup>94</sup>

Canada also noted the implications of the bilateral approach for the prospects of getting "outsiders" to join the planned multilateral agreement. The Canadians argued that the horizontal approach would have made it "possible to compel reluctant countries to participate in the plan by threatening to withhold tariff benefits if they did not participate".<sup>95</sup> In the Canadians' view, this would have been "politically feasible internationally because the requirements under the plan for a horizontal tariff cut would be equitable, simple, and easily understandable".<sup>96</sup> The selective method, by contrast, "would be complicated and to some extent inequitable vis-à-vis outsiders and could not well be used as a weapon to force them in".<sup>97</sup>

Instead of leading to a reconsideration of the method for tariff negotiations, these concerns about how best to accomplish the "compulsion of outsiders"<sup>98</sup> lent new impetus to the idea of negotiating tariff reductions and an accompanying multilateral agreement on non-tariff barriers first among a "nuclear group" of "major trading nations"<sup>99</sup> and requiring outsiders "to negotiate their way in by entering into bilateral agreements with each of the countries making up the nuclear group".<sup>100</sup> On the basis of these discussions with the Canadians, the Executive Committee on Economic Foreign Policy recommended that a "selective nuclear-multilateral approach" be advocated in future negotiations. This approach envisaged that

a nuclear group of approximately a dozen countries would agree to negotiate, first, bilateral agreements for selective tariff reductions, and second, an informal, multilateral program dealing with tariff preferences and non-tariff barriers, which program would then be presented at a general international conference to be concluded and made operative among the nuclear group and other nations wishing to participate.<sup>101</sup>

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<sup>94</sup> Ibid.

<sup>95</sup> Ibid. 67.

<sup>96</sup> Ibid. 67-68.

<sup>97</sup> Ibid. 68.

<sup>98</sup> Ibid. 67.

<sup>99</sup> Ibid. 71-72; in discussions with the UK, a US negotiator had earlier mentioned the idea of "getting a nucleus of important trading nations together in an opened agreement to which other countries might be more or less obliged to adhere"; ibid. 59.

<sup>100</sup> Ibid. 73; see also Chapter 2 *infra*.

<sup>101</sup> Ibid. 75 and fn 34.

While the British continued to express disappointment at this approach,<sup>102</sup> it had become virtually non-negotiable, and would become the way in which the GATT would in fact be negotiated and concluded.<sup>103</sup> Subsequent procedural discussions between Britain and the United States focused on the composition of the nuclear group.<sup>104</sup>

In sum, the origins of the GATT were marked by two moves of exclusion and subsequent inclusion: First, the procedure for tariff negotiations with bilateral reciprocity at its core was virtually dictated by the US Congress. If other nations, including the United Kingdom, wanted to negotiate with the United States on tariffs, they had to accept the United States' terms. Second, the structure of a multilateral agreement – the relation between tariffs and other forms of government action in relation to trade, and the degrees of stringency/leniency with which the other forms of government action would be treated – was broadly determined by the United States and the United Kingdom. This structure, in turn, would be safeguarded through the nuclear approach, which would leave newcomers virtually powerless to fundamentally shape the broad outlines of the agreement.

One aspect of this structure is particularly important to note, since it greatly magnified the ramifications of the first exclusionary move. While the GATT contained substantive obligations with regard to other barriers to trade, it was envisaged that tariff barriers would be gradually reduced through continuous negotiations. As a result, tariffs would represent the primary area of negotiating activity in the first two decades of the GATT.<sup>105</sup> Due to the centrality of tariffs in negotiations under the early GATT, tariff negotiations would become paradigmatic for international trade negotiations generally. As a result, the practices and procedures of tariff negotiations, imported as they were from the US Reciprocal Trade Agreements programme, came to fundamentally shape conceptions of how international trade lawmaking "works". The imprint that these practices and procedures left on multilateral trade lawmaking is most tangible in the effects of the reciprocity discourse.

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<sup>102</sup> Ibid. 90-92.

<sup>103</sup> For a description of the tariff negotiations in Geneva in 1947, see Jackson 1969, 218-220.

<sup>104</sup> See FRUS 1945, 87-90.

<sup>105</sup> Dam 1970, 27 notes that "at least until the Kennedy Round", the GATT had "largely limited negotiations ... to tariffs" and that there had been no "concerted attempts to devise comparable negotiation procedures for nontariff barriers".

## B. The Effects of the Reciprocity Discourse

The overarching effect of the two exclusionary moves that marked the origins of the GATT was to universalise the principles and practices of US trade lawmaking. What had until that point been US principles and practices became the principles and practices of the multilateral trade regime.<sup>106</sup> These principles and practices gave multilateral trade lawmaking very particular features, which continue to shape it to this day.

First, the concerns voiced by Canada in the preparatory negotiations, namely that the adoption of reciprocal bargaining as the method of trade negotiations in the GATT would universalise the *mercantilist logic* of the Reciprocal Trade Agreements programme and reproduce the political economy of US trade policymaking in other countries, proved well founded. As one of the US negotiators who participated in the negotiations with Canada observed four years after the adoption of the GATT:

The conception of tariff bargaining has spread. It has now reached the stage in which negotiation is the internationally accepted method for the reduction of tariffs. The General Agreement on Tariffs and Trade accomplished an extensive downward revision of tariffs by the bargaining process. ... There is, of course, nothing in the General Agreement on Tariffs and Trade ... that precludes unilateral tariff reduction. Once, however, the idea of tariff bargaining becomes widely established, a psychology adverse to unilateral tariff reduction is created. Even if a country has no expectations of future negotiations, the pervasive tariff-bargaining idea would operate as a hindrance to any unilateral reductions that it might contemplate. The growth of the tariff-bargaining idea has fixed more firmly in the public mind the conception that a tariff reduction is a sacrifice for the country making it and that the country benefits only if similar action is taken concurrently by some other country. In public statements describing the results of negotiations, the common use of the term 'concession' to describe a reduction or binding of a duty is strengthening the conception that a tariff reduction is a benefit to some one else. Henceforth, the legislator or public official who advocates a unilateral tariff reduction is going to have to contend to an increasing extent with this conception. He will have to explain why he wants to 'sacrifice' the national interest for the benefit of foreigners without getting counter balancing 'sacrifices' from them.<sup>107</sup>

The adoption of the US model of reciprocal bargaining consolidated a mercantilist conception of the political economy of trade<sup>108</sup> and marginalised other conceptions of the

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<sup>106</sup> See also Jackson 1969, 223: "The first five rounds of GATT tariff negotiations were greatly influenced by the domestic law of the United States on which the United States executive branch based its negotiating authority."

<sup>107</sup> Hawkins 1951, 98. Hawkins had favoured the adoption of a horizontal reduction formula, reportedly at some risk to his career; see Irwin/Mavroidis/Sykes 2008, 39; see also Evans 1971, 24: it was "not possible to overlook the power that the concept of reciprocity exerted on the public and legislative mind".

<sup>108</sup> See also Hudec 1987, 16-17, who describes reciprocity as the "dominant message" of the "theory of the United States legal design", which "made it very hard to argue that freedom from GATT obligations was not a

political, economic, and cultural significance of trade. It is not inconceivable that the multilateral trading system could have fostered, and could in turn have been sustained by, a political culture less reliant on reciprocity. Britain in the 19<sup>th</sup> and early 20<sup>th</sup> century provided a precedent for a society in which free trade was cherished as a political and cultural value, and reciprocity was rejected as an aberration and a betrayal of the principles of free trade.<sup>109</sup> Of course, Britain was somewhat unique in this regard, and in light of the history of American trade politics, there was little prospect of the United States promoting a trading system on this basis internationally after the Second World War, for example by unilaterally liberalising its trade<sup>110</sup> (though this option was often mentioned by US officials in order to stress the moderation of their proposals to domestic audiences<sup>111</sup>). What the example of Britain goes to show, however, is that there is no historically or geographically universal political economy of trade that renders reciprocity, which allows policymakers to trade off import-competing with export interests, the only politically feasible principle of international trade lawmaking. However, as Canada had feared, and Hawkins (and many others) subsequently confirmed, reciprocity – once it was accepted as the principle of trade lawmaking – works to produce domestic political-economic conditions that reinforce its logic, and hence weakens the influence of free trade as a political or cultural value.

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valuable good". Hudec's use of the term "theory" highlights the contingent and malleable character of this conception, which was not simply describing a 'truth' about the political economy of trade.

<sup>109</sup> Trentmann 1998; Dam 1970, 65, notes that the economist's perspective on tariff reduction – that tariff reduction is beneficial for the country doing the reducing – "prevailed among noneconomists as well in the latter half of the nineteenth century."

<sup>110</sup> Dam 1970, 86:

Hull's key insight was that unilateral tariff reduction was not in the political cards in most countries and certainly not in the US Congress.

<sup>111</sup> See Hull 1936, 8:

When we were formulating our basic policy, there were two ways open to us to make our vital contribution to the process of economic demobilization. We could undertake a downward revision of our tariff by unilateral and autonomous action, in the hope that other nations would, as a result, also begin to move away from their present suicidal policies in the field of foreign trade. Or else we could, by the negotiation of bilateral trade agreements, attempt a mitigation of trade barriers on a reciprocal basis.

We chose the second course as offering by far the better promise of trade improvement. An autonomous reduction of our tariff would provide no assurance that our example would be followed by other nations or, if it would be followed, that the resulting mitigation of trade barriers would, in fact, apply to those commodities which are of the greatest interest to us.

*Sayre 1936, 5:*

... the question of method was long and carefully considered. The mere unilateral reduction of such of our own rates of duty as were excessively high no matter how wisely effected, could have given no assurance that the formidable barriers to our commerce created by foreign nations would likewise be modified.

Second, the adoption of the US method of trade negotiations into the multilateral trade regime also universalised the metaphors and imagery through which US officials perceived and described international trade lawmaking. This imagery assimilated the international arena to a marketplace, and conceived of international trade lawmaking as a series of commercial transactions. An expression of mercantilist calculus, the market metaphor was designed to assure US domestic audiences that the US would only make "concessions" when these were "paid for" with substantively equivalent concessions by its trading partners. As US negotiator Claire Wilcox assured his audience in a speech: "The United States makes no concessions, in the course of this bargaining, unless it obtains concessions in return."<sup>112</sup> Under the Reciprocal Trade Agreements Act, the US was to use trade agreements, in Secretary of State Stettinius's words, "to expand [its] foreign trade by a process of hard-headed and business-like bargaining";<sup>113</sup> reciprocal trade liberalisation was "based on full payment by the other party".<sup>114</sup>

The logic of payment was imported wholesale into the GATT, and later the WTO. The negotiating rules for early GATT negotiations spelled out the principle of payment, stipulating that "no participating government shall be required to grant unilateral concessions, or to grant concessions to other governments without receiving concessions in return".<sup>115</sup> While the concept of a "market" is rarely explicitly used to describe trade lawmaking, at least in official pronouncements, metaphors that evoke the image of a market are ubiquitous both in official parlance and in academic commentary on trade negotiations:<sup>116</sup> "requests" and "offers" are drawn up, improved, modified, or withdrawn in the course of negotiations, concessions are "bought", "banked", "purchased", "sold" and "paid for", negotiators worry about "free rides", i.e., about others receiving concessions "for free", and about getting something "in return". They request "compensation", present "bills", receive "debit", "credit", or "capital" for concessions, and worry about "redistribution" and about coming out of negotiations "with a negative balance sheet". "Non-paying members" cannot expect to receive concessions, the "price" of a concession

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<sup>112</sup> Wilcox 1947, 16.

<sup>113</sup> Quoted in Gardner 1969, 159.

<sup>114</sup> Hudec 1987, 7.

<sup>115</sup> *Torquay Tariff Conference Procedures 1952*, 105, para. 3(b).

<sup>116</sup> For reasons of readability, evidence of the use of the market metaphor in official pronouncement and in the academic literature on trade negotiations has been compiled in an Appendix. All terms quoted in this paragraph are taken from material contained in the Appendix.

and the "exchange rate" between concessions in different areas has to be right, and new members have to pay an "entrance fee" and buy a "ticket of admission".

The market metaphor lends international trade lawmaking a very distinctive logic and dynamic.<sup>117</sup> Since the reciprocity discourse converts whatever is conceptualised as a trade "barrier" into a bargaining chip, and understands the reduction of such "barriers" as "concessions" and hence as "currency", it imbues these trade "barriers" with a status and value that bears no necessary relation to their economic effects or to other public policy merits that they may reflect.<sup>118</sup> This disconnect between the economic benefits/costs and the bargaining status of trade "barrier" reduction as a "concession" is widely acknowledged.<sup>119</sup> In the early days of the GATT, there were concerns that the logic of payment would not only inhibit the unilateral reduction of trade barriers where this was in the best interests of the country concerned, but would also lead to the "padding" of trade barriers in order to generate more currency, with potentially negative effects for the country concerned.<sup>120</sup> As Abbott and Snidal observe, this disconnect between the 'currency' status of a proposed measure and its potential benefits "makes every proposal a bargaining chip, an opportunity for 'hold-up'", even where the participants have a common interest in the proposed measure.<sup>121</sup> The opportunity to exact payment for whatever measure is proposed

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<sup>117</sup> A very good discussion of the effects of the reciprocity discourse is Abbott/Snidal's analysis of the WTO's "quid pro quo mentality" and "institutional culture of quid pro quo bargaining"; Abbott/Snidal 2002. A shortened version of the paper is Abbott 2001.

<sup>118</sup> Another way of saying this would be that there is no necessary relation between the "exchange value" and the "use value" of concessions; see also Hoekman/Kostecki 2001, 38:

A MTN is a market in the sense that countries come together to exchange market access commitments on a reciprocal basis. It is a barter market. In contrast to the markets one finds in city squares, countries do not have access to a medium of exchange: they do not have money with which to buy, and against which to sell, trade policies. Instead they have to exchange apples against oranges: tariff reductions for iron against foreign market access commitments for cloth. This makes the trade policy market less efficient than one where money can be used, and is one of the reason that MTNs can be a tortuous process.

<sup>119</sup> As Krugman 1997, 114, has famously put it, the economic theory underlying the reciprocal exchange of "concessions" in the form of tariff reductions "does not make sense on any level"; Hoekman and Kostecki, 21, note that mercantilism "makes no economic sense".

<sup>120</sup> Hawkins 1951, 100-101; Evans 1971, 31-32; Paemen/Bensch 1995, 45, argue that this was also the rationale behind the "standstill" provisions in the Ministerial Declaration launching the Uruguay Round in 1986:

By bringing in new restrictions, a country could strengthen its hand in the negotiations – it might be tempted to 'make capital' out of the removal of these new restrictions by presenting this pseudo-withdrawal as a genuine concession, to be added to its tally in the Uruguay Round.

<sup>121</sup> Abbott/Snidal 2002, 200; this observation is made in the context of WTO lawmaking, of which Abbott and Snidal note:

Even as it moves far beyond tariffs as the subject of its negotiations, the organization remains mired in the obsessive quid pro quo thinking that has dominated tariff negotiations for fifty years.

leads trade officials to frame issues "as a bargaining problem with divided interests rather than as an issue of common concern".<sup>122</sup> As a WTO Secretariat official explained to me, the difficulty in concluding negotiations on "systemic" issues such as the review of the Dispute Settlement Understanding was that no WTO Member would be willing to "pay" for systemic improvements with diffuse benefits.<sup>123</sup> In sum, the 'currency' status of measures conceptualised as trade "barrier" reduction, and indeed of any proposals put forward by a participant in trade lawmaking, deflects questions as to their merit, economic or otherwise.<sup>124</sup>

The status of trade "barriers" as the currency of trade negotiations also lends a certain inertia to trade liberalisation. The logic of payment necessitates that trade "barriers" have to be reduced in trade negotiations, because that is the only way in which participants can "pay" for whatever they want from their counterparts. The direction of trade negotiation is thus almost invariably liberalisation. The logic of payment can also, at least in part, account for the expansionary tendencies of trade lawmaking. Given that there is no easy way for countries to renew their reserves, countries inevitably run out of currency at some point, resulting in "inadequate bargaining ammunition"<sup>125</sup> when "most of the available coin that could be used without serious political costs had already been spent".<sup>126</sup> The expansion of trade lawmaking into new areas enhances the opportunity for trade-offs.<sup>127</sup>

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See also Winham 1968, 364, referring to the Tokyo Round:

In the code negotiations, reciprocity led negotiators to demand payment for the actions they took, regardless of whether those actions were more beneficial to the initiator or to the supposed recipients.

<sup>122</sup> Abbott/Snidal 2002, 193.

<sup>123</sup> Interview with a lawyer in the WTO Secretariat. The lawyer emphasised that this was especially the case where the proposals already reflected current practice or could be implemented without an amendment of the DSU. See also Odell 2005, 472, who identifies this as a general problem of WTO negotiations:

Taking the initiative is costly in negotiation terms since a proposal for a compromise undermines the credibility of the speaker's commitment to his or her preferred position and hence the ability to claim the largest possible share of the gain. Only the very largest traders conceivably stand to gain enough individually to pay, individually, this cost of taking the initiative toward compromise in the WTO.

<sup>124</sup> Jackson has contrasted the results of tariff bargaining with lawmaking on "fixed rules and principles based upon a *rational appraisal of beneficial policy*"; Jackson 1969, 669 (emphasis added).

<sup>125</sup> Evans 1971, 14, notes that

after some twenty years of whittling away at tariffs, many contracting parties were finding further reductions more difficult politically. In the case of the United States, this growing political resistance was expressed in the inadequate bargaining ammunition that was provided US negotiators after the initial round of GATT negotiations in 1947.

<sup>126</sup> Evans 1971, 15; Cline 1982, 9: through liberalization the US "has lost its bargaining chips".

<sup>127</sup> See the complaints by India about the expansion into services in MIN(86)/ST/33.

Apart from lending trade "barrier" reduction a status that is not necessarily connected to its merits, and imbuing trade lawmaking with unidirectional and expansionary tendencies, the reciprocity discourse works to preclude considerations of equity.<sup>128</sup> Historically, this effect first became evident in the differential effects of the reciprocity norm on countries with different levels of trade barriers. When a country already has very low trade barriers, it finds itself with much less 'currency' with which to pay for concessions from its trading partners.<sup>129</sup> To address this problem, the negotiators of the ITO Charter and later the Contracting Parties of the GATT agreed that the "binding against increase of low duties or of duty-free treatment shall, in principle, be recognized as a concession equivalent in value to the reduction of high duties".<sup>130</sup> However, in light of the logic of payment, this principle was reportedly "not expected to be effective", and offers to bind an existing low rate were "usually treated with polite indifference".<sup>131</sup> This effect of the reciprocity discourse led to strong dissatisfaction of low-tariff countries with the reciprocity norm.<sup>132</sup>

Over the course of the development of the trading regime, the normative cover that the reciprocity discourse and the logic of payment provide countries in ignoring appeals based on equity has developed much wider implications, especially as the perceived inequities of the trading system have been compounded over successive negotiating rounds.<sup>133</sup> For example, many developing countries have perceived the outcomes of the Uruguay Round as grossly imbalanced and have hence seen a primary purpose of the implementation phase and the Doha Round in "rebalancing" the international trading system.<sup>134</sup> In such a situation, the demand for reciprocity is a device for winners in previous negotiations to exclude from consideration the fairness of the outcomes of previous

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<sup>128</sup> See Finger/Reincke/Castro 1999, 2-5, who contrast the "mercantilist bargaining model" with the "common good model"; they characterise the bargaining model as "what you get is what you pay for" and the "common good model" as "focus[ing] not on the successes of individual countries, but on the success of the group".

<sup>129</sup> GATT/CP.6/SR.6, 5: "the main obstacle in the way of tariff reductions by means of multilateral negotiations was the fact that certain European countries with very low tariff levels had come to the end of their capacity to offer fresh concessions." See also Evans 1971, 22, who notes that reciprocity in this sense had "not always been accepted as equitable".

<sup>130</sup> GATT, Article XXVIII bis, 2(a); Evans 1971, 23; Hawkins 1951, 101; ITO Charter, Article 17, para 2(d).

<sup>131</sup> Evans 1971, 23; see also Curzon 1965, 94.

<sup>132</sup> Jackson 1969, 222.

<sup>133</sup> Wilkinson 2004, 151, compares the "WTO's legal framework" to a "poorly layered cake", in that the "asymmetry in WTO rules is amplified" "as each new layer of regulation is added."

<sup>134</sup> Ostry 2002, 292. As will be discussed below, the notion that the flaws of the results of the Uruguay Round could be remedied through "rebalancing" is itself a product of the reciprocity discourse, which can only conceptualise policy mistakes as 'overpayment'.

negotiations and thus reset the baseline for the negotiations to zero.<sup>135</sup> In other words, the reciprocity discourse is fundamentally ahistorical.

As Stiglitz and Charlton have pointed out, the reciprocity discourse reflects a conception of the relationship between the participants in international trade lawmaking that is fundamentally different from the relationship between the members of a national community: "In national economic debates, we do not demand that the poor give up an amount commensurate with what they get. Rather, we talk about social justice and equity."<sup>136</sup> Or, as the Indian delegate put it at the conclusion of the Tokyo Round:

the basic principle of preservation of rights of trading countries is still based on the law of the jungle, i.e. tit for tat, and not what an enlightened world community might wish to follow in order to collectively safeguard and preserve the rights of the weaker partners.<sup>137</sup>

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Stiglitz/Charlton 2005, 107, remark that for developed countries to "demand a *quid pro quo*" in the Doha Round

would be to look at the current negotiation outside of its historical context. The developed countries have to date received the lion's share of the benefits from previous trade negotiations. Accordingly, they *ought* to be willing to do more for the developing countries in this round.

In the late 1950s, the ahistoricity of the reciprocity discourse astonished US President Eisenhower. In a memorandum preceding the Dillon Round, the US Secretary of State warned President Eisenhower about the lack of bargaining power of the US due to a lack of authority to offer tariff concessions, warning in particular that

[u]nless the United States is able to induce the EEC to accept a one-sided agreement – and this is not a possibility to be relied upon – the United States will be unable to take full advantage of the offer already made by the EEC to reduce its common external tariff by 20 percent provided adequate reciprocity is offered by other countries in return.

In his response, President Eisenhower said he was "struck" by this statement:

While the phrase 'this is not a possibility to be relied upon' is possibly technically correct, it seems to me we ought to put our own current balance of payments situation very strongly before the conferees and make unmistakably clear that we have gotten into this situation through generous and liberal assistance and trading policies. Now it is time for them to do their share, and a failure on their part to do so would bring into question our basic relationships and attitudes toward these problems.

FRUS 1958-1960, 284; for the response, see *ibid.* 286-287, where negotiators promise to "use to the utmost what bargaining strength we have, including appeal to the Common Market nations on the basis of the goodwill our assistance to them in the last ten years should have engendered." This strategy was at best partially successful: the Secretary of State would later write to President Kennedy to say that he was "[d]eeply concerned about state Dillon Round negotiations due to meagerness [of the] US offers"; FRUS 1961-1963, 472-479.

<sup>136</sup> Stiglitz/Charlton 2005, 107, fn 1. See already Jackson 1969, 671:

a good argument can be made that GATT has tended to somewhat redress the balance of economic power for the less-developed and less-powerful countries. ... Yet this does not mean that the status quo is adequate. Clearly, the redress of economic power imbalance could go farther in the sense of creating opportunities for the less-developed equal to those of the developed to pursue their economic and other national goals. *This same policy choice has consistently been made within nations, and particularly the Western democratic nations*, i.e., to assist internally depressed areas or groups at the expense of the richer portions of the society. There seems reason to apply this same principle on an international scale. (emphasis added)

<sup>137</sup> MTN/P/5, 73.

Indeed, as a commentary on the WTO Agreement notes, "according to the WTO, there is no international community on economic issues."<sup>138</sup> Instead, the reciprocity discourse conceives of the trade regime as a collection of bilateral contracts akin to commercial contracts between market actors.<sup>139</sup> This conception of the trade regime, like the reciprocity norm itself, can be traced to the US method of bilateral tariff negotiations that provided the template for international trade lawmaking.<sup>140</sup> Beyond the technical difficulties that had been the main concern of the British and Canadian negotiators with this method, the bilateralism of tariff negotiations has had a lasting impact on what was and is perceived to be the character of the trading regime, an impact that has persisted even as the bilateral method of tariff negotiations has been gradually abandoned. As Abbott has pointed out, "the roots of many GATT provisions and ways of thinking lay in bilateral arrangements, where the concept of a community interest separate from the interests of the two parties has less meaning."<sup>141</sup>

Paradoxically, the one element of US trade policy that was at odds with the market logic – the principle of MFN, whereby every "concession" that was granted to one contracting party also had to be extended automatically to all others – had the effect of bringing this market logic into even sharper relief. The principal supplier rule, which the US had devised in response to the tension between the bilateral logic of reciprocity and the multilateral effects of MFN, was designed to minimise the effects of MFN and preserve the principle of payment. By stipulating that a party only had to consider requests for tariff reductions from another party that was a principal supplier of the product concerned, the

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<sup>138</sup> Bogdandy 2006, 11; cf. *ibid.* 9:

It is worth noting that the Preamble [of the WTO Agreement, N.L.] nowhere states that the aims of the first recital, in particular the environmentally sustainable economic growth of all Members, constitute a common interest, a common international good or an international value. Perhaps for that reason the term 'international community', which is ubiquitous in international legal parlance, is used by the Appellate Body only when referring to other treaty regimes, but is not applied to the WTO. In Appellate Body reports, one never finds a WTO interest as there is a 'Community interest' in EC law, a core concept of EU law; rather, it appears that only the Members have interests to be considered. (footnotes and emphasis omitted)

<sup>139</sup> Finger 2005; Bogdandy 2006, 12: "[M]ost, if not all, WTO obligations are best understood as bilateral and not collective in nature". For a discussion of the legal implications of this conception, see Pauwelyn 2003; for a contrary view, see Carmody 2006.

<sup>140</sup> Evans 1971, 10: "The Geneva negotiating techniques and those used in later GATT negotiations were not, and could not have been, truly multilateral. For the most part, they followed closely the procedures that had been developed in bilateral bargaining."

<sup>141</sup> Abbott 1992a, 39.

principal supplier rule minimised the potential of unrequited concessions through MFN.<sup>142</sup>

In an early tariff negotiation, the rule was formulated as follows:

Participating countries may request concessions on products of which they, individually or collectively, are or are likely to be the principal suppliers to the countries from which the concessions are asked. This rule shall not apply to prevent a country not a principal supplier from making a request, but the country concerned may invoke the principal supplier rule if the principal supplier of the product is not participating in the negotiations or is not a contracting party to the General Agreement.<sup>143</sup>

The principal supplier rule thus confirmed the right of a party to exact the maximum price for its concessions; it only had to sell to the highest bidder. The principal supplier rule may thus have been the clearest indication that the market logic was not to be overridden by any considerations of collective purpose, which might have called for giving negotiating priority to the member in which the concession would lead to the largest rise in the standard of living, or would have made the largest contribution to development.<sup>144</sup> While the principal supplier rule diminished in importance with the increasing use of horizontal reduction formulas, it still has echoes in the numerous contexts in which bilateral negotiations are continuing, and, more significantly perhaps, in the general importance that is still given to trade volume over potential trade effects.<sup>145</sup>

In sum, to understand the effects of the reciprocity discourse, one has to take the market metaphor seriously. Fundamental to a market is the logic of payment, the idea that

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<sup>142</sup> As Winters puts it, the principal supplier rule "maximized the bilateral internalisation of the concession – that is, the largest possible part of the concession accrued to the two parties negotiating it and minimised spillovers to potential free-riders"; Winters 1990, 1291.

<sup>143</sup> TN.56/4, para. 3. (emphasis added)

<sup>144</sup> In the 1950s India proposed rules "for the evaluation of concessions based on the relative importance of a commodity in the exporting country, rather than its relative importance to the trade of the importing country". This proposal was rejected; instead, the Contracting Parties reaffirmed that "governments participating in the negotiations should retain complete freedom to adopt any method they might feel most appropriate for estimating the value of duty reductions and bindings"; L/1043, para. 11.

In the Tokyo Round, Zaire (as it then was) noted that the principal supplier rule "disregard[ed] the importance for our economy of the products in respect of which we had made requests for concessions"; MTN/P/5, 69. This argument resurfaced in the Uruguay Round:

under the GATT rules, the 'principal supplying interest' was determined according to a country's relative share of the total volume of imports into the importing country. This method of calculation clearly benefited the large countries. With a view to improving their trading position, the developing countries and the smaller industrialised countries wanted the importance of the product within the structure of the supplier country's exports to be taken into account.

Paemen/Bensch 1995, 65.

<sup>145</sup> See e.g. Winham 1986, 202; for the effects of the principal supplier rule on trade flows, see Gowa/Kim 2005, 453-478; Gowa and Kim find that the GATT's "bargaining protocol ... privileged trade expansion between the members of a remarkably small set of states", namely Britain, Canada, France, Germany, and the US.

one has to give something in order to get something. This logic tends to preclude collective action in pursuit of a common goal; any "public" benefits, i.e. any furtherance of the public good, are merely incidental to "private" commercial transactions, and there is no guarantee that they will materialise. Moreover, considerations of fairness play little role in a market. To the market, everyone is formally equal, and a market recognises no history, it only knows the here and now. Prices are the same whether you are rich or poor, or whether you got a bad deal in the past. A market is governed by those who have most to buy or sell, rather than those who are most needy. This is, in somewhat pointed form, the conception of trade lawmaking inherent in the reciprocity discourse.

The effects of the reciprocity discourse come into sharper relief when we consider alternative methods and conceptions of trade lawmaking, which – had they been adopted instead of the US model – would have set multilateral trade lawmaking on a different course, since some or all of the effects of the reciprocity discourse would be weaker or non-existent. The effects of these alternative discourses of trade lawmaking are of course hypothetical, at least in part. I will consider three alternatives, starting with those which had most chance of actually succeeding.

It is likely that the lawmaking discourse would have taken a different form if the proposals for a horizontal reduction formula, instead of bilateral tariff bargaining, had been adopted for the negotiation of the GATT. The reciprocal character of the tariff reductions resulting from the application of a horizontal formula would have been much more diffuse.<sup>146</sup> Reciprocity would have taken the form not so much of individual payments, but of a commitment that "what was done by one country would be done by all", as the British had put it.<sup>147</sup> A multilateral formula would thereby have diminished the need for trade barriers as 'currency' and would thus have "bypassed the problem of differences in bargaining power".<sup>148</sup> Moreover, the effect of a horizontal formula on countries with different tariff structures would have been readily apparent, and would thus have been predictable and intelligible in a way that the results of bilateral item-by-item negotiations

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<sup>146</sup> Rehm, a participant in the Kennedy Round negotiations, where a formula approach to tariff reductions was adopted, formulates the expectation of reciprocity under this approach thus:

Reciprocity was considered to be inherent and self-evident in any scheme which required all participating countries to cut all their tariffs by the same amount. (Rehm 1968, 410)

<sup>147</sup> FRUS 1945, 4; see also *ibid.* 57: "all parties will make sacrifices at once"; *ibid.* 59: "let's ... all make substantial reductions at once"; formula-based liberalization has also been described as "concerted unilateralism"; Sauvé/Stern 2000, 28, and Thompson 2000, 475.

<sup>148</sup> Evans 1971, 22.

were not. As mentioned above, the discussion of alternative horizontal reduction formulas in the preparatory negotiations turned to a striking degree on the "equity" of the alternative formulas, especially on whether they would have a differential effect on high-tariff and low-tariff countries.<sup>149</sup> Finally, the application of a horizontal reduction formula would have given the resulting obligations a distinctly multilateral character.<sup>150</sup>

It is worth considering a second hypothetical scenario, namely whether the principles of lawmaking in the emerging multilateral trade regime would have taken a different form had the ITO Charter been ratified. The GATT was envisioned as a tariff agreement that would become an integral part of the ITO; the procedures for tariff negotiations under the ITO would thus have been the same as those that were in fact adopted under the GATT. However, since the ITO encompassed much more than tariffs, it is questionable whether the principles of tariff negotiations would have attained the same status as *the* paradigm for trade negotiations that they attained under the GATT. To begin with, the ITO Charter envisioned continuing negotiations on matters such as foreign investment<sup>151</sup> and the regulation of international commodities trade.<sup>152</sup> Moreover, the type of intervention contemplated in these and other chapters – in particular chapter V on restrictive business practices – would have made the ITO much more of a "public" institution engaged in the active regulation and management of trading relations<sup>153</sup> – in marked contrast to the character of the GATT as a forum for the exchange of ultimately bilateral and hence "private" concessions. Finally, it is conceivable that the elaborate institutional set-up of the ITO, in particular the provision for an "Executive Board" akin to the United Nations Security Council,<sup>154</sup> would have changed the dynamics of lawmaking as

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<sup>149</sup> FRUS 1945, 1: concern that "draft convention treats high tariffs no more severely than low tariffs"; see also *Anglo-American Discussions 1943*, *passim*.

<sup>150</sup> See L/1844, para. 5, which describes tariff reduction under linear formula as "a collective approach to trade liberalization which might be expected to lead to an expansion of international trade to the benefit of all." The document also notes that, under such an approach, "the concept of reciprocity country-by-country would be less relevant than it has been in negotiations based upon the traditional technique."

<sup>151</sup> ITO Charter, Article 11(c): "The Organization may ... formulate and promote the adoption of a general agreement or statement of principles regarding the conduct, practices and treatment of foreign investment"; see also ITO Charter, Articles 12:1(d) and 12:2(b).

<sup>152</sup> ITO Charter, Chapter VI.

<sup>153</sup> For an analysis of the trade regime in terms of the public/private distinction, see Abbott 1992a and 1992b.

<sup>154</sup> ITO Charter, Articles 78-81.

compared to the GATT, which, at least initially, had to operate in denial of its institutional existence.<sup>155</sup>

A third alternative to lawmaking based on reciprocity that has been discussed in the academic literature would have been to adopt a more deliberative, incremental and less legalistic approach to international trade issues. As Dam has argued, the US negotiators adopted a "code-of-laws approach" to international trade policy and "tended to see the [ITO's] primary purpose as the application and enforcement of substantive rules of law".<sup>156</sup> It was arguably the "hard", enforceable character of the legal obligations which the parties would assume under the US design that made a more flexible approach to lawmaking than strict reciprocity unpalatable, at least to the US. According to Dam, however, such an approach would have been more appropriate:

What was needed was not an enforcement agency, but rather, in view of the differences that divided countries and of the economic and financial environment of international trade, an institutional framework within which countries might examine the particular circumstances of specific trade problems, thereby, if possible, identifying their common interest and working out mutually acceptable solutions. Since the different policies pursued by different countries reflected competing values, it was important to create procedures for clarifying the common interests of the various trading countries and for establishing the impact of specific commercial policies.

The ITO was not primarily designed to fulfil that function, and the GATT as it came into being was, of course, totally unequipped to do so.<sup>157</sup>

As Dam and many other commentators have noted, the GATT did in fact evolve into an institution that was much less legalistic, more flexible and more consensus-oriented than the US had envisioned, especially when it came to the settlement of disputes and the enforcement of legal obligations.<sup>158</sup> Remarkably, however, the *de facto* "softness" of the GATT's legal obligations never fed back into the process of how the law was made, or into the form that GATT commitments were given in the first place: the conviction that all trade law should be formally binding "hard" law persisted throughout the operation of the GATT,

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<sup>155</sup> For a comparison of the GATT and the ITO, see also Hudec 1975, 51-52.

<sup>156</sup> Dam 1970, 16.

<sup>157</sup> Ibid.

<sup>158</sup> See only Hudec 1970; Winham 1987, 20, has argued that

the unusual origins of GATT have lent to it an air of impermanence and pragmatism, which have ironically been a source of strength in an international system where law ultimately rests on the consent of the governed.

and has only been reinforced by the establishment of the WTO, with its strengthened dispute settlement procedures.<sup>159</sup>

Thirty years after Dam's observations, Abbott and Snidal have renewed the argument for a "soft law track" in WTO lawmaking, which would allow countries to explore emerging issues without a commitment to enter into binding obligations with respect to them. Instead, the regulation of these issues would be approached through non-binding guidelines which might gradually develop into more substantive rules.<sup>160</sup> As Abbott and Snidal explain, a

soft law strategy works through deliberation to develop common understandings of appropriate behaviour and common recognition of the value of a norm beyond immediate bargaining payoffs. Because normative arrangements are at first only loosely binding, states can participate in the process with little fear of becoming enmeshed in onerous, unwanted requirements.<sup>161</sup>

Under such an approach, Abbott and Snidal suggest, it would become "illegitimate for a state to tie its acceptance to narrow individual gains";<sup>162</sup> the approach would thus overcome or at least mitigate the logic of payment.

In the context of the extension of trade lawmaking to cover behind-the-border measures with significant implementation costs, Finger has pointed to the dangers of using reciprocity to create binding legal obligations. He contrasts GATT/WTO lawmaking in this context with the approach of the development banks, where "legal obligation comes in specific project lending documents". As he argues "[t]o build behind-the-border institutions, such country-specific and project-specific legalities are better suited to the one-off problems and trial-error rhythm of what is needed than is [the] WTO's generic approach to legal obligation".<sup>163</sup> He concludes that reciprocity, the "old diplomat's economics", is "not adequate for the new subjects the WTO has taken on".<sup>164</sup>

In sum, Dam, Abbott and Snidal, and Finger investigate the link between the legalism of the GATT/WTO and the dynamics of lawmaking. Their analyses suggest that if a more flexible approach to the legal status of negotiating outcomes were taken, reciprocity

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<sup>159</sup> See also Chapter 4 *infra*.

<sup>160</sup> Abbott/Snidal 2002; see also Abbott/Snidal 2000.

<sup>161</sup> Abbott/Snidal 2002, 201.

<sup>162</sup> *Ibid.*

<sup>163</sup> Finger 2005, 38.

<sup>164</sup> *Ibid.* 39.

would be perceived as less necessary, and recognised as less suitable, for international trade lawmaking.

### **C. The Evolution of the Reciprocity Discourse**

The evolution of the reciprocity discourse since the early years of the GATT has been marked by three broad trends. First, the gradual adoption of formula approaches for tariff reductions since the Kennedy Round has increased the importance of a more "diffuse" form of reciprocity in the negotiations.<sup>165</sup> At the same time, bilaterally tailored "specific" reciprocity retained a key role in multilateral trade lawmaking, for example in the negotiation of exceptions to tariff formulas and in supplemental bilateral bargains to address perceived imbalances resulting from the application of multilateral formulas. The persistence of these bilateral elements testifies to how deeply the principle of payment had become ingrained in multilateral trade lawmaking over the first two decades of the GATT (a).

Second, the increasing preoccupation with non-tariff "barriers" to trade and the expansion of the GATT and later the WTO into new areas, such as regulatory standards, trade in services, and intellectual property protection, posed new problems for the conceptualisation of reciprocity. In response, the contracting parties devised a range of techniques for measuring reciprocity, from counting the elimination of a particular practice by its predominant user as "payment" to quantifying non-tariff barriers, thus making them amenable to the traditional reciprocity calculus. In some contexts, the mutually beneficial effects of common rules were recognised without explicit reciprocity calculations. The expansion of trade lawmaking into new areas was problematised by the reciprocity discourse in characteristic ways: the addition of new agreements to the GATT increased longstanding concerns about "free riding" by countries which refused to participate and thereby avoided "payment" for concessions in the new areas. This problem was addressed through a radical development in the Uruguay Round whereby the *adherence* to agreements in new areas by itself was framed as a "concession" that was demanded in return for market access. This development, as well as later attempts to remedy its problematic consequences, brought some of the more distressing effects of the reciprocity discourse, in particular the

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<sup>165</sup> For the distinction between "specific" and "diffuse" reciprocity, see Keohane 1986; Winters 1990, 1292, presents empirical evidence for "a gradual reinterpretation of reciprocity from bilateral to multilateral form".

disconnect between the 'currency' status of an issue or position and its substantive merits, into sharp relief (b). At the end of this section, the role of reciprocity in accession negotiations will be briefly addressed (c). The third major trend, the emergence of the discourse of "special and differential treatment" for developing countries, will be discussed in a separate section.

### ***a) Reciprocity in Tariff Negotiations***

Discontent with the bilateral item-by-item negotiating method for tariff negotiations that had been adopted for the GATT arose already after the first two tariff negotiations in 1947 and 1949. As noted above, the low-tariff countries<sup>166</sup> found themselves almost without "currency" to pay for tariff cuts by their trading partners and started to argue for negotiating methods that would lead to a greater "equilibrium" between the tariff rates imposed by different countries.<sup>167</sup> In the course of these discussions, proposals for the use of a multilateral reduction formula resurfaced in the form of a French plan presented in September 1951, which envisaged a linear reduction of the weighted average of tariffs in each major sector of the economy, with special waivers for less-developed and low-tariff countries.<sup>168</sup> As Curzon has characterised the proposal, "[t]his was not a timid scheme to reduce tariffs from time to time and on a *quid pro quo* basis, but a universal call for freer trade where those not responding had to ask for a special waiver."<sup>169</sup> The French plan only partially addressed the problems of low-tariffs countries. It dispensed with the need for currency, as the principle of payment would be replaced by what the French called "the principle of equal participation in a common effort".<sup>170</sup> However, it did not achieve a levelling of tariffs, as relative disparities between tariffs would remain unaffected. Only later would the potential of formula approaches to achieve what was perceived as greater "equity" in outcomes, i.e., a greater "equilibrium" between tariff levels, become an issue.

Although the French plan was discussed in the GATT for many years, and eventually came to be known as the "GATT plan", it was not adopted for either the 1956

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<sup>166</sup> In particular the Benelux countries, who accounted for the biggest share in international trade after the US and the UK at the time.

<sup>167</sup> Curzon 1965, 87-89.

<sup>168</sup> GATT/CP.6/23; for the initial discussion of this proposal, see GATT/CP.6/SR.6.

<sup>169</sup> Curzon 1965, 90.

<sup>170</sup> GATT/IW.2/7, 6.

Review Session<sup>171</sup> or the Dillon Round in 1960-1961 due to the opposition of the United Kingdom and the United States, the latter still "prisoner",<sup>172</sup> as a matter of domestic law, to the methodology prescribed by the Reciprocal Trade Agreements Act. Frustrated by the lack of progress in the GATT, the European countries instead used the formula approach to achieve rapid tariff reductions among themselves in the course of founding the European Economic Community and the European Free Trade Area.<sup>173</sup> The formation of the EEC gave new impetus for the use of tariff reduction formulas in the GATT not only by providing a successful precedent,<sup>174</sup> but also by prompting the United States, which was now for the first time faced with a market larger than itself, into revising its trade legislation in a way that permitted horizontal as opposed tariff reductions.<sup>175</sup>

The United States felt the pressure to adopt a new approach to tariff negotiations particularly acutely in the Dillon Round. In this Round, the US negotiators found their authority to offer tariff concessions so severely curtailed by the elaborate safeguards set up under the Reciprocal Trade Agreements Act<sup>176</sup> that they repeatedly directed desperate appeals to the US President, complaining about their lack of "bargaining strength"<sup>177</sup> and "negotiating power"<sup>178</sup> and asking for additional authority to offer tariff reductions and bindings. Impatient with product-by-product negotiations, the European Communities and the UK had unilaterally offered to reduce their tariff on manufactured products by 20 per cent across the board.<sup>179</sup> The Europeans had adopted what Secretary of State Rusk described as a "flexible and statesmanlike view" in not expecting the US to "make

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<sup>171</sup> See L/373.

<sup>172</sup> Curzon 1965, 95.

<sup>173</sup> See Curzon 1965, 92-98, especially his observations on the role that discussions in the GATT had played in providing European officials with the "experience to propose and co-ordinate a tariff policy which was to ripen just in time for one of the politically important decisions in post-war Europe"; *ibid.* 96.

<sup>174</sup> See L/1844, para. 3:

It was widely felt that the successful application of linear tariff reductions within the EEC and EFTA demonstrated the practicability of this approach provided that all participating governments possessed adequate negotiating powers.

See also GATT 1960, 10; GATT 1961, 10; GATT 1962, 10.

<sup>175</sup> On the Trade Expansion Act, see L/1983; Metzger 1964; Curzon 1965, 100; FRUS 1961-1963, 484-495; 512-516.

<sup>176</sup> This authority was limited to reducing tariffs by 20 per cent to begin with; as a memorandum to President Kennedy put it, "in the bureaucratic process of developing bargaining offers for these negotiations, the Eisenhower Administration threw away most of its chips"; FRUS 1961-1963, 475.

<sup>177</sup> FRUS 1958-1960, 283.

<sup>178</sup> FRUS 1961-1963, 456.

<sup>179</sup> *Ibid.* 475.

reciprocal concessions to the same extent".<sup>180</sup> In a rare example of wider considerations factoring into the reciprocity calculus, the Europeans reportedly

recognized that the United States had put up with quantitative limitations on their part during the post-war years ...[.] that the United States was having balance of payments difficulties ... [and] wished to minimize discrimination against the United States resulting from the establishment of the Common Market and the European Free Trade Association.<sup>181</sup>

Even so, US officials expressed apprehension about the meagreness of the US offer, warning the President that

we have so hamstrung our own negotiators that they do not have the authority to make the concessions needed to satisfy even the modest requirements of reciprocity which the European nations are expecting.<sup>182</sup>

In the end, the round was concluded with the amount of trade covered by concessions clearly balanced in favour of the US.<sup>183</sup>

In the first round for which the use of a horizontal tariff reduction formula was agreed multilaterally,<sup>184</sup> the question of how to preserve or modify the principle of reciprocity under the formula approach soon took centre stage.<sup>185</sup> During the first meeting of a Working Party<sup>186</sup> set up to study the procedure for tariff reductions, it was acknowledged "that the linear approach must lead to a departure from the rigid balance-of-benefits theory that had governed the negotiations under the item-by-item approach."<sup>187</sup> What the participating countries expected instead was "a general 'across-the-board' balance between concessions granted and received".<sup>188</sup> Beyond this commitment to "balance", tensions soon surfaced between those countries that wanted to introduce an element of

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<sup>180</sup> Ibid. 475.

<sup>181</sup> Ibid. 475.

<sup>182</sup> Ibid. 475-476.

<sup>183</sup> Ibid. 521-527; the reciprocity calculation is at 525.

<sup>184</sup> See L/1657.

<sup>185</sup> Evans 1971, 185, describes reciprocity as "the most significant and far-reaching of the issues that developed" in the discussions about the tariff reduction formula. As Evans observes, the participants in the negotiations "did not trust [linear tariff reductions] to produce the kind of reciprocity they had sought in past negotiations and still continued to seek".

<sup>186</sup> Records of the discussions of the working party are annexed to L/2002.

<sup>187</sup> L/1982, 3.

<sup>188</sup> L/1982, 3; see also FRUS 1964-1968, 638, reporting

it ha[d] already been agreed that it shall be open to each country to request additional concessions or to modify its own offer where this is necessary to obtain a balance of advantages between it and the other participating countries.

This condition "would permit the United States to adjust the number of items which it would reserve in accordance with the principle of reciprocity"; the US is referring to MIN(63)9, principle 5.

"equity" into the formula and those who insisted on preserving the principle of payment in its pure form. This was the first time in GATT history that the *meaning* of reciprocity, and in particular the principle of payment, was contested in a major way.

Initially, it was just individual European low-tariff countries which pointed out that "it would hardly be reasonable" to apply the same linear reduction to countries with high and low tariffs.<sup>189</sup> At the third meeting of the Working Party, however, it was the EEC that presented an informal proposal that would have achieved a harmonisation of tariffs, rather than merely a reduction.<sup>190</sup> Under the EEC proposal, participants would agree on certain notional tariff rates, in effect tariff floors, for different kinds of products, and would reduce the difference between their existing rates and the notional rate by an agreed percentage.<sup>191</sup> The effect of this formula would have been to reduce high tariffs the most, whereas tariff rates at or under the floor would not have to be reduced at all. Low-tariff countries would thus not have to "pay" anything for the tariff reductions by high-tariff countries. As Curzon reports, the EEC stressed "the equity of this procedure".<sup>192</sup>

In response, the US made it clear that "proposals based on linear unequal cuts were unacceptable".<sup>193</sup> In its view, the objective of the negotiations should not be "the establishment of uniform conditions of competition", but rather the "maximiz[ation of] trade benefits", which would be achieved by equal linear cuts.<sup>194</sup> The US insistence on equal linear cuts reflected continuing adherence to the principle of payment: from its perspective, what mattered was that the parties *pay equal amounts*, rather than that the formula achieve some form of *equity of outcomes*, such as a harmonisation of tariff levels. The relevant consideration, from the US's point of view, was that "the reduction of a high rate of duty might lead to a greater increase in trade than the same percentage reduction in a lower rate of duty"<sup>195</sup> – reductions by a high-tariff country under equal linear cuts were thus potentially "more valuable" than the same reductions by a low-tariff country.<sup>196</sup> It is worth noting that for the first time in the history of the GATT, the US stance on reciprocity was

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<sup>189</sup> L/1982, 4; cf. Evans 1971, 186.

<sup>190</sup> On the origins of the proposal, see Evans 1971, 186; Preeg 1970, 60-61.

<sup>191</sup> The EEC envisioned different floors for primary products (0 percent), semi-manufactured products (5 percent), and finished products (10 percent); L/2002, 15; Preeg 1970, 3.

<sup>192</sup> Curzon 1965, 104; cf. Evans 1971, 187.

<sup>193</sup> L/2002, Annex III, para. 2.

<sup>194</sup> Ibid.

<sup>195</sup> Ibid.

<sup>196</sup> L/2002, Annex II, para. 7; this statement is not explicitly attributed to the United States.

not compelled by domestic legislation – the Trade Expansion Act authorising the Kennedy Round negotiations merely called for "mutual" trade benefits.<sup>197</sup> A participant in the negotiations noted, however, that

the broad statutory standard was applied by the U.S. negotiators more rigorously than was legally – though perhaps not politically – necessary. For a number of reasons, including practice in prior negotiations, public and Congressional expectations, and the normal competitiveness of a negotiation, a notion of equivalency of tariff reduction was applied.<sup>198</sup>

The debate about tariff "disparities", i.e., the comparative treatment of high and low tariffs, took up a large part of the negotiations about the modalities for tariff reductions in the Kennedy Round. Despite numerous proposals, the EEC could not convince the other contracting parties, in particular the US, to adopt an automatic formula to deal with tariff disparities. The compromise solution envisioned that tariff disparities would be addressed on an ad hoc basis when they were "meaningful in trade terms". The tension between the competing principles of equal payment in the form of equal linear cuts, and equity of outcomes, demanding a harmonisation formula, would remain one of the principal ways in which the meaning of reciprocity in trade negotiations would be contested for some time.

In other contexts, the principle of reciprocity as it had been traditionally conceptualised remained unperturbed. Agricultural products were exempted from the formula approach and were addressed, in a limited way, through request-and-offer negotiations. Moreover, the parties were allowed to table lists of exceptions to the formula governing tariff reductions in industrial products. While the contracting parties had early on recognised the "risk ... that the negotiations for exceptions could easily develop into a kind of inverted item-by-item negotiation",<sup>199</sup> they failed to agree on a method to address exceptions in a general or automatic manner. The resulting product-by-product negotiations reportedly led negotiators "to view the reciprocity principle in a traditional manner".<sup>200</sup>

The participants in the tariff negotiations of the Tokyo Round encountered essentially the same issues.<sup>201</sup> The tension between the objectives of equal payment and tariff harmonisation resurfaced and gave rise to a number of increasingly sophisticated

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<sup>197</sup> Rehm 1968, 412.

<sup>198</sup> Ibid.

<sup>199</sup> L/1982, 4.

<sup>200</sup> Dam 1970, 70; see also Winters 1990, 1292, who argues that "the lists of exceptions were manipulated to achieve a rough reciprocity."

<sup>201</sup> See Wingham 1968, 158-160.

formula proposals.<sup>202</sup> In a major departure from the Kennedy Round, all proposals now contained an element of tariff harmonisation. Even the US proposal, though envisaging linear cuts for all tariffs above what the GATT Secretariat had calculated as the average tariff rate in major developed countries, conceded the principle of harmonisation for duties below that rate (6.67 percent).<sup>203</sup> The greater openness towards tariff harmonisation displayed by the US reflected a shift in what the US regarded as the objective of trade negotiations. In the Kennedy Round, the US had insisted that trade negotiations should aim to "maximize trade benefits", rather than to establish "uniform conditions of competition".<sup>204</sup> In the Tokyo Round, by contrast, the US government had concluded "that tariff and non-tariff barrier liberalization in the MTN must result in *substantially equivalent competitive opportunities* among the developed countries", which could be achieved in the context of tariff negotiations "by application of the principle of equal access in duty rates."<sup>205</sup> Accordingly, the tariff reduction formula proposed by the US sought to "ensure more equitable access among developed country markets."<sup>206</sup>

The discussions following the presentation of the US proposal brought the increasingly contested meaning of reciprocity to the fore. Some countries, such as Canada and Australia, continued to conceptualise reciprocity as the principle of payment, emphasising the "reciprocity and balance of the tariff *bargain*".<sup>207</sup> With only a few major export items, these countries had little to gain from across-the-board reductions in industrial tariffs, at least as they had been proposed by the US, and hence insisted on "payment" either through a reduction of non-tariff barriers to their agricultural exports<sup>208</sup> or through

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<sup>202</sup> For an overview, see *GATT 1979*, 42-45. Formulas were proposed by the US, Canada, the EEC, Japan, and Switzerland. The different formulas will be discussed in detail in Chapter 3 *infra*.

<sup>203</sup> MTN/TAR/W/15; the US draws attention to its change of mind:

This represents the first occasion on which my delegation has embraced harmonization of tariffs as an objective in a tariff-cutting exercise. It is well known that my delegation has previously advocated a linear approach to tariff reductions and that we have differed with those who have advanced theories of tariff harmonization. We have now concluded, however, that our interests and the objectives of this Group are advanced by an approach to tariff cutting which embraces both linear and harmonization elements.

<sup>204</sup> Ibid. 3.

<sup>204</sup> L/2002, Annex III, 2.

<sup>205</sup> MTN/TAR/W/9 (emphasis added); see also MTN/TAR/W/15, 2, where the "achievement of substantially equivalent competitive opportunities in the markets of developed countries" is described as "a guiding concept for the United States in these negotiations".

<sup>206</sup> MTN/TAR/W/15, 1.

<sup>207</sup> MTN/TAR/W/18, 5 (emphasis added); MTN/TAR/W/38.

<sup>208</sup> MTN/TAR/W/38.

greater-than-formula cuts on tariffs affecting their exports.<sup>209</sup> Other parties, in particular the EEC, used the opening presented by the new-found US concern with competitive opportunities to redefine reciprocity as referring to the "*level* of tariff protection" in different countries.<sup>210</sup> The EEC saw the "built-in equilibrium" in its harmonisation formula not in equivalent tariff reductions, but in what it described as the "better balance of profiles of the various tariffs of developed countries" that the formula would secure.<sup>211</sup> This patently new reading of reciprocity was supported by Switzerland, which argued that "there is no real reciprocity in the level of tariff protection which the various participants in the negotiation enjoy at present".<sup>212</sup> It followed, according to the Swiss, that "one can rightly wonder whether each of them should be expected to offer mathematically the same contribution"<sup>213</sup> – a direct challenge to the principle of payment.<sup>214</sup>

As it happened, the formula that Switzerland subsequently proposed<sup>215</sup> was ultimately adopted as a compromise solution between the predominantly linear US formula and the strongly harmonising EEC proposal.<sup>216</sup> The Swiss formula represented a deviation from the market model of reciprocity to the extent that equity considerations had led the participants to value small reductions in low tariffs as equivalent to larger reductions in high tariffs. However, it did not constitute a fundamental break with the principle of payment in tariff negotiations. For one thing, several countries refused to go along with the

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<sup>209</sup> MTN/TAR/W/18, 3-4. Specifically, Canada demanded the elimination of duties of less than 5 percent; see also MTN/TAR/W/2.

<sup>210</sup> MTN/TAR/W/29, 6-7 (emphasis added): "there is no true situation of reciprocity in the level of tariff protection at present enjoyed by the various participants in the negotiations".

<sup>211</sup> MTN/TAR/W/29, 7.

<sup>212</sup> MTN/TAR/W/25, 2.

<sup>213</sup> Ibid.

<sup>214</sup> See also the comments by the US in MTN/TAR/W/30, 6, on "elements of reciprocity to be achieved within the Tariffs Group":

The Community spokesman, if I understand him correctly, is suggesting that we look at reciprocity from another dimension – not in terms of how much each of us may give up – but in terms of where we end up with regard to tariffs at the end of the day. That is to say, he is, or seems to be, suggesting that the relative distribution of tariffs after the negotiations should be more closely aligned without regard to the question of whether one country gives up more than another country in the process of achieving this greater similarity in tariff profiles.

The US delegate noted that "[t]his concept of reciprocity has a certain attraction when applied to the entire tariff schedules of our major trading partners", but could not be meaningfully applied in the case at hand, because the EC was excluding agricultural products from its tariff reduction formula, rendering the latter "seriously deficient in reciprocity terms".

<sup>215</sup> See MTN/TAR/W/34 and MTN/TAR/W/37.

<sup>216</sup> On the circumstances of the adoption, see Winham 1986, 201-203; MTN.GNG/NG1/W/1, 5; Winters 1990, 1295, describes the Swiss Formula as "a compromise between the proportional cut proposed by the US and the EC's non-linear rule which reduced high tariffs the most".

harmonisation formula. Canada claimed that it would be getting "virtually nothing" in return for the "substantial and meaningful tariff reductions" that it would have to undertake, and that the formula would hence "fall far short of meeting the test of reciprocity and of mutual advantage".<sup>217</sup> It dismissed the economic rationale of the idea of harmonisation, which on its view merely had "certain presentational advantages".<sup>218</sup> Canada ended up presenting an offer based on its own formula.<sup>219</sup> Other countries, including all developing countries, followed the traditional item-by-item technique.<sup>220</sup> But even among those parties who applied the Swiss formula in their initial offers, the primary role of the formula was to set the baseline for the calculation of the "balance" in bilateral bargains, in the sense that deviations from the formula had to be "paid for" with extra concessions.<sup>221</sup> In the bargaining phase that followed the agreement on the formula, the negotiations retained many of the features that had characterised the traditional bilateral item-by-item procedure. These features, and chiefly among them the principle of payment, had become deeply ingrained.

The Tokyo Round negotiations on agricultural market access were preceded by a heated debate within the US government on the conception of reciprocity that should be adopted for the agricultural negotiations. The US Department of Agriculture suggested that reciprocity should be assessed against a benchmark of "minimum interference with the flow of world trade". Reciprocity would be attained when all countries were "equally near" this "goal".<sup>222</sup> The Department argued that

it is this idea, and not any technical formula for measuring the value of concessions granted in exchange for concessions received (formulas which are bound to be obsolete by the time staged concessions have taken full effect), which should govern U.S. views toward reciprocity in the proposed multilateral trade negotiations.<sup>223</sup>

The Department recognized that "trade-offs are an essential part of the negotiating procedure" and that, under its proposed approach, the negotiating outcome would not be

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<sup>217</sup> MTN/TAR/W/31.

<sup>218</sup> Ibid.

<sup>219</sup> MTN/TAR/W/49; see Wingham 1986, 269-272.

<sup>220</sup> MTN.GNG/NG1/W/1, 5.

<sup>221</sup> Wingham 1986, 203, 256-268; Winters 1990, 1294.

<sup>222</sup> FRUS 1973-1976, 615; see also ibid. 619:

reciprocity should be assessed only in terms of the extent to which countries are conforming to basis GATT principles and the distance they need to go to arrive at complete conformity.

<sup>223</sup> Ibid. 615.

"fully balanced in this sense".<sup>224</sup> In particular, "[c]ountries with a substantial degree of border protection still remaining would be expected to give more than countries which are already quite liberal in their trade policies."<sup>225</sup> The Department of Agriculture's approach, then, mirrored the interpretation of reciprocity that would be advocated by the EC and Switzerland, and partly embraced by US negotiators, in the negotiations on industrial tariffs.

The US Department of Commerce resisted this approach for agricultural negotiations principally on the grounds that a conception of reciprocity based on "equality in approaching '... the goal of minimum interference with the flow of world trade'" was "not one which can be either clearly defined or which is likely to be accepted by other countries since they would stand to lose more than ourselves by agreeing to this concept."<sup>226</sup> In the end, the Tokyo Round negotiations on agricultural market access, which, at the insistence of the EC, were conducted separately from the negotiations on industrial tariffs, took place on the basis of the traditional request-and-offer technique – a minimum compromise that reflected the fundamental disagreements between the US and the EC in this area.<sup>227</sup>

Concurrently with the conclusion of the Tokyo Round, and in light of the worsening trading position of the United States, the conception of reciprocity as equal market access was gaining currency in US domestic discourse.<sup>228</sup> In marked contrast to the multilateral tariff harmonisation agenda that was increasingly accepted in the GATT, the proponents of "reciprocity legislation" in the US advocated a *unilateral* approach, whereby the US would use the threat of trade *retaliation* to force liberalisation upon countries which, in *its* judgment, were not providing "reasonable" access to US exports.<sup>229</sup> This "aggressive unilateralism"<sup>230</sup> had a profound influence on the multilateral trading system: in conjunction with the coercive structure of the Uruguay Round "single undertaking",<sup>231</sup> it

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<sup>224</sup> Ibid. 619.

<sup>225</sup> Ibid.

<sup>226</sup> Ibid. 629, 632.

<sup>227</sup> See Winters 1990, 1294; Winham 1986, 146-158, 164-167.

<sup>228</sup> See Cline 1982, 7:

US reciprocity objectives in the past meant seeking reciprocal *changes* in protection in trade negotiations; the new approach seeks reciprocity in the *level* of protection *bilaterally* and over a certain *range of goods*. (original emphases)

<sup>229</sup> Bayard/Elliott 1994; Hudec 1975; Rhodes 1993.

<sup>230</sup> Bhagwati/Patrick 1991; others have called it "aggressive reciprocity": Wonnacott 1984.

<sup>231</sup> See Chapter 2 *infra*.

would provide the coercive backdrop against which developing countries would accept new commitments on trade in services, intellectual property rights and investment in the Uruguay Round.<sup>232</sup>

In the Uruguay Round tariff negotiations the hardened US stance manifested itself in its insistence, against virtually unanimous opposition, to return to the bilateral request-and-offer approach,<sup>233</sup> and in its increasing impatience with countries who refused to reciprocate concessions.<sup>234</sup> The negotiations about modalities for tariff reductions had seen an unprecedented number of formula proposals, many with a strong harmonisation element, and some contemplating supplementary request-and-offer negotiations to go beyond formula reductions. However, given that the US made it clear that it "would not alter its previous position" that a request-and-offer approach should be followed,<sup>235</sup> the agreed procedures for tariff negotiations merely stipulated that each participant would provide the Secretariat with its offers for the reduction, elimination, and binding of its tariffs by a certain date.<sup>236</sup>

The Uruguay Round tariff negotiations saw several proposals of new methodologies for measuring reciprocity which were not formally adopted. Australia presented a methodology for the calculation of an "effective rate of assistance" covering both tariffs and non-tariff measures, which could be "used as a means of ensuring that 'concessions' made as part of the negotiations are reasonably balanced".<sup>237</sup> As an alternative to the formula approach that would accommodate the request-and-offer method, the US suggested that the modalities for the tariff negotiations should contain a "statement of results", for example in the form of an agreement on an average reduction of levels over a certain time

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<sup>232</sup> Winters 1990, 1301: "curbing US unilateralism in general was one of the major objectives of nearly all participants in the [Uruguay] Round".

<sup>233</sup> See MTN.GNG/NG1/13, para. 5; Paemen/Bensch 1995, 111-112, offer a discussion of the reasons for the United States' preference for returning to the request-and-offer method, arguing that the United States wanted to avoid the transparency associated with formula approaches in order to be able to maintain its tariff peaks on textile products. Paemen and Bensch also note that during the negotiations on modalities "all sides had been urging a systematic approach. Only the Americans came out clearly against the idea"; Paemen/Bensch 1995, 113.

<sup>234</sup> MTN.GNG/NG1/11, reporting the US position:

It did not intend to make concessions to participants which did not fulfil the basic requirement of providing [tariff and trade] data, and it would not make offers on products which would indirectly benefit such participants.

<sup>235</sup> MTN.GNG/NG1/14, para. 9. The US agreed to examine offers made on the basis of a formula.

<sup>236</sup> MTN.GNG/NG1/17.

<sup>237</sup> MTN.GNG/NG1/14, para. 8; see also Paemen/Bensch 1995, 105, who characterise the Australian proposal for "an integrated approach to market access" as "sheer heresy", noting that "five groups" were discussing what the Australians saw as "an indivisible whole".

period.<sup>238</sup> This approach was adopted in the separate negotiations on agricultural market access: tariffs on agricultural products were to be reduced *on average* by a certain percentage, with a specified minimum reduction for each tariff line.<sup>239</sup> The trade ministers of the major trading powers informally agreed on a similar average reduction for industrial products, and used this as a yardstick to ensure that "each participating country had made an appropriate contribution to the tariff reduction exercise".<sup>240</sup>

In the Doha Round "non-agricultural market access" (NAMA) negotiations, WTO Members agreed to reduce their tariffs pursuant to a Swiss formula. For the first time in the history of international trade lawmaking, developed countries would apply the formula to all non-agricultural products without exception. In the negotiations on agricultural products, by contrast, a new approach was developed: Both tariffs and domestic support were subjected to reduction commitments in accordance with a tiered formula, which mandates different reductions depending on the 'tier' into which a tariff falls (e.g. 0-20, 20-50, 50-75, over 75 for tariffs of developed countries).<sup>241</sup> This formula allowed a particularly fine calibration of reduction commitments, since both the tiers and the percentage reductions for tariffs or domestic support bindings falling within the tiers can be individually adjusted. According to a Canadian negotiator, the tiers for the developed countries were designed so as to capture the key tariff and domestic support bindings of the US and EU in particular tiers.<sup>242</sup> However, the properties of the formula are proving not to be the only, or even primary, factor influencing the perception of reciprocity in the Doha agricultural negotiations: Developed countries are allowed to schedule a specified percentage of tariff lines as "sensitive products", which are subject to lower reduction commitment, while developing countries can, in addition, schedule a number of "special products" on which tariff bindings do not have to be reduced at all. As in previous tariff negotiations on industrial tariffs, the reciprocity dynamic is likely to play out primarily in bilateral

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<sup>238</sup> MTN.GNG/NG1/W/19.

<sup>239</sup> MTN.GNG/MA/W/24, paras. 2 and 15: the percentage for developed countries was 36 with a 15 per cent minimum reduction, for developing countries no less than two-thirds of that amount.

<sup>240</sup> Finger 2005, 34. The agreement on a 30 per cent average reduction is also reported in Oxley 1990, 168. Finger notes, however, that the participants "seem to have policed these guidelines rather softly". In a study on the Uruguay Round tariff negotiations, Finger and his colleagues did not encounter any delegation "who had attempted to calculate the depth of cut by each country, or even of major trading partners". In calculating the cuts, they found "little evidence of either equal sacrifice or mercantilist balance"; Finger 2005, 35-36; cf. Finger/Reincke/Castro 1999.

<sup>241</sup> TN/AG/W/4/Rev.4, para. 61.

<sup>242</sup> Interview with Pamela Cooper.

bargaining over exceptions. The US has already indicated dissatisfaction after consulting with India and China about their prospective "special" products. According to the US, these consultations confirmed its "worst fears" – an indication that the emerging economies will designate key US exports, such as soy and poultry, as "special" products.<sup>243</sup> The logic of reciprocity is also evident in the latest Chair's text on the agricultural negotiations, which notes that the membership would expect "payment" from Canada and Japan to allow them to designate additional tariff lines as "sensitive".<sup>244</sup>

In the Doha Round, questions of reciprocity in the negotiations on industrial tariffs have taken centre stage, emerging as the key obstacle to the conclusion of the Round. The Hong Kong Ministerial Declaration had called for a number of sectoral negotiations on non-agricultural market access, with participation being non-mandatory.<sup>245</sup> The aim of the developed countries, in particular the United States, was to use these sectoral negotiations to extract higher than formula concessions from the three major emerging economies, namely China, India, and Brazil. One rationale that the developed countries gave for their demands was that, given their already low level of industrial tariffs and the further cuts envisioned by the Doha Round formula, they would "lose all leverage to obtain future industrial tariff reductions from emerging economies" and that the Doha Round thus represented "the last opportunity towards a harmonisation of tariffs with emerging economies".<sup>246</sup> The elimination of selected tariffs under the "product basket approach" would dispense with the need to pay for additional tariff reductions in the future, and thus solve the problem of the developed countries lack of currency in this area. Beyond this pragmatic rationale, the developed countries also offered a more principled rationale, namely the aim to "rebalance the disparity in the contribution between developed and emerging countries" so that the latter would "catch up" with the former in terms of industrial market access.<sup>247</sup>

The emerging economies, on the other hand, objected that sectoral tariff reductions would have to be "balanced and proportionate", and that the emerging economies would be making "disproportionate efforts" by undertaking the proposed elimination of selected

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<sup>243</sup> *US TNC Statement 2011*; interview with Joseph Glauber.

<sup>244</sup> TN/AG/26, 3.

<sup>245</sup> WT/MIN(05)/DEC, para. 16, and Annex B, paras. 21-23.

<sup>246</sup> TN/C/14, 2.

<sup>247</sup> *Ibid.*

industrial tariff, given that they were starting from a much higher level than the developed countries.<sup>248</sup> In effect, the emerging economies were arguing that the extreme harmonisation demanded by developed countries would violate the principle of payment. They pointed out that developed countries had the opportunity to "pay" for additional cuts in industrial tariffs by undertaking further reductions in agricultural subsidies, invoking the principle that "those who ask for more have to pay more".<sup>249</sup>

***b) Redefining the "Currency": Non-Tariff "Barriers" and Domestic Regulation***

The second trend in the evolution of the reciprocity discourse was the increasing centrality of the attempt to address what were conceptualised as non-tariff "barriers" to trade. This expansion of the trading system was to some extent driven by the reciprocity discourse itself. First, non-tariff barriers had to be addressed in order to safeguard the value of concessions that had been "paid for" in tariff negotiations – this was the original rationale for including rules on non-tariff barriers, such as quantitative restrictions, in the GATT. Second, extending trade lawmaking to cover non-tariff barriers had the advantage of increasing the amount of 'currency' with which participants could pay for concessions, i.e., it increased opportunities for pay-offs.

On the other hand, the extension of trade lawmaking to non-tariff barriers also presented challenges to the reciprocity discourse. Non-tariff barriers were widely perceived to be less "bargainable" than tariffs.<sup>250</sup> Even in tariff negotiations, participants always retained complete freedom to assess the value of concessions offered by their counterparts and to decide when an appropriate balance had been reached; in other words, "agreement defined reciprocity, not the other way around".<sup>251</sup> However, certain widely accepted metrics for measuring reciprocity did emerge. Thus, reciprocity was usually captured by measuring "the amount of existing trade covered by the tariff item and the extent to which the percentage duty is reduced".<sup>252</sup> The underlying goal, as a US official who participated in tariff negotiations put it, was to negotiate "with a view to producing a dollar's worth of

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<sup>248</sup> Ibid. 3.

<sup>249</sup> *India TNC Statement 2011*.

<sup>250</sup> Dam 1970; Rehm 1968, 427: "Unlike tariffs, non-tariff barriers do not lend themselves to simple negotiating rules."

<sup>251</sup> Finger 2005, 29.

<sup>252</sup> Dam 1970, 27.

increased exports for every dollar's worth of increased imports".<sup>253</sup> In accounts from tariff negotiations up until the Uruguay Round, there are numerous examples of attempts by participants to explicitly calculate the level of reciprocity.<sup>254</sup>

By contrast to tariffs, many non-tariff barriers are not easily quantifiable, and therefore call for a more qualitative, and hence more "subjective", assessment of reciprocity.<sup>255</sup> While this problem is usually traced to the Kennedy Round, it had accompanied multilateral trade lawmaking from the outset.<sup>256</sup> One way of integrating non-tariff barriers into the reciprocity logic is to prohibit a particular type of barrier, which will then count as a "payment" by those countries which have been the predominant users of that kind of barrier. Thus, during the GATT/ITO preparatory negotiations, the US was initially prepared to offer a 50 per cent across-the-board cut in its tariffs to pay for the abolition of quantitative restrictions (as well as the British imperial preferences) by its trading partners. A more recent example of the legal status of a particular practice being conceptualised as the unit of payment is the use of "zeroing" in anti-dumping duty calculations: Reinstating this practice as legal would be perceived as a concession for which the US as the predominant user would have to "pay".<sup>257</sup> These examples suggest that the integration of non-tariff barriers into the reciprocity discourse is relatively easy where the question is simply one of the legality/illegality of a practice, and the benefits and costs of the practice are relatively clearly distributed rather than diffuse.

Another approach to the regulation of non-tariff barriers that was considered during the preparatory negotiations would have disciplined non-tariff barriers, in particular quantitative restrictions and subsidies, by providing that the production volumes and prices of the protected products must not exceed certain specified amounts, which were to be expressed as percentages of production in a base period and in relation to world market prices, respectively.<sup>258</sup> The British, who wanted to use this approach to subject protection

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<sup>253</sup> Harry Hawkins, quoted in Evans 1971, 22.

<sup>254</sup> FRUS 1947, 1019-1020; FRUS 1961-1963, 525.

<sup>255</sup> Evans 1971, 256-257 notes the "difficulty of measurement" of reciprocity:

There is no such common yardstick as the ad valorem equivalent of tariff to help the negotiators formulate their bids and offers or to provide them with a mathematical basis for defending at home whatever bargain they might strike.

See Lang 2011, 219 with further references.

<sup>256</sup> See also MTN.GNG/NG2/W/1, Annex I, para. 17: "GATT has dealt with non-tariff measures from the beginning."

<sup>257</sup> Interview with Jane Bradley.

<sup>258</sup> FRUS 1945, 50-51.

for agricultural production to multilateral rules, argued for their proposal with reference to substantive goals – sheltering a section of the market to provide stability to agricultural production while ensuring that the most efficient producers could capture increasing shares of the market when demand increased.<sup>259</sup> The British proposal did not foresee that the production volumes and price differentials would be subject to reciprocal bargaining; instead, they would be permanently fixed, with uniform parameters for all countries. However, the idea of disciplining non-tariff barriers *indirectly* by employing indicators of their protective effect would eventually be used to subject such measures to much the same reciprocity calculus as tariffs.

A third approach to dealing with non-tariff barriers that was mentioned in the preparatory negotiations and that was implicitly encouraged by the design of the GATT was tariffication, i.e. the conversion of non-tariff barriers, in particular quantitative restrictions, into tariffs<sup>260</sup> – a technique that would eventually be used in the Uruguay Round agricultural negotiations.

Finally, the question arises how the reciprocity discourse can accommodate situations in which the benefits and costs of rules are diffuse, making it impossible to frame an agreement on such rules as a bargaining trade-off. As Winters has pointed out:

Trading rules are constitutional issues, affecting all contracting parties directly and therefore have to be negotiated multilaterally. ... [S]ince the outcome is essentially qualitative, reciprocity is difficult to achieve; unlike tariff negotiations, where concessions can be fine-tuned, constitutional talks offer little scope for marginal adjustments or for side-payments.<sup>261</sup>

This non-bargainability of rules on certain non-tariff barriers could represent an opportunity to move beyond the principle of payment in international trade lawmaking, and there appear to have been examples of negotiations on non-tariff barriers in which this has in fact been the case: the negotiations of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) during the Uruguay Round are sometimes cited as an example of negotiations which were dominated by experts looking for the best solution in

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<sup>259</sup> FRUS 1944, 102-103; FRUS 1945, 50-51.

<sup>260</sup> See FRUS 1945, 3; FRUS 1973-1976, 616-617.

<sup>261</sup> Winters 1990, 1295.

light of common interests, approximating the "rational appraisal of beneficial policy" that Jackson has juxtaposed to reciprocal bargaining.<sup>262</sup>

More often than not, however, the reciprocity discourse has encouraged the framing of issues "as a bargaining problem with divided interests rather than as an issue of common concern",<sup>263</sup> and has led to a search for "cross-sectoral trade-offs", which, according to Winters, tends to "imbue ... the whole process with an air of crisis".<sup>264</sup> This subsumption of the regulation of non-tariff "barriers" to the logic of payment has greatly magnified the general tendency of the reciprocity discourse to disconnect the "currency" status of a particular measure from its economic or moral merits: While some of the policies which can be conceptualised as non-tariff "barriers" to trade do have the regulation of trade as their primary objective, many such policies are primarily directed toward achieving other regulatory goals, and may only have an incidental, and sometimes relatively minor, effect on trade.<sup>265</sup> When such policies are conceptualised as "non-tariff barriers" and come to appear through the lens of the reciprocity discourse as simply another method of payment, the other regulatory goals that they pursue tend to be marginalised. Essentially, the reciprocity discourse forces trade negotiators to "commodify" a diverse range of regulatory policies, values, principles, and objectives, to establish what they are "worth",<sup>266</sup> and to "make comparisons of relative value" between them.<sup>267</sup> As Winham notes, "such comparisons can easily appear repugnant to a domestic constituency."<sup>268</sup>

In sum, the challenges to the reciprocity discourse posed by negotiations on non-tariff "barriers" can be resolved along a spectrum marked by the following extremes: On one end, the non-tariff "barriers" can be assimilated to traditional trade barriers, in

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<sup>262</sup> Jackson 1969, 669; interview with Gretchen Stanton. Whether this view would be shared by some developing countries is questionable. Finger 2002 has pointed to the considerable costs to developing countries of implementing the SPS Agreement, and Stanton, who chaired the negotiations, remembered that after the conclusion of the Uruguay Round one of the tasks of the Secretariat was to "explain to some developing countries what they had just signed".

<sup>263</sup> Abbott/Snidal 2002, 193.

<sup>264</sup> Winters 1990, 1295; in the Kennedy Round, the Director-General stated that

[c]ountries must be willing to register debits and credits in individual areas and look for compensation within the total Kennedy Round package; otherwise, narrow, halting gestures will result in a series of sector deals levelled at the lowest common denominator. (FRUS 1964-1968, 800)

<sup>265</sup> See Dymond/Hart 2000, 33; Winham 1986, 86.

<sup>266</sup> Hoekman 2012, 758; see also Low/Subramanian 1995, 423: "national treatment has been transformed from a principle into negotiating currency under GATS"; on the commodification of interests and values, i.e., "turn[ing] what [was] thought [to be] an end into a set of far more manageable interests or means", see also Cohen 2008, 542.

<sup>267</sup> Winham 1986, 292.

<sup>268</sup> Ibid.

disregard of their potential non-trade objectives and effects. On the other end, such negotiations can be used to transcend the logic of payment in international trade lawmaking. As I will argue in the following, the history of trade negotiations does not exhibit a clear trend towards either of these extremes.

The first round of trade negotiations since the original GATT/ITO negotiations which explicitly took up the regulation of non-tariff "barriers" was the Kennedy Round.<sup>269</sup> The resolution of Ministers adopted to launch the Round left no doubt about the central role that reciprocity should play in the negotiations, specifying that

in the trade negotiations it shall be open to each country to request additional trade concessions or to modify its own offers where this is necessary to obtain a balance of advantages between it and the other participating countries. It shall be a matter of joint endeavour by all participating countries to negotiate for a sufficient basis of reciprocity to maintain the fullest measure of trade concessions.<sup>270</sup>

A Sub-Committee on non-tariff barriers was established, and the participants were invited to bring forward matters on which they wished to negotiate, and to suggest "how they are to be dealt with".<sup>271</sup> In response, Britain proposed that it should be left to the participants "to take account of the progress made in the liberalization or removal of [non-tariff barriers] when it comes to their assessment of the balance of reciprocity".<sup>272</sup> Other participants suggested a division between issues that could be resolved through bilateral discussions of specific measures and questions of general relevance "which could require the drawing up of new rules or codes of conducts", such as safeguards, anti-dumping procedures, and customs valuation.<sup>273</sup> A distinction was thus early on established between two scenarios considered above: the abolition of a practice used by a particular state and the drawing up of general rules to regulate the practice. The differentiation between these scenarios would occur based on whether the negotiating objective was "the removal of a particular measure or its modification, or, say, the multilateral adoption of new rules of codes of conduct".<sup>274</sup> Arguably, these choices had different implications regarding the conceptualisation of reciprocity.

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<sup>269</sup> See MIN(63)9, listing as one of the principles of the planned negotiations that "the trade negotiations shall deal not only with tariffs but also with non-tariff barriers".

<sup>270</sup> MIN(63)9, principle 5.

<sup>271</sup> TN.64/NTB/2; for the terms of reference of the Subcommittee on Non-tariff Barriers, see TN.64/3.

<sup>272</sup> TN.64/NTB/2.

<sup>273</sup> See TN.64/NTB/5; N.64/NTB/14; TN.64/22, para.4.

<sup>274</sup> TN.64/NTB/17, 2.

Among the non-tariff barriers identified by participating governments were customs valuation methods, such as the wine-gallon assessment and the American Selling Price (ASP) in the US,<sup>275</sup> preferential procurement policies,<sup>276</sup> technical standards, and import restrictions imposed for sanitary reasons.<sup>277</sup> On several subjects deemed to be suitable for a systemic approach, the contracting parties established negotiating groups.<sup>278</sup> In the end, only two agreements on non-tariff barriers were included in the Final Act of the Kennedy Round: an agreement eliminating the ASP method for customs valuation (subject to approval by the US Congress)<sup>279</sup> and an Anti-Dumping Code.

The ASP Agreement represented a clear example of how the principle of payment could be applied to non-tariff barriers. US negotiators insisted that the ASP Agreement had to be "separate and self-balancing".<sup>280</sup> As they explained to their European counterparts, if the Agreement was tied to the general Kennedy Round package, the US Congress would feel that it was put under undue pressure and might reject the entire Kennedy Round agreement.<sup>281</sup> The ASP Agreement thus had to pay for itself. This was achieved by trading the elimination of the ASP system of customs valuation through conversion of the respective tariff lines into ad valorem tariffs, as well as a reduction in the new ad valorem rates, on the part of the US, for the abolition of various non-tariff barriers<sup>282</sup> as well as additional tariff reductions on chemical products on the part of European countries.<sup>283</sup> The

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<sup>275</sup> TN.64/NTB/19; TN.64/NTB/21.

<sup>276</sup> TN.64/NTB/20.

<sup>277</sup> TN.64/NTB/4; for an overview, see TN.64/22, which lists a total of 19 barriers.

<sup>278</sup> Namely, anti-dumping, customs valuation methods, government procurement, (in principle) state trading, administrative and technical regulations; TN.64/30.

<sup>279</sup> Congress did not ratify the agreement; Evans 1971, 304; for accounts of the negotiations, see Preeg 1970, 169-176, 178-184.

<sup>280</sup> Rehm 1968, 419; see also Winham 1986, 82, fn 30, who reports that EC negotiators were angered by the US request for compensation. On the EC's demand that the US unilaterally eliminate ASP, see FRUS 1964-1968, 798; cf. *ibid.* 814, where US negotiators comment on an EC paper:

An EEC quid-pro-quo for American movement on ASP is not discussed. ... We have stated that ASP is negotiable within the context of a chemicals sectors package and overall KR reciprocity.

<sup>281</sup> Cf. Evans 1971, 259-260.

<sup>282</sup> Namely, changes in road taxes by Belgium, France and Italy, reduction in the preferential duty for unmanufactured tobacco by the UK, and the admission of canned fruit with corn syrup; see ASP Agreement, Article 10.

<sup>283</sup> The GATT's Director General had earlier warned of the problems with reciprocity that might arise in the chemicals sector, and suggested that non-tariff barriers be eliminated in return for the ASP:

If the maximum result is to be achieved it will also be necessary for the participants to give renewed consideration to the rather complicated questions of reciprocity which arise. In the nature of things, mathematically full reciprocity may not be attainable within the sector and, as in other sectors, an agreement might leave debits and credits to be balanced off in the final stage of the negotiations. In so far as a satisfactory solution to the problem of the American Selling Price system would be an

agreement explicitly stipulated that the non-tariff measures would be modified or eliminated "in return for the additional concessions provided for herein by the other parties to this Agreement".<sup>284</sup> In this case, the application of the principle of payment was facilitated by the fact that the non-tariff measures at issue were practices that were used predominantly by one or a few countries and the abolition of which held clear and specific, rather than diffuse, benefits for other countries.

The negotiations of the Anti-Dumping Code exhibited a similar dynamic. While the US, Canada and Western European countries shared a general interest in harmonising their anti-dumping procedures,<sup>285</sup> the Code clearly embodied an exchange of concessions.<sup>286</sup> The US agreed to a higher threshold and to a time limit of 90 days for its practice of withholding appraisements of imports.<sup>287</sup> In return, the other parties "were forced to accept reciprocal limitations on their own freedom of action in anti-dumping proceedings".<sup>288</sup> In particular, by agreeing to be bound by the code, Canada accepted GATT Article VI on a definite basis and thus had to introduce an injury test as a prerequisite for the imposition of anti-dumping duties.<sup>289</sup> Similarly, the United Kingdom had to introduce basic due process into its anti-dumping procedures, including notifying importers and exporters of the initiation of an investigation, and giving the affected parties an opportunity to present their views.<sup>290</sup>

The Tokyo Round featured much more comprehensive negotiations on non-tariff measures than the Kennedy Round, resulting in seven multilateral "codes" in addition to bilateral agreements. The principles of the Tokyo Round already reflect changing attitudes to reciprocity. The formulation is now: "the negotiations should be conducted on the basis of mutual advantage and mutual commitment with overall reciprocity".<sup>291</sup> While this

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important contribution to the negotiations on non-tariff barriers, it would probably be matched by action by other participants on other non-tariff barriers.

FRUS 1964-1968, 787.

<sup>284</sup> ASP Agreement, Articles 7(a), 9(a), 10(a).

<sup>285</sup> Preeg 1970, 166; Rehm 1968, 430; Dam 1970, 175.

<sup>286</sup> See Preeg 1970, 167: "The antidumping code was a balanced agreement ... containing concessions on all sides"; Evans 1971, 261: "The differences between the objectives of the United States on the one hand and of Western Europe (including the United Kingdom) on the other were clear cut. ... In the end, each side achieved a substantial measure of its objectives".

<sup>287</sup> Anti-Dumping Code, Article 10(d); for other participant's requests on this issue, see TN.64/NTB/38, 2-10.

<sup>288</sup> Dam 1970, 175.

<sup>289</sup> Dam 1970, 174; see Anti-Dumping Code, Article 3.

<sup>290</sup> Anti-Dumping Code, Article 6; Dam 1970, 177.

<sup>291</sup> Prep.Com/W/6, 5.

formulation owes a lot to the United States' new-found interest in achieving "equity" in competitive opportunities, it captures the more diverse ways in which reciprocity is realised in the non-tariff field. The Tokyo Round codes span the entire spectrum in this respect: where numbers were involved, as in the government procurement code, reciprocity was measured quantitatively;<sup>292</sup> where there were established interests and entrenched positions, general rules embodied specific trade-offs (subsidies, to some extent customs valuation); where there was primarily a shared interest in developing rules, questions of payment receded into the background, and reciprocity was only discussed with respect to the degree of adherence to the common code (standards).

The starting point of the negotiations on subsidies and countervailing duties, on the one hand, and on customs valuation, on the other hand, was similar. In both areas, the United States maintained measures that were inconsistent with GATT rules, but that the United States was allowed to maintain under the grandfather clause of the Protocol of Provisional Application. Thus, US countervailing duty law did not contain a requirement to prove "material injury" to domestic producers before countervailing duties could be applied, in contravention of GATT Article VI.<sup>293</sup> Similarly, the ASP system of customs valuation, which had already been at issue in the Kennedy Round, was in "flat contravention" of GATT Article VII.<sup>294</sup> From the perspective of the United States' counterparts, principally the EC, the United States should not have expected to be compensated with reciprocal concessions for remedying these anomalies.<sup>295</sup> Just as in the Kennedy Round, however, the United States insisted on being "paid" both for the elimination of the ASP and the introduction of a material injury requirement. Interestingly, the subsequent negotiations on these two issues took on very different dynamics.

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<sup>292</sup> Winham 1986, 367, notes how the availability of quantitative measures impacts attitudes to reciprocity:

[There was a] difference between negotiation over words, which was found in the code negotiations, and negotiation over numbers, which was found in the bargaining over tariffs or the wine-gallon tax method. Because numbers are usually more precise than words, they led to a negotiating style that emphasized strict reciprocity in terms of items exchanged. Whether that reciprocity was meaningful in broader terms appeared to be a separate question. By comparison, words admit of greater nuance than numbers, and therefore they promoted a bargaining style that was more flexible and more exploratory.

<sup>293</sup> Rivers/Greenwald 1979, 1453.

<sup>294</sup> Winham 1986, 107.

<sup>295</sup> Rivers/Greenwald 1979, 1454.

With respect to the subsidy/countervail negotiations, Rivers and Greenwald observe that,

[b]before a negotiation can begin in earnest, there must be either a consensus among the countries involved in the negotiations as to the policy objectives to be achieved or, failing that, agreement on a neutral framework within which conflicting policy differences can be compromised.<sup>296</sup>

On the subject of subsidies and countervailing duties, Rivers and Greenwald assert, "consensus on negotiating objectives was impossible."<sup>297</sup> The parties were hence left with the option of finding a "neutral framework" for solving their differences. The reciprocity discourse, of course, provides just such a framework<sup>298</sup> – policies are assimilated into units of payment, and the discussion shifts from their substantive merits to their value as payment. In the case at hand, the US used the leverage that it derived from other countries' interest in the introduction of a material injury test in its countervailing duty law to "buy" an increase in discipline on the use of domestic subsidies by the code signatories – something that its counterparts did not care for.<sup>299</sup>

The negotiations on the ASP system of customs valuation took a very different course. In the Kennedy Round, the parties had attempted to eliminate the ASP through an explicit exchange of concessions – the European countries had agreed to eliminate non-tariff barriers affecting the United States in return. This agreement, which was buried in a groundswell of protectionist sentiment in the United States, did not even make it to a vote in the US Congress.<sup>300</sup> In the Tokyo Round, EC negotiators chose a new approach. Instead of limiting themselves to the narrow issue of the elimination of the ASP (and how to pay for it), they focused on the larger goal of creating a uniform system of customs valuation that would be applied by all GATT contracting parties – a goal that they shared with the

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<sup>296</sup> Rivers/Greenwald 1979, 1465

<sup>297</sup> Rivers/Greenwald 1979, 1465.

<sup>298</sup> The reciprocity discourse is "neutral" only in the sense that it is indifferent to substantive goals.

<sup>299</sup> In one of the first meetings of the SCM Committee set up under the Code after the conclusion of the Tokyo Round, the US representative described the trade-off thus:

One of the major objectives of the trading partners of the United States in negotiating this code was to have the United States expand its injury test to dutiable products and to make the test one of "material injury". The fundamental negotiating position of the United States had been that they would give other countries a material injury test in their law for dutiable, as well as duty-free, products in return for increased discipline over other countries' trade distorting subsidy practices.

SCM/M/3, para. 11; see also Rivers/Greenwald 1979, 1452-1453; Winham 1986, 119, 372.

<sup>300</sup> Evans 1971, 304; Sherman 1980, 123-124.

Americans.<sup>301</sup> While the Europeans initially favoured their own system of customs valuation, which was already being applied by approximately 100 countries,<sup>302</sup> they were prepared to abandon that system in order "to create a new, uniform system from the ground up".<sup>303</sup> It is possible to read this development as a simple trade-off, in that "the EC gained a major benefit by the reform of U.S. practices, but paid for this benefit by rewriting European customs practices as well."<sup>304</sup> It is more plausible, however, to see it as an instance where the negotiators managed to transcend the logic of payment and instead to consider the issues on their merits.<sup>305</sup> This was facilitated by the fact that, in contrast to the subsidy/countervail negotiations, the major participants agreed on the policy objective.<sup>306</sup> In the process, what had been the major bone of contention in the Kennedy Round, namely the question of the ASP, became a minor side issue in the Tokyo Round.<sup>307</sup>

The negotiations on standards from the outset exhibited a similar dynamic to the negotiations on customs valuation. An extensive inventory of non-tariff measures compiled by the GATT secretariat had revealed such a "prevalence of standards-related issues" that negotiators were encouraged to approach the issue "in terms of a general problem rather than [one of] isolated and unconnected examples"<sup>308</sup> – in other words, as a question that was ill-suited to individual trade-offs, and that needed to be considered in a principled manner.<sup>309</sup> Even before the Tokyo Round was formally launched in 1973, a working group

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<sup>301</sup> Winham 1986, 187:

The EC concession (or initiative, if one prefers) succeeded in turning a difficult zero-sum problem of bargaining into a much broader debate over reform in which both parties had common interests. The EC initiative redefined the nature of the problem...

See also Sherman 1980, 124:

The elegant strategy for dispatching ASP adopted by the European negotiators was to call for a uniform international code on customs valuation. ASP was such an inappropriate system that no one could suggest seriously that it be applied universally under an international agreement. Thus, the valuation Code was designed largely to give ASP a decent burial, in a form that was so integral to the agreed-upon package that the United States could not leave the issue unresolved once again.

<sup>302</sup> GATT 1979, 69. Some of these countries, among them Japan, had only recently introduced this system.

<sup>303</sup> Sherman 1980, 120.

<sup>304</sup> Winham 1986, 372.

<sup>305</sup> Sherman 1980, 127:

the negotiators for each country were aware that whatever valuation rules they devised for their imports would also be applied by others to their exports. This realization made possible the degree of disinterested objectivity necessary to reach a successful result.

<sup>306</sup> Sherman 1980, 127: "genuine national differences of interest in the area of customs valuation are, at best, difficult to discern."

<sup>307</sup> Sherman 1980, 124: "the Tokyo Round negotiations on valuation rarely mentioned ASP."

<sup>308</sup> Winham 1986, 103.

<sup>309</sup> For background material prepared by the GATT Secretariat, see MTN/NTM/W/5, paras. 3-6.

on standards had agreed on the basic principles that should govern the code<sup>310</sup> and was able to present an already well-developed draft to the Tokyo Round negotiating group on Technical Barriers to Trade.<sup>311</sup> Progress had been such that some delegations, and in particular the US, argued that the Code should be seen as "self-balancing" and should be implemented in advance and independently of other parts of the round.<sup>312</sup> This was resisted by the EC, which felt that the code "provided insufficient reciprocity for European interests"<sup>313</sup> – not with respect to its substance, but rather with respect to the extent to which the authorities of different parties would be bound by it. In particular, the EC was concerned that in federal systems, where regulatory authority was partly vested in the constituent states, a large proportion of standardization activity and conformity assessments would escape the coverage of the agreement.<sup>314</sup> These concerns remained alive throughout the Tokyo Round,<sup>315</sup> and at the conclusion of the round the EC reserved the right to review the implementation of the code to ensure that its suppliers enjoyed "conditions of total reciprocity".<sup>316</sup>

The negotiation of the code on government procurement was reportedly a "relatively uncontentious" affair and posed few difficulties in terms of reciprocity, since

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<sup>310</sup> Winham 1987, 233, notes that the negotiation "went fairly easily between national delegations" because there was "[b]asic agreement" on the "proposition" that "foreign concerns were relevant" to the work of domestic standard-setting bodies"; this was reflected in provisions providing that standards should not create unnecessary obstacles to trade, that participants should contribute to the formulation of international standards by the appropriate international organizations, that domestic standards should, wherever possible, be based on international standards, and that standards should be specified in terms of performance rather than design.

<sup>311</sup> For the different versions of the draft code, see Spec(71)39; Spec(71)45 and Spec(71)45/Corr.1; Spec(71)45/Rev.1; Spec(71)143; INT(72)6; INT(72)72; INT(72)103; INT(72)104; INT(73)28; INT(73)45; INT(73)51 and INT(73)51/Add.1; the draft GATT Code of Conduct for Preventing Technical Barriers to Trade that was presented to the Sub-Group "Technical Barriers to Trade" in the Tokyo Round is annexed to MTN/NTM/W/5.

<sup>312</sup> See MTN/NTM/W/5, Annex 1, para. 11: it appeared to some delegations that, unlike some other non-tariff areas, products standards might be one where there was a possibility for sufficient balance to enable implementation of a code prior to the conclusion of the broader trade negotiations.

See also MIN(73)W/2, para. 40; Cf. Middleton 1980, 204:

Rapid progress was made in this work and already at an early stage some governments put forward the view that the code was 'self-balancing' (i.e. a balance of rights and obligations for all signatories) and could therefore be concluded independently of other work then being undertaken in GATT.

Cf. Winham 1986, 194.

<sup>313</sup> Winham 1986, 105, 233-234.

<sup>314</sup> See MTN/NTM/W/5, Annex 1, para. 9; cf. Winham 1986, 197.

<sup>315</sup> At the conclusion of the Tokyo Round, the EC stated: "we have been very concerned that there should be full reciprocity between signatories"; MTN/P/5, 45.

<sup>316</sup> See the "Declaration on the Code on Technical Barriers to Trade"; MTN/P/5, 50.

"total procurement" provided an easily quantifiable "metric for reciprocity".<sup>317</sup> The agreement followed the model of the GATT in that it combined multilateral rules regulating procurement procedures with individual schedules stipulating the coverage of the agreement for each individual party. Reciprocity in coverage was established in bilateral negotiations. The multilateral rules, for their part, embodied a

tradeoff in which the Americans accepted the EC lead on outlining tendering procedures, and the EC accepted a greater measure of transparency than its member governments were comfortable with.<sup>318</sup>

In sum, the participants in the negotiations on the Tokyo Round codes clearly sought to establish some form of reciprocity in every single code.<sup>319</sup> At the same time, there is evidence that the parties also assessed reciprocity on the basis of the overall Tokyo Round "package". At the outset of the negotiations, the EC already anticipated that reciprocity would be "harder to assess over non-tariff barriers than over customs duties", so that "a broad spread of solutions [would] be needed to make up a worthwhile and well-balanced package."<sup>320</sup> One indication that overall reciprocity was central was the EC's reluctance to accept the standards code by itself – instead, "the finalization of the code had to await the conclusion of the Tokyo Round 'package'.<sup>321</sup> Winham has speculated that the Europeans wanted "to use the standards negotiation as a bargaining chip in higher-priority areas such as customs valuation."<sup>322</sup>

The next negotiating round, the Uruguay Round, witnessed the most comprehensive attempt yet to reduce or discipline what were conceptualised as non-tariff "barriers" to trade. In order to capture reciprocity for these purposes, negotiators not only made use of

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<sup>317</sup> Winters 1990, 1296; see also Winham 1986, 190.

<sup>318</sup> Winham 1986, 192.

<sup>319</sup> Winham 1986, 372:

Tokyo Round negotiators took the position that the individual code negotiations were 'self-balancing,' even though nations had obvious differential interests in the codes which would have made tradeoffs between them probable.

<sup>320</sup> EC *Overall Approach* 1973, 8; see also Finlayzon/Zacher 1981, 577:

Although the difficulties of measuring reciprocity were magnified in the case of NTB negotiations, no one was prepared to abandon the concept. According to some observers, the NTB codes were basically assessed as a 'package' by the OECD countries.

The EC position is also reflected in MIN(73)W/2, para. 40:

Some delegations are of the opinion that all the texts already drawn up, or still in preparation, should be taken into account in the context of the negotiations so as to make up, with other elements of solutions, a meaningful and well-balanced package.

<sup>321</sup> Middleton 1980, 204.

<sup>322</sup> Winham 1986, 194.

the entire repertoire of techniques employed in previous trade negotiations, but also developed the unprecedented idea of a "grand bargain",<sup>323</sup> whereby the acceptance of entire agreements – most prominently, the assumption by developing countries of commitments on intellectual property rights, investment, and trade in services – was conceptualised as "payment" for concessions by developed countries in other areas, particular on agriculture and textiles.<sup>324</sup>

As I will argue below and in Chapter 2, it is doubtful whether the developed countries' side of the "grand bargain" in effect motivated its acceptance by developing countries at the end of the Uruguay Round. While the round was on-going, few authors expected developing countries to sign up to the new agreements. Thus, Winham anticipated that "in addressing the new issues developed countries may again be forced (as they were in the Tokyo Round code) to sacrifice universality to achieve liberalization in specific areas."<sup>325</sup> Emmert speculated that, since developing countries might be reluctant to block the conclusion of new codes, they would "adopt the code by consensus and will then simply refuse to become contracting parties."<sup>326</sup> It is highly plausible to assume that, had it not been for the unpalatable alternative of the US's aggressive unilateralism, especially on the protection of intellectual property rights,<sup>327</sup> as well as the coercive structure of the Uruguay Round "single undertaking", which forced developing countries to accept the entire Uruguay Round package if they wanted to become members of the WTO and thus retain their access to developed countries' markets,<sup>328</sup> the "grand bargain" would never have been concluded.<sup>329</sup>

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<sup>323</sup> For an early formulation of this idea, see Aho/Aronson 1985, chapter 8 ("A Global Bargain").

<sup>324</sup> Ostry 2002, 287; Ostry notes that the "grand bargain" was "quite different from old-time GATT reciprocity": what was exchanged was market access to developed country markets for the "inclusion into the trading system of trade in services (GATS), intellectual property (TRIPS) and (albeit to a lesser extent than originally demanded) investment (TRIMs)."

<sup>325</sup> Winham 1990, 797-798.

<sup>326</sup> Emmert 1990, 1345. At the same time, Emmert also considered the possibility of a "package deal ... in the form of an international agreement obligating its signatories to enter simultaneously into a whole new set of side-codes for IP, textiles, agriculture and other matters"; *ibid.* 1354.

<sup>327</sup> Watal 2007, 131:

the alternative to negotiating multilateral intellectual property standards would, almost certainly, have been to negotiate bilateral trade and intellectual property agreements without commonly accepted multilateral points of reference and without functioning restraints on the threats of trade counter-measures.

See also Sell 2003, 109-110, 173; Devereaux/Lawrence/Watkins 2006, 64.

<sup>328</sup> See Chapter 2 *infra*.

<sup>329</sup> See also Stegemann 2000, 1243:

In the event, however, the "grand bargain" language provided a convenient way of re-describing the unprecedented result of the Uruguay Round in the familiar terms of the reciprocity discourse, allowing commentators to portray the result as an unremarkable extension of the logic of cross-sectoral trade-offs. According to this "contract story", the developed countries "bought' TRIPS not by agreeing to keep their markets open (which is the dynamic behind the coercion story) but by agreeing to liberalize their markets further".<sup>330</sup> Thus, Jeffrey Schott, an influential commentator on trade issues based at the Institute for International Economics in Washington D.C., has asserted that,

[i]n the end, developing countries were willing to trade their support for the TRIPS accord for improved access to industrial markets in agriculture and light manufacturing products.<sup>331</sup>

Relying on Schott and other sources,<sup>332</sup> the most comprehensive negotiating history of the Uruguay Round notes matter-of-factly that

developing countries' reservations against incorporating substantive obligations with respect to intellectual property in the GATT were exchanged for increased market access to developed countries for, *inter alia*, agriculture and textiles.<sup>333</sup>

While the supposed gains that developing countries made in agriculture and textiles are also mentioned by most authors who emphasise the more coercive aspects of the way the Uruguay Round was concluded, the primary effect of describing the results of the Uruguay Round in terms of reciprocity is arguably to create the impression of continuity and balance where there were none, for at least three reasons. First, as I will show in Chapter 2, the developing countries, and Brazil and India in particular, never accepted the premises of the "bargain". Throughout the Uruguay Round, they maintained that the GATT had no jurisdiction to address intellectual property rights and services, and when they agreed to negotiations on services, it was under the proviso that there could be no trade-offs

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It is unlikely that any of the newly industrialised, developing or transition countries would have accepted the TRIPS Agreement if it had stood by itself, without compensating concessions based on other agreements of the WTO system. Also, many of these countries might not have accepted the TRIPS obligations in exchange for the *new* market access concessions obtained during the Uruguay Round, because there were meagre and uncertain . . . This, however, was not the relevant choice.

<sup>330</sup> Gerhart 2000, 370.

<sup>331</sup> Schott 1994, 115.

<sup>332</sup> In particular, Reichman 1993. In fact, Reichman paints a more complicated picture than the negotiating history allows.

<sup>333</sup> Dwyer 1999, 468.

between goods and services.<sup>334</sup> Second, the developing countries regarded the integration of textiles into the trading system as a right to which they were entitled anyway, since textile trade was regulated in explicit derogation from GATT rules.<sup>335</sup> The same was true, to a lesser extent, in agriculture, where key components of the European and North American domestic support schemes operated under the cover of waivers granted early in the GATT.<sup>336</sup> Third, even though the developing countries, some more so than others,<sup>337</sup> were interested in the liberalization of agricultural trade, the driving force behind this issue had always been the US. While other countries did have some input in the early stages of the negotiations, the final shape of the Agreement on Agriculture was famously hammered out between the US and the EC in a series of bilateral accords and was "presented to the rest of the membership as a *fait accompli*."<sup>338</sup> It is hard to see how the modest liberalization achieved by the Agreement, which stayed far behind the US's own demands in this area,<sup>339</sup> could plausibly be seen as a "concession" to developing countries, especially on the part of the US.<sup>340</sup>

In sum, the Uruguay Round single undertaking is best understood as an "offer" the developing countries could not refuse. In relation to the overall result of the Uruguay

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<sup>334</sup> MTN.GNS/W/3, para. 5; see also *ibid.* para. 43; Oxley 1990, 188-189; Paemen/Bensch 1995, 55:

Since the two negotiations would be entirely separate, there could be no question of advantages in the area of goods being offset by concessions in the area of services, or vice-versa, trade-offs which would have been both legitimate and inevitable had both areas been within the framework of the GATT. The structure of the Uruguay Round prevented this.

The Punta del Este Declaration also called for "balanced concessions ... within broad trading areas and subjects ... in order to avoid unwarranted cross-sectoral demands"; MIN.DEC, 3.

<sup>335</sup> Paemen and Bensch, employing the language of the reciprocity discourse, note:

That the industrialised countries were able to 'sell' as a genuine concession a commitment they would have been obliged to fulfil anyway, sooner or later, throws a particularly harsh light on the respective strengths of North and South in the area of international trade.

Paemen/Bensch 1995, 41; on the developing countries' position on "rollback" generally, see *ibid.* 45.

<sup>336</sup> The Punta del Este Declaration explicitly stipulated with regard to quantitative restrictions, one of the primary instruments used in this area, that "no GATT concessions [shall be] requested for the elimination of these measures"; MIN.DEC, 4.

<sup>337</sup> India, for example, had few offensive interests in agriculture; see Winters 1994.

<sup>338</sup> Howse 2001, 361; see also Paarlberg 1997; De Zeeuw 1997.

<sup>339</sup> See only the US's original proposal to eliminate all border barriers, export subsidies, and production subsidies in agriculture within ten years; MTN.GNG/NG5/W/14.

<sup>340</sup> Paemen and Bensch, two EC negotiators, describe the trade-offs involved in the final stages of the Uruguay Round as follows:

the European Community's hopes for substantial reductions in the high U.S. tariffs on textiles, ceramics and glass had come to nought. The Community negotiator observed that 'Generally speaking, the imbalance to the advantage of the U.S. is the European Community's quid pro quo for the adjustments made to the Blair House agreement'. One politically sensitive area had been traded off against another. The Americans and Europeans had swapped agriculture for textiles.

Paemen/Bensch 1995, 245. (reference omitted)

Round, reciprocity was not an operative negotiating rule; rather, the reciprocity discourse provided an interpretative framework that could be used *after the fact* to give a veneer of acceptability to what would otherwise appear as a blatantly coercive outcome.<sup>341</sup> If one wanted to capture the unprecedented nature of the Uruguay Round single undertaking in terms of the reciprocity discourse, one would have to emphasise not so much what the developed countries gave, but what they threatened to take away. As Hudec put it at the time, the single undertaking "completely restructure[d] the developed-developing country bargain, proposing to pay for all the new developing country concessions *simply by agreeing not to destroy the market access they already ha[d].*"<sup>342</sup>

The reciprocity discourse also shaped the way in which WTO members would later approach the legacy of the Uruguay Round. Thus, even though one can plausibly argue that the adoption of the TRIPS Agreement was the wrong policy for developing countries,<sup>343</sup> and indeed for the majority of "developed" countries as well,<sup>344</sup> the reciprocity discourse can only conceptualise this policy failure as an "imbalance", as if the developing countries had simply "overpaid". From this perspective, what was needed was a "rebalancing" of the system, a new bargain that would be skewed in favour of the developing countries.<sup>345</sup> And it was precisely this purpose that the Doha "Development" Agenda launched in 2001 was supposed to serve.

Even besides the fact that, given the ahistorical tendencies of the reciprocity discourse, such a "rebalancing" is unlikely to happen,<sup>346</sup> this framing of the Uruguay Round

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<sup>341</sup> If the conception of the Uruguay Round result as a "bargain" is hard to sustain in light of the positions that the participants took as the round was ongoing, it makes even less sense in terms of the economics involved. Thus, Finger has described the result as "economically inane"; Finger 2002, 301. As Finger shows, "[i]n real economics ... the developed countries gained, the developing countries lost from each of the three components [intellectual property, agriculture, and textiles, N.L.]". Finger 2005, 37; see also Winters 1994.

<sup>342</sup> Hudec 1992, 76. (emphasis added)

<sup>343</sup> For example, with respect to Brazil and Thailand, Abbott and Reichman report that "there has been a staggering, disproportionate increase, in Brazilian expenditures on imports of pharmaceutical products" and that

[s]ince the entry into force of the TRIPS Agreement, Thailand's budgetary expenditures for the provision of medicines have increased dramatically and now constitute approximately 10% of the total government budget.

Abbott/Reichman 2007, 951-952.

<sup>344</sup> The literature criticising the TRIPS Agreement is voluminous; see only Harris 2006.

<sup>345</sup> A USTR official complained to me that India was under the impression that, by accepting the TRIPS Agreement in the Uruguay Round, it had "paid" for the next 50 years of trade concessions.

<sup>346</sup> When EU trade commissioner Pascal Lamy at one point suggested that the poorest developing countries should get the Doha Round "for free", he quickly had to backtrack and change his slogan to a "round at a modest price"; Stiglitz/Charlton 2005, 92 and fn 7.

legacy is problematic in that it cuts short the critical engagement with past negotiating results: instead of revisiting, revising and potentially even scrapping an agreement, the reciprocity discourse allows the winners to "bank" their gains – "a deal is a deal"<sup>347</sup> – and encourages the losers to seek compensatory gains in future negotiations. The reciprocity discourse, then, can only evaluate the results of negotiations in distributive terms that obviate questions about the substantive merits of the policy in question. For the most part,<sup>348</sup> it was in these terms that the post-Uruguay Round debate about TRIPS would play out: developing countries framed their grievances about TRIPS as "implementation" issues, and asked for longer transition periods and technical assistance.

Apart from the overall North-South "bargain", questions of reciprocity also arose in numerous other contexts in the Uruguay Round. Besides the tariff negotiations on manufactured goods and agriculture discussed above, I will briefly survey the methods employed to achieve reciprocity in three areas: non-tariff barriers and subsidies in agriculture, services, and government procurement.

The bulk of the traditional non-tariff "barriers" – most prominently, quantitative restrictions and subsidies – that the Uruguay Round was supposed to address were to be found in the area of agriculture. The negotiators early on decided to quantify the protection provided by these barriers, which would subsequently allow them to subject their reduction to the traditional reciprocity calculus. Thus, the protective effect of domestic subsidies was calculated with the help of an Aggregate Measurement of Support (AMS), which was then subjected to reciprocal reduction commitments. Similarly, export subsidies were quantified in terms of volume and budgetary outlay, and subject to reduction commitments. All border measures, such as quantitative restrictions and *sui generis* regimes such as the EC's variable levy system, were to be "tariffied", i.e. converted into tariffs, and then reduced.

The negotiations on trade in services posed a number of conceptual challenges.<sup>349</sup> As Brazil noted at the outset of the negotiations:

Nowhere can one find generally accepted definitions of services, of what services can actually be traded across borders as well as, consequently, of what can, with precision, be described as international trade in services.<sup>350</sup>

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<sup>347</sup> Finger 2002, 306.

<sup>348</sup> There was one significant exception – access to essential medicines – which I will briefly address below.

<sup>349</sup> See Drake/Nicolaïdis 1992; Lang 2009; Lang 2011, chapter 9.

<sup>350</sup> MTN.GNS/W/3, para. 22.

These conceptual challenges also extended to the question of how to measure reciprocity in the services context. In early 1991, the contracting parties requested the GATT secretariat to "prepare an informal note identifying considerations that participants may wish to take into account when evaluating offers from a national perspective".<sup>351</sup> The note is instructive not only for its suggested approach to the services negotiations, but as an analysis of how reciprocity functions in other areas of negotiations.

The note starts out by noting the disconnect between the reciprocity metric traditionally applied in tariff negotiations and the economic effects of the tariff reductions at issue:

The procedures adopted in tariff negotiations do not normally centre on the implications of tariff reductions for changes in economic welfare, nor are they based on the extent to which trade flows are likely to change as a result of the offered changes in tariff schedules.<sup>352</sup>

Instead, the note suggests that reciprocity calculations in tariff negotiations have served to "provid[e] negotiators with a focal point", i.e.,

something tangible enabling parties to set objectives, evaluate the position of others, assess negotiating progress and identify acceptable compromises with respect to a particular yardstick.<sup>353</sup>

In the secretariat's view, the choice of "changes in trade-weighted tariff levels" as the "focal point" for tariff negotiations "appears to have been driven largely by data availability".<sup>354</sup>

The secretariat noted some parallels between the services negotiations and past "negotiations on 'difficult-to-quantify' non-tariff measures". In the negotiations on government procurement, for example, the "value of past procurement" provided a focal point even though it is "unrelated to trade per se". The secretariat noted that, if negotiators were hoping to adopt a quantitative approach to reciprocity in the services context, then "a

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<sup>351</sup> MTN.GNS/W/118, para. 1.

<sup>352</sup> Ibid. para. 6; the Secretariat notes the extreme difficulty of establishing the effects of tariff reductions, which would

require a multicountry, multicommodity general equilibrium approach that is capable of taking into account intersectoral linkages (and thus effective rates of protection), use recent and credible estimates of demand, supply and substitution elasticities, and incorporate all relevant government policies, not just tariffs. Even this only provides an indication of the general equilibrium effect induced by what is offered. Dynamic effects, such as induced shifts in comparative advantage, are not taken into account.

Ibid. fn 2.

<sup>353</sup> Ibid. para. 6.

<sup>354</sup> Ibid.

quantifiable counterpart to the more traditional trade-oriented 'focal point' may have to be found".<sup>355</sup>

The solution proposed by the secretariat departed in several ways from traditional notions of reciprocity as "payment", and appeared to reflect the lessons of several decades of the use of reciprocity in trade negotiations. To begin with, the secretariat sought to dissuade negotiators from focusing on the principal suppliers of a particular service, noting that establishing principal suppliers was not only difficult in light of the available data, but was also undesirable because it might neglect both "those countries that currently do not export (or import) significant amounts of a service but have the potential for doing so", and "small countries for which a specific activity might be of great importance"<sup>356</sup> – both of these effects of the principal supplier rule had been perennial concerns of developing countries throughout the history of multilateral trade lawmaking. Instead, the secretariat suggested measuring the value of an offer by "determining the total value of output in the offered sectors as a proportion of total service sector output or GDP".<sup>357</sup> Crucially, in evaluating offers on the basis of this "coverage ratio", "the size of a country's economy" or service sector would be "taken into account".<sup>358</sup> Moreover, in keeping with the GATT contracting parties' increasing embrace of equality of competitive opportunities as a yardstick for reciprocity, the approach would give "credit to countries that ... do not impose any barriers in certain sectors" and would therefore not be "biased against countries with more liberal or open regimes".<sup>359</sup> The secretariat acknowledged that this conception was based on the premise that the participants would value "standstill" commitments, i.e., commitments not to impose new restrictions, as much as "rollback" commitments, i.e.,

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<sup>355</sup> Ibid. para. 7. Regarding the possibility of a "trade-oriented" focal point, the secretariat noted that the lack of estimates of the ad valorem equivalent of existing restrictions to services trade does not permit a calculation and comparison of levels and changes in levels of trade restriction. Indeed, there is to date no generally accepted definition of what constitutes a barrier to trade in services.

Ibid. para. 8.

<sup>356</sup> Ibid. para. 10.

<sup>357</sup> Ibid. para. 13. The "sectoral offers" would then be "discount[ed] ... in the light of limitations, qualifications and conditions placed on market access and national treatment for each mode of delivery" and would be "weighted" by each participant on the basis of an subjective assessment of the importance of the sector. Ibid. paras. 13, 18-26.

<sup>358</sup> Ibid. paras. 14 and 17.

<sup>359</sup> Ibid. para. 17; a similar approach was also advocated by the EC, which advocated the concept of "a comparable degree of effective access" to services markets as a yardstick for reciprocity; Paemen/Bensch 1995, 115.

commitments to dismantle existing restrictions.<sup>360</sup> Only if this premise was accepted would the secretariat's conception of reciprocity have dispensed with the need to use restrictions on services trade as "currency" in trade negotiations. Instead, an objective and dynamic benchmark, based on the size of a country's service sector or GDP, would serve as the baseline for formulating expectations of a country's liberalisation commitments. The secretariat itself was apparently sceptical that this view would be accepted, noting that "rollback ... will, other things being equal, be preferred by trading partners to standstill".<sup>361</sup>

It appears that in the end no universal approach to measuring reciprocity was adopted. The negotiations on the sectoral coverage of the GATS proceeded through the request-and-offer method. In some cases, the participants tried to establish cross-sectoral linkages; thus, the Europeans tried to link commitments on audiovisual services, on which they were in the defensive, to maritime transport services – a sensitive issue for the US –, while the US tried to link audiovisuals to the plurilateral negotiations on civil aircraft.<sup>362</sup> In other cases, the participants, and in particular the US, sought reciprocity within a particular sector. The US Treasury Department even contemplated implementing its commitments on financial services on a conditional MFN basis, in order to induce other countries to open their financial services markets.<sup>363</sup> As negotiators were unable to solve these issues in time, the negotiations on maritime transport services, financial services, and telecommunications continued after the conclusion of the Uruguay Round.

Aggressive pursuit of reciprocity also marked the renegotiation of the Tokyo Round Government Procurement code. Given that the structure of the entities engaging in public procurement varied widely among member states, it ultimately "proved impossible to restore equilibrium in the offers".<sup>364</sup> As a result, the annexes to the Uruguay Round Government Procurement Code contain numerous "reciprocity clauses",<sup>365</sup> whereby

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<sup>360</sup> Ibid. paras. 27-31.

<sup>361</sup> Ibid. para. 28.

<sup>362</sup> Paemen/Bensch 1995, 246

<sup>363</sup> Paemen/Bensch 1995, 242; according to Paemen and Bensch, the US proposal was "[i]nspired by the notion of reciprocity and 'free rider' phobia"; see also the *Decision on Financial Services* adopted at the Marrakesh Ministerial Meeting.

<sup>364</sup> Paemen/Bensch 1995, 236.

<sup>365</sup> Ibid.

individual parties exclude other specified parties from access to certain types of procurement.<sup>366</sup>

In the aftermath of the Uruguay Round, one aspect of the TRIPS Agreement – the regulation of access to essential medicines – received an extraordinary amount of public attention; it is remarkable in the present context because the treatment of this issue did not only result in a change of the TRIPS's legal text – the first and only amendment to the Uruguay Round agreements so far – but also decisively escaped the confines of the reciprocity discourse. The issue related to the possibility that the TRIPS Agreement might frustrate the poorest developing countries' access to essential medicines.<sup>367</sup> In particular, the TRIPS Agreement allowed the production of generic medicines under a compulsory licence only if the production was "predominantly for the supply of the domestic market of the Member" granting the compulsory license.<sup>368</sup> Countries without manufacturing capacity for pharmaceuticals would thus not be able to access generic medicines under this provision, since other countries would not be able to grant compulsory licences primarily for export. Developing countries, aided by non-governmental organisations, were able to raise public awareness of this issue to an extent that the developed countries were forced to address it outside the context of a new trade round. Moreover, the developing countries managed to reframe the issue in a way that made it appear highly inappropriate to address it within the context of a reciprocal bargain.<sup>369</sup> As Morin and Gold explain:

Unlike usual WTO bargaining in which it is appropriate to try to secure benefits narrowly for one's constituents, in the case of access to medicines, such conduct would have been seen as inappropriate. ... While it is socially acceptable for a state to claim that a new free trade agreement better positions its domestic industry to be globally competitive, it would be inappropriate to brag that a decision increases the price of medicines in developing countries and increases the profit margin of pharmaceutical firms.<sup>370</sup>

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<sup>366</sup> See, for example, the General Notes attached to the Annexes of the European Community, which exclude the suppliers and service providers of Canada, the US, Japan, Korea and Israel from certain types of procurement "until such time as the EC has accepted that the Parties concerned give comparable and effective access for EC undertakings to the relevant markets"; WT/Let/438.

<sup>367</sup> The literature on this subject is extensive; see only Abbott 2002; Abbott 2005; Odell/Sell 2006; Abbott/Reichman 2007.

<sup>368</sup> TRIPS Agreement, Article 31(f).

<sup>369</sup> See Morin/Gold 2010, 570: "there is no suggestion of strategic linkages being made with other specific trade issues".

<sup>370</sup> Morin/Gold 2010, 568; on the "reframing" of the issue accomplished by developing countries and civil society, see also Sell 2003, 146-162; Odell/Sell 2006.

What is most remarkable about this episode in the present context is how unique and "deviant"<sup>371</sup> it was. In the Doha Round, there has only been one other instance in which a group of countries has been able to frame an issue in a way that made it inappropriate for the reciprocity discourse.

In March 2003, Benin, Burkina Faso, Chad and Mali submitted a proposal in which they called for the phasing out of subsidies for cotton production.<sup>372</sup> The moral stakes on this issue appeared similar to the access to medicines issue: on one side, there were millions of poor West African farmers and their families who depended for their livelihood on cotton farming and who were suffering from low prices for cotton on the world market; on the other side, there were 25,000 American farmers who were being subsidised with billions of dollars every year and were thus able to sell their production on world markets below their costs of production. After putting up considerable resistance, especially at the Ministerial Meeting in Cancún, the US eventually agreed to eliminate all export subsidies on cotton and reduce domestic support for cotton production more expeditiously than for other agricultural commodities.<sup>373</sup> However, the treatment of cotton remains tied to the overall agricultural negotiations in the Doha Round. This not only means that the reduction commitments on cotton will most likely not be implemented until the Round as a whole is concluded; it also means that, while the developed countries are not specifically asking for payment from the four West African countries who sponsored the initiative, they will be able to insist on compensatory gains as part of the overall Doha Round "package".

While the conclusion of the Doha Round remains uncertain, the shape of an eventual "package" is now reasonably clear. Initially, it appeared as though the developed countries were aiming for a rerun of the Uruguay Round: At the Doha Ministerial Conference and for the first two years of the Doha Round, the developed countries insisted on conducting negotiations on the so-called Singapore issues: investment, competition, transparency in government procurement, and trade facilitation.<sup>374</sup> Mindful of their experience in the Uruguay Round, the developing countries staunchly resisted such negotiations; the compromise reached at Doha envisioned that negotiations on these issues

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<sup>371</sup> Morin/Gold 2010, 568.

<sup>372</sup> TN/AG/GEN/4, for discussions of the so-called "Sectoral Initiative on Cotton", see Eagleton-Pierce 2013, chapter 4; Shahin 2008; Blustein 2009, 144-147; 150-152.

<sup>373</sup> See WT/L/579, Annex A, para. 4; WT/MIN(05)/DEC, para. 11.

<sup>374</sup> For the debate on the Singapore issues at the Doha Ministerial, see Jawara/Kwa 2004.

would commence after a subsequent ministerial conference "on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations".<sup>375</sup> At the next Ministerial Conference, developing countries succeeded in making it clear that there was no consensus to proceed with the Singapore issues, but when the EU finally offered to drop three of the issues, it was too late to reach a consensus and the Conference ended in failure. Some observers speculated that the EU insisted on negotiations on the Singapore issues in order to make the developing countries pay for concessions that it was expected to make on agriculture.<sup>376</sup>

Once the Singapore issues – except for trade facilitation, which, arguably, turned out to be largely self-balancing<sup>377</sup> – were off the table, the attention of the developed countries shifted to the relatively high tariffs on manufactured products that most developing countries, including the large emerging economies, maintain. As noted above, the developed countries have been seeking greater-than-formula reductions in certain product sectors as a payment for further reductions in agricultural support. The response from the developing countries – "those who ask for more have to pay more"<sup>378</sup> – is best interpreted as a demand for larger reductions in agricultural support than the developed countries have so far agreed to.

#### **D. Socialisation into the Bargain: Reciprocity and Accessions**

Due to the limited progress of the Doha Round, accession negotiations have over the past decade become the "cutting edge" of lawmaking in the multilateral trading system.<sup>379</sup> Both under the GATT and the WTO Agreement, states or separate customs territories can accede "on terms to be agreed" between the acceding government and the members of the trade regime.<sup>380</sup> Accession negotiations are governed by the principle of payment: the acceding government has to pay an "entrance fee",<sup>381</sup> buy a "ticket of admission"<sup>382</sup> as a "quid pro quo"<sup>383</sup> for the advantages that membership confers, among them the market access that

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<sup>375</sup> WT/MIN(01)/DEC/1, paras. 20, 23, 26, 27.

<sup>376</sup> See Woolcock 2003.

<sup>377</sup> See the discussion in the section on Special and Differential Treatment *infra*.

<sup>378</sup> *India TNC Statement 2011*.

<sup>379</sup> Interview with Peter Milthorpe.

<sup>380</sup> GATT Article XXXIII, WTO Agreement Article XII; former colonies could accede to the GATT through the procedure provided in GATT Article XXVI:5.

<sup>381</sup> *GATT 1960*, 9; Dam 1970, 110; Curzon and Curzon 1973, 305.

<sup>382</sup> Jones 2009, 292.

<sup>383</sup> *GATT 1960*, 9.

GATT/WTO members have granted each other in the course of past negotiating rounds and that is extended to the new entrants through the most-favoured nation principle.<sup>384</sup> Existing GATT/WTO members do not grant any new concessions in accession negotiations.

There is no necessary relation between the level of obligations of existing members and the obligations which the acceding government is asked to take on. Members are free to engage in bilateral negotiations with the acceding government and to demand concessions of interest to them, irrespective of whether they have undertaken comparable commitments themselves. Already during the GATT years, the Secretariat noted that the "entrance fee" which an acceding country has to pay under this procedure is likely to vary considerably" depending on the benefits that a country is likely to derive from accession to the GATT.<sup>385</sup> Since the founding of the WTO, the "price [has been] constantly going up",<sup>386</sup> resulting in increasingly unbalanced obligations between old and new members. Except in the case of acceding Least-developed countries (LDCs), there are no rules or other checks limiting what existing members can demand from an acceding country.<sup>387</sup> In line with the market logic of the reciprocity discourse, the membership can drive the price as high as the demand for membership allows; considerations of equity play no role.<sup>388</sup>

What gives the accession process a wider significance for WTO lawmaking is that it appears to be singularly effective at socialising new members into the "you get what you pay for" mind-set of the reciprocity discourse. Anecdotal evidence suggests that those who have recently undergone accessions are among the most active – and most demanding – members of accession working parties.

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<sup>384</sup> Hudec 1987, 25-26:

Developing countries acceding to the Agreement were expected to negotiate meaningful tariff concessions as a payment for the legal right to benefit from the tariff concessions of other GATT members.

<sup>385</sup> *GATT 1960*, 9.

<sup>386</sup> Interview with Peter Milthorp; see also Milthorp 2009.

<sup>387</sup> Stiglitz/Charlton 2005, 158; guidelines for accessions of LDCs were first adopted by the WTO's General Council in 2002; see WT/L/508. These guidelines have recently been "strengthened, streamlined and operationalized" by the Council in a new decision that for the first time stipulates "benchmarks" for tariff levels and services commitments; see WT/L/508/Add.1.

<sup>388</sup> Interview with EU negotiator, who pointed out that considerations of fairness have no role in "commercial" negotiations.

## E. Conclusion

Reciprocity, in one form or another, forms the basis of a wide range of social arrangements.<sup>389</sup> At the same time, reciprocity can take many forms, from a very specific and concrete to a more diffuse kind.<sup>390</sup> As I have shown in the present section, the conception of reciprocity that is embodied in the reciprocity discourse of multilateral trade lawmaking is of an exceedingly specific and narrow kind, in that it is modeled on transactions between commercial actors in a market. Pursuant to the market metaphor of multilateral trade lawmaking, the participants in trade negotiations are expected to "pay" for any benefits that they receive. The market metaphor is deeply embedded in the thinking and acting of trade negotiators; it is arguably a metaphor "they live by".<sup>391</sup>

In the first part of this section, I have tried to show that this was by no means an inevitable development. The negotiating method that most clearly embodies the principle of payment – bilateral tariff bargaining – was not one that any of the officials negotiating the new international trading order in the late 1940s was hoping to adopt. Even US trade officials, who had developed this method in the framework of the Reciprocal Trade Agreements programme, recognised the multilateral negotiation of a horizontal formula for tariff reductions as superior in a number of respects. The US Congress, however, forced their hands. Bilateral tariff bargaining was thus adopted for the multilateral trade regime at the insistence of the legislature of a single state, and against the better judgment of virtually all officials who had held extensive negotiations on this issue for several years.

In the second part of this section, I have traced the ramifications of the adoption of the principle of payment for the multilateral trade regime. I have argued that the principle of payment detracts from the idea of free trade as a political or cultural value, and that it imbues trade policies with a negotiating "value" that is unrelated to their economic effects or to other public policy merits that they may reflect. This effect is exacerbated in the case of policies which primarily pursue regulatory objectives unrelated to trade; when such measures come to be seen through the lens of the reciprocity discourse as simply another method of payment, the other goals that they pursue tend to be marginalised. This effect was particularly striking in the aftermath of the Uruguay Round, where the reciprocity

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<sup>389</sup> According to Fuller, it is one of two basic forms of social ordering, the other being "organization by common aims"; Fuller 1978, 357.

<sup>390</sup> Keohane 1986; Fuller 1978, 358.

<sup>391</sup> On the effects of "metaphors we live by", see Lakoff/Johnson 2003.

discourse provided a convenient framework for re-describing what was arguably a grave policy mistake committed under coercive circumstances – the adoption of the TRIPS Agreement by the developing countries – as a "grand bargain" in which one side had simply overpaid.

I have also shown how the reciprocity discourse, by privileging those who have most to pay with, precludes considerations of equity in multilateral trade lawmaking. The principal supplier rule, designed to minimize unpaid-for concessions, preserves the right of each party to sell trade concessions only to the highest bidder, without regard for the significance that a product may have for the economic and trade prospects of an exporting country. Moreover, the reciprocity discourse is fundamentally ahistorical; the balance of past trade concessions is rarely, if ever, taken into account.

In the third part of the section, I have traced the evolution of the reciprocity discourse both in tariff negotiations and in negotiations on non-tariff barriers. In the 1960s and 1970s, a conception of reciprocity that took into account the equity of outcomes appeared to gain some ground on the traditional conception of reciprocity as equal payment, particularly in the tariff context. Thus, harmonization formulas for tariff reduction became widely accepted. Despite this change, however, the strict conception of reciprocity maintained a strong hold on the imagination of trade negotiators, as was reflected in negotiations on exceptions from the horizontal formula, and in efforts to restore a rough bilateral balance through withdrawals of concessions at the end of negotiations.

The extent to which the conception of reciprocity as payment has become entrenched has also been apparent in negotiations on non-tariff barriers, which were often marked by a search for trade-offs even in negotiations on general rules of conduct. Only rarely, as in the case of the Customs Valuation Code in the Tokyo Round, did the negotiators manage to take a broader view of the issues and transcend the logic of payment. In other contexts, such as the Tokyo Round Subsidies Code, where no such consensus on fundamental objectives was possible, the reciprocity discourse served as a framework for designing a code embodying an explicit trade-off. These two examples exemplify the opportunities, as well as the dangers, inherent in the reciprocity discourse. It may well have been that, in the case of the Tokyo Round Subsidies Code, the reciprocity discourse allowed negotiators to tackle an issue through explicit trade-offs that they would otherwise not have been able to resolve. The danger is, however, that the reciprocity discourse will

lead negotiators to think about an issue in terms of reciprocal payments even where common interests could be identified; thus, the attempt to resolve the problem of the ASP system of customs valuation through the negotiation of a comprehensive customs valuation code embodying common interests was only undertaken after the attempt in the Kennedy Round to solve the issue through an explicit exchange of concessions had failed. In fact, the reciprocity discourse works as a disincentive for countries to advance proposals with diffuse benefits, because it is likely that whoever sponsors such a proposal will be asked to "pay" for it, even though all would gain from its implementation.

The ahistorical and morally agnostic character of the reciprocity discourse has come to haunt the developed countries in the Doha Round: The discourse does not provide them with any principled basis for insisting that the emerging economies should "catch up" with them in terms of their WTO commitments by participating in the officially "non-mandatory" NAMA sectorals. Instead, it is the emerging economies that have been able to rely on the reciprocity discourse to reject the developed countries' demands as "unbalanced" and "disproportionate" and in violation of the principle of payment. If lawmaking in the trading system were founded on a more principled basis, the trading system might have been better able to cope with a fundamental change such as the rise of the emerging economies.

## II. The Discourse of "Special and Differential Treatment"

The discussion in the first part of this chapter has given particular attention to one area of international trade lawmaking – tariff negotiations. This focus was justified by two considerations. First, tariff negotiations were the area of operation of the emerging trading system in which the dynamic of exclusion and inclusion that marked the founding of the GATT was most stark: the principles and practice of tariff negotiations were practically dictated by the constraints of US domestic politics. Second, since tariffs were the primary area of negotiating activity in the first two decades of the GATT, the conception of reciprocity as payment, the key element of the US method of tariff negotiations, came to fundamentally shape ideas of how international trade lawmaking in general "works".

The preferences of the US, and to a lesser extent the UK, however, also manifested themselves in the political choices embodied in the structure and substantive provisions of the draft for the ITO Charter and the GATT.<sup>392</sup> First, the preferences of these countries for some protective instruments over others were reflected in the relative degrees of stringency with which the drafts treated different forms of government action in relation to trade: some practices were allowed, others disciplined, and yet others outlawed. Second, the drafts included specific exemptions from general rules that were designed to accommodate the practices of the "nuclear" countries.<sup>393</sup> The imprint that the preferences of the US and UK had left on the drafts, both in terms of the general rules that they established and in the exceptions that they made, did not escape the other participants in the preparatory

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<sup>392</sup> As Wilcox noted, the trade programme pursued through the ITO and the GATT had been "an American program at every step of the way":

It was our charter that the Preparatory Committee adopted as the basis of its deliberations in London in the fall of 1946. It was our work that laid down the pattern to which the experts meeting in London have generally agreed. The ITO is recognized everywhere as an American project. (Wilcox 1947, 6)

<sup>393</sup> See Wilcox 1949, 492-493; Wilcox notes that eight of the exceptions in the Charter have "real significance", and that "[f]our of them were included at the instance of the United States", while the other four "were designed to meet the needs of countries in balance-of-payments difficulties and of countries whose economies are in the process of reconstruction or development" (491). As Wilcox further explains, the two groups of exceptions are not treated equally:

The four exceptions in the first group become effective without any sort of finding or approval by any international agency. Those in the second group do not come into operation until numerous obstacles have been surmounted, conditions fulfilled, criteria satisfied, procedures followed, and permissions obtained. Once this has been done, they impose a series of additional obligations that must be assumed. And finally, they provide in one way or another for the limitation of the period during which the exception may be enjoyed. (493)

negotiations to the ITO and the GATT,<sup>394</sup> and was heavily contested especially by the "under-developed" countries among them, which preferred different protective instruments over those privileged by the US/UK draft.

In the present section, I will first show how these different policy preferences of developed and "under-developed" countries, which were in large part motivated by different views on the necessary and appropriate role of the state in international trade,<sup>395</sup> came to be reflected in the GATT as "rules" and "exceptions", respectively, laying the roots for the conceptualisation of "developing" countries' concerns as "exceptional" or "special" (A). I will then discuss the first efforts in the early decades of the GATT to address the problems that the "less-developed" countries encountered in their trade. As I argue, these problems were initially conceptualised as *structural* problems of the trading system, and were addressed through a range of initiatives that relied on lawmaking techniques alien to the reciprocity discourse (B). In the wake of the perceived failure of this attempt at addressing the imbalances in the trading system in a comprehensive manner, developing countries sought to accommodate the principle of payment by arguing for a different principle of exchange, namely "special and more favourable treatment" (C). Finally, I examine what the principle of "special and differential treatment" meant in relation to non-tariff measures (D). Section E concludes.

### **A. Establishing the Baseline: The GATT/ITO Preparatory Negotiations**

One of the aims that the US was pursuing with its proposals for an international trade organisation was to restore the role of private enterprise in international commerce.<sup>396</sup> As

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<sup>394</sup> The US and UK were of course aware of this. The British negotiators remarked during the exploratory talks that some draft provisions of the GATT "appeared to be tailored" to US circumstances; FRUS 1945, 140; the comparative treatment of countries with different kinds of market access barriers was a recurrent theme in the negotiations. For example, in early 1945 the US Ambassador to the UK reported that the British think that our ideas are tilted in favor of countries whose main obligation would be to reduce tariffs as against countries whose obligations would involve extensive action not only on tariffs but also on preferences and quantitative restrictions (FRUS 1945, 1)

Cf. Irwin/Mavroidis/Sykes 2008, 70, 121, fn 82; and Curzon 1965, 131, who notes that the exceptions to quantitative restrictions "reflected very much the United States preoccupations in this field".

<sup>395</sup> See also Dam 1970, 12-14:

Views on the role and organization of international trade differed profoundly between deficit and surplus countries, developed and underdeveloped countries, market-economy and planned-economy countries, and so forth.

<sup>396</sup> Wilcox 1947, 11-12:

Clair Wilcox put it, the purpose of the ITO was not "to confer upon an international agency the power to regiment world trade but to employ such an agency as a means of liberating trade from the forms of regimentation imposed on it by national governments."<sup>397</sup> In the US's *Proposals for Expansion of World Trade and Employment*, which it published in 1945 and which became the starting point for the preparatory discussions, "release from restrictions imposed by governments"<sup>398</sup> was listed as the first problem which an ITO would have to address.

The US vision of a preeminent role for private enterprises in international trade did not mean that the US was pursuing the complete removal of governmental interference with trade. As the US acknowledged in its *Proposals*, "[n]o government is ready to embrace 'free trade' in any absolute sense".<sup>399</sup> However, the US vision of a preeminent role for private enterprise shaped its views of what *type* of state intervention should be permitted. Chiefly, this vision manifested itself in the US's preference for the use of price-based instruments, such as tariffs, over volume-based instruments, such as quantitative restrictions. As Wilcox declared, the US's "traditional system of employing tariffs as the means of controlling imports" was "consistent with the preservation of private enterprise. The import quota system is not."<sup>400</sup> At the preparatory negotiations in Geneva, Wilcox made the point more forcefully:

Of all forms of restrictionism ever devised by the mind of men, Q.R. is the worst. Beside it protective tariffs appear to be a liberal method of controlling trade. In the case of a tariff the total volume of imports can expand with the expansion of trade. There is flexibility in the volume of trade. Under a quota system the volume of trade is rigidly restricted, and no matter how much more people may wish to buy or consume, not one single more unit will be admitted than the controlling authority thinks fit.<sup>401</sup>

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Ever since the war our Government has sought to remove controls and restore the freedom of private enterprise. ... If the American program for world trade were to fail, its failure would hasten the spread of nationalization among the other countries of the world.

<sup>397</sup> Wilcox 1947, 3; Irwin/Mavroidis/Sykes 2008, 16; see also Wilcox 1946, 3-5, on the principle ... that the foreign trade of the United States should be carried on by private enterprise. Indeed, we should prefer this pattern, by and large, for international trade in general.

<sup>398</sup> US *Proposals* 1945, 2.

<sup>399</sup> US *Proposals* 1945, 2; Wilcox 1946, 11: it was a "misapprehension" that the US government was seeking to establish free trade. This, of course, is not the case. Free trade would require the complete elimination of all protective barriers. Politically, it would be impossible; economically, it would be unwise.

<sup>400</sup> Wilcox 1947, 10-11.

<sup>401</sup> E/PC/T/A/PV/22, 20; see also Wilcox 1947, 9-10, where he concludes that in the absence of the American program [i.e. the ITO/GATT], the world would be headed straight toward the strangulation of its commerce through the imposition of detailed administrative controls.

This outlook was not shared by all other governments, not even Britain, the US's first and most influential interlocutor. At the time, there was a strong movement towards state planning in order to achieve full employment, and some elements in the UK government, notably John Maynard Keynes, regarded the American plans as a dangerous return to 19<sup>th</sup> century laissez-faire.<sup>402</sup> As the US Ambassador reported, there was a

feeling among some of the British tendencies that the United States will be a drag on post-war social change. Congressional utterances and actions and stress in American public utterances on the virtues of private enterprise have led to suspicion of future American policy among many in liberal and labor and even left wing conservative circles. In international trade questions, the issue is somewhat clouded by lack of a clearly conceived progressive policy and failure to grasp the importance of reconciling planning with an advantageous territorial division of labor.<sup>403</sup>

Ultimately, the strong value attached to free trade in Britain's political culture, the accommodation achieved through the lenient treatment of state trading, the exemption of the British imperial preferences from the most-favoured nation obligation, and the

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Paemen and Bensch 1995, 75, comment that,

[i]n the eyes of the General Agreement, which makes no pretence of being anything other than an ideological text, customs duties constitute the "decent" sort of protection.

<sup>402</sup> Irwin/Mavroidis/Sykes 2008, 15; see FRUS 1944, 6, for British concerns about the possibility of a post-war depression in the US:

Keynes felt that the vast majority in American business and congressional circles had not yet grasped the fundamental principle of full employment policy and would reject the measures necessary to apply them. ... The British group ... would welcome evidence of greater activity in the formulation of domestic plans for maintaining full employment in the United States ...

<sup>403</sup> FRUS 1944, 8-9; this argument was made in the context of the US position on state trading, with regard to which the US Ambassador reports:

Some British economists in Government stress that the subject should not be considered as if the Soviet Union were the only important case involved.

With regard to the "lack of a clearly conceived progressive policy", an economist in the Labour party later admitted that "the Labour Party's research and thinking had been weakest on the international economic side and [that] the proposal for state purchases of imports had not been thought through"; FRUS 1945, 39-40; see also Crowley/Haddon-Cave 1947, 35, who note that, at the time of the preparatory discussions, "no attempt ha[d] yet been made to include the problem of international trade" into the "comprehensive reorientation of economic theory" that had occurred in the 1930s under the influence of Keynes. See, however, the US Ambassador's description of the international outlook of the Labour Party:

... British Socialism and Trade Unionism ... are essentially international in outlook. ... As regards trade matters this outlook may have appeared to some to be obscured at times by Labor's belief in planning on a national scale ... Indeed, Labor's views on trade differ substantially from those of 19<sup>th</sup> and early 20<sup>th</sup> century advocates of free trade who linked it indissolubly with private enterprise. ... But these differences must not be allowed to obscure the fact that ... British Labor could not without reversal of its whole political convictions become the advocate of exclusive economic blocs, or of deliberate discriminations on nationalistic and imperialistic grounds. Nor could it take the initiative in erecting or raising barriers to economic intercourse with the workers of other lands. ... In any event, it is clear that Labor's basic outlook and its political strength make it a more reliable instrument of UK co-operation in realizing the objectives of art. VII as a whole than can be found in any other political party in UK. (FRUS 1945, 201-202)

exception for quantitative restrictions for balance-of-payments purposes, reconciled the British with the American plans.

At the first preparatory conference in London in 1946, the US was for the first time confronted with the polar opposite vision of the role of the state and private enterprise in trade, in the form of the Indian comments on the US's *Proposals*.<sup>404</sup> At the outset, the Indian delegation noted that, in its view, the American and British experts who had developed the *Proposals*

were concerned almost exclusively with the problems of their respective countries and the scheme which has emerged from their talks represents a compromise between the interests and policies of the U.K. and the U.S.A.<sup>405</sup>

The delegation then went on to sketch its vision of the role of a future independent Indian state in India's trade:

[R]apid and large-scale development of the entire economy under the direction or control of the State, on the basis of a detailed plan, may be expected to become a normal feature of India's economic life. ... For the success of such a policy, it is essential that trade, both external and internal, should be carefully regulated.

To India, it was important that an international trade organisation allow the Indian state to take

measures needed to ensure that India's external trade fits in with the requirements of the development plans. These plans may be expected to lay down targets for production and to indicate a programme of development for each industry or section of an industry. It would be obviously impossible to carry out such plans if exports and imports were left to the discretion of the individual trader, subject to such control as may be indirectly exercised through tariffs.<sup>406</sup>

The two visions of the role of the state in international trade put forward by the United States and India resulted in contradictory views on the comparative merits of price-based and volume-based instruments in the control of international trade. To India, the very inflexibility and rigidity of quantitative restrictions that was abhorred by the United States – at least when it came to industrial products – made them the most efficient means of directing its foreign exchange to the most important uses.<sup>407</sup> Tariffs, by contrast, not only

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<sup>404</sup> Cf. Brown 1950, 75.

<sup>405</sup> E/PC/T/5 – E/PC/T/W.14, 7

<sup>406</sup> E/PC/T/5 – E/PC/T/W.14, 9-10.

<sup>407</sup> E/PC/T/5 – E/PC/T/W.14, 10:

made such direction much more difficult, but also imposed heavy burdens on all importers.<sup>408</sup> India hence regarded tariffs as inefficient and wasteful, and planned to use them only in rare cases.<sup>409</sup>

At the second preparatory conference in Geneva in 1947, the conflict over which protective devices would be allowed boiled to a head again. The Indian delegate compared the treatment of the four major protective instruments – tariffs, subsidies, state trading, and quantitative restrictions – in the Charter:

On tariffs, we have fixed no ceiling whatever, nor have we imposed any restrictions on a country's freedom of action in this respect, except to the extent determined by obligations which it has voluntarily undertaken. On subsidies, too, we have not attempted to set any limit, and it is of interest to note that, where serious prejudice to the interest of any Member is caused by subsidisation, the Charter provides for no more than a discussion between the parties concerned. When we come to State Trading, our generosity seems to know no bounds – it is almost staggering in its lavishness.

Quite otherwise, Mr. Chairman, is our position with respect to Quantitative Restrictions. Article 25 bans it altogether with certain exceptions enumerated in later paragraphs of that article and in Article 26. But the use of Quantitative Restrictions for protection purposes is covered by no exception, and a country desiring to employ it in the interests of its programme of economic development is left to have recourse to the provisions of that omnibus Article, Article 13.<sup>410</sup>

Article 13 of the ITO Charter, which would be incorporated into the GATT as Article XVIII, allowed developing countries<sup>411</sup> to modify or withdraw tariff concessions or impose other restrictive measures inconsistent with the GATT for the purpose of infant-industry protection, subject to notification and consultation requirements and the payment of adequate compensation.<sup>412</sup> This provision redefined quantitative restrictions from a

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unless non-essential imports are reduced to a minimum and essential imports are regulated in accordance with some order of priorities, the development plans may be completely stultified.

<sup>408</sup> E/PC/T/A/PV/22, 30.

<sup>409</sup> E/PC/T/5 – E/PC/T/W.14, 10:

Tariffs are uncertain in their effects and under a system of a planned trade their use will be restricted to a minimum.

<sup>410</sup> E/PC/T/A/PV/22, 25; on the treatment of tariffs, see also *Senate Hearings 1947*, 5:

Nobody can say under this charter, or in this organization, how much or how far tariffs should be reduced. That remains within the province of each individual country. There is an obligation to negotiate.

The obligation to negotiate was not included in the GATT. Dam 1970, 25, notes that, as a result, [n]othing in the General Agreement require[d] any contracting party to take a single step in the direction of reducing tariffs.

<sup>411</sup> The actual language used is a "contracting party, the economy of which can only support low standards of living and is in the early stages of development" (GATT Article XVIII, para. 4 (a)).

<sup>412</sup> Article XVIII also allowed parties to impose quantitative restrictions for balance-of-payment purposes in a manner that prioritises imports essential to their development.

protective instrument on par with tariffs and subsidies to an exceptional measure, which could only be resorted to under certain circumstances and with prior approval of the organization. The Indians complained:

Where is the equity in laying down the same procedure for waiving a negotiated obligation and for permission to use a recognized instrument of economic development [i.e. quantitative restrictions, N.L.]?<sup>413</sup>

The Indians thus objected to the definition of their preferred instrument of trade regulation as an *exceptional* measure, while protective instruments that were of marginal interest to them – tariffs and subsidies – were to be regarded as *normal*<sup>414</sup> ways of regulating trade, subject only to negotiated reductions or consultation requirements.<sup>415</sup> The Indian position was not necessarily more protectionist than the US position. Wilcox acknowledged that "the question at issue is not whether protection is to be provided, but only how it may be provided".<sup>416</sup> And Jackson concludes his review of the discussions at the second preparatory conference thus:

The issues at Geneva in 1947 did not ... seem to be free trade versus protectionism, or internationalism versus national sovereignty. Each of the groups in the debate desired international control of some things and not of others. Both sides desired to use certain types of trade protective measures but wanted to limit or restrict others. The controversy seemed to be over *which* trade restrictions would be subjected to greater international control and *which not*.<sup>417</sup>

In fact, India went to some length to argue that the preference of the ITO Charter for protective instruments other than quantitative restrictions was not justifiable on the merits, as tariffs could be "equally destructive of international trade", and subsidies and state trading could be "manipulated by governments as arbitrarily as Quantitative

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<sup>413</sup> E/PC/T/A/PV/22, 29.

<sup>414</sup> On the concept of normalcy as a heuristic device for understanding trade law, see Tarullo 1985; Tarullo 1987.

<sup>415</sup> See the US statement at E/PC/T/A/PV/22, 15:

The matter which is now at issue before us is the freedom of the so-called underdeveloped countries to take protective measures. One might assume, to listen to some discussions, on this matter, that the Charter provided no liberty at all in this regard. This is not the case. Under the London and New York Drafts, an undeveloped country is free first to use subsidies and second it is free to impose a new tariff on any commodity which it has not bound against the imposition of a tariff, or to raise a tariff on any commodity which it has not bound against increase in the course of a trade agreement.

<sup>416</sup> E/PC/T/A/PV/22, 15.

<sup>417</sup> Jackson 1969, 637. (original emphasis)

Restrictions".<sup>418</sup> The amendment which it introduced with respect to quantitative restrictions for protective purposes allowed new or intensified quotas only "where such restrictions are no more restrictive in their effect than other forms of protection permissible under this Charter".<sup>419</sup> The amendment also accommodated concerns that quantitative restrictions might be used to circumvent tariff concessions, providing that such restrictions would not be applied "to any product in respect of which the importing Member country has assumed an obligation through negotiations with any other Member or Members pursuant to Chapter V".<sup>420</sup> India further suggested that quantitative restrictions could be made subject to negotiations, akin to tariffs.<sup>421</sup> The proposals of India and other countries which preferred quantitative restrictions to tariffs as a protective instrument, such as New Zealand,<sup>422</sup> would thus have led to a multilateral trading system in which both tariffs and quantitative restrictions would have been the object of continuous negotiations, presumably with safeguards that commitments on one protective instrument would not be undermined by the use of the other.

Instead of being the subject of negotiations, the use of quantitative restrictions, to the extent that it was allowed, would be subject to surveillance. As the US chief negotiator Wilcox assured his domestic audience, the exceptions allowing use of quantitative restrictions by less-developed countries "do not come into operation until numerous obstacles have been surmounted, conditions fulfilled, criteria satisfied, procedures followed, and permissions obtained".<sup>423</sup> And, sure enough, developing countries would later describe balance-of-payments consultations as a "painful routine which had an inquisitorial character and was biased against the developing countries".<sup>424</sup>

What this discussion goes to show is that the initial confrontation between "developed" and "developing" countries in the trading system did not take the form of

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<sup>418</sup> E/PC/T/A/PV/22, 27.

<sup>419</sup> E/PC/T/A/PV/22, 28; see also the examples provided by India for when the use of quantitative restrictions would be justified; *ibid.* 30 and Brown 1950, 76.

<sup>420</sup> E/PC/T/A/PV/22, 28.

<sup>421</sup> E/PC/T/A/PV/22, 31.

<sup>422</sup> New Zealand made an impassioned plea for quantitative restrictions along the lines of the argument presented by the Indian delegation; E/PC/T/A/PV/26, 21-27.

<sup>423</sup> Wilcox 1949, 493; Wilcox added:

Once this has been done, they impose a series of additional obligations that must be assumed. And finally, they provide in one way or another for the limitation of the period during which the exception may be enjoyed.

<sup>424</sup> CG.18/6, para. 15.

demands for "special" treatment by the latter, but rather represented a substantive clash of views on the comparative merits of different protective instruments – views that were informed by different visions of the appropriate role of the state in international trade, and that did not necessarily correlate with a more or less protectionist orientation. India, arguably the most vocal and engaged "less-developed" participant in the preparatory negotiations, did not seek "exceptions" to the rules; rather, it tried to shape the rules themselves, and to correct what it saw as an arbitrary lack of evenhandedness in a draft text profoundly shaped by the preferences and perspectives of the United States and Britain. It was a US decision to accommodate the Indian perspective through "exceptions" to the general rules, rather than to change the basic design of the trade policy disciplines embodied in the ITO and the GATT – a fact that was resented by the Indians. This move by the US – to safeguard its preferred policy while accommodating "less-developed" countries through exceptions – foreshadowed the "special" treatment that developing countries would later be accorded in the trading system. It is therefore deeply misleading to state, as Hudec does, that the developing country members of GATT "began by seeking to be excepted from the obligations in the GATT's code of behaviour".<sup>425</sup> Hudec constructs this picture by treating the structure of the GATT, and in particular its preference for tariffs as a protective instrument, as axiomatic, self-evident, and natural ("The GATT code of behavior rested on three central principles"<sup>426</sup>), rather than as the product of a very specific political agenda.

In practice, the prohibition of quantitative restrictions did little to constrain the use of quotas by developing countries for the first five decades of the trading system.<sup>427</sup> While few countries went through the trouble of invoking the exception for economic development, they could always avail themselves of the exception for balance-of-payments

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<sup>425</sup> Hudec 1987, 4.

<sup>426</sup> Hudec 1987, 3.

<sup>427</sup> The developed countries started to progressively tighten the screws on the balance-of-payments exception in the late 1970s (see the discussions in the Consultative Group of 18: CG.18/1, paras. 19-24; CG.18/2, paras. 12-20; CG.18/3, paras. 4-25; CG.18/4, paras. 15-19; CG.18/5, paras. 14-20) and in the Uruguay Round. According to Paemen/Bensch 1995, 65, the developed countries saw

[b]etter discipline in the area of BOP restrictions [as] the bridge-head for a wider effort to integrate the developing countries more fully and to encourage them to observe the rules of the General Agreement.

During the Uruguay Round, the US was planning to challenge India's balance-of-payments restrictions through dispute settlement proceedings after the Round was concluded, which it eventually did in 1996; interview with Craig Thorn; for the Panel and Appellate Body reports, see WT/DS90/R and WT/DS90/AB/R; for India's complaints about efforts to restrict the use of the balance-of-payments exception during the Uruguay Round, see SR.43/ST/16, 3-4, and MTN.TNC/MIN(90)/ST/46, 3.

purposes, which had been inserted at the insistence of Britain and, except for reporting requirements, did not impose any of the conditions and burdens which saddled the economic development exception. This meant, however, that developing countries which reserved a greater role for state planning in their international trade operated from the outset under an "exceptional" regime, with little means, and in some cases little incentive, to participate in the "normal" activity of tariff negotiations. Commenting on the increasing use of restrictions for balance-of-payments purposes by developing countries in the 1950s, Hudec has noted that

[i]t began to look as if emergency restrictions were going to be a permanent feature of developing-country trade regimes, making other GATT obligations irrelevant.<sup>428</sup>

What Hudec fails to mention, of course, is that it had been the US-UK design which defined quantitative restrictions as "emergency restrictions" in the first place.

Much greater practical problems for developing countries' trading positions were created by the specific exemptions from general rules that were designed to accommodate the practices of the "nuclear" countries. The US's aversion to state planning and quantitative restrictions did not extend to the area of agriculture, and an exception to the prohibition of quantitative restrictions for agricultural and fisheries products, taken almost verbatim from the US's reciprocal trade agreements, was included in all drafts of the ITO Charter and in the GATT. In conjunction with the lack of a ceiling on tariff levels and the lenient treatment of subsidies in the GATT, the lack of restraint on agricultural protectionism frustrated the attempts of many developing countries to increase their export earnings in order to finance their economic development.<sup>429</sup> When these problems crystallised in the first decade of the GATT, they were initially conceptualised as a *structural problem of the trading system*, to be addressed through the removal of obstacles to the trade of "less-

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<sup>428</sup> Hudec 1987, 29.

<sup>429</sup> The paradigmatic case was Cuba and sugar: during the preparatory negotiations, the Cuban delegation spoke at length about the problems created by the US sugar quota and the high levels of subsidisation. Its pronouncement on the treatment of subsidies in the draft ITO Charter are particularly memorable:

[T]he subsidy is another form of restriction, and Article 30, instead of recognising that the system of subsidies is an artificial way of producing, of trading, on the contrary recognises this evil. If we are so fond of the liberty of commerce, we should have done with the subsidies the same thing as I propose for the quotas: eliminate all the subsidies and quotas. It is a very strange thing that the subsidy is something normal, correct, when it is used by a strong financial nation. To give public money to foster or maintain a product that is good for nothing, or that is raised by very artificial methods, to compete with the products of other nations that are produced in a natural form, according to the benefits of sun and soil, is not bad. So that kind of subsidy, which is absolutely artificial and ... immoral, is legal, and is in accordance with the Charter. (E/PC/T/A/PV/22, 40-41)

"developed" countries within the framework of a "programme for expansion of international trade".

## **B. Before Some Countries Became "Special": The Cooperative Approach to International Trade Lawmaking**

After one decade of the GATT's operation, it became evident that different countries were benefiting unevenly from the kind of trade liberalisation that had been achieved under its auspices. Noting "the failure of the trade of less developed countries to develop as rapidly as that of industrialized countries", the Contracting Parties of the GATT commissioned an expert examination of trends in international trade, which became known as the Haberler Report.<sup>430</sup> Under the impression of the Haberler Report, the Contracting Parties launched an Action Programme for the "expansion of international trade", which was to be accomplished by a "three-pronged attack on outstanding trade barriers":<sup>431</sup> a new round of tariff negotiations; an attempt to address agricultural protectionism; and an effort to remove obstacles to the expansion of the trade of less-developed countries. The Contracting Parties set up three committees to implement the three elements of the programme.<sup>432</sup> Committee I was tasked with preparing another round of tariff negotiations, which would ultimately become the Dillon Round.<sup>433</sup> Committee II was to address the problem of agricultural protectionism by collecting data and studying the effects of agricultural trade barriers and by developing procedures for consultations with individual countries on their agricultural policies.<sup>434</sup> Committee III was to concern itself with obstacles to the expansion of the export trade of less-developed countries.<sup>435</sup>

The Programme on Expansion of International Trade marked an important juncture for lawmaking discourses in three respects. First, while the objective of the programme was framed as the "expansion" of trade, which could simply have meant *more* reciprocal trade barrier reduction (the work of Committee I), the programme also had a significant "systemic" component: it took into view the overall balance of benefits provided by the

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<sup>430</sup> L/775. The report is *GATT 1958*.

<sup>431</sup> *GATT 1960*, 7.

<sup>432</sup> For the terms of reference, see L/939.

<sup>433</sup> See L/885.

<sup>434</sup> See the reports: L/1192; L/1326; L/1461; in December 1961, the Contracting Parties tasked Committee II to carry out further consultations with parties upon request; W.19/20. For a discussion of the work of Committee II, see Josling/Tangermann/Warley 1996, 38-41.

<sup>435</sup> See the reports: L/1063; L/1162; L/1321; L/1554; the principal findings and recommendations of Committee III are contained in L/1557.

trading system, and sought to redress the perceived imbalance of benefits – between agricultural importers and exporters (Committee II), and between developed and less-developed countries (Committee III), respectively – *outside* the context of reciprocal trade barrier reductions. The conceptualisation of agricultural protectionism as "disturb[ing]" the "balance" of benefits under the agreement,<sup>436</sup> as "prejudic[ing]" the "integrity of the GATT concept of reciprocal rights and obligations"<sup>437</sup> and as "undermin[ing] the whole concept of a multilateral trading system"<sup>438</sup> testify to a concern with the equity of the trading system that goes beyond the logic of payment.

Second, while the first prong of the programme could build on the established principles and practices for tariff negotiations, the second and third prongs required new lawmaking techniques.<sup>439</sup> In the initial discussions, the Contracting Parties had little conception what these would be; they merely expressed the view "that there should be some attempt to overcome those obstacles to the expansion of trade which arose from national agricultural policies", as well as "other obstacles to the expansion of the export trade of under-developed countries".<sup>440</sup> The record notes that there appeared to be "general agreement" that these were matters to which the Contracting Parties "should now address themselves".<sup>441</sup>

As I will show below, the procedures that they eventually developed differed markedly from the market logic of the reciprocity discourse, revolving around the analysis and discussion of actual and potential trade flows, as well as the objectives and effects of particular policies. The information gathered in this process provided the basis for appeals for "moderation" in the use of agricultural trade barriers, and for an "enlightened attitude on the part of the highly-developed countries in opening their markets to the products of the

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<sup>436</sup> L/1461, para. 15.

<sup>437</sup> GATT 1960, 11.

<sup>438</sup> GATT 1960, 12.

<sup>439</sup> The programme was not exclusively a lawmaking initiative, but also had a compliance component, since many of the obstacles to trade identified by Committees II and III were inconsistent with GATT law even as it stood at the time; see L/1557, 3, where Committee III notes that

many of these restrictive measures [applied by industrialised countries, N.L.], particularly discriminatory restrictions, are in clear contradiction with obligations of the importing countries under the General Agreement; a conscientious application of the General Agreement by all contracting parties will in itself go a long way towards removing many of the barriers at present still confronting exports from less-developed countries.

<sup>440</sup> SR.13/7, 24.

<sup>441</sup> Ibid. 24.

less-developed countries".<sup>442</sup> In short, the lawmaking aims of the second and third pillar were to be attained through analysis, discussion and persuasion (what I will in the following call the "cooperative" approach), rather than payment.

Third, the programme came at an important juncture in the history of trade lawmaking in that it provided the backdrop against which the "developing" countries (re)defined their relationship with the GATT and its "developed" members.<sup>443</sup> It was the first time in GATT history that the Contracting Parties devoted systematic attention to the problems that the "less-developed" countries encountered in their trade.<sup>444</sup> In addition, the "less-developed" countries increasingly organised themselves as a group.<sup>445</sup> In 1959, they submitted a first joint "note" to the Contracting Parties<sup>446</sup>, and in 1963 they started a series of informal weekly meetings.<sup>447</sup>

Due to these three factors – its systemic concerns, the pioneering of the cooperative approach to lawmaking, and the less-developed countries' increasing articulation of their interests – the fate of the programme for the expansion of international trade would shape the role of developing countries in multilateral trade lawmaking in a lasting way. As I will argue below, the perceived failure of the programme marked the end of the attempt to address the problems of developing countries as a structural problem of the trading system to be addressed through a cooperative approach, and channelled developing countries' energies towards seeking accommodation with the reciprocity discourse, by arguing for a principle of "special and more favourable treatment". While this discourse is widely perceived and portrayed as an exception to reciprocity, its actual operation replicated and reinforced the market logic of the reciprocity discourse.

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<sup>442</sup> GATT 1961, 12-13; see also GATT 1962, 14:

There is a need to alleviate the present paradoxical situation whereby the industrialized countries, on the one hand, extend massive financial assistance to the less-developed countries to facilitate their economic development and, on the other, impede access to their markets for the exports which result from this development.

<sup>443</sup> See also Hudec 1987, Chapter 3.

<sup>444</sup> As Hudec 1987, 205, puts it, by 1960 the GATT "had become officially 'concerned' with the worsening trade situation of developing countries".

<sup>445</sup> Curzon 1965, 231; Hudec 208:

In the early 1960s the developing countries formed a functioning 'caucus,' capable of formulating and negotiating specific demands upon GATT and upon its developed country members. In virtually every enterprise undertaken by GATT, it soon became necessary to make room for representation of the developing country point of view.

<sup>446</sup> W.14/15; W.17/11.

<sup>447</sup> See LDC/M/1 and subsequent documents in this series.

Between September 1959 and October 1960 Committee II undertook a "programme of consultation and confrontation"<sup>448</sup> on the agricultural policies of all individual members of the GATT. Each contracting party was requested to submit documentation on its current agricultural policies, on the non-tariff barriers employed in conjunction with these policies, as well as detailed information on all measures affecting selected commodities which "enter[ed] importantly into world trade". This information was then subject to "examination" by the Committee, and other countries would "express ... their anxieties" about the actual or potential trade effects of these policies.<sup>449</sup> The aim of the work of Committee II was to facilitate, in the words of the GATT Secretariat, a "new modus vivendi for trading conditions in agricultural and food products".<sup>450</sup> What was hoped for was not so much the "wholesale abandonment of agricultural protectionism", but rather "some degree of moderation in the application of agricultural policies and a change in their direction and technique".<sup>451</sup>

Committee III was tasked with examining "the broad problem of the difficulties which confront the less-developed countries in expanding their export trade with the rest of the world."<sup>452</sup> In March 1959, Committee III adopted a work programme, which consisted of three parts.<sup>453</sup> First, the less-developed countries were asked to provide lists of *products* in which they had an actual or potential export interest. Second, and on this basis, the major *obstacles* to the expansion of the export earnings of the less-developed countries were to be studied. This second part would include an examination of trade barriers and other measures maintained by developed countries, identification of the comparative advantages of the less-developed country in question,<sup>454</sup> the potential for less-developed countries to "improve their own production and marketing techniques" and to remove obstacles to exports. Third, the Committee would review the *action* "taken, or to be taken" by the

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<sup>448</sup> *GATT 1961*, 12.

<sup>449</sup> L/1192, paras. 2 and 5.

<sup>450</sup> *GATT 1961*, 12.

<sup>451</sup> *Ibid.* 12.

<sup>452</sup> *Ibid.* 7.

<sup>453</sup> For the work programme, see COM.III/1, 1.

<sup>454</sup> In the words of the work programme:

Study of the possibility of channelling expansion of existing industries or starting of new industries by less developed countries into directions where such countries will be economically efficient producers – e.g., in regard to a few such industries selected on the basis of raw material availability, feasibility of labour-intensive rather than capital-intensive techniques, etc. – thus avoiding relatively inefficient use of capital. (COM.III/1, 2)

contracting parties to accomplish the objective of expanding the export earnings of the less developed countries.

Over the following years, the Committee conducted a "detailed examination" of over thirty products and product groups that less-developed countries had identified as being of special export interest to them.<sup>455</sup> The Committee extensively documented the type and severity of restrictions on importation of these products maintained by industrialised countries, estimated the effects of removing these restrictions,<sup>456</sup> and issued recommendations to this effect. Finally, the Committee reviewed individual industrialised countries' progress in modifying or eliminating these restrictions, and urged further action where progress had not been forthcoming.

Overall, the way in which Committee III approached its subject matter differed fundamentally from lawmaking governed by the reciprocity discourse. Under the reciprocity discourse, lawmaking begins with each country individually drawing up a list of "requests" and "offers"; under the cooperative approach adopted by Committee III, the first step was to establish a shared understanding of what was inhibiting the achievement of a common objective, namely, the increase of the export earnings of the less-developed countries.<sup>457</sup> To build this shared understanding, Committee III relied on information provided by both its less-developed and its developed members, as well as data provided by the GATT Secretariat. The reports of the Committee reflect a remarkable degree of consensus about the major obstacles to the exports of the less-developed countries; open disagreements, such as on the question whether a reduction in revenue duties on tropical products would lead to a substantial increase in consumption of those products, were extremely rare.

Under the reciprocity discourse, the next step is to match requests and offers – whether a participant achieves its lawmaking objectives depends to a large extent on its

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<sup>455</sup> The products included: coffee, tea, cocoa, oilseeds and vegetable oils, tobacco, lead, copper, timber, cotton, cotton textiles, and jute manufactures, bicycles, sewing machines, electrical fans, diesel engines, electrical motors, vegetable or chrome tanned hides and skins, finished leather and leather goods, iron ores, aluminium, alumina and bauxite, and sporting goods; see L/1063, para. 2; L/1321, paras. 4-33; L/1162, para. 10; L/1321, Annexes A-E.

<sup>456</sup> This point was particularly controversial in the case of internal taxes on products such as coffee, tea and cocoa on which there was no domestic production; see L/1063, paras. 10-12; L/1162, Document 3 ("Explanatory Notes on the Measurement of Price Elasticities"); L/1321, paras. 5-7 and Annex F.

<sup>457</sup> L/1162, para. 3:

the Committee intended that the studies should be conducted objectively in the spirit of the common interest of all contracting parties in moving rapidly towards the basic objectives of Committee III.

individual bargaining power. If the participant does not have anything to offer that its counterparts are prepared to pay for with the concessions that it is interested in, it will not achieve its objectives. Under the cooperative approach, by contrast, lawmaking relies on collective pressure rather than individual bargaining power – collective pressure not in the sense that the less-developed countries united against the developed countries, but rather in the sense that *all* members of Committee III, including the major industrialised countries to whom the appeals of the Committee were addressed, subscribed to these appeals and thereby committed to take action in pursuit of the shared objective and to submit to a subsequent review of their progress.<sup>458</sup> In many ways, the *modus operandi* of the Committee anticipates what would be celebrated as a major innovation when it was introduced three decades later in the course of the Uruguay Round – the Trade Policy Review Mechanism. The Trade Policy Review Mechanism, which subjects WTO Members' trade policies to collective examination and confrontation, has been hailed as a "a small step towards making individual members responsible to a greater collectivity" and "as a subtle change from GATT as a contract between individual signatories towards GATT as an international institution."<sup>459</sup> Arguably, the work of Committee III, which over time started asking "increasingly embarrassing questions" and making "steadily more specific recommendations",<sup>460</sup> represented a more radical departure from the bilateral-contract conception of the GATT than the comparatively tame Trade Policy Review Mechanism.

A third fundamental difference between the reciprocity discourse and the cooperative approach is the role that law plays under the two approaches. Reciprocity only works with hard, binding law: only a legally binding commitment is a concession worth paying for. As I will discuss more extensively in chapter 4, the reciprocity discourse is inextricably bound up with the conception of GATT as a contract embodying a balance of concessions. In the work of Committee III, by contrast, the question of whether an obstacle

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<sup>458</sup> With respect to an appeal directed to the industrialized countries in the second report of Committee III to examine their tariff rates, their fiscal duties, their quantitative restrictions and all other protectionist measures with a view to increasing the export earnings of the under-developed countries so that the latter might become less dependent on aid,

Curzon remarks:

It is relevant in this context to remember that countries like Germany, United States, France, United Kingdom, Canada, Sweden, Australia, Netherlands, as well as 12 under-developed or semi-industrialized countries were responsible for these findings. (Curzon 1965, 232, fn 1)

<sup>459</sup> Winham 1990, 802.

<sup>460</sup> Dam 1970, 234.

to the trade of the less-developed countries was legal or illegal under the GATT was seen as largely irrelevant. The Committee clarified early on that it

did not consider the extent to which certain of these restrictions ... were of a temporary nature nor, of course, did it consider whether particular restrictions were in accord with the General Agreement.<sup>461</sup>

The Committee further clarified that it would address itself "not only to measures applied inconsistently with the General Agreement, but to all types of barriers affecting trade in these products".<sup>462</sup>

While the Committee's refusal to investigate the legality of measures maintained by developed countries may in part have been due to the sensitivity of this issue – such investigations might have jeopardized developed countries' cooperation in the Committee –, it is more plausible to see it as owing to the fact that the legality/illegality question was simply irrelevant in light of the Committee's mandate to examine all measures that could be taken to increase the export earnings of the less-developed countries. In light of the Committee's single-minded focus on this objective, the question – all-important in the framework of the reciprocity discourse – of whether a measure was being maintained illegally and hence its elimination had already been paid for, simply had no particular purchase.<sup>463</sup>

A fourth difference between the programme and negotiations governed by reciprocity is the way in which the subject matter of negotiations is delineated and framed. Under the reciprocity discourse, negotiations tend to be organized by reference to different types of trade barriers, such as tariffs; this produces a uniform currency of payment and thus makes the payments of individual participants comparable. The starting point of the analysis under the cooperative approach, by contrast, was a specific product or sector, such as tropical products. The cooperative approach thus brought all trade restrictions and other policies affecting the trade in these products into view. Moreover, it also highlighted the

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<sup>461</sup> L/1063, 3.

<sup>462</sup> L/2341, 10.

<sup>463</sup> A similar non-legalistic attitude was evident in a lawsuit brought by Uruguay against the developed countries of the GATT at around the same time (1961), listing 576 measures maintained by developed countries that were inhibiting Uruguay's exports; see L/1647; Hudec characterises the complaint as "showpiece litigation – an effort to dramatize a larger problem by framing it as a lawsuit"; Hudec 1987, 47. With one exception, Uruguay did not bother to specifically allege that any of these measures was inconsistent with the GATT; its point was that "whether or not these barriers were legal, the GATT was not working if it could not do better than this"; Hudec 1987, 47.

interaction between different protective instruments, for example, differential tariff rates for raw materials and processed products, and thus revealed effective protection that was not apparent when tariff lines were considered in isolation. While a focus on individual products and sectors is evidently useful where the aim is to achieve a particular substantive goal, it is ill-suited to the imperatives of reciprocity, as it blurs the currency of payments and diminishes the opportunities for cross-sectoral payoffs.

Committee III compiled a voluminous record of trade restrictions maintained by the industrialised countries and other obstacles to the exports of less-developed countries. The initial results of the programme were less than had been hoped for. As the GATT Secretariat put it,

[b]y late 1961, Committee III had carried its work as far forward as it could ... It had clearly identified the barriers which impede an expansion of the less-developed countries' exports. It had strongly urged the importing countries concerned, particularly industrialized countries, to take the steps necessary to reduce or eliminate these barriers. The results of these appeals were disappointing.<sup>464</sup>

The less-developed countries saw "no improvement"<sup>465</sup> in their trading position, which had even deteriorated in some respects.<sup>466</sup>

The Committee nonetheless pressed forward with an approach focused on persuading the developed countries to give up their trade barriers. In December 1961, the Contracting Parties adopted a "Declaration on Promotion of the Trade of Less-Developed Countries", in which they recognised "the need for a conscious and purposeful effort" to increase the export earnings of less-developed countries, and the industrialised countries acknowledged their "particular responsibility" in "reduc[ing] to a minimum" any restrictions on the exports of less-developed countries.<sup>467</sup> The Declaration listed in detail the trade restrictions that Committee III had identified in this regard.

Over time, the appeals of the Committee became more urgent, and the less-developed countries' proposals became more concrete. In 1963, the less-developed countries suggested a "Programme of Action" that set specific dates for the elimination of particular barriers to trade maintained by developed countries. They also submitted a

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<sup>464</sup> GATT 1962, 16; see also Dam 1970, 234: "the response to the work of Committee III was essentially disappointing".

<sup>465</sup> W.14/15, para. 3.

<sup>466</sup> W.17/11, para. 8.

<sup>467</sup> The Declaration is attached to L/1657.

proposal for duty-free access for tropical products to developed country markets.<sup>468</sup> For the first time, these proposals were openly resisted. The EEC and the less-developed countries associated with it endorsed the action programme only in the most tentative terms, instead advocating a "deliberate effort to organize international trade in products of interest to the less-developed countries" as well as the authorization of preferences in favour of developing countries.<sup>469</sup> It was no secret that the EEC took this position in order to protect the preferential treatment that its associated states enjoyed in the European market.<sup>470</sup>

The 1963 Ministerial meeting spawned a number of new committees and working parties: the contracting parties decided to set up an "action committee" to review the implementation of the action programme;<sup>471</sup> a committee on legal and institutional issues to study ways of putting the work of Committee III on a more permanent institutional basis;<sup>472</sup> and a working group to study the question of preferences.<sup>473</sup> The work of the Committee on the Legal and Institutional Framework of the GATT in Relation to Less-Developed Countries resulted in the addition of a new Part IV on "Trade and Development" to the GATT.

Part IV has been described as "merely a slightly more impressive statement of the urgent but non-binding texts that the Action Programme had been issuing over the preceding five years, giving them a permanent form in the text of the General Agreement."<sup>474</sup> Given the non-legalistic impetus of the work of Committee III, it was indeed somewhat ironic for this work to result in new legal text. However, true to the spirit of the cooperative approach to trade lawmaking, the three articles of the chapter, entitled "Principles and Objectives", "Commitments", and "Joint Action", primarily *record* the

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<sup>468</sup> MIN(63)7.

<sup>469</sup> MIN(63)7, para. 6. Dam 1970, 235, comments on this episode:

It is a curious point of history that at the end of 1963, when the less-developed countries urged the developed countries to commit themselves to a GATT-type barrier-lowering approach to the problems of the less-developed countries, the developed countries were unable to give them full satisfaction because some of the developed countries were already interested in more radical ideas ...

<sup>470</sup> See Bartels 2007, 730; the EEC stated that the effort to organize markets

would have to take into account economic inequalities between the less-developed countries themselves and the fact that certain less-developed countries cannot at present, without a transitional phase, face competition from the countries which have already achieved a certain degree of development or from the long-industrialized countries without suffering damage.

(MIN(63)7, para. 6)

<sup>471</sup> MIN(63)8, 2; see also the report by the Chairman of the Action Committee, L/2307 and L/2307/Add.1.

<sup>472</sup> MIN(63)7, paras. 28 and 30 and MIN(63)8, 2; the report is in L/2281.

<sup>473</sup> MIN(63)7, para. 24; the report is L/2196/Rev.1.

<sup>474</sup> Hudec 1987, 56.

demands of the less-developed countries and the intentions of the contracting parties to work together towards their achievement, and do little to *codify* commitments undertaken in response to those demands.<sup>475</sup> In Dam's words, the chapter represents an effort

to move away from a legality-illegality approach in the assessment of developed country performance toward multilateral efforts to achieving "solutions satisfactory to all ... concerned".<sup>476</sup>

The major practical effect of Part IV was that, through its provisions on consultation and joint action, it put the work of Committee III, and hence the cooperative approach to trade lawmaking – analysis, consultation, confrontation, recommendations – on a permanent institutional basis. Article XXXVIII.2(f) mandated the establishment of such "institutional arrangements as may be necessary" to further the objectives of the Part and to "give effect" to its provisions. To this end, the contracting parties established the Committee on Trade and Development in February 1965.<sup>477</sup> The Committee on Trade and Development essentially took up the work of Committee III where the latter left it off.<sup>478</sup>

Overall, it would be inaccurate to say that the cooperative approach to trade lawmaking proved completely ineffectual in inducing developed countries to change their trade policies.<sup>479</sup> However, several factors severely limited the scope of those changes. First, the cooperative approach violated the principle of payment. Committee III had noted that "for both fiscal and developmental reasons, less-developed countries cannot rely solely on the traditional methods of tariff negotiation involving exchange of concessions" and had recommended that "contracting parties, particularly industrialized countries, should examine this problem and consider the feasibility of giving relief through unilateral action, independently of the next round of multilateral tariff negotiations."<sup>480</sup> In practice, the developed countries, even though they were, as members of Committee III, themselves responsible for this recommendation, proved to be extremely reluctant to do so.

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<sup>475</sup> The relatively widespread perception that Part IV does not contain any legal obligations will be discussed in Chapter 4.

<sup>476</sup> Dam 1970, 240.

<sup>477</sup> For the terms of reference of the Committee, TD/1 - COM.TD/1.

<sup>478</sup> Committee III held its last meeting on 12 November 1964, where the Secretariat was requested to prepare a summary of the Committee's work, including unfinished matters, for the use of the Committee on Trade and Development; the document is L/2341.

<sup>479</sup> See the progress recorded in the report by the Chairman of the Action Committee, L/2307 and L/2307/Add.1.

<sup>480</sup> Second Report of Committee III on Expansion of Trade, L/1063 of 12 October 1959, para. 9.

One observer has argued that the developed countries

were still too accustomed to viewing the GATT as a passive organization in which barriers to trade were reduced only by quid pro quo negotiations, to be willing to take extensive unilateral steps toward the reduction of barriers to less-developed-country exports.<sup>481</sup>

Apart from habits of mind, the fact that, in their negotiations amongst each other, developed countries would still be operating under the reciprocity discourse, made them reluctant to follow the recommendations of the Committee III. As several observers have argued,

the developed countries were loath to reduce any customs duties except in the context of the Kennedy Round for fear of losing credit for their concessions in the final balancing of bindings.<sup>482</sup>

In some instances, the trade negotiators of developed countries simply had no authority to grant unilateral concessions. Thus, US negotiators reported that, in the Dillon Round, they had "made a gesture" in taking account the needs of the less-developed countries "by accepting agreements balanced in their favour in terms of strict trade coverage." However, the United States had been "unable within the framework of policy laid down under existing legislation ... to accede to their wishes for completely unreciprocated concessions."<sup>483</sup>

Even when the US Congress gave the authority for a major unreciprocated concession in the 1962 Trade Expansion Act – the elimination of tariffs on tropical agricultural and forest commodities –, US negotiators found themselves unable to use this authority as it was conditioned on comparable action by the EEC.<sup>484</sup> The EEC, in turn, was not willing to make a similar move, most likely in an effort to protect the preference margins enjoyed by its associated countries in the EEC market.<sup>485</sup> In general, the parochialism of the EEC, and in particular France, which manifested itself in resistance to the 1963 Programme of Action,<sup>486</sup> in the EEC's refusal to match the US Tokyo Round offer

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<sup>481</sup> Dam 1970, 234; see also the observation by the less-developed countries themselves that the industrialized countries appear to take the view that [the high tariffs on imports from the less-developed countries] could be reduced only through the exchange of tariff concessions on a reciprocal basis. (W.17/11, para. 5)

<sup>482</sup> Dam 1970, 242; for a similar view, see Curzon 1965, 243: "It is probable that countries hesitated to act immediately for fear of losing bargaining strength in the 1964 tariff round."

<sup>483</sup> FRUS 1961-1963, 524.

<sup>484</sup> For a description of this aspect of the Trade Expansion Act, see L/1983, 4.

<sup>485</sup> Vingerhoets 1969, 51; Bartels 2007, 730; Evans 1971, 251-252.

<sup>486</sup> See MIN(63)7, para. 6.

on tropical products,<sup>487</sup> and later in France's boycott of Part IV and the consultations of the Committee on Trade and Development,<sup>488</sup> was a second major factor that explains the meagre results of the cooperative approach;<sup>489</sup> its effects were compounded by the reluctance of other developed countries to act without the EEC.<sup>490</sup>

As a result of these factors, Committee III did by and large not succeed in decreasing tariff barriers to the exports of less-developed countries.<sup>491</sup> Neither was there much movement on internal fiscal charges – as noted above, the developed countries doubted that reductions in such charges would result in substantially increased imports of the products in question and were for the most part not willing to change their tax systems. It was only with regard to quantitative restrictions that the Committee recorded major progress;<sup>492</sup> even this progress, however, "had been mainly the result of the emergence from balance of payments difficulties of a number of contracting parties in fulfilment of their obligations under the General Agreement".<sup>493</sup> The hard core of quantitative restrictions that were maintained for other than balance-of-payments reasons – mostly on imports of agricultural products – would prove exceedingly intractable,<sup>494</sup> and would remain a focus of the work of Committee III and the Committee on Trade and Development for years to come.<sup>495</sup>

In the final analysis, then, it appeared that "[t]rade policy toward the less developed countries [was] more talked about than acted on", as a task force on foreign trade policy for the incoming Nixon administration put it in 1969.<sup>496</sup> As a consequence, the developing

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<sup>487</sup> See MIN(63)7, paras. 10-23 ("Trade in Tropical Products – Free Access to Markets of Industrialized Countries for Tropical Products").

<sup>488</sup> Dam 1970, 243.

<sup>489</sup> On the European Union's trade and development policy generally, see Bartels 2007.

<sup>490</sup> An internal US review of its trade policy would later attribute "a good bit of past stagnation" in efforts to help the less-developed countries "to the belief that developed countries all have to act together". The review recommended "devis[ing] ways of putting the United States in the position to remove barriers to imports from LDCs independently of what Europe or Japan does." FRUS 1969-1972, 465-466.

<sup>491</sup> L/1321, para. 39 ("very limited progress in the downward revisions of tariffs on the products of interest to less-developed countries").

<sup>492</sup> L/1321, para. 36 ("progress so far made was largely confined to the removal of quantitative restrictions").

<sup>493</sup> L/1321, para. 37.

<sup>494</sup> Dam 1970, 243.

<sup>495</sup> See the work of the Group on Residual Restrictions established by the Committee on Trade and Development; COM.TD/B/3; COM.TD/B/6. Quantitative restrictions were also the subject of negotiations in the Kennedy and Tokyo Rounds. Many were not eliminated until the "tarification" mandated by the Uruguay Round Agreement on Agriculture.

<sup>496</sup> FRUS 1969-1972, 465. The review went on to caution: "If we are not seriously prepared to do something, we had better mind what we say."

countries became increasingly disillusioned with the cooperative approach to trade lawmaking. One representative stated in the Consultative Group of Eighteen in the late 1970s that

[i]t was an illusion to believe that procedures and institutions were an effective substitute for clearly spelled out, equitable and precise rules. The Committee on Trade and Development had, in the absence of such rules, demonstrated its inability to steer trade policy in the directions contemplated in Part IV and became largely a forum for the ritual repetition of well-worn and familiar phrases.<sup>497</sup>

Another representative expressed the view

... that the Committee on Trade and Development had so far had a negligible impact on the policies of the developed countries. Evidence was lacking of a serious commitment to Part IV of the General Agreement, in particular its standstill provisions. The Committee had now been exploring for years the question of how the situation could be improved.<sup>498</sup>

### **C. When Some Countries Became "Special": The Birth of "Special and Differential Treatment"**

The studies undertaken in the course of the programme had brought the limitations of the "orthodox pattern"<sup>499</sup> of trade lawmaking, i.e., lawmaking governed by reciprocity, in addressing the obstacles to the trade of less-developed countries into sharp relief. These limitations were of three kinds.

First, trade lawmaking at the time was still largely limited to tariff negotiations. The majority of the obstacles that developing countries faced, however, were restrictions other than tariffs – most prominently, quantitative import restrictions, internal fiscal charges, and subsidies and price support schemes for agricultural production. The developing countries, as well as agricultural exporters who were similarly disadvantaged by this limitation "argued strongly that, to make the forthcoming negotiations meaningful and more equitable for them, these measures should also be negotiable in the course of the tariff conference."<sup>500</sup> Apart from token attempts to integrate internal taxes into the tariff negotiations, however, these barriers remained non-negotiable.

Second, the less-developed countries argued that their capacity to pay for concessions was in any case limited, since they needed tariffs for "revenue and

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<sup>497</sup> CG.18/8, para 16.

<sup>498</sup> CG.18/10, para 17.

<sup>499</sup> W.14/15, para. 4.

<sup>500</sup> GATT 1960, 10.

developmental purposes".<sup>501</sup> They further pointed out that "capital goods account[ed] for the greater part of their import bill and the duties on these good [were] in any case very low to negligible".<sup>502</sup> Moreover, many of their imports were "tied" to loans from particular countries, so the tariffs had "little practical significance".<sup>503</sup>

A third major limitation on the less-developed countries' capacity to expand their exports through tariff negotiations was the principal supplier rule: since they were "not yet principal or even substantial" suppliers of the goods the exports of which they were most interested in expanding, namely manufactured or semi-manufactured goods, they were not automatically entitled to negotiate on these products.<sup>504</sup> This problem persisted in the Tokyo Round, where developing countries complained that developed countries,

having received our requests for concessions, have replied that they could not take them into consideration on the pretext that we were neither a principal supplier nor a major supplier, thus disregarding the importance for our economy of the products in respect of which we had made requests for concessions.<sup>505</sup>

Given the low volume of their exports in these products, they also felt that it would be unjustifiable for them to be made to "pay compensation" for market access in these products.<sup>506</sup>

In sum, and put in terms of the market metaphor, the less-developed countries faced three problems in the negotiations: what they needed to buy was largely not for sale, they had in any case little means to pay for it, and, even if it was on sale, they were not necessarily entitled to buy it.<sup>507</sup>

Due to these limitations, the reciprocity discourse had held little promise for the less-developed countries. However, confronted with the failure of their attempt to achieve significant reductions of trade barriers through the cooperative approach to trade

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<sup>501</sup> W.17/11, para. 7.

<sup>502</sup> W.14/15, para. 4.

<sup>503</sup> W.17/11, para. 7.

<sup>504</sup> Ibid.: "It would, therefore, be difficult for [the less-developed countries] even to initiate negotiations."

<sup>505</sup> MTN/P/5, 69.

<sup>506</sup> W.17/11, para. 7.

<sup>507</sup> The less-developed countries were not the only members for whom the principle of payment and the structure of the legislative marketplace created problems: countries which mainly exported agricultural products and other primary commodities, such as Canada and Australia, claimed to be in a "special negotiating position" due to the exclusion of non-tariff barriers and even some tariffs on items of major export interest to them from the negotiations. They focused their efforts on including agricultural trade barriers into the negotiations, rather than seeking more fundamental changes to the lawmaking principles of the GATT; see L/1043, para. 2.

lawmaking, the developing countries were left with little choice but to seek accommodation with the reciprocity discourse in the forthcoming major trade rounds, namely, the Dillon and Kennedy Rounds.

Developing countries had already achieved some recognition of their difficulties in participating in tariff negotiations on the basis of reciprocity. As early as the GATT/ITO preparatory negotiations, a Joint Committee on Industrial Development had recommended that the "uneven" state of "the comparative development of Member countries" should be taken into account "in any tariff negotiations".<sup>508</sup> Moreover, Article XXVIII bis of the GATT, which had been added during the 1955 review negotiations, recognised

the needs of less-developed countries for a more flexible use of tariff protection to assist their economic development and the special needs of these countries to maintain tariffs for revenue purposes.<sup>509</sup>

In the early 1960s, this recognition began to crystallise into the principle that developed countries would not expect "full reciprocity" from developing countries. What is crucial to understand, though, is that the concessions for which developed countries would not expect full reciprocity from developing countries were not concessions resulting from negotiations *between* developing countries and developed countries; because of the principal supplier rule, such negotiations rarely took place.<sup>510</sup> Rather, the concessions for which developed countries would not demand "full reciprocity" from developing countries were concessions that developed countries granted *each other* and that *incidentally* benefited developing countries.<sup>511</sup> In other words, the principle of "less-than-full reciprocity" did not refer to concessions that had been *requested by* and *granted to* developing countries; it only meant that developed countries would not demand "full

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<sup>508</sup> E/PC/T/23, 10.

<sup>509</sup> GATT Article XXVIII<sub>bis</sub>(3).

<sup>510</sup> The link between the principal supplier rule and the emergence of the principle of "less-than-full reciprocity" is also made by Winters 1990, 1291:

The principal supplier rule biased negotiations towards the commodities of interest to economically large countries – the major industrial powers – for they were more frequently principal suppliers than were other countries. This was a major complaint of the developing countries over the early years ... and was one of the factors behind the developments in the GATT during the 1960s which relaxed the obligations imposed on developing countries, permitted industrial countries to discriminate in their favour, and released them from reciprocity during negotiating rounds. (reference omitted)

<sup>511</sup> See Curzon 1965, 106: it would seem

right to help the developing countries within the precincts of the most-favoured-nation club by passing on to them in the form of 'aid' tariff concessions *negotiated between the industrial countries* and providing them with a market for their manufactured products. (emphasis added)

compensation" from developing countries for incidental benefits that the latter might derive from tariff bargains concluded among developed countries.<sup>512</sup>

The incidental nature of the benefits that developing countries could hope to derive from what would eventually become known as the principle of "special and differential treatment" became particularly obvious in the first round in which a participant – the EEC – tabled an offer based on a linear across-the-board reduction – the Dillon Round. The EEC made it plain that this offer "did not involve reciprocity on the part of less-developed countries".<sup>513</sup> The EEC further announced that

in the course of the multilateral negotiations the Community would endeavour to exchange with the other industrialized countries tariff concessions on products which are of particular interest to less-developed countries.<sup>514</sup>

This statement makes it clear that the EEC's offer of "non-reciprocity" did not mean that it would grant concessions on products of interest to developing countries directly to those countries on non-reciprocal terms. The developing countries were reduced to hoping that products of interest to them would be the subject of bargains among the developed countries.

Unsurprisingly, the amount of tariff reduction achieved on products of interest to developing countries would remain paltry, and far below what was accomplished on the exports of developed countries. As the developing countries noted at the outset of the Kennedy Round,

in past tariff negotiations under the GATT, products of special interest to less-developed countries had tended to be excluded from the tariff concessions made by the developed countries, with the result that ... tariffs on products of special interest to them tended to be disproportionately high.<sup>515</sup>

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<sup>512</sup> See also this explanation of what "non-reciprocity" implied in the Kennedy Round:

There will ... be no balancing of concessions granted on products of interest to developing countries by developed participants on the one hand and the contribution which developing participants would make to the objective of trade liberalization on the other ...

COM.TD/W/37, para. 9. See also Rolland 2012, 75:

while developed countries could not require reciprocity from developing countries, they could simply refrain from offering them concessions. Non-reciprocity therefore only meant that developing countries were not required to give anything beyond their means, but did not guarantee that they would get anything for free.

<sup>513</sup> TN.60/SR.8, 4; see also ibid. 14 and L/1435, Annex A, para. 3.

<sup>514</sup> TN.60/SR.8, 4. (emphasis added)

<sup>515</sup> See TN.64/LDC/1, para. 4.

In the Kennedy Round itself, developing countries did not fare much better. While the use of a 50 per cent horizontal reduction by most developed countries should have greatly increased the scope of incidental benefits, developing countries could do little to prevent developed countries from exempting products of interest to them from the linear reduction.

As the Chairman of the Committee on Trade and Development noted in a report:

Developed participants have already indicated that they may ultimately be forced to withdraw offers on particular products. Their principal suppliers of these products are, almost without exception, other developed countries. In certain instances, even though a developing country is not the principal supplier of the product in question, developing countries taken together have a trade interest of great importance to them. In the great majority of cases, the current trade interest of the developing countries of the products in question is small but there is already some indication that relatively more advanced developing countries will be affected if withdrawals are made *to restore the balance between developed participants* since they have a larger interest in products predominantly traded between these countries.<sup>516</sup>

In some cases, concessions of great value to developing countries were not offered in the first place because the developed country in question did not expect to receive adequate reciprocity for them from other developed countries. In the Kennedy Round negotiations on agriculture, for example, the US hesitated to table offers that it believed the developing countries might "find very attractive" because it could not be sure that it would be able to "reach any commensurate arrangement with [its] commercial equals" and would thus be forced to withdraw those offers.<sup>517</sup>

It is telling that official pronouncement on "non-reciprocity", which became a standard feature of negotiating plans starting in the early 1960s, were consistently couched in terms of the "attitude" or "expectations" of developed countries, rather than the rights and aspirations of developing countries. Thus, at a Ministerial Meeting in 1961, ministers agreed that "a more *flexible attitude* should be taken with respect to the degree of reciprocity to be expected" from the less-developed countries.<sup>518</sup> The "Declaration on Promotion of the Trade of Less-Developed Countries" adopted at the same meeting similarly encouraged the contracting parties to "adopt a *sympathetic attitude* on questions of reciprocity".<sup>519</sup> The working party negotiating procedures for the Kennedy Round tariff negotiations agreed that "the developed countries cannot *expect* to receive reciprocity from

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<sup>516</sup> COM.TD/W/37, para. 15. (emphasis added)

<sup>517</sup> FRUS 1964-1968, 838.

<sup>518</sup> L/1657, 2. (emphasis added)

<sup>519</sup> L/1657, Annex, para. 5. (emphasis added)

less-developed countries.<sup>520</sup> The same wording of the principle was adopted by ministers for the Kennedy Round.<sup>521</sup> Part IV of the GATT, added in 1965, provided that

[t]he developed contracting parties do not *expect* reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less developed contracting parties.<sup>522</sup>

In all these formulations from the formative phase of the principle of special and differential treatment, it is clear that the agency is with the developed countries – it is the developed countries that, in an act of charity and magnanimity, agree to moderate their expectations, not the developing countries that gain some kind of entitlement. The developing countries are little more than passive beneficiaries; they are free to articulate their wishes for tariff reductions, but the developed countries are equally free to reject or ignore them.<sup>523</sup>

In the final analysis, then, the principle of special and differential treatment did not represent much of a deviation from the principle of payment: while it suggested that developing countries should receive certain trade benefits at a discount, it did not in any way oblige the developed countries to sell anything at all at the reduced rates. The principle thus left intact a fundamental element of the market metaphor of trade lawmaking: the freedom of the seller to decide what to sell and at what price. At most, the principle of special and differential treatment modified the exchange rate between concessions by developed countries on one hand and developing countries on the other hand. By designating this modification of the exchange rate as "special", though, the principle actually affirmed the rule of "full payment"<sup>524</sup> as the "normal" *modus operandi* of trade lawmaking.<sup>525</sup> Starting in the 1970s, the developed countries further reinforced the idea that "less-than-full reciprocity" was no more than a temporary aberration by introducing the concept of "graduation", pursuant to which the developing countries would "gradually

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<sup>520</sup> L/2002, para. A.8; see also L/1982, 4: "It was clear that a strict reciprocity could not be requested from these countries".

<sup>521</sup> MIN(63)9, para. A.8.

<sup>522</sup> GATT Article XXXVI.8. (emphasis added)

<sup>523</sup> See Hudec 1987, 61-62, on the Kennedy Round:

The developing-country demands ... were dealt with in pretty much a unilateral fashion. ... [t]he developed countries ... felt free to treat developing-country requests for liberalization as simply yes-or-no issues that needed no negotiation.

<sup>524</sup> Hudec 1987, 7.

<sup>525</sup> Cf. Tarullo 1985.

accept the same obligations of reciprocity as they progress toward higher stages of development".<sup>526</sup>

It is important to draw attention to the ways in which the principle of special and differential treatment differed from the cooperative approach. Through the cooperative approach, developing countries had sought to impose specific obligations on developed countries to eliminate barriers to the exports of less-developed countries; the focus of this approach was on the realisation of the common goal of expanding the export earnings of these countries, and it directed attention to the products and measures that would have to be addressed in order to achieve that goal. The principle of special and differential treatment, by contrast, was a principle of exchange, a variation of, and parasitic on, the principle of reciprocity; any benefits to developing countries' trade deriving from its application were incidental to exchanges between developed countries, and therefore accidental.

Since its emergence in the 1960s, the principle of special and differential treatment in tariff negotiations has evolved in ways that has arguably satisfied the aspirations of neither the developed nor the developing countries. The developed countries' hope that developing countries would "graduate" to full reciprocity has largely remained unfulfilled; while there has been increasing differentiation of tariff reduction commitments *among* developing countries, the developed/developing country distinction has remained an almost impermeable boundary, and the principle of special and differential treatment, instead of being temporary, has if anything been further entrenched. Developing countries' hope, on the other hand, that the principle could give rise to a "right" to tariff reductions on non-reciprocal terms and to the formulation of "specific rules" pursuant to which tariff reductions for the benefit of developing countries would be undertaken has also come to little.<sup>527</sup> While special and differential treatment has become a pervasive feature of

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<sup>526</sup> MTN/TAR/W/10, 2; the principle of graduation was also applied to the granting of preferences; see the "Enabling Clause", L/4903, para. 7; for commentary, see Frank 1979; Tarullo 1985, 545 ("Paragraph 7 contains the silent promise that some day all will revert to normalcy"); Winham 1987, 146; Narlikar 2006, 1017 ("the Enabling Clause was only a stopgap measure before developing countries assumed their 'normal' responsibilities of reciprocal trade liberalization").

<sup>527</sup> At an early stage of the Kennedy Round, for instance, the developing countries suggested that "specific rules should be established" regarding tariff reductions for the benefit of developing countries,

providing for example for zero duties on certain classes of products ... and establishing a maximum level, related to the duties on finished manufactures, for the duties on semi-processed products.

The reaction of developed countries to this proposal was to argue "that a more pragmatic approach to this question would be more practical and more effective" – a diplomatic way of saying that the proposal was

reduction modalities – virtually every reduction coefficient in the draft modalities for NAMA and agriculture in the current Doha Round is substantially higher for developed countries than for developing countries<sup>528</sup> –, the principle still means little more than that developing countries will do essentially the same as the developed countries, just less so and more slowly.

There is one aspect of the Doha Round negotiations, however, that represents a significant departure from the principle of special and differential as it has been traditionally understood: the commitment to grant duty-free and quota-free treatment to all exports from LDCs.<sup>529</sup> This commitment, adopted by Ministers at the Hong Kong Ministerial Meeting in 2005, is not merely an undertaking not to demand reciprocity from LDCs; rather, it implies an obligation on the part of developed countries ("developed-country Members *shall*") to provide secure and unhindered market access, and a corresponding *right* on the part of LDCs to access those markets. This commitment, once it is implemented, will thus achieve full liberalisation for *all* exports of a *sub-group* of developing countries – the same objective that the cooperative approach sought to attain for the *key* exports of *all* developing countries.

#### **D. Special and Differential Treatment in Agreements on Non-Tariff Measures**

While differentiated reduction coefficients have provided a straightforward way of embodying the principle of special and differential treatment in formula-based reduction modalities, agreements on non-tariff measures are more complicated in this respect. The most simple way of according special treatment to developing countries in this area is to exempt them from obligations, either by allowing them not to sign up to agreements or by providing exemptions from specific obligations. Up until the Uruguay Round, this was indeed the situation with regard to most non-tariff barriers. While developing countries during this period had little influence on the development of the rules on non-tariff barriers,

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politically unacceptable because it would unduly constrain the developed countries' room for manoeuvre; TN.64/21, para. 10.

<sup>528</sup> The point that special and differential treatment nowadays simply means the tweaking of reduction coefficients was emphasised to me by Joseph Glauber, who participated for the US in the Doha Round agriculture negotiations; interview with Joseph Glauber. See also the first proposal to express special and differential treatment in reduction modalities in the Uruguay Round: MTN.GNG/NG1/W/18, para. II.d).

<sup>529</sup> WT/MIN(05)/DEC, para. 47 and Annex F.

allowing the developed countries to set the standard in this area as well, they also faced little pressure to conform to this standard. They thus enjoyed "special" treatment, as it were, by default.

The Uruguay Round single undertaking, which forced the developing countries to sign up to virtually all Uruguay Round agreements, changed the picture radically. All of a sudden, the default position was that the developing countries had the same obligations as the developed countries; the specific exemptions and privileges provided in the Uruguay Round agreements thereby acquired a practical significance that those contained in the Tokyo Round codes never had. While these exemptions and privileges took a number of forms,<sup>530</sup> the only form of special treatment that developing countries enjoyed with respect to some of the most demanding obligations in the Uruguay Round agreements were transition periods of up to ten years for implementing them.<sup>531</sup> The device of transition periods had, of course, a close kinship with the idea of "graduation" in the tariff field – the notion that, in the end, all countries should be subject to the same obligations, and that the obligations applying to developed countries should provide the standard in this respect. Again, then, special and differential treatment was to be no more than a temporary aberration from the norm derived from developed countries' practices.

One can of course wonder whether it would not be beneficial for developing countries to gradually apply the same rules as the developed countries. Answering this question would require a detailed analysis of the history and substance of the Uruguay Round agreements that I cannot undertake here. What is reasonably clear, though, is that at least some of the Uruguay Round agreements posed two distinct kinds of problems for the developing countries, and that the shallow and temporary form of special and differential treatment which the developing countries were granted in the Uruguay Round did little to help them address those problems. The first kind of problem arose in the case of agreements the implementation of which was manifestly not in the interest of most developing countries – many have argued that this was the case of the TRIPS Agreement. Evidently, no form of special and differential treatment short of a complete exemption from

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<sup>530</sup> For an overview, see WT/COMTD/W/77; see also the discussion in Rolland 2012, chapter 6.

<sup>531</sup> Cf. Shaffer 2005, 273: "In practice ... developing countries often have only received longer transition periods to implement WTO obligations".

the obligations of such an agreement would solve this problem.<sup>532</sup> Developing countries confront a problem of a different type in the case of agreements the implementation of which might well yield benefits for them, but would involve one-off costs that would exceed, at least in the short and medium-term, any benefits that might possibly flow from doing so.<sup>533</sup> Transition periods can at best mitigate this problem. Another form of special and differential treatment, however, involving the provision of technical assistance and capacity building, might transform this latter type of agreement into a "win-win" proposition. I want to suggest that the type of special and differential treatment provisions that are being envisaged for the Trade Facilitation Agreement currently under negotiation in the Doha Round may potentially accomplish this.

On first sight, the negotiations on trade facilitation could appear to repeat the old pattern whereby legal disciplines are modelled on practices that the developed countries are already following anyway, but will require costly adaptation from developing countries. Reportedly, however, the developing countries have had substantial input in the negotiations and have identified significant grievances that they hope an eventual agreement will address.<sup>534</sup> Moreover, there are few if any doubts that developing countries' trade will benefit from streamlined customs procedures. At the same time, it is widely acknowledged that implementing the agreement will tax the scarce resources, both human and financial, of many developing countries. What is innovative about the special and differential treatment section of the draft text on trade facilitation is that it is designed to tackle this problem head on.<sup>535</sup> Instead of simply allowing developing countries to opt out of commitments, the draft text establishes a link between the obligations of developing countries on the one hand and their implementation capacity on the other hand, effectively making the provision of technical assistance by developed countries a pre-condition for the respective obligations of developing countries to take effect.<sup>536</sup> In addition, developing

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<sup>532</sup> It may be that the LDCs will ultimately be granted such an exemption. Their "transition period" for implementing the TRIPS Agreement has recently been extended for another eight years. While the developed countries have so far resisted putting off the implementation of TRIPS indefinitely for LDCs, they have not excluded the possibility of further extensions; see IP/C/64.

<sup>533</sup> The SPS Agreement may be a case in point.

<sup>534</sup> See Neufeld 2008, 285-288; most recently, India has been pushing for a requirement that "customs authorities ... give exporters the option of taking back rejected consignments before destroying them"; Mehta 2013.

<sup>535</sup> TN/TF/W/165/Rev.14, 29-36.

<sup>536</sup> See TN/TF/W/165/Rev.14, Section II, 2.1, which establishes different "categories of commitments" for developing countries and least-developed countries. Category C commitments only have to be implemented

countries are given wide discretion to determine their own technical assistance needs and implementation schedule. The draft agreement has been hailed for "placing emphasis – and onus – on the creation of enhanced capabilities as opposed to mere temporary carve-outs"<sup>537</sup> and thereby "putting every Member in a position to actually implement the envisaged measures".<sup>538</sup> When the agreement is eventually implemented, developing countries could thus benefit from the lower transaction costs of their trade without having to bear undue implementation burdens. The draft agreement on trade facilitation could thus be seen as an example of the cooperative approach to trade lawmaking, in which all parties contribute towards a common goal: the developed countries contribute resources and expertise, while the developing countries assume a commitment to implement legal obligations.

## **E. Conclusion**

Developing countries have been active participants in the trade regime from the outset; for several decades now, the majority of the members of the trade regime have been developing countries. One may hence wonder why it is that developing countries have been accorded "special" treatment throughout the history of multilateral trade lawmaking. Why has addressing the concerns and interests of developing countries never become the "normal" approach, the default option, in multilateral trade lawmaking?

One answer could be that the developing countries have never been prepared to do what multilateral trade lawmaking is all about, namely, assume legal commitments to reduce barriers to trade. This answer is strongly suggested by Hudec's influential account in *Developing Countries in the GATT Legal System*. As I have argued in the present section, it is an answer that is deeply misleading. Instead, I suggest that developing countries' interests have been conceptualised as "special" in the trading system so as to allow the developed countries to pursue their preferred design of the trading regime and their preferred method of making trade law relatively unperturbed. Granting "special" treatment to developing

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after a transitional period and "upon the acquisition of implementation capacity through the provision of technical and/or financial assistance and support for capacity building" (brackets omitted). Section II, 2.2 provides that developing and least-developed Members "shall determine, on an individual basis, the provisions to be included under Categories A, B and C."

<sup>537</sup> Neufeld 2008, 296.

<sup>538</sup> Neufeld 2008, 283.

countries has allowed the developed countries to accommodate them within the system without changing the fundamental features and default characteristics of that system.

In the first part of this section, I show how this strategy worked with respect to one fundamental feature of the US design: the preference for price-based over volume-based protective instruments that was to be embodied in the ITO and the GATT. This preference stemmed from the conviction of US officials that trade should be the domain of private enterprise, with minimal interference by the state. Tariffs, on this view, allowed the laws of supply and demand to do their work, while quantitative restrictions replaced these laws with administrative discretion. The officials of developing countries such as India held the diametrically opposite conviction: they saw it as essential that the state have the ability to channel the limited foreign exchange at its disposal to imports needed for its economic development, such as capital goods. To achieve this end, quantitative restrictions were ideally suited, whereas tariffs were ineffective and wasteful. This conflict between developing countries and the US did not have anything to do with an unwillingness of the former to reduce barriers to trade and to assume legal commitments in this respect. It was simply a question of whether the protective instruments preferred by the developing countries would be treated on an equal footing with the protective instruments preferred by the US – both could have been subject to continuous negotiation and bindings, as suggested by India.<sup>539</sup> Instead, however, the US and its developed partners chose to enshrine the preference for tariffs as a fundamental feature of the GATT by confining quantitative restrictions to exception provisions.

The developed countries chose a similar strategy to preserve another feature of their design as the default rule for the trading system: the principle of reciprocity. When the developing countries became aware of the trade barriers that were preventing an expansion of their export earnings in the late 1950s, they chose what Dam has called "a GATT-type barrier-lowering approach"<sup>540</sup> to address the problem: Working with the developed countries in Committee III, they sought to identify the products most essential to their export prospects, to analyse the barriers maintained by the developed countries which

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<sup>539</sup> This was, in fact, the approach that US officials had chosen with respect to another protective instrument, which they abhorred no less than quantitative restrictions: state trading. In the hope of luring the USSR into the GATT and the ITO, the US had accepted that state trading would be treated on par with tariffs; see GATT Article XVII:3, which envisages "negotiations on a reciprocal and mutually advantageous basis designed to limit or reduce" obstacles to trade resulting from state trading.

<sup>540</sup> Dam 1970, 235.

prevented an expansion of their exports, and to persuade the developed countries to dismantle these barriers. While the developed countries cooperated in the work of Committee III, they did not, for the most part, implement the recommendations of the Committee. Instead, they were only prepared to reduce trade barriers in the framework of reciprocal negotiations, which, due to the principal supplier rule, they held primarily among themselves. It was *within* this framework of reciprocal negotiations that they accorded the developing countries a "special" status, by not asking them to reciprocate incidental benefits that they might derive from concessions granted by the developed countries to each other.

Just as the developing countries in the preparatory negotiations had not been asking for "exceptions" to the rules, but had rather been advocating *different* rules, the developing countries in the late 1950s and early 1960s were not asking for "special" treatment within the framework of reciprocal negotiations, but were rather trying to pursue trade barrier reduction in a *different* framework altogether. This new framework, which I have called the cooperative approach to trade lawmaking, differed from the reciprocity discourse in fundamental ways. It was only after the failure of the cooperative approach that the developing countries resigned themselves to their "special" position in the reciprocity discourse and gradually embraced the discourse of special and differential treatment – a discourse that preserved key elements of the market metaphor of trade lawmaking, such as the freedom of the seller to decide what to sell and at what price, and merely modified the exchange rate between concessions granted by developed and developing countries, respectively.

Special and differential treatment, then, has principally been a tool to facilitate the participation of developing countries in a trade regime shaped by the preferences and practices of developed countries. Just as the term "special" is inextricably linked to a conception of what is "normal", the concept of "special and differential treatment" is premised upon an acceptance that what the developed countries do in the trading system is "normal", and that the developing countries should aspire to eventually do the same. The extremely shallow differential treatment – in the form of transition periods – that developing countries were granted in some of the key Uruguay Round agreements has brought this expectation of "graduation" into sharp relief. Even when an enduring recognition of the "special" status of developing countries appears more secure than ever,

as it currently does (except for the big emerging economies), it remains true that the pursuit of "special and differential treatment", premised as it is on the implicit acceptance of the "normality" of the dominant rules and practices, is something different from an attempt to define a new "normal" – for example, an approach that addresses, as a matter of course, the interests of all WTO members, without the need for special accommodations. An approach, in other words, that obviates the need to distinguish between "normal" and "special" in the first place.

It should be encouraging, then, that the heading of Section II of the Doha Round draft text on trade facilitation – "Special and Differential Treatment Provisions for Developing Country Members and Least Developed Country Members" – does not capture very well what Section II in fact does. For the provisions of the section do not water down or exempt developing countries from the obligations contained in Section I; instead, the provisions of Section II reflect a collective endeavour to put developing countries in a position to implement those obligations with the help of "tailor-made approaches that involve... each country in the determination – and enhancement – process of its respective capacity".<sup>541</sup> To the extent that the trade facilitation agreement represents an effort by the developing and the developed countries to work together and each do what is necessary for the achievement of a common objective – i.e., reducing the transaction costs of trade –, it could signal a revival of the cooperative approach to trade lawmaking.

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<sup>541</sup> Neufeld 2008, 296.

### III. The Discourse of "Development"

In the second part of this chapter, I have shown how the demands of "less-developed" countries were absorbed into the market logic of the reciprocity discourse through the discourse of special and differential treatment. The idea of "development", however, presented a challenge to the reciprocity discourse in international trade lawmaking in a much wider sense. In particular, the development discourse tells a story about the *temporality*, *teleology*, and *relationality* of the trading system that is at odds with the reciprocity discourse. By the US, the trading system was primarily understood in relation to the past: as an attempt to overcome the "economic warfare" of the interwar years and the parochialism of the colonial era through legal rules, non-discrimination and reciprocal liberalisation. The forward-looking element of the American design – progressive liberalization of tariff barriers – was to be achieved indirectly, incidentally to reciprocal exchanges of "concessions".<sup>542</sup> The development discourse, by contrast, sought to orient the trading system towards a future goal, and was directed against both the trading patterns of the colonial era and the indifference towards outcomes of the reciprocity discourse (A). The development discourse thus imbued the trading system with a progressive narrative and a social aim that was absent from the reciprocity discourse, and which challenges and subsumes the objective of trade liberalisation. The discourse tied liberal trade to the goal of development, with the consequence that the attainment of development came to appear as a precondition for the realization of liberal trade (B). Finally, the development discourse redefined the relationship between the participants in international trade lawmaking, with the result that development became the primary principle of differentiation within the trading system (C).

#### A. Temporality: The History and Future of the Trading System

The participants in the preparatory negotiations of the ITO and the GATT located the founding of the trading system on a number of historical trajectories. American officials construed the founding of the trading system as part of the move out of an international state of nature to a global rule of law, exemplified by the founding of the United Nations.<sup>543</sup>

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<sup>542</sup> See also Lang 2011, 197, who notes that "liberalization was in fact a less important norm during the first two decades of the trade regime's history than is often assumed".

<sup>543</sup> *Senate Hearings 1947*, 3:

Order in international economic relations was seen as essential not only to the maintenance of international peace.<sup>544</sup> American officials also regularly evoked the imagery of "economic war"<sup>545</sup> and a state of nature<sup>546</sup> to describe what international economic relations had been like in the past – and would be like in the future if nations did not agree to multilateral rules along the lines proposed by the United States.<sup>547</sup> When the US introduced the world to its post-war plans, American officials characterised the aim of their *Proposals* as the achievement of a "release" from "restrictions" (imposed by governments and private cartels) and from "fear" (of disorder in commodity markets and irregularity in production and employment).<sup>548</sup> This "release" would be achieved by the adoption of binding legal rules, combined with provisions for the progressive reciprocal liberalisation of trade barriers.

The chief manifestation of the international economic anarchy targeted by the US were the numerous trade restrictions adopted in the course of the Second World War, and the principal elements of the American design for the new international economic order closely tracked those of the Reciprocal Trade Agreements programme, which had been the American response to that founding trauma of modern trade policy, the escalation of protectionism in the wake of the Great Depression. However, the US initiative also sought to overcome another aspect of international economic relations that American officials perceived as a thing of the past: the colonial model of trade policy and in particular one of its primary manifestations, the British Imperial Preferences.<sup>549</sup> This aim figured less prominently in the US's public pronouncement, but was a central topic in US negotiations

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The International Trade Organization is to be a forum where such actions [affecting economic relations with other countries] can be discussed around the conference table before they are finally taken just as contemplated political and military actions are discussed in the organizations of the United Nations which have been set up for that purpose.

See also E/PC/T/PV/1, 4-5.

<sup>544</sup> This was a central tenet of the philosophy of Cordell Hull, who initiated the Reciprocal Trade Agreements programme; see Dam 2005, 84-85.

<sup>545</sup> E/PC/T/A/PV/22, 18; see also Canada's warning that a not sufficiently restrictive Charter would become "exceedingly dangerous ... possibilities for economic warfare in the world around us would continue unabated"; *ibid.* 21-22.

<sup>546</sup> *Senate Hearings 1947*, 3:

Heretofore nations have acted unilaterally in taking action vitally affecting their economic relations with other countries. When other countries were hurt by such action, as was usually the case, they retaliated and in the end all were hurt and all were mad.

Belgium portrayed the US initiative as a rejection of the "liberty of the jungle"; E/PC/T/A/PV/22, 33.

<sup>547</sup> E/PC/T/A/PV/22, 17.

<sup>548</sup> *US Proposals 1945*, 2-7.

<sup>549</sup> Oral History Interview with John Leddy, 21; Toye 2003; Winham 1986, 31-32.

with the British, both prior to and during the negotiations of the GATT. Apart from the considerable commercial interest that the US had in the abolition of the Imperial Preferences, the US was motivated by an aversion to the parochialism of colonial preferences, which it sought to replace with the principle of non-discrimination in the form of the MFN clause. In sum, for the US, the founding of a multilateral trading system represented a step out of a dark past marked by "economic war", "restrictions", "fear" and colonial preferences into a future characterised by the rule of law, reciprocal liberalisation, and non-discrimination.

As soon as the discussion about the founding of a multilateral trading system was opened to a wider range of countries, namely, at the 1946 Preparatory Conference in London, a discourse emerged that located this founding event on a different historical trajectory, and appraised its significance in different terms. For the discourse of "development", the founding of the trading system was an undertaking that had the potential to promote and assist, but also to hinder and obstruct, the "development" of the trade regime's "under-developed" members. Rather than portraying it as a triumph over the sins of the past, this discourse was oriented exclusively towards the future – with a mixture of hope and suspicion. However, this discourse did not simply interpret the "past" differently. Rather, it did not admit of a "past" in the first place, even though the "past" of "development" – that which came *before* development – would appear to be if anything *more* consequential (and sinful) than the "original sin" of protectionism against which the US defined its project. Hudec has observed (and reinforced) this contrast between the discourse of development and the US project:

GATT legal policy towards developing countries owes nothing to the past. There was no Golden Age that pointed the way. Before 1939, the organizing principle for rich-poor relationships had been colonialism. Most of the countries in Africa and Asia were colonies *de jure*. A goodly portion of those in Central and South America were colonies *de facto*. This colonial past was not what the post-1945 world was looking for. The world required a clean start – a completely new departure. ...

Not only was there no Golden Age to point towards as a goal but, perhaps more important, there had been no past failures that could serve as a lesson about what *not* to do – nothing resembling the lesson that developed countries had been taught by the beggar-thy-neighbour policies of the 1930s. Individual governments no doubt had ideas – even convictions – about what would work and what would not work, but there was no collective experience.<sup>550</sup>

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<sup>550</sup> Hudec 1987, 6-7.

Hudec's statement is both correct and deeply misleading. It is correct in that the development discourse does not *admit* of a "past of development". It is deeply misleading in that it suggests that this construction of an absence somehow reflects an underlying reality, namely that "there had been no past failures that could serve as a lesson about what *not* to do" and that "there was no collective experience".<sup>551</sup> By all accounts, trade had been a central aspect of colonial relations.<sup>552</sup> And even though the development discourse admitted of neither a past nor a present of colonialism, echoes of the colonial experience are evident both in what the development discourse embraces and in what it rejects.

The development discourse treats colonialism as the *antonym* of development. This is sometimes made explicit, for example when the Pakistani delegation informed the GATT membership that "[t]he process of economic development in Pakistan commenced simultaneously with independence."<sup>553</sup> This construction could be seen as an expression of the idea that as long as a people remains under colonial rule, it has no agency to pursue, and no voice to articulate, its ambition for "development". In the context of the GATT, it was only when the colonial power declared to the GATT that the respective "customs territory" possessed or would acquire "full autonomy in the conduct of its external commercial relations" that the former colonial subject was set free to become a "developing" country.<sup>554</sup> Tellingly, the GATT recognises that a contracting party "in the early stages of development" may have "*just started* [its] economic development".<sup>555</sup> Another indication of the co-extensiveness of independent statehood and incipient development is the frequent reference to "less-developed" countries as "young" countries, with a "short history", during the preparatory negotiations.<sup>556</sup>

This antonymous construction of colonialism and development, however, does not explain why the development discourse did not problematise the colonial past of almost all "developing" participants in international trade lawmaking in a way similar to the way in which the US narrative dramatised the protectionism of the inter-war years. As Trebilcock and Howse have noted, in the post-war period the

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<sup>551</sup> Hudec 1987, 6-7.

<sup>552</sup> Andrews 1914, 48; Marley 1938; Barnes 1938; Rist 2010, 52.

<sup>553</sup> L/1924, para. 5.

<sup>554</sup> GATT Article XXVI.5(c).

<sup>555</sup> See Note ad GATT Article XVIII.1 and XVIII.4, para. 2. (emphasis added)

<sup>556</sup> See e.g. E/PC/T/A/PV/26, 21.

specialization patterns of many developing countries could with justification be viewed as the historically contingent product of colonialism – developing countries served as ready sources of raw materials on the one hand, and as markets for the finished products of the colonial powers on the other. This suggested not only the artificiality of existing comparative advantage in developing countries, but also its foundation in fundamentally unjust power relationships.<sup>557</sup>

It would have been perfectly conceivable, even plausible, for the development discourse to construct colonialism as a past trauma giving rise to a moral obligation on the part of the colonial powers to assist the newly independent countries in escaping the trading position entrenched under colonial rule. What the development discourse appears to do instead, however, is to substitute the image of a *generic state of "underdevelopment"* for the varied colonial – and, for that matter, pre-colonial – histories of "developing" countries. As a result, the distinctive impact of colonial rule is not a part of the story that the development discourse tells.<sup>558</sup>

Some authors have argued that this move is facilitated by the ahistoricism of the concept of "development" itself. In Tarullo's view, the notion that "[n]ations develop from predominantly agricultural to predominantly industrial economies" is based on the "adolescence myth": "As adolescents grow into adults, so developing nations are expected to grow into developed nations". This construction of development as a "natural phenomen[on]", Tarullo argues,

robs the world of its history and recalls the definition proffered by Barthes of myth as 'depoliticized speech.' It is *natural* to be underdeveloped while growing towards development; the history of imperialism is incidental.<sup>559</sup>

Rist offers a similar analysis of the internal logic of the development discourse. In contrast to the "colonizer/colonized opposition", which suggests "hierarchical subordination", the development/underdevelopment dichotomy

introduced the idea of a continuity of substance, so that now the two terms of the binomial differed only relatively. 'Underdevelopment' was not the opposite of 'development', only its incomplete or ... 'embryonic' form; an acceleration of growth was thus the only logical way of bridging the gap. The relationship more or less established itself in a quantitative mode, with a fundamental unity assumed between the two phenomena. In this comparison,

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<sup>557</sup> Trebilcock/Howse 2005, 485-486.

<sup>558</sup> The historylessness of colonial subjects is a pervasive theme in colonial discourse; see Wolf 2010; Said 1994, 40, 75.

<sup>559</sup> Tarullo 1985, 548. (original emphasis)

moreover, each nation was considered for itself: its 'development' was very largely an internal, self-generated, self-dynamizing phenomenon, even if it could be 'assisted' from outside. Once more, *the naturalization of history empties history of its content*. The historical conditions that would explain the 'lead' of some countries over others cannot enter into the argument, since the 'laws of development' are supposedly the same for all ... Not only does this bracket out the effects of conquest, colonization, the slave trade, the dismantling of craft production in India, the breaking up of social structures, and so on; it also presents things as if the existence of industrial countries did not radically alter the context in which candidates for industrialization have to operate. The world is conceived not as a structure in which each element depends upon the others, but as a collection of formally equal 'individual' nations.<sup>560</sup>

A number of authors have investigated how these features of the concept of "development" suited the interests of the former colonial powers by obscuring their share of responsibility for the economic state of the "developing" countries and legitimising continued Western intervention in the name of "development assistance".<sup>561</sup> These authors have pointed to striking continuities between the colonial "civilizing mission" and post-colonial "development aid". These continuities also formed part of the founding process of the trading system. The discussions on development at the 1946 Preparatory Conference occasionally echoed colonial themes, for example when the Lebanese delegate explained the "non-economic" motivation for "development" thus:

Higher standards of life for the population do not only mean more food and clothing, but also better education and better enjoyment of the higher elements of culture. This cultural aspect is as important, if not more important, than the purely material aspect of raising the level of consumption. The relation between manufacturing industry and culture is very intimate. Manufacturing industry advances science and enables man to control nature, while agriculture leaves man in a state of dependence on nature, thus fostering fatalism and a generally unprogressive mentality. While manufacturing frees man materially and intellectually, agriculture keeps him in a sort of slavery to forces which, especially in the less-developed countries, are beyond his control.<sup>562</sup>

There are a number of indications, however, that, even though the development discourse did not openly address and define itself against the colonial past, in the context of international trade lawmaking it was primarily designed to emancipate the "less-developed" countries from their position under colonial rule.

A first indication of this emancipatory function of the development discourse was that, in international trade lawmaking, it was initiated and promoted by the "less-

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<sup>560</sup> Rist 2010, 74-75. (footnotes omitted, emphasis added)

<sup>561</sup> See in particular Alessandrini 2010.

<sup>562</sup> E/PC/T/C.1 & II/PV/2, 21.

developed" countries themselves.<sup>563</sup> While the lineage of the concept of "development" may be Western, the "less-developed" countries appropriated the concept in the context of the founding of the multilateral trading system and deployed it as a counterweight to the US narrative about the purpose of the trading system, namely to lift international economic relations out of the state of nature, release world trade from public and private restrictions and provide a forum for reciprocal liberalisation.

In the late 1940s, the attitude of the Western states towards the development discourse ranged from cooption (in the case of Canada and Australia, which did not consider themselves to be fully developed, and to some extent by the UK and France, which analogised the needs of post-war reconstruction to development) to more or less open hostility. In the early discussions between Britain and the US, the idea of "development" had played almost no role. Britain had at one point invoked the "principle of colonial trusteeship" to argue for lenient treatment of export taxes in the Charter (which would facilitate the establishment of processing industries by its colonies).<sup>564</sup> Influenced by discussions with India and Australia, Britain had also anticipated that "countries in an early stage of industrial development" would insist on the flexible use of tariffs for revenue purposes and for the protection of infant industries, and would be suspicious "that the developed countries were trying to restrict local development to gain or retain the market for their own manufactures".<sup>565</sup> In response, the US had indicated that it would be prepared to agree to an infant-industry exception "if formidable pressure was brought to bear at a trade conference in favor of" such an exception and "if adequate safeguards could be established".<sup>566</sup> While the US agreed that a corresponding provision should be drafted, it preferred to "hold back such provisions" as a bargaining chip.<sup>567</sup> The *Proposals* published by the US in November 1945 did not contain any mention of an infant-industry exception,

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<sup>563</sup> On the importance of recognising the agency of developing countries in the development project, see also Brigg 2002, 425, who notes that "the ascription of agency to the West by viewing the notion of development as a Western imposition or hegemony ... elides the fact that many Third World governments and subjects have actively embraced development ..."; one of the effects of this move is "to write the 'Others' – Third World people – out of history in a similar way to discourses that are more commonly targeted as Eurocentric."

<sup>564</sup> FRUS 1945, 5. For an account of what "colonial trusteeship" meant in practice, see Barnes 1938, who describes the exploitation in the British colonies in Africa.

<sup>565</sup> FRUS 1945, 2, 3, 5.

<sup>566</sup> FRUS 1945, 34-35.

<sup>567</sup> Ibid.

or, for that matter, of "development". At the outset of the 1946 Preparatory Conference, India commented on these discussions:

Under pressure exerted by countries of the British Empire, the U.K. made a half hearted attempt to assert the right of undeveloped countries to apply tariffs 'for a limited period under adequate safeguards for the protection of infant industries.' The U.S.A., however forgetful of its own history, was not prepared to concede even this limited 'right'.<sup>568</sup>

US negotiators continued to exhibit considerable scepticism towards the relevance of the concept of "development" for the trading system throughout the Preparatory Conference, especially when it came to the "freedom of the so-called underdeveloped countries to take protective measures".<sup>569</sup> When demand for specific provisions on development did in fact materialise, the US reacted by submitting a "tentative and non-committal draft chapter" on development, which it subsequently portrayed as a considerable concession. The infant-industry provision, Clair Wilcox noted, could "be regarded only as one of extreme generosity".<sup>570</sup> And with regard to the US's agreement "to co-operate in the economic development of other countries and specifically to impose no unreasonable impediments on the exportation of capital materials, equipment and technology which are needed for that development", Wilcox reminded the other participants that "[t]here never was before, in the history of the world, such a commitment".<sup>571</sup> The US obviously regarded the development discourse as a threat to *its* narrative that the Charter would overcome the dark past of untrammelled protectionism. If the less-developed countries' amendments allowing quantitative restrictions for protective purposes were adopted, Wilcox warned,

the restrictions of the Fifties and the Sixties will make the restrictionism of the Thirties look like absolute free trade. ... We all know that the folly of the past brought us to tragedy. What reason is there to suppose that even greater folly in the future would bring us to a better future?<sup>572</sup>

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<sup>568</sup> E/PC/T/5 - E/PC/T/W.14, 6.

<sup>569</sup> E/PC/T/A/PV/22, 15.

<sup>570</sup> E/PC/T/A/PV/22, 16.

<sup>571</sup> E/PC/T/A/PV/22, 14.

<sup>572</sup> E/PC/T/A/PV/22, 17.

The US would not accept, Wilcox concluded, "a Charter that was in its very terms a sanctification of autarchy, an incitement to resume economic aggression, a guarantee of economic war."<sup>573</sup>

Not only did the development discourse challenge the West's conception of the historical meaning of the trading system's founding. It was also emancipatory in that it was, without ever mentioning colonialism by name, at its core directed against the division of labour and the trade patterns instituted under colonial rule. In particular, this meant achieving the industrialisation of the predominantly agrarian countries of the South. At the Preparatory Conference, this transformative agenda produced anxiety among those of the "industrial" countries evidently still wedded to a colonial mind set. The Belgian delegate lamented, for example, as follows: "I must say that, in *accepting the industrial development of the rest of the world*, we have to display a considerable amount of fortitude".<sup>574</sup>

The South's agenda also clashed with the selective legalism of the US proposal, which Lebanon described in the following terms:

It is evident that there is, throughout the Charter, a conflict ... in the means for achieving two of its purposes, namely (1) the purpose of the removal of trade barriers, and (2) the purpose of the promotion of the industrial development of the undeveloped countries. But it is worth noting that to achieve the first purpose, strict and definite obligations are placed upon the Members, which restrict their liberty of action in the achievement of the second purpose. On the other hand, the Charter does not provide for equally strict and definite obligations to give positive assistance for economic development.<sup>575</sup>

Cuba formulated the fear shared by many of the "under-developed" countries, namely that by adopting the Charter

we would be freezing the actual economic status of the different countries of the world. The agricultural countries would continue to be agricultural. The monopoly countries would

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<sup>573</sup> E/PC/T/A/PV/22, 18.

<sup>574</sup> E/PC/T/A/PV/22, 33 (emphasis added). In insisting on prior approval for the use of quantitative restrictions to protect infant industries, the Belgian delegate provided the following motivation:

the development of other countries imposes changes in our industrial production and the whole set-up of our economic life. Such changes have to be gradual if they are not going to provoke the greatest social difficulties and sometimes downright misery. If a number of countries which are our markets are going to apply all kinds of quantitative restrictions without any prior notice, without any prior discussion as to some sort of adaptation of their policy to the policies of other countries, we are going to find that some industries cannot continue to function normally.

Lebanon argued against prior approval in these terms:

Will the industrialized countries who will inevitably have to make the necessary readjustment not be able to resist effectively the legitimate desire of the under-industrialized countries to develop their industries in order to raise the standard of life of their people?" E/PC/T/A/PV/26, 5

<sup>575</sup> E/PC/T/A/PV/26, 3; for a critique of the trading system as promoting "selective liberalisation", see also Alessandrini 2010.

continue to be monopolies, and the more developed countries would continue selling typewriters and radios, etc. to those nations that were trying to produce the primitive tools.<sup>576</sup>

In a speech dripping with sarcasm about the wisdom of the "experienced civilized nations"<sup>577</sup> – a rare echo of colonial imagery –, the Cuban delegate complained that "economic development has become here some sort of wicked word that is looked at with great apprehension by many Delegations."<sup>578</sup> By contrast to the US narrative about the need to exit the state of nature in international economic relations, Cuba suggested that the "young nations" might prefer "the liberty of the jungle" which was sometimes "more healthy than the very sophisticated and civilized world".<sup>579</sup> While such rhetoric openly mocking the categories of colonial thinking was rare at the Preparatory Conference<sup>580</sup>, many "less-developed" countries shared Cuba's apprehension about the selective legalism of the Draft Charter, which circumscribed the less-developed countries' use of protective instruments, while imposing no binding obligations on the developed countries in respect to the formers' development.

The themes of the debate about the historical significance of the trading system at the preparatory conference have been taken up again and again throughout the history of the trade regime. Warnings against a fallback into 1930s-style protectionism have become

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<sup>576</sup> E/PC/T/A/PV/22, 44; see also China:

the Charter in its present draft merely seeks to acquire and maintain for the advanced nations a series of markets which they either have no intention at all to develop or seem anxious even to prevent from developing. (E/PC/T/A/PV/26, 15)

See also Brazil's intervention, which formulated the fears of under-developed countries, though it did not agree that they were justified:

To some it may, perhaps, seem that the Charter, when applied, will deliberately or not result in an instrument for the maintenance of the status quo, thus perpetuating the unfavourable situation of the less developed countries. (E/PC/T/A/PV/26, 10; original emphasis)

France argued against this view:

We are convinced that it is nobody's intention here to admit that the Charter should become a rigid instrument, the provisions of which would tend merely to regularise international competition and to provide guarantees for acquired positions. We must, on the contrary, strive that this Charter should be an instrument of economic and social progress. (E/PC/T/A/PV/26, 17)

<sup>577</sup> E/PC/T/A/PV/22, 38; see also ibid. 37:

We have here, like one of the other bad boys of this Conference, dared to raise a voice against our older brothers, and have come into the room when that big civilisation ... is drafting the Charter of a new economic order.

<sup>578</sup> E/PC/T/A/PV/22, 42.

<sup>579</sup> E/PC/T/A/PV/22, 37.

<sup>580</sup> See also Brown 1950, 98, who reports that a requirement drafted by the US that "development plans should be 'soundly conceived, mutually consistent and effectively coordinated'" was rejected as "'older brother' language".

standard fare in multilateral trade negotiations.<sup>581</sup> To provide only a few examples: In the early 1960s the US Under-Secretary of State alerted his colleagues to the potential fallout of a possible collapse of the Dillon Round in the following terms:

Without overstating the consequences of such an event I think it could very well mean the destruction of the GATT and a return to anarchy in our international commercial relations.<sup>582</sup>

In discussions about the launching of a new round of trade negotiations in the mid-1980s, the United States framed the issue in similar terms:

The contracting parties faced a choice between two alternatives: pursuit of individual interests by seeking immediate relief for trade problems through protectionist solutions, as had been done in the 1930s; or reconfirmation of belief in GATT principles, and the start of a common effort to negotiate the structural improvements, access to markets and new disciplines so urgently needed to solve international trade problems.<sup>583</sup>

This statement was echoed by the representative of Japan, who

called on both developed and developing contracting parties to reaffirm their resolve that the tragedy of the 1930s, arising from protectionism embodied in economic blocs, should never be repeated.<sup>584</sup>

The notion that the place of the trading system in history is best understood in relation to the events of the 1930s – originally first and foremost the US view – has to some extent become the official GATT and WTO philosophy. In a speech to the United Nations in the 1970s, GATT Director-General Olivier Long stated:

I imagine that few people would argue that the world would be better off without any generally-accepted rules for trade. The law of the jungle applied to international trade in the 1930's, and the world paid dearly for the fact. For the past generation the GATT has provided the rule of law that was lacking in world trade during the Great Depression years.<sup>585</sup>

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<sup>581</sup> See Wilkinson 2009 for an extensive discussion of the role of crisis rhetoric in international trade lawmaking.

<sup>582</sup> FRUS 1961-1963, 506.

<sup>583</sup> 4SS/SR/1, 4.

<sup>584</sup> Ibid. 14.

<sup>585</sup> L/4306, 2.

Pascal Lamy, who recently left his post as the WTO's Director-General after serving two terms, used to have a picture of Senator Smoot and Representative Hawley in his office to remind him of the purpose of his work.<sup>586</sup>

On the part of the developing countries, the fear which they had expressed at the preparatory conference, namely that the trading system might end up "freezing the actual economic status of the different countries of the world", has stayed very much alive. While the developed countries have tended to consider continuous trade negotiations necessary to maintain the commitment to liberal and rules-based trade, the developing countries have tended to favour a more transformative agenda. Apart from their long-standing efforts to reduce barriers to their exports maintained by developed countries, the transformative impetus of the developing countries' participation in trade lawmaking is particularly evident in two projects:<sup>587</sup> their decade-long fight against tariff escalation; and their campaign, which stretched from the 1960s to the 1980s, for international action to promote structural adjustment in developed countries.

Tariff escalation refers to the differentiation of tariffs in relation to the degree of processing, whereby low or no tariffs are imposed on the raw materials, higher tariffs are imposed on semi-finished products, and the highest tariffs apply to the finished product. This tariff structure, traditionally maintained by many developed countries, made it difficult for developing countries to move up the value chain, as it encouraged companies to export raw materials from developing countries for processing in developed countries, rather than to process the product in the developing country.<sup>588</sup> The effect of tariff escalation on the composition of the developing countries' exports was noted in the GATT as early as the 1960s,<sup>589</sup> and a proposal to address tariff escalation in reduction modalities was made – and

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<sup>586</sup> Lamy stated this at an event at the WTO in July 2013. Smoot and Hawley were responsible for the notorious Tariff Act of 1930, which raised US tariffs significantly during the Great Depression, triggering retaliatory action from the US' trading partners.

<sup>587</sup> The developing countries also campaigned for the transformation of international economic relations on a larger scale, in particular by demanding the formation of a "New International Economic Order" in the 1970s. These demands, however, were mostly articulated in the framework of the United Nations, and in particular UNCTAD; the developed countries did their best, for the most part successfully, to keep this agenda outside of the trade regime. See McRae/Thomas 1983, 66, who report that the developed countries met Brazil's proposal for a "Framework Group" in the Tokyo Round with scepticism "out of concern that it might become a vehicle for the rhetoric of the 'New International Economic Order'."

<sup>588</sup> Cf. Trebilcock/Howse 2005, 481. Pioneering works on the effects of tariff structure are Balassa 1965; Corden 1966.

<sup>589</sup> See e.g. L/1557, para. 24:

rejected – as early as the Kennedy Round.<sup>590</sup> The problem has persisted throughout the operation of the trading system, and is for the first time comprehensively addressed in the Doha Round Modalities for Agriculture, which provide separate modalities for the reduction and, in some cases, elimination, of tariff escalation.<sup>591</sup>

In contrast to tariff escalation, which concerned an issue plainly at the core of the trade regime's competence, structural adjustment was not an easy fit for the GATT's traditional repertoire of instruments and techniques,<sup>592</sup> and the contracting parties struggled for a long time to define the GATT's role in relation to this issue. Structural adjustment was first discussed by a group of experts in the 1960s,<sup>593</sup> it was the subject of reporting requirements in respect to the textiles sector,<sup>594</sup> and again became a hotly debated issue in the early 1980s.<sup>595</sup> A key puzzle in these discussions was the fact that a number of trade instruments that could serve to facilitate adjustment, such as safeguards and subsidies, could just as well be used to delay adjustment.<sup>596</sup> The question was thus *how* these instruments were used – a question that ultimately went to the role of the state in the adjustment process, and the relationship between the state and the economy more generally. The developing countries were hoping that developed country governments, prodded by multilateral pressure, would take a more proactive role in promoting adjustment to import competition in their economies. In the end, the GATT's activities on structural adjustment were largely limited to information exchanges and consultations; no obligations *directly* concerned with structural adjustment were ever negotiated. However, a number of agreements negotiated in the Uruguay Round, and in particular the Agreement on Textiles and Clothing and the Agreement on Safeguards, have made it more difficult for countries to prevent or delay structural adjustment. At least in the textiles sector, then, the developing countries' ambition has thus, at last, been largely fulfilled.

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An expansion of exports of these items [leather goods and leather footwear, N.L.] was unfavourably affected ... by the practice of granting relatively less liberal tariff treatment to semi-manufactures and to the finished product than to unprocessed materials.

<sup>590</sup> See TN.64/21, para. 10, cited above in fn. 527.

<sup>591</sup> TN/AG/W/4/Rev.4, paras. 84-92.

<sup>592</sup> See the discussion of the perceived impossibility of accommodating structural adjustment through "contractual undertakings" in chapter 4 *infra*; for a comparative analysis of adjustment policies, see Trebilcock/Chandler/Howse 1990.

<sup>593</sup> See the reports of the group in COM.TD/H/4 and COM.TD/68.

<sup>594</sup> See the reports in COM.TEX/W/25 and COM.TEX/16.

<sup>595</sup> See the reports of the Working Party on Structural Adjustment and Trade Policy in L75347 and L/5568; for the discussions in the Consultative Group of 18, see CG.18/W/83 and the materials cited therein.

<sup>596</sup> See CG.18/W/83, para. 3.

Tariff escalation and structural adjustment have of course not been the only initiatives that developing countries have pushed over the history of the trading system; they do, however, exemplify what I take to be the basic orientation of developing countries towards the historical significance of the trade regime: an orientation that is marked by the expectation that the trade regime will usher in a fundamental change in the international division of labour. The developing countries' worst fear has not been 1930s-style anarchy, but a trade regime that would, as Brazil put it in the Uruguay Round,

freeze an inequitable international division of labour and represent an unacceptable limitation to our legitimate aspirations of also becoming producers and suppliers of high-technology goods and services.<sup>597</sup>

This orientation is quite far removed from the idea that the incremental and gradual liberalisation of trade is necessary so that countries can from time to time reaffirm and revitalise their commitment to a rules-based trading system, thereby banishing the temptation of protectionism and realising a few efficiency gains on the side (to somewhat caricature the US view).<sup>598</sup>

Both the rule-of-law narrative and the development discourse, then, employ a technique of "temporal othering" to define the identity of the trading system; the rule-of-law explains the significance of the trading system "by means of casting as Other [the system's] own past, whose repetition in the future it seeks to avoid".<sup>599</sup> The development discourse, by contrast, casts as Other the present, which it seeks to overcome in the future.

Despite their different orientations – towards the past and the future, respectively – the two discourses are similar in one respect: they both produce a constant sense of restlessness. Neither ever declares victory. The development discourse carries the connotation of a perpetually unfulfilled promise; development is aspired to, but never quite achieved. The rule-of-law narrative, in turn, imparts a sense of fragility; it is animated by a constant fear of backsliding and complacency.

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<sup>597</sup> MTN.GNS/W/3, para. 43.

<sup>598</sup> See also Winham 1986, 142, who describes the relationship between developed and developing countries in similar terms when he argues that, as an "outgrowth of the interests of the mainly Western, developed countries", the GATT "looks to the competitive protectionism of the 1930s as the major evil to avoid", whereas the developing countries "seek more to escape their own underdevelopment than to create a liberal world trade regime".

<sup>599</sup> Prozorov 2011, 1273; Prozorov analyses this technique in the context of European integration.

## B. Teleology: The Aims of the Trading System

The different stories that the US and the proponents of the development discourse told about the historical significance of the trading system were intertwined with different views on the objectives of the trading system. The primary objectives advanced by the US narrative were an expansion of world trade, to be achieved through reciprocal liberalisation and the elimination of discrimination, which would also support world peace. At the insistence of Britain, the US had included the objective of full employment in its *Proposals*. This objective, however, was primarily construed as a precondition for the expansion of trade, and where the objectives of full employment and trade expansion came into conflict, the latter objective was given priority. Thus, the *Proposals* stipulated that "[d]omestic programs to expand employment should be consistent with realization of the purposes of liberal international agreements" and should not include measures

which are likely to create unemployment in other countries or which are incompatible with international undertakings designed to promote an expanding volume of international trade and investment in accordance with comparative efficiencies of production.<sup>600</sup>

Development was not among the US objectives for the ITO.<sup>601</sup> In the context of the employment provisions of the *Proposals*, it was only the "attainment of approximately full employment *by the major industrial and trading nations*" that was considered key to the realisation of the ITO's objectives in the international economic arena.<sup>602</sup> While the *Proposals* referred to the United Nations' pledge, in Article 55 of the UN Charter, to promote "higher standards of living, full employment, and conditions of economic and social progress and development",<sup>603</sup> the US considered the attainment of these objectives

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<sup>600</sup> *US Proposals 1945*, 9-10; according to Gardner, the provision on employment remained at the level of general principles "since neither Government had any well-developed views on how the employment problem could usefully be handled in any international agreement"; Gardner 1969, 148. One concern of the British was that the US would not take decisive steps, in the form of countercyclical policies, to avert another depression; the commitment in the *Proposals* (9) that signatory nations "will take action designed to achieve and maintain full employment" would thus have had some significance to them. See also Gardner 1969, 147, on the role of full employment in British public opinion. For a contemporary discussion, see Smithies 1947.

<sup>601</sup> See the "purposes of the Organization" listed in *US Proposals 1945*, 11; cf. *Senate hearing 1947*, 4, on the ITO chapter covering "economic development":

This chapter did not appear in the original United States draft ... It was added because a number of the underdeveloped countries felt that provisions dealing explicitly with this subject are a necessary and proper part of an International Trade Charter.

<sup>602</sup> *US Proposals 1945*, 9. (emphasis added)

<sup>603</sup> *US Proposals 1945*, 9.

to be the responsibility of the UN's Economic and Social Council. Curiously, the preamble of the GATT made reference to the first two of these objectives ("raising standards of living" and "ensuring full employment") but omits the latter (promoting "conditions of economic and social progress") – presumably reflecting the US view that trade expansion was the primary goal of the trading system.<sup>604</sup>

The development discourse which emerged at the Preparatory Conference took issue not so much with the US objectives of trade expansion as such as with what was perceived as a single-minded focus on trade liberalisation as the way to achieve it.<sup>605</sup> Several countries argued that the development of the less-developed countries held the greatest potential for an expansion of international trade, by creating demand for investment goods and by increasing the purchasing power of the population in less-developed countries.<sup>606</sup> And while the development discourse prioritised "development" over "liberalisation" as an objective, it did not establish a clear relationship between the two, thus opening the relationship to continuous redefinitions and renegotiations over the course of the history of international trade lawmaking – in response to changing economic conditions, intellectual currents, international power relations, and indeed changing conceptions of "development" and "liberalisation" itself.<sup>607</sup>

The difference between the objectives that the US and other developed countries associated with the trade regime, and the way the purpose of the trade regime is portrayed in the development discourse, is best illustrated by considering how the developing countries sought to shape the *second* constitutional moment of the trading system – the Uruguay Round negotiations on an agreement on trade in services – in a way that would

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<sup>604</sup> By contrast, the ITO Charter listed as one of its objectives to "foster and assist industrial and general economic development, particularly of those countries which are still in the early stages of industrial development, and to encourage the international flow of capital for productive investment." ITO Charter, Article 1, 2.

<sup>605</sup> The British delegate portrayed the conflict in terms of "expansion of trade" vs. "expansion of production":

I am absolutely convinced that you cannot have one without the other. If we divide ourselves into those who say "Expansion of trade is the only thing that matters", and those who say "Expansion of production is the only thing that matters", and still more if those two classes say "The expansion of our trade is the only thing that matters", and "The expansion of our production is the only thing that matters", then the world is in for a very serious trouble indeed. (E/PC/T/A/PV/26, 28)

<sup>606</sup> E/PC/T/23, 4, para. 1.

<sup>607</sup> One of the arguments provided by the US why provisions on "development" should not be included in the ITO Charter was that

[c]ontrary to commercial policy ... economic development presented considerable difficulty in its definition and machinery; it would therefore, be necessary first to consult the specialized agencies as well as the Economic and Social Council of the United Nations with which the Organization would co-operate. (E/CONF.2/C.6/SR.4, 6)

make it fundamentally different from the first. From the outset of the services negotiations, Brazil tried to establish the principle that these negotiations should not be "an exercise to liberalize trade in services at any costs", and that "trade liberalization [was not] an end in itself".<sup>608</sup> Brazil recalled that, in trade negotiations on goods, the principle of special and differential treatment had been "conceived as an afterthought to the GATT, as a right to derogate on an ad hoc basis from the general rules".<sup>609</sup> The negotiations on trade in services, by contrast, would have "to start from a totally different standpoint":

The objective of development will be ... the kernel of the exercise. We are mandated ... not to further the best theoretical possible allocation of resources at the world level, a result which in the end might work mainly for the advantage of a few more advanced States or of transnational corporations. ... Development shall have to be ... not a basis for derogation to possible general rules, but an integral part of any set of rules we may eventually devise.<sup>610</sup>

India spelt out some of the practical implications of this approach:

If the objective of development of developing countries is to be achieved, the enumeration of sectors of trade in services will have to be first tested in terms of whether, and to what extent, expansion of trade in such services would promote development of developing countries. It is not enough to generalize that international competition is good and that it would lead to maximization of welfare all around. ... the aim of development has to be understood as seen by the developing country concerned, and not in terms of some mysterious handiwork of an invisible hand operating through idealized market processes.<sup>611</sup>

India, too, rejected the way in which development had been addressed in the GATT:

We believe that we should not base our approach on assumptions borrowed from familiar areas of trade in goods supplemented by carving out exceptions in terms of special and differential treatment for developing countries. The objective of development should not be considered as an adjunct or an afterthought. The approach to the multilateral framework itself should be such as to ensure the achievement of this objective and it is here that one intensely feels the inadequacy of the GATT model.<sup>612</sup>

The contrast drawn here between the trade regime's approach to trade in goods, which was informed by the US objectives of trade expansion, and what the developing countries hoped would be its approach to trade in services, brings the differences between the developed countries' views and the development discourse into sharp relief.<sup>613</sup> For the latter, trade

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<sup>608</sup> MTN.GNS/W/3, para. 16.

<sup>609</sup> Ibid. para. 44.

<sup>610</sup> Ibid. para. 44.

<sup>611</sup> MTN.GNS/W/4, para. 14.

<sup>612</sup> Ibid. para. 15.

<sup>613</sup> For a discussion of these differences, see also Rolland 2012.

liberalisation, and even trade expansion, is no more than a means to an end.<sup>614</sup> The developing countries' commitment to trade lawmaking stands and falls by their perception of whether the law at issue would contribute to their development.<sup>615</sup>

In one respect, however, the US narrative and the development discourse converged: They both established a powerful connection between "developed country" status and trade liberalisation. While the development discourse allows discursive room for debates about the necessity and wisdom of trade liberalisation for "developing" countries, it associates, by negative implication, as it were, "developed" country status with liberal trade.<sup>616</sup> Once a country is "developed", there is no discursive refuge for trade protection. This tightening of the discursive breathing space arguably constitutes a powerful disincentive for "developing" countries to "graduate" to "developed" country status.

### **C. Relationality: Differentiation in the Trading System**

Entangled with the contestation of the historical trajectory and telos of the trading system was the question of the relationship between the members of the trade regime. At the time when the GATT and the ITO Charter were negotiated, "development" was a relatively new concept; in fact, according to some authors, it was not "invented" as an issue of international concern until Truman's proclamation of his "Four Points" in 1949.<sup>617</sup> Unsurprisingly, the differentiation between more or less "developed" countries remained very fluid at this time; in the trading system, the very desirability of such a differentiation remained contested.

Pre-war trade agreements provided no precedent for a differentiation between countries according to their "stage" of development. The agreements concluded by the United States with less-developed countries under the Reciprocal Trade Agreements

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<sup>614</sup> MTN.TNC/MIN(88)/ST/25, 1:

For the developing countries, the expansion of international trade is not an end in itself. It is an instrument for economic development, which in turn provides the only solution to the chronic problems of structural imbalance, poverty and unemployment. The development dimension must, therefore, be made the focus of whatever rules we evolve for the world-trading system.

<sup>615</sup> SR.44/ST/17, 1:

The participation of developing countries in GATT is necessarily centred on the contribution that such participation makes to their development process.

<sup>616</sup> See e.g. Oxley 1990, 104:

Consistent with the prevailing philosophy of development, trade liberalization was not generally regarded as an obligation of developing countries. ... liberalization was what the industrialized countries had to do.

<sup>617</sup> Rist 2010, Chapter 4.

programme, sixteen in all, made no distinction between the contracting parties.<sup>618</sup> According to Evans, it was under the influence of this tradition that the drafters of the GATT "went to some lengths to avoid making any formal distinction between different classes of members".<sup>619</sup> In accordance with the market metaphor, countries were to be regarded as formally equal.<sup>620</sup>

During their bilateral discussions, British and US officials mostly described less-developed countries as "countries in an early stage of (industrial) development", without however establishing a legal category.<sup>621</sup> During the Preparatory Conference, the attributes "undeveloped",<sup>622</sup> "non-developed",<sup>623</sup> "underdeveloped",<sup>624</sup> "less-developed",<sup>625</sup> "developing",<sup>626</sup> "inadequately developed relative to their potential",<sup>627</sup> "less industrialized",<sup>628</sup> and "young" country, as opposed to "more" or "highly developed", "advanced", and "industrialized" country were used virtually interchangeably. But not only was the terminology unsettled; the concept of "development" itself was fluid, and many countries were unsure in which category they fell. Australia, one of the chief proponents of provisions on "economic development" in the Charter, saw itself as "an under-developed country in relation to the potential resources of our country", but admitted that there were "countries even less developed than we are".<sup>629</sup> Canada cautioned that "there are very few economies which can be said to be fully developed, certainly ours is not."<sup>630</sup> Belgium found the entire distinction dubious, pointing to the heterogeneity, in terms of size and factor endowments, of the countries "lump[ed] together" under the categories of "underdeveloped" and "industrial" countries, respectively, though it did not hesitate to describe itself as "an industrial country with ... a highly developed population".<sup>631</sup> Britain thought the distinction to be "totally unreal", and counselled against portraying the issue at

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<sup>618</sup> Hudec 1987, 6-7.

<sup>619</sup> Evans 1971, 114.

<sup>620</sup> Hudec 1987, 4: "The history begins with a legal relationship based essentially on parity of obligation".

<sup>621</sup> FRUS 1945, 2-3, 20, 34-35.

<sup>622</sup> E/PC/T/A/PV/22, 36.

<sup>623</sup> E/PC/T/A/PV/26, 39.

<sup>624</sup> E/PC/T/A/PV/22, 5, 15; E/PC/T/A/PV/26, 27.

<sup>625</sup> E/PC/T/23, 5.

<sup>626</sup> E/PC/T/23, 5.

<sup>627</sup> E/PC/T/23, 8.

<sup>628</sup> E/PC/T/23, 8.

<sup>629</sup> E/PC/T/A/PV/22, 5; see also E/PC/T/A/PV/26, 34, where Australia thanks the delegate of China for "kindly restor[ing] Australia's status as an under-developed country".

<sup>630</sup> E/PC/T/A/PV/22, 21.

<sup>631</sup> E/PC/T/A/PV/22, 33.

hand – the prohibition of quantitative restrictions – as "a definite division between two classes of countries".<sup>632</sup>

The original GATT did not contain the term "less-developed contracting parties";<sup>633</sup> instead, the "economic development" exception was made available to countries described in terms of elaborate criteria, namely a "contracting party, the economy of which can only support low standards of living\* and is in the early stages of development\*", with ad notes further defining the key terms.<sup>634</sup> Presumably, these criteria would have made it possible, whenever a contracting party invoked the provision, to examine whether it met all the criteria, instead of having to rely on the self-designation of the respective party.

In practice, however, this was not attempted. In the context of tariff negotiations, the contracting parties early on found it "extremely difficult, not to say impossible" to solve the problem of the definition of "under-developed countries" by "means of general provisions", and recognised that this was a problem that "cannot be dealt with otherwise than on a case basis".<sup>635</sup> Attempts to "define developing country status in terms of objective economic criteria" were made in UNCTAD over several years, but were ultimately abandoned.<sup>636</sup> The principle of self-selection prevailed. At the same time, given the discretionary nature of most special and differential treatment, the extent to which a country would enjoy the benefits of developing country status depended heavily on the developed countries' recognition of that status.

The case of South Africa is perhaps the best illustration of the melange of economic, ideological and even emotional factors that make up the meaning of "developed" vs. "developing" country status. During the Preparatory Conference, South Africa was clearly uncomfortable with the distinction.<sup>637</sup> It tentatively put itself in the "under-developed" country category – on the basis that Australia, which saw itself as an under-developed country, had "done things in its development which we have not yet dreamed of in South Africa" – but then proceeded to employ this status not to make demands on the developed countries, but rather to lecture its fellow "under-developed" countries about the

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<sup>632</sup> E/PC/T/A/PV/26, 28.

<sup>633</sup> This term now appears in Part IV, which was added in 1965.

<sup>634</sup> GATT Article XVIII and ad notes to Paragraphs 1 and 4.

<sup>635</sup> L/58, 1.

<sup>636</sup> Paemen/Bensch 1995, 19.

<sup>637</sup> The South African representative stated:

It has not been clear to me, since this Conference started, where the line has actually been drawn between the two. (E/PC/T/A/PV/23, 10)

advantages of the American design for the ITO.<sup>638</sup> The desire of the representative to be regarded as a peer by the developed countries – he switched in the course of his statement from describing South Africa as an "under-developed" country to characterising it as a "not-fully-developed country"<sup>639</sup> – was unmistakable. It was precisely this aspiration that the US invoked 46 years later, when it rejected South Africa's request to be re-classified as a developing country as it was emerging from apartheid.<sup>640</sup> "South Africa", the US representative stated, "had never been viewed as a developing country and had itself taken pride in its capabilities as a world-class trader". Given that South African "ranked among the top 30 trading nations of the world" and was widely seen as a "predominantly manufacturing economy", the US government was "not disposed to recognize South Africa as a developing country" in the GATT context.<sup>641</sup> It appears that, for South Africa under white rule, being seen as a developed country was partly a point of pride; the African National Congress, by contrast, saw no shame in South Africa being classified as a developing country.

Given these ideational connotations of "developing country" status, it should perhaps not be surprising that, for a country to decide to change its status, it will often take more than the mere fact that it has ascended in the economic league tables. Despite the phenomenal growth experienced by many formerly poor countries over the past decades, the most important trend with respect to the relations between the members of the trading system has not been the "graduation" of developing countries to developed country status, but rather an increasing differentiation *within* the developing country category.

This differentiation has its origins in the Tokyo Round: the *Tokyo Declaration* was the first major policy document to call for "special attention" to be given to the "particular situation and problems of the least-developed among the developing countries".<sup>642</sup> It is not entirely clear who was the driving force behind this development. Winham portrays it as part of the developed countries' "graduation" agenda:

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<sup>638</sup> E/PC/T/A/PV/23, 10: "I may perhaps presume that I can also speak as a representative of an under-developed country to other under-developed countries." (emphasis added)

<sup>639</sup> E/PC/T/A/PV/23, 14.

<sup>640</sup> South Africa expressed the desire to be reclassified at its Trade Policy Review in 1993; C/RM/G/37, 106-107.

<sup>641</sup> C/RM/M/37, para. 54.

<sup>642</sup> *Tokyo Declaration* 1973, para. 6.

The industrialized members of GATT took the position that a distinction should be made for levels of development among the less-developed countries, while the backers of the Group of 77, sensing that such a distinction might be used to deny them preferential treatment, strongly resisted the attempt to develop a relative notion of development.<sup>643</sup>

Other evidence contradicts this view, however.<sup>644</sup> Thus, the report of the Preparatory Committee consistently notes that it was "[d]elegations from developing countries" who "proposed that the negotiations should also provide for special consideration of the problems" of not only the least-developed, but also the land-locked developing countries.<sup>645</sup> Moreover, US officials internally characterised the debate about special treatment for least-developed countries as "basically a LDC problem" on which "[t]he LDCs themselves could not agree".<sup>646</sup>

While the initiative for further differentiation thus likely originated among the developing countries themselves, it held attractions for both sides of the "graduation" debate. For the more advanced developing countries, it was a superior alternative to full graduation: While they might have to forego some preferential treatment, the fundamental distinction between them and the developed countries was preserved. For the developed countries, in turn, increased differentiation, while inferior to full graduation, opened up the opportunity to ratchet up obligations on the advanced developing countries to an extent that would be unfeasible if the same obligations also applied to the least-developed countries.

In the Doha Round Modalities for Agriculture, differentiation has been taken to new heights.<sup>647</sup> Apart from the three "generally recognized categories of Members – LDCs, developing countries, and developed countries",<sup>648</sup> the Doha Round Agricultural Modalities contain differentiated obligations for five groups of countries: recently acceded members (RAMs), very RAMs, small low-income RAMs with economies in transition, net food-importing developing countries (NFIDCs), and small vulnerable economies (SVEs). The criteria by which this increasing differentiation occurs do not exhibit a readily discernible

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<sup>643</sup> Winham 1986, 94.

<sup>644</sup> Winham cites no source for his contention.

<sup>645</sup> MIN(73)W/2, paras. 12, 13, 20, 24, 34, 72. Land-locked developing are not specifically mentioned in the *Tokyo Declaration*.

<sup>646</sup> FRUS 1969-1976, 684: the US only needed "to watch it to make sure that their internal argument does not disrupt the Tokyo meeting". Note that the abbreviation "LDC" in this quote refers to "less-developed country".

<sup>647</sup> On the increasing differentiation of WTO members, see also Pauwelyn 2013a.

<sup>648</sup> JOB/GC/40, 1. Presumably, "generally recognized categories" refers to categories that are recognized independently of any particular negotiating context, such as the selection process of the Director-General, the context from which this statement stems.

pattern or trend. Very RAMs and small low-income RAMs with economies in transition are identified *ad hoc* in the modalities themselves;<sup>649</sup> NFIDCs are identified in a list maintained by the Committee on Agriculture.<sup>650</sup> Apart from the LDCs, which are recognized as such by the Economic and Social Council of the UN on the basis of a number of economic and social criteria,<sup>651</sup> only the SVEs are explicitly identified on the basis of objective economic benchmarks.<sup>652</sup> While the modalities state that the SVE designation is "not meant to create any sub-category of Members", it is highly likely that the separate treatment of SVEs in the Agricultural Modalities will serve as a precedent for future negotiations.

One of the effects of the increased differentiation of the developing country category is that, by and large, WTO Members that remain in the developing country category without being part of any other subgroups comprise those countries that would probably fall within a hypothetical "emerging economies category", were they not so virulently opposed to giving up the developed/developing country distinction.<sup>653</sup> Arguably, the trend towards differentiation has thus also changed what it means to be "just" a "developing country", without additional qualifications.

## **D. Conclusion**

The development discourse has played a paradoxical role in multilateral trade lawmaking: on one hand, the idea of development has naturalised the subordinate and dependent position of the poorer members of the trading system. By positing a generic state of underdevelopment from which the "developing" countries were "just" emerging, it not only obscured the colonial past, but also borrowed imagery that had informed the colonial project. On the other hand, the idea of development contained a powerful emancipatory claim, namely, the ambition of the "less-developed" countries to escape the trading positions entrenched under colonial rule, and to attain the levels of productivity and

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<sup>649</sup> TN/AG/W/4/Rev.4, para. 9.

<sup>650</sup> G/AG/5/Rev.10.

<sup>651</sup> For details, see *UN 2008*.

<sup>652</sup> TN/AG/W/4/Rev.4, para. 157 and Annex I; SVEs are defined on the basis of their share of world merchandise trade (no more than 0.16 per cent), share of world trade in non-agricultural goods (no more than 0.10 per cent) and share of world agricultural trade (no more than 0.40), averaged over the 1999-2004 period.

<sup>653</sup> Among these are China, India, Brazil, Argentina, South Africa, Malaysia, Indonesia, Mexico, and Thailand.

material well-being of the industrialised countries – an aspiration that had for the most part been stymied under colonial rule.

In its emancipatory ambition, the development discourse clashed with the views held by the US and most other developed countries about the historical significance, the aims, and the relationships between the members of the multilateral trading system. Where the US saw the historical mission of the trade regime in overcoming the protectionist past, the developing countries viewed the regime as an endeavour that could prove its worth only in the future – and that could easily turn out to be more harmful than the "liberty of the jungle" if it was unduly restrictive of the "young" countries' development. Where the US saw trade expansion, to be achieved by unshackling trade from governmental restrictions, as the core objective of the trading system, the developing countries considered trade merely as a means to an end. They saw little use in a trade organization that protected established trade flows but did not play an active role in transforming the international division of labour. Finally, while the US did not want to introduce the issue of development into what it saw as a "commercial" agreement – it would have preferred to leave the United Nations to deal with what it regarded as a complicated political issue – the developing countries always understood and defined their position in relation to the trade regime and its members in terms of development; as a result, the perceived degree of development, rather than ideological or geographical divisions, has been the primary principle of differentiation among the trade regime's members throughout its history. In sum, the meaning and purpose of the trade regime have been contested in fundamental ways from the very beginning.

## Chapter 2: Practices

In her article “Negotiation, Meet New Governance: Interests, Skills, and Selves”, Amy Cohen explores the complementarities between the perspectives of two literatures: the micro perspective of the negotiation literature, which draws on practical experience in business negotiations and alternative dispute resolution to identify and promote “effective” negotiating strategies and attitudes, and the macro perspective of the New Governance approach to social organisation, a mode of governance that seeks to avoid both the rigidity and unresponsiveness of the state and the unpalatable distributive consequences of a self-regulating market. The institutional designs of the New Governance approach, Cohen argues, are ultimately dependent on precisely the kinds of individuals – flexible, strategic, un-dogmatic, and collaborative – that the negotiation literature seeks to mould. Cohen describes the negotiating “skills” that the two literatures promote as “technologies of the self” that enable individuals to redefine their interest in terms “cognisable” within a pre-existing order. As Cohen puts it, “one of the greatest benefits – but simultaneously greatest costs – of these skills is that they are purposefully designed to shape individual interests in ways that are strategically adaptive to existing social and power relations”.<sup>654</sup>

Cohen's investigation of the relationship between institutions and selves provides a useful entry point to the analysis of the lawmaking practices in the multilateral trading system.<sup>655</sup> Throughout the trading system's history, trade lawmaking has for the most part taken place in “clubs” of varying sizes and composition. Whether a participant in trade lawmaking found itself on the inside or the outside of the club depended in large part on its negotiating attitude, and, more specifically, on whether and to what extent it was ready to engage in reciprocal bargains with the dominant traders. It was by constituting a club – the General Agreement on Tariffs and Trade – which operated outside, and would later have operated *within*, the larger International Trade Organization that the major trading powers first established the principle of payment as the uncontested foundation for tariff negotiations. Over the course of the GATT's history, the club dynamic was employed to extend the reciprocity principle to ever new areas of negotiation. Whoever was not prepared to engage in “give and take”, whatever the merits of the issue in question, was simply

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<sup>654</sup> Cohen 2008, 540.

<sup>655</sup> For a definition of the concept of "practice", see *supra* fn 11.

excluded from effective participation in the negotiations. Over time, the institutional tool of the club thereby fostered bargaining attitudes in line with the reciprocity discourse<sup>656</sup> and frustrated alternative, more principled approaches to multilateral trade lawmaking. The *institutional* features of trade negotiations were thus employed to mould the *selves* of the participants in trade lawmaking in a way that would make them more accepting of, compliant with, and ultimately invested in lawmaking on the basis of the principle of payment.

In the present chapter, I will focus on the practices of participation in multilateral trade lawmaking. For reasons of space, I cannot analyse here a number of other practices that play a vital role in multilateral trade lawmaking, in particular, practices of representation,<sup>657</sup> decision-making,<sup>658</sup> and chairing.<sup>659</sup>

## I. Practices of Participation

When US and British officials started negotiating about the structure of the post-war trading order, they envisaged a universal international organisation that would be the counterpart of the United Nations in the economic sphere.<sup>660</sup> This “impulse to universality”<sup>661</sup> was reflected in the US's ambition to negotiate a charter for an international

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<sup>656</sup> See Lang 2013, 157-158:

Markets ... rests not only on a bedrock of legal rules which help to define the relations between market participants, but also on the ongoing production of market participants with the recognizable dispositions, motivations, and cognitive characteristics of the calculative *homo economicus*.

The same is arguably true for the legislative marketplace created by the market metaphor of multilateral trade lawmaking.

<sup>657</sup> Questions of representation have arisen in multilateral trade lawmaking in two dimensions: a vertical and a horizontal dimension. The vertical dimension refers to the representation of the interests of GATT/WTO members in an institutionalised body comprising only a subset of the membership. Questions of representation in this sense were extensively debated in the trading system on three occasions: during the GATT/ITO preparatory negotiations with respect to the composition of the "Executive Board" of the ITO; during the 1970s with respect to the composition of the "Consultative Group of 18"; and in the wake of the Seattle ministerial, when the WTO membership debated reforms to procedural rules, including the conduct of "Green Room" meetings. In all these contexts, the debate revolved around the question of whether those states which formed part of the more select group would be expected to represent their own individual or factional interests, or whether they should act in the interest of the membership as a whole.

The horizontal dimension refers to the representation of the interests of GATT/WTO members in coalitions. Coalitions started to become a prominent feature of lawmaking in the trading system during the Uruguay Round and have been playing a central role in the Doha Round negotiations. The literature on this subject is extensive; see only Hamilton/Whallery 1989; Higgott/Cooper 1990; Narlikar 2003; Narlikar/Odell 2006; Narlikar 2012.

<sup>658</sup> See the literature cited *supra* in fn. 36.

<sup>659</sup> For excellent discussions, see Odell 2005; Kanitz 2010.

<sup>660</sup> See *US Proposals 1945*, 1; *Senate Hearings 1947*, 3, cited *supra* in fn 543.

<sup>661</sup> Kahler 1992, 681.

trade organisation through “United Nations machinery”<sup>662</sup> and in the persistence with which it sought the cooperation of the Soviet Union and, to a lesser extent, China, in this endeavour. The US also agreed to add chapters on employment – and later and more hesitantly, development – to its draft charter in order to widen the appeal of the organisation.<sup>663</sup>

As I have described in the previous chapter, however, during the discussions on the procedures for tariff reductions the US, UK and Canadian negotiators also began to consider an alternative paradigm of participation for the multilateral trading system: the club. Economic theory defines clubs by reference to the characteristics of the goods that the members of the club share. Put simply, a 'club good' is a good that is best shared with some, but not too many, others. As a consequence, the club members seek to exclude those whose participation would pose higher costs than benefits. To say that states adopt a club approach to multilateral trade lawmaking, then, is to say that they seek to manipulate the circle of participants depending on how they weigh the costs and benefits of the participation of additional states.<sup>664</sup> In the present section, I will first discuss what the major trading nations perceived these costs and benefits to be, i.e., what it was that prompted them to see participation in multilateral trade lawmaking as a 'club good'. I will also explore how these countries attempted to reconcile the club approach with their ambition to establish a universal organisation (A). I will then trace how the club dynamic manifested itself in the practices of participation in multilateral trade lawmaking throughout the history of the GATT (B). Next, I will argue that a fundamental recalculation of the costs and benefits of the participation of developing countries in the trading system led the major developed countries to conclude the Uruguay Round with the establishment of a new club with very different characteristics from the GATT, namely, the WTO (C). In the WTO, the club dynamic of participation survives in at least three different incarnations: overtly, in accession negotiations; formalised in negotiations in “variable geometry”; and disguised, in the increased differentiation of obligations.

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<sup>662</sup> FRUS 1944, *passim*.

<sup>663</sup> See FRUS 1945, 118, where the Secretary of State explains to President Truman that the pledge to maintain employment was "important to insure the cooperation of other countries in achieving our trade objectives."

<sup>664</sup> According to the economic theory of clubs, the "optimal" size of a club is reached when the marginal benefits that [a club member] secures from having an additional member ... are just equal to the marginal costs that he incurs from adding a member. (Buchanan 1965, 5)

## A. The Club Within: GATT and the ITO

There can be no doubt that the US design for the post-war trading order was originally of a universal nature. During the Second World War, the US leveraged the aid that it was granting its allies to secure their commitment to enter into discussions on the post-war international economic order with the US and other governments. The US originally negotiated the wording of Article VII of its mutual aid agreements with Britain, but copied it verbatim into all later mutual aid agreements, among them those with the Soviet Union and China. Article VII of the mutual aid agreements committed the parties to

agreed action ... open to participation by all other countries of like mind, directed to the expansion, by appropriate international and domestic measures, of production, employment, and the exchange and consumption of goods.<sup>665</sup>

Even before the first exploratory discussions on the post-war economic order pursuant to Article VII took place between the United States and Britain, the British government suggested that the Soviet Union and China be notified that such consultations were planned and that they be kept “generally informed on the upshot of the discussion”.<sup>666</sup> US officials agreed; they were concerned not to

give the impression that the United States and Great Britain were coming to previous agreements on the matters [i.e. monetary and commercial policy] before other governments were brought in and acquainted with the progress of the discussions.<sup>667</sup>

Referring to Article VII of its mutual aid agreements, the US further informed the British that

the United States [was] in a somewhat different position than that of the United Kingdom in respect to the Soviet Government and the Chinese Government, in that the United States ha[d] exactly the same commitments to those Governments that it ha[d] to the United Kingdom Government.

The US government had therefore decided

to extend invitations [to hold exploratory talks] to the Soviet Government and to the Chinese Government identical to those which ha[d] been extended to the United Kingdom Government.<sup>668</sup>

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<sup>665</sup> See, for example, Article VII, respectively, of the Anglo-American Mutual Aid Agreement, and of the Mutual Aid Agreement between the United States and the Union of Soviet Socialist Republic.

<sup>666</sup> FRUS 1943, 1108-1109.

<sup>667</sup> Ibid. 1109.

In the following months, the US reiterated its desire to enter into exploratory discussions on commercial policy with the Soviet Union. At the tripartite conference of foreign ministers in Moscow in October 1943, the US presented a memorandum on the “Bases of Our Program for International Economic Cooperation”, in which it suggested the conclusion of a general convention to which all of the important countries of the world would be parties, which would lay down the rules and principles that should govern trade relations between nations.<sup>669</sup>

The US also proposed the establishment of a “Commission comprising representatives of the principal United Nations”, i.e. the US, the UK, the USSR and China, and “possibly certain others of the United Nations”, such as “Canada, the Netherlands and Brazil”, to discuss and set up the necessary procedures. The US further presented a memorandum summarising the results of the exploratory discussions between the US and the UK that had already taken place,<sup>670</sup> and stated that it was “particularly important that similar conversations be arranged soon between Soviet and American experts”.<sup>671</sup> Later in 1943, President Roosevelt personally raised the issue with Churchill and Stalin at the Teheran Conference,<sup>672</sup> and again urged the “establishment of United Nations machinery for postwar economic collaboration” in separate letters to Churchill and Stalin in February 1944.<sup>673</sup> The US repeated these requests in April and May 1944.

While the exploratory talks with the Soviet Union and China never took place, the persistence with which the US attempted to initiate discussions especially with the Soviet Union is evidence of its expectation that the international economic arrangement of the post-war era would be firmly anchored within the framework of the United Nations, in which the Soviet Union was anticipated to play a key role. The US also sought the inclusion of the Soviet Union in the inner circle of the negotiations “as a means of working out a solution of problems of [the] state trading system”<sup>674</sup> – a further indication of the universal scope ultimately desired for the proposed organisation. Consistent with its

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<sup>668</sup> FRUS 1943, 1110; for the details on the invitation to the Soviet government, see *ibid.* 1111; discussions with the Chinese embassy in Washington are mentioned *ibid.* 1118. Although there was no mutual aid agreement between the US and Canada, the US decided that exploratory discussions should be held with Canada as well; *ibid.* 1125.

<sup>669</sup> *Ibid.* Annex 9.

<sup>670</sup> *Ibid.* 766-768.

<sup>671</sup> *Ibid.* 766; the US Secretary of State Cordell Hull reiterated this point in conversations; see *ibid.* 665-666.

<sup>672</sup> *Ibid.* 530-533.

<sup>673</sup> FRUS 1944, 15. Stalin's positive reply is *ibid.* 22-23.

<sup>674</sup> FRUS 1945, 89.

ambition to pursue the establishment of a post-war international economic order through “United Nations machinery”, the US introduced a resolution calling for an “International Conference on Trade and Employment” at the First Session of the Economic and Social Council of the United Nations held in February 1946.<sup>675</sup> The resolution established a Preparatory Committee to elaborate a draft convention and appointed nineteen states as members of the Committee. One month before the first session of the Preparatory Committee in October 1946, the United States published a *Suggested Charter for an International Trade Organization of the United Nations*. Consistent with the “impulse to universality”, the proposed organisation was to have low barriers to entry: no more was supposed to be required of new members than to accept the obligations of the charter.<sup>676</sup>

The *Suggested Charter*, however, also embodied a different paradigm of participation with respect to one central issue: tariff negotiations. As described in the previous chapter, it was in the context of their discussion of alternative methods of tariff reductions that US, UK and Canadian negotiators first considered the idea of holding negotiations initially among a “nucleus of important trading nations”.<sup>677</sup> Three rationales for the “nuclear group”,<sup>678</sup> or “club”,<sup>679</sup> approach emerged during the discussions. First, given that the US insisted on using the method of bilateral requests and offers to negotiate tariff reductions, the three states considered it more *practicable* to conduct tariff negotiations initially among a small group of countries. Recognising the limited negotiating capacity of its partners, including the UK and Canada,<sup>680</sup> the US granted that

the number of countries should be kept small since the greater the number engaged in simultaneous negotiations the more difficult the negotiating problem, particularly for countries other than the United States.<sup>681</sup>

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<sup>675</sup> See E/PC/T/117/Rev.1, para. 1; for the text of the resolution, see Brown 1950, 59.

<sup>676</sup> See *Suggested Charter 1946*, Article 2; see also *Senate Hearings 1947*, 3: “Chapter II, relating to membership, looks toward world-wide participation in the organization”.

<sup>677</sup> The idea is first mentioned by the US negotiator Harry Hawkins; FRUS 1945, 59.

<sup>678</sup> FRUS 1945, 72.

<sup>679</sup> The term “club” was first used by a Canadian negotiator; FRUS 1945, 65.

<sup>680</sup> The impracticability of conducting multiple bilateral negotiations simultaneously had been one of the primary objections of the UK and Canada to the bilateral request and offer method of tariff negotiations; see *supra* text at fn 86.

<sup>681</sup> FRUS 1945, 88; see also Canada's remark that

[i]t seemed obvious that this [i.e., bilateral tariff negotiations] could not be done if too many countries were involved, but it might be achieved among a relatively small nucleus of countries, say 8 to 12 of the major trading nations. (FRUS 1945, 71)

Second, the club approach would allow the “nuclear” countries to agree on the procedure for tariff reductions, as well as disciplines on non-tariff barriers, without having to take into account the views of other countries. States which the nuclear countries feared would not be constructive or sufficiently ambitious could simply be excluded (unless their inclusion was essential for political or economic reasons). The Canadians argued, for example, that

a general conference of all countries might be dangerous, since the views of the many small countries might unduly weaken the bolder measures which the large trading nations might find it possible to agree upon. ... [J]udging from past experience, the presence at a general international conference of the less important, and for the most part protectionist-minded, countries, would inevitably result in a watering down of the commitments which a smaller number of the major trading nations might find it possible to enter into.<sup>682</sup>

There were some differences of opinion between the US and Canada regarding the extent to which legal disciplines on non-tariff barriers, rather than just bilateral tariff bargains, should be definitely agreed among the smaller circle of countries. With a view to their ambition for an ultimately universal organisation, the Americans had “reservations” as to the “desirability of actually concluding the arrangements among the nuclear group prior to the holding of a general international trade conference at which the views of other countries would be obtained.”<sup>683</sup> The Canadians, by contrast, were adamant “that the arrangements among the nuclear group should not be kept open and thereby made subject to changes at the general conference.”<sup>684</sup> These differences in detail notwithstanding, the proponents of the nuclear approach clearly saw it as a way to *shield* certain elements of the proposed trading arrangements – the procedure and level of ambition of the tariff negotiations in the case of the US, in the case of the Canadians the rules on non-tariff barriers as well – from the scrutiny and influence of outsiders.

A third, and related, rationale for the nuclear approach was that it would, at a later stage, present the opportunity to force those outsiders into the arrangement *on the nuclear group's terms*. The proponents of the approach expected that, given its members' share in international trade, the nuclear group would exert a pull on outsiders to join the arrangement, even though the latter would have had no part in its creation and little say about its terms. Harry Hawkins, who first brought up the idea of an agreement among a

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<sup>682</sup> FRUS 1945, 64 and 71-72.

<sup>683</sup> FRUS 1945, 73.

<sup>684</sup> Ibid.

“nucleus of important trading nations”, assumed that “other countries might be more or less obliged to adhere” to it.<sup>685</sup> The Canadians were greatly preoccupied by the question of how to achieve the “compulsion of outsiders”; they were concerned that the bilateral method of tariff reduction was not well suited for use “as a weapon to force” “reluctant countries” to participate in the agreement.<sup>686</sup> One approach discussed between the US and Canada to deal with this question was to require new members “to negotiate their way in by entering into bilateral agreements with each of the countries making up the nuclear group”, under the threat that tariff concessions which the members of the nuclear group had negotiated with each other might otherwise be withdrawn after a “probational period”.<sup>687</sup> As will be discussed below, it was this approach that the US ultimately proposed in its *Suggested Charter*.

The three motivations for the club approach – the greater practicality of negotiating and reaching agreement among a smaller group of countries, the ability to shape the content of this agreement more decisively than would otherwise be feasible, and the possibility to compel outsiders to join the agreement largely on the insiders' terms – have shaped the practices of participation in multilateral trade lawmaking throughout the history of the trading system, though the relative prominence of these three motivations has varied. Another key factor has been the considerations that went into selecting members of the club. Here, too, the discussions between US, the UK and Canada in 1945 foreshadowed things to come.

From the outset of the discussions on the composition of the nuclear group, the US, UK, and the British Dominions (Australia, Canada, New Zealand, and South Africa) were treated as the “very minimum for such a nucleus”.<sup>688</sup> The inclusion of the Dominions primarily reflected their close political and economic ties with the UK. The UK had been “anxious to have the Dominions keep in agreement with Britain and the United States at each stage of the economic talks”,<sup>689</sup> and the four countries had therefore had considerable indirect (or in the case of Canada, direct) input into the exploratory talks between the US

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<sup>685</sup> FRUS 1945, 59.

<sup>686</sup> FRUS 1945, 67-68; see also the discussion of how to deal with “countries refusing to participate” *ibid.* 72.

<sup>687</sup> FRUS 1945, 73; the negotiators acknowledged that these questions would “require the reexamination of existing most-favored nation commitments”.

<sup>688</sup> FRUS 1945, 59.

<sup>689</sup> FRUS 1944, 1-2.

and the UK.<sup>690</sup> The same was true for India, even though it had not yet gained independence from Britain at the time. In the case of India, however, the US initially resisted its inclusion into the nuclear group, partly on the basis that “the strongly protectionist sentiment in India ma[de] it unlikely that India could be persuaded to join [the] nuclear group in expeditious tariff reduction.”<sup>691</sup> Individual UK officials harboured similar concerns. Keynes, in particular, feared that it might “not be practicable” to get some of the developing countries, “particularly India”, “to enter into a convention that will go as far as United States and United Kingdom will be prepared to go.”<sup>692</sup> In the end, India was included at the insistence of the British.<sup>693</sup>

A list of “nuclear” countries proposed by the US Secretary of State in August 1945 as reflecting the “combined political and economic judgment of the [State] Department” further included the other members of the “Big Five” (the Soviet Union, China, and France), as well as “major trading nations of Europe, Latin-America and the Orient”, the including the Netherlands, Belgium and Brazil.<sup>694</sup> The State Department felt that the “[d]efinition of the nucleus by some easily understandable objective standard” was “important in justifying [the] exclusion of other countries”<sup>695</sup> and that the inclusion of the Big Five, as a shorthand for political importance, and major trading nations from different parts of the world (economic importance and representativeness) constituted such a standard. Another consideration for the State Department was the opportunity to influence – through inclusion in the nuclear group – the trade policies of states in which these policies were perceived to be in flux. Thus, the Department saw the inclusion of China as providing an opening to “influenc[e] along liberal lines the direction of Chinese commercial and industrial policies which are presently in process of development.”<sup>696</sup> Similarly, the fact that Belgium and the Netherlands were planning a customs union and would therefore have to renegotiate their trade agreements with other countries militated for their inclusion, in

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<sup>690</sup> See FRUS 1944, 1, reporting on extensive UK consultations with the Dominions; and FRUS 1945, 3, where US officials note their impression that the UK had been “drawn” into a position “under pressure from ministerial quarters and from the attitudes of India and Australia and the anticipated attitudes of other countries in a relatively early state of development.”

<sup>691</sup> FRUS 1945, 89.

<sup>692</sup> FRUS 1945, 20.

<sup>693</sup> FRUS 1945, 137-138.

<sup>694</sup> FRUS 1945, 88; the Department felt that including Argentina, as the British had urged, was “out of the question”; *ibid.* 89.

<sup>695</sup> FRUS 1945, 88.

<sup>696</sup> FRUS 1945, 89.

order to ensure “that this revision … take place along lines harmonious with [the US'] general commercial policy.”<sup>697</sup>

The considerations which determined whether a country would be invited to be part of the nuclear group thus included the following: economic influence, as measured in shares of world trade, and perceived political importance; strong political ties to one or more of the core members of the group; representativeness in terms of geography and trading profile;<sup>698</sup> and the opportunity of influencing trade policies at times of political transition. Countries which were either not significant in trade terms, which were expected to oppose the core countries' plans or not to show sufficient ambition in reducing trade barriers, were to be excluded – unless they had an ally among the core countries, as was the case for India and Australia. The list proposed by the State Department would be reflected, with a few additions, in the membership of the Preparatory Committee as well as, later, the original membership of the GATT.<sup>699</sup>

The *Suggested Charter* published by the US in September 1946 envisaged the following reconciliation of the club approach to the tariff negotiations with the universal ambit of the ITO. The GATT and the ITO Charter would be negotiated on separate institutional tracks.<sup>700</sup> While the preparatory negotiations for the Havana conference, at which the ITO Charter was to be concluded, were sponsored by the UN's Economic and Social Council, the GATT would be, as the *Suggested Charter* explained, an “arrangement for the concerted reduction of tariffs and trade barriers among the countries *invited by the United States* to enter into negotiations for this purpose”.<sup>701</sup> Once the ITO Charter came into force, the exclusive character of the GATT would be temporarily preserved *within* the ITO in the form of an “Interim Tariff Committee”, which would originally consist of all

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<sup>697</sup> *Ibid.*

<sup>698</sup> As mentioned above, the participation of the Soviet Union was sought in order to negotiate questions of state trading; the US also wanted to include China on the grounds that it would “permit the United States to offer reductions in duties on commodities of which the Orient was practically the sole supplier”; *ibid.*

<sup>699</sup> It should be noted that the members of the United Nations, which would be invited to participate in the Havana Conference, were themselves something of a club, since the UN was by no means a universal organisation at the time. The discussion about which non-UN countries to invite to the Havana Conference has some eerie echoes of the discussions about the composition of the “nuclear” group; see, e.g., FRUS 1947, 915-916.

<sup>700</sup> Brown 1950, 61-63.

<sup>701</sup> *Suggested Charter* 1946, footnote 1 to Article 56(2) (emphasis added); see also Brown 1950, 61-63.

ITO members which were also parties to the GATT.<sup>702</sup> The sole task of this Committee would be to decide whether an ITO member had complied with its obligation, under Article 18 (1) of the *Suggested Charter*, to enter, upon request, into “reciprocal and mutually advantageous negotiations” with other members “directed to the substantial reduction of tariffs (or of margins of protection afforded by state trading) on imports and exports”.<sup>703</sup> If the Committee determined that a member had failed to fulfil this obligation “within a reasonable period of time”, it could authorise

the complaining Member, or in exceptional cases the Members of the Organization generally, ... notwithstanding the provisions of Article 8 [General Most-Favored-Nation Treatment], ... to withhold from the trade of the other Member any of the tariff reductions which the complaining Member, or the Members of the Organization generally ... may have negotiated pursuant to paragraph 1 of this Article.<sup>704</sup>

ITO members which were not original parties to the GATT could only join the Committee when, “in the judgment of the Committee”, they had undertaken tariff reductions “comparable in scope or effect to those completed by the original members of the Committee”.<sup>705</sup> In other words, they had to “negotiate their way in”, as the US and Canada had envisaged during their exploratory discussions.<sup>706</sup> Only when two thirds of the ITO's members had become members of the Interim Tariff Committee would the Committee cease operation and its functions be transferred to the ITO membership as a whole.<sup>707</sup>

The Interim Tariff Committee, then, was to be the club within. Its members would have controlled admission, with wide discretion in deciding whether the prospective entrant had earned the privileges of membership,<sup>708</sup> and would have been able to wield the ultimate power in the trade context – the power to authorise the suspension of tariff concessions – against any member who refused to engage in tariff negotiations to the satisfaction of its trading partners. Although the obligation to engage in tariff negotiations was to be couched in general terms (“Each Member ... shall ...”), it was clearly directed at those outside the

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<sup>702</sup> *Suggested Charter 1946*, Article 56 (2); see also Crowley/Haddon-Cave 1947, 42, who report the state of the draft on the Interim Tariff Committee after the conclusion of the first session of the Preparatory Committee, which took place in London in 1946.

<sup>703</sup> *Suggested Charter 1946*, Article 18 (1).

<sup>704</sup> *Suggested Charter 1946*, Article 18 (3).

<sup>705</sup> *Suggested Charter 1946*, Article 56 (2).

<sup>706</sup> FRUS 1945, 73.

<sup>707</sup> The so-called “Conference”; *Suggested Charter 1946*, Article 56 (2).

<sup>708</sup> The *Suggested Charter* did not foresee a right for ITO members to appeal decisions of the Interim Tariff Committee to the Conference. Introducing such a right was discussed at the Havana Conference; see.

club who had not already undertaken such negotiations (and had been excluded from the club in the first place partly on the basis of their presumed unwillingness to engage in them). The ostensible institutional “reconciliation” of the GATT with the ITO, then, was from the start conspicuously informed by the third rationale for the club approach: the ability to force others to join the club on the members' terms.

The US draft of this arrangement survived the sessions of the Preparatory Committee in London and Geneva relatively unscathed<sup>709</sup> – perhaps unsurprisingly, since all members of the Preparatory Committee could expect to become original members of the GATT and thus of the (Interim) Tariff Committee.<sup>710</sup> At the Havana conference, however, the arrangement faced a backlash from the prospective outsiders. They were particularly aggrieved that the draft charter did not provide for an appeal of the decisions of the Tariff Committee (either to the Executive Board, the Conference, the International Court of Justice, or through dispute settlement proceedings).<sup>711</sup> During the negotiations, the UK negotiator acknowledged that the

Tariff Committee's special membership and consequent independent character and function had caused confusion and even the suspicion that the Tariff Committee would be an exclusive club unaccessible to countries with no basis to carry out the undertakings contained in Article 17 [the obligation to carry out tariff negotiations], and that the club's exclusiveness would enable the members to exercise unduly powerful influence over the work of the Organization.<sup>712</sup>

Canada likewise recognised the “fear of some countries” that, under the arrangement envisaged by the draft charter, “powerful countries might force substantial tariff reductions on weaker ones, and that in the case of refusal, the latter would be kept from participation

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<sup>709</sup> The articles corresponding to Articles 18 and 56 in the *Suggested Charter* are identical in the *London Draft* (Articles 24 and 67) and are slightly modified and developed in the *Geneva Draft* (Articles 17 and 81); in the *Geneva Draft*, ITO members who successfully conclude tariff negotiations under Article 17 automatically become contracting parties to the GATT, and thereby also members of a (now permanent) “Tariff Committee”; the Tariff Committee only exercises indirect control over the accession of new members (i.e. through the power to determine, in case of a disagreement, whether the latter have complied with their obligation to “enter into and carry out” tariff negotiations); see *Geneva Draft*, Article 17 (1)(d) and Article 81 (2).

<sup>710</sup> The US extended the invitation to conduct tariff negotiations to all members of the Preparatory Committee; see Brown 1950, 61; by 1947, the “nuclear” group had thus become synonymous with the Preparatory Committee; see FRUS 1947, 912, fn \*: “Nuclear countries were those represented on the Preparatory Committee”.

<sup>711</sup> The Tariff Committee was explicitly exempt from the final authority of the Conference; *Geneva Draft*, Article 74 (1).

<sup>712</sup> E/CONF.2/C.6/SR.14, 3; at some point in the discussion the UK had apparently also referred to the Tariff Committee as an “oligarchy”; this characterisation was mentioned by Peru; E/CONF.2/C.6/SR.14, 8.

in the Organization.”<sup>713</sup> However, both the UK and Canada tried to reassure the opponents that these fears were unfounded, pointing to the experience of negotiating the GATT at the second session of the Preparatory Committee. The UK claimed that “most countries could find a basis for tariff agreements”, and even countries which had not negotiated tariff agreements might still be admitted to the Tariff Committee.<sup>714</sup>

The US was less apologetic. The US negotiator explained that

the central objective of the Organization was the reduction of tariffs and other obstacles to international trade. Only countries which had carried out the negotiations required by Article 17 should be members of the Tariff Committee – some countries present at the Conference had already done so and shown *what could be done*. Experience between the two World Wars showed the danger of adopting resolutions at international conferences which lacked any provision making for their implementation. Article 81 was one of the articles in the Charter which ensured this practice was not to be repeated and his delegation regarded it as of the highest importance.<sup>715</sup>

At the first meeting of a sub-committee set up to study the question, the official set out the US position in even stronger terms, emphasising

that the Organization was not to be a goodwill mission occupied in merely passing resolutions but it was to be an organization *tied to action*. The question before the Sub-Committee was not one of two international organizations – The Trade Organization and the Tariff Committee – but was one of two steps in a process towards obtaining the benefits of the Charter. One stop in this process was acceptance of the Charter; the other was the negotiations under Article 17, the conclusion of which gave automatic membership in the Tariff Committee. In connection with the second step it was correct that the necessary determination should be made only by Members which had carried out the negotiations themselves.<sup>716</sup>

What is striking is the peculiar meaning with which the US imbued the concepts “doing” and “action” in these statements. From an impartial perspective, the problem with the countries against which this remark was directed would not appear to be that they did not want “action”; rather, it was that they wanted “action” that was *different* from the “action” envisaged by the US. By framing its demand that other countries engage in a particular practice, namely reciprocal tariff negotiations, as a generic call for “action” and for something that “can be done”, the US signalled that the way it imagined trade lawmaking was the only way to do it. And against the backdrop of the club dynamic, this

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<sup>713</sup> E/CONF.2/C.6/SR.15, 1.

<sup>714</sup> E/CONF.2/C.6/SR.14, 2-3 (emphasis in original).

<sup>715</sup> E/CONF.2/C.6/SR.14, 9 (emphasis added).

<sup>716</sup> E/CONF.2/C.6/W.8, 2 (emphasis added).

was not mere rhetoric. What the club approach allowed the US to do was to actually make *their* “action”, i.e. reciprocal tariff negotiations, the only game in town. As I will argue throughout this chapter, it was this ability to marry institutional power to the imagery of “action” and “ambition” that would allow the US and the other major trading countries to gradually entrench the conception of trade lawmaking as necessarily based on reciprocity.

The controversy between the prospective insiders and outsiders about the authority and composition of the Tariff Committee was ultimately resolved through a compromise. The US had managed to establish a somewhat dubious parallelism between the Tariff Committee and the proposed Committee for Economic Development.<sup>717</sup> The compromise consisted in eliminating both the Tariff Committee and the Economic Development Committee from the charter.<sup>718</sup> Even without its institutional embodiment, however, the club dynamic of the relationship between the GATT and the wider ITO membership was preserved. This was accomplished by reversing the burden of proof in cases where a GATT member considered that a non-GATT member had failed to carry out tariff negotiations to the former's satisfaction. Under the original draft, the GATT member would have had to refer the matter to the Tariff Committee, which would have had to *authorise* the suspension of tariff concessions. Under the Havana Charter, a GATT member could *unilaterally* suspend tariff concessions towards any ITO member that had not acceded to the GATT two years after the ITO Charter had come into force *unless* the Organisation decided, by majority vote, to “require the continued application” of concessions on the basis that the ITO member in question had been “unreasonably prevented” from acceding to the GATT.<sup>719</sup> While this arrangement made it easier for an individual member to suspend concessions in response to unsatisfactory negotiations, it allowed all ITO members a say in whether this suspension was justified.

Although the ITO Charter never came into force, the controversy about the Tariff Committee is informative in that it sheds light on what kind of institution the major trading powers intended the GATT to be. The club character of the GATT was to be the guarantor of the principle of reciprocity, which the Havana Charter stated in the following terms:

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<sup>717</sup> E/CONF.2/W.15.

<sup>718</sup> E/CONF.2/45, 12-15; Brown 1950, 157-158.

<sup>719</sup> ITO Charter, Article 17(4)(b).

No Member shall be required to grant unilateral concessions, or to grant concessions to other Members without receiving adequate concessions in return.<sup>720</sup>

The most-favoured nation principle – which pursuant to Article 16 of the Havana Charter operated among all ITO members – harboured the danger that tariff concessions that GATT contracting parties had granted to one another would go permanently unrequited. The provisions concerning the Tariff Committee in the drafts of the Charter, and on the right to withdraw tariff concessions unilaterally in the final version of the Charter, were designed to allow GATT members to exact a payment for these concessions from other ITO members. More fundamentally, they gave GATT members the leverage to establish the principle of payment as the uncontested foundation for tariff negotiations. Whoever was not prepared to pay for tariff concessions could simply be excluded from the club.

## **B. The Self-Perpetuating Club: Participation in GATT Negotiations**

The stillbirth of the ITO dispensed with the need for complicated derogations from the most-favoured nation principle: since the most-favoured nation rule now only applied among GATT members in the first place, derogations were no longer necessary to allow them to enforce the principle of payment vis-à-vis outsiders.<sup>721</sup> Instead of being “the club within” a larger organisation, the GATT was now a club, period. The interaction between those inside and outside the GATT would henceforth be exclusively governed by the accession procedure of GATT Article XXXIII, which provided that governments could accede to the agreement “on terms to be agreed” between the government in question and the contracting parties to the GATT. The contracting parties took utmost care to ensure that every one of them could individually insist on receiving adequate payment in the accession process: When in 1948 the quorum for admissions of new members was changed from unanimity to a two-thirds majority of the contracting parties (at the request of the ITO

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<sup>720</sup> ITO Charter, Article 17(2)(b).

<sup>721</sup> In fact, the possibility for such a derogation was temporarily preserved even in the GATT. In 1948, GATT Article XXV was amended to reflect the obligation to conduct tariff negotiations under Article 17(1) of the ITO Charter. In contrast to the compromise included in Article 17(4) of the ITO Charter, whereby a GATT member could *unilaterally* decide to withhold tariff concessions from an ITO member that it deemed had not complied with this obligation, a contracting party could only withhold tariff concessions towards another contracting party of the GATT after having been *authorised* to do so by the contracting parties acting jointly, and not at all if it had directly negotiated any tariff concessions in its schedule with the contracting party in question. This provision was never utilised and was deleted at the 1955 Review Session – a further indication that the obligation to enter into tariff negotiations was directed against those ITO members who remained outside the GATT. See GATT/1/47/Rev.1; GATT/1/SR.2, 3; and Jackson 1969, 542.

negotiators, who hoped to minimise the risk that ITO members might be “unreasonably prevented” from joining the GATT<sup>722</sup>), the contracting parties added GATT Article XXXV, which allowed individual contracting parties not to apply tariff concessions, or the entire agreement, to a new contracting party as long as it had not entered into tariff negotiations with that party.<sup>723</sup> The new article was perceived as necessary because a two-third majority of the contracting parties could otherwise have “oblige[d] a Contracting Party to enter into a trade agreement with another country, without its consent.”<sup>724</sup>

It was not primarily due to the provisions on accession, however, that the image of GATT as a “club” became ingrained in the imagination of observers and a steadily increasing subset of its contracting parties over the following decades.<sup>725</sup> In fact, the large majority of countries acceding to the GATT over the following decades were developing countries that had emerged from colonial rule and that could join the GATT by simply succeeding into the obligations which their former colonial masters had assumed with respect to their territories.<sup>726</sup> The perception that the GATT operated as a club arose instead from the way in which the *practices* that determined who participated in and benefited from trade negotiations reproduced and perpetuated the club dynamic *within* the framework of the GATT itself. As I will argue below, there were four such practices: the practice of negotiating tariff concessions primarily, and often exclusively, with the principal supplier of a product (i); the practice of excluding certain product categories and types of trade barriers from negotiations (ii); the practice of concluding agreements on tariff formulas and

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<sup>722</sup> GATT/1/21, 3: the amendment “give[s] effect to the recommendation of the Co-ordinating Committee and the Heads of Delegations of the United Nations Conference”; see E/Conf.2/45, 14.

<sup>723</sup> The new article was proposed by the United States; GATT/1/SR.7, 4-5; for background on accessions under GATT Article XXXIII, see Jackson 1969, 92-96; for background on the so-called non-application clause (GATT Article XXXV), see Jackson 1969, 100-102 and 92, fn 4.

<sup>724</sup> GATT/1/SR.7, 5; see also L/1466.

<sup>725</sup> Over this time, the notion that developing countries regarded the GATT as a “rich man's club” became common place. Thus, Oxley, the Australian ambassador to the GATT, commented in 1990: “Global trade liberalization was regarded as a plaything of the rich and GATT was derided as a rich man's club” (Oxley 1990, 103); Hugo Paemen and Alexandra Bensch, two European trade negotiators, note about the Uruguay Round: “The developing countries were among those least enthusiastic about launching forth into the Uruguay Round. The GATT had always seemed to them a 'rich men's club'" (Paemen/Bensch 1995, 253).

<sup>726</sup> Curzon and Curzon, writing in 1973, note that

since most newcomers are newly independent and not very well off, established GATT members do not normally drive too hard a bargain, and many former dependencies enter without any payment at all if they happened to be within GATT's territorial application before they gained independence.

Curzon and Curzon 1973, 305. There were also some hard accession negotiations, however. Curzon and Curzon mention Switzerland's accession; *ibid*. Moreover, “the few planned economy countries which did join the GATT had been obliged to accept accession protocols which substantially curtailed their rights”; Paemen/Bensch 1995, 88; see also McKenzie 2008.

non-tariff barriers among small groups of countries constituting a “critical mass” (iii); and the practice of conducting negotiations in an often informal and secretive way (iv). These practices reproduced and perpetuated the club dynamic not so much because they *de jure* excluded any countries from most-favoured nation treatment; rather, they *de facto* excluded a large number of GATT members, largely but not exclusively developing countries, from meaningful participation in multilateral trade lawmaking and from the benefits of trade liberalisation.

Before I discuss these practices in more detail, I will briefly recall the three major motivations for the club approach that had been made explicit in the preparatory discussions to the GATT: the greater practicality of negotiating and reaching agreement among a smaller group of countries, the ability to shape the content of this agreement more decisively than would otherwise be feasible, and the possibility to compel outsiders to join the agreement largely on the insiders' terms. In the academic literature, the first factor is the most popular explanation for why the core GATT countries continued to operate as a *de facto* club in many respects. Many scholars emphasise the ease with which agreement could be reached among the likeminded core of the GATT countries. As Robert Hudec memorably put it, the GATT was

a place where the leading countries could go off to do business by themselves, unencumbered by the complexities of a larger organization ... [a] place (one might almost say a club) where likeminded people could get together and do their work in peace.<sup>727</sup>

As I will argue in the following, however, the other two factors are very much part of the explanation as well, and did significantly increase in importance over time. Thus, by contenting themselves with "do[ing] business by themselves", the "leading countries" could not only reach agreement more easily. They were also able to keep doing things their way. During the first two decades of the GATT, this mostly meant sticking to reciprocity and the principal supplier rule as the basis for tariff negotiations and limiting the scope of negotiations to tariffs on manufactured products. What stands out about the club dynamic of GATT negotiations during this time is that it was self-perpetuating, in the sense that negotiating principles like reciprocity and the principle supplier rule *automatically* excluded those who were not able or willing to play by the "leading countries" rules from

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<sup>727</sup> Hudec 1975, 51.

the benefits of trade liberalisation, hence providing them with a strong incentive to participate in trade negotiations on the insider's terms.

This changed somewhat during the late 1960s and 1970s, as the focus began to shift from tariff negotiations to the negotiation of codes elaborating GATT provisions and formulating rules on the use of non-tariff measures. The major trading nations largely continued to "do business by themselves" and thereby managed to decisively shape the content of the codes. This was achieved by concluding agreements among a critical mass of (mostly developed) countries, and by conducting the negotiations in a secretive and exclusionary manner. In relation to the codes, however, the ability of the core to compel the adherence of outsiders proved to be limited by the unconditional most-favoured nation clause of the GATT. Towards the end and in the aftermath of the Tokyo Round, this limitation led to increasing frustration on the part of developed countries, in particular the United States. As will be discussed in the next section, it was the increasing failure of the club approach to achieve the compulsion of outsiders, combined with a fundamental recalculation of the costs and benefits of the participation of developing countries in the trading system, that led the developed countries to adopt a radical new strategy for the conclusion of the Uruguay Round: The constitution of a new club with the *primary* purpose of achieving the compulsion of outsiders.

In the following, however, I will first describe the four practices that governed participation in multilateral trade negotiations, and that reflected and sustained the club dynamic of those negotiations, over the period from the early GATT until the Uruguay Round.

#### ***a) Who Can Negotiate: The Principle of Payment and the Principal Supplier Rule***

The principle of payment, which governed GATT negotiations from the outset, played a central role in ensuring that trade negotiations continued to exhibit a club dynamic. Only those nations with something to "sell" – i.e., access to a lucrative market – were in a position to demand concessions from their negotiating partners.<sup>728</sup> As Winham has put it,

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<sup>728</sup> Winham 1990, 814:

The effect of the norm of reciprocity meant that only those nations that had significant trade flows were in a position to give, and therefore demand, concessions from trading partners. Tariff

influence in a tariff negotiation is a direct function of the size of a nation's trade. Nations with smaller trade flows simply are not in a position to offer many concessions to other countries and hence have little standing in a negotiation where the modus operandi is reciprocal exchange. ... the fact that GATT negotiations have traditionally been tariff negotiations has probably increased the tendency of developing countries to regard GATT as a rich man's club.<sup>729</sup>

By making effective participation in trade negotiations dependent on market size, i.e., on a country's ability to "sell" something of interest to other countries, the principle of payment reduced the role of small and less economically developed countries in trade negotiations.

Even if an economically less powerful country was willing and able to *offer* concessions in tariff negotiations, its ability to *demand* concessions from its trading partners was limited by the principal supplier rule.<sup>730</sup> This rule explicitly entitled participants in trade negotiations to reject requests for tariff concessions when the country requesting the concessions was not the principal supplier of the product in question.<sup>731</sup> As a result, it pushed any country that did not already have major export volumes of particular products to the sidelines of trade negotiations, limiting their potential to profit from trade negotiations to the accidental benefits from tariff reductions agreed between the major trading powers.<sup>732</sup>

The club dynamic produced by the principle of payment and the principal supplier rule was self-perpetuating: the exchange of concessions among the major trading countries, whose markets were attractive to each other and who tended to be the principal suppliers of the bulk of each other's imports, expanded the trade among these countries, making it more difficult for others to break into the core of the club. At the same time, these negotiating practices had a powerful assimilating effect: any country that hoped to benefit from trade negotiations had to be prepared to play by the rules of the game, thereby perpetuating these rules. As a result, the GATT confined "its *active* membership to willing liberalisers".<sup>733</sup>

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negotiations thus marginalized the developing countries, because their trade flows were small and they had little to offer in return for the benefits they sought.

<sup>729</sup> Winham 1986, 256.

<sup>730</sup> The role of the principal supplier rule in limiting the participation of developing countries in trade negotiations is widely acknowledged in the literature; see Wilkinson/Scott 2008; Gowa/Kim 2005.

<sup>731</sup> See *supra* fns 59 and 144**Error! Bookmark not defined..**

<sup>732</sup> Gowa/Kim 2005.

<sup>733</sup> Collier 2006, 1425. (original emphasis)

### ***b) What Can Be Negotiated: Limitations on Products and Policies***

The major trading nations further limited the scope for effective participation in trade negotiations by circumscribing the subject matter of negotiations to those products and trade policy instruments that were of most interest to them. This involved not only the effective exclusion of entire sectors, such as agricultural products and textiles, from meaningful liberalisation commitments; it also encompassed the drawing of ever finer distinctions *within* product categories – in other words, the definition of subdivisions of products solely for purposes of tariff classification – in order to ensure that the benefits from a negotiated tariff concession did not spill over to countries which supplied a similar product but had not paid for the concession.

The special status accorded to agricultural products and textiles in trade negotiations within the framework of the GATT up until the Uruguay Round is well known.<sup>734</sup> In addition to the special treatment of agriculture, for example in relation to quantitative restrictions, that was already enshrined in the GATT itself, the United States and European countries obtained waivers which left them with virtually complete freedom to protect their agricultural markets.<sup>735</sup> The protective instruments imposed for this purpose, among which the otherwise outlawed quantitative restrictions featured prominently, were largely excluded from the scope of GATT negotiations up until the Uruguay Round.

Developing countries faced a similar problem with regard to tropical products, which were often their major export items. By contrast to agricultural commodities that could also be produced in temperate zones, tropical products did not face high market access barriers, but their consumption was often subject to internal taxes for revenue purposes, which were similarly excluded from the scope of trade negotiations under the GATT.<sup>736</sup>

But product selection also occurred in sectors that were at the centre of the negotiations. Here, the desire to “concentrate … concessions on products exported only by

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<sup>734</sup> See Josling/Tangermann/Warley 1996; Aggarwal 1985; Gowa and Kim note that even the trade of Italy and Japan, two states that are commonly perceived as belonging to the core of the GATT, did not profit as significantly from the GATT as the trade of what they call the “privileged group” (Britain, Canada, France, Germany and the United States), because “both countries specialized in precisely those products [agricultural goods and textiles] that privileged group members succeeded in exempting from GATT rules”. Gowa/Kim 2005, 455-456.

<sup>735</sup> Josling/Tangermann/Warley 1996.

<sup>736</sup> See Chapter 1, section II.B.

participants ... sometimes required that new product categories be developed.”<sup>737</sup> The contracting parties achieved this by introducing new subdivisions into their tariff schedules. This so-called “tariff specialisation”, i.e. the “detailed classification of products for duty purposes”, had long been recognized as a way “to evade most-favoured-nation obligations”<sup>738</sup> – or, at the very least, to minimize their effects.

The tension between tariff specialization and the MFN principle broke into the open in a number of trade disputes over the course of GATT history. These disputes demonstrate the importance that the GATT’s contracting parties attributed to their ability to use tariff specialisation as a means of excluding contracting parties that had not paid for a concession from the benefits of that concession.

One example is the *Japan/Canada – Dimension Lumber* case.<sup>739</sup> Canada argued that certain types of lumber falling under different headings in the Japanese tariff were “like” products, and that the different tariff treatment of these products – some of which were predominantly found in the United States, some predominantly in Canada – was therefore inconsistent with Japan’s MFN obligations. While the tariff lines at issue had not been created for the purposes of negotiations, but reflected unilateral decisions by Japan in light of its import and protection needs,<sup>740</sup> the arguments of Japan highlight the important role that Japan attributed to tariff specialization for limiting the benefits from tariff concessions to those who pay for them. Thus, Japan argued that, if contracting parties were permitted to reclassify products in other contracting parties’ tariff schedules on the basis that these products were “like”, such reclassifications “could be used to undermine negotiated tariff concessions”, as complainants could reclassify items “in order to gain an unbargained-for-concession”.<sup>741</sup> By “attempting to build a case by establishing within existing sub-positions of the Japanese Tariff sub-groups of goods with a degree of similarity ..., so as to find allegedly ‘like products’ that receive different tariff treatment”, Canada was, in Japan’s view, “forcing Japan into a concession that had not been negotiated.”<sup>742</sup> Japan warned of

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<sup>737</sup> Finger 1979, 426.

<sup>738</sup> Hawkins 1951, 88; see already *League of Nations* 1927.

<sup>739</sup> L/6470, para. 3.37 (“In the Canadian view the duty on SPF dimension lumber was an example of ‘tariff specialization’”).

<sup>740</sup> L/6470, paras. 3.8, 3.21, 4.16, 5.5 (“The Panel noted that the tariff classification for 4407.10-110 had been established autonomously by Japan, without negotiation”). (contra Hudec 1998, 114, and Lang 2011, 258)

<sup>741</sup> L/6470, para. 3.20.

<sup>742</sup> L/6470, para. 3.35.

dire consequences for a system of tariff negotiations based on payment if this approach was accepted, noting that

any moves to introduce tariff sub-classifications based on “end-use” criteria, would have the result that negotiators, when considering a concession-request on a given tariff position, would have to examine for “likeness”, with the product covered by the requested position, all other products covered under any other tariff position, and, if there existed such “like” products, the negotiators would then have to decide whether, or not, they would be in a position, and willing, to grant the concession, bearing in mind reciprocity obligations and other relevant desiderata and requirements.<sup>743</sup>

Other countries took the opposite view and warned of the “dangers of allowing widespread abuse of the MFN clause through 'breaking out' a tariff line into numerous specialized and essentially arbitrary categories”.<sup>744</sup> In this controversy, the conflict between the MFN rule and the principle of payment that had given rise to the principal supplier rule reappears in the guise of the tension between the prohibition to discriminate between like products and the imperative to concentrate the benefits of tariff concessions on those who are paying for them.

The panel in *Japan/Canada – Dimension Lumber* recognised tariff differentiation as a “legitimate means of trade policy”, in that it was a “legitimate means of adapting the tariff scheme to each contracting party's trade policy interest, comprising both its protection needs and its requirements for the purposes of tariff- and trade negotiations.”<sup>745</sup> Robert Hudec reads these “rather opaque references to the needs of tariff negotiations” as owing to the above-mentioned tension, noting that

it was no doubt awkward for the panel to acknowledge, in the face of all the fanfare proclaiming the MFN obligation to be a “cornerstone” of GATT policy, that governments do need a bit of freedom to discriminate in tariff negotiations.<sup>746</sup>

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<sup>743</sup> L/6470, para. 3.32.

<sup>744</sup> L/6470, para. 4.9. (New Zealand)

<sup>745</sup> L/6470, paras. 5.9 and 5.10. Other panels took a different view; see the Panel Report in *Alcoholic-Beverages*, para. 5.5 b):

Just as Article I:1 was generally construed, in order to protect the competitive benefits accruing from reciprocal tariff bindings, as prohibiting 'tariff specialization' discriminating against 'like' products, only the literal interpretation of Article III:2 as prohibiting 'internal tax specialization' discriminating against 'like' products could ensure that the reasonable expectation, protected under GATT Article XXIII, of competitive benefits accruing under tariff concessions would not be nullified or impaired by internal tax discrimination against like products.

See also *Spain – Unroasted Coffee*; for discussion, see Hudec 1998, 114-116; and Lang 2011, 257-259.

<sup>746</sup> Hudec 1998, 114.

Other authors have confirmed the importance of the product selection facilitated by tariff differentiation for the success of tariff negotiations. Hufbauer *et al.* note that, in tariff negotiations, “the legal devotion to an unconditional most-favored-nation approach often exceeded its economic substance”. They speculate that, “[i]f ‘product selection’ had not been available as a way around a strict MFN approach, there would perhaps have been much less tariff cutting.”<sup>747</sup> Product selection was indeed highly successful in concentrating the benefits of trade liberalization among those who actively participated in tariff negotiations. As Finger reports,

[t]he participating countries with whom the United States exchanged concessions at the Geneva 1947, Geneva 1956, Dillon and Kennedy rounds supplied in each case just under 70 percent of dutiable U.S. imports. At the first of these rounds, judicious selection of products managed to internalize 84 percent of U.S. concessions, and by the Dillon Round product selection had become a fine art, internalizing 96 percent of U.S. concessions.<sup>748</sup>

In sum, product selection, both in its blatant (exemption of entire sectors) and more subtle (tariff differentiation) forms, played a significant role in concentrating the benefits of trade negotiations among the core countries. The exclusion of most policies other than tariffs from the ambit of negotiations for most of the GATT's history proved to be particularly problematic for developing countries and agricultural exporters, who were unable to achieve reductions in the major trade barriers facing their exports.

### ***c) Who Needs to Agree: Critical Mass Approaches to Lawmaking***

The dynamics described in the previous two sections were most characteristic of trade negotiations in the first two decades of the GATT's operation. The Kennedy Round in the 1960s brought two major changes. First, negotiations on non-tariff barriers started to play a more prominent role. For a number of reasons, these negotiations were not subject to the self-perpetuating club dynamic that had characterized tariff negotiations. Thus, in negotiations on non-tariff barriers, there were no conventions akin to the principal supplier rule that would have restricted who could *request* concessions from their trading partners. Moreover, even though the participants were still primarily interested in the practices of their major trading partners, in negotiations on non-tariff barriers all countries potentially

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<sup>747</sup> Hufbauer/Erb/Starr 1980, 67, fn 39.

<sup>748</sup> Finger 1979, 427.

had something to *offer*, namely their consent to multilateral rules – at least in those areas where multilateral solutions, instead of bilateral accommodations, were sought.<sup>749</sup> As Winham has observed:

Once non-tariff measures and other issues came onto the agenda of GATT negotiations – which occurred mainly at the Tokyo Round – developing countries were less inhibited by their trade profiles and were more able to make an impact on multilateral trade negotiations. In the negotiations over trade rules or codes of behaviour, large and small nations start on a footing of greater equality than they do in a tariff negotiation based wholly on the respective trading performances of the participants. Economic power and interest are still the principal variables in current GATT negotiations, but the correlation between bargaining position and trade performance has diminished and there is consequently greater scope for negotiating skill and perseverance on the part of individual national delegations.<sup>750</sup>

Second, even the dynamics of tariff negotiations changed in the Kennedy Round, at least superficially. The Kennedy Round was the first negotiating round in which tariff reductions were supposed to be achieved in accordance with a multilaterally agreed formula, rather than through bilateral bargains. This held out the prospect that less economically powerful countries would not only profit from tariff reductions on a wider range of products, but would also have a say in the design of the reduction formula.

These developments ran counter to the club dynamic that had characterized past GATT negotiations: from the perspective of the core GATT countries, these changes posed precisely those dangers that the club approach was designed to avoid. First, the active participation of a wider range of countries in the negotiation of rules and tariff formulas would make reaching agreement more difficult; second, in order to reach consensus under these circumstances, the core countries might have to make substantial concessions to other countries; and, third, if agreement could not be reached and the core countries decided to implement agreements among themselves, the MFN obligation would make it hard to prevent the outsiders from benefitting from the agreement; this, in turn, would make it difficult to force them to join it on the insiders' terms. As I will show in the following, the core countries found mechanisms to replicate the club dynamic under the changed circumstances in a way that addressed the first two concerns, but did little to remedy the third. Thus, the use of a critical mass approach to negotiations on non-tariff barriers and tariff formulas prevented potentially non-cooperative countries from blocking agreement

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<sup>749</sup> See Chapter 1, Section I.C.b) for a discussion of negotiating approaches to non-tariff barriers.

<sup>750</sup> Winham 1990, 814.

and from influencing the substance of the agreement in ways that would be unacceptable to the core. Moreover, the concentration of negotiating activity among a small group of core countries that used to come about automatically through the principal supplier rule was increasingly institutionalised in the form of exclusive negotiating arrangements (see next section). None of these instantiations of the club approach, however, allowed the core to internalize the benefits of their agreements to the same extent as had been possible under the traditional protocol of tariff negotiations.

Aside from the rules for the entry into force of the GATT itself,<sup>751</sup> one of the earliest examples of the use of a critical mass approach in negotiations on non-tariff measures was the adoption of binding declarations containing additional obligations with regard to subsidies. The original version of the GATT contained only reporting and consultation requirements in Article XVI; this provision had been agreed under the assumption that the much more stringent obligations contained in the ITO Charter would come into force soon.<sup>752</sup>

When the ITO Charter failed to enter into force, the contracting parties decided, at the Review Session in 1955, to amend Article XVI to include more specific obligations on export subsidies. The new paragraph 4 of the provision envisaged that contracting parties would cease to grant any form of export subsidies on non-primary products “as from 1 January 1958 or the earliest practicable date thereafter”. This was supplemented by a standstill provision, whereby contracting would not extend existing subsidies or introduce new subsidies in the meantime, i.e., up until 31 December 1957.<sup>753</sup> An Interpretive Note clarified that the

intention of paragraph 4 is that the contracting parties should seek before the end of 1957 to reach agreement to abolish all remaining subsidies as from 1 January 1958; or, failing this, to reach agreement to extend the application of the standstill until the earliest date thereafter by which they can expect to reach such agreement.

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<sup>751</sup> See GATT Article XXVI.6, which stipulates that the agreement

shall enter into force, as among the governments which have accepted it, on the thirtieth day following the day on which instruments of acceptance have been deposited with the Secretary-General of the United Nations on behalf of governments signatory to the Final Act the territories of which account for *eighty-five per centum* of the total external trade of the territories of the signatories to the Final Act adopted at the conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Tarde and Employment. Such percentage shall be determined in accordance with the table set forth in Annex H. (emphasis added)

<sup>752</sup> Jackson 1969, 368-370; Irwin/Mavroidis/Sykes 2008, 156-158.

<sup>753</sup> GATT, Article XVI(4).

Since the contracting parties failed to reach agreement on the abolition of all export subsidies on non-primary products by late 1957, they adopted, on 30 November 1957, a declaration extending the standstill provisions of Article XVI (4) for one year.<sup>754</sup> Paragraph 4 of the Declaration stipulated:

This Declaration shall enter into force on the day on which it will have been accepted by the Governments of Belgium, Canada, France, the Federal Republic of Germany, Italy, Japan, the Kingdom of the Netherlands, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.<sup>755</sup>

The Declaration and a Proces-Verbale extending it for another year entered into force on 11 May 1959 for those governments which had signed them.<sup>756</sup> In 1960, the contracting parties finally adopted a “Declaration Giving Effect to the Provisions of Article XVI, Paragraph 4”, which contained a similar provision regarding the “critical mass” of countries that had to accept it in order for it enter into force. Thus, paragraph 2 of the Declaration read:

This Declaration shall enter into force, for each government which has accepted it, on the thirtieth day following the day on which it shall have been accepted by that government or on the thirtieth day following the day on which it shall have been accepted by the Governments of Austria, Belgium, Canada, Denmark, France, the Federal Republic of Germany, Italy, Luxemburg, the Kingdom of the Netherlands, Norway, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, whichever is later.<sup>757</sup>

Gallagher and Stoler have noted the implications of this declaration:

At a time when forty-two governments were [contracting parties] to the GATT, only seventeen signed the declaration. The new obligations applied to the seventeen signatories, but rights under Article XVI:4 accrued to all forty-two [contracting parties]. Clearly, this apparent lack of reciprocity did not stop the seventeen from signing on because they must have considered that they collectively constituted a critical mass of [contracting parties] likely to engage in meaningful export subsidies on industrial products.<sup>758</sup>

The declarations on the extension of the standstill provision and the bringing into effect of the prohibition on export subsidies on industrial products implemented on a critical mass basis obligations that were envisaged in the (amended) GATT itself. The Kennedy Round

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<sup>754</sup> L/774; see also Jackson 1969, 373. The Declaration was extended twice: see L/935 and L/1121.

<sup>755</sup> L/774, para. 4. See also L/892, reporting on the status of acceptance of the Declaration.

<sup>756</sup> L/985.

<sup>757</sup> Giving Effect to the Provisions of Article XVI:4, Declaration of 19 November 1960, BISD, 9<sup>th</sup> Suppl. 1961.

<sup>758</sup> Gallagher/Stoler 2009, 384. (footnotes omitted)

Anti-Dumping Code, however, marked a new departure: the negotiation of a legally separate agreement adding to GATT obligations but bypassing the amendment procedures of the GATT. The resort to “codes” during the Kennedy and Tokyo Rounds is often attributed to the difficulties of amending the GATT.<sup>759</sup> It should be noted, however, that the amendment provisions of the GATT themselves foresaw that the GATT could be amended by a critical mass of contracting parties. Pursuant to Article XXX, amendments to the GATT (except to Part I and Article XXIX, as well as Article XXX itself, which required unanimity) would “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.”<sup>760</sup> However, the core countries must have found the threshold of two-thirds of the contracting party too high, and therefore opted for the negotiation of separate “codes”, which could be brought into force by fewer parties.<sup>761</sup>

The “Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade”, as the Kennedy Round Anti-Dumping Code was formally known, did not even stipulate a minimum threshold for acceptances for its entry into force: Article 13 simply provided that it would “enter into force on 1 July 1968 for each party which has accepted it by that date.”<sup>762</sup> Of course, among the states which had negotiated the code –

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<sup>759</sup> See e.g. Curzon/Curzon 1980, 143:

the GATT started out with 23 contracting parties. It now has 83. They are incapable of agreeing unanimously to change even a comma in the original agreement. How, then, is GATT to change? The answer is to draw up codes ... and to create a network of new rights and obligations among the countries which accept them.

<sup>760</sup> GATT Article XXX.

<sup>761</sup> See Jackson 1969, 81; and Winters 1990, 1295:

Amending the GATT requires the agreement of two-thirds of the members and so the new provision were embodied in an interpretive Anti-dumping Code, which the industrial country contracting parties signed separately from their 'regular' GATT membership. This plurilateral approach represented a major innovation in the development of multilateral trading rules.

The precedential effect of the Anti-Dumping Code for negotiations on other non-tariff barriers is also noted by Dam 1970, 175.

<sup>762</sup> Kennedy Round Anti-Dumping Code, Article 13.

principally OECD countries<sup>763</sup> – acceptance was informally contingent upon the acceptance by the other participants (as well as the successful conclusion of the Round as a whole).<sup>764</sup>

The second agreement on non-tariff barriers negotiated during the Kennedy Round, regarding the elimination of the American Selling Price system of customs valuation, was explicitly concluded among a limited group of countries, namely Belgium, France, Italy, Switzerland, the United Kingdom, the United States and the European Economic Community, and would enter into force only if accepted by all those governments.<sup>765</sup>

In both cases, the limited circle of parties who needed to agree made it easier to reach an agreement, and allowed those parties to shape the content by themselves. It appears that in each case the benefits were sufficiently concentrated among the participants so that unrequited accidental benefits accruing to non-participants were not a major concern.<sup>766</sup> While the Anti-Dumping Code remained open to signature by additional parties,<sup>767</sup> the only obvious incentive would be the opportunity to participate in the Committee set up pursuant to Article 17 of the Agreement. However, Jackson notes a more subtle way in which the Code could affect non-parties. Given that

the code is worded as an 'interpretation' of Article VI of GATT, its provisions could, over time, be accepted as the definite interpretation of GATT, thus binding all GATT parties.<sup>768</sup>

Again, the outsiders would thus ultimately join the insiders on the insiders' terms.<sup>769</sup> Such *multilateralisation by stealth* only had prospects of success as long as participation in the

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<sup>763</sup> The following countries initially notified their interest to be represented in the group that negotiated anti-dumping policies during the Kennedy Round: Canada, the EEC, Japan, Norway, Sweden, Switzerland, the United Kingdom and the United States; see TN.64/NTB/39. There is also a documentary record of participation by Denmark (TN.64/NTB/W/10/Add.6), Australia (TN.64/NTB/W/10/Add.8), New Zealand (TN.64/NTB/W/10/Add.9) and Finland (TN.64/NTB/W/10/Add.10). Evans notes that the "principal participants" were all members of the OECD, which had previously studied the anti-dumping policies of its members; Evans 1971, 260.

<sup>764</sup> On the exchange of concessions embodied in the Anti-Dumping Code, see *supra* text at fn 286.

<sup>765</sup> ASP Agreement, Article 12.

<sup>766</sup> Jackson 1969, 410:

Because of the MFN clause in Article I of GATT, it obligates parties to that code, even in their actions toward GATT contracting parties who are not code parties – an interesting circumstance of nonreciprocity.

See also L/3149.

<sup>767</sup> Kennedy Round Anti-Dumping Code, Article 13.

<sup>768</sup> Jackson 1969, 410.

<sup>769</sup> In a similar vein, Gallagher and Stoler argue that the critical mass approach to the bringing into effect of GATT Article XVI:4 proved to be "a successful path to disciplining export subsidies" on the basis of, *inter alia*, "its plurilateral extension through the Tokyo Round Subsidies Code and, eventually, to all WTO members at the end of the Uruguay Round." Gallagher/Stoler 2009, 384.

codes was not openly politicised – which may have been true for the Kennedy Round, but was certainly no longer true for the Tokyo Round.

In the early 1970s, the “tight little club of the 1950s was gone”,<sup>770</sup> and the negotiation of codes with participation of a critical mass of countries became the dominant *modus operandi* of the Tokyo Round.<sup>771</sup> At the same time, the limits of implementing the club approach through the use of critical mass became more evident in the Tokyo Round: at the conclusion of the Round, the developed countries found themselves confronted with rival codes and amendments proposed by developing countries, with demands that only codes adopted by the Trade Negotiations Committee with a two-thirds majority could enter into force, and (at least partially successful) resistance against the conditional-MFN elements of the codes. Moreover, the negotiation of the one code on which the co-operation of developing countries was essential, the safeguards code, ended in failure.<sup>772</sup>

The Tokyo Round was from the outset driven by the United States, in conjunction with the European Community and Japan.<sup>773</sup> In 1973, the United States issued joint statements with the EC and Japan, respectively, declaring their intention to initiate a new round of trade negotiations.<sup>774</sup> While the other developed GATT parties welcomed this initiative, developing countries were more sceptical and “made it clear that their association with the undertaking was conditional upon the details to be applied to their participation including the techniques and modalities to be worked out for the negotiations.”<sup>775</sup> In an internal memorandum, US negotiators reported criticism of the draft declaration launching the Tokyo Round by some developing countries, noting that “such discordant notes”, if repeated at the Tokyo Ministerial, would be “regrettable”, but

should not interfere with the basic objective which is approval of the declaration by the countries which are planning meaningful participation in the forthcoming negotiations.

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<sup>770</sup> Hudec 1988, 1507.

<sup>771</sup> See Winters 1990, 1296: “the practice of separate but parallel Codes was re-affirmed and plurilateralism accepted”

<sup>772</sup> For background, see Winham 1986, 197-200; for an account of the failure of the negotiations, see *ibid.* 240-247.

<sup>773</sup> FRUS 1973-1976, 591: In 1971 “the European Community and Japan, at our urging, agreed that multilateral trade negotiations should begin in 1973”.

<sup>774</sup> GATT 1979, 49; Winham 1986, 93; see L/3669 and L/3670; Oxley 1990, 159, comments:

The driving forces of the Tokyo Round of trade negotiations had been the United States and the other three quadrilaterals. The objectives for the Tokyo Round were prepared following discussions among the United States, Japan and the European Community. They announced that the negotiations were to begin and everyone else was invited to participate.

<sup>775</sup> MIN(73)W/2, para. 2.

There is no requirement for any country to participate, and the election not to participate by a few developing countries will not affect the approval of the declaration.<sup>776</sup>

In effect, the entire Tokyo Round thus proceeded from the outset on a critical mass basis.<sup>777</sup> This allowed the developed countries, and particularly the US and the EC, to “essentially negotiate[e] among themselves”<sup>778</sup> (see next section) and thereby to realise the first two benefits of the club approach – facilitating agreement and shaping the content of that agreement decisively. At the same time, they became more reluctant than they had been in the Kennedy Round to forego the third element of the club approach – forcing outsiders to join the agreement on the insiders' terms – by extending the benefits of that agreement to non-participants, as required by the unconditional MFN clause of the GATT. Hence, for the first time in the history of the GATT, formal conditional MFN was openly considered as an element of the new “codes”.<sup>779</sup> The report of the preparatory commission for the Tokyo Round negotiations noted the suggestion by “some delegations” that “the negotiations on certain non-tariff measures should be conducted on the basis that the benefits would accrue only to countries that are parties to the resulting arrangement.”<sup>780</sup> The EC in particular had openly embraced conditional MFN as the basis for the code negotiations.<sup>781</sup> From the outset, the developing countries announced their opposition to this development.<sup>782</sup>

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<sup>776</sup> FRUS 1969-1976, 682.

<sup>777</sup> Hufbauer/Erb/Starr 1980, 67, note with respect to the negotiations on non-tariff barriers in the Tokyo Round:

From the beginning of the Tokyo Round it was clear that not all GATT members would accept this extension of international discipline.

<sup>778</sup> At a meeting of the Consultative Group of 18 held in 1978, one participant noted that the developing countries did not know what to expect from the Tokyo Round since the developed countries were essentially negotiating among themselves (CG.18/8, para. 17)

<sup>779</sup> See Hudec 1992, 74:

the U.S. and the EC both declared during the course of the negotiations that they would refuse to give the benefits of the newly drafted codes to those countries that would not sign them. This signaled the beginning of conditional MFN treatment.

Hufbauer/Erb/Starr 1980, 67 (footnote omitted):

... the major nations that were willing to accept meaningful international measures demanded that such discipline apply equally to their trading partners. In order to ensure this international quid pro quo, the Tokyo Round established the principle of conditional MFN as the centerpiece of its work – the six Codes governing nontariff barriers.

<sup>780</sup> MIN(73)W/2, para. 23; a statement to this effect was included in all drafts of the report; see Prep.Com/W/6, para. 14; Prep.Com/W/6/Rev.1, para. 18; Prep.Com/W/6/Rev.2, para. 20.

<sup>781</sup> EC *Overall Approach* 1973, 8:

The solutions arrived at [on non-tariff barriers, N.L.] should be accepted by as many countries as possible if the existing imbalance between the various contracting parties is not to be worsened. It

During the preparatory phase of the Tokyo Round, negotiations had already substantially advanced on a “Standards Code”.<sup>783</sup> The working group that drafted the code had worked “on the hypothesis that benefits under the Code would accrue as of right solely to other adherents, without these benefits having to be extended to contracting parties which did not adhere to the Code”.<sup>784</sup> This hypothesis did not extend only to the Code itself, but also to “multilateral schemes for assuring conformity to mandatory or quasi-mandatory standards” contemplated under the code. In the first draft considered by the working group, the hypothesis was *inter alia* reflected in a provision stipulating that such schemes

should not include any provisions which would prevent individual members from accepting assurances of conformity provided by non-participating countries, except where the non-participation of such countries is due to unwillingness to accept the obligations of membership.

The provision was accompanied by a note that “[t]his somewhat tortuous phraseology is designed to make these schemes as 'liberal' as possible, but at the same time to discourage attempts to obtain the benefits of membership without accepting the corresponding obligations.”<sup>785</sup> While the provision was later dropped, it indicates the spirit in which the negotiations proceeded.

The draft standards code that was ultimately forwarded to the Tokyo Round negotiating group on technical barriers to trade contained an explicit “critical mass” provision stating that it would enter into force after an as yet unspecified number of contracting parties (“[x]”), “including those listed in Annex 2”, had ratified it.<sup>786</sup> Annex 2 was still “[to be added]” at this stage, but there proved to be little enthusiasm for doing so

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should therefore be made clear that any advantages which might derive from solutions comprising obligations going beyond the present GATT rules would be reserved for countries which in practice abide by these solutions (conditional application of the most-favoured-nation clause).

Winham notes that “while this went against the usual American support for the principle of non-discrimination, it was an approach that gained wide acceptance in the subsequent NTM negotiations”; Winham 1986, 82. On the US position, see Kolligs 1990, 555 and fn 7.

<sup>782</sup> MIN(73)W/2, para. 23: “Delegations from developing countries have stressed that all concessions resulting from the negotiations should be extended to them unconditionally.”

<sup>783</sup> See MTN/NTM/5, para. 7.

<sup>784</sup> COM.IND/W/108, para. 8; the report of the Working Group, including the draft code, is also attached to MTN/NTM/5.

<sup>785</sup> Spec(71)39, 19.

<sup>786</sup> MTN/NTM/W/5, Appendix 1, Article 22(a)(i) of the Draft Code; at the time, Annex 2 was still “to be added”.

in subsequent negotiating sessions.<sup>787</sup> The provision does not appear in the final version of the Code. By all indications there was an informal understanding between the US and the EC that both would ratify the code, and they were presumably unwilling to jeopardize the entry into force of the code by making it contingent on the accession of other parties.<sup>788</sup>

This solution to the “critical mass” question was facilitated by the fact that, by its terms, the code provided benefits only to those who were “Parties” to it,<sup>789</sup> which created an incentive for other contracting parties to join. In the case of the standards code, these benefits were not primarily substantive – thus, many of the provisions of the code merely elaborate the national treatment obligation to which the parties were subject in any case with respect to all GATT contracting parties pursuant to Article III:4 of the GATT – but procedural: the code created new notification requirements which only applied with respect to other parties to the code, and only parties were members in the Committee established pursuant to the Code.<sup>790</sup>

While the Standards Code was thus, like all other Tokyo Round codes, “conditional in important procedural respects”,<sup>791</sup> the Subsidies and Government Procurement codes “fully embrace[d] the conditional MFN principle in their substantive elements”<sup>792</sup> in that, by their terms, they provided substantive benefits to signatories that were not enjoyed by other contracting parties to the GATT. Thus, while GATT Article III:8 exempts government procurement from the scope of the national treatment obligation of the GATT, the Government Procurement Code provided for national treatment of “products and suppliers of other Parties” with respect to government procurement covered by the agreement.<sup>793</sup> Similarly, the Subsidies Code imposed more stringent disciplines than the GATT on the use of subsidies which cause injury to the domestic industry – or serious

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<sup>787</sup> See MTN/NTM/W/12, 7:

The Sub-Group noted that it would, at some stage, have to discuss the provisions in the text relating to minimum participation and key countries.

<sup>788</sup> Thus, explicitly including a country in the list of “critical mass” countries would give that country leverage by allowing it to block the coming into force of the code. Conversely, excluding a country from the list of “critical mass” countries might have taken the pressure off that country to join the code, which would contravene the third element of the club approach.

<sup>789</sup> Earlier drafts of the Code use the term “adherents” instead of “Parties”; see e.g. COM.IND/W/108, Annex.

<sup>790</sup> Hufbauer/Erb/Starr 1980, 68, note that each of the Tokyo Round codes “establishes a committee of signatories to resolve substantive and technical question relating to Code operation.”

<sup>791</sup> Ibid. 68.

<sup>792</sup> Ibid. 69

<sup>793</sup> Tokyo Round Government Procurement Code, Article II.

prejudice to the interests – of “another signatory”.<sup>794</sup> Moreover, Article 1 of the Subsidies Code stipulated that the imposition of countervailing duties “on any product of the territory of any signatory imported into the territory of another signatory” had to be in accordance with the provisions of GATT Article VI as well as the code. The most significant practical effect of this provision was that the United States could impose countervailing duties on subsidised imports from other signatories only after determining that these imports were causing “material injury” to its domestic industry – a requirement of GATT Article VI from which the United States was exempt with respect to the contracting parties of the GATT because its countervailing duty law, which did not require such a determination, predated the adoption of the GATT.

The developing countries resisted both aspects of the club approach adopted by the US and the EC in the Tokyo Round – critical mass negotiations and unconditional MFN – from the outset. Their first line of defence was to prevent the adoption of agreements on a critical mass basis within the framework of the Tokyo Round negotiations. At a meeting of the Trade Negotiations Committee in July 1978, Yugoslavia, speaking “on behalf of the developing countries”, stated:

At this stage we are requesting that a rule be established for the decision-making process in the MTN according to which no adoption of a negotiating document would be accepted unless the large majority of participants declared themselves in favour of it. We cannot proceed on the basis that a group of a few countries may consider it appropriate for others to be kept out of arrangements if they are not in a position to accept their conceptual approach.<sup>795</sup>

The developing countries were clearly concerned that the critical mass approach was allowing the developed countries to develop the law without feeling the need to bring the developing countries on board. While the developing countries found it “understandable for there to be, in the process of negotiation, many stages and many bilateral and multilateral consultations”, they saw these “as a technique for reaching universally acceptable solutions”,<sup>796</sup> not as a way for small groups of countries to conclude agreements among themselves.

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<sup>794</sup> Tokyo Round Subsidies Code, Article 8.

<sup>795</sup> MTN/W/35, 1. Developing countries were also concerned that the code approach circumvented the amendment provisions of the GATT. Thus, Yugoslavia noted that “whenever amendments are made in the General Agreement, the CONTRACTING PARTIES have to approve them according to the existing rules.” For background, see Steinberg 2002, 357.

<sup>796</sup> MTN/W/35, 4.

The developing countries kept up their resistance to the critical mass approach until the very end of the Tokyo Round negotiations. They attempted to amend the final drafts of the codes to the effect that they would only be open for acceptance “after being adopted by the Trade Negotiations Committee”.<sup>797</sup> This would have given developing countries a chance to prevent those codes which did not adequately reflect their interests from entering into force at all – and would thus have given them leverage to effect changes in the codes. An alternative proposal advanced at the conclusion of the negotiations, which would have had a similar effect, was that the codes “should enter into force when two thirds of the participants in the MTN have accepted them.”<sup>798</sup>

The question of whether an agreement among a subset of GATT contracting parties could only be concluded with the consent of all contracting parties went to the heart of the matter of what kind of institution the GATT was. On the developing countries' view, the Trade Negotiations Committee “could only proceed on the basis of consensus”;<sup>799</sup> the addition of any new body of law to the GATT framework required a positive consensus of the membership, even if only a subset of members would subscribe to it. In contrast to this collectivist conception of the GATT, the developed countries took the view that

the MTN was not a general diplomatic conference, that no agreement was being forced on any government but that on the other hand the Committee could not prevent a number of countries from entering into an agreement if they wished to, unless the provisions of the agreement were contrary to the GATT.<sup>800</sup>

These governments, then, viewed the GATT as a collection of bilateral or plurilateral contracts. Subsets of members who wished to enter into such contracts were free to do so as long as they “were not imposing anything on other governments but simply moving to higher levels of discipline”.<sup>801</sup> Apart from consistency with the GATT, there was no substantive constraint on the content of bilateral or plurilateral agreements, such as would exist if they were subject to approval by the contracting parties as a whole. It was unsurprising that the developed countries should take this view, as it was only under this

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<sup>797</sup> See MTN/P/5, 2(d); see also MTN/NTM/65, para. 12 (proposal to amend Article 15.1 of the Standards Code); MTN/NTM/66, para. 10 (proposal to amend Article 19:2(a) of the Subsidies Code); MTN/NTM/67, para. 5 (proposal to amend Article 22:1 of the Customs Valuation Code); MTN/NTM/69, para. 12 (proposal to amend Part IX, paragraph 1(a) of the Government Procurement Code).

<sup>798</sup> MTN/P/5, 2(e).

<sup>799</sup> MTN/P/5, para. 14.

<sup>800</sup> MTN/P/5, para. 14.

<sup>801</sup> MTN/P/5, para. 19.

conception of the GATT that the conclusion of critical mass agreements, and thus the realization of the first two benefits of the club approach – the greater ease of reaching agreement among a small group and the opportunity to shape the content of that agreement decisively – could be realised.

The developed countries' view prevailed – by default, as there was no consensus to add the language suggested by the developing countries to the draft codes. As one of the developing countries complained, a “precedent” was “now set for various groups of countries to put up Agreements amongst themselves and to seek the umbrella of the MTN.”<sup>802</sup>

The developing countries' second line of defence was directed against the third element of the club approach – the attempt of the developed countries to force the developing countries to join the codes on the formers' terms by limiting the benefits of the codes to code signatories through conditional MFN. In this, the developing countries were, at least partially, successful.<sup>803</sup> On 28 November 1979, the contracting parties adopted a decision entitled “Action by the Contracting Parties on the Multilateral Trade Negotiations”, in which they “reaffirm[ed] their intention to ensure the unity and consistency of the GATT system”, noted that “existing rights and benefits under the GATT ... including those derived from Article I” of non-signatories to the codes were “not affected” by the codes, and expressed their expectation that non-signatories would be regularly informed on developments regarding the codes and would be able to follow the proceedings of the code committees “in an observer capacity”.<sup>804</sup> This decision made it clear that, the language of the codes notwithstanding, the contracting parties expected the benefits of the codes to be extended to all contracting parties on the basis of the MFN

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<sup>802</sup> MTN/P/5, 62.

<sup>803</sup> In Steinberg's view, they were completely successful with regard to the Subsidies Code and the revised Anti-Dumping Code; see Steinberg 2002, 357 (“the developing countries received all of the rights to the subsidies code and the anti-dumping code, but they were not obliged to sign or otherwise abide by the obligations contained in those agreements”). By contrast, it appears that it was accepted that the Government Procurement Code would operate on a conditional MFN basis. Thus, India, which was one of the key proponents of the view that the benefits of the Subsidies Code had to be extended on an MFN basis, reportedly accepted that it had to negotiate its accession to the Government Procurement Code; see Steinberg 1995, 20-23. For the view that government procurement is exempted from the MFN obligation, see *ibid.* 20 and Hudec 1987, 97, fn 26; for the argument that the MFN obligation of the GATT obliged the parties to the Government Procurement Code to extend the benefits of the code to non-signatories, see Kolligs 1990.

<sup>804</sup> L/4905.

obligation in GATT Article I.<sup>805</sup> While there was no similar legal basis for the procedural rights of non-signatories envisaged in the decision, the contracting parties' administrative and budgetary control of the GATT Secretariat provided them with at least some leverage in this regard.<sup>806</sup>

Despite these decisions at the GATT level, the United States' Congress, refused to implement the Subsidies and Government Procurement codes on an MFN basis.<sup>807</sup> In the case of the Subsidies Code, the US was unwilling to extend the benefits of its new countervailing duty law to those who would not pay for it with increased discipline on their subsidy practices: The US implementing legislation denied the code's benefits not only to non-signatories of the code, but also to developing countries that made use of the flexibility provided by Article 14.5<sup>808</sup> not to eliminate export subsidies on non-primary products.<sup>809</sup> To this end, the United States invoked the non-application clause of the agreement against developing countries which did not enter into commitments that the US found satisfactory.<sup>810</sup> When the US subsequently proceeded to impose countervailing duties on industrial fasteners from India without applying an injury test, India requested consultations and eventually the establishment of a panel pursuant to Article XXIII of the GATT.<sup>811</sup> In its panel request, India questioned whether the non-application clause could be "validly invoked by any Party with the objective of obtaining concessions from another Party to the

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<sup>805</sup> Again, it is not clear that this applied to the Government Procurement Code.

<sup>806</sup> See Steinberg 2002, 357 ("the GATT secretariat could not provide services to administer a code without a consensus of the Contracting Parties"); see also Steinberg 1995, 21.

<sup>807</sup> For an extensive discussion, see Kolligs 1990. It appears that other developed countries applied the codes, with the exception of the Government Procurement code, on an MFN basis; see Hudec 1987, 89.

<sup>808</sup> Article 14.5 of the Tokyo Round Subsidies Code provided:

A developing country should endeavour to enter into a commitment to reduce or eliminate export subsidies when the use of such export subsidies is inconsistent with its competitive and development needs.

A footnote specified that the "commitment" had to be notified to the SCM Committee.

<sup>809</sup> As the US representative clarified at a meeting of the SCM Committee:

The United States' position was that it could extend the benefits of an injury test in its law only to those countries that had undertaken increased discipline in the subsidies area. In the case of developing countries, this meant that the United States could only apply its new countervailing duty law to those developing countries that had undertaken commitments with regard to their export subsidy practices. ... while he in no way contested the right of any country to sign this code without the commitments he had referred to, his Government would find it impossible to apply their new law to imports from developing countries which did not provide commitments.

SCM/M/3, para. 11.

<sup>810</sup> See Tokyo Round Subsidies Code, Article 19.9; for the notification of the invocation of the non-application clause with respect to India, see Let/1159, 27 August 1980.

<sup>811</sup> For India's consultations request, see L/5028; for the panel request, see L/5062; for discussions of this episode, see Winham 1986, 359-360; Hudec 1987, 88-89; Kolligs 1990, 579; Steinberg 2002, 358, fn 97.

Agreement which are not envisaged in the provisions and go beyond the balance of rights and obligations contained in the Agreement.”<sup>812</sup> In effect, India argued that the non-application clause could not be used to force outsiders to join the Subsidies Code on the insiders' terms. India further argued that the United States' refusal to apply an injury test in the countervailing duty investigation of India's exports violated the MFN principle in Article I of the GATT. To support its argument, India relied *inter alia* on the contracting parties' above mentioned decision, which had confirmed that the GATT Article I rights of non-signatories were “not affected” by the codes.<sup>813</sup> Eventually, the US gave in and agreed to apply the provisions of the Subsidies Code in relation to India.<sup>814</sup>

***d) Who Gets to Be in the Room: From the Bridge Club to the Green Room***

Throughout the history of the GATT, the club approach to trade lawmaking was implemented through exclusive negotiating arrangements. In the first two decades of the GATT's operation, the tariff or trade negotiations committee, i.e., the GATT body overseeing the negotiations, was itself an exclusive body whose membership was limited to those contracting parties who engaged in tariff negotiations on a reciprocal basis. Starting in the Kennedy Round, as membership of the trade negotiations committee became more inclusive, the core countries started to use other, more informal meetings to maintain control of the negotiations.

The question of who could be a member in the trade negotiations committee overseeing a trade negotiation was for the first time openly contested in the Kennedy Round.<sup>815</sup> At the Ministerial Meeting at which the decision to launch the Kennedy Round negotiations was taken, ministers from some developing countries raised the question of “how the membership of the Committee would be decided and whether the less-developed countries would be adequately represented”.<sup>816</sup> The Executive Secretary, Eric Wyndham-White, reminded the ministers that, “in past negotiations the tariff negotiations committee

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<sup>812</sup> L/5062, para. 3(c); India referred in this respect to the Working Party report on the review of the operation of Article XXXV of the GATT, L/1545, which had concluded that non-application could not legitimately be used as a bargaining lever for gaining privileges and advantages over and above those provided for in the General Agreement.

India noted that this conclusion had been “endorsed by the then US representative in unequivocal terms”.

<sup>813</sup> L/5062, para. 3(f).

<sup>814</sup> Hudec 1987, 89; India's request to terminate the panel proceedings is in L/5062/Add.1.

<sup>815</sup> See MIN(63)SR, 4-7.

<sup>816</sup> *Ibid.* 4.

had been composed solely of the countries which took part in the negotiations” and that “[i]t would be inappropriate to provide for a trade negotiations committee which would include countries not participating in any way in the trade negotiations.”<sup>817</sup>

It was clear to all involved that the kind of “participation” in trade negotiations that had been required in the past to entitle a contracting party to membership in the trade negotiations committee was a readiness to engage in reciprocal tariff reductions. This notion was becoming increasingly problematic, however. Over the years preceding the Kennedy Round, the GATT had been focusing increasingly on the trade problems of the less-developed countries, particularly within the framework of the programme for the expansion of international trade.<sup>818</sup> One of the principles that had gained increasing acceptance in the run-up to the Kennedy Round was the principle of non-reciprocity for developing countries. In fact, the very resolution that provided for the establishment of the trade negotiations committee and that the ministers were debating at the 1963 Ministerial Meeting announced as one of the principles of the upcoming negotiations that

every effort shall be made to reduce barriers to exports of the less-developed countries, but that the developed countries cannot expect to receive reciprocity from the less-developed countries.<sup>819</sup>

As a result, it appeared to some developing countries that the notion of “participation” as readiness to engage in reciprocal concessions was becoming increasingly anachronistic. Thus, the Malaysian minister “enquired whether the less-developed countries could be considered as 'negotiating'" since they were not asked to offer reciprocal concessions, and the Indian minister, after noting the manifold ways in which the developing countries had a stake in the upcoming negotiations, stated that “[i]t could not be considered therefore that reciprocal action on tariff cuts would be the only contribution which various parts of the world hoped to make towards the expansion of world trade.”<sup>820</sup>

In order to deal with the undeniable tension between the traditional understanding of “participation” in GATT negotiations and the GATT's newfound concern for the trade interests of developing countries, the United States, which had drafted the resolution under discussion, had come up with what the Indian minister described as “a somewhat complex

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<sup>817</sup> Ibid. 5-6.

<sup>818</sup> See Chapter 1, Section II.B.

<sup>819</sup> MIN(63)9, A.8.

<sup>820</sup> MIN(63)SR, 7.

procedure”,<sup>821</sup> whereby a special committee of the trade negotiations committee would be set up in which “the less-developed countries together with the developed countries could discuss and agree on the terms for participation”.<sup>822</sup> As the Executive Secretary noted, “the implications of the word 'negotiating' would be one of the interesting questions” which the committee “might consider”.<sup>823</sup> In other words, the committee was to perform a gatekeeping function by setting conditions for the participation of developing countries in the Kennedy Round negotiations. The Executive Secretary attempted to frame the committee as an effort to facilitate the participation of developing countries in the Kennedy Round, noting that

if these countries were in doubt because they could not form a judgement as to the conditions of participation, having regard to their development problems, it was at least reasonable to make provision whereby there could be some discussion of the question before they made up their minds whether or not they were going to participate actively in the negotiations, and therefore to seek membership of the Trade Negotiations Committee itself.<sup>824</sup>

The obvious alternative, of course, would have been not to make participation in the trade negotiations subject to “conditions” which could potentially create difficulties for the developing countries in light of their “development problems”. India clearly saw this, and its proposal to delete the reference to the committee from the ministerial resolution, on the basis that “every country which would be participating in the negotiations would be doing so in a way consonant with its economic development needs”,<sup>825</sup> was eventually accepted. The preparatory phase of the Kennedy Round, then, saw the last rearguard action to defend the trade negotiations committee as a body “tied to action” (to use the words of the US delegate at the Havana Conference<sup>826</sup>).

However, that was not the end of the debate over “participation” in the Kennedy Round. The Executive Secretary, who was also Chairman of the Trade Negotiations Committee, continued to express his “understanding” that those contracting parties that had notified their intention to participate in the work of the Trade Negotiations Committee

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<sup>821</sup> Ibid. 5.

<sup>822</sup> Ibid. 5-6 (explanation given by the Executive Secretary). The establishment of the committee is foreseen in paragraph B 3(f) of the draft resolution contained in MIN(63)4. The final version of the resolution, from which the paragraph is deleted, is in MIN(63)9.

<sup>823</sup> MIN(63)SR, 7.

<sup>824</sup> Ibid. 7.

<sup>825</sup> Ibid. 7.

<sup>826</sup> See *supra* text at fn 716.

“intended to take an active part in the trade negotiations in the sense of being prepared to make a contribution”:<sup>827</sup> However, membership in the TNC was formally open to any contracting party that requested to become a member, and there was thus no way to police the Executive Secretary’s “understanding”. To remedy this problem, the core countries simply proceeded to de-couple the status of a “full participant” in the negotiations from membership in the TNC. The status of a “full participant” and the attendant privileges, in turn, remained “tied to action”, i.e., to a readiness to engage in (at least some) reciprocal reduction of trade barriers.

In June 1963, the TNC decided to establish a Sub-Committee on the Participation of Less-Developed Countries to consider “any special problems relating to the participation of less-developed countries in the trade negotiations”.<sup>828</sup> It soon became clear that this committee would be quite similar to the special committee that had been envisaged in the paragraph B 3(f) of the draft resolution considered at the 1963 Ministerial Meeting, and the reference to which had been deleted at the suggestion of India. The first hint that the new Sub-Committee on the Participation of Less-Developed Countries was a kind of reincarnation of the “gatekeeping committee” that the developing countries had thought had dispensed with during the preparatory negotiations, was a remark by United States that the committee would be “charged with establishing the basis for the participation of the less-developed countries in the negotiations”. The United States added that this “could be done in a pragmatic way so that the basis for participation would be in line with ground rules as they evolved”.<sup>829</sup> The US representative’s reference to “evolving” ground rules spooked some of the developing countries;<sup>830</sup> the latter considered the question of ground rules, as least as far as the principle of non-reciprocity was concerned, to have been settled.<sup>831</sup>

Over the course of the discussions in the Committee, the link between “participation” and reciprocity, which the developing countries believed had been severed

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<sup>827</sup> TN.64/SR.1, 1.

<sup>828</sup> TN.64/SR.2, 3. See the TN.64/LDC/ series of documents.

<sup>829</sup> TN.64/21, 6, para. 20.

<sup>830</sup> TN.64/21, 6, para. 26 (Brazil: “it would be difficult for the less-developed countries to express their willingness to participate in the trade negotiations before the ground rules had been elaborated.”).

<sup>831</sup> TN.64/21, 14, para. 50 (India: “Ministers had agreed at their meeting of May 1963 that the developed countries could not expect to receive reciprocity from the less-developed countries; it was not open for the Sub-Committee to re-examine this matter.”); para. 57 (Argentina: “the Ministerial Decision made it perfectly clear that less-developed countries would not be expected to give full reciprocity in the forthcoming trade negotiations.”).

in the preparatory negotiations, began to re-emerge in the guise of a “contribution” that developing countries were expected to make to the trade negotiations in order to be considered as “full participants”. Thus, in response to questions, the Executive Secretary clarified that “a less-developed country could be said to be participating in the trade negotiations when it played its part drawing up the ground rules for these negotiations, and when it contributed to the negotiations.”<sup>832</sup> The United States acknowledged that, given that the “ground rules” were still to be established, “it was hardly possible for less-developed countries to know exactly what their contribution to the negotiations should be.”<sup>833</sup> The United States made it clear, however, that “participating less-developed countries should all make a contribution to the negotiations” and that “it would be difficult for the [US] delegation to make full use of the authority which it possessed if less-developed countries did not make some contribution to the negotiations as a whole.”<sup>834</sup> In a similar vein, the EC representative clarified that the “notion of 'reciprocity' contained two elements”, namely “a contribution as such” and “the quantitative value of such contribution”; it “seem[ed] obvious”, the EC representative explained, that the principle of non-reciprocity “relate[d] more specifically to the value aspect”, leaving “the contribution aspect to be dealt with”.<sup>835</sup>

In practical terms, “participation” in the Kennedy Round largely revolved around the question to what extent a country would be involved in the process of “justification”, “confrontation and negotiation” of the exceptions to the linear tariff reduction formula that most of the developed countries had agreed to apply.<sup>836</sup> To a large extent, whether a country would benefit from the Kennedy Round tariff reduction exercise depended on its ability to ensure that the major developed countries did not exempt products of interest to it from the linear cut. In order to be able to do this, a country had to (a) know whether products of interest to it had been exempted by any of the linear countries and (b) had to be present in the meetings in which the exceptions lists were examined and discussed. It was participation in this basic sense – in the sense of being allowed to see the exceptions lists, to be in the room when they are discussed, and to participate in the discussion – that the

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<sup>832</sup> TN.64/21, 14, para. 51.

<sup>833</sup> TN.64/21, 14, para. 52.

<sup>834</sup> TN.64/21, 16, para. 59.

<sup>835</sup> TN.64/21, 15, para. 58.

<sup>836</sup> See the “procedures for the justification and subsequent negotiation of exceptions” in TN.64/29, para. 2(c).

developed countries made contingent on the readiness of a less-developed country to “contribute” to the negotiations.

The Executive Secretary, even though he clearly cared deeply about the less-developed countries’ “contribution”, was not willing to go quite as far. He acknowledged that “there was no logical connexion between the receipt of exceptions lists by the developing countries and indication by these countries of their own contributions, since the question of reciprocity did not arise”.<sup>837</sup> He merely suggested that “for practical purposes, it was probably desirable ... to establish dates for the two distinct processes simultaneously.”<sup>838</sup> However, this did not sit well with some developed countries. They noted that, under the secretariat’s plan,

the less-developed countries would see the whole of the exceptions lists and enter into discussion on their contents before they had provided any indication of the extent of their own contribution to the Kennedy Round.<sup>839</sup>

The developed countries considered this to be at odds with the fact that, with respect to the process of confrontation and justification, they had only agreed to the involvement of

those developing countries which were *participating*. It would be difficult to infer that developing countries were in fact full *participants* before the extent of their contribution was known. It would therefore be preferable ... for the developing countries to submit an indication of their contribution prior to their viewing the exceptions lists.<sup>840</sup>

It is appropriate to take a step back at this point to appreciate the very particular meaning given to the term “participation” in this statement. Recall that in the preparatory negotiations, it had appeared that the developing countries had managed to overcome the association between reciprocity and participation; in particular, what they had achieved was that their “participation” – involvement, membership, presence – in the Trade Negotiations Committee was not made *contingent* on reciprocity. Instead of reintroducing conditions for “participation” at the TNC-level, what this statement does to re-define what “participation” means. In effect, this statement says to the developing countries: ‘you may well be members of the Trade Negotiations Committee; you may well be present at its meetings; and you may well be involved in its discussions – but none of this means that you are *participating*

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<sup>837</sup> TN.64/LDC/27, para. 4.

<sup>838</sup> Ibid.

<sup>839</sup> TN.64/LDC/27, para. 9.

<sup>840</sup> TN.64/LDC/27, para. 9. (emphases added)

in the trade negotiations. Membership, presence, voice (elements that would seem highly indicative of what one would normally understand as political participation) do not count; what counts is whether you *pay*. This is a market, and you only *participate* – are a *part* of – a market if you buy and sell.'

Some developing countries were not fooled by the word play, noting that the "procedural suggestions which had been made appeared to represent a reversion to the concept of reciprocity."<sup>841</sup> Nevertheless, it was on the basis of this understanding of what counts as "participation" that the process for the examination and justification of exceptions from tariff reductions was organized. At the centre of this structure was an informal body composed of the "linear" countries, i.e., those developed countries undertaking tariff reductions on the basis of a linear formula; this body met in January and February of 1965 "to conduct the justification process".<sup>842</sup> Countries which had not submitted a linear offer were – with the exception of Canada – not entitled to attend these meetings. According to the "Plan for the participation of the less-developed countries in the trade negotiations", the linear countries would subsequently inform those less-developed countries which had "formally notified ... their readiness to table" at a specific date "a statement of the offers which they would make as a contribution to the objectives of the trade negotiations" *which* items of special interest to the less-developed countries were contained on the exceptions lists.<sup>843</sup> On the same date, the developed countries would also make "suggestions as to the offers which participating less-developed countries might make".<sup>844</sup> As the next step, the less-developed countries which had indicated their intention to make offers were allowed to participate in an "examination of the lists of excepted items" that were of interest to them.<sup>845</sup> Finally, "[l]ess-developed countries having tabled a statement of their proposed contributions would thereafter take part in the trade negotiations and would receive the full

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<sup>841</sup> TN.64/LDC/27, para. 12.

<sup>842</sup> TN.64/SR.10, para. 5. The decision to conduct the "process of justification" in a "body consisting of the countries participating in the negotiations on the basis of the linear offer" is recorded in TN.64/29, para. 2(c).

<sup>843</sup> TN.64/41/Rev.1, A; the Director-General described this process as follows:

as the procedures relating to the non-linear countries came into effect, the negotiation would not be limited to the linear countries, but would *gradually extend to cover all the participating countries*.

TN.64/SR.10, para. 7. (emphasis added)

<sup>844</sup> TN.64/41/Rev.1, A, para. 3. Pursuant to this paragraph, the United States presented individual "suggestion papers" to less-developed countries and held at least 45 meetings with LDC delegations "to explain [its] offers and suggestions". Canada, Japan, Sweden, and the United Kingdom had also suggested "at least some KR contributions by the LDC's [sic]"; FRUS 1964-1968, 797.

<sup>845</sup> TN.64/41/Rev.1, A, para. 2(c). The Director-General would later report that "a number of items of particular interest to less-developed countries have been excepted from the linear cut"; FRUS 1964-1968, 785.

exceptions lists.”<sup>846</sup> While the submission of a statement of offers thus in principle entitled a less-developed country to negotiate with the linear countries about the products on the latter's exceptions lists, the United States had obtained a guarantee that it was left “open to a developed country to decide whether a specific offer by a less-developed country constituted an acceptable basis for opening negotiations with that country.”<sup>847</sup>

The disciplining effect of the definition of “participation” established by the developed countries in the Kennedy Round is evident in a document circulated by the GATT's Director-General – formerly the Executive Secretary – to the Trade Negotiations Committee “for the convenience of the Committee” in December 1965 (see Figure 1).<sup>848</sup> The document contains two simple lists of countries. The first records countries which had tabled offers on industrial or agricultural goods, or, in the case of less-developed countries, had submitted “statements of the offers they would make as a contribution to the trade negotiations”. The second lists countries which had “formally notified their intention to participate in the trade negotiations”, but had “not yet presented” their statements of offers. With respect to the first group of countries, the document states that these countries “had been recognized as full participants in the negotiations”.<sup>849</sup> Countries in the second group, by contrast, “are to be regarded as full participants from the date on which they present” their statements of offers. This document represents perhaps the prime example of “hierarchical observation” of compliance with the reciprocity norm in multilateral trade lawmaking.<sup>850</sup>

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<sup>846</sup> TN.64/41/Rev.1, A, para. 4.

<sup>847</sup> TN.64/SR.10, para. 32. This US concern is reflected in the proviso of the plan that “each participant will have the right to decide whether a basis for negotiation exists.” TN.64/41/Rev.1, B, para. 6.

<sup>848</sup> TN.64/73.

<sup>849</sup> It appears that this recognition was not automatic, since the sentence continues “with the exception of Turkey”. It is further explained that “Turkey has notified the Trade Negotiations Committee of the basis on which it proposes to participate in the negotiations. The Committee has still to examine this proposal.” Turkey's notification is in TN.64/65.

<sup>850</sup> See Brigg 2002, 429–430 (interpreting Foucault's *Discipline and Punish*): “Hierarchical observation and normalising judgement come together in the examination. . . It is here that 'truth' is established.”

Portugal (European territory)	x	x	
South Africa	x	x	
Sweden	x	x	(linear)
Switzerland	x	x	(linear)
Turkey	no	x	
United Arab Republic	statement of contribution (specific tariff offers on industrial products)		
United Kingdom	x	x	(linear with exceptions)
United States	x	x	(linear with exceptions)
Uruguay	statement of contribution		
Yugoslavia	statement of contribution (specific tariff offers on industrial products)		

2. All thirty-one countries listed above have been recognized as full participants in the negotiations with the exception of Turkey. Turkey has notified the Trade Negotiations Committee of the basis on which it proposes to participate in the negotiations. The Committee has still to examine this proposal.

3. The following additional countries have formally notified their intention to participate in the trade negotiations under the plan for the participation of the less-developed countries but have not yet presented their statements of the offers they would make as a contribution to the objectives of the trade negotiations. These countries are to be regarded as full participants from the date on which they present such statements:

Argentina	Nicaragua	Spain
Ceylon	Niger	Togo
Cyprus	Pakistan	Uganda
Ghana	Portugal in respect of non-European territories	
Ivory Coast		
Malta		

4. There are, therefore, now forty-three countries<sup>1</sup> actively concerned in the trade negotiations. In addition Iceland and Tunisia have indicated that they wish to negotiate for accession.

Fig. 1: Observation of compliance with the reciprocity norm; excerpt from TN.64/73.

While the group of "linear" countries was at the core of the tariff negotiations, much of the "action" in the Kennedy Round occurred among an even more select circle of participants referred to as the "Bridge Club",<sup>851</sup> a group consisting of the Executive Secretary and representatives of the United States, the EEC, the United Kingdom, as well as, occasionally, Japan and Canada.<sup>852</sup> According to Curzon and Curzon, the "private

<sup>851</sup> Winham 1990, 811: the Bridge Club "effectively accounted for most of the actions of the round"; Winham 1986, 272: "essentially all of the action of the negotiation occurred within this group."

<sup>852</sup> Winham 1990, 811; Winham 1986, 65, fn 9; Curzon/Curzon 1973, 319, describe the membership of the "Bridge Club" as consisting of "the director-general, on the one hand, and the representatives of the United States, the EEC, and the United Kingdom, on the other".

meetings” between the Bridge Club members represented the “control center” of the Round.<sup>853</sup> For example, when the Director-General drafted a report on the progress of the Kennedy Round for the attention of ministers of the participating countries,<sup>854</sup> he “held a series of information meetings with the major Kennedy Round participants … before writing the report”, then gave the US, the EEC, Japan, and the United Kingdom an opportunity “to comment individually on the first draft”, and incorporated some of their “suggested amendments in the final version”.<sup>855</sup>

What was true for the Kennedy Round – that the “main action of the negotiation often occurred away from the multilateral chambers”<sup>856</sup> – was even more characteristic of the Tokyo Round. Most negotiations in the Tokyo Round had what Winham, arguably the foremost historian of the Tokyo Round, has described as a “pyramidal” structure whereby “agreements were initiated by the major powers at the top and then gradually multilateralized through the inclusion of other parties in the discussions.”<sup>857</sup> As Winham has explained:

Together, the EC and the United States conducted a largely bipolar negotiation, with each 'superpower' effectively possessing a veto over the various Tokyo Round agreements. Other parties such as Japan, Canada, and smaller developed countries played important role in selected areas, but more often than not faced a *fait accompli* when the two major players reached bilateral agreement.<sup>858</sup>

Formal bodies, such as the Trade Negotiations Committee, played even less of a role in the Tokyo Round negotiations than they had in the Kennedy Round.<sup>859</sup>

The extent to which the negotiations had this pyramidal structure varied among the different negotiating areas and the different phases of the negotiations. In the “Tariffs Group”, for example, the participants extensively debated the merits and demerits of alternative tariff formulas,<sup>860</sup> only to have the EC and the US proceed to agree bilaterally on

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<sup>853</sup> Curzon/Curzon 1973, 319; see also Preeg 1970, 186, on the informal but fairly frequent 'big four' meetings (the United States, the EEC, the United Kingdom, and Japan) held by Wyndham White to assess the course of the negotiations.

<sup>854</sup> See GATT 1966.

<sup>855</sup> FRUS 1964-1968, 795.

<sup>856</sup> Winham 1986, 65. Kahler calls this phenomenon "disguised minilateralism"; Kahler 1992, 686; for his discussion of the Kennedy Round, see *ibid.* 688.

<sup>857</sup> Winham 1986, 376; see also *ibid.* 174-175; and Winham 1990, 812.

<sup>858</sup> Winham 1990, 812.

<sup>859</sup> See McRae/Thomas 1983, 68-71, for a discussion of the formal and informal negotiations.

<sup>860</sup> See text at fn 202 *supra* and fn 1029 *infra*.

a formula which was "not even put before Group Tariffs for discussion or approval."<sup>861</sup> In the subsidies negotiations, the basic outline of an agreement was circulated in July 1978 by Canada, the EC, Japan, the Nordic countries and the US "for the information and consideration of other interested delegations".<sup>862</sup> The limited circle of participants in the subsequent negotiations was partly due to self-selection. As Hufbauer *et al.* report,

only the United States, the EC, Japan and Canada took an active part in the early stages of the subsidies negotiation. Only with great effort were countries such as Mexico, India and Hungary involved in the negotiations. In fact, some countries – such as Singapore and Australia, which watched the negotiations closely – did not in the end associate themselves with the negotiated Agreement.<sup>863</sup>

The negotiations on customs valuation similarly followed the pyramidal pattern.<sup>864</sup> Sherman attributes the developing countries' decision to propose an alternative code at the conclusion of the negotiations to "the fact that the LDCs, as well as some other trading nations, were not consulted until relatively late in the MTN proceedings, after the Code was nearing its final form."<sup>865</sup> Indeed, at the TNC meeting held to conclude the round, the developing countries characterised the customs valuation code as a "draft negotiated among a certain number of developed countries".<sup>866</sup> And while the pyramidal dynamic was reportedly not present in the negotiation of the Government Procurement Code,<sup>867</sup> it was taken to an extreme in the negotiations on the revision of the Kennedy Round Anti-Dumping Code and the Code on Civil Aircraft: Most participants in the Tokyo Round negotiations saw the texts of these codes for the first time at the TNC meeting that was called to draw up the Procés-Verbale to conclude the round. As Malaysia protested at the meeting,

... developing country delegations ... have constantly pointed out the need for transparency in the negotiations. Yet today we find texts of Agreements which have been negotiated amongst a few developed countries on subjects like Trade in Civil Aircraft of which an overwhelming majority of participants in the MTN were not aware until 7 April 1979. My country and many other developing countries are sizeable customers for civil aircraft and yet we have been kept out of the negotiations of this Agreement. ... The so-called

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<sup>861</sup> McRae/Thomas 1983, 64; see also *ibid.* 68 and 71; for the EC-US agreement on a tariff formula, see also Winham 1986, 166-167.

<sup>862</sup> MTN/NTM/W/168.

<sup>863</sup> Hufbauer/Erb/Starr 1980, 67, fn. 41; on India's participation, see MTN/P/5, 76.

<sup>864</sup> Winham 1986, 188-189.

<sup>865</sup> Sherman 1980, 129; see MTN/NTM/W/222/Rev.1.

<sup>866</sup> MTN/P/5, 40. (Brazil)

<sup>867</sup> Winham 1986, 189 ("fully engaged all countries"), 193-194 ("absence of a pyramidal process").

Agreement on Implementation of Article VI of GATT is another document that has surfaced at the final hour.<sup>868</sup>

Malaysia was particularly frustrated by the fact that the developed countries had resisted the creation of a formal negotiating sub-group on anti-dumping, only to come up with a draft Anti-Dumping Code – a revised version of the Kennedy Round Anti-Dumping Code which had been negotiated exclusively among developed countries<sup>869</sup> – at the conclusion of the Round.<sup>870</sup>

The discontent among the developing countries at that final TNC meeting of the Tokyo Round was palpable. Malaysia dismissed the draft codes before the TNC as "a series of documents purporting to be Agreements".<sup>871</sup> The Chilean remarked that his country was "placed before a minimum compromise between the major trading nations".<sup>872</sup> The developing countries attributed the unsatisfactory way in which the negotiations had proceeded to the lack of rules of procedure.<sup>873</sup> Yugoslavia noted the "fact that at some stages of the negotiations the developing countries were not invited, and that transparencies were often absent".<sup>874</sup>

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<sup>868</sup> MTN/P/5, 62; see also *ibid.* 39 (Brazil):

two of the texts before us – those dealing with civil aircraft and anti-dumping – are new to my Delegation.

*ibid.* 64, where Switzerland notes that it had insufficient time to study the civil aircraft code that had been "put before us by a few delegations"; *ibid.* 70 (Zaire):

the results presented to us today constitute, in the case of many of the codes, compromise solutions reached rather between developed partners than between developed and developing partners.

*Ibid.* 90 (Nigeria):

Many developing countries' delegates were not consulted in some areas until the last days of negotiations when amendments were impossible.

*Ibid.* 73 (India):

we have neither participated in the negotiations nor had occasion to examine the texts which we have seen only now.

The Indian delegate therefore expressed his delegation's

total reservation with regard to the agreements reached among some delegations from developed countries in respect of Anti-Dumping and Civil Aircraft.

The EC delegation contested the validity of this criticism, *ibid.* 48, stating that

if anyone says that they have been excluded from the negotiation of this Agreement not only is that point not valid but we gave notice of our intent some time back in July of last year, for example in the Framework of Understanding of July 1978 of our intention to negotiate an agreement in this area.

<sup>869</sup> See MTN/P/5, 47, where the EC describes the proposed code as "a satisfactory updating of the first Code in the GATT".

<sup>870</sup> MTN/P/5, 62.

<sup>871</sup> MTN/P/5, 61.

<sup>872</sup> MTN/P/5, 87.

<sup>873</sup> MTN/P/5, 62: Developing countries had "called for proper rules of procedure to be laid out both for the Trade Negotiations Committee and for the various Groups and Sub-Groups but the matter was not taken up". (Malaysia)

<sup>874</sup> MTN/P/5, 36.

In sum, exclusionary negotiating arrangements, in conjunction with a readiness to conclude agreements on a critical mass basis, allowed the developed countries, and in particular the US and the EC, to implement the club approach to trade lawmaking in the Tokyo Round. Negotiating mostly among themselves, and enlarging the circle of participants gradually by first including those most likely to assent to their approach and marginalising those most likely to oppose it, the two majors made it easier to come to an agreement in the negotiations, and managed to shape the results of the negotiations decisively. They thus accomplished the first two benefits associated with the club approach. However, the Tokyo Round also showed the limits of the club approach to multilateral trade lawmaking: in the area of safeguards, which was largely a North-South issue and where the developing countries would hence have had to be part of any agreement for it to be meaningful, no agreement could be reached. Moreover, as noted above, the MFN principle limited the extent to which the developed countries could deny the benefits of the codes to non-signatories, thus curtailing their ability to entice the latter to join those agreements on the signatories' terms.

Exclusionary negotiating arrangements were also characteristic of the Uruguay Round, especially in its final stages. "Green Room" meetings had been introduced by the GATT's new Director-General Arthur Dunkel in the early 1980s.<sup>875</sup> During the early stages of the Uruguay Round, Dunkel used the Green Room to "organize negotiations, appoint chairs for each of the groups, review proposals, maintain momentum, and make sure no significant delegation was left out."<sup>876</sup> Which delegations were invited to Green Room meetings depended partly on a country's significance in trade terms, and partly on the strength of individual representatives; India and Brazil, for example, were always there.<sup>877</sup>

As the Uruguay Round progressed, much of the action shifted from the Green Room to bilateral negotiations between the US and the EC, sometimes with involvement of

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<sup>875</sup> Hart 1995, 204; Blackhurst/Hartridge 2005, 464; the New York Times reported from the 1982 Ministerial Meeting:

... in a suite of offices with olive green walls, members of the high-powered "chairman's group" held 24-hour vigils and were dubbed the 'boys in the green room'.

New York Times 1982.

<sup>876</sup> Hart 1995, 216.

<sup>877</sup> Oral History Interview with Warren Lavorel, 10:40-12:08; see also Blackhurst and Hartridge 2005, 463, who note that the selection of Green Room participants was "apparently arbitrary", but "well understood in fact".

the other two "Quad" countries (Japan and Canada). As Paemen and Bensch, two EC negotiators, have put it, even the influence of coalitions such as the Cairns Group

gradually faded away. As the battle over agriculture between the European Community and the U.S. gathered pace, it became clear that there was no room for additional combatants.<sup>878</sup>

The agriculture negotiations, where the EC and the US had managed to reach a bilateral agreement that left the other participants in the round little choice but to accept it as a *fait accompli*, subsequently became the model on which the EC and the US hoped to resolve other outstanding issues in the Round.<sup>879</sup> Paemen and Bensch describe this "trigger strategy", which, as they note, "had proved so effective in agriculture", as follows:

A bilateral Euro-American solution would be found to the problems ... and endorsed by the two major partners, Japan and Canada. Thereafter, it could be 'multilateralised' in Geneva.<sup>880</sup>

Unsurprisingly, this strategy led to some discontent particularly among the developing countries. Paemen and Bensch report that, after the major industrialised countries reached an agreement on key elements of the Uruguay Round package at a G-7 summit in Tokyo,

the developing countries were quick to point out that the package contained nothing at all for them. Whilst this may have been an exaggeration, it gave some indication of the genuine frustration felt by the other participants in the Uruguay Round. They had had to sit on the sidelines and watch while the United States and the European Community decided their fate.<sup>881</sup>

In the final stages of the Uruguay Round, the US and the EC thus exploited the first two benefits of the club approach to the fullest extent: they negotiated mostly among themselves, which made agreement easier, and they could shape the content of the resulting agreement decisively. By themselves, however, exclusive negotiating arrangement did little for the third element of the club approach: the ability to entice outsiders to join the agreement on the insiders' terms. The solution that the developed countries eventually devised to deal with this problem is the subject of the next section.

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<sup>878</sup> Paemen/Bensch 1995, 99.

<sup>879</sup> See Paemen/Bensch 1995, 224:

The USTR agreed to Leon Brittan's suggestion that intensive bilateral talks be resumed to try to find in advance Blair House-style Euro-American solutions to the major outstanding problems in the Uruguay Round context.

<sup>880</sup> Paemen/Bensch 1995, 225.

<sup>881</sup> Paemen/Bensch 1995, 231.

### C. The Self-Transcending Club: The Single Undertaking and the Founding of the WTO

The practices of participation discussed in the previous section – the negotiation of tariff concessions with principal suppliers; the exclusion of certain product categories and types of trade barriers from negotiations; the conclusion of agreements among a “critical mass” of countries; and informal and often exclusionary negotiating arrangements – allowed the major developed countries to realise the first two benefits of the club approach – the relative ease of reaching agreement among fewer participants, and the disproportionate influence on the content of that agreement of those participants – throughout the history of lawmaking in the GATT. By the end of the Tokyo Round it had become clear, however, that the developed countries' ability to realise the third benefit of the club approach – forcing outsiders to join the insiders on the insiders' terms – was increasingly limited. Towards the end of the next round of trade negotiations, the Uruguay Round, the United States conceived of, and the other Quad countries embraced, a radical solution to this problem. Under the scenario envisaged by the United States and ultimately put into practice, the major trading nations would *leave* the GATT and all the agreements concluded under its auspices, only to join a new agreement comprising a substantively identical, but legally distinct GATT, successor agreements to the Tokyo Round agreements, as well as new agreements negotiated in the course of the Uruguay Round. The central feature of the new agreement, which would distinguish it from the GATT framework, would be that any country which wanted to join it had to subscribe to *all* the agreements concluded in the Uruguay Round. The primary purpose of what was originally simply called the “GATT II” and ultimately became the Marrakesh Agreement Establishing the World Trade Organization was thus to realize the third element of the club approach: to compel countries which had been refusing to join the new agreements in the Tokyo Round and were planning to do likewise in the Uruguay Round, to join those agreements.

In the early 1980s, nothing foreshadowed this development. While the United States was dissatisfied with the results of the Tokyo Round, and in particular with the fact that it ultimately had to implement them on an MFN basis, its initial reaction appeared to be to move in the opposite direction of a dramatic, all-or-nothing confrontation. Thus, US negotiators proposed to move away from major trade rounds and to instead “transform...

the GATT into a permanent negotiating forum".<sup>882</sup> At a meeting of the Consultative Group of 18 shortly after the conclusion of the Tokyo Round, it was

pointed out that non-tariff barriers to trade were likely to be the central problem ahead. If this turned out to be the case, such barriers might be taken up in negotiations subject by subject in a self-balancing manner rather than simultaneously in a new comprehensive round. Issues that had received insufficient attention in the Tokyo Round, such as agriculture, should be taken up immediately after the Round. ... the past practice of periodic comprehensive negotiations should be replaced by a process of permanent negotiation.<sup>883</sup>

In a similar vein, US representatives argued as late as 1985 that

the issues for negotiation – most of which were contained in the 1982 Work Programme – would vary in their degree of ripeness and it would seem reasonable that if agreement could be reached on a given set of issues, they should be concluded, without waiting for agreement on the totality.<sup>884</sup>

When the Uruguay Round negotiations were eventually launched, they unfolded from the outset in a more polarised atmosphere, especially between developed and developing countries, than had ever before been the case. In the Kennedy Round, the negotiations on non-tariff barriers had been an uncontroversial, if relatively unproductive affair. In the Tokyo Round, there was a broad consensus to negotiate on non-tariff measures such as standards, subsidies and countervailing duties, and customs valuation; disagreement centred on the substance of any new disciplines and on the opaque and exclusionary manner in which some of the negotiations proceeded. In the Uruguay Round, by contrast, there was from the outset a fundamental disagreement over whether negotiations on services, intellectual property rights, and investment measures should take place in the GATT framework at all.<sup>885</sup> This was an entirely new level of discord, and it resulted in, by

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<sup>882</sup> CG.18/28 of 17 July 1985, 5.

<sup>883</sup> CG.18/7, para 19; ; see also CG.18/12, para 19:

One member said that, given the necessary political will, and adequate policy guidelines, there was no reason why negotiations should not take place in GATT between major rounds.

See further Hart 1995, 203, noting that after the Tokyo Round,

work proceeded on unfinished business, some in the vain hope that it could be concluded on its own merit, others in the clear knowledge that it constituted preparatory work for a new, as yet undefined, negotiation.

<sup>884</sup> CG.18/28, 5.

<sup>885</sup> India and Brazil proposed the following amendment to the draft ministerial declaration:

"IV. Subjects for Negotiations  
Services

Delete the title and its content."

MIN(86)/W/11; see also India's statement at the Punta del Este Ministerial:

We are firmly of the view that the issues of investment, intellectual property and services do not belong to GATT. ... The proposal to hold negotiations on services in GATT is ... untenable. ...

GATT standards, brutal confrontations<sup>886</sup> and tortured compromises throughout the round. The compromises on services and intellectual property rights were reached by holding out the prospect that these issues would be kept institutionally separate from the GATT – precisely the opposite of what ultimately happened.

The compromise on trade in services is embodied in the Punta del Este Ministerial Declaration launching the Uruguay Round. Apart from the introductory paragraph providing for the establishment of a Trade Negotiations Committee (TNC) and a concluding paragraph explicitly keeping open the question of the implementation of the negotiating results,<sup>887</sup> the declaration is divided into two parts, the first part devoted to “Negotiations on Trade in Goods”, and the second part dealing with “Negotiations on Trade in Services”. The separation of the negotiations on trade in goods and trade in services was adopted to reassure the developing countries that there would be no substantive linkage between the two sets of negotiations.<sup>888</sup> As Brazil reminded the other delegations at the first meeting of the GNS, “the premise of trade-offs between the area of goods and that of services has been excluded from the start of our deliberations.”<sup>889</sup> Moreover, the final paragraph of the declaration made it clear that the integration of an agreement on trade in services into the GATT was not to be seen as a foregone conclusion; instead, the

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Continued adherence to the multilateral trading system or commencement of the New Round cannot be made contingent upon induction of alien themes into GATT.

MIN(86)/ST/33, 3-4; see further the proposal by India and Brazil for a decision to be adopted at the Punta del Este Ministerial inviting governments

to give consideration to holding an intergovernmental meeting to examine, outside the GATT framework, what appropriate multilateral action is desirable on trade in services.

MIN(86)/W/3; on the divisions between developed and developing countries at the outset of the Uruguay Round, see also Steinberg 1995 and Winham 1990, 797-798.

<sup>886</sup> An early climax was the decision by the United States to call for a formal vote in order to break the developing countries' resistance to new negotiations; see Hart 1995, 202 and 207; Oxley 1990, 133. Moreover, the preparatory committee could not agree on a single draft declaration and decided to forward three competing drafts to the ministerial meeting; the Director-General's letter of transmittal, in which he appeared to express a preference for one of the draft declarations, prompted a sharp rebuke from India and Brazil; see PREP.COM(86)W/50 for the Director-General's letter of transmittal; L/6041 (India); and L/6042 (Brazil).

<sup>887</sup> The concluding paragraph of the Declaration (MIN.DEC) reads:

Implementation of Results under Parts I and II

When the results of the Multilateral Trade Negotiations in all areas have been established, Ministers meeting also on the occasion of a Special Session of CONTRACTING PARTIES shall decide regarding the international implementation of the respective results.

<sup>888</sup> See Oxley 1990, 138; Brazil went so far as to construct the legal fiction that the negotiations on goods and the negotiations on services had been launched at different meetings by different bodies and had established “two legally distinct negotiating processes”; MTN.GNS/W/3, paras. 4-5; for details, see *infra* text at fn 1281.

<sup>889</sup> MTN.GNS/W/3, para. 5; see also *ibid.* para. 43; Oxley 1990, 188-189; Paemen/Bensch 1995, 55, quoted in *supra* fn 334.

declaration envisaged that the implementation of the negotiating results would be decided by the contracting parties once the negotiations had been concluded.

The compromise on intellectual property rights started out differently, but ultimately assumed a similar form. Developing countries were, if anything, even more resolutely opposed to the inclusion of substantive obligations regarding the protection of intellectual property rights into the GATT framework than they were to the inclusion of services. However, they could live with negotiations to clarify and elaborate the existing GATT provisions touching on intellectual property rights, and to conclude an agreement on trade in counterfeit goods which had already been the subject of negotiations in the Tokyo Round. And this was all that they agreed to in the Ministerial Declaration.<sup>890</sup>

Once the negotiations got under way, however, the developed countries essentially ignored the limited ministerial mandate and proceeded to table negotiating texts envisaging substantive minimum standards for the protection of intellectual property. Confident that they had the ministerial mandate on their side, the developing countries were “[n]ot willing to give an inch” and limited themselves to pointing out that it was the World Intellectual Property Organisation (WIPO) that had “responsibility for all matters of substance relating to rights.”<sup>891</sup> As a result,

for the first two years of negotiation, up to the Mid-Term Review Conference in Montreal, the Northern hemisphere participants in the TRIPs negotiations were talking about one thing, while those from the Southern hemisphere were talking about something entirely different. ... For the latter group, the various documents churned out by the industrialised

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<sup>890</sup> For a discussion of how the draft ministerial declarations were amended to reflect the developing countries' perspective, see Raghavan 1990, 126-130, comparing the Swiss-Colombian draft and the final version. See also Paemen/Bensch 1995, 119:

In order to get the developing countries to accept the inclusion of intellectual property in the Uruguay Round, the Ministerial Declaration had explicitly limited the multilateral agreement to counterfeit goods, a subject which had already been addressed within the framework of the Tokyo Round. ... As far as [the developing countries] were concerned, the Uruguay Round TRIPs negotiation did not go beyond adding one or two interpretative notes to GATT Articles IX (Marks of Origin) and XXd (General Exceptions), which refer to intellectual property, and the adoption of the text on counterfeit goods negotiated during the Tokyo Round.

<sup>891</sup> Paemen/Bensch 1995, 119; see e.g. MTN.GNG/NG11/4, para. 11:

Some delegations said that much of what was suggested in the United States paper and also in some of the other suggestions did not fall in the mandate of the Group, which did not call for the establishment of norms and standards for the protection of intellectual property. It was not the job of the Group to establish a new system for the protection of intellectual property rights in GATT. These were matters for WIPO and were extensively under consideration in the various parts of WIPO's current activities.

The developing countries relied on the statement in the Ministerial Declaration acknowledging that the negotiations "shall be without prejudice to other complementary initiatives that may be taken in the World Intellectual Property Organization and elsewhere to deal with these matters."

countries were not worth the paper they were written on. They were utterly and totally irrelevant.<sup>892</sup>

The Mid-Term Review in December 1988 did not advance matters. The developed countries' position that substantive standards should be included in the new agreement was reflected in the draft prepared by the sympathetic chair.<sup>893</sup> This met with fundamental opposition from most developing countries, and especially India. At the meeting,

the Indian negotiator reiterated time after time his total opposition to the approach adopted by the text. His view was that a discussion of intellectual property, and especially the contents of rights, was out of place in the GATT context. It was a matter for the World Intellectual Property Organisation.<sup>894</sup>

As a result, the document adopted at the meeting contains two bracketed texts on intellectual property rights reflecting diametrically opposed positions.<sup>895</sup> Owing in part to the disagreement on intellectual property rights, the Mid-Term Review was widely seen as a failure and its results were put "on hold" until another high-level meeting scheduled for April 1989.

At the April meeting, negotiators reached a compromise along similar lines as the comprise on services reflected in the Punta del Este Ministerial Declaration. According to Paemen and Bensch, EC negotiators

secretly told India and Brazil that the future agreement on TRIPs would not necessarily have to form part of the legal GATT texts. This represented a major concession ... India, which tended to adopt a legalistic attitude in matters relating to the GATT, allowed itself to be persuaded.<sup>896</sup>

This assurance is reflected in the following proviso in the document adopted at the April 1989 meeting:

Ministers agree that the outcome of the negotiations is not prejudged and that these negotiations are without prejudice to the views of participants concerning the institutional

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<sup>892</sup> Paemen/Bensch 1995, 120.

<sup>893</sup> Ibid. 137.

<sup>894</sup> Ibid.; see also Devereaux/Lawrence/Watkins 2006, 62: At the mid-term review developing countries "continued to block any discussion of substantive standards." Somewhat disingenuously, Stewart states that Brazil and India "prevented attainment" of the mid-term objectives; Stewart 1993, 2268-2269.

<sup>895</sup> MTN.TNC/7(MIN), 21-24.

<sup>896</sup> Paemen/Bensch 1995, 143; see also Oxley 1990, 170:

The developing countries were still very unhappy about having to deal with this subject. They were prepared to consider negotiations for new commitments but would not yet concede that they should be linked to the GATT system.

aspects of the international implementation of the results of the negotiations in this area, which is to be decided pursuant to the final paragraph of the Punta del Este Declaration.<sup>897</sup>

With this proviso in place, the developing countries agreed to negotiations encompassing substantive standards of intellectual property protection within the framework of the Uruguay Round. The text held out the prospect that any results on substantive standards could be either implemented under the auspices of WIPO or in another manner that would keep it institutionally separate from the GATT.<sup>898</sup> At the same time, it allowed the developing countries to finally engage in the negotiations on substantive standards; up until that point, these negotiations had been conducted almost exclusively by the developed countries, and the developing countries recognised the danger that they were losing the opportunity to influence the final result in this area.<sup>899</sup>

In sum, the compromise between developed and developing countries that provided the basis for the negotiations on services and intellectual property rights in the Uruguay Round was that the decision on the form and institutional framework of the implementation of the negotiating results would be decided at the end of the negotiations – presumably, as was GATT practice, on the basis of consensus. Thus, the developing countries would be able to decide to join these agreements only if they were implemented in a form that was satisfactory to them, or not to join them at all. It was clear that what the developing countries wanted to avoid at all costs was that agreements in these areas would be substantively linked to trade in goods, so that failure to comply with commitments on trade in services and intellectual property rights would give developed countries a right to retaliate against the exports of developing countries (“cross-retaliation”).<sup>900</sup> The

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<sup>897</sup> MTN.TNC/11, 21. To recall, the final paragraph of the Punta del Este Declaration reads:

Implementation of Results under Parts I and II

When the results of the Multilateral Trade Negotiations in all areas have been established, Ministers meeting also on the occasion of a Special Session of CONTRACTING PARTIES shall decide regarding the international implementation of the respective results.

<sup>898</sup> It is clear that this remained India's position; see, e.g., MTN.GNG/NG11/W/37, 19-20:

The protection of intellectual property rights has no direct or significant relationship to international trade. It is because substantive issues of intellectual property rights are not germane to international trade that GATT itself has played only a peripheral role in this area and the international community has established other specialised agencies to deal with them. It would therefore not be appropriate to establish within the framework of the General Agreement on Tariffs and Trade any new rules and disciplines pertaining to standards and principles concerning the availability, scope and use of intellectual property rights.

<sup>899</sup> Omar Gad 2006, 106.

<sup>900</sup> See India's statement at the Punta Del Este Ministerial, MIN(86)/ST/33, 4:

“institutional reservation” on the implementation of the results in services and intellectual property rights appeared to give them the right to reject any agreement that provided for cross-retaliation. In short, it held out the promise than they could join any agreement *on their own terms*.

This, of course, would frustrate the third element of the club approach. It suggested that the developed countries could go ahead and conclude agreements on services and intellectual property rights among themselves, but they would not be able to compel countries like India and Brazil – precisely those countries at whose practices these agreements were primarily aimed – to join those agreements on the developed countries' terms.

Faced with this scenario, US negotiators began to internally discuss various options for concluding the Uruguay Round in late 1989.<sup>901</sup> Preoccupied with the prospect that many developing countries would “free ride” on the new agreements under negotiation in the round,<sup>902</sup> US negotiators considered the option of asking for a waiver from GATT MFN obligation for those agreements which presented the greatest concern in this regard. They also contemplated different scenarios under which non-signatories would voluntarily renounce their right to insist that the signatories apply an agreement on an MFN basis – basically a formalisation of what happened in the Tokyo Round, at least with respect to the United States.<sup>903</sup>

In the summer of 1990, US negotiators began considering more radical options to deal with the “free rider” problem.<sup>904</sup> One of them was the “GATT II” approach, whereby

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It is our belief that the developing countries in putting their signature to linkages between goods and services will be putting their signature to crippling economic retaliation which they can hope to ward off only by compromising their national policies to the dictates of mightier economic powers. Are we to forge this destiny for ourselves? Do we present these shackles when we go back home to our countrymen?

<sup>901</sup> Interview with Richard Steinberg.

<sup>902</sup> See Paemen/Bensch 1995 on the US position in the services negotiations:

The Americans were becoming obsessed with the idea of "free-riding" ... This was to be a constant concern throughout the negotiations on services and took precedence over the Americans' fear of alienating some of the developing countries.

<sup>903</sup> As noted above, the United States had implemented the Tokyo Round codes on Subsidies and Government Procurement on a conditional MFN basis; apart from India (which was a signatory to the Subsidies Code, but against which the United States invoked the non-application clause), no GATT contracting party ever formally complained about this.

<sup>904</sup> The following is primarily based on an interview with Richard Steinberg, as well as interviews with Craig Thorn, Jane Bradley, Rufus Yerxa, and Andrew Stoler (via email). Steinberg, who was working at USTR at the time, was chiefly responsible for developing options for concluding the round. Thorn, Bradley, Yerxa, and Stoler were involved in the internal discussions. By his own account, Steinberg's thinking on this issue was

the “Quad” countries – the US, the EC, Japan, and Canada – would withdraw from the GATT and join a substantively identical but legally distinct “GATT II” to which the new Uruguay Round agreements as well as the amended Tokyo Round codes would be annexed. The idea was that not joining the new GATT II and thus losing all rights to access the markets of the Quad countries would prove too costly for virtually all other contracting parties, thus forcing them to join the GATT II on the Quad countries’ terms. The chief drawback of the approach as it was perceived at the time was that it would be too confrontational and would further deteriorate relations with the developing countries. US negotiators referred to this option internally as “the power play”.<sup>905</sup>

An alternative option that was contemplated was to add the new agreements to the existing GATT through an amendment and to subsequently expel those contracting parties that refused to ratify the amendment from the GATT.<sup>906</sup> The major downside of this approach was seen in the fact that it would be hard to secure the support of two-thirds of the contracting parties to bring the amendment into force, and even harder to convince a sufficient number of contracting parties to subsequently expel those who did not ratify the amendment. Also, this variant did not appear significantly less confrontational than the “GATT II” approach. Other ideas under discussion revolved around obtaining a waiver from the GATT’s MFN obligation either for all Uruguay Round agreements as a package or for each agreement individually. What was clear to US negotiators even at this point was that an “a la carte”, or “menu”, approach to concluding the Uruguay Round, whereby each contracting party could choose which agreement to accept and at the same time enjoy the benefits of all agreements on an MFN basis, was unacceptable to them. Of course, this was

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influenced by the Realist school in International Relations, which posits that, for international institutional arrangement to be sustainable, they must reflect the power relations between the participants in such arrangements. Steinberg had studied with Stephen Krasner, a proponent of the Realist school. Steinberg also recalls that the early 1990s were the heyday of the so-called “Washington consensus”; one of the tenets of the “Washington consensus” was that developing countries should embrace trade liberalization for their own sake. It thus appeared that forcing the developing countries to join the agreements negotiated in the Uruguay Round would ultimately be in those countries’ own interest.

<sup>905</sup> Steinberg 2002, 360.

<sup>906</sup> The possibility to expel a contracting party that refuses to adopt an amendment was envisaged in GATT Article XXX:2, which provides, in relevant part:

The CONTRACTING PARTIES may decide that any amendment made effective under this Article is of such a nature that any contracting party which has not accepted it within a period specified by the CONTRACTING PARTIES shall be free to withdraw from this Agreement, or to remain a contracting party with the consent of the CONTRACTING PARTIES.

precisely the scenario on the basis of which the developing countries had agreed to negotiate on services and substantive intellectual property rights.

Meanwhile, the EC and Canada were pursuing a different idea, namely, to set up a new institution as an organisational umbrella for the GATT and the new Uruguay Round agreements. Canada, which was drawing on the ideas of Professor John Jackson,<sup>907</sup> first suggested the establishment of a "World Trade Organization" in April 1990,<sup>908</sup> and the EC followed up with a formal proposal for a "Multilateral Trade Organization" to the negotiating group on the "Functioning of the GATT System" (FOGS) in July 1990.<sup>909</sup> As the EC explained at the first meeting of the FOGS group at which the question was discussed, it was not seeking to "undertake anything particularly revolutionary"; instead, its aim was "to establish a purely organizational treaty" which would provide an "umbrella-type organizational framework" for the "implementation and administration of the results of the negotiations and perhaps legally separate multilateral agreements".<sup>910</sup> The EC noted the possibility of "a services agreement which in all likelihood would be separate from the GATT".<sup>911</sup> The EC explicitly cited the WIPO as "an example of the kind of common organizational umbrella for different international agreements which his delegation was looking [sic] in this regard."<sup>912</sup> This, of course, ran directly counter the US's thinking at the time. Sure enough, the US representative took a dim view of the rationales offered by the EC for establishing a new organisation.<sup>913</sup> In particular, the US argued that

legal structure was not and would not be the cause of the 'fragmentation' of the trading system. The fundamental problem was political; some countries refused to accept new obligations or clarifications of old obligations. The mere creation of an MTO could not

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<sup>907</sup> See Jackson 1990; Jackson was hired as a consultant by the Canadians.

<sup>908</sup> Winham 1990, 821, quotes a press release of 11 April 1990.

<sup>909</sup> MTN.GNG/NG14/W/42.

<sup>910</sup> MTN.GNG/NG14/18, 12-13, para 51.

<sup>911</sup> Ibid.

<sup>912</sup> Ibid. 13, para. 53.

<sup>913</sup> Ibid. paras. 30-35; the document does not identify the United States representative explicitly; however, several clues make it clear that this is the US representative's statement, such as the interest that is expressed in "exploring the question of whether a new organizational and decision-making structure could enhance the efficient governance of the world's trade regime" and the warning that "in the past some governments, including her own, had found it impossible to obtain ratification by their legislative bodies of an MTO-structure" and that "[a]ll participants should be interested in ensuring that those countries could avoid presenting their legislatures with a Uruguay Round package that included establishment of an MTO such that implementation of the Round were undercut by concern over possible developments with an MTO" (para. 30).

force any country to accept an obligation which it was not otherwise willing to accept, and it could not therefore solve this problem.<sup>914</sup>

To the US's surprise, the EC subsequently proved very receptive to the "single protocol" approach, as US negotiators had started calling "GATT II" idea,<sup>915</sup> when the US first presented the idea to the other Quad countries later in July 1990.<sup>916</sup> In discussions with the Quad countries in the following months, the US pressed the point that adopting the "single protocol" approach would not only take care of the problem of "free riders", but would also limit the extent to which the Quad countries would have to make substantive concessions to the other participants in the Round, thus making it possible to avoid what US negotiators called "lowest common denominator" agreements.<sup>917</sup> In effect, US negotiators were arguing that the "single protocol" allowed the Quad to go all in for the club approach to multilateral trade lawmaking: in their scenario, all that ultimately mattered was that the Quad countries reached agreement among themselves; all other countries would effectively be forced to join whatever the Quad agreed on the Quad's terms.

In order to make the "single protocol" idea more palatable to the other Quad countries and, eventually, the rest of the contracting parties, US negotiators started linking it with the "single undertaking" principle contained in the Punta del Este Ministerial Declaration. The principle stipulated that

The launching, the conduct and the implementation of the outcome of the negotiations shall be treated as parts of a single undertaking.<sup>918</sup>

This was somewhat disingenuous – it was clear to everyone involved that "[i]t was never the intention at Punta Del Este to craft a process that would automatically obligate all

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<sup>914</sup> MTN.GNG/MG14/18, 8, para. 32.

<sup>915</sup> In discussions with the other Quad countries, US negotiators sought to highlight the unifying effect of their approach, in that it would provide an elegant way of tying the results of the round together ("Single Protocol"), and to de-emphasise the more dramatic aspect of their proposal: that it envisaged doing so through a successor agreement to the GATT ("GATT II"). The latter aspect, they suggested, could be treated as a "technical issue"; interview with Richard Steinberg.

<sup>916</sup> Interview with Richard Steinberg.

<sup>917</sup> Interview with Richard Steinberg.

<sup>918</sup> MIN.DEC, para. B(ii). The *Tokyo Declaration* had contained a similar principle, pursuant to which the negotiations were to be "considered as one undertaking, the various elements of which shall move forward together"; *Tokyo Declaration 1973*, para. 8. Regarding the meaning of this principle, US negotiators commented that it would allow "the U.S. to keep the agriculture issue as part of the negotiation and not to allow it to be separated and possibly lost"; FRUS 1973-1977, 684. In the debate about the implementation of the Tokyo Round results, the principle played no role. On the origins and wider significance of the "single undertaking" idea, see also Wolfe 2009.

GATT [contracting parties] to be bound by all of the agreements".<sup>919</sup> As Andrew Stoler, one of the US negotiators promoting the re-interpretation of the "single undertaking" concept in 1990, would later write,

the single undertaking as it was expressed in 1986 in no way was interpreted as implying that all participants in the negotiations would need to take on all of the resulting obligations – especially those resulting from the services negotiations.<sup>920</sup>

In the negotiations up until that point, the "single undertaking", or principle of "globality", as the Europeans liked to call it, had been repeatedly invoked in attempts to adjust the pace of negotiations in one area to the progress in another. In particular, the Europeans had championed it to whittle down the ambitions in the agricultural negotiations by linking them to other negotiating areas.<sup>921</sup> When the negotiations in agriculture stalled during the Mid-Term Review, the Latin Americans had in turn relied on the principle to withhold their consensus to the results in other areas.<sup>922</sup> Essentially, then, US negotiators were attempting to change the meaning of the "single undertaking" from the Tokyo-Round/Punta del Este understanding as "the various elements of [the negotiations] shall move forward together" to a "single protocol" understanding as "accept everything or remain outside the multilateral system".<sup>923</sup> There is little doubt that "few countries would have accepted this interpretation of the single undertaking in 1986."<sup>924</sup>

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<sup>919</sup> Stoler 2008, 1.

<sup>920</sup> Stoler 2008, 4; the "single undertaking" principle only applied to the goods part of the negotiations.

<sup>921</sup> See in particular the discussion of the principle in Paemen/Bensch 1995, 58, 80-81 ("the principle of globality had been introduced to avoid excessive concentration on agriculture"), 97-98, 195 ("the principle of globality, the European Community's battle-cry throughout the Uruguay Round, was really a one-way instrument, designed to adjust the pace of negotiations in other sectors to that of agriculture"); see also Oxley 1990, 158 ("The Americans interpreted globality as 'Eurospeak' for saying that little was to be allowed to happen in the negotiations on agriculture").

<sup>922</sup> Winham 1990, 808-809, 813; Oxley 1990, 169; Paemen/Bensch 1995, 80 ("This 'principle of globality' would later be taken up by other participants and exploited for their own ends"); see also Oral History Interview with Julio Lacarte-Muró, 13:58-16:44; Ricupero 1998, 16:

Developing countries were among the main proponents of the *single undertaking* provision in paragraph B (ii) of the Punta del Este Declaration. The Latin American members of the Cairns Group, in particular, wished to pre-empt a recurrence of the situation in earlier multilateral rounds where the initiatives to liberalize the agriculture sector had simply been permitted to die during the course of the negotiations.

<sup>923</sup> Gallagher/Stoler 381; cf. Stoler 2008, 1:

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

Ibid. 4:

As it happened, the developing countries were no more prepared to accept the new meaning of the “single undertaking” in 1990. By November 1990, the US had held informal consultations on the idea with some developing countries, including India and Brazil. At a TNC meeting in December 1990, India made its position clear:

We have entered into negotiations in the area of TRIPs with a clear reservation to the question of lodgement of the outcome. Nearly two years of negotiations on norms and standards have convinced us that there is no place in GATT for an agreement covering these aspects. They raise issues of policy spanning over diverse areas of technology, ethics, culture and economic development. GATT is concerned with trade policies and should remain as such.

Negotiations for a multilateral framework on services have always been held in a separate juridical framework from GATT.

...we are concerned at attempts to link agreements in the area of TRIPs and trade in services to the GATT through the concept of a single undertaking or the mechanism of a common dispute settlement machinery. We are not opposed to the idea of a new organization by whatever name it is called, as long as it is structured to service three distinct agreements. We reject any proposal which tends to link up three distinct agreements with a view to facilitating cross-retaliation.<sup>925</sup>

In an UNCTAD meeting in March 1991, the Indian ambassador did not mince his words, stating that

[t]he concept of a 'single undertaking' had been introduced at a 'very late stage' and was tantamount to 'breach of good faith'. It was not part of the basis of negotiations and had been introduced to force Third World countries to accept all the results of the Round or opt out of the system. It would be prudent to avoid such an approach. The provision of flexibility for the Third World had not only to be in terms of time derogation but in absolute terms so that they were not forced to accept obligations inconsistent with their development, financial and trade needs.<sup>926</sup>

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The Quad changed the meaning of the Uruguay Round's single undertaking at the end of the game. Ricupero 1998, 16, arguably misinterprets who was the driving force behind the reinterpretation:

during the period between the Montreal and Brussels Ministerial meetings, the concept of *single undertaking* was altered, mainly at the initiative of the EC and Canada, but with ideas coming from the GATT Secretariat.

Paemen/Bensch 1995, 257:

the industrialised countries have invented the principle of the 'Single Undertaking', which states in effect that the results of the negotiations constitute a single entity – and that a country must decide whether to take it or leave it.

<sup>924</sup> Stoler 2008, 4.

<sup>925</sup> MTN.TNC/MIN(90)/ST/, 4; in informal consultations, Brazil had taken a similar position; interview with Richard Steinberg.

<sup>926</sup> Raghavan 1991.

The Draft Final Act that was sent to the Brussels Ministerial Meeting in December 1990 still reflected the developing countries position. Thus, it envisaged that the participants in the negotiations would

... agree that the Agreements, Decisions and Understandings on trade in goods, as set out in Annex I, and the General Agreement on Trade in Services, as set out in Annex II, [the Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, as set out in Annex III{FN1}] [and institutional provisions as set out in Annex IV], [constitute [three] [four] distinct legal texts] and embody the results of their negotiations.<sup>927</sup>

The section on intellectual property rights made the continuing disagreement between developed and developing countries explicit:

The presentation of two draft agreements, the first on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods and the second on Trade in Counterfeit and Pirated Goods, is a reflection of two basically different approaches to the question of the relationship of the eventual results to the GATT. Some participants ... envisage a single TRIPS agreement encompassing all the areas of negotiation; this agreement would be implemented as an integral part of the General Agreement. Other participants ... envisage two separate agreements, one on Trade in Counterfeit and Pirated Goods, to be implemented in GATT, and the second on standards and principle concerning the availability, scope and use of intellectual property rights. The latter agreement would be implemented in the 'relevant international organization, account being taken of the multidisciplinary and overall aspects of the issues involved'. It was agreed in the Mid-Term Review that the institutional aspects of the international implementation of the results of the negotiations on TRIPS would be decided by Ministers pursuant to the final paragraph of the Punta del Este Declaration.<sup>928</sup>

At this time, the annex on institutional provisions was still largely a blank page.<sup>929</sup>

One year later, the GATT's Director-General, Arthur Dunkel, presented another version of the draft final act, the so-called "Dunkel Draft". The US and EC had persuaded Dunkel to incorporate the "single protocol" idea into his draft.<sup>930</sup> Article II of the proposed

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<sup>927</sup> MTN.TNC/W/35/Rev.1, 2 (square brackets in original); footnote 1 referred to the "institutional reservation" that had provided the basis for the Mid-Term Review compromise on intellectual property rights.

<sup>928</sup> MTN.TNC/W/35/Rev.1, 193.

<sup>929</sup> MTN.TNC/W/35/Rev.1, 384.

<sup>930</sup> See Steinberg 2002, 356:

... the Dunkel Draft ... was tabled by the GATT Director-General as the secretariat's draft. However, it was largely a collection of proposals prepared by and developed and negotiated between the EC and the United States, fine-tuned after meeting with broader groups of countries, and it embodied the secretariat's changes mostly on points of contention between the two transatlantic powers.

According to an Uruguay Round negotiator from a developing country whom I interviewed, Arthur Dunkel's loss of credibility after proposing the Dunkel Draft was such that he had to eventually give up his post as Director-General, making way for Peter Sutherland.

Agreement Establishing the Multilateral Trade Organization<sup>931</sup> achieved all of the United States' objectives: it tied the results of the Uruguay Round together by providing that the agreements annexed to the MTO Agreement would constitute an "integral part" of the MTO Agreement; it stipulated that the agreements "shall have all members as parties", thus eliminating any possibilities for "free riding"; and it constituted the MTO Agreement as a successor agreement to the GATT by providing that "[t]he General Agreement on Tariffs and Trade, as it results from the Final Act of the Uruguay Round ... *is legally distinct* from the Agreement known as the General Agreement on Tariffs and Trade, dated 30 October 1947"; this would allow the Quad countries to withdraw from the original GATT and to terminate the market access obligations to GATT contracting parties which they had accumulated over the four decades of the operation of the GATT with respect to any country which refused to join the new organization; as a result, those who refused to join "would remain contracting parties to a *de facto* defunct agreement".<sup>932</sup>

The institutional provisions of the Draft Final Act were not finalised for another two years. Negotiations occurred primarily in the "Informal Group on Institutional Issues" chaired by Julio Lacarte between September and December 1993.<sup>933</sup> According to Andrew Stoler, who was the US representative in the Lacarte group and who was, in his own words, "very much involved in the Quad discussions that eventually led to th[e] reinterpretation of the Punta 'single undertaking' and [in] forcing this down the throats of developing

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<sup>931</sup> See MTN.TNC/W/FA, 92.

<sup>932</sup> Ricupero 1998, 17; see also Steinberg 2002, 360; Stegemann 2000, 1243: not joining the new organization would mean

giving up the cumulated market access rights as guaranteed by multilateral trading rules and as negotiated in all GATT rounds.

Hudec 1992, 76:

governments would have to decide between accepting everything or leaving the GATT.

Stoler 2008, 4:

In their decision to leave the old GATT and its MFN obligations behind, the Quad countries were able to force Uruguay Round participants into accepting obligations under all of the new system's agreements with the exception of the Government Procurement and Civil Aircraft Codes.

Tarullo 2002, 170 and 177:

... suppose that the entire Uruguay Round was in some sense a contract of adhesion imposed by the United States (and possibly the European Union), leaving many developing countries with the Hobson's choice of acceding to an unsatisfactory package of agreements or being left out of the trading system altogether. ... a smaller state ... may ... be faced with the choice of either signing on to the new agreements anyway or risk being left behind by the world trading system. This was quite literally true in the Uruguay Round, which substituted the 'GATT 1994' for the original GATT and thus ended the obligations of GATT members under the original agreement. Had a dissident state chosen not to accept the whole package of agreements concluded in the Uruguay Round, it would have been left with no multilateral trade rights.

<sup>933</sup> Andrew Stoler, email communication; Paemen/Bensch 1995, 234.

countries”,<sup>934</sup> the latter “did not give in until the Lacarte group successfully tied up all the ends”; thus, “the whole issue stayed alive until mid-December 1993 when it fell into place on the last couple of days of the negotiations.”<sup>935</sup> In the end, the “single protocol” idea as it was first incorporated in the Dunkel Draft survived without substantive changes into the final version of the Marrakesh Agreement Establishing the World Trade Organization.<sup>936</sup> This was unsurprising – once the Quad countries had agreed to go ahead with the approach, there was simply nothing that the developing countries could do to prevent it from happening. That was the entire point.

The WTO, then, came into being as the ultimate club. Once the Quad countries knew that they would leave the old club and found a new one, they also knew that all they had to do was to agree among themselves. While this was not exactly easy – disagreements on agriculture and services persisted until the very end – it was at least possible. The founding of the WTO also gave the developed countries the leverage to shape the results of the Uruguay Round decisively – a multilateral agreement on services, an agreement on substantive intellectual property rights, both linked to trade in goods through the possibility of cross-retaliation in dispute settlement – these were all points that the developing countries, and in particular India, had opposed categorically throughout the round.<sup>937</sup> Even more so than the GATT, however, the WTO was supposed to be a self-transcending club: it was never the intention to keep other countries out and to limit its membership. Rather, the intention was to get everyone else to join, but on the insiders’ terms. In a way, then, the WTO was the club to end all clubs.<sup>938</sup>

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<sup>934</sup> Andrew Stoler, email communication.

<sup>935</sup> Andrew Stoler, email communication.

<sup>936</sup> See WTO Agreement, Article II.2 and II.4.

<sup>937</sup> While India noticeably warmed to the services agreement in the course of the negotiations, there is not a single negotiating document from the Uruguay Round in which India goes on record as supporting either cross-retaliation between services, intellectual property, and goods, or a GATT agreement on substantive intellectual property rights.

<sup>938</sup> Interestingly, both Richard Steinberg and Andrew Stoler, probably the chief architects of the Uruguay Round “single undertaking”, are unhappy with the outcome. Stoler “regret[s] it all deeply” and now finds “the whole idea” to have been “a huge mistake”. According to Stoler, it eventually turned out that “the one-size-fits-all approach was not going to work and that the system was never going to be a one-tier system” (see the section on “Differentiation of Obligations” *infra*). At the same time, the single undertaking resulted in a large number of countries being “deeply involved in decision-making and often making sure that nothing happens in the WTO”. Stoler’s chief regret is to have “wrecked what had been a pretty good system in the GATT years”. Andrew Stoler, email communication; interview with Richard Steinberg.

## D. The Internalised Club: Lawmaking in the WTO

The conclusion of the Marrakesh Agreement and the establishment of the WTO changed the framework for multilateral trade lawmaking in important ways. First, the establishment of the WTO held the promise that lawmaking would occur on a continuous basis, dispensing with the need for major negotiating rounds.<sup>939</sup> The built-in negotiating agendas in the GATS Agreement and the Agreement on Agriculture, as well as the decisions taken at the Marrakesh Ministerial to continue negotiations on unfinished business of the Uruguay Round, were concrete commitments in this respect.<sup>940</sup> Second, the Marrakesh Agreement arguably transformed the institutions of the multilateral trading system from a forum for the conclusion of bilateral or plurilateral “contracts” into a something more akin to a legislative body. Whereas the GATT system had allowed subsets of contracting parties to agree to more ambitious obligations in areas in which they had a particular interest without the consent of the other contracting parties,<sup>941</sup> the WTO Agreement gives the entire membership control over the conclusion of new plurilateral agreements.<sup>942</sup> Moreover, by obliging all Members to join all WTO agreements (with the exception of the four plurilateral agreements, of which three are now defunct), the WTO system gives all members a stake in the development of the law in all areas, thus making them potentially more reluctant to let small groups of members take the lead in developing the law among themselves. As a result, it has become much more difficult for a subset of members to assume more ambitious obligations in the framework of the multilateral trading system – to some extent, then, the WTO has indeed ended all clubs.

At the very least, the new lawmaking framework is markedly less hospitable to the club dynamics that flourished under the GATT. The only area in which this dynamic is still squarely at play in the WTO context is in accession negotiations, including accessions to

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<sup>939</sup> See Steger 2007, 492-493; Moore 2005, 5 fn 5.

<sup>940</sup> See GATS, Article XIX; Agreement on Agriculture, Article 20; see the *Decision on Negotiations on Movement of Natural Persons*; *Decision on Financial Services*; *Decision on Negotiations on Maritime Transport Services*; *Decision on Negotiations on Basic Telecommunications*; *Decision on Professional Services*; and the *Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, all adopted at the Marrakesh Ministerial Meeting.

<sup>941</sup> Recall the unsuccessful attempt by developing countries at the conclusion of the Tokyo Round to make the opening for acceptance of the Tokyo Round codes subject to a consensus decision of the TNC; *supra* text at fn 797.

<sup>942</sup> WTO Agreement, Article X.9:

The Ministerial Conference, upon the request of the Members parties to a trade agreement, may decide *exclusively by consensus* to add that agreement to Annex 4. ... (emphasis added)

the single functioning plurilateral agreement in the WTO framework, the Agreement on Government Procurement (a).

In regular negotiations, WTO members have developed negotiating techniques that superficially resemble the club approach in the sense that they allow the bulk of the negotiations to occur among relatively small groups of countries, thereby reducing the complexity of the negotiations and giving these countries a disproportionate influence on the outcome. Procedurally this is accomplished through negotiations in “variable geometry” (b); in terms of substance, it is made possible by exempting large swaths of the membership from new legal commitments, leading to an ever more sophisticated differentiation of obligations (c). In contrast to the times of GATT, however, this ‘internalised’ club is constrained: procedurally, by transparency and reporting procedures that have been put in place, and, substantively, by the need to keep other WTO members, who can now block an outcome that they perceive as unfavourable, on board.

#### *a) Accession Negotiations<sup>943</sup>*

Accession negotiations provide a unique opportunity to WTO members to realize the third element of the club approach: make outsiders join their agreement(s) on the insiders' terms. As discussed in chapter 1, except in the case of LDCs there are virtually no limits to what a WTO member can demand from an acceding country. Participants in the accession process have described its first stage – the examination of the conformity of the acceding country's trade regime with WTO rules – as “akin to having a complainant at a panel act as the sole panellist”.<sup>944</sup> The second stage of the accession process involves bilateral negotiations between the acceding country and interested WTO members. The key difference between these negotiations and the general lawmaking process in the WTO is that accession negotiations “offer... the applicant no possibility of imposing a marginal cost on the *demandeur*”.<sup>945</sup> Grynberg and Joy, who worked on the accession of Vanuatu to the WTO, have described implications of this constellation:

Without any right or ability to impose costs on a *demandeur* negotiations must continue until the WTO members are satisfied that no further concessions are possible. Thus, irrespective of the size of the applicant, the bilateral negotiations will be protracted unless

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<sup>943</sup> See also *supra* Chapter 1, Section I.D.

<sup>944</sup> Grynberg/Joy 2000, 159.

<sup>945</sup> Ibid. 160.

the applicant quickly concedes the vast bulk of the standardized demands of the large WTO members.<sup>946</sup>

The accession process thus allows WTO members to impose *their* terms on an acceding country – a paradigmatic instantiation of the third element of the club approach.

### **b) Variable Geometry**

The question of “who gets to be in the room” did not cease to be an issue in the WTO – to the contrary, in the first years of the existence of the WTO, there was considerable apprehension that the GATT practice of the major trading powers reaching agreement among themselves and presenting it to the rest of the membership as a *fait accompli* would continue – in other words, that the club dynamic of the GATT would survive. These concerns acquired new urgency after the collapse of the Seattle ministerial meeting, which was supposed to launch a new round of trade negotiations. While the meeting was wildly seen as having failed due to inadequate preparation and substantive disagreements,<sup>947</sup> it had featured the same exclusionary dynamics that were known from the GATT days.<sup>948</sup> In the wake of Seattle, WTO members began to discuss what came to be known as the agenda item of “internal transparency and effective participation of all members” in the WTO’s General Council.<sup>949</sup> The basic thrust of these discussions was that, while informal consultations between smaller groups of members were useful and, given the large membership of the WTO, indeed essential to build a consensus, the transparency of these consultations had to be increased, the non-participating members had to be informed about developments in these consultations on a regular basis, and all decision-making power had to be effectively reserved to forums in which the entire membership participated. As India put it at the time, if these conditions are met, the “green room meetings will by and large get de-glamorised”.<sup>950</sup>

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<sup>946</sup> Ibid.

<sup>947</sup> See WT/GC/M/53, para. 44, reporting the statement of the Director-General:

While he believed most would agree that major issues of substance had played a greater role than process in preventing agreement in Seattle, getting the process right was important.

See also JOB(00)/2331, 3, for the views of WTO members on this issue.

<sup>948</sup> Keohane and Nye 2001, 269-270.

<sup>949</sup> See WT/GC/M/55, 39-47; WT/GC/M/57, 24-32; WT/GC/M/61, 44-47; WT/GC/M/73, 21; WT/GC/M/74, 19-32; WT/GC/M/75, 7-27; WT/GC/M/77, 62-78; for proposals submitted by delegations, see WT/GC/W/471; and WT/GC/W/477.

<sup>950</sup> JOB(00)/2331, 14.

By most accounts, the consultations on internal transparency and effective participation in 2000 and 2002 quickly yielded substantial improvements in terms of making WTO negotiations more inclusive.<sup>951</sup> The chairmen of WTO negotiating groups openly embrace negotiations in “variable geometry”<sup>952</sup> or “concentric circles”,<sup>953</sup> and by and large have taken their reporting commitments seriously; the procedural safeguards that crystallised in the consultations are reflected in how the WTO defines the terms “transparent”<sup>954</sup> and “inclusive”<sup>955</sup> for the purposes of WTO negotiations.

At the same time, anything that smacks of a fall back into the club dynamic of the GATT era has met with a rather furious backlash. Thus, in the run-up to the Cancún ministerial in 2003, the United States and the EU presented a joint proposal on agriculture that was more lenient than most developing countries and agricultural exporters had hoped, most notably in continuing to allow agricultural export subsidies.<sup>956</sup> With the conclusion of the agricultural negotiations in the Uruguay Round still fresh in their minds, the major developing countries coalesced in a new coalition, the G20, to resist the proposal. At the Cancún ministerial itself, the United States managed to have its response to a proposal for the expeditious reduction of subsidies on cotton inserted in the draft ministerial declaration; this contributed to the collapse of the meeting. In the subsequent negotiations, the US and the EU had to abandon their positions on both subjects; the next ministerial declaration

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<sup>951</sup> See already WT/GC/M/59; for a sceptical view, see Jawara/Kwa 2004.

<sup>952</sup> References to this concept in Chairs' reports are common; see e.g. TN/CTD/M/46, para. 6.

<sup>953</sup> The WTO website defines "concentric circles" as follows:

a system of small and large, informal and formal meetings handled by the chairperson, who is at the centre. The outer "circle" is the formal meeting of the full membership, where decisions are taken and statements are recorded in official minutes or notes. Inside, the circles represent informal meetings of the full membership or smaller groups of members, down to bilateral consultations with the chair. Members accept the process as they all have input and information is shared. ...

<sup>954</sup> The WTO website defines "transparent" as follows:

sharing information, in this case so all members know what is happening in smaller group meetings. In WTO negotiations and other decision-making, ideas are tested and issues are discussed in a variety of meetings, many of them with only some members present. Members approve of this process so long as information is shared. They also want the process to ensure they can have input into it ('inclusive'). The final decision can only be taken by a formal meeting of the full membership.

<sup>955</sup> The WTO website defines "inclusive" as follows:

ensuring all members have input into a process even when meetings involve only some of them. In WTO negotiations and other decision-making, ideas are tested and issues are discussed in a variety of meetings, many of them with only some members present. Members approve of this process so long as information is shared and they have input into it either by being present or being represented by a group coordinator. The final decision can only be taken by a formal meeting of the full membership. ...

<sup>956</sup> For sources on this episode, see *supra* fn 30.

envisioned the abolition of agricultural export subsidies by 2013 and contained an expeditious schedule for the reduction and abolition of subsidies on cotton.

In sum, it is undeniable that participation in negotiations still has elements of the club approach. Small group meetings serve to make it easier to reach agreement. Moreover, the major trading nations are present and active in all small group meetings, which will translate into a disproportionate impact on the outcome of the negotiations. At the same time, their control of the negotiations has become much more tenable and their ability to force others to join their agreement is extremely diminished. Other WTO members are now much better informed of the progress of the negotiations and are effectively able to insert themselves into the negotiations and to block agreement whenever they want. Moreover, the number of major players has increased, and the US and the EU now share the stage with a number of other major participants, in particular India, Brazil, and China.

### *c) Differentiation of Obligations*

WTO members have attempted to take advantage of the first two benefits of the club approach in WTO lawmaking by accepting an increased differentiation of obligations in the trading system. This increased differentiation has taken two forms.

First, negotiating modalities, such as the NAMA and agriculture modalities in the current Doha Round negotiations, now contain highly differentiated rules for the undertaking of commitments.<sup>957</sup> At least in part, this differentiation reflects an attempt to reduce the complexity of trade negotiations: thus, the agriculture modalities envisage very shallow commitments for large groups of members, most of which have very small shares in agricultural trade. Reportedly, these members were exempted from meaningful reduction commitments in part to allow the negotiations on the modalities to take place among the relatively few countries with substantial trade volumes.<sup>958</sup> The differentiation of commitments in negotiating modalities has thus in part been motivated by the first benefit of the club approach: the greater practicality of negotiating among a smaller group.

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<sup>957</sup> On the increased differentiation of negotiating modalities, see also *infra* text at fn 1049.

<sup>958</sup> Interview with Joseph Glauber; according to Glauber, the chairman of the negotiations would simply ask the negotiating group whether anyone would mind if he exempted, say, the LDCs or the SVEs from a particular reduction commitment. Because of the small trade volumes involved, nobody would object, and the group would be exempted. As a result, many of the key reduction commitments in the agriculture modalities would ultimately only apply to a relatively small group of countries with significant trade volumes, and negotiations would thus mainly occur among those countries. On the increasing differentiation of the "developing country" country category in the WTO, see also *supra* text at fn 653.

Second, some WTO members have chosen to take on additional commitments, for example with respect to market access for information technology products<sup>959</sup> and with respect to the regulation of telecommunications markets,<sup>960</sup> on a critical mass basis. In order to be able to assume these commitments without having to seek the permission of non-participating countries, the participants in critical mass lawmaking have inscribed their additional commitments in their GATT and GATS schedules, instead of embodying them in an amendment to those agreements<sup>961</sup> or in a new plurilateral agreement.<sup>962</sup> The route via schedules allowed the critical mass countries to realise the first two benefits of the club approach: they could negotiate among themselves and did not have to pay attention to the interests of outsiders. At the same time, however, scheduled commitments have to be implemented on an MFN basis; in other words, the scheduling option does not allow the critical mass countries to exclude non-participants from the benefits that the latter might derive from the additional commitments, as an amendment or a new plurilateral agreement might have done. Again, the insiders thus have little leverage to force outsiders to join their agreement.

## II. Conclusion

In this chapter, I have made two interconnected arguments. The first, and more general, argument is that the practices of participation in the trading system are best explained in light of the club approach to multilateral trade lawmaking. As I have shown, despite the ambition to universality that marked the US's push for an ITO, the developed countries early on began to see participation in multilateral trade lawmaking as a 'club good'. Three factors prompted them to take this perspective: the greater practicality of negotiating among a smaller group of countries; the ability of the insiders to shape the content of the agreement decisively; and the prospect that they might subsequently be able to force outsiders to join the agreement on the insiders' terms.

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<sup>959</sup> On the Information Technology Agreement, see *WTO 2012*.

<sup>960</sup> For the Reference Paper on basic telecommunications, see Lang 2011, 284-290; for the original proposal, see S/NGBT/W/18.

<sup>961</sup> This would have required the support of at least a two-thirds majority of WTO members; see *WTO Agreement, Article X:1*.

<sup>962</sup> This would have required a consensus decision by the WTO membership; see *WTO Agreement, Article X:9*.

While the club approach holds many attractions for the insiders and has been employed for a number of reasons, I have drawn particular attention to how the major developed countries have used it to establish and defend the principle of payment as the basis for multilateral trade lawmaking. My second, and more specific, argument, then, relates to this relationship between the club approach and the principle of payment. I have elucidated this relationship as one of mutual reinforcement. On one hand, the desire to enforce the principle of payment has often been the chief *motivation* for adopting the club approach to lawmaking in the trading system. As I have argued above, the club approach was pioneered not only to make bilateral request-and-offer negotiations practicable, but also to allow the "nuclear" countries to deny the benefits of the tariff concessions that they had granted each other to any ITO member that did not engage in tariff negotiations to the satisfaction of the nuclear countries. Similarly, the exclusionary negotiating arrangements adopted in the Kennedy Round tariff negotiations were in large part adopted to entice developing countries to make an appropriate "contribution" to the negotiations; thus, any country that had not been recognised – on the basis of its compliance with the reciprocity norm – as a "full participant" in the negotiations, was not allowed to see the list of products that the developed countries were planning to exempt from their horizontal tariff cut; such a country was thus unable to protest against the exemption of products of export interest to it. In the Tokyo Round, the developed countries' strategy to include the conditional MFN principle in the new codes on non-tariff barriers, although only partially successful, was similarly designed to force non-signatories to pay for the benefits of the codes. And finally, the Uruguay Round single undertaking and the establishment of the WTO were embraced by the Quad countries, and the US in particular, as "an opportunity not to be missed to rid the new system once and for all of free riders."<sup>963</sup> The prominence of the club approach in multilateral trade lawmaking is thus in large part explained by the desire to enforce the principle of payment.

The relationship also works the other way round, however. Thus, it is questionable whether the principle of payment would have become so deeply entrenched in multilateral trade lawmaking if the club approach had not be available as an *enforcement tool*. This interplay between the principle of payment and the club approach – with the former

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<sup>963</sup> Stoler 2008, 4.

providing the rationale for the latter, and the latter facilitating the enforcement of the former – has arguably shaped the practices of participation in multilateral trade lawmaking in profound ways.

## Chapter 3: Techniques

In his article “Nomos and Narrative”, Robert Cover argues that normative precepts only have meaning when they are embedded in narratives: “Every prescription is insistent in its demand to be located in discourse – to be supplied with history and destiny, beginning and end, explanation and purpose.”<sup>964</sup> The nomos of trade law is shot through with multiple, at times complementary, at times conflicting narratives about what trade law seeks to achieve. These narratives call for different lawmaking techniques which in turn produce different kinds of legal provisions.<sup>965</sup> In the present chapter, I attempt to reconstruct five such narratives, and to analyse the techniques and provisions associated with them.<sup>966</sup>

A first narrative revolves around the idea that the aim of trade law is the *liberalisation* of trade. This narrative is associated with legal techniques that “bind”, reduce, and gradually remove “barriers” to trade, such as tariffs. These *reduction techniques* involve fixing the kind and quantity of such trade barriers that a party is allowed to maintain at a particular point in time and establishing trajectories for their reduction and elimination over time. A second narrative sees the aim of trade law in ensuring the *fairness* of international trade. This narrative calls for legal techniques that “level the playing field” among different economic actors and their products. These *levelling techniques* ensure that these actors or objects are treated in accordance with, or face conditions that conform to, certain (variable) benchmarks, such as the treatment accorded to other similar actors or objects, or the “normal” operation of a system. A third narrative sees *stability* – of prices, trade volumes, or incomes – as a central concern for international trade law. This narrative supports legal techniques that allow states to individually or collectively manage international trade in pursuit of these objectives. *Managing techniques* are distinctive in

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<sup>964</sup> Cover 1983, 5; for a recent application of Cover's insight, see Benjamin 2010.

<sup>965</sup> For a discussion of law as a “technique” more generally, see Kelsen 1941; Summers 1971. Summers identifies “five basic techniques” in domestic law, which he calls the “grievance-remedial”, “penal”, “administrative-regulatory”, “public benefit conferral”, and “private arranging” techniques (*ibid.* 736), which appear to be more or less congruent with tort law, criminal law, administrative law, public law, and contract law. The concept of technique used in the present chapter operates at a somewhat lower level of abstraction, as it focuses on individual provisions, not entire bodies of law.

<sup>966</sup> This chapter draws in part on the GATT Secretariat's compilations on “techniques and modalities” for trade negotiations. The most extensive such compilations were made in preparation for the Tokyo Round; see COM.IND/W/76; COM.AG/W/77; COM.AG/W/88. These documents do not link the techniques they compile to any narratives about the aims of trade law; the Agriculture Committee's Working Group specifically notes “the limitations on its work caused by the fact that it has not yet been possible to discuss the objectives of the future negotiations”; COM.AG/W/88, para. 5.

that they do not primarily regulate the use of a particular instrument, but tend to authorize or require the achievement of particular outcomes, leaving the choice of instrument more or less open. A fourth narrative – of *necessity* – aims to circumscribe the trade-restrictive effects of measures taken in the pursuit of “non-trade” policy objectives. This narrative gives rise to legal techniques that obligate states to design such measures in ways that minimise their trade-restrictive effects. Fifth, a variety of narratives, such as those of *good governance* and *harmonisation*, envisage a regulating role for international trade law. These narratives call for legal techniques that establish positive standards of behaviour. *Regulating techniques* take the form of procedural standards, minimum standards of treatment, or substantive standards.

Of course, there is not always a single narrative that explains the purpose and logic (if any) of a particular legal technique or provision.<sup>967</sup> While narratives are sometimes embedded in the legal text – in preambles, statements of principles, interpretative notes, and in the legal provisions themselves –, negotiators at times cannot agree on a single narrative that explains what they are doing; as a result, there may be competing narratives in the text,<sup>968</sup> or no narratives at all – witness, for example, the missing preambles to the Uruguay Round agreements on anti-dumping and on subsidies and countervailing measures.<sup>969</sup>

Moreover, the selection of narratives identified above could be criticised, at the same time, as too specific and too general. Thus, there is a sense in which the narratives of liberalisation, fairness, and necessity, are all part of a larger narrative about the efficiency gains that can be obtained from removing obstacles to trade. The rationale for choosing the lower level of abstraction is that it is at this level that the narratives give rise to distinct types of legal techniques. At the same time, the narratives of liberalisation, fairness, and

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<sup>967</sup> For a compelling exposition of different narratives on the purpose and use of anti-dumping law, see Hudec 1979, 205-208.

<sup>968</sup> See the preamble to the Tokyo Round Subsidies Code:

...  
*Recognizing* that subsidies are used by governments to promote important objectives of national policy,

*Recognizing* also that subsidies may have harmful effects on trade and production, ...

<sup>969</sup> Cartland/Depayre/Woznowski 2012, 992:

... the SCMA does not contain any preamble or explicit/implicit indication of its object and purpose because the drafters specifically decided that it would be impossible to agree on these matters and that therefore, the SCMA shall have no preamble or any identification of its object and purpose.

See also Tarullo 2002, 118:

there is no authoritative statement of the intention underlying 17.6(ii), like or unlike that offered by the United States

necessity, not to speak of stability and regulatory objectives such as good governance, are fundamentally indeterminate. Saying that a provision is explained by the desire to remove barriers to trade, provide for equal treatment of imports, or restrict regulation to what is necessary, only begs the questions of what constitute a “barrier” to trade, which concept of “equality” should be employed, what can count as “necessary”, and how these concepts are to be applied in a particular case.<sup>970</sup> The justification for bracketing these questions in this chapter is that these are questions that negotiators, to some extent, bracket themselves. Even where the negotiators attempt to control the narratives that will ultimately give meaning to the law they make through preambles, interpretative notes etc., the extent to which they can in fact do so is heavily circumscribed.<sup>971</sup> As Cover notes,

there is a radical dichotomy between the social organization of law as power and the organization of law as meaning. ... Precepts must 'have meaning,' but they necessarily borrow it from materials created by social activity that is not subject to the strictures of provenance that characterize what we call formal lawmaking. ... Even when authoritative institutions try to create meaning for the precepts they articulate, they act, in that respect, in an unprivileged fashion.<sup>972</sup>

I treat the narratives analysed in this chapter as, in a sense, “good faith” narratives, i.e., I take them at face value, even though it may well be that negotiators sometimes use them strategically without actually believing that these they make much sense. The point is that these narratives are “out there” and can be employed by negotiators to explain the logic of proposed legal provisions. There are a number of counter-narratives that seek to reveal narratives analysed here as incoherent, if not disingenuous. For example, the law of anti-dumping and countervailing duties, which is justified by its proponents on the basis of concerns about “fairness”, is widely seen as not “serv[ing] any useful purpose” and as simply a protectionist tool.<sup>973</sup> The charge of “protectionism” is also regularly levelled at advocates of managing international trade in pursuit of objectives such as averting “market

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<sup>970</sup> On the indeterminacy of these questions, see respectively Lang 2011, chapter 8; Tarullo 1987, 540; and Sykes 2003.

<sup>971</sup> Cover 1983, 17:

The precepts we call law are marked off by social control over their provenance, their mode of articulation, and their effects. But the narratives that create and reveal the patterns of commitment, resistance, and understanding – patterns that constitute the dynamic between precept and material universe – are radically uncontrolled. (reference omitted)

<sup>972</sup> Cover 1983, 18.

<sup>973</sup> See only Sykes 1990, 699-700.

disruption" or assuring food security. Often, these are instances in which legal techniques and precepts that are motivated by the narratives of fairness and stability are seen through the lens of the liberalisation narrative, and are thus simply assessed in terms of whether they reduce or increase barriers to trade.<sup>974</sup>

One aim of this chapter is to give a sense of the range of narratives and techniques that trade negotiators have developed. While the chapter cannot be completely exhaustive in this regard, it can be read as an inventory of the narratives and techniques of trade lawmaking. In addition, however, the chapter also advances three more specific propositions.

First, the chapter seeks to show that the aims of trade law are and always have been contested in fundamental ways.<sup>975</sup> While the objective of liberalisation has traditionally played a central role in trade lawmaking, it has always competed with other objectives, in particular the objective of stability. This competition began during the bilateral talks between the US and the UK preceding the GATT/ITO preparatory negotiations, and it continues today in debates about proposals by developing countries in the Doha Round. At the same time, yet other objectives – particular of a regulatory nature – have become much more prominent in recent decades.

Second, the chapter seeks to show how what trade law can achieve is circumscribed by the techniques that negotiators have available. This proposition will be illustrated below primarily with two examples. The first and more specific example relates to agricultural subsidies; negotiators struggled for decades to discipline agricultural support, a hugely complex task due to the variety of instruments used to support agricultural production. The second and more general example relates to the relative rise and decline of different narratives in multilateral trade lawmaking. I argue that the decline of the stability narrative in multilateral trade lawmaking can be traced at least in part to the shortcomings of managing techniques.<sup>976</sup> Commodity agreements – one type of managing technique – are almost universally perceived as an unmitigated failure, with the consequence that trade law is now seen as much less apt to deal with problems of commodity trade such as those brought to the fore by the food crisis of 2008. By contrast, the increasing comfort with

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<sup>974</sup> See for example Finger's characterisation of safeguards as "legalized backsliding"; Finger 1995.

<sup>975</sup> In this respect, the chapter picks up the more general discussion of the teleology of the trading system in Chapter 1 and shows how it plays out at the level of specific lawmaking techniques.

<sup>976</sup> These shortcomings will also be explored in the last section of Chapter 4, on the "Function of Law".

regulating techniques that negotiators acquired in the course of the Uruguay Round led to an exponential growth of what were perceived as potential subject matters for trade law in the late 1990s and early 2000s.

Third, the chapter aims to show how techniques frame the way in which a particular issue is perceived. I argue that a legal technique will always address a particular subject matter partially and selectively. A legal technique cannot account for all aspects and features of the subject matter that it seeks to regulate;<sup>977</sup> "it has to reduce complexity".<sup>978</sup> It will single out one particular aspect, perceive an issue through a particular lens, and construct a metric that only captures the issue along one dimension, and not others.

One way of illustrating how techniques have this effect is to examine what the techniques discussed in this chapter direct our attention to. Imagine a policy adopted by a government. A reduction technique will lead us to quantify the policy or its effects along a particular dimension and to reduce this quantity over time. A levelling technique will lead us to compare it with a benchmark and to ask, for example, how the treatment accorded by the policy to one group of products or economic actors compares with the treatment of other similar products or economic actors, or with what would happen in the marketplace. A managing technique will lead us to examine the policy in light of a particular goal, and of conditions stipulated for the pursuit of this goal. A minimizing technique will lead us to ask whether the policy is the most efficient way of achieving an authorised aim. A regulating technique will lead us to assess the policy in relation to certain procedural or substantive standards.

It is of course possible to combine various techniques; trade law provides numerous examples. Thus, a benchmark derived from a levelling technique can be used as a basis for

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<sup>977</sup> See Luhmann 1995/2004, 225-226/219-220:

The legal system cannot account for all social circumstances in its own complexity. Like any system in relation to its environment, it has to reduce complexity, and it has to protect the make-up of its own complexity with high walls of indifference. (slightly modified translation)

<sup>978</sup> Luhmann 1995/2004, 225/219. See also Jackson's description of the *raison d'être* of legal techniques:

A desideratum of international techniques for dealing with problems that arise is to try to limit the complexity and scope of such problems so that they can be dealt with one by one. Legal norms, and compliance with them, can provide the framework – the woof and warp of international economic relations, so that particular problems that arise can be dealt with in relative isolation by judging them in the context of the legal norms associated with them. ... To put this another way, what is necessary in international economic relations is the development procedures and techniques that will "chip off" bits and pieces of the amorphous complex totality of commercial relationships and find solutions to those chipped-off pieces so that they are not an issue in every new negotiation that occurs in the future.

Jackson 1969, 767.

quantifying a measure, which can then in turn be subjected to a reduction technique.<sup>979</sup> Trade law has many procedural obligations (a regulating technique) that apply in addition to substantive obligations generated by other techniques. Reduction and levelling techniques are often used cumulatively as well. Obligations derived from different techniques can also be layered: Most famously, under GATT Article XX, a measure can be excused from violating obligations derived from other techniques if it passes muster from the perspective of a minimizing technique, combined with a relaxed version of a levelling technique (the Article XX chapeau).

These possibilities for the cumulative and layered use of different lawmaking techniques mitigate, but do not eliminate, three effects – some might call them risks, others might consider them as desirable, or as inevitable trade-offs – of addressing an issue through these techniques: The first effect is the necessary *partiality* or one-dimensionality of techniques mentioned above; the second effect is the likelihood of *entrenchment*, i.e., the likelihood that an issue that has been addressed with a particular technique on one occasion will be seen through the lens of that technique, and addressed with the same technique, on future occasions as well.<sup>980</sup> The third effect is *abstraction*, i.e., the possibility that negotiations become disconnected from the substance of the issue that they are purportedly addressing, and instead revolve around features of, or problems produced by, the technique that is being employed.<sup>981</sup>

In sum, the chapter seeks to provide an inventory of lawmaking techniques, and to substantiate the propositions that the objectives of trade lawmaking have historically been contested in fundamental ways, that what trade law can achieve is circumscribed by the techniques that negotiators have available, and that lawmaking techniques frame the way in which a particular issue is perceived, which gives rise to the risks of partiality, entrenchment, and abstraction.

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<sup>979</sup> An example is the calculation of an AMS in the Agreement on Agriculture.

<sup>980</sup> One could say that there is a certain path-dependency in the use of techniques.

<sup>981</sup> A similar phenomenon in treaty interpretation has been termed "decontextualization"; Broude 2007, 216.

## I. Reduction Techniques and "Liberalisation" Narratives

Reducing the trade barriers erected during the interwar years was one of the central objectives of the United States in promoting the establishment of the post-war multilateral trade regime. The *Proposals* listed the “release from restrictions imposed by governments” as the first objective of the prospective ITO. The drafters of the *Proposals* acknowledged that “[n]o government is ready to embrace 'free trade' in any absolute sense”, but they maintained that “much can usefully be done by international agreement toward reduction of governmental barriers to trade”.<sup>982</sup> This goal is also reflected in the preambles of the ITO Charter and the GATT, both of which are “directed to the substantial reduction of tariffs and other barriers to trade”.<sup>983</sup>

Throughout the history of multilateral trade negotiations, liberalization, i.e., the reduction of tariffs as well as other barriers to trade, was among the principal goals of negotiations. The Ministerial Resolution on the Kennedy Round called for “a significant liberalization of world trade” through “substantial” tariff reductions.<sup>984</sup> The Tokyo Round negotiations aimed to “achieve the expansion and ever-greater liberalization of world trade”, which was to be achieved “*inter alia*, through the progressive dismantling of obstacles to trade”.<sup>985</sup> Similarly, the Uruguay Round negotiations aimed to “bring about further liberalization and expansion of world trade” and to achieve this “by the reduction and elimination of tariffs, quantitative restrictions and other non-tariff measures and obstacles”.<sup>986</sup>

The central place accorded to objective of trade liberalisation is also evident in that, in moments of crisis, contracting parties used to reaffirm their commitment to further liberalisation. Thus, in the 1982 Ministerial Declaration the contracting parties

Reaffirm their commitment to abide by their GATT obligations and to support and improve the GATT trading system, so that it may contribute vigorously to the further liberalization and expansion of world trade ...

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<sup>982</sup> US *Proposals 1945*, 2. See also France, GATT/CP.6/SR.6, 1:

The complete elimination of all restrictions on international trade, though desirable from the long-term point of view of productivity and costs, might in fact not achieve the desired purposes in the face of important structural differences between the economies of the world; if unbridled competition were allowed in the actual world the ensuing dislocation was likely to impair seriously the economic equilibrium.

<sup>983</sup> ITO Charter, Preamble; GATT, Preamble.

<sup>984</sup> MIN(63)9, paras. A.1. and A.4.

<sup>985</sup> *Tokyo Declaration 1973*, para. 2.

<sup>986</sup> MIN.DEC, 2.

The goal of progressive liberalisation is embodied in specific articles of the GATT and the GATS. Thus, GATT Article XXVIII bis states that

negotiations ... directed to the substantial reduction of the general level of tariffs and other charges on imports and exports and in particular to the reduction of such high tariffs as discourage the importation even of minimum quantities ... are of great importance to the expansion of international trade.

The article provides that the contracting parties "may therefore sponsor such negotiations from time to time."<sup>987</sup> Part IV of the GATS is entitled "Progressive Liberalization"; its article XIX stipulates that "Members shall enter into successive rounds of negotiations ... with a view to achieving a progressively higher level of liberalization."<sup>988</sup> Finally, the Agreement on Agriculture contains a provision on progressive liberalisation; it "recogniz[es] that the long-term objective of substantial progressive reductions in support and protection ... is an ongoing process" and provides for the initiation of "negotiations for continuing the process".<sup>989</sup>

Reduction techniques in international trade lawmaking essentially take two forms: the first is the outright prohibitions of particular types of trade restrictions, oftentimes qualified by exceptions – this was the approach taken to quantitative restrictions in the GATT, as well as to export subsidies on manufactured products. The second is the "binding" and gradual reduction of trade restrictions that a party is allowed to maintain.<sup>990</sup> The following discussion will focus on the second form of reduction technique, and especially on two sets of tools that trade negotiators use to put it into practice: schedules and reduction modalities, such as formulas.

## A. Schedules

Schedules are a tool to individualise legal obligations. Whereas the general provisions of a trade agreement apply to all parties to the agreement, schedules that are annexed to the

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<sup>987</sup> GATT, Article XXVIII bis.

<sup>988</sup> GATS, Article XIX.

<sup>989</sup> Agreement on Agriculture, Article XII.

<sup>990</sup> GATT Article XXVIII describes the reduction technique as follows:

negotiations may be directed towards the reduction of duties, the binding of duties at then existing levels or undertakings that individual duties or the average duties on specified categories of products shall not exceed specified levels.

GATS Article XIX(1) provides that negotiations

shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access.

agreement are customized for each party individually. Schedules provide a means of codifying highly differentiated legal obligations; they thus represent a way of legally accommodating diversity among the parties to the agreement. In the trade context, this diversity relates both to the form and the content of legal obligations that a party is willing to take on. With respect to form – taking tariff schedules as an example – schedules can reflect the tariff structure and valuation methodology of each individual party; with regard to content, they can codify a different level of obligation (“binding”) for each individual tariff line of a party. Figure 2 shows a model schedule prepared during the negotiations of the GATT.

SCHEDULE I - RURITANIA

Part I

Ruritania Tariff Item Number	Description of Products	Rate of Duty
23	Naphthenic Acids	12½% ad val.
48	Electrical apparatus	.....
	NOTE: The products provided for under Item 48 shall be exempt from ordinary most-favoured-nation customs duties which exceed the preferential duties on such products by more than 10% ad valorem	
67	Zinc oxide	1-1/10¢ per lb.
84	Apples, fresh	60¢ per 100 lbs gross
112	Turpentine	Free
167	Fish: Salmon Oysters	10% ad val. \$1.40 per 100 lbs.
202	Steel ingots, cogged ingots, blooms and slabs, by whatever process made: valued at not more than 1½¢ per lb. valued at more than 1½¢ per lb.	3/10¢ per lb. 4/10¢ per lb.
331	Linseed oil	2¢ per lb.
	NOTE: The Government of Ruritania shall, on or after the day on which it removes the existing margin of internal tax preference on linseed oil, be free to impose, in addition to the duty specifically provided for under this item, a duty on importation which shall not be more than equivalent to such margin of preference.	
367	Automobiles	40% ad val. plus special charge (e.g., primage, mon- opoly fee, sur- tax, etc.) not in excess of 8% ad val.
538	Table and kitchen articles	.....
	NOTE: The products provided for under Item 538 shall not be subject to <u>/name</u> of special charge other than ordinary customs duty, such as primage, monopoly fee, surtax, etc., in excess of 8% ad val.	
841	Typewriters	30% ad val.

Fig. 2: Model schedule; excerpt from E/PC/T/153.

In international trade lawmaking, schedules have primarily been used with respect to trade restrictions or other policy instruments whose outright prohibition is not seen as feasible or desirable, but with respect to which participants nonetheless want to take on individually customised legal obligations. Schedules serve as a tool to do so by “binding” such measures, i.e., by stipulating the quantity, form, and conditions under which they may be used. While schedules were initially used exclusively with respect to tariffs, they have been employed for a much wider range of legal obligations, such as commitments on trade in services and agricultural subsidies, since the Uruguay Round. Moreover, the agreements on government procurement negotiated during the Tokyo and Uruguay Rounds contain “annexes” – a different term for schedules – defining, for each party individually, the coverage of the agreements. Prior to the Uruguay Round, the use of schedules had also been considered for the gradual elimination of the remaining quantitative restrictions,<sup>991</sup> and scheduling has more recently been suggested as a way of gradually harmonising the rules of origin used by WTO members in their preferential trade agreements.<sup>992</sup> In one rare case of post-Uruguay Round lawmaking, a number of WTO members have inscribed regulatory principles for basic telecommunications in the "additional commitments" section of their GATS schedules.<sup>993</sup>

Schedules are linked to the general part of a trade agreement through a general provision in the agreement setting out the legal obligation associated with the entries in the schedule and making the schedules an integral part of the agreement.<sup>994</sup> Even though they are an integral part of the agreement, schedules are usually easier to modify than the general part of the agreement. The commitments in the original GATT schedules were unconditionally binding for only three years, until 1 January 1951, after which a contracting party was free to “modify, or cease to apply” concessions listed in its schedule after reaching agreement on compensation with the contracting parties with which the concessions had been negotiated or which otherwise had a “substantial interest” in the

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<sup>991</sup> The proposals foresaw that the quotas would be gradually enlarged until full liberalisation. In the Uruguay Round, quantitative restrictions on agricultural products were “tariffied”, i.e., converted into their *ad valorem* equivalents and bound in tariff schedules.

<sup>992</sup> Choi 2010, 133-134.

<sup>993</sup> See the original proposal to this effect, which describes the advantages of using a schedule as compared to an amendment: S/NGBT/W/18.

<sup>994</sup> See GATT Article II; GATS Articles XVI, XVII, and XVIII: Agreement on Agriculture, Article 3. In early drafts of the GATT, the legal obligation was set out in the schedule itself; see E/PC/T/153, 5.

concession.<sup>995</sup> Three years after the entry into force of the GATT, the contracting parties decided to “prolong the assured life” of the GATT schedules for another three years, until 1 January 1954.<sup>996</sup> At the review session in 1955, the contracting parties amended Article XXVIII of the GATT to the effect that the validity of GATT schedules would be extended automatically every three years, unless concessions were modified or withdrawn on the first day of any three-year period.<sup>997</sup> The GATS, as the original GATT, allows WTO members to “modify or withdraw any commitments in its Schedule” after three years, subject to compensation.<sup>998</sup> It would appear that GATT contracting parties and WTO members could at any time increase the level of obligation in their schedules.

Where scheduled commitments are modified across the board as the result of a negotiating round, this is done by drawing up a new schedule rather than modifying the original schedule. The new schedule supersedes the old schedule in areas of overlap, but the old schedule remains in force.<sup>999</sup> This possibility of adding new layers of obligations over time – without the need of amending the general part of an agreement – makes schedules a particularly suitable tool for implementing a gradual reduction technique.

The scheduling technique has mostly been employed for legal obligations that can be expressed in a quantity.<sup>1000</sup> This affinity between schedules and quantifiable obligations could be explained both with reference to the diversity and gradualness of the legal obligations embodied in schedules. With regard to the former, legal obligations expressed in quantities preserve a degree of comparability of the individually customised obligations in schedules – a property that is particularly important in light of the central role of the concept of reciprocity in multilateral trade lawmaking. With regard to the latter, legal obligations expressed in quantities lend themselves to gradual modification over time.

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<sup>995</sup> See Original GATT, Article XXVIII.1. In case no agreement was reached, the other parties were entitled to withdraw “substantially equivalent concessions initially negotiated with the contracting party” concerned; Original GATT, Article XXVIII.2.

<sup>996</sup> See GATT/CP.4/25; see also SECRET/CP/15; and L/108.

<sup>997</sup> GATT, Article XXVIII (amended version).

<sup>998</sup> GATS, Article XXI. By contrast to the GATT, the GATS provides for arbitration in case no agreement on compensation can be reached. Failure to implement the arbitration award entitles the other parties to withdraw substantially equivalent concessions from the trade of the non-implementing party on a non-MFN basis, something that is not possible under GATT Article XXVIII.

<sup>999</sup> Jackson 1969, 203. Jackson notes that “the tariff ‘Schedule’ of GATT is a fiction”, since “each GATT party’s tariff concessions are spread over a series of treaty instruments”.

<sup>1000</sup> The limitations on national treatment that can be scheduled under the GATS are an important exception.

There is a strong affinity, then, between the tool of the schedule and the narrative of progressive liberalization. A legal obligation codified in the form of a number in a schedule has the feel of something temporary; the schedule freezes a level of obligation for a moment, but almost implicit in this momentary freeze is the expectation that the number will be further reduced. In some instances, an inscription in a schedule is merely a placeholder for a possible future commitment (such as an inscription of "unbound" for a particular mode of supply and sector in a GATS schedule), but even this non-commitment, by explicitly "holding the place" for a future commitment, suggests a particular form and direction of any potential lawmaking.

There is also a strong affinity between the tool of the schedule and the idea of reciprocal liberalization. Inscribing a legal obligation in a schedule signals that it is "negotiating currency",<sup>1001</sup> liable to be modified in exchange for reciprocal modifications in other parties' schedules. Schedules, moreover, are a powerful symbol of the idea that trade law embodies *individual* legal obligations. Each party to the GATT had, and each member of the WTO has, their individual schedule. It is only by virtue of having a schedule – and thus the ability to record individual obligations – that a party can participate in reciprocal exchanges of commitments.

Overall, the tool of the schedule is so intimately linked with a particular lawmaking narrative (progressive liberalization), with a particular form of legal commitments (commitments expressed in a quantity), and with a particular form of lawmaking (through the reciprocal exchange of concessions) that it tends to entrench the use of reduction techniques in relation to any subject matter that is codified through schedules. In the current Doha Round negotiations, the clearest evidence of this tendency is the "taboo" of exceeding pre-Doha bindings: for many developed countries, any proposal that would allow WTO members to exceed their pre-Doha bindings is a sacrilege that they will find hard, if not impossible, to accept.<sup>1002</sup>

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<sup>1001</sup> Recall Low's and Subramanian's remark that the GATS, by allowing the scheduling of limitations on national treatment, "transformed [national treatment] from a principle into negotiating currency"; Low/Subramanian 1995, 423.

<sup>1002</sup> Interview with Joseph Glauber; see also Wolfe 2009b, 535: "Developed countries were offended by the principle of allowing tariffs to rise above the pre-Doha bound rates...". See already L/58, 5:

Recourse to the escape clause would, in no circumstances permit the raising of a duty beyond the initial rate obtaining at the beginning of the exercise.

## B. Modalities

The codification of individualised obligations in schedules presents a challenge for negotiations, since negotiating every obligation individually is extremely time-consuming. Nonetheless, the “item-by-item” technique has been used for the negotiation of scheduled concessions on many occasions. The reason it was used in the tariff negotiations of the first five GATT negotiating rounds was that US negotiators did not have the authority to negotiate for horizontal tariff reductions.<sup>1003</sup> In the tariff negotiations in the Uruguay Round, the US again insisted on using the technique.<sup>1004</sup> The item-by-item technique has also been used for the negotiation of reductions in non-tariff barriers where the negotiation of general rules was not deemed necessary or feasible, and for the scheduling of initial commitments on trade in services in the Uruguay Round.

However, since the very outset of multilateral trade negotiations, there have been attempts to replace item-by-item negotiations with negotiations on general “modalities” for the undertaking of commitments. Under this approach, rather than considering each item individually, all – or a specific subsection or percentage of – the items in a party's schedule are modified in accordance with more or less uniform, mutually agreed rules. The archetype of a modality is the tariff reduction formula, pursuant to which all tariff lines are reduced by a specified percentage. Another type of modality is the model schedule which can specify the form, or even the content, of commitments to be undertaken by individual parties.<sup>1005</sup> In the following, I will briefly discuss the various reduction formulas that have been proposed and used throughout the history of trade lawmaking. I will then consider the impact of reduction modalities on the dynamics of trade lawmaking.

### a) *Linear Reduction Formulas*

A linear formula for reducing tariffs was first considered in the bilateral negotiations held by the US with the UK and Canada, respectively, preceding the official preparatory negotiations to the GATT and the ITO.<sup>1006</sup> As a US negotiator later recalled,

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<sup>1003</sup> See Chapter 1.

<sup>1004</sup> In the Uruguay Round the constraint was not legal, but political: the item-by-item technique allowed negotiators to insist on bilateral reciprocity and at the same time to protect their tariff peaks.

<sup>1005</sup> An example of a model schedule is the Understanding on Commitments in Financial Services; S/CSC/W/34.

<sup>1006</sup> See *Anglo-American Discussions 1943*, 223-224, Alternative B; DCER 11(II), 62-63.

[c]utting every tariff in the book by 50 percent across the board was a revolutionary idea. ... previously they had been cut selectively on a product-by-product basis, carefully-drawn piecemeal cuts of 20 percent, 10 percent, 15 percent.<sup>1007</sup>

As recounted in chapter 1, the US Congress refused to give authority for linear across-the-board reductions at the time. While the EC and UK unilaterally presented offers based on a linear reduction of 20 per cent in the Dillon Round, it was not until the Kennedy Round that linear reductions were negotiated on a multilateral basis. The resolution adopted by ministers to launch the preparatory phase of the Kennedy Round provided that

in view of the limited results obtained in recent years from item-by-item negotiations, the tariff negotiations ... shall be based upon a plan of substantial linear tariff reductions with a bare minimum of exceptions which shall be subject to confrontation and justification.<sup>1008</sup>

The resolution also stated that the "linear reductions shall be equal", but that in "cases where there are significant disparities in tariff levels, the tariff reductions will be based upon special rules of general and automatic application."<sup>1009</sup> The background to this statement was a debate about the potential differential impact of equal linear cuts on countries with different tariff structures. In particular, countries with relatively low tariffs were arguing that they would experience a greater increase in imports as a result of the linear cut than countries with relatively high tariffs. As Cooper has shown, this argument relies on a number of (doubtful) empirical assumptions, in particular that "tariff levels are significantly correlated with import values or elasticities or both."<sup>1010</sup> What the debate about tariff disparities in the Kennedy Round shows is that, notwithstanding the economics of the issue, there is an unease with modalities that preserve inequalities in the legal obligations of the parties.

It was in preparation for the Tokyo Round that linear reduction modalities were first considered for the reduction of export subsidies on agricultural products.<sup>1011</sup> One set of suggestions was to reduce, by 20 per cent per year, either the total amount of subsidy payments, the total amount of subsidy payments for each individual product, the average subsidy payment per unit of a product, or the difference between the domestic price and the

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<sup>1007</sup> Oral History Interview with John Leddy, 22.

<sup>1008</sup> MIN(63)9, paras. A.1. and A.4..

<sup>1009</sup> MIN(63)9, paras. A.1. and A.4..

<sup>1010</sup> Cooper 1964, 599.

<sup>1011</sup> Export subsidies on non-primary products had been prohibited as a consequence of a 1956 amendment to GATT Article XVI for most developed contracting parties.

world price for a particular product in a base year.<sup>1012</sup> While the effort to discipline agricultural export subsidies did not come to fruition in the Tokyo Round, a linear formula for reductions of subsidised quantities ("21 percent from the base period level") and budgetary outlays for export subsidies ("36 percent from the base period level") "for each agricultural product or group of products" was adopted in the Uruguay Round.<sup>1013</sup> Similarly, domestic support for agricultural production, quantified through an Aggregate Measurement of Support, was subject to a linear 20 per cent reduction in the Uruguay Round.<sup>1014</sup>

### ***b) Average Reduction Formulas***

A variant of linear cuts applied to individual tariff lines is the linear reduction of the simple or trade-weighted average level of tariffs, across the board or in a particular sector. While the trade-weighted variant of this approach was considered in the bilateral negotiations between the US and the UK,<sup>1015</sup> it was – as all other formula proposals – abandoned before the negotiations reached the multilateral stage. In multilateral trade negotiations, a proposal along similar lines was first advanced by France in the early 1950s. The so-called "French Plan" envisaged a 30 per cent reduction of tariffs "based on the weighted average level of customs protection afforded to each main branch of economic activity".<sup>1016</sup> France's goal was to achieve a substantial reduction of tariffs while at the same time "preserv[ing] flexibility" by allowing countries not to reduce – or possibly even increase – tariffs on certain products by undertaking greater-than-formula reductions on others.<sup>1017</sup> The proposal was extensively discussed by a working party; in light of the resistance by the United States, it was watered down to a proposal to use weighted average reductions as a benchmark to assess the equivalence of concessions in the run-up to the 1956 tariff conference. Not even in this version was it acceptable to the United States, which by law was limited to reducing duties by a maximum of 15 per cent.<sup>1018</sup>

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<sup>1012</sup> COM.AG/W/77, 2-3.

<sup>1013</sup> MTN.GNG/MA/W/24, para. 11; Annex 8, para. 5.

<sup>1014</sup> MTN.GNG/MA/W/24, para. 8.

<sup>1015</sup> *Anglo-American Discussions 1943*, 224-225, Alternative D.

<sup>1016</sup> GATT/CP.6/23; the proposal was further elaborated in GATT/IW.2/5; GATT/IW.2/7; and L/58.

<sup>1017</sup> GATT/CP.6/SR.6, 2. As the French explained, one of the "basic principles" of their proposal "consists in giving countries every possible leeway to apply the automatic lowering of duties to products selected by them within each main branch" of economic activity; GATT/IW.2/7.

<sup>1018</sup> See L/373.

The proposal to use weighted-average reductions resurfaced in the Tokyo Round, where Canada suggested using it in order to "provide a more flexible approach to exceptions", while ensuring "a broad and substantial reduction of tariffs". Canada highlighted as a particular advantage of this approach that it automatically factored both higher-than-formula and lower-than-formula cuts into the calculation.<sup>1019</sup>

The first instance in which an average reduction was actually included in modalities was in the Uruguay Round agricultural negotiations. The Uruguay Round modalities for agriculture provided that tariffs be reduced, "on a simple average basis by 36 per cent with a minimum rate reduction of 15 per cent for each tariff line".<sup>1020</sup> In the Uruguay Round negotiations on industrial tariffs, which were held on an item-by-item basis, an average reduction "at least as ambitious as that achieved by the formula participants in the Tokyo Round"<sup>1021</sup> was used as a yardstick to measure the adequacy of tariff reductions undertaken pursuant to request-and-offer negotiations.<sup>1022</sup> A similar use of an average reduction as a yardstick is envisioned in the Doha Round modalities for agriculture, which circumscribe the use of the Special Products exemption for developing countries by stipulating that the "overall average cut shall, in any case, be 11 percent".<sup>1023</sup>

### ***c) Harmonisation Formulas***

The first proposal for using a harmonisation formula for tariff reductions was made by the British in the US-UK talks preceding the formal preparatory negotiations for the ITO and GATT. The British negotiators sought to achieve a harmonising effect by combining a linear reduction with a ceiling and/or a floor.<sup>1024</sup> Their concern with a linear reduction of 50 per cent, as proposed by the Canadians, was that it "would not bring down the very high rates sufficiently while effecting a very substantial cut in the moderate rates".<sup>1025</sup> The British favoured a 25 per cent reduction with a ceiling of 25 per cent (to "achieve a drastic scaling down of the very high rates") and a floor of 10 per cent under which tariff rates

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<sup>1019</sup> MTN/TAR/W/18, 2.

<sup>1020</sup> See MTN.GNG/MA/W/24, paras. 2 and 15: the percentage for developed countries was 36 with a 15 percent minimum reduction, for developing countries no less than two-thirds of that amount.

<sup>1021</sup> MTN.TNC/11, 4, para. 2(a). The target was somewhere around 30 percent for developed countries and 25 percent for developing countries; see Oxley 1990, 168; Finger 2005, 34 and fn 11.

<sup>1022</sup> This "statement of results" approach was proposed by the US; MTN.GNG/NG1/W/19.

<sup>1023</sup> TN/AG/W/4/Rev.4, para. 129.

<sup>1024</sup> See Cairncross/Watts 1989, 101, 103; *Anglo-American Discussions* 1943, 223-224, Alternatives A and C.

<sup>1025</sup> DCER 11(II), 63.

would not have to be reduced.<sup>1026</sup> An alternative that was briefly considered before it went the way of all formulas in the preparatory negotiations was the formula  $y = x/2 + 5$ , i.e., the new tariff rate (y) would be half the original (x) plus 5 per cent.<sup>1027</sup>

In the preparatory phase of the Kennedy Round, the EEC proposed yet a different version of a harmonisation formula. Instead of reducing all tariffs by 50 per cent, as was favoured by the United States, the EEC suggested that the 50 per cent reduction should be applied not to the tariff rates as such, but to the difference between the tariff rate and a notional target rate, which would be zero for primary products, 5 per cent for semi-manufactured products, and 10 per cent for finished products.<sup>1028</sup> In the case of semi-manufactures and finished products, lower tariffs would thus have to be reduced by less than higher tariffs, and tariffs at or below the floor would not have to be reduced at all. The EEC proposal was not adopted due to objections by the US.

The US abandoned its categorical resistance against a harmonization formula in the Tokyo Round, which resulted in a range of proposals for such formulas.<sup>1029</sup> The US proposal, designed to make full use of the US negotiators' authority to reduce tariff by up to 60 per cent, combined linear and harmonization elements; thus, the US sought to apply a linear 60 per cent cut to tariffs above the average level of industrial tariffs of developed countries, as calculated by the GATT Secretariat (6.2 per cent), and a harmonizing coefficient based on the formula  $y = 1.5x + 50$  to all tariff lines below that threshold.<sup>1030</sup> The EC's proposal was more strongly harmonising; it suggested the formula  $y = x$  applied four times, i.e., any tariff line would be reduced by a percentage equal to the tariff line, and this would be done four times.<sup>1031</sup> Figure 3 shows a comparison of the US and the EC formula, provided by the US to highlight the greater reduction achieved by its formula.

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<sup>1026</sup> Cairncross/Watts 1989, 101; DCER 11(II), 63, 65.

<sup>1027</sup> DCER 11(II), 65; FRUS 1945, 1-2.

<sup>1028</sup> L/2002, Annex III, para. 1; Evans 1971, 186-187; Preeg 1970, 3.

<sup>1029</sup> For a discussion of the formulas proposed in the Tokyo Round, see also Winham 1986, 160-163.

<sup>1030</sup> MTN/TAR/W/15.

<sup>1031</sup> MTN/TAR/W/29.

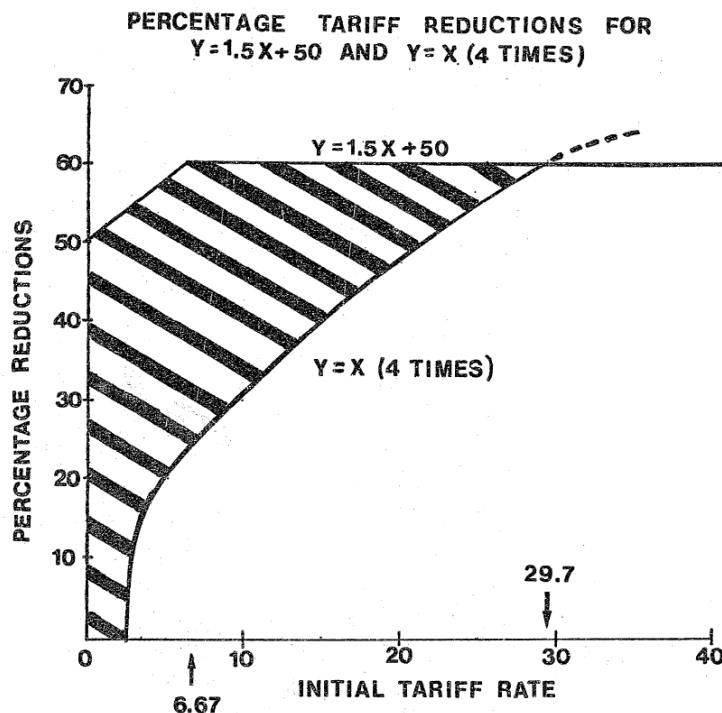


Fig. 3: Comparison of Percentage Reductions in US and EC formulas, provided by the US; excerpt from MTN/TAR/W/15/Add.1.

The formula proposed by Japan was similar to the formula briefly considered in the preparatory negotiations, in that it included a linear reduction plus an ad valorem constant ( $y = 0.3x + 3.5$ ).<sup>1032</sup> The formula that ultimately carried the day in the Tokyo Round tariff negotiations, however, was proposed by Switzerland. What came to be known as the "Swiss formula" has since become one of the most well-known tools of trade negotiators. Some commentators have suggested that its success is due to its simplicity, a factor that was also highlighted by the Swiss themselves (see Figure 4).<sup>1033</sup>

<sup>1032</sup> MTN/TAR/W/36, para. 3.

<sup>1033</sup> Wingham 1986, 163.

TARIFF CUTTING FORMULA

Proposal by Switzerland

1. Switzerland proposes the following tariff-cutting formula:

$$z = \frac{14 \cdot x}{14 + x}$$

This formula expresses directly the final duty (z) in the form of a quotient wherein the dividend comprises the initial duty (x) multiplied by 14, and the divisor is the initial duty (x) increased by 14.

Example: for an initial duty (x) of 10 per cent one obtains:

$$z = \frac{14 \cdot 10}{14 + 10} \quad \text{or } z = \frac{140}{24} = 5.83 \text{ or,}$$

in round figures, 6.0.

This is a simple formula which besides the initial duty (x) uses only one supplementary parameter, i.e. 14, and involves only elementary arithmetical operations.<sup>1</sup>

Fig. 4: Swiss Formula; excerpt from MTN/TAR/W/34.

Another factor that certainly contributed to the adoption of the Swiss Formula in the Tokyo Round was the fact that it represented a compromise between the strongly-harmonising EC formula and the predominantly linear US formula (see Figure 5).

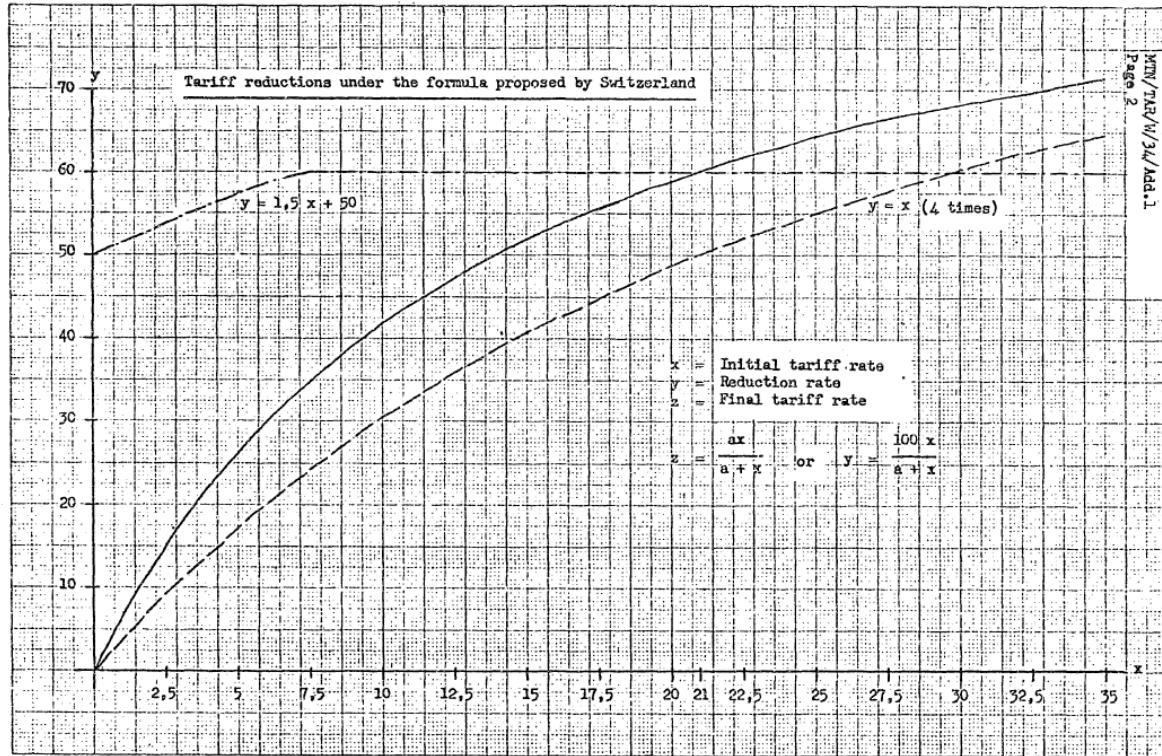


Fig. 5: Swiss Formula in comparison with the formulas proposed by the US and the EC; excerpt from MTN/TAR/W/34/Add.1.

While the different formulas discussed in the Tokyo Round certainly reflected different conceptions of reciprocity (see chapter 1) and were informed by a keen awareness on the part of participants of how different formulas would affect the structure and levels of their tariffs,<sup>1034</sup> one is left with the impression that practical and aesthetic considerations did play a role as well. On this level, the Swiss formula was clearly superior to the US and EC formulas in particular. While the US tried to choose a non-arbitrary threshold for the transition from the harmonising to the linear part of its proposal, its mixed proposal inevitably remained somewhat clumsy. The EC formula, on the other hand, while appearing simple, required a number of laborious calculations to arrive at the final rate.<sup>1035</sup> The Swiss formula represented an elegant compromise.

<sup>1034</sup> See Winham 1986, 162, who notes that it was possible for a nation to make endless permutations to the tariff formula in order to advantage its particular trade structure.

<sup>1035</sup> See the calculations and tables of results in Annex I of MTN/TAR/W/29.

The Swiss formula subsequently came to be seen as the harmonization formula *par excellence*.<sup>1036</sup> Its single coefficient allowed for easy and transparent adjustment of the desired degree of harmonization; in the Tokyo Round, the US, Switzerland, Japan, and Czechoslovakia used the coefficient 14, while the EC and a number of other developed countries used the coefficient 16.<sup>1037</sup> In the Uruguay Round, Switzerland proposed a coefficient of 15.<sup>1038</sup> In the Doha Round NAMA modalities, the flexibilities provided by the coefficient are used to the fullest extent: developed countries are to apply the formula with a coefficient of 8; developing countries can choose between the coefficients of 20, 22, and 25, whereby the lower two coefficients (implying relatively more stringent reduction commitments) are coupled with a number of exemptions.<sup>1039</sup> Thus, a developing country that chooses a coefficient of 20 can apply lower than formula cuts to up to 14 per cent of its tariff lines or leave up to 6.5 per cent unbound or without reduction; a developing country that chooses 22 as the coefficient can do likewise for 10 per cent and 5 per cent of tariff lines, respectively; or a developing country can choose the coefficient 25 without the use of any flexibilities.<sup>1040</sup>

#### ***d) Tiered Formulas***

A tiered formula is a formula that applies different reduction modalities depending on the "tier" into which a binding falls. Usually, though not always, the reductions required by a tiered formula will be steeper for higher tiers than for lower tiers. Tiered formulas thus tend to be variants of harmonisation formulas.<sup>1041</sup> Indeed, the formula favoured by the UK in the preparatory negotiations – a linear formula with a ceiling and floor – can be understood as a tiered formula, in the sense that tariffs falling above the ceiling, between the ceiling and the floor, and under the floor were treated differently. It may well have served as an inspiration for the Canadian negotiators who proposed a very similar formula thirty years later in the Tokyo Round. Similarly to the old British approach, the Canadians suggested a ceiling: all tariffs over 20 per cent were to be reduced to 20 per cent; tariffs between 5 and 20 per cent were to be reduced through a linear formula either across the board or on a weighted

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<sup>1036</sup> See e.g. MTN.GNG/NG1/W/18, 2.

<sup>1037</sup> MTN.GNG/NG1/W/1, 5.

<sup>1038</sup> MTN.GNG/NG1/W/16.

<sup>1039</sup> TN/MA/W/103/Rev.3, para. 5.

<sup>1040</sup> Ibid. para. 7.

<sup>1041</sup> See also the EC's proposal of a "sliding-scale formula" to be applied in the case of tariff disparities in the Kennedy Round; Evans 1971, 198.

average basis. The key difference between the Canadian proposal and the old British approach was that, whereas the British had envisaged a floor under which tariffs would not have to be reduced, the Canadians wanted tariffs at or below 5 per cent to be eliminated<sup>1042</sup> – an extremely rare case of a formula in which (some) low rates would be subject to a higher percentage reduction (namely 100 per cent) than higher rates.

Tiered formulas lend themselves particularly well to precise calibration: in the Doha Round draft modalities for agriculture, which envisage the use of tiered formulas for the reduction of both tariffs and domestic support commitments<sup>1043</sup>, the tiers in the formula for developed countries were reportedly designed so as to capture the key tariff and domestic support bindings of the US and EU in particular tiers.<sup>1044</sup>

#### *e) Modalities and the Dynamics of Trade Lawmaking*

Evans has described the change in GATT negotiations occasioned by the decision to negotiate tariff reductions through general modalities rather than item-by-item:

A year and half elapsed between the tentative decision ... to hold a new round of trade negotiations and the date when the Kennedy Round was officially opened. It was another six months before negotiations, in the traditional meaning of the term, could be said to have begun. The reason for this unprecedented period of gestation was, of course, the fact that for the first time the problem of reaching agreement on a rule for automatic tariff reductions had been injected into the preparatory phase.

In all GATT tariff conferences before the Kennedy Round, the preliminary decisions required of the Contracting Parties had been simple and procedural. But this new factor insured that the conference rules would be as tightly negotiated as the ultimate concessions themselves. In fact, had they been possible, totally automatic tariff reductions would have shifted the entire bargaining process forward to the opening phase of the conference. The rules would no longer have been procedural; they would have determined the shape and content of the final agreement. The "negotiating conference" would then have been reduced to the dull task of verifying and recording results.<sup>1045</sup>

Beginning with the Kennedy Round, the weight of trade negotiations has indeed gradually shifted from bargaining over individual concessions to the negotiation of the "modalities" in accordance with which such concessions are to be given. In all areas that are subject to reduction techniques, the Doha Round negotiations have so far been exclusively concerned with modalities, and it is to be expected that, once the negotiations on modalities are

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<sup>1042</sup> MTN/TAR/W/18, 2.

<sup>1043</sup> TN/AG/W/4/Rev.4, para.

<sup>1044</sup> Interview with Pamela Cooper.

<sup>1045</sup> Evans 1971, 183; the report of the Kennedy Round Working Party on Procedures for Tariff Reductions and the record of discussions is in L/2002.

concluded, the only element of suspense will be which of its tariff lines a member will designate as a "sensitive" or "special" product; the absolute number of tariff lines eligible for such designations has been specified in the modalities. Several veteran trade negotiators have criticised these abstract "negotiations about negotiations" and have argued that it would be more fruitful to focus on concrete trade problems.<sup>1046</sup> Others consider the shift towards modalities as an inevitable development: With the growing membership of the GATT and later the WTO, negotiations on the basis of bilateral requests and offers simply became unworkable.<sup>1047</sup> Negotiations on horizontal reduction modalities represented a way to reduce the complexity of trade negotiations. At the same time, modalities negotiations themselves have become ever more complex since they were first conducted in the Kennedy Round. Thus, in the Kennedy Round, when only a limited number of developed countries applied a linear tariff reduction formula, it was still possible for these countries to iron out perceived imbalances in their offers (mostly resulting from decisions by participants to exempt individual tariff lines from the linear offer) through bilateral and plurilateral negotiations without generally applicable rules. In the Doha Round, by contrast, WTO members are no longer willing to leave anything to chance: Not only the reduction formulas, but also the scope and form of exceptions to the formulas are now specified in the modalities. Moreover, whereas tariff formulas in the Kennedy and Tokyo rounds were only applied by a number of developed countries, the modalities now apply to all participants in the negotiations, and have to accommodate differences in levels of commitments that different groups of members are willing and able to undertake.

In sum, modalities negotiations as they are taking place in the current Doha Round are best understood as an effort to ensure an *adequate* complexity of trade negotiations.<sup>1048</sup> In other words, they represent an attempt to come down somewhere between the extremes of the unmanageable complexity of bilateral item-by-item negotiations on one hand, and

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<sup>1046</sup> Interview with Hugo Paemen; a remark to this effect was also made by Stuart Harbinson at an event at the WTO in July 2013.

<sup>1047</sup> In the Tokyo Round, the US Department of Agriculture had proposed a request-and-offer approach, which was rejected by the US Department of Commerce and the State Department, which noted that

[s]o widely accepted are its limitations as a viable negotiating technique that at a recent meeting of the GATT Committee on Trade in Industrial Products (CTIP), the Committee agreed to exclude item-by-item negotiations on industrial products from further examination.

FRUS 1973-1976, 628-629; see also FRUS 1973-1976, 631:

The line-by-line approach is an unwieldy and, in fact, a virtually impossible negotiating technique.

<sup>1048</sup> See Luhmann's reformulation of the idea of justice as "adequate complexity"; Luhmann 199/2004, 225/219.

the unacceptable – in view of the differences between countries – simplicity of a single formula applied to all products and countries on the other hand. As I argue, negotiators try to achieve this aim by combining the *generality* of modalities with a number of *strategies of particularisation*.

The negotiation of modalities represents a move towards generality in at least three respects: First, modalities are not negotiated for individual members, but for entire categories of countries; second, and as a consequence, modalities will tend to be negotiated multilaterally rather than bilaterally; and thirdly, modalities are not usually negotiated for individual products, but apply across the board to all products in a particular area (subject to exceptions). This move to generality is partly offset through strategies of particularisation designed to accommodate the individual interests and circumstances of WTO members in the modalities. In the Doha Round Draft Modalities for Agriculture, for example, one finds at least four such strategies.

A first layer of differentiation is achieved through the distinction between different categories of members. Because the developed/developing country distinction is so deeply entrenched, this differentiation has exclusively taken place in the developing country category. As described in Chapter 1, the Draft Modalities establish distinct obligations for at least six sub-groups of developing countries, in addition to the general developing country category: RAMs, very RAMs, small low-income RAMs with economies in transition, NFIDCs, LDCs and SVEs.<sup>1049</sup> Very rarely, provisions in the modalities apply only to a specific country.<sup>1050</sup> These differentiations allow the participants in lawmaking to tailor obligations to the individual circumstances of countries.

The formulas used to calculate reduction commitments provide a second layer of differentiation. As discussed above, formulas can be designed to affect countries with different structures and levels of bindings differently, and the tiered formula used in the Agriculture Modalities provides particular flexibility in this regard. Further differentiation is accomplished through exception provisions, which are formulated as percentages of tariff lines and thus allow Members flexibility to take account of their individual circumstances.

And finally, the modalities at several points leave developing countries with discretion as to the methodologies that they choose to calculate and schedule their

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<sup>1049</sup> See TN/AG/W/4/Rev.4, paras. 9, 10, 17, 19, 65, 151; see *supra* text at fn 647.

<sup>1050</sup> *Ibid.* para. 64, fn 10.

commitments – a possibility that is also provided in the NAMA modalities, where developing countries can choose among several combinations of reduction coefficients and flexibilities.

In sum, these strategies of particularisation produce modalities that are far removed from the one-size-fits-all approach of the early tariff formulas. Instead, they embody an intricate trade-off between generality and particularity. The way in which the balance between these two elements is struck also determines the effect that modalities have on the dynamics of trade negotiations, and in particular the risks of what I have called "abstraction".

The generality of modalities has one clear advantage that British and Canadian trade negotiators did not tire of emphasising in their negotiations with the US as early as the mid-1940s: general rules for the assumption of legal commitments make the commitments intelligible and evaluable in a way that the outcomes of bilateral bargaining are not.<sup>1051</sup> This generality also has a flipside, however, in that particular, substantive trade concerns are not addressed directly, but have to be accommodated in a framework of general rules; this can lead negotiations to become divorced from the concerns that motivated particular lawmaking proposals. One example of this risk of abstraction is the fate of proposals on food and livelihood security advanced by the G-33 group of developing countries in the Doha Round agricultural negotiations. As Eagleton-Pierce notes, in the course of the negotiations

the full heretical force of the G-33's critique, complete with attention to concerns about hunger and nourishment, has been partially sidelined or lost as the negotiations shifted into conventional bargaining over quantitative modalities ... this was an inevitable process of legally translating the G-33's heterodox ideas into the existing WTO schemes of classification.<sup>1052</sup>

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<sup>1051</sup> At least not without the help of elaborate computer models – which was actually contemplated in the 1960s; see Wilkinson and Scott 2008, 487; see also Sauvé/Stern 2000, 28, who note that formula-based liberalization can lead to "improved public understanding of negotiating objectives and outcomes"; and Thompson 2000, 474; see also Paemen/Bensch 1995, 113:

The tariff reduction formula method ... has the drawback of being excessively transparent. For instance, if a country agrees to reduce all duties by half, except for tariffs applicable to textiles, the protectionist nature of such an exception is far more evident than it would be under the request and offer method.

<sup>1052</sup> Eagleton-Pierce 2013, 144.

Intelligibility at one level – the comparability of commitments, the effect of commitments on tariff structures, the transparency of exceptions, etc. – thus comes at the expense of removing the negotiations further from the concrete trade problems that are at stake.

The danger of abstraction also arises in another respect: because specific modalities apply to entire categories of countries, negotiators have to formulate proposals with a view not only to how they will affect their trade relations with their individual counterparts, but with all countries in their own and their counterparts' category. This can lead to a phenomenon called "shadow boxing" by a US negotiator, where countries find themselves in heated negotiations with other countries whose trade they are not actually interested in. The prime example for this constellation was the deadlock between the US and India over a Special Safeguard Mechanism (SSM) for agricultural products at the 2008 Mini-Ministerial: whereas the US was primarily concerned about the effects of the SSM on its soya exports to China, India wanted to use it mostly against developing country competitors such as Malaysia.<sup>1053</sup> Such constellations can be diffused through further particularisation of the modalities.<sup>1054</sup>

## II. Levelling Techniques and "Fairness" Narratives

Of the trade barriers that the multilateral trading system was designed to address, discriminatory measures were perceived as particularly pernicious. As the *Proposals* stated, it was especially when barriers "discriminate between countries or interrupt previous business connections" that they "create bad feeling and destroy prosperity".<sup>1055</sup> US officials decried preferential regimes – especially the British system of imperial preferences – as destructive.<sup>1056</sup> The most-favoured nation rule, often described as the cornerstone of the GATT, was designed to eliminate discrimination among GATT contracting parties;<sup>1057</sup> it

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<sup>1053</sup> Interview with Joseph Glauber; see also Wolfe 2009b, 535; Eagleton-Pierce 2013, 151.

<sup>1054</sup> See Wolfe 2009b, 535:

Whether or not the poorest Members ought to be able to use a SSM was not really at issue, because their trade impact is so small. The difficulty was that developing countries insist that the same mechanism be available for *all* products in *all* developing countries.

<sup>1055</sup> *US Proposals 1945*, 3.

<sup>1056</sup> See Oral History Interview with John Leddy, 21: the US opinion was that the imperial preference system "had bred a great deal of friction between [the US] and the British, and that it ought to be junked"; see also DiMascio/Pauwelyn 2008, 60.

<sup>1057</sup> See the preambles of the ITO Charter and the GATT, both of which are "directed to ... the elimination of discriminatory treatment in international commerce".

stipulated that any advantage or privilege that was granted to products imported from one contracting party had to be extended immediately and unconditionally to products from all other contracting parties.<sup>1058</sup>

The MFN rule is an example of a levelling technique of trade lawmaking. Levelling techniques – designed to “level the playing field” between different producers and their products<sup>1059</sup> – differ from reduction techniques in that they do not establish an absolute standard of treatment, say, a particular tariff binding that cannot be exceeded, but a relative standard. This relative standard can either be the treatment accorded to “like” or similar products, or a benchmark such as the “normal” operation of a market. In the first case, levelling techniques are directed against *discrimination* among producers or products; in the latter case, they purport to remedy the *distortion* of a market by foreign governments (through subsidies) or producers (through dumping).

The “fairness” narrative and the “level playing field” metaphor are explicitly invoked in the context of claims of market distortion much more frequently than in the context of claims of discrimination.<sup>1060</sup> One could argue that this is due to the fact that “discrimination” is in itself an evocative and forceful charge in a way that “distortion” is not, but one could also question the appropriateness of discussing these two subjects as part of a single narrative and/or legal technique. I believe that the concept of “discrimination” implies a denial of fair treatment: the purpose of the non-discrimination provisions is “ultimately about ensuring fair competitive conditions between imported and domestic products”.<sup>1061</sup> Moreover, with respect to techniques, the issues implicated in the two areas are similar. Both establish a relative standard of treatment defined in relation to a benchmark, and both discipline, at some level, differential treatment.

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<sup>1058</sup> GATT, Article I.

<sup>1059</sup> For uses of the “level playing field” metaphor, see Cass/Boltuck 1996, 355 (section on “the level playing field as moral imperative”); Bhagwati/Mavroidis 2004, 120; York 1990 (“A Level Playing Field: Toward a Canada-U.S. Trade Law”); Zampetti 2006. See more recently, the evocations of the “level playing field” metaphor by US public officials in the context of the China-US-EU solar dispute; *New York Times*, 20 May 2013 (“This is the moment for the administration to obtain a global agreement that levels the playing field for American producers”; “Our goal is to support a healthy global solar industry in conditions that foster the adoption of renewable energy and continued innovation and a level playing field for all”); *Lamy 2013*:

...hence to the levelling of the global trade playing field, which must ultimately remain our collective goal. Because this is what fairness is about. ...we need to make sure that the manner in which these measures are addressed contributes to levelling — and not scattering — the playing field. ... new elements which require multilateral handling, so as to better level the trade playing field.

<sup>1060</sup> Most references in the previous footnote are from the former context.

<sup>1061</sup> Bronckers/McNelis 2000, 347.

In the following, I will briefly discuss levelling techniques directed against discrimination, and then address the much more challenging issues posed by levelling techniques directed against the distortion of markets.

### **A. Discrimination**

The levelling technique directed against discrimination is primarily embodied in provisions stipulating that a party shall provide to imported products from one party “treatment no less favourable” than that provided to like products from another party (MFN treatment) or to like products of domestic origin (national treatment).<sup>1062</sup> In some instances, the content of the non-discrimination provision is spelt out in more specific terms. Thus, GATT Article III.2 provides that imported products shall not be taxed “in excess of” like domestic products, and that directly competitive or substitutable products shall be “similarly taxed”. GATT Article XIII, in turn, explicates the implications of the obligation of non-discrimination in the context of the administration of quantitative restrictions in considerable detail. Thus, non-discrimination in this context is not conceptualised as the identical treatment of all importers, but rather as treatment in accordance with circumstances that would prevail *but for* the government measure, in that import quotas or licences are to be assigned in proportion to the share of imports “which the various contracting parties might be expected to obtain in the absence of” the restriction.<sup>1063</sup> The benchmark for “equal treatment” is thus provided by the conditions that would obtain in the marketplace. Similarly, GATS Article XVII explicitly links the non-discrimination discipline to competition in the marketplace, specifying that less favourable treatment can take the form of both formally identical and formally different treatment, and that such treatment

shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other member.<sup>1064</sup>

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<sup>1062</sup> See GATS, Articles II (MFN Treatment) and XVII (National Treatment); TBT Agreement, Article 2.1 (MFN and National Treatment); TRIPS Agreement Article III (National Treatment). This language was first used in GATT Article III.4. The MFN provisions in GATT Article I and Article 4 of the TRIPS Agreement use different language, stating that “any advantage, favour, privilege or immunity … shall be accorded immediately and unconditionally”; the MFN provision in the GATS Article II is a mixture of the two (“no less favourable treatment shall be accorded immediately and unconditionally”).

<sup>1063</sup> GATT, Article XIII.2.

<sup>1064</sup> GATS, Article XVII.3.

Disciplines on different treatment in the context of measures that are recognised as pursuing a legitimate policy objective tend to be less stringent, prohibiting “arbitrary and unjustifiable” discrimination in the way in which the measures are applied,<sup>1065</sup> or “arbitrary or unjustifiable” distinctions in the level of protection deemed appropriate in different contexts.<sup>1066</sup>

## B. Distortion

While eliminating discrimination in international trade has always been a relatively widely shared goal,<sup>1067</sup> a second strand of the fairness narrative has been more controversial – that directed against the “distortion” of markets by governments and private enterprises. Even more than any other of the narratives discussed in this chapter, this strand of the fairness narrative was “almost entirely a U.S. contribution”.<sup>1068</sup> Robert Hudec reconstructs it as follows:

The United States concept of unfairness … grows out of the structure, and the ideology, of the United States private enterprise economy. Since investment resources are privately owned, it is the private enterprise that bears the loss of investment when its domestic production is displaced by foreign competition. It is the individual workers who bear the major cost of employment displacement. The ideology that justifies these private losses holds that those who prevail in a competitive marketplace are the more efficient producers, and therefore deserve the business they have taken because of superior efficiency. This normative role assigned to superior efficiency requires that there be a parallel normative condemnation of those other forms of business practice which permit competitors to gain market superiority without superior efficiency, i.e., the producer who is able to reduce his prices because he receives a cash subsidy from his government. Such competitive practices, unrelated to efficiency, must be classified as unfair competition. Producers and workers can be asked to bear the losses of fair competition only if they are protected from unfair competition.<sup>1069</sup>

While the original GATT did little to rein in subsidisation and dumping,<sup>1070</sup> it allowed contracting parties to counteract subsidisation and dumping with anti-dumping and

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<sup>1065</sup> GATT, Article XX, TBT Agreement, Preamble, SPS Agreement, Article 2.3.

<sup>1066</sup> SPS Agreement, Article 5.5.

<sup>1067</sup> At the same time, discrimination – or “preferential” treatment – has been a pervasive feature of international trade; see Patterson 1966.

<sup>1068</sup> Hudec 1996, 7. Commentators frequently highlight that “no international consensus exists on what constitutes unfair government support to industry”; York 1990, 7; Sykes 1990, 699.

<sup>1069</sup> Hudec 1979, 206.

<sup>1070</sup> The original GATT did not condemn dumping and only contained notification and consultation requirements regarding subsidies; see Original GATT, Articles VI and XVI.

countervailing duties. These provisions were modelled on US law.<sup>1071</sup> While the GATT never defined the concept of a “subsidy”, an early amendment defined “dumping” as a practice “by which products of one country are introduced into the commerce of another country at less than the normal value of the products”.<sup>1072</sup> “Normal” value, in turn, was defined by reference to the price at which the like product is sold “in the ordinary course of trade” in the exporting country or, failing that, the highest price at which it is sold in other export markets.

In GATT Article VI, the central challenge of this type of levelling technique is already apparent: how to tell apart fair and unfair competition, a dumped product from a product priced in the “ordinary course of trade”, and a “bounty or subsidy” from other governmental action affecting the market. In short, it is the problem of how to establish a benchmark of “normalcy” against which the “distortion” presumptively caused by subsidisation or dumping could be measured. The most common source of such a benchmark has been “the market”. As Tarullo notes, US laws purportedly providing “relief from unfair trade practices”

do not make ‘fairness’ the standard for deciding whether to impose countervailing duties: neither the statute nor its administrators require a fairness analysis. ... fairness rhetoric simply masks a market standard. ... The market correction laws use both a market standard and, by implication, the efficiency principles on which a market standard is assumed to rest, as the measure of unfairness.<sup>1073</sup>

In the multilateral context, trade negotiators during the GATT years largely left the task of defining a benchmark for “fair competition” to treaty interpreters: domestic investigating authorities and GATT panellists. There was one area, however, in which the problem of subsidisation was perceived as so pervasive as to require a legislative response: in the agricultural sector. The problems encountered by trade lawmakers in establishing a benchmark in this field foreshadowed the issues arising in the application of these kinds of legal obligations, which have caused some to call for the abolition of anti-dumping and countervailing duty law.

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<sup>1071</sup> Tarullo 1987, 548-549: The US trade laws “were the models for GATT provisions that allowed nations to impose imports restrictions on products for which they had previously agreed to reduce tariffs”; *ibid.* 549, fn 6: “United States law inspired many of these exceptions”.

<sup>1072</sup> GATT, Article VI.

<sup>1073</sup> Tarullo 1987, 552-553.

At the beginning of systematic efforts to discipline subsidies and other support measures in the agricultural sector stood a recommendation in the Haberler Report to find some way to measure the degree of agricultural protectionism in individual countries.<sup>1074</sup> The Haberler Report suggested that the way to do so would be through “a comparison between the total return actually received by the domestic farmer for his production and the return which would correspond to the ruling world price.”<sup>1075</sup> This proposal was quickly rejected by a group of experts<sup>1076</sup> set up to study the issue, on the basis that the world price was itself affected by the distortions that were supposed to be measured.

International prices in general are greatly influenced, and to an extent which cannot be determined, by support measures in certain exporting and importing countries, by export subsidies, and by various special arrangements between exporting and importing countries. Although the support measures and subsidies will be reflected in the calculations, their existence nevertheless distorts the basis of the comparison.<sup>1077</sup>

The group faced the difficulty of having to determine “what might be called a degree of protection equal to zero, i.e. a situation which would be characterized by the absence of any kind of intervention”:<sup>1078</sup>

the only theoretically correct procedure is to compare a given situation with that which would exist in the absence of the protection that is to be measured. This comparison cannot in fact be made because of the obvious impossibility of experimentation and the lack of comparable historical circumstances that could take the place of experimentation. The assumption of absence of protection would imply many consequential changes inside and outside the country concerned, which are not susceptible to evaluation.<sup>1079</sup>

Given these difficulties, it was acknowledged that the very concept of the “degree of agricultural protectionism” would be “defin[ed] by the methods employed for its measurement”.<sup>1080</sup> The experts group ultimately settled on what it called the “standard

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<sup>1074</sup> GATT 1958, paras. 45 and 205.

<sup>1075</sup> Ibid. para. 45.

<sup>1076</sup> L/1326, 2. See also COM.II/92.

<sup>1077</sup> COM.II/103, para. 5; see also ibid. para. 14, where the experts reject the method of comparing domestic prices with a uniform world price.

<sup>1078</sup> COM.II/94; Germany similarly pointed to the "difficulty of marking precisely the point at which economic measures begin to have a protectionist effect"; COM.II/103, 22.

<sup>1079</sup> COM.II/103, para. 4. See also COM.II/W.7, para. 1:

The concept of the degree of agricultural protectionism is highly complex. Ideally, it ought to rest, for each given country, on a comparison between the situation, as regards supply ..., demand and price, actually existing under its given agricultural policies and that which would eventually result from the complete abolition of all protectionist devices – or possibly that which would exist if no such devices had ever been applied.

<sup>1080</sup> COM.II/W.7, para. 3.

method" for measuring agricultural protection, under which "the contribution to farm income arising from governmental action or authority" would be

assessed on the basis of the sum total of the difference between farm prices and import prices and import prices or export prices (for import and export commodities, respectively) plus all direct and indirect subsidies for agriculture (where not already included in the prices differences).<sup>1081</sup>

This first attempt to establish the degree of "protection" illustrates the analytical moves associated with a levelling technique: first, a benchmark needs to be established; in the case of "discrimination", this benchmark is furnished by the actual treatment accorded to a like or directly competitive or substitutable product; in the case of "distortion", the benchmark is a hypothetical, counterfactual state unperturbed by "governmental action or authority". As a second step, the conduct in question is compared with the benchmark, to establish whether and to what extent it deviates from this benchmark.

The attempt to regulate domestic support in agriculture through this technique was not further pursued until more than two decades later, after the method for measuring agricultural support had been refined by economists working for the Food and Agriculture Organization (FAO) and later the OECD. Unaware of the discussions on this issue that had taken place in the GATT,<sup>1082</sup> an economist working for the FAO developed the concept of a Producer Subsidy Equivalent (PSE), which measured agricultural support by calculating what the government would have to pay its farmers to maintain their income in the hypothetical case that it abolished all protection and support for the agricultural sector. In other words, the PSE is the "subsidy that would be necessary to replace the array of actual farm policies employed in a particular country in order to leave farm income unchanged."<sup>1083</sup> In the 1980s, the PSE concept was taken up and developed by the OECD in a major study of the agricultural policies of major agricultural trading countries, which was published shortly after the launch of the Uruguay Round.<sup>1084</sup> This analytical groundwork was then relied upon by the Uruguay Round negotiators to develop an Aggregate

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<sup>1081</sup> COM.II/103, para. 13.

<sup>1082</sup> Interview with Timothy Josling.

<sup>1083</sup> Tangermann/Josling/Pearson 1987, 266.

<sup>1084</sup> OECD 1987; cf. Josling/Tangermann/Warley 1996, 105-110.

Measurement of Support (AMS) that formed the basis for reduction commitments in the Uruguay Round Agreement on Agriculture.<sup>1085</sup>

The AMS used in the Agreement on Agriculture requires two distinct judgments about benchmarks. The first is a judgment about the existence and amount of agricultural "support"; such support exists, according to the Agreement, where a government pays a subsidy to, or foregoes revenue otherwise due from, the producers of an agricultural commodity, or where it maintains an administered price that is higher than "a fixed external reference price".<sup>1086</sup> The benchmark here is the government's budgetary situation or the price of an agricultural product in the hypothetical scenario that the government is *not* supporting agricultural production. The second judgment about a benchmark required by the Agreement is the decision whether governmental support is "trade distorting"; support measures that have "no, or at most minimal, trade-distorting effects or effects on production" are exempt from the calculation of the AMS.<sup>1087</sup> The circumstances under which a support measure conforms to this standard are carefully defined through a long list of "policy-specific criteria and conditions" in Annex 2 of the Agreement.

The Uruguay Round Agreement on Subsidies and Countervailing Measures (SCM) formulates benchmarks in more general terms. The first benchmark is similar to the one in the Agreement on Agriculture, in that it involves an analysis of the government's budgetary situation, the income of producers or prices of products, in light of the question of whether there has been a "financial contribution" by the government or "any form of income or price support".<sup>1088</sup> The second and third benchmarks differ more markedly from what one finds in the Agreement on Agriculture: While the Agreement on Agriculture distinguishes between "trade-distorting" and "non-/minimally-trade distorting" measures on the basis of a detailed catalogue of policy-specific criteria, the SCM Agreement attempts to get at something similar by asking two general questions, namely, whether the measure confers a "benefit" on the recipient, and whether the measure is "specific", i.e., limited to a particular recipient or group of recipients.

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<sup>1085</sup> The initial proposal by the US to use the PSE as a basis for reduction commitments is MTN.GNG/NG5/W/14; for a comparison of the PSE and the AMS, see Josling/Tangermann/Warley 1996, 204-206.

<sup>1086</sup> Agreement on Agriculture, Annex 3.

<sup>1087</sup> Agreement on Agriculture, Annex 2.

<sup>1088</sup> SCM Agreement, Article 1.1(a)(1) and 1.1(a)(2). The benchmark character of this provision is most obvious in the subparagraph 1.1(a)(1)(ii), which requires an examination of whether "government revenue that is otherwise due is foregone".

Benchmarks are essentially filtering devices, designed to capture conduct that deviates from a particular baseline. Benchmarks would appear to be particularly prone to one of the risks involved in the use of lawmaking techniques identified above: partiality. Benchmarks almost by definition capture an issue along a single dimension. The "benefit" benchmark, designed to filter government action that is not in conformity with market outcomes, is a good example.<sup>1089</sup> The question asked by the benefit benchmark is whether a firm has received something from the government on terms that it could not have obtained in the marketplace.<sup>1090</sup> The one-dimensionality of this question is immediately obvious. The benchmark does not distinguish between well-functioning and failing markets, between efficient and inefficient government activity, or between socially desirable and undesirable subsidies – rather, it distinguishes between outcomes that could have obtained in an actual market, and outcomes which could not.

One way to reduce the partiality of the benchmark technique is to use several layers of benchmarks, which will address different dimensions of the subject matter at issue. Thus, the SCM Agreement in effect applies three filters: it captures only government action that (a) involves an actual or potential cost to the government ("financial contribution"), (b) produces non-market outcomes ("benefit") and (c) advantages some firms or sectors over others ("specificity"). The third filter, in particular, has been widely interpreted as a proxy for the distinction between "good" and "bad" subsidies. Quite apart from the questionable success of the "specificity" standard on this score,<sup>1091</sup> the layering of benchmarks creates its own problems, since each layer filters out some action that, by the logic of the other layers, should be included. For example, government action that provides non-market advantages to some firms but does not take the form of a financial contribution is (with the limited exception of income and price support mechanisms) excluded from the Agreement's purview. The incoherence produced by the layering of benchmarks – as well as the inadequacies of these benchmarks themselves – has led critics to argue that subsidy rules such as those embodied in the SCM Agreement

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<sup>1089</sup> Apart from its one-dimensionality, the use of market benchmarks in itself is fraught with problems; see only Zheng 2010.

<sup>1090</sup> See SCM Agreement, Article 14.

<sup>1091</sup> Tarullo and Sykes, among others, are sceptical of the specificity standard's ability to tell apart efficient from inefficient government intervention; see Tarullo 1987; Sykes 2010.

rely on arbitrary baselines, distinctions that elevate form over substance, and on myopic analysis of government programs that inevitably masks the full effects of government activity on business enterprise. Hence, there is little reason to believe that the rules ... serve to identify market-distorting subsidies with much accuracy, or that they identify subsidy practices that ought to be discouraged by any other principled criterion.<sup>1092</sup>

By contrast to the SCM Agreement, the Agreement on Agriculture attempts to avoid the partiality of the benchmarking technique not simply by layering benchmarks. While it also purports to identify "trade-distorting" subsidies, it spells out what this is taken to mean for individual policies, and thus takes into account the varied features and merits of those policies.<sup>1093</sup> In particular, the Agreement spells out specific requirements for general services provided by the government, including research, pest and disease control, training, inspection, marketing and infrastructural services, for public stockholding for food security purposes, domestic food aid, direct payments to producers, decoupled income support, government contributions to income insurance and safety-net programmes, natural disaster relief and a number of structural assistance programmes.<sup>1094</sup> With respect to all these forms of government support, which are subject to up to six discrete requirements, the Agreement avoids the one-dimensionality of the benchmark technique. The principal drawback of spelling out criteria for what makes discrete policies "non-trade distorting" is the limited scope of this approach as compared to a general benchmark. Policies that are not explicitly provided for will either not be disciplined or, as in the Agreement on Agriculture, will be deemed to be trade-distorting by default (i.e., they will be "non-exempt" from reduction commitments). While this approach may thus be feasible for particular sectors,<sup>1095</sup> it would be difficult to implement for subsidies across the board.

### **III. Managing Techniques and "Stability" Narratives**

Narratives emphasising the need for stability in international trade have been part of multilateral trade lawmaking from the outset. In its *Proposals for Expansion of World Trade and Employment*, the United States propagated the "release from fear of disorder in

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<sup>1092</sup> Sykes 2010, 474.

<sup>1093</sup> Sykes explicitly exempts the Agreement on Agriculture from his critique of subsidies disciplines; Sykes 2010, 475.

<sup>1094</sup> Agreement on Agriculture, Annex 2.

<sup>1095</sup> A sector approach to subsidies regulation was also long favoured in relation to civil aircraft; see the Tokyo Round Civil Aircraft Code; the 1992 EEC-US Civil Aircraft Agreement; and SCM Agreement, fns 15, 24.

the markets for primary commodities”<sup>1096</sup> as one of the four objectives that the proposed ITO would achieve. The *Proposals* noted the “danger of violent and rapid movement in the markets for primary commodities”<sup>1097</sup> after the end of the Second World War and warned that the necessary adjustments should not come “too fast” lest they “bring serious distress to many small producers and to their communities”.<sup>1098</sup> The United States anticipated the need for intergovernmental commodity agreements “to provide a program of adjustment and a period of time within which the essential change can be made without undue hardship” and acknowledged that during the transitional period it might be “necessary to restrict production or exports, to fix prices, or to allocate shares of markets among producing countries.”<sup>1099</sup> In other words, the United States suggested to “manage” trade by controlling economic variables – production, exports, prices, market shares – that would otherwise be determined endogenously by the market. The US emphasised that the purpose of managing international trade in this way was “not to protect vested interests, but to prevent widespread distress during the course of necessary change.”<sup>1100</sup>

While the United States envisioned that tools to manage trade would be employed on a temporary basis to smoothen the transition from the wartime economy to the peace, the United Kingdom saw a more permanent role for managing techniques in the multilateral trading system, particularly with regard to agricultural products. In the bilateral discussions between the US and the UK preceding the preparatory conferences, UK negotiators acknowledged that it was “necessary to prevent unlimited protection and preserve multilateralism”, but also insisted on the need “to take care of stability and the political factors bound up with it.”<sup>1101</sup> The British noted that “agricultural production is particularly subject to wide fluctuations” and found that the “ideas developed at Washington are not adequate for dealing with this problem.”<sup>1102</sup> In particular, UK negotiators found that techniques for liberalisation and non-discrimination that were at the centre of US thinking were not adequate to their objectives. They pointed out

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<sup>1096</sup> *US Proposals 1945*, 5.

<sup>1097</sup> *Ibid.*

<sup>1098</sup> *Ibid.*

<sup>1099</sup> *Ibid.* 6.

<sup>1100</sup> *Ibid.*

<sup>1101</sup> FRUS 1944, 100; see also *ibid.* 102: “Special stress is given to the need for stability.”

<sup>1102</sup> FRUS 1944, 102.

that stability cannot be attained unless imports are regulated, that no single method is adequate for the purpose of such regulation, and that either tariffs or subsidies or quotas or a combination of two or all of them might have to be used in particular cases.<sup>1103</sup>

In short, when it came to agriculture, the British did “not wish to be restricted as to method of controlling imports”.<sup>1104</sup> Instead, they proposed that disciplines be formulated in terms of production and price levels that must not be exceeded. Thus, “protection” – in whatever form – would be allowed as long as domestic production did not exceed a certain level (specified in relation to the level of production in a representative period) and as long as the domestic price did not exceed the world price by more than a specified percentage.<sup>1105</sup> The formulas for calculating the permitted production and price levels would be the subject of multilateral negotiations.

Apart from their discomfort with permanently enshrining a regime aimed at maintaining the stability of agricultural production in individual countries in the multilateral trading system,<sup>1106</sup> US negotiators found it difficult to envision how the managing technique proposed by the British would work in practice, and in particular, how to quantify the required “reduction of protection” in case the permitted production or price levels “were exceeded”.<sup>1107</sup> The UK negotiators responded that

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<sup>1103</sup> FRUS 1944, 102.

<sup>1104</sup> FRUS 1944, 102.

<sup>1105</sup> FRUS 1944, 102. The United Kingdom's Wheat Act served as a template. At a later point in the discussions, UK negotiators gave a more technical explanation of what they envisioned; see FRUS 1945, 13-14:

In respect of any food product coming within the scope of the measure, let  $X$  equal the permitted protection which is the degree of protection required to maintain the permitted excess of domestic price over the average world price in the base period. Let  $P$  equal the actual protection at any given time. Let  $Y$  equal the specified level of production, which is the maximum level to which production is allowed to be raised by the permitted protection. The specified level is arrived at by multiplying average production in the base period by an agreed percentage. Let  $Q$  equal the actual quantity of domestic production at any given time. Then if  $P$  equals  $X$  but  $Q$  is less than  $Y$  no increase of  $P$  is allowed and domestic production must be allowed to remain  $P$  [ $Q$ ?] unless it can be raised by other than protectionist measures. On the other hand if  $P$  equals  $X$  and  $Q$  is greater than  $Y$ , then  $P$  must be reduced until  $Q$  is equal to  $Y$ .

<sup>1106</sup> See the US question at FRUS 1945, 6:

With regard to stability of (domestic) production, is it the British view that this would be recognized in the proposed convention as a permanent and accepted objective of economic policy? Specifically, would they be inclined to resist the inclusion of accompanying provisions making it clear that measures against imports imposed on the grounds of promoting stability would be merely of a transitional character and looking towards the relaxation and ultimate removal of such measures as soon as practicable?

The UK response is at FRUS 1945, 14:

These are intended as permanent and not merely transitional measures.

<sup>1107</sup> FRUS 1945, 6; US negotiators noted that

Precise formulas would be impracticable. Governments would be obligated to take adequate steps and would be judged on attainment of the required result rather than on methods.<sup>1108</sup>

After further discussion, US negotiators summarised their understanding of the British proposal as follows:

[C]ontracting states [would] be permitted to deal with special problems of agricultural price or income support, affecting a list of 'primary foodstuffs' to be set out in the agreement, by any methods of intervention they wish to use, provided:

- (a) That their domestic production of these commodities does not exceed Y per cent of a pre-war base; and
- (b) That their domestic (presumably wholesale) market price of these commodities does not exceed the world market price by more than X per cent, the values of X and Y to be negotiated and specified in the agreement.<sup>1109</sup>

The British proposal for dealing with agriculture had the hallmarks of the managing technique of trade lawmaking: it formulated disciplines in terms of trade outcomes (prices and production levels) instead of instruments, leaving the choice of instruments open. In this the technique differs fundamentally from reduction techniques, which tend to target particular instruments for elimination or reduction.

Nothing resembling the British proposal made it into any of the drafts of the ITO Charter or the GATT. Nonetheless, managing techniques are embodied in these documents in several provisions. Three provisions of the GATT expressly allow contracting parties to manage trade through quantitative restrictions – Article XI(2) permits the use of quantitative restrictions to restrict imports of agricultural and fisheries products in connection with programs to control the domestic production of the like or directly substitutable products; Article XII allows the use of quantitative restrictions to safeguard the balance of payments;<sup>1110</sup> Article XVIII authorises developing countries to use quantitative restrictions to safeguard their balance of payments or to protect infant

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It seems clear that in the case of subsidies, as illustrated by the pre-war United Kingdom wheat act, the British have in mind that appropriate reduction would be achieved by limiting the subsidy in effect to a goal quantity. It is not clear how this would be done if tariffs or quotas were used in lieu of subsidies.

<sup>1108</sup> FRUS 1945, 14.

<sup>1109</sup> FRUS 1945, 32.

<sup>1110</sup> See Dam 1970, 15, on the need to resort to "direct controls on trade" under a system of fixed exchange rates as it existed in the postwar period.

industries.<sup>1111</sup> Moreover, Article XIX allows parties to take “emergency action” in response to import surges that are causing or threatening “serious injury” to domestic producers.

These GATT provisions embody managing techniques in that they allow contracting parties to manage trade in order to achieve a particular outcome: to implement their domestic agricultural policy, to safeguard their balance of payments, to protect infant industries, or to avoid serious injury to their producers. Whereas reduction techniques impose an absolute limit on the use of particular instruments and levelling techniques establish relative standards of treatment based on specified benchmarks, managing techniques circumscribe trade measures by reference to a particular goal, effect, or result that is to be achieved.<sup>1112</sup> While some of the GATT provisions enshrining managing techniques specifically identify the instruments that can be used to achieve these objectives, in practice contracting parties have resorted to a wider range of instruments than foreseen in the provisions. Thus, the European Community famously employed a system of variable levies in order to ensure that imports did not undermine the Common Agricultural Policy (CAP). Variable levies were more suitable than the quantitative restrictions foreseen in Article XI to prevent imports from undercutting the price levels set by the CAP since they automatically adjusted the price of imports to the domestic price. Similarly, GATT practice saw frequent instances of the use of import surcharges, instead of quantitative restrictions, which were authorised by Articles XII and XVIII(B), to safeguard the balance of payments.<sup>1113</sup> Articles XVIII(C) regarding infant-industry protection and XIX regarding safeguards are open-ended regarding the choice of instruments. The only obligations that cannot be suspended for the purposes of infant-industry protection are the obligations in GATT Articles I and XIII, which outlaw discrimination among different contracting parties.<sup>1114</sup> And while Article XIX expressly mentions the possibility of suspending tariff

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<sup>1111</sup> See Article XVIII, para. 9, regarding measures to safeguard the balance of payments (“may … control the general level of imports by restricting the quantity or value of merchandise permitted to be imported”); and Section C regarding infant-industry protection.

<sup>1112</sup> Tarullo 1987, 550: Safeguards “provide for restrictions on imports solely because of unacceptable or undesirable *effects* in the United States and are not concerned with the *conduct* of the foreign seller or government”.

<sup>1113</sup> See the notification about a “temporary import surcharge” imposed by the United States on all dutiable imports for balance of payments purposes, L/3567. The surcharge was subject to examination by a working party.

<sup>1114</sup> See GATT, Article XVIII, para. 20. Paragraph 20 also lists Article II regarding tariff concessions as an obligation which cannot be suspended under the procedures of Section C of Article XVIII. However, this is

concessions in order to avoid “serious injury” to domestic producers, the use of the term “including tariff concessions” makes it plain that safeguards can also be implemented through other means, say, quantitative restrictions.<sup>1115</sup> The only limit on instruments that can be used under Article XIX may be, as in the case of infant-industry protection under Article XVIII, the obligations regarding non-discrimination in Article I and XIII.<sup>1116</sup> The GATT thus establishes a clear hierarchy between levelling and managing techniques; discrimination is not allowed, even where discriminatory measures might be the most effective way of achieving a particular legally authorised goal.

While the four GATT provisions discussed so far allowed individual contracting parties to manage trade for particular purposes, the ITO Charter also contained a chapter providing for the collective management, through “inter-governmental commodity control agreements”, of the international trade in particular commodities.<sup>1117</sup> The chapter recognized that

the conditions under which some primary commodities are produced, exchanged and consumed are such that international trade in these commodities may be affected by special difficulties such as the tendency towards persistent disequilibrium between production and consumption, the accumulation of burdensome stocks and pronounced fluctuations in prices.<sup>1118</sup>

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only because Section A of Article XVIII already provides special procedures for the modification and withdrawal of tariff concessions for the purposes of infant-industry protection.

<sup>1115</sup> For safeguards, see Sykes 2006, 11:

Safeguard measures under Article XIX are not limited to the suspension of negotiated tariff concessions. Paragraph 1(a) makes clear that the increased quantities of imports may result from other obligations as well, and that it is permissible to suspend such obligations in addition to modifying or withdrawing a tariff concession. An obvious candidate for suspension aside from a tariff concession is Article XI, which generally prohibits quantitative restrictions.

For an example for the use of quantitative restrictions under Article XIX, see L/859. US officials explained the choice thus:

quotas selected in preference to tariff in this exceptional case because compatible with international discussions regarding export curtailment, our hope that a permanent solution can be worked out on international basis promptly and because quotas allow foreign countries realize larger portion proceeds from sales in US market (FRUS 1958-1960, 183)

<sup>1116</sup> See Sykes 2006, 11. Sykes suggests that selective safeguards (i.e., the suspension of GATT Article I and Article XIII) may not be allowed.

<sup>1117</sup> The Charter defined “commodity control agreement” as “an intergovernmental agreement which involves”:

- (a) the regulation of production or the quantitative control of exports or imports or a primary commodity and which has the purpose or might have the effect of reducing, or preventing an increase in, the production of, or trade in, that commodity; or
- (b) the regulation of prices.

ITO Charter, Article 61.

<sup>1118</sup> ITO Charter, Article 55.

The ITO Charter acknowledged that “such difficulties may, at times, necessitate special treatment of the international trade in such commodities through inter-governmental agreement”.<sup>1119</sup> The objectives for which the Charter considered commodity agreements as appropriate ranged from the US concern about the need to help along adjustments between supply and demand<sup>1120</sup> to the desire of many other countries to “achiev[e] a reasonable degree of [price] stability” for primary commodities.<sup>1121</sup> The Charter provided that commodity agreements could only be resorted to where the problems in question could “not be corrected by normal market forces”.<sup>1122</sup>

When the ITO Charter failed to come into force, some contracting parties attempted at the 1955 Review Session to include “provisions along the lines of Chapter IV of the Havana Charter”<sup>1123</sup> into the GATT; they were rebuffed by the US and Germany, and the effort to establish a permanent framework for commodity agreements in the GATT was subsequently abandoned.<sup>1124</sup> However, increasing the stability of trade in primary products remained a central objective for many contracting parties for decades to come; arguably, it was only in the course of the Uruguay Round and in the context of the negotiation of the Agreement on Agriculture that one of the chief proponents of this objective, the EC, was forced to abandon it.<sup>1125</sup> In the intervening decades, calls to “organise” international trade in primary commodities were regularly considered for, and sometimes included in, declarations adopted in the GATT;<sup>1126</sup> the elaboration of commodity agreements was endorsed in the GATT;<sup>1127</sup> and a few agreements were adopted within the GATT itself.<sup>1128</sup>

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<sup>1119</sup> ITO Charter, Article 55.

<sup>1120</sup> ITO Charter, Article 57:

to prevent or alleviate the serious economic difficulties which may arise when adjustments between production and consumption cannot be effected by normal market forces alone as rapidly as the circumstances require

<sup>1121</sup> ITO Charter, Article 57:

to prevent or moderate pronounced fluctuations in the price of a primary commodity with a view to achieving a reasonable degree of stability on a basis of such prices as are fair to consumers and provide a reasonable return to producers, having regard to the desirability of securing long-term equilibrium between the forces of supply and demand

<sup>1122</sup> ITO Charter, Article 62.

<sup>1123</sup> Josling/Tangermann/Warley 1996, 34.

<sup>1124</sup> See *ibid.* 34-35.

<sup>1125</sup> Oxley 1990, 199, reports that up until the mid-1980s

the French proposed with regular monotony that the five major wheat suppliers – the United States, the European Community, Canada, Australia and Argentina – agree on market shares for the world wheat market.

<sup>1126</sup> MIN(63)7, paras. 6 and 11 (EEC):

The US's general opposition to commodity agreements<sup>1129</sup> did not prevent it from embracing managing techniques with respect to agricultural commodities in which it was uncompetitive and in which it would have been unable to survive if "liberalisation" or "fairness", rather than "stability", had been the guiding paradigms. For example, the United States participated for several decades in the International Wheat Agreement, which allocated export quotas and stipulated maximum and minimum prices for international wheat trade.<sup>1130</sup> US officials internally explained the attractions of using managing techniques in this area as follows:

Since the United States can only compete in the world wheat market by means of export subsidies, the International Wheat Agreement provides a convenient framework within which our export subsidy program can be operated in an atmosphere of international cooperation. In effect the Agreement gives international acceptance and approval of our export subsidy program, for it is operated to implement the provisions of an internationally agreed marketing arrangement. This fact has important political implications, for it removes an important area of our export trade from potential controversy. Unilateral action by the United States would be a constant source of charges that we were impairing the markets of others and depressing world wheat prices. As our current arrangements have international sanction, the export subsidy program is not a source of irritation among friendly competitors.<sup>1131</sup>

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international action should ... be directed to a deliberate effort to organize international trade in products of interest to the less-developed countries ... the general and primary objective was to organize markets ...

MIN(73)W/2, paras. 60 and 61:

the conditions for expansion of trade would be more favourable if the stability of world markets were better assured. The best way of achieving that objective would be to organize some orderly world markets by means of appropriate international arrangements. ... a price mechanism (minimum and maximum prices) would be negotiated for certain products, along with measures concerning stocks, in order to regulate supply ...

Prep.Com/W/6, para. 10:

In the discussions on agricultural products it has been suggested that the negotiations should, in addition, have stability of markets, acceptable and predictable conditions of access and stable and remunerative prices as their objectives.

The *Tokyo Declaration 1973*, para. 2, envisaged

measures designed to attain stable, equitable and remunerative prices for primary products.

<sup>1127</sup> MIN(63)7, paras. 13 and 15:

Ministers ... endorsed the commodity agreement approach to cocoa ... Ministers confirmed the intention of their governments to apply in an efficacious manner the International Coffee Agreement

<sup>1128</sup> Agreements on bovine meat and dairy were adopted in the Tokyo Round, and later became plurilateral agreements in the WTO; for background, see Winham 1986, 156-157; McRae/Thomas 1983, 65; Paemen/Bensch 1995, 67.

<sup>1129</sup> See Winham 1986, 157, reporting that the US was "specifically opposed to market organization schemes such as commodity agreements and the like"; for the US opposition to commodity agreements at the outset of the Tokyo Round, see also FRUS 1973-1976, 615-616, quoted *infra* at fn 1342.

<sup>1130</sup> For a history of commodity agreements regulating the international trade in wheat, see Wheeler 1967.

<sup>1131</sup> FRUS 1958-1960, 167.

In the late 1950, the United States also developed an interest in managing trade in another area, cotton textiles. The US suggested that the contracting parties "study the problem of alleviating 'the adverse effects of an abrupt invasion of established markets while continuing to provide steadily enlarged opportunities for trade'"<sup>1132</sup> – what the United States called the problem of "market disruption". As with regard to agricultural trade after the Second World War, the US purportedly embraced managing techniques to allow a smoother adjustment than would occur if the competition was allowed to run its course.<sup>1133</sup> In practice, however, the restrictions on textile trade that were implemented as a result of the US initiative and that were ultimately enshrined the Multi-Fiber Arrangement (MFA), would be maintained for several decades. The MFA became the "apotheosis of the concept of managed trade" in the multilateral trading system.<sup>1134</sup> Only in the Uruguay Round did the developed countries agree to a gradual phase-out of the MFA.<sup>1135</sup>

More than sixty years after the debate about the management of agricultural trade in the US-UK exploratory talks, the conflict between reduction and managing techniques is again at the forefront of international trade lawmaking. Two proposals advanced by the G-33 group of developing countries in the Doha Round agricultural negotiations, regarding a Special Safeguard Mechanism and public stockholding for food security purposes, arguably represent an attempt to obtain additional tools to manage trade in the pursuit of certain substantive aims, such as rural development and food security. Both proposals clash with the liberalisation narrative favoured by the US and other developed countries in relation to agriculture, as well as with the reduction techniques for tariffs and agricultural subsidies that are already embodied in the Agreement on Agriculture. At the level of lawmaking techniques, this clash finds its clearest expression in the conflict about the possibility of

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<sup>1132</sup> SR.15/17, 153; for the US statement, see also Spec(59)222.

<sup>1133</sup> The US initiative faced opposition from developing countries; India, for example, did not accept the position that goods produced in countries with low wages could be considered as presenting a different type of competition from goods produced in countries where other factors contributed to cheapness of production. (SR.15/17, 154)

Internally, US officials acknowledged that their approach to managing import competition was influenced by considerations of where the competition came from; see FRUS 1961-1963, 532-535:

We cannot deal with the United Kingdom as though it were a low-wage producer pouring disruptive imports into our market, as we dealt with the cotton textile-producing countries. ...we cannot treat Italy as though it were Hong Kong.

<sup>1134</sup> Wolf 1983, 455; see also Aggarwal 1985.

<sup>1135</sup> See the Agreement on Textiles and Clothing.

exceeding pre-Doha bindings. From the perspective of the liberalisation narrative, exceeding pre-Doha bindings is a taboo – it defies the logic of reduction techniques and runs counter to what trade negotiations are supposed to achieve. From the perspective of narratives centred around substantive goals such as rural development and food security, the question of whether one exceeds a previously negotiated binding in pursuit of these objectives has no particular significance; if doing so is necessary to achieve these important objectives, so be it. The conflict between reduction and managing techniques contributed to the failure of the 2008 mini-Ministerial Meeting in Geneva, and it is the biggest obstacle to the conclusion of a "Doha-light" package at the Bali Ministerial Conference in December 2013. This conflict is only the latest example of the contestation over the objectives and the appropriate techniques of multilateral trade lawmaking that has been a feature of the trading system since its beginning.

#### **IV. Minimizing Techniques and "Necessity" Narratives<sup>1136</sup>**

The concept of "necessity" has a long history in public international law as a principle circumscribing the legal obligations of a state.<sup>1137</sup> It was on this model – as a circumstance precluding wrongfulness of otherwise illegal conduct – that the concept of necessity was initially incorporated into trade law, in Articles XX and XXI of the GATT. Minimizing techniques were thus initially employed only as a second layer of discipline that operated below reduction and levelling techniques: it was only when a measure violated a party's obligation not to maintain trade barriers beyond a specific level or not to discriminate against imports that the question of whether that measure was "necessary" to achieve a particular regulatory objective could arise.<sup>1138</sup>

With the Tokyo Round Standards Code, and more prominently the TBT and SPS Agreements adopted in the Uruguay Round, the requirement not to create "unnecessary obstacles to international trade" has become a free-standing obligation. As Hudec has pointed out, the development added a new objective to trade law,

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<sup>1136</sup> Due to limited space, I can discuss this technique here only in the most cursory fashion.

<sup>1137</sup> For a recent discussion, see Sloane 2012.

<sup>1138</sup> See Sykes 2003 for a general discussion of least-restrictive means requirements.

one that can be described as the prevention of unjustified regulation *per se*, whether or not such a regulation creates a competitive disadvantage for foreign goods *vis-à-vis* domestic goods.<sup>1139</sup>

The SPS Agreement for the first time sets out legislatively what it means for an SPS measure to be "more trade-restrictive than required":

a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.<sup>1140</sup>

Minimising techniques share some important properties with managing techniques; in particular, both techniques seek to discipline trade measures by stipulating when and how they may pursue a specific authorised aim. The problems that beset these types of legal techniques will be discussed in some depth in Sections III.C and III.D of Chapter 4.

## V. Regulating Techniques<sup>1141</sup>

Regulating techniques have been employed in multilateral trade lawmaking to formulate standards of three kinds: procedural standards, substantive standards, and minimum standards.

Procedural standards regarding the prompt publication of "laws, regulations, judicial decisions and administrative rulings" and the impartial and uniform administration of laws have been included in the GATT from the outset<sup>1142</sup> and are now an integral part of virtually every field of trade law; they are particularly prominent in the trade remedy field. Apart from the objective of ensuring equal treatment of foreign traders, the use of procedural standards has been inspired by ideals derived from administrative law<sup>1143</sup> and, more recently, narratives of "good governance".<sup>1144</sup>

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<sup>1139</sup> Hudec 2003, 187; Hudec cites Articles 2 and 5.1 of the SPS Agreement and Article 2.2 of the TBT Agreement as examples of provisions embodying this goal.

<sup>1140</sup> SPS Agreement, fn 3 to Article 5.6.

<sup>1141</sup> Due to limited space, I can only provide an extremely brief overview of regulating techniques.

<sup>1142</sup> GATT, Article X.

<sup>1143</sup> See Stewart/Sánchez-Badin 2011.

<sup>1144</sup> See, with respect to GATS Article VI, Sauvé/Stern 2000, 14; Feketekuty 2000.

The attempt to harmonise domestic regulation through substantive standards is of more recent provenance, and substantive standards remain relatively rare in trade law.<sup>1145</sup> Participants in trade lawmaking increasingly perceived the need to address the trade effects of "regulatory heterogeneity",<sup>1146</sup> when the significance of border measures as barriers to trade had diminished in the 1960s and 1970s.<sup>1147</sup> The primary example for the use of this technique in trade law is the obligation to base technical regulations and SPS measures on relevant international standards.<sup>1148</sup> The narrative supporting efforts to establish substantive standards in trade law sees the gradual "harmonisation" of domestic regulation of WTO members as a goal for the trade regime.<sup>1149</sup>

The use of minimum standards, as embodied in the TRIPS Agreement, is a closely related technique. The key difference between substantive standards and minimum standards is that, in the case of the latter, WTO members are free to "implement in their law more extensive protection than is required by" the agreement.<sup>1150</sup> In the SPS and TBT Agreements, by contrast, the possibility to implement measures that seek to attain a higher level of protection than international standards is heavily circumscribed.

In the wake of the Uruguay Round, in which regulating techniques were used on a broader scale than ever before, trade negotiators set their sights on other subject matters which could be addressed through these techniques, in particular trade facilitation, transparency in government procurement, investment, and competition. While negotiations on the latter three of the so-called Singapore Issues were ultimately discontinued due to the resistance of the developing countries, the post-Uruguay Round enthusiasm for regulating techniques illustrates how the negotiators' technical repertoire affects their sense for the possibilities of trade law.

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<sup>1145</sup> See Lang 2011, 284: "establishing regulatory standards was (and remains) highly unusual in the context of international trade negotiations"; Lang analyses the example of regulatory standards in basic telecommunications.

<sup>1146</sup> Sykes 1999, 49; Sykes distinguishes harmonisation from other ways in which regulation can be constrained in order to limit their trade effects, namely "non-discrimination requirements" (levelling technique), "least restrictive means requirements" (minimising technique), and "notice and transparency requirements" (procedural standards), and "mutual recognition"; *ibid.* 50.

<sup>1147</sup> See MIN(73)W/2, para. 53, where the Tokyo Round Preparatory Committee identifies harmonisation as an alternative to the elimination or reduction of measures such as "sanitary and administrative regulations of all kinds".

<sup>1148</sup> See TBT Agreement, Article 2.4; SPS Agreement, Article 3; for discussion, see Howse 2011.

<sup>1149</sup> For example, the Preamble of the SPS Agreement expresses WTO members' desire to "further the use of harmonized sanitary and phytosanitary measures between Members", and Article 3 is entitled "Harmonization".

<sup>1150</sup> TRIPS Agreement, Article 1.1.

## VI. Conclusion

The purpose of this chapter was twofold. On one hand, I have sought to compile an inventory of the narratives and techniques of trade lawmaking, in order to give a sense of the range of the technical repertoire that trade negotiators have developed. On the other hand, I have also attempted to substantiate three more specific claims. First, I have argued that the objectives of trade lawmaking have always been contested in fundamental ways. The perennial conflict between the liberalisation and stability narratives, which is also at the forefront of current disagreements in the Doha Round, is the foremost example of this contestation. In this respect, the chapter adds support and detail to the more general discussion of the historical significance and teleology of the trading system in Chapter 1.

A second claim that I have advanced is that what trade law can achieve is circumscribed by the techniques that negotiators have available. The contrasting fortunes of managing and regulating techniques over the past three decades are perhaps the prime exhibit for that claim. The failure of virtually all commodity agreements has left many trade officials with a sense that there is little that trade law can do to deal directly with international commodity problems. The difficulties that the trade regime has had in accommodating developing countries' demands for a greater international effort to promote structural adjustment in the developed countries can also partly be explained by the lack of straightforward techniques for addressing this complex issue.<sup>1151</sup> At the same time, the addition of a number of regulating techniques to their repertoire has made trade lawmakers more confident that trade law is equipped to deal with issues that reach deeply into domestic regulatory policy, such as qualification requirements and procedures,<sup>1152</sup> or competition disciplines.

Finally, I have argued that techniques frame the way in which a particular issue is perceived, and have drawn attention to three specific risks in this regard. Thus, levelling techniques, and in particular the use of benchmarks, can lead to a one-dimensional, *partial* perspective on a subject matter. By comparing the subsidies disciplines in the SCM Agreement and Agreement on Agriculture, I have attempted to reveal the limitations of different strategies for avoiding this one-dimensionality of benchmarks. Thus, the layering of benchmarks in the SCM Agreement leads to incoherent results, whereas the strategy of

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<sup>1151</sup> See the discussion *supra* at fn 592 and *infra* at fn 1223.

<sup>1152</sup> See GATS, Article VI.

defining policy-specific criteria in the Agreement on Agriculture, while allowing greater sensitivity to the many dimensions of agricultural policies, is necessarily of a limited scope, which means that any policies that are not specifically addressed are subject to a default rule.

I have discussed the second risk, of *entrenchment*, in the context of the use of schedule. I have suggested that the tool of the schedule has such a strong affinity with progressive liberalisation and reduction techniques that the mere fact that a commitment has once been expressed in the form of a quantity in a schedule will be strongly suggestive of how negotiators will approach the issue in question in subsequent negotiations.

Finally, I have discussed the risk of *abstraction* in the context of modalities. I have argued that, while modalities increase the intelligibility of reduction commitments at the aggregate level, they have the effect of decoupling trade negotiations from concrete trade problems, with the result the negotiations increasingly revolve around features of, and problems produced by, the technique that is being employed rather than the substance of the issue that they are purportedly addressing.

## Chapter 4: The Use of Law

In his article “The GATT Legal System: A Diplomat's Jurisprudence”, Robert Hudec explores “one of the more striking puzzles” of the early trade regime: the contrast between the “style” in which the GATT was drafted and “the manner in which the GATT Contracting Parties ha[d] gone about enforcing it”.<sup>1153</sup> In its “substantive provisions”, Hudec notes, the GATT “resemble[s] a tax code”: “a long, complex and carefully drafted instrument which is on the whole fairly rigorous in its demands”.<sup>1154</sup> The dispute settlement provisions, by contrast, “seem[ed] to make no functional distinction between breach of legal obligations and other grievances”; “[l]egal decisions rendered” under these provisions “often [left] it unclear whether there ha[d] even been a legal ruling at all”.<sup>1155</sup>

Hudec's puzzle provides a useful entry point into the analysis of the role that “law” plays in multilateral trade lawmaking, because the contrast between the rigidity and “lawyerlike precision”<sup>1156</sup> of the GATT's substantive obligations, on one hand, and the pragmatic, flexible, and compromise-oriented manner in which they were applied, on the other hand, brings the question of what it means to make and apply “law” into sharp relief. What distinguishes the “tax code”-type language of the GATT's text from the “diplomat's jurisprudence”? What is it that makes the diplomat's jurisprudence “puzzling for lawyers”?<sup>1157</sup> And why was it that “lawyers and judges” were, for all intents and purposes, banned from GATT dispute resolution processes?<sup>1158</sup>

While Hudec does not put it in these terms, the most plausible answer is that it is the diplomats' reluctance to make *distinctions* between legal and illegal conduct that makes their jurisprudence so peculiar.<sup>1159</sup> Thus, Hudec notes that trade negotiators spent “considerable time … drafting precise and detailed provisions”<sup>1160</sup> – precise and detailed, presumably, as to which conduct would count as legal and which as illegal. However, “these obligations had restricted use” in the diplomats' jurisprudence – when a provision

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<sup>1153</sup> Hudec 1970, 615.

<sup>1154</sup> Ibid.

<sup>1155</sup> Ibid.

<sup>1156</sup> Ibid.

<sup>1157</sup> Ibid.

<sup>1158</sup> Ibid. 619; see also Jackson 1967, 132.

<sup>1159</sup> As will become clear further below, this discussion owes much to Luhmann's theory of law, in particular his conceptualization of law as the code legal/illegal; see Luhmann 1995/2004, chapter 4.

<sup>1160</sup> Hudec 1970, 618.

came into play in a dispute, the distinction between legal and illegal conduct that it established was of little import, and certainly not determinative of what the report would say.<sup>1161</sup> Presumably, it is this reluctance on the part of the diplomats to assign the values legal/illegal to a party's conduct that often left it "unclear whether there has even been a legal ruling at all".<sup>1162</sup> And the "lawyers and judges" presumably had to be kept out of dispute settlement because their inclination to distinguish between legal and illegal conduct manifested a "failure to understand the need for compromise" in international economic matters.<sup>1163</sup> The hallmark of the diplomats' jurisprudence developed in the GATT, then, was to "suppress the law's natural instinct for final decisions"<sup>1164</sup> – decisions, that is, which unequivocally classify conduct as either legal or illegal.

From Hudec's reconstruction of the diplomat's jurisprudence, then, we can infer by negative implication a central aspect of what it means to make law – namely, establishing distinctions between legal and illegal conduct.<sup>1165</sup> Starting out from this very basic understanding, I will in the following explore three questions related to the role of law in multilateral trade regulation. The first section addresses the question of why the trade policymakers of the postwar period decided to adopt a "code-of-laws approach"<sup>1166</sup> to the problems of international trade in the first place. The very need for a "diplomat's jurisprudence" in the GATT would suggest that law was, at the very least, not a perfect fit for the issues posed by international trade in the postwar period (I). The second section discusses the particular kind of law that trade lawmakers have deemed suitable for the regulation of international trade, namely, law modelled on the private law "contract" (II). The third section explores how law is recursively implicated in the process of its own making – by stipulating procedures for the making of "valid" law, by substantively

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<sup>1161</sup> Ibid. 618:

the disputes procedures in most agreements did not even distinguish between legal claims and other disputes. ... There was no need to separate the claims involving legal obligations, for the procedure in all cases was simply voluntary consultation.

<sup>1162</sup> Ibid. 615.

<sup>1163</sup> Ibid. 619. Hudec repeatedly mentions the fact that the GATT Secretariat did not have any lawyers.

<sup>1164</sup> Ibid. 665.

<sup>1165</sup> See Luhmann 1995/2004, 176/182. As I will argue below, there is another central element of what it means to make law, namely, establishing distinctions between law and non-law. The distinctions legal/illegal and law/non-law roughly correspond to Hart's distinction between primary and secondary rules; see Hart 1994. For Luhmann's discussion of Hart, see Luhmann 1995/2004, 109/130.

<sup>1166</sup> Dam 1970, 13.

circumscribing the authority of the lawmakers, and by its formal properties and functional exigencies (III).

## I. Why Law?

There are reasons to think that a “binary scheme” distinguishing between legal and illegal conduct – a scheme that “runs the risk of abstraction and the enforcement of a harsh either/or”<sup>1167</sup> – was rather unsuitable for the post-war trade regime. As the discussion in previous chapters has shown, and as others have argued, there was no consensus on central elements of the proposed design, in particular on the privileging of price-based over volume-based instruments of protection and on the question of preferential treatment.<sup>1168</sup> Dealing with these issues through a “harsh either/or” would inevitably force those who find themselves on the “illegal” side of the equation to take refuge in exceptions, excluding them from the “normal” business of the trade regime.<sup>1169</sup> As Winham has argued, “[t]he code approach formulated by the United States proved unacceptable to many of the original signatories of the GATT largely because the substance of the code was unacceptable.”<sup>1170</sup> It was disagreement on substance that led some less-developed countries to prefer the “liberty of the jungle”<sup>1171</sup> – i.e., no law – to the law proposed by the United States.

For many states, the central element of the United States’ design – the “outlawing” of virtually all non-tariff barriers to trade – was not only undesirable as a matter of policy preference, but was also unworkable as a matter of economic reality. As Dam has argued, the international monetary system of the postwar period left the majority of countries that did not have currency reserves with little choice but to impose trade controls whenever they were faced with a current account deficit.<sup>1172</sup>

The predictable outcome of writing a code of law under these circumstances was that the reach of its rigid pronouncements would have to be whittled down through

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<sup>1167</sup> Luhmann 1995/2004, 191/193.

<sup>1168</sup> See in particular Dam 1970, 13-14; Winham 1986, 30-32. Other authors downplay these disagreements; see Hudec 1971, 1314. Hudec “admit[s]” that doing so attributes only marginal importance to the views of the developing countries, which were “in fundamental disagreement about the equity of the entire structure” of the US-UK design; *ibid.* fn 36; see also Lang 2011, 196, who notes that the “embedded liberal consensus” relied on the marginalization of developing countries.

<sup>1169</sup> See Chapter 1, section II.A.

<sup>1170</sup> Winham 1986, 32; Winham includes the major European powers in this statement.

<sup>1171</sup> E/PC/T/A/PV/22, 37.

<sup>1172</sup> Dam 1970, 15; Dam notes that “adjustments in exchange rates were permitted, but only as a last resort”.

exceptions, carve-outs and safeguards.<sup>1173</sup> Given this prospect, why did the policymakers of the postwar period, and in particular US policymakers, nevertheless insist on a detailed code of conduct, rather than, say, a document stipulating a range of principles? Why did they not limit themselves to setting up an institution that could serve as a forum for deliberation and for consultations in case of conflicts?<sup>1174</sup> The analysis of the history of multilateral trade lawmaking in the previous chapters suggests four closely linked answers.

#### *The “Rule of Law”*

The first answer can be found in the view that US negotiators took of the historical significance of the multilateral trading system. As shown in Chapter 1, US policymakers portrayed the interwar years as a Hobbesian state of nature, and imagined the creation of the ITO as part of a process of establishing the rule of law in international relations. Creating actual legal rules was an essential part of realizing this civilizational accomplishment.<sup>1175</sup> Thus, lawmaking was a key element in the larger civilizational imagery that motivated the US push for the ITO.

#### *Moral Certainty and the Opportunity for Lock-in*

Another reason why US policymakers were comfortable with the rigidity of a legal code may lie in the fact that this rigidity dovetailed with the ideological clarity and moral certainty of the US position. There were two essential elements of this position:<sup>1176</sup> What Hudec has called the United States' private enterprise "ideology"<sup>1177</sup> accounted for its aversion towards volume-based instruments of protection, such as quantitative restrictions; and Cordell Hull's conviction that non-discriminatory trade was essential to peace explains the US rejection of preferential treatment.<sup>1178</sup> These two elements gave US negotiators a clear sense of what kind of trading system they wanted, and US policymakers did not

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<sup>1173</sup> Dam 1970, 14; Hudec 1971, 1311, in particular fn 28.

<sup>1174</sup> As suggested by Dam 1970, 16.

<sup>1175</sup> It is probably no coincidence that John Jackson, with Robert Hudec probably the scholar most immersed in early "GATT think", coined the famous trajectory from a power-based to a rules-based system, linking it explicitly to civilizational progress; see Jackson 1990, 52:

To a large degree, the history of civilization may be described as a gradual evolution from a power oriented approach, in the state of nature, towards a rule oriented approach.

<sup>1176</sup> Cf. Irwin/Mavroidis/Sykes 2008, 41, who cite an "Interim Report" by the US State Department setting out "the two major postwar commercial-policy objectives of the United States":

(1) the greatest possible expansion of international trade on a sound and non-discriminatory basis; and (2) the conduct of that trade so as to give widest possible scope to private competitive enterprise.

<sup>1177</sup> Hudec 1979, 206.

<sup>1178</sup> See Dam 2005.

hesitate to use the postwar lawmaking moment to enshrine this vision in legal rules and thereby “lock it in” for the future. This sense of an opportunity to shape the course of international economic relations is clearly reflected in the first sentences of the *Proposals*:

The main prize of the victory of the United Nations is a limited and temporary power to establish the kind of world we want to live in.

That power is limited by what exists and by what can be agreed on. Human institutions are conservative; only within limits can they be moved by conscious choice. But after a great war some power of choice exists; it is important that the United Nations use it wisely.<sup>1179</sup>

In having a very firm conception of what it meant to use this power “wisely”, the United States differed not only from the developing countries, who were looking for maximum flexibility in the use of policy instruments to pursue their development plans, but also from the other Western countries; faced with war-ravaged economies and potentially uncompetitive agricultural sectors, entangled in colonial relationships, and under the influence of Keynesian ideas that suggested the need to resort to a whole range of trade policy instruments, their positions were altogether more messy and *ad hoc*, and did not have the ideological purity of the US position.

From this perspective, the fact that the prohibitions of quantitative restrictions and preferences were circumscribed by exceptions (some of which insisted upon by the United States itself) and were not fully enforced for decades<sup>1180</sup> was of secondary importance. What mattered was that the United States managed to legislate its moral disapproval of these policy instruments into the DNA of the trading system. In a telling example of how law disguises authorship, what had been US principles and preferences became principles of “the GATT”.<sup>1181</sup>

#### *Legal Obligation as “Effective” Action*

The need to make “hard” law was also reinforced by what US negotiators saw as failed past attempts to rein in the state of nature in international economic relations. In their view, international conferences during the inter-war years, which had largely limited themselves to pronouncements of general principles and recommendations, had been ineffective or

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<sup>1179</sup> *US Proposals 1945*, 1.

<sup>1180</sup> Arguably, widespread resort to quantitative restrictions ended only with the comprehensive tariffication of quantitative restrictions in the Uruguay Round Agreement on Agriculture. See Agreement on Agriculture, Article 4(2).

<sup>1181</sup> As an illustration, see Hudec 1987, 3: “The GATT code of behavior rested in three central principles”; see Lang 2009, 34-36, on how law can “objectify” knowledge.

worse.<sup>1182</sup> The ITO by contrast, was “not to be a goodwill mission occupied in merely passing resolutions but it was to be an organization tied to action”.<sup>1183</sup> As discussed in chapter 2, the “action” in question was the reciprocal reduction and “binding” of tariffs – i.e., the assumption of legal commitments not raise tariffs above a specified value.

#### *Legal Commitments as Units of Payment*

A fourth reason for using the code approach was that the US's entire trade negotiations machinery was geared towards the negotiation of reciprocal *legal* commitments.<sup>1184</sup> Under the Reciprocal Trade Agreements programme, the US President was granted authority to lower US tariff rates in exchange for reciprocal action on the part of trading partners. Since tariffs are a legal construct and their reduction is a legal event, only action in the same currency, i.e., in the currency of legal commitments, could be accepted as payment. The very rigidity of legal commitments made them particularly suitable to serve as units of payment. As already noted in chapter 1, there is a mutually facilitative relationship between “hard” law and the conception of reciprocity as payment in the multilateral trading system. As will be discussed in the next section, this relationship also determines which kind of law serves as the model for lawmaking in the multilateral trading system.

The four rationales for using law in the regulation of international trade have by and large retained their force over the decades of the operation of the GATT. The GATT's contracting parties have preferred to temper the harshness of the law on the implementation side,<sup>1185</sup> rather than to refrain from making it in the first place. While the contracting parties

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<sup>1182</sup> E/CONF.2/C.6/SR.14, 9:

Experience between the two World Wars showed the danger of adopting resolutions at international conferences which lacked any provision making for their implementation.

See also Hudec 1970, 619, and Dam 2005, 85.

<sup>1183</sup> E/CONF.2/C.6/W.8, 2.

<sup>1184</sup> See Hudec 1971, 1315, fn 37, on the question of “why the draftsmen used the form of legal obligation at all”:

The answer, I think, is that the momentum of past practice virtually forced them to accept the conventional form of an international agreement as a starting point. On the purely technical level, the United States Executive's authority to negotiate tariff reductions was tied to the formation of conventional agreements.

<sup>1185</sup> The wide variations in the extent to which GATT law was implemented and enforced are well known. At a meeting of the Consultative Group of 18, one member argued that

GATT was based on a few common sense rules and principles of fairness. Many of them had evolved from practices and were, though unwritten, of precise content. The GATT exerted pressure on governments prudently, pragmatically and without over-extending itself. The recipe for GATT's relative success had been one element of law, two elements of common sense and a good dose of

did experiment with other approaches to governing their trade relations,<sup>1186</sup> they always made sure that the making of law remained at the centre of the GATT's activities.

The rationales, which originally principally motivated the United States, have evolved and been appropriated by others, not least representatives of the GATT. While the idea that trade law provides a bulwark against a fallback into protectionism and anarchy remains a powerful theme, the "rule of law" idea has acquired the additional meaning of protecting the weak members of the trading system against the strong. In the 1970s, this argument was advanced against the so-called "management approach" to trade regulation.<sup>1187</sup> In a discussion on "the relative merits of a rule-oriented and a management-oriented approach to international trade relations" in the Consultative Group of 18, for example, one member argued that

rules protected the smaller members of the trading community and made governmental interventions in the flow of goods across borders predictable; inherent in the management approach was the danger of unpredictable *ad hoc* solutions imposed by the stronger trading partners on the weaker ones. ... the present world economic situation was characterized by such instability and diversity that greater reliance on management procedures was inevitable. However rule application and management procedures had to be clearly separated. Otherwise the trading community ran the risk that all aspects of commercial relations were dominated by considerations of power and short-term interests.<sup>1188</sup>

On this view, "law was the only counterbalance to the economic and commercial influence of the most powerful nations."<sup>1189</sup>

The founding of the WTO, with its more developed dispute settlement system, has added substance to the view that the "rule of law" embodied in the trade regime can protect the weak against the strong. In particular, the new Dispute Settlement Understanding outlawed the use of unilateral measures to enforce trade obligations,<sup>1190</sup> which had been

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fairness. If the relative weight of these elements were substantially altered the result might very well become indigestible for governments.

CG.18/7, para. 23.

<sup>1186</sup> The agriculture and development components of the Programme for the Expansion of International Trade, discussed in chapter 1, are perhaps the primary example.

<sup>1187</sup> The best discussion of the debate is Hudec 1971; Hudec identifies Dam as a proponent of the management approach, and Jackson as a proponent of the rules-based approach. Hudec has his own reasons for preferring the rules-based approach, which centre on the way in which law empowers those who argue in favour of trade liberalisation within national governments and bureaucracies and among domestic publics; see Hudec 1971, 1315-1325; see also Hudec 1987, part II. On the empowering effects of law generally, see Lang 2009, 37-38.

<sup>1188</sup> CG.18/7, para. 23.

<sup>1189</sup> 4SS/SR/1, 5. Chile made this argument in the context of asking for more effective dispute settlement procedures.

<sup>1190</sup> DSU, Article 23.

used aggressively by the United States in the 1980s and early 1990s.<sup>1191</sup> Providing “security and predictability” to the multilateral trading system is one of the central aims of the dispute settlement system, and it now sometimes appears that a commitment to a “rules-based system” has become the one goal that the entire WTO membership can agree on.<sup>1192</sup>

As regards the second rationale – the use of law to express and “lock in” firmly held moral convictions –, it remains true that those with the clearest sense of purpose argue most forcefully for new legal rules, and appear most comfortable with the rigid and potentially harsh distinctions that they imply. The United States’ proposal in the Uruguay Round to eliminate all export subsidies, production subsidies and market access barriers in agriculture is a case in point.<sup>1193</sup> Just as with its uncompromising stance towards quantitative restrictions in the GATT/ITO negotiations, the United States would plainly not have been able to live up to its own rhetoric. However, its proposal was not only a shrewd negotiating move,<sup>1194</sup> it was also a proposal that made the legal regulation of agricultural subsidies – something that had eluded negotiators for decades – appear eminently feasible, even logical: prohibiting certain conduct is, after all, something that the law does rather well.<sup>1195</sup>

Turning to the third rationale, the idea that making law is what distinguishes an “effective” international organisation remained central to the identity of the GATT.<sup>1196</sup> As one of the GATT’s Director Generals, Olivier Long, put it in a speech

It is the hallmark of GATT as a forum that all negotiations there ... are essentially practical and down-to-earth, directed to achieving concrete results. ... I believe that it owes most to the fact that participants in any GATT negotiation know that they can call for support on their rights as signatories to a binding agreement. It is the existence of the General

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<sup>1191</sup> At an event at the WTO in July 2013, former Brazilian WTO ambassador and foreign minister Celso Lafer emphasised that, for Brazil, the protection against Section 301 has been the most important aspect of the “rule of law” embodied in the WTO.

<sup>1192</sup> As reflected a recent speech by the new WTO Director-General Azevedo; see *Azevedo 2013*: all Members benefit from a predictable, rules-based multilateral trading system, embodied in this Organization.

<sup>1193</sup> See MTN.GNG/NG5/W/14.

<sup>1194</sup> This is, at least, how it appeared to EC negotiators at the time; see Paemen/Bensch 1995, 106-107.

<sup>1195</sup> The proposal did not completely avoid the complications of “measuring” aggregate agricultural support which plagued proposals to “manage” agricultural support, since it called for phasing out agricultural support over a 10-year period. See MTN.GNG/NG5/W/14, 2, on the proposed method for measuring support, the PSE.

<sup>1196</sup> L/4306, 2:

The General Agreement itself – the set of rules for international trade - ... remains the essential focus of GATT and its activities.

Agreement itself that underpins the effectiveness of GATT as a forum for conciliation and negotiation.<sup>1197</sup>

There were of course periods in GATT history during which no or little lawmaking was happening, and the contracting parties focused on analysing and deliberating emerging issues, sometimes in the framework of "work programmes". There was usually a sense, however, that at some point it would "become necessary ... to push forward the implementation of the Work Program through a new round of negotiations to exchange contractual concessions"<sup>1198</sup> – a point at which "further collective progress ... could only be achieved by contractual commitments through multilateral negotiation".<sup>1199</sup> In other words, whatever else the contracting parties were doing, what ultimately mattered was that the results of the work were embodied in new legal commitments.

In the 1970s, as ever more developing countries joined the GATT, the prospect of the GATT becoming more like the United Nations Conference on Trade and Development (UNCTAD) sent shudders down the spines of Western trade negotiators. US diplomats in Geneva sent anguished cables to Washington warning of the "creeping UNCTADization" of GATT, a development that "risk[ed] undermining the concept of the obligations of individual contracting parties that has been central to an efficient functioning of the GATT".<sup>1200</sup> They pointed to the increasing participation of non-GATT developing countries in the activities of the GATT, to increasingly common "block-type" behaviour, i.e., the forming of developing country coalitions, and to a tendency to establish links between the activities of UNCTAD and the GATT; thus, UNCTAD resolutions would "invite" the GATT to engage in this or that activity. Michael Hart, a former Canadian negotiator, expressed the sentiment thus:

UNCTAD's penchant for long speeches, dreary meetings, and highly negotiated political statements full of rhetoric and weasel words had been alien to the GATT before the 1980s. The decline in UNCTAD's attractiveness as a forum for political negotiations had led to a new fascination with GATT and the introduction to GATT meetings of UNCTAD's preoccupation with procedure, texts, and agenda. ... The result is a Geneva or New York mentality that is more fascinated by gamesmanship than by genuine policy discussion, a mentality that began to show up at GATT meetings in the 1980s.<sup>1201</sup>

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<sup>1197</sup> Ibid. 4.

<sup>1198</sup> C/M/191, 8.

<sup>1199</sup> 4SS/SR/1, 13.

<sup>1200</sup> Interview with Richard Steinberg.

<sup>1201</sup> Hart 1995, 394, fn 16; see also Oxley 1990, 100-110.

These developments, of course, did not necessarily inhibit the making of law *per se*;<sup>1202</sup> however, they threatened to undermine the particular *kind* of lawmaking that had become established in the GATT, namely, lawmaking on the model of reciprocally negotiated contracts (see next section).

The idea that "hard law" is the distinctive contribution that the trade regime makes to the governance of the global economy has recently been reiterated by the US in the context of the negotiation of an agreement on trade facilitation in the Doha Round. As the US Ambassador stated:

... For there to be real benefits for all, obligations must be clear and binding.

The value that the WTO adds to global trade is binding rules. If we don't create binding rules, our WTO negotiations add no value, and frankly, that type of outcome is of no interest to the United States. We already have a non-binding customs codes in the World Customs Organization. ...<sup>1203</sup>

Finally, as shown in chapter 1, reciprocity, and with it the indispensability of using legal commitments as units of payment, has remained central to multilateral trade lawmaking. The major attempt to govern trade relations in a different manner, namely, through analysis, discussion, and action in light of a common aim, was defeated precisely because the GATT contracting parties were unwilling to do anything of (legal) consequence outside the context of a reciprocal exchange of concessions.<sup>1204</sup>

The continuing force of the rationales for making international trade law notwithstanding, there have also been doubts as to the suitability of using law to address some of the issues that are, or could be, the subject of international trade rules. These doubts have intensified in the aftermath of the unprecedented expansion of trade law in the Uruguay Round. Some of the criticism, discussed briefly in chapter 1, focuses on the association of "hard" law and reciprocity. Thus, Abbott and Snidal have argued for a "soft law track" in WTO lawmaking that would free states to address complex normative issues, such as corruption, without the concern of having to "pay" for progress in addressing these

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<sup>1202</sup> In fact, there was quite a bit of law that the developing countries would have been more than happy to make. For example, the developing countries were pushing for the binding of preferences and international measures to promote structural adjustment at this time

<sup>1203</sup> *US TNC Statement 2013*.

<sup>1204</sup> See Chapter 1, section II.B.

issues in the currency of rigid legal requirements.<sup>1205</sup> In a related vein, Finger has taken aim at the rigidity engendered by the generality of rules generated in a multilateral process, arguing that the domestic regulatory issues that are increasingly the subject of WTO rules would be better addressed through “country-specific and project-specific legalities”<sup>1206</sup>

Yet other critics have doubted the wisdom of legal disciplines that purport to minimize the impact of health and food safety regulation on trade.<sup>1207</sup> The latter criticism has echoes of Dam's warning against adopting a code-of-laws approach to subject matters marked by fundamental value conflicts. There is a new dimension to the problem, however. The value conflicts Dam had in mind related to the role of the state in the economy, and manifested themselves, *inter alia*, in divergent preferences for different protective instruments. Since these protective instruments – principally tariffs and quantitative restrictions – were themselves legal creations, subjecting them to legal discipline was a straightforward exercise. The conflict could be unambiguously expressed in legal language – e.g., whether to prohibit quantitative restrictions, or not – and compromises could be clearly enshrined in the law too, for example by stipulating exceptions. No problems of “translation” posed themselves.

When it comes to questions of health, food safety, and environmental concerns, by contrast, trade law takes cognizance of conflicts that play out on a different terrain, in a different idiom. In adjudicating these conflicts, trade lawmakers have attempted to defer to scientific judgments about evidence, and to democratic choices about acceptable risks<sup>1208</sup> – in other words, they have tried to “couple” the legal system with its scientific and political environment. As I will argue more extensively later in this chapter, this kind of coupling has been perceived as problematic when the environment does not generate any easily observable metric onto which the legal system can map its legal/illegal distinction. In the absence of such a metric, the legal system has to rely on proxies, often of a procedural kind, to apply its distinction.<sup>1209</sup>

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<sup>1205</sup> Abbott/Snidal 2002, 201; see *supra* text at fn 160.

<sup>1206</sup> Finger 2005, 38; see *supra* text at fn 163.

<sup>1207</sup> In particular, through the SPS Agreement; for a recent discussion (and rebuttal) of academic criticism of the SPS Agreement, see Rigod 2013.

<sup>1208</sup> See Lang 2011, 251, describing “the primary innovation of the SPS Agreement” as its “turn to scientific expertise as an arbiter of the boundary between legitimate and illegitimate domestic regulation.”

<sup>1209</sup> See Lang/Cooney 2007.

The long-standing criticism of anti-dumping and countervailing duty law can be understood through the same lens. Here, the law purports to track economic efficiency. However, as Tarullo and many others have shown, judgments about economic efficiency confront a number of practically insurmountable conceptual and empirical problems.<sup>1210</sup> The law hence relies on a number of intuitive proxies – e.g., countervailing duties can be imposed to the amount of the subsidy – that make little sense from an economic perspective.<sup>1211</sup>

Arguably, it is the imperfection, not to say crudeness, of structural coupling that has engendered much of the dissatisfaction with trade law at the intersection with science and in the trade remedy context, and has caused some to call for its abolition.<sup>1212</sup>

## II. What Kind of Law?

While there is an old debate in international law on whether international treaties should be conceptualised on the model of private law contracts,<sup>1213</sup> the analogy was enthusiastically embraced by the “contracting parties” of the GATT. Initially, this reflected the need to portray the GATT as a “trade agreement” rather than an international organisation, to ensure that its negotiation and adoption was covered by the US president's authority under the Reciprocal Trade Agreements Act. It was for this reason that the participants in the GATT were not called “members”, but “contracting parties”, which would be capitalised when the “CONTRACTING PARTIES” took any official decisions.<sup>1214</sup> As Hudec puts it rather dramatically, the

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<sup>1210</sup> Tarullo 1987, 556.

<sup>1211</sup> Imposing countervailing duties to the ad-valorem value of the subsidy will under virtually all circumstances “overcompensate” the domestic industry. An alternative model for calculating countervailing duties is the “entitlement approach”, which limits itself to insulating the domestic industry from the effects of the subsidy. For a critique of countervailing duties in general and the entitlement approach in particular, see Sykes 1990.

<sup>1212</sup> See only Voon 2010.

<sup>1213</sup> See Lauterpacht 1927. As Lauterpacht puts it, the core of the question is whether using private law as a model for international law reflects

the practice of States and the nature of international relations, or a regrettable lack of originality on the part of international lawyers who, unable to grasp the special and quite peculiar character of international relations, proceed to mould them after the private law pattern? (*ibid.* 6)

<sup>1214</sup> See GATT Analytical Index, 874, and Jackson 1967, 132, fn 5.

spelling of the name in capitals was to be the sole indication of a collective entity. Every other hint of organizational existence was ruthlessly hunted down and exterminated.<sup>1215</sup>

Over time, the conception of GATT as a contract became an article of faith.<sup>1216</sup> The GATT's Director-General Olivier Long began a speech at the United Nations in the mid-1970s thus:

Let me begin by stressing that GATT is above all a contract. It is a legal instrument; a multilateral agreement into which all its member governments have entered voluntarily.

This contractual character of GATT is central to it. It colours its nature and the way it functions. GATT cannot be properly understood or assessed unless the fact of the contract is kept constantly in mind. ... The existence of the GATT contract – the network of specific legal rights and mutual obligations – remains the characteristic that most distinguishes membership of GATT.<sup>1217</sup>

In practice, the contract conception of the GATT has served three principal purposes. The conception has been invoked, first, to resist changes to the GATT outside the context of reciprocal bargains, and, second, to exclude subject matters from its purview that would be unsuitable for such bargains. Third, the contract conception has served more broadly to legitimise the pursuit of narrow self-interest in trade negotiations, by assimilating the “contracting parties” to economic actors in pursuit of individual gain, oblivious to any larger common purpose.

Examples of the first use of the contract conception are particularly prominent in discussions in the Consultative Group of 18 concerning the Brazilian proposal for a “framework” group to consider the trade relationships between developed and developing countries during the Tokyo Round negotiations. In relation to the proposal, other members expressed apprehension that, if

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<sup>1215</sup> Hudec 1975, 46; see also Jackson 1967, 132, fn. 5, who notes that this decision was made “in order to remove any connotation of formal organization”.

<sup>1216</sup> It was even reaffirmed by the Appellate Body in *Japan – Taxes on Alcoholic Beverages*, 15:

The *WTO Agreement* is a treaty – the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the *WTO Agreement*.

It is probably no coincidence that Julio Lacarte-Muró, the most seasoned trade negotiator of the GATT era, was the presiding member of the Appellate Body division deciding this appeal. See already E/PC/T/A/PV/22, 18, and MTN.GNG/NG14/17, para. 18, where the GATT is described as “a collective contract”.

<sup>1217</sup> L/4306, 1 and 6.

the reform activities of the [framework] group were to extend beyond that date [on which the Tokyo Round was supposed to be concluded], a situation could be created in which attempts would be made to obtain additional benefits after the negotiations proper were completed and this prospect would tend to disrupt working relationships and the scope of concessions within the negotiations.<sup>1218</sup>

In this regard, it was noted that “changing one article of a contract such as the General Agreement necessarily put into question other elements or articles of the contract.”<sup>1219</sup> At the next meeting of the Group, the same point was made again:

Several members drew attention to the fact that the General Agreement in its present form represented a balance of rights and obligations. Proposals for reform in one area, however limited they might be, necessarily affected the balance as a whole as perceived by contracting parties individually as well as collectively. One of the group's aims should therefore be to keep this notion of balance in view when considering individual changes. The need for such a global approach in the work of a framework group was also reinforced by the unique contractual character of the General Agreement ...<sup>1220</sup>

The contract conception has also been employed to delimit the scope of what can properly be the subject of GATT/WTO law. Olivier Long's above-quoted speech was made to an Ad Hoc Committee on Restructuring of the Economic and Social Sectors of the United Nations System.<sup>1221</sup> The speech was marked by a barely disguised desire to keep the objectives and methods of the institutions working on trade-related issues in the UN system at a healthy distance from the GATT, and Long's principal tool in this endeavour was to emphasise the contractual character of the GATT. This technique was continued by his successor, Arthur Dunkel, who, at a meeting of the Consultative Group of 18, invoked the contract conception of the GATT to delimit the GATT's competence vis-à-vis other international bodies, in particular UNCTAD, by noting that

it would be important to bear in mind the contractual nature of the GATT and the strict limitation of GATT's competence to those international trade questions which could be embodied in legal undertakings by governments.<sup>1222</sup>

Structural adjustment, i.e., assisting workers in moving out of uncompetitive industries, was not one of those trade questions, at least in the view of developed country

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<sup>1218</sup> CG.18/2, para. 26.

<sup>1219</sup> CG.18/2, para. 26.

<sup>1220</sup> CG.18/3, para 29.

<sup>1221</sup> L/4306.

<sup>1222</sup> CG.18/15, para. 8.

delegates. In the late 1970s and early 1980s, developing countries realized that they would only be able to convince developed countries to remove barriers to trade in sectors in which the developing countries were gaining market share if the political pressure on developed country governments to maintain those barriers eased. The developing countries thus started to advocate a greater role for the GATT in pressuring developed countries to retrain workers in those industries so that they could move up the value chain.<sup>1223</sup> This effort never came to fruition; one of the arguments against it was "that the final aim of all GATT negotiations was to arrive at contractual undertakings" and that "it was difficult to see how this aim could be reached in the context of positive adjustment measures."<sup>1224</sup>

It is not hard to understand what made it "difficult" for some countries to envision legal obligations regarding adjustment assistance. Adjustment assistance implicated potentially sensitive issues of public policy – aspects of a state's welfare system, such as employment insurance and education, as well as industrial policy and, more generally, the role of the state in business and in its citizens' lives.<sup>1225</sup> Moreover, given the diversity of domestic political systems<sup>1226</sup> and the array of tools necessary for successful structural adjustment, there was no easily observable metric which could be used as a basis for constructing international legal obligations – one of the reasons for unease with the use of law identified above. Furthermore, structural adjustment is a complex and protracted process; it is not something that a government can legislate into existence on a whim.<sup>1227</sup> Another reason is suggested by the objection that obligations regarding structural adjustment could not take the form of "*contractual*", as opposed to more generally "legal", undertakings. It was clear to all involved in the discussion that obligations regarding structural adjustment would, in effect if not in form, have been one-sided obligations: It was the developed countries that would be asked to move up the value chain, not the developing countries.<sup>1228</sup> The lack of reciprocity ran counter to the idea of a contract.

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<sup>1223</sup> See CG.18/11, para. 24 and CG.18/W/39; see also *supra* text at fn 592.

<sup>1224</sup> CG.18/11, para. 24.

<sup>1225</sup> See CG.18/11, paras. 21-22; and CG.18/12, paras. 10, 12.

<sup>1226</sup> See CG.18/11, para. 17.

<sup>1227</sup> See CG.18/11, para. 18:

[One] member said that the idea that a government could predict the future of industries and then restructure them accordingly was certainly tempting. But in his view this required a foreknowledge and powers of intervention that at least his authorities did not possess.

See however *ibid.* para. 20.

<sup>1228</sup> See CG.18/11, para. 19 for the debate on this issue. The view of the developing countries was that "[t]he issue should be seen primarily against the background of the industrialization of the developing countries and

Whatever the reason why some contracting parties deemed structural adjustment unfit for "contractual undertakings", the important point here is that, for them, "unfit for contractual undertakings" meant "unfit for the GATT". Something that could not be made the subject of a contract was not within GATT's purview, however germane it might otherwise be to the development of the trading system.

The link between the idea of GATT as a contract, the concept of reciprocity, and the scope of what was deemed an appropriate subject matter for the GATT is brought into even sharper relief by another example: the question of trade preferences in favour of developing countries. As discussed above, the possibility of using legal commitments as units of payment was one of the reasons why the US and others choose the code-of-laws approach to trade regulation: Law was chosen to facilitate payments. The link also cut the other way, however: Only when a country that paid for a concession was it entitled to that concession as a matter of law; and only law was an appropriate subject matter for the GATT.

Trade preferences in favour of developing countries violated two principles of the GATT: the principle of non-discrimination, and the principle of reciprocity. The first conflict was addressed through waivers – first temporary, then permanent – of the MFN obligation. The second conflict was "solved" by excluding the granting of preferences from the scope of GATT negotiations, and the granted preferences from the scope of GATT law. During the Tokyo Round – the first negotiating round subsequent to the granting of the MFN waiver – developing countries attempted to negotiate the "binding" of preferential rates and/or preference margins in GATT schedules; these attempts were rebuffed with the reminder that preferences granted under the General System of Preferences were "unilateral and non-contractual",<sup>1229</sup> – in other words: since they were not "paid for", preferences were not subject to the GATT contract, and hence also not an appropriate subject for the multilateral lawmaking process in the GATT.<sup>1230</sup>

Proponents of the contract conception of the GATT were always particularly disturbed by proposals that would have reduced the control of the contracting parties over

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the complementary structural adjustments required in the developed countries". See also *ibid.* 20: "The task the international community was facing now was to deliberately accelerate the adjustment process in the developed countries for the benefit of the newly industrializing nations." See further CG.18/12, para. 8.

<sup>1229</sup> MIN/TAR/W/23, 2; see also MTN.GNG/NG1/W/6, 1, where Brazil describes preference schemes as "non-contractual".

<sup>1230</sup> See also MIN(73)W/2, para. 34; the proposal has recently been revived in the academic literature; see Bartels/Häberli 2010.

the GATT Secretariat's activities, and would have imbued the work of the GATT with a larger collective purpose. The Jamaican proposal regarding adjustment assistance would have had this effect; it envisaged that

the GATT secretariat establish a list of sectors which had become or were likely to become sensitive to changes in the pattern of world trade, that information on governmental measures to facilitate structural adjustments in these sectors be collected, and that recommendations with regard to the sensitive sectors and the governmental adjustment measures be made.<sup>1231</sup>

One of the reactions to this proposal was that "[i]t was preferable to solve trade problems through general rules"; "specific policy recommendations by the GATT" might "call into question" a country's "legitimate resort to the GATT safeguard provisions".<sup>1232</sup> Essentially, this was an argument that countries should be free to act within their contractual rights and should not be constrained by any larger public policy pursued by the GATT membership.

In the Uruguay Round, proposals to "strengthen the analytical capacity of GATT" provoked nervous questions about whether this "implied a change in the contractual nature of the GATT, and whether there was any link in this context with proposals to establish a World Trade Organization".<sup>1233</sup> The Trade Policy Review Mechanism established during the Uruguay Round, which subjects WTO Members' trade policies to collective examination and confrontation, has indeed been described as a "a small step towards making individual members responsible to a greater collectivity" and "as a subtle change from GATT as a contract between individual signatories towards GATT as an international institution."<sup>1234</sup> Even after the constraints on the institutionalisation of the trade regime had been overcome with the establishment of the WTO, however, many participants in trade lawmaking and WTO officials have continued to view the WTO primarily as a "contract organization", i.e.

a 'Member-driven' institution that facilitates the negotiations of trade agreements (the 'contracts'), helps oversee implementation or the resulting contractual commitments, and, where requested, issues judicial decision over these commitments.<sup>1235</sup>

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<sup>1231</sup> CG.18/11, para. 24, referring to CG.18/W/39.

<sup>1232</sup> CG.18/12, para. 12.

<sup>1233</sup> MTN.GNG/NG14/17, 9, para. 27.

<sup>1234</sup> Wingham 1990, 802.

<sup>1235</sup> Shaffer 2005, 248.

Shaffer has noted that “[m]any developing countries would like to have the WTO mandate explicitly include 'development' issues, but developed countries prefer to keep it narrow, focusing on the 'rules' of a 'contract' organization.”<sup>1236</sup> As Andrew Lang has put it,

[I]aw is … imagined as protecting the pursuit of individual projects, arbitrating between different individual projects, and providing an institutional space for the fulfilment of those projects.<sup>1237</sup>

In one important respect, the WTO is less of a "contract organization" than the GATT was: as discussed in chapter 2, a subset of WTO members can no longer use the WTO framework as a forum for the conclusion of contracts among themselves without sanction by the entire WTO membership. Rather, new plurilateral agreements can only be added to Annex 4 of the WTO Agreement with the consensus of all WTO members.<sup>1238</sup> In this respect, then, the WTO is more akin to a legislative body, since the entire membership determines when new legal rules can be made. This differs markedly from the GATT, where the membership at large only had the relatively crude sanction of preventing the secretariat from servicing any agreements concluded among a subset of the contracting parties, and the Trade Negotiations Committee "could not prevent a number of countries from entering into an agreement if they wished to, unless the provisions of the agreement were contrary to the GATT."<sup>1239</sup>

Another legal element of the GATT that reinforced the conception of it as "bundles of bilateral 'contracts'"<sup>1240</sup> was preserved in the WTO, however: the non-application clause.<sup>1241</sup> The idea behind the non-application clause was that no GATT contracting party should be forced to apply the GATT to another party "without its consent" – a possibility that arose because of the two-thirds majority decision-making rule for accessions to the

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<sup>1236</sup> Shaffer 2005, 268, fn 106.

<sup>1237</sup> Lang 2011, 246. I should note that Lang makes this comment in the context of his discussion of the perspective assumed by the dispute settlement organs, and views this attitude towards law as a relatively recent development (I have omitted a "now" from the above quote). I would argue that, while this attitude may have only recently manifested itself in the dispute settlement process, it has been characteristic of lawmaking throughout the history of the multilateral trade regime.

<sup>1238</sup> WTO Agreement, Article X.9 ("exclusively by consensus").

<sup>1239</sup> MTN/P/5, para. 14; as discussed in chapter 2, this was the view that prevailed by default.

<sup>1240</sup> This formulation is borrowed from Pauwelyn 2003, 939.

<sup>1241</sup> See GATT Article XXXV. Some of the Tokyo Round Codes contained non-application clauses as well; see Tokyo Round Subsidies Code, Article 19.9; Tokyo Round Government Procurement Code Article IX.9.

GATT.<sup>1242</sup> While the practical significance of the non-application clause is much diminished by the practice of deciding on accessions by consensus, giving all WTO Members the ability to block accessions, some WTO Members have chosen the option of invoking the clause rather than blocking a country's accession altogether.<sup>1243</sup>

The legal implications of the contract conception of GATT obligations have been explored at length elsewhere.<sup>1244</sup> I want to highlight two more subtle ways in which the contract conception affects multilateral trade lawmaking. First, by analogising lawmaking in the trading system to negotiations among private commercial actors in the marketplace, the contract conception legitimises the pursuit of narrow self-interest in trade negotiations. When individuals or companies act as private commercial actors, they are not expected to concern themselves with anything but their own advantage.<sup>1245</sup> The contract conception of trade law arguably does its part in diminishing such expectations in trade negotiations as well.

Second, the contract conception makes it more difficult to change rules of trade law that are not or no longer desirable, and thus makes it more difficult to experiment with trade law. If trade law was adopted in pursuit of a common goal, it would be logical to change it when it proves ineffective in achieving that goal, or when it proves to be otherwise inequitable. Under the contract conception, however, any change to the rights acquired as a result of trade negotiations entitles the parties who benefit from these rights to compensation in order to maintain the initial "balance" of concessions. The idea that states have "paid" for these rights makes it more difficult to revise rules that have proved ineffective, unfair or have turned out to benefit only a minority of states.<sup>1246</sup>

It is not the case that the GATT contracting parties never contemplated fashioning their law on models other than the contract. I have already noted that the adoption of the ITO Charter might have given the multilateral trade regime the character of a more "public" institution pursuing a wider range of substantive policy goals more independently of the

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<sup>1242</sup> The non-application clause was introduced when the decision-making rule for accessions was changed from consensus to two-thirds majority; see *supra* fn 723 and GATT Analytical Index, 1037-1038.

<sup>1243</sup> WTO Analytical Index, 57. Of nine invocations, six have been withdrawn, while three are still in force.

<sup>1244</sup> See Pauwelyn 2003.

<sup>1245</sup> At the same time, individuals confront such expectations in other roles: as citizens of a state, as members of a society, community, family etc.

<sup>1246</sup> For example, only a small minority of WTO Members are net-beneficiaries of the TRIPS Agreement.

immediate self-interests of its individual members.<sup>1247</sup> In later decades, while the UNCTAD served more as a cautionary tale, the OECD was occasionally brought into play as a potentially attractive model for the GATT. In fact, a number of topics that were taken up in GATT lawmaking had been first discussed and analysed in the OECD, and the OECD served as the main inspiration for the "management" approach to trade problems that found strong advocates in the 1970s.<sup>1248</sup> References to this model were creeping up in GATT discussions in the 1970s and 1980s. Thus, while the Working Group drafting the text of what would become the Tokyo Round Standards Code adopted the "working hypothes[is]" that the result "could take the form of a contractual code", some delegations preferred to keep the options open, emphasizing that "the draft could also serve as a basis for other types of approach, such as a voluntary code, a set of principles, etc., if one of these solutions were preferred."<sup>1249</sup> In the early stages of the Uruguay Round, Brazil noted the possibility that a multilateral agreement on services could be "of a simple exhortatory character, as those existing in an OECD context, or of a more contractual character, as is the case in GATT".<sup>1250</sup> Finally, Abbott's and Snidal's critique of the inability of WTO lawmaking to address complex normative issues was inspired by a comparison with how the OECD had dealt with the same issue, corruption.<sup>1251</sup>

Academic commentators have for some time also advocated yet another model for the law of the multilateral trading system: that of a "constitution".<sup>1252</sup> Some of the rationales identified above for using law in the regulation of international trade do indeed seem to call for this model: thus, the "rule of law" in international economic relations would certainly be more firmly established by a "constitutional" document than by "bundles of bilateral 'contracts'" from which any party can withdraw after a 6-month notice period.<sup>1253</sup> Similarly, the principle of non-discrimination and the prohibition on quantitative restrictions would have been "locked-in" more comprehensively by a document that did not

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<sup>1247</sup> See chapter 1. For the distinction between "private" and "public" institutions in the context of procedures for dispute settlement, see Abbott 1992a and 1992b.

<sup>1248</sup> See Hudec 1971.

<sup>1249</sup> MTN/NTM/W/5, 6, para. 6.

<sup>1250</sup> MTN.GNS/W/3, para. 41; Brazil's point was that, in any case, the agreement would have to be arrived at by consensus.

<sup>1251</sup> Abbott/Snidal 2002.

<sup>1252</sup> See Cass 2005 for an overview.

<sup>1253</sup> See GATT Article XXXI and WTO Agreement Article XV. Most contracting parties to the GATT applied it pursuant to the Protocol of Provisional Application, under which the notice period was reduced to 60 days; Protocol of Provisional Application, para. 6.

give the parties to it the option not to apply them towards a newly acceding party, and that withheld from its adherents acting collectively the power to waive even these fundamental obligations. The potential attractions of the constitutional model notwithstanding, however, there is no indication that the participants in multilateral trade lawmaking ever considered this model as a desirable option. As Dunoff has persuasively argued, "neither WTO texts nor practice" support the conception of the WTO as a constitutional entity.<sup>1254</sup> By the constitutionalists' own standards – Jackson's famous distinction between "power oriented" and "rule oriented" approaches, for example –, GATT/WTO lawmaking arguably finds itself squarely in the first category. Jackson has acknowledged

the extent to which GATT reflects bargaining power. GATT has been termed a 'negotiating' institution, 'pragmatic and flexible.' But negotiation implies 'swap,' which implies that he who has most to 'swap' will likely receive the most.<sup>1255</sup>

Jackson contrasts this to what would supposedly be a more "constitutional" approach, namely one based on "fixed rules and principles based upon a rational appraisal of beneficial policy, where bargaining power should (ideally) be less relevant".<sup>1256</sup>

### **III. How Is Law Recursively Implicated In Its Own Making?**

The previous two sections have examined the rationales for choosing law to regulate international trade, as well as the particular kind of law that has served as a model for the law made in the multilateral trading system. The present section will explore the question of how law shapes the process of its own making.

This is not a question that has received much attention in the academic literature, and authors who have investigated the role of law in trade negotiations have tended to conceptualise it in exceedingly narrow terms. Busch and Reinhardt, for example, have used the phrase "bargaining in the shadow of law" to refer to negotiations in the consultation phase of dispute settlement proceedings.<sup>1257</sup> In their analysis, the "shadow of law" is equated with the prospect of adjudication: if the negotiations fail, the dispute will advance to the panel stage. The negotiation of mutually agreed solutions can also occur after the

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<sup>1254</sup> Dunoff 2006, 648.

<sup>1255</sup> Jackson 1969, 669.

<sup>1256</sup> Ibid.

<sup>1257</sup> Busch/Reinhardt 2000.

conclusion of dispute settlement proceedings, where it takes place under a similar "shadow of law", i.e., the threat of further adjudication in the form of compliance proceedings).

Actual or potential adjudication can also affect negotiations that are not part of dispute settlement proceedings themselves: by interpreting WTO law, the Appellate Body can change what the participants in lawmaking perceive as the legal status quo, and can thereby affect the bargaining position of the participants: according to the reciprocity logic governing WTO lawmaking, a member would have to pay with concessions on other issues to have its preferred interpretation of a provision restored by making that interpretation more explicit.<sup>1258</sup> An example of this constellation is the Appellate Body jurisprudence on the prohibition of "zeroing" in the calculation of anti-dumping duties, which the US would have to "pay" dearly to change (through an authoritative interpretation or an amendment of the Anti-Dumping Agreement).<sup>1259</sup> The interpretations of the dispute settlement organs can also make negotiating positions unsustainable, as the US experienced in the negotiations on cotton subsidies, which were simultaneously litigated by Brazil.<sup>1260</sup> The impact of law as adjudication on WTO lawmaking is hence relatively straightforward: the possibility of reaching a desired outcome through dispute settlement enhances the bargaining position of the advantaged member by making its desired outcome the default situation. Conceptually, the impact of law as adjudication on the lawmaking process is thus not different from the way in which the legal status quo generally shapes the lawmaking process.

Another sense in which the "shadow of law" has been understood is as the impact of procedural rules. In his article on decision-making under the GATT and WTO, Richard Steinberg has distinguished bargaining in the "shadow of law", in which rules of procedure based on the sovereign equality of states are fully respected, from bargaining in the "shadow of power", when powerful states use coercive methods to achieve their desired outcomes.<sup>1261</sup> According to Steinberg, in the GATT/WTO context the procedural rules derived from the legal concept of sovereign equality serve important information-gathering and legitimising functions for powerful states without substantially affecting the outcome

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<sup>1258</sup> On the strategic use of litigation in the Uruguay Round, see Nordgreen 1991. On the effects of Appellate Body decision on negotiating dynamics, see also Tarullo 2002, 165-179; and Stoler 2004.

<sup>1259</sup> Interview with Jane Bradley.

<sup>1260</sup> Interview with Joseph Glauber; according to Glauber, the position that the United States had taken in Cancún in response to the demands of the Cotton-4 was abandoned because it became untenable in light of the findings of the Panel and Appellate Body in the *US-Upland Cotton* dispute.

<sup>1261</sup> Steinberg 2002.

of the lawmaking process, which is determined by the constellation of interests among the most powerful states.

According to these accounts, then, the role of law in WTO negotiations is fairly limited. Law is either a bargaining chip in the form of the threat of adjudication, or appears in the form of procedural rights that can be disregarded at key moments. In the present section, I will paint a more complicated picture of the ways in which law is implicated in its own making. I start from the intuition that although law becomes formally binding only in the moment when it is adopted and ratified, the fact that one is making law must exert some kind of structuring influence on the process of its making. In other words, those who make law inevitably operate under some conception of what it means to make law. In this section, I will consider four elements of this conception: procedures for making valid law, substantive limitations on the authority to make law, the form of law, and the function of law.

### **A. Procedural Rules**

In Steinberg's account of lawmaking in the multilateral trading system, procedural rules, such as the consensus principle, have some impact at the early stages of a negotiating round, but lose significance towards the end of the round, unless a powerful external force compels the major powers to continue to pay heed to them.<sup>1262</sup> This account raises the question of how the major powers can create law without following the rules for making valid law? Who or what says whether something is valid law?

One answer is that law stipulates the conditions of its own validity:

At least since the advent of legal positivism, law has been cast as an institution, regime, or system that exists only as an effect of self-description; that is, law comes into being paradoxically, as an effect of the identification of certain enunciations or transactions as 'legal' by reference to a criterion that is posited by those enunciations or transactions themselves.<sup>1263</sup>

One way in which law is implicated in its own making, then, is by stipulating the conditions for its own existence. Both the GATT and the WTO Agreement stipulate the

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<sup>1262</sup> On Steinberg's account, in the Tokyo Round this external force were the foreign policy imperatives of the Cold War; they compelled the developed countries to implement the Tokyo Round codes on an MFN basis; see also *supra* text at fn 803. Note that Steinberg's argument is based on a very small sample of two negotiating rounds, one of which does not actually support his argument.

<sup>1263</sup> Pottage 2012, 173.

time and circumstances of their own "entry into force".<sup>1264</sup> At the same time, they also circumscribe the conditions of validity for subsequent law, through procedural rules regarding decision-making, waivers, authoritative interpretations and amendments.<sup>1265</sup> These procedural rules unravel the paradox of law's self-referentiality in time: adopted at one point in time, they stipulate what shall be considered valid law at a later point in time.<sup>1266</sup>

What is the impact of these kinds of rules in multilateral trade lawmaking? It is clear that relatively little law has been made in the trading system pursuant to these rules. While the power to waive obligations has been used with some regularity,<sup>1267</sup> the GATT has only been successfully amended on two occasions since the early 1950s,<sup>1268</sup> and the only attempt so far to amend one of the WTO agreements remains in limbo.<sup>1269</sup> The problem was recognised during the GATT era, and discussed in forums such as the Consultative Group of 18, where members acknowledged

that there was a need for more flexible rule adjustment procedures both under GATT and the codes negotiated under the auspices of GATT. In many instances the non-observance of GATT rules was not due to lack of willingness to co-operate but rather due to the fact that the rules were no longer realistic and appropriate in the present circumstances. For the sake of preserving the integrity of the General Agreement and the supplementary codes, flexible rule amendment procedures should be agreed.<sup>1270</sup>

To some extent, the GATT contracting parties simply ignored the rules – thus, during the GATT years a series of certifications of rectifications and modifications of schedules which would have derived their legal force from an amendment that failed to attract the necessary unanimous acceptance, "were generally treated by contracting parties *as if* they were in effect".<sup>1271</sup> More importantly, however, subsets of contracting parties

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<sup>1264</sup> GATT, Article XXVI.6; WTO Agreement, Article XIV.1.

<sup>1265</sup> See GATT, Articles XXV:3 and XXX:4 (decision-making), XXV:5 (waiver power), XXX (amendments) and WTO Agreement, Articles IX:1 (decision-making), IX:2 (authoritative interpretation), IX:3 (waiver power), and X (amendments).

<sup>1266</sup> See Luhmann 1995/2004, 109/131: "What is valid law or not valid law at any one moment is that what has been made valid before." (my translation).

<sup>1267</sup> For an extensive discussion, see Feichtner 2012; for the GATT era, see GATT Analytical Index, 882-888.

<sup>1268</sup> At the 1954-55 Review Session and in 1965, to add Part IV to the GATT; see GATT Analytical Index, 1002.

<sup>1269</sup> See Kennedy 2010; see also WTO Analytical Index, 49-50.

<sup>1270</sup> CG.18/7, para. 23.

<sup>1271</sup> GATT Analytical Index, 1006. (emphasis added) See also Jackson 1967, 141-142:  
... oddly enough ... these schedule changes are treated by GATT parties as if they were in force. ...  
These certifications are also treated by GATT parties as if they were in force!

resorted to concluding agreements that established their own validity autonomously,<sup>1272</sup> rather than deriving it from the lawmaking authority provided for in the GATT. This was at times criticised as circumventing the amendment provisions of the GATT,<sup>1273</sup> and it produced a highly fragmented legal order.<sup>1274</sup>

While the conclusion of such autonomous agreements was not envisaged in the GATT, it was not foreclosed either – as it is in the WTO framework, where the consensus requirement makes such agreements subject to multilateral sanction – and it was certainly facilitated by the contract conception of the GATT. A contract does not foreclose other contracts, while a constitution would normally preclude lawmaking outside of the framework that it sets up. A contract does not even exclude the possibility of a new contract replacing the original contract – again, a possibility that is rarely contemplated in constitutions.<sup>1275</sup>

The opportunities for autonomous lawmaking alongside the GATT did not mean that negotiators did not consider the possibilities of lawmaking pursuant to the procedures envisaged in the GATT. As discussed in chapter 2, it was especially before taking the radical step of replacing the GATT with a new agreement that the negotiators of the Quad countries extensively considered the full range of options offered by the GATT, including various combinations of amendments (to annex new agreements to the GATT), waivers (of the MFN obligation in relation to those agreements), and expulsions (of those parties who refused to join the new agreements).<sup>1276</sup> It was only in light of the realisation that practically insurmountable obstacles, in terms of the number of votes required, stood in the way of implementing the Uruguay Round results in the desired manner (i.e., with universal membership for almost all agreements), that the Quad countries opted for the conclusion of a successor agreement to the GATT.

In sum, the relatively high hurdles that saddle the lawmaking authority conferred upon the contracting parties by the GATT have to a large extent channelled lawmaking towards the conclusion of legally autonomous agreements and, ultimately, the replacement

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<sup>1272</sup> See the Kennedy Round Anti-Dumping Code and the Tokyo Round Codes.

<sup>1273</sup> See MTN/W/35.

<sup>1274</sup> As famously pointed out in Jackson 1990.

<sup>1275</sup> The German Basic Law, which provides in Article 146 for its own replacement by a new constitution to be adopted by the people of a unified Germany, is a notable exception.

<sup>1276</sup> Interview with Richard Steinberg.

of GATT with a new agreement that subsumes a substantively identical, but legally distinct, GATT 1994.

The incentives to make law pursuant to the procedures foreseen in the WTO Agreement are in principle stronger than they were in the GATT due to the more integrated nature of the WTO legal system. In particular, it is only by adding a new multilateral agreement to Annex 1 of the WTO Agreement by formal amendment, or by adding a plurilateral agreement to Annex 4 of the WTO Agreement pursuant to Article X:9 thereof, that new agreements can be made the subject of dispute settlement proceedings in the WTO, and can thus ultimately be enforced through the suspension of trade concessions. This stands in contrast to the GATT, where parties could in practice use unilateral trade sanctions to enforce legal obligations outside the GATT framework.

Nevertheless, there are some parallels between the GATT and the WTO experience, in that the most significant lawmaking activity since the establishment of the WTO has taken place outside the WTO framework – not in the form of the conclusion of new plurilateral agreements, but through the conclusion of new bilateral or regional trade agreements, which are authorised through the exceptions from the MFN rule for free trade agreements and customs unions in GATT Article XXIV and GATS Article V.

## **B. Substantive Legal Limits on the Authority to Make Law**

If the primary impact of procedural rules on lawmaking activity has been to channel this activity out of the framework of the trading system, arguments that there are substantive legal limits on the authority to make law in the framework of the trade regime – in other words, that the trade regime has a circumscribed "competence" or "jurisdiction" – have had no comparable force.<sup>1277</sup>

Arguments to this effect first came to prominence in the context of the Uruguay Round:<sup>1278</sup> India, Brazil, and many other developing countries insisted that negotiations on

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<sup>1277</sup> Arguments about "competence" or "jurisdiction" need to be distinguished from arguments that a subject matter is unsuitable for the trading system because it does not lend itself to "contractual obligations": The former argument goes to the scope of the lawmaker's legal *authority*, whereas the latter refers to the possibility of addressing an issue with what are seen as the particular legal *means* of the GATT. As discussed above, the latter type of argument has been effectively employed on several occasions.

<sup>1278</sup> For a contemporary discussion of the issue, see Roessler 1987; cf. GATT Analytical Index, 878-881 ("Competence of the Contracting Parties"), for a survey of GATT practice.

services and intellectual property rights could not take place within the framework of the GATT because

GATT and the CONTRACTING PARTIES had competence only in the areas covered by the Articles of the General Agreement [and these] jurisdictional and legal realities could not be altered because some major trading nations held a different view[.]<sup>1279</sup>

The view that the GATT did not have "jurisdiction" to address services led India and Brazil to propose that the contracting parties

invite Governments represented in the CONTRACTING PARTIES meeting in Punta del Este to give consideration to holding an intergovernmental meeting to examine, *outside the GATT framework*, what appropriate multilateral action is desirable on trade in services.<sup>1280</sup>

Even after the Punta del Este Ministerial had endorsed negotiations on goods and services, Brazil held firm to the legal fiction that the negotiations on goods and the negotiations on services had been launched at different meetings by different bodies. Thus, Brazil argued that the decision to negotiate on trade in services had been taken

in an ad hoc intergovernmental meeting, *parallel* to the special session of the CONTRACTING PARTIES where a decision on a new round of negotiations on trade in goods in the GATT was *simultaneously* adopted<sup>1281</sup>

and that "two legally distinct negotiating processes" had been established:

"one, on trade in goods, to be conducted in the GATT framework; the other, on trade in services, to be carried out in an ad hoc juridical frame of reference."<sup>1282</sup>

When the Punta del Este Declaration was adopted, Brazil and India had insisted that the Chairman gavel twice, to signal that the separateness of the negotiations on goods and services.<sup>1283</sup> Initially, India also objected to negotiations on trade in services taking place in the GATT building.<sup>1284</sup> With respect to intellectual property, India insisted to the very end of the Uruguay Round that the World Intellectual Property Organization had exclusive jurisdiction regarding substantive intellectual property rights.<sup>1285</sup>

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<sup>1279</sup> C/M/191, 10 (India). See also ibid. 16 (Nigeria: "GATT did not have jurisdiction to deal with services"); ibid. 18 (Brazil: new issues were "outside GATT's competence"); 4SS/SR/1, 2 (Brazil: matters "not falling within the competence of the General Agreement"); 4SS/SR/1 and 4SS/SR/2, *passim*.

<sup>1280</sup> MIN(86)/W/3. (emphasis added)

<sup>1281</sup> MTN.GNS/W/3, para. 4. (original underlining; emphasis added)

<sup>1282</sup> MTN.GNS/W/3, para. 5. (original underlining)

<sup>1283</sup> Oral History Interview with Warren Lavorel, 7:37-8:30.

<sup>1284</sup> Interview with Jane Bradley.

<sup>1285</sup> See only *supra* fn 891.

These arguments were ultimately ineffective, if not counterproductive. As discussed in chapter 2, the developed countries accommodated the developing countries' "jurisdictional" concerns to some extent, by leaving open the question of institutional implementation. If anything, however, this limited accommodation gave the developing countries a false sense of security that they would be able to block the implementation of agreements on services and intellectual property in the GATT framework. In a way, then, the developed countries took advantage of the developing countries' "legalistic"<sup>1286</sup> faith in their own position.<sup>1287</sup>

Subsequent invocations of the concept of jurisdiction confirm the point that the trade regime's legislative competence is not effectively circumscribed as a legal matter. Robert Hudec has argued that "post-discriminatory" standards are "outside the scope of the jurisdiction or the purpose of the [WTO]"<sup>1288</sup> – at a time when these kinds of standards had of course already been incorporated in several WTO agreements, as acknowledged by Hudec himself.<sup>1289</sup> More recently, the WTO's Director-General elect Roberto Azevedo has argued that the WTO does "not have the competence nor the jurisdiction" to address the question of exchange rate distortions.<sup>1290</sup> The WTO had held discussions on exchange rate questions only months before<sup>1291</sup>, and if there had been agreement to address this question, it is hard to see how the WTO membership could have been legally prevented from doing so.<sup>1292</sup>

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<sup>1286</sup> Recall Paemen and Bensch's remark that it was due to India's "legalistic attitude in matters relating to the GATT" that India had "allowed itself to be persuaded" to negotiate on substantive intellectual property rights by the proviso regarding institutional implementation; Paemen/Bensch 1995, 143.

<sup>1287</sup> Steinberg describes the "developing countries' legal competence argument" as "utterly baseless", which, he reports, "irritated the North"; Steinberg 1995, 29.

<sup>1288</sup> Hudec 2003, 188; Hudec notes that

[t]he [WTO] is supposed to be about promoting international trade, and this [i.e., the prevention of unjustified regulation *per se*, N.L.] is not part of that original mission or indeed its stated mission.

<sup>1289</sup> Hudec mentions Article 2.2 of the TBT Agreement, Articles 2 and 5.1 of the SPS Agreement, and, with some qualifications, Article XX of the GATT.

<sup>1290</sup> WTO Reporter, 24 June 2013.

<sup>1291</sup> Azevedo himself, as Brazil's ambassador at the time, had played a leading role in pushing for these discussions.

<sup>1292</sup> There is, of course, Article XV of the GATT, the provision that comes closest to delimiting the jurisdiction of the GATT vis-à-vis another international organization, the IMF. See also Roessler 1987, 76. Article XV assigns exclusive jurisdiction to the Fund with respect to factual questions relating to foreign exchange, and with respect to questions of compliance with the Fund's Articles of Agreement or with special exchange agreements. It otherwise only imposes consultation requirements. It is hard to see how this provision could be used to circumscribe the competence of WTO members to address exchange questions legislatively.

There is one substantive limitation on the authority to make law, however: the most-favoured-nation rule. Even the defenders of the conception of the trade regime as a forum for the conclusions of contracts acknowledged that the provisions of such contracts could not be "contrary to the GATT".<sup>1293</sup>

### C. The Form of Law

A third aspect of the conception of what it means to make law relates to form. How does a lawmaker create something that will be recognised as a legal obligation? At the beginning of this chapter, I defined lawmaking as the establishment of distinctions between legal and illegal conduct, as well as of distinctions between law and non-law.<sup>1294</sup> If we accept this basic conception, we can say that lawmaking involves the generation of "programmes" for making distinctions between legal/illegal conduct and legal/non-legal action.<sup>1295</sup> The techniques analysed in Chapter 3 can be said to constitute such programmes: they represent different ways of systematically distinguishing between legal and illegal conduct – with the help of bindings, benchmarks, objectives, efficiency calculations, and several types of standards.

Luhmann has argued that the programmes of law are always *conditional* programmes, i.e., they take the form of "if-then" propositions.<sup>1296</sup> As Luhmann explains, a conditional program has the function of "governing the assignation of code values to cases": "The conditional program establishes conditions that determine whether something is legal or illegal."<sup>1297</sup> This raises the question of how the managing techniques, and to a lesser extent the minimizing techniques, analysed in the previous chapter, which allow states to adopt trade measures in pursuit of a particular aim, can generate a legal programme. As Luhmann points out,

From a legal perspective, the designation of an aim can only mean that measures are legal *only if* they are consistent with purposive criteria, such as criteria of causal suitability or of a

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<sup>1293</sup> MTN/P/5, para. 14.

<sup>1294</sup> The latter distinction revolves around the question of whether an action has a particular legal significance or not. For example, a law that is not made according to the proper procedures is not illegal, it is merely not law. Again, I should emphasise that this is merely a different way of describing what Hart conceptualised as secondary, power-conferring rules.

<sup>1295</sup> On the concept of "programming" and its relationship to "coding", see Luhmann 1995/2004, chapter 4.

<sup>1296</sup> Luhmann 1995/2004, 195-196/196-197, 203/202. Luhmann distinguishes conditional programs from purposive programs. For a similar observation, see the Appellate Body's distinction between "purposive" and "operative" language, with the former not a "separate obligation in itself"; Appellate Body Report, *Turkey – Textiles*, para. 57.

<sup>1297</sup> Luhmann 1995/2004, 197/197 (my translation).

reasonable means-ends relationship. A legislatively or judicially established aim cannot be more than a guideline for the determination of the conditions that can be the basis for a decision between legal and illegal.<sup>1298</sup>

The goal-orientation of managing and minimising techniques thus does not prevent them from generating conditional programs. However, "the conditional program will have to be put together (more or less) on a case-by-case basis, and experience suggests that judges will then consider stereotypical 'measures' which they consider suitable."<sup>1299</sup> As I will argue in the following section, it is because of this case-specific design of the conditional program that these techniques tend to do a poorer job at fulfilling the function of law than other techniques.

In some cases, trade lawmakers have been so reluctant to spell out the conditions for legal/illegal conduct that many have refused to recognize the product of their work as "law". The prime example is Part IV of the GATT. Hudec has described the "language of Part IV" as "a bit more legalistic" than the "non-binding texts" from which it developed, "giving the illusion of greater commitment". In Hudec's view, though, "the text of Part IV contained no definable legal obligations":<sup>1300</sup>

The drafting reached new heights in suggesting commitment where there was none. Instead of 'should', the text now said 'shall' several times. But the 'shall' never went anywhere.<sup>1301</sup>

Hudec points to qualifications such as "to the fullest extent possible"<sup>1302</sup> and formulations to the effect that developed countries shall "accord high priority", "make every effort", shall "give active consideration", and shall "have special regard"<sup>1303</sup> to one thing or another, to support his claim.

From the perspective on the form of law developed in this section, these formulations do not render the text of Part IV devoid of legal commitments. The text still has the form of a conditional program, it is just that the locus of the distinction legal/illegal has been displaced from the question of whether a developed country has, say, "refrain[ed] from introducing ... customs duties or non-tariff import barriers on products currently or potentially of particular export interest to less-developed contracting parties" to the

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<sup>1298</sup> Ibid. 202/201-202 (modified translation).

<sup>1299</sup> Ibid. 202/202 (modified translation).

<sup>1300</sup> Hudec 1987, 56.

<sup>1301</sup> Hudec 1987, 56-57.

<sup>1302</sup> GATT Article XXXVII(1).

<sup>1303</sup> GATT Article XXXVII(3).

question of whether it has done so "to the fullest extent possible".<sup>1304</sup> This displacement has no doubt rendered the conditions under which a developed country complies with the obligation more obscure, but it has not made it impossible to specify them.<sup>1305</sup>

What the reluctance by Hudec and others to recognize Part IV of the GATT as imposing legal obligations goes to show is the extent to which *form*, as opposed to *pedigree*, can influence the perception of something as "legal". I have noted above how a series of certifications for the rectification and modification of schedules that would have derived their legal validity from an amendment that never came into force, were treated by the contracting parties as though they were in force, i.e., they were treated as legally binding. While this reflected the famous pragmatism of the GATT era, it was certainly facilitated by the fact that these certifications had a quintessentially legal form: a modified number in a schedule leaves no doubt about the conditions under which a contracting party's conduct falls into the legal or the illegal category. Thus, it was easy to treat these certifications as law, despite their lack of legal status. Part IV represents the opposite case: Its impeccable legal pedigree – Part IV was the last amendment of the GATT to come into force – could not make up for the relative obscurity of the conditions under which a contracting party's conduct falls into the legal or the illegal category. Whether a text is seen as law, then, can depend on the extent to which it clearly spells out the conditions for the application of the values legal/illegal, more than on its traceability to a validity-conferring "source".

#### **D. The Function of Law**

Lon Fuller has famously set out the "implicit laws of lawmaking", i.e., the rules that a lawmaker has to respect if she wants to succeed at making law. Conceiving of law as "the enterprise of subjecting human conduct to the governance of rules",<sup>1306</sup> Fuller contends that a lawmaker will fail to achieve this purpose if she fails to make general rules, fails to publish the rules, makes retroactive rules, makes unintelligible rules, makes inconsistent

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<sup>1304</sup> See GATT Article XXXVII(1).

<sup>1305</sup> A similar point is made at much greater length by Sonia Rolland in Rolland 2012, 119-126. Rolland also provides an overview of the jurisprudence on Part IV at 145-152.

<sup>1306</sup> Fuller 1964, 96. For a more complex conception of the function of law, see Luhmann 1995/2004, chapter 3. For Luhmann, regulating conduct and solving conflicts are performances which the law can effect; *ibid.* 157/168.

and contradictory rules, makes rules that are impossible to comply with, constantly changes the rules, or arbitrarily applies the rules.<sup>1307</sup>

Not all of these potential pitfalls are of equal concern to trade lawmakers: as regards *generality*, trade lawmakers have developed an ingenious device for reconciling individually customised obligations with a general rule: schedules.<sup>1308</sup> The question of *promulgation* is generally less of an issue where the maker and addressee of the law are identical. While the *retroactive* reach of WTO rules has been an issue in a number of disputes<sup>1309</sup>, this is not a pervasive problem and is in any case counterbalanced by the primarily prospective character of the remedies provided in the WTO system.<sup>1310</sup> *Inconsistent* rules were of some concern in the fragmented legal system of the GATT, but in the more integrated WTO system, the problem is marginal, and mostly arises in the relationship between GATT provisions and the WTO agreements developing them.<sup>1311</sup> Given the difficulties of making law in the trading system, *constant change* in the rules is certainly not a problem that those who have to comply with trade law confront.<sup>1312</sup> And what some perceive as the *arbitrary application* of trade law has been a source of concern for trade lawmakers<sup>1313</sup>, but it is the dispute settlement organs, rather than lawmakers, that are primarily responsible on this score.

In the present section, I will focus on the two remaining challenges that lawmakers confront if the law they make is to fulfil its function: the challenge to make intelligible rules, and rules with which compliance is possible. Before I examine these challenges in the context of trade lawmaking, however, I need to say more about how these challenges are bound up with the function of law.

Habermas's theory of law goes beyond Fuller's purposive conception of law by exploring why law becomes necessary as a complement to morality in human society.<sup>1314</sup>

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<sup>1307</sup> See Fuller 1964, chapter 2.

<sup>1308</sup> See the discussion of schedules in Chapter 3.

<sup>1309</sup> EC – Sardines; EC – Large Civil Aircraft; EC – Hormones.

<sup>1310</sup> See the discussion of prospective and retrospective remedies in Eeckhout 2009, 448-451.

<sup>1311</sup> Most prominently, between GATT Article XIX and the WTO Agreement on Safeguards; see Ortino 2009, 151-154; for a general discussion of norm conflict in the WTO context, see Chase 2012.

<sup>1312</sup> The concern is rather the opposite: that many rules of trade law may be outdated. As early as the Kennedy Round, the contracting parties had the sense that they were "parties to a contract which they were aware was not completely up to date"; TN.64/21, para. 21.

<sup>1313</sup> See Tarullo 2002; Greenwald 2003; and Stoler 2004.

<sup>1314</sup> Habermas 1998, 143. Habermas emphasises that this exploration is "part of a *functional* explanation, not, for instance, a normative justification of law":

According to Habermas, law alleviates the cognitive, motivational, and organisational burdens imposed by a "post-conventional morality".<sup>1315</sup>

With regard to the first element, Habermas notes that post-conventional morality only generates highly abstract norms which may be difficult to apply in concrete cases: "The problems of justification and application posed by complex questions will often overtax the analytical capacities of the individual".<sup>1316</sup> It is here that law enters the picture: positive law can make up for the "cognitive indeterminacy" resulting from the high level of abstraction of moral imperatives by spelling out what is expected from an individual in a particular situation.<sup>1317</sup> Law can thereby "alleviate the individual from the cognitive burdens of forming her own moral judgment".<sup>1318</sup>

Of course, law only fulfils this function if it is less "cognitively indeterminate" than the moral norms that it complements. To take a well-known example from the trade context: The GATT originally disciplined export subsidisation of primary products by providing that

such subsidy shall not be applied in a manner which results in [the subsidising] contracting party having more than an equitable share of world export trade in that product, account being taken of the shares of the contracting parties in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product.<sup>1319</sup>

The central concept in this provision – equity – is a moral concept, which, as successive GATT panels noted, was not further defined.<sup>1320</sup> Arguably, in terms of cognitive determinacy, the provision does not add much to what a moral discourse about the fairness of particular economic policies would have to offer. This stands in contrast to the export subsidy commitments adopted as part of the Uruguay Round Agreement on Agriculture, which are specified in a country's schedule in terms of quantities and budgetary outlays for each individual product. As Josling et al. comment,

No more is there anything like the "equitable share", and all language referring to "special factors" has gone. There is no need to debate what a "previous representative period" might

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For the legal form is not at all a principle that could be 'justified' either epistemically or normatively.  
Ibid. 143 (original emphasis, my translation).

<sup>1315</sup> Habermas 1998, 146.

<sup>1316</sup> Ibid. 147.

<sup>1317</sup> Ibid.

<sup>1318</sup> Ibid.

<sup>1319</sup> GATT Article XVI(3).

<sup>1320</sup> See GATT Analytical Index, 453-455.

be, or how to determine "displacement" or "price undercutting". If one wants to know how far an individual country can go in subsidizing its agricultural exports, one turns to its Schedule and finds precise numbers regarding its commitments.<sup>1321</sup>

While there is still scope for interpretative conflicts,<sup>1322</sup> these commitments are clearly more determinate<sup>1323</sup> than the standard of the GATT era.<sup>1324</sup>

A second way in which positive law complements morality is by compensating for the motivational deficiencies of morality. On Habermas's account, morality's demands on the willpower of individuals are buttressed by the facticity of state-enforced law.<sup>1325</sup> Habermas also identifies a third way in which law complements morality: law provides an institutional framework to translate the universal imperatives of morality, especially as they relate to positive duties, into specific competences and obligations. In other words, it allows for "a moral division of labour".<sup>1326</sup>

Law has been fulfilling both of these latter two functions to varying degrees over the history of the trade regime. The effectiveness of trade law in motivating compliance is the subject of a vast literature;<sup>1327</sup> as it is primarily a matter of dispute settlement and enforcement, however, I will only consider to what extent the way in which law is made has an appreciable effect on the prospects for compliance. The most basic way in which that is the case is expressed in Fuller's maxim that the law must be made it such a way that compliance with it is possible.

The question to which degree trade law is used to organize a moral division of labour goes to the level of institutionalisation and bureaucratisation of the trade regime. As noted above, the contract conception of trade law has severely limited the extent to which states have used this function of law in the context of the trade regime. The provision of technical assistance to developing countries by the WTO Secretariat and the increasing

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<sup>1321</sup> Josling/Tangermann/Warley 1996, 195.

<sup>1322</sup> See only Appellate Body Report, *EC – Export Subsidies on Sugar*.

<sup>1323</sup> One should note, however, that "cognitive determinacy" does not necessarily require favouring more specific over more general rules. As Braithwaite 2002 argues, whether general or specific rules are more likely to produce legal certainty depends on the circumstances.

<sup>1324</sup> One could, and should, of course ask whether this determinacy is a good thing. The point I am making here is merely that cognitive determinacy is a specific contribution that law can make to the regulation of social conduct, and that law makes this contribution to a greater extent the more determinate it is. The question of whether it is beneficial to have cognitive determinacy on what should be done in a particular area of regulatory endeavour, and hence whether we *want* law to fulfil this function, are separate questions that ultimately go to the issue of whether an area of regulatory endeavour should to be subject to law at all.

<sup>1325</sup> Habermas 1998, 148.

<sup>1326</sup> Ibid. 148-149.

<sup>1327</sup> See only Hudec 1993; Bown/Pauwelyn 2010.

involvement of the WTO in "aid for trade" are the primary examples of WTO members pooling resources and delegating tasks to meet their moral obligations to assist the poorer members of the trading system.

In sum, if we understand the function of law as complementing morality in "the enterprise of subjecting human conduct to the governance of rules", we can say that law will fail to fulfil its function (a) if it stipulates rules that are unintelligible, or not determinate enough to alleviate the cognitive burdens associated with following moral (or other) imperatives; or (b) if it stipulates rules with which compliance is impossible, and with respect to which law's special aptitude to induce compliance will thus come to nothing.

*a) Governing by Goals:<sup>1328</sup> The Limitations of Managing and Minimising Techniques*

I have already noted above that managing and minimizing techniques will tend to do a poorer job at guiding conduct than other techniques because they discipline trade policy by specifying an authorised aim, in the light of which the conditions for "legal" conduct will have to be specified on a case-by-case basis. Obligations generated through managing and minimizing techniques will thus tend to be more cognitively demanding than obligations derived from other techniques. To provide a simple example: It is relatively straightforward for a country to establish whether a duty that it levies on an imported product exceeds its tariff binding, or whether a measure that it has adopted imposes higher burdens on imports from one country than on imports from other countries or products of domestic origin.<sup>1329</sup> When obligations are stipulated in terms of a goal, the implications for a country's conduct will tend to be much less clear.<sup>1330</sup> In multilateral trade lawmaking, this feature of managing and minimising techniques has caused problems in different ways.

In the case of managing techniques, wariness of the freedom of action that a state can potentially claim under the banner of an authorised goal has led lawmakers to *overcompensate* by defining exceedingly restrictive conditions under which a state can pursue the goal in question, severely diminishing the practicability of pursuing these goals

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<sup>1328</sup> The title is borrowed from Westerman 2007.

<sup>1329</sup> Admittedly, the inquiry can be more complex when a measure is not *de jure*, but only *de facto* discriminatory.

<sup>1330</sup> On the difficulties of legislating by goals, see generally Schoenbrod 1983 and Westerman 2007.

within the confines of the law. As noted in chapter 1, GATT contracting parties were not authorised to use trade measures to safeguard their balance of payments or to protect infant industries until, in the words of US negotiator Wilcox,

numerous obstacles ha[d] been surmounted, conditions fulfilled, criteria satisfied, procedures followed, and permissions obtained.<sup>1331</sup>

Even the articles providing for the management of trade that were favoured by the US, namely, the exception from the prohibition of quantitative restrictions for agricultural trade in GATT Article XI and the safeguards provision in Article XIX – provisions that, as Wilcox highlighted, became "effective without any sort of finding or approval by any international agency"<sup>1332</sup> – ultimately proved too restrictive to be workable: With regard to agriculture, the US was granted a waiver that allowed it to employ quantitative restrictions beyond the scope of GATT Article XI:2(c).<sup>1333</sup> And while the safeguards provision of the GATT was initially used with some regularity, it fell into disuse in the later decades of the operation of the GATT.<sup>1334</sup> As Sykes has argued, the WTO Agreement on Safeguards did little to resolve the perplexities regarding the conditions under which safeguards could be used, and has been interpreted by the Appellate Body in a way that makes it virtually impossible to apply safeguards in a WTO-consistent manner.<sup>1335</sup> There may of course be a number of reasons for the restrictiveness of the conditions for the use of managing techniques in GATT/WTO law. Hostility towards the stability narrative from those who see the purpose of trade law exclusively in terms of liberalisation is certainly an important factor. However, I argue that the necessity to compensate for the cognitive indeterminacy of disciplines formulated in terms of a goal by establishing highly determinate (and potentially over-determinative) conditions under which those goals may be pursued is at least part of the explanation. The legal problems resulting from this "overuse" of law are thus to some extent a symptom of the limitations of managing techniques in fulfilling the cognitive function of law.

In the case of minimising techniques, the cognitive indeterminacy engendered by formulating disciplines in terms of a goal has been more plainly in view: thus, the attention

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<sup>1331</sup> Wilcox 1949, 493. It is certainly no coincidence that these provisions are among the longest articles in the GATT; Article XII runs to 3 pages, and Article XVIII to 7 pages – the longest by far.

<sup>1332</sup> Wilcox 1949, 493.

<sup>1333</sup> For background, see McMahon 2006, 1-3; Josling/Tangermann/Warley 1996, 26-29.

<sup>1334</sup> Sykes 2003.

<sup>1335</sup> Sykes 2003; Sykes 2004.

of litigators and commentators has focused on the appropriate *means* to achieve the authorised goal, rather than the *conditions* under which the goal can be pursued in the first place. While I cannot review here the extensive debate on the interpretation of GATT Article XX, I will suggest three ways in which the trade regime's adjudicatory organs have coped with the indeterminacy of obligations to minimise the trade effects of the pursuit of "non-trade" goals. First, the adjudicatory bodies have gone some way in reformulating the purposive programme of the necessity test into a conditional program.<sup>1336</sup> Thus, GATT and WTO panels and the Appellate Body have clarified some of the conditions under which a measure will be considered "necessary".<sup>1337</sup> Second, in what can be understood as a corrective move to the first approach, the Appellate Body has introduced a "weighing and balancing" test that has restored some of the flexibility that had been lost by reformulating the necessity test as a series of rigid "if-then" propositions.<sup>1338</sup> While this was arguably motivated by the political sensitivity of striking down measures pursuing objectives such as the protection of health and the environment, it has re-opened up space for broader considerations of appropriateness,<sup>1339</sup> or, to put it less charitably, for the use of Luhmann's "stereotypical 'measures'" as yardsticks for "necessary" measures.<sup>1340</sup> Third, the Appellate Body has also been able to sidestep the indeterminacy inherent in minimising obligations to some extent by shifting the emphasis from these obligations to the more comfortable terrain of non-discrimination obligations that apply cumulatively with the minimising obligation, such as the chapeau of GATT Article XX and Article 2.1 of the *TBT Agreement*.<sup>1341</sup>

In sum, the deficiencies of managing and minimising techniques in fulfilling the cognitive function of law have led, in the case of managing techniques, to attempts to

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<sup>1336</sup> Cf. Luhmann 1995/2004, 202/201-202.

<sup>1337</sup> Starting with GATT Panel Report, *US – Section 337*, para. 5.26. In the SPS Agreement, the conditional program is established legislatively; see *supra* text at fn 1140.

<sup>1338</sup> Appellate Body Report, *Korea – Beef*; as Ortino has put it, the Appellate Body had to respond to the "diverging needs of 'flexible application' and 'legal certainty'"': While the Appellate Body "tries to provide the elements upon which to base a 'necessity' determination", it also "recognizes the inescapable and indispensable flexibility in applying concepts such as the 'necessity' requirement"; Ortino 2009, 144. See also the discussion in Trebilcock/Howse 2005, 541-545, and Lang 2011, 320-323.

<sup>1339</sup> See also Lang 2011, 6, identifying "ambiguity-producing complexity" as one of the "characteristic features" of the Appellate Body's jurisprudence. Lang argues more broadly that the indeterminacy of trade law is such that its interpretation will inevitably be informed by a sense of political appropriateness.

<sup>1340</sup> Luhmann 1995/2004, 202/202.

<sup>1341</sup> Cases in which a measure passed muster under the necessity test or another of the subheadings of GATT Article XX, but was found wanting under an accompanying non-discrimination obligation, include *US – Gasoline*, *US – Shrimp*, *Brazil – Tyres*, *US – Clove Cigarettes* (the Panel's finding of consistency with Article 2.2 was not appealed), and *US – Tuna (Mexico) II*.

restrict the scope of these provisions by imposing restrictive thresholds for their use. In the case of minimising techniques, the uncertainty is still there; the trade regime's adjudicatory bodies have avoided it to some extent by emphasising discriminatory elements of the measures at issue.

Managing techniques are potentially flawed in another respect, as well, namely, when they stipulate an aim the achievement of which is wholly or partially outside the control of the parties to the agreement. The most striking example of the use of managing techniques in this way are commodity agreements that formulate obligations in terms of price ranges without regulating the factors determining supply and demand of the product in question. This was the basis for the US's growing opposition to commodity agreements in the early 1970s:

We must make it abundantly clear at the outset that we will not be diverted during the course of the negotiations by proposals to use multilateral commodity arrangements that seek to deal with prices. Experience has proved beyond the shadow of a doubt that international arrangements dealing with prices – and that do not and cannot deal with production and trade policies affecting exports and imports – are bound to fail, because these policies are the primary determinants of price. The price ranges of agreements often have proved to be inconsistent with the underlying supply and demand situation, therefore they could not accommodate to sudden changes in the supply-demand curve ... let us be firm in our resolve not to go through another 'agreement' exercise aimed at organizing world trade in wheat and possible other commodities along rigid lines. As we have learned, agreements are not the answer to trade problems.<sup>1342</sup>

To a lesser degree, the problem is also present in other obligations: for example, whether a party complies with its domestic support commitments under the Agreement on Agriculture depends to some extent on factors outside the party's control, such as the world price of the agricultural products which the party subsidises, and the exchange rate of its currency. Even where factors outside the party's control do not make compliance impossible (which would violate one of Fuller's laws of lawmaking), designing legal obligations in this way likely diminishes the law's ability to motivate compliance. Thus, a party will tend to make fewer efforts to comply if there is a prospect that other factors may bring it into compliance; and while the ability to blame those factors – if at any point it is

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<sup>1342</sup> FRUS 1973-1976, 615-616.

found to be non-compliant – will not save the party as a legal matter, it will at least have some politically face-saving effect.<sup>1343</sup>

### ***b) Governing by Proxy: The Challenge of "Structural Coupling"***

I have hypothesised above that dissatisfaction with trade law focuses on those elements of the law that attempt to take cognisance of the logic of other idioms, disciplines or systems, such as the economy, the sciences, politics or morality. One often encounters complaints, for example, that "WTO rules do not make full economic sense",<sup>1344</sup> warnings that "the WTO should not set itself up as an arbiter of objective science",<sup>1345</sup> and concerns that trade law might "rob democratic communities of sovereign regulatory choices."<sup>1346</sup> As I argue, this dissatisfaction reflects the challenges of "coupling" the trade regime with these other systems.<sup>1347</sup>

A trade lawmaker faces two basic options for addressing this challenge: The first choice is to *incorporate* the concepts, standards, and knowledge claims of other systems directly into the law. In legal theory, this strategy of incorporation is perhaps best known in the context of the law's relation to morality. Thus, legal rules frequently incorporate moral concepts, such as "reasonableness" and "fairness"; in trade law, as noted above, we find the concept of an "equitable share of world trade". Trade law also provides examples of the reliance on the knowledge claims of systems other than morality. Thus, under the SPS Agreement, measures taken to protect human, animal or plant life or health have to be "based on scientific principles" and must not be "maintained without sufficient scientific evidence".<sup>1348</sup> It is hard to see how an adjudicator could answer the question whether a measure is "based on scientific principles" without asking a scientist. Similarly, it is difficult to see how an adjudicator could assess the economic harm resulting from a trade

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<sup>1343</sup> This problem is not unique to trade law; indeed, it would appear to be a minor problem in trade law as compared to a field such as climate change regulation, where legal obligations are formulated in terms of emissions targets. Emissions are notoriously subject to factors wholly or partially outside the parties' control, such as economic activity and climatic conditions.

<sup>1344</sup> Pauwelyn 2013b, 238.

<sup>1345</sup> Lang/Cooney 2007, 543, referring to a concern widely shared in the literature.

<sup>1346</sup> Howse 2000, 2330.

<sup>1347</sup> I borrow the idea of conceiving of these subject matters as "systems" from Niklas Luhmann. On Luhmann's conception of "systems" and the concept of "structural coupling", see Luhmann 1992.

<sup>1348</sup> SPS Agreement, Article 2.2.

restriction (the "level of nullification or impairment"<sup>1349</sup>) without relying on economic expertise. In these cases, then, trade law seeks, as far as possible, *unmediated* access to the knowledge of other systems.<sup>1350</sup>

One problem posed by this kind of coupling is that the knowledge produced by other systems may not always fit the requirements of the law: as I put it above, these systems do not necessarily generate an easily observable metric onto which the legal system can map its legal/illegal distinction. Thus, it has been argued that, when it comes to complex ecological systems, "scientific understanding [i]s necessarily partial and provisional".<sup>1351</sup> Such knowledge may not provide clear guidance on whether a particular measure is supported by "sufficient scientific evidence". Alternatively, the question asked by the law may not make any sense in a different system. For example, economists have been perplexed by the meaning of the notion that increased imports "cause" "serious injury" to domestic producers, since from an economic perspective imports and the health of domestic producers are both endogenous variables that are explained by underlying factors such as input costs, consumer incomes, and productivity.<sup>1352</sup> Finally, the incorporation of moral concepts such as equity may detract from law's ability to fulfil its function to provide clear guidance for conduct. In sum, the problem with seeking direct access to the knowledge of other systems is that the knowledge provided by these systems may be unfit for law's requirement of clear and final decisions.<sup>1353</sup>

A second way in which trade lawmakers can seek to couple law with other systems is by developing legal proxies for events and effects in other systems.<sup>1354</sup> The use of such proxies is arguably a pervasive phenomenon in trade law, particularly in relation to economics. As Pauwelyn has argued, the drafters of the WTO agreements employed "a

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<sup>1349</sup> DSU Article 22.4; see Pauwelyn 2012 on the use of economic expertise in WTO dispute settlement.

<sup>1350</sup> Of course, completely unmediated access is impossible; access is still mediated by law in numerous ways, for example, by procedural rules for the selection of experts etc. The point of these rules is to secure the highest quality of knowledge provided by other systems.

<sup>1351</sup> Lang/Cooney 2007, 543.

<sup>1352</sup> Sykes 2003, 266; Sykes notes that "[a]gainst this backdrop, the question 'did increased quantities of imports cause serious injury to a domestic industry?' is simply incoherent"; *ibid.* 267.

<sup>1353</sup> Another problematic aspect of law's "coupling" with other systems is how law in turn affects the operation of these systems, as they seek to respond to the needs of the law; for the effects of the GATS Agreement on the production of knowledge on international trade in services, see Lang 2009; for the potential impact of the demands of the SPS Agreement on regulatory decision-making, see Lang/Cooney 2007, 544-545.

<sup>1354</sup> The term "proxy" is also used by Pauwelyn 2013b, 236:

The test of 'control' by the government (e.g. through ownership or the right to appoint directors), that is, the test upheld by the Panel in this dispute (and previous Panels before it) is a more objective test and more workable, even though it does remain a proxy.

number of 'legal fictions'" "to simplify matters".<sup>1355</sup> Pauwelyn has compared the "legal fictions" employed by negotiators for different scenarios with respect to the treatment of the cumulative application of anti-dumping and countervailing duties. Thus, in the case of export subsidies, negotiators decided to prohibit cumulation on the basis of "the simplifying assumptions or 'legal fiction' that an export subsidy will have no impact on domestic prices and fully pass through into lower export prices".<sup>1356</sup> In the case of domestic subsidies, on the other hand, negotiators

'assumed' something different and, to simplify complex economic effects, worked on the basis of another 'legal fiction', namely that domestic subsidies pass through to the same extent into both domestic and export prices so that a prohibition on cumulation is not warranted.<sup>1357</sup>

Thus, instead of seeking unmediated access to the knowledge of other disciplines, trade lawmakers can adopt simplifying assumptions about events and effects in other systems and use these assumptions as proxies for the "real" events and effects. These proxies can then in turn be employed as the foil for legal obligations. In Pauwelyn's example, instead of having to engage in the "messy" exercise of "measuring the exact degree of cumulation",<sup>1358</sup> an adjudicator will simply have to establish whether the subsidy which is applied cumulatively with an anti-dumping duty is an export subsidy or a domestic subsidy in order to apply the legal/illegal distinction to the conduct in question. Proxies thus allow law to fulfil its function of providing guidance with some determinacy.

In a different way, proxies have also become an increasingly popular device for managing the interface between trade law and science. The proxies considered in this context have been largely of a procedural nature.<sup>1359</sup> Instead of passing judgment on the substantive regularity choices of WTO members, which presupposes direct access to scientific expertise, the WTO adjudicator would instead police the procedural quality of the regulatory process of WTO members.<sup>1360</sup> While some authors see this role of the

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<sup>1355</sup> Ibid. 237.

<sup>1356</sup> Ibid. 237-238.

<sup>1357</sup> Ibid. 238. (emphasis omitted)

<sup>1358</sup> Ibid. 239.

<sup>1359</sup> Given what is at stake in disputes under the SPS Agreement, the kind of substantive proxies that trade law routinely employs with respect to economic questions would hardly be acceptable with regard to scientific questions.

<sup>1360</sup> For a review of the jurisprudence and literature on the "proceduralisation" of WTO review of domestic regulation, see Lang 2011, 324-330 (in the context of GATT Article XX) and 330-343 (in the context of the SPS Agreement).

adjudicator as valuable in itself, since it can enhance the democratic quality of decision-making in WTO members,<sup>1361</sup> one can also interpret the analysis of procedural questions as a proxy for the quality of the scientific judgment reflected in the decision adopted by the member.<sup>1362</sup> It is a proxy that is immediately intelligible to law – for example, in terms of administrative law concepts such as due process, transparency, and participation –, and thus gives trade law a reasonably clear metric for applying the legal/illegal distinction.

To provide a final example of the use of a proxy in trade law: In the context of the regulation of measures protecting human health and the environment, trade law not only has to contend with scientific evidence, but also with democratic value choices. Trade lawmakers have attempted to capture the element of democratic choice with the concept of an "appropriate level of sanitary or phytosanitary protection" that a member may choose.<sup>1363</sup> Given that it is virtually impossible to directly "observe" a country's value choices and attitudes to risk, trade lawmakers have used the level of protection that is "embodied" in the measure at issue as a proxy for these choices and attitudes.<sup>1364</sup>

The use of proxies in trade law has met with several types of criticism. One type of criticism is, predictably, that proxies often capture one type of conduct, but not another type of conduct which has equivalent effect.<sup>1365</sup> This criticism goes to the "responsiveness" of the legal standard to the underlying phenomenon, to the extent to which legal proxies can mirror the phenomena they try to capture, or, in Luhmann's terminology, to the complexity of law's "internal reconstruction of its environment".<sup>1366</sup>

In some cases, the alleged mismatch between legal proxies and the "real" world can be easily remedied by, for example, extending a prohibition on one type of conduct to

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<sup>1361</sup> See e.g. Howse 2000.

<sup>1362</sup> Arguably, the extensive use of procedural standards regarding the administration of trade remedies can be read as serving this double purpose as well: On one hand, these standards embody core principles of administrative law that are central to any system of accountable government; their observation is thus, to some extent, an end in itself. On the other hand, there is also the expectation that following these procedures will lead to more "accurate" substantive outcomes. For example, in the wake of a recent WTO dispute between the United States and China, in which China was faulted for violating a number of procedural obligations in a trade remedy investigation, a USTR attorney expressed the hope "that China will become more transparent in response to this ruling and that this will lead to 'better substantive decisions' in Beijing"; Inside U.S. Trade 2013, 8.

<sup>1363</sup> SPS Agreement, Articles 3.3, 5.5; see also TBT Agreement, preamble.

<sup>1364</sup> See Du 2010.

<sup>1365</sup> See the example of quantitative restrictions vs. export taxes; Pauwelyn 2013b, 238.

<sup>1366</sup> Luhmann 1995/2004, 225-226/219-220.

another type of conduct having equivalent effect.<sup>1367</sup> There is an obvious trade-off involved, however, which Tarullo has described in relation to the "surrogates for a direct efficiency test" used in countervailing duty law:

Efforts ... to make these tests more manageable would either make them easier to apply at the risk of substantial deviation from the presumed efficiency ends of the law or make them more consistent with the efficiency aim at the risk of turning toward direct efficiency analysis.<sup>1368</sup>

In other words, the more "true" to the "real world" a proxy is designed to be, the more complex, the less intelligible, and thus the less useful it becomes. Trade lawmakers here again confront the challenge of achieving an "adequate complexity" of the law.<sup>1369</sup>

In some instances, the underlying phenomena are so complex that any attempt to capture them through legal proxies can appear futile, and may do more harm than good. Thus, Tarullo has argued that "a trade policy intended to foster general equity and economic effectiveness cannot be based on even sophisticated legal standards".<sup>1370</sup> In Tarullo's view,

a legal standard directly or indirectly based upon efficiency norms is impossible to apply in any practical way when the actions to be judged are those of a sovereign government making economic policy decisions that cannot be realistically divorced either from the multitude of policies that constitute an economic program or from the basic political choices of a society.<sup>1371</sup>

As a consequence, Tarullo argues that trade remedy law should give up on trying to model economic efficiency, and should instead be guided by openly political choices regarding the management of the adjustment process.

#### **IV. Conclusion**

In the present chapter, I have explored why trade negotiators decided to use law for the regulation of international trade, what kind of law they have deemed appropriate for this

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<sup>1367</sup> To use Pauwelyn's example again: It would be relatively straightforward to extend the GATT's prohibition of quantitative export restrictions to export taxes. One would, however, have to confront the question of whether export taxes are sufficiently different from quantitative export restrictions (for example, in light of their potential to generate revenue) to justify treating them differently.

<sup>1368</sup> Tarullo 1987, 556. According to Tarullo, "direct evaluation of the efficiency consequences of particular government interventions is, for all practical purposes, impossible." *Ibid.*

<sup>1369</sup> Luhmann 1995/2004, 225/219.

<sup>1370</sup> Tarullo 1987, 551.

<sup>1371</sup> Tarullo 1987, 556, fn 26; for a similar view in relation to international disciplines on subsidies, see Sykes 2010, 474-475.

purpose, and how law affects the process of its own making. In the course of the analysis, I have briefly sketched what could be regarded as the dominant view on each of these three questions.

With respect to the first question – why law? – the benefits that come with the "security and predictability" of a "rules-based" trading system are almost universally recognised as a major contribution that the trade regime makes to the global economy, and these benefits are now regarded as valuable – although not necessarily for exactly the same reasons<sup>1372</sup> – across virtually the entire WTO membership. Given the US' preoccupation with establishing the "rule of law" in international economic relations in the post-war years, this view has indeed a solid, albeit partial,<sup>1373</sup> basis in the historical record.

With regard to the second question – what kind of law? – there is arguably a deep gulf between the view held by many academics on one hand and the perspective of the WTO membership on the other hand. Following in the footsteps of John Jackson, it is commonplace for academics to regard the trading system as in some way a constitutional entity, a view that has gained particular currency in light of the exclusive and compulsory jurisdiction of the WTO's dispute settlement organs, and of the possibility to enforce their rulings through officially authorised and supervised trade sanctions. There is little to no evidence, however that this view of the trading system is shared by the participants in trade lawmaking; instead, the model that has been consistently invoked by trade negotiators, particularly those from developed countries, is that of the private law contract.

The third question – how does law shape the process of its own making? – has received relatively little attention and has primarily been analysed with respect to the extent to which concurrent or prospective dispute settlement influences the lawmaking process.

In an attempt to disturb and move beyond these views,<sup>1374</sup> I have taken up and pursued two insights from the previous chapters. The first insight relates to the central role of reciprocity in multilateral trade lawmaking, and in particular the close kinship between the principle of payment and "hard" law. Thus, a key claim that I have made in the first part of this chapter is that the choice for law is partly explained by the need to use legal

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<sup>1372</sup> See Steinberg 2004, 250, on the different reasons that the US and other countries had for supporting the legalisation of dispute settlement in the trade regime.

<sup>1373</sup> Recall the discussion of the different conceptions of the historical significance of the trading system in Chapter 1.

<sup>1374</sup> I will immediately admit that the simplified representations of these views that I have given here do not come close to doing justice to what are often extremely sophisticated and diverse positions.

commitments as units of payment. As I have argued, the rigid either/or character of law made it particularly suitable to serve as a medium of payment. This perspective offers a necessary corrective to the "rule-of-law" interpretation of the choice for law, since it can explain why some subject matters were *not* subject to legal rules in the trading system, even though the "rule-of-law" rationale would have applied to these subject matters with equal force.

I explore this limiting effect of the link between law and payment in the second part of the chapter. Under the contract conception of international trade law, only a concession that has been paid for is one to which the beneficiary is entitled as a matter of law. The most significant manifestation of this principle is the "non-contractual" character of the developed countries' preference schemes in favour of developing countries. Since the developing countries have not "paid" for it, their preferential access to the developed countries' markets is not guaranteed as a matter of law. But that is not the end of it: the "non-contractual" character of preferences has not only meant that preferences cannot be legally enforced, but also that they are not an appropriate subject for discussion and negotiation in the multilateral trading system: the developing countries' attempt to negotiate preferential rates or preference margins in the Tokyo Round was rejected out of hand by the developed countries. As a result, the contract conception of international trade law has not only shaped the form of legal commitments in the trade regime, but also served a gate-keeping function with respect to what subject matters the trade regime will address.

In the third part of the chapter, I identify a further effect of the contract conception of international trade law: a contract does not preclude the conclusion of other contracts, or its replacement with a new contract, as a constitution arguably would. The contract conception has therefore legitimised the creation of autonomous codes in parallel to the GATT in circumvention of the amendment provisions of the GATT, and facilitated the GATT's ultimate replacement with a new contract, the WTO Agreement. While the establishment of the WTO represents a marked change in this respect, as new plurilateral agreements now need to be sanctioned by the entire membership, other aspects of the contract conception, not least those relating to the link between payment and hard law, remain alive.

The second insight from the previous chapters that I have taken up relates to the effects and limitations of legal techniques. In Chapter 3, I analysed the risks of partiality,

entrenchment, and abstraction that arise in the use of tools such as benchmarks, schedules, and formulas in multilateral trade lawmaking. In the present chapter, I have taken this discussion further by probing how the form and function of law circumscribe what trade law can achieve. The form and function of law, I have suggested, impose limits on the law's capacity to accommodate managing and minimising techniques, and on its ability to appropriate the knowledge of other "systems", such as the economy, science, and the political system, for its purposes. These limits arise from two sources: first, the *conditional* form of law stands in tension with the goal-orientation of managing and minimizing techniques; and second, the law's *functional* requirement of a cognitively determinate basis for applying the legal/illegal distinction stands in tension with the indeterminacy of purposive programmes as well as with the nature of the knowledge produced in other systems.

I have only been able to analyse the strategies employed by trade lawmakers in order to deal with these tensions in a preliminary and tentative manner. With respect to managing and minimising techniques, I have argued that lawmakers (and adjudicators) have attempted to shift the focus of the analysis away from the purposive program in question and onto more comfortable terrain: in the case of managing techniques, lawmakers have sought to circumscribe the freedom of action that a state can potentially claim in pursuit of an authorised goal by establishing exceedingly restrictive conditions that a state has to meet in order to be allowed to pursue that goal in the first place; in the case of minimising techniques, adjudicators have used levelling provisions applying cumulatively with the purposive programme in question, such as the *chapeau* of GATT Article XX, to take some of the weight off the necessity analysis. I have also analysed trade lawmakers' attempt to "couple" trade law with events and effects observed in other systems through the use of proxies or "legal fictions".

What I have attempted to bring out in this discussion are the trade-offs that lawmakers face when they try to reconcile the goal-orientation of managing and minimising techniques, as well as the knowledge of other systems, with the formal and functional requirements of law. Defining restrictive conditions for the use of managing techniques gives adjudicators a clear basis for applying the legal/illegal distinction, but can also make it impracticable to pursue the goal in question within the confines of the law. Allowing adjudicators to focus on discrimination rather than the necessity of measures alleviates their

burden of having to pronounce themselves on the sensitive question of which policies a state can adopt in the pursuit of important regulatory objectives, but also leaves the implications of the necessity requirement relatively obscure (which of course may not be a bad thing). I have also noted the well-known dilemma that presents itself in the use of proxies: the more closely a proxy tracks the phenomena that it tries to capture, the less intelligible and useful – in other words, the less of a proxy – it is likely to become.

## Conclusion

It has not been the aim of this thesis to lead the reader to any particular conclusion about the truths of multilateral trade lawmaking. A reader may well find that, whatever their drawbacks and sometimes awkward implications, these truths have, on balance, served "us" well.<sup>1375</sup> Such a reader might note that the principle of reciprocity has, after all, sustained considerable lawmaking activity for several decades, and that the conception of legal commitments as payments has provided a convenient organising device for framing what are often hugely complex negotiating problems. Such a reader might find that thinking of the trading system primarily as a bulwark against protectionism is simply the most compelling narrative that there is – after all, who should be on that picture in the Director-General's office if not Senator Smoot and Representative Hawley?<sup>1376</sup> Such a reader might further argue that trade lawmakers should stick with what they do best, namely liberalising trade, and that all experiments with managing trade – and be it through limited safeguards – have proved to be dead ends.

Another reader may be less sanguine about the effects of the reciprocity principle; she may be concerned that the principle of payment prevents trade negotiators from identifying (or acknowledging) areas of common interest; and she may find the founding story of the trading system as a paragon of the rule of law arising out of death and destruction not only uncomfortably partial as a historical matter, but also somewhat ironic in light of the fact that the present market access enjoyed by the majority of WTO members in the major markets of the world is not guaranteed as a matter of law, because it has not been paid for, and is thus at risk both from changing political currents and legislative dysfunction. Finally, she may find that trade lawmakers should remain open to a range of objectives, and should not doggedly pursue a path simply because it has been taken in the past.

The aim of the present thesis has not been to arbitrate between these (certainly caricatured) views. Rather, this thesis has fulfilled its purpose if, whatever conclusion the reader may arrive at, she or he does so with a greater awareness of the contingent and

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<sup>1375</sup> A crucial question is of course: who is the "us" here? Is it the citizens of the world? Is it the citizens of those states who have participated most actively in multilateral trade lawmaking? Or should the assessment focus on the poorest people in the world? The question of who should compose this reference group is one of the key questions that a broader normative account of multilateral trade lawmaking would have to answer.

<sup>1376</sup> See *supra* fn 586.

contested origins of the truths of multilateral trade lawmaking, a more acute sense of the trade-offs and ramifications of these truths, and a broader appreciation of the potentials and limitations of trade law. It is fitting, then, to recall some of the major ways in which the present thesis has attempted to provide the resources for such a more circumspect attitude towards the truths of multilateral trade lawmaking.

In my analysis, the ramifications of the principle of reciprocity, and more particularly, of the conception of reciprocity as payment, appear as a pervasive feature of multilateral trade lawmaking. The metaphorical conception of trade negotiations as a marketplace for the exchange of "concessions", and the understanding of legal commitments as "payments", are only the most obvious manifestations of this principle. As I show in Chapter 2, for example, the principle of reciprocity has deeply shaped conceptions of what it means to "participate" in trade lawmaking. Thus, "participation" in the trading system has not primarily carried a political meaning; a country which took part in deliberations and sought to influence the course of the evolving trade regime did not thereby become a "participant" in trade lawmaking. Instead, "participation" in trade lawmaking was analogised to its equivalent in the marketplace, where the only ones who matter are those who buy and sell. While this was often only implicit in the way that trade negotiations were organised, it was made explicit in the Kennedy Round, where only those who were prepared to pay for what they wanted were recognised as "full participants" in the negotiations and enjoyed the attendant privileges.

The principle of reciprocity has also had a profound influence on how law has been used in the trading system. As I argue in Chapter 4, there is a strong two-way link between the principle of payment and "hard" law: On one hand, the need to use legal commitments as units of payment goes a long way towards explaining trade negotiators' long-standing attachment to "hard" law. On the other hand, the principle of payment also limits the reach of law in the trading system: most significantly, only a concession that has been paid for is one to which the beneficiary is entitled as a matter of law.

Given how deeply entrenched and pervasive in its effects the principle of payment is in the knowledge practices of multilateral trade lawmaking, it is natural that destabilising this principle has been one of the central objectives of this thesis. I have tried to achieve this in a number of ways. Thus, I have pointed to the contingent circumstances of the principle's adoption for tariff negotiations in the emerging trading system. While the

principle of reciprocity had a tradition in bilateral trade agreements, most prominently in the US Reciprocal Trade Agreements programme, the adoption for the multilateral trading system of the method of bilateral tariff bargaining, in which the principle of payment is embodied in its purest form, was by no means a foregone conclusion. Instead, the method was adopted against the better judgment of the trade negotiators of the time, and the force of their reaction against this development indicates that these negotiators perceived very acutely that more than the practicality of negotiations was at stake. Among the effects feared by the trade negotiators was that the method would render bargaining outcomes unintelligible and impossible to assess in moral terms. They were also concerned about the impact of the principle on the political economy of trade, and in particular about the prospect that changes in trade policy, even if beneficial to the country which considered implementing them, would only be made in response to payment. The adoption of the principle of payment for the trading system was thus not only contingent (on the domestic political constellation in the US), but was also contested from the start.

In Chapter 1, I have also extensively discussed the effects of the reciprocity discourse on the dynamics of multilateral trade lawmaking. One of these effects, which I believe is particularly consequential, is the extreme difficulty of recognising and correcting policy mistakes in the trading system. Quite apart from the practical difficulties of amending WTO law, this effect comes about because the reciprocity discourse can only describe policy failures, such as – from the perspective of most WTO members – the adoption of the TRIPS Agreement in the Uruguay Round, as instances of 'overpayment' by those who suffer the consequences of a given failure. It thus encourages the idea that the problem can be remedied by the conclusion of a new 'bargain' that would be balanced in favour of those who overpaid the last time around. As I have argued, this perspective not only cuts short the critical engagement with past negotiating results, but also prompts negotiators to think of the regulatory policies and values in question as fungible commodities that can, if necessary, be traded off against each other.

Finally, I have explored alternatives to lawmaking based on reciprocity; the cooperative approach to trade lawmaking that was adopted in the context of the Programme for the Expansion of International Trade in the 1950s differed in fundamental ways from lawmaking based on reciprocity. This approach involved the analysis of obstacles to trade in light of a common objective, and relied on collective pressure, rather than payment, to

achieve changes in trade policy. Its failure can in large part be attributed to the extent to which the principle of payment had already been entrenched at the time, especially among the developed countries.

My analysis of the techniques of trade lawmaking in Chapters 3 and 4 has a somewhat different impetus than my discussion of the reciprocity discourse. These techniques are of central importance for multilateral trade lawmaking: they effectively circumscribe the universe of what trade law can do. At the same time, they are essentially a set of tools, and their impact depends on how they are used in particular instances of lawmaking. The effects of the techniques of trade lawmaking are thus much more indeterminate than the effects of the reciprocity discourse.

My discussion of the techniques of trade lawmaking has served a dual purpose: first, I have sought to give a sense of the range of techniques that trade negotiators have developed, and thereby give an indication of the possibilities, but also the limits, of the technical repertoire of trade law as it currently exists. Second, I have sought to reveal the trade-offs and risks involved in the use of particular techniques. In Chapter 3, for example, I have shown how the use of modalities can increase the intelligibility of negotiating outcomes at the aggregate level, but only at the cost of removing the negotiations from the concrete substantive issues that are at stake. In Chapter 4, I have explored how the use of legal proxies requires striking a balance between, on one hand, the desire to "track" events and effects in other systems as closely as possible and, on the other hand, the need to preserve the simplicity and clarity of the proxy, which is essential if the proxy is to fulfil the law's function of providing cognitive determinacy. In respect of both the use of modalities and the use of proxies, negotiators thus have to define what constitutes "adequate complexity" – a question that itself illustrates the open-textured nature of lawmaking techniques.

## **Appendix: The Market Metaphor of Multilateral Trade Lawmaking<sup>1377</sup>**

- **"Market"**

- Hoekman/Kostecki 2001, 25:  
"the WTO is ...a forum for the exchange of liberalization commitments. That is, it is a market."
- Collier 2006, 1425:  
"basically a marketplace for OECD countries to strike deals for reciprocal trade liberalisation";
- Lang 2011, chapter 8, *passim*.

- **To "buy"**

- Hoekman 1988, 212:  
"developing countries may have to show a willingness to 'buy' the type of safeguards agreement they want";
- Finger 1995, 290:  
"A VER *buys* back previously sold market access";
- Gerhart 2000, 370:  
the developed countries "bought" TRIPS".

- **To "bank"**

- Hoekman 2013, 758:  
"trading partners will simply 'bank' its reforms and not recognize them as 'concessions' in a future multilateral trade round".

- **To "purchase"**

- FRUS 1947;
- Wilcox 1947, 4:  
US tariff reductions "would be used to *purchase* equivalent reductions in foreign tariffs and in other barriers to trade".

- **To "sell"**

- Paemen/Bensch 1995, 41:  
"the industrialised countries were able to 'sell'" the liberalisation of textile trade "as a genuine concession";

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<sup>1377</sup> The quotations are listed in chronological order; all emphases are added.

- *ibid.* 115:

"Behind this attitude lay the suspicion ... that the automatic extension of concessions had led to U.S. interests being *sold* off at rock-bottom prices in earlier multilateral negotiations";

- Finger 1995, 290:

"A VER buys back previously *sold* market access".

- **"Payment"; to "pay"**

*From negotiating records and official documents:*

- E/PC/T/A/PV/22:

"a procedure, under which we should return to certain countries part of the price they were *paying* for the benefits conferred upon them by the other nations of the world";

- E/CONF.2/W.15:

"Members ... will not be called upon to *pay* an unreasonable price for continuing to enjoy concessions already granted to other Members";

- L/2002, 2:

countries expected "to *pay* fully for all benefits received";

- GATT 1960, 9:

"The Member States will, of course, be expected to *pay* compensation for increases in the form of duty reductions on other items in the common tariff."

- *Ibid.* 9:

"The 'entrance fee' which an acceding country has to *pay* under this procedure is likely to vary considerably. A country with a diversified export trade will ... be expected to *pay* a bigger 'entrance fee' than a country whose export trade consists of a few products."

- FRUS 1961-1963, 522:

"the United States *paid* compensation for certain changes which it had made since the last tariff negotiations in 1956";

- FRUS 1964-1968, 818:

US representatives "asked the question (unanswered) what the Community would be willing to *pay* for a U.S. concession on petroleum if it were available";

- MTN/P/5, 68:

"Canada would ... be able to adjust its tariff rates ... as a matter of right and without being expected to *pay* compensation";

- FRUS 1973-1976, 629:

The US "must *pay* for agricultural concessions with industrial concessions";

- C/M/191:  
"developing countries could not be expected to make further contributions towards something for which they had already *paid*" (Nicaragua);
- 4SS/SR/1, 5:  
"The dismantling of measures not consistent with GATT was not a concession and should not require *payment*" (Chile);
- MTN.TNC/MIN(94)/ST/38, 2 (India):  
"It is disingenuous to expect that developing countries need to *pay* for this integration and are obliged to offer reciprocal market access.";
- Statement of India to the TNC on 2 February 2011, reaffirming a statement by a Swiss minister:  
"those who ask for more have to *pay* more";
- TN/AG/26, 3 (Chair's Report):  
It remains to be seen "what *payment* would be required" for Japan and Canada to designate additional products as "Sensitive Products".

*From the academic literature:*

- Curzon 1965, 59:  
concessions were spread "to other countries unwilling to '*pay*' for them" (referring to arguments made in the pre-GATT period);
- Ibid. 73 and fn1:  
"knowledge that a second or third country is willing to *pay* something too"; a supplier "may declare that as he has '*paid*' for the present tariff position the new concession may 'invalidate' his original '*payment*', he must therefore be *compensated* by a new equivalent concession";
- Ibid. 103:  
"those who can 'afford' to *pay* for such concessions will be asked to make their contribution"
- Patterson 1966, 285, fn 27:  
"A few such concessions were made [by the US to third countries in exchange for concessions by those countries that benefitted Japan, N.L.] and were '*paid for*' by Japanese concessions to the United States";
- Jackson 1969, 219:  
"If '*unpaid*' benefits thereby flowed to GATT members, it would be possible in most GATT negotiations to seek '*payment*' for those benefits";

- Hudec 1970, 616:  
"one country's tariff reductions being *paid* for, in theory, by the reductions on the other side";
- Curzon and Curzon 1973, 305:  
the acceding government "pays an entrance fee in exchange for all the benefits and concessions that have already been negotiated in the past"; "many former dependencies enter without any *payment* at all";
- Ibid. 311:  
countries having bilateral MFN treaties with the United States "obtain the benefits of concessions negotiated by the United States in GATT without '*paying*' for them";
- Rivers/Greenwald 1979, 1454:  
"there was to be no *payment* in terms of improved discipline over subsidies";
- Hudec 1987, 7:  
Reciprocal trade liberalization is "based on full *payment* by the other party";
- Ibid. 17:  
Reductions in US trade barriers must be "*paid* for" with other countries' trade barriers (paraphrasing the US position);
- Tussie 1987, 27:  
"To keep an eye on reciprocity, the principal supplier is the one made to '*pay*' in kind for the concession";
- Winham 1986, 187:  
"What had caused the problem was the demand by the American negotiators that they be '*paid*' something for dropping the ASP and final list, in order that they would have a more reciprocal package to present to Congress. The demand for *payment* had angered the Europeans, who hardly felt that a party violating GATT law through the stratagem of a grandfather clause should be compensated for ending the illegality";
- Ibid. 260:  
"EC negotiators felt that they had already paid full value" for a concession;
- Ibid. 364:  
"reciprocity led negotiators to demand payment for the actions they took"; "the U.S. demand that it be paid for" a concession;
- Ibid. 372:  
"the EC ... *paid* for this benefit by rewriting European customs practices";
- Hudec 1992, 75:  
"developing countries viewed the Uruguay Round as the opportunity to receive *payment*" for their unilateral reforms ... [s]ome *payment* was made on tropical products";

- Ibid. 76:  
"proposing to *pay* for all the new developing country concessions";
- Ibid. 76-77:  
"developing countries ... were simply making a late payment for the trade access that developed countries had given them";
- Ibid. 77:  
"the new developing country policies do not constitute 'full payment.' Full payment would require that the developing countries have their markets as open as those of the U.S. in all respects";
- Finger 1995, 290:  
"... exporters who had *paid* for the initial concession";
- Hart 1995, 207:  
the European Community "was not prepared to *pay* for these new rules on the basis of a major reform of agricultural trade";
- Paemen/Bensch 1995, 54:  
"the developing countries feared that any concessions they obtained from industrialised countries in the area of goods might involve *paying* a price in the area of services";
- ibid. 76:  
"It [MFN, N.L.] enables a large number of countries which have done absolutely nothing to earn the privilege to benefit from a concession for which only the original negotiating countries have '*paid*'. ... each country will sooner or later benefit from negotiated concessions '*paid* for' by others";
- ibid. 98:  
the EC's "enthusiasm for 'legal globality' might be inspired by the notion that it could '*pay* for' its agricultural protectionism with concessions elsewhere";
- ibid. 115:  
"many countries had gained advantages without '*paying*' for them";
- ibid. 138:  
There would not be "any *payment* in return for the elimination of the grey area";
- ibid. 208:  
"According to GATT rules, if a direct cause-and-effect link can be established between a subsidy and a drop in imports, the main beneficiaries of the binding, who in effect '*paid* for' the original concession, are entitled to demand that the original value of the concession be restored";

- Finger, Reincke, and Castro 1999, 3:  
the essence of the "mercantilist bargaining model" is the principle that "what you get is what you *pay for*";
- Gerhart 2000, 370:  
"price the United States had to *pay* to secure the intellectual property rights";
- Abbott/Snidal 2002, 193:  
in the WTO, "you get what you *pay for*" (citing a USTR official);
- Tarullo 2002, 173 and fn 228:  
"It looks ... as if the United States must '*pay*' twice to obtain discretion to choose among 'permissible' legal interpretations ... Members that challenge U.S. anti-dumping administration will have obtained a concession without *paying* for it. ... The United States might have been willing to '*pay*' more for such a standard ..."; see also *ibid.* fn 228, referring to "costs", "pay", and "price";
- Gallagher/Stoler 2009, 377:  
"in a redistributive framework, you cannot ask the poor for cuts in trade barriers if you define them as a *payment* or a concession made to other economies, including the rich".
- Lester 2012:  
"Under Article 28, Ukraine should '*pay*' for tariff increases by lowering tariffs on other goods"; Rolland 2012, *passim*.

The formulation that a member had to "pay" for concessions was also used by former and current trade negotiators and WTO officials whom I interviewed.

- **"Free rides"; for "free"**
  - Jackson 1969, 40
  - Stiglitz/Charlton 2005, 92
  - Sykes 2006, 6:  
"existing members are unwilling to extend these benefits to new members for *free*".
- **Getting something "in return"**
  - FRUS 1961-1963, 456:  
"Since we will seek from other countries tariff reductions of much greater depth than we will be able to offer in return, we need to be able to make reductions on as broad an amount of trade coverage as possible";
  - Paemen/Bensch 1995, 108-109, characterising a possible negotiating approach for the EU during the Uruguay Round in the following terms:  
"I have something to offer which you all want - ... [w]hat are you willing to offer me in return?" Paemen and Bensch comment: "Despicable though this attitude may seem, trade

negotiations are not for the faint-hearted. When employed correctly, this strategy is one of the most effective available to the negotiator. The Americans used it with considerable flair in the area of industrial tariffs throughout the Uruguay Round."

- **"Compensation"**

- GATT 1960, 9:

"The Member States will, of course, be expected to pay compensation for increases in the form of duty reductions on other items in the common tariff."

- Curzon 1965, 73, fn 1

- Evans 1971, 10:

"Where two exporting countries stood to benefit substantially from a tariff concession, the offer could be, and often was, made contingent on the receipt of 'compensation' from both."

- FRUS 1964-1968, 800:

"Countries must be willing to register debits and credits in individual areas and look for *compensation* within the total Kennedy Round package";

- Wigham 1986, 82, fn 30:

"In the Kennedy Round, the U.S. negotiators had argued that the EC should *compensate* the United States for the removal of the ASP".

- Paemen/Bensch 1995, 39:

developing countries were offered "*compensation*" in the form of liberalization of textiles trade in exchange for taking on commitments in services trade;

- GATT/CPS/5.

- MTN/P/5, 68.

- TN/AG/W/4/Rev.4, fn. 19:

"Switzerland shall *compensate* with new market access opportunities equivalent to 1 per cent of domestic consumption."

- FRUS 1964-1968, 787, para. 28:

"The United States initial negotiating position is that this offer is in itself more than equivalent *compensation* for the Community's present maximum offer".

- **"Bill"**

- Paemen/Bensch 1995, 79:

"a particular effort at liberalisation in the area of trade in tropical products was one of the items on the *'bill'* presented to the industrialised countries in return for the launch of the New Round in general and, more particularly, the inclusion of the new subjects."

- **"Debit"**

- FRUS 1964-1968, 787, para. 31:  
"an agreement might leave *debts* and credits to be balanced off in the final stage of the negotiations";

- FRUS 1964-1968, 800:  
"Countries must be willing to register *debts* and credits in individual areas and look for compensation within the total Kennedy Round package".

- **"Credit"**

- FRUS 1964-1968, 787, para. 31:  
"an agreement might leave debits and *credits* to be balanced off in the final stage of the negotiations"

- FRUS 1964-1968, 800:  
"Countries must be willing to register debits and *credits* in individual areas and look for compensation within the total Kennedy Round package"

- Canada, MTN/TAR/W/18, 2:  
The proposal to use weighted average reductions would "take into account the need to give *credit* for tariff reductions of greater than such linear cut as might be hypothesized and to give proper *credit* for tariff cuts less than an agreed level, i.e. for what might be called partial exceptions."

- COM.AG/W/77, 15:  
"the country may claim negotiating credit"

- Oxley 1990, 75:  
"The Americans did not accept the argument that the EC measures created '*credit*' that others now had to match by cutting back their own production";

- Paemen/Bensch 1995, 152:  
"In the developing countries' view, 'exploiting' these measures [i.e. their unilateral liberalisation undertaken largely at the behest of IMF and World Bank, N.L.] meant giving nothing else away in the Uruguay Round whilst obtaining '*credit*' after the event from other GATT partners for this autonomous opening up of markets."

- Dam 1970, 242:  
"the developed countries were loath to reduce any customs duties except in the context of the Kennedy Round for fear of losing *credit* for their concessions in the final balancing of bindings"

- MTN.TNC/11, 4, para. 2:  
"... Ministers agree on the following: ... (c) The need for an approach to be elaborated to give *credit* for bindings..."

- Oxley 1990, 183:  
"Because tariffs are legal, *credit* can be claimed for offers to cut them. To mix up reductions of tariffs and non-tariff measures might lead to claims for *credit* for cutting illegal measures";

- MTN.GNG/MA/W/24, para. 8:  
"*Credit* shall be allowed in respect of actions undertaken since the year 1986."

- Hoekman 2013, 758:  
"How much '*credit*' should be given for such autonomous reforms in subsequent negotiations has been a source of contention."

- **"Capital"**

- Paemen/Bensch 1995, 45:  
A country "might be tempted to 'make *capital*' out of the removal of ... new restrictions by presenting this pseudo-withdrawal as a genuine concession, to be added to its tally in the Uruguay Round".

- **"Redistribution"**

- Tarullo 2002, 178:  
"there will be some '*redistribution*' effected by the AB practice".

- **"Balance sheet"**

- MTN/W/35, 2, Yugoslavia, on behalf of the developing countries:  
"As matters look at present, the developing countries are justified in feeling apprehension that they might come out of these negotiations with a *negative balance sheet*."

- **"Price"**

- E/PC/T/A/PV/22;
- Milthorp 2009, 107 and 109;
- Paemen/Bensch 1995, 115;
- Tarullo 2002, 174;
- Gerhart 2000, 370:  
"Threats made by the United States to close its borders softened up the target countries and effectively lowered the *price* the United States had to pay...".

- **"Exchange Rate"**

- **"Entrance fee"; "ticket of admission"**

- GATT 1960, 9:

"The 'entrance fee' which an acceding country has to pay under this procedure is likely to vary considerably. A country with a diversified export trade will ... be expected to pay a bigger 'entrance fee' than a country whose export trade consists of a few products."

- Dam 1970, 110;
- Curzon and Curzon 1973, 305.

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