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**New Directions in
International Economic Law**
Essays in Honour of John H. Jackson

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9. The World Trade Organization: A New Constitution for the Trading System

I. INTRODUCTION

The establishment of the World Trade Organization in 1995 represented a watershed for the multilateral trading system. The *Marrakesh Agreement Establishing the World Trade Organization* (the "WTO Agreement")¹ is important for two reasons: First, it provided a means for implementing the Uruguay Round agreements while providing for continuity with the previous GATT and Tokyo Round Code system; and second, it formally established, for the first time in the fifty year history of the GATT, an international organization for world trade, complete with its own detailed charter.

The latter achievement, although historic, was not part of the original agenda for the Uruguay Round of multilateral trade negotiations set in 1986 in Punta del Este, Uruguay, by Ministers meeting on the occasion of a session of the GATT *Contracting Parties*. The Punta Del Este Ministerial Declaration called for multilateral trade negotiations to be conducted in two major subject areas: Trade in goods and trade in services. The objectives of the negotiations on trade in goods were to: Strengthen the role of the GATT; improve the multilateral trading system; bring about a wider coverage of world trade under agreed, effective and enforceable multilateral disciplines; increase the responsiveness of the GATT system to the evolving national economic environments; and enhance the relationship of the GATT with relevant international organizations.² The GATT *Contracting*

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¹ THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS – THE LEGAL TEXTS, World Trade Organization, 1995, 6–18.

² *Ministerial Declaration on the Uruguay Round*, DECLARATION OF 20 SEPTEMBER 1986, GATT Doc. No. MIN.DEC (September 20, 1986). See GATT, Basic Documents and Selected Documents (BISD), 33S/87, at 19.

M. Bronckers and R. Quick (eds.), *New Directions in International Economic Law*, 135–153.
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Parties did not, however, in 1986, contemplate the establishment of a new international organization to carry out these objectives. In fact, it was not until early 1990, in the lead up to the Brussels Ministerial Meeting, that was originally supposed to be the conclusion of the Round, that the idea of establishing an international organization was first promulgated. Professor John Jackson had written a monograph for the Royal Institute of International Affairs entitled *Restructuring the GATT System*,³ which led to a séminar in London and discussions of the idea in Geneva in the fall of 1989. The then Italian Trade Minister, Renato Ruggiero (who later became the first Director-General of the WTO) was the first politician to emphasize publicly the need to establish an international organization capable of administering and implementing the Uruguay Round results. The idea was also promulgated by officials in the government of Canada at that time and caught the attention of the then Canadian Minister of International Trade, the Honourable John Crosbie. He actively promoted the idea at Ministerial Meetings in Mexico City in April 1990, at the Group of Seven Summit that summer, at an APEC Ministerial Meeting in September 1990 and at other informal Ministerial meetings prior to the Brussels Ministerial in December 1990.

Almost all delegations and the Director-General of the GATT at the time, Arthur Dunkel, understood the need for an effective means of implementing the Uruguay Round results and a strengthened multilateral trading system. In addition, it was generally recognized that a strong, institutional structure was needed to administer the new package of agreements resulting from the Round and to provide a forum for multilateral trade negotiations in the future. This was an objective that all delegations and the GATT Director-General shared, however, they differed on the means by which that objective should be achieved. Canada and the European Communities, supported by Mexico, took the view that the only way to ensure a strong, permanent institutional structure for the trading system was to establish an international organization responsible for world trade. The European Communities and Canada also favoured a centralized, fully-integrated system, with a Ministerial Conference and a General Council responsible for administering all the agreements and having the central authority to make the important decisions affecting the system, such as interpretations, amendments and waivers. Another group of countries, led by the United States and Japan, took the view that fundamental institutional reform was not necessary to implement the Uruguay Round agreements. They argued that the GATT had evolved over the past forty-plus years and that the new system would continue to evolve to meet new challenges in the future. Therefore, in their view, there was no need to establish an international organization. They also feared that creating a new international organization might result in a loss of sovereignty for individual Member states.

³ Jackson, John H., *RESTRUCTURING THE GATT SYSTEM* (The Royal Institute of International Affairs, Pinter Publishers, London, 1990), 121.

It was not the intention of the Uruguay Round negotiators to bring about fundamental institutional reform, except in the area of dispute settlement, much less to create a new constitution for the world trading system. The original intention of the proponents for a world trade organization was to prepare a framework charter, along the lines of the draft Charter for the Organization on Trade and Cooperation prepared by the GATT *Contracting Parties* in 1955.⁴ Such a charter would have set out the basic institutional framework necessary to administer the system, provided a vehicle for implementing the Uruguay Round results and provided the necessary legal status for the new organization and privileges and immunities for its officials. However, it would not have included major provisions on decision-making, waivers, amendments or non-application. The focus on decision-making rules came very late in the Round, at the insistence of the countries opposed to the idea of creating an international organization, in particular, the United States and Japan.

In this article, I will explain some of the reasons why the original proponents of the idea of an international trade organization came to the conclusion that it was imperative to correct a major failure of history, the failure of the proposed International Trade Organization ("ITO") in 1948,⁵ and to create, at the conclusion of the Uruguay Round, an international organization responsible for world trade. I will also provide a snapshot of the history of this particular negotiation. Finally, and most importantly, I will reflect on the major constitutional elements in the WTO charter, the *WTO Agreement*, in particular, Articles IX and X which deal with decision-making, interpretations, waivers, amendments to the existing agreements and the means by which new agreements are added to the WTO system.

At this point in time, five years after the establishment of the WTO, it is time to reflect on the reasons behind the new decision-making provisions of the *WTO Agreement* and to ask whether they are adequate for the trading system in the 21st century. There is an interesting dichotomy in the decision-making provisions of the *WTO Agreement*. On the one hand, there is the strong underlying objective to integrate all administrative, decision-making and dispute settlement functions of the Uruguay Round agreements into one central authority under the responsibility of the Ministerial Conference and the General Council. On the other hand, the *WTO Agreement* sets out a high standard of consensus as the preferred method for decision-making, except where certain specific fallbacks and exceptions are provided. Although the intention was to provide a strong institutional structure that would have the requisite flexibility to guide the trading system in the 21st century, the requirements of decision-making by consensus or a two-thirds (for some amendments) or three-fourths majority of all Members

⁴ See 1955 Organization on Trade and Cooperation Draft Charter, *Final Act Adopted at the Ninth Session of the Contracting Parties*, Geneva, GATT, BISD 3S/55, at 232.

⁵ See Havana Charter, U.N. Doc. E/Conf. 2/78 (1948). Also reprinted as U.N. Doc. ICITO/1/4 (1948).

(for waivers and interpretations) may create rigidities in the system that may make it difficult to make changes in the future. However, the GATT has a strong tradition of flexibility and has demonstrated a remarkable ability to evolve to meet the challenges that it has faced over the last 50 years. The early indications are that the WTO will continue to follow in the same tradition, and with its stronger institutional foundations, will be able to adapt to the challenges of the 21st century.

II. WHY A WTO?

As the Uruguay Round progressed, it became clear that its results would bring tremendous new pressures on the existing institutional system. The GATT, after all, was not an organization or even a coherent institution. What was loosely referred to as the GATT actually consisted of a number of treaties, each with its own institutional and dispute settlement mechanisms, as well as over 200 other legal instruments, including protocols, understandings, waivers and other decisions of the *Contracting Parties*. The principal agreements were the General Agreement on Tariffs and Trade itself, which was concluded in 1947,⁶ and the nine Tokyo Round agreements (or "Codes"),⁷ which were concluded in 1979. The GATT system was fragmented.⁸ Each agreement, including each Tokyo Round Code, had its own membership, committee and dispute settlement mechanism. The GATT dispute settlement rules and procedures were derived from Articles XXII and XXIII as well as dispute settlement understandings that had been negotiated over the years. The Tokyo Round Codes, however, each had its own separate committee and dispute settlement mechanism.

The GATT *Contracting Parties* had the authority to take decisions relating to disputes brought under the General Agreement.⁹ Each Code had its own Committee which oversaw the dispute settlement proceedings under that Code. These Committees had different memberships, comprised of the countries that were signatories to each Code. This fragmentation led to forum-shopping among

⁶ General Agreement on Tariffs and Trade, dated October 30, 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference of Trade and Employment.

⁷ Those "Codes" were: *Agreement on Technical Barriers to Trade*, *Agreement on Government Procurement*, *Agreement on Interpretation and Application of Articles VI, XVI and XXIII*, *Arrangement Regarding Bovine Meat*, *International Dairy Agreement*, *Agreement on Implementation of Article VII*, *Agreement on Import Licensing Procedures*, *Agreement on Trade in Civil Aircraft* and *Agreement on Implementation of Article VI*. See GATT, BISD 26S/80.

⁸ Professor Jackson popularized the use of the term "balkanization" to describe this situation. See Jackson, J.H.; *The Birth of the GATT-MTN System: A Constitutional Appraisal*, in SYMPOSIUM ON THE MULTILATERAL TRADE AGREEMENT II: LAW AND POLITICS IN INTERNATIONAL BUSINESS, Vol. 12 (1980), 21.

⁹ GATT, Article XXIII.

agreements and inconsistent success with respect to the adoption of panel reports and the implementation of rulings.

The Uruguay Round results were extremely broad and comprehensive. The *WTO Agreement* consists of over 20 agreements, including the GATT 1994 and 12 other goods agreements, the *General Agreement on Trade in Services* ("the GATS") and the *Agreement on Trade-related Intellectual Property* ("the Agreement on TRIPS"). Significant new institutional arrangements, including the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), the *Trade Policy Review Mechanism* (the "TPRM") and the *WTO Agreement* itself are also part of the package. The extensive Uruguay Round results added considerable new burdens on an already fragile and fragmented system. A strong institutional structure, with a high degree of integration of its institutional mechanisms, particularly with respect to dispute settlement, was necessary to ensure that the rights and obligations of WTO Members were effectively administered and enforced.

In the Punta del Este Declaration, the participants in the Uruguay Round had agreed to implement the results of the negotiations on trade in goods as a "single undertaking". However, it was not until the Brussels Ministerial Meeting in 1990 that it was clear that the results of the negotiations in *both* trade in goods and trade in services would be implemented as a "single undertaking". The participants decided that the *à la carte* approach of the Tokyo Round would not be adopted to complete the Uruguay Round. Certain delegations were concerned about the potential free-rider problem if governments were free to pick and choose which agreements they wanted to accept. With the comprehensive set of agreements and the large number of participants involved in the Uruguay Round, it would have been impossible to achieve a balanced package unless all participants were obliged to accept all of the results. There were also certain strong views, on the part of some participants, that it was time to reduce the web of exemptions, exceptions, grandfather rights and differential treatment that had characterized the system for over forty years. It was felt, by some delegations, that rights and obligations should apply equally to all parties and that equitable application of the rules would guarantee a stronger, more disciplined system.

In the months leading up to the Brussels Ministerial Meeting in December 1990, several delegations recognized the need for a legal means to implement the Uruguay Round agreements. The legal options for implementing the new agreements were essentially threefold. First, the new agreements could be brought into the system by means of the amendment procedures of Article XXX of the GATT. However, these provisions were extremely difficult, if not impossible, to use in practice. Article XXX required unanimous acceptance by all contracting parties for amendments to Part I of the General Agreement or to the provisions of Articles XXIX or XXX; for other Parts of the General Agreement, two-thirds of the contracting parties had to accept an amendment for it to become effective, but it became effective only for those contracting parties that had accepted it. Given the practical difficulties involved in using the amending procedures of Article XXX, Article XXV was used more frequently

in the previous GATT system to adopt new understandings.¹⁰ Although the practice in the GATT for the last few decades had been for decisions to be taken by consensus, Article XXV provided that decisions of the contracting parties could be taken on the basis of a majority vote. Modifications also could be effected by means of the waiver provisions in Article XXV:5 of the GATT which required a decision consisting of a two-thirds majority of the votes cast, where that majority comprised more than half of the contracting parties. A third option was to implement the agreements as separate, stand-alone agreements following the *à la carte* approach of the Tokyo Round. However, that approach was not acceptable to Uruguay Round participants because of their commitment to the concept of the "single undertaking".

In order to effect the transition from the old system to the new system, and to ensure that all the agreements would be accepted as a "single undertaking", the Uruguay Round participants agreed to develop an entirely new legal instrument, the *WTO Agreement*, as the means for implementation of the results of the Uruguay Round and a new institutional charter for the trading system. The approach was to create a single legal instrument that all participants would accept, to withdraw from the old GATT, and to terminate the Tokyo Round Codes after a transition period.

In addition to the practical imperatives of implementing the Uruguay Round results, there were other compelling historical and legal reasons to establish an international organization. Professor John Jackson, in his 1990 book, *Restructuring the GATT System*, points out that there were a number of constitutional defects of the GATT system resulting from the failure to establish the International Trade Organization (the "ITO") in 1947–48. The United States proposed a draft ITO charter in 1946,¹¹ which was negotiated together with provisions allowing for reciprocal tariff concessions and rules. The International Trade Organization Charter (the "ITO Charter"), concluded in Havana in 1948,¹² became known as the Havana Charter and contained, in addition to institutional and dispute settlement provisions, chapters on restrictive business practices and labour practices as well as trade in goods. After the United States failed to implement the ITO Charter, negotiators met at a conference in Geneva in 1948 and the *General Agreement on Tariffs and Trade* was born.¹³

The first constitutional defect of the GATT system, identified by Jackson, was its weak treaty structure.¹⁴ After almost fifty years of history, the GATT

¹⁰ For example, the "Enabling Clause" according special and differential treatment to developing countries. See GATT *Contracting Parties* Decision of November 28, 1979, on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, GATT, BISD 26S/80 at 203.

¹¹ See London Report, First Session of the Preparatory Committee (1946), U.N. document EPCT/CII/1-66 (1946).

¹² *Supra*, note 6.

¹³ Jackson, John H., *supra*, note 4, 10–13.

¹⁴ Jackson, John H., *supra*, note 4, 13–14.

was applicable only provisionally, through the Protocol of Provisional Application ("PPA")¹⁵ and other Protocols of Accession. The *WTO Agreement* was accepted definitively by its Members.¹⁶ The PPA and many of the other Protocols included "grandfather rights" exceptions for mandatory legislation, which was inconsistent with Part II of the GATT, but which existed on the date of the PPA or that other Protocol. Although most of these "grandfather rights" exceptions had expired with the passage of time, there were a few significant remaining ones. Although the PPA is no longer in force, the other Protocols of Accession were included as part of the GATT 1994 in paragraph 1(b)(ii) of the language incorporating the GATT 1994 into Annex 1A of the *WTO Agreement*. However, paragraph 1(b)(ii) stipulates that these Protocols are part of the GATT 1994, "excluding the provisions (a) concerning provisional application and withdrawal of provisional application and (b) providing that Part II of GATT 1947 shall be applied provisionally to the fullest extent not inconsistent with legislation existing on the date of the Protocol".

There were also problems of uniform interpretation of the GATT and the Tokyo Round Codes. In the event of a conflict or an inconsistency between the provisions of the GATT and those of a Tokyo Round Code, there was uncertainty as to which agreement would prevail. It was unclear what the relationship was, for example, between the GATT and the *Agreement on Technical Barriers to Trade*, which had the largest number of signatories of all the Tokyo Round Codes. It was not clear, furthermore, whether a waiver granted by the *Contracting Parties* under the GATT also affected the rights and obligations of signatories to a related Tokyo Round Code.

Third, the issue of membership in the GATT system was complex and fragmented. As indicated previously, there were 128 *Contracting Parties* to the GATT as of December 1994.¹⁷ However, the Tokyo Round Codes had memberships ranging from 13 signatories to the *Agreement on Government Procurement* to 47 for the *Agreement on Technical Barriers to Trade*.¹⁸ The participation of developing countries and least-developed countries in the GATT system was less than satisfactory, from both a developing country's and a developed country's perspective. The developing countries felt that they were not accepted as full participants, and did not have the same rights as the developed countries in the system. On the other hand, the developed countries felt that the developing countries were not subject to all of the obligations that the developed countries were. Thus, there was a perception that the GATT rules, and the Tokyo Round Codes, were not applicable equally to all, and that there needed to be more even application of the rights and obligations to all contracting parties.

¹⁵ See Protocol of Provisional Application, reprinted in *GUIDE TO GATT LAW AND PRACTICE*, Vol. II (WTO, Geneva, 1995), 1071.

¹⁶ See Articles XI, XII and XIV of the *WTO AGREEMENT*.

¹⁷ *BISD*, 42S/95, at ix.

¹⁸ See *Sixteenth Annual Review of the Implementation and Operation of the Technical Barriers to Trade Agreement*, TBT/39/Rev. 1 (November 30, 1995), 3.

Fourthly, the power of the *Contracting Parties* was ambiguous. The GATT Council which administered the GATT on a day-to-day basis, was created by a resolution of the *Contracting Parties* and had no permanent treaty status.¹⁹ There was also no permanent institutional mechanism for initiating new negotiations or for ensuring ongoing review and modification of agreements. There were many gaps in the powers of the *Contracting Parties*, including their ability to interpret the General Agreement and whether they could take action *vis-à-vis* the Tokyo Round Codes. There was no treaty provision establishing a body responsible for the management and administration of the overall system. Indeed, the only way that actions or decisions could be taken was by a consensus resolution by the GATT Council or by the appropriate Code Committee. Significantly, there was no body with the authority to deal with issues that cut across more than one agreement.

A related problem was the ambiguous scope of Article XXV of the GATT. Article XXV was the only provision of the GATT that provided rules and procedures for decision-making (apart from Article XXX, which dealt with amendments). Remarkably, the Tokyo Round Codes did not have similar provisions. Despite the language of Article XXV, which provides for majority voting, the practice for most of GATT history has been for decisions of the *Contracting Parties* and the GATT Council to be taken by consensus. Consensus has generally been interpreted to mean that a decision would be considered to be approved at a meeting, when no contracting party, present at that meeting, objected to the decision.²⁰ There were specific provisions in Article XXV:3 of the GATT 1947 relating to decisions waiving obligations. Generally speaking, waivers were approved by means of ballots on the basis of a two-thirds majority of votes cast, where those voting represented at least one-half of the GATT contracting parties. Approximately 115 waivers were granted throughout the history of the GATT 1947,²¹ including the 1955 United States Agricultural Waiver.²²

Although the dispute settlement mechanism of the GATT had evolved into one of the most outstanding international examples of effective dispute resolution, there were many problems with that system. As has been noted, there was fragmentation of the various dispute settlement mechanisms in the GATT and

¹⁹ The Council was established on June 4, 1960, by decision of the Contracting Parties acting pursuant to Article XXV. See Decision of June 4, 1960 Establishing the Council of Representatives, reprinted in GATT, BISD 9S/61, at 8.

²⁰ Footnote 1 of Article IX:1 of the WTO AGREEMENT now provides the following definition of consensus:

The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.

²¹ See GUIDE TO GATT LAW AND PRACTICE, Vol. II (WTO, Geneva, 1995), 887.

²² Waiver Granted to the United States in Connection With Import Restrictions Imposed Under Section 22 of the United States Agricultural Adjustment Act (of 1933), as Amended, reprinted in GATT, BISD 3S/55, at 32.

the Tokyo Round Codes. There was also the problem of potential blockage of adoption of panel reports and lack of effective implementation of rulings and recommendations. The record of the Tokyo Round Codes, in this latter respect was not very good. Approximately one-third of the panel reports issued under the Tokyo Round Anti-dumping and Subsidies Codes were not adopted by those Code Committees. Major reform and integration of the dispute settlement system was necessary for the continued viability of the GATT and the effective enforcement of the new agreements concluded as a result of the Uruguay Round.

Finally, there was a need to improve cooperation between the three international institutions responsible for global economic relations: The GATT, the International Monetary Fund (the "IMF") and the World Bank. The 1988 Montreal Ministerial Meeting resulted in a statement in the Functioning of the GATT System ("FOGS") Negotiating Group encouraging greater coherence in global economic policy-making by increased institutional cooperation among the GATT, the IMF and the World Bank. The then Director-General of the GATT, Arthur Dunkel, was directed to explore means of making this happen with his counterparts at the IMF and the World Bank. Greater precision was added to this "coherence" language at the Brussels Ministerial Meeting in 1990. A formal statement encouraging cooperation was finally enshrined in Article III:5 of the *WTO Agreement* which reads as follows:

With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies.

III. HISTORY OF THE NEGOTIATION OF THE WTO

The first serious discussion among Uruguay Round negotiators on the idea of a World Trade Organization and an integrated dispute settlement system took place at an informal Quadrilateral ("Quad")²³ high officials' meeting hosted by Canada in Geneva in July, 1990. Canada presented two papers for discussion at that meeting: One recommending the establishment of a "World Trade Organization" and one on the legal difficulties of implementing the Uruguay Round results under the existing GATT. During the fall of 1990, informal papers were circulated by the European Communities and the United States dealing with the issue of implementation of the agreements. The European Communities took the view that the only logical way to implement the results of the Round, and to provide for a strong institutional structure for the trading system, was to create a "Multilateral Trade Organization". The United States, on the other hand, did not believe that it was necessary to create an organization, but was concerned with the issues of: 1. Effective management of the trading

The "Quad" consists of the United States, the European Communities, Japan and Canada.

system by a small, coordinating group of major trading countries; 2. eliminating the free-rider problem in the transition from the existing GATT to the new system; and 3. providing the maximum incentive for GATT *Contracting Parties* to accept the Uruguay Round results as a "single undertaking".

In the fall of 1991, during the negotiations in the Institutional Group²⁴ chaired by Ambassador Julio Lacarte-Muró²⁵ (the so-called "Lacarte Group"), Canada and the European Communities tabled a draft charter for a Multilateral Trade Organization ("MTO"). Mexico was a co-sponsor of this proposal. Over the objections of several other delegations, Chairman Lacarte-Muró requested that the Institutional Group prepare a draft Agreement Establishing the Multilateral Trade Organization ("MTO Agreement") on the condition that if the Dunkel Draft Final Act of 1991²⁶ was accepted by all Uruguay Round participants, the MTO Agreement and an integrated dispute settlement understanding would be completed after the finalization of the Uruguay Round results. On that basis, delegations agreed to hold intensive discussions on these new institutional issues in Geneva in December 1991. This process produced a draft "Agreement Establishing the Multilateral Trade Organization" which became part of the Dunkel Draft Final Act of 1991. The Institutional Group also prepared a list of issues to be discussed in developing an integrated dispute settlement system.²⁷ The Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"), as it existed in the Dunkel Draft Final Act, applied only to dispute settlement under the GATT.

From January through May 1992, a Legal Drafting Group, established by the Director-General, reviewed all of the agreements in the Dunkel Draft Final Act. Another task of that Group, chaired by Madan Mathur (a former GATT Deputy Director-General), was to flesh out the draft text of the MTO Agreement and to modify the DSU in light of the document "Elements of an Integrated Dispute Settlement System". During that period, a lot of substantive work, both in informal discussions and in meetings of the Legal Drafting Group, was carried out on these institutional issues. A number of proposals were put forward by several delegations, including by those countries which did not formally support the establishment of an organization, and a great deal of discussion took place concerning the key issues relating to the draft MTO Agreement.

There was a period of intense activity in late 1992, at which time it was thought, once again, that the Uruguay Round might conclude. The GATT

²⁴ See "Uruguay Round Structure Streamlined", GATT Focus, No. 1, March 1991, at 1.

²⁵ Dubbed by the Financial Times as the "grandfather" of the GATT, Ambassador Lacarte-Muró was the first Deputy Executive Secretary of the GATT during the negotiations in 1947 and 1948, and immediately thereafter. He is now a Member of the Appellate Body, having served as its first Chairman in 1996 and 1997.

²⁶ See Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. No. MTN.TCN/W/FA (December 20, 1991).

²⁷ *Elements of an Integrated Dispute Settlement System*, Dunkel Draft Final Act. See GATT doc. MTN.TNC/W/FA, T.1-T.6.

Director-General, Arthur Dunkel, held several high-level meetings with Chief Negotiators and Ambassadors to try to conclude the Round on the basis of the 1991 Dunkel Draft Final Act. However, the United States, with a newly-elected Democratic administration, had come to the table with a number of proposals to modify the Dunkel Draft Final Act in several key areas, relating, in particular, to trade and the environment, trade-related intellectual property rights, anti-dumping and agriculture. In December 1992, the United States took the position that it could not accept the establishment of a Multilateral Trade Organization. This was viewed as a controversial move, as most delegations at this point in time believed that an MTO was part of the overall balance of the Uruguay Round package. The United States insisted that it was possible to conclude the Round, implement the Uruguay Round agreements and provide a strong institutional structure for administering the system *without* establishing an organization. The United States proposed informally that there be a protocol covering the Uruguay Round agreements, which would address certain administrative and legal matters, rather than a charter establishing an international organization. As a result of the increasing interest of environmental groups in trade matters, especially in response to the circulation of the panel report in the *United States – Restrictions on Imports of Tuna*,²⁸ and the negotiation of the North American Free Trade Agreement (the “NAFTA”), the United States’ negotiators viewed the MTO charter as a lightning rod for domestic opposition to the Uruguay Round in the United States. Indeed, several non-governmental organizations campaigned strongly against a Multilateral Trade Organization in December 1991, expressing concerns about loss of sovereignty over domestic policy-making, particularly in the environmental, labour and social areas. As a result of opposing views on this issue and the lack of agreement on agriculture, the Uruguay Round negotiations failed, once again, to conclude in December 1992.

In the summer of 1993, the new Director-General, Peter Sutherland, announced that he would ask Ambassador Lacarte-Muró to convene once again the Institutional Group in the fall of 1993 to complete the two texts remaining to be concluded in the Uruguay Round package: The Agreement Establishing the MTO and an integrated DSU. At the first meeting of this informal group, the United States made a statement indicating that it would prefer that this negotiation take place on two tracks: One, on the basis of a draft protocol that the United States had prepared; and the other, on the basis of the draft Agreement Establishing the MTO (as proposed by Canada and the European Communities and negotiated during the Legal Drafting Group process in 1992). However, Chairman Lacarte-Muró replied that the mandate given him by the Director-General was to complete the text of the MTO Agreement in the Dunkel Draft Final Act and, therefore, the negotiations proceeded on that basis. The United States agreed to participate in this negotiation, but indicated that it remained opposed to the idea of an international organization and could only possibly accept it as “the icing on

²⁸ DS29/R, June 16, 1994 (unadopted).

the cake" if the results of the Uruguay Round were a large enough cake. An intensive and difficult negotiation took place in October and November of 1993, and on November 14, 1993, a draft Agreement Establishing a Multilateral Trade Organization and an integrated DSU were finally concluded in the Institutional Group.

Despite these fully negotiated texts, the United States maintained a reservation on the draft Agreement Establishing the MTO until the very last minute of the Uruguay Round negotiations. Around midnight on December 14, 1993, after all of the other agreements had been approved by the Heads of Delegations in the Sutherland process, the United States lifted its reservation on the establishment of an international organization, on the condition that it be called the "World Trade Organization", not the "Multilateral Trade Organization". Thus, the United States, in the last minutes of the Uruguay Round negotiations, reverted to the original name proposed by Canada in the spring of 1990. The United States had decided that the cake was, indeed, large enough for the icing on the top.

IV. EXPERIENCE WITH THE WTO

In the first five years of the WTO, there has been much activity, but the experience with decision-making has remained much as it was in the previous GATT system. There are many more Councils and Committees in the new organization generating considerably more meetings and paper than previously. Important negotiations are taking place, some of which have been already successful, for example, in telecommunications. Negotiations mandated as part of the "built-in" agenda under the *Agreement on Agriculture* and the *General Agreement on Trade in Services* commenced in January this year. The major success story, however, has been dispute settlement. Over 180 requests for consultations have been made since 1 January 1995. Twenty-six Appellate Body reports and thirty-two panel reports have been completed and adopted by the Dispute Settlement Body. Decisions to establish panels and adopt panel reports are now taken automatically by the DSB, unless there is a consensus against adoption.²⁹ Given the timeframes and the automatic method of decision-making, the results of panel and Appellate Body reports are clearly binding on WTO Members. WTO Membership is currently at 135 Members, with approximately 30 countries in the process of accession, including several of the former Soviet Republics and China.

The question remains whether the *WTO Agreement* equips the WTO with the appropriate administrative structure and decision-making capabilities to guide it successfully into the 21st century. In order to answer that question, we must examine first the changes brought about by the *WTO Agreement*, as compared with the previous GATT system, and assess how the decision-making apparatus has been working to date.

²⁹ DSU, Articles 6.1 and 16.4.

The functions of the WTO, as set out in Article III of the *WTO Agreement*, are to “facilitate the implementation, administration and operation and further the objectives” of the Agreement and the Multilateral Trade Agreements as well as to provide a framework for the administration and operation of the Plurilateral Trade Agreements. The WTO is also a forum for negotiations among its Members concerning their multilateral trade relations and matters relating to the *WTO Agreement*, and in this context, several of the agreements annexed to the *WTO Agreement* have further “built-in” negotiation agendas. In other matters related to trade, but not specifically covered by the *WTO Agreement*, Article III provides that the WTO “may also provide a forum for further negotiations among its Members ... as may be decided by the Ministerial Conference”.³⁰

Very briefly, the organizational structure of the WTO consists of a Ministerial Conference, composed of all WTO Members, which is required to meet at least every two years and has the authority to carry out the functions of the WTO and to take all decisions or actions necessary to this effect.³¹ The first WTO Ministerial Meeting was held in Singapore in December 1996, and the second, commemorating the 50th anniversary of the GATT, took place in Geneva in May 1998. The third Ministerial Conference was held in Seattle in December 1999.

Article IV of the *WTO Agreement* establishes a General Council, which has delegated authority from the Ministerial Conference to carry on the day-to-day business of the WTO in the intervals between meetings of the Ministerial Conference.³² The General Council has all of the powers and authority of the Ministerial Conference and, in fact, takes most of the decisions on behalf of the Ministerial Conference. The General Council is also charged to convene as often as appropriate to discharge the responsibilities of the Dispute Settlement Body³³ and the Trade Policy Review Body.³⁴ These Bodies have their own chairpersons and rules of procedure, but technically, they are the General Council performing different functions or wearing different hats. In the hierarchy of the organization, below the General Council are the Councils responsible for the operation of the Multilateral Trade Agreements: The Council for Trade in Goods, the Council for Trade in Services and the Council for Trade-Related Aspects of Intellectual Property Rights.³⁵ Reporting to the Council for Trade in Goods are several Committees responsible for supervising the specific goods agreements in Annex 1A of the *WTO Agreement*, including agriculture, textiles and clothing, subsidies and countervailing measures, anti-dumping, safeguards, etc. There are also a few Committees, such as the Committee on Financial Services, which report to the Council for Trade in Services. The General Council, among its other responsibilities, is required to make appropriate arrangements

³⁰ WTO AGREEMENT, Article III:2.

³¹ WTO AGREEMENT, Article IV:1.

³² WTO AGREEMENT, Article IV:2.

³³ WTO AGREEMENT, Article IV:3.

³⁴ WTO AGREEMENT, Article IV:4.

³⁵ WTO AGREEMENT, Article IV:5.

for effective cooperation with other inter-governmental organizations and to consult and cooperate with non-governmental organizations.³⁶ Some of these arrangements have already been approved by the General Council and other proposals are under consideration.³⁷ In its first few years, the WTO has negotiated important new cooperation agreements with the IMF,³⁸ the World Bank³⁹ and the World Intellectual Property Organization.⁴⁰

Article IX:1 of the *WTO Agreement* provides that the "WTO shall continue the practice of decision-making by consensus followed under the GATT 1947." The Councils and Committees are deemed to have decided a matter by consensus at a meeting if no Member, present at the meeting, formally objects to the proposed decision.⁴¹ Except where specifically provided in the *WTO Agreement*, if a decision cannot be arrived at by consensus, the matter at issue can be decided by voting. Generally speaking, where this fallback option is exercised, decisions of the Ministerial Conference and the General Council are to be taken by a majority of the votes cast.⁴² However, for certain important decisions, such as adopting interpretations of the *WTO Agreement* or approving waivers of obligations, the fallback voting requirement is a three-fourths majority of the Members.⁴³ For approving the accession of new Members, it is a two-thirds majority of the Members.⁴⁴

Technically, the Rules of Procedure of the General Council,⁴⁵ and those of most other Councils and Committees, provide for a quorum of a simple majority of the WTO Members for any meeting.⁴⁶ Currently, according to these Rules of Procedure, approximately 68 Members would have to be present at a meeting of a Council or a Committee when it is taking a decision by consensus. However, in practice, that rule is sometimes overlooked. On one occasion in the Dispute Settlement Body, at a meeting when the panel and Appellate Body reports in *Japan – Taxes on Alcoholic Beverages* were on the agenda for adoption, Japan raised a question as to whether there was a quorum to convene the meeting. As there were only 38 delegations present, that meeting was suspended until a subsequent day when a quorum could be properly established. The decision to adopt those reports was taken on the subsequent day.⁴⁷

³⁶ WTO AGREEMENT, Article V:2.

³⁷ See, in this regard, the *Guidelines for Arrangements on Relations with Non-Governmental Organizations*, WT/L/162 (July 18, 1996), Decision of the General Council.

³⁸ Annex I, WT/L/195.

³⁹ Annex II, WT/L/195.

⁴⁰ IP/C/6 and Add.1.

⁴¹ See footnote 1 to Article IX:1 of the WTO AGREEMENT.

⁴² *Ibid.*

⁴³ WTO AGREEMENT, Articles IX:2 and IX:3.

⁴⁴ WTO AGREEMENT, Article XII:2.

⁴⁵ WT/L/161.

⁴⁶ WT/L/161, Ch. VI, Rule 16.

⁴⁷ See Minutes of the Meeting of the Dispute Settlement Body held on October 29, and November 1, 1996, WT/DSB/M/25.

Any decision required to be made by the DSB under the provisions of the DSU must be arrived at by consensus.⁴⁸ The fallback to majority voting, provided in Article IX:1 of the *WTO Agreement*, does not apply to decisions made under the DSU. Other decisions that can be made only on the basis of consensus, with no possibility of resorting to majority voting, include the granting of a waiver concerning an obligation that is subject to a transition period or a period for staged implementation and the addition of any new Plurilateral Trade Agreement to Annex 4 of the *WTO Agreement*.⁴⁹ Any decision to amend the rules and procedures of the Dispute Settlement Understanding also must be taken by consensus.⁵⁰ It is interesting to note that although the Ministerial Conference and the General Council may resort to voting,⁵¹ the Rules of Procedure of the Council for Trade in Goods, the Council for Trade in Services and the Council for TRIPS do not allow these Councils to resort to voting.⁵² Where any of these Councils cannot arrive at a decision by consensus, it must refer the matter to the General Council for decision. Thus, the ultimate authority of the General Council is preserved, and only the General Council has the authority to make decisions affecting the overall system. With respect to decisions to adopt an interpretation of the *WTO Agreement* or to grant a waiver, the *WTO Agreement* provides that any such proposal should come up through the Council responsible, i.e., the Council for Trade in Goods, the Council for Trade in Services or the Council for TRIPS, before being finally presented to and approved by the General Council.⁵³

Decisions on the accession of new Members are dealt with under Article XII of the *WTO Agreement*. Article XII:2 provides that any decision on accession shall be taken by the Ministerial Conference, and that the Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of WTO Members. However, in practice, decisions on the accession of new Members have been taken by the General Council, acting on behalf of the Ministerial Conference, and with the exception of the accession of Ecuador in 1995 (which was approved by a majority vote), all other decisions relating to accession of new Members have been approved by consensus. When the first proposals for waivers and accessions were made in the summer of 1995, there was a great deal of discussion among WTO Members as to whether there

⁴⁸ DSU, Article 2.4. Note 1 of that Article provides that:

The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision.

⁴⁹ WTO AGREEMENT, note 4 to Article IX:3, Article X:9.

⁵⁰ WTO AGREEMENT, Article X:8.

⁵¹ WTO AGREEMENT, Article IX:1.

⁵² Rules of Procedure for Meetings of the Council for Trade in Goods Adopted by the General Council on July 31, 1995, WT/L/79; Rules of Procedure for Meetings of the Council for Trade in Services Adopted by the Council for Trade in Services on October 4, 1995, S/L/15; Rules of Procedure for Meetings of the Council for TRIPS, IP/C/1.

⁵³ WTO AGREEMENT, Article IX:2.

should be voting on these matters pursuant to Articles IX:3 and XII:2 of the *WTO Agreement*, or whether such decisions should be taken by the General Council on the basis of consensus. The General Council decided in November 1995 that it would seek to take decisions relating to requests for waivers and accessions under Articles IX and XII of the *WTO Agreement* by consensus, unless such a decision could not be arrived at by consensus, in which case the matter would be decided by voting under Articles IX or XII.⁵⁴

Similarly, with respect to the adoption of the annual WTO budget, although Article VII:3 of the *WTO Agreement* provides that the General Council shall adopt the financial regulations and the annual budget estimate by a two-thirds majority comprising more than half of the Members of the WTO, in actual practice, the General Council has approved the annual budgets by consensus.

Thus, in accordance with the provisions of Article IX:1 of the *WTO Agreement*, the WTO has continued the practice of decision-making by consensus followed by the GATT 1947 in all areas, including decisions to approve waivers of obligations and accessions of new Members. Only in the case of the accession of Ecuador in 1995, and in the case of certain proposals to extend waivers also made in 1995, were postal ballots sent out to the Members to vote on a particular matter.⁵⁵ These waiver extension proposals never received the requisite number of votes to be approved, but the accession of Ecuador was approved by a majority vote.⁵⁶ Since that time, all decisions relating to requests for accessions or waivers have been taken by consensus in the General Council.

Under Article XXX of the GATT 1947, ratification and acceptance by *all* contracting parties was required to alter certain obligations: Articles I and II (the most-favoured-nation principle and tariff concessions), XXIX (the relationship of the agreement to the Havana Charter) and XXX (amendments). Amendment of other GATT articles required acceptance by two-thirds of the contracting parties, but were effective only for those contracting parties that had accepted them.

The provisions on amendments in Article X of the *WTO Agreement* are complex. The requirements differ depending upon the particular agreement and the particular provisions in question, as well as upon the nature of the particular amendment. Depending upon the specific provisions involved, an amendment requires either acceptance by all Members or acceptance by two-thirds of the Members in order to become effective. For example, modifications to Article X (dealing with amendments) and Article IX (dealing with decision-making) of the *WTO Agreement* require acceptance by *all* Members.⁵⁷ Similarly, changes to the fundamental MFN provisions in Articles I and II of the GATT 1994, Article II:1

⁵⁴ Decision-Making Procedures Under Articles IX and XII of the WTO AGREEMENT, Statement by the Chairman as agreed by the General Council on November 15, 1995, WT/L/93, November 24, 1995.

⁵⁵ See Minutes of the General Council Meeting, WT/GC/M/6, p. 5 (September 20, 1995).

⁵⁶ See Minutes of the General Council Meeting, WT/GC/M/6, p. 4 (July 31, 1995), and Decision of the General Council of August 16, 1995, WT/ACC/ECU/5 (August 22, 1995).

⁵⁷ WTO AGREEMENT, Article X:2.

of the GATS and Article IV of the *Agreement on TRIPS* may only come into effect upon acceptance by *all* Members.⁵⁸ Amendments to other provisions of the *WTO Agreement*, the agreements relating to trade in goods in Annex 1A or the *Agreement on TRIPS* in Annex 1C that are “of a nature that would alter the rights and obligations of Members” shall take effect upon acceptance by two-thirds of the Members, and only with respect to those Members that have accepted them.⁵⁹ Amendments to provisions of those agreements that would not alter the rights and obligations of the Members shall take effect definitively for all Members upon acceptance by two-thirds of the Members.⁶⁰ With respect to the GATS, amendments to Parts I, II and III of the GATS shall take effect, for the Members that have accepted them, upon acceptance by two-thirds of the Members.⁶¹ Amendments to Parts IV, V and VI of the GATS shall take effect definitively for all Members upon acceptance by two-thirds of the Members.⁶² Any changes to the *Agreement on TRIPS* meeting the requirements of Article 71:2 of that Agreement may be adopted by the Ministerial Conference by consensus without further formal acceptance process.⁶³ Similarly, any decisions to amend the DSU in Annex 2 of the *WTO Agreement* shall be made by consensus, and any such amendments will take effect for all Members upon approval by consensus of the Ministerial Conference.⁶⁴

The amendment procedures in Article X of the *WTO Agreement* are considerably more complex than the previous GATT Article XXX provisions. They are not, however, more flexible. In fact, a greater number of provisions, including Articles IX and X of the *WTO Agreement* (concerning decision-making and amendments) as well as the MFN provisions of the GATT 1994, the GATS and the *Agreement on TRIPS*, require acceptance by *all* Members. Any changes to other provisions of the Multilateral Trade Agreements that alter the rights and obligations of Members must be accepted by two-thirds of the Members, and apply only to those Members which have accepted them. This is not a change from the provisions of GATT Article XXX. Only amendments that do not alter the rights and obligations of Members may take effect definitively for all Members upon acceptance by two-thirds of them, but this is likely to apply only to institutional or procedural provisions that do not substantively affect the rights and obligations of Members. There is some flexibility for modifications to the rules and procedures of the DSU to be made by consensus, without requiring ratification and acceptance by WTO Members.

Although it is not explicit, new agreements should be brought into the WTO through the amendment provisions of Article X of the *WTO Agreement*. Article X:9

⁵⁸ WTO AGREEMENT, Article X:2.

⁵⁹ WTO AGREEMENT, Article X:3.

⁶⁰ WTO AGREEMENT, Article X:4.

⁶¹ WTO AGREEMENT, Article X:5.

⁶² WTO AGREEMENT, Article X:8.

⁶³ WTO AGREEMENT, Article X:6.

⁶⁴ WTO AGREEMENT, Article X:8.

provides a specific procedure for bringing in new plurilateral trade agreements. It provides that the Ministerial Conference, upon the request of the Members parties to a new plurilateral trade agreement, may decide "exclusively by consensus" to add that agreement to Annex 4. This is a difficult requirement for bringing new plurilateral trade agreements into the WTO system, as it requires the consensus of Members not parties to the new plurilateral agreement.

In the very first case in the WTO of a new plurilateral trade agreement being negotiated, the Information Technology Agreement (or "ITA"),⁶⁵ the amendment procedures of Article X:9, relating to plurilateral trade agreements, were not used. Formally, the ITA is not a plurilateral trade agreement in Annex IV of the *WTO Agreement*. However, the parties to the ITA agreed to reduce their tariff bindings on certain products in their Schedules which are annexed to the GATT 1994. Those bindings, therefore, are an integral part of the GATT 1994, pursuant to the provisions of Article II of the GATT.⁶⁶ As a result, dispute settlement under the DSU is available for those market access commitments. An ITA Committee was established informally under the aegis of the Council for Trade in Goods, but no further steps have been taken to bring the ITA formally under the umbrella of the WTO.

V. CONCLUSIONS

The successful conclusion of the Uruguay Round in 1994, and the subsequent establishment of the World Trade Organization in 1995, were truly remarkable achievements for the multilateral trading system. The new, more detailed provisions on decision-making (including interpretations and waivers) in Article IX and on amendments in Article X of the *WTO Agreement* were the product of intensive negotiation among 40 or 50 delegations at the end of the Uruguay Round. The *WTO Agreement* has eliminated many of the "constitutional defects" of the previous GATT system as identified by Professor Jackson, but it may have also provided some new rigidities in decision-making procedures. The powers of the Ministerial Conference, the General Council and the other Councils and Committees are less ambiguous than was the case with the GATT *Contracting Parties*, and the *WTO Agreement* now clearly provides a solid treaty basis for the entire integrated WTO system of agreements. Although the decision-making and amendment rules in the *WTO Agreement* are considerably more detailed than the previous GATT Articles XXV and XXX, they are not more flexible.

With respect to decision-making, continuity with the previous GATT 1947 has been carefully preserved, in part, through Article XVI:1 of the *WTO Agreement*. As a result of fears about sovereignty expressed, in particular, by the United

⁶⁵ See Ministerial Declaration on Trade in Information Technology Products, WT/MIN(96)/16, adopted in Singapore (December 13, 1996).

⁶⁶ GATT 1994, Article II:7.

States and Japan, decision-making by consensus has been elevated from its previous status as an unwritten practice to being enshrined as a rule.⁶⁷ The fallback voting requirements, when consensus cannot be achieved, for important decisions by the Ministerial Conference or the General Council, in particular, adopting interpretations of the *WTO Agreement* or granting waivers from obligations, have been increased to a three-fourths majority of all WTO Members, from a two-thirds majority for waivers and a simple majority for interpretations under the GATT 1947. Amendments, also, have not been made easier, but rather have been made more complex, and, in some cases, more difficult. For example, any modification of the decision-making procedures in Article IX or of the amendment procedures in Article X of the *WTO Agreement* can only be made effective upon acceptance of *all* WTO Members. Most amendments of the Multilateral Trade Agreements take effect upon acceptance of two-thirds of the Members, after a complex approval process in the Ministerial Conference or General Council.

Given the almost universal membership in the WTO and the strong historic commitment in the GATT and the WTO to the principle of decision-making by consensus, it is sometimes difficult to plan or to set policy goals within the WTO system. The recent experience of the Seattle Ministerial Meeting has caused many delegations to reflect on whether the decision-making rules and procedures of the WTO need to be improved. In the Director-General's report to the General Council at its first meeting after Seattle, he indicated that several Members are considering making proposals directed at reform of decision-making procedures within the WTO.⁶⁸

The WTO has inherited the unique and remarkable ability of its predecessor, the GATT, to be flexible and to adapt to the challenges of the future. The decision by the General Council in 1995 to take decisions concerning requests for waivers and accessions of new Members by consensus was a sign of this flexibility. Obtaining a consensus decision among Members present at a meeting is easier, in practice, than sending out postal ballots and hoping that a three-fourths majority of all Members will return them. As the experience with the ITA demonstrates, WTO Members can still find practical means to implement new plurilateral agreements, despite some of the apparent rigidities of the amendment procedures of the *WTO Agreement*.

⁶⁷ WTO AGREEMENT, Article IX:1.

⁶⁸ Director-General's Report to the General Council, February 7, 2000, which appeared as a statement to the press in WTO PRESS/166, (February 7, 2000).