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The Club Approach to Multilateral Trade Lawmaking

Nicolas Lamp*

ABSTRACT

The World Trade Organization (WTO) stands at the center of an emerging structure of global economic governance. Its rules affect important aspects of everyone's lives—how much people pay for the products that they purchase, what types of employment are open to them, and which medicines they can access. And yet, while the WTO was conceived as a “negotiating machine” that would develop rules in sync with an increasingly dynamic global economy, negotiations on a new set of global trade rules have now been deadlocked for over a decade. This impasse is all the more surprising in light of the fact that the multilateral trade regime was, up until the establishment of the WTO in 1995, one of the most productive engines of international lawmaking. The present Article explores why multilateral trade lawmaking used to work, and why it is no longer working today.

A key part of the answer is that before the establishment of the WTO, the multilateral trading system worked as a “club,” which allowed the major trading powers to manipulate the circle of participants in trade negotiations depending on how these powers weighed the costs and benefits of the participation of additional states. The Article identifies three factors that led the major trading nations to adopt this approach: (1) the greater practicality of negotiations among a smaller group of countries, (2) the insiders' greater influence on the outcome of the negotiations, and (3) the chance to subsequently compel outsiders to join the agreement on the insiders' terms. The Article shows how the major trading powers were able to implement the club approach to multilateral trade lawmaking

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throughout the pre-WTO era—an ability that accounts for much of the legislative dynamism of that time. The Article then argues that the founding of the WTO, while itself an example of the successful employment of the club logic, has made the use of the club approach in the multilateral trading system much more difficult, if not impracticable. As a result, the pace of lawmaking in the multilateral trading system is now circumscribed by the need to seek the support, or at least acquiescence, of all WTO members.

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I. INTRODUCTION

The World Trade Organization (WTO) stands at the center of an emerging structure of global economic governance. Its rules affect important aspects of everyone's lives—how much people pay for the products that they purchase, what types of employment are open to

them, and which medicines they can access. And yet, while the WTO was conceived as a “negotiating machine”¹ that would develop rules in sync with an increasingly dynamic global economy, negotiations on a new set of global trade rules have now been deadlocked for over a decade. This impasse is all the more surprising in light of the fact that the multilateral trade regime was, up until the establishment of the WTO in 1995, one of the most productive engines of international lawmaking. The present Article explores why multilateral trade lawmaking used to work, and why it is no longer working today.

A key part of the answer, the Article suggests, is that before the establishment of the WTO, the multilateral trading system worked as a “club.” It is not uncommon to see the institutions of the multilateral trade regime—the General Agreement on Tariffs and Trade² (GATT) in particular—described as a “club.”³ Some use this label to evoke the pragmatism, informality, and insularity that characterized the GATT.⁴ Others employ the concept to highlight the extent to which many countries, especially developing countries, have historically been excluded from meaningful participation in trade lawmaking and

1. See PETER SUTHERLAND, ET AL., CONSULTATIVE BOARD, *THE FUTURE OF THE WTO: ADDRESSING INSTITUTIONAL CHALLENGES IN THE NEW MILLENNIUM* 61 (2004) (describing the World Trade Organization as “in large measure a negotiating machine” that was “designed to seek negotiated solutions to the challenges of global trade”).

2. See generally General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]. The GATT was a trade agreement adopted by twenty-three countries in 1947, with the aim of reducing barriers to international trade. The GATT was originally part of a larger effort to establish institutions that would govern the international economy in the wake of the Second World War. In the field of trade, the larger institutional project—the establishment of an International Trade Organization (ITO)—floundered, and the GATT remained the main multilateral forum for the governance of international trade during the second half of the twentieth century, until it was replaced by the WTO in 1995. The relationship of the GATT to the ITO and its replacement by the WTO will be discussed in detail in Part III *infra*.

3. Gerard Curzon & Victoria Curzon, *GATT: Traders' Club*, in *THE ANATOMY OF INFLUENCE: DECISION MAKING IN INTERNATIONAL ORGANIZATIONS* 298, 298 (Robert W. Cox & Harold K. Jacobson eds., 1973); Peter-Tobias Stoll, *The World Trade Organization as a Club: Rethinking Reciprocity and Common Interest*, in *FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA* 172 (Ulrich Fastenrath et al. eds., 2011); Robert Wolfe, *Canada's Adventures in Clubland: Trade Clubs and Political Influence*, in *READINGS IN CANADIAN FOREIGN POLICY: CLASSIC DEBATES AND NEW IDEAS* 377 (Chris Kukucha and Duane Bratt eds., 2011).

4. See Robert O. Keohane & Joseph S. Nye Jr., *The Club Model of Multilateral Cooperation and Problems of Problems of Democratic Legitimacy*, in, *EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM* 264, 266 (Roger B. Porter at al. eds., 2001) (describing how the “club model” insulated trade negotiators from officials representing non-trade interests and from public scrutiny more generally); Brian Hocking, *Changing the Terms of Trade Policy Making: From the 'Club' to the 'Multi-stakeholder' Model*, 3 *WORLD TRADE REV.* 3 (2004).

from the benefits of the trade regime.⁵ However, the concept has remained more of a political catchphrase than a systematically developed analytical tool. The present Article takes inspiration from economic theory to give the club concept more analytical depth and then employs the refined concept to explore the history, legal ramifications, and political implications of the club approach to multilateral trade lawmaking.

Economic theory defines clubs by reference to the characteristics of the goods that the members of the club share.⁶ Put simply, a club good is a good that is best shared with some, but not too many, others.⁷ As a consequence, the club members seek to exclude those whose participation would pose higher costs than benefits.⁸ To say that states adopt a club approach to multilateral 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.

The observation that the major trading nations have perceived participation in multilateral trade lawmaking as a club good is by no means trivial. In fact, there are good reasons, as well as historical precedents, for treating participation in trade lawmaking as a private or a public good, rather than a club good. As recently as the early twentieth century, both the United States and the United Kingdom saw trade lawmaking as a private good that was best "shared" with no one else. In the United States, Congress was for the most part unwilling to let anyone interfere with its autonomy in setting tariff levels.⁹ And the United Kingdom was "stubborn[ly] unilateral . . ." for different reasons; the status of free trade in its political culture was such that it saw any attempt to bargain over trade policy as heresy.¹⁰ Conversely, it is not implausible to see participation in trade lawmaking as a public good. U.S. Secretary of State Cordell Hull, the

5. See Joanne Gowa & Soo Yeon Kim, *An Exclusive Country Club: The Effects of the GATT on Trade, 1950-94*, 57 *WORLD POL.* 453, 455-56 (2005) (arguing that the GATT "privileged trade expansion among the major trading nations").

6. See generally James M. Buchanan, *An Economic Theory of Clubs*, 32 *ECONOMICA* 1 (1965).

7. See *id.*

8. See *id.*

9. William B. Kelly, Jr., *Antecedents of Present Commercial Policy, 1922-1934*, in *STUDIES IN UNITED STATES COMMERCIAL POLICY* 1, 61 (William B. Kelly, Jr. ed., 1963) ("Tariffs . . . were regarded as a matter of strictly domestic concern and not a subject for international discussion or negotiations.").

10. See FRANK TRENTMANN, *FREE TRADE NATION: COMMERCE, CONSUMPTION, AND CIVIL SOCIETY IN MODERN BRITAIN* 12 (2008); see also *id.* at 147 (recording the view held by senior British officials that "tariff bargains were 'a commercial sin'") and 159 (noting that Britain was "commercially internationalist but politically isolationist").

intellectual father of the Reciprocal Trade Agreements program,¹¹ famously saw one of the principal objectives of an international trade regime in the promotion of international peace.¹² Arguably, the regime was more likely to serve this function when more states participated in its creation and subsequently adhered to it. Indeed, many international lawmaking endeavours aim for universal adherence and are therefore as inclusive as possible. The U.S. plans for an International Trade Organization (ITO) were no exception.¹³ The ITO was supposed to be a universal organization with low barriers to entry,¹⁴ negotiated in the framework of the United Nations through a process culminating in a multilateral conference open to all members of the United Nations (the Havana Conference).¹⁵

What, then, prompted the major trading nations to complement this universal ambition with, and eventually abandon it in favor of, the club approach to multilateral trade lawmaking that is embodied in the GATT? Examination of the historical material reveals three factors that led these nations to see participation in multilateral trade lawmaking as a club good: (1) the greater *practicality* of negotiations among a smaller group of countries, (2) the insiders' greater *influence* on the outcome of the negotiations, and (3) the possibility subsequently to compel outsiders to join the agreement on the insiders' terms (*leverage*). As shown below, these three rationales

11. Under the Reciprocal Trade Agreements program, the U.S. Congress delegated authority to negotiate reciprocal trade agreements with foreign countries to the President. The original Trade Agreements Act was adopted in 1934. Foreign Trade Agreements, 19 U. S. C. § 1351, 48 Stat. 943 (1934).

12. See Kenneth W. Dam, *Cordell Hull, the Reciprocal Trade Agreements Act, and the WTO*, in, REFORMING THE WORLD TRADING SYSTEM: LEGITIMACY, EFFICIENCY, AND DEMOCRATIC GOVERNANCE 83 (Ernst-Ulrich Petersmann ed., 2005).

13. At the London session of the Preparatory Conference for the ITO, the Czech delegate reflected this view in his statement:

I believe there is no doubt that the main objective that we should never lose sight of is to consolidate peace through economic collaboration. We have no doubt that the more states that are attracted and are able to join the I.T.O., the more fully this objective and the more specific aims of the organization will be achieved.

U.N. Economic and Social Council, Preparatory Committee of the International Conference on Trade and Employment, VERBATIM REPORT OF THE SECOND MEETING OF COMMITTEE II, U.N. DOC. E/PC/T/C.II/PV/2 16 (Oct. 17, 1946) [hereinafter SECOND MEETING OF COMMITTEE II].

14. See *infra* note 49 and accompanying text.

15. The ITO was supposed to be a comprehensive international economic organization. Apart from a chapter on commercial policy—which would become the basis for the GATT—the ITO Charter contained chapters on employment and economic activity, economic development and reconstruction, restrictive business practices, and intergovernmental commodity agreements. See generally Havana Charter for an International Trade Organization, U.N. DOC. E/CONF. 2/78 (Mar. 24, 1948) [hereinafter ITO Charter].

for using the club approach help explain the patterns of participation in multilateral trade lawmaking from the GATT/ITO preparatory negotiations to the present. While the tools employed by the major trading nations to implement the club approach, and the constraints that they have faced in doing so, have evolved, these underlying rationales have largely retained their force.

There are at least three reasons why it is important to understand the club approach to multilateral trade lawmaking. First, an understanding of how multilateral trade lawmaking has worked in the past can shed light on the reasons why, except in certain constellations, it no longer works today. While the club approach has been a pervasive feature of lawmaking throughout the history of the trading system, the opportunities for employing the club approach in the WTO are much diminished. This is not only due to the requirement that new plurilateral agreements can only be added to the WTO Agreement (and thus made subject to the dispute settlement system) with the consensus of the entire membership.¹⁶ The Article also argues that the club approach has become a victim of its own success. In the Uruguay Round of trade negotiations,¹⁷ the major developed countries managed to leverage the club approach to force the developing countries to assume an unprecedented level of obligations. It is unlikely that they will ever be able to replicate this feat: not only have developing countries become adept at resisting the club dynamics of the GATT era, but the very success of the club approach in the Uruguay Round also means that the multilateral trading system is now too valuable to the developed countries for them to credibly threaten to abandon it in favor of a new club. Based on the history of multilateral trade lawmaking, one would expect that the most promising avenues for lawmaking are those in which elements of the club dynamic are still present, such as negotiations for accession to the WTO, negotiations in the context of existing plurilateral agreements,¹⁸ negotiations of agreements whose benefits are concentrated among a clearly circumscribed group of members (so-called "critical mass agreements"),¹⁹ and negotiations of bilateral

16. Marrakesh Agreement Establishing the World Trade Organization art. X.9, 1867 U.N.T.S. 154 (Apr. 15, 1994) [hereinafter Marrakesh Agreement].

17. The Uruguay Round of trade negotiations was launched in September 1986 at a Ministerial Meeting in Punta del Este, Uruguay. The negotiations were concluded in December 1993, and the results of the negotiations were adopted at a Ministerial Meeting in Marrakesh, Morocco, in April 1994.

18. In particular, the Government Procurement Agreement, a revised version of which entered into force in April 2014. See Revised Agreement on Government Procurement, ANNEX TO THE PROTOCOL AMENDING THE AGREEMENT ON GOVERNMENT PROCUREMENT (Mar. 30 2012), http://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pdf [<http://perma.cc/PFB5-5JAS>] (archived Oct. 7, 2015).

19. Such as the so-called Information Technology Agreement. See Ministerial Declaration on Trade in Information Technology Products, WT/MIN(96)/16 (1996). A subset of WTO Members recently concluded negotiations aimed at expanding the

and regional preferential trade agreements outside the WTO.²⁰ And indeed, most lawmaking activity since the establishment of the WTO has taken place across these fora. By uncovering the rationales for using the club approach in the history of multilateral trade lawmaking, the Article provides an explanation for this trend.

A second reason why it is important to analyze the history of participation in multilateral trade negotiations is that it allows one to gain a critical understanding of how the institutions, principles, practices, and legal rules that shape the trade regime to this day were established, defended, and made to work. Why did the major trading powers decide to establish the exclusive GATT alongside the universal ITO, and how did they try to reconcile the two institutions? How did the United States and its developed country allies succeed in entrenching the principle of reciprocity as the basis for trade lawmaking, and which tools did they devise to exclude potential “free-riders” from the benefits of the trade regime? How did the “Quad” countries (the United States, the European Communities, Canada, and Japan) manage to get the developing countries to sign up to an agreement enshrining substantive intellectual property rights in the Uruguay Round—even those who had been vehemently opposed to such an agreement throughout the negotiations? As the Article will show, the dynamics of the club approach to multilateral trade lawmaking are at the heart of the answer to all these questions.

Finally, a keen appreciation of how the club approach has been employed in the multilateral trading system can also provide the basis for a normative evaluation of this lawmaking technique. While such an evaluation is beyond the scope of this Article, it remains a desideratum for future research, especially in light of recent suggestions to employ the club approach that was pioneered in the trading system in other areas of international lawmaking, such as climate change regulation.²¹

The Article consists of three Parts. The first gives a brief overview of how the club concept has been used in the academic literature so far and lays out the conception of the club approach employed here. The second Part provides a detailed discussion of the use of the club approach throughout the history of multilateral trade lawmaking. The final Part concludes.

product scope of the ITA. See General Council, *Declaration on the Expansion of Trade in Information Technology Products*, WT/L/956 (July 28, 2015).

20. The largest such agreement to date is the recently concluded Trans-Pacific Partnership, which comprises twelve countries accounting for approximately one-third of global trade.

21. See William Nordhaus, *Climate Clubs: Overcoming Free-riding in International Climate Policy*, 105 AM. ECON. REV. 1339 (2015) (discussing the viability of a club approach to climate change negotiations); DAVID G. VICTOR, *GLOBAL WARMING GRIDLOCK: CREATING MORE EFFECTIVE STRATEGIES FOR PROTECTING THE PLANET* (2011) (arguing for the formation of “carbon clubs” and the negotiation of “climate accession deals” inspired by the experience of GATT/WTO lawmaking).

II. CONCEPTUALIZING CLUBS IN MULTILATERAL TRADE LAWMAKING

Many authors who describe the GATT as a club do not explain what exactly they mean by this term. Gerard Curzon and Victoria Curzon, in their paper on the “trader’s club” of GATT, give little indication of what makes the GATT a club, except that they note the need to pay an “entrance fee” in order to be admitted.²² Several other authors report the developing countries’ perception of the GATT as a “rich man’s club,” without exploring this notion further.²³ In contrast to Curzon and Curzon’s focus on the relationship between members and nonmembers of the GATT, the “rich man’s club” notion appears to locate both the insiders and outsiders *within* the GATT membership; it refers to a lack of participation by developing countries in the GATT, including those developing countries that were contracting parties to the GATT.²⁴

More recently, several authors have defined the club concept more explicitly, but in ways that appear to be at odds with older conceptions. Robert Keohane and Joseph Nye have described the “club model” of lawmaking as based on the exclusion of “officials in other government bureaucracies and in international organizations in different issue areas” on one hand and as operating largely outside the view of the public on the other hand.²⁵ Their conception is less concerned with the participation of developing countries in trade lawmaking, but refers primarily to the insularity of trade lawmakers both in relation to domestic constituents and other areas of global governance. Robert Wolfe has employed the club concept in yet a different sense, namely to describe coalitions and informal groupings in WTO lawmaking.²⁶

Little is gained by giving a meaning to the club concept that is at odds with how that concept has been understood for most of the

22. Curzon & Curzon, *supra* note 4, at 305.

23. ALAN OXLEY, *THE CHALLENGE OF FREE TRADE* 103 (1990); HUGO PAEMEN & ALEXANDRA BENSCH, *FROM THE GATT TO THE WTO: THE EUROPEAN COMMUNITY IN THE URUGUAY ROUND* 253 (1995); GILBERT R. WINHAM, *INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATION* 256 (1986) [hereinafter WINHAM, TOKYO ROUND].

24. One can distinguish four dimensions of “participation” in GATT lawmaking: first, participation can simply mean *membership* in the GATT; second, participation can refer to *involvement* in GATT negotiations; third, participation can refer to the *level of commitments* assumed in GATT negotiations; and fourth, participation can refer to the *level of benefits* that a contracting party derives from GATT rules. These dimensions of participation do not necessarily coincide. See Rorden Wilkinson & James Scott, *Developing Country Participation in the GATT: A Reassessment*, 7 *WORLD TRADE REV.* 473, 473 (2008) (discussing the second dimension, involvement); Gowa & Kim, *supra* note 6 (providing empirical evidence on the fourth dimension (level of benefits, measured in terms of trade expansion)).

25. Keohane & Nye, *supra* note 5. Keohane and Nye’s conception is taken up by Hocking, *supra* note 5.

26. See Wolfe, *supra* note 4.

GATT's history, however vague that understanding may have been. Instead, this Article draws on the economic theory of clubs to give the club concept more analytical depth. The economic theory of clubs, focusing as it does on limitations imposed on participation in the enjoyment of a good, is broadly consonant with the way in which the club concept has traditionally been employed in the context of the trading system. At the same time, the economic theory of clubs can add some rigor to an analysis of the club approach to trade lawmaking. It does so, first, by providing a conceptual framework for thinking about the alternatives to treating participation in trade lawmaking as a club good, and, second, by defining the circumstances in which states face incentives to adopt a club approach to trade lawmaking.

The economic theory of clubs, as first formulated by James Buchanan, starts from the premise that "there exists some most preferred or 'optimal' membership for almost any activity in which we engage."²⁷ Buchanan distinguishes club goods from "purely private" goods on the one hand and from "purely public" goods on the other hand. For "purely private" goods, "the optimal sharing arrangement . . . is clearly one person (or one family unit)."²⁸ For "purely public" goods, on the other hand, "the optimal sharing group . . . includes an infinitely large number of members."²⁹ For Buchanan, the "interesting cases are those goods and services, the consumption of which involves some 'publicness,' where the optimal sharing group is more than one person or family but smaller than an infinitely large number"—in other words, club goods (and services). The "central question in a theory of clubs," then, "is that of determining the membership margin, so to speak, the size of the most desirable cost and consumption sharing arrangement."³⁰ This optimal club size 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."³¹

In applying Buchanan's insight to multilateral trade lawmaking, the first question that needs to be answered is in relation to which good the club dynamic is to be analyzed. This is an empirical question; this Article therefore derives the answer from the historical record analyzed below. As suggested below, the club good in question is participation in multilateral trade lawmaking, in the sense of involvement in negotiations and decision making.

This first question is inextricably linked with a second question: What did the major trading nations perceive the benefits and costs of

27. See Buchanan, *supra* note 7, at 1.

28. *Id.*

29. *Id.* at 1–2.

30. *Id.* at 2.

31. *Id.* at 5.

the participation of additional countries in trade lawmaking to be? This is also an empirical question, which is explored in the following Part. The contribution of the economic theory of clubs to the argument at this stage is simply that it clarifies what it means to say that states have treated participation in multilateral trade lawmaking as a club good: it means that, more often than not, the major trading nations have considered the costs of the participation of additional states in multilateral trade lawmaking to outweigh the benefits of such participation.

III. THE CLUB APPROACH IN THE HISTORY OF MULTILATERAL TRADE LAWMAKING

When U.S. and British officials started negotiating about the structure of the postwar trading order in the early 1940s, they envisaged a universal international organization that would be the counterpart of the United Nations in the economic sphere.³² This "impulse to universality"³³ was reflected in the United States' ambition to negotiate a charter for an international trade organization through "United Nations machinery"³⁴ and in the persistence with which it sought the cooperation of the Soviet Union and, to a lesser extent, China, in this endeavor. The United States 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 organization.³⁵

32. See U.S. Dep't of State, *Proposals for Expansion of World Trade and Employment 1, (1949)* (laying out the State Department's vision for the postwar international economic order, including the establishment of an "International Trade Organization," in preparation for an "International Conference on Trade and Employment"). Also see the statement of William L. Clayton, Under Secretary of State for Economic Affairs in *International Trade Organization: Hearings on Trade Agreements System and Proposed International Trade Organization Charter Before the Senate Comm. On Finance, 80th Cong., 1st 3 (1947)* [hereinafter *Senate Hearings*], where he noted:

The International Trade Organization is to be a forum where such actions [affecting economic relations with other countries, N.L.] 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.

33. Miles Kahler, *Multilateralism with Small and Large Numbers*, 46 INT'L ORG. 681, 681 (1992).

34. Foreign Relations of the United States, VOLUME II, GENERAL: ECONOMIC AND SOCIAL MATTERS 1944, at 15 [hereinafter *FRUS 1944*].

35. See Foreign Relations of the United States, VOLUME VI, THE BRITISH COMMONWEALTH; THE FAR EAST 1945, at 118 [hereinafter *FRUS 1945*] (documenting the Secretary of State's explanation to President Truman that the pledge to maintain employment was "important to insure the cooperation of other countries in achieving our trade objectives").

It was during the discussions on the procedures for tariff reductions that the U.S., UK, and Canadian negotiators first considered an alternative paradigm of participation for the multilateral trading system: the club. Subpart A discusses what prompted these nations to see participation in tariff negotiations as a club good. It will also explore how these countries attempted to reconcile the club approach with their ambition to establish a universal organization. Subpart B traces how the club dynamic manifested itself in the practices of participation in multilateral trade lawmaking throughout the history of the GATT. Subpart C argues 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. Subpart D shows that the establishment of the WTO has made the use of the club approach in the multilateral trading system much more difficult, if not impracticable. The club dynamic of participation survives in three incarnations: overtly in accession negotiations, formalized in negotiations in “variable geometry,” and disguised in the increased differentiation of obligations. However, it is heavily 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 unfavorable, on board.

A. *The Club Within: GATT and the ITO*

There is ample evidence that the U.S. design for the postwar trading order was originally of a universal nature. During the Second World War, the United States leveraged the aid that it was granting its allies to secure their commitment to enter into discussions on the postwar international economic order with the United States and other governments.³⁶ This commitment was embodied in Article VII of the mutual aid agreements under which the United States provided material and logistical support to its allies. Article VII 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.”³⁷ The

36. DOUGLAS A. IRWIN, PETROS C. MAVROIDIS & ALAN O. SYKES, *AM. LAW INST., THE GENESIS OF THE GATT* 12–13 (2008).

37. See e.g., *Anglo-American Mutual Aid Agreement*, U.S.–U.K., art. VII, Feb. 28, 1942, 56 Stat. 1433; *Mutual Aid Agreement between the United States and the Union of Soviet Socialist Republics*, U.S.–U.S.S.R., art. VII, June 11, 1942, 56 Stat. 1500.

United States originally negotiated the wording of Article VII with Britain but copied it verbatim into all later mutual aid agreements, including those with the Soviet Union and China.

Even before the first exploratory discussions on the postwar 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."³⁸ U.S. 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, N.L.] before other governments were brought in and acquainted with the progress of the discussions."³⁹ Referring to Article VII of its mutual aid agreements, the United States 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."⁴⁰ The U.S. 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."⁴¹

In the following months, the United States 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 United States 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."⁴²

The United States also proposed the establishment of a "Commission comprising representatives of the principal United Nations," namely, the United States, the United Kingdom, 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

38. Foreign Relations of the United States, VOLUME I, GENERAL 1943, at 1108-1109 [hereinafter *FRUS 1943*].

39. *Id.* at 1109.

40. *Id.* at 1110.

41. *Id.*; see also *id.* at 1111 (laying out in detail the particulars of the invitation to the Soviet government); *id.* at 1118 (mentioning discussions between the Department of State and the Chinese Embassy in Washington). Although there was no mutual aid agreement between the United States and Canada, the United States decided that exploratory discussions should be held with Canada as well. *Id.* at 1125.

42. *Id.* at 763.

necessary procedures. The United States further presented a memorandum summarizing the results of the exploratory discussions between the United States and the United Kingdom,⁴³ and stated that it was “particularly important that similar conversations be arranged soon between Soviet and American experts.”⁴⁴ In 1944, President Roosevelt again urged the “establishment of United Nations machinery for postwar economic collaboration” in separate letters to Churchill and Stalin.⁴⁵

While the exploratory talks with the Soviet Union and China never took place, the persistence with which the United States attempted to initiate discussions—especially with the Soviet Union—is evidence of its expectation that the international economic arrangement of the postwar 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 United States 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”⁴⁶—a further indication of the universal scope ultimately desired for the proposed organization. Consistent with its ambition to pursue the establishment of a postwar international economic order through “United Nations machinery,” the United States 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 1946.⁴⁷ 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” (the Suggested Charter). Consistent with the “impulse to universality,”⁴⁸ the proposed organization was to have low barriers to entry: no more

43. See *id.* at 766–68.

44. *Id.* at 766; see also *id.* at 665–66 (documenting Secretary Hull’s attempt to impress the importance of international economic cooperation on Molotov by recalling “the inadequate preparation on economic matters at the time of the Versailles Conference and the incalculable harm which the world suffered as a result of the inadequate treatment of economic problems after the last war”).

45. *FRUS 1944*, *supra* note 34, at 14–15.

46. *FRUS 1945*, *supra* note 35, at 89.

47. United Nations Conference on Trade and Employment, *Report of the Preparatory Committee of the United Nations Conference on Trade and Employment*, ¶ 1 U.N. Doc. E/PC/T/117/Rev.1 (July 9, 1947); see WILLIAM ADAMS BROWN, JR., *THE UNITED STATES AND THE RESTORATION OF WORLD TRADE: AN ANALYSIS AND APPRAISAL OF THE ITO CHARTER AND THE GENERAL AGREEMENT ON TARIFFS AND TRADE 59* (1950) (providing the full text of the resolution).

48. Kahler, *supra* note 33, at 681.

was supposed to be required of new members than to accept the obligations of the charter.⁴⁹

The Suggested Charter, however, also embodied a different paradigm of participation with respect to one central issue: tariff negotiations. It was in the context of their discussion of alternative methods of tariff reductions that U.S., UK, and Canadian negotiators first considered the idea of holding negotiations initially among a "nucleus of important trading nations."⁵⁰ Three rationales for the "nuclear group,"⁵¹ or "club,"⁵² approach emerged during the discussions. First, given that the United States 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. Recognizing the limited negotiating capacity of its partners, including the United Kingdom and Canada,⁵³ the United States 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."⁵⁴

Second, the club approach would allow the "nuclear" countries to agree on the procedure for tariff reductions, as well as disciplines on nontariff⁵⁵ barriers, without having to take into account the views of other countries. States that 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

49. U.S. DEPT OF STATE, SUGGESTED CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION OF THE UNITED NATIONS, art. 2 (1946) [hereinafter SUGGESTED CHARTER]; see also *Senate Hearings, supra* note 32, at 3 ("Chapter II, relating to membership, looks toward world-wide participation in the organization.")

50. *FRUS 1945, supra* note 35, at 59.

51. *Id.* at 72.

52. *Id.* at 65 (recording that the term "club" was first used by a Canadian negotiator).

53. See *id.* at 90 (explaining that the impracticality of conducting multiple bilateral negotiations simultaneously had been one of the principal objections of the United Kingdom and Canada to the bilateral request-and-offer method of tariff negotiations).

54. *Id.* at 88. See also Canada's remark that: "[i]t seemed obvious that this [i.e., bilateral tariff negotiations, N.L.] 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." *Id.* at 71.

55. The nontariff barriers that trade negotiators were concerned with at the time included quantitative restrictions, exchange controls, subsidies, and barriers arising from state trading.

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.⁵⁶

There were some differences of opinion between the United States and Canada regarding the extent to which legal disciplines on nontariff barriers, rather than just bilateral tariff bargains, should be definitely agreed among the smaller circle of countries. Given their ambition to build a universal organization, 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."⁵⁷ 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."⁵⁸ These differences 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 United States and the rules on nontariff barriers in the case of the Canadians—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 outsiders into the arrangement *on the nuclear group's terms*. U.S. negotiators envisaged that the level of tariff reductions agreed among the members of the nuclear group "would create the standard by which to judge the requirements to which other nations joining the organisation should be expected to conform [It] would be the test of what other countries joining the organisation should do in this respect."⁵⁹ The proponents of the club 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 "nucleus of important trading nations," assumed that "other countries might be more or less obliged to adhere" to it.⁶⁰ The Canadians were greatly preoccupied with 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

56. *Id.* at 64; *id.* at 71–72.

57. *Id.* at 73.

58. *Id.*

59. SECOND MEETING OF COMMITTEE II, *supra* note 13, at 9.

60. *FRUS 1945*, *supra* note 35, at 59.

agreement.⁶¹ One approach discussed between the United States 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 that the members of the nuclear group had negotiated with each other might otherwise be withdrawn after a "probational period."⁶² It was this approach that the United States ultimately incorporated into its Suggested Charter.

The Suggested Charter published by the United States 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.⁶³ While the preparatory negotiations for the Havana Conference, at which the ITO Charter was to be concluded, were sponsored by the United Nations 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."⁶⁴ 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 ITO members that were also parties to the GATT.⁶⁵ 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."⁶⁶ If the Committee determined that a member had failed to fulfil this obligation "within a reasonable period of time," it could authorize

the complaining Member, or in exceptional cases the Members of the Organization generally . . . notwithstanding the provisions of Article 8 [General

61. *Id.* at 67-68; *see also id.* at 72 (recording a discussion of how to deal with "countries refusing to participate").

62. *Id.* at 73. The negotiators acknowledged that these questions would "require the reexamination of existing most-favored-nation commitments." *Id.*

63. BROWN, *supra* note 47, at 61-63.

64. SUGGESTED CHARTER, *supra* note 49, art. 56, ¶ 2 n.1 (emphasis added); *see also* BROWN, *supra* note 47, at 61-63 (highlighting the institutional separateness of the negotiation of the GATT from the preparatory negotiations for the ITO Charter).

65. SUGGESTED CHARTER, *supra* note 49, art. 56, ¶ 1; *see also* N.G. Crowley & C.P. Haddon-Cave, *The Regulation and Expansion of World Trade and Employment*, 23 ECON. REC. 32, 42 (1947) (discussing 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).

66. SUGGESTED CHARTER, *supra* note 49, art. 18, ¶ 1.

Most-Favored-Nation Treatment, N.L.] . . . 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.⁶⁷

ITO members that 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."⁶⁸ In other words, they had to "negotiate their way in," as the United States and Canada had envisaged during their exploratory discussions.⁶⁹ 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.⁷⁰

The Interim Tariff Committee, then, was to be the club within. Its members would have controlled admission, with wide discretion to decide whether the prospective entrant had earned the privileges of membership,⁷¹ and would have been able to wield the ultimate power in the trade context—the power to authorize 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 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). Thus, the ostensible institutional "reconciliation" of the GATT with the ITO was from the start conspicuously informed by the third rationale for the club approach: the ability of club members to force others to join the club on the members' terms.

The U.S. draft of this arrangement survived the sessions of the Preparatory Committee in London and Geneva relatively unscathed⁷²—perhaps unsurprisingly, since all members of the

67. *Id.* art. 18, ¶ 3, at 12.

68. *Id.* art. 56, ¶ 2, at 37–38.

69. *FRUS 1945*, *supra* note 35, at 73.

70. SUGGESTED CHARTER, *supra* note 49, art. 56 ¶ 2, at 37–38.

71. 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.

72. The articles corresponding to Articles 18 and 56 in the Suggested Charter are identical in the London Draft of the Charter (Articles 24 and 67, respectively). See U.N. Conference on Trade and Employment, *Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment*, U.N. Doc. E/PC/T/33 (1946). They are slightly modified and developed in the Geneva Draft (Articles 17 and 81, respectively). See U.N. Conference on Trade and Employment, *Report of the Second Session of the Preparatory Committee of the United*

Preparatory Committee could expect to become original members of the GATT and thus of the Interim Tariff Committee envisaged in the London Draft (which became a permanent Tariff Committee in the Geneva Draft of the Charter).⁷³ 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).⁷⁴ 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 inaccessible to countries with no basis to carry out the undertakings contained in Article 17 [the obligation to carry out tariff negotiations, N.L.], and that the club's exclusiveness would enable the members to exercise unduly powerful influence over the work of the Organization.⁷⁵

Canada likewise recognized 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 in the Organization."⁷⁶ However, both the United Kingdom and Canada tried to reassure the opponents that these fears were unfounded, pointing to the experience of negotiating the GATT

Nations Conference on Trade and Employment, at 17-18, 51, E/PC/T/186 (Sept. 10, 1947) [hereinafter "Geneva Draft"]. 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 *id.* at 17-18, 51 (containing text of Articles 17(1)(d) and 81(2), respectively).

73. The United States extended the invitation to conduct tariff negotiations to all members of the Preparatory Committee. See BROWN, *supra* note 47, at 61-62 (discussing the role of the Preparatory Committee in the tariff negotiations that led to the conclusion of the GATT). By 1947, the "nuclear" group had thus become synonymous with the Preparatory Committee. See *Foreign Relations of the United States, VOLUME I, GENERAL; THE UNITED NATIONS 1947*, at 912 n.* ("Nuclear countries were those represented on the Preparatory Committee.").

74. The Tariff Committee was explicitly exempt from the final authority of the Conference. See Geneva Draft, *supra* note 72, at 48 (containing text of Article 74 (1)).

75. U.N. Conference on Trade and Employment, *Sixth Committee: Organization, Summary Record of the Fourteenth Meeting*, at 3, U.N. Doc. E/CONF.2/C.6/SR.14 (Dec. 19, 1947) [hereinafter *Summary Record of the Fourteenth Meeting*]. At some point in the discussion, the United Kingdom had apparently also referred to the Tariff Committee as an "oligarchy"; this characterization was mentioned by Peru. *Id.* at 8.

76. U.N. Conference on Trade and Employment, *Sixth Committee: Organization, Summary Record of the Fifteenth Meeting*, at 1, U.N. Doc. E/CONF.2/C.6/SR.15 (Dec. 26, 1947).

at the second session of the Preparatory Committee. The United Kingdom claimed that “most countries could find a basis for tariff agreements,” and even countries that had not negotiated tariff agreements might still be admitted to the Tariff Committee.⁷⁷

The United States was less apologetic. The U.S. 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.⁷⁸

At the first meeting of a subcommittee set up to study the question, the official set out the U.S. position in even stronger terms, emphasizing

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.⁷⁹

What is striking is the peculiar meaning with which the United States imbued the concepts “doing” and “action” in these statements. It was certainly not the case that the countries against which this remark was directed did not want “action”; however, they wanted “action” that was *different* from the “action” envisaged by the United States.⁸⁰ 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 United

77. *Summary Record of the Fourteenth Meeting*, *supra* note 75, at 2–3 (emphasis omitted).

78. *Id.* at 9 (emphasis added).

79. U.N. Conference on Trade and Employment, *Sixth Committee: Organization, Sub-Committee on Article 81 (the Tariff Committee), Summary Record of the First Meeting*, U.N. Doc. E/CONF.2/C.6/W.8, at 2, (Dec. 24, 1947) (emphasis added).

80. In particular, the less developed countries participating in the tariff negotiations had argued for positive obligations to be imposed on ITO members to aid the development of the less developed countries. They also criticized the unwillingness of the United Nations to accept any discipline regarding subsidies, in particular regarding agricultural products.

States signalled that the way it imagined trade lawmaking was the only way to do it. And against the backdrop of the club dynamic, this was not mere rhetoric. The club approach allowed the United States to actually make *their* "action" (i.e., reciprocal tariff negotiations) the only game in town. It was this ability to marry institutional power to the imagery of "action" and "ambition" that allowed the United States 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 United States had managed to establish a somewhat dubious parallelism between the Tariff Committee and a proposed Committee for Economic Development.⁸¹ The compromise consisted of eliminating both the Tariff Committee and the Economic Development Committee from the Charter.⁸² 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 Geneva draft of the Charter, the GATT member would have had to refer the matter to the Tariff Committee, which would have had to *authorize* the suspension of tariff concessions.⁸³ Under the ITO 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 Organization 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.⁸⁴ 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 sheds light on what kind of institution the major trading powers intended the GATT to be. The club character of the GATT was designed to guarantee the principle of reciprocity, which the ITO Charter stated in the following terms: "No

81. See U.N. Conference on Trade and Employment, *Tariff Committee and Committee on Economic Development, Note Submitted for Discussion by Australian, Mexican and United States Delegation*, U.N. Doc. E/CONF.2/W.15 (Jan. 20, 1948).

82. U.N. Conference on Trade and Employment, *Report of the Co-Ordinating Committee to the Heads of Delegations*, U.N. Doc. E/CONF.2/45, at 12-15 (Mar. 2, 1948) [hereinafter E/Conf.2/45]; BROWN, *supra* note 47, at 157-58.

83. Geneva Draft, *supra* note 72, at 17-18, 51 (containing text of Articles 17(1)(d) and 81(2), respectively).

84. ITO Charter, *supra* note 15, art. 17, ¶ 4(b).

Member shall be required to grant unilateral concessions, or to grant concessions to other Members without receiving adequate concessions in return.”⁸⁵

The most-favored nation (MFN) principle—which obliged any ITO member to extend any trade benefit that they granted to any country to all other ITO members⁸⁶—harbored the danger that tariff concessions that GATT contracting parties had granted to one another would go permanently unrequited. The provisions concerning the (Interim) 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-favored nation principle: since the most-favored 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.⁸⁷ Instead of being “the club within” a larger organization, the GATT was now a club, period. The interaction between those inside and outside the GATT would henceforth be exclusively governed by the accession

85. *Id.* art. 17, ¶ 2(b).

86. *See id.* art. 16, ¶ 1 (“[A]ny advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for all other Member countries.”).

87. In fact, the possibility for such 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 *authorized* 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 utilized 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 First Session of the Contracting Parties: Summary Record of the Second Meeting*, GATT Doc. GATT/1/SR.2, at 3 (Mar. 4, 1948); *GATT First Session of the Contracting Parties: Revision of Draft Protocol Contained in Document GATT/1/28 Modifying Certain General Provisions of the General Agreement on Tariffs and Trade*, GATT Doc. GATT/1/47/Rev.1 (Mar. 19, 1948); JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 542 (1969).

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 decision rule for admissions of new members was changed from unanimity to a two-thirds majority of the contracting parties (at the request of the ITO negotiators who hoped to minimize the risk that ITO members might be "unreasonably prevented" from joining the GATT⁸⁸), 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.⁸⁹ The negotiators perceived the new article as necessary because a two-thirds 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."⁹⁰

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.⁹¹ 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 could join the GATT by simply succeeding into the obligations that their former colonial masters had assumed with respect to their

88. See *GATT Sub-Committee on Supersession: Report to the Contracting Parties*, GATT Doc. GATT/1/21, at 3 (Mar. 11, 1948) ("[The amendment] give[s] effect to the recommendation of the Co-ordinating Committee and the Heads of Delegations of the United Nations Conference."); E/Conf.2/45, *supra* note 82, at 14 (illustrating the context in which the proposal to change the decision rule arose).

89. The new article was proposed by the United States. *GATT First Session of the Contracting Parties: Summary Record of the Seventh Meeting*, GATT Doc. GATT/1/SR.7, at 4-5, (Mar. 15, 1948) [hereinafter GATT/1/SR.7]. For background on accessions under GATT Article XXXIII, see JACKSON, *supra* note 87, at 92-96. For background on the so-called non-application clause (GATT Article XXXV), see JACKSON, *supra* note 87, at 100-02.

90. GATT/1/SR.7, *supra* note 89, at 5; see also GATT Executive Secretary, *Application of Article XXXV to Japan: Origins of Article XXXV and Factual Account of its Application in the Case of Japan*, GATT Doc. L/1466, at 1, (May 11, 1961).

91. Over this time, the notion that developing countries regarded the GATT as a "rich man's club" became commonplace. 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, *supra* note 23, at 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, *supra* note 23, at 253.

territories.⁹² 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 the Article argues below, there were four such practices: (1) the practice of negotiating tariff concessions primarily, and often exclusively, with the principal supplier of a product; (2) the practice of excluding certain product categories and types of trade barriers from negotiations; (3) the practice of concluding agreements on tariff formulas and nontariff barriers among small groups of countries constituting a “critical mass”; and (4) the practice of conducting negotiations in an often informal and secretive way. These practices reproduced and perpetuated the club dynamic not so much because they *de jure* excluded any countries from most favored nation treatment. Rather, they *de facto* excluded a large number of GATT members, largely developing countries, from meaningful participation in multilateral trade lawmaking and from the benefits of trade liberalization.

Before discussing these practices in more detail, the Article will briefly recall the three major motivations for the club approach that had been made explicit in the preparatory discussions to the GATT: (1) the greater practicality of negotiating and reaching agreement among a smaller group of countries, (2) the ability to shape the content of this agreement more decisively than would otherwise be feasible, and (3) 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 emphasize 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,

92. Curzon and Curzon, writing in 1973, noted that:

[S]ince 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 & Curzon, *supra* note 4, at 305. There were also some hard accession negotiations, however. Curzon and Curzon mention Switzerland’s accession. *See id.* (“Switzerland . . . took two years to negotiate provisional accession and a further eight years to achieve full membership because a number of agricultural exporters . . . objected to Switzerland’s all too efficient form of agricultural protection and felt that it could afford to import more cheap food.”). 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, *supra* note 23, at 88. *See generally* Francine McKenzie, *GATT and the Cold War: Accession Debates, Institutional Development, and the Western Alliance, 1947–1959*, 10 J. COLD WAR STUD. 78 (2008).

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.”⁹³

As the discussion in this subpart will demonstrate, however, the other two factors are very much part of the explanation as well and significantly increased in importance over time. Thus, by contenting themselves with “do[ing] business by themselves,” the “leading countries” could not only reach agreement more easily but could also keep doing things their way. During the first two decades of the GATT, “doing things their way” 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 principal supplier rule *automatically* excluded those who were not able or willing to play by the “leading countries” rules from the benefits of trade liberalization, hence providing them with a strong incentive to participate in trade negotiations on the insiders’ terms.

This structure 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 nontariff measures. The major trading nations largely continued to “do business by themselves” and thereby shaped 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-favored nation clause of the GATT. Towards the end and in the aftermath of the Tokyo Round,⁹⁴ this limitation led to increasing frustration on the part of developed countries, in particular the United States. As will be discussed in the next subpart, 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.

93. ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 51 (1975).

94. The Tokyo Round was launched in Tokyo in 1973 and concluded in 1979. See generally WINHAM, *TOKYO ROUND*, *supra* note 23 (providing a comprehensive historical analysis of the Tokyo Round negotiations).

In the following sections, however, the Article 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.

1. 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.⁹⁵ As Winham has put it:

[I]nfluence 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 [T]he 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.⁹⁶

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.⁹⁷ 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

95. See Gilbert R. Winham, *GATT and the International Trade Régime*, 45 INT'L J. 796, 814 (1990) (“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 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.”).

96. WINHAM, TOKYO ROUND, *supra* note 23, at 256.

97. The role of the principal supplier rule in limiting the participation of developing countries in trade negotiations is widely acknowledged in the literature. See Gowa & Kim, *supra* note 6, at 455; Wilkinson & Scott, *supra* note 24, at 485 (“Indeed, the reliance on reciprocity, the principal supplier rule and the focus solely on tariffs, all had a detrimental effect on the capacity of developing countries to participate in tariff negotiations.”).

product in question.⁹⁸ 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.⁹⁹

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 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."¹⁰⁰

2. 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

98. See Cordell Hull, U.S. Sec'y of State, American Foreign Trade Policies: Address Before the Chamber of Commerce of the United State (Apr. 30, 1936), in 24 DEPT OF STATE COM. POL'Y SERIES, at 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.

Id.; see also JOHN W. EVANS, THE KENNEDY ROUND IN AMERICAN TRADE POLICY: THE TWILIGHT OF THE GATT? 6 (1971) ("[A]ny tariff reduction granted in a bilateral negotiation had to be 'generalized,' leading to the practice of limiting such reductions to tariffs on products principally supplied by the negotiating partner in order that 'unrequited benefits' to other countries might be avoided."); HARRY C. HAWKINS, COMMERCIAL TREATIES AND AGREEMENTS: PRINCIPLES AND PRACTICE 81-82 (1951) ("[T]he United States granted concessions on particular products to the country that had supplied the greatest proportion of our imports . . . [E]ach concession was made to the country that had the greatest interest in it."); Transcript of Interview by Richard D. McKinzie with John M. Leddy (June 15, 1973), HARRY S. TRUMAN LIBRARY & MUSEUM, <http://www.trumanlibrary.org/oralhist/leddyj.htm> [<http://perma.cc/C5DM-YQQN>] (archived Oct. 4, 2015) ("[Y]ou would find that one or two, possibly, maybe three, countries made up the bulk of the whole imported supply. They were the chief and most effective competitors, and that, therefore, you would not lose much bargaining power by extending the concession to others.")

99. See Gowa & Kim, *supra* note 6, at 455-56 (noting the small number of countries that directly benefited from the bargaining protocol under the GATT).

100. Paul Collier, *Why the WTO is Deadlocked: And What Can Be Done About It*, 29 WORLD ECON. 1423, 1425 (2006).

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 liberalization commitments. It also meant 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 that 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.¹⁰¹ In addition to the special treatment of agriculture, for example, in relation to quantitative restrictions, which was already enshrined in the GATT itself, the United States and European countries obtained waivers that left them with virtually complete freedom to protect their agricultural markets.¹⁰² The protective instruments imposed for this purpose, among which quotas—normally prohibited by the GATT¹⁰³—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.¹⁰⁴ 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.¹⁰⁵

But product selection also occurred in sectors that were at the center of the negotiations. Here, the desire to “concentrat[e] concessions on those products exported only by participants . . .

101. See generally VINOD K. AGGARWAL, *LIBERAL PROTECTIONISM: THE INTERNATIONAL POLITICS OF ORGANIZED TEXTILE TRADE* (1985) (chronicling the history of developed countries' attempts to organize the trade in textile products under the GATT); TIMOTHY E. JOSLING, STEFAN TANGERMANN & T.K. WARLEY, *AGRICULTURE IN THE GATT* (1996) (analyzing the special role of agricultural trade throughout the history of the GATT). 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 those states belonging to 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, *supra* note 6, at 455–56.

102. See JOSLING, TANGERMANN & WARLEY, *supra* note 101, at 11, 26–31.

103. See GATT, *supra* note 3, art. XI, ¶ 1.

104. Committee III on Expansion of Trade, *Special Report of Committee III to the Contracting Parties*, ¶ 7, L/1557, annex, at 8 (Sept. 27, 1961).

105. *Id.* ¶ 8, at 8–9.

sometimes required that new product categories be developed.”¹⁰⁶ 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”¹⁰⁷—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 specialization 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.¹⁰⁸ 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,¹⁰⁹ 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

106. J.M. Finger, *Trade Liberalization: A Public Choice Perspective*, in CHALLENGES TO A LIBERAL INTERNATIONAL ECONOMIC ORDER 421, 426 (Ryan C. Amacher et al. eds., 1979).

107. HAWKINS, *supra* note 98, at 88; *see also* LEAGUE OF NATIONS, ECONOMIC AND FINANCIAL SECTION, MEMORANDUM ON DISCRIMINATORY TARIFF CLASSIFICATIONS, TRANSMITTED BY W.T. PATE (1927).

108. Report of the Panel, *Canada/Japan: Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber*, ¶ 3.37, L/6470 (July 19, 1989) GATT BISD (36th Supp.), at 167, 186 (1990) [hereinafter L/6470] (“In the Canadian view the duty on SPF dimension lumber was an example of ‘tariff specialization.’”).

109. *Id.* ¶¶ 3.8, 3.21, 4.16, 5.5, at 177, 181, 196, 197 (“The Panel noted that the tariff classification for 4407.10–110 had been established autonomously by Japan, without negotiation.”). *But see* Robert E. Hudec, “Like Product”: *The Differences in Meaning in GATT Articles I and III*, in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW 101, 114 (Thomas Cottier & Petros Mavroidis eds., 2000) [hereinafter Hudec, *Like Product*] (speculating that the “background to the claim appears to have been a typical case of reciprocity discrimination—the classification of lumber by species of tree, resulting in more favourable treatment of United States origin lumber, in response to a tariff concession granted by Japan to the United States in a trade agreement bargain in which Canada did not participate”); ANDREW LANG, WORLD TRADE LAW AFTER NEOLIBERALISM: RE-IMAGINING THE GLOBAL ECONOMIC ORDER 258 (2011) (discussing the case based on Hudec’s interpretation).

be used to undermine negotiated tariff concessions,” as complainants could reclassify items “in order to gain an unbargained-for-concession.”¹¹⁰ 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.”¹¹¹ Japan warned of 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.¹¹²

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.”¹¹³ 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 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* recognized 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 interests, comprising both its protection needs and its requirements for the purposes of tariff and trade negotiations.”¹¹⁴ Robert Hudec reads these “rather opaque

110. L/6470, *supra* note 108, ¶ 3.20, at 180.

111. *Id.* ¶ 3.35 at 185.

112. *Id.* ¶ 3.32 at 184.

113. *Id.* ¶ 4.9 at 195 (describing New Zealand’s observations and views on the interpretation of “like products”).

114. *Id.* ¶ 5.9–.10 at 198. Other panels took a different view. See Report of the Panel, *Japan—Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, ¶ 5.5(b), L/6216 (Oct. 13, 1987) GATT BISD (34th Supp.), at 113–14 (“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 Report of the

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.”¹¹⁵

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: “If ‘product selection’ had not been available as a way around a strict MFN approach, there would perhaps have been much less tariff cutting.”¹¹⁶ Product selection was indeed highly successful in concentrating the benefits of trade liberalization among those who actively participated in tariff negotiations. As Finger reports:

The 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.¹¹⁷

In sum, product selection, both in its blatant (exemption of entire sectors) and subtler (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.

Panel, *Spain—Tariff and Treatment of Unroasted Coffee*, ¶ 4.4, L/5135 (June 11, 1981) GATT BISD (28th Supp.), at 111 (1982) (“[T]he Panel found that there was no obligation under the GATT to follow any particular system for classifying goods, and that a contracting party had the right to introduce in its customs tariff new positions or subpositions as appropriate . . . however . . . whatever the classification adopted, Article I:1 required that the same tariff treatment be applied to ‘like products.’”). See generally Hudec, *Like Product*, *supra* note 109, at 114–16 (analyzing the meaning of “like product” in *Japan/Canada-Dimension Lumber* and *Spain—Unroasted Coffee*); LANG, *supra* note 109, at 257–59 (developing Hudec’s discussion).

115. Hudec, *Like Product*, *supra* note 109, at 114.

116. G.C. Hufbauer, J. Shelton Erb & H. P. Starr, *The GATT Codes and the Unconditional Most-Favored-Nation Principle*, 12 LAW & POLY INT’L BUS. 59, 67 n.39 (1980).

117. Finger, *supra* note 106, at 427.

3. 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 nontariff 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 nontariff 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 nontariff barriers all countries potentially had something to *offer*, namely their consent to multilateral rules—at least in those areas where multilateral solutions, instead of bilateral accommodations, were sought. 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.¹¹⁸

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

118. Winham, *supra* note 95, at 814.

core countries might have to make substantial concessions to other countries. 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, thus making it difficult to force them to join it on the insiders' terms.

As the discussion in this subpart will demonstrate, 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 nontariff barriers and tariff formulas prevented potentially non-cooperative countries from blocking agreement 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 occur automatically through the principal supplier rule was increasingly institutionalized in the form of exclusive negotiating arrangements. 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,¹¹⁹ one of the earliest examples of the use of a critical mass approach in negotiations on nontariff 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, a provision that had been agreed under the assumption that the much more stringent obligations contained in the ITO Charter would come into force soon.¹²⁰

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

119. See GATT, *supra* note 3, art. 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 named in Annex H [i.e., signatory to the Final Act], the territories of which account for 85 per centum of the total external trade of the territories of such governments, computed in accordance with the applicable column of percentages set forth therein. (emphasis added).

120. See JACKSON, *WORLD TRADE*, *supra* note 87, at 368-70; IRWIN ET AL., *supra* note 36, at 156-58.

thereafter.”¹²¹ This was supplemented by a standstill provision whereby contracting parties would not extend existing subsidies or introduce new subsidies in the meantime (i.e., up until 31 December 1957).¹²² 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.

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 November 30, 1957, a declaration extending the standstill provisions of Article XVI (4) for one year.¹²³ 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.¹²⁴

The Declaration and a *Proces-Verbale* extending it for another year entered into force on May 11, 1959, for those governments that had signed them.¹²⁵ 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

121. GATT, *supra* note 3, art. XVI(4).

122. *See id.*, art. XVI(4).

123. *Declaration Extending the Standstill Provisions of Article XVI:4. Adopted by the Contracting Parties on 30 November 1957*, L/774 (Dec. 11, 1957); *see also* JACKSON, *WORLD TRADE*, *supra* note 87, at 373. The Declaration was extended twice. *See Proces-Verbal, Extending the Validity of the Declaration Extending the Standstill Provisions of Article XVI:4 of the General Agreement on Tariffs and Trade*, L/935 (Nov. 21, 1958); *Subsides—Article XVI:4, Proces-Verbal Further Ext ending the Validity of the Declaration Extending the Standstill Provisions of Article XVI:4*, L/1121 (Dec. 9, 1959).

124. L/774, *supra* note 123, ¶ 4; *see also Declaration Extending the Standstill Provisions of Article XVI:4. Note by the Executive Secretary*, L/892 (Oct. 25, 1958) (Contracting Parties, Thirteenth Session) (reporting on the status of acceptance of the Declaration).

125. *Proces-Verbal and Declaration Extending the Standstill Provisions of Article XVI:4. Entry into Force*, L/985 (May 15, 1959) (Contracting Parties, Fourteenth Session).

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.¹²⁶

Gallagher and Stoler have noted the implications of this declaration:

At a time when forty-two governments were [contracting parties] to 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.¹²⁷

The declarations on the standstill provision and 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 Anti-Dumping Code,¹²⁸ 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.¹²⁹ The amendment provisions of the GATT, however, 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, Article XXIX, and Article XXX itself, which all 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

126. Declaration Giving Effect to the Provisions of Article XVI.4, Nov. 19, 1960, GATT B.I.S.D. (9th Supp.) (1961).

127. Peter Gallagher & Andrew Stoler, *Critical Mass as an Alternative Framework for Multilateral Trade Negotiations*, 15 GLOBAL GOVERNANCE 375, 384 (2009) (footnotes omitted).

128. The Kennedy Round Anti-Dumping code was an agreement negotiated during the Kennedy Round of trade negotiations (1964–1967) that imposed additional disciplines (beyond those provided by GATT art. VI) on the administration of anti-dumping duties. The code is formally known as the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (June 30, 1967), GATT B.I.S.D. (15th Supp.) [hereinafter Kennedy Round Anti-Dumping Code].

129. See, e.g., Gerard Curzon & Victoria Curzon, *The Multi-Tier GATT System*, in THE NEW ECONOMIC NATIONALISM 137, 143 (Otto Hieronymi ed., 1980) ("[T]he 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.")

party upon acceptance by it.”¹³⁰ However, the core countries apparently 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.¹³¹

The Kennedy Round Anti-Dumping Code 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.”¹³² Of course, among the states that had negotiated the code—principally member countries of the Organization for Economic Co-operation and Development (OECD)—acceptance was informally contingent upon the acceptance by the other participants (as well as the successful conclusion of the Round as a whole).

The second agreement on nontariff barriers negotiated during the Kennedy Round, regarding the elimination of the American Selling Price (ASP) 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. This agreement would enter into force only if accepted by all those governments.¹³³

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 nonparticipants were not a major concern.¹³⁴ While the Anti-Dumping Code remained open to

130. GATT, *supra* note 3, art. XXX(1).

131. See JACKSON, *WORLD TRADE*, *supra* note 87, at 81 (“The difficulties of getting GATT amendments into force have led GATT parties to seek other ways to achieve their purposes . . . [T]he expedient of entering into a wholly separate treaty, which specifies obligations relating to the GATT, has been used. This separate treaty can be brought into force by as few parties as desire it—binding only them . . .”); L. Alan Winters, *The Road to Uruguay*, 100 *ECON. J.* 1288, 1294 (1990) (“Amending the GATT requires the agreement of two-thirds of the members and so the new provisions 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 nontariff barriers is also noted by KENNETH W. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 175 (1970).

132. Kennedy Round Anti-Dumping Code, *supra* note 128, art. 13, at 34.

133. Agreement Relating Principally to Chemicals, Supplementary to the Geneva (1967) Protocol to the General Agreement on Tariffs and Trade (June 26, 1967), GATT B.I.S.D. (15th Supp.), art. 12, at 10 [hereinafter ASP Agreement].

134. See JACKSON, *WORLD TRADE*, *supra* note 87, at 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 *Agreement on Implementation of Article VI. Note by the Director-General*, L/3149 (Nov. 29, 1968).

signature by additional parties,¹³⁵ the only obvious incentive would be the opportunity to participate in the Committee set up pursuant to Article 17 of the Agreement. However, John Jackson notes a more subtle way in which the Code could affect nonparties. 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."¹³⁶ Again, the outsiders would thus ultimately join the insiders on the insiders' terms.¹³⁷ Such *multilateralization by stealth* only had prospects of success as long as participation in the codes was not openly politicized—which may have been true for the Kennedy Round, but was no longer true for the Tokyo Round, as the following discussion demonstrates.

In the early 1970s, the "tight little club of the 1950s was gone,"¹³⁸ and the negotiation of codes with participation of a critical mass of countries became the dominant modus operandi of the Tokyo Round.¹³⁹ 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 were confronted with rival codes and amendments proposed by developing countries, with demands that only codes adopted by the Trade Negotiations Committee (TNC) with a two-thirds majority could enter into force, and (at least partially successful) resistance against the conditional-MFN elements of the codes.¹⁴⁰ Moreover, the negotiation of the one code on which the cooperation of developing countries was essential, the safeguards code, ended in failure.¹⁴¹

135. See Kennedy Round Anti-Dumping Code, *supra* note 128, art. 13, at 34 ("This Agreement shall be open for acceptance, by signature or otherwise, by contracting parties to the General Agreement and by the European Economic Community").

136. JACKSON, WORLD TRADE, *supra* note 87, at 410.

137. 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, *supra* note 127, at 384.

138. Robert E. Hudec, *Reforming GATT Adjudication Procedures: The Lessons of the DISC Case*, 72 MINN. L. REV. 1443, 1507 (1988).

139. See Winters, *supra* note 131, at 1296 ("[T]he practice of separate but parallel Codes was re-affirmed and plurilateralism accepted").

140. By contrast to the unconditional MFN principle contained in GATT art. I.1, which obliged GATT parties to extend any trade benefit granted to any other country to all GATT contracting parties, a conditional MFN principle would only oblige a party to a code to extend the benefits of the code to other GATT contracting parties who were also parties to the code. This principle is conditional in the sense that MFN benefits are only extended on the condition that the other party reciprocate in kind.

141. For background, see WINHAM, TOKYO ROUND, *supra* note 23, at 197–200. For an account of the failure of the negotiations, see *id.* 240–47.

The Tokyo Round was from the outset driven by the United States, in conjunction with the European Community and Japan.¹⁴² In 1973, the United States issued joint statements with the European Community (EC) and Japan, respectively, declaring their intention to initiate a new round of trade negotiations.¹⁴³ While the other developed GATT parties welcomed this initiative, developing countries were more skeptical and “made it clear that their association with the undertakings was conditional upon the details to be applied to their participation including the techniques and modalities to be worked out for the negotiations.”¹⁴⁴ In an internal memorandum, U.S. 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. 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.¹⁴⁵

In effect, the entire Tokyo Round proceeded from the outset on a critical mass basis.¹⁴⁶ This allowed the developed countries, particularly the United States and the EC, to “essentially negotiat[e] . . . among themselves”¹⁴⁷ and thereby realize the first two

142. See Foreign Relations of the United States, 1969–1976, VOLUME XXXI, FOREIGN ECONOMIC POLICY, 1973–1976, at 591 [hereinafter *FRUS 1973–1976*] (noting that in 1971 “the European Community and Japan, at our urging, agreed that multilateral trade negotiations should begin in 1973”).

143. GENERAL AGREEMENT ON TARIFFS AND TRADE, THE TOKYO ROUND OF INTERNATIONAL TRADE NEGOTIATIONS. REPORT BY THE DIRECTOR—GENERAL OF GATT 21 (1979); WINHAM, TOKYO ROUND, *supra* note 23, at 93; see *Joint Japan—United States Statement on International Economic Relations—9 February 1972*, L/3669 (Feb. 10, 1972); *Joint European Community—United States Declaration—11 February 1972*, L/3670 (Feb. 11, 1972). OXLEY, *supra* note 23, at 159, comments:

The driving forces in 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.

144. Ministerial Meeting, *Report of Preparatory Committee for Trade Negotiations*, WTO Doc. MIN(73)W/2 (Aug. 7, 1973) at ¶ 2.

145. *FRUS 1973–1976*, *supra* note 142, at 682.

146. See Hufbauer, Erb & Starr, *supra* note 116, at 67 (noting with respect to the negotiations on nontariff barriers in the Tokyo Round that “[f]rom the beginning of the Tokyo Round it was clear that not all GATT members would accept this extension of international discipline”).

147. See Consultative Group of Eighteen, *Note on the Eighth Meeting of the Consultative Group of Eighteen, 12–13 October 1978*, CG.18/8 (Nov. 17, 1978), ¶ 17 (reporting that 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

benefits of the club approach—facilitating agreement and shaping the content of that agreement decisively. At the same time, the United States and the EC 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 nonparticipants, 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.”¹⁴⁸ 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.”¹⁴⁹ The EC in particular had openly embraced conditional MFN as the basis for the code negotiations.¹⁵⁰ From the outset, the developing countries announced their opposition to this development.¹⁵¹

During the preparatory phase of the Tokyo Round, negotiations had already substantially advanced on a “Standards Code.”¹⁵² The

Tokyo Round since the developed countries were essentially negotiating among themselves”) (alteration in original).

148. See Robert E. Hudec, *GATT and the Developing Countries*, 1 COLUM. BUS. L. REV. 67, 74 (1992) [hereinafter Hudec, *GATT*] (“[T]he 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 signalled the beginning of conditional MFN treatment.”); Hufbauer, Erb & Starr, *supra* note 116, at 67 (footnote omitted) (“[T]he 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.”)

149. MIN(73)W/2, *supra* note 144, ¶ 23. A statement to this effect was included in all drafts of the report.

150. *Development of an Overall Approach to Trade in View of the Coming Multilateral Negotiations in GATT*, COM (73) 556 (Sept. 15, 2013) (Memorandum from the Commission to the Council), at 8 (“The solutions arrived at [on nontariff 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 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 nondiscrimination, it was an approach that gained wide acceptance in the subsequent NTM negotiations.” WINHAM, TOKYO ROUND, *supra* note 23, at 82. On the U.S. position, see Walter Kolligs, *The United States Law of Countervailing Duties and Federal Agency Procurement After the Tokyo Round: Is It “GATT Legal”?*, 23 CORNELL INT’L L.J. 553, 555, n. 7 (1990).

151. See MIN(73)W/2, *supra* note 144, ¶ 23 (“Delegations from developing countries have stressed that all concessions resulting from the negotiations should be extended to them unconditionally.”).

152. See Multilateral Trade Negotiations, Sub-Group “Technical Barriers to Trade”, *Standards; Packaging and Labelling; Marks of Origin. Background Note by the Secretariat*, MTN/NTM/W/5 (Apr. 21, 1975), ¶ 7 (“During the preparatory phase of 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."¹⁵³ 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.¹⁵⁴ 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."¹⁵⁵ The provision was accompanied by a note that "this 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."¹⁵⁶ 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.¹⁵⁷ Annex 2 was still "[to be added]" at this stage, but there proved to be little enthusiasm for doing so in subsequent negotiating sessions.¹⁵⁸ The provision does not appear in the final version of the Code. By all indications, there was an informal understanding between the United States and the EC that both would ratify the Code, and they were

negotiations, a large measure of agreement was reached, on an ad referendum basis, on the text of a proposed GATT Code of Conduct for Preventing Technical Barriers to Trade (often referred to as 'the Standards Code').").

153. *Committee on Trade in Industrial Products: Group 3 on Standards*, COM.IND/W/108 (June 25, 1973), ¶ 8. The report of the Working Group, including the draft code, is also attached to MTN/NTM/W/5, *supra* note 152.

154. Note by the United Kingdom Delegation, *Draft GATT Code of Conduct Regarding Standards Which May Act as Technical Barriers to Trade*, Spec(71)39 (May 14, 1971), at 18-20.

155. *Id.* at 19.

156. *Id.*

157. MTN/NTM/W/5, *supra* note 152, app. 1, art. 22(a)(i) of the Draft Code.

158. See Multilateral Trade Negotiations, Group "Non-Tariff Measures", Sub-Group on Technical Barriers to Trade, *Issues Raised and Suggestions Made at May Meeting of Sub-Group*, MTN/NTM/W/12 (July 10, 1975), at 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.").

presumably unwilling to jeopardize the entry into force of the Code by making it contingent on the accession of other parties.¹⁵⁹

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,¹⁶⁰ 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. Rather, the benefits were procedural: the Code created new notification requirements that only applied with respect to other parties to the Code, and only parties were members in the Committee established pursuant to the Code.¹⁶¹

While the Standards Code was thus, like all other Tokyo Round codes, "conditional in important procedural respects,"¹⁶² the Subsidies and Government Procurement codes "fully embrace[d] the conditional MFN principle in their substantive elements"¹⁶³ 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.¹⁶⁴

Similarly, the Subsidies Code imposed more stringent disciplines than the GATT on the use of subsidies that cause injury to the domestic industry—or serious prejudice to the interests—of "another signatory."¹⁶⁵ Moreover, Article 1 of the Subsidies Code stipulated

159. 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 undermine the third element of the club approach.

160. Earlier drafts of the Code use the term "adherents" instead of "Parties," see e.g., COM.IND/W/108, *supra* note 153, Annex.

161. Hufbauer, Erb & Starr, *supra* note 116, at 68 (noting that each of the Tokyo Round codes "establishes a committee of signatories to resolve substantive and technical questions relating to Code operation").

162. *Id.*

163. *Id.* at 69.

164. Agreement on Government Procurement, Apr. 12, 1979, GATT B.I.S.D. (26th Supp.), art. II, at 33 [hereinafter Government Procurement Code].

165. Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, GATT B.I.S.D. (26th Supp.), art. 8, at 56 [hereinafter Subsidies Code].

that the imposition of countervailing duties¹⁶⁶ “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 subsidized 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.¹⁶⁷

The developing countries resisted both aspects of the club approach adopted by the United States and the EC in the Tokyo Round—critical mass negotiations and unconditional MFN—from the outset. Their first line of defense 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 [multilateral trade negotiations, N.L.] 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.¹⁶⁸

The developing countries were 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

166. Countervailing duties are tariffs imposed on imports that are believed to be subsidized in order to neutralize the effect of the subsidization.

167. The Protocol of Provisional Application, pursuant to which the GATT had been put into effect, only obliged the contracting parties to implement the provisions of Part II of the GATT “to the fullest extent not inconsistent with existing legislation.” See Protocol of Provisional Application of the General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 308, ¶ 1(b).

168. Multilateral Trade Negotiations, Trade Negotiations Committee, *Statement Made by the Delegate of Yugoslavia on Behalf of the Developing Countries on 3 July 1978*, MTN/W/35 (July 6, 1978), at 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 Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT’L ORG. 339, 357 (2002).

reaching universally acceptable solutions,"¹⁶⁹ not as a way for small groups of countries to conclude agreements among themselves.

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 adoption by the Trade Negotiations Committee."¹⁷⁰ This would have given developing countries a chance to prevent those codes that 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."¹⁷¹

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 what kind of institution the GATT was. In the developing countries' view, the Trade Negotiations Committee "could only proceed on the basis of consensus";¹⁷² 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.¹⁷³

These developed 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."¹⁷⁴ 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 took this view, as it was only under this

169. MTN/W/35, *supra* note 168, at 4.

170. See Trade Negotiations Committee, *Proceedings of the Session. Held in the International Labour Office, Geneva, 11 and 12 April 1979*, WTO Doc. MTN/P/5 (July 9, 1979), at 2(d).

171. *Id.* at 2(e).

172. *Id.* ¶ 14.

173. *Id.*

174. *Id.* ¶ 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 realized.

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."¹⁷⁵

The developing countries' second line of defense 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. The developing countries were, at least partially, successful in this area.¹⁷⁶ On November 28, 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 nonsignatories to the codes, were "not affected" by the codes, and expressed their expectation that nonsignatories would be regularly informed on developments regarding the codes and able to follow the proceedings of the code committees "in an observer capacity."¹⁷⁷ This decision made it clear that, the language of the codes notwithstanding, the contracting parties expected the benefits of the

175. *Id.* at 62.

176. In Steinberg's view, they were completely successful with regard to the Subsidies Code and the revised Anti-Dumping Code. Steinberg, *supra* note 168, at 357 ("[T]he developing countries received all of the rights to the subsidies code and the anti-dumping code, but they were not obligated 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 Richard H. Steinberg, *Consensus Decision-Making at the GATT and WTO: Linkage and Law in a Neorealist Model of Institutions* 20–23 (Working Paper 72, 1995) [hereinafter Steinberg, *Consensus Decision-Making*] (discussing the strategy of developing countries in the code negotiations). For the view that government procurement is exempted from the MFN obligation, see *id.* at 20 and ROBERT E. HUDEC, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM 97, n. 26 (1987) [hereinafter HUDEC, DEVELOPING COUNTRIES]. 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 nonsignatories, see Kolligs, *supra* note 150.

177. *Action by the Contracting Parties on the Multilateral Trade Negotiations: Decision of 28 November 1979, L/4905* (Dec. 3, 1979).

codes to be extended to all contracting parties on the basis of the MFN obligation in GATT Article I.¹⁷⁸ While there was no similar legal basis for the procedural rights of nonsignatories 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.¹⁷⁹

Despite these decisions at the GATT level, the U.S. Congress refused to implement the Subsidies and Government Procurement codes on an MFN basis.¹⁸⁰ In the case of the Subsidies Code, the United States 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 United States' implementing legislation denied the Code's benefits not only to nonsignatories of the Code, but also to developing countries that made use of the flexibility provided by Article 14.5¹⁸¹ not to eliminate export subsidies on non-primary products.¹⁸² To this end, the United States invoked the "non-application" clause of the agreement against

178. Again, it is not clear that this applied to the Government Procurement Code.

179. See Steinberg, *supra* note 168, at 357 ("[T]he GATT secretariat could not provide services to administer a code without a consensus of the Contracting Parties."); see also Steinberg, *Consensus Decision-Making*, *supra* note 176, at 21 (reporting an attempt by India and Nigeria to leverage the fact that "the GATT secretariat's administration of the code would need developing country support" to press for the inclusion of special and differential treatment provisions in the Government Procurement Code).

180. For an extensive discussion, see Kolligs, *supra* note 150, at 575-89. It appears that other developed countries applied the codes, with the exception of the Government Procurement code, on an MFN basis. See HUDEC, *DEVELOPING COUNTRIES*, *supra* note 176, at 89.

181. Art. 14.5 of the Tokyo Round Subsidies Code provided that "[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." Subsidies Code, *supra* note 165, at 51. A footnote specified that the "commitment" had to be notified to the Committee on Subsidies and Countervailing Measures (SCM Committee). *Id.* at 69.

182. As the U.S. 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 [W]hile 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.

Committee on Subsidies and Countervailing Measures, *Minutes of the Meeting Held on 8 May 1980*, GATT Doc. SCM/M/3, at 3, ¶ 11 (June 27, 1980).

developing countries that did not enter into commitments that the United States found satisfactory.¹⁸³

When the United States 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.¹⁸⁴ In its panel request, India questioned whether the nonapplication clause could be “validly invoked by any Party with the objective of obtaining concessions from another Party to the Agreement which are not envisaged in the provisions and go beyond the balance of rights and obligations contained in the Agreement.”¹⁸⁵ In effect, India argued that the nonapplication 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.¹⁸⁶ 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 nonsignatories were “not affected” by the

183. See Subsidies Code, *supra* note 165, art. 19.9 (preventing the application of the agreement “as between any two signatories if either of the signatories, at the time either accepts or accedes to this Agreement, does not consent to such application.”) For the notification of the invocation of the non-application clause with respect to India, see Communication from the United States, *United States—Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade Done at Geneva on 12 April 1979*, GATT Doc. Let/1159 (Aug. 27, 1980) (“[T]he United States does not consent to the application of the aforementioned Agreement between the United States and India and therefore does not consider itself to be bound by any of the obligations of the Agreement with respect to India.”).

184. See Consultations Under Article XXIII:1, Request by India, *India—Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade Done at Geneva on 12 April 1979*, GATT Doc. L/5028 (Sept. 29, 1980); *United States—Imposition of Countervailing Duty Without Injury Criterion/Industrial Fasteners Imported From India, Recourse to Article XXIII:2 by India*, GATT Doc. L/5062 (Oct. 31, 1980) [hereinafter L/5062] (India’s panel request); see also HUDEC, DEVELOPING COUNTRIES, *supra* note 176, at 88–89 (reporting that, in response to India’s complaint, the United States “backed away and settled by granting Subsidy Code benefits to India on the same easy terms offered to Pakistan”); Kolligs, *supra* note 15050, at 579 (same); Steinberg, *supra* note 168, at 358, n. 97; WINHAM, TOKYO ROUND, *supra* note 23, at 359–60.

185. L/5062, *supra* note 184, at 3, ¶ 3(c). India referred in this respect to the GATT Secretariat, *Report of the Working Party on Article XXXV Review*, GATT Doc. L/1545 (Sept. 6, 1961), at 5, which had suggested that the contracting parties might want to “dispel the idea” that non-application “could legitimately be used as a bargaining lever for gaining privileges or 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.” L/5062, *supra* note 184, at 3.

186. L/5062, *supra* note 184, at 3, ¶ 3(e).

codes.¹⁸⁷ Eventually, the United States gave in and agreed to apply the provisions of the Subsidies Code in relation to India.¹⁸⁸

4. 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 an exclusive body whose membership was limited to those contracting parties which 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.¹⁸⁹ At the Ministerial Meeting during 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."¹⁹⁰ The Executive Secretary, Eric Wyndham-White, reminded the ministers that "in past negotiations the tariff negotiations committee 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."¹⁹¹

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. However, this notion was becoming increasingly problematic. Over the years preceding the Kennedy Round, the GATT had been focusing

187. *Id.* at 4, ¶ 3(f). For the decision, see *supra* note 178.

188. See HUDEC, DEVELOPING COUNTRIES, *supra* note 176, at 89. India's request to terminate proceedings is in *United States—Imposition of Countervailing Duty Without Injury Criterion/Industrial Fasteners Imported From India, Recourse to Article XXIII:2 by India, Request for Termination of Proceedings*, GATT Doc. L/5062/Add.1 (Sept. 30, 1981).

189. See GATT Secretariat, *Summary Record of the Meeting Held at the Palais des Nations, Geneva, on Tuesday 21 May 1963*, GATT Doc. MIN(63)SR, at 4-7 (May 21, 1963), [hereinafter MIN(63)SR].

190. *Id.* at 4.

191. *Id.* at 5-6.

increasingly on the trade problems of the less developed countries, particularly within the framework of the program for the expansion of international trade. One of the principles that had gained increasing acceptance in the run-up to the Kennedy Round was the principle of nonreciprocity 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."¹⁹² 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, "It 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."¹⁹³

In order to deal with the 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, came up with what the Indian minister described as "a somewhat complex procedure,"¹⁹⁴ whereby a special committee of the Trade Negotiations Committee would be set up. In this special committee, "the less-developed countries together with the developed countries could discuss and agree upon the terms for participation."¹⁹⁵ As the Executive Secretary noted, "the implications of the word 'negotiating' would be one of the interesting questions" that the committee "might consider."¹⁹⁶ In other words, the committee was to perform a gatekeeping function by setting conditions for the participation of developing countries in the

192. GATT Secretariat, *Arrangements for the Reduction or Elimination of Tariffs and Other Barriers to Trade, and Related Matters and Measures for Access to Markets for Agricultural and Other Primary Products. Resolution Adopted on 21 May 1963*, GATT Doc. MIN(63)9, at A.8. (May 22, 1963) [hereinafter MIN(63)9].

193. MIN(63)SR, *supra* note 189, at 6.

194. *Id.* at 5.

195. *Id.* at 5-6 (recording the 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 (this document is not preserved). The final version of the resolution, from which the paragraph is deleted, is in MIN(63)9, *supra* note 192.

196. MIN(63)SR, *supra* note 189, at 7.

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 such 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.¹⁹⁷

The obvious alternative would have been not to make participation in the trade negotiations subject to "conditions" that 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,"¹⁹⁸ 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 U.S. delegate at the Havana Conference¹⁹⁹).

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 "intended to take an active part in the trade negotiations in the sense of being prepared to make a contribution."²⁰⁰ However, membership in the Trade Negotiations Committee 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 Trade Negotiations Committee. 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 Trade Negotiations Committee decided to establish a Sub-Committee on the Participation of Less-Developed Countries to consider "any special problems relating to the

197. *Id.*

198. *Id.*

199. See *supra* text accompanying note 80.

200. Trade Negotiations Committee, *Proceedings of the First Meeting. Held at the Palais des Nations, Geneva, on Thursday, 27 June 1963, at 2.30 p.m.*, GATT Doc. TN.64/SR.1, at 1 (July 2, 1963).

participation of less-developed countries in the trade negotiations.”²⁰¹ It soon became clear that this committee would be quite similar to the special committee envisaged in paragraph B 3(f) of the draft resolution considered at the 1963 Ministerial Meeting, 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 thought they had dispensed with during the preparatory negotiations was a remark by the United States that the committee would be “charged with establishing the basis for the participation of the less-developed countries in the negotiations.”²⁰² 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.”²⁰³ The U.S. representative’s reference to “evolving” ground rules spooked some of the developing countries,²⁰⁴ which considered the question of ground rules, as least as far as the principle of nonreciprocity was concerned, to have been settled.²⁰⁵

Over the course of the discussions in the Sub-Committee on the Participation of the Less-Developed Countries, the link between “participation” and reciprocity, which the developing countries believed had been severed 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 to be considered as “full participants.”²⁰⁶ Thus, in response to questions, the Chairman 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

201. Trade Negotiations Committee, *Proceedings of the Second Meeting. Held at the Palais des Nations, Geneva, on 19–20 September, 1963*, GATT Doc. TN.64/SR.2, at 3 (Oct. 4, 1963). See the TN.64/LDC/ series of documents for records of the Sub-Committee’s communications. *E.g.* Trade Negotiations Committee, Sub-Committee on the Participation of the Less-Developed Countries, *Note by the Secretariat on the Third Meeting of the Sub-Committee on 17 December 1964*, GATT Doc. TN.64/LDC/27 (Dec. 28, 1964) [hereinafter TN.64/LDC/27].

202. Trade Negotiations Committee, *Report of the Sub-Committee on the Participation of the Less-Developed Countries to the Trade Negotiations Committee*, GATT Doc. TN.64/21, at 6, ¶ 20 (Apr. 30, 1964) [hereinafter TN.64/21].

203. *Id.*

204. *Id.* at 7, ¶ 26 (recording Brazil as noting that “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.”).

205. *Id.* at 14–15, ¶ 50 (recording India as noting that “[m]inisters 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.”); *see also id.* at 15, ¶ 57 (recording Argentina as noting that “the Ministerial Decision made it perfectly clear that less-developed countries would not be expected to give full reciprocity in the forthcoming trade negotiations.”).

206. *Id.* at 4, ¶¶ 13–15.

contributed to the negotiations."²⁰⁷ 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."²⁰⁸ The United States made clear, however, that "participating less-developed countries should all make a contribution to the negotiations" and that "it would be difficult for [the U.S.] 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."²⁰⁹ 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 nonreciprocity "relate[d] more specifically to the value aspect," leaving "the contribution aspect to be dealt with."²¹⁰

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 "[j]ustification . . . confrontation[,] and negotiation" of the exceptions to the linear tariff reduction formula that most of the developed countries had agreed to apply.²¹¹ 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 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) be present in the meetings in which the exceptions lists were examined and discussed. It was participation in this basic sense—being allowed to see the exceptions lists, to be in the room when they are discussed, and to participate in the discussion—that the developed countries made contingent on the readiness of a less developed country to "contribute" to the negotiations.

The Executive Secretary, even though he 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."²¹² He merely suggested that "for practical purposes, it was probably desirable . . . to establish

207. *Id.* at 14, ¶ 51.

208. *Id.* at 14, ¶ 52.

209. *Id.* at 16, ¶ 59.

210. *Id.* at 15, ¶ 58.

211. See Trade Negotiations Committee, *Conclusions Reached by the Sub-Committee on the Tariff Negotiating Plan at Its Meeting of 11 and 12 June 1964*, GATT Doc. TN.64/29, at 2, ¶ 2(c) (June 22, 1964) (setting out "procedures for the justification and subsequent negotiation of exceptions").

212. TN.64/LDC/27, *supra* note 201, 2, ¶ 4.

dates for the two distinct processes simultaneously.”²¹³ However, this did not sit well with some developed countries. They noted that, under the plan proposed by the GATT Secretariat, “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.”²¹⁴ 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.²¹⁵

It is appropriate to take a step back at this point to appreciate the 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, they achieved that their “participation”—involvement, membership, and presence—in the Trade Negotiations Committee was not made *contingent* on reciprocity. Instead of reintroducing conditions for “participation” at the TNC-level, this statement redefines what “participation” means. In effect, this statement indicated to the developing countries the following: You may well be members of the Trade Negotiations Committee. You may well be present at its meetings. You may also be involved in its discussions. But none of this means that you are *participating* in the trade negotiations. Membership, presence, and 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.”²¹⁶ 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 center of this structure was an informal body composed of the “linear” countries (i.e., those developed countries undertaking tariff

213. *Id.*

214. *Id.* at 3, ¶ 9.

215. *Id.* (emphases added).

216. *Id.* at 4, ¶ 12.

reductions on the basis of a linear formula). This body met in January and February of 1965 "to conduct the justification process."²¹⁷ Countries that 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 the *participating* less-developed countries (i.e., those that had "formally notif[ed] . . . 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.²¹⁸ On the same date, the developed countries would also make "suggestions as to the offers which participating less-developed countries might make."²¹⁹ As the next step, the less developed countries that 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.²²⁰ 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 exceptions lists."²²¹ 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

217. Trade Negotiations Committee, *Proceedings of the Tenth Meeting. Held at the Palais des Nations, Geneva, on 18 March 1965*, GATT Doc. TN.64/SR.10, at 2, ¶ 5 (Apr. 14, 1965) [hereinafter TN.64/SR.10]. 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, *supra* note 211, at 2, ¶ 2(c).

218. Trade Negotiations Committee, *Report by Chairman on Meeting of the Sub-Committee on the Participation of the Less-Developed Countries on 12 March 1965*, GATT Doc. TN.64/41/Rev.1, at 1 (Mar. 18, 1965) [hereinafter TN.64/41/Rev.1]. The Director-General described this process as follows: "[A]s 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, *supra* note 217, at 3, ¶ 7 (emphasis added).

219. TN.64/41/Rev.1, *supra* note 218, at 2, ¶ 3. Pursuant to this paragraph, the United States presented individual "suggestion papers" to less-developed countries and held at least forty-five 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]." Foreign Relations of the United States, 1964-1968, VOLUME VIII, INTERNATIONAL MONETARY AND TRADE POLICY, at 797 [hereinafter *FRUS 1964-1968*].

220. TN.64/41/Rev.1, *supra* note 218, at 2, ¶ 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*, *supra* note 219, at 785.

221. TN.64/41/Rev.1, *supra* note 218, at 2, ¶ 4.

specific offer by a less-developed country constituted an acceptable basis for opening negotiations with that country.”²²²

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 1965.²²³ The document contains two simple lists of countries. The first records countries that 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.”²²⁴ The second lists countries that had “formally notified their intention to participate in the trade negotiations” but had “not yet presented” their statements of offers.²²⁵ With respect to the first group of countries, the document states that these countries had “been recognized as full participants in the negotiations.”²²⁶ 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.²²⁷ This document represents perhaps the prime example of “hierarchical observation” of compliance with the reciprocity norm in multilateral trade lawmaking.²²⁸

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,”²²⁹ a group consisting of the Executive Secretary and

222. TN.64/SR.10, *supra* note 217, at 9, ¶ 32. This U.S. 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, *supra* note 218, at 2, ¶ 6.

223. Trade Negotiations Committee, *Status of Offers: Note by the Director-General*, GATT Doc. TN.64/73, at 1 (Dec. 16, 1965) [hereinafter TN.64.73].

224. *Id.*

225. *Id.* at 2, ¶ 3.

226. It appears that this recognition was not automatic, since the sentence continues “with the exception of Turkey.” *Id.* at 2. 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.” *Id.*; see also Trade Negotiations Committee, *Participation in the Kennedy Round. Notification by Turkey*, GATT Doc. TN.64/65, at 1 (June 1, 1965) [hereinafter TN.64/65] (setting out the terms on which Turkey planned to participate in the Kennedy Round).

227. TN.64/73, *supra* note 223, at 2, ¶ 3.

228. See Morgan Brigg, *Post-Development, Foucault and the Colonisation Metaphor*, 23 THIRD WORLD Q. 421, 429–430 (2002) (interpreting Foucault’s *Discipline and Punish*, “Hierarchical observation and normalising judgement come together in the examination . . . [i]t is here that ‘truth’ is established.”).

229. See Winham, *supra* note 95, at 811 (noting that the Bridge Club “effectively accounted for most of the actions of the round”); WINHAM, TOKYO ROUND, *supra* note 23, at 272 (“[E]ssentially all of the action of the negotiation occurred within this group.”).

representatives of the United States, the European Economic Community (EEC), the United Kingdom, as well as, occasionally, Japan and Canada.²³⁰ According to Curzon and Curzon, the "private meetings" between the Bridge Club members represented the "control center" of the Round.²³¹ 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,²³² he "held a series of information meetings with the major Kennedy Round participants . . . before writing the report;" then, he gave the United States, 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."²³³

What was true for the Kennedy Round—that the "main action of the negotiation often occurred away from the multilateral chambers"²³⁴—was even more characteristic of the next round of trade negotiations, the Tokyo Round. Most negotiations in the Tokyo Round had what Gilbert 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."²³⁵ 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.²³⁶

230. Winham, *supra* note 95, at 811; see also WINHAM, TOKYO ROUND, *supra* note 23, at 65, n.9 ("The small group in the Kennedy Round that included the United States, the EEC, the United Kingdom, and variously Canada and Japan became known as the 'bridge club.'"); Curzon & Curzon, *supra* note 4, at 319 (explaining that the 'bridge club' was named for the fact that usually no more than four people were present in the discussions).

231. Curzon & Curzon, *supra* note 4, at 319; see also ERNEST H. PREGG, TRADERS AND DIPLOMATS: AN ANALYSIS OF THE KENNEDY ROUND OF NEGOTIATIONS UNDER THE GENERAL AGREEMENT ON TARIFFS AND TRADE 186 (1970) (describing 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.").

232. FRUS 1964-1968, *supra* note 219, at 785.

233. *Id.* at 795.

234. WINHAM, TOKYO ROUND, *supra* note 23, at 65. Kahler calls this phenomenon "disguised unilateralism." Kahler, *supra* note 33, at 686. For Kahler's discussion of the Kennedy Round, see *id.* at 688.

235. WINHAM, TOKYO ROUND, *supra* note 23, at 376; see also *id.* at 174-75 (describing the pyramidal structure of the negotiation of the Tokyo Round Subsidies Code).

236. Winham, *supra* note 95, at 811-12.

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.²³⁷

The extent to which the negotiations had this pyramidal structure varied across 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, only to have the EC and the United States proceed to agree bilaterally on a formula that was "not even put before Group Tariffs for discussion or approval."²³⁸ 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 United States "for the information and consideration of other interested delegations."²³⁹ 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.²⁴⁰

The negotiations on customs valuation similarly followed the pyramidal pattern.²⁴¹ Sherman attributes the developing countries' decision to propose an alternative code at the conclusion of the negotiations to "the fact that the LDCs [less-developed countries], 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."²⁴² Indeed, at the TNC meeting held to conclude the round, the developing countries characterized the customs valuation

237. See D.M. McRae & J.C. Thomas, *The GATT and Multilateral Treaty Making: The Tokyo Round*, 77 AM. J. INT'L L. 51, 68-71 (1983).

238. *Id.* at 64; see also *id.* at 68 (describing how the United States and the EC reached agreement on a tariff reduction formula outside the multilateral negotiation) and 71 (describing the crucial role of bilateral meetings between the United States and the EC in the negotiations). [F]or the EC-US agreement on a tariff formula, see also WINHAM, TOKYO ROUND, *supra* note 2323, at 166-67.

239. Multilateral Trade Negotiations, Group "Non-Tariff Measures," Sub-Group "Subsidies and Countervailing Duties," *Subsidies/Countervailing Measures: Outline of an Arrangement*, GATT Doc. MTN/NTM/W/168, at 1 (July 10, 1978).

240. Hufbauer, Erb & Starr, *supra* note 116, at 67 n.41; see *Proceedings of the Session*, *supra* note 170, at 76 (recording India's views on its participation in the negotiations of the Subsidies Code).

241. WINHAM, TOKYO ROUND, *supra* note 23, at 188.

242. Saul L. Sherman, *Reflections on the New Customs Valuation Code*, 12 L. & POL'Y INT'L BUS. 119, 129 (1980); see *Customs Valuation*, GATT Doc. MTN/NTM/W/222/Rev.1 (Mar. 27, 1979) (detailing the alternative code).

code as a "draft negotiated among a certain number of developed countries."²⁴³ And while the pyramidal dynamic was reportedly not present in the negotiation of the Government Procurement Code,²⁴⁴ 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 Agreement on Implementation of Article VI of GATT is another document that has surfaced at the final hour.²⁴⁵

Malaysia was particularly frustrated by the fact that the developed countries had resisted the creation of a formal negotiating subgroup on anti-dumping, only to come up with a draft Anti-Dumping Code—a revised version of the Kennedy Round Anti-Dumping Code that had

243. *Proceedings of the Session*, *supra* note 170, at 40 (recording Brazil's position).

244. WINHAM, TOKYO ROUND, *supra* note 23, at 189 (describing the negotiations on government procurement as "fully engag[ing] all countries"); *id.* at 193-94 (describing the same negotiations as marked by an "absence of a pyramidal process").

245. *Proceedings of the Session*, *supra* note 170, at 62. Brazil highlighted that "two of the texts before us—those dealing with civil aircraft and anti-dumping—are new to my Delegation." *Id.* at 39. Switzerland noted that it had insufficient time to study the civil aircraft code that had been "put before us by a few delegations." *Id.* at 64. Zaire's position was that "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." *Id.* at 70. Nigeria stated: "Many developing countries' delegates were not consulted in some areas until the last days of negotiations when amendments were impossible." *Id.* at 90. India noted "we have neither participated in the negotiations nor had occasion to examine the texts which we have seen only now." *Id.* at 73. 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." *Id.* The EC delegation contested the validity of this criticism, *id.* at 48, stating that:

[I]f 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.

Id.

been negotiated exclusively among developed countries²⁴⁶—at the conclusion of the Round.²⁴⁷

The discontent among the developing countries at that final TNC meeting of the Tokyo Round was palpable. Malaysia dismissed the draft codes before the Trade Negotiations Committee as “a series of documents purporting to be Agreements.”²⁴⁸ The Chilean delegate remarked that his country was “placed before a minimum compromise between the major trading nations.”²⁴⁹ The developing countries attributed the unsatisfactory way in which the negotiations had proceeded to the lack of rules of procedure.²⁵⁰ Yugoslavia noted the “fact that at some stages of the negotiations the developing countries were not invited, and that transparencies were often absent.”²⁵¹

In sum, exclusionary negotiating arrangements, in conjunction with a readiness to conclude agreements on a critical mass basis, allowed the developed countries, in particular the United States 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 marginalizing those most likely to oppose it, the United States and the EC 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, the developing countries would have had to be part of any agreement for it to be meaningful. The club approach did not “work” in this context, and the participants failed to reach an agreement on safeguards in the Tokyo Round. Moreover, as noted above, the MFN principle limited the extent to which the developed countries could deny the benefits of the codes to nonsignatories, thus curtailing their ability to entice the latter to join those agreements on the signatories’ terms.²⁵²

Exclusionary negotiating arrangements were also characteristic of the next negotiating round, the Uruguay Round, especially in its final stages. “Green Room” meetings had been introduced by the

246. See *id.* at 47 (recording the EC’s assessment of the proposed code as “a satisfactory updating of the first Code in the GATT”).

247. *Id.* at 62.

248. *Id.* at 61.

249. *Id.* at 87.

250. Malaysia recalled that the 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.” *Id.* at 62.

251. *Id.* at 36.

252. See *supra* notes 176–18 and accompanying text.

GATT's new Director-General Arthur Dunkel in the early 1980s.²⁵³ 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."²⁵⁴ 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.²⁵⁵

As the Uruguay Round progressed, much of the action shifted from the Green Room to bilateral negotiations between the United States and the EC, sometimes with involvement of the other two "Quad" countries—Japan and Canada. As Hugo Paemen and Alexandra 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."²⁵⁶

The agriculture negotiations, where the EC and the United States 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 United States hoped to resolve other outstanding issues in the Round.²⁵⁷ 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."²⁵⁸

253. FEN OLSER HAMPSON & MICHAEL HART, MULTILATERAL NEGOTIATIONS: LESSONS FROM ARMS CONTROL, TRADE, AND THE ENVIRONMENT 204 (1995); see also Richard Blackhurst & David Hartridge, *Improving the Capacity of WTO Institutions to Fulfill Their Mandate*, in REFORMING THE WORLD TRADING SYSTEM: LEGITIMACY, EFFICIENCY, AND DEMOCRATIC GOVERNANCE 455, 464 (Ernst-Ulrich Petersmann ed., 2005). The New York Times reported from the 1982 Ministerial Meeting: "[I]n 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.'" Clyde H. Farnsworth, *A Reporter's Notebook: Behind the Scenes at the GATT Trade Talks in Geneva*, N.Y. TIMES, Dec. 5, 1982, at F8.

254. HAMPSON & HART, *supra* note 253, at 216.

255. Gabrielle Marceau, *Interview with Warren Lavorel*, VIMEO, <http://vimeo.com/31135731>, 10:40–12:08 (last visit Sept. 30, 2015) [<http://perma.cc/6MDB-VWQQ>] (archived Sept. 30, 2015). See also Blackhurst & Hartridge, *supra* note 253, at 463, who note that the selection of Green Room participants was "apparently arbitrary" but "well understood in fact."

256. PAEMEN & BENSCH, *supra* note 23, at 99.

257. "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." *Id.* at 224.

258. *Id.* at 225.

Unsurprisingly, this strategy led to some discontent particularly among the developing countries. Paemen and Bensch report that, after the major industrialized 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.²⁵⁹

In the final stages of the Uruguay Round, the United States 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 shaped the content of the resulting agreement decisively. 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 subpart.

C. The Self-Transcending Club: The Single Undertaking and the Founding of the WTO

In the previous subpart, I have discussed four practices of participation that shaped lawmaking in the multilateral trading system throughout the GATT era: (1) the negotiation of tariff concessions with principal suppliers, (2) the exclusion of certain product categories and types of trade barriers from negotiations, (3) the conclusion of agreements among a "critical mass" of countries, and (4) the use of informal and often exclusionary negotiating arrangements. These practices allowed the major developed countries to realize the first two benefits of the club approach—the relative ease of reaching agreement among fewer participants, and the disproportionate influence of those participants on the content of the agreement—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 realize 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

²⁵⁹. *Id.* at 231.

auspices, only to join a new regime comprising a substantively identical, but legally distinct GATT as well as a number of new agreements negotiated in the course of the Uruguay Round. The central feature of the new regime, which would distinguish it from the GATT framework, would be that any country that wanted to join it had to subscribe to *all* the agreements concluded in the Uruguay Round. The primary purpose of the new regime, which was originally called the "GATT II" and ultimately became the World Trade Organization, was thus to realize the third element of the club approach: to compel countries that had been refusing to join the new agreements in the Tokyo Round and that were planning to do likewise in the Uruguay Round to join those agreements.

When the Uruguay Round negotiations were eventually launched, they unfolded from the outset in a more polarized atmosphere, especially between developed and developing countries, than had ever before been the case. In the Kennedy Round, the negotiations on nontariff barriers had been an uncontroversial, if relatively unproductive affair.²⁶⁰ In the Tokyo Round, there was a broad consensus to negotiate on nontariff measures such as standards, subsidies and countervailing duties, and customs valuation; disagreement centered on the substance of any new disciplines and on the opaque and exclusionary manner in which some of the negotiations proceeded.²⁶¹ In the Uruguay Round, by contrast, there was from the outset a fundamental disagreement about whether negotiations on services, intellectual property rights, and investment measures should take place in the GATT framework at all.²⁶² This was an entirely new level of discord, and it resulted in,

260. Only two agreements on non-tariff barriers were concluded in the Kennedy Round: the Kennedy Round Anti-Dumping Code, *supra* note 128, and the ASP Agreement, *supra* note 133.

261. See *infra* notes 235-250 and accompanying text for discussion on disagreements in the Tokyo Round.

262. India and Brazil proposed the following amendment to the draft ministerial declaration:

IV. Subjects for Negotiations Services

Delete the title and its content.

Communication from India and Brazil, GATT Doc. MIN(86)/W/111 (Sept. 9, 1986). 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 Continued adherence to the multilateral trading system or commencement of the New Round cannot be made contingent upon induction of alien themes into GATT.

India: Statement by Mr. Vishwanath Pratap Singh, Finance Minister, at the Meeting of the GATT Contracting Parties at Ministerial Level, 15-19 September 1986, Punta del Este, Uruguay, GATT Doc. MIN(86)/ST/33, at 3-4 (Sept. 17, 1986). 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

by GATT standards, brutal confrontations and tortured compromises throughout the round.²⁶³ 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, the declaration is divided into two parts.²⁶⁴ The first part is devoted to “Negotiations on Trade in Goods,” and the second part deals 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.²⁶⁵ As Brazil reminded the other delegations at the first meeting of the Group of Negotiations on Services, “the premise of trade-offs between the area of goods and that of services has been

appropriate multilateral action is desirable on trade in services.” *Communication from India and Brazil*, GATT Doc. MIN(86)/W/3 (Sept. 19, 1986). On the divisions between developed and developing countries at the outset of the Uruguay Round, see also Steinberg, *Consensus Decision-Making*, *supra* note 176, and Winham, *supra* note 95, at 797–98.

263. 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 HAMPSON & HART, *supra* note 253, at 202 (“It took from 1979 to the middle of 1985 to reach sufficient consensus among the GATT’s core members that a new round would be desirable, and even then it took rare resort to a formal ballot to isolate the dissidents”) and 207 (discussing the use of voting at the initiative of the United States to convene a special session of the contracting parties and to establish the preparatory committee for the launch of the Uruguay Round); OXLEY, note 23, at 132–35 (discussing the run-up to the launch of the Uruguay Round, including the use of a postal ballot to convene the special session). 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 *Communication From the Chairman*, GATT Doc. PREP.COM(86)W/50 (Aug. 8, 1986) (detailing the Director-General’s position); *Communication from India*, GATT Doc. L/6041 (Aug. 27, 1986) (complaining that the communication sent by the Chairman “does not reflect adequately your own summing up at the end of the meeting of the Preparatory Committee” and that “an element of value judgement has entered into your communication”); *Communication from Brazil*, GATT Doc. L/6042 (Aug. 27, 1986) (highlighting the lack of consensus).

264. *Ministerial Declaration on the Uruguay Round*, GATT Doc. MIN.DEC (Sept. 20, 1986) [hereinafter *Punta del Este Declaration*].

265. See OXLEY, *supra* note 23, at 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.” *Communication from Brazil*, GATT Doc. MTN.GNS/W/3, at ¶¶ 4–5 (Mar. 11, 1987).

excluded from the start of our deliberations."²⁶⁶ 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 declaration envisaged that the implementation of the negotiating results would be decided by the contracting parties once the negotiations had been concluded.²⁶⁷

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.²⁶⁸ 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 that had already been the subject of negotiations in the Tokyo Round. And this was all that they agreed to in the Ministerial Declaration.²⁶⁹

266. *Communication from Brazil*, GATT Doc. MTN.GNS/W/3, at ¶ 5 (Mar. 11, 1987); see also *id.* at ¶ 43 ("What we would find particularly difficult to conceive, if not impossible to accept, is the notion of cross-linkages between concessions in the area of goods and in the area of services."); OXLEY, *supra* note 23, at 188-89 ("The major concession that the developing countries secured at Punta del Este was that the services negotiations would be formally delinked from the rest of the negotiations."); PAEMEN & BENSCH, *supra* note 23, at 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.").

267. The concluding paragraph of the *Punta del Este Declaration*, *supra* note 264, at 10, 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.

268. See Frederick M. Abbott, *Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework*, 22 VAND. J. TRANSNAT'L L. 689, 691 (1989) (citing "consistent and intense developing country resistance" to the incorporation of substantive intellectual property protections into the trade regime).

269. For a discussion of how the draft ministerial declarations were amended to reflect the developing countries' perspective, see CHAKRAVARTHI RAGHAVAN, *RECOLONIZATION: GATT, THE URUGUAY ROUND & THE THIRD WORLD* 126-30 (1990) (comparing the Swiss-Colombian draft and the final version). See also PAEMEN & BENSCH, *supra* note 23, at 119, stating:

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

Once the negotiations were 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.²⁷⁰ 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 Organization (WIPO) that had “responsibility for all matters of substance relating to rights.”²⁷¹ 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 countries were not worth the paper they were written on. They were utterly and totally irrelevant.²⁷²

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.²⁷³ This met with fundamental opposition from most developing countries, 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

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.

270. PAEMEN & BENSCH, *supra* note 23, at 119. For an overview of the divergent positions on the scope of the negotiations in the first two years of the Uruguay Round, see generally GATT Secretariat, *Compilation of Written Submissions and Oral Statements*, GATT Doc. MTN.GNG/NG11/W/12/Rev.1 (Feb. 5, 1988).

271. PAEMEN & BENSCH, *supra* note 23, at 119.

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.

GATT Secretariat, *Meeting of the Negotiating Group of 28 October 1987*, GATT Doc. MTN.GNG/NG11/4, at ¶ 11 (Nov. 17 1985). 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.” *Punta del Este Declaration*, *supra* note 264, at 8.

272. *Id.* at 120.

273. *Id.* at 137.

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.²⁷⁴

As a result, the document adopted at the meeting contains two bracketed texts on intellectual property rights reflecting diametrically opposed positions.²⁷⁵ 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 compromise 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."²⁷⁶ 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 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.²⁷⁷

With this proviso in place, the developing countries agreed to negotiations encompassing substantive standards of intellectual

274. *Id.*; see also CHARAN DEVEREAUX, ROBERT Z. LAWRENCE & MICHAEL D. WATKINS, *CASE STUDIES IN US TRADE NEGOTIATION: MAKING THE RULES* 62 (2006) (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. II THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992), at 2268-69 (Terence P. Stewart ed., 1993).

275. *Trade Negotiations Committee Meeting at Ministerial Level: Montreal, December 1988*, at 21-24, GATT Doc. MTN.TNC/7(MIN) (Dec. 9, 1988).

276. PAEMEN & BENSCH, *supra* note 23, at 143. See also OXLEY, *supra* note 23, at 170, stating:

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.

277. *Trade Negotiations Committee Mid-Term Meeting*, GATT Doc. MTN.TNC/11, at 21 (Apr. 2, 1989). To recall, the final paragraph of the *Punta del Este Declaration*, *supra* note 264, at 10, 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.

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.²⁷⁸ 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 recognized the danger that they were losing the opportunity to influence the final result in this area.²⁷⁹

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. 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 (so-called cross-retaliation).²⁸⁰ The “institutional reservation” on the implementation

278. It is clear that this remained India's position. An example of this is the following statement from India:

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.

Communication from India, GATT Doc. MTN.GNG/NG11/W/37, at 19–20 (July 10, 1989).

279. MOHAMED OMAR GAD, REPRESENTATIONAL FAIRNESS IN WTO RULE-MAKING, NEGOTIATING, IMPLEMENTING, AND DISPUTING THE TRIPS PHARMACEUTICAL-RELATED PROVISIONS 106 (2006).

280. “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?” *India: Statement by Mr. Vishwanath Pratap Singh, Finance Minister, at the Meeting of the GATT Contracting Parties at Ministerial Level, 15–19 September 1986, Punta del Este, Uruguay*, GATT Doc. MIN(86)/ST/33, at 4 (Sept. 17, 1986).

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 that 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 conclude agreements on services and intellectual property rights among themselves, but that 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, U.S. negotiators began to internally discuss options for concluding the Uruguay Round in late 1989.²⁸¹ Preoccupied with the prospect that many developing countries would “free ride” on the new agreements under negotiation in the round,²⁸² U.S. negotiators considered the option of asking for a waiver from the GATT MFN obligation for those agreements that presented the greatest concern in this regard.²⁸³ They also contemplated different scenarios under which nonsignatories would voluntarily renounce their right to insist that the signatories apply an agreement on an MFN basis, basically a formalization of what happened in the Tokyo Round, at least with respect to the United States.²⁸⁴

In the summer of 1990, U.S. negotiators began considering more radical options to deal with the “free rider” problem.²⁸⁵ One of them

281. Interview with Richard Steinberg, Stanford, Cal. (Dec. 2011) [hereinafter Steinberg Interview].

282. See PAEMEN & BENSCH, *supra* note 23, at 133, on the U.S. 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.

283. Steinberg Interview, *supra* note 281.

284. 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.

285. 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 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

was the "GATT II" approach, whereby the "Quad" countries—the United States, 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.²⁸⁶ 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. U.S. negotiators referred to this option internally as "the power play."²⁸⁷

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.²⁸⁸ The major downside of this approach was 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.²⁸⁹ 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 U.S. negotiators even at this point was that an "à 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.²⁹⁰ Of course, this was precisely the scenario on the basis of which the developing countries

to join the agreements negotiated in the Uruguay Round would ultimately be in those countries' own interest. Steinberg Interview, *supra* note 281.

286. *Id.*

287. Steinberg, *supra* note 168, at 360.

288. The possibility to expel a contracting party that refuses to adopt an amendment was envisaged in GATT art. 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.

General Agreement on Tariffs and Trade art. XXX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

289. Steinberg Interview, *supra* note 281.

290. *Id.*

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 organizational umbrella for the GATT and the new Uruguay Round agreements. Canada, which was drawing on the ideas of Professor John Jackson,²⁹¹ first suggested the establishment of a "World Trade Organization" in April 1990,²⁹² and the EC followed up with a formal proposal for a "Multilateral Trade Organization" (MTO) to the negotiating group on the "Functioning of the GATT System" (FOGS) in July 1990.²⁹³ 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" that would provide an "umbrella-type organizational framework" for the "implementation and administration of the results of the negotiations and perhaps legally separate multilateral agreements."²⁹⁴ The EC noted the possibility of "a services agreement which in all likelihood would be separate from the GATT."²⁹⁵ 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."²⁹⁶ This, of course, ran directly counter the United States' thinking at the time. Sure enough, the U.S. representative took a dim view of the rationales offered by the EC for establishing a new organization.²⁹⁷ In particular, the United States 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 force any country to accept an obligation which it was not otherwise willing to accept, and it could not therefore solve this problem.²⁹⁸

To the United States' surprise, the EC subsequently proved very receptive to the "single protocol" approach, as U.S. negotiators had

291. See JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* (1990) (setting out Jackson's diagnosis of what ailed the trading system and his vision for how it should be reformed) Jackson was hired as a consultant by the Canadians.

292. Winham, *supra* note 95, at 821, 821 n.23 (quoting a press release of April 11, 1990).

293. *Communication from the European Community*, GATT Doc. MTN.GNG/NG14/W/42 (Jul. 9, 1990).

294. GATT Secretariat, *Meeting of 25-26 June 1990*, GATT Doc. MTN.GNG/NG14/18, ¶ 51 (Jul. 9, 1990).

295. *Id.*

296. *Id.* ¶ 53.

297. *Id.* ¶¶ 30-35.

298. *Id.* ¶ 32.

started calling the “GATT II” idea,²⁹⁹ when the United States first presented the idea to the other Quad countries later in July 1990.³⁰⁰ In discussions with the Quad countries in the following months, the United States 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 U.S. negotiators called “lowest common denominator” agreements.³⁰¹ In effect, U.S. negotiators were arguing that the “single protocol” allowed the Quad to go all in for the club approach to multilateral trade lawmaking: in the United States 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, U.S. negotiators started linking it with the “single undertaking” principle contained in the Punta del Este Ministerial Declaration.³⁰² The principle stipulated: “The launching, the conduct and the implementation of the outcome of the negotiations shall be treated as parts of a single undertaking.”³⁰³ 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 GATT [contracting parties] to be bound by all of the agreements.”³⁰⁴ As Andrew Stoler, one of the U.S.

299. In discussions with the other Quad countries, U.S. 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-emphasize 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.” Steinberg Interview, *supra* note 281.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Punta del Este Declaration, supra* note 264, at 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.” World Trade Organization, Ministerial Declaration of 15 September 1973, WTO Doc. GATT/1134, 12 ILM 1533 (1973), ¶ 8. Regarding the meaning of this principle, U.S. 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 1973–1976, supra* note 142, at 684. In the debate about the implementation of the Tokyo Round results, the principle played no role. See generally Robert Wolfe, *The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor*, 12 J. INT’L ECON. L. 835 (2009) (discussing the origins and wider significance of the “single undertaking” idea).

304. Andrew Stoler, *Breaking the Impasse: A Critical Mass Approach to Multilateral Trade Negotiations*, CPP SYMP. ON THE FUTURE OF THE MULTILATERAL

negotiators promoting the reinterpretation 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.”³⁰⁵

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.³⁰⁶ When the negotiations in agriculture stalled during the Mid-Term Review of the Uruguay Round held in Montreal in 1988, the Latin Americans had in turn relied on the principle to withhold their consensus to the results in other areas.³⁰⁷ Essentially, then, U.S. 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.”³⁰⁸ There is little doubt that “few

TRADE SYS., at 1, http://www.iit.adelaide.edu.au/docs/critical_mass_speech_final.pdf [<http://perma.cc/84DL-7U8Y>] (archived Sept. 30, 2015).

305. *Id.* at 4.

306. See in particular, the discussion of the principle in PAEMEN & BENSCH, *supra* note 23, at 58, 80–81 (“[T]he principle of globality had been introduced to avoid excessive concentration on agriculture.”), 97–98, 195 (“[T]he 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, *supra* note 23, at 158 (“The Americans interpreted globality as ‘Eurospeak’ for saying that little was to be allowed to happen in the negotiations on agriculture.”).

307. See OXLEY, *supra* note 23, at 169 (describing how the Latin American members of the Cairns Group blocked the outcome on other issues in the absence of progress in the negotiations on agriculture); PAEMEN & BENSCH, *supra* note 23, at 80 (“This ‘principle of globality’ would later be taken up by other participants and exploited for their own ends.”); Winham, *supra* note 95, at 808–809, 813 (describing the Latin American countries’ decision to withhold their consensus at the mid-term review as “the most vivid example of the influence developing countries have had on the Uruguay Round”); see also Rubens Ricupero, *Integration of Developing Countries into the Multilateral Trading System*, in THE URUGUAY ROUND AND BEYOND: ESSAYS IN HONOR OF ARTHUR DUNKEL 9, 16 (Jagdish Bhagwati & Mathias Hirsch eds., 1998) (“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.”) (emphasis in original); Gabrielle Marceau, *Interview with Julio Lacarte-Muró*, VIMEO, <https://vimeo.com/31948117>, 13:58–16:44 (last visit Nov. 15, 2015) [perma.cc/R7LS-38T9] (archived Jan. 7, 2016).

308. Gallagher & Stoler, *supra* note 127, at 381 (quotes in “accept everything” phrase in original); see also PAEMEN & BENSCH, *supra* note 23, at 257 (“[T]he

countries would have accepted this interpretation of the single undertaking in 1986.”³⁰⁹

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 United States 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 on 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 distinct from GATT

[W]e 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.³¹⁰

At a meeting of the United Nations Conference on Trade and Development (UNCTAD) in March 1991, the Indian ambassador did not mince his words, stating that

The concept of a “single undertaking” had been introduced at a “very late stage” and was tantamount to “breach of good faith”. [sic] 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

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.”); Ricupero, *supra* note 307, at 16 (“[D]uring 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.”) (emphasis in original); note that Ricupero arguably misinterprets who was the driving force behind the reinterpretation; Stoler, *supra* note 304, at 1, 4 (“[T]he 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 The Quad changed the meaning of the Uruguay Round’s single undertaking at the end of the game.”).

309. Stoler, *supra* note 304, at 4.

310. World Trade Organization, Meeting at Ministerial Level, Brussels, December 1990, *India: Statement by Dr. Subramanian Swamy, Union Minister of Commerce, Law and Justice*, MTN.TNC/MIN(90)/ST/46 (Dec. 4, 1990), at 4; Interview with Richard Steinberg (explaining that Brazil took a similar position in informal consultations).

were not forced to accept obligations inconsistent with their development, financial and trade needs.³¹¹

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.³¹²

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 principles 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.³¹³

At this time, the annex on institutional provisions was still largely a blank page.³¹⁴

One year later, the GATT's Director-General, Arthur Dunkel, presented another version of the draft final act, the so-called "Dunkel Draft." The United States and EC had persuaded Dunkel to

311. C. Raghavan, *G77 Assail "Single Undertaking" and MTO Efforts in Round*, SUNS ONLINE (Mar. 18, 1991), <http://www.sunsonline.org/trade/process/during/uruguay/mto/03180091.htm> [<http://perma.cc/M5ZH-YHAJ>] (archived Sept. 30, 2015).

312. Trade Negotiations Committee, *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, WTO Doc. MTN.TNC/W/35/Rev.1 (1990), at 2 (square brackets in original) (referring in footnote 1 to the "institutional reservation" that had provided the basis for the Mid-Term Review compromise on intellectual property rights).

313. *Id.* at 193.

314. *Id.* at 384 (containing a placeholder for an "organizational agreement").

incorporate the “single protocol” idea into his draft.³¹⁵ Article II of the proposed Agreement Establishing the Multilateral Trade Organization³¹⁶ 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.³¹⁷ It stipulated that the agreements “shall have all members as parties,”³¹⁸ 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.”³¹⁹ This would allow the Quad countries to withdraw from the original GATT and to terminate the market access obligations to GATT contracting parties that they had accumulated over the four decades of GATT’s operation with respect to any country that refused to join the new organization. As a result, those who refused to join “would remain contracting parties to a *de facto* defunct agreement.”³²⁰

315. See Steinberg, *supra* note 168, at 356 (“[T]he 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.”).

316. See Trade Negotiations Committee, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, WTO Doc. MTN.TNC/W/FA (1991), at 91 [hereinafter Dunkel Draft] (explaining its establishment in the Agreement Establishing the Multilateral Trade Organization (Annex IV)).

317. *Id.* at 92 (art. II.1. of the Agreement Establishing the Multilateral Trade Organization).

318. *Id.*

319. *Id.* (art. II.3. of the Agreement Establishing the Multilateral Trade Organization) (emphasis added).

320. Ricupero, *supra* note 307, at 17; see also Hudec, *GATT*, *supra* note 148, at 76 (“[G]overnments would have to decide between accepting everything or leaving the GATT.”); Klaus Stegemann, *The Integration of Intellectual Property Rights into the WTO System*, 23 *WORLD ECON.* 1237, 1243 (2000) (explaining that 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.”); Steinberg, *supra* note 168, at 360 (explaining the single undertaking approach); Stoler, *supra* note 304, at 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.”); Daniel K. Tarullo, *The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions*, 34 *LAW & POL’Y INT’L BUS.* 109, 170, 177 (2002) (“[S]uppose 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

The institutional provisions of the Draft Final Act were not finalized for another two years. Negotiations occurred primarily in the "Informal Group on Institutional Issues," chaired by Julio Lacarte between September and December 1993.³²¹ According to Andrew Stoler, the U.S. representative in the Lacarte group 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 countries,"³²² 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."³²³ 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.³²⁴ 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 and an agreement on substantive intellectual property rights were 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.³²⁵

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

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.").

321. See PAEMEN & BENSCH, *supra* note 23, at 234; E-mail from Andrew Stoler to Nicolas Lamp (Feb. 7, 2013) (on file with author) [hereinafter Stoler Correspondence] (describing the negotiations in the Lacarte Group).

322. Stoler Correspondence, *supra* note 321.

323. *Id.* at 1.

324. See Marrakesh Agreement art. II.2, II.4.

325. While India noticeably warmed to the services agreement during 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.

countries out and to limit its membership. Rather, the intention was to get everyone else to join, but on the insiders' terms. The Quad countries' willingness to exit the GATT and to establish a new treaty in its stead provided them with unprecedented leverage to build the trading system they wanted. Perhaps ironically, the Quad countries used this leverage to eliminate the "multi-tier" system³²⁶ that had emerged through the club dynamics of the GATT era and replace it with a "one-tier system"³²⁷ in which all countries had to assume similar levels of obligation. In a way, then, the WTO was supposed to be the club to end all clubs.

D. *The Internalized Club: Lawmaking in the WTO*

The conclusion of the Marrakesh Agreement in 1994 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.³²⁸ The built-in negotiating agendas in the General Agreement on Trade in Services (GATS) and the Agreement on Agriculture,³²⁹ 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.³³⁰ Second, the Marrakesh Agreement

326. Curzon & Curzon, *supra* note 129, at 143–44.

327. Stoler Correspondence, *supra* note 321, at 2.

328. See Mike Moore, *The Democratic Roots of the World Trade Organization*, in THE WORLD TRADE ORGANIZATION. LEGAL, ECONOMIC AND POLITICAL ANALYSIS, VOLUME I 39, 5 n.5 (Patrick F.J. Macrory et al. eds., 2005); Debra P. Steger, *The Culture of the WTO: Why It Needs to Change*, 10 J. INT'L ECON. L. 483, 492–93 (2007) (noting that the Marrakesh Agreement "did not expressly contemplate major negotiating rounds," and that agreements could be concluded without rounds).

329. General Agreement on Trade in Services art. XIX, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (planning to conduct periodic negotiations within five years); Agreement on Agriculture art. 20, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410 (entered into force Jan. 1, 1995) (planning to start negotiations one year before the end of implementation).

330. See World Trade Organization, Ministerial Decision on Negotiations on Movement of Natural Persons, https://www.wto.org/english/docs_e/legal_e/47-dsnat.pdf [<https://perma.cc/6LNA-J9PC>] (archived Sept. 30, 2015) (establishing a negotiating group); World Trade Organization, Ministerial Decision on Financial Services, https://www.wto.org/english/docs_e/legal_e/48-dsfin.pdf [<https://perma.cc/TL98-488U>] (archived Sept. 29, 2015) (planning to monitor negotiations within four months of the WTO agreement); Decision on Negotiations on Maritime Transport Services, https://www.wto.org/english/docs_e/legal_e/49-dsmar.pdf [<https://perma.cc/LAA9-MAY9>] (archived Sept. 30, 2015) (planning negotiations to take place between May 16, 1994, and June 1996); World Trade Organization, Ministerial Decision on Negotiations on Basic Telecommunications, https://www.wto.org/english/docs_e/legal_e/50-dstel.pdf [<https://perma.cc/4454-WG2L>] (archived Sept. 29, 2015) (deciding that negotiations

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,³³¹ the WTO Agreement gives the entire membership control over the conclusion of new plurilateral agreements.³³² Moreover, by obliging all Members to join all WTO agreements (with the exception of the four plurilateral agreements, of which two 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.³³³ 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. Finally—and this may be the most consequential point—the very success of the Uruguay Round single undertaking in forcing the developing countries to assume an unprecedented level of obligations made it highly unlikely that the developed countries would ever be willing and able to employ the club approach in its most extreme form³³⁴ again. On the one

would take place between May 16, 1994, and April 30, 1996); World Trade Organization, Ministerial Decision on Professional Services https://www.wto.org/english/tratop_e/serv_e/20-prof_e.htm [<https://perma.cc/7KX2-BALQ>] (archived Sept. 30, 2015); World Trade Organization, Ministerial Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, https://www.wto.org/english/docs_e/legal_e/53-ddsu.pdf [<https://perma.cc/D4WC-CWHB>] (archived Sept. 29, 2015) (planning to review the rules within four years of the “the entry into force of the Agreement Establishing the World Trade Organization”).

331. 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. See Trade Negotiations Committee, *Proceedings of the Session*, *supra* text accompanying note 170.

332. See Marrakesh Agreement art. 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).

333. Andrew Stoler has highlighted this implication of the Uruguay Round single undertaking as well: “By forcing all developing countries (and all of the countries that had been in “de facto [contracting party]” status) to join the WTO and accept all the agreements, we forced all of them to also be part of the future decision-making process in the WTO.” Stoler Correspondence, *supra* note 321, at 2 (emphasis in original).

334. The club approach takes its most extreme form where the insiders attempt to implement the third element of the approach (i.e., compelling outsiders to join the club on the insiders’ terms) by denying outsiders not only the benefits of any new commitments assumed by the insiders (as in the case of the GPA), but also the benefits of *previously granted* commitments. The only examples of this extreme form of the club approach are the GATT/ITO Charter, which provided for the possibility that the benefits of the ITO Charter could be denied to any ITO member who did not join the GATT, and the WTO Agreement, which effectively allowed its Members to deny the benefits of the GATT 1947 to any GATT member who did not join the WTO.

hand, the multilateral trade regime has arguably become too valuable to the developed countries for them to credibly threaten that they would exit the WTO. This threat was credible in the GATT, which imposed low levels of discipline on developing countries and was marred by an ineffective dispute settlement system; it is not credible in the WTO, which combines high levels of discipline on developing countries with an effective dispute settlement mechanism.³³⁵ On the other hand, the developing countries are determined not to find themselves in a scenario in which the developed countries present them with a *fait accompli* ever again, and they have been highly effective in building blocking coalitions that will allow them to avoid such an outcome in future negotiations.³³⁶ To some extent, then, the establishment of the WTO has indeed ended all clubs.³³⁷

Interestingly, both Richard Steinberg and Andrew Stoler, probably the chief architects of the Uruguay Round “single undertaking,” are unhappy with this outcome.³³⁸ Stoler “regret[s] it all deeply” and now finds “the whole idea” to have been “a huge mistake.”³³⁹ 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.”³⁴⁰ 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

335. Richard Steinberg also argues that a “replay [of] the 1994 ‘power play’ that concluded the Uruguay Round” is now “impossible,” albeit for different reasons. In Steinberg’s view, the threat of exit by the European Union and the United States would not be credible because, as a result of the proliferation of preferential trade agreements since the mid-1990s, “the US and EU each owe MFN to many countries independent of the GATT Art. I obligation by virtue of their MFN obligations in their free trade agreements. They would have to exit all trade agreements to replay the 1994 power play.” Richard Steinberg, *Future of the WTO*, U. CHICAGO L. SCH. FACULTY BLOG (Feb. 23, 2009), <http://uchicagolaw.typepad.com/faculty/2009/02/future-of-the-wto.html> [http://perma. cc/ZZD4-S586] (archived Sept. 30, 2015).

336. See *infra* note 354 and accompanying text, at 142–43 (explaining that Brazil and India formed a developing-country alliance to push back against the U.S. and E.U.’s plan that advanced their own agendas at the expense of other nations).

337. At least *within* the multilateral trading system. One could interpret the proliferation of preferential trade agreements over the past two decades as a form of exit by the major trading powers, that is, a decision to pursue trade liberalization outside the multilateral trading system rather than within it. However, while there are certainly club dynamics at play in the negotiation of preferential trade agreements, they are not taking the extreme form that one encounters at key moments in the evolution of the multilateral trading system: there is no indication that any subset of WTO members would be prepared to leave the WTO in order to entice other countries to join a preferential trade agreement. See *supra* note 335 and accompanying text.

338. See Stoler Correspondence, *supra* note 321; Steinberg Interview, *supra* note 281.

339. Stoler Correspondence, *supra* note 321, at 2.

340. In Stoler’s view, “things have got much worse since [the conclusion of the Uruguay Round, N.L.] with a proliferation of groups getting special treatment and having to undertake less than full obligations. That side of the outcome is a shambles.” *Id.*; see also *infra* “Differentiation of Obligations.”

nothing happens in the WTO.”³⁴¹ Stoler’s chief regret is to have “wrecked what had been a pretty good system in the GATT years.”³⁴²

At the very least, the new lawmaking framework in the WTO 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 the single functioning plurilateral agreement in the WTO framework, the Agreement on Government Procurement (section 1).

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” (section 2). 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 (section 3). In contrast to the times of the GATT, however, this internalized 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 unfavorable, on board. As a result, the pace of lawmaking in the multilateral trading system is now circumscribed by the need to seek the support, or at least acquiescence, of all WTO members—as this Article has demonstrated, this had never been the case in the GATT.

1. Accession Negotiations

Accession negotiations provide a unique opportunity for WTO members to realize the third element of the club approach: make outsiders join their agreement(s) on the insiders’ terms. 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.”³⁴³ 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

341. Stoler Correspondence, *supra* note 321, at 2.

342. *Id.*

343. Roman Grynberg & Roy Mickey Joy, *The Accession of Vanuatu to the WTO: Lessons for the Multilateral Trading System*, 34 J. WORLD TRADE 159, 159 (2000).

the general lawmaking process in the WTO is that accession negotiations offer “the applicant no possibility of imposing a marginal cost on the *demandeur*.”³⁴⁴ Roman Grynberg and Roy Mickey 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 the applicant quickly concedes the vast bulk of the standardized demands of the large WTO members.³⁴⁵

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.

2. 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,³⁴⁶ it had featured the same exclusionary dynamics that were known from the GATT days.³⁴⁷ 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. The basic thrust of these discussions was that, while informal

344. *Id.* at 160 (emphasis in original).

345. *Id.*

346. See World Trade Organization, General Council Minutes of 7–8 February 2000, WTO Doc. WT/GC/M/53 (2000) ¶ 44 (reporting the statement of the Director-General, “[w]hile 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 World Trade Organization, Internal Transparency and Effective Participation of all Members: Main Points Raised by Delegations, WTO Doc. JOB(00)/2331 (Apr. 14, 2000), at 3 [hereinafter *Transparency Main Points*] (providing the views of WTO members on this issue).

347. Keohane & Nye, *supra* note 5, at 269–70 (citing a complaint by the Indian delegation that “only about thirty countries were authorized to participate in the WTO’s consultative process in Seattle at the end of November 1999”; the process “eliminated 100-plus countries from any participation at all, and some could not even enter the premises’ where the negotiations were taking place.”).

consultations between smaller groups of members were useful and, given the large membership of the WTO, essential to build a consensus, the transparency of these consultations had to be increased, the nonparticipating 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.”³⁴⁸

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.³⁴⁹ The chairmen of WTO negotiating groups openly embrace negotiations in “variable geometry”³⁵⁰ or “concentric circles”³⁵¹ and by and large have taken their reporting commitments seriously. The procedural safeguards that crystallized in the consultations are reflected in how the WTO defines the terms “transparent”³⁵² and “inclusive”³⁵³ for the purposes of WTO negotiations.

348. Transparency Main Points, *supra* note 346, at 14.

349. See e.g., World Trade Organization, General Council Minutes of 18 October 2000, WTO Doc. WT/GC/M/59 (2000), ¶ 23 (noting that the Hong Kong representative said of the issue, “[t]he process had been effective, and was a successful example of the improvements made in terms of internal transparency.”). For a skeptical view, see FATOUMATA JAWARA & AILEEN KWA, BEHIND THE SCENES AT THE WTO: THE REAL WORLD OF INTERNATIONAL TRADE NEGOTIATIONS (2004).

350. References to this concept in Chairs’ reports are common. See e.g., World Trade Organization, Committee on Trade and Development, Forty-Sixth Special Session, *Note on the Meeting of 20 March 2012*, TN/CTD/M/46 (Jun. 26, 2012) at ¶ 6 (“While such engagement in variable geometry was intended to help advance the work pragmatically, he wished to stress that his door remained open to any delegation that wished either to get an update on the progress of the work, or that wished to contribute an input to advance the work.”).

351. *Glossary*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm [<https://perma.cc/Q3R5-73BX>] (archived Oct. 1, 2015) (defining “concentric circles” as “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.”).

352. *Id.* (defining “transparent” as “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.”).

353. *Id.* (defining “inclusive” as “ensuring all members have input into a process even when meetings involve only some of them. In WTO negotiations and other

At the same time, anything that smacks of a fall back into the club dynamic of the GATT era has been met with a rather furious backlash. Thus, in the run-up to the Cancún ministerial in 2003, the United States and the European Union presented a joint proposal on agriculture that was less ambitious than most developing countries and agricultural exporters had hoped, most notably in continuing to allow agricultural export subsidies.³⁵⁴ 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, contributing to the collapse of the meeting.³⁵⁵ In the subsequent negotiations, the United States and the European Union had to abandon their positions on both subjects; the next ministerial declaration envisaged the abolition of agricultural export subsidies by 2013 and contained an expeditious schedule for the reduction and abolition of subsidies on cotton.³⁵⁶

In sum, 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 tenuous, and their ability to force others to join their agreement is greatly 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 to. Moreover, the number of major players has increased, and the United States and the European Union now share the stage with a number of other major participants, in particular India, Brazil, and China.

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.”).

354. See PAUL BLUSTEIN, *MISADVENTURES OF THE MOST FAVOURED NATIONS: CLASHING EGOS, INFLATED AMBITIONS, AND THE GREAT SHAMBLES OF THE WORLD TRADE SYSTEM* 141–44 (2009).

355. World Trade Organization, Preparations for the Fifth Session of the Ministerial Conference, Draft Cancún Ministerial Text, Second Revision, WTO Doc. JOB(03)/150/Rev.2 (Sept. 13, 2003), ¶ 27.

356. World Trade Organization, Ministerial Declaration of 18 December 2005, WTO Doc. WT/MIN(05)/DEC (2005), ¶¶ 6, 11 (“We agree to ensure the parallel elimination of all forms of export subsidies and disciplines on all export measures with equivalent effect to be completed by the end of 2013 All forms of export subsidies for cotton will be eliminated by developed countries in 2006.”).

3. 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 modalities on agriculture and non-agricultural market access in the current Doha Round negotiations, now contain highly differentiated rules for the undertaking of commitments.³⁵⁷ 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.³⁵⁸ 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.

Second, some WTO members have chosen to take on additional commitments, for example with respect to market access for information technology products³⁵⁹ and with respect to the regulation

357. The Doha Round of trade negotiations was launched at a Ministerial Meeting in Doha, Qatar, in November 2001. The so-called “modalities” are documents reflecting the current state of the negotiations. The modalities contain formulas that will determine the scope of new market access commitments that WTO Members will be required to undertake once the Doha Round is concluded. The current version of the draft modalities stems from December 2008; WTO Members have been unable to agree to amend the draft modalities ever since, and there is virtually no prospect that they will be adopted in their current form. See Negotiating Group on Market Access, *Fourth Revision of Draft Modalities for Non-Agricultural Market Access*, WTO Doc. TN/MA/W/103/Rev.3 (Dec. 6, 2008); Committee on Agriculture, Special Session, *Revised Draft Modalities for Agriculture*, WTO Doc. TN/AG/W/4/Rev.4 (Dec. 6, 2008).

358. Interview with Joseph Glauber, in Washington, D.C. (Apr.–May 2010) (explaining that the chairman of the negotiations would simply ask the negotiating group whether anyone would mind if he exempted, say, the least-developed countries (LDCs) or the small vulnerable economies (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).

359. See WTO Secretariat, *15 Years of the Information Technology Agreement: Trade, Innovation and Global Production Networks* (2012), http://www.wto.org/english/res_e/publications_e/ita15years_2012full_e.pdf [<https://perma.cc/569Y-3RQW>] (archived Oct. 1, 2015) (discussing the Information Technology Agreement).

of telecommunications markets,³⁶⁰ on a critical mass basis. In order to be able to assume these commitments without having to seek the permission of nonparticipating 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 agreements³⁶¹ or in a new plurilateral agreement.³⁶² The route via schedules allowed the critical mass countries to realize 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 nonparticipants 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.

IV. CONCLUSION

This Article shows how the multilateral trading system used to work as a club. Despite the ambition to universality that marked the United States' 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: (1) the greater practicality of negotiating among a smaller group of countries, (2) the ability of the insiders to shape the content of the agreement decisively, and (3) the prospect that they might subsequently be able to force outsiders to join the agreement on the insiders' terms.

While the club approach holds many attractions for the insiders and has been employed for a number of reasons, this Article has drawn particular attention to how the major developed countries have used it to establish and defend the principle of reciprocity as the basis for multilateral trade lawmaking. The relationship between the club

360. For discussion of the Reference Paper on basic telecommunications, see LANG, *supra* note 109, at 284–90, and World Trade Organization, *Communication from the United States: Scheduling Regulatory Principles*, S/NGBT/W/18 (Jan. 23, 1996).

361. This would have required the support of at least a two-thirds majority of WTO members. See Marrakesh Agreement art. X:1 (“If consensus is not reached at a meeting of the Ministerial Conference within the established period, the Ministerial Conference shall decide by a two-thirds majority of the Members whether to submit the proposed amendment to the Members for acceptance.”).

362. This would have required a consensus decision by the WTO membership. See Marrakesh Agreement art. 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.”).

approach and the principle of reciprocity is one of mutual reinforcement. The desire to enforce the principle of reciprocity has often been the chief motivation for adopting the club approach to lawmaking in the trading system. As is 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 recognized as a "full participant" in the negotiations on the basis of its compliance with the reciprocity norm 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 nonsignatories 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 United States in particular, as "an opportunity not to be missed to rid the new system once and for all of free riders."³⁶³ The prominence of the club approach in multilateral trade lawmaking is thus in large part explained by the desire to enforce the principle of reciprocity.

Finally, the Article shows that the founding of the WTO, while itself an example of the successful employment of the club dynamic, has made the use of the club approach in the multilateral trading system much more difficult, if not impracticable. In a way, the WTO was the club to end all clubs. 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. At the very least, the new lawmaking framework is markedly less hospitable to the club dynamics that flourished under the GATT.

363. Stoler, *supra* note 304, at 4.