Reinforcing the WTO

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I. Introduction

This year marks the 50th anniversary of the General Agreement on Tariffs and Trade, universally known as the GATT. Given the challenges facing the trading system as it enters a new century, a look back at "the creation" provides some useful insights for assessing the future of the multilateral, rules-based system.

The GATT was but one structure, and undoubtedly the least impressive, in the postwar architecture of international economic cooperation. The fact that it can be called a structure at all is miraculous, since the basic treaty creating the GATT was never formalized, and it was not intended to operate as an international organization at all. Its fellow institutions in the Bretton Woods system, the International Monetary Fund (IMF) and the World Bank, were endowed with substantial financial and staff resources, with powerful boards and effective managements, and with a clear mission and the capacity to carry it out. The GATT enjoyed none of these advantages, operating with an undermanned secretariat, few resources, and consensus decisionmaking.

Its successor organization, the World Trade Organization (WTO), is the first post–Cold War, global institution—a substantial new undertaking by the world community whose creation is a tribute to the resilience of the liberal trading order. There are profound differences, however, between the challenges that faced the GATT in the postwar decades and the role of the WTO in today's global

economy. It is the contrast between the mandates and capabilities of these two institutions that defines the challenges ahead in preserving and expanding the liberal global trading system.

II. Creation of the GATT

The United States took the leading role in building a new trading system after World War II. Memories of the protectionist battles of the 1930s, initiated by the notorious 1930 Smoot Hawley Tariff Act, were still vivid. Cordell Hull, Franklin D. Roosevelt's Secretary of state, had reversed the long-standing protectionist policy of the United States in 1934 by obtaining passage of the Reciprocal Trade Agreements Act, which authorized the President to negotiate tariff reductions with foreign states on a nondiscriminatory basis.

The Constitution of the United States gives Congress exclusive power "to regulate commerce with foreign nations," although Congress may delegate trade policy powers to the executive branch. Hull was convinced that freer international trade was essential to U.S. prosperity, to world recovery, and to the maintenance of world peace. From 1934 on, Hull's vision became "the core mythology" of U.S. foreign policy.[1]

The other major actor in the design of the postwar institutions, the United Kingdom, was also strongly influenced by the memory of the 1930s. British Lord Keynes and American Harry Dexter White, the fathers of the Bretton Woods system, saw beggar-thy-neighbour devaluations to be as pernicious as the tariff war of the 1930s. They agreed that a stable rules-based payments system required a stable rules-based trading system, and vice versa, but

they were unable to agree on the norms and principles to construct such a trading system.

Of interest is that it was easier for these macroeconomists to deal with monetary issues involving exchange rates and capital flows. They shared a convenient kind of "macromyopia" that focused comfortably on finance, but allowed them to delegate the detailed, messy, "political" micro issues to people in other government departments, not the treasuries. Thus, only the broadest generalities on trade were included in the IMF's Articles of Agreement. Trade negotiations followed a separate track.

The trade disagreement between the United Kingdom and the United States concerned two fundamental issues: nondiscrimination, or the most favored nation (MFN) rule; and the extent and nature of "escape clauses" to permit temporary import barriers for protection of the domestic economy. The United Kingdom wanted to maintain their system of preferential treatment of Commonwealth countries for political reasons. And, as stated in their 1944 White Paper on Employment Policy, they regarded the maintenance of full employment and the creation of the welfare state as more important than free trade. Even the *Economist*, the traditional champion of laissez-faire and free trade, declared "that it did not challenge the old principle that international exchange and division of labour leads to the highest possible national income, but modifications were necessary, because the modern community had acquired economic needs other than maximum wealth."[2]

While there were some Americans, especially Keynesian academics, who shared that view, it was not the prevailing view of the academic, business, and policymaking establishment. As Jacob Viner noted, "the zeal of the United States for the elimination of special and flexible controls over foreign trade is in large part explained by the absence of any prospect that the United States will in the near future devise or accept a significant program for stabilization of employment or for the planning of investment, the confidence prevailing in this country that our competitive position in foreign trade and the exchange position in foreign trade and the exchange position of the American dollar will continue to be strong, and the availability of the cache of gold at Fort Knox to tide us over even a prolonged and substantial adverse balance of payments if perchance it should occur."[3]

The depth of this transatlantic divide on the crucial issue of the role of government deserves underlining. There was no government-constructed postwar "social contract" in the United States. While an Employment Act was passed in 1946 (and the Council of Economic Advisers created as an instrument of the Keynesian policy approach), after the 1946 elections the Republicans dominated Congress, and the role of the Council of Economic Advisers in this respect was somewhat limited. Most of the U.S. social contract was negotiated by the mass production unions in the golden age of growth; in other words, it was largely privatized.

Furthermore, the European social contract involved more than Keynesian demand management. It included a commitment to income redistribution involving an expanded role for the state in both taxation and expenditure, alien to the historical and deeply embedded U.S. conception of the government's role. The New Deal represented a departure dictated by changed circumstances, but not a fundamental transformation of the vision of the Founding Fathers. Thus, the romantic ideal of the Hull vision was undergirded not by a widely held international consensus shared by the United States and the Europeans about the nature of the relationship between the trading system and domestic policy. Rather, as Jacob Viner noted, U.S. support for the GATT stemmed primarily from trade and investment opportunities abroad because of the U.S. lead in the world economy.

Separate trade negotiations between the United States and the United Kingdom began in 1943. It was not until the end of 1945, well after completion of the Bretton Woods agreements, that a document was released in Washington which included, among a number of proposals, a Charter for an International Trade Organization (ITO) and the GATT, a subset of the broader institution. After several preparatory meetings and extensive negotiations, the ITO Charter was presented in 1948 to a meeting in Havana.

The Charter of the ITO reflected the many compromises negotiated during the preparatory process. In contrast to the Bretton Woods institutions, weighted voting (according to economic clout) was dropped for a one-country, one-vote rule. Chapters on employment, development, antitrust, investment, agriculture, and a number of exceptions to liberal trade rules were included. The battles among both developed and developing countries were over exceptions and exceptions to exceptions. Even the United Kingdom's

Commonwealth Preference was included under a "grandfathering" of existing preferential arrangements.

Despite all the compromise and difficult negotiations leading to agreement in Havana, plans for the ITO were overtaken by events. At the time of the Havana meeting, the Marshall Plan was launched. The trade and payments liberalization of the Marshall Plan institution, the Organization for European Economic Cooperation (OEEC), based on discrimination against the United States, settled the issue of nondiscrimination without debate. No country took action to ratify the ITO agreement after Havana because all were waiting for the United States, the lead nation, to ratify it first.

President Truman had to go to Congress for another extension of negotiating authority in 1949, so he decided not to send the ITO to Congress for approval in 1948. Meanwhile, opposition was building from many quarters, and support from few. In addition, the Korean War had started. All in all, interest in global cooperation had waned. The President judged that there was virtually no chance of approval of the Havana Charter and so decided not to seek congressional approval. The basis for this judgment seems pretty plausible: no strong support (except among academics and some bureaucrats), but lots of strong opposition.

Given this climate, it is worth considering why the enabling legislation for the Bretton Woods agreements and the Marshall Plan were adopted by the Congress. The answer seems to be that neither program excited strong opposition. The Bretton Woods agreements were about money and the dollar; Americans were not worried about the dollar. Recall the Viner argument: They knew there was lots of gold in Fort Knox. The Marshall Plan was about the Cold War; there was little opposition to waging the Cold War.

In the case of the ITO, however, the domestic coalition in support was too weak. There were too many loopholes, far too much government intervention for free traders, and too much free trade for protectionists. Protectionist forces, especially labor unions, formed a National Labour Management Council on Foreign Trade with some import-sensitive industries. But the most effective business opposition was not based on fear of import penetration. As Diebold explains: "Their objection was that the Charter would do little to remove the trade barriers set up by foreign countries and might even strengthen some of them.... Moreover, the businessmen who took this view usually believed that the Charter went too far in

subordinating the international commitments of signatory countries to the requirements, real or imagined, of national economic plans and policies."[4]

What lay at the heart of the opposition of powerful business lobbies was a rejection of the idea that there can be many variants of market systems, with different institutional arrangements, including different mixes of government and business roles. And where such differences existed, they were, in the view of U.S. business, probably unfairly protectionist. The support for trade liberalization by many U.S. business groups, was based on support for access to foreign markets, which were seen as less open than those of the United States, in large part because of government intrusiveness.

Despite this opposition, U.S. leadership in the trade arena did not fail with the death of the ITO. It was U.S. initiative that had launched the GATT in Geneva in 1947 as a prelude to Havana. The Geneva negotiations had three parts: preparation of the ITO Charter; negotiation of a multilateral agreement for reciprocal tariff reductions; and drafting of general obligations. The latter two parts became the GATT, which was much narrower in coverage than the ITO and contained less binding commitments. It did not elicit the widespread opposition generated by the proposed trade institution. In fact, the United States joined 22 other "contracting parties" in signing the agreement without ever putting it to Congress. Its weakness was its strength, at least at the outset.

Successive rounds of negotiations in the 1950s and 1960s reduced the tariffs erected in the disastrous 1930s. This was the "golden age" of trade liberalization, defined in terms of the reduction of border barriers. There are several reasons for this success:

- Reformers had a clear target in the form of visible tariffs and nontariff barriers erected in the 1930s, removal of which promised to extend market opportunities.
- Pent-up demand and economic recovery after World War II masked dislocations that rapid trade liberalization might have caused.
- The U.S. government, focused on Cold War competition with the Soviets, was tolerant of trade restrictions and distortions among both allies and nonaligned countries that were a focus of political competition.

Over time, however, the essential compromises embedded in the GATT began to erode its structure, like termites in the basement. This became increasingly clear in the 1970s. The mid-decade OPEC "oil shock" had produced a new economic malady termed stagflation and a marked increase in "new protectionism," including voluntary export restraints (VERs) and quasilegal market sharing agreements (orderly marketing arrangements or OMAs). An explosion of subsidies to support declining industries, especially in Europe, added to the enormous subsidy support in the European Community's Common Agriculture Policy (CAP). The GATT system was not equipped to handle either nontransparent measures such as VERs and OMAs or domestic strategies for declining industry. The GATT's weak dispute settlement mechanism added to U.S. frustration with the system.

The U.S. government's response to the rise of the "new protectionism" was to begin moving the trade policy agenda inside the border. This new mode of trade liberalization was embodied in the agenda of the Tokyo Round of trade negotiations. New issues included trade-impeding barriers arising from domestic policies, such as industrial and agricultural subsidies; government procurement and regulation of product standards; and strengthening antidumping rules to facilitate the use of this favorite remedy of the business community against "unfair" trade. Thus, the focus of the Tokyo Round was, for the first time in GATT experience, no longer simply on reducing border barriers to trade. Rules governing domestic policy with trade spillover were now on the table, highlighting differences in the extent and nature of government intervention in different counties.

Unfortunately, the Tokyo Round proved to be a disappointment, certainly to the United States. The shift of focus inside the border did not produce the hoped-for results: neither tough language on domestic subsidies and technical barriers, nor a strong dispute resolution mechanism. Problems like European agricultural and industrial subsidies were not effectively addressed.

The Tokyo Round triggered another fundamental change: the "legalization" of the trading system. This evolution towards detailed, legalistic rules was perhaps inherent in the shift from reciprocal bargaining over border barriers to domestic rule-making. Arguably more important was the changing nature of U.S. trade policy. There was growing conviction among business groups and labor unions that other countries were engaged in unfair trade practices and that

the “free ride” of the 1950s and 1960s had to stop. For the U.S. government, the best option seemed to be a strengthening of the trade remedy laws. Congress demanded detailed legalistic prescriptions to prevent circumvention by any future administration unwilling to defend “national interests.” One notable result was the enormous increase in use of antidumping provisions by both the United States and the European Union, and an equally impressive rise in U.S. countervailing actions against “unfair subsidies.” This rise in the use of trade remedy laws, dubbed “administered protectionism,” marked the onset of the 1980s.

III. Creation of the WTO

Given the complexity and contentiousness of the issues facing the system and the wide policy differences separating governments, there was considerable sentiment within the trade community that the GATT would not be able to continue functioning. It was in this difficult environment that efforts at launching the Uruguay Round negotiations began. Yet not only did the Uruguay Round produce agreement on a WTO, it focused much more extensively inside the border and produced even greater legalization of the system, vastly expanding upon the legacy of the Tokyo Round. Indeed, one could argue that the change was qualitative—not quantitative. The reasons for this transformation of the system are worth spelling out.

The start was not auspicious; the negotiations just to launch the Round took almost as long as the entire Tokyo Round in the 1970s. The Americans had been trying to launch a new round since the early 1980s because of their dissatisfaction with the Tokyo results and rising protectionist fury in Congress (mainly because of the overvalued dollar). After a number of near-failures, the Uruguay Round was launched in Punta del Este in September 1986 and formally concluded in Marrakesh, Morocco, in April 1994, several years later than the originally announced target completion date.

The extraordinary difficulty in both initiating and completing the Round stemmed essentially from two fundamental factors: the nearly insuperable problem of finishing the unfinished business of

past negotiations, most of all agriculture; and the equally contentious issue of introducing quite new agenda items, notably trade in services and intellectual property and, though in a more limited way, investment. The Europeans blocked the launch to avoid coming to grips with their agricultural subsidies. And a number of developing countries were so bitterly opposed to including nontraditional issues, such as services and intellectual property, that U.S. goals in these areas were not even covered by the negotiating agenda at the outset. The developing countries opposed GATT involvement in such *domestic policies and institutions* as regulation and legal systems that had previously been alien to the GATT world of "shallow" integration and that had constituted a direct challenge to national sovereignty.

Yet, however difficult was the negotiation of "traditional" issues left over from previous rounds—even agriculture, textile issues, and some sensitive tariffs and nontariff barriers that had long been roadblocks—the methods and objectives were clear. The objective was the original GATT objective: the liberalization of trade by reducing or eliminating border barriers or their close domestic proxies.

But the other part of the Uruguay Round, the "new" issues of services, intellectual property and investment, was anything but traditional. The inclusion of the new issues was demanded by the Americans to correct the basic structural asymmetry of the original GATT. In the postwar period when the GATT was created, the term "trade in services" would have been an oxymoron. Intellectual property was covered by the World Intellectual Property Organization (WIPO) and its predecessor agreements. In the new policy areas, barriers to access are not at the border and are not necessarily transparent, but rather involved mainly domestic regulatory and legal systems. This is hardly the GATT world of shallow integration; it is a different world of ever-deepening integration that has and will generate a new form of trade dispute: *system friction*.

Trade in services grew much more rapidly during the 1980s than did merchandise trade, and the United States was the leading exporter by a considerable margin. The same lead status was evident in investment and technology. U.S. multinationals controlled 43 percent of the world stock of foreign investment at the outset of the 1980s, and the U.S. technology balance of payments surplus was well over $6 billion, while every other Organisation for Economic

Co-operation and Development (OECD) country was in deficit. Without a fundamental rebalancing of the GATT, it seemed highly improbable that the U.S. business community or politicians would have continued to support the multilateral system for much longer.[5] Indeed by the mid-1980s, the United States was pursuing a multitrack trade policy: unilateralism, using the trade remedies contained in Section 301 of the 1974 Trade Act; bilateralism exemplified by the Canada–United States Free Trade Agreement; and multilateralism via the Uruguay Round. So there were other options available to the United States besides a multilateral agreement.

But the new issues must be seen in a broader context than the rebalancing of GATT structure to ensure U.S. support for the multilateral system. In the second half of the 1980s, an unprecedented surge in foreign direct investment (FDI) ushered in a new phase of interdependence, sometimes termed globalization. While this investment bulge was partly due to one-off factors, there were and are underlying forces promoting globalization, especially the revolution in information and communication technology. Thus, multinational enterprises (MNEs) have become dominant global actors: the main channels for trade, finance, and technology, and engines of growth.

For MNEs, border barriers are less important than domestic "structural impediments," which are barriers to effective market access by trade or effective presence by investment, which is also a two-way funnel for technology flows. These impediments can arise, often unintentionally, from regulatory policies, legal cultures, and the behavior of private actors—in other words, from differences in systems among countries. The GATT agenda implied the primacy of trade and a preservation of system *diversity*, a diversity that was evident "at the creation." The agenda of deeper integration covers trade, investment, and technology and is far more intrusive and erosive of national sovereignty as it incorporates an intrinsic pressure for *harmonization* of diverse systems. This pressure is reinforced by locational competition for investment, which facilitates regulatory arbitrage by the MNE.

The Uruguay Round marked the transition to this new agenda. All future negotiations, whether multilateral, regional or bilateral, will involve issues inside the border because the main forces of globalization, direct investment, and the communications revolution will not abate. Since the frontier between the state and the market

is not clear and immutable, but varies over time and geography, the deeper integration agenda will be far more contentious than the negotiation of lower border barriers.

In a sense the Uruguay Round launched the first small step on the long and difficult path to a single global market. The term "contestability" was blessed by OECD Ministers in 1995 as the overall objective of trade policy.[6] The idea remains vague and undefined in terms of practical policy guidelines, but could be interpreted to ensure that a firm in any country should be able to satisfy demand in any other country by either trade or investment, or both, unimpeded by significant "structural impediments" to effective access and presence. This sounds pretty much like the notion of a single market in the only example known to the postwar world, the European Union. Full regulatory convergence need not be required. For example, mutual recognition agreements could "satisfice" as second best in the realm of technical and regulatory standards. However in many service sectors, a commitment to a specified regulatory model would probably be required, as in the agreement on telecommunications.

It must be stressed that the Uruguay Round was only the first small step in the road to a global market. Indeed, the Round is not over. The "built-in" agenda left over from the negotiations involves the launch of new negotiations for services in 2000 and also the remit from the 1996 WTO Ministerial Meeting in Singapore adds consideration of competition policy, investment, and environment to the WTO mandate. This will entrench and extend the deeper integration policy focus. A fundamental but little understood part of this new policy template relates to the legal system. A few examples are worth describing to illustrate this point, especially because there is far greater diversity of legal systems among present and potential member countries today than in 1948 at the creation of GATT.

The first example concerns *transparency* now regarded as a pillar of the multilateral trading system. Yet while it is today considered one of the basic rules governing that system its genesis, captured in Article X of the 1947 GATT, was based on U.S. administrative law and was of little import at the time of the GATT's creation.[7]

In 1946, while the negotiations for the new trading system were under way, the U.S. Congress passed the Administrative

Procedures Act, or APA. In the September 1946 State Department document *Suggested Charter for an International Trade Organization of the United Nations*, an Article 15 was included, with the title "Publication and Administration of Trade Regulations—Advance Notice of Restrictive Regulations." This became Article 38 in the Havana Charter for the International Trade Organization (ITO) and Article X of the GATT, which survived the death of the ITO.[8] In Article X the title does not include "advance notice of restrictive regulations" but otherwise, there is no significant difference from the State Department drafting. By way of contrast most other articles of the original U.S. proposals involved considerable haggling and compromise, especially with the British.

The Canadians participated in the negotiations from their launch in London in October 1946 to their conclusion in Havana in November 1947. A memorandum to the Secretary of State for External Affairs, which tracked the negotiating process and the changes in each article at each stage, noted that Article 38 "was not altered nor were any interpretive notes" required. The memo goes on to state: "This article imposes no obligations upon Canada not already complied with, and the general benefit to international trade needs no elaboration."[9] Evidently, each of the 56 delegations at Havana felt exactly the same. Why this indifference or endorsement, or both, of the U.S. position as a pillar of the new international trading system? There obviously is no way of definitively answering this question, although a look at the nature and origins of administrative law is suggestive.

Administrative law is procedural rather than substantive. It establishes norms to control what government bureaucrats do and how they do it. It arose essentially because of the delegation of power from legislators to administrative bodies propelled by the expanded role of government in the industrial countries that began in the 1920s and 1930s. While all Western countries developed administrative law regimes in the period after World War I, the U.S. system has some characteristics, which distinguish it from continental European regimes and also from the English common law legal family.

The U.S. system reflects not only its common law roots, but also its origins in the American Revolution, which created a unique diffusion of power among the three branches of government and a system of checks and balances intended to prevent any accretion of

power. This is significantly different from common law parliamentary systems in the United Kingdom, Canada, or Australia, which rest on legislative primacy and a strong executive. Among the more important distinguishing characteristics of the U.S. system are greater use of independent regulatory agencies, often with quasijudicial and quasilegislative functions; greater emphasis on notice and comment and freedom-of-information laws; and a greater reliance on judicial review of the rule-making activity of administrative agencies or departments. By and large, the U.S. system is more litigious and adversarial and hence more fact- or evidence-intensive. It is designed to limit the room for administrative discretion.

Article X in the GATT replicates most of the U.S. approach. The word *transparency* does not appear, but the article spells out in detail the rules for "publication and administration" of trade regulations with the latter emphasizing the *desirability* (rather than *necessity*) of independent tribunals and judicial review (although the Protocol for Chinese accession requires independent tribunals and judicial review). Perhaps this "dilution" reflected a compromise with the United Kingdom in earlier negotiations or recognition by the State Department that some of the participating countries had not yet fully established their legal infrastructure. Be that as it may, the inclusion of Article X on transparency at the time of GATT's origin appeared to be noncontroversial to the drafters of the new system, because it mainly involved reporting tariff schedules. It was noncontroversial because it was insignificant.

The Tokyo Round nudged transparency a bit further. An "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance" was adopted at the close of the Round. Paragraph 3 of the Understanding introduces a modified version of surveillance and underlines the desirability of advance notice.[10] The really significant changes take place, however, in the Uruguay Round. The concept of surveillance is greatly expanded in the new WTO Trade Policy Review Mechanism (TPRM), one of the improvements achieved in the negotiations on the Functioning of the GATT System (FOGS). The TPRM was modeled on OECD "country studies" that are designed to enhance the effectiveness of the policymaking process through informed public understanding—that is, transparency.

More importantly, the new issues give transparency a radically different meaning. It requires publication of laws and regulations and the mode of administration in services or, to a more limited extent, investment regimes. The agreement on trade-related-intellectual property (TRIPS) included detailed enforcement procedures that mirror step by step the administrative and judicial mechanisms in the United States. Finally, the TRIPS agreement underlines the transparency issue: The word is used as a heading in the relevant article. A separate council is established to which notification of regulations and administrative arrangements must be made, and this council is mandated to monitor compliance. Disputes will come under the new dispute settlement arrangements.

Implementing these vastly expanded transparency requirements will present formidable difficulty among countries with systems that differ markedly from the Western legal families. For example, the origin of administrative law in Western countries was the growth of government and its *raison d'être* was to constrain this expanding administrative power (that is, to control the bureaucrats). This is hardly a trivial point. More significantly, in the present context, effectively *monitoring* implementation would require a significant improvement in the capability of the WTO, about which more is explained below. Before turning to that subject, however, another example of the legalization of the trading system illustrates how contentious this aspect of the new agenda can be.

The second example of the trend to legalization, the protection of investment, is taken from a regional agreement: the North American Free Trade Agreement (NAFTA). The investment provisions of NAFTA included procedures for resolving disputes by which private parties as well as governments could take action and adopt a very broad definition of investment expropriation. The definition is so broad that it could lead to investor claims against government regulation in, say, environmental, cultural, or health areas, which negatively affect the value of investment.[11] Some form of investment protection was required in the WTO negotiations on investment, as it was in the OECD's negotiations on a Multilateral Agreement on Investment (MAI), because there would be little business support for an agreement without it.

In the United States property rights are protected by the Constitution and this meaning of expropriation is quite common in jurisprudence concerning "takings." In international law, the "taking"

versus "regulation" distinction exists but the jurisprudence mainly covers conventional expropriation and not the question of where a "state action implemented for clear public policy purposes crosses over the line from non-compensable regulation to compensable taking."[12] In Canada, where constitutionally entrenched property rights do not exist, the extent of judicial control over government action is far less stringent than in the U.S. system, and jurisprudence in the area of "takings" is quite different. This has led to a situation by which a foreign firm could sue for compensation (say, because of a federal or provincial environmental regulation), but a domestic firm could not. That is a vastly inflated definition of "national treatment" and one that is unlikely to be politically acceptable. Indeed, it was the adoption of the NAFTA language on expropriation in the MAI that provided a powerful rallying point for opponents of the negotiations.

Since in a sense, any regulation might alter the relative costs and opportunities of companies but only a foreign country can seek compensation, several challenges by American companies in Canada have raised a political firestorm. No case in Canada has yet been submitted to arbitration. Rather, the government has preferred to change policies and pay compensation in advance of the arbitral process.[13] Hence even if a case were lost, it need not deter skilled lawyers pursuing other such litigation to induce "policy" settlements.

This example of the influence of lawyers on seemingly reasonable policy norms and principles suggests that the most significant import or export arising from trade agreements may well be legal systems. Indeed one could argue that legalization creates its own built-in reinforcement by launching an endogenous growth process. This was hardly an outcome intended at the creation of the GATT 50 years ago, but it is very much a part of the WTO mandate. This raises the most important issue now facing the trading system: Is that mandate congruent with the WTO's capabilities?

IV. The WTO and Globalization

In the launch of the Uruguay Round, there was recognition that the GATT would not provide an adequate foundation for the much more ambitious and comprehensive trading system embedded in the negotiating agenda. Thus, the Punta Declaration established the FOGS negotiating group. FOGS was promoted by a coalition of middle powers, both developed and developing, since institutional issues were not a priority for either the United States or the European Union. The middle powers recognized that the alternative to a rules-based system would be a power-based system and, lacking power, they had the most to lose.

Nonetheless, the goals of FOGS were relatively modest: to improve the adaptability of GATT to respond to accelerating change in the global economy; to improve the "coherence" of international policies by establishing better linkages between the GATT and the Bretton Woods institutions; and most importantly to strengthen the enforcement of the trading system's rules of the road by improving dispute-settlement arrangements. The creation of a new institution was not included among these objectives, and the proposal by Canada for a new institution, the WTO, was not put forward until April 1990. It was soon endorsed by the European Union, which had opposed stronger dispute settlement in the Tokyo Round and which had taken a position of benign neglect with respect to FOGS. The European Union became an active supporter of a new institution

that could house a single, strong dispute settlement mechanism, out of growing concern about U.S. unilateralism.

The Canadian proposal was couched in terms of the substantive aspects of the Uruguay Round negotiations. As the press release announcing the Canadian proposal stated: "Developments in the substantive negotiations are now demonstrating that the Uruguay Round results cannot be effectively housed in a provisional shelter. It is also becoming clear that the post-Uruguay trade policy agenda will be complex and may not be adequately managed within the confines of the GATT system as it now exists." (Ottawa, April 1990)

The WTO has turned the GATT from a trade agreement into a membership organization. It is a minimalist institution forged solely on legal principles. It establishes a legal framework that brings together all the various pacts and codes and other arrangements that were negotiated under the GATT. Members of the WTO must abide by the rules of all these agreements, as well as the rules of the GATT, as a "single undertaking." The most important element of the WTO, the "jewel in the crown," is the greatly strengthened Dispute Settlement Mechanism.

The WTO also includes two institutional innovations proposed under FOGS: a Trade Policy Review body, as mentioned above, designed to highlight changes in the policies of member countries through published analytical studies, and a biannual Ministerial Conference, designed to raise the public and political profile of trade policy. As to the objective of greater coherence, the Final Act included only a hortatory declaration encouraging the Director General of the WTO to review possible cooperative mechanisms with the heads of the IMF and World Bank. Formal agreements specifying cooperation modalities between the WTO, the IMF, and the World Bank were concluded in November 1996. They carefully detail who can attend which meeting and what information can be exchanged, and they provide for the possibility of consultation between secretariats on trade policy–related issues.

This minimalist approach was probably the most that could have been achieved at the time. Yet the premise of increasing substantive complexity, on which the WTO agreement was based, was seriously underestimated. The agenda of deeper integration is profoundly different in scope, complexity, and contentiousness from the trade policy agenda of the postwar world. Yet the WTO is not significantly different in *capabilities* from the GATT.

Two other differences between the circumstances of the GATT and WTO, which also heighten the capability deficit, deserve mention. First despite its weakness, the GATT was the only game in town. It has been likened to a bicycle, but one that managed to keep rolling along through successive negotiations. It is important to realize that the GATT bicycle hogged the road; there were no other vehicles in the way. Today, of course, there is plenty of traffic, some of it very speedy: regional limousines, bilateral trucks, and occasional unilateral tanks.

Finally and most fundamentally over the longer term, the new dispute settlement system involves a supranational encroachment on sovereign matters. For many who worked hard for a successful conclusion of the Uruguay Round, the dispute settlement mechanism was *a* if not *the* major achievement of the negotiations. After all, what is the point of having new rules if they cannot be enforced? There was really no acceptable alternative to greatly strengthening the dispute settlement system, although not many understood the full implications of the new system.

For example, the juridification of the process creates a built-in reinforcement of legalization. The tendency to appeal rulings already seems a part of the system, and one would expect that more and more panel reports would be written for the appellate body rather than the parties. In turn, this should shift the selection panels from trade-type professionals to lawyers. Further, under the GATT when the negotiated norms or rules were less binding, the decisions on disputes were less significant in the political domain. The binding nature of the WTO arrangement can catapult the decisions right into the center of domestic politics. This greater power inevitably shines a spotlight not just on the WTO dispute body *decisions*, but also on the *process* of decisionmaking. There are increasingly frequent demands for more "transparency" and "democratization."

These tensions between the polity and the economics of deepening integration has been well put in a recent paper on the current problems of defining European citizenship: "In Western liberal democracies public authority requires legitimation through one principal source: the citizens of the polity."[14] The comparison of the WTO with the European Union is not entirely misplaced. The danger of what has been called the European Union's "democratic deficit" is that without the ability to throw the scoundrels out, you target the whole institution. There are some who might argue the

same case against the WTO: If the system is not “democratized,” tear up the contract. In sum, it seems abundantly clear that the WTO needs strengthening.

V. Reinforcing the WTO

The WTO is like the GATT in being a member-driven organization without a significant knowledge infrastructure. That is to say, it has no secretariat of highly qualified experts able to undertake serious policy research as in the OECD, the IMF, and the World Bank. This analytic deficit virtually precludes policy discussion and the important peer group pressure it generates, on the basic issues of the new policy agenda: regulatory convergence, the role of legal systems, the tradeoff between domestic and international objectives, and the crucial issue of the state-market frontier. Further, without the instrument of peer group pressure, the transaction costs of achieving consensus in the WTO can be so high that more flexible and therefore speedier alternatives will be desirable. Moreover, the size and disparate interests of the membership greatly add to the difficulty of achieving consensus. Equally important, with the entry of new members, such as China and Russia, the lack of "transparency" threatens a serious overload of the already stretched and evidentiary-intensive dispute settlement system.

Although the notion of a shared vision of the postwar trading system is part romantic myth, the designers of the postwar system did share enough basic ideas to provide a context for policy dialogue and, of course, the Cold War was a powerful, cohesive force. Some may argue that support for trade liberalization is actually stronger today than in 1948, but this depends on what is meant by "trade

liberalization." The issues facing democratic countries today—the domestic balance between market efficiency and other social and political objectives, and the balance between these domestic objectives and international rules—were hardly a matter of vital concern immediately after the war when border barriers dominated.

Further, just as the agenda for deeper integration was and will continue to be determined not only by governments but also by multinational corporations, other actors are now increasingly important in the global trade debate. International Non-Governmental Organizations (INGOs) are increasingly influential, among which environmental groups are the most prominent. The traditional politics of trade were concerned with dividing the trade and economic pie among system participants. Some of the INGOs may have similar objectives but their message may also be indifferent or even hostile to trade, not to mention more easily sold to a television or e-mail audience sensitive to the globalization issue. There are genuine and significant *systemic* differences in a global approach based on ecology and one based on efficiency, and the ecology message is especially attractive to a younger generation searching for a worthy cause. The point is not to highlight conflicts between trade and the environment, but to illustrate the radically changed politics of trade policy. Consensus will require dialogue and difficult debate.

So, what reforms would be necessary to strengthen the WTO and ensure the sustainability of the multilateral rules-based system? There is certain to be a wide range of views on this matter, but several elements should be part of the reform agenda.

Strong Leadership

The first requirement to enhance the flexibility and adaptability of the WTO is to establish a smaller body or executive committee akin to the IMF Interim Committee or the World Bank's Development Committee. A Uruguay Round attempt to establish a successor to the 1975 Consultative Group of Eighteen (CG18) unfortunately failed, mainly because of opposition from a number of developing countries who feared exclusion. Given the change in atmospherics since the late 1980s, in particular the much more widespread appreciation of the need for a global rules-based system, the time is now ripe for another effort.

The next WTO Ministerial Meeting should propose that an Executive Committee of Ministers be established to provide overall guidance to the WTO in promoting the ongoing liberalization of the world trading system. The Executive Committee would be able to meet on a regular basis and, with the assistance of the Director-General and the secretariat, review current and prospective policy issues to advise the biennial Ministerial Conference, which would retain full decisionmaking authority. With such a forum, at both a Ministerial and Senior Official level, the *norms* and *principles* of liberalization rather than the *specifics of legalistic detail* could be discussed and debated. It is essential to underline that forging a consensus in a smaller group aided by expert policy-analytic information is facilitated by peer group pressure. The Executive Committee can then play a role in promoting the extension of the consensus to the entire membership.

In establishing such a committee, the most difficult problem, of course, is membership, so it comes as no surprise that the various formulas tried out in the Uruguay Round failed to secure agreement. In establishing the TPRM, however, the FOGS Committee created a precedent for a possible formula. Thus, different countries were subject to different review schedules on the basis of the member's share of world trade. This same formula could be used for establishing a committee of reasonable size and rotating membership that would ensure that all countries and regions would be represented within a given time frame.[15]

Analytical Capacity

Essential to the effective functioning of the Executive Committee is the support of a high-quality, expert secretariat. The secretariat need not be large and, in the interest of remaining lean as well as keeping abreast of the latest research, the WTO should not even attempt to generate all its policy analysis in-house. Like most research bodies today, the WTO secretariat would have to establish a research network linked to other institutions, such as the OECD, the Bretton Woods institutions, private think tanks, and universities. This network should also include other INGOs, such as business groups (for example, the International Chamber of Commerce), transnational environmental groups, international labor associations, and intergovernmental organizations, such as the International Labour Organisation. Cooperative programs involving technical

assistance in trade, legal, and environmental issues could be launched with business and other organizations.

Developing a broad network would enhance the possibility of achieving agreement on "linkage issues," such as the environment and labor. Knowledge networks have proved to be key elements in promoting cooperation and coordination, and the diffusion of knowledge in national capitals would offer another essential ingredient of consensus-building. If mutually agreed proposals were to emerge from this broad dialogue, the process itself would improve the transparency of the WTO policy process even as it reduces the negative impact on these disparate debates on trade policy.

Technical Assistance

Issues like regulatory reform, competition policy, effective and transparent administrative law regimes, and other institutional issues will require substantial administrative and legal adaptation in many member countries, especially because of the wide system diversity among current and prospective members. Thus, the WTO will also have to greatly strengthen its currently minimal facilities for technical training in a wide range of areas. Even under the most optimistic scenario of enhanced resources, the WTO capabilities in training would be dwarfed by the technical assistance resources of the World Bank and, increasingly, the IMF. Thus, cooperative arrangements would be required with those institutions to achieve policy coherence.

Coordination within the Bretton Woods System

The problem of policy coherence is being complicated by recent changes in the policy orientation of the IMF and World Bank. Both institutions, albeit for different reasons and not entirely in harmony, are shifting policy focus to issues of institutional infrastructure: domestic regulatory policies, "transparency," the role of government and trade policies. This is essentially the same broad range of issues as the WTO. It is probably not an exaggeration to assert that "IMF and...World Bank programs, not just in East Asia but in India, Latin America, Central Europe and Africa, have led to more systematic trade liberalization than...bilateral or multilateral negotiations have ever achieved.[16]

In the light of these developments, the coherence agreements of 1996 require significant changes to be meaningful. However, genuine cooperation between the WTO and its sister agencies will not really have effect without upgrading of the WTO's strategic knowledge assets. This brings the discussion back to its starting point: the basic mismatch between the WTO's capabilities and its mandate.

It is difficult to predict whether the political leaders of WTO member countries will recognize the need for significant reinforcement of this third pillar of international cooperation: overdue replacement for the ITO. Given the proven capacity of the trading system to limp along without a strong framework and the current lack of U.S. enthusiasm for international institutions, a more likely scenario is minor incremental change. If that is so, the failure to match the capabilities of the WTO to the challenges ahead will constitute a greater threat to continuation of the rules-based multilateral system than any that has arisen in the past 50 years.

End Notes

1. John A. C. Conybeare, *Trade Wars: The Theory and Practice of International Commercial Rivalry* (New York, 1987), 251.

2. Karin Kock, *International Trade and Policy and the GATT, 1947–1967* (Stockholm: Almquist and Wiksell, 1969), 9. The desired "modification" was the right to take temporary trade restrictive measures when faced with balance of payments difficulties.

3. Jacob Viner, "Conflicts of Principle in Drafting a Trade Charter," *Foreign Affairs*, No. 4 (July 1947): 621–22.

4. William Diebold, Jr., *The End of the I.T.O.*, Essays in International Finance, No. 16, October 1952, Princeton University, 14.

5. Sylvia Ostry, *The Post–Cold War Trading System: Who's on First?* (Chicago: University of Chicago Press, 1997), 105–108.

6. See, for example, Edward M. Graham and Robert Z. Lawrence, "Measuring the International Contestability of Markets," *Journal of World Trade* 30(5) (1996): 5–20; and Americo Beviglia Zampetti and Pierre Sauv, "Onwards to Singapore: The International Contestability of Markets and the New Trade Agenda," *The World Economy* 19(3) (1996): 333–34.

7. This discussion on transparency is based on Sylvia Ostry, "China and the WTO: The Transparency Issue," *UCLA Journal of International Law and Foreign Affairs* (forthcoming).

8. WTO, *Guide to GATT Law and Practice, Volume 1* (Geneva: WTO, 1995), 309.

9. Canadian Legation, *Report of the Canadian Delegation to the United Nations Conference on Trade and Employment at Havana* (Berne, July 13, 1948), 32 (mimeo).

10. "Contracting parties moreover undertake, to the maximum extent possible, to notify the contracting parties of their adoption of trade measures affecting the operation of the General Agreement, it being understood that such notification would be without prejudice to views on the consistency of measures with or their relevance to obligations under the General Agreement. Contracting parties should endeavour to notify such measures in advance of implementation. In other cases, where prior notification has not been possible, such measures should be notified promptly *ex post facto*. Contracting parties which have reason to believe that such trade measures have been adopted by another contracting party may seek information on such measures bilaterally,

from the contracting party concerned." WTO, *Guide to GATT Law and Practice*, p. 300.

11. For a discussion of the "takings" issue, see David Schneiderman, "NAFTA's Takings Rule: American Constitutionalism Comes to Canada," *University of Toronto Law Journal* 499 (1996): 500–537; and Jon Johnson, *The North American Free Trade Agreement: A Comprehensive Guide* (Aurora: Canada Law Book, 1994), 289–333.
12. Johnson, *North American Free Trade Agreement*, 290.
13. Sylvia Ostry and Julie Soloway, "The MMT case ended too soon," *The Globe and Mail* Toronto, July 24, 1998.
14. Joseph Weiler, "To Be a European Citizen—Eros and Civilization" (Faculty of Law, University of Toronto, April 1, 1998), 12 (mimeo).
15. Robert Wolfe, "Global Trade as a Single Undertaking: The Role of Ministers in the WTO," *International Journal* LI:4 (Autumn 1996).
16. Lawrence Summers, "Why America Needs the IMF," *Wall Street Journal* (March 27, 1998): A.22. This is hardly the best route, since none of the measures are bound in the WTO.

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