The Club Approach to Multilateral Trade Lawmaking

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Abstract

The World Trade Organization (WTO) stands at the center of an emerging world of global economic governance. Its rules affect important aspects of all our lives – how much we pay for the products that we purchase, what types of employment are open to us, and which medicines we 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 explains why multilateral trade lawmaking used to work, and why it is no longer working today.

The core 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 they 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: the greater practicability of negotiations among a smaller group of countries, the insiders’ greater influence on the outcome of the negotiations, and the chance to subsequently compel outsiders to join the agreement on the insiders’ terms. The article provides an analysis of how the major trading powers implemented the club approach to multilateral trade lawmaking throughout the history of the trade regime. The article then 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.

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I. Introduction

The World Trade Organization (WTO) stands at the center of an emerging world of global economic governance. Its rules affect important aspects of all our lives – how much we pay for the products that we purchase, what types of employment are open to us, and which medicines we 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 lawmakers. The present article explains why multilateral trade lawmaking used to work, and why it is no longer working today.

The core 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 Trade\(^2\) in particular – described as a ‘club.’\(^3\) Some use this label to evoke the pragmatism, informality, and insularity that characterised 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 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 borrows 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. As

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consequence, the club members seek to exclude those whose participation would pose higher costs than benefits. To say that states adopt a club approach to multilateral 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 20th century, both the United States (US) and the United Kingdom (UK) 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, whereas 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. Conversely, it is not implausible to see participation in trade lawmaking as a public good. Cordell Hull, the intellectual father of the Reciprocal Trade Agreements program, famously saw one of the principal objectives of an international trade regime in the promotion of international peace. Arguably, the regime was more likely to serve this function the more states participated in its creation and subsequently adhered to it. Indeed, many international lawmaking endeavours aim at universal adherence, and are therefore as inclusive as possible. As I will argue below, the US plans for an International Trade Organization (ITO) were no exception: The ITO was supposed to be a universal organization with low barriers to entry, 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).

What, then, prompted the major trading nations to complement this universal ambition with, and eventually abandon it in favour of, the club approach to multilateral trade lawmaking that is embodied in the GATT? My examination of the historical material reveals three factors that led these nations to see participation in multilateral trade lawmaking as a ‘club good’: the greater practicality of negotiations among a smaller group of countries, the insiders’ greater influence on the outcome of the negotiations, and the possibility subsequently to compel outsiders to join the agreement on the insiders’ terms (leverage). As I show below, these three rationales for using the club approach go a long way towards explaining the patterns of participation in multilateral trade lawmaking from the GATT/ITO

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7 Frank Trentmann, Free Trade Nation, Commerce, Consumption, and Civil Society in Modern Britain 12 (2008); see also id. 147 (“tariff bargains were ‘a commercial sin’”) and 159 (Britain was “commercially internationalist but politically isolationist”).
8 See only 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).
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 patterns of participation in multilateral trade lawmaking. First, an understanding of how multilateral trade lawmaking has worked in the past can shed light on the reasons why it is, except in certain constellations, no longer working today. The paper shows that, while the club approach has been a pervasive feature of lawmaking throughout the history of the trading system, the scope for using the club approach in the WTO is much diminished, primarily through 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.

Based on the history of multilateral trade lawmaking, one would expect that the most promising avenues for lawmaking are those in which the club dynamic is still present, such as negotiations for accession to the WTO, negotiations in the context of existing plurilateral agreements, negotiations of agreements whose benefits are concentrated among a clearly circumscribed group of members, and negotiations of bilateral and regional preferential trade agreement outside the WTO. 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 paper provides an explanation for why this is so.

A second reason why it is important to analyse the history of participation in negotiations is that it allows us 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

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10 In particular, the Government Procurement Agreement, a revised version of which has entered into force in April 2014; see Revised Agreement on Government Procurement, Annex to the Protocol Amending the Agreement on Government Procurement, adopted on 30 March 2012 (GPA/113), available at http://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pdf.
11 Such as the so-called Information Technology Agreement; see Ministerial Declaration on Trade in Information Technology Products, WT/MIN(96)/16 (Dec. 13, 1996)
12 One example are the ongoing Trans-Pacific Partnership (TPP) negotiations.
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 paper, 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, as well.\(^\text{13}\)

The paper consists of three sections. 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 section provides a detailed discussion of the use of the club approach throughout the history of multilateral trade lawmaking. The final section concludes.

II. Conceptualising Clubs in Multilateral Trade Lawmaking

Many authors who describe the GATT as a ‘club’ do not explain what exactly they mean by this term. Curzon and 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.\(^\text{14}\) Several other authors report the developing countries’ perception of the GATT as a “rich man’s club”, without exploring this notion further.\(^\text{15}\) In contrast to Curzon and Curzon’s focus on the relationship between members and non-members 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 of those developing countries which were contracting parties to the GATT.\(^\text{16}\)

\(^{13}\) See in particular David G. Victor, Global Warming Gridlock. Creating More Effective Strategies for Protecting the Planet (2011).

\(^{14}\) Curzon & Curzon, supra note 3, at 305.


\(^{16}\) 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 (2008) for a good discussion of the second dimension (involvement); Gowa & Kim, supra note 5, provide empirical evidence on the fourth dimension (level of benefits, measured in terms of trade expansion).
More recently, several authors have defined the club concept more explicitly, but in ways that appear to be at odds with older conceptions. Thus, Keohane and 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. 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. Wolfe has employed the club concept in yet a different sense, namely to describe coalitions and informal groupings in WTO lawmaking.

I believe that 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 GATT’s history, however vague that understanding may have been. Instead, I draw on the economic theory of clubs in order 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 rigour 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”. Buchanan distinguishes ‘club’ goods from “purely private” goods on 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)”. For “purely public” goods, on the other hand, “the optimal sharing group … includes an infinitely large number of members”. 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”. This optimal club size is reached

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17 Keohane & Nye, supra note 4; Keohane and Nye’s conception is taken up by Hocking, supra note 4.
18 Wolfe, supra note 3.
19 Buchanan, supra note 6, at 1.
20 Id.
21 Id. at 1-2.
22 Id. at 2.
“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”.23

In applying Buchanan’s insight to multilateral trade lawmaking, a first question that needs to be answered is in relation to which ‘good’ the club dynamic is to be analysed. This is ultimately an empirical question; my answer is therefore derived from the historical record analysed below. As I suggest, the ‘club good’ in question is ‘participation in multilateral trade lawmaking’, in the sense of involvement in negotiations and decisionmaking.

This first question is inextricably linked with a second question: what did the major trading nations perceive the benefits and costs of the participation of additional countries in trade lawmaking to be? This is also an empirical question, which I will explore in the following section. The contribution of the economic theory of clubs to my argument at this stage is simply that it clarifies what I mean by saying 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 US and British officials started negotiating about the structure of the post-war trading order, they envisaged a universal international organisation that would be the counterpart of the United Nations in the economic sphere.24 This “impulse to universality”25 was reflected in the US’s ambition to negotiate a charter for an international trade organisation through “United Nations machinery”26 and in the persistence with which it sought the cooperation of the Soviet Union and, to a lesser extent, China, in this endeavour. The US also agreed to add chapters on employment – and later

23 Id. at 5.

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.

26 ‘President Roosevelt to the British Prime Minister (Churchill)’ (Feb. 23, 1944), Foreign Relations of the United States, 1944, Volume II, General: Economic and Social Matters, 15 [hereinafter FRUS 1944].
and more hesitantly, development – to its draft charter in order to widen the appeal of the organisation.27

It was during the discussions on the procedures for tariff reductions that the US, UK and Canadian negotiators first considered an alternative paradigm of participation for the multilateral trading system: the club. In the present section, I will first discuss what it was that prompted these nations to see participation in tariff negotiations as a ‘club good’. I will also explore how these countries attempted to reconcile the club approach with their ambition to establish a universal organisation (A). I will then trace how the club dynamic manifested itself in the practices of participation in multilateral trade lawmaking throughout the history of the GATT (B). Next, I will argue that a fundamental recalculation of the costs and benefits of the participation of developing countries in the trading system led the major developed countries to conclude the Uruguay Round with the establishment of a new club with very different characteristics from the GATT, namely, the WTO (C). In the WTO, the club dynamic of participation survives in at least three different incarnations: overtly, in accession negotiations; formalised in negotiations in “variable geometry”; and disguised, in the increased differentiation of obligations (D).

A. The Club Within: GATT and the ITO

There is ample evidence that the US design for the post-war trading order was originally of a universal nature. During the Second World War, the US leveraged the aid that it was granting its allies to secure their commitment to enter into discussions on the post-war international economic order with the US and other governments. The US originally negotiated the wording of Article VII of its mutual aid agreements with Britain, but copied it verbatim into all later mutual aid agreements, among them those with the Soviet Union and China. Article VII of the mutual aid agreements committed the parties to “agreed action … open to participation by all other countries of like mind, directed to the expansion, by appropriate international and domestic measures, of production, employment, and the exchange and consumption of goods.”28

Even before the first exploratory discussions on the post-war economic order pursuant to Article VII took place between the United States and Britain, the British government suggested that the Soviet Union and China be notified that such consultations were planned and that they be

27 See ‘Memorandum by the Acting Secretary of State to President Truman’ (Sept. 7, 1945), Foreign Relations of the United States, 1945, Volume VI. The British Commonwealth; The Far East, 118 [hereinafter FRUS 1945], where the Secretary of State explains to President Truman that the pledge to maintain employment was “important to insure the cooperation of other countries in achieving our trade objectives.”

kept “generally informed on the upshot of the discussion.” US officials agreed; they were concerned not to “give the impression that the United States and Great Britain were coming to previous agreements on the matters [i.e. monetary and commercial policy, N.L.] before other governments were brought in and acquainted with the progress of the discussions.” Referring to Article VII of its mutual aid agreements, the US further informed the British that “the United States [was] in a somewhat different position than that of the United Kingdom in respect to the Soviet Government and the Chinese Government, in that the United States had exactly the same commitments to those Governments that it had to the United Kingdom Government.” The US government had therefore decided “to extend invitations [to hold exploratory talks] to the Soviet Government and to the Chinese Government identical to those which had been extended to the United Kingdom Government.”

In the following months, the US reiterated its desire to enter into exploratory discussions on commercial policy with the Soviet Union. At the tripartite conference of foreign ministers in Moscow in October 1943, the US presented a memorandum on the “Bases of Our Program for International Economic Cooperation”, in which it suggested the “conclusion of a general convention to which all of the important countries of the world would be parties, which would lay down the rules and principles that should govern trade relations between nations.” The US also proposed the establishment of a “Commission comprising representatives of the principal United Nations”, i.e. the US, the UK, the USSR and China, and “possibly certain others of the United Nations”, such as “Canada, the Netherlands and Brazil”, to discuss and set up the necessary procedures. The US further presented a memorandum summarising the results of the exploratory discussions between the US and the UK that had already taken place, and stated that it was “particularly important that similar conversations be arranged soon between Soviet and American experts”.

Later in 1943, President Roosevelt personally raised the issue.

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29 ‘The British Embassy to the Department of State’ (Aug. 31, 1943), Foreign Relations of the United States, 1943, Volume I, General, 1108-1109 [hereinafter FRUS 1943].
30 Id. at 1109.
31 ‘Memorandum of Conversation, by the Assistant Chief of the Division of European Affairs’, FRUS 1943, at 1110; for the details on the invitation to the Soviet government, see ‘The Secretary of State to the Ambassador in the Soviet Union (Standley)’ (Sept. 3, 1943), id. at 1111; discussions with the Chinese embassy in Washington are mentioned in ‘The Secretary of State to the Chinese Ambassador (Wei)’ (Nov. 27, 1943), id. at 1118. Although there was no mutual aid agreement between the US and Canada, the US decided that exploratory discussions should be held with Canada as well; ‘The Secretary of State to President Roosevelt’ (Dec. 20, 1943), id. at 1125.
32 ‘Protocol, Signed at Moscow, November 1, 1943’, Annex 9, id. at 763.
33 Id. at 766-768.
34 Id. at 766; the US Secretary of State Cordell Hull reiterated this point in conversations; see ‘Summary of the Proceedings of the Eleventh Session of the Tripartite Conference, October 29, 4 p.m.’, id. at 665-666.
with Stalin and Churchill at the Teheran Conference, and again urged the “establishment of United Nations machinery for postwar economic collaboration” in separate letters to Churchill and Stalin in February 1944. The US repeated these requests in April and May 1944.

While the exploratory talks with the Soviet Union and China never took place, the persistence with which the US attempted to initiate discussions especially with the Soviet Union is evidence of its expectation that the international economic arrangement of the post-war era would be firmly anchored within the framework of the United Nations, in which the Soviet Union was anticipated to play a key role. The US also sought the inclusion of the Soviet Union in the inner circle of the negotiations “as a means of working out a solution of problems of [the] state trading system” – a further indication of the universal scope ultimately desired for the proposed organisation. Consistent with its ambition to pursue the establishment of a post-war international economic order through “United Nations machinery”, the US introduced a resolution calling for an “International Conference on Trade and Employment” at the First Session of the Economic and Social Council of the United Nations held in February 1946. The resolution established a Preparatory Committee to elaborate a draft convention and appointed nineteen states as members of the Committee. One month before the first session of the Preparatory Committee in October 1946, the United States published a “Suggested Charter for an International Trade Organization of the United Nations”. Consistent with the “impulse to universality”, the proposed organisation was to have low barriers to entry: no more was supposed to be required of new members than to accept the obligations of the charter.

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 US, UK and Canadian negotiators first considered the idea of holding negotiations initially among a “nucleus of important

36 ‘President Roosevelt to the British Prime Minister (Churchill)’ (Feb. 23, 1944), FRUS 1944, at 15. Stalin’s positive reply is in ‘The Chairman of the Council of People’s Commissars of the Soviet Union (Stalin) to President Roosevelt’ (Mar. 10, 1944), id. at 22-23.
37 ‘The Secretary of State to the Ambassador in the United Kingdom (Winant)’ (Aug. 9, 1945), FRUS 1945, at 89.
38 See E/PC/T/117/Rev.1, para. 1; for the text of the resolution, 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).
39 See U.S. DEP’T OF STATE, SUGGESTED CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION OF THE UNITED NATIONS (1946) [hereinafter SUGGESTED CHARTER], art. 2; see also Senate Hearings, supra note 24, 3: “Chapter II, relating to membership, looks toward world-wide participation in the organization”. 
trading nations’.

Three rationales for the “nuclear group”, or “club”, approach emerged during the discussions. First, given that the US insisted on using the method of bilateral requests and offers to negotiate tariff reductions, the three states considered it more practicable to conduct tariff negotiations initially among a small group of countries. Recognising the limited negotiating capacity of its partners, including the UK and Canada, the US granted that “the number of countries should be kept small since the greater the number engaged in simultaneous negotiations the more difficult the negotiating problem, particularly for countries other than the United States.”

Second, the club approach would allow the “nuclear” countries to agree on the procedure for tariff reductions, as well as disciplines on non-tariff barriers, without having to take into account the views of other countries. States which the nuclear countries feared would not be constructive or sufficiently ambitious could simply be excluded (unless their inclusion was essential for political or economic reasons). The Canadians argued, for example, that a general conference of all countries might be dangerous, since the views of the many small countries might unduly weaken the bolder measures which the large trading nations might find it possible to agree upon. ... [J]udging from past experience, the presence at a general international conference of the less important, and for the most part protectionist-minded, countries, would inevitably result in a watering down of the commitments which a smaller number of the major trading nations might find it possible to enter into.

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40 The idea is first mentioned by the US negotiator Harry Hawkins; ‘The Ambassador in the United Kingdom (Winant) to the Secretary of State’ (June 28, 1945), FRUS 1945, at 59.
41 ‘Memorandum of Conversation, by Mr. John M. Leddy, Assistant Adviser in the Division of Commercial Policy: Informal Discussions on Commercial Policy Between Officials of the Canadian Government and Officers of the Department of State’ (undated), FRUS 1945, at 72 [hereinafter ‘Leddy Memorandum I’].
42 The term “club” was first used by a Canadian negotiator; ‘Memorandum of Conversation, by Mr. John M. Leddy, Assistant Adviser in the Division of Commercial Policy: Informal Discussions on Commercial and Financial Policy Between Officials of the United States and Canada’ (July 9, 1945), FRUS 1945, at 65 [hereinafter ‘Leddy Memorandum II’].
43 The impracticability of conducting multiple bilateral negotiations simultaneously had been one of the principal objections of the UK and Canada to the bilateral request and offer method of tariff negotiations.
44 ‘The Secretary of State to the Ambassador in the United Kingdom (Winant)’ (Aug. 9, 1945), FRUS 1945, 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. (‘Leddy Memorandum I’, supra note 41, at 71.)
There were some differences of opinion between the US and Canada regarding the extent to which legal disciplines on non-tariff barriers, rather than just bilateral tariff bargains, should be definitely agreed among the smaller circle of countries. With a view to their ambition for an ultimately universal organisation, the Americans had “reservations” as to the “desirability of actually concluding the arrangements among the nuclear group prior to the holding of a general international trade conference at which the views of other countries would be obtained.”\textsuperscript{46} 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.”\textsuperscript{47} These differences in detail notwithstanding, the proponents of the nuclear approach clearly saw it as a way to shield certain elements of the proposed trading arrangements – the procedure and level of ambition of the tariff negotiations in the case of the US, in the case of the Canadians the rules on non-tariff barriers as well – from the scrutiny and influence of outsiders.

A third, and related, rationale for the nuclear approach was that it would, at a later stage, present the opportunity to force those outsiders into the arrangement \textit{on the nuclear group’s terms}. The proponents of the approach expected that, given its members’ share in international trade, the nuclear group would exert a pull on outsiders to join the arrangement, even though the latter would have had no part in its creation and little say about its terms. Harry Hawkins, who first brought up the idea of an agreement among a “nucleus of important trading nations”, assumed that “other countries might be more or less obliged to adhere” to it.\textsuperscript{48} The Canadians were greatly preoccupied by the question of how to achieve the “compulsion of outsiders”; they were concerned that the bilateral method of tariff reduction was not well suited for use “as a weapon to force” “reluctant countries” to participate in the agreement.\textsuperscript{49} One approach discussed between the US and Canada to deal with this question was to require new members “to negotiate their way in by entering into bilateral agreements with each of the countries making up the nuclear group”, under the threat that tariff concessions which the members of the nuclear group had negotiated with each other might otherwise be withdrawn after a “probational period”.\textsuperscript{50} It was this approach that the US ultimately proposed in its Suggested Charter.

The Suggested Charter published by the US in September 1946 envisaged the following reconciliation of the club approach to the tariff negotiations with the universal ambit of the ITO. The GATT and the ITO

\textsuperscript{46} ‘Leddy Memorandum I’, \textit{supra} note 41, at 73.

\textsuperscript{47} \textit{Id.}

\textsuperscript{48} ‘The Ambassador in the United Kingdom (Winant) to the Secretary of State’ (June 28, 1945), \textit{FRUS 1945}, at 59.

\textsuperscript{49} ‘Leddy Memorandum I’, \textit{supra} note 41, at 67-68; see also the discussion of how to deal with “countries refusing to participate”; \textit{Id.} at 72.

\textsuperscript{50} \textit{Id.} at 73; the negotiators acknowledged that these questions would “require the reexamination of existing most-favored nation commitments”.
Charter would be negotiated on separate institutional tracks.\textsuperscript{51} While the preparatory negotiations for the Havana conference, at which the ITO Charter was to be concluded, were sponsored by the UN’s Economic and Social Council, the GATT would be, as the \textit{Suggested Charter} explained, an “arrangement for the concerted reduction of tariffs and trade barriers among the countries \textit{invited by the United States} to enter into negotiations for this purpose”.\textsuperscript{52} 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 which were also parties to the GATT.\textsuperscript{53} 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”.\textsuperscript{54} If the Committee determined that a member had failed to fulfil this obligation “within a reasonable period of time”, it could authorise

the complaining Member, or in exceptional cases the Members of the Organization generally, … notwithstanding the provisions of Article 8 [General Most-Favored-Nation Treatment], … to withhold from the trade of the other Member any of the tariff reductions which the complaining Member, or the Members of the Organization generally … may have negotiated pursuant to paragraph 1 of this Article.\textsuperscript{55}

ITO members which were not original parties to the GATT could only join the Committee when, “in the judgment of the Committee”, they had undertaken tariff reductions “comparable in scope or effect to those completed by the original members of the Committee”.\textsuperscript{56} In other words, they had to “negotiate their way in”, as the US and Canada had envisaged during their exploratory discussions.\textsuperscript{57} 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.\textsuperscript{58}

The Interim Tariff Committee, then, was to be the club within. Its members would have controlled admission, with wide discretion in deciding

\begin{footnotesize}
\textsuperscript{51} BROWN, supra note 38, at 61-63.
\textsuperscript{52} SUGGESTED CHARTER, supra note 39, footnote 1 to art. 56(2) (emphasis added); see also BROWN, supra note 38, at 61-63.
\textsuperscript{53} SUGGESTED CHARTER, supra note 39, art. 56 (2); see also N.G. Crowley & C.P. Haddon-Cave, \textit{The Regulation and Expansion of World Trade and Employment}, 23 ECON. REC. 32, 42 (1947), who report the state of the draft on the Interim Tariff Committee after the conclusion of the first session of the Preparatory Committee, which took place in London in 1946.
\textsuperscript{54} SUGGESTED CHARTER, supra note 39, art. 18 (1).
\textsuperscript{55} Id. art. 18 (3).
\textsuperscript{56} Id. art. 56 (2).
\textsuperscript{57} ‘Leddy Memorandum I’, supra note 41, at 73.
\textsuperscript{58} The so-called “Conference”; SUGGESTED CHARTER, supra note 39, art. 56 (2).
\end{footnotesize}
whether the prospective entrant had earned the privileges of membership, and would have been able to wield the ultimate power in the trade context – the power to authorise the suspension of tariff concessions – against any member who refused to engage in tariff negotiations to the satisfaction of its trading partners. Although the obligation to engage in tariff negotiations was to be couched in general terms (“Each Member … shall …”), it was clearly directed at those outside the club who had not already undertaken such negotiations (and had been excluded from the club in the first place partly on the basis of their presumed unwillingness to engage in them). The ostensible institutional “reconciliation” of the GATT with the ITO, then, was from the start conspicuously informed by the third rationale for the club approach: the ability to force others to join the club on the members’ terms.

The US draft of this arrangement survived the sessions of the Preparatory Committee in London and Geneva relatively unscathed – perhaps unsurprisingly, since all members of the Preparatory Committee could expect to become original members of the GATT and thus of the (Interim) Tariff Committee. 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). 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

59 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.

60 The articles corresponding to Articles 18 and 56 in the Suggested Charter are identical in the London Draft of the Charter (art. 24 and 67); see Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/33 (1946). They are slightly modified and developed in the Geneva Draft (art. 17 and 81); see Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, 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 Geneva Draft, art. 17 (1)(d) and art. 81 (2).

61 The US extended the invitation to conduct tariff negotiations to all members of the Preparatory Committee; see BROWN, supra note 38, at 61; by 1947, the “nuclear” group had thus become synonymous with the Preparatory Committee; see ‘The Chairman of the Interdepartmental Committee on Trade Agreements (Brown) to President Truman’ (Apr. 2, 1947), Foreign Relations of the United States, 1947, Volume I, General; The United Nations, at 912, fn *: “Nuclear countries were those represented on the Preparatory Committee”.

62 The Tariff Committee was explicitly exempt from the final authority of the Conference; Geneva Draft, supra note 60, art. 74 (1).
Tariff Committee would be an exclusive club unaccessible to countries with no basis to carry out the undertakings contained in Article 17 [the obligation to carry out tariff negotiations, N.L.], and that the club’s exclusiveness would enable the members to exercise unduly powerful influence over the work of the Organization.  

Canada likewise recognised the “fear of some countries” that, under the arrangement envisaged by the draft charter, “powerful countries might force substantial tariff reductions on weaker ones, and that in the case of refusal, the latter would be kept from participation in the Organization.” However, both the UK and Canada tried to reassure the opponents that these fears were unfounded, pointing to the experience of negotiating the GATT at the second session of the Preparatory Committee. The UK claimed that “most countries could find a basis for tariff agreements”, and even countries which had not negotiated tariff agreements might still be admitted to the Tariff Committee. 

The US was less apologetic. The US negotiator explained that the central objective of the Organization was the reduction of tariffs and other obstacles to international trade. Only countries which had carried out the negotiations required by Article 17 should be members of the Tariff Committee – some countries present at the Conference had already done so and shown what could be done. Experience between the two World Wars showed the danger of adopting resolutions at international conferences which lacked any provision making for their implementation. Article 81 was one of the articles in the Charter which ensured this practice was not to be repeated and his delegation regarded it as of the highest importance.

At the first meeting of a sub-committee set up to study the question, the official set out the US position in even stronger terms, emphasising that the Organization was not to be a goodwill mission occupied in merely passing resolutions but it was to be an organization tied to action. The question before the Sub-Committee was not one of two international organizations – The Trade Organization and the Tariff Committee – but was one of two steps in a process towards obtaining the benefits of the Charter. One stop in this process was acceptance of the Charter; the other was the negotiations under Article 17, the conclusion of which gave automatic membership in the Tariff Committee. In connection with the second step it was correct that the necessary determination should be made only by Members which had carried out the negotiations themselves.

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63 E/CONF.2/C.6/SR.14, 3; at some point in the discussion the UK had apparently also referred to the Tariff Committee as an “oligarchy”; this characterisation was mentioned by Peru; E/CONF.2/C.6/SR.14, 8.
What is striking is the peculiar meaning with which the US imbued the concepts “doing” and “action” in these statements. The problem with the countries against which this remark was directed would not appear to be that they did not want “action”; rather, it was that they wanted “action” that was different from the “action” envisaged by the US. By framing its demand that other countries engage in a particular practice, namely reciprocal tariff negotiations, as a generic call for “action” and for something that “can be done”, the US signalled that the way it imagined trade lawmaking was the only way to do it. And against the backdrop of the club dynamic, this was not mere rhetoric. What the club approach allowed the US to do was to actually make their “action”, i.e. reciprocal tariff negotiations, the only game in town. It was this ability to marry institutional power to the imagery of “action” and “ambition” that allowed the US and the other major trading countries to gradually entrench the conception of trade lawmaking as necessarily based on reciprocity.

The controversy between the prospective insiders and outsiders about the authority and composition of the Tariff Committee was ultimately resolved through a compromise. The US had managed to establish a somewhat dubious parallelism between the Tariff Committee and the proposed Committee for Economic Development. The compromise consisted in eliminating both the Tariff Committee and the Economic Development Committee from the charter. Even without its institutional embodiment, however, the club dynamic of the relationship between the GATT and the wider ITO membership was preserved. This was accomplished by reversing the burden of proof in cases where a GATT member considered that a non-GATT member had failed to carry out tariff negotiations to the former’s satisfaction. Under the original draft, the GATT member would have had to refer the matter to the Tariff Committee, which would have had to authorise the suspension of tariff concessions. Under the Havana Charter, a GATT member could unilaterally suspend tariff concessions towards any ITO member that had not acceded to the GATT two years after the ITO Charter had come into force unless the Organisation decided, by majority vote, to “require the continued application” of concessions on the basis that the ITO member in question had been “unreasonably prevented” from acceding to the GATT. While this arrangement made it easier for an individual member to suspend concessions in response to unsatisfactory negotiations, it allowed all ITO members a say in whether this suspension was justified.

Although the ITO Charter never came into force, the controversy about the Tariff Committee is informative in that it sheds light on what kind of institution the major trading powers intended the GATT to be. The club

70 Havanna Charter for an International Trade Organization (March 24, 1948) U.N. Doc. E/Conf. 2/78, art. 17(4)(b) [hereinafter ITO Charter].
character of the GATT was to be the guarantor of the principle of reciprocity, which the Havana Charter stated in the following terms: “No Member shall be required to grant unilateral concessions, or to grant concessions to other Members without receiving adequate concessions in return.”

The most-favoured nation principle—which pursuant to Article 16 of the Havana Charter operated among all ITO members—harboured the danger that tariff concessions that GATT contracting parties had granted to one another would go permanently unrequited. The provisions concerning the Tariff Committee in the drafts of the Charter, and on the right to withdraw tariff concessions unilaterally in the final version of the Charter, were designed to allow GATT members to exact a payment for these concessions from other ITO members. More fundamentally, they gave GATT members the leverage to establish the principle of payment as the uncontested foundation for tariff negotiations. Whoever was not prepared to pay for tariff concessions could simply be excluded from the club.

**B. The Self-Perpetuating Club: Participation in GATT Negotiations**

The stillbirth of the ITO dispensed with the need for complicated derogations from the most-favoured nation principle: since the most-favoured nation rule now only applied among GATT members in the first place, derogations were no longer necessary to allow them to enforce the principle of payment vis-à-vis outsiders. Instead of being “the club within” a larger organisation, the GATT was now a club, period. The interaction between those inside and outside the GATT would henceforth be exclusively governed by the accession procedure of GATT Article XXXIII, which provided that governments could accede to the agreement “on terms

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71 ITO Charter, art. 17(2)(b).

72 In fact, the possibility for such a derogation was temporarily preserved even in the GATT. In 1948, GATT Article XXV was amended to reflect the obligation to conduct tariff negotiations under Article 17(1) of the ITO Charter. In contrast to the compromise included in Article 17(4) of the ITO Charter, whereby a GATT member could unilaterally decide to withhold tariff concessions from an ITO member that it deemed had not complied with this obligation, a contracting party could only withhold tariff concessions towards another contracting party of the GATT after having been authorised to do so by the contracting parties acting jointly, and not at all if it had directly negotiated any tariff concessions in its schedule with the contracting party in question. This provision was never utilised and was deleted at the 1955 Review Session—a further indication that the obligation to enter into tariff negotiations was directed against those ITO members who remained outside the GATT. See Revision of Draft Protocol Contained in Document GATT/1/28 Modifying Certain General Provisions of the General Agreement on Tariffs and Trade, GATT/1/47/Rev.1 (Mar. 19, 1948) (First Session of the Contracting Parties); Summary Record of the Second Meeting, Held at the Capitolio, Havana, Cuba on 2 March 1948, GATT/1/SR.2 (Mar. 4, 1948) (First Session of the Contracting Parties) at 3; and JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT: A LEGAL ANALYSIS OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 542 (1969) [hereinafter JACKSON, WORLD TRADE].
to be agreed” between the government in question and the contracting parties to the GATT. The contracting parties took utmost care to ensure that every one of them could individually insist on receiving adequate payment in the accession process: When in 1948 the quorum for admissions of new members was changed from unanimity to a two-thirds majority of the contracting parties (at the request of the ITO negotiators, who hoped to minimise the risk that ITO members might be “unreasonably prevented” from joining the GATT73), 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.74 The new article was perceived as necessary because a two-third majority of the contracting parties could otherwise have “oblige[d] a Contracting Party to enter into a trade agreement with another country, without its consent.”75

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.76 In fact, the large majority of countries acceding to the GATT over the following decades were developing countries that had emerged from colonial rule and that could join the GATT by simply succeeding into the obligations which their former colonial masters had assumed with respect to their territories.77 The perception that the GATT

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73 Report to the Contracting Parties, GATT/1/21 (Mar. 11, 1948) (Sub-Committee on Supersession) at 3: the amendment “give[s] effect to the recommendation of the Co-ordinating Committee and the Heads of Delegations of the United Nations Conference”; see E/Conf.2/45, 14.

74 The new article was proposed by the United States; Summary Record of the Seventh Meeting. Held at the Capitolio, Havana, Cuba on 13 March 1948 at 6.00 p.m., GATT/1/SR.7 (Mar. 15, 1948) (First Session of the Contracting Parties), at 4-5; for background on accessions under GATT Article XXXIII, see JACKSON, WORLD TRADE, supra note 72, at 92-96; for background on the so-called non-application clause (GATT Article XXXV), see JACKSON, WORLD TRADE, supra note 72, at 100-102 and 92, fn 4.

75 GATT/1/SR.7, supra note 74, at 5; see also Application of Article XXXV to Japan. Origins of Article XXXV and Factual Account of its Application in the Case of Japan. Report by the Executive Secretary, L/1466 (May 11, 1961).

76 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 15, 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 15, at 253).

77 Curzon and Curzon, writing in 1973, note that since most newcomers are newly independent and not very well off, established GATT members do not normally drive too hard a bargain, and many former dependencies enter without any payment at all if they happened to be within GATT’s territorial application before they gained independence.

Curzon & Curzon, supra note 3, at 305. There were also some hard accession negotiations, however. Curzon and Curzon mention Switzerland’s accession; Id. Moreover, “the few planned economy countries which did join the GATT had been obliged to accept accession
operated as a club arose instead from the way in which the *practices* that
determined who participated in and benefited from trade negotiations
reproduced and perpetuated the club dynamic within the framework of the
GATT itself. As I will argue below, there were four such practices: the
practice of negotiating tariff concessions primarily, and often exclusively,
with the principal supplier of a product (i); the practice of excluding certain
product categories and types of trade barriers from negotiations (ii); the
practice of concluding agreements on tariff formulas and non-tariff barriers
among small groups of countries constituting a “critical mass” (iii); and the
practice of conducting negotiations in an often informal and secretive way
(iv). These practices reproduced and perpetuated the club dynamic not so
much because they *de jure* excluded any countries from most-favoured
nation treatment; rather, they *de facto* excluded a large number of GATT
members, largely but not exclusively developing countries, from meaningful
participation in multilateral trade lawmaking and from the benefits of trade
liberalisation.

Before I discuss these practices in more detail, I will briefly recall
the three major motivations for the club approach that had been made
explicit in the preparatory discussions to the GATT: the greater practicality
of negotiating and reaching agreement among a smaller group of countries,
the ability to shape the content of this agreement more decisively than
would otherwise be feasible, and the possibility to compel outsiders to join
the agreement largely on the insiders’ terms. In the academic literature, the
first factor is the most popular explanation for why the core GATT countries
continued to operate as a *de facto* club in many respects. Many scholars
emphasise the ease with which agreement could be reached among the
likeminded core of the GATT countries. As Robert Hudec memorably put
it, the GATT was “a place where the leading countries could go off to do
business by themselves, unencumbered by the complexities of a larger
organization … [a] place (one might almost say a club) where likeminded
people could get together and do their work in peace.”

As I will argue in the following, however, the other two factors are very
much part of the explanation as well, and did significantly increase in
importance over time. Thus, by contending themselves with “do[ing] business by themselves”, the “leading countries” could not only reach
agreement more easily. They were also able to keep doing things their way.
During the first two decades of the GATT, this mostly meant sticking to
reciprocity and the principal supplier rule as the basis for tariff negotiations
and limiting the scope of negotiations to tariffs on manufactured products.
What stands out about the club dynamic of GATT negotiations during this
time is that it was self-perpetuating, in the sense that negotiating principles
like reciprocity and the principle supplier rule *automatically* excluded those

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protocols which substantially curtailed their rights”; PAEMEN & BENSCH, *supra* note 15, at
88; see also Francine McKenzie, *GATT and the Cold War. Accession Debates, Institutional

78 ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 51
(1975).
who were not able or willing to play by the “leading countries’” rules from the benefits of trade liberalisation, hence providing them with a strong incentive to participate in trade negotiations on the insider’s terms.

This changed somewhat during the late 1960s and 1970s, as the focus began to shift from tariff negotiations to the negotiation of codes elaborating GATT provisions and formulating rules on the use of non-tariff measures. The major trading nations largely continued to “do business by themselves” and thereby managed to decisively shape the content of the codes. This was achieved by concluding agreements among a critical mass of (mostly developed) countries, and by conducting the negotiations in a secretive and exclusionary manner. In relation to the codes, however, the ability of the core to compel the adherence of outsiders proved to be limited by the unconditional most-favoured nation clause of the GATT. Towards the end and in the aftermath of the Tokyo Round, this limitation led to increasing frustration on the part of developed countries, in particular the United States. As will be discussed in the next section, it was the increasing failure of the club approach to achieve the compulsion of outsiders, combined with a fundamental recalculation of the costs and benefits of the participation of developing countries in the trading system, that led the developed countries to adopt a radical new strategy for the conclusion of the Uruguay Round: The constitution of a new club with the primary purpose of achieving the compulsion of outsiders.

In the following, however, I will first describe the four practices that governed participation in multilateral trade negotiations, and that reflected and sustained the club dynamic of those negotiations, over the period from the early GATT until the Uruguay Round.

\[\text{a) Who Can Negotiate: The Principle of Payment and the Principal Supplier Rule}\]

The principle of payment, which governed GATT negotiations from the outset, played a central role in ensuring that trade negotiations continued to exhibit a club dynamic. Only those nations with something to “sell” – i.e., access to a lucrative market – were in a position to demand concessions from their negotiating partners.\textsuperscript{79} As Winham has put it,

influence in a tariff negotiation is a direct function of the size of a nation’s trade. Nations with smaller trade flows simply are not in a position to offer many concessions to other countries and hence have little standing in a negotiation where the modus operandi is reciprocal exchange. … the fact that GATT negotiations have traditionally been tariff negotiations has

\textsuperscript{79} Gilbert R. Winham, \textit{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.
probably increased the tendency of developing countries to regard GATT as a rich man’s club.\textsuperscript{80}

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.\textsuperscript{81} This rule explicitly entitled participants in trade negotiations to reject requests for tariff concessions when the country requesting the concessions was not the principal supplier of the product in question.\textsuperscript{82} 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.\textsuperscript{83}

The club dynamic produced by the principle of payment and the principal supplier rule was self-perpetuating: the exchange of concessions among the major trading countries, whose markets were attractive to each other and who tended to be the principal suppliers of the bulk of each other’s imports, expanded the trade among these countries, making it more difficult for others to break into the core of the club. At the same time, these negotiating practices had a powerful assimilating effect: any country that hoped to benefit from trade negotiations had to be prepared to play by the rules of the game, thereby perpetuating these rules. As a result, the GATT confined “its active membership to willing liberalisers”.\textsuperscript{84}

\begin{footnotes}
\item[80] WINHAM, TOKYO ROUND, supra note 15, at 256.
\item[81] The role of the principal supplier rule in limiting the participation of developing countries in trade negotiations is widely acknowledged in the literature; see Wilkinson & Scott, supra note 16; Gowa & Kim, supra note 3.
\item[82] Cordell Hull, Address before the Chamber of Commerce of the United States: American Foreign Trade Policies (Apr. 30, 1936), at 15:

\begin{quote}
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.
\end{quote}

\item[83] Gowa & Kim, supra note 3.
\item[84] Paul Collier, Why the WTO is Deadlocked: And What Can Be Done About It, 29 WORLD ECON. 1423, 1425 (2006). (original emphasis)
\end{footnotes}
b) What Can Be Negotiated: Limitations on Products and Policies

The major trading nations further limited the scope for effective participation in trade negotiations by circumscribing the subject matter of negotiations to those products and trade policy instruments that were of most interest to them. This involved not only the effective exclusion of entire sectors, such as agricultural products and textiles, from meaningful liberalisation commitments; it also encompassed the drawing of ever finer distinctions within product categories – in other words, the definition of subdivisions of products solely for purposes of tariff classification – in order to ensure that the benefits from a negotiated tariff concession did not spill over to countries which supplied a similar product but had not paid for the concession.

The special status accorded to agricultural products and textiles in trade negotiations within the framework of the GATT up until the Uruguay Round is well known. In addition to the special treatment of agriculture, for example in relation to quantitative restrictions, that was already enshrined in the GATT itself, the United States and European countries obtained waivers which left them with virtually complete freedom to protect their agricultural markets. The protective instruments imposed for this purpose, among which the otherwise outlawed quantitative restrictions featured prominently, were largely excluded from the scope of GATT negotiations up until the Uruguay Round.

Developing countries faced a similar problem with regard to tropical products, which were often their major export items. By contrast to agricultural commodities that could also be produced in temperate zones, tropical products did not face high market access barriers, but their consumption was often subject to internal taxes for revenue purposes, which were similarly excluded from the scope of trade negotiations under the GATT.

But product selection also occurred in sectors that were at the centre of the negotiations. Here, the desire to “concentrate … concessions on products exported only by participants … sometimes required that new product categories be developed.” 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

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85 See TIMOTHY E. JOSLING, STEFAN TANGERMANN & T.K. WARLEY, AGRICULTURE IN THE GATT (1996); VINOD K. AGGARWAL, LIBERAL PROTECTIONISM. THE INTERNATIONAL POLITICS OF ORGANIZED TEXTILE TRADE (1985); Gowa and Kim note that even the trade of Italy and Japan, two states that are commonly perceived as belonging to the core of the GATT, did not profit as significantly from the GATT as the trade of what they call the “privileged group” (Britain, Canada, France, Germany and the United States), because “both countries specialized in precisely those products [agricultural goods and textiles] that privileged group members succeeded in exempting from GATT rules”. Gowa & Kim, supra note 3, at 455-456.

86 JOSLING, TANGERMANN & WARLEY, supra note 85.

purposes”, had long been recognized as a way “to evade most-favoured-nation obligations” – or, at the very least, to minimize their effects.

The tension between tariff specialization and the MFN principle broke into the open in a number of trade disputes over the course of GATT history. These disputes demonstrate the importance that the GATT’s contracting parties attributed to their ability to use tariff specialisation as a means of excluding contracting parties that had not paid for a concession from the benefits of that concession.

One example is the Japan/Canada – Dimension Lumber case. 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, the arguments of Japan highlight the important role that Japan attributed to tariff specialization for limiting the benefits from tariff concessions to those who pay for them. Thus, Japan argued that, if contracting parties were permitted to reclassify products in other contracting parties’ tariff schedules on the basis that these products were “like”, such reclassifications “could be used to undermine negotiated tariff concessions”, as complainants could reclassify items “in order to gain an unbargained-for-concession”. 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.” 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

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88 HAWKINS, supra note 82, at 88; see already League of Nations 1927.
89 Report of the Panel, Canada/Japan: Tariff on imports of Spruce, Pine, Fir (SPF) dimension lumber, ¶ 3.37, L/6470 (Apr. 26, 1989) GATT B.I.S.D. (36 Supp.) at 176 (1990) (“In the Canadian view the duty on SPF dimension lumber was an example of ‘tariff specialization’”).
91 L/6470, supra note 89, ¶ 3.20 at 181.
92 Id. ¶ 3.35 at 185.
“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.  

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”. In this controversy, the conflict between the MFN rule and the principle of payment that had given rise to the principal supplier rule reappears in the guise of the tension between the prohibition to discriminate between like products and the imperative to concentrate the benefits of tariff concessions on those who are paying for them.

The panel in Japan/Canada – Dimension Lumber recognised tariff differentiation as a “legitimate means of trade policy”, in that it was a “legitimate means of adapting the tariff scheme to each contracting party’s trade policy interest, comprising both its protection needs and its requirements for the purposes of tariff- and trade negotiations.” Robert Hudec reads these “rather opaque references to the needs of tariff negotiations” as owing to the above-mentioned tension, noting that “it was no doubt awkward for the panel to acknowledge, in the face of all the fanfare proclaiming the MFN obligation to be a ‘cornerstone’ of GATT policy, that governments do need a bit of freedom to discriminate in tariff negotiations.”

Other authors have confirmed the importance of the product selection facilitated by tariff differentiation for the success of tariff negotiations. Hufbauer et al. note that, in tariff negotiations, “the legal devotion to an unconditional most-favored-nation approach often exceeded its economic substance”. They speculate that, “[i]f ‘product selection’ had not been available as a way around a strict MFN approach, there would

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93 Id. ¶ 3.32 at 184.
94 Id. ¶ 4.9 at 195 (New Zealand).
95 Id. ¶ 5.9 and 5.10 at 198. Other panels took a different view; see Report of the Panel, Japan – Customs Duties, Taxes and Labelling Practice on Imported Wines and Alcoholic Beverages, ¶ 5.5 b, L/6216 (Oct. 13, 1987) GATT B.I.S.D. (34th Supp.), at 113:

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.

96 Hudec, “Like Products”, supra note 90, at 114.
perhaps have been much less tariff cutting." Product selection was indeed highly successful in concentrating the benefits of trade liberalization among those who actively participated in tariff negotiations. As Finger reports,

[t]he participating countries with whom the United States exchanged concessions at the Geneva 1947, Geneva 1956, Dillon and Kennedy rounds supplied in each case just under 70 percent of dutiable U.S. imports. At the first of these rounds, judicious selection of products managed to internalize 84 percent of U.S. concessions, and by the Dillon Round product selection had become a fine art, internalizing 96 percent of U.S. concessions.  

In sum, product selection, both in its blatant (exemption of entire sectors) and more subtle (tariff differentiation) forms, played a significant role in concentrating the benefits of trade negotiations among the core countries. The exclusion of most policies other than tariffs from the ambit of negotiations for most of the GATT’s history proved to be particularly problematic for developing countries and agricultural exporters, who were unable to achieve reductions in the major trade barriers facing their exports.

c) Who Needs to Agree: Critical Mass Approaches to Lawmaking

The dynamics described in the previous two sections were most characteristic of trade negotiations in the first two decades of the GATT’s operation. The Kennedy Round in the 1960s brought two major changes. First, negotiations on non-tariff barriers started to play a more prominent role. For a number of reasons, these negotiations were not subject to the self-perpetuating club dynamic that had characterized tariff negotiations. Thus, in negotiations on non-tariff barriers, there were no conventions akin to the principal supplier rule that would have restricted who could request concessions from their trading partners. Moreover, even though the participants were still primarily interested in the practices of their major trading partners, in negotiations on non-tariff barriers all countries potentially 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

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98 Finger, supra note 87, at 427.
diminished and there is consequently greater scope for negotiating skill and perseverance on the part of individual national delegations.\textsuperscript{99}

Second, even the dynamics of tariff negotiations changed in the Kennedy Round, at least superficially. The Kennedy Round was the first negotiating round in which tariff reductions were supposed to be achieved in accordance with a multilaterally agreed formula, rather than through bilateral bargains. This held out the prospect that less economically powerful countries would not only profit from tariff reductions on a wider range of products, but would also have a say in the design of the reduction formula.

These developments ran counter to the club dynamic that had characterized past GATT negotiations: from the perspective of the core GATT countries, these changes posed precisely those dangers that the club approach was designed to avoid. First, the active participation of a wider range of countries in the negotiation of rules and tariff formulas would make reaching agreement more difficult; second, in order to reach consensus under these circumstances, the core countries might have to make substantial concessions to other countries; and, third, if agreement could not be reached and the core countries decided to implement agreements among themselves, the MFN obligation would make it hard to prevent the outsiders from benefitting from the agreement; this, in turn, would make it difficult to force them to join it on the insiders’ terms. As I will show in the following, the core countries found mechanisms to replicate the club dynamic under the changed circumstances in a way that addressed the first two concerns, but did little to remedy the third. Thus, the use of a critical mass approach to negotiations on non-tariff barriers and tariff formulas prevented potentially non-cooperative countries from blocking agreement and from influencing the substance of the agreement in ways that would be unacceptable to the core. Moreover, the concentration of negotiating activity among a small group of core countries that used to come about automatically through the principal supplier rule was increasingly institutionalised in the form of exclusive negotiating arrangements (see next section). None of these instantiations of the club approach, however, allowed the core to internalize the benefits of their agreements to the same extent as had been possible under the traditional protocol of tariff negotiations.

\textsuperscript{99} Winham, \textit{supra} note 79, at 814.
Aside from the rules for the entry into force of the GATT itself, one of the earliest examples of the use of a critical mass approach in negotiations on non-tariff measures was the adoption of binding declarations containing additional obligations with regard to subsidies. The original version of the GATT contained only reporting and consultation requirements in Article XVI; this provision had been agreed under the assumption that the much more stringent obligations contained in the ITO Charter would come into force soon.

When the ITO Charter failed to enter into force, the contracting parties decided, at the Review Session in 1955, to amend Article XVI to include more specific obligations on export subsidies. The new paragraph 4 of the provision envisaged that contracting parties would cease to grant any form of export subsidies on non-primary products “as from 1 January 1958 or the earliest practicable date thereafter”. This was supplemented by a standstill provision, whereby contracting would not extend existing subsidies or introduce new subsidies in the meantime, i.e., up until 31 December 1957. 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 30 November 1957, a declaration extending the standstill provisions of Article XVI (4) for one year. 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

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100 See GATT 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 signatory to the Final Act the territories of which account for eighty-five per centum of the total external trade of the territories of the signatories to the Final Act adopted at the conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Tarde and Employment. Such percentage shall be determined in accordance with the table set forth in Annex H. (emphasis added)


102 GATT art. XVI(4).

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.\textsuperscript{104}

The Declaration and a Proces-Verbale extending it for another year entered into force on 11 May 1959 for those governments which had signed them.\textsuperscript{105} In 1960, the contracting parties finally adopted a “Declaration Giving Effect to the Provisions of Article XVI, Paragraph 4”, which contained a similar provision regarding the “critical mass” of countries that had to accept it in order for it enter into force. Thus, paragraph 2 of the Declaration read:

This Declaration shall enter into force, for each government which has accepted it, on the thirtieth day following the day on which it shall have been accepted by that government or on the thirtieth day following the day on which it shall have been accepted by the Governments of Austria, Belgium, Canada, Denmark, France, the Federal Republic of Germany, Italy, Luxemburg, the Kingdom of the Netherlands, Norway, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, whichever is later.\textsuperscript{106}

Gallagher and Stoler have noted the implications of this declaration:

At a time when forty-two governments were [contracting parties] to the GATT, only seventeen signed the declaration. The new obligations applied to the seventeen signatories, but rights under Article XVI:4 accrued to all forty-two [contracting parties]. Clearly, this apparent lack of reciprocity did not stop the seventeen from signing on because they must have considered that they collectively constituted a critical mass of [contracting parties] likely to engage in meaningful export subsidies on industrial products.\textsuperscript{107}

The declarations on the extension of the standstill provision and the bringing into effect of the prohibition on export subsidies on industrial products implemented on a critical mass basis obligations that were envisaged in the (amended) GATT itself. The Kennedy Round Anti-Dumping Code, however, marked a new departure: the negotiation of a legally separate agreement adding to GATT obligations but bypassing the amendment procedures of the GATT. The resort to “codes” during the Kennedy and Tokyo Rounds is often attributed to the difficulties of

\textsuperscript{104} L/774, supra note 103, at para. 4. See also 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.


amending the GATT. It should be noted, however, that the amendment provisions of the GATT themselves foresaw that the GATT could be amended by a critical mass of contracting parties. Pursuant to Article XXX, amendments to the GATT (except to Part I and Article XXIX, as well as Article XXX itself, which required unanimity) would “become effective, in respect of those contracting parties which accept them, upon acceptance by two-thirds of the contracting parties and thereafter for each other contracting party upon acceptance by it.” However, the core countries must have found the threshold of two-thirds of the contracting party too high, and therefore opted for the negotiation of separate “codes”, which could be brought into force by fewer parties.

The “Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade”, as the Kennedy Round Anti-Dumping Code was formally known, did not even stipulate a minimum threshold for acceptances for its entry into force: Article 13 simply provided that it would “enter into force on 1 July 1968 for each party which has accepted it by that date.” Of course, among the states which had negotiated the code – principally OECD countries – 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 non-tariff barriers negotiated during the Kennedy Round, regarding the elimination of the American Selling Price system of customs valuation, was explicitly concluded among a limited group of countries, namely Belgium, France, Italy, Switzerland, the United Kingdom, the United States and the European Economic Community, and would enter into force only if accepted by all those governments.

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   the GATT started out with 23 contracting parties. It now has 83. They are incapable of agreeing unanimously to change even a comma in the original agreement. How, then, is GATT to change? The answer is to draw up codes … and to create a network of new rights and obligations among the countries which accept them.

109 GATT art. XXX.


   Amending the GATT requires the agreement of two-thirds of the members and so the new provision were embodied in an interpretive Anti-dumping Code, which the industrial country contracting parties signed separately from their ‘regular’ GATT membership. This plurilateral approach represented a major innovation in the development of multilateral trading rules.

The precedential effect of the Anti-Dumping Code for negotiations on other non-tariff barriers is also noted by Kenneth W. Dam, *The GATT: Law and International Economic Organization* 175 (1970).


In both cases, the limited circle of parties who needed to agree made it easier to reach an agreement, and allowed those parties to shape the content by themselves. It appears that in each case the benefits were sufficiently concentrated among the participants so that unrequited accidental benefits accruing to non-participants were not a major concern.\textsuperscript{113}

While the Anti-Dumping Code remained open to signature by additional parties,\textsuperscript{114} the only obvious incentive would be the opportunity to participate in the Committee set up pursuant to Article 17 of the Agreement. However, Jackson notes a more subtle way in which the Code could affect non-parties. Given that “the code is worded as an ‘interpretation’ of Article VI of GATT, its provisions could, over time, be accepted as the definite interpretation of GATT, thus binding all GATT parties.”\textsuperscript{115} Again, the outsiders would thus ultimately join the insiders on the insiders’ terms.\textsuperscript{116} Such *multilateralisation by stealth* only had prospects of success as long as participation in the codes was not openly politicised – which may have been true for the Kennedy Round, but was certainly no longer true for the Tokyo Round.

In the early 1970s, the “tight little club of the 1950s was gone”,\textsuperscript{117} and the negotiation of codes with participation of a critical mass of countries became the dominant *modus operandi* of the Tokyo Round.\textsuperscript{118} At the same time, the limits of implementing the club approach through the use of critical mass became more evident in the Tokyo Round: at the conclusion of the Round, the developed countries found themselves confronted with rival codes and amendments proposed by developing countries, with demands that only codes adopted by the Trade Negotiations Committee with a two-thirds majority could enter into force, and (at least partially successful) resistance against the conditional-MFN elements of the codes. Moreover, the negotiation of the one code on which the co-operation of developing countries was essential, the safeguards code, ended in failure.\textsuperscript{119}

\textsuperscript{113} *JACKSON, WORLD TRADE*, supra note 72, 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).

\textsuperscript{114} Kennedy Round Anti-Dumping Code art. 13.

\textsuperscript{115} *JACKSON, WORLD TRADE*, supra note 72, at 410.

\textsuperscript{116} 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 107, at 384.


\textsuperscript{118} See Winters, *supra* note 110, at 1296: “the practice of separate but parallel Codes was re-affirmed and plurilateralism accepted”.

\textsuperscript{119} For background, see *WINHAM, TOKYO ROUND*, supra note 15, at 197-200; for an account of the failure of the negotiations, see *id.*, 240-247.
The Tokyo Round was from the outset driven by the United States, in conjunction with the European Community and Japan. In 1973, the United States issued joint statements with the EC and Japan, respectively, declaring their intention to initiate a new round of trade negotiations. While the other developed GATT parties welcomed this initiative, developing countries were more sceptical and “made it clear that their association with the undertaking was conditional upon the details to be applied to their participation including the techniques and modalities to be worked out for the negotiations.” In an internal memorandum, US negotiators reported criticism of the draft declaration launching the Tokyo Round by some developing countries, noting that “such discordant notes”, if repeated at the Tokyo Ministerial, would be “regrettable”, but should not interfere with the basic objective which is approval of the declaration by the countries which are planning meaningful participation in the forthcoming negotiations. 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.

In effect, the entire Tokyo Round thus proceeded from the outset on a critical mass basis. This allowed the developed countries, and particularly the US and the EC, to “essentially negotiate[e] among themselves” (see next section) and thereby to realise the first two benefits of the club approach – facilitating agreement and shaping the content of that

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The driving forces of the Tokyo Round of trade negotiations had been the United States and the other three quadrilaterals. The objectives for the Tokyo Round were prepared following discussions among the United States, Japan and the European Community. They announced that the negotiations were to begin and everyone else was invited to participate.

124 Hufbauer, Erb & Starr, supra note 97, at 67, note with respect to the negotiations on non-tariff barriers in the Tokyo Round:

From the beginning of the Tokyo Round it was clear that not all GATT members would accept this extension of international discipline.

125 At a meeting of the Consultative Group of 18 held in 1978, one participant noted that the developing countries did not know what to expect from the Tokyo Round since the developed countries were essentially negotiating among themselves (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), at para. 17)
agreement decisively. At the same time, they became more reluctant than they had been in the Kennedy Round to forego the third element of the club approach – forcing outsiders to join the agreement on the insiders’ terms – by extending the benefits of that agreement to non-participants, as required by the unconditional MFN clause of the GATT. Hence, for the first time in the history of the GATT, formal conditional MFN was openly considered as an element of the new “codes”.126 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.”127 The EC in particular had openly embraced conditional MFN as the basis for the code negotiations.128 From the outset, the developing countries announced their opposition to this development.129

During the preparatory phase of the Tokyo Round, negotiations had already substantially advanced on a “Standards Code”.130 The working group that drafted the code had worked “on the hypothesis that benefits

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126 See Robert E. Hudec, GATT and the Developing Countries, 1 COLUM. BUS. L. REV. 67, 74 (1992) [hereinafter Hudec, GATT]:

the U.S. and the EC both declared during the course of the negotiations that they would refuse to give the benefits of the newly drafted codes to those countries that would not sign them. This signaled the beginning of conditional MFN treatment.

Hufbauer, Erb & Starr, supra note 97, at 67 (footnote omitted):

… the major nations that were willing to accept meaningful international measures demanded that such discipline apply equally to their trading partners. In order to ensure this international quid pro quo, the Tokyo Round established the principle of conditional MFN as the centerpiece of its work – the six Codes governing non-tariff barriers.

127 MIN(73)W/2, supra note 122, at para. 23; a statement to this effect was included in all drafts of the report.

128 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 non-tariff barriers, N.L.] should be accepted by as many countries as possible if the existing imbalance between the various contracting parties is not to be worsened. It should therefore be made clear that any advantages which might derive from solutions comprising obligations going beyond the present GATT rules would be reserved for countries which in practice abide by these solutions (conditional application of the most-favoured-nation clause.

Winham notes that “while this went against the usual American support for the principle of non-discrimination, it was an approach that gained wide acceptance in the subsequent NTM negotiations”; WINHAM, TOKYO ROUND, supra note 15, at 82. On the US 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 and fn 7 (1990).

129 MIN(73)W/2, supra note 122, at para. 23: “Delegations from developing countries have stressed that all concessions resulting from the negotiations should be extended to them unconditionally.”

130 See Multilateral Trade Negotiations, Sub-Group “Technical Barriers to Trade”, Standards; Packaging and Labelling; Marks of Origin. Background Note by the Secretariat, MTN/NTM/5 (Apr. 21, 1975), at para 7.
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". This hypothesis did not extend only to the Code itself, but also to “multilateral schemes for assuring conformity to mandatory or quasi-mandatory standards” contemplated under the code. In the first draft considered by the working group, the hypothesis was *inter alia* reflected in a provision stipulating that such schemes “should not include any provisions which would prevent individual members from accepting assurances of conformity provided by non-participating countries, except where the non-participation of such countries is due to unwillingness to accept the obligations of membership.” The provision was accompanied by a note that “[t]his somewhat tortuous phraseology is designed to make these schemes as ‘liberal’ as possible, but at the same time to discourage attempts to obtain the benefits of membership without accepting the corresponding obligations.” 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. Annex 2 was still “[to be added]” at this stage, but there proved to be little enthusiasm for doing so in subsequent negotiating sessions. The provision does not appear in the final version of the Code. By all indications there was an informal understanding between the US and the EC that both would ratify the code, and they were presumably unwilling to jeopardize the entry into force of the code by making it contingent on the accession of other parties.

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, which created an incentive for other contracting parties to join. In the case of the standards code, these benefits were not primarily

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131 Committee on Trade in Industrial Products: Group 3 on Standards, COM.IND/W/108 (June 25, 1973), at para. 8; the report of the Working Group, including the draft code, is also attached to MTN/NTM/5, supra note 130.

132 Draft Code of Conduct Regarding Standards Which May Act as Technical Barriers to Trade, Spec(71)39 (May 14, 1971) (Note by the United Kingdom Delegation), at 19.

133 MTN/NTM/5, supra note 130, Appendix 1, art. 22(a)(i) of the Draft Code.

134 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.

135 Thus, explicitly including a country in the list of “critical mass” countries would give that country leverage by allowing it to block the coming into force of the code. Conversely, excluding a country from the list of “critical mass” countries might have taken the pressure off that country to join the code, which would contravene the third element of the club approach.

136 Earlier drafts of the Code use the term “adherents” instead of “Parties”; see e.g. COM.IND/W/108, supra note 131, Annex.
substantive – thus, many of the provisions of the code merely elaborate the national treatment obligation to which the parties were subject in any case with respect to all GATT contracting parties pursuant to Article III:4 of the GATT – but procedural: the code created new notification requirements which only applied with respect to other parties to the code, and only parties were members in the Committee established pursuant to the Code.

While the Standards Code was thus, like all other Tokyo Round codes, “conditional in important procedural respects”, the Subsidies and Government Procurement codes “fully embrace[d] the conditional MFN principle in their substantive elements” 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. Similarly, the Subsidies Code imposed more stringent disciplines than the GATT on the use of subsidies which cause injury to the domestic industry – or serious prejudice to the interests – of “another signatory”. Moreover, Article 1 of the Subsidies Code stipulated that the imposition of countervailing duties “on any product of the territory of any signatory imported into the territory of another signatory” had to be in accordance with the provisions of GATT Article VI as well as the code. The most significant practical effect of this provision was that the United States could impose countervailing duties on subsidised imports from other signatories only after determining that these imports were causing “material injury” to its domestic industry – a requirement of GATT Article VI from which the United States was exempt with respect to the contracting parties of the GATT because its countervailing duty law, which did not require such a determination, predated the adoption of the GATT.

The developing countries resisted both aspects of the club approach adopted by the US and the EC in the Tokyo Round – critical mass negotiations and unconditional MFN – from the outset. Their first line of defence was to prevent the adoption of agreements on a critical mass basis within the framework of the Tokyo Round negotiations. At a meeting of the Trade Negotiations Committee in July 1978, Yugoslavia, speaking “on behalf of the developing countries”, stated:

137 Hufbauer, Erb & Starr, supra note 97, at 68, note that each of the Tokyo Round codes “establishes a committee of signatories to resolve substantive and technical questions relating to Code operation.”
138 Id.
139 Id. at 69.
141 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.) at 56, art. 8 [hereinafter Subsidies Code].
At this stage we are requesting that a rule be established for the decision-making process in the MTN according to which no adoption of a negotiating document would be accepted unless the large majority of participants declared themselves in favour of it. We cannot proceed on the basis that a group of a few countries may consider it appropriate for others to be kept out of arrangements if they are not in a position to accept their conceptual approach.\textsuperscript{14}\textsuperscript{5}

The developing countries were clearly concerned that the critical mass approach was allowing the developed countries to develop the law without feeling the need to bring the developing countries on board. While the developing countries found it “understandable for there to be, in the process of negotiation, many stages and many bilateral and multilateral consultations”, they saw these “as a technique for reaching universally acceptable solutions”,\textsuperscript{14}\textsuperscript{3} 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 being adopted by the Trade Negotiations Committee”.\textsuperscript{14}\textsuperscript{4} This would have given developing countries a chance to prevent those codes which did not adequately reflect their interests from entering into force at all – and would thus have given them leverage to effect changes in the codes. An alternative proposal advanced at the conclusion of the negotiations, which would have had a similar effect, was that the codes “should enter into force when two thirds of the participants in the MTN have accepted them.”\textsuperscript{14}\textsuperscript{5}

The question of whether an agreement among a subset of GATT contracting parties could only be concluded with the consent of all contracting parties went to the heart of the matter of what kind of institution the GATT was. On the developing countries’ view, the Trade Negotiations Committee “could only proceed on the basis of consensus”;\textsuperscript{14}\textsuperscript{6} 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

\textsuperscript{142} Multilateral Trade Negotiations, Trade Negotiations Committee, \textit{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, \textit{In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO}, 56 INT’L ORG. 339, 357 (2002).

\textsuperscript{143} MTN/W/35, supra note 142, at 4.


\textsuperscript{145} MTN/P/5, supra note 144, 2(e).

\textsuperscript{146} Id. at para. 14.
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.  

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These governments, then, viewed the GATT as a collection of bilateral or plurilateral contracts. Subsets of members who wished to enter into such contracts were free to do so as long as they “were not imposing anything on other governments but simply moving to higher levels of discipline”.  

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Apart from consistency with the GATT, there was no substantive constraint on the content of bilateral or plurilateral agreements, such as would exist if they were subject to approval by the contracting parties as a whole. It was unsurprising that the developed countries should take this view, as it was only under this conception of the GATT that the conclusion of critical mass agreements, and thus the realization of the first two benefits of the club approach – the greater ease of reaching agreement among a small group and the opportunity to shape the content of that agreement decisively – could be realised.

The developed countries’ view prevailed – by default, as there was no consensus to add the language suggested by the developing countries to the draft codes. As one of the developing countries complained, a “precedent” was “now set for various groups of countries to put up Agreements amongst themselves and to seek the umbrella of the MTN.”

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The developing countries’ second line of defence was directed against the third element of the club approach – the attempt of the developed countries to force the developing countries to join the codes on the formers’ terms by limiting the benefits of the codes to code signatories through conditional MFN. In this, the developing countries were, at least partially, successful.  

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On 28 November 1979, the contracting parties

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147 Id.
148 Id. at para. 19.
149 Id. at 62.
150 In Steinberg’s view, they were completely successful with regard to the Subsidies Code and the revised Anti-Dumping Code; see Steinberg, supra note 142, at 357 (“the developing countries received all of the rights to the subsidies code and the anti-dumping code, but they were not obliged to sign or otherwise abide by the obligations contained in those agreements”). By contrast, it appears that it was accepted that the Government Procurement Code would operate on a conditional MFN basis. Thus, India, which was one of the key proponents of the view that the benefits of the Subsidies Code had to be extended on an MFN basis, reportedly accepted that it had to negotiate its accession to the Government Procurement Code; see 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]. For the view that government procurement is exempted from the MFN obligation, see id. 20 and ROBERT E. HUDEC, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM 97, fn 26 (1987) [hereinafter HUDEC, DEVELOPING COUNTRIES]; for the argument that the MFN obligation
adopted a decision entitled “Action by the Contracting Parties on the Multilateral Trade Negotiations”, in which they “reaffirm[ed] their intention to ensure the unity and consistency of the GATT system”, noted that “existing rights and benefits under the GATT ... including those derived from Article I” of non-signatories to the codes were “not affected” by the codes, and expressed their expectation that non-signatories would be regularly informed on developments regarding the codes and would be able to follow the proceedings of the code committees “in an observer capacity”. This decision made it clear that, the language of the codes notwithstanding, the contracting parties expected the benefits of the codes to be extended to all contracting parties on the basis of the MFN obligation in GATT Article I. While there was no similar legal basis for the procedural rights of non-signatories envisaged in the decision, the contracting parties’ administrative and budgetary control of the GATT Secretariat provided them with at least some leverage in this regard.

Despite these decisions at the GATT level, the United States’ Congress, refused to implement the Subsidies and Government Procurement codes on an MFN basis. In the case of the Subsidies Code, the US was unwilling to extend the benefits of its new countervailing duty law to those who would not pay for it with increased discipline on their subsidy practices: The US implementing legislation denied the code’s benefits not only to non-signatories of the code, but also to developing countries that made use of the flexibility provided by Article 14.5 not to eliminate export subsidies on non-primary products. To this end, the United States invoked the non-application clause of the agreement against developing countries which did not enter into commitments that the US found satisfactory. When the US subsequently proceeded to impose countervailing duties on industrial fasteners from India without applying an injury test, India requested consultations and eventually the establishment of

of the GATT obliged the parties to the Government Procurement Code to extend the benefits of the code to non-signatories, see Kolligs, supra note 128.


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

153 See Steinberg, supra note 142, at 357 (“the 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 150, at 21.

154 For an extensive discussion, see Kolligs, supra note 128. 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 150, at 89.

155 Art. 14.5 of the Tokyo Round Subsidies Code provided:

A developing country should endeavour to enter into a commitment to reduce or eliminate export subsidies when the use of such export subsidies is inconsistent with its competitive and development needs.

A footnote specified that the "commitment" had to be notified to the SCM Committee.

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

157 See Subsidies Code art. 19.9; for the notification of the invocation of the non-application clause with respect to India, see Communication from the United States, Let/1159 (Aug. 27, 1980).
a panel pursuant to Article XXIII of the GATT. In its panel request, India questioned whether the non-application clause could be “validly invoked by any Party with the objective of obtaining concessions from another Party to the Agreement which are not envisaged in the provisions and go beyond the balance of rights and obligations contained in the Agreement.” In effect, India argued that the non-application clause could not be used to force outsiders to join the Subsidies Code on the insiders’ terms. India further argued that the United States’ refusal to apply an injury test in the countervailing duty investigation of India’s exports violated the MFN principle in Article I of the GATT. To support its argument, India relied inter alia on the contracting parties’ above mentioned decision, which had confirmed that the GATT Article I rights of non-signatories were “not affected” by the codes. Eventually, the US gave in and agreed to apply the provisions of the Subsidies Code in relation to India.

d) Who Gets to Be in the Room: From the Bridge Club to the Green Room

Throughout the history of the GATT, the club approach to trade lawmaking was implemented through exclusive negotiating arrangements. In the first two decades of the GATT’s operation, the tariff or trade negotiations committee, i.e., the GATT body overseeing the negotiations, was itself an exclusive body whose membership was limited to those contracting parties who engaged in tariff negotiations on a reciprocal basis. Starting in the Kennedy Round, as membership of the trade negotiations committee became more inclusive, the core countries started to use other, more informal meetings to maintain control of the negotiations.

The question of who could be a member in the trade negotiations committee overseeing a trade negotiation was for the first time openly

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158 For India’s consultations request, see Consultations Under Article XXIII:1, Request by India, L/5028 (Sep. 29, 1980); for the panel request, see United States – Imposition of Countervailing Duty Without Injury Criterion/Industrial Fasteners Imported From India, Recourse to Article XXIII:2 by India, L/5062 (Oct. 31, 1980); for discussions of this episode, see WINHAM, TOKYO ROUND, supra note 15, at 359-360; HUDEC, DEVELOPING COUNTRIES, supra note 150, at 88-89; Kolligs, supra note 128, at 579; Steinberg, supra note 142, at 358, fn. 97.

159 L/5062, supra note 158, at para. 3(c); India referred in this respect to the Report of the Working Party on Article XXXV Review, L/1545 (Sep. 6, 1961), which had concluded that non-application could not legitimately by used as a bargaining lever for gaining privileges and advantages over and above those provided for in the General Agreement. India noted that this conclusion had been “endorsed by the then US representative in unequivocal terms”.

160 L/5062, supra note 158, at para. 3(f).

161 HUDEC, DEVELOPING COUNTRIES, supra note 150, at 89; India’s request to terminate the panel proceedings is in Recourse to Article XXIII:2 by India, Request for Termination of Proceedings, L/5062/Add.1 (Sept. 30, 1981).
contested in the Kennedy Round. At the Ministerial Meeting at which the decision to launch the Kennedy Round negotiations was taken, ministers from some developing countries raised the question of “how the membership of the Committee would be decided and whether the less-developed countries would be adequately represented.” 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.”

It was clear to all involved that the kind of “participation” in trade negotiations that had been required in the past to entitle a contracting party to membership in the trade negotiations committee was a readiness to engage in reciprocal tariff reductions. This notion was becoming increasingly problematic, however. Over the years preceding the Kennedy Round, the GATT had been focusing increasingly on the trade problems of the less-developed countries, particularly within the framework of the programme for the expansion of international trade. One of the principles that had gained increasing acceptance in the run-up to the Kennedy Round was the principle of non-reciprocity for developing countries. In fact, the very resolution that provided for the establishment of the trade negotiations committee and that the ministers were debating at the 1963 Ministerial Meeting announced as one of the principles of the upcoming negotiations that “every effort shall be made to reduce barriers to exports of the less-developed countries, but that the developed countries cannot expect to receive reciprocity from the less-developed countries.” As a result, it appeared to some developing countries that the notion of “participation” as readiness to engage in reciprocal concessions was becoming increasingly anachronistic. Thus, the Malaysian minister “enquired whether the less-developed countries could be considered as ‘negotiating”’ since they were not asked to offer reciprocal concessions, and the Indian minister, after noting the manifold ways in which the developing countries had a stake in the upcoming negotiations, stated that “[i]t could not be considered therefore that reciprocal action on tariff cuts would be the only contribution which various parts of the world hoped to make towards the expansion of world trade.”

In order to deal with the undeniable tension between the traditional understanding of “participation” in GATT negotiations and the GATT’s

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162 See Summary Record of the Meeting, Held at the Palais des Nations, Geneva, on Tuesday 21 May 1963, MIN(63)SR (May 21, 1963) (Meeting of Ministers, 16-21 May 1963), at 4-7.
163 Id. at 4.
164 Id. at 5-6.
165 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, MIN(63)9 (May 22, 1963) (Meeting of Ministers, 16-21 May 1963), at A.8.
166 MIN(63)SR, supra note 162, at 7.
newfound concern for the trade interests of developing countries, the United States, which had drafted the resolution under discussion, had come up with what the Indian minister described as “a somewhat complex procedure”,\(^\text{167}\) whereby a special committee of the trade negotiations committee would be set up in which “the less-developed countries together with the developed countries could discuss and agree on the terms for participation”.\(^\text{168}\) As the Executive Secretary noted, “the implications of the word ‘negotiating’ would be one of the interesting questions” which the committee “might consider”.\(^\text{169}\) In other words, the committee was to perform a gatekeeping function by setting conditions for the participation of developing countries in the Kennedy Round negotiations. The Executive Secretary attempted to frame the committee as an effort to facilitate the participation of developing countries in the Kennedy Round, noting that

> if these countries were in doubt because they could not form a judgement as to the conditions of participation, having regard to their development problems, it was at least reasonable to make provision whereby there could be some discussion of the question before they made up their minds whether or not they were going to participate actively in the negotiations, and therefore to seek membership of the Trade Negotiations Committee itself.\(^\text{170}\)

The obvious alternative, of course, would have been not to make participation in the trade negotiations subject to “conditions” which could potentially create difficulties for the developing countries in light of their “development problems”. India clearly saw this, and its proposal to delete the reference to the committee from the ministerial resolution, on the basis that “every country which would be participating in the negotiations would be doing so in a way consonant with its economic development needs”,\(^\text{171}\) was eventually accepted. The preparatory phase of the Kennedy Round, then, saw the last rearguard action to defend the trade negotiations committee as a body “tied to action” (to use the words of the US delegate at the Havana Conference).\(^\text{172}\)

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

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\(^{167}\) Id. at 5.

\(^{168}\) Id. at 5-6 (explanation given by the Executive Secretary). The establishment of the committee is foreseen in paragraph B 3(f) of the draft resolution contained in MIN(63)4 (this document is not preserved). The final version of the resolution, from which the paragraph is deleted, is in MIN(63)9, supra note 165.

\(^{169}\) MIN(63)SR, supra note 162, at 7.

\(^{170}\) Id.

\(^{171}\) Id.

\(^{172}\) See supra text at fn 67.
being prepared to make a contribution”.

However, membership in the TNC was formally open to any contracting party that requested to become a member, and there was thus no way to police the Executive Secretary’s “understanding”. To remedy this problem, the core countries simply proceeded to de-couple the status of a “full participant” in the negotiations from membership in the TNC. The status of a “full participant” and the attendant privileges, in turn, remained “tied to action”, i.e., to a readiness to engage in (at least some) reciprocal reduction of trade barriers.

In June 1963, the TNC decided to establish a Sub-Committee on the Participation of Less-Developed Countries to consider “any special problems relating to the participation of less-developed countries in the trade negotiations”. It soon became clear that this committee would be quite similar to the special committee that had been envisaged in paragraph B 3(f) of the draft resolution considered at the 1963 Ministerial Meeting, and the reference to which had been deleted at the suggestion of India. The first hint that the new Sub-Committee on the Participation of Less-Developed Countries was a kind of reincarnation of the “gatekeeping committee” that the developing countries thought they had dispensed with during the preparatory negotiations, was a remark by United States that the committee would be “charged with establishing the basis for the participation of the less-developed countries in the negotiations”. The United States added that this “could be done in a pragmatic way so that the basis for participation would be in line with ground rules as they evolved”. The US representative’s reference to “evolving” ground rules spooked some of the developing countries; the latter considered the question of ground rules, as least as far as the principle of non-reciprocity was concerned, to have been settled.

Over the course of the discussions in the Committee, 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 in order to be considered as “full participants”. Thus, in response to questions, the Executive Secretary

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176 *Id.* at 6, at para. 26 (Brazil: “it would be difficult for the less-developed countries to express their willingness to participate in the trade negotiations before the ground rules had been elaborated.”).
177 *Id.* at 14, at para. 50 (India: “Ministers had agreed at their meeting of May 1963 that the developed countries could not expect to receive reciprocity from the less-developed countries; it was not open for the Sub-Committee to re-examine this matter.”); at para. 57 (Argentina: “the Ministerial Decision made it perfectly clear that less-developed countries would not be expected to give full reciprocity in the forthcoming trade negotiations.”).
clarified that “a less-developed country could be said to be participating in
the trade negotiations when it played its part drawing up the ground rules
for these negotiations, and when it contributed to the negotiations.”\(^{178}\) 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.”\(^{179}\) The United
States made it clear, however, that “participating less-developed countries
should all make a contribution to the negotiations” and that “it would be
difficult for the [US] delegation to make full use of the authority which it
possessed if less-developed countries did not make some contribution to the
negotiations as a whole.”\(^{180}\) In a similar vein, the EC representative clarified
that the “notion of ‘reciprocity’ contained two elements”, namely “a
contribution as such” and “the quantitative value of such contribution”; it
“seem[ed] obvious”, the EC representative explained, that the principle of
non-reciprocity “relate[d] more specifically to the value aspect”, leaving
“the contribution aspect to be dealt with.”\(^{181}\)

In practical terms, “participation” in the Kennedy Round largely
revolved around the question to what extent a country would be involved in
the process of “justification”, “confrontation and negotiation” of the
exceptions to the linear tariff reduction formula that most of the developed
countries had agreed to apply.\(^{182}\) To a large extent, whether a country would
benefit from the Kennedy Round tariff reduction exercise depended on its
ability to ensure that the major developed countries did not exempt products
of interest to it from the linear cut. In order to be able to do this, a country
had to (a) know whether products of interest to it had been exempted by any
of the linear countries and (b) had to be present in the meetings in which the
exceptions lists were examined and discussed. It was participation in this
basic sense – in the sense of being allowed to see the exceptions lists, to be
in the room when they are discussed, and to participate in the discussion –
that the developed countries made contingent on the readiness of a less-
developed country to “contribute” to the negotiations.

The Executive Secretary, even though he clearly cared deeply about
the less-developed countries’ “contribution”, was not willing to go quite as
far. He acknowledged that “there was no logical connexion between the
receipt of exceptions lists by the developing countries and indication by
these countries of their own contributions, since the question of reciprocity
did not arise”.\(^{183}\) He merely suggested that “for practical purposes, it was

\(^{178}\) Id. at 14, para. 51.
\(^{179}\) Id. at 14, para. 52.
\(^{180}\) Id. at 16, para. 59.
\(^{181}\) Id. at 15, para. 58.
\(^{182}\) See the “procedures for the justification and subsequent negotiation of exceptions” in
Trade Negotiations Committee, Conclusions Reached by the Sub-Committee on the Tariff
Negotiating Plan at Its Meeting of 11 and 12 June 1964, TN.64/29 (June 22, 1964), at para. 2(c).
\(^{183}\) 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
probably desirable … to establish dates for the two distinct processes simultaneously.”\textsuperscript{184} However, this did not sit well with some developed countries. They noted that, under the secretariat’s plan, “the less-developed countries would see the whole of the exceptions lists and enter into discussion on their contents before they had provided any indication of the extent of their own contribution to the Kennedy Round.”\textsuperscript{185} 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.\textsuperscript{186}

It is appropriate to take a step back at this point to appreciate the very particular meaning given to the term “participation” in this statement. Recall that in the preparatory negotiations, it had appeared that the developing countries had managed to overcome the association between reciprocity and participation; in particular, what they had achieved was that their “participation” – involvement, membership, presence – in the Trade Negotiations Committee was not made contingent on reciprocity. Instead of reintroducing conditions for “participation” at the TNC-level, what this statement does is to re-define what “participation” means. In effect, this statement says to the developing countries: ‘you may well be members of the Trade Negotiations Committee; you may well be present at its meetings; and you may well be involved in its discussions – but none of this means that you are participating in the trade negotiations. Membership, presence, voice (elements that would seem highly indicative of what one would normally understand as political participation) do not count; what counts is whether you pay. This is a market, and you only participate – are a part of – a market if you buy and sell.’

Some developing countries were not fooled by the word play, noting that the “procedural suggestions which had been made appeared to represent a reversion to the concept of reciprocity.”\textsuperscript{187} Nevertheless, it was on the basis of this understanding of what counts as “participation” that the process for the examination and justification of exceptions from tariff reductions was organized. At the centre of this structure was an informal body composed of the “linear” countries, i.e., those developed countries undertaking tariff reductions on the basis of a linear formula; this body met in January and February of 1965 “to conduct the justification process.”\textsuperscript{188}

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id. at para. 9.
\item Id. at para. 9. (emphases added)
\item Id. at para. 12.
\end{enumerate}
\end{footnotesize}
Countries which had not submitted a linear offer were – with the exception of Canada – not entitled to attend these meetings. According to the “Plan for the participation of the less-developed countries in the trade negotiations”, the linear countries would subsequently inform those less-developed countries which had “formally notified … their readiness to table” at a specific date “a statement of the offers which they would make as a contribution to the objectives of the trade negotiations” which items of special interest to the less-developed countries were contained on the exceptions lists.\textsuperscript{189} On the same date, the developed countries would also make “suggestions as to the offers which participating less-developed countries might make”.\textsuperscript{190} As the next step, the less-developed countries which had indicated their intention to make offers were allowed to participate in an “examination of the lists of excepted items” that were of interest to them.\textsuperscript{191} 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.”\textsuperscript{192} While the submission of a statement of offers thus in principle entitled a less-developed country to negotiate with the linear countries about the products on the latter’s exceptions lists, the United States had obtained a guarantee that it was left “open to a developed country to decide whether a specific offer by a less-developed country constituted an acceptable basis for opening negotiations with that country.”\textsuperscript{193}

\textsuperscript{189} Trade Negotiations Committee, \textit{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 (Mar. 18, 1965), at A; the Director-General described this process as follows:

\begin{quote}

as the procedures relating to the non-linear countries came into effect, the negotiation would not be limited to the linear countries, but would gradually extend to cover all the participating countries.
\end{quote}

\textsuperscript{190} TN.64/41/Rev.1, supra note 189, at A, para. 3. Pursuant to this paragraph, the United States presented individual “suggestion papers” to less-developed countries and held at least 45 meetings with LDC delegations “to explain [its] offers and suggestions”. Canada, Japan, Sweden, and the United Kingdom had also suggested “at least some KR contributions by the LDC’s [sic]”; ‘Airgram From the Mission to the European Office of the United Nations to the Department of State’ (Jan. 6, 1966), \textit{Foreign Relations of the United States, 1964-1968}, Volume VIII, International Monetary and Trade Policy, at 797 [hereinafter \textit{FRUS 1964-1968}].

\textsuperscript{191} TN.64/41/Rev.1, supra note 189, at A, para. 2(c). The Director-General would later report that “a number of items of particular interest to less-developed countries have been excepted from the linear cut”; ‘The GATT Trade Negotiations. Report by the Director General’ (Jan. 3, 1966), \textit{FRUS 1964-1968}, at 785 [hereinafter ‘Director-General’s Report on Kennedy Round’].

\textsuperscript{192} TN.64/41/Rev.1, supra note 189, at A, para. 4.

\textsuperscript{193} TN.64/5R.10, supra note 188, at para. 32. This US concern is reflected in the proviso of the plan that “each participant will have the right to decide whether a basis for negotiation exists.” TN.64/41/Rev.1, supra note 189, at B, para. 6.
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.\textsuperscript{194} The document contains two simple lists of countries. The first records countries which had tabled offers on industrial or agricultural goods, or, in the case of less-developed countries, had submitted “statements of the offers they would make as a contribution to the trade negotiations”. The second lists countries which had “formally notified their intention to participate in the trade negotiations”, but had “not yet presented” their statements of offers. With respect to the first group of countries, the document states that these countries “had been recognized as full participants in the negotiations”.\textsuperscript{195} Countries in the second group, by contrast, “are to be regarded as full participants from the date on which they present” their statements of offers.

This document represents perhaps the prime example of “hierarchical observation” of compliance with the reciprocity norm in multilateral trade lawmaking.\textsuperscript{196}

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”,\textsuperscript{197} a group consisting of the Executive Secretary and representatives of the United States, the EEC, the United Kingdom, as well as, occasionally, Japan and Canada.\textsuperscript{198} According to Curzon and Curzon, the “private meetings” between the Bridge Club members represented the “control center” of the Round.\textsuperscript{199} For example, when the Director-General drafted a report on the progress of the Kennedy Round for the attention of ministers of the

\begin{footnotesize}
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\item[\textsuperscript{194}] Trade Negotiations Committee, \textit{Status of Offers. Note by the Director-General}, TN.64/73 (Dec. 16, 1965).
\item[\textsuperscript{195}] It appears that this recognition was not automatic, since the sentence continues “with the exception of Turkey”. It is further explained that “Turkey has notified the Trade Negotiations Committee of the basis on which it proposes to participate in the negotiations. The Committee has still to examine this proposal.” See Trade Negotiations Committee, \textit{Participation in the Kennedy Round. Notification by Turkey}, TN.64/65 (June 1, 1965).
\item[\textsuperscript{196}] See Morgan Briggs, \textit{Post-Development, Foucault and the Colonisation Metaphor}, 23 \textit{Third World Q.} 421, 429-430 (2002), (interpreting Foucault’s \textit{Discipline and Punish}): “Hierarchical observation and normalising judgement come together in the examination. … It is here that ‘truth’ is established.”
\item[\textsuperscript{197}] Winham, \textit{supra} note 79, at 811: the Bridge Club “effectively accounted for most of the actions of the round”; \textit{Winham, Tokyo Round, supra} note 15, at 272: “essentially all of the action of the negotiation occurred within this group.”
\item[\textsuperscript{198}] Winham, \textit{supra} note 79, at 811; \textit{Winham, Tokyo Round, supra} note 15, at 65, fn 9; Curzon & Curzon, \textit{supra} note 3, at 319.
\item[\textsuperscript{199}] Curzon & Curzon, \textit{supra} note 3, at 319; see also Ernest H. Preeg, \textit{Traders and Diplomats. An Analysis of the Kennedy Round of Negotiations under the General Agreement on Tariffs and Trade} 186 (1970), on the informal but fairly frequent ‘big four’ meetings (the United States, the EEC, the United Kingdom, and Japan) held by Wyndham White to assess the course of the negotiations.
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participating countries, he “held a series of information meetings with the major Kennedy Round participants … before writing the report”, then gave the US, the EEC, Japan, and the United Kingdom an opportunity “to comment individually on the first draft”, and incorporated some of their “suggested amendments in the final version”.

What was true for the Kennedy Round – that the “main action of the negotiation often occurred away from the multilateral chambers” – was even more characteristic of the Tokyo Round. Most negotiations in the Tokyo Round had what Winham, arguably the foremost historian of the Tokyo Round, has described as a “pyramidal” structure whereby “agreements were initiated by the major powers at the top and then gradually multilateralized through the inclusion of other parties in the discussions.” 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.

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.

The extent to which the negotiations had this pyramidal structure varied among the different negotiating areas and the different phases of the negotiations. In the “Tariffs Group”, for example, the participants extensively debated the merits and demerits of alternative tariff formulas, only to have the EC and the US proceed to agree bilaterally on a formula which was “not even put before Group Tariffs for discussion or approval.” In the subsidies negotiations, the basic outline of an agreement was circulated in July 1978 by Canada, the EC, Japan, the Nordic countries and the US “for the information and consideration of other interested

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202 WINHAM, TOKYO ROUND, supra note 15, at 65. Kahler calls this phenomenon “disguised minilateralism”; Kahler, supra note 25, at 686; for his discussion of the Kennedy Round, see id. at 688.
203 WINHAM, TOKYO ROUND, supra note 15, at 376; see also id. 174-175; and Winham, supra note 79, at 812.
204 Winham, supra note 79, at 812.
206 Id., at 64; see also id. at 68 and 71; for the EC-US agreement on a tariff formula, see also WINHAM, TOKYO ROUND, supra note 15, at 166-167.
delegations”. 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.

The negotiations on customs valuation similarly followed the pyramidal pattern. Sherman attributes the developing countries’ decision to propose an alternative code at the conclusion of the negotiations to “the fact that the LDCs, as well as some other trading nations, were not consulted until relatively late in the MTN proceedings, after the Code was nearing its final form.” Indeed, at the TNC meeting held to conclude the round, the developing countries characterised the customs valuation code as a “draft negotiated among a certain number of developed countries” And while the pyramidal dynamic was reportedly not present in the negotiation of the Government Procurement Code, 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.

208 Hufbauer, Erb & Starr, supra note 97, at 67, fn. 41; on India’s participation, see MTN/P/5, supra note 144, at 76.
211 MTN/P/5, supra note 144, at 40. (Brazil)
212 WINHAM, TOKYO ROUND, supra note 15, at 189 (“fully engaged all countries”), 193-194 (“absence of a pyramidal process”).
213 MTN/P/5, supra note 144, at 62; see also id. at 39 (Brazil):
Malaysia was particularly frustrated by the fact that the developed countries had resisted the creation of a formal negotiating sub-group on anti-dumping, only to come up with a draft Anti-Dumping Code – a revised version of the Kennedy Round Anti-Dumping Code which had been negotiated exclusively among developed countries\textsuperscript{214} – at the conclusion of the Round.\textsuperscript{215}

The discontent among the developing countries at that final TNC meeting of the Tokyo Round was palpable. Malaysia dismissed the draft codes before the TNC as “a series of documents purporting to be Agreements”.\textsuperscript{216} The Chilean delegate remarked that his country was “placed before a minimum compromise between the major trading nations”.\textsuperscript{217} The developing countries attributed the unsatisfactory way in which the negotiations had proceeded to the lack of rules of procedure.\textsuperscript{218} Yugoslavia noted the “fact that at some stages of the negotiations the developing countries were not invited, and that transparencies were often absent”.\textsuperscript{219}

In sum, exclusionary negotiating arrangements, in conjunction with a readiness to conclude agreements on a critical mass basis, allowed the developed countries, and in particular the US and the EC, to implement the club approach to trade lawmaking in the Tokyo Round. Negotiating mostly among themselves, and enlarging the circle of participants gradually by first

\textsuperscript{214} See id. at 47, where the EC describes the proposed code as “a satisfactory updating of the first Code in the GATT”.

\textsuperscript{215} Id. at 62.

\textsuperscript{216} Id. at 61.

\textsuperscript{217} Id. at 87.

\textsuperscript{218} Id. at 62: Developing countries had “called for proper rules of procedure to be laid out both for the Trade Negotiations Committee and for the various Groups and Sub-Groups but the matter was not taken up”. (Malaysia)

\textsuperscript{219} Id. at 36.
including those most likely to assent to their approach and marginalising those most likely to oppose it, the two majors made it easier to come to an agreement in the negotiations, and managed to shape the results of the negotiations decisively. They thus accomplished the first two benefits associated with the club approach. However, the Tokyo Round also showed the limits of the club approach to multilateral trade lawmaking: in the area of safeguards, which was largely a North-South issue and where the developing countries would hence have had to be part of any agreement for it to be meaningful, no agreement could be reached. Moreover, as noted above, the MFN principle limited the extent to which the developed countries could deny the benefits of the codes to non-signatories, thus curtailing their ability to entice the latter to join those agreements on the signatories’ terms.

Exclusionary negotiating arrangements were also characteristic of the Uruguay Round, especially in its final stages. “Green Room” meetings had been introduced by the GATT’s new Director-General Arthur Dunkel in the early 1980s. 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.” 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.

As the Uruguay Round progressed, much of the action shifted from the Green Room to bilateral negotiations between the US and the EC, sometimes with involvement of the other two “Quad” countries (Japan and Canada). As Paemen and Bensch, two EC negotiators, have put it, even the influence of coalitions such as the Cairns Group “gradually faded away. As the battle over agriculture between the European Community and the U.S.

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220 Michael Hart, Multilateral Trade Negotiations, in MULTILATERAL NEGOTIATIONS. LESSONS FROM ARMS CONTROL, TRADE, AND THE ENVIRONMENT 125, 204 (Fen Osler Hampson with Michael Hart, 1995); Richard Blackhurst & David Hartridge, Improving the Capacity of WTO Institutions to Fulfil 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:

… in a suite of offices with olive green walls, members of the high-powered “chairman’s group” held 24-hour vigils and were dubbed the ‘boys in the green room’.


221 Hart, supra note 220, at 216.

222 Interview by Gabrielle Marceau with Warren Lavorel, Geneva, Switzerland, 10:40-12:08, available at http://vimeo.com/31135731; see also Blackhurst & Hartridge, supra note 220, at 463, who note that the selection of Green Room participants was “apparently arbitrary”, but “well understood in fact”.
gathered pace, it became clear that there was no room for additional combatants.”

The agriculture negotiations, where the EC and the US had managed to reach a bilateral agreement that left the other participants in the round little choice but to accept it as a fait accompli, subsequently became the model on which the EC and the US hoped to resolve other outstanding issues in the Round. 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.”

Unsurprisingly, this strategy led to some discontent particularly among the developing countries. Paemen and Bensch report that, after the major industrialised countries reached an agreement on key elements of the Uruguay Round package at a G-7 summit in Tokyo,

the developing countries were quick to point out that the package contained nothing at all for them. Whilst this may have been an exaggeration, it gave some indication of the genuine frustration felt by the other participants in the Uruguay Round. They had had to sit on the sidelines and watch while the United States and the European Community decided their fate.

In the final stages of the Uruguay Round, the US and the EC thus exploited the first two benefits of the club approach to the fullest extent: they negotiated mostly among themselves, which made agreement easier, and they could shape the content of the resulting agreement decisively. By themselves, however, exclusive negotiating arrangement did little for the third element of the club approach: the ability to entice outsiders to join the agreement on the insiders’ terms. The solution that the developed countries eventually devised to deal with this problem is the subject of the next section.

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

The practices of participation discussed in the previous section – the negotiation of tariff concessions with principal suppliers; the exclusion of certain product categories and types of trade barriers from negotiations; the conclusion of agreements among a “critical mass” of countries; and informal and often exclusionary negotiating arrangements – allowed the major developed countries to realise the first two benefits of the club approach – the relative ease of reaching agreement among fewer

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224 Id. at 224:

The USTR agreed to Leon Brittan’s suggestion that intensive bilateral talks be resumed to try to find in advance Blair House-style Euro-American solutions to the major outstanding problems in the Uruguay Round context.
225 Id. at 225.
226 Id. at 231.
participants, and the disproportionate influence on the content of that agreement of those participants – throughout the history of lawmaking in the GATT. By the end of the Tokyo Round it had become clear, however, that the developed countries’ ability to realise the third benefit of the club approach – forcing outsiders to join the insiders on the insiders’ terms – was increasingly limited. Towards the end of the next round of trade negotiations, the Uruguay Round, the United States conceived of, and the other Quad countries embraced, a radical solution to this problem. Under the scenario envisaged by the United States and ultimately put into practice, the major trading nations would leave the GATT and all the agreements concluded under its auspices, only to join a new agreement comprising a substantively identical, but legally distinct GATT, successor agreements to the Tokyo Round agreements, as well as new agreements negotiated in the course of the Uruguay Round. The central feature of the new agreement, which would distinguish it from the GATT framework, would be that any country which wanted to join it had to subscribe to all the agreements concluded in the Uruguay Round. The primary purpose of what was originally simply called the “GATT II” and ultimately became the Marrakesh Agreement Establishing the World Trade Organization was thus to realize the third element of the club approach: to compel countries which had been refusing to join the new agreements in the Tokyo Round and were planning to do likewise in the Uruguay Round, to join those agreements.

When the Uruguay Round negotiations were eventually launched, they unfolded from the outset in a more polarised atmosphere, especially between developed and developing countries, than had ever before been the case. In the Kennedy Round, the negotiations on non-tariff barriers had been an uncontroversial, if relatively unproductive affair. In the Tokyo Round, there was a broad consensus to negotiate on non-tariff measures such as standards, subsidies and countervailing duties, and customs valuation; disagreement centred on the substance of any new disciplines and on the opaque and exclusionary manner in which some of the negotiations proceeded. In the Uruguay Round, by contrast, there was from the outset a fundamental disagreement over whether negotiations on services, intellectual property rights, and investment measures should take place in the GATT framework at all. This was an entirely new level of discord, and it resulted in, by GATT standards, brutal confrontations and tortured compromises throughout the round. The compromises on services and intellectual property rights were reached by holding out the prospect that these issues would be kept institutionally separate from the GATT – precisely the opposite of what ultimately happened.

The compromise on trade in services is embodied in the Punta del Este Ministerial Declaration launching the Uruguay Round. Apart from the introductory paragraph providing for the establishment of a Trade Negotiations Committee (TNC) and a concluding paragraph explicitly keeping open the question of the implementation of the negotiating
results, the declaration is divided into two parts, the first part devoted to “Negotiations on Trade in Goods”, and the second part dealing with “Negotiations on Trade in Services”. The separation of the negotiations on trade in goods and trade in services was adopted to reassure the developing countries that there would be no substantive linkage between the two sets of negotiations. As Brazil reminded the other delegations at the first meeting of the GNS, “the premise of trade-offs between the area of goods and that of services has been excluded from the start of our deliberations.” 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.

The compromise on intellectual property rights started out differently, but ultimately assumed a similar form. Developing countries were, if anything, even more resolutely opposed to the inclusion of substantive obligations regarding the protection of intellectual property rights into the GATT framework than they were to the inclusion of services. However, they could live with negotiations to clarify and elaborate the existing GATT provisions touching on intellectual property rights, and to conclude an agreement on trade in counterfeit goods which had already been the subject of negotiations in the Tokyo Round. And this was all that they agreed to in the Ministerial Declaration.

227 The concluding paragraph of the Ministerial Declaration on the Uruguay Round, MIN.DEC (Sep. 20, 1986) [hereinafter Punta del Este Declaration] reads:
Implementation of Results under Parts I and II
When the results of the Multilateral Trade Negotiations in all areas have been established, Ministers meeting also on the occasion of a Special Session of CONTRACTING PARTIES shall decide regarding the international implementation of the respective results.

228 See OXLEY, supra note 15, 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”; see Group of Negotiations on Services, Communication from Brazil, MTN.GNS/W/3 (Mar. 11, 987), at paras. 4-5.

229 MTN.GNS/W/3, supra note 228, at para. 5; see also id. at para. 43; OXLEY, supra note 15, at 188-189; PAEMEN & BENSCH, supra note 15, 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.

230 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 126-130 (1990), comparing the Swiss-Colombian draft and the final version. See also PAEMEN & BENSCH, supra note 15, at 119:
In order to get the developing countries to accept the inclusion of intellectual property in the Uruguay Round, the Ministerial Declaration had explicitly limited the multilateral agreement to counterfeit goods, a subject which had already been addressed within the framework of the Tokyo Round. … As far as [the developing countries] were concerned, the Uruguay Round TRIPS negotiation did not go
Once the negotiations got under way, however, the developed countries essentially ignored the limited ministerial mandate and proceeded to table negotiating texts envisaging substantive minimum standards for the protection of intellectual property. Confident that they had the ministerial mandate on their side, the developing countries were “[n]ot willing to give an inch” and limited themselves to pointing out that it was the World Intellectual Property Organisation (WIPO) that had “responsibility for all matters of substance relating to rights.”\textsuperscript{231} 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.\textsuperscript{232}

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.\textsuperscript{233} This met with fundamental opposition from most developing countries, and especially India. At the meeting, the Indian negotiator reiterated time after time his total opposition to the approach adopted by the text. His view was that a discussion of intellectual property, and especially the contents of rights, was out of place in the GATT context. It was a matter for the World Intellectual Property Organisation.\textsuperscript{234}

As a result, the document adopted at the meeting contains two bracketed texts on intellectual property rights reflecting diametrically opposed positions.\textsuperscript{235} 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.

\textsuperscript{231} PAEMEN \& BENSCH, supra note 15, at 119.
\textsuperscript{232} Id. at 120.
\textsuperscript{233} Id. at 137.
\textsuperscript{235} Trade Negotiations Committee, Trade Negotiations Committee Meeting at Ministerial Level, Montreal, December 1988, MTN.TNC/7(MIN) (Dec. 9, 1988), at 21-24.
At the April meeting, negotiators reached a compromise along similar lines as the comprise on services reflected in the Punta del Este Ministerial Declaration. According to Paemen and Bensch, EC negotiators “secretly told India and Brazil that the future agreement on TRIPs would not necessarily have to form part of the legal GATT texts. This represented a major concession … India, which tended to adopt a legalistic attitude in matters relating to the GATT, allowed itself to be persuaded.”  

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.  

With this proviso in place, the developing countries agreed to negotiations encompassing substantive standards of intellectual property protection within the framework of the Uruguay Round. The text held out the prospect that any results on substantive standards could be either implemented under the auspices of WIPO or in another manner that would keep it institutionally separate from the GATT. At the same time, it allowed the developing countries to finally engage in the negotiations on substantive standards; up until that point, these negotiations had been conducted almost exclusively by the developed countries, and the developing countries recognised the danger that they were losing the opportunity to influence the final result in this area.  

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

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236 PAEMEN & BENSCH, supra note 15, at 143; see also OXLEY, supra note 15, at 170:
The developing countries were still very unhappy about having to deal with this subject. They were prepared to consider negotiations for new commitments but would not yet concede that they should be linked to the GATT system.

237 Trade Negotiations Committee, Mid-Term Meeting, GATT Doc. MTN.TNC/11 (Apr. 2, 1989), at 21. To recall, the final paragraph of the Punta del Este Declaration, supra note 227, 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.

238 MOHAMED OMAR GAD, REPRESENTATIONAL FAIRNESS IN WTO RULE-MAKING, NEGOTIATING, IMPLEMENTING, AND DISPUTING THE TRIPS PHARMACEUTICAL-RELATED PROVISIONS 106 (2006).
join them at all. It was clear that what the developing countries wanted to avoid at all costs was that agreements in these areas would be substantively linked to trade in goods, so that failure to comply with commitments on trade in services and intellectual property rights would give developed countries a right to retaliate against the exports of developing countries (“cross-retaliation”). The “institutional reservation” on the implementation of the results in services and intellectual property rights appeared to give them the right to reject any agreement that provided for cross-retaliation. In short, it held out the promise than they could join any agreement on their own terms.

This, of course, would frustrate the third element of the club approach. It suggested that the developed countries could go ahead and conclude agreements on services and intellectual property rights among themselves, but they would not be able to compel countries like India and Brazil – precisely those countries at whose practices these agreements were primarily aimed – to join those agreements on the developed countries’ terms.

Faced with this scenario, US negotiators began to internally discuss various options for concluding the Uruguay Round in late 1989. Preoccupied with the prospect that many developing countries would “free ride” on the new agreements under negotiation in the round, US negotiators considered the option of asking for a waiver from GATT MFN obligation for those agreements which presented the greatest concern in this regard. They also contemplated different scenarios under which non-signatories would voluntarily renounce their right to insist that the signatories apply an agreement on an MFN basis – basically a formalisation of what happened in the Tokyo Round, at least with respect to the United States.

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239 See India’s statement at the Punta Del Este Ministerial in MIN(86)/ST/33, supra note Error! Bookmark not defined., at 4:

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?

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

241 See PAEMEN & BENSCH, supra note 15, at 133, on the US position in the services negotiations:

The Americans were becoming obsessed with the idea of “free-riding” … This was to be a constant concern throughout the negotiations on services and took precedence over the Americans’ fear of alienating some of the developing countries.

242 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.
In the summer of 1990, US negotiators began considering more radical options to deal with the “free rider” problem. One of them was the “GATT II” approach, whereby the “Quad” countries – the US, the EC, Japan, and Canada – would withdraw from the GATT and join a substantively identical but legally distinct “GATT II” to which the new Uruguay Round agreements as well as the amended Tokyo Round codes would be annexed. The idea was that not joining the new GATT II and thus losing all rights to access the markets of the Quad countries would prove too costly for virtually all other contracting parties, thus forcing them to join the GATT II on the Quad countries’ terms. The chief drawback of the approach as it was perceived at the time was that it would be too confrontational and would further deteriorate relations with the developing countries. US negotiators referred to this option internally as “the power play”.

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. The major downside of this approach was seen in the fact that it would be hard to secure the support of two-thirds of the contracting parties to bring the amendment into force, and even harder to convince a sufficient number of contracting parties to subsequently expel those who did not ratify the amendment. Also, this variant did not appear significantly less confrontational than the “GATT II” approach. Other ideas under discussion revolved around obtaining a waiver from the GATT’s MFN obligation either for all Uruguay Round agreements as a package or for each agreement individually. What was clear to US negotiators even at this point was that an “a la carte”, or “menu”, approach to concluding the Uruguay Round, whereby each contracting party could choose which agreement to accept and at the same time enjoy the benefits of all

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243 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 to join the agreements negotiated in the Uruguay Round would ultimately be in those countries’ own interest; Steinberg Interview, supra note 240.

244 Steinberg, supra note 142, at 360.

245 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.
agreements on an MFN basis, was unacceptable to them. Of course, this was precisely the scenario on the basis of which the developing countries had agreed to negotiate on services and substantive intellectual property rights.

Meanwhile, the EC and Canada were pursuing a different idea, namely, to set up a new institution as an organisational umbrella for the GATT and the new Uruguay Round agreements. Canada, which was drawing on the ideas of Professor John Jackson, first suggested the establishment of a “World Trade Organization” in April 1990, and the EC followed up with a formal proposal for a “Multilateral Trade Organization” to the negotiating group on the “Functioning of the GATT System” (FOGS) in July 1990. As the EC explained at the first meeting of the FOGS group at which the question was discussed, it was not seeking to “undertake anything particularly revolutionary”; instead, its aim was “to establish a purely organizational treaty” which would provide an “umbrella-type organizational framework” for the “implementation and administration of the results of the negotiations and perhaps legally separate multilateral agreements”. The EC noted the possibility of “a services agreement which in all likelihood would be separate from the GATT”. 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.” This, of course, ran directly counter the US’s thinking at the time. Sure enough, the US representative took a dim view of the rationales offered by the EC for establishing a new organisation. In particular, the US argued that

legal structure was not and would not be the cause of the ‘fragmentation’ of the trading system. The fundamental problem was political; some countries refused to accept new obligations or clarifications of old obligations. The mere creation of an MTO could not force any country to accept an obligation which it was not otherwise willing to accept, and it could not therefore solve this problem.

To the US’s surprise, the EC subsequently proved very receptive to the “single protocol” approach, as US negotiators had started calling “GATT II” idea, when the US first presented the idea to the other Quad

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246 See John H. Jackson, Restructuring the GATT System (1990); Jackson was hired as a consultant by the Canadians.
250 Id.
251 Id. at 13, para. 53.
252 Id. paras. 30-35.
253 Id. at 8, para. 32.
254 In discussions with the other Quad countries, US negotiators sought to highlight the unifying effect of their approach, in that it would provide an elegant way of tying the
countries later in July 1990. In discussions with the Quad countries in the following months, the US pressed the point that adopting the “single protocol” approach would not only take care of the problem of “free riders”, but would also limit the extent to which the Quad countries would have to make substantive concessions to the other participants in the Round, thus making it possible to avoid what US negotiators called “lowest common denominator” agreements. In effect, US negotiators were arguing that the “single protocol” allowed the Quad to go all in for the club approach to multilateral trade lawmaking: in their scenario, all that ultimately mattered was that the Quad countries reached agreement among themselves; all other countries would effectively be forced to join whatever the Quad agreed on the Quad’s terms.

In order to make the “single protocol” idea more palatable to the other Quad countries and, eventually, the rest of the contracting parties, US negotiators started linking it with the “single undertaking” principle contained in the Punta del Este Ministerial Declaration. The principle stipulated that “The launching, the conduct and the implementation of the outcome of the negotiations shall be treated as parts of a single undertaking.” 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”.

As Andrew Stoler, one of the US negotiators promoting the re-interpretation of the “single undertaking” concept in 1990, would later write, “the single undertaking as it was expressed in 1986 in no way was interpreted as implying that all participants in the negotiations would need to take on all of the resulting obligations – especially those resulting from the services negotiations.”

results of the round together (“Single Protocol”), and to de-emphasise the more dramatic aspect of their proposal: that it envisaged doing so through a successor agreement to the GATT (“GATT II”). The latter aspect, they suggested, could be treated as a “technical issue”; Steinberg Interview, supra note 240.

255 Id.
256 Id.
257 Punta del Este Declaration, supra note 227, at para. B(ii). The Tokyo Declaration had contained a similar principle, pursuant to which the negotiations were to be “considered as one undertaking, the various elements of which shall move forward together”; see Tokyo Declaration on Multilateral Trade Negotiations (Sept. 14, 1973), 12 I.L.M. 1533 (1973), para. 8. Regarding the meaning of this principle, US negotiators commented that it would allow “the U.S. to keep the agriculture issue as part of the negotiation and not to allow it to be separated and possibly lost”; FRUS 1973-1976, at 684. In the debate about the implementation of the Tokyo Round results, the principle played no role. On the origins and wider significance of the “single undertaking” idea, see also Robert Wolfe, The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor, 12 J. INT’L ECON. L. 835 (2009).

259 Id. at 4; the “single undertaking” principle only applied to the goods part of the negotiations.
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. When the negotiations in agriculture stalled during the Mid-Term Review, the Latin Americans had in turn relied on the principle to withhold their consensus to the results in other areas.

Essentially, then, US negotiators were attempting to change the meaning of the “single undertaking” from the Tokyo-Round/Punta del Este understanding as “the various elements of [the negotiations] shall move forward together” to a “single protocol” understanding as “accept everything or remain outside the multilateral system”. There is little doubt that “few countries would have accepted this interpretation of the single undertaking in 1986.”

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260 See in particular the discussion of the principle in PAEMEN & BENSCH, supra note 15, at 58, 80-81 (“the principle of globality had been introduced to avoid excessive concentration on agriculture”), 97-98, 195 (“the principle of globality, the European Community’s battle-cry throughout the Uruguay Round, was really a one-way instrument, designed to adjust the pace of negotiations in other sectors to that of agriculture”); see also OXLEY, supra note 15, at 158 (“The Americans interpreted globality as ‘Europespeak’ for saying that little was to be allowed to happen in the negotiations on agriculture”).

261 Winham, supra note 79, at 808-809, 813; OXLEY, supra note 15, at 169; PAEMEN & BENSCH, supra note 15, at 80 (“This ‘principle of globality’ would later be taken up by other participants and exploited for their own ends”); see also Oral History Interview with Julio Lacarte-Muró, 13:58-16:44; 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.

262 Gallagher & Stoler, supra note 107, at 381; cf. Stoler, supra note 258, at 1:

The Quad countries decided that they could take advantage of the creation of the Multilateral Trade Organization (later the WTO) to force other Uruguay Round participants to accept a different meaning of the single undertaking language.

Id. 4:

The Quad changed the meaning of the Uruguay Round’s single undertaking at the end of the game.

Ricupero, supra note 261, at 16, arguably misinterprets who was the driving force behind the reinterpretation:

during the period between the Montreal and Brussels Ministerial meetings, the concept of single undertaking was altered, mainly at the initiative of the EC and Canada, but with ideas coming from the GATT Secretariat.

PAEMEN & BENSCH, supra note 15, at 257:

the industrialised countries have invented the principle of the ‘Single Undertaking’, which states in effect that the results of the negotiations constitute a single entity – and that a country must decide whether to take it or leave it.

263 Stoler, supra note 258, at 4.
As it happened, the developing countries were no more prepared to accept the new meaning of the “single undertaking” in 1990. By November 1990, the US had held informal consultations on the idea with some developing countries, including India and Brazil. At a TNC meeting in December 1990, India made its position clear:

We have entered into negotiations in the area of TRIPs with a clear reservation to the question of lodgement of the outcome. Nearly two years of negotiations on norms and standards have convinced us that there is no place in GATT for an agreement covering these aspects. They raise issues of policy spanning over diverse areas of technology, ethics, culture and economic development. GATT is concerned with trade policies and should remain as such.

Negotiations for a multilateral framework on services have always been held in a separate juridical framework from GATT.

…we are concerned at attempts to link agreements in the area of TRIPs and trade in services to the GATT through the concept of a single undertaking or the mechanism of a common dispute settlement machinery. We are not opposed to the idea of a new organization by whatever name it is called, as long as it is structured to service three distinct agreements. We reject any proposal which tends to link up three distinct agreements with a view to facilitating cross-retaliation.264

In an UNCTAD meeting in March 1991, the Indian ambassador did not mince his words, stating that

[t]he concept of a ‘single undertaking’ had been introduced at a ‘very late stage’ and was tantamount to ‘breach of good faith’. It was not part of the basis of negotiations and had been introduced to force Third World countries to accept all the results of the Round or opt out of the system. It would be prudent to avoid such an approach. The provision of flexibility for the Third World had not only to be in terms of time derogation but in absolute terms so that they were not forced to accept obligations inconsistent with their development, financial and trade needs.265

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

264 Trade Negotiations Committee, 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; in informal consultations, Brazil had taken a similar position; interview with Richard Steinberg.

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.266

The section on intellectual property rights made the continuing disagreement between developed and developing countries explicit:

The presentation of two draft agreements, the first on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods and the second on Trade in Counterfeit and Pirated Goods, is a reflection of two basically different approaches to the question of the relationship of the eventual results to the GATT. Some participants … envisage a single TRIPS agreement encompassing all the areas of negotiation; this agreement would be implemented as an integral part of the General Agreement. Other participants … envisage two separate agreements, one on Trade in Counterfeit and Pirated Goods, to be implemented in GATT, and the second on standards and principle concerning the availability, scope and use of intellectual property rights. The latter agreement would be implemented in the ‘relevant international organization, account being taken of the multidisciplinary and overall aspects of the issues involved’. It was agreed in the Mid-Term Review that the institutional aspects of the international implementation of the results of the negotiations on TRIPS would be decided by Ministers pursuant to the final paragraph of the Punta del Este Declaration.267

At this time, the annex on institutional provisions was still largely a blank page.268

One year later, the GATT’s Director-General, Arthur Dunkel, presented another version of the draft final act, the so-called “Dunkel Draft”. The US and EC had persuaded Dunkel to incorporate the “single protocol” idea into his draft.269 Article II of the proposed Agreement Establishing the Multilateral Trade Organization270 achieved all of the United States’ objectives: it tied the results of the Uruguay Round together by providing that the agreements annexed to the MTO Agreement would constitute an “integral part” of the MTO Agreement; it stipulated that the

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266 Trade Negotiations Committee, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Revision, MTN.TNC/W/35/Rev.1 (Dec. 3, 1990), at 2 (square brackets in original); footnote 1 referred to the “institutional reservation” that had provided the basis for the Mid-Term Review compromise on intellectual property rights.

267 Id. at 193.

268 Id. at 384.

269 See Steinberg, supra note 142, at 356:

… the Dunkel Draft … was tabled by the GATT Director-General as the secretariat’s draft. However, it was largely a collection of proposals prepared by and developed and negotiated between the EC and the United States, fine-tuned after meeting with broader groups of countries, and it embodied the secretariat’s changes mostly on points of contention between the two transatlantic powers.

270 See Trade Negotiations Committee, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations [Dunkel Draft], MTN.TNC/W/FA (Dec. 20, 1991) at 92.
agreements “shall have all members as parties”, thus eliminating any possibilities for “free riding”; and it constituted the MTO Agreement as a successor agreement to the GATT by providing that “[t]he General Agreement on Tariffs and Trade, as it results from the Final Act of the Uruguay Round … is legally distinct from the Agreement known as the General Agreement on Tariffs and Trade, dated 30 October 1947”; this would allow the Quad countries to withdraw from the original GATT and to terminate the market access obligations to GATT contracting parties which they had accumulated over the four decades of the operation of the GATT with respect to any country which refused to join the new organization; as a result, those who refused to join “would remain contracting parties to a de facto defunct agreement”.271

The institutional provisions of the Draft Final Act were not finalised for another two years. Negotiations occurred primarily in the “Informal Group on Institutional Issues” chaired by Julio Lacarte between September and December 1993.272 According to Andrew Stoler, who was the US representative in the Lacarte group and who was, in his own words, “very much involved in the Quad discussions that eventually led to th[e] reinterpretation of the Punta ‘single undertaking’ and [in] forcing this down the throats of developing countries”;273 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

271 Ricupero, supra note 261, at 17; see also Steinberg, supra note 142, at 360; Klaus Stegemann, The Integration of Intellectual Property Rights into the WTO System, 23 WORLD ECON. 1237, 1243 (2000): not joining the new organization would mean giving up the cumulated market access rights as guaranteed by multilateral trading rules and as negotiated in all GATT rounds.

Hudec, GATT, supra note 126, at 76:
governments would have to decide between accepting everything or leaving the GATT.

Stoler, supra note 258, 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.

… suppose that the entire Uruguay Round was in some sense a contract of adhesion imposed by the United States (and possibly the European Union), leaving many developing countries with the Hobson’s choice of acceding to an unsatisfactory package of agreements or being left out of the trading system altogether. … a smaller state … may … be faced with the choice of either signing on to the new agreements anyway or risk being left behind by the world trading system. This was quite literally true in the Uruguay Round, which substituted the ‘GATT 1994’ for the original GATT and thus ended the obligations of GATT members under the original agreement. Had a dissident state chosen not to accept the whole package of agreements concluded in the Uruguay Round, it would have been left with no multilateral trade rights.

272 E-mail from Andrew Stoler to author (Feb. 7, 2013) (on file with author) [hereinafter Stoler Correspondence]; PAEMEN & BENSCH, supra note 15, at 234.

273 Stoler Correspondence, supra note 272.
couple of days of the negotiations.”274 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.275 This was unsurprising – once the Quad countries had agreed to go ahead with the approach, there was simply nothing that the developing countries could do to prevent it from happening. That was the entire point.

The WTO, then, came into being as the ultimate club. Once the Quad countries knew that they would leave the old club and found a new one, they also knew that all they had to do was to agree among themselves. While this was not exactly easy – disagreements on agriculture and services persisted until the very end – it was at least possible. The founding of the WTO also gave the developed countries the leverage to shape the results of the Uruguay Round decisively – a multilateral agreement on services, an agreement on substantive intellectual property rights, both linked to trade in goods through the possibility of cross-retaliation in dispute settlement – these were all points that the developing countries, and in particular India, had opposed categorically throughout the round.276 Even more so than the GATT, however, the WTO was supposed to be a self-transcending club: it was never the intention to keep other countries out and to limit its membership. Rather, the intention was to get everyone else to join, but on the insiders’ terms. In a way, then, the WTO was the club to end all clubs.277

D. The Internalised Club: Lawmaking in the WTO

The conclusion of the Marrakesh Agreement and the establishment of the WTO changed the framework for multilateral trade lawmaking in important ways. First, the establishment of the WTO held the promise that lawmaking would occur on a continuous basis, dispensing with the need for major negotiating rounds.278 The built-in negotiating agendas in the GATS

274 Id.
275 Marrakesh Agreement art. II.2 and II.4.
276 While India noticeably warmed to the services agreement in the course of the negotiations, there is not a single negotiating document from the Uruguay Round in which India goes on record as supporting either cross-retaliation between services, intellectual property, and goods, or a GATT agreement on substantive intellectual property rights.
277 Interestingly, both Richard Steinberg and Andrew Stoler, probably the chief architects of the Uruguay Round “single undertaking”, are unhappy with the outcome. Stoler “regret[s] it all deeply” and now finds “the whole idea” to have been “a huge mistake”. According to Stoler, it eventually turned out that “the one-size-fits-all approach was not going to work and that the system was never going to be a one-tier system” (see the section on “Differentiation of Obligations” infra). At the same time, the single undertaking resulted in a large number of countries being “deeply involved in decision-making and often making sure that nothing happens in the WTO”. Stoler’s chief regret is to have “wrecked what had been a pretty good system in the GATT years”. Stoler Correspondence, supra note 272; Steinberg Interview, supra note 240.
Agreement and the Agreement on Agriculture, as well as the decisions taken at the Marrakesh Ministerial to continue negotiations on unfinished business of the Uruguay Round, were concrete commitments in this respect. Second, the Marrakesh Agreement arguably transformed the institutions of the multilateral trading system from a forum for the conclusion of bilateral or plurilateral “contracts” into a something more akin to a legislative body. Whereas the GATT system had allowed subsets of contracting parties to agree to more ambitious obligations in areas in which they had a particular interest without the consent of the other contracting parties, the WTO Agreement gives the entire membership control over the conclusion of new plurilateral agreements. Moreover, by obliging all Members to join all WTO agreements (with the exception of the four plurilateral agreements, of which three are now defunct), the WTO system gives all members a stake in the development of the law in all areas, thus making them potentially more reluctant to let small groups of members take the lead in developing the law among themselves. As a result, it has become much more difficult for a subset of members to assume more ambitious obligations in the framework of the multilateral trading system – to some extent, then, the WTO has indeed ended all clubs.

At the very least, the new lawmaking framework is markedly less hospitable to the club dynamics that flourished under the GATT. The only area in which this dynamic is still squarely at play in the WTO context is in accession negotiations, including accessions to the single functioning plurilateral agreement in the WTO framework, the Agreement on Government Procurement (a).

In regular negotiations, WTO members have developed negotiating techniques that superficially resemble the club approach in the sense that they allow the bulk of the negotiations to occur among relatively small groups of countries, thereby reducing the complexity of the negotiations and giving these countries a disproportionate influence on the outcome. Procedurally this is accomplished through negotiations in “variable geometry” (b); in terms of substance, it is made possible by exempting large swaths of the membership from new legal commitments, leading to an ever more sophisticated differentiation of obligations (c). In contrast to the times of GATT, however, this ‘internalised’ club is constrained: procedurally, by transparency and reporting procedures that have been put in place, and, substantively, by the need to keep other WTO members, who can now block an outcome that they perceive as unfavourable, on board.

279 Recall the unsuccessful attempt by developing countries at the conclusion of the Tokyo Round to make the opening for acceptance of the Tokyo Round codes subject to a consensus decision of the TNC; supra text at fn 144.
280 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)
a) Accession Negotiations

Accession negotiations provide a unique opportunity to WTO members to realize the third element of the club approach: make outsiders join their agreement(s) on the insiders’ terms. As discussed in chapter 1, except in the case of LDCs there are virtually no limits to what a WTO member can demand from an acceding country. Participants in the accession process have described its first stage – the examination of the conformity of the acceding country’s trade regime with WTO rules – as “akin to having a complainant at a panel act as the sole panellist”.281 The second stage of the accession process involves bilateral negotiations between the acceding country and interested WTO members. The key difference between these negotiations and the general lawmaking process in the WTO is that accession negotiations “offer… the applicant no possibility of imposing a marginal cost on the demandeur”.282 Grynberg and Joy, who worked on the accession of Vanuatu to the WTO, have described implications of this constellation:

Without any right or ability to impose costs on a demandeur negotiations must continue until the WTO members are satisfied that no further concessions are possible. Thus, irrespective of the size of the applicant, the bilateral negotiations will be protracted unless the applicant quickly concedes the vast bulk of the standardized demands of the large WTO members.283

The accession process thus allows WTO members to impose their terms on an acceding country – a paradigmatic instantiation of the third element of the club approach.

b) Variable Geometry

The question of “who gets to be in the room” did not cease to be an issue in the WTO – to the contrary, in the first years of the existence of the WTO, there was considerable apprehension that the GATT practice of the major trading powers reaching agreement among themselves and presenting it to the rest of the membership as a fait accompli would continue – in other words, that the club dynamic of the GATT would survive. These concerns acquired new urgency after the collapse of the Seattle ministerial meeting, which was supposed to launch a new round of trade negotiations. While the meeting was wildly seen as having failed due to inadequate preparation and substantive disagreements,284 it had featured the same exclusionary

282 Id. 160.
283 Id.
284 See WT/GC/M/53, para. 44, reporting the statement of the Director-General:
While he believed most would agree that major issues of substance had played a greater role than process in preventing agreement in Seattle, getting the process right was important.
dynamics that were known from the GATT days. 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 consultations between smaller groups of members were useful and, given the large membership of the WTO, indeed essential to build a consensus, the transparency of these consultations had to be increased, the non-participating members had to be informed about developments in these consultations on a regular basis, and all decision-making power had to be effectively reserved to forums in which the entire membership participated. As India put it at the time, if these conditions are met, the “green room meetings will by and large get de-glamorised”.

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. The chairmen of WTO negotiating groups openly embrace negotiations in “variable geometry” or “concentric circles”, 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” and “inclusive” for the purposes of WTO negotiations.

See also Internal Transparency and Effective Participation of all Members. Main Points Raised by Delegations, JOB(00)/2331 (Apr. 14, 2000), at 3, for the views of WTO members on this issue.

Keohane & Nye, supra note 17, at 269-270.

JOB(00)/2331, supra note 284, at 14.

See already General Council, Special Session on Implementation, Minutes of Meeting, WT/GC/M/59 (Nov. 13, 2000); for a sceptical view, see Fatoumata Jawara & Aileen Kwa, Behind the Scenes at the WTO. The Real World of International Trade Negotiations (2004).

References to this concept in Chairs’ reports are common; see e.g. 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 para. 6.

The WTO website defines “concentric circles” as follows:

a system of small and large, informal and formal meetings handled by the chairperson, who is at the centre. The outer “circle” is the formal meeting of the full membership, where decisions are taken and statements are recorded in official minutes or notes. Inside, the circles represent informal meetings of the full membership or smaller groups of members, down to bilateral consultations with the chair. Members accept the process as they all have input and information is shared.

The WTO website defines “transparent” as follows:

sharing information, in this case so all members know what is happening in smaller group meetings. In WTO negotiations and other decision-making, ideas are tested and issues are discussed in a variety of meetings, many of them with only some members present. Members approve of this process so long as information is shared. They also want the process to ensure they can have input into it (“inclusive”). The final decision can only be taken by a formal meeting of the full membership.

The WTO website defines “inclusive” as follows:
At the same time, anything that smacks of a fall back into the club dynamic of the GATT era has met with a rather furious backlash. Thus, in the run-up to the Cancún ministerial in 2003, the United States and the EU presented a joint proposal on agriculture that was more lenient than most developing countries and agricultural exporters had hoped, most notably in continuing to allow agricultural export subsidies. With the conclusion of the agricultural negotiations in the Uruguay Round still fresh in their minds, the major developing countries coalesced in a new coalition, the G20, to resist the proposal. At the Cancún ministerial itself, the United States managed to have its response to a proposal for the expeditious reduction of subsidies on cotton inserted in the draft ministerial declaration; this contributed to the collapse of the meeting. In the subsequent negotiations, the US and the EU had to abandon their positions on both subjects; the next ministerial declaration envisaged the abolition of agricultural export subsidies by 2013 and contained an expeditious schedule for the reduction and abolition of subsidies on cotton.

In sum, it is undeniable that participation in negotiations still has elements of the club approach. Small group meetings serve to make it easier to reach agreement. Moreover, the major trading nations are present and active in all small group meetings, which will translate into a disproportionate impact on the outcome of the negotiations. At the same time, their control of the negotiations has become much more tenable and their ability to force others to join their agreement is extremely diminished. Other WTO members are now much better informed of the progress of the negotiations and are effectively able to insert themselves into the negotiations and to block agreement whenever they want. Moreover, the number of major players has increased, and the US and the EU now share the stage with a number of other major participants, in particular India, Brazil, and China.

c) Differentiation of Obligations

WTO members have attempted to take advantage of the first two benefits of the club approach in WTO lawmaking by accepting an increased differentiation of obligations in the trading system. This increased differentiation has taken two forms.

First, negotiating modalities, such as the NAMA and agriculture modalities in the current Doha Round negotiations, now contain highly differentiated rules for the undertaking of commitments. At least in part, this differentiation reflects an attempt to reduce the complexity of trade negotiations: thus, the agriculture modalities envisage very shallow ensuring all members have input into a process even when meetings involve only some of them. In WTO negotiations and other decision-making, ideas are tested and issues are discussed in a variety of meetings, many of them with only some members present. Members approve of this process so long as information is shared and they have input into it either by being present or being represented by a group coordinator. The final decision can only be taken by a formal meeting of the full membership. …
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.\footnote{292} 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 products\footnote{293} and with respect to the regulation of telecommunications markets,\footnote{294} on a critical mass basis. In order to be able to assume these commitments without having to seek the permission of non-participating countries, the participants in critical mass lawmaking have inscribed their additional commitments in their GATT and GATS schedules, instead of embodying them in an amendment to those agreements\footnote{295} or in a new plurilateral agreement.\footnote{296} The route via schedules allowed the critical mass countries to realise the first two benefits of the club approach: they could negotiate among themselves and did not have to pay attention to the interests of outsiders. At the same time, however, scheduled commitments have to be implemented on an MFN basis; in other words, the scheduling option does not allow the critical mass countries to exclude non-participants from the benefits that the latter might derive from the additional commitments, as an amendment or a new plurilateral agreement might have done. Again, the insiders thus have little leverage to force outsiders to join their agreement.

\footnote{292} Interview with Joseph Glauber, Washington, D.C. (Apr./May 2010); according to Glauber, the chairman of the negotiations would simply ask the negotiating group whether anyone would mind if he exempted, say, the LDCs or the SVEs from a particular reduction commitment. Because of the small trade volumes involved, nobody would object, and the group would be exempted. As a result, many of the key reduction commitments in the agriculture modalities would ultimately only apply to a relatively small group of countries with significant trade volumes, and negotiations would thus mainly occur among those countries.


\footnote{294} For the Reference Paper on basic telecommunications, see LANG, supra note 90, at 284-290; for the original proposal, see Negotiating Group on Basic Telecommunications, Communication from the United States. Scheduling Regulatory Principles, S/NGBT/W/18 (Jan. 23, 1996).

\footnote{295} This would have required the support of at least a two-thirds majority of WTO members; see Marrakesh Agreement art. X:1.

\footnote{296} This would have required a consensus decision by the WTO membership; see Marrakesh Agreement art. X:9.
IV. Conclusion

In this article, I have shown that the multilateral trading system used to work as a ‘club.’ Despite the ambition to universality that marked the US’s push for an ITO, the developed countries early on began to see participation in multilateral trade lawmaking as a ‘club good’. Three factors prompted them to take this perspective: the greater practicality of negotiating among a smaller group of countries; the ability of the insiders to shape the content of the agreement decisively; and the prospect that they might subsequently be able to force outsiders to join the agreement on the insiders’ terms.

While the club approach holds many attractions for the insiders and has been employed for a number of reasons, I have drawn particular attention to how the major developed countries have used it to establish and defend the principle of reciprocity as the basis for multilateral trade lawmaking. The relationship between the club approach and the principle of reciprocity is one of mutual reinforcement. On one hand, 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 I have argued above, the club approach was pioneered not only to make bilateral request-and-offer negotiations practicable, but also to allow the “nuclear” countries to deny the benefits of the tariff concessions that they had granted each other to any ITO member that did not engage in tariff negotiations to the satisfaction of the nuclear countries. Similarly, the exclusionary negotiating arrangements adopted in the Kennedy Round tariff negotiations were in large part adopted to entice developing countries to make an appropriate “contribution” to the negotiations; thus, any country that had not been recognised – on the basis of its compliance with the reciprocity norm – as a “full participant” in the negotiations, was not allowed to see the list of products that the developed countries were planning to exempt from their horizontal tariff cut; such a country was thus unable to protest against the exemption of products of export interest to it. In the Tokyo Round, the developed countries’ strategy to include the conditional MFN principle in the new codes on non-tariff barriers, although only partially successful, was similarly designed to force non-signatories to pay for the benefits of the codes. And finally, the Uruguay Round single undertaking and the establishment of the WTO were embraced by the Quad countries, and the US in particular, as “an opportunity not to be missed to rid the new system once and for all of free riders.”

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 297 Stoler, supra note 258, at 4.
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.