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# Introduction and overview

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This introductory chapter outlines the development of the role of law and lawyers in the multilateral trading system from its birth in 1948 until today. It recounts the various ways that law and lawyers have been included (and sometimes excluded) first in the General Agreement on Tariffs and Trade (GATT) and then in the World Trade Organization (WTO) system. It traces the ways in which the GATT and WTO Secretariats have been structured and legal work has been distributed over time. It further seeks to uncover the various and complex historical processes and circumstances that have led the WTO to become one of the most important players in the development of international law and, according to many commentators, a prime example of the possibility and value of the international rule of law.

Our aim in preparing this chapter has been to provide useful background and context for the chapters that follow. Our aim is not to provide a theoretical or philosophical description of the rule of law or a comprehensive narrative of the history of the GATT or the WTO. It is rather to show how changing circumstances have both reflected and shaped the evolution of the rule of law in the GATT and the WTO. It thus places the individual chapters that follow into a historical framework. Various chapters in this book focus on specific manifestations or expressions of the rule of law in GATT and WTO practice. Accordingly, our aim in this chapter is to construct a chain that links the past to the present, to tell the story of the rule of law in the GATT and the WTO.

Much of what follows is based upon our reading of the contributions that form the bulk of this book. We have also conducted independent research to fill gaps and resolve inconsistencies. In this, however, we have not attempted to be comprehensive. A full history of this topic remains to be written; here we present the results of our own, far

more modest 'historical sleuthing'. We would be thrilled if what we have uncovered whets the appetite of some dedicated researchers and spurs a more thorough 'archaeology' of GATT and WTO institutional history. Nevertheless, though relatively modest in scope, the research undertaken was essential to provide background and context to the more personal reflections contained in the following chapters. As a perusal of the table of contents testifies, the book contains contributions from a wide range of current and former GATT and WTO staff, as well as Appellate Body members. The contributions are diverse in their subject matter and style, ranging from theoretical and historical studies to more personal reflections and memoirs. In light of this, this introductory chapter tries to provide a broad overview of the GATT and the WTO story. This ensures that the individual contributions can be fully appreciated and understood in light of the historical circumstances that are not always explicit but have nevertheless informed and shaped the contributors' experiences.

Throughout this introduction, we attempt to show that while the term 'rule of law' may be of recent coinage,[1] the fundamental concepts of justice, fairness and transparency that underpin it have always been present in the GATT and WTO systems. Of course, the concept of the 'rule of law' has been understood differently by different people at different times in the history of the GATT and the WTO, and the degree to which a 'rules-based' system and a system based on the rule of law are the same is, as former Appellate Body member and chairperson David Unterhalter notes in his chapter,[2] not always clear. Some contributors to this book argue that, although the GATT was a rules-based system, it is only since the establishment of the WTO that a true 'rule of law' culture has emerged in the multilateral trading system. Other contributors, however, submit that the GATT Secretariat was always deeply concerned with ensuring basic rule of law values, even where the agreed rules themselves were not always strictly respected. In this chapter, we argue that the vital importance of rules-based decision-making was appreciated from the very beginning of the GATT's existence, even if the institutional mechanisms in which that understanding was embodied and expressed changed over the years, sometimes dramatically. On our reading of GATT and WTO history, the story of the multilateral trading system is, on the whole, a story about the way participants and stakeholders have sought to ensure that rules are followed and, more profoundly, that international trade operates in a fair and transparent environment. From the contributions in this book, it is also clear that generations of GATT and WTO staff involved in legal work –

[1] See Hillman, Chapter 2 in this book. [2] See Unterhalter, Chapter 32 in this book.

lawyers and non-lawyers alike – have always believed that the value of the GATT and the WTO system lies precisely in its power to bring the rule of law into the realm of international commerce. This conviction has animated their careers.

We begin by discussing the various ways in which the negotiators of the GATT understood and sought to incorporate the rule of law into their proposed International Trade Organization (ITO). The chapter then proceeds through the decades, sketching an overall or 'bird's eye' view of the historical and current role of law and lawyers. This sketch is based on the individual perspectives of persons involved in GATT and WTO legal work and in various tasks directly or indirectly related to expressions of the rule of law. Our focus throughout is on dispute settlement, the quintessential 'legal' activity of the Secretariat, as well as non-dispute-related legal work, whose importance is too often underestimated. With respect to dispute settlement, we look at both the development of institutional mechanisms to resolve international trade disputes in a fair and transparent manner, and at the changing role of lawyers and legalism in the dispute mechanism over the years. With respect to non-panel work, we explore the day to day implementation of the rule of law in the GATT/WTO practices and look at the changing place of lawyers as technical experts assisting the Secretariat's operational divisions to administer the GATT and subsequent multilateral trade agreements. We further look at the role of lawyers and non-lawyers in 'housekeeping' – that is, institutional and administrative – legal work.[3]

## 1945–48: Beginnings – negotiating the Havana Charter

As is well known, the GATT was never intended to be an independent international institution. On the contrary, it was negotiated as a stopgap solution to implement tariff concessions. The GATT was only one part of the Havana Charter of the ITO, which in turn was intended to be one of the pillar international institutions of post-Second World War (WWII) reconstruction. Ultimately, the ITO never entered into force, and the GATT lived on in a state of provisional application.

Although the GATT was only provisionally applied pending the anticipated entry into force of the ITO, governments made significant trade concessions to accede to the GATT and gain admission to the club. Their actions demonstrated the value that the GATT contracting parties had created together, even in an improvised and provisional framework. The

[3] On 'house-keeping' legal work, see Renouf, Chapter 23 in this book.

GATT stood as living proof that if the commercial substance was there, the legal formalities could be set aside for another day; it was too useful to abandon when the ITO faded away. Over time, governments found it less and less troubling that the GATT was only provisionally applied. Although the GATT managed to develop over time into a quasi-international organisation, it was only in 1995, with the creation of the WTO, that the multilateral trading system gained a formal international organisation.

Our tour of GATT history starts with the wartime negotiations on post-war economic reconstruction. Ambivalence concerning the role of law and lawyers was already evident at that time. As Peter Williams, a previous director in the GATT Secretariat, describes in his chapter in this book (Chapter 4), many of the original negotiators were 'statesmen and diplomats' who preferred to see the project of building a multilateral trading system as essentially political and economic, rather than legal.[4] During UK–US negotiations on future economic institutions,[5] the eminent economist and UK negotiator John Maynard Keynes remarked: '[i]sn't our scheme intended to get things done, whereas yours will merely provide a living for a large number of lawyers?'[6] US negotiator (and lawyer) Dean Acheson recalled that 'Keynes did not like lawyers. He thought the United States "a lawyer-ridden land" and believed that "the Mayflower, when she sailed from Plymouth, must have been entirely filled with lawyers".'[7]

It is therefore hardly surprising that both the London and Geneva sessions of the Preparatory Committee for the Charter negotiations were the scene of significant controversy over the role of law in trade diplomacy and the place, if any, of lawyers in the future Organization. In the earliest published proposed ITO Charter prepared in 1946 by the United States,[8] Article 76(2) would have permitted the ITO (with the approval of the UN General Assembly) to refer any question concerning interpretation of its Charter to the International Court of Justice (ICJ) for an advisory opinion. The US Draft Charter would also have allowed any ITO member to appeal to the ICJ any 'justiciable issue' arising from an ITO ruling concerning

[4] Williams, Chapter 4.
[5] D.A. Irwin, P.C. Mavroidis and A.O. Sykes, *The Genesis of the GATT* (Cambridge University Press, 2009), p. 65 *et seq.*
[6] R. Skidelsky, *John Maynard Keynes: Fighting for Britain, 1937–1946* (London: Macmillan, 2000), p. 416.
[7] D. Acheson, *Present at the Creation: My Years in the State Department* (New York: W.W. Norton, 1969), p. 83.
[8] Reprinted as Annexure 11 to the Report of the First Session of the Preparatory Committee of the UN Conference on Trade and Employment ('London Report'), October 1946.

arms trade, essential security interests of members, fissionable materials, security-related UN Charter obligations, or any 'justiciable issue' arising out of any other ITO ruling with the consent of the ITO.[9]

Negotiators modified this scheme during the London, New York and Geneva conferences of the Preparatory Committee. Most importantly, they revised the article on interpretation and settlement of disputes in London. An Article 86 (a redrafted version of Article 76 in the US Draft Charter) was added to the Charter to enable the ITO to ask for an advisory opinion of the Court 'on legal questions arising within the scope of [its] activities'.[10] This wording caused considerable difficulty among the negotiators. What, after all, was a 'legal question', as opposed to a factual or an economic one?

Many delegates were concerned by this apparent expansion of the ICJ's competence to include substantive political and economic questions. Some delegates expressed the view that 'only legal issues should be referred to the courts, politico-economic decisions being recognised as the Organization's own responsibility'.[11] Delegates from common law jurisdictions especially voiced concern about vesting the ICJ with a supervisory jurisdiction that would 'obstruct ITO action'. These delegates agreed that 'mostly factual' issues should not come within the Court's competence, since '[o]n such issues . . . the ITO's experts are more reliable than . . . judges'.[12]

Delegates' desire to keep law at a distance from the political, economic and other technical business of the Organization was fed by scepticism regarding the role of lawyers in international trade diplomacy and in

[9] S. J. Rubin, 'The Judicial Review Problem in the International Trade Organization', *Harvard Law Review*, 63 (1949), 78–98, 81.

[10] *Ibid.*, 81. The ITO was intended to become a UN specialised agency, and Article 96(2) of the UN Charter provides that UN specialised agencies may (with UN General Assembly approval) request ICJ advisory opinions on 'legal questions arising within the scope of their activities'; see e.g. the 1996 ICJ advisory opinion *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (finding that the legal question posed by the World Health Organization (WHO) was not within the scope of WHO's activities).

[11] Report of the First Session of the Preparatory Committee of the UN Conference on Trade and Employment, p. 792.

[12] See Rubin, above n. 9, p. 87. Canada, for instance, expressed doubt whether the kinds of highly technical economic, financial and commercial matters to be dealt with by the ITO were amenable to judicial interpretation and decision. The major common law countries, including the United States and the United Kingdom, therefore sought to insulate 'factual questions' from questions concerning the 'legal validity' of acts or decisions taken by the ITO. The latter were to be reviewable according to law; the former, which were not considered to be 'legal' questions, were wholly within the mandate of the Organization, and as such would be immune from judicial review.

economic management and relations more generally. During the negotiations in 1947, Australia argued for limiting ICJ review jurisdiction, to foil lawyers' occupational tendency to 'mission creep':

> [I]t might be argued that the Court, being a legal Court, would confine itself to legal aspects, but I have had some experience of lawyers and they very frequently regard legal aspects of the question as covering the whole question, and we might find ourselves therefore in a position where we are submitting what are essentially problems of an economic character from a body which purports, at any rate, to be equipped to handle such problems, and is set up for the purpose of handling them, to another body which is set up for an entirely different purpose, and which has no claims to adequacy in this field.[13]

The United Kingdom also rejected the possibility of vesting broad review powers in the ICJ, insisting that the ITO should be 'master in its own house'.[14] It doubted the workability of any strict distinction between fact and law, and hoped to increase the difficulty of accessing what would nevertheless remain a technically available avenue for judicial oversight. The United Kingdom thus sought an amendment that would make appeal to the ICJ available only on matters regarding 'the interpretation of the Charter', and then only with the agreement of at least one-third of the membership.

However, a number of delegates representing countries with civil law traditions urged that the ICJ should have jurisdiction over some factual as well as legal questions. The delegate from France, for instance, suggested that 'the question submitted to the Court may be of a legal nature, but should be examined at the same time as some facts'.[15] A number of delegates went further, supporting a Belgian proposal to establish an economic or commercial chamber or division of the ICJ, whose judges would be proficient in the economic, political and social technicalities of international trade.

The strong common law opposition to the presence of lawyers (and the role, if not the rule, of law in international trade) is perhaps surprising, given the strong commitment to governance through case law (and the

[13] UN Economic and Social Council, 'Second Session of the Preparatory Committee of the UN Conference on Trade and Employment', Corrigendum of verbatim report of twenty-sixth meeting of Commission B (E/PC/T/B/PV/33, 22 July 1947), p. 54.

[14] Rubin, above n. 9, p. 88.

[15] UN Economic and Social Council, 'Second Session of the Preparatory Committee of the UN Conference on Trade and Employment', Corrigendum of verbatim report of twenty-sixth meeting of Commission B (E/PC/T/B/PV/33, 22 July 1947), p. 59.

bureaucracy that accompanies its administration) that is so characteristic of the common law system. One way to account for the general opposition of the common law negotiators to any broad review jurisdiction may be to recognise that the fact/law distinction, pressed by Australia and the United States among others, reflects the division of competence between executive and judiciary in classical administrative law jurisprudence.[16] Negotiators familiar with that system may have understood the ITO as a kind of supranational administrative agency, to be accorded the same discretion and autonomy, and subject to the same (limited) judicial oversight as national executive agencies.[17] It is also plausible to think that, as Rubin has suggested, 'this attitude was attributable to the fact that the common law countries' delegations were primarily composed of economists, or at any rate non-lawyers'.[18]

Whatever the reason, it is clear that many, if not most, of the GATT's negotiators were ambivalent or even hostile to attempts to 'judicialise' international trade, even though the purpose of the GATT (and the ITO) was to establish a transparent, predictable and rules-based system for international trade. In this attitude, then, lies the kernel of a Janus-faced approach to law that would come to characterise the GATT as an institution: a suspicion of formal legalism on the one hand, but a deep commitment to rules and rules-based conduct on the other. To use the framework suggested by Unterhalter in his chapter (Chapter 32), a certain hostility towards a strictly rules-based system, but a commitment nevertheless to the rule of law as a meta-value encompassing transparency, predictability and fairness in trade relations.

In the end, of course, the ITO Charter never entered into force. Neither did its Article 91(2), which provided that '[a]ny resolution . . . or decision of the Conference . . . shall be subject to review by the International Court of Justice'.[19] This history is nonetheless valuable insofar as it suggests a deep discomfort among many negotiators and especially those from relatively powerful, influential and developed states, about the role of law and lawyers in the multilateral trading system. To them, and to the governments they represented, international trade relations were first and foremost politico-economic, rather than legal. The multilateral trading system, as they saw it, was thus to be primarily technical and pragmatic rather than strictly legal, operated by people like them (economists and trade technicians) rather than administrative or international lawyers.

[16] Rubin, above n. 9, p. 97. [17] *Ibid.*, pp. 96–8. [18] *Ibid.*, p. 87. [19] *Ibid.*, p. 91.

## 1948–50: The beginning of the GATT

As GATT was never intended to be an international organisation, it had almost no institutional provisions and only limited provisions on dispute resolution. Perhaps because 'a number of delegations felt that as [the] GATT was only an "interim arrangement", it was unnecessary to spell out in the Agreement all the clauses contained in the Havana Charter'.[20] The GATT's dispute settlement provisions included little instruction on how disputes should be resolved, and no guidance whatsoever on the Secretariat's structure or its role in dispute settlement.

This flexibility enabled the Secretariat staff, which consisted of a very small number of persons 'on loan' from the Interim Commission for the International Trade Organization (ICITO), to respond pragmatically to changes in the international trading environment.[21] Thus, the Secretariat was able to evolve into different divisions and develop staff expertise. This allowed the Secretariat to respond to the needs of the contracting parties and to its own growing role in the administration of the multilateral trading system.

Lawyers have always had a presence in the Secretariat. The first two leaders of the Secretariat, Eric Wyndham White[22] and his successor Olivier Long, were both lawyers by training. Wyndham White only had a handful of staff working directly under him, including a legal adviser, Alan Renouf, who was seconded from the United Nations in 1948.[23] Renouf was an Australian who had been closely involved in the establishment of the United Nations. He worked as a member of the preparatory commission and as Australia's delegate before taking up the post of Legal Adviser.

[20] General Agreement on Tariffs and Trade, 'Dispute Settlement Procedures', (NRR/jp, 15 June 1976) (copy on file with authors), p. 7.

[21] The Secretariat of the GATT was legally the ICITO Secretariat from 1948 until 1 January 1995 with the entry into force of the WTO Secretariat.

[22] As Farias has explained, Wyndham White's first title was Executive Secretary for the Interim Commission for the International Trade Commission. In 1957 the title was changed to Executive Secretary to the Contracting Parties of the GATT; finally, by a decision of 23 March 1965, the contracting parties changed the title to Director-General of the Contracting Parties: see R. de Souza Farias, 'Mr GATT: Eric Wyndham White and the Quest for Trade Liberalization', *World Trade Review*, 12 (3) (2013), 463–85, 464. See also Article XXVI of the GATT 1994.

[23] Interim Commission for the International Trade Organization, Executive Committee, 'Report of the Executive Committee of the ICITO on the Work of the Secretariat' (ICITO/EC.2/5, 13 July 1948), p. 1. Little is known about Renouf's work in GATT's early days. Coincidentally, the current Legal Counsel to the Administration also has the surname Renouf, but there is no relation: see Yves Renouf, Chapter 23 in this book.

Following his time at the GATT, he went on to a very distinguished diplomatic career, including postings to Washington, DC and Paris as Australian Ambassador.[24]

It is not entirely clear what role Alan Renouf had as adviser to Wyndham White. Presumably, he was involved in the institutional implementation of one of the first truly multilateral international treaties. At this early stage, lawyers were not involved in the settlement of disputes, at least not as lawyers, even though the first steps towards third-party adjudication of trade disputes began almost from the inception of the GATT, with disputes referred to the chairperson of the contracting parties for a ruling.[25] These requests for a ruling were dealt with at the session (periodic gatherings of the GATT membership) at which they were raised.[26] By the time the third case[27] was submitted to the chairperson of the contracting parties for a ruling in 1949, the proceedings included a more extensive discussion between the disputants and other contracting parties. However, there was no formalised role for lawyers or legal advice, and disputes were ultimately resolved by vote for or against the claim.

The *Brazil – Internal Taxes*[28] case marked a shift in the dispute settlement proceedings. For the first time, disputes began to be referred to working parties, which consisted of between five and eighteen delegations (including the parties to the dispute). The working party was expected to issue a report to the contracting parties, who could then adopt it.[29]

[24] Renouf's obituary is available at: www.smh.com.au/news/obituaries/straighttalker-in-diplomatic-ranks/2008/05/28/1211654116394.html?page=fullpage.

[25] The first chairman of the contracting parties was the Canadian diplomat Dana Wilgress.

[26] The first dispute (1948) concerned a request by the Netherlands for a ruling by the chairman of the contracting parties on whether Cuban consular taxes would be included in 'charges of any kind' in Article I of the GATT. The chairperson ruled that it would. After a short discussion, the contracting parties agreed with the chairperson. The second case was concerned with the Most-Favoured-Nation principle in Article I:1 of the GATT and was dealt with in a similar way to the first 'case' and at the same session.

[27] General Agreement on Tariffs and Trade, 'Request of the Government of Czechoslovakia for a decision under Article XXIII as to whether or not the Government of the United States has failed to carry out its obligations under the Agreement through its administration of the issue of export licences' (CP.3/SR22 – II/28, 8 June 1949).

[28] Working Party Report, Brazilian Internal Taxes (*Brazil – Internal Taxes*), GATT/CP.3/42 (First Report), adopted 30 June 1949, BISD II, p. 181; GATT/CP.5/37 (Second Report), adopted 13 December 1950, BISD II, p. 186.

[29] 'Considerations Concerning Extended Use of Panels: Note by the Executive Secretary' (L/392, 22 August 1955), p. 2: 'The working party has consisted of a number of delegations, varying from five to eighteen according to the importance of the question or the interests involved. A delegation which is a member of the working party is free to appoint any individual in its delegation and to change this representative as it thinks fit. All members

The focus was, however, very much on securing a negotiated settlement through diplomacy, and the working party reports for this period reflect a certain measure of negotiation and compromise which was necessary to take account of the diverging views of the various membership.[30] Indeed, a Secretariat memorandum indicates that '[t]hough the[] Working Parties considered and pronounced on legal issues, they were still negotiating bodies'.[31]

The absence of lawyers in these proceedings is at least partly accounted for by the fact that, as Professor Hudec has explained, 'most of the delegates to GATT meetings were also veterans of the GATT/ITO negotiations themselves. As such, they all felt they knew exactly what was meant by all of the provisions in the agreement they had drafted.'[32] Legal advice and interpretation were therefore felt to be unnecessary.[33] Moreover, many participants in the burgeoning multilateral trading system considered that 'the rules would only be observed when participants voluntarily accepted them and when the rules reconciled their conflicting short-term interests with their common long-term interests in a mutually beneficial manner'. Accordingly, informal, diplomatic dispute resolution

of the working party occupy the same status, including the contracting party which is being consulted or whose report is under consideration. The report of such a working party must either represent the views of all its members or record any minority views. Since the tendency has been to strive for unanimity, there has usually been some measure of negotiation and compromise between the consulting government and the rest of the working party in determining the form the report shall take.'

[30] General Agreement on Tariffs and Trade, 'Dispute Settlement in International Economic Agreements: Factual Study by the Secretariat' (MTN/SG/W/8, 6 April 1976), p. 3 ('the majority of the Working Party themselves were frequently inhibited in frank expression of views in their report to the contracting parties because of their desire to reach unanimous agreement in the Working Party').

[31] General Agreement on Tariffs and Trade, 'Dispute Settlement Procedures' (NRR/jp, 16 June 1976), (copy on file with authors), p. 7.

[32] R. E. Hudec, 'The Role of the GATT Secretariat in the Evolution of the WTO Dispute Settlement Procedure' in J. Bhagwati and M. Hirsch (eds.), *The Uruguay Round and Beyond: Essays in Honor of Arthur Dunkel* (Berlin: Springer-Verlag, 1998), p. 104. See also, to similar effect, Luyten, Chapter 3 in this book.

[33] *Ibid.*, p. 106 ('Given the extensive experience of the Chairman and the leading delegates, it is probable that they already had strong views on how they wanted these early legal issues to be handled, and would not have required much guidance from the Secretariat . . . most of the delegates serving on the working parties would probably have needed very little guidance as to the merits of the legal problems before them'); see also Jennifer Hillman, 'An Emerging International Rule of Law? The WTO Dispute Settlement System's Role in its Evolution', *Ottawa Law Review*, 42 (2010–11), 269–84, p. 276 ('The key goal was finding a solution, rather than crafting exhaustive legal analysis or the best application of the law to the facts at hand').