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978-1-107-08523-7 - A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System

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## A HISTORY OF LAW AND LAWYERS IN THE GATT/WTO

How did a treaty that emerged in the aftermath of the Second World War, and barely survived its early years evolve into one of the most influential organisations in international law? This unique book brings together original contributions from an unprecedented number of eminent current and former GATT and WTO staff members, including many current and former Appellate Body members, to trace the history of law and lawyers in the GATT/WTO and explore how the nature of legal work has evolved over the institution's sixty-year history. In doing so, it paints a fascinating portrait of the development of the rule of law in the multilateral trading system, and allows some of the most important personalities in GATT and WTO history to share their stories and reflect on the WTO's remarkable journey from a 'provisionally applied treaty' to an international organisation defined by its commitment to the rule of law.

GABRIELLE MARCEAU is a counsellor in the Legal Affairs Division of the WTO Secretariat. Her main function is to advise panellists in WTO disputes, the Director-General's Office, the Secretariat and WTO members on WTO-related matters. Dr Marceau is also Associate Professor at the Law Faculty of the University of Geneva, Switzerland, and has published extensively on WTO matters.

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## PLATES

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1. Sir James Helmore Laconte (middle), UK Ambassador, and Alan Renouf (right), GATT Legal Officer, in discussion at the Palais des Nations in 1947.
2. The original contracting parties to the GATT hold one of their first sessions at the Palais des Nations in Geneva on 17 August 1948.
3. A meeting of GATT contracting parties circa 1957. Those pictured include (from left to right): Jean Royer, GATT Deputy Director-General; Peter Haight, Head of Operations Unit; Eric Wyndham White, GATT Executive Secretary; and Madelaine Feisilber, Royer's Personal Assistant.
4. An informal meeting in 1967 in the office of Eric Wyndham White, GATT Executive Secretary, which resulted in all key elements of the Kennedy Round being agreed. Participants include (seated from left to right): Jean Rey, European Commissioner for External Relations; Finn Gundelach, GATT Deputy Director-General; and Peter Williams, secretary of the meeting.
5. Paul Luyten (seated), Head of the EEC Permanent Delegation to the GATT, signing a GATT legal instrument circa 1976. Also pictured (from left to right) are: Hielke van Tuinen, GATT Counsellor; Åke Lindén, GATT Counsellor; and Yvette Davel, Administrative Assistant.
6. Signing of a GATT legal instrument circa 1966. Those pictured include: Finn Gundelach (left, standing), GATT Director and subsequently Deputy Director-General; Åke Lindén (centre, back), GATT Counsellor; and Noel Torres (right), legal adviser in the GATT Secretariat.
7. Gardner Patterson (left), Deputy Director-General, Olivier Long (centre), GATT Director-General, and Peter Williams (right), Secretary of the Trade Negotiations Committee, at a ministerial meeting in Tokyo in September 1973 to open the Tokyo Round.
8. Åke Lindén (left), GATT counsellor, Raul Trejos Flores (centre), Ambassador of Costa Rica, and Hector Millan (right), GATT Counsellor, at the signing of Costa Rica's Protocol of Accession in Geneva in 1990.
9. John Weekes (right), Chairman of the General Council, and Stuart Robinson, Director of the Session and Council Affairs Division, at the 46th meeting of the GATT contracting parties on 12–13 December 1990 in Geneva.

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10. Åke Lindén, Director of the Tariff Division (GATT), in his office at the Centre William Rappard in Geneva in 1994.
11. Ernst-Ulrich Petersmann, first GATT officer to hold a legal title, hired in 1981 as Assistant Legal Affairs Officer.
12. William Davey (right), Director of WTO Legal Affairs Division, at the signing of the Fifth Protocol (Financial Services) of the General Agreement on Trade in Services (GATS) by Sivaramen Palayathan, Trade Adviser, Permanent Mission of Mauritius to the WTO, in Geneva in June 1999.
13. The 'Lacarte Group' negotiating the Marrakesh Agreement Establishing the WTO and the Uruguay Round Dispute Settlement Understanding in October 1993. Participants include: Bernard Jansen (front left), EEC Legal Service; Åke Lindén (centre, standing), Director of the Tariff Division (GATT); Julio Lacarte-Muró (centre, seated), Ambassador for Uruguay, Chairman. GATT staff include Amy Porges and Peter Milthorpe (centre left, right of door).
14. Appellate Body Secretariat and members in March 2000. Those pictured include: Julio Lacarte-Muró (fifth from left), Appellate Body member; Florentino Feliciano of the Philippines (sixth from left), Appellate Body member; Said El-Nagar of Egypt (eighth from left), Appellate Body member; Debra Steger (centre), Director of the Appellate Body Secretariat; James Bacchus of the United States (sixth from right), Appellate Body member; Claus-Dieter Ehlermann of Germany (fifth from right), Appellate Body member; Mitsuo Matsushita of Japan (third from right); and Christopher Beeby of New Zealand (far right).
15. Swearing-in ceremony of Arumugamangalam Venkatachalam Ganesan (right) as an Appellate Body member in 2000, accompanied by Florentino Feliciano, Appellate Body chairperson.
16. WTO Legal Affairs Division in May 2000. Those pictured include Yves Renouf (second from left), Julie Pain (fourth from left), Gabrielle Marceau (sixth from left), Geraldine Murphy (eighth from left), Pieter Jan Kuijper (sixth from right), Werner Zdouc (second from right) and Reto Malacrida (far right).
17. Swearing-in ceremony of Luiz Olavo Baptista (right) as an Appellate Body member in 2001, accompanied by James Bacchus, Appellate Body chairperson.
18. Appellate Body hearing in 2002 for *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products* (second recourse to Article 21.5 of the DSU by New Zealand and the United States). Seated on the podium are: Luiz Olavo Baptista (centre), presiding member; Giorgio Sacerdoti (centre right); Yasuhei Taniguchi (centre left); Nicolas Lockhart (far right), legal officer in Appellate Body Secretariat; and Jan Bohanes (far left), legal officer in Appellate Body Secretariat.
19. Compliance panel for *Chile – Price Band System* with WTO Secretariat team in Geneva in August 2006. From left to right: Jorge Castro, legal counsellor in the Legal Affairs Division; Pablo Bentes, intern in the Legal Affairs Division; Ho-Young Ahn, panellist from Korea; Hardeep Puri, panel chair from India;

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- Timothy Groser, panellist from New Zealand; Arti Daswani, legal officer in the Legal Affairs Division; and Bruce Wilson, Director of the Legal Affairs Division.
20. The Rules Division in July 2008. Those pictured include Jan Woznowski (front row, second from left), Judith Czako (front row, third from left), Mark Koulen (middle row, far left), Guy Evans (middle row, far right), Graham Cook (back row, far right), Jesse Kreier (back row, second right) and Johann Human (back row, far left).
  21. Swearing-in ceremony of Peter Van den Bossche as an Appellate Body member in 2009, accompanied by David Unterhalter (left), Appellate Body chairperson.
  22. Members of the Appellate Body in 2009. Those pictured include (from left to right) Ricardo Ramírez of Mexico, Werner Zdouc (Director of the Appellate Body Secretariat), Yuejiao Zhang of China, Peter Van den Bossche of Belgium, Jennifer Hillman of the United States, David Unterhalter of South Africa, Lilia R. Bautista of the Philippines, Giorgio Sacerdoti of Italy and Shotaro Oshima of Japan.
  23. Alejandro Jara (left), WTO Deputy Director-General, at the WTO's Eighth Ministerial Conference in December 2011 in Geneva.
  24. Valerie Hughes, Director of the Legal Affairs Division, at the opening of the 30th anniversary of the Legal Affairs Division in June 2012 in Geneva.
  25. WTO directors of the Legal Affairs Division at the 30th anniversary of the Legal Affairs Division in June 2012 in Geneva. From left to right: Frieder Roessler (Feb 1989–Aug 1995); Valerie Hughes (Sept 2010–); Bruce Wilson (Sept 2002–Aug 2010); William Davey (Sept 1995–July 1999) and Pieter Jan Kuijper (Nov 1999–April 2002).
  26. Representatives of the Latin American countries and the European Union following the signing of the banana agreement in Geneva in November 2012. Those pictured include: Roberto Azevêdo (third from left), Ambassador of Brazil; Pascal Lamy (centre), then WTO Director-General; and Gabrielle Marceau (eighth from left) of the Legal Affairs Division. The picture also includes ambassadors from Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Venezuela and Peru.
  27. Gabrielle Marceau, Counsellor of the Legal Affairs Division and editor of this book, speaking on trade and energy at a session of the WTO Public Forum 2013 in Geneva.
  28. Rob Anderson (right), Counsellor of the Intellectual Property Division, and Bozena Mueller-Holyst (second from left), Counsellor of the Council and Trade Negotiations Committee Division (and generally responsible for the work of the Dispute Settlement Body) at the WTO's Ninth Ministerial Conference in December 2013 in Bali, Indonesia.
  29. Deputy Director-General Karl Brauner holding a meeting (in the context of the strategic review) with staff in the Centre William Rappard in January 2014.

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30. Director-General Roberto Azevêdo, depositary of WTO legal instruments, receiving from H. E. Dr Saadaldeen Talib, Yemeni Minister of Trade and Industry, Yemen's Protocol of Accession on 27 May 2014.

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settlement panels, and the Uruguay Round negotiating groups on dispute settlement and institutional questions.

ÅKE LINDÉN (1961–95) was Director of the Office of Legal Affairs from 1983 to 1989. Prior to this appointment, he served as Director of the GATT Tariff Division and held several other posts in the GATT Secretariat. He subsequently served as Legal Adviser to the Director-General of the GATT and as Special Adviser to the Director-General of the WTO. Mr Lindén passed away in 2013.

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HIELKE VAN TUINEN (1961–82) held different functions in his career in the GATT, including Assistant Director-General. He became the first Director of the GATT Office of Legal Affairs on 1 January 1981 until December 1982, when he was promoted to the position of Head of the Department of Conference Affairs and Administration.

DAVID UNTERHALTER (2006–13) is a former member and chairperson (2008–10) of the Appellate Body. Prior to joining the WTO, he served on a number of WTO dispute settlement panels. He is currently a Professor of Law at the University of Cape Town in South Africa, and a practising advocate at the Bar in London and Johannesburg, where he practises in several fields, including trade and competition law.

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BRUCE WILSON (2002–10) is a former director of Legal Affairs Division of the WTO. He has practised law at several US law firms and was staff director of the trade sub-committee of the Committee on Ways and Means, US House of Representatives during the preparation of US implementing legislation for the North American Free Trade Agreement and for the Uruguay Round trade agreements. He also worked at the Office of the US Trade Representative. He is currently director of the Office of International Affairs of the Public Company Accounting Oversight Board in Washington, DC.

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International Trade and Economic Arbitration Commission, as well as being vice-president of China's International Economic Law Society. Ms Zhang held various senior positions at the Asian Development Bank, was executive director of the Western African Development Bank, Legal Counsel of the World Bank and governor of UNIDROIT for eight years. Finally, before 1996, Ms Zhang was Director-General of the Law and Treaties Department at the Ministry of Foreign Trade and Economic Cooperation; she was also one of China's chief negotiators on intellectual property and bilateral treaties for investment protection, and chief Legal Counsel for China's GATT resumption/accession.

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## FOREWORD

ROBERTO AZEVÊDO

*WTO Director-General*

The establishment of the WTO in 1995 is widely regarded as a major milestone in modern international law. As our Organization marks its twentieth anniversary, this book paints an interesting and sometimes surprising portrait of the evolution of the role that law and lawyers have played throughout the history of the multilateral trading system. The picture that emerges is of an Organization that understands and values the importance of an open, non-discriminatory, rules-based multilateral trading system in ensuring that all countries are able to participate in the global economy and feel the full benefits of trade in improving people's lives.

The benefits of this area of the WTO's work are wide-ranging, and not always immediately apparent. For example, I think it's clear that the strength of the dispute settlement function was a crucial factor in preventing a surge of protectionist measures during the recent financial crisis. Having the rules in place and adherence closely monitored – with the dispute settlement mechanism there to back them up – helped to keep protectionism in check during a dangerous period for the global economy. In this way, and many others, WTO lawyers have provided a great public service over the years. They have proved time and again that they are a credit to the Organization, and I think the contents of this excellent book underline that fact.

The numerous contributors do a wonderful job of reminding us where we have come from and how we have progressed and developed over the last two decades. I would like to congratulate Gabrielle Marceau and everyone else who has been involved in preparing a book that is quite unlike anything else in the literature on the WTO – a personal, engaging 'insiders' account' of the nature of legal work in the Centre William Rappard, and an insightful portrait of the development of the rule of law in the unique setting of a relatively young international institution.

On a personal note, I am very pleased to see recognition in many chapters of the role played by non-lawyers in developing the rule of law in

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the WTO and in its predecessor, the GATT. While I am not a lawyer by training, I was fortunate to serve for almost five years as Director of the Brazilian Foreign Ministry's Dispute Settlement Unit. My experience during that time leads me to agree whole-heartedly with the view, expressed by many contributors to this book, that the rule of law is not merely a technical concept with relevance only for lawyers; rather it is the defining principle of the multilateral trading system, and a guiding light for everyone who is involved in it.

I commend this book to anyone with an interest in international law or international trade. It is a fascinating look back at a crucial element of the trading system – and one which should inspire us as we look forward to the challenges ahead.



*Roberto Azevêdo*  
*WTO Director-General*

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## PREFACE

GABRIELLE MARCEAU

This book evolved out of a conference held in 2012 to celebrate the thirtieth anniversary of the WTO's Legal Affairs Division (LAD). To mark the occasion, my colleagues Lauro Locks, János Volkai and Jorge Castro decided to organise a conference bringing together current and former LAD directors, staff and interns. My director, Valerie Hughes, enthusiastically encouraged this initiative – and, indeed, has continued to support the various projects and activities that have subsequently been born out of it, including this publication.

The conference, called 'LAD at Thirty', was a great success. However, as it unfolded, it became clear that some of our ideas about the origin of LAD were mistaken. Notably, we had understood that Åke Lindén was the first ever Director of LAD; in fact, we discovered that Hielke van Tuinen had served as Director of the very first Office of Legal Affairs two years prior to Lindén's appointment.

I was intrigued. Who was Hielke van Tuinen? I continued researching. Thanks to Ian Bates' amazing contact list, I was able to speak with van Tuinen, who was residing in The Hague. I learned a lot about the GATT 'corridor philosophy' from my meetings and exchanges with him, and with Åke Lindén. With the help of my colleagues Tessa Bridgman and Julie Pain, I tried to find archival material concerning the development of the Legal Affairs Division and the first lawyers in the GATT Secretariat. As the GATT archives are incomplete, I decided to contact a number of GATT and WTO retirees to try to find out more, and it proved most useful.

On the occasion of the WTO Open Day in June 2013, LAD produced a short pamphlet on the work of the first GATT lawyers and the establishment of LAD based on the information that our recent research had uncovered. At around the same time, we were invited to publish the papers given at the 'LAD at Thirty' conference, and the contributors decided in favour of a joint Cambridge University Press/WTO publication that would include all the conference papers and an additional introductory essay.

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When I met with Finola O’Sullivan, Cambridge University Press’s Editorial Director, she told me that Cambridge University Press would prefer a book that told not only the story of LAD but also the story of law and lawyers in the GATT/WTO systems more generally. She suggested that I edit a broad collection of essays from lawyers and non-lawyers who had performed legal work in and around the GATT and WTO Secretariats.

I was of course honoured to accept Cambridge University Press’s suggestion, but insisted that the publication include only ‘insiders’, i.e. people who had worked as staff members, including in management roles, in the GATT and WTO Secretariats, as well as Appellate Body members and Appellate Body Secretariat staff; selecting outsiders would be too difficult. By limiting the scope, I hoped to produce a book that would examine the changing understanding of the rule of law *within* the multilateral trading system through views and comments of its internal actors. Cambridge University Press accepted my proposition, but requested that I reach out broadly so as to be able to offer as many representative and authentic views as possible of the role of law and lawyers in the GATT/WTO Secretariats, and more generally of the development of the rule of law in the GATT/WTO systems. Accordingly, I invited contributions from various staff who had done legal work in the GATT and WTO Secretariats, as well as members and staff of the Appellate Body, with a view to collecting testimonies and personal reflections on the rule of law in the day-to-day work of the GATT/WTO system.

As we were still missing information on the birth of the GATT’s first legal office, on the origins of the Rules Division – which shares responsibility for assisting panels in approximately 50 per cent of all disputes – and on the nature and extent of much of the non-dispute legal work undertaken in the GATT/WTO Secretariats, we used the preparation of this book as an opportunity to elucidate some aspects of the work of divisions and colleagues directly involved with panel and non-panel legal work. We were able to trace numerous and diverse ways in which the rule of law has manifested itself in the multilateral trading system over the last sixty years.

I soon realised that, within the time frame for this publication, the book’s account of the role of law and lawyers could not be comprehensive – we would need to write an encyclopaedia and invest years of research in tracking down and analysing largely inaccessible and private staff archives to provide anything approaching a full history of the role of law and lawyers in the GATT/WTO, and this was a task better left to full-time scholars.

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This book is thus not a narrative history of the GATT or the WTO, nor does it provide a theoretical or philosophical analysis of the rule of law in all its shapes and forms. The chapters in this book are not ‘academic’ in the conventional sense. I encouraged contributors to ‘draft from the heart’ rather than follow a strictly chronological account of the development of the GATT/WTO; accordingly, the book is not a dry study of organisational development but rather a collection of different perspectives on the rule of law in practice and as an ethos, rather than merely as an abstract ideal.

Overall, this book suggests that the rule of law, at least as manifest in the GATT and WTO Secretariats, is not solely concerned with legal formalism and respect for agreed norms, but also includes day-to-day work that emphasises the importance of equality, fairness and transparency. As we look back over the WTO’s first two decades and think ahead to the challenges and opportunities yet to come, I hope that the commitment to the rule of law that so many of the book’s contributors identify as fundamental to the GATT/WTO system will continue to inspire and guide us.

Preparing this book has, of course, been a collaborative project, and I am very grateful for the assistance and support I have received in putting this book together. First and foremost I thank all of the contributors, who so generously dedicated their time and effort to producing fascinating and high-quality essays. This book really belongs to them, and I hope they will be pleased with the final product.

My deep gratitude also goes to my director Valerie Hughes, who supported the ‘LAD at Thirty’ conference, the creation of a pamphlet on the history of LAD and this broader publication on the role of law and lawyers and the development of the rule of law in the international trading system.

In the WTO Secretariat, I am grateful to Siobhan Ackroyd, Inger Bauer, Tessa Bridgman, Julie Pain, Laoise Ni Bhriain, Heather Sapey-Pertin and Bruno Ventrone for their assistance in research, drafting, editing, and compiling the photos reproduced in this book. I would like to thank all my colleagues in LAD who directly or indirectly contributed to the success of the ‘LAD at Thirty’ conference, the pamphlet, and this book, with particular thanks to Jorge Castro, Tania Parcerro Herrera and Mireille Cossy, who provided additional editorial and technical assistance. Anthony Martin in the WTO Publications Unit guided this project, and his commitment and faith in the value of this book have proved invaluable. I am deeply honoured that Cambridge University Press invited me to lead this project, from which I have learned immensely, and I am forever indebted to Finola O’Sullivan. After more than twenty years working on legal matters in LAD

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and in the Cabinet of former Director-General Pascal Lamy, the opportunity to celebrate the WTO's twentieth anniversary by publishing this book with Cambridge University Press is an indescribable honour and pleasure.

I am honoured that WTO Director-General Roberto Azevêdo agreed to write this book's Foreword, especially because in so many ways he exemplifies the rule of law in the multilateral trading system. Indeed, from the very beginning of his career he has fought to strengthen respect for the rule of law in the WTO, especially for the benefit of developing countries.

As well as providing individual essays, a number of current and past GATT/WTO staff assisted in the preparation of the introductory chapter and the chapter on the history of the Rules Division, responding with kindness and generosity to my infinite questions. I would like to thank David Hartridge, John Kraus, Mark Koulen, Claude Mercier, Jan Woznowski and especially Peter Williams.

This adventure would not have been possible without the tireless support and kind assistance of my colleagues Siobhan Ackroyd and Daniel Ari Baker.

Finally, I am grateful to Frieder Roessler, who hired me on 11 September 1994 to join the GATT LAD. It has been a blessing to be able to work for both the GATT and the WTO Secretariats and to witness and contribute to the development of the rule of law in the multilateral trading system.

*Gabrielle Marceau*