
Overview

§ 1.01 The ITO, the GATT, and the WTO

[1] *Bretton Woods and the Havana Charter*

Even as World War II dragged on, the Allied leaders began to plan for the postwar world which, they hoped, would not be characterized by the economic isolationism that had marked the prewar years. Many believed that this isolationism had contributed in no small way to the deepening of the Great Depression and the onset of war. In a 1941 speech, entitled “Post-War Commercial Policy,” United States Undersecretary of State Sumner Wells said:

Nations have more often than not undertaken economic discriminations and raised up trade barriers with complete disregard for the damaging effects on the trade and livelihood of other peoples, and ironically enough, with similar disregard for the harmful resultant effects upon their own export trade.

The resultant misery, bewilderment, and resentment, together with other equally pernicious contributing causes, paved the way for the rise of those very dictatorships which have plunged almost the entire world into war.¹

These and other similar concerns eventually led to the famed July 1944 conference at Bretton Woods, New Hampshire, and, eventually, the resulting “Bretton Woods organizations.” These were the International Bank for Reconstruction and Development (commonly known as the World Bank) and the International Monetary Fund.²

¹ US Dep’t. of State, Pub. No. 1660, Commercial Policy Series 71 (1941), quoted in John H. Jackson, *WORLD TRADE AND THE LAW OF GATT* 38 (Bobbs-Merrill, 1969).

² This section draws heavily on Richard N. Gardner, *STERLING-DOLLAR DIPLOMACY IN CURRENT PERSPECTIVE: THE ORIGINS AND PROSPECTS OF OUR INTERNATIONAL ECONOMIC ORDER* (Columbia University Press, 1980); Robert E. Hudec, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (2nd ed., Butterworth, 1990); John Jackson, note 1 above; Douglas A. Irwin, Petros C. Mavroidis, and Alan O. Sykes, *THE GENESIS OF THE GATT* (Cambridge University Press, 2008); and on the WTO’s *ANALYTICAL INDEX, GUIDE TO GATT LAW AND PRACTICE* (1995). Ben Steil, *THE*

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The Bretton Woods conference was one of the two major initiatives seeking to establish a framework for international cooperation that saw the light of day at the end of World War II. The other initiative was the negotiation of the Charter of the United Nations (UN).³

Probably because the Bretton Woods conference was attended only by representatives of finance ministries and not by representatives of trade ministries, an agreement covering trade was not negotiated there. A trade agreement, however, was very much in the minds of the Allied trade and economic policy makers. In early December 1945, following discussions with the United Kingdom, the United States issued a proposal for an International Trade Organization, the ITO. This document, the so-called Suggested Charter, became the basis for the negotiation of the GATT and the ITO.⁴ Almost five years later to the day, however, on December 6, 1950, the United States Department of State announced that the ITO was dead, killed by the United States Congress, which – in a manner eerily reminiscent of its previous treatment of the Treaty of Versailles and the League of Nations – had made it clear that it would not approve the ITO.

Still, all was not lost. An odd portion of the ITO survived, in an odd way. It was known as the General Agreement on Tariffs and Trade, or the GATT, and it lasted for forty-seven years – nearly half a century.⁵ On January 1, 1995, it was replaced by the World Trade Organization, the WTO. While it is broader both in its reach and in its effectiveness than the proposed ITO, the WTO is nevertheless not all that the ITO was originally intended to be.

BATTLE OF BRETTON WOODS (Princeton University Press, 2013) provides an excellent and detailed discussion of the Bretton Woods negotiations, as well as of the two dominant personalities, Dexter-White and Lord Keynes. In addition, John Jackson, *THE WORLD TRADING SYSTEM* (The MIT Press, 1989), provides an excellent history and description of the world trading system. We would also refer readers to the richly informative history of law and lawyers in the GATT and WTO secretariats edited by Professor Gabrielle Marceau of the WTO Legal Affairs Division, *A HISTORY OF LAW AND LAWYERS IN THE GATT/ WTO: THE DEVELOPMENT OF THE RULE OF LAW IN THE MULTILATERAL TRADING SYSTEM* (Cambridge University Press, 2015).

³ Henry Cabot Lodge, who was appointed US Ambassador to the UN in 1953, reportedly said of the UN that it “is created to prevent you from going to hell. It isn’t created to take you to heaven.”

⁴ Indeed, as explained in detail in Irwin, Mavroidis, and Sykes, note 2 above, the majority of GATT provisions were derived from provisions of the Suggested Charter.

⁵ The nomenclature can be confusing. In this volume, when we refer to the agreement itself, we refer to “the GATT” and, subsequently, “the GATT 1947” and the “the GATT 1994,” as appropriate. When referring to the entity more generally – as explained below, it was not an organization in its own right – we refer simply to “GATT.”

[2] *The Negotiation of the GATT*

The GATT was an effort to salvage something from the wreckage of the ITO, which was too ambitious for the United States Congress and others. Perhaps, with the benefit of hindsight, the ITO was too ambitious by almost any reasonable standard. It was negotiated over a two-year period, from 1946 through 1948, at a series of meetings in London, New York, Geneva, and finally at a United Nations Conference on Trade and Employment in Havana from November 1947–March 1948. This produced the ITO Statute, more commonly known as the Havana Charter (in full, the Havana Charter for an International Trade Organization).⁶ As the name of the conference suggests, the ITO encompassed not only trade policy, but also other policies affecting trade, such as employment policy. Furthermore, it included agreements on commodity trading and economic development, as well as a chapter regarding the treatment of restrictive business practices.

While the negotiation of the Havana Charter was much broader in scope, many governments were in fact primarily interested in more rapid relaxation of tariffs and other trade restrictions. These governments realized the enormity of the full agenda of the Havana Charter and decided to bifurcate the process, putting the GATT (tariffs and trade barriers) on one track and the other ITO issues on another. In fact, this bifurcated approach had already been used at the London Conference (October–December 1946), as governments anticipated lengthy negotiations on the broader ITO agenda and thought that some early harvesting on tariffs would increase the willingness to cooperate on the other issues.

Under the sponsorship of the Preparatory Committee charged with drafting the ITO charter, a Drafting Committee met in January and February 1947 at Lake Success, New York, and produced a full draft of the GATT. From April to October 1947, the members of the Preparatory Committee streamlined the draft, conducted a round of tariff negotiations, and put the final touches to the GATT at the European Office of the United Nations in Geneva.⁷

⁶ Irwin, Mavroidis, and Sykes, note 2 above, provide a detailed history of the negotiation and creation of the GATT, which examines the background to the creation of the GATT, the evolution of the provisions of the GATT, and the economic rationale for the GATT. Additional background on the history of the WTO may be found in Craig vanGrasstek, *THE HISTORY AND FUTURE OF THE WORLD TRADE ORGANIZATION* (WTO, 2013). For a detailed analysis of the provisions of the Havana Charter by one of the chief US negotiators, see Clair Wilcox, *A CHARTER FOR WORLD TRADE* (Macmillan, 1949).

⁷ The GATT was negotiated in face of growing domestic opposition within the United States to the proposed ITO. It was therefore imperative to agree on the provisional application of

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This became the first of GATT's eventual eight rounds of negotiations. It produced the "Geneva Final Act," consisting of the Lake Success text of the GATT (with some minor amendments) and the schedules of tariff commitments made by the twenty-five governments taking part.⁸ It also included a "Protocol of Provisional Application" or "PPA," which was intended to be a temporary expedient to give effect to the GATT until the ITO was ratified. Because the ITO never came into being, however, the PPA ended up being fundamental to GATT for its forty-seven-year existence.

[3] *The Protocol of Provisional Application (PPA)*

The broad scope of the ITO called for changes in the laws of many signatory governments and, consequently, eventual legislative approval under their various constitutional systems before it could become effective. Some governments did not want to wait until that process was completed in order to benefit from the already-negotiated trade concessions. Accordingly, at the end of October 1947, eight of these governments agreed to apply the GATT provisionally as of 1 January 1948, pursuant to the PPA.⁹

Under the terms of the PPA, the eight countries undertook to apply Parts I and III of the GATT fully, and to apply Part II only "to the fullest extent not inconsistent with existing legislation."¹⁰ Part I contained just two articles, the first dealing with non-discrimination among competing foreign suppliers (most-favored-nation, or MFN), and the second containing the commitment to be bound by the schedule of tariff rates just negotiated. Part III contained articles dealing, for the most part, with administrative matters.

The substantive heart of the GATT, Part II, consisted of Articles III through XXIII. These included provisions covering national treatment;

the GATT separately from the process of completing and ratifying the ITO. In the wonderful phrase attributed to US Under Secretary of State for Economic Affairs William L. Clayton, "we need to act before the vested interests get their vests on." William Diebold, *Reflections on the International Trade Organization*, 14 N. ILL. U. L. REV. 335, 336 (1993–94).

⁸ FINAL ACT ADOPTED AT THE CONCLUSION OF THE SECOND SESSION OF THE PREPARATORY COMMITTEE OF THE UNITED NATIONS CONFERENCE ON TRADE AND EMPLOYMENT, UN Sales No. 1947.II/10; 55 UNTS 187 (1947).

⁹ The eight were: Australia, Belgium, Canada, France, Luxembourg, the Netherlands, the United Kingdom, and the United States.

¹⁰ 55 UNTS 308, 1(a) and (b) (1947).

anti-dumping and countervailing duties; valuation of imports for customs purposes; marks of origin; import and export quotas and limitations; restrictions on imports for balance of payments purposes; exchange arrangements; subsidies; state trading enterprises; governmental assistance to economic development; emergency action on imports of particular products; exceptions to GATT obligations, including exceptions necessary to protect human, plant, and animal life, health, and safety; and exceptions for national security purposes. Part II thus provides the necessary market access complement to Part I.

Together, Parts I and II set out the basic GATT approach to trade liberalization. This approach is based on a preference for tariff protection to other forms of protection, such as quantitative restrictions or quotas, and, consequently: (i) the abolition (in principle, but not always in practice) of all quotas; (ii) the application of quotas only exceptionally and only with multilateral permission; (iii) “national” (no less favorable) treatment granted to all products of GATT parties that have lawfully cleared customs; and (iv) the granting of MFN treatment with respect to both border and behind-the-border (internal) measures affecting trade, to all GATT parties, subject to specific, narrowly-drawn exceptions.

The application of Part II only to the extent that its articles were consistent with existing legislation created what became known as the “grandfather rights.”¹¹ Parties that held these rights were allowed to continue to apply GATT-inconsistent measures notwithstanding their obligations under the GATT. Article XXIX:2 of the GATT shows how temporary this was intended to be. It provides that: “Part II of this Agreement shall be suspended on the day on which the Havana Charter comes into force.” As this was expected to occur soon, the inconsistent domestic legislation was not expected to be long lived. But because the Havana Charter never came into force, the GATT remained in force, on a “provisional” basis, for its entire forty-seven years. However, the “grandfather rights” had little lasting impact. In *US – Manufacturing Clause*, a GATT Panel established that once a GATT contracting party had implemented (the whole or part of) Part II, it could not subsequently go back and invoke its grandfather rights.¹²

¹¹ An example would be the US countervailing duty law, which did not require a determination of material injury, as called for by Article VI in Part II of GATT, until the United States agreed to include such a requirement for signatories to the so-called 1979 Tokyo Round Subsidies Code or for other countries that entered into comparable bilateral agreements with the United States.

¹² See GATT Panel Report, *US – Manufacturing Clause*, L/5609 (1 March 1984).

[4] GATT's Forty-Seven "Provisional" Years

Between the issuance of the PPA in October 1947 and its date of entry into force on January 1, 1948, most of the other countries participating in the Geneva tariff negotiations also agreed to apply the PPA. Over the next forty-seven years, these Geneva negotiations were followed by seven additional negotiations, called "rounds," each of which involved more participants as additional countries acceded to the GATT. The Uruguay Round was the eighth and, to date, the last round completed. At the time of writing, the ninth round, which was launched in November 2001 in Doha, Qatar, and is known as the Doha Development Round is still technically under negotiation, even though few believe it will materialize into a final outcome, at least in its current form. In the meantime, in 2017, the Trade Facilitation Agreement came into force as an "early harvest" of the round. The previous rounds are shown in Table 1.1.

Table 1.1

Round ¹³	Dates	Number of Parties ¹⁴
Geneva	1947	19
Annecy	1949	27
Torquay	1950	33
Geneva	1956	36
Dillon	1960–61	43
Kennedy	1962–67	74
Tokyo	1973–79	85
Uruguay	1986–94	128
Doha	2001–	146 (initially, now 164) ¹⁵

¹³ The first four rounds are named for the place where they were held: Geneva; Annecy, France; and Torquay, England. The Dillon Round and the Kennedy Round were named after the United States Under Secretary of State, C. Douglas Dillon, and President John F. Kennedy, respectively, who were instrumental in starting those rounds. The Tokyo and Uruguay Rounds were named after the city and the country, respectively, where trade ministers agreed to launch the rounds, as was the Doha Development Round.

¹⁴ Computations of the total number of parties vary from source to source, because some of the original 1947 group subsequently withdrew from GATT (e.g., China, Czechoslovakia) and because countries that acceded to GATT/WTO during the course of a round would be counted at the end, but not at the beginning. Counts of participants in GATT/WTO activities may vary also depending on how the European Union is accounted for – as a single entity or as individual members (the EU is a Member of the WTO, as are its individual members).

¹⁵ As of December 2020, an additional twenty-three countries or customs territories were in the process of accession to the WTO. It should be noted that WTO membership is open

All of the rounds up to the Dillon Round in 1960–61 dealt with tariff cuts. In the Kennedy Round, a first, relatively unsuccessful attempt was made to deal with so-called non-tariff barriers, or NTBs. This is an amorphous term that is used to cover all behind-the-border measures of a regulatory character affecting trade (such as labor, health, and environment policies), as well as behind-the-border procedures that lead to imposition of (additional) duties at the border (such as anti-dumping and countervailing measures).

As tariffs were progressively cut, NTBs became more prominent as trade barriers. In Baldwin's analogy, reducing the level of tariffs was akin to a receding tide that eventually revealed the existence of other trade barriers.¹⁶ But national legislatures, particularly the US Congress, often balked at attempts to regulate NTBs. Thus, a Kennedy Round Anti-dumping Code and an agreement dealing with a highly protectionist US method of valuing certain chemicals and footwear for customs purposes were not accepted by the US Congress on the stated grounds that in reaching these agreements, the US negotiators had exceeded their mandate.¹⁷

This experience soured many trading partners of the United States, who found themselves having to negotiate twice: first with the US negotiators and then with the Congress. If NTBs were to be dealt with in future negotiations, another way had to be found that would take into account the need of US trading partners to know that a package put together with the US negotiators would not be taken apart by the Congress, and the constitutional need of the United States to refer to Congress all agreements requiring statutory change, as was the case with most measures dealing with NTBs. The solution was the so-called fast-track procedure, which was first included in the US Trade Act of 1974.¹⁸

not just to “countries” but also to separate customs territories. Accordingly, throughout this book, when used in connection with WTO members, the terms “country” and “developing country” include separate customs territories and countries with economies in transition.

¹⁶ Robert E. Baldwin, *NON-TARIFF DISTORTIONS IN INTERNATIONAL TRADE* (The Brookings Institution, 1970).

¹⁷ See Russell Long, *United States Law and the International Antidumping Code*, 3 INT'L LAWYER 464 (1969).

¹⁸ Pub. Law 93-618, 88 Stat. 1978. Douglas A. Irwin, *CLASHING OVER COMMERCE* (University of Chicago Press, 2017) explains how the US policy was shaped, the manner in which disagreements between Congress and the US President were solved over time, and how we ended up with fast track. See, also, Craig vanGrasstek, *TRADE AND AMERICAN LEADERSHIP: THE PARADOXES OF POWER AND WEALTH FROM ALEXANDER HAMILTON TO DONALD TRUMP* (Cambridge University Press, 2019).

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Under this procedure, the Congress agreed that a bill implementing a negotiated agreement would not be amendable on the floor of either House of Congress, would not be stalled in committee, and would receive a straight “yes or no” vote within a stated time period.

This provision permitted the Tokyo Round negotiations to go forward, and led to the adoption of a wide variety of side-agreements or “codes” dealing with non-tariff issues:

1. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (the Anti-dumping Code)
2. Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (the Subsidies Code)
3. Agreement on Import Licensing Procedures
4. Agreement on Trade in Civil Aircraft
5. Agreement on Technical Barriers to Trade
6. Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade and Protocol to the Agreement (the Customs Valuation Code)
7. Agreement on Government Procurement

The Tokyo Round negotiations were the most extensive ever undertaken up to that point (1979). However, the 1986–94 Uruguay Round was even more extensive in both its reach and its results. As the number of participants and issues increased, so too did the time required for successful completion of each round.

Before turning to a discussion of the Uruguay Round, however, we shall review briefly the evolution of dispute settlement under GATT, particularly as it evolved after the Tokyo Round. As we shall see, dispute settlement was one of the major goals of the Uruguay Round negotiators, and one of their major accomplishments.

[5] *GATT Dispute Settlement*

In a remarkable article, de Scitovsky (1942) explained in a few words the need to enforce not only the GATT, but all similar trade agreements: “Because of the real or presumed benefits which national governments may anticipate from trade restrictions, and because of the supervening demands of special interest groups, an international free-trade system has

a natural tendency to disintegrate and must be enforced by some kind of international convention.”¹⁹

Enforcement was not too much of a concern when drafting the GATT, because all of the institutional provisions that would have been relevant had been included in the ITO Charter rather than the GATT.²⁰ The GATT itself contained only two provisions – Articles XXII and XXIII – on the procedure to be followed, but did not provide for any institution under whose aegis enforcement or dispute adjudication would take place. All of these details were left to the GATT CONTRACTING PARTIES, meaning the sum of all GATT-participating countries, to decide by consensus as they took various steps towards a system of dispute resolution.²¹

Dispute settlement in the GATT began with a complaint in the summer of 1948. The Netherlands complained at a meeting of the CONTRACTING PARTIES that Cuba was applying a 5 percent consular tax to imports from some countries, but only a 2 percent tax to imports from others. The issue before the CONTRACTING PARTIES, therefore, was whether consular taxes were covered by the term “charges of any kind” in GATT Article I:1, dealing with MFN treatment. The chairman of the session ruled that they were so covered: “In response to a request for an interpretation of the phrase ‘charges of any kind’ in paragraph 1 of Article I with respect to consular taxes, the chairman ruled that such taxes would be covered by the phrase ‘charges of any kind.’”²²

This single sentence constitutes the entirety of GATT’s first dispute settlement “report.”

Early dispute settlement in GATT strongly reflected its diplomatic roots. In fact, the process initially was referred to as “conciliation,” not as dispute settlement. This was reflected in many of the early disputes. For example, in 1962, France had imposed import restrictions. The

¹⁹ Tibor de Scitovsky, *A Reconsideration of Theory of Tariffs* (1942), in *PAPERS ON WELFARE AND GROWTH* 139–66 (Allen & Unwin, 1964).

²⁰ This section draws heavily on Robert E. Hudec’s outstanding two-volume history of GATT dispute settlement, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY*, note 2 above, and *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* (Butterworth, 1993) (hereafter *ENFORCING INTERNATIONAL TRADE LAW*).

²¹ The term CONTRACTING PARTIES in upper case letters was the GATT convention for referring to joint action by all of the parties to the GATT. Since the GATT was an agreement, not an organization, the GATT itself could not act. When used in the lower case, the term “contracting party” (or “parties”) refers to an individual signatory (or group of signatories) to the GATT.

²² See Report of Working Party 7 on the Cuban Schedule, GATT/CP.2A3 (13 September 1948).

United States complained, and France, to its credit, acknowledged that its measures were illegal. The natural consequence of this admission would be to pave the way towards adoption of countermeasures. Nevertheless, in a remarkable passage in its report on *French Import Restrictions*, the GATT Panel explicitly asked the United States to stop short of requesting authorization to impose countermeasures and give France the necessary breathing space to bring its measures into conformity with its obligations.²³ The United States was probably comforted by the fact that it would benefit from similar flexibility were one of its own measures to be challenged in the future.

Similarly, in 1955, the GATT Panel on *German Import Duties on Starch and Potato Flour* acknowledged that an agreement made during the negotiations to continue to reduce duties was an integral part of the balance of concessions agreed during the Torquay Round, even though that agreement had not subsequently been transposed into a schedule of concessions.²⁴

The term “panel” came from the term “panel of experts,” which, as Professor Hudec has noted, was “coined long before the GATT to describe an *ad hoc* group of government experts (rather than policy officials) convened to render an expert opinion about some technical question that is capable of being answered objectively. The term thus connoted objective decisions based on expertise rather than political representation of one’s government.”²⁵

Most of the advocates before panels and most of the panelists themselves – the “judges” – were diplomats, not lawyers. Dana Wilgress, a Canadian negotiator of the GATT, emerged as the most frequent “panelist” in the first years.²⁶ The then Secretary-General of the GATT, Eric Wyndham-White, was notoriously critical of legalistic approaches to settlement of disputes.²⁷ This attitude was by no means new or unique to Mr. Wyndham-White. In 1932, a report of the League of Nations Economic Committee took the view

²³ See GATT Panel Report, *French Import Restrictions*, L/1921, adopted 14 November 1962, BISD 11S/94, ¶ 7.

²⁴ See GATT Panel Report, *German Import Duties on Starch and Potato Flour*, W.9/178, 16 February 1955, unadopted, BISD 3S/77, ¶¶ 2–4.

²⁵ Robert E. Hudec, *The Role of the GATT Secretariat in the Evolution of the WTO Dispute Settlement Procedure*.

²⁶ Peter Williams, *Law and Lawyers in the Multilateral Trading System: Back to the Future*, in Gabrielle Marceau (ed.), *A HISTORY OF LAW AND LAWYERS IN THE GATT/WTO*, 85 (Cambridge University Press and the WTO, 2015).

²⁷ Rogerio de Souza Farias, *Mr GATT: Eric Wyndham-White, and the Quest for Trade Liberalization*, 12 *WORLD TRADE REVIEW* 463–85 (2013).