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**THROWING THE BABY OUT WITH
THE BATH WATER?**

P.A. Gordon

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Department of International Relations
Research School of Pacific and Asian Studies
Australian National University
Canberra ACT Australia

ABSTRACT

The Uruguay Round was lauded as a victory for proponents of multilateralism and rules based relations between states. The inclusion of new areas of trade regulation under the GATT/WTO umbrella, the creation of an institutionalised framework for trade negotiation and the increased definition and stringency of agreements has produced a blueprint for unprecedented levels of international trade regulation. This paper argues that institutionalisation and increased regulation of the international trading system fail to take adequate account of the fundamental strength underpinning the GATT system between 1947 and 1986. This strength was its ability to balance legalism and pragmatism, enabling contracting parties to marry domestic pressures with international economic obligations. The tendency to favour legalistic, rather than pragmatic, rule creation and implementation, inherent in the Uruguay Round Agreement, reflects a privileging of rules over power based relations between states as supported by Regime Theory. It is a tendency that threatens the flexibility of the GATT system and thus the ability of member states to work within it. The non-participation of WTO members would challenge the continued existence of the multilateral system, in turn undermining the principles supported by that system, predominantly that of trade liberalisation.

THE WORLD TRADE ORGANISATION—THROWING THE BABY OUT WITH THE BATH WATER?

How institutionalisation and increased regulation of the international trading system might undermine development towards trade liberalisation

P.A. Gordon

By bringing into being the World Trade Organization today, we are enshrining the rule of law in international economic and trade relations, thus setting rules and disciplines over the temptations of unilateralism and the law of the jungle.

King Hassan II, Marrakesh Ministerial Meeting.¹

In December 1993, the 117 contracting and associated parties to the General Agreement on Tariffs and Trade (GATT) concluded the Uruguay Round of Multilateral Trade Negotiations. An integral part of the final agreement was an item establishing the institutional foundation for a multilateral trade organisation. The World Trade Organisation (WTO),² as envisioned in the Final Act of the Uruguay Round, is institutionally based, more wide ranging in its terms of reference and stringent in its regulation enforcement than its predecessor. While the creation of the WTO is an attempt to address those issues related to world trade which GATT was not equipped to deal with, the flexibility and lack of stringency which characterised GATT are much less evident in the Agreement Establishing the World Trade Organisation. Though the WTO is attempting to further those principles fostered by GATT, its institutionalisation and increased regulation counter the essential element which underpinned GATT's effectiveness—its ability to function in an imperfect trading environment, through its practical approach to rule application, while simultaneously upholding specific principles in the letter of its agreements.

The relationship between institutionalisation, increased trade regulation and liberalisation in GATT, is based on an understanding of relations between

¹ Quoted in S. Charnovitz, 'The World Trade Organisation and Social Issues', *Journal of World Trade*, 28:5 (1994), p. 33.

² The title 'Multilateral Trade Organisation' was changed to 'World Trade Organisation' on 15 December 1993.

contracting parties³ within multilateral trade negotiations (MTNs). These relations are both affected by domestic and international economic and political pressures, and in turn affect the evolution and functioning of the international trading system. While some have encouragingly described increased regulation in GATT as indicative of a move away from power based relations between states towards relations based on rules,⁴ it is a view which fails to recognise the delicate balance between legalism and pragmatism⁵ that has underpinned GATT's achievements to date. Shifting this balance in favour of an increasingly legalistic approach to international trade threatens to limit the options by which members harmonise the multitude of internal and external pressures to which they are hostage. In the past, practical application of GATT agreements has catered to these pressures, occasionally in contradiction to the letter of those same agreements. The effect of this has been to enable participation of member states in the GATT trading system, by allowing them a degree of flexibility in their adherence, while simultaneously protecting the principles inherent in GATT by engendering respect for the overall system based on this flexibility. Institutionalisation and increased regulation of GATT, as represented by the WTO Agreement, by enforcing agreement adherence,

³ Under Articles XXV:1 the contracting parties acting jointly are described in the General Agreement as the 'CONTRACTING PARTIES'. The 'contracting parties' in small case refers to the individual member countries. In this paper 'Contracting Parties' will refer to the joint action of member bodies to GATT rather than 'CONTRACTING PARTIES'. Signatories to the WTO are no longer referred to as contracting parties, but 'Members'.

⁴ J.H. Jackson, *Restructuring the GATT System*, Pinter, London, (1990), pp. 49–54. J.A. McKinney, 'The World Trade Regime: Past Successes and Future Challenges', *International Journal*, 49:3 (1994), p. 467. J.A. Findlayson and M.W. Zacher, 'The GATT and the Regulation of Trade Barriers: Regime Dynamics and Functions', *International Organization*, 35:4 (1981), p. 600–1. G.R. Winham, 'GATT and the International Trade Régime', *International Journal*, 45:4 (1990), p. 822.

⁵ The definition of 'legalism' and 'pragmatism' here differs slightly from Ken Dam defines 'legalism' as 'used...to refer to the drafting of international agreements under which draftsmen attempt to foresee all of the problems that may arise in a particular area...and to write down highly detailed rules in order to eliminate to the greatest extent possible any disputes, or even any doubts, about the rights and obligations of each agreeing party under all future circumstances'. The use of 'legalism' in this paper is the same as Dam's and adds that the term refers to strict adherence to the letter of the law, or, in GATT's case, letter of the Agreement, rather than its spirit. Dam defines 'pragmatism' as 'an approach to the drafting and administration of international agreements under which emphasis is placed on mutual agreement on objectives, and rules concerning rights and obligations are considered formalities to be avoided whenever possible'. Rather, this paper uses 'pragmatism' to describe the willingness of contracting parties to employ *both* established regulatory and alternative means in order to achieve certain ends. K.W. Dam, *The GATT Law and International Economic Organization*, University of Chicago Press, Chicago, (1970), pp.3–4.

denies the extent of flexibility allowed contracting parties in the past, forcing them to either contravene GATT agreements or withdraw from them. States' defiance of and non-participation in GATT would necessarily weaken the current trading system, in turn undermining respect for the principles upon which the system is based, including the predominant principle and objective of GATT—international trade liberalisation.

Essentially, this paper will argue that moves towards rules based relations between states derive from a hypothesis—the prevalent model of the formation and transformation of international economic regimes⁶—that fails to take adequate account of the perceived need for states to act in their own interest, and the influence this exerts over the establishment of international fora. It sees a contingent approach to relations between states, as embodied in the pre-Uruguay GATT system, as the most effective method by which to protect principles necessary for the attainment of commonly agreed objectives, where a balance between legalism and pragmatism is constantly sought and maintained within a dynamic international trade environment.

Trade liberalisation: the WTO's objective?

'Liberalisation' has traditionally meant implementation of the basic principles and objectives of the GATT, that is, simply the removal of formal, external trade restrictions.⁷

Gilpin's depiction of GATT as the embodiment of trade liberalisation is a characteristic common to much GATT literature. There is an often unstated assumption of a link between GATT and international trade liberalisation resulting in a proliferation of varied understandings as to both the term liberalisation and of its place in GATT.

Before attempting to argue the potential dangers for trade liberalisation of the institutionalisation and increased regulation of GATT, it is necessary to define what is meant by the term, and determine if in fact the WTO and the Uruguay Agreement set out to achieve it. If they do not there is little point in pursuing this line of argument.

Trade liberalisation refers to the process of reducing barriers which inhibit the flow of goods, services, investment capital, technology and labour between states. The extent to which reduction of these barriers can and should be achieved

⁶ J.G. Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order', in S.D. Krasner, *International Regimes*, Cornell University Press, Ithaca, (1983), p. 197.

⁷ R. Gilpin, *The Political Economy of International Relations*, Princeton University Press, New Jersey, (1987), p. 390.

underpins much of the debate and confusion surrounding the trade liberalisation issue. On the one hand, proponents of liberal trade see the total elimination of barriers to trade as the purpose of liberalisation, where market forces dictate the international trading system and administrative intervention has no place. On the other hand, supporters of trade policy argue the dangers of total reliance on market forces for wider social and political issues, depicting government intervention as necessary, if not desirable. The value of trade liberalisation, in a trade policy context, is inherent in the process itself, allowing governments to negotiate control of trade for the perceived protection and benefit of their citizens.

While most commentators recognise free trade as providing GATT's theoretical basis, John Ruggie describes this assumption as ill founded if not irrelevant.

According to Ruggie, current interpretations of trade liberalisation differ radically from the kind of liberalisation drafters of the Bretton Woods system envisioned. Essentially Keynesian in outlook, his coinage of the term 'embedded liberalism' refers to an institutional compromise, where, '[u]nlike the economic nationalism of the 1930s, the international economic order would be multilateral in character; but unlike the liberalism of the gold standard and free trade, its multilateralism would be predicated upon domestic interventionism'.⁸ It is an interpretation of liberalism that privileges domestic economic stability over free trade. These categorisations of trade liberalisation tend to obfuscate the relationship between GATT, the WTO and liberalisation.

GATT's creation and evolution were based on three fundamental norms: non-discrimination, multilateralism and the application of the Most-Favoured Nation principle (MFN) to all signatories, expansion of trade through the reduction of trade barriers, and unconditional reciprocity among all signatories.⁹ Though this paper emphasises the potential dangers of rigidity in the GATT system specifically for liberalisation, it is in fact the system as a whole that is potentially threatened as liberalisation has assumed a predominance in the WTO above all other GATT norms.

Since its inception the relative importance of different questions within GATT has varied according to perceptions of those issues considered the most pressing at any particular time. The disarray that characterised the inter-war years encouraged states to foster a degree of international economic order based on non-discrimination and multilateralism. Order, in effect, was the essential issue underpinning the creation of an international trading system. In 1947, principal clauses of the Havana Agreement addressed the issue of employment. This was

⁸ J.G. Ruggie, 'Unravelling Trade: Global Institutional Change and the Pacific Economy', in R. Higgott, R. Leaver and J. Ravenhill (eds), *Pacific Economic Relations in the 1990s: Cooperation or Conflict?*, Allen and Unwin, Sydney, (1993), p. 16.

⁹ Gilpin, *The Political Economy of International Relations*, p. 191.

indicative of the predominance of this issue and the perceived need, at that time, to provide full employment. Later the gradual adhesion of six European states into the European Economic Community,¹⁰ highlighted the potential dangers of regionalism and its possible impact on the principle of MFN. The 1980s saw United States monetary policy contribute to a blow out in its balance of payments figures, leading groups affected by resultant adjustment measures to place pressure on the Administration to implement protectionist trade policies. During this period, the binding of tariffs through GATT negotiations saw the increased implementation of non-tariff barriers (NTBs) in support of the perceived need for domestic protection. This development focused attention on the debate between liberal and protectionist trade practices.

Though emphasis on different issues has varied, from employment to regionalism and most recently protectionism, trade liberalisation, based on non-discrimination, has become GATT/WTO's predominant principle and objective.¹¹ This is not to say that liberalisation has become the only principle or objective of GATT, rather the one through which, with liberalisation's evolution and achievement, others such as wealth, employment, development and cooperation, would be realised.¹²

¹⁰ Prior to the EC's genesis in July 1967, there were three Communities: the European Coal and Steel Community (ECSC), established in the Paris Treaty of 1952; the European Economic Community; and the European Atomic Energy Community, the last two established in the Treaty of Rome of 1958. These Communities had separate executives and councils of ministers. In 1967 the three Communities merged, and now have a single executive (the European Commission), one Council of Ministers, a European Parliament, and a Court of Justice. G.R. Winham, *International Trade and the Tokyo Round Negotiation*, Princeton University Press, New Jersey, (1986), p. 3. The ECSC and the EC both have been the focus of GATT attentions at different times.

¹¹ Though Findlayson and Zacher argue that liberalisation 'did not have the paramountcy of non discrimination in the postwar years' (J.A. Findlayson and M.W. Zacher, 'The GATT and the Regulation of Trade Barriers: Regime Dynamics and *International Regimes*, Cornell University Press, Ithica, (1983), p. 282), Charles Lipson disagrees, citing the central importance of tariff reductions for all contracting parties as evidence of the centrality of liberalisation (C. Lipson, 'The Transformation of Trade: the Sources and Effects of Regime Change', in Krasner, *International Regimes*, p. 240).

¹² An examination of the assumptions inherent in this statement would fill several tomes. Current debates question the link between liberalisation and international economic growth and liberalisation and international interdependence. While neo-classical economists have argued that wealth and interdependence are logical results of liberalisation, Timothy McKeown ('A Liberal Trade Order? The Long-Run Pattern of Imports to the Advanced Capitalist States', *International Studies Quarterly*, 35:2 (1991)) and Helen Milner (*Resisting Protectionism Global Industries and the Politics of International Trade*, Princeton, New Jersey, (1988)) offer convincing arguments that reverse orthodox theories.

The primacy of trade liberalisation within the WTO is evident in both the principle's predominance in pre-Uruguay GATT (for the WTO encompasses GATT) and the wording of the WTO Agreement.

Of the eight Multilateral Trade Negotiations held under GATT auspices, tariff reductions, initially considered the most important barrier to the flow of goods between contracting parties, dominated the first five rounds.¹³ With the significant reduction of tariffs at these negotiations, the trade distorting effects of NTBs became increasingly evident and saw this issue taken up, to varying extents, at subsequent MTNs. The dominance of tariff and NTB issues at MTNs is evidence of, initially, the history of GATT, which was established to deal specifically with tariff issues until such time as the International Trade Organisation (ITO) came into being, but more significantly, the importance of issues related to trade barriers and means by which to achieve their management and reduction.

Forty-eight years after the demise of the ITO, the Agreement Establishing the World Trade Organisation has set itself similar if not identical tasks as those outlined for GATT, with an addition in the area of environmental protection.¹⁴ The means for achieving these goals include the 'entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and

¹³ McKinney, 'The World Trade Regime', p. 448.

¹⁴ The *Parties* to this Agreement,

Recognising that their relation in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring real income and effective demand, and expanding the production and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development, *Recognising* further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development,

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements *directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations,*

Resolved, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of multilateral trade negotiations,

Determined to preserve the basic principles and to further the objectives underlying this multilateral trading system. (emphasis added)

Agreement Establishing the World Trade Organization, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, December, 1993.

other barriers to trade and to the elimination of discriminatory treatment in international trade relations’.

Liberalisation, while always a principle of GATT, has assumed a predominant place on the WTO agenda. Whether it will be as capable of achieving it as GATT, is questioned by this paper. The assumption inherent in this question rests on acknowledging that GATT was indeed successful in implementing a degree of trade liberalisation.

GATT and the promotion of trade liberalisation.

The measure of GATT’s ability to promote a liberal trading order is a highly relative gauge. The fact that we do not know how the international trading system might have developed had GATT not existed, further complicates the task of determining its ‘success’.¹⁵

It is not strictly necessary to measure GATT’s ‘success’ by comparing the extent of trade liberalisation achieved were GATT never to have existed, with current levels. The relative ‘success’ can and perhaps should be measured by determining how far the Agreement fulfilled the liberalisation objectives it set for itself. Two achievements stand out above all others. The first relates to the nature and scope of GATT membership, and the second, to the gradual reduction of import tariffs on manufactured goods.

The choice of states to become contracting parties to GATT is one of the Agreement’s greatest achievements in terms of developing trade liberalisation. Perhaps an obvious point, yet without member bodies’ participation, recognition and implementation of GATT principles and practices would not have occurred. Despite commentators regularly sounding GATT’s death knell, the Agreement has not only survived but increased its membership from 23 contracting parties to the 1947 negotiations, to 117 signatories of the Uruguay Round Agreement.

While the growing number of GATT members has improved the forum’s credentials as the primary regulator of international trade, the ability of the Agreement to attract major trading nations, or major suppliers, has been central to its effectiveness. The 23 founding members of GATT controlled more than 25 per cent of world trade. Today WTO Member’s combined share of world trade exceeds 90 per cent.¹⁶ The importance of market share is based on the assumption that

¹⁵ A. Shonfield (ed.), ‘The Management of Trade Relations in the GATT’, in *International Economic Relations of the Western World 1959–1971: Volume 1, Politics and Trade*, Oxford University Press for the Royal Institute of International Affairs, London (1976), pp. 192–3.

¹⁶ *1994 International Trends and Statistics GATT International Trade*, GATT Secretariat, Geneva, (1994).

maximum benefits from trade are gained when one is able to secure large and stable markets for the good or service that is to be traded. Though Preeg argues that this is a narrow view of potential benefits from increased trade,¹⁷ it is, in part, an understanding upon which the current trade regime is based. Derived from this staple of trade theory, it follows that without the involvement of major trading nations there would be little incentive for lesser states to join and adhere to GATT rules and principles, other than the rules themselves. The desire of these states to secure as large a market as possible for their goods would have seen the continuation of bilateral trade practices with those major trading states not participating in GATT.

Though it is argued that GATT's ability to initially attract major trading states rests more with US postwar dominance than any inherent quality of the regime itself,¹⁸ it was the regime's balancing of legalism and pragmatism in the letter and application of its agreements that facilitated major trading state adherence.

Lesser trading states joined and maintained membership in GATT because of the protection offered by a rules based system and because of benefits which accrued to them from the MFN clause—whereby any concession negotiated between any two contracting parties is automatically granted to all other signatories.¹⁹ Multilateralism enabled small states to benefit from negotiations in which they might not otherwise have participated in lieu of their relative unimportance as a supplier. There is little incentive for a large state to negotiate with a smaller supplier when the reciprocal gains to be made from those negotiations are relatively minor. In recognition of this, Peter Katzenstein observes that:

[t]he securing of a liberal international economy has been an overriding objective for the small European states. Since the position of small states is intrinsically weak, this group of states has a strong interest in...strengthening the principle of multilateralism.²⁰

While this argument holds true for developed small states, the position of underdeveloped states, attempting to protect the growth of domestic industries in order to foster development, does not always allow them to benefit from reduced trade barriers. Working within a regulated, as opposed to an essentially power based system, however, has advantages in itself.

¹⁷ E.H. Preeg, 'Krugmanian Competitiveness: A Dangerous Obfuscation', *Washington Quarterly*, 17:4 (1994), p. 116.

¹⁸ C.P. Kindleberger, *The World in Depression, 1929-1939*, University of California, Berkeley, (1973).

¹⁹ Findlayson and Zacher, 'The GATT and the Regulation of Trade Barriers', p. 566.

²⁰ P.J. Katzenstein, *Small States in World Markets Industrial Policy in Europe*, Cornell University Press, Ithaca, (1985), p. 40.

(1989), p. 533.

Orbis: A Journal of World Affairs, 33:4

GATT's acceptance of these deviations is indicative of the regime's recognition of the importance of major supplier participation for the Agreement's credibility, and thus the need to cater to these parties' perceived need for non-GATT consistent actions. While much pre-Uruguay GATT commentary depicted these abuses as signs of GATT's weakness and irrelevance, they can be interpreted as examples of that balance between ideological rule creation and pragmatic implementation: between legalism and pragmatism. It is this balance that has enabled states to join and maintain their membership in GATT in allowing them the flexibility to marry domestic demands and international obligations.

GATT's proven record of reducing tariffs on manufactured products stands out as its most significant achievement. Though the ITO Agreement was more comprehensive in its coverage of issues pertaining to trade barriers, US Congressional rejection of the Agreement left tariff reductions, as embodied in GATT, as the only internationally agreed method for creating more liberal trading conditions.²⁷ In reducing tariffs, GATT has been largely successful though these reductions have, until the Uruguay Round, been limited to manufactured products.²⁸

The process of tariff reduction negotiation is itself evidence of the legalism/pragmatism compromise. Though the Agreement established a legal framework upon which to base tariff reductions, the process of negotiation and commercial diplomacy facilitated adherence where legalistic rule application was problematic.²⁹ Its dual nature has facilitated member participation, negotiation, and enforcement of schedules of tariff reductions.

The above mentioned examples of GATT's pragmatism have also been interpreted as its weakness. Deviations from provisions and codes have often been depicted as flaws in the GATT system and indicative of its deterioration. One of the purposes of establishing the WTO was to counter this perceived deterioration.

GATT's 'flaws'—why the perceived need for increased regulation and institutionalisation

The GATT system is...widely perceived to be outmoded. Given all the changes in the world economy and, too, the redistribution of economic power since it was drafted, the GATT's rules are often seen as irrelevant and, even when not they are more honoured in the breach than in the

²⁷ O. Long, *Law and its Limitations in the GATT Multilateral Trade System*, Graham and Trotman/Martinus Nijhoff, London, (1987), p. 22.

²⁸ Import tariffs levied on industrial products by the major industrial countries have been reduced from a weighted average of about 40 per cent of product value in 1947 to around 5 per cent today. McKinney, 'The World Trade Regime', p. 447.

²⁹ Long, *Law and its Limitations in the GATT Multilateral Trade System*, p. 21.

observance. There is a strong feeling that, without new negotiations, the system will probably collapse.³⁰

In 1988 Lester Thurow declared GATT to be dead. His assessment was based on an increasing tendency of contracting parties to implement trade policies which infringed GATT agreements. These trade policies employed NTBs, such as orderly marketing arrangements, voluntary export restraints, selective procurement and product standards, to redress or at least soften domestic adjustment problems, help foster development through industry specific protection, or re-establish balance of payments equilibria. Though referred to as 'New Protectionism', GATT's history is peppered with exceptions, waivers and outright violations of rules and principles. During the 1980s, increases in NTBs was interpreted as a move towards protectionist trade practices. The WTO was established in part to counter this trend by strengthening adherence enforcement through better defined and stringent regulation. As recently as January 1995, the then Director-General of the WTO, Peter Sutherland, 'warned that the world risked being engulfed by a returning tide of protectionism and nationalism of the worst kind; unless a stronger framework was developed for global economic policy co-ordination'.³¹

Interpreting the increased prevalence of NTBs as evidence of protectionism assumes NTBs to be contrary to the GATT system as a whole. In recognising the balance between legalism and pragmatism as the mechanism enabling GATT's promotion of specific trade principles, one must also recognise that exceptions, waivers and even violations are integral to those pragmatic aspects of GATT which underpin its flexibility, and subsequently, its success.

According to Ruggie, 'New Protectionism' is misleading in that it is defined from a free-trade base line and not the 'institutional compromise' that is embedded liberalism.

...within the embedded-liberalism framework, there is no anomaly [that being despite 'new protectionism', the markets of industrialised countries are more open today than they were only a decade ago] to begin with: in terms of its overall balance of political objectives, this was how the trade regime was expected and designed to function...the bulk of the 'new protectionism' may be seen instead as norm-governed institutional adaptation to a very different international competitive environment than existed in the past.³²

³⁰ G. Patterson and E. Patterson, 'Importance of a GATT Review in the New *World Economy*, 9:2 (1986), p. 154.

³¹ P.P. Sutherland, 'Key Issues in the Global Economy—How the WTO Contributes to Global Solutions', address to senior media representatives, Davos, 29 January 1995, p. 4.

³² Ruggie, 'Unravelling Trade', p. 20.

Another argument, questioning the presumed negative effects of NTBs on the GATT system, stems from Bhagwati's observation that 'the growth of protection appears significant but its consequences do not'.³³ The essence of this argument sees NTBs as instruments of national policy-makers attempting to appease domestic demands. By introducing an NTB, government is seen to be protecting national interests, while the relative ineffectiveness of the measure does the least amount of damage to open international trade. It is what Bhagwati refers to as 'porous protection'.

Correspondingly, Yarbrough and Yarbrough have depicted the supposed disarray of trade relations as a realignment of the trade system from one based on exclusionary multilateralism to lateralism, where various forms of preferential agreement, regionalism, bilateralism or minilateralism, now play major roles alongside GATT's multilateralism.³⁴ Rather than constituting abuses of the multilateral system, it is argued, these alternative arrangements 'may help sustain the growth of world trade since they are easier to monitor and enforce, despite the fact that they contravene the principle of non-discrimination'.³⁵

Deviations from GATT principles and rules are either sanctioned by Contracting Parties, and therefore GATT consistent, or undertaken outside GATT auspices and in violation of GATT provisions. Exemptions—such as the Multifibre Arrangement (MFA) or the Generalised System of Preferences (GSP)—and waivers constitute GATT-legal deviations, whereas VERs and OMAs would be considered abuses.

In 1961 several major textile trading countries established a temporary agreement regulating trade in cotton textiles in an attempt to protect their domestic industries. This agreement was separate from GATT, authorising less stringent criteria for safeguards, and permitted restrictive actions against selected sources as opposed to the global non-discriminatory measures contained in GATT.³⁶ Thirteen years later, this agreement was succeeded by the MFA, enlarging its coverage to include wool and man-made fibres.

The MFA violated the principle of non-discrimination and applied quantitative restrictions to textile trade. Despite these GATT abuses, developing countries, the main targets of these restrictive measures, 'accepted' the Arrangement, for it

³³ J. Bhagwati, *Protectionism*, Massachusetts Institute Press, Massachusetts (1988), p. 56.

³⁴ B.V. Yarbrough and R.M. Yarbrough, 'Regionalism and Layered Governance: The *Journal of International Affairs*, 48:1 (1994), p. 95.

³⁵ S. Gill and D. Law, *The Global Political Economy: Perspectives, Problems, and Policies*, Harvester, New York, (1988), p. 251.

³⁶ S. Bagchi, 'The Integration of the Textile Trade into GATT', *Journal of World Trade*, 28:6 (1994), p. 31.

established rules in place of unilateral action; guaranteed multilateral surveillance of the Arrangement's operation; and contained obligations for importing countries to respect the most recent trade flows and to provide for annual growth with certain norms of flexibility.³⁷ The MFA is an example of an agreement which blatantly contravened GATT norms, yet facilitated regulation of trade in textiles. Taking this sector out of GATT's purview enabled drafters of the MFA—predominantly the US—to remain in GATT without openly violating a specific textile clause; it established a degree of sectoral regulation; and provided rules within which signatories were forced to work.

In 1964, the Contracting Parties granted the US a waiver on negotiation of tariff reductions for agricultural commodities. Exceptional in that no time limit was tied to the waiver, the matter was raised following the enactment of Section 22 of the US Agricultural Adjustment Act. The legislation required the Administration to impose quantitative restrictions or special fees on any imported goods which were detrimental to the production or sale of domestic farm produce. As one of the world's largest trading nations and despite being one of the most vocal proponents of freer international trade, US GATT negotiators 'were keenly aware that no treaty that impinged upon the U.S. farm program could receive the constitutionally-required senatorial approval'.³⁸ The demise of the ITO demonstrated that US non-participation in GATT would render the Agreement ineffective. The Contracting Parties' decision to grant the US waiver recognised the international trade hierarchy and the necessity of working within it in order to maintain GATT's viability, if not its continued existence.

Unlike exceptions and waivers, voluntary export restraints and orderly marketing arrangements represent unsanctioned violations of the non-discrimination principle. These NTBs have been predominantly imposed by the US and the European Union against Japan and newly industrialised countries in order to buffer certain domestic industrial sectors, in particular textiles, automotive and high technology industries. They essentially involve a bilateral agreement where the quantity and type of goods to be traded are fixed according to the requirements of the importing country.

While William Niskanen describes these practices as evidence of blatant US power politics,³⁹ Patterson and Patterson see VERs and OMAs as symptomatic of more subtle difficulties related to domestic adjustment problems with far greater repercussions for the trading system at large.⁴⁰

³⁷ *ibid.*

³⁸ Dam, *The GATT Law and International Economic Organization*, p. 260.

³⁹ Niskanen, 'The Bully of World Trade', pp. 531–8.

⁴⁰ Patterson and Patterson, 'Importance of a GATT Review in the New Neg', p. 162.

The WTO's attempt to restrict deviation from its principles and rules through increased regulation fails to recognise the value of many of these deviations for the viability of the system as a whole. Overly enforcing rule adherence undermines both the regime's ability to deal with change in the international environment and contracting parties' need to address domestic adjustment and development problems in ways they feel most appropriate to their specific context.

Irrespective of whether or not deviations from GATT were truly detrimental to the multilateral system, the Uruguay Round Agreement does include structural and substantive agreements which attempt to redress them.

This paper is predicated upon the assumption that the WTO Agreement represents a significant change in the conduct of international trade. Whereas GATT had evolved gradually, since its inception, and in response to developments in the trading environment, the nature and extent of change envisioned in the outcomes of the Uruguay Round is substantially different to that resulting from previous negotiations. The Uruguay Round introduced legalistic and comprehensive change to the trading system. In contradistinction, the evolution of GATT had been pragmatic and gradual.⁴¹

The WTO: more regulatory than GATT?

Increased regulation of the multilateral trading system is evident in an examination of the Uruguay Round outcomes as compared to pre-existing GATT agreements and practices. Yet by what measure is one able to determine the relative stringency of an institution to one that has only just come into being? This dilemma is particularly relevant in the case of comparing GATT and the WTO, for GATT practices have been known to differ from the letter of its agreements. So while it is relatively straightforward to compare GATT and WTO documents, it is, as yet, virtually impossible to compare GATT and WTO practices.

The Uruguay Round Agreement is attempting to establish 'an integrated, more viable and durable multilateral trading system'.⁴² The agreements and understandings contained in the document have been created to reduce trade barriers, provide remedies for perceived flaws in the system and provide structures to deal with future changes in the international trade environment. They envision a specific form of international trade relations and provide guidelines for achieving it. It is this envisioned form of trade relations, as specified in the letter of the WTO Agreement, which constitutes a significant change from past practices and

⁴¹ '...changes in the management system for trade have been gradual and largely informal'. P.M. Wijkman, 'Informal Systemic Change in the GATT', *World Economy*, 9:1 (1986), p. 37.

⁴² *Agreement Establishing the World Trade Organization*.

agreements. The comparison then, examines the conduct of multilateral trade relations as undertaken in the past to that envisioned for the future as based on the Uruguay Round document.

The nature of this comparison is relevant for two reasons. As the actual practice of international trade under the WTO is yet to be determined, the argument postulates two *potential* outcomes from institutionalisation and increased regulation. Either the reduced flexibility and increasingly legalistic approach to international trade will drive major trading states from the multilateral system, or lead them to seek ulterior channels for negotiation in order to allow adaptability when dealing with domestic pressures. Both options effectively undermine the credibility of the WTO system. Alternatively, the WTO will continue to implement pragmatic, rather than legalistic, rule application, as occurred under GATT. Yet in this scenario, the abuse of agreements will be so much more evident, in light of the increased definition and comprehensiveness of WTO provisions, that deterioration of the multilateral system would be the end result. The *potentiality* of these outcomes derives from the unknown direction trade will take under the WTO, while their *validity* is firmly based on GATT's history and the WTO Agreement.

The institutionalisation and increased regulation of the trading system stems from two distinct parts of the WTO Agreement. The institutionalisation of GATT is found in the Agreement Establishing the World Trade Organisation, and specifically, Articles relating to structure, administration, decision making and dispute resolution. Increased regulation of substantive issues is outlined in four Annexes of six sections. These Annexes constitute increased regulation in the volume of issue-areas covered, as well as heightened rule procedure and definition.

The WTO: institutionalisation of GATT and a move towards legalistic rule creation and application

As noted earlier, GATT existed, between 1947 and 1995, as a provisional agreement created to deal initially and primarily with tariff issues. It 'was never intended to be more than a flexible and pragmatic document representing the maximum that countries were prepared to agree upon when it was signed'.⁴³ The WTO Agreement represents the institutionalisation of GATT, where institutionalisation refers to the creation of a 'formal system of rules and objectives (and) a rationalised administrative instrument'.⁴⁴

⁴³ G. Curzon and V. Curzon, 'GATT: Traders' Club', in R.W. Cox and H.K. Jacobson, *The Anatomy of Influence*, Yale University Press, New Haven, (1974), p. 299.

⁴⁴ P. Selznick, *Leadership in Administration*, Harper and Row, New York, 1957, p. 8, quoted in C. Archer, *International Organizations*, Allen and Unwin, London, (1983), p. 2.

Structure

Article IV of the WTO Agreement establishes a formal administrative structure for the conduct of trade negotiations, comprised of a Ministerial Conference (MC), a General Council (GC), three councils and three committees. The three councils, responsible for issues pertaining to trade in goods, trade in services and trade related aspects of intellectual property rights, are permitted to establish subsidiary bodies as required. The three committees deal specifically with trade and development issues, balance-of-payments restrictions and budget, finance and administrative matters. A Secretariat, headed by a Director-General, has been formally included in the WTO Agreement to facilitate the work done in these eight main bodies.

The Agreement outlines various responsibilities for each of these groups and establishes timetables and delegates authority for the refinement of specific functions. In the MC resides ultimate authority for 'decisions on all matters under any of the Multilateral Trade Agreements'.⁴⁵ The MC is comprised of representatives of all Members and is required to meet at least once every two years. Between MC meetings, the GC will undertake the functions of the MC, though ultimate authority will remain the prerogative of the MC. The GC will also discharge the responsibilities of the Dispute Settlement Body and the Trade Policy Review Body and its membership, like the MC, is open to all members. The three councils will come under the general guidance of the GC, while the three committees, though established by the MC, will be answerable to the GC and be required to undertake any function assigned to them by the GC.

The clearly delineated structure of the WTO represents a move towards an increasingly legalistic approach to multilateral trade relations and stands in stark contrast to the illegitimate yet flexible pre-Uruguay GATT structure.

Though no structural provisions were formally incorporated into GATT itself, a *de facto* structure evolved with the demise of the ITO. To a certain extent, this informal structure reflected that now established by the WTO Agreement. The Contracting Parties, the only institutional body envisaged when GATT first came into being, had authority to legislate provisions of the General Agreement.⁴⁶ In 1960 the Council of Representatives was established by a decision of the Contracting Parties as their intersessional body, and replaced the intersessional committee. Membership of the Council was open to all contracting parties, yet in 1987 only two-thirds of members were represented. Decisions in Council were consensus based.⁴⁷

⁴⁵ *Agreement Establishing the World Trade Organization*, Article IV:1.

⁴⁶ Long, *Law and its Limitations in the GATT Multilateral Trade System*, pp. 45–6.

⁴⁷ *ibid.* p. 48.

As in the WTO, GATT established subsidiary committees, working parties and panels to examine specific questions and problems. Unlike the WTO there was no authority in the General Agreement for their creation.⁴⁸ The nature of these subsidiary bodies was temporary, though occasionally long-running, their membership determined by the particular question under consideration, and their conclusions founded essentially on 'pragmatism or negotiation'.⁴⁹

Looking at the respective formal and informal structures of the WTO and GATT there seems little difference between the two. If anything the WTO structure represents the formalisation of a structure which already existed. Yet it is this very process of institutionalisation which constitutes a significant change in multilateral trade relations.

Where once all that was required to establish or close a committee, council or body was a decision by the Contracting Parties or the Council of Representatives, under the WTO, these changes involve alterations to the WTO Agreement. Article X of the Agreement deals with amendment procedures.⁵⁰ The process it outlines involves an initial submission of an amendment proposal to the MC. Within 90 days of the proposal being formally tabled, the MC must decide whether to submit the proposal to the membership for acceptance. The MC decision to submit the proposal to the membership should be a consensus decision. However, if consensus is not reached within the established period, the Ministerial Conference shall decide by a two-thirds majority of the Members whether to submit the proposed amendment to the Members for acceptance.⁵¹ If then put to the membership, amendments that would alter rights and obligations need to be accepted by two-thirds of Members. If this is achieved, the amendment comes into effect immediately for those who voted for the amendment, and for those who agree to it at a later date. Part three of Article X states:

The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under this paragraph is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case, shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference.⁵²

⁴⁸ *ibid.* p. 52.

⁴⁹ *ibid.* p. 50.

⁵⁰ Amendments to the GATT required a two-thirds majority in order to become effective. However, those parties who did not accept the amendment were not required to adhere to it. Under the WTO, Members can be forced to adhere to an amendment in accordance with changes made to amendment procedures in Article X.

⁵¹ *Agreement Establishing the World Trade Organization*, Article X:1.

⁵² *ibid.* Article X:3.

This lengthy amendment procedure applies to the whole of the WTO Agreement. The institutionalisation of GATT patently has the potential to restrict structural changes within the Organisation so as to render it incapable of responding to changes in the international trade environment. Where consensus is easily achievable, the procedure for amending the Agreement is relatively straightforward. Were the current consensus supporting the norms of non discrimination and efficiency challenged by the principles of redistribution and equity, as argued by some Third World states, amendment of the WTO Agreement would prove confrontational to say the least.

Decision-making

Of all the changes to GATT, those made to decision-making procedures most threaten to increase politicisation of trade negotiations. While domestic political considerations are inherent factors in any trade negotiation, international politics has been far less influential in shaping GATT trade relations than is the case in other multilateral fora.

Article IX of the WTO Agreement signals a move away from consensus based decision-making in favour of voting. The Article's wording acknowledges the GATT practice of consensus and adds: 'Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting'.⁵³

Were Article IX to have been left at that point, the difference between decision-making procedures under the WTO would have little differed from that as practised under GATT. However, two inclusions in this Article evidence a tendency toward legalistic, over pragmatic rule application. The first relates to the allocation of authority for interpretation of WTO understandings and agreements. Under the WTO, the MC and GC have exclusive authority to adopt interpretations of the WTO and Multilateral Trade Agreements as based on a three-fourths majority decision by Members.⁵⁴ Under GATT, the Contracting Parties were not explicitly granted authority to interpret agreements.⁵⁵ Second, Article IX states that decisions regarding waivers shall be limited to 90 days, at which time, if no decision has been reached, a vote will be taken requiring three-fourths majority for sanction of the waiver.

The increased emphasis on voting over consensus decision-making, and the corresponding clause which requires members voting against any particular agreement or decision to adhere to that decision within a specified period of time,

⁵³ *ibid.* Article IX:1.

⁵⁴ *ibid.* Article IX:2.

⁵⁵ Jackson, *Restructuring the GATT System*, pp. 57–8.

Agreement Establishing the World Trade Organization, Article

IX: 2.

⁵⁸ The Cairns Group of Fair Traders in Agriculture was formed for the first time at ministerial level in August 1986. Its members included Argentina, Australia, Brazil, Canada, Chile, Colombia, Fiji, Hungary, Indonesia, Malaysia, New Zealand, the Philippines, Thailand and Uruguay. The aim of the Group is to counter US and EEC agricultural subsidy competition which affects the agricultural trade of Cairns Group countries. The Cairns Group formed a third force in the agricultural negotiations, with the US and the EU, and is credited with forcing this back onto GATT's agenda.

⁵⁹ Curzon and Curzon, 'GATT: Traders' Club', p. 317.

have tended to take dispute settlement in the area of multilateral trade towards a more legalistic approach.⁶⁰

The Understanding on Rules and Procedures Governing the Settlement of Disputes contains five central features which differentiate it from previous GATT dispute settlement procedures. They include a detailed exposition of dispute resolution procedures⁶¹ and strict time-scales for their implementation. Under the WTO specific dispute settlement procedures will operate automatically, requiring a consensus decision by Members to interrupt them. The Understanding allows for the appointment of persons qualified in international law to hold dispute panel positions and establishes an appellate tribunal, again allowing the appointment of expert, and independent persons to hold office on the tribunal.⁶²

The nature of GATT's relationship to the defunct ITO saw the 1947 Agreement drawn up with very few explicit references to dispute resolution, though, depending on one's definition of a 'dispute resolution procedure', there exist references to settlement processes in different parts of the document. While Articles XXII and XXIII of GATT have provided the framework for dispute settlement since its inception, implementation of these Articles established practices which went beyond the fairly vague directions they outlined.

Though Article XXII established little more than the right to consult with other contracting parties on any matter relevant to the operation of the Agreement,⁶³ Article XXIII established three essential pillars of dispute resolution.

⁶⁰ Kohona, 'Dispute Resolution under the World Trade Organization', *Journal of World Trade*, 28:2 (1994), p. 24.

⁶¹ The sub-topics covered in the Understanding include coverage and application, administration, general provisions, consultations, good offices, conciliation and mediation, establishment of panels, terms of reference of panels, composition of panels, procedures for multiple panels, third parties, function of panels, panel procedures, right to seek information, confidentiality, interim review stage, adoption of panel reports, appellate review, communications with the panel or appellate body, time-frame for DSB (Dispute Settlement Body) decisions, surveillance of implementation of recommendations and rulings, compensation and suspension of concessions, strengthening of the Multilateral System, special procedures involving Least-Developed Country Members, arbitration, non-violation, responsibilities of the Secretariat, working procedures, a proposed timetable for panel procedures and expert review groups. *Agreement Establishing the World Trade Organization*, Annex 2, Articles 1–27, Appendix 1–4.

⁶² Kohona, 'Dispute Resolution under the World Trade Organization', p. 24.

⁶³ Article XXII Consultation.

1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.

The first enabled invocation of a settlement procedure on the basis of nullification or impairment of benefit, due to a contracting party as derived from a GATT principle or code, rather than strictly on breach of an agreement. This clause would support the argument that GATT dispute procedures were orientated toward settlement negotiation rather than rule enforcement. In addition, the Contracting Parties were permitted to give rulings on any dispute and authorise the suspension of obligations to contracting parties found to be responsible for any nullification or impairment of benefit to other contracting parties.

Unlike GATT's Article XXIII, which emphasised nullification and impairment of benefit as the legitimate cause for invoking dispute settlement, rather than rule abuse, the Uruguay Round Agreement refers to both impairment of benefit as cause for initiating a dispute settlement as well as infringement of obligations.⁶⁴

Critics of GATT dispute procedures have regarded institutionalisation of the system as necessary to halt blatant abuses of GATT rules.⁶⁵ The article by Palitha Kohona, while supportive of changes made to dispute resolution rules, recognises the significance of these changes and his assessment sounds a faint warning. The relevance of Kohona's assessment to the issue of the dangers of institutionalisation is such that his views are worth quoting at length.

The UR [Uruguay Round] Understanding seeks to give effect to the rights and obligations under the provisions of the Covered Agreements and to clarify those provisions in accordance with the customary rules of interpretation of public international law. This is a significant drift away from the traditional approach to the resolution of disputes under the multilateral trade agreements. The GATT dispute settlement system favoured an approach which emphasised pragmatic, mutually acceptable solutions. It had not relied to any appreciable extent on the rules of public international law.

2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

Agreement Establishing the World Trade Organization, Article XXII.

⁶⁴ In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and, in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge. *Agreement Establishing the World Trade Organization*, Annex 2, 3.8.

⁶⁵ See C.M. Aho and J.D. Aronson, *Trade Talks: America Better Listen!*, Council on Foreign Relations, New York, (1985), pp. 46–8. Also, Patterson and Patterson summarise four reports compiled to examine specific issues dealt with at the Uruguay Round, including dispute resolution. Patterson and Patterson, 'Importance of a GATT Review in the New Negotiations', p. 164 5.

The approach to dispute settlement reflected in paragraph 3.2^[66] is consistent with the objectives of those countries which sought to achieve a better rules-based international dispute settlement system to deal with international trade disputes. The adherence to the rules of interpretation of public international law in the implementation of the provisions of the Covered Agreements will contribute towards enhancing the security, certainty and predictability of the system and provide a greater juristic basis for the decisions of the DSB [Dispute Settlement Body]. However, this will require a sympathetic and sensitive approach from those charged with resolving disputes in view of the need to produce results which are compatible with the long-standing objective of the GATT system of seeking results which are generally acceptable to the parties and, consequently, effective.⁶⁷

In recognising a move away from pragmatic to legalistic rule creation and application, Kohona equally acknowledges the inherent dangers of strict adherence to this Understanding. The need for a 'sympathetic and sensitive approach' is vital not only for dispute resolution but for effective and constructive international relations. A sympathetic understanding of national diversity and a sensitive approach to incorporating that diversity into any international system must be considered the vital prerequisites for cohesive relations between states. An attempt to impose rigid structures and rules on the conduct of these relations has the potential to undermine international cohesiveness.

The institutionalisation of dispute resolution procedures in the WTO has the effect of imposing rigidity on the international trading system. Increasing regulation of the system both in the extent and nature of agreements correspondingly has the potential to undermine its flexibility and capacity to remain relevant in a dynamic trade environment. The stringency of the WTO is evident not only in its institutional provisions, but equally in its substantive agreements.

⁶⁶ 3.2 The dispute settlement system of the WTO is a central element in providing security and predicability to the multilateral trading system. The Members of the WTO recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

Agreement Establishing the World Trade Organization, Annex 2, 3.2.

⁶⁷ Kohona, 'Dispute Resolution under the World Trade Organization', pp. 28 9.

The WTO: more comprehensive and regulatory in its substantive agreements

The Uruguay MTN took seven years to complete and undertook negotiation in an unprecedented number of issue-areas. The scope of the Round is indicative of the increased regulation⁶⁸ of the international trading system, as evident in the extent and nature of trade issues now covered by the WTO as compared to those previously covered by GATT.

Inclusion of new issues

When GATT was first drawn up in 1947, its specific purpose was to achieve tariff reductions based on non-discrimination.⁶⁹ Though the sixth MTN, or Kennedy Round of 1964–67, examined regionalism and its effects for trade liberalisation, it was done within the context of ensuring a decrease of the EEC's external tariff. Again tariffs remained GATT's central concern. The Tokyo Round was the first MTN to examine NTBs to any significant extent. Here, negotiations were undertaken which produced codes on subsidies and countervailing duties, customs valuation, government procurement, import licensing, technical barriers to trade, trade in civil aircraft as well as revising the anti-dumping code. Though more comprehensive in its coverage of trade issues than any previous MTN, these codes were binding only on those contracting parties who signed them.

All of these codes have been further revised in the Uruguay Round Agreement. In addition, the regulation of agriculture, textiles and clothing, trade-related investment measures, services and trade-related aspects of intellectual property rights have been brought under WTO auspices. Though trade in textiles and clothing was previously regulated by the MFA, and intellectual property rights was and continues to be overseen by the World Intellectual Property Organization, the inclusion of these issues in the WTO Agreement represents regulation of the international trading system at an unprecedented level.

The Uruguay Round Agreement on Agriculture represents a significant break through, though, strictly speaking, this trade area had not been entirely excluded from GATT. Agreements on anti-dumping and countervailing duties, quantitative restrictions, subsidies and general exemptions all included provisions for trade in agricultural products. In practice, however, agriculture remained impervious to attempts to include it in tariff reduction negotiations, primarily due to objections from major trading countries. Under the WTO, agriculture is subject to all GATT rules and disciplines previously only applied to trade in manufactured products.

⁶⁸ This section defines regulation as the creation of rules that govern procedures or behaviour. P. Hanks (ed.), *Collins Dictionary of the English Language*, Collins, Sydney, (1985), p. 1230.

⁶⁹ McKinney, 'The World Trade Regime', p. 448.

Though considerable tariffs and subsidy allowances remain, the WTO Agreement regulates agricultural trade to an extent unrealised under GATT.

As discussed earlier, trade in textiles previously was governed by the MFA—a separate, sectoral, temporary arrangement. It was not until the Uruguay Round that agreement was reached to gradually integrate this sector into the WTO and to phase out MFA restrictions over a ten-year transitional period. While full integration of trade in textiles is indicative of the increased scope of WTO regulation, the degree of regulation of textiles and clothing has been fundamentally affected by the revision of GATT rules and disciplines, particularly in the areas of safeguards, subsidies, anti-dumping and trade-related aspects of intellectual property rights.⁷⁰

Trade in services, trade-related investment measures and trade-related aspects of intellectual property rights are all areas of trade new to GATT. The incorporation of these areas into the WTO sets a precedent for further expansion of trade regulation into all aspects of international and domestic trade.

Increased regulation of existing agreements

The increased extent of regulation is evident in codes revised during the Uruguay Round. Codes and agreements on state trading enterprises, balance-of-payments, free trade areas, joint action by Members, procedures for the modification of schedules, subsidies and countervailing duties, customs valuation, government procurement, import licensing, technical barriers to trade, safeguards, pre-shipment inspection, rules of origin, anti-dumping and non-application have all been revised, to varying extents, and incorporated into the WTO Agreement.

The essential difference between these codes under GATT, as compared to the WTO, is their legally binding status. Under GATT those states choosing not to ratify any specific codes were not subject to them.⁷¹ The WTO Agreement, and all incorporated agreements and understandings (except the Plurilateral Agreements⁷²) are binding on all Members.

The revision of the anti-dumping code is an example of the increased extent of regulation introduced by the Uruguay Round, and implemented through the WTO, as compared to GATT.

⁷⁰ N. Blokker and J. Beelstra, 'Towards a Termination of the Multi-fibre Arrangement?', *Journal of World Trade*, 28:5 (1994), pp. 112–17.

⁷¹ Long, *Law and its Limitations in the GATT Multilateral Trade System*, p. 27.

⁷² The WTO Agreement includes four Plurilateral Agreements on Civil Aircraft, Government Procurement and International Trade in Dairy and Bovine Meat Products. These Agreements are binding only on those who sign them and are exceptions to the rule requiring obligatory adherence to the Uruguay Round Agreement in entirety.

Article VI of GATT 1947 provided the basis for the development of anti-dumping definitions and procedures. The first revision of this Article took place during the Kennedy Round, at which time the Agreement on Implementation of Article VI of GATT was drawn up. Essentially, anti-dumping codes allow legitimate retaliation for the dumping of goods in the market of a fellow contracting party. The new WTO code is more detailed than that which preceded it and, subsequently, provides a sturdier framework for the many anti-dumping procedures enacted in different states under GATT. The aim of the code is to supersede national codes, establishing in their place a central, multilateral procedure capable of dealing with anti-dumping issues across the board.

In establishing an all encompassing code, the Agreement on Implementation of Article VI (Anti-dumping and Countervailing Duties) sets out in considerable detail actions which constitute dumping and injury. It establishes processes for initiation and subsequent investigation of injury, including definitions of appropriate evidence. Where injury is found to have occurred, provisional measures, price undertakings, the imposition and collection of anti-dumping duties processes are outlined. In addition, issues relating to the duration and review of anti-dumping duties and price undertakings, public notice and explanation of determinations, judicial review, anti-dumping on behalf of a third country, and the founding of a committee on anti-dumping practices have all been delineated and established as integral to the WTO.

Revision of GATT substantive codes produced provisions which were more detailed in both their definition of terms and outline of procedures. The resulting agreements leave less room for variation in interpretation and application. They provide, in effect, more stringent rules and procedures for the implementation of substantive agreements. The defining difference between these codes under GATT, as compared to the WTO, is their legally binding status on all Members.

Increased regulation and institutionalisation: undermining development towards trade liberalisation

The WTO then, represents the institutionalisation and increased regulation of the international trading system. While its purpose is to further those principles established by GATT, counter the gradual erosion of the system due to rule abuse, address past change in the international trade environment and cater for future change, the method by which contracting parties have chosen to achieve this could threaten the existence of the system itself.

A fundamental dilemma underpinning the WTO's institutionalisation and stringent regulation is the question of how far rules based relations between states can replace power based relations. The belief that increased stringency will create a more effective trading system is evidenced by the WTO Agreement. This privileging

of rule over power based relations derives from the prevalent model of the formation and transformation of international economic regimes,⁷³ itself an inadequate concept in that it fails to sufficiently recognise the autonomy of states and the influence of sovereignty on the formation of international economic institutions. The essence of the relationship between international obligation, inherent in any international institution, and domestic autonomy is a balancing of pragmatism and legalism. The WTO represents an increasingly legalistic approach to international economic relations and thus an imbalance in the institutional compromise between international obligation and domestic independence: an imbalance that threatens to undermine the GATT system and the principles upon which it is based.

Regime theory informs the rules versus power based relations debate by depicting regimes as limiting 'the discretion of states to intervene in the functioning of self-regulating currency and commodity markets', and sees regimes as restraining 'self-seeking states in a competitive international political system from meddling directly in domestic and international economic affairs in the name of their national interest'. International regimes, those 'principles, norms, rules and decision-making procedures around which actor expectations converge in a given issue-area',⁷⁴ establish the parameters within which states function in the international sphere. Strengthening regimes by clearly defining and institutionalising principles and norms, and enforcing rules and decision-making procedures, reinforces the parameters dictating state action and limit unilateral initiative. The value of regimes is that they moderate the exercise of power: a positive interpretation which privileges rules based relations over power based relations.

The institutionalisation and increased regulation of GATT mirrors this causal link between regimes and rules/power based relations between states. In an attempt, amongst other things, to strengthen the regime in order to facilitate rule enforcement, the Uruguay Round institutionalised principles and norms and increased regulation of rules and decision-making procedures.

⁷³ 'In its simplest form, the model makes this prediction: if economic capabilities are so concentrated that a hegemon exists...an "open" or "liberal" international economic order will come into being. In the organization of a liberal order, pride of place is given to market rationality. This is not to say that authority is absent from such an order. It is to say that authority relations are constructed in such a way as to give maximum scope to market forces rather than to constrain them. Specific regimes that serve such an order, in the areas of money and trade, for example, limit the discretion of states to intervene in the functioning of self-regulating currency and commodity markets. These may be termed "strong" regimes, because they restrain self-seeking states in a competitive international political system from meddling directly in domestic and international economic affairs in the name of their national interest'. Ruggie, 'International Regimes, Transactions, and Change', p. 197.

⁷⁴ S.D. Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening *International Regimes*, p .1.

Yet regime theory fails to take adequate account of the role of state sovereignty in establishing international institutions. It simplifies relations between states by attributing institutional cooperation to the existence of a hegemon. Were this the case, all that would be required of a hegemon would be the creation of rules by which other states would act. Legalism would dominate international institutions for, as the 'strength of the regime [read rules]...is backed by the capabilities of the hegemon'.⁷⁵ A dominant hegemon, necessary for a regime to exist in the first place, would solely determine the nature of a regime with no input from lesser states.

The inadequacy of this explanation highlights the inadequacy of the assumption which favours rules based relations over power based relations. An interactive balance of all these aspects of inter-state relations provides a more accurate description of the dynamic shaping international relations. It is an interactive balance which determines the relationship between a hegemonic state and other states, where lesser states both bend to, yet legitimate through adherence, the power of the hegemon.

This balance was evident in GATT's legalistic rule creation and pragmatic application. The Agreement's ability to attract members and reduce tariffs on manufactured goods stemmed from negotiations based on that balance.

Trade liberalisation is the WTO's central principle and objective. Its continued predominance is dependant on the maintenance of the GATT trade regime which in turn relies on the respect and continued participation of Members. GATT's history is littered with examples of contracting parties adopting alternative trade strategies to those permitted by GATT, aimed at buffering domestic adjustment and development from international obligations.

GATT was able to maintain credibility and membership because the flexibility inherent in its legalistic/pragmatic balance of rule creation and application enabled states to adhere to multilateral rules in principle, yet deviate in practice, when national pressures demanded it. The WTO's emphasis on legalistic rule application has the potential to undermine the system's flexibility making it more difficult, if not impossible, for governments to balance international and domestic pressures. Non-participation in the WTO or violation of legally binding and detailed provisions would necessarily undermine the Organisation's credibility and question its continued existence. Without a trade regime that actively promotes trade liberalisation through multilateralism, the development of liberalisation in a competitive global environment could be severely restricted if not completely reversed.

⁷⁵ Ruggie, 'International Regimes, Transactions, and Change', p. 197.

Conclusion

The Uruguay Round Agreement was lauded at its completion as a major victory for proponents of multilateral trade. It was perceived to be ‘setting rules and disciplines over the temptations of unilateralism and the law of the jungle’. Yet this perception presupposes we are capable of overruling the law of the jungle. To a certain extent this is true: the postwar world has seen states give up considerable autonomy to international institutions. What this paper argues is that there is a point at which the necessity of catering to domestic pressures requires governments to assert their autonomy at the expense of international obligation. The point at which this might occur has, as yet, not been reached in the area of international trade relations. The institutionalisation and increased regulation of the WTO, however, represents an inexorable shift towards that point.

The potential repercussions of an increasingly entrenched trading system threatens to undermine the very purpose for which the WTO was established: to promote trade liberalisation. The WTO’s predecessor—GATT—embodied the principle of trade liberalisation and was able to foster this principle by balancing legalistic rule creation and pragmatic implementation. This balance allowed contracting parties a degree of flexibility in marrying domestic and international demands. GATT’s credibility was based on this flexibility, for it facilitated participation and negotiation; two essential requirements for the development of international trade liberalisation.

Despite GATT’s ability to attract major trading states along with smaller states, and having achieved a significant reduction in the level of tariffs on manufactured goods, the proliferation of NTBs during the 1980s brought criticism upon GATT for its perceived inability to deal with deviations from established principles and rules. Though exceptions, waivers and violations constituted deviations from the letter of GATT, they were also indicative of GATT’s pragmatic approach to rule implementation. Critics failed to recognise that some deviations actually facilitated GATT’s effectiveness and maintained its credibility in the face of a dynamic trade environment. Nevertheless, perceived flaws lead to calls for a review of the Agreement. The WTO is, in part, a response to those calls.

The extent to which the WTO is more institutionalised and regulatory than GATT is evident in the WTO Agreement’s substantive provisions. The inclusion of defined terms and procedures in agreements establishing the WTO structure, decision-making and dispute resolution, have institutionalised a once *de facto*, yet flexible, trade regime. The very enactment of a trade organisation has imposed stringencies upon the functioning of the WTO. The scope and extent of regulation has increased with the inclusion of new issues and more detailed and obligatory substantive regulations.

While the evolution of GATT since its inception had been pragmatic and gradual, change initiated by the Uruguay Round is legalistic and comprehensive. The institutionalisation and increased regulation of the WTO is an attempt to create 'an integrated, more viable and durable multilateral trading system'.⁷⁶ It is predicated upon the assumption that 'strong' international economic regimes restrain states from undertaking unilateral action in the name of national interest. This is an assumption which has failed to adequately recognise domestic pressures on contracting parties and the necessity of balancing national and international pressures. Unless the WTO is able to facilitate a domestic/international institutional compromise, members will be forced to find alternative channels for conducting international trade. Non-adherence to obligatory rules or non-participation would necessarily undermine the credibility of the WTO, restricting, if not reversing, development of its central objective—international trade liberalisation.

⁷⁶ *Agreement Establishing the World Trade Organization.*

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