

HEINONLINE

Citation: 3 Minn. J. Global Trade 35 1994



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Wed Nov 11 13:52:07 2015

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=1944-0294](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=1944-0294)

The Road from GATT to MTO*

Gardner Patterson**

Eliza Patterson***

I. THE INSTITUTIONAL DEVELOPMENT OF THE GATT

A. INTRODUCTION

As an institution, the General Agreement on Tariffs and Trade (GATT)¹ is a complex and untidy thing. There is not even a consensus as to what it should be called. Is it a general agreement, an executive agreement, a treaty, a cluster of treaties; or is it an organization? While all observers agree that the first Secretary-General was not serious when he once referred to GATT as "a network of loopholes held together by waivers," it is anything but neat and orderly. Some of this characteristic is inherent in the complex nature of its task: developing (i.e. negotiating) "... reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment."² Also contributing to the complexity of defining the GATT is the fact that in international trade agreements generally, "the political compulsion to obtain signatures upon a piece of paper oftentimes was more important than the economic compulsion that the paper should contain a basis of real understanding."³ Inherent in this process is the hope that any papered-over differences, conflicts, inconsistencies or gaps would either not become important or could be resolved by some subsequent negotiation, regulation or decision.

An important part of this institutional and legal untidiness also results from the fact that GATT was not intended by the

* This Article was written before the completion of the Uruguay Round.

** Economist and former Deputy Director-General of GATT.

*** Attorney, Port Authority of New York and New Jersey, working on trade issues. The views expressed herein are solely those of the authors.

1. General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. pts. 5,6, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

2. GATT pmbl.

3. Raymond Vernon, *America's Foreign Trade Policy and the GATT*, in 21 ESSAYS IN INTERNATIONAL FINANCE 1, 4 (1954).

drafters to stand alone. It was seen as an interim phase—a sort of advance installment—in the negotiation of an International Trade Organization (ITO) which would provide the commitments and institutional structure for voting, rules of procedure, a secretariat, and detailed dispute settlement arrangements that are a normal part of an international organization.⁴ As a result of the expectation that a formal legal arrangement was to be concluded in the future, members accepted the obligations of the GATT under a Protocol of Provisional Application.⁵ They thereby agreed to bind themselves only “to the fullest extent not inconsistent with existing legislation,”⁶ thus avoiding the necessity for a formal ratification of the agreement or for modification of domestic legislation in conflict with it.⁷

B. PRAGMATISM TAKES OVER

The abandonment of the ITO⁸ left to the GATT CONTRACTING PARTIES (cps) the task of dealing with many legal, institutional and constitutional matters on a pragmatic, *ad hoc* basis. As it happened, this situation suited the first Secretary General of the GATT, Eric Wyndham White, who believed that the purpose of the GATT was to foster multilateral negotiated reductions in trade barriers. In his opinion, this activity was not well served by a rigorous adherence to legal norms, and sophisticated economic theory provided little useful guidance to trade negotiators. His successor, Olivier Long, a learned and thoughtful man, was more concerned with the problems of “managing the GATT,” but he also believed that “legalism” does not contribute to trade liberalization.⁹ He viewed with sympathy what he

4. See generally JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT*, chs. 1-2 (1969).

5. The Protocol of Provisional Application of the General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 55 U.N.T.S. 308.

6. *Id.*

7. This “grandfather” clause was of considerable importance to the United States because it permitted the continuing absence of an injury test in the application of countervailing duties on subsidized imports, and permitted the United States to maintain the discriminating features in of its coastal shipping regulations: only U.S.-flagged vessels may carry cargo from one U.S. port to another.

8. For an authoritative account see William Diebold, Jr., *The End of the ITO*, in 16 *ESSAYS IN INTERNATIONAL FINANCE* (1952).

9. See OLIVIER LONG, *LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM* 61-64 (1987) for a detailed exposition of this view as well as an authoritative account of how the GATT functioned in the pre-Uruguay Round years.

called the "evolution through tolerance," i.e. tolerance of measures not compatible with the strict application of the rules.¹⁰

Pragmatism became deeply embedded in the substantive functioning of the GATT. In response to specific problems that arose as time went on, the cps, occasionally borrowing from the defunct ITO, approved a series of decisions, issued reports, created subsidiary bodies, and developed practices and rules in conducting their business that gave the GATT many of the characteristics of an international organization.¹¹ This in turn was destined to result over time in a jerry-built organizational and legal structure and a reluctance to legally formalize the institutional framework.

In this environment, the extremely important practice of decision-making by consensus developed. Although GATT Article XXV provides that each cp is entitled to one vote at all meetings of the cps and that each decision shall be taken by majority vote,¹² the practice developed early whereby the cps do not proceed to a formal vote in reaching decisions, except for decisions on waivers and accessions. Since 1959 the practice has been for the chairman to "take the sense of the meeting." Consensus is understood to mean that no member maintains an objection to a text or attempts to prevent its adoption.¹³

This system and these methods worked remarkably well during the decades of the 1950s and 1960s when GATT's membership was relatively small and "like-minded." The attention of the cps was primarily on reducing tariffs on manufactured goods and shrinking the networks of quantitative restrictions built up before, during and after World War II. It was a time when it was possible to settle most disputes on an informal "fix-it" basis. It seemed no longer to be the case, as one authoritative observer stated in 1952, that there ". . . is a widespread opinion that GATT should be given a firmer, clearer, juridical status." Indeed, a rather mild effort in 1955 to create an Organization for Trade Co-operation was not pursued.¹⁴ The United States was opposed and others apparently did not feel strongly about it.¹⁵

10. *Id.* at 19.

11. Documents detailing the more important of these actions can be found in the Basic Instruments and Selected Documents volumes [hereinafter BISD], periodically issued by the GATT Secretariat.

12. GATT art. XXV.

13. LONG, *supra* note 9, at 55.

14. *Id.* at 12.

15. *Id.*

Changes were underway, however, that would in time put the "constitutional" issue higher on the agenda. In 1961, a Short Term Arrangement on Cotton Textiles was signed¹⁶ and has been followed by a series of ever more encompassing textile and clothing arrangements.¹⁷ These arrangements were negotiated under the aegis of the GATT and were serviced by the GATT Secretariat. Furthermore, under these agreements, reports were sent to the GATT Council. Yet, the agreements were in direct contravention of the GATT articles on discrimination and the use of quotas.¹⁸ This is a classic example of GATT pragmatism at work and was a powerful precedent.

Other relevant changes were underway. A host of new nations were acceding to the GATT. The number of cps more than doubled in the 1960s. Most of the new members were small developing countries. They came with economic problems and national traditions vastly different from those of the earlier members. The problem of how to "manage" the GATT took on new dimensions.¹⁹

C. INSTITUTIONAL COMPLICATIONS FROM THE TOKYO ROUND

As a consequence of the great success of the GATT in reducing tariffs and quantitative restrictions in the 1970s, the focus in trade negotiations shifted to non-tariff barriers to trade. Faced

16. GATT, *Cotton Textiles, Arrangements Regarding International Trade*, BISD 10th Supp. 18 (1962). This agreement was deemed necessary to obtain Congressional approval for U.S. participation in the Kennedy Round.

17. See, e.g., GATT, *Long Term Arrangement Regarding International Trade in Cotton Textiles*, BISD 11th Supp. 25 (1963), extended by Protocols of May 1, 1967, BISD 15th Supp. 56 (1968), and June 15, 1970, BISD 18th Supp. 18 (1972); GATT, *Arrangement Regarding International Trade in Textiles*, BISD 21st Supp. 3 (1975), extended by Protocols of Dec. 14, 1977, BISD 24th Supp. 5 (1978), Dec. 22, 1981, BISD 28th Supp. 3 (1982), and July 31, 1986, BISD 33rd Supp. 7 (1987).

18. See GATT arts. I, XI, and XIII.

19. In an effort to cope with the problem of an ever-increasing number of cps and the need "to foresee future developments in international trade relations, and to anticipate and lay the groundwork for future trade policies," the Consultative Group of Eighteen, after much prodding by Director General Long, was permanently established in 1975. It was only consultative in character, however. The United States flatly rejected including the word "management" in the title. The members were never willing to make it a real steering committee. See LONG, *supra* note 9, at 50-51.

The so-called "Wise Men's Report" to the GATT proposed that a GATT Ministerial-level body of limited membership be established to "set the course" of their countries' trade and economic policies and to support the multilateral trading system. TRADE POLICIES FOR A BETTER FUTURE: THE 'LEUTWILER REPORT', THE GATT AND THE URUGUAY ROUND 56-57 (1987).

with what were regarded as virtually insurmountable procedural and substantive problems in formally amending the GATT to accommodate the non-tariff results of the Tokyo Round, the cps opted for a series of side "agreements," "arrangements," or "understandings."²⁰

Each of the Tokyo Round agreements was signed by some but not all GATT members, raising the important question of Most Favored Nation (MFN) rights for the non-signatories: the "free rider" problem. Article I of the GATT (the MFN clause) provides that any trading privilege accorded by a GATT signatory must be given to *all* signatories.²¹ The issue presented by these new agreements was whether the benefits gained by the new agreements extended to GATT members who did not sign them. It was also very important that the various codes contained separate and often different rules for dispute settlement. As the nature and extent of GATT commitments proliferated, the number of disputes was destined to grow rapidly. Inconsistencies and conflicts between the GATT and the rules of the various new agreements²² were destined to plague GATT members in the future.

As GATT approached its fortieth anniversary, few questioned that it had been remarkably successful in its task of liberalizing trade. GATT had succeeded in slashing tariffs and

20. These are: GATT, *Agreement on Technical Barriers to Trade*, BISD 26th Supp. 8 (1980); GATT, *Agreement on Government Procurement*, BISD 26th Supp. 33 (1980); GATT, *Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT*, BISD 26th Supp. 56 (1980); GATT, *Arrangement Regarding Bovine Meat*, BISD 26th Supp. 84 (1980); GATT, *International Dairy Arrangement*, BISD 26th Supp. 91 (1980); GATT, *Agreement on Implementation of Article VII of the GATT*, BISD 26th Supp. 116 (1980); GATT, *Protocol to the Agreement on Implementation of Article VII of the GATT*, BISD 26th Supp. 151 (1980); GATT, *Agreement on Import Licensing Procedures*, BISD 26th Supp. 154 (1980); GATT, *Agreement on Trade in Civil Aircraft*, BISD 26th Supp. 162 (1980); GATT, *Agreement on Implementation of Article VI of the GATT*, BISD 26th Supp. 171 (1980); *Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries*, GATT Doc. L/4903 (Nov. 28, 1979)(Decision) BISD 26th Supp. 203 (1980); *Declaration on Trade Measures Taken for Balance-of-Payments Purposes*, GATT Doc. L/4904 (Nov. 28, 1979) BISD 26th Supp. 205; *Safeguard Action for Development Purposes*, GATT Doc. L/4897 (Nov. 28, 1979)(Decision) BISD 26th Supp. 209; *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, GATT Doc. L/4907 (Nov. 28, 1979) BISD 26th Supp. (1980).

21. GATT art. I.

22. JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* (1990). Jackson provides an authoritative account of these conflicts, duplications and inconsistencies. We have benefitted in preparing this Article from discussions with Professor Jackson, but he bears no responsibility for what is stated here.

removing a huge number of quantitative restrictions. GATT was also successful in negotiating codes and agreements that eliminated, reduced, or brought within international disciplines a host of non-tariff measures adversely affecting trade. As a result, GATT deserved a great deal of credit for helping build the prosperity that the world took for granted. Nonetheless, the GATT system did strike many as having become "unmanageably complex."²³

II. URUGUAY ROUND MANDATE RECOGNIZES ORGANIZATIONAL PROBLEMS

Against this background, the cps decided at their 1986 Punta del Este Ministerial Meeting to launch the Uruguay Round.²⁴ The agenda covered not only all the traditional GATT subjects — agriculture, tariffs, textiles and clothing, antidumping, subsidies, and safeguards — but also included intellectual property, services, and trade-related investment measures. These were the so-called "new subjects."²⁵ It was also specifically provided that the results of the Uruguay Round "shall be treated as a single undertaking."²⁶ In other words, participants would accept all the results, or nothing. The Ministers recognized that the task of covering all of these subjects, at a time of rapid changes in the world economy and the great increase in the trading importance of the developing countries, necessitated the examination of the institutional structure of GATT. This recognition led them to establish a negotiating group on the "Functioning of the GATT System" (FOGS).²⁷

The terms of reference for this group included developing understandings and arrangements that would enable the GATT to better monitor trade policies and practices of the cps.²⁸ This was to be accomplished through regular monitoring, which would allow for determination of the impact of those policies and practices on the functioning of the multilateral trading system.²⁹ Another goal was to improve the quality of decisions and

23. Victoria Curzon Price, *New Institutional Developments in GATT*, 1 MINN. J. GLOBAL TRADE 87, 105 (1992).

24. Ministerial Declaration on the Uruguay Round, Sept. 20, 1986, BISD 33rd Supp. 19-28 (1987).

25. *Id.*

26. *Id.* at 20 (Part I(B)(ii)).

27. JACKSON, *supra* note 22, at 3-4.

28. Ministerial Declaration on the Uruguay Round, *supra* note 24, at 26 (Part I(E)(i)).

29. *Id.*

their overall effectiveness by involving the Ministers in GATT decision-making.³⁰ In addition, the group sought to strengthen GATT's relationship with other international organizations responsible for monetary and financial matters, so as to achieve greater coherence in economic policy-making on a global level.³¹

Nothing specific was said at the 1986 Punta del Este Ministerial Meeting about developing a new organizational structure. The FOGS negotiating group concentrated on developing a trade policy review mechanism, achieving a greater ministerial involvement in GATT, and finding ways for the GATT to contribute more to the achievement of greater coherence in global economic policy, especially by cooperating with the International Monetary Fund (IMF) and the World Bank. In the FOGS report to the December 1988-April 1989 "Mid-Term Review," no mention was made of any discussion of a possible Multilateral Trade Organization (MTO), although it was agreed that the group should "continue to explore other means by which to improve the overall effectiveness and decision-making of the GATT."³²

Work was proceeding, however, on the organizational and constitutional questions in various other places. The Royal Institute of International Affairs sponsored a detailed study by Professor John Jackson which spelled out many of the institutional and legal shortcomings and defects of GATT. This study, which was to become a seminal work, argued for the establishment of a World Trade Organization (WTO).³³ This proposed WTO would not contain many substantive obligations, but would take the form of an umbrella institution with a firm constitutional basis. The WTO would administer and service GATT and the relevant codes, agreements, and understandings.³⁴ Earlier, in 1983, Camps and Diebold, in a study sponsored by the Council on Foreign Relations, had also made a case for changes in the organizational structure of the GATT.³⁵

In the spring of 1990 the European Community (EC), drawing heavily on Jackson's study, tabled before the GATT some

30. *Id.* part I(E)(ii).

31. *Id.* part I(E)(iii).

32. *News of the Uruguay Round of Multilateral Trade Negotiations* [hereinafter NUR] 046, GATT (Mar. 4, 1991).

33. JACKSON, *supra* note 22, at 91-103.

34. *Id.* Both existing and future GATT agreements and codes would be administered by the proposed WTO. *Id.*

35. MIRIAM CAMPS & WILLIAM DIEBOLD, JR., *THE NEW MULTILATERALISM: CAN THE WORLD SYSTEM BE SAVED?* (1983). See also MIRIAM CAMPS, *THE CASE FOR A NEW GLOBAL TRADE ORGANIZATION* (1980).

ideas on the establishment of a multilateral trade organization (MTO). The EC noted the priority that must be given in the negotiations to the substantive issues, but expressed the hope at the December 1990 Ministerial meeting (then scheduled to "conclude" the Uruguay Round) that the ministers could agree in principle to establish such an organization, to be followed by detailed negotiations on the MTO's content. Noting the fragmentation of the GATT system with the proliferation of side-codes, to be further complicated by an agreement on services, this communication stressed three specific needs. The first need was to establish the legal basis for ensuring the effective implementation of the results of the Uruguay Round, in particular that the new dispute settlement procedures would be applicable to each of the separate agreements. The second need was to provide a proper institutional framework for the Secretariat. The third need was to provide the institutional basis for cooperation with other international organizations to the end of ensuring greater coherence in global economic policy-making.³⁶ This MTO was to be a purely organizational convention without substantive provisions, which would serve as an umbrella for the administration of the GATT and its side agreements.

At about the same time, Canada put forward a similar proposal. It stressed the need to strengthen the institutional framework of the GATT as a means of blunting the pressure for regional arrangements and unilateral action. The Swiss also put forward some ideas, emphasizing the need to strengthen the GATT Secretariat, especially its independent analytical capacity. The United States stepped in a few months later and presented a proposal in October 1990 calling for the establishment of a GATT Management Board to improve the effectiveness of the decision-making capabilities of the GATT with wide but unspecified functions. The proposal authorized the Board to develop a plan for a successor organization to the GATT.

The draft documents prepared for the ill-fated December 1990 Brussels meeting included no specific proposals on institutional reform of the GATT. There was a section entitled "Institutional Reinforcement of the GATT," but it simply referred to an April 1989 "Decision" that the cps should meet at Ministerial

36. See International Chamber of Commerce, Commission on International Trade Policy, Doc No.103/INT 61, Sept. 1991, reproducing a report by the UNCTAD. Over the years the U.N. and especially the UNCTAD have put forward many proposals for strengthening international organizations in the area of trade, but space does not permit us to summarize them here.

level at least once every two years in order, *inter alia*, "to make a further contribution to the direction and content of GATT work."³⁷ It also noted that the results of the Uruguay Round would "substantially enlarge the scope of further cooperation" and would require appropriate adoption of existing consultative and institutional arrangements.³⁸ Annex IV of the draft documents was titled "Basic Elements of an Organizational Agreement," but it was literally a blank page. It was apparent that a number of institutional issues remained to be settled but the question of what, if anything, should be done to create a new organizational structure was put on the back burner for a while. The task of reaching agreement on several difficult and outstanding substantive issues was taxing enough without the drain of energy and attention surely to occur if broader organizational and structural questions were considered.³⁹

Importantly, in April 1991, a new negotiating structure for the whole Uruguay Round was established and one of six groups was labeled "Institutions." It took over the work of the FOGS group and the dispute settlement group and assumed the task of drafting a Final Act.⁴⁰ As the Director-General later stated in November 1991, the task of the Institutional Group was to develop the institutional support necessary for implementing the results of the substantive negotiations: "A very well coordinated approach is essential in respect of the infrastructure that will be put in place to fulfill the requirements of notification, monitoring, surveillance, and dispute settlement arising from a large number of Uruguay Round agreements."⁴¹

III. DUNKEL DRAFT MTO PROPOSAL

Following further extensive negotiations among the members and discussions with them and the chairmen of the various negotiating groups, the Director-General of GATT, Arthur Dunkel, on December 20, 1991, tabled a 436 page document entitled "Draft Final Act Embodying the Results of the Uruguay

37. Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN.TNC/W/35 (Nov. 26, 1990) at 322. This draft was known as the "Brussels Draft."

38. *Id.* at 323-24.

39. For a summary of Uruguay Round negotiations during that time period, see NUR 046, GATT (March 4, 1991).

40. See NUR 047, GATT (April 29, 1991).

41. NUR 050, GATT, at 7 (Nov. 11, 1991).

Round of Multilateral Trade Negotiations,"⁴² often referred to as the "Dunkel Draft." The press reported that "the vast bulk of the text - upwards of 85 per cent - was negotiated and agreed."⁴³ Nonetheless, it was not a consensus document. Key texts had been put together as compromise positions by Dunkel's staff.⁴⁴

In addition to all of the substantive provisions,⁴⁵ the Dunkel Draft included three major institutional undertakings: a comprehensive reform of the dispute settlement procedures, a trade policy review mechanism, and the text of an Agreement Establishing the Multilateral Trade Organization.⁴⁶ The following sections consider in detail the text of the draft Agreement Establishing the Multilateral Trade Organization.

A. COMMON INSTITUTIONAL FRAMEWORK

The MTO document established a common institutional framework for all the agreements annexed to it. These annexed agreements include GATT, as modified by the Uruguay Round, and its associated instruments, except the Protocol of Provisional Application;⁴⁷ all existing agreements and arrangements previously concluded under GATT auspices; and the complete results of the Uruguay Round.⁴⁸ The old GATT would lapse. The MTO would have legal personality. The MTO was intended to ensure a "single undertaking approach"⁴⁹ — it was to be all or

42. Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN.TNC/W/FA (Dec. 20, 1991) [hereinafter Dunkel Draft].

43. Frances Williams, *Dunkel Goes For Final GATT Sprint*, FIN. TIMES, Jan. 13, 1992, at 4.

44. PATRICK LOW, *TRADING FREE: THE GATT AND U.S. TRADE POLICY* (1993).

45. The substantive provisions of the Dunkel Draft included: Agriculture, Subsidies, Anti-dumping, Textiles, Safeguards, and Trade in Services.

46. Dunkel Draft, *supra* note 42, at 91-101 (Annex IV)[hereinafter MTO].

47. While this Protocol would not be included in the MTO, existing grandfather rights would be preserved. Footnote 1 to the draft MTO text provides that "[t]he provisions of the MTO Agreement are without prejudice to the substantive results of the Uruguay Round as it affects the existing rights of contracting parties under paragraph 1(b) of the Protocol of Provisional Application and under equivalent provisions of the Protocols of Accession." *Id.* art. II n.1.

48. These documents were all attached as Annexes to the MTO Agreement. *Id.* Annexes 1-4.

49. "The MTO framework would serve as a vehicle to ensure a 'single undertaking approach' to the results of the Uruguay Round - thus membership in the MTO would automatically entail taking on all the results of the Round without exception." NUR 055, GATT (Dec 3, 1991).

nothing.⁵⁰ This critical aspect would solve the "free rider" problem noted earlier.⁵¹ The only exception in the coverage, except for the provisions on "non-application" noted below, was that governments could join the MTO without being signatories to four of the Tokyo Round agreements.⁵²

B. FUNCTIONS OF THE MTO

The functions of the MTO as set out in Article III of the Dunkel Text were to facilitate the administration and the operation of the entire enterprise.⁵³ The MTO was also intended to provide the framework for the implementation of all the agreements that had been or might be negotiated under the auspices of the Agreement and to provide the forum for future trade negotiations. In addition, the MTO would administer the Integrated GATT Dispute Settlement System and the Trade Policy Review Mechanism, and cooperate with the IMF and the World Bank in achieving greater coherence in global economic policy making.⁵⁴

There were no provisions for formal or legal ties to the United Nations.⁵⁵ In brief recognition of the great interest of various environmental groups in trade, Article IV provided that the MTO could make, as appropriate, suitable arrangements with non-governmental organizations "concerned with matters within the scope of the MTO."⁵⁶

C. STRUCTURE OF THE MTO

The MTO would be headed by a Ministerial Council⁵⁷ (open to all members) meeting at least once every two years.⁵⁸ This

50. Article II of the MTO states that the annexed Agreements "shall have all members as parties." MTO, *supra* note 46, art. II(1).

51. See text accompanying notes 21-22.

52. The excepted agreements are: the Agreement on Trade in Civil Aircraft; the Agreement on Government Procurement; the International Dairy Arrangement; and the Arrangement Regarding Bovine Meat. MTO, *supra* note 46, Annexes 1 & 4.

53. *Id.* art. III.

54. *Id.*

55. The GATT has no formal relationship to the United Nations. It is treated as a specialized agency on a *de facto* basis. The most important tie to the United Nations is the participation of members of the Secretariat in the United Nations' pension and insurance schemes. GATT art. XXVI specifies that the GATT shall be deposited with the Secretary-General of the United Nations and that body is authorized to effect registration of the General Agreement. GATT art. XXVI.

56. MTO, *supra* note 46, art. IV.

57. *Id.* art. V.

58. *Id.* art. V(1).

was meant to replace the present practice of an annual "high level" meeting of the cps. A General Council, open to all members, would be established to meet regularly to supervise the operation of the MTO and the annexed agreements⁵⁹ between Ministerial Council meetings.⁶⁰ This Council would replace the present GATT Council. Under the Council would be three subsidiary councils: a Goods Council,⁶¹ a Services Council,⁶² and a Trade Related Aspects of Intellectual Property Rights (TRIPS) Council.⁶³ These bodies would oversee the operation of agreements in their respective sectors. In addition, two new "Bodies" would be created: a Dispute Settlement Body and a Trade Policy Review Mechanism.⁶⁴

The General Council, which would establish its own rules and procedures, would also set up the following committees: Budget, Finance and Administration, Trade and Development, and Balance of Payments.⁶⁵ A Secretariat was to be established, with its functions and responsibilities to be approved by the General Council.⁶⁶

D. JOINT ACTION AND VOTING

A critical aspect of the proposal was that at meetings of the Ministerial Conference and General Council, that is, for joint action by the cps, each member was entitled to one vote.⁶⁷ Generally, decisions were to be taken by a majority of votes cast, *except* that for a waiver of obligations a two-thirds majority of the votes cast was required, with such majority comprising more than half the members.⁶⁸ These provisions parallel the original GATT Article XXV. GATT Article XXV, however, was drafted when the membership was much smaller and there were few small developing country members. Also, as noted above, (except for accessions and waivers) GATT has not proceeded to a formal vote in reaching decisions for many years. Rather, it has taken decisions by consensus.

59. *Id.* art. V(2).

60. *Id.*

61. *Id.* arts. V(3), V(4), and V(5).

62. *Id.* arts. V(3), V(4), and V(6).

63. *Id.* arts. V(3), V(4), and V(7).

64. *Id.* art. V(3).

65. *Id.* art. V(3). Comparable bodies currently exist under GATT.

66. *Id.* art. VI.

67. *Id.* art. IX(1).

68. *Id.* art. IX(3).

It was provided in the MTO draft that the Ministerial Conference and the General Council, operating under the majority rule, "shall have the authority to interpret the provisions" of all the attached agreements.⁶⁹ No such explicit interpretation provision is included in GATT and the practices to date have been varied and complex, including rulings by the Chairman of the cps, reports of Panels and Working Parties, and Council action.⁷⁰

E. NON-APPLICATION AND AMENDMENTS

With respect to amendments and modifications of the Agreements, Article X of the MTO Draft specified that such *negotiations* "shall be concluded by the Ministerial Conference on the basis of consensus"⁷¹ and that they would "become effective for each member, upon acceptance by two-thirds of the members."⁷² This is an important change from GATT Article XXX which provides that amendments become effective in *respect of those countries which accept them* upon acceptance by two-thirds of the cps and thereafter for each contracting party upon acceptance by it.⁷³ Both the MTO draft and GATT Article XXX provide that the Ministerial Conference (cps in the case of GATT) may decide that any member not accepting an amendment is free to withdraw or can remain a member with the consent of the Ministerial Conference (or cps under GATT).⁷⁴

The provisions on Accession,⁷⁵ Non-Application between Particular Members,⁷⁶ Acceptance,⁷⁷ and Withdrawal⁷⁸ again

69. *Id.* art. IX(2).

70. See JACKSON, *supra* note 4, at 17-26. Because international rules are frequently drafted in vague terms as the price for securing agreement of multiple parties, subsequent interpretations can prove decisive. As a result, parties find it difficult to agree on the locus of power of interpretation. GATT's failure to explicitly address the issue is a recognition of this difficulty. With the expansion of the rules of international trade under the Uruguay Round the important role of interpretations became so significant that an explicit provision became necessary. Necessary as a provision is, making rulings by a majority vote binding even on those who disagree has proven extremely controversial. As discussed *infra* text accompanying notes 110-17, the United States has insisted that interpretations be by consensus. We agree. See *infra* part V.

71. MTO, *supra* note 46, art. X(1).

72. *Id.* art. X(2) (emphasis added).

73. GATT art. XXX.

74. MTO, *supra* note 46, art. X(3). GATT art. XXX.

75. MTO, *supra* note 46, art. XII.

76. *Id.* art. XIII.

77. *Id.* art. XIV.

78. *Id.* art. XV.

parallel those in GATT. But, as discussed below, this time the non-application provisions create very serious problems by jeopardizing the "single undertaking" approach.

The section on Final Provisions states that no reservations can be entered in respect of any provision in the agreements in Annex 1 and that the members "shall endeavour to take all necessary steps . . . to ensure the conformity of their laws with [the annexed] Agreements."⁷⁹

Even though the document represented the results of extensive negotiations among the cps, many concerns were swept aside by the drafters and, as noted above, it was not a consensus document. Moreover, the national delegates who worked with the Secretariat in drafting the MTO were often relatively junior officials and not as sensitive to some of the political implications as their seniors would prove to be.⁸⁰ It was recognized that further elaboration of the text would be required, and a special working group was set up in December 1991 to try to resolve the contentious issues.⁸¹ Meanwhile, the reactions of interested parties around the world ranged from serious objection to cautious approval.

IV. REACTIONS

A. DEVELOPING COUNTRIES

Professor Robert E. Hudec drew attention to what some thought would be a serious problem for developing countries when he noted that a legal instrument combining the results of the Uruguay Round with all existing GATT legal obligations in one package meant that governments would have to decide whether to accept everything or leave GATT.⁸² "In essence, this new approach completely restructures the developed-developing country bargain, proposing to pay for all the new developing country concessions [in the Uruguay Round] simply by agreeing not to destroy the market access they already have."⁸³ One can, of course, easily imagine some of those looking out for the interests of developed countries responding to this concern by saying, "it's about time they paid for their free rides of the past."⁸⁴

79. *Id.* art. XVI.

80. Interview with observer who spoke on condition of non-attribution.

81. NUR 055, GATT, at 1 (Dec. 3, 1992).

82. Robert E. Hudec, *GATT and the Developing Countries*, 1992 COLUM. BUS. L. REV. 67, 76.

83. *Id.*

84. U.S. negotiator who spoke on condition of non-attribution.

Some developing countries, even before the release of the Dunkel Draft, were reported to favor placing the entire enterprise within the United Nations system.⁸⁵ Presumably they believed their concerns would receive more sympathetic treatment there. This proposal, apparently, has not been seriously pursued and we have found no documentary evidence of the specific problems the developing countries have found in the MTO proposal. Nor have we found any evidence that these countries were attempting to block acceptance of the MTO or to negotiate major changes in the Dunkel Draft.

B. NON-GOVERNMENTAL ORGANIZATIONS

The most outspoken opponents of the MTO are the consumer and environmental Non-Governmental Organizations (NGOs).⁸⁶ The essence of their opposition is that the MTO will increase the power and effectiveness of international trade rules and in so doing will infringe on the ability of national governments to control their domestic policy and legislation. As stated by one group: the MTO "means enhanced enforcement of bad procedural and substantive rules"⁸⁷ which reduces national sovereignty, undermines national policies and the ability of nations to protect the environment and consumers, weakens domestic laws, and does so with little or no accountability.⁸⁸

In our view, while the NGOs have focused their opposition on the MTO, their real target is the entire Dunkel Draft and its goal of liberalizing trade through the implementation of enforceable substantive international rules. As the unifying structure, the MTO offers a convenient, and not totally illogical, target. Although their concerns regarding the impact on domestic laws are overblown and more properly addressed to the agreement on dispute settlement, they do have certain merit. The new system will increase pressure on nations to conform their domestic laws to the international rules to which they have agreed. Many

85. William Dullforce, *Leading Developing Countries Urge UN World Trade Body*, FIN. TIMES, Oct. 2, 1990, at 8.

86. Certain individual members of the U.S. Congress have also strongly criticized the MTO. Rep. Jill Long (D-Ind.) has been particularly outspoken. Among other actions, she requested a Congressional Research study of the impact of the MTO on domestic U.S. laws. The study, dated March 18, 1992, was prepared by the American Law Division.

87. PUBLIC CITIZEN, INC., WHY VOTERS ARE CONCERNED: ENVIRONMENTAL AND CONSUMER PROBLEMS IN GATT AND NAFTA, BRIEFING BOOK FOR THE 103RD CONGRESS 37 (1993).

88. *Id.* ch. 8.

would find this increased pressure for compliance to be a plus, rather than a cause for concern.

The views of NGOs regarding the power of the MTO to impose rules which override domestic policies is again exaggerated but not totally unfounded. The decision-making within the MTO, which is nothing more than the sum of its member nations and not an independent entity as the NGOs imply, does allow for the possibility that nations will be bound by obligations to which they did not agree. This aspect of the MTO was also opposed by the United States.⁸⁹

While the NGOs generally fail to identify the particular offending provisions of the Dunkel text, key among their concerns is that the MTO will force nations to change their domestic laws, presumably in ways that will adversely affect their particular interests. Three aspects of the MTO agreement are relevant to this issue. Those aspects are the role of the MTO in grandfather rights, specific obligations regarding domestic law changes, and dispute settlement.

1. Grandfather Rights

Outside the context of dispute settlement, the MTO is not designed to enforce conformity of all domestic laws with the annexed Agreements. The MTO specifically allows countries to maintain inconsistent laws for which they have previously claimed grandfather rights and which were not affected by the Uruguay Round. Although the GATT Protocol of Provisional Application, of which grandfather rights is a part, is specifically excluded from the scope of the MTO,⁹⁰ a recurrent footnote preserves existing grandfather rights.⁹¹

Regarding non-grandfathered laws that are inconsistent with the Agreement, the MTO requires only that countries *attempt* to achieve conformity. Article XVI(4) provides that, "[t]he Members shall endeavour to take all necessary steps, where changes to domestic laws will be required to implement the provisions of the agreements annexed hereto, to ensure the conformity of their laws with these Agreements."⁹² Use of the word "endeavour" clearly indicates that countries are *not required* to change their non-conforming laws. The MTO obligation to make a good-faith effort to conform to the obligations to which a coun-

89. U.S. negotiator who spoke on condition of non-attribution.

90. MTO, *supra* note 46, art. II(1).

91. See *supra* note 47 and accompanying text.

92. MTO, *supra* note 46, art. XVI(4).

try has agreed is no different than that which exists under the current GATT.

2. Impose Rules Not Agreed To

A second major worry of the NGOs is that the MTO will not only force member countries to change their domestic laws to conform to the international rules to which they have agreed, but that it will also impose on them international rules and policies with which they do not necessarily agree.⁹³

Again, the claims are exaggerated but not totally without basis. Although when nations join the Agreements they do so knowingly and voluntarily, the obligations to which they are thereby subjected may be changed by subsequent actions of the MTO.⁹⁴ The most important such actions for present purposes are amendment of the Agreements, interpretation of the Agreements and waivers of obligations imposed by the Agreements.

The most direct and explicit means for altering obligations is by amendment. As more fully discussed below, under the MTO, amendments become binding on *all* parties when implemented into domestic law by two-thirds of the members.⁹⁵ Thus, nations may find themselves bound by provisions with which they do not agree, unless they withdraw altogether or are given an exception by the Ministerial Conference.⁹⁶

A less direct, but potentially as effective, way to alter obligations is through interpretation. This is particularly true with international obligations where the price for widespread acceptance is often vagueness. Interpretation of the Agreements is decided by a majority of votes cast, with each member having one vote.⁹⁷ Thus, nations in the minority effectively will find themselves subject to obligations to which they never agreed.⁹⁸

To reduce the risk of this happening, the MTO provides that an obligation (whether or not the subject of a formal interpretation) may be waived for a member if such waiver is approved by two-thirds of the votes cast and such two-thirds comprises more than half the MTO members.⁹⁹ However, while this waiver may

93. Official of an NGO who spoke on condition of non-attribution.

94. It must be kept in mind that actions by dispute settlement panels are not actions of the MTO.

95. MTO, *supra* note 46, art. X(2).

96. *Id.* art. X(3).

97. *Id.* art. IX(1), (2).

98. This would not be likely to occur in the current GATT where decisions are taken by consensus.

99. MTO, *supra* note 46, art. IX(3).

address the concerns of those opposed to the interpretation, it is not without significance for those remaining under its terms. The actual impact of an international economic obligation depends on who undertakes it. Thus, opponents of the waiver will find themselves subject to an obligation with a different impact than that to which they agreed.

3. Dispute Settlement

One of the MTO's major functions is to administer the dispute settlement system.¹⁰⁰ As such, it is a convenient target for objections more properly directed at the Dunkel draft agreement on the dispute settlement mechanism.¹⁰¹

Even if misdirected, are the concerns about the proposed dispute settlement provisions justified? To a certain extent, yes. The Dunkel Text on dispute settlement would certainly strengthen enforcement of GATT rules. It provides for a strict time schedule, the automatic establishment of panels, confidential proceedings, automatic adoption of panel reports, strict surveillance of implementation, near-automatic authorization of retaliation, and a process for appeal.¹⁰² These changes would greatly improve the efficiency of the system and, most importantly, increase the pressure on losing parties whose laws are found to violate the GATT to conform. No longer could a losing party block the adoption of an unfavorable report, nor assume that there would be no economic cost for noncompliance. However, the new right of appeal provides a valuable protection against arbitrary political decisions and thereby eliminates much of the justification and need for noncompliance and blocking of reports. Still, nations would not be forced to change their laws. A losing nation would have, as it does presently, the option of not conforming; it would simply be more likely to pay a price. Moreover, in the United States, dispute settlement panel rulings would not be self-executing. Any changes in U.S. laws necessary to comply would generally require an act of Congress to implement.

Some members of the U.S. Congress and U.S.-based NGOs are particularly concerned that the United States will be forced

100. *Id.* art. III(4).

101. Understanding on the Rules and Procedures Governing the Settlement of Disputes under Articles XXII and XXIII of the General Agreement on Tariffs and Trade, Dunkel Draft, *supra* note 42, at S.1.

102. MTO, *supra* note 46, art. V(3).

to abandon section 301 of the Trade Act of 1974.¹⁰³ This fear was given credence by the EC, whose early support of the MTO was in part based on its belief that the MTO would do away with section 301.¹⁰⁴ It is, however, exaggerated. Much of section 301 is totally GATT-consistent.¹⁰⁵ Furthermore, nothing in the Dunkel Draft dispute settlement provisions would prohibit the United States from continuing to use section 301 in a GATT-inconsistent manner. The United States would simply be more likely to be required to pay for doing so. Moreover, the new procedures reduce the need for section 301, which was instituted in large part as a result of the dissatisfaction with the ability of GATT to resolve disputes effectively and expeditiously.¹⁰⁶

C. THE U.S. POSITION

The United States was the only negotiating country to express strong opposition to the Dunkel Draft MTO and to advocate that it be dropped from the Uruguay Round final package. The EC and Canada, the two other major players in the MTO debate, perceived many of the same problems as did the United States.¹⁰⁷ In contrast to the United States, however, they considered the MTO to be critical to the success of the Uruguay Round and thought that the problems could be resolved through negotiated changes.

The United States supported the stated objectives of the MTO, but believed that as drafted, it did not adequately accom-

103. Trade Act of 1974, Pub. L. No. 93-618, tit. III, § 301, 88 Stat. 1978, 2041 (codified as amended at 19 U.S.C. § 2411 (1988)). Section 301 is the mechanism by which the United States responds, generally by imposing prohibitive duties on imports from the concerned country, to foreign countries' "unfair" trade practices which burden U.S. commerce. As such it is a valued tool for members of Congress concerned with the protection of their constituents' interests. For similar reasons it is perhaps the U.S. trade law most disliked by U.S. trading partners who are its target.

See generally Judith D. Bello and Alan F. Holmer, *U.S. Trade Law and Policy Series No. 21: GATT Dispute Settlement Agreement: Internationalization or Elimination of Section 301?*, 26 INT'L L. 795 (1992) (discussing interaction of section 301 and GATT).

104. U.S. negotiators who spoke on condition of non-attribution.

105. Section 301 is GATT consistent when it is used in conjunction with GATT dispute settlement against practices determined by GATT panels to be GATT illegal or against practices not covered by the GATT.

106. An important component of the Uruguay Round is the negotiation of rules on dispute settlement. Key among the weaknesses of the current GATT rules are the absence of deadlines, the opportunities for parties to stall, and the ability of parties to prevent a final binding ruling from being issued.

107. EC and Canadian officials, each of whom spoke on condition of non-attribution.

plish them. Moreover, an unintended, but substantial, cost of the MTO was that it provided a target on which opponents of trade liberalization could focus their opposition without seeming to oppose the entire round.¹⁰⁸ The U.S. concerns focused on voting rules and the provisions on non-application and future negotiations.¹⁰⁹

1. Voting Rules and Procedures

A major U.S. concern was that the rules on voting would permit actions having an effect on the rights and obligations of the United States to be taken without U.S. consent. Three areas present concerns regarding voting procedures: decision making or joint action, interpretation, and amendments.

As noted earlier, Article IX (1) of the MTO draft concerning "Joint Action" provides that decisions of the Ministerial Conference or the General Council will be by a majority vote, with each member nation having one vote.¹¹⁰ In order to ensure that it would never be outvoted, the United States suggested providing for weighted voting based on factors that would guarantee this result. Such a system, while favored by the EC, was strongly opposed by the developing countries.¹¹¹

The second paragraph of Article IX provides that interpretations of the Agreements shall be made by a similar majority vote.¹¹² Because of the important role interpretations play in determining the impact of the Agreements on members, the United States insisted that interpretations be adopted by consensus.¹¹³

Article X of the MTO draft provides for a two step process for amending the Agreements. Amendments must first be agreed to by a consensus of the members in the Ministerial Conference.¹¹⁴ It must next be accepted domestically by two-thirds of the member governments, at which point it becomes binding on all members, even non-accepting members.¹¹⁵ Non-accepting

108. U.S. Uruguay Round Coordinator, Ambassador designate, John Schmidt, Statement to National Foreign Trade Council (Aug. 5, 1993).

109. U.S. negotiator who spoke on condition of non-attribution.

110. Despite the provision in GATT art. XXV calling for majority rule, since 1959 all joint actions have been by consensus. See *supra* text accompanying notes 12-13.

111. U.S. negotiator who spoke on condition of non-attribution.

112. MTO, *supra* note 46, art. IX(2).

113. U.S. negotiator who spoke on condition of non-attribution.

114. MTO, *supra* note 46, art. X(1).

115. *Id.* art. X(2).

members may, in circumstances determined by a majority of the members to so justify, withdraw from the MTO, or remain a member with the consent of the Ministerial Conference.¹¹⁶ The United States did not object to amendments becoming binding upon acceptance by two-thirds of the member governments, but insisted that they be binding only on those that accept them.¹¹⁷

In addition to concerns regarding voting procedures, the United States had concerns with the provisions on non-application, and future negotiations on trade and the environment.¹¹⁸

2. Non-Application

The Dunkel Draft MTO provisions on non-application are not clear, but can be interpreted to effectively allow countries to pick and choose among the Agreements.¹¹⁹ This would totally negate the idea of a single undertaking designed to avoid the free rider problem and which was the primary reason that the United States originally supported the concept of an MTO.¹²⁰ The U.S. position was that countries should be allowed to invoke non-application only in respect of all the annexed agreements, preserving the all-or-nothing, single undertaking concept.¹²¹

3. Environmental and Waiver Concerns

A less important concern of the United States was that the Dunkel Draft MTO text provided insufficient reference to trade and the environment.¹²² The United States wanted reference to

116. *Id.* art. X(3). With the exception of MFN and tariff schedules, amendments become binding on cps who accept them, upon acceptance by two-thirds of the cps. GATT art. XXX.

117. U.S. negotiator who spoke on condition of non-attribution.

118. U.S. negotiator who spoke on condition of non-attribution.

119. The text of MTO Article XIII(1) is not clear as to whether countries will be permitted to invoke non-application vis-a-vis individual agreements or whether a non-application must apply to the entire group of agreements in each of the three core groups of agreements set forth in Annexes 1A, 1B, and 1C. MTO, *supra* note 46, art. XIII(1).

120. U.S. negotiator who spoke on condition of non-attribution.

121. The MTO text reaffirms that the MTO was intended to serve as the basis for a single undertaking. The Preamble notes among the purposes of the MTO the development of an "integrated" trading system. MTO, *supra* note 46, pmbl. The provisions on the scope of the MTO note that MTO members shall be parties to *all* the annexed agreements. *Id.* art. II.

122. Letter from Ambassador Michael Kantor to Rep. Jill Long (D-Ind.) (June 21, 1993) (on file with the authors) [hereinafter Kantor Letter]. This particular concern was raised to placate the domestic environmental movement and its congressional allies in the hopes of gaining their support for the Uruguay Round. Administration officials who spoke on condition of non-attribution.

be made to the need to ensure sustainable development and to provide specifically for further negotiations on trade and the environment.¹²³ The United States viewed as inadequate the provision in Article III(3) for future negotiations concerning trade relations which reads, "as may be decided by the Ministerial Conference."¹²⁴ While no country has opposed the idea of future negotiations on trade and the environment, explicit reference to any specific negotiation was apparently avoided due to the difficulty of agreeing on which topics would be cited. The United States also considered that the statement in the preamble recognizing that trade "should be conducted with a view to . . . developing the optimal use of the resources of the world at sustainable levels"¹²⁵ incorrectly implies that the goal is to develop and use resources, rather than to promote sustainable development.¹²⁶

Finally, although there is some ambiguity on the issue, the United States apparently opposed the creation of a general waiver authority in the Ministerial Conference or General Council which would apply to all the Agreements.¹²⁷ The United States preferred instead that decisions on waivers be governed by procedures established in each individual agreement or each of the three core groups of Agreements set forth in sub-Annexes 1A, 1B and 1C.

4. An Alternative U.S. Proposal

Arguing that it was unable to negotiate satisfactory amendments to the Dunkel MTO text, the United States proposed an alternative to achieve the objectives of the MTO without creating the problems discussed above.¹²⁸ This draft "Decision and Protocol"¹²⁹ would establish a structure similar to that of the MTO but one which would not create an organization with an independent legal standing. The proposal addressed the various concerns of the United States to the MTO as follows.

Decision-making by the Ministerial Trade Committee, a body analogous to the MTO's Ministerial Conference, generally

123. U.S. negotiator who spoke on condition of non-attribution.

124. MTO, *supra* note 46, art. III(3).

125. *Id.* pmbl.

126. U.S. negotiator who spoke on condition of non-attribution.

127. MTO, *supra* note 46, art. IX(3).

128. U.S. negotiator who spoke on condition of non-attribution.

129. The text of "Decisions and Protocol" is contained in the Kantor Letter. See *supra* note 122.

would be by consensus.¹³⁰ No mention is made of amendment, interpretation or waivers, implying that these specific decisions would also be by consensus. Accession by new members, however, would be provided by a two-thirds majority vote.¹³¹

The protocol attempted to ensure all or nothing participation in three ways. First, it contained a preambulatory resolution to develop an "integrated" multilateral trading system encompassing GATT, former rounds and "all of the results of the Uruguay Round."¹³² Second, it provided that acceptance of the Protocol constitutes acceptance of all of the Agreements.¹³³ Third, it allowed for withdrawal from all, but not just some, of the Agreements.¹³⁴

Importance was accorded to environmental protection and sustainable development by a statement in the preamble that the negotiated trade liberalization should be "consistent with environmental protection and conservation" and "contribute to the *promotion* of sustainable development."¹³⁵ Interestingly, no specific reference was made to trade and the environment as a subject of future negotiations. Furthermore, despite the demands of the environmental movement, the U.S. proposal adopted an organizational structure with a "Committee" rather than a higher level "Council" on trade and the environment.¹³⁶

The U.S. proposal remained on the table along with the draft MTO text, but as of winter 1993 had not received the support of any other delegation.¹³⁷

V. CONCLUSION

Provided agreement is finally reached on the substantive issues of the Uruguay Round,¹³⁸ the case for a new organizational/institutional structure with a definitive legal basis is compelling. In addition, the general outline of the draft MTO — objectives, scope, function, and structure — strike us as well designed and responsive to demonstrated needs. There are, however, three major areas where changes are desirable — probably even

130. Kantor Letter, *supra* note 122, at Protocol, ¶ 8.

131. *Id.* Protocol ¶ 3.

132. *Id.* at Decision, pmb1.

133. *Id.* at Protocol ¶ 1.

134. *Id.* at Protocol ¶ 13.

135. *Id.* at Decision, pmb1. (emphasis added).

136. *Id.* at Protocol ¶ 5(d)(iv).

137. Kantor Letter, *supra* note 122.

138. The Uruguay Round was completed on December 15, 1993.

necessary — if a successful agreement on an MTO is to be reached.

The most important has to do with decision-making by the members acting as a group. A system of one member, one vote and majority rules, or some variation thereof, apparently is simply not acceptable to some of the members whose participation is essential, including the United States and the EC. A system of formal weighted voting would require a major negotiation in itself and it is difficult to imagine a solution that would be acceptable to both the giants and the smaller members. We conclude that the appropriate solution would be to codify and continue the practice followed by the GATT cps since 1959 and take joint-action decisions by consensus, except where different procedures have been agreed to in the individual Uruguay Round agreements. This system has been tested in a wide variety of situations, is familiar to all the members, and has worked remarkably well for over three decades. We know of no convincing reason why it should not be extended to accession decisions and the granting of waivers which are currently subject to a formal voting procedure.

The second needed change in the draft is for a clear provision that future negotiations will deal with the issues of trade and the environment. A reading of GATT discussions and debates for the past several years shows that the members have already committed themselves to this.¹³⁹ Indeed, one often sees reference to the next round of multilateral trade negotiations as the "Green Round." It would, however, in our view, be a great mistake to attempt to spell out in the MTO document either the aims or the specific subject matter of such negotiations. That is a task that will take many months, and to attempt to deal with it now could well doom the whole Uruguay Round. Those are matters for the negotiations of the terms of the mandate for the next round.

Finally, the provisions in the MTO draft on non-application must make unequivocally clear that the MTO is a "single-under-taking," that it is all or nothing participation, and that a member does not have the option of picking and choosing among the

139. See e.g., *GATT to Focus on Trade and Environment Link*, GATT Focus, (Oct. 1991); *Arthur Dunkel Calls On Governments To Develop Constructive Links Between Trade And Environmental Policy-Making*, GATT Doc. GATT/1527, (Jan. 23, 1992); *Expanding Trade Can Help Solve Environmental Problems, Says Report*, GATT Doc. GATT/1529, (Feb. 3, 1992); *Expanding Trade Can Help Solve Environmental Problems, Says Report*, GATT Focus, (Mar. 1992).

various annexed agreements, or among the various groups of annexed agreements. Members should be given only the chance, at the time they join the MTO, to notify the General Council that they will not apply *any* of the annexed Agreements to another member. Without provisions such as these, a successful agreement on an MTO will not be reached.

