Preface

I. Background of the Uruguay Round Negotiations

In 1947, the General Agreement on Tariffs and Trade (GATT) was signed, establishing tariff and general trade obligations intended to operate under the umbrella of the International Trade Organization (ITO). The ITO was expected to complement the two Bretton Woods institutions already established—the International Monetary Fund and International Bank for Reconstruction and Development—in facilitating global economic recovery following World War II. However, the ITO never came into existence, principally because the United States Congress did not approve it.

The GATT sought to fill the gap, and promoted liberalized trade through its provisions and, over the years, successive "rounds" of multilateral trade negotiations (MTN). The first six MTN rounds succeeded dramatically in reducing tariff levels around the world. Yet as tariffs declined, nontariff barriers to trade sprang up: subsidies, corporate dumping, "buy national" requirements, nontransparent rules, the valuation of imports so as to maximize applicable customs duties, and standards nominally erected to protect health or safety but in fact applied to restrict trade. The net gains from tariff reduction were seriously eroded by the GATT's failure to address the new, nontariff barriers.

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The seventh, Tokyo MTN Round took the first, albeit faltering, steps to impose discipline on the new nontariff barriers to trade. Various "codes" were negotiated to supplement the GATT's basic rules on trade in products. However, these codes were voluntary, and far from all GATT contracting parties acceded to them. Moreover, the rules themselves were only incremental steps toward, not the final destination of, trade liberalization.

The United States sought to capitalize on the Tokyo Round momentum as early as 1982, at a ministerial conference in Geneva. U.S. Trade Representative Bill Brock urged his counterparts to kick off another MTN round, to continue where the Tokyo Round left off. However, the U.S. effort failed. The European Community became increasingly self-absorbed, in particular with the EC 1992 Single Market Initiative, and the United States increasingly relied on bilateral and plurilateral efforts to expand trade, initially through free trade agreements with Israel and Canada.

In 1985, the U.S. trade deficit skyrocketed. Over 300 trade bills were introduced in the Congress that year, many of them protectionist. The second Reagan administration confronted strong political pressure to close the U.S. market against imports from foreign markets that were not reciprocally open to U.S. exports. The hue and cry was to obtain a "level playing field." The Reagan administration aimed to show more progress toward free trade, to maintain U.S. political support for it, and to reap its economic benefits. The United States again led a campaign to launch another MTN round.

In 1986, the United States succeeded in convincing GATT contracting parties to do so. U.S. Trade Representative Clayton Yeutter and other administration officials represented the United States at the ministerial conference convened in Punta del Este, Uruguay, in September 1986. Urged by the United States, contracting parties agreed to begin negotiations to extend the frontiers of the GATT to cover trade in services, the protection of intellectual property, and to a limited extent, trade-related investment measures, as well as to improve existing GATT rules.

The negotiations proceeded rather slowly over the next two years. This pace had been anticipated, however, and ministers had agreed to hold a ministerial Midterm Review to facilitate both progress and the pace thereof by securing ministerial-level attention, identifying issues requiring resolution, and charting a course for the remaining two years of talks.

At the Midterm Review (in December 1988, the twilight of the second Reagan administration), some concrete results were achieved, which were formalized at the following April GATT meeting (during the early Bush administration). In particular, contracting parties agreed to apply ad referendum new procedural rules for the settlement of disputes, to expedite the legal proceedings under article XXIII. For the most part, however, the results of the Midterm Review underscored the need to accelerate actual bargaining, as opposed to merely identifying issues and posturing on original positions.
The ministerial meeting at which the negotiations were scheduled to conclude was held in Brussels in December 1990. While negotiators met in good faith and sought to develop a number of compromises in various negotiating groups, ultimately discussions in all areas broke down over the impasse in a single negotiating group, agriculture. While the United States offered to put all agricultural issues on the negotiating table, the European Community refused. Despite an eleventh hour Swedish compromise proposal, the agricultural negotiations failed. Third-world representatives then declined to pursue negotiations in other substantive areas, since access to developed country markets for agricultural goods was one of their two principal objectives in the Uruguay Round. (The other was access to developed country markets for textile and apparel goods.)

The GATT Secretariat tried again to bring the talks to closure by scheduling a ministerial meeting in Geneva a year later, in December 1991. Because talks again broke down, the then director-general of the GATT, Arthur Dunkel, sought to facilitate a breakthrough by issuing a document prepared by the GATT Secretariat. The Draft Final Act, made available in December 1991, did not purport to represent a negotiated agreement, but rather what the Secretariat perceived to be a likely consensus of views. Mr. Dunkel’s object presumably was to crystallize consensus where it had been achieved, and focus future negotiations on the remaining issues and the Secretariat’s particular suggestions for resolving them.

Issuance of the “Dunkel text” spurred another effort to conclude negotiations, but it petered out in the absence of substantial progress. The United States then became diverted by the 1992 presidential election campaign, the results of which ensured that the U.S. negotiating team would change in 1993 at the highest levels. With the certain arrival of a new set of negotiators, other nations became newly interested in exploring any likelihood of achieving closure in the talks before the experienced Bush administration team was replaced.

Consequently, there were serious efforts following the November 1992 U.S. election to close on agreements. While the new Clinton administration was not in place and could be consulted only unofficially, the idea was to wrap up the Round, let the outgoing Bush administration bear the brunt of any criticism of the results, and then allow the Clinton administration to proceed with its trade agenda (rather than continue a Reagan-Bush legacy agenda) following the legislative implementation of the Round.

Despite the best efforts of Ambassador Carla Hills and many others, however, the final breakthrough proved elusive. Much progress was made, but then essentially lost when negotiators were unable to agree on final concessions.

II. Closure at Long Last

The Clinton team then took over, with Ambassador Mickey Kantor succeeding Ambassador Hills. The Clinton team obtained fast-track negotiating authority (which had expired) in July 1993 on the eve of the Tokyo G-7 Economic Summit.
The new fast-track authority deliberately had a short fuse: it applied only to trade agreements that the President notified to the Congress by December 15, 1993, and signed by April 15, 1994. The concept was to provide just enough time to close negotiations, and not enough time to invite further delay.

It worked. Negotiators finally closed on agreements, in all but a few cases, in December, enabling the President to provide the requisite notice to the Congress on December 15, 1993. The Final Act then was signed in Marrakech, Morocco, on April 15, 1994.

Perfection ever eludes trade negotiators and agreements, of course. For example, no agreement was reached on basic telecommunications services; instead, it was decided to continue negotiations. With respect to financial services, moreover, a last minute Decision on Financial Services and the inclusion of an additional annex to the General Agreement on Trade in Services (GATS) allow for the GATS provisions on financial services to enter into force on a most-favored-nation (MFN) basis for an initial six months. During that six-month period, negotiations aimed at improving the level and quality of those commitments will continue. Such discussions will be without prejudice to the right of countries to modify (or even withdraw) their commitments, as they see fit, in the light of the results of those negotiations, before the end of the six-month period.

In addition to these "legacy" negotiations, the U.S. administration urged other contracting parties to agree to embark on a new, post-Uruguay Round negotiating agenda focused on environmental, labor, and competition issues. While agreement was reached to establish a permanent Committee on Trade and the Environment, the discussions up until the eve of the Marrakech ministerial meeting on April 15, 1994, failed to produce a similar agreement regarding labor issues.

III. U.S. Legislative Implementation

With the Final Act signed at Marrakech, "all" that remained in the United States was for the President to submit, and the Congress to pass, legislation to change U.S. law in a manner necessary and appropriate to implement the new agreements. The administration began negotiating the contents of the implementing bill with the Congress, since any bill submitted under fast-track procedures could not be amended. While the fast-track procedures ensure expedited consideration of proposed legislation, they also put pressure on the administration to "get it right" since any bill submitted cannot be modified subsequently to obtain votes needed for passage.

The administration and Congress negotiated for months. In addition to an army of smaller issues, they were plagued by various larger issues as well, such as whether and for how long to extend the Generalized System of Preferences; and whether to provide for parity for Caribbean Basin Initiative (CBI) beneficiaries that enjoy less access to the U.S. textile and apparel market than provided by the North American Free Trade Agreement. The issues that loomed largest,
however, were whether to further extend fast-track authority, and how to satisfy the pay-as-you-go budget rules (which require offsetting the revenues lost as a result of Uruguay Round tariff reductions). Much of the delay in coming to closure with the Congress resulted from the administration’s treading warily on the revenue issues, to try to ensure bipartisan support.

The administration’s inability to obtain bipartisan support for the proposed fast-track extension led to the deletion of this proposal from the implementing bill. President Clinton found his administration caught between the demands of rival congressional leaders and rival ideas. House Republican Leader-to-be Newt Gingrich, among others (mostly Republicans), insisted that any extension of fast-track authority for legislation to implement trade agreements could not be linked to environmental or labor issues. House Majority Leader Richard Gephardt, among others (mostly Democrats), insisted that any future fast-track authority must be linked irrevocably to labor and environmental negotiations.

In its original proposals, the administration at least nodded in Mr. Gephardt’s direction, to the satisfaction of apparently no one. To linkage supporters, the nod was too little; to linkage opponents, the nod was too much. Unable to navigate a course that retained bipartisan support for the rest of the bill, the administration reluctantly dropped its fast-track contents.

The President fared better on the funding issues. After prolonged negotiations, the administration finally found an acceptable formula for meeting the House rule requiring the offset of all revenues lost from the tariff cuts over five years. However, it became clear early in the process that the administration would be unable to offset the revenues lost from tariff cuts over ten years, which was necessary to satisfy the more stringent Senate budget rule. Any legislation that fails to satisfy this rule is subject to a point of order. To prevail in the Senate, then, the administration would need sixty votes, rather than a simple majority.

Finally in September, the administration closed negotiations. The fast-track extension was history, the revenues lost over five years accounted for, the Generalized System of Preferences extended for ten months, and CBI parity left for another legislative vehicle. The antidumping provisions were rewritten, a new rule of origin established for textile and apparel goods, and the Super 301 trade remedy (based on the threat of unilateral U.S. action) reenacted for another two years. With these final issues resolved, the stage was set for unprecedentedly fast action under fast-track procedures. The President submitted the bill to the Congress on September 27, 1994, in the expectation that the Congress would pass it prior to adjournment in the first week in October.

Having made concessions to many members in the negotiating process, the administration felt it had the votes it needed. Beyond substance, it relied upon procedural cooperation from the Democratically controlled House and Senate for lightning-fast action. Contrary to its name, the fast track is not necessarily fast. It ensures votes in the House and Senate on trade bills affecting revenues within ninety “legislative” days of submission—which normally is about six
months. The Clinton administration hoped to achieve enactment instead within seven to ten days of the bill's introduction.

The vote in the Senate, however, was postponed until December because Senator Ernest Hollings (D-SC) refused to permit the Senate Commerce Committee, which he chaired, to discharge the bill earlier than required under the fast-track procedures. He thus used his committee's jurisdiction over a small portion of the bill to block a Senate vote before December. The Senate's delay in acting on the bill then was replicated by the House of Representatives, which also chose to take up the bill after the November 8, 1994, elections. Ultimately, the House passed the bill 288 to 146, and the Senate followed suit, 76 to 24.

IV. The World Trade Organization (WTO)

To set the stage for the six symposium articles that follow, this preface discusses briefly the WTO itself. The WTO Agreement will: (1) provide a new legal basis for the international movement of goods and services, the protection of intellectual property rights, and to a lesser extent, trade-related investments; (2) furnish a common organizational and institutional framework for the conduct of trade relations among its members; and (3) act as a forum for negotiations on further trade liberalization and additional legal disciplines.

A key difference between the GATT and the WTO is that the WTO Agreement is a "single undertaking," integrating many Uruguay Round and previous GATT agreements into a single legal framework. This approach helps resolve four problems with the GATT. First, by integrating most of the agreements, it eliminates the current fragmentation of GATT rights and responsibilities. Under the integrated system, all WTO members will be bound by the multilateral agreements, including the integrated dispute settlement system and surveillance under the trade policy review mechanism.

Second, such integration, coupled with the increased responsibilities of developing countries, reduces the GATT problem of "free riders." The WTO Agreement often provides developing countries longer transition periods in which to assume new obligations, but ultimately they are required to perform obligations, just as are developed countries. Moreover, while waivers of obligations may be available, especially for least developed countries, they are subject to supermajority votes of WTO members and must be specifically limited in duration.

Third, the trade-liberalizing momentum of the Uruguay Round, combined with the increasing globalization of the world economy, have induced more countries to join the GATT process. Twenty-five countries became contracting parties since the Uruguay Round began in 1986, and major accession negotiations are ongoing. Thus, the WTO is likely to be more nearly universal than was the GATT.

Fourth, the GATT was originally concluded in 1947 on a provisional basis; over forty-five years later, many contracting parties, including the United States, still apply the GATT through the Protocol of Provisional Application. This provi-
sional approach, with its "grandfather" protection of certain nonconforming measures, has been replaced by a definitive application of the Final Act of the Uruguay Round.

The basic principles of the new "GATT 1994" remain largely the same as the "GATT 1947." The Multilateral Trade Agreements listed in Annexes 1, 2, and 3 to the WTO Agreement form "integral" parts of that Agreement. Annex 1A is the GATT 1994, which includes the GATT 1947 and associated legal instruments, notably including the protocols of accession, list of valid waivers, and understandings on balance-of-payments provisions, state trading, and waivers under article XXV:5. The Uruguay Round Protocol to the GATT 1994 lists the Schedules of Concessions of the WTO members, divided into five appendices. New in this section is the addition of agricultural products. The new schedules come into effect with respect to a WTO member on the day the WTO Agreement enters into force for that member. (However, the least developed countries have been given an extra year to file their tariff schedules.)

Annex 1A also includes sectoral agreements and agreements on implementation of basic GATT trade rules on agriculture, sanitary and phytosanitary measures, textiles and clothing, technical barriers to trade, trade-related investment measures, customs valuation, antidumping measures, preshipment inspection, rules of origin, import licensing procedures, subsidies and countervailing measures, and safeguards.

Annex 1B is the General Agreement on Trade in Services (GATS), Annex 1C the Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods (TRIPS). Another agreement binding on all WTO members is the Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2), which applies to the WTO Agreement, all the annexed multilateral trade agreements, and any annexed plurilateral agreement for which the signatories confirm such application. Annex 3 carries forward another multilateral agreement, the Trade Policy Review Mechanism, which was commenced during the Uruguay Round.

The WTO Agreement provides for two categories of members: (1) original members, open to the contracting parties of the GATT 1947 as of the date of entry into force of the Agreement and the European Communities, and (2) membership by accession for any other state (or separate customs territory with autonomy for the conduct of its external commercial relations) on terms agreed between it and the WTO.

The principal organ of the WTO is the Ministerial Conference, composed of representatives of all members. The Ministerial Conference is required to meet at least once every two years. During the periods between such conferences, the governing body is the General Council, the direct descendant of the GATT Council, likewise composed of representatives of all members. The General Council is assisted in its work by three subcouncils, the Council for Trade in Goods, the Council for Trade in Services, and the Council for Trade-Related Aspects of
Intellectual Property Rights. Each of these bodies oversees the functioning of the relevant agreement at Annex 1A, 1B, and 1C, as appropriate. The General Council also is charged with convening, on an ad hoc basis, the Dispute Settlement Body as provided for in the Dispute Settlement Understanding at Annex 2, and the Trade Policy Review Body, as provided for in the Trade Policy Review Mechanism at Annex 3. It will establish rules of procedure for the existing standing committees on Trade and Development, Balance-of-Payments Restrictions, Trade and the Environment, and Budget, Finance, and Administration, as well as for any other standing committees the Ministerial Conference may establish.

The WTO Agreement provides for a Secretariat, headed by a director-general appointed by the Ministerial Conference. The director-general is responsible for appointing members of staff of the Secretariat. To the extent practicable, the Secretariat of the GATT 1947 is intended to be carried over to the WTO. The WTO will remain headquartered in Geneva, Switzerland, and will be accorded the normal privileges and immunities necessary to carry out its functions.

The GATT practice with respect to decision making, with a preference for "consensus" decisions, is carried over into the WTO. Where formal voting is required, each WTO member has one vote in the Ministerial Conference and in the General Council. The WTO Agreement specifies that the MFN provisions in the GATT 1994, GATS, and TRIPS agreements, and the WTO amendment provisions may be amended only upon acceptance by all members. It specifies a supermajority vote on certain matters, such as the issuance of any waiver.

The WTO is intended to act as a forum for ongoing negotiations on further trade liberalization measures and additional legal disciplines. However, members could, at some stage in the future, seek to hold further rounds of multilateral trade negotiations.

V. The Focus of This Issue

While the Uruguay Round covers all economic activity to some extent and other Uruguay Round agreements warrant review, this symposium focuses on six particular agreements: intellectual property, dispute settlement, agriculture, government procurement, services, and antidumping measures.

Three of these agreements—intellectual property, dispute settlement, and agriculture—merit particularly close scrutiny for their pioneering achievements, as they represent the greatest leaps in international trade rule making. In reaching agreement on intellectual property protection, the GATT frontiers were extended dramatically. In improving the GATT rules for settling disputes, the Uruguay Round outcome helps establish the credibility of the new WTO and increases confidence that any dispute about the application of WTO rules will be resolved effectively and expeditiously. In establishing meaningful and specific discipline on agricultural trade for the first time, the Uruguay Round seeks to compensate for previous GATT rounds and rules that were both inadequate and inadequately observed.
The fourth subject addressed in this symposium, government procurement, was actually negotiated on a separate but parallel track to the Uruguay Round. Government procurement was not included in the negotiating mandate at the Punta del Este ministerial meeting in September 1986. In fact, the negotiations recently concluded began only after the Montreal Midterm Review in December 1988, and were concluded in January 1994, after the Uruguay Round Final Act was agreed (but not signed) in December 1993. Moreover, the Agreement on Government Procurement will remain a plurilateral rather than multilateral agreement, so that its application will remain voluntary rather than mandatory. Nonetheless, in light of the continuing significance of government procurements in world trade and the substantive expansion of the agreement with respect to its scope and coverage, this agreement is expected to be one of the large and lasting accomplishments of the Uruguay Round.

The fifth subject of this symposium, the General Agreement on Trade in Services, is disappointing relative to the large expectations regarding it. While the efforts and rhetoric were ambitious, the results fall short of achieving widespread liberalization in many traded services. Moreover, there is no general requirement to eliminate or phase out inconsistent measures in effect at the time the WTO enters into force. Nevertheless, the increasing significance of services in global trade means that the GATS results achieved thus far, as well as any further results of ongoing negotiations in key sectors, merit careful examination.

The sixth subject of this symposium is one of the most controversial and technical. Neither supporters nor detractors of the antidumping laws claim that the agreement achieved is likely to be, or should be, a long-lived beacon on the trade horizons. Beneficiaries of the U.S. antidumping law and antidumping duties claim that the antidumping agreement imperils the ability of the United States to protect its producers against injuriously traded goods offered for sale in the U.S. market at below "fair value." To the contrary, claim other U.S. producers that export and import, the antidumping agreement does not do enough to liberalize trade, and prevent antidumping proceedings from functioning as a serious barrier to trade. In light of the particular controversy surrounding this hypertechnical agreement, a debate between these two viewpoints is included, rather than a single analysis embracing one of these viewpoints (or trying to eschew them both).

With the exception of the antidumping debate, this symposium does not analyze the domestic implementing measures of the United States or other contracting parties. Rather, the focus is on the new substantive rules achieved in critical subject areas, and the directions of the new WTO. The articles and debate served by this issue should thus provide a foundation for study of the various domestic implementing measures, other Uruguay Round agreements, the relationship between the new multilateral agreements and other trade-liberalizing initiatives, and the application of the new rules to particular facts, as in dispute settlement proceedings.