THE THREAT OF POLITICIZATION OF THE WTO

ARIE REICH*

1. INTRODUCTION

Over the years, many international organizations have become victims of what is often referred to as politicization. Politicization was one of the reasons for the temporary withdrawal of the United States from the International Labor Organization ("ILO") between 1977 and 1980,1 and for its withdrawal from the United Nations Economic, Scientific and Cultural Organization ("UNESCO") in 1984.2 Likewise, the more recent United Nations World

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* Vice Dean, Faculty of Law, Bar Ilan University, Israel; Visiting Professor, Faculty of Law, University of Toronto. I have benefited from the comments and suggestions of Tomer Broude, Jeffrey Dunoff, Marcia Harpaz, Moshe Hirsch, Robert Keohane, and Yaffa Zilbershatz. I am also indebted to several trade officials with whom I had helpful discussions, in particular Marcel Shaton, John C.C. Deng, Edwini Kwame Kessie, Gabriela Wurcel, and Joseph Ackerman. Thanks to Jeff Reynolds for his research assistance. Needless to say, the opinions, errors, and omissions contained herein are entirely mine.

1 See generally Background on U.S. Reentry into ILO, 80 DEP'T ST. BULL. 65, 65-66 (1980) (detailing reasons for the American decision to withdraw from the International Labor Organization ("ILO") and subsequently rejoin the organization); Letter from Henry A. Kissinger, U.S. Secretary of State, to Mr. Francis Blanchard, Director General of the ILO (Nov. 5, 1975), reprinted in 14 I.L.M. 1582 (1975) (expressing the intent of the United States to withdraw from the ILO). Kissinger’s communication reiterated four complaints. Firstly, the United States deplored the erosion of tripartite representation caused by government encroachment on the independence of workers and employers. Secondly, the United States deplored the use by the International Labor Conference of double standards in matters of human rights, particularly with regard to trade union freedom and forced labor; the selective condemnation or exemption of certain groups of member states by virtue of their political systems undermined ILO credibility as well as respect for human rights. Thirdly, and most importantly, the United States denounced resolutions condemning particular member states on the basis of political criteria without due process of law and in flagrant disregard of established ILO procedures for examining complaints alleging violation of trade union freedoms. Finally, the United States categorically condemned the growing politicization which had caused the ILO to divert its attention from its social mandate and to become increasingly involved in matters more properly within the competence of the United Nations ("UN"). Id. at 1583-84.

2 See Letter from George P. Shultz, U.S. Secretary of State, to His Excellency Amadou-Mahtar M’Bow, Director General, United Nations Educational, Scientific
Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban, South Africa in 2001, which was meant to be "a landmark in the struggle to eradicate all forms of racism," was hijacked by a prevailing majority of undemocratic states that turned it into a political weapon of racism and bigotry antithetical to the human rights protection that it was meant to promote. Even a trade-oriented international organization such as the United Nations Conference on Trade and Development ("UNCTAD") has been tainted by severe politicization that is generally seen as having frustrated UNCTAD's ability to achieve most of its objectives.

In contrast to these and other international governmental organizations ("IGOs"), the World Trade Organization ("WTO"), as well as its predecessor, the General Agreement on Tariffs and Trade ("GATT"), seems to have managed to keep relatively free from the plague of politicization. It is a business-minded organization fully devoted to its mandate of multilateral trade liberalization and of developing an "integrated, more viable and durable multilateral trading system." Unlike many other so-called

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4 See, e.g., Anne Bayefsky, The UN World Conference Against Racism: A Racist Anti-Racism Conference, 96 AM. SOC'Y INT'L. L. PROC. 65 (2002) (arguing that the treatment of Israel during the World Conference Against Racism was an example of what the Conference was meant to prevent). Bayefsky further writes:

Success on the political battlefield was to be accomplished by using the language of human rights to demonize and then dismember the opponent. Human rights served as a weapon to wrongly characterize the "plight of the Palestinian people" as one of racial persecution, to fan the flames of anti-Semitism, and ultimately to provoke irrational passions that undermine both the cause of peace and of human dignity.

5 Marrakesh Agreement Establishing the World Trade Organization, Apr. 15,
specialized agencies of the United Nations ("UN") which often have turned into battlegrounds of major political conflicts, both regional and transcontinental (East-West), often only remotely related to the mandate of the organization, the GATT and the WTO have hitherto largely managed to keep away from such conflicts and prevent them from infiltrating their internal discourse. This is not to say that the GATT and the WTO have been free from politics. As in every organization involving states—which are, by definition, political entities—politics is always involved, in the sense of diverging socio-economic policies and ideologies and the use of political tactics in order to further what is perceived as the national interests of the various member states. However, the politics practiced within the GATT and the WTO is trade politics, as opposed to "higher" geopolitical politics that is unrelated, at least in a direct and meaningful way, to trade policy. Thus, even states involved in severe political conflicts, with no formal diplomatic connections, can find themselves cooperating within the WTO in order to further common commercial interests.

This Article seeks to understand the reasons for the unpolticized nature of the GATT and the WTO, and more generally what it is that makes one international framework more attractive to the influence of politics than others. It will seek to determine the special characteristics of the WTO that have managed to keep it clear from that type of politics and will ask whether, based on those special characteristics, there is a risk that this may change in the future. The threat to the WTO in this regard stems from the broadened mandate of the organization, the recurring attempts from certain directions to introduce politically controversial concepts into the WTO discourse, the change in the public profile of the WTO, the subordination of trade policy to foreign policy, and the growing membership of the organization. Indeed, lately there have been a few worrying signs of politicization within the WTO that have had a negative impact on its ability to function and fulfill its mandate.6


6 See infra text accompanying notes 82–93, describing the existing situation whereby: no international governmental organization ("IGO") is being granted observer status within the World Trade Organization ("WTO") as a result of retaliation measures by Egypt and other Arab states in protest against the United States' refusal to grant observer status to the Arab League; no WTO address and telephone directory could be published for a long time because of a political
The issue of politicization of functional IGOs is a relatively unexplored topic. Given the importance of effective IGOs to a well-functioning world order and the detrimental effect politicization has had on the ability of many of the IGOs to fulfill their missions, this is a vitally important topic. This Article begins to fill in a gap in the literature in this regard—in relation to IGOs, in general, and relating to the GATT/WTO, in particular—with the hope of spurring further research in this field.

The discussion will proceed as follows: Section 2 will discuss the politicization phenomenon in international organizations in general, and within its theoretical setting of functionalism in particular, and will thus develop the definition of politicization that will be used in this paper. It will also show how politicization has infiltrated some of the major UN specialized agencies, including those with a pure economic mandate, and has severely harmed those agencies' ability to fulfill their mandates. Section 3 will then expound on the relative absence of politicization within the GATT during its half-century existence and will discuss some of the instances in which the GATT was confronted with political conflicts and how it dealt with them. Section 4 will try to reveal the reasons for this absence of politicization within the GATT by contrasting it to other IGOs that were plagued by politicization. Based on the conclusions of the previous section, in Section 5 I will try to assess the risk that the WTO will be politicized in the future, the sources of this risk, and the worrisome signs of politicization that have already emerged.

2. THE POLITICIZATION PHENOMENON IN INTERNATIONAL ORGANIZATIONS

Politicization has had a destructive effect on many international organizations, in particular the UN's specialized agencies. These organizations were meant to serve various nonpolitical goals, in fields such as health, culture, education, and trade, but often find themselves hijacked into highly controversial and political conflicts that frustrate their ability to fulfill their

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7 Most of the existing literature is referred to in the coming footnotes, in particular infra note 9.
mandates. In the seventies and the eighties, many of these organizations were almost paralyzed insofar as their original mandates were concerned, to the extent that, in 1982, the Secretary-General of the UN himself recognized the serious crisis that the multilateral approach to international relations was experiencing and the related erosion of the authority and prestige of international institutions.8

While one can find several different definitions of politicization in the scant literature on the subject,9 the notion can best be understood when it is related to the theory of functionalism. Functionalism is one of the most central theories of international organizations, which motivated many of the founders of the UN's specialized agencies.10 It holds that a world community can best be achieved by the creation of nonpolitical international agencies dealing with specific economic, social, technical, or humanitarian functions.11 Functionalists argued that it was unrealistic to expect governments to agree to give up substantial authority to international organizations in areas that involve their vital political

8 The Secretary-General at the time was Javier Pérez de Cuéllar. See generally The Secretary-General, Report of the Secretary-General on the Work of the Organization, 1982, delivered to the General Assembly, U.N. Doc. A/37/1 (Sept. 7, 1982) (expressing his anxiety over the inability of the United Nations and its various organs to serve their purpose and to play an effective role in the international conflicts of the time); Robert W. Cox, The Crisis of World Order and the Problem of International Organization in the 1980s, 35 INT’L J. 370 (1980) (describing the crisis of international organizations and the powerlessness of the UN and its specialized agencies in the face of this crisis); UNITED NATIONS ASSOCIATION OF THE UNITED STATES OF AMERICA, IN THE MINDS OF MEN: UNESCO AND INTERNATIONAL INTELLECTUAL COOPERATION INTO THE 21ST CENTURY (1989) http://www.unausa.org/site/pp.asp?c=fvKRI8MPJpF&b=358977 (arguing that UNESCO politicization “manifested itself in the system-wide ‘crisis of multilateralism’ that by the mid-1980s seemed to place the UN itself in jeopardy”).


10 See, e.g., Eckart Klein, United Nations Specialized Agencies, in 5 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 349, 366 (Rudolf Bernhardt ed., 1983) (stating that “[t]he conceptual basis of the Specialized Agencies is functionalism”).

11 The founder of Functionalism is considered to be David Mitrany. Hans J. Morgenthau, Introduction to DAVID MITRANY, A WORKING PEACE SYSTEM 7, 11 (1966).
and security interests. However, in order to perform nonpolitical functions, such as airline routing, river navigation, and weather forecasting—functions that serve their citizens but need to be carried out beyond national borders—governments can, and ought to, engage in cooperative arrangements with other governments.\(^\text{12}\) Only after states have developed habits of effective international cooperation concerning such less controversial matters, will a process of ramification occur—that is, a gradual expansion of the areas of cooperation into areas of high-level political concerns. The functionalist premise served not only as the theoretical underpinning of the specialized UN agencies at the time of their founding, but also of the European Economic Community ("EEC"). The EEC, which has since evolved into the European Union with newly obtained powers in the field of foreign policy and security, appears to have successfully followed the path set out by the functionalists.

Be that as it may, functionalism clearly assumes that economic, social, and technical matters can be separated from politics.\(^\text{13}\) Indeed, the success of the specialized agencies and other IGOs in dealing with such matters is conditioned upon such separation. Their proper functioning is often based on a delicate consensus between their members on what both the mandate and spheres of activity of the organizations should be. Once this consensus is broken by one or more member states, other member states are bound to feel free to break it themselves in the pursuit of each state's particular political interests. Politicization therefore implies serious dysfunction of the IGO, which will impair the IGO's entire operation. Thus, politicization, for the sake of this paper, refers to a situation where actions are taken for purposes unrelated or inadequately related to the goals and functions of that IGO, but rather stem from the geopolitical goals and strategies of a particular member state or group of member states.\(^\text{14}\) While it is

\(^\text{12}\) Lyons et al., supra note 9, at 83.

\(^\text{13}\) Other schools of thought in the field of international relations, such as Realism and Marxism, are more skeptical about the possibility of separating politics from economic, social, and technical matters, and, consequently, are also skeptical of the analytical usefulness of the notion of politicization. See, e.g., id. (questioning the analytical usefulness of the concept of politicization, while at the same time recognizing its political impact).

\(^\text{14}\) Thus, by basing our definition on the stated goals and functions of the organization, as specified in its charter, we overcome the claims made by some commentators that political and nonpolitical goals cannot be differentiated, since
true that some IGO mandates are rather vague and member states often disagree about the precise scope of an IGO's objectives, the fact that there may be disagreement between the members of the organization about how broadly or narrowly its mandate and objectives should be interpreted does not negate the criterion itself. Law is abundant with abstract and vague definitions that are the subject of diverse interpretations, but are nevertheless helpful and workable in most cases (for example, the legal concept of "reasonableness"). As will be discussed below, the GATT/WTO mandate is relatively precise and limited when compared to the mandates of some other IGOs. We will also see that the GATT/WTO practice itself confirms that the contracting parties distinguish between economic and political goals, and view the former as within the mandate of the GATT/WTO and the latter as outside it. If all its members agree upon this, the

See id. (recognizing that agency programs are established via political intergovernmental agreements, and therefore are intrinsically intertwined with political issues); see also David A. Baldwin, Prologamena to Thinking about Economic Sanctions and Free Trade, 4 CHI. J. INT'L L. 271, 271 (2003) ("The practice of differentiating between 'political' and 'non-political' economic sanctions requires a criterion for distinguishing between political and non-political goals. Unless such a criterion can be found, the distinction between 'political' and 'nonpolitical' motives (goals, purposes, or ends) is untenable."). My response to Baldwin is that a criterion can be found, at least when speaking about the activities of and within an IGO: the criterion is the mandate of the IGO. Where actions are taken for purposes either unrelated or inadequately related to this mandate, but rather stem from geopolitical goals and strategies of a certain member state or group of member states, then it is a political action which tends to politicize the IGO. This criterion makes the distinction reasonably clear and workable, in particular for lawyers who are accustomed to examining the scope and limits of legal authority. See BROWN, supra note 9, at 27, 87–100 (advocating a similar approach to this argument, particularly as it applies to voting powers).

15 See, e.g., Ministerial Declaration of 29 November 1982, L/5424 (Nov. 29, 1982), GATT B.I.S.D. (29th Supp.) at 9, 11 (1982) [hereinafter Ministerial Declaration of 1982] (where the contracting parties undertake to abstain from taking restrictive trade measures for reasons of a noneconomic character, thus in essence recognizing the distinction between economic and political policies and that only the former are legitimate within the system). See also examples quoted infra regarding the accession of Egypt, the statements of the Japanese and U.S. representatives in the General Agreement on Tariffs and Trade ("GATT") discussion of the Falkland/Malvinas dispute, and the U.S.-Poland and U.S.-Nicaragua disputes.

16 See infra Section 3.
definition of politicization will change accordingly. Consequently, in principle, the notion of politicization does not prevent the introduction of noneconomic considerations into the discourse of an IGO devoted to economic or trade matters, provided these considerations fall inside its mandate and further its objectives.

Victor-Yves Ghebali has identified six types of dysfunctions that amount to politicization. One type is dysfunction through "extraneity," where politicization derives from the systematic insertion of extraneous issues into agendas, debates, and work programs. As an example, he cites the "intrusion of the Middle East question into the debates of virtually all the [UN specialized] agencies since 1973." Another example is the disarmament issue, which was usually raised by the Soviet bloc countries within the work programs of organizations such as UNESCO, the ILO, and the UN Committee on Peaceful Uses of Outer Space.

Both cases identified by Ghebali constitute a serious impairment of the workings of the UN specialized agencies. On the one hand, the specialized agencies are obliged to spend a disproportionate amount of time and effort on sensitive political issues, which more correctly fall within the mandate of the United Nations, at the expense of their own well-defined activities. On the other hand, as exemplified by the disarmament issue, this overloading of work programs produces over-lapping and considerable duplication of effort, and intensifies (rather than resolves) the controversy.

This dysfunction is closely related to another dysfunction, which Ghebali calls "hyper-confrontation." In this type of dysfunction, politicization leads to changes in the rules of the parliamentary diplomacy game. On the one hand, constructive

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17 Ghebali, supra note 9, at 322. In addition to extraneity, hyper-confrontation, and excommunication, which I describe in the text above, Ghebali identifies the following three types of politicization dysfunctions: the erosion of the liberal principles embodied in the charters of the IGOs, which serves to undermine the constitutional purposes and functions of these charters; "nomomania," meant to describe the abusive practice of forcing through resolutions of one-side normative content that contribute nothing to solving the problem at hand; and administrative mismanagement and budgetary excesses. Id.

18 Id.


20 Ghebali, supra note 9, at 322.

21 Id. at 323.
debates are losing ground to polemics and ill-disguised propaganda. On the other hand, outright confrontation tends to prevail over any spirit of compromise within the decisionmaking process. In organizations where this process is based on majority voting, the result will be the imposition of resolutions that are unacceptable to the minority, whose viewpoints are, in some instances, totally ignored.\footnote{Id. Ghebali cites two examples to illustrate this situation. The first is a resolution by the UN Committee on Peaceful Uses of Outer Space. \textit{See} G.A. Res. 37/92, U.N. Doc. A/RES/37/92 (Dec. 10, 1982) (laying out the principles governing the utilization by states of earth satellites for the purpose of direct broadcasting). The second example is a decision by the United Nations Conference on Trade and Development ("UNCTAD") in November 1983 on a system of South-South preferences whereby Turkey and Israel were excluded from the system, by a vote dominated by the Group of 77. \textit{Id.}} In organizations such as the WTO, where decisions are made by consensus, the result of the choice of confrontation over compromise may be complete paralysis.

Another type of dysfunction, identified by Ghebali, takes the form of condemnation and excommunication.\footnote{Id. at 324.} He rightly maintains that condemnation and near-expulsion of member states through resolutions enacted by the voting majority constitute the most disturbing aspect of politicization. These measures are always applied to certain states (but never to others) that are singled out by this majority in accordance with a somewhat double standard. The condemnatory resolutions so frequently adopted by the specialized agencies display a rather summary conception of justice: they call certain members to account for political considerations without due process of law, while the majority serves as prosecution, judge, and jury. This type of politicization has been found even within IGOs devoted to purely economic goals, such as the United Nations Conference on Trade and Development ("UNCTAD"). The "Group of 77," which incorporated all the developing countries within the UNCTAD, controlled the organization for decades and managed to pass scores of extremist resolutions with its automatic majority resolutions. Although these resolutions perhaps served their political goals, they did little to contribute to the welfare of the developing states that such resolutions were supposed to serve. The Group also excommunicated Turkey and Israel from their scores, notwithstanding the fact that, at the time, these states...
undoubtedly met the criteria for developing countries. Many of the Group of 77 delegates would walk out of the room whenever an Israeli delegate spoke, and would automatically vote down any proposal submitted by such a delegate, irrespective of its merits.

3. THE ABSENCE OF POLITICIZATION WITHIN THE GATT/WTO

Turning now to the GATT/WTO system, it was established as an organization devoted to reciprocal trade liberalization. In order to further the goals of “raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods,” the 1947 GATT created the framework for “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 commerce.” In the Marrakesh Agreement Establishing the WTO, concluded in 1994, the wording was changed from “full use” to “optimal use of the world’s resources,” and the objectives of “sustainable development” and “preserving the environment” were added. Thus, actions taken and decisions made in trade matters for the sake of environmental protection are today within the mandate of the organization. Otherwise, the goals remained the same, with the agreement repeating the previous goal of substantial reduction of tariffs and other barriers to trade.

Thus, based on our above definition, politicization would be found to occur if we determine that actions within the GATT/WTO organs were taken for purposes that are unrelated or inadequately related to the goals and functions of the organization.


25 Id. at 145-46. Rom describes how at first the Sudanese delegate voted in favor of an Israeli proposal in relation to the functions of an International Center of Trade, but when informed by his Arab colleagues that Israel was the initiator of this proposal he withdrew his vote and gave it to another proposal put forward by the Swedish delegation. Id. at 146.


27 WTO Agreement pmbl., para. 1.

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but rather are aimed to achieve geopolitical goals and strategies of a certain member state or group of member states. This has usually not been the case within the GATT/WTO, at least not until recently, and if there have been such occurrences, they have been relatively rare and insignificant.

Some of the instances in which the GATT was confronted with political conflicts and how it dealt with them are recounted below.

3.1. The Accession of Egypt

An illustrative—and perhaps constitutive—episode in this regard is the story of the accession of Egypt (or the United Arab Republic, as it was called at the time) to the GATT in the early sixties. 28 The request to accede was submitted in April 1962 and was greeted with much enthusiasm by most members, who were interested in broadening the ranks of the GATT with a large and important developing country such as Egypt. Israel, who had become a permanent member shortly before, asked to be part of the Working Party commissioned to examine the request. When the Egyptians discovered this, they were beside themselves. At the time, Egypt, under Jamal Nasser, saw itself as the leader of the Arab world and stood at the forefront of the campaign to impose political isolation and economic boycott on Israel and on anyone trading with her. Egypt threatened that if Israel remained a member of its “admission committee” it would withdraw its request to accede. However, Israel had preempted Egypt by declaring that “it was in favor of the accession of any country to the GATT, provided it was willing to fulfill the obligations of the agreement.” 29 Moreover, the accepted rule was that any contracting party who so requested had the right to participate in a Working Party examining the accession of a new country. Despite the heavy political pressure to withdraw from the Working Party

28 This episode is described and documented in detail in my article in Hebrew on the history of Israel’s participation in the GATT. Arie Reich, Hahistoriah shel Hishtatfut Medinat Yisrael BeGATT Ube‘irgun Hasachar Ha‘olami [The History of Israel’s Participation in the GATT/WTO], in IRGUN HASACHAR HA’OLAMI VEYISRAEL: MISHPAT, KALKALA VEPOLITIKA [THE WORLD TRADE ORGANIZATION AND ISRAEL: LAW, ECONOMICS AND POLITICS] (Arie Reich ed., forthcoming 2006).

29 Delegate of Israel, Statement to the General Agreement of Tariffs and Trade (Nov. 13, 1962) (GATT, Summary Record of the Ninth Meeting Held at the Palais des Nations, Geneva, on Tuesday, November 13, 1962, SR 20/9, at 135 (Nov. 26, 1962)).
that was placed on the Israeli delegate by the GATT Secretary-General, Eric Wyndham White, and by some of the more powerful GATT members, Israel insisted on participating. In response to these pressures, the Israeli delegate emphasized the fact that the GATT was supposed to be a nonpolitical organization, and that giving in to the Egyptian pressures would set a dangerous precedent. In the course of the deliberations of the Working Party, Israel did not oppose the accession of Egypt, but did, however, point out the problematic aspects of Egypt's trade policy, which, in Israel's opinion, needed to be changed prior to an accession. In particular, Egypt's economic boycott of Israel and of any foreign company trading with Israel was clearly in conflict with the provisions of the GATT, as was its blocking of the Suez Canal to certain vessels, which was in clear violation of Article V of GATT.30 In response, the Egyptian delegate insisted that this boycott was imposed not for commercial reasons, but "as a result of a political conflict which was not a matter to be discussed within GATT."31

At the end of the day, the Working Party voted in favor of Egypt's accession. However, the fact that the Egyptian delegate was forced to face the Israeli delegate, to talk to him and to answer his questions, was unprecedented. More importantly, the Egyptian assertion that the political conflict between the two countries was not a matter to be discussed within the GATT set an even more significant precedent and was actually followed in practice by future Egyptian delegates to the GATT who also refrained from trying to use the organization in their political battle against Israel.32 Indeed, an Israeli diplomat who served in Geneva in the

30 "There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transportation." GATT art. V, para. 2.


32 This does not mean that one can agree with the Egyptian assertion that its violations of the GATT were justified because of its political motivation. Although there are scholars that argue for the existence of a general "foreign policy exception," this is not the general view among most commentators. See Eugene Kontorovitch, The Arab League Boycott and WTO Accession: Can Foreign Policy Excuse Discriminatory Sanctions, 4 CHI. J. INT'L L. 283 (2003) (examining whether GATT applies to trade restrictions imposed solely for foreign policy purposes). The point made here is a different one: that Egypt accepted the notion that the political conflict between Egypt and Israel should not be brought to the
eighties told me that the same Egyptian and Pakistani diplomats who would walk out on him whenever he would rise to speak in the UNCTAD would do nothing of the sort across the street at the GATT headquarters. On the contrary, there they would willingly cooperate with him in mutually advantageous initiatives.

3.2. The Falkland/Malvinas Islands Conflict

Another incident that illustrates the resolve of the GATT contracting parties to keep political conflict outside the organization is connected to the Falklands crisis between Argentina and the United Kingdom ("UK"). Following Argentina's invasion of the Falkland/Malvinas Islands in April 1982, the EEC adopted a decision imposing trade sanctions on Argentina, which was joined by Australia and Canada. Instead of bringing the issue to the dispute settlement mechanism, Argentina decided to bring it before the GATT Council. In a communication circulated to all contracting parties, and in its oral presentations to the Council, Argentina claimed that the trade sanctions violated fundamental provisions under the GATT (such as the Most-Favored Nation ("MFN") obligation under Article I and the ban on import restrictions under Article XI) and that the sanctions were imposed for noneconomic reasons, namely, in order to exert political pressure on Argentina. Argentina also pointed out that, except for the UK, the sanctions had been imposed on the Malvinas by contracting parties that were foreign to the political conflict GATT and should not influence its work. This does not mean that GATT contracting parties are precluded from asserting their legal rights under the GATT, or from taking the available measures to enforce them through the dispute settlement system and, if authorized, through suspension of benefits.

33 Marcel Shaton, who served as Israel's delegate to the GATT during the years 1981-1986, recounted this story to me.

34 For instance, Mr. Shaton recalls active cooperation between the Pakistani and Israeli delegations in order to further an initiative related to the Multi-Fiber Agreement, which was in the interest of the two states. As another example, Israel and several Arab countries also found themselves cooperating on several fronts in the WTO Ministerial in Doha in order to further positions of mutual economic interest. See Sapir Peretz, Veidat Irgun Hasachar Haolami: Sikuy Lesevev Sichot Nosaf [The WTO Conference: A Chance for Another Negotiating Round], GLOBES (Isr.), Nov. 11, 2001, at 8 (noting that during the Ministerial in Doha, Katar, Israeli, and Arab delegates were cooperating to further common interests).

35 Permanent Mission of Argentina to GATT, Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons, ¶ 1, L/5317 (Apr. 30, 1982).

36 GATT Council, Minutes of Meeting Held in the Centre William Rappard on 7 May 1982, ¶ 2, C/M/157 (June 22, 1982).
with Argentina, and that Argentina had not been notified of the measures taken. Finally, the Argentinean delegate tried to characterize the situation as one of economic aggression of developed countries against a developing country in violation of the special rules that the developing countries were entitled to enjoy under GATT and under other international conventions.

In their response, both in writing and orally before the Council, the representatives of the European Community ("EC"), Australia, and Canada argued that their measures were taken "on the basis of their inherent rights, of which Article XXI ("Security Exceptions") of the General Agreement was a reflection."\(^{37}\) They also recalled that the UN Security Council had passed Resolution 502 calling for the withdrawal of Argentinean troops from the islands and the immediate cessation of hostilities, and therefore their actions could be seen as falling within either Article XXI(b)(3) or XXI(c).\(^{38}\) In any case, they stated this was not an issue of the relations between developing and developed countries.\(^{39}\) Finally, they argued that measures under Article XXI did not require any notification to GATT or to the affected party.\(^{40}\) Many other delegations spoke at the session,\(^{41}\) some supporting the Argentinean position and some the EC position on the question of whether the trade sanctions amounted to a violation of GATT obligations and whether this was a North/South issue. However, almost all delegations expressed their concern about the introduction of political conflicts into the GATT discourse and how this could harm the GATT's ability to serve its purpose. For instance, the statement of the Japanese representative (who did not take a stance on the dispute itself) is typical of this concern.

The representative of Japan, in expressing his country's deep concern about this crisis, said that GATT was an international organization

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\(^{37}\) Commission of the European Communities, Australia, and Canada, *Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons* ¶ 1, L/5319 (May 5, 1982).

\(^{38}\) Id.

\(^{39}\) Id.

\(^{40}\) See, for instance, presentations by the European Community ("EC") and Canada. *Minutes of Meeting Held in the Centre William Rappard on 7 May 1982*, supra note 36, at 10–11.

\(^{41}\) Representatives of no less than twenty-eight country delegations spoke at the session. *See id.*
specializing in and dealing with economic matters such as reducing and eliminating tariffs and other trade barriers, through co-operation among the contracting parties. In his view, the interjection of political elements into GATT activities would not facilitate the carrying out of its entrusted tasks. He stressed that one of the most important contributing factors for the effective and efficient functioning of the GATT was that contracting parties had developed a working habit of dealing with trade affairs in a businesslike manner. It was therefore important that contracting parties remind themselves of the tradition of this pragmatic and businesslike approach; and he expressed the wish that based upon this tradition, the spirit of co-operation would prevail in GATT.42

A similar concern was raised by the U.S. representative.

He stated that GATT could not resolve this dispute or help the involved parties, and that forcing the GATT, against its provisions and traditions, to play a role that it was never intended to play could seriously undermine its utility, benefit, and promise for all contracting parties.43

Thus, almost all delegations were of the opinion that the conflict between the UK and Argentina could not be solved within the GATT, and expressed their hope that it would be resolved in a more appropriate international forum. Under such conditions, it was clear that the Council, working under the consensus principle, would be unable to take any decision on the merits of the dispute, not even on its trade aspects. While the Argentinean delegate had suggested that the consensus rule should be abandoned in this case,44 the Chairman of the Council, B.L. Das of India, ignored this plea, and after summarizing the various opinions that had been

42 Id. at 9; see also id. at 5-7, 9-11 (reflecting similar opinions in statements from Zaire, Cuba, India, Singapore, New Zealand, Canada, the United Kingdom, and Australia).

43 Id. at 8.

44 Id. at 12.
expressed in the discussion, opted for a neutral (and rather meaningless) decision according to which "in the light of the utmost importance of the subject and the keen interest which had been shown in it, the matter should remain open and be kept on the agenda of the Council." 45

The manner in which the GATT Council's Chairman sidestepped the need to take any stance in this political controversy is typical of how the GATT has worked over the years. It is how the GATT has managed to keep out of controversy and continued to fulfill its task of promoting trade liberalization and successful cooperation among its members, regardless of any political and military conflicts that erupted between them. Thus, Argentina's attempt to obtain a resolution in its favor from the GATT Council was doomed to fail. In the UNCTAD, in contrast, Argentina would probably have fared better, considering the automatic majority of the developing countries which clearly would have come out against the "economic aggression" of the previously colonial powers.46 However, a resolution in its favor from UNCTAD would have had little value for Argentina and done nothing to solve its economic problems.

Of course, Argentina could have tried to bring its claim to formal dispute settlement within the GATT. Indeed, from a strictly legal perspective, the defending claim of the EC, Australia, and

45 Id. at 13. This proposal was adopted by the Council. In June 1982, the EC embargo was suspended. Argentina, nevertheless, continued to demand from the Council a decision that would establish a general interpretation of Article XXI reflecting its views. See generally GATT art. XXI (outlining security exceptions to the treaty). After considerable debate, a much more limited decision was adopted, merely requiring that contracting parties be notified to the fullest extent possible of trade measures taken under Article XXI. Thus a legal rule regarding the duty of notification was established by the Council, but not a ruling on the merits of the politically sensitive controversy. See GATT Council, Decision Concerning Article XXI of the General Agreement: Decision of 30 November 1982, L/5426 (Dec. 2, 1982), GATT B.I.S.D (29th Supp.) at 23 (1982) (discussing the rights of contracting parties under Article XXI). See generally ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 502 (1993) (outlining the "Falklands War" embargo case between Argentina and the EC, Canada, and Australia). The Ministerial Declaration adopted at the thirty-eighth session of the Contracting Parties included a provision whereby "the contracting parties undertake, individually and jointly: . . . to abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement." Ministerial Declaration of 1982, supra note 15, at 9, 11.

46 Id. This was the spirit of the presentations of most of the developing countries in the GATT Council, particularly those from Latin America.
Canada, according to which their trade sanctions were justified under Article XXI of GATT, was quite weak. Except for the UK, none of these countries could be considered as having taken genuine measures "necessary for the protection of [their] essential security interest."\textsuperscript{47} Nor did the Security Council's Resolution 502 mention any such trade sanctions,\textsuperscript{48} so they could not be considered as acting "in the pursuance of [their] obligations under the UN Charter," as required by Article XXI(c).\textsuperscript{49} While there are scholars that argue for the existence of a general "foreign policy exception,"\textsuperscript{50} this is not the view among most commentators,\textsuperscript{51} and it is unlikely that such a claim would be accepted by a GATT Panel. On the other hand, the language of Article XXI(b) appears to leave it to each state to decide what it considers "necessary for the protection of its essential security interests," and an argument could also be made for a broader interpretation of Article XXI(c).\textsuperscript{52} Be that as it may, under the pre-WTO system which required a consensus decision within the GATT Council in order to launch a dispute settlement procedure and in order to get a panel report adopted,\textsuperscript{53} the prospects for Argentina were not very promising either. This too was a political "safety valve" of the GATT that prevented its dispute settlement mechanism from getting involved

\textsuperscript{47} GATT art. XXI(b).


\textsuperscript{49} GATT art. XXI(b). Since only the Security Council is capable of creating obligations under the UN Charter, it is generally thought that this provision refers to Security Council decisions requiring the imposition of trade sanctions on a certain state. But see discussion infra note 73.

\textsuperscript{50} See RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 812 cmt. a (1987) (stating that "[t]he GATT has regulated devices employed by states to gain economic advantage for their products over the products of other states; it has been thought to be inapplicable to trade practices to achieve noneconomic ends such as national security or foreign policy purposes").

\textsuperscript{51} See RAJ BHALA, INTERNATIONAL TRADE LAW: THEORY AND PRACTICE 273 (2d ed. 2001) (stating that aside from non-application, there is no broad "political" exception to the MFN obligation in the GATT-WTO regime that could easily justify certain U.S. trade sanctions); Kontorovitch, supra note 32, at 298–301 (analyzing the incompatibility of the foreign policy purpose exception with WTO rules); Hans-Wolfgang Micklitz, International Regulation and Control of the Production and Use of Chemicals and Pesticides: Perspectives for a Convention, 13 MICH. J. INT'L L. 653, 693 (1992) (noting that there is no GATT mechanism that allows restrictions for foreign policy reasons).

\textsuperscript{52} GATT art. XXI.

\textsuperscript{53} HUDIC, supra note 45, at 8–9, 166.
in politically sensitive disputes. Indeed, the record shows that there have been very few disputes over the security exception in Article XXI.54

3.3. Other Political Conflicts Within the GATT

Following the Falkland/Malvinas conflict, there were several more instances in which trade sanctions that were imposed for noneconomic reasons put pressure on the GATT system. These include a U.S. withdrawal of MFN treatment in response to Poland’s treatment of the “Solidarity” movement in 1984,55 and U.S. trade sanctions and later total trade embargo in response to Nicaragua’s policies in Central America.56 In all three cases a similar pattern emerges: any attempt by a contracting party to obtain a decision in the GATT Council in its favor on the substantive issue(s) in dispute failed,57 whereas formal dispute

54 See e.g., RAJ BHALA & KEVIN KENNEDY, WORLD TRADE LAW: THE GATT-WTO SYSTEM, REGIONAL ARRANGEMENTS, AND U.S. LAW 154-157 (1998) (outlining how Article XXI has worked in practice). None of the few disputes relating to Article XXI reached any substantive ruling on this provision, or on its application to the case at hand. In the Nicaragua case of 1985, the United States blocked the appointment of a panel until the question of the validity of the United States’ Article XXI invocation was excluded from the panel’s terms of reference. Id.; see also HUDEC, supra note 45, at 527 (detailing the effect of the U.S. embargo on trade with Nicaragua).

55 For an account of this dispute, see HUDEC, supra note 45, at 507-08.

56 Id. at 202-03, 512-13, 527-28.

57 Poland attempted to obtain a decision by the Council “not accepting” the United States’ justification for the measure. In view of the disagreement of the United States and other contracting parties, no decision was ever adopted in this regard, even though the issue was raised several more times over the next two years. See GATT Council, Minutes of Meeting Held in the Centre William Rappard on 2 November 1982, at 4-12, C/M/162 (Nov. 19, 1982) (considering the United States’ proposed unilateral suspension of Poland’s most-favored-nation status); see, e.g., GATT Council, Summary Record of the Second Meeting Held at the International Labour Office, on Tuesday, 27 November 1984, at 10 a.m., at 7-9, SR.40/2 (Jan. 9, 1985) (noting in point 14 the failure of the United States to comply with GATT recommendations and dispute settlement procedures). Poland never requested adjudication by a panel. Likewise, in the second dispute with the United States, Nicaragua proposed a Council decision disapproving the U.S. embargo, to no avail. See GATT Council, United States – Trade Measures Affecting Nicaragua: Draft Decision Submitted by Nicaragua, C/W/475 (May 31, 1985) (deciding to disapprove unilateral trade embargoes and urge the two governments to initiate dispute settlement); GATT Council, Minutes of Meeting Held in the Centre William Rappard on 10 October 1985, at 5-6, C/M/192 (Oct. 24, 1985) (agreeing to establish a panel to examine Nicaragua’s complaint against the United States); GATT Council, Minutes of Meeting Held in Centre William Rappard on 12 March 1986, at 7-8, C/M/196 (April 2, 1986) (announcing the limited mandate of the panel
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settlement did result in a legal ruling on the substance of the claim. Thus, for example, the first complaint by Nicaragua resulted in a panel ruling in its favor, according to which the U.S. had violated the relevant GATT provision. The panel report was even adopted by the Council. Most states speaking in the Council expressed the view that unilateral use of trade restrictions for political ends was improper, a position that also had been reflected in a Ministerial Declaration. The second claim was also accepted by the GATT panel established to hear the dispute. However, at the insistence of the United States, the panel was precluded from considering the validity of the U.S. Article XXI defense.

Thus, the GATT Council's unwillingness (or inability) to take sides in a political dispute unrelated to its trade mandate does not usually preclude its dispute settlement system from considering trade sanctions imposed on political grounds and from ruling on the matter based on the straightforward application of the relevant GATT provisions invoked. Sometimes, the ruling can even be adopted in the Council. The rationale is quite simple: a contracting party imposing trade sanctions on another contracting party—even for political reasons—is not fulfilling its part in the reciprocal trade deal between the two countries, and must be prepared to suffer retaliation by the affected party. In today's WTO system of binding dispute settlement, trade sanctions by one

established to examine the trade issues between Nicaragua and the United States). Nicaragua's attempt to get the Council to adopt the panel ruling together with additional declarations by the Council in its favor also failed (GATT Council, United States - Trade Measures Affecting Nicaragua, Communication from Nicaragua, C/W/524 (July 14, 1987).


59 GATT Council, Minutes of Meeting Held in the Centre William Rappard on 13 March 1984, at 7-11, C/M/176 (Apr. 10, 1984). The U.S. did not try to block this decision. Id. at 8.

60 See discussion supra note 45.

61 Report of the Panel, United States - Trade Measures Affecting Nicaragua L/6053 (Oct. 13, 1986). The United States was willing to have the report adopted, but only as it was, without any additions by the Council disapproving of the United States' actions and suggesting compensation. Since Nicaragua insisted on such additions, the impasse was never resolved and the report remained unadopted.

62 Id.; see also HUDEC, supra note 45, at 528 (noting that the Council did not pass any ruling as a result of the United States' insistence on adopting the panel report as it had been written, and, by its very terms of reference, did not include any questioning of Article XXI justification).
member state against another—even if politically motivated—would thus be fearlessly analyzed from a purely legal perspective by a panel and the Appellate Body; if found incompatible with WTO rules, such sanctions would be ordered to be repealed. In case of non-compliance, the harmed state would be authorized to retaliate. It is true that sometimes the retaliation is not as effective as the sanctions as a result of an asymmetry in economic power (such as in the case of the United States and Nicaragua), but that is an inherent problem of the GATT/WTO enforcement system, and not peculiar to these types of cases.

Likewise, interviews with veteran officials of the GATT and the WTO, as well as with diplomats who served there as members of various delegations, all confirm that the atmosphere was always very professional and business-oriented, and that there was a general consensus that non-trade politics should be kept out of the organization. Certain things “were simply not done” on Rue de Lausanne 154, even if they were done elsewhere in Geneva. The GATT contracting parties (and later WTO member states) needed the organization to work, and could not afford to “rock the boat” by introducing politically controversial issues into the discussions. They had ample opportunity to do so elsewhere, in Geneva or in New York. The GATT/WTO was simply not the place for it.

4. Reasons for the Absence of Politicization within the GATT/WTO

What, then, could the reasons be for this relative lack of politicization within the GATT/WTO in contrast to other IGOs? Several explanations can be offered:

4.1. Membership

The record shows that most of the politicization of the IGOs in the seventies and eighties was a result of the Cold War and of the Middle East conflict (in particular after the Yom Kippur War in 1973). The initiators were mostly the Soviet bloc countries and

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63 See Ghebali, supra note 9, at 324–328 (noting that since the 1973 war, Israel became the major scapegoat in resolutions passed by the various IGOs, and describing the Cold War background to many of the other manifestations of politicization); UNITED NATIONS ASSOCIATION OF THE UNITED STATES OF AMERICA, supra note 8 (noting that politicization in UNESCO was connected to the Cold War and the Middle East conflict); see also Klaus Hüfner & Jens Naumann, Unesco: Only the Crisis of a “Politicized” UN Specialized Agency?, 30 COMP. EDU. REV.
the Arab states, respectively. Unlike other IGOs, the GATT remained outside the reach of those countries because most of them were not members. The Soviet bloc countries, with their centrally planned non-market economies, were precluded from joining and were ideologically opposed to the liberal goals of the GATT. As an alternative to the GATT, they established their own economic organization—the Council for Mutual Economic Assistance ("CMEA")—at the same time that the GATT was established. As for the Arab states, with the exception of Egypt, as discussed above, very few joined the GATT. Thus, the lack of politicization can be explained by the fact that the potential initiators of politicization (due to their political conflicts with GATT members) were simply absent from the organization during most of the problematic years. While lately more Arab states have been joining, they are usually the more politically moderate members of the Arab League and are less likely to instigate political conflict within the GATT.

120, 120-21 (1986) (positing that "the present trend in UNESCO and other parts of the UN system is becoming ominously reminiscent of the tragic collapse of the League of Nations"); Hans N. Weiler, Withdrawing from UNESCO: A Decision in Search of an Argument, 30 COMP. EDU. REV. 132, 132-33 (1986) (recalling that the debate over the United States' withdrawal from UNESCO was focused on, among other things, the group's undue politicization).

There are exceptions to this rule. Cuba was an original signatory of the GATT in 1948, prior to its communist revolution in 1959. Czechoslovakia was also an original signatory, while Yugoslavia acceded in 1966, Poland in 1967, Romania in 1971, and Hungary in 1973.


Lebanon and Syria were originally parties to the GATT by signing the Protocol of Provisional Application on July 30, 1948. However, both notified the Secretary-General of their withdrawal shortly thereafter: Lebanon on December 27, 1950, and Syria on June 7, 1951. See GATT pmbl. Kuwait became a contracting party as early as 1961 by succession (after having been part of the British Commonwealth), but as a small country did not keep a permanent mission to the GATT and was usually not very active in the discussions. Morocco acceded to the GATT only in 1987, and Tunisia in 1990. Bahrain succeeded in 1971, but only acceded in December 1993. Id.

In addition to the five Arab member states mentioned supra note 66, including Egypt, four additional states have joined the WTO since its establishment: Jordan, Oman, Qatar, and the United Arab Emirates. Another eight have submitted requests for accession and are in various stages of the
4.2. Technocrats' Domain

The GATT was traditionally the domain not of the Foreign Ministries—and certainly not of the Prime Ministers’ or Presidents’ offices—but of the technocrats of the Trade Ministries and the Treasuries. This type of diplomacy was considered "second-class," not worthy enough for high-level Foreign Ministry diplomats, and considered "low politics" as compared with "high politics" that dealt with security and "real" foreign policy. It was relatively ignored by the media, which also allowed a quiet and professionally oriented business environment. As noted by Weiler:

The GATT successfully managed a relative insulation from the "outside" world of international relations and established among its practitioners a closely knit environment revolving round a certain set of shared normative values (of free trade) and shared institutional (and personal) ambitions situated in a matrix of long-term first-name contacts and friendly personal relationships. GATT operatives became a classical "network."

4.3. Members' Vested Interest in the Proper Functioning of the System

The GATT/WTO regime serves the essential interests of its member states. It is not just an organization that serves as a forum for discussion, exchange of ideas, or formulation of recommendations and declaratory resolutions, as do some of the other IGOs previously discussed. It is an organization in charge of binding agreements, with the means to ensure the enforcement of their provisions. The negotiations under the GATT's auspices are geared to producing more binding obligations and stronger enforcement measures. Such obligations are aimed at bringing down trade barriers, opening up more export markets for each country's industries, and raising the standards of living all over the world. Thus, the well-being and prosperity of national economies

process: Algeria, Iran, Iraq, Lebanon, Libya, Saudi Arabia, Sudan, and Yemen. That may very well change the situation, as may be indicated from the current crisis around the observer status of the Arab League. See also infra note 78 and accompanying text.

depend on the proper functioning of the GATT regime. Its breakdown has the potential of harming the global economy, as well as that of each and every member of the organization. Countries that do not share this understanding would not have joined the organization in the first place, considering all the burdensome obligations connected with such membership. The members therefore have a vested interest in the proper functioning of the system. They cannot afford to let it be sacrificed on the altar of some dubious political achievement, in the form of a declaratory resolution or condemnation that can just as well be obtained in the UN General Assembly or another international forum that is less vital for their economic well-being and perhaps more politically visible than the GATT/WTO.

4.4. Narrowly Defined Mandate

In contrast to the ambitious and vague mandate of some of the other IGOs, such as UNESCO,\(^69\) GATT had a relatively precise and limited mandate, confined to the field of trade policy and trade liberalization. The GATT originally gave much deference to the domestic socioeconomic policies of its member states, and as long as these policies were applied non-discriminatorily, in accordance with the two principles of National Treatment and MFN,\(^70\) the GATT would not interfere.\(^71\) The organization thus managed to stay out of potential controversies connected to the diverging socioeconomic ideologies of its members. Also, the precisely defined mandate of the organization does not lend itself easily to

\(^{69}\) The preamble of the UNESCO Charter of National Commissions provides that the goals of the organization, established in 1946, are “to contribute to peace and security in the world by promoting collaboration among nations through education, science, culture and communication in order to further universal respect for justice, for the rule of law, and for the human rights and fundamental freedoms.” Charter of National Commissions for UNESCO, UNESCO 20th General Conference Res. 7/42, pmbl. ¶ 4 (1978), available at http://unesdoc.unesco.org/images/011/001140/114032E.pdf. This vague and overly broad mandate has also contributed to the introduction of political and ideological controversy into UNESCO, leading to its politicization. See United Nations Association of the United States of America, supra note 8 (“Paradoxically, the very mandate to build ‘defenses of peace’ can put an organization in the front lines of battle, and UNESCO forums have not been impervious to conflicts raging in the world outside.”).

\(^{70}\) GATT arts. I, III.

bring under its auspices issues connected to major political conflicts. Although trade sanctions are among the weapons used by opponents in such conflicts, the GATT contained appropriate escape clauses in order to dodge such political dynamite. In particular, the GATT includes: the non-application clause, Article XXXV, which allows a contracting party to refuse to apply the obligations under the agreement toward a certain state if it declares so at the time it becomes a contracting party;\textsuperscript{72} and the security exceptions clause, Article XXI, which effectively defers to a country's own judgment of what is necessary in order to protect its essential security interests, as well as to mandatory decisions of the Security Council, when such are taken.\textsuperscript{73} All this is also likely to have contributed to the GATT/WTO regime's success in keeping

\textsuperscript{72} Article XXXV:1 of the GATT provides:

This Agreement, or alternatively Article II of this Agreement, shall not apply as between any contracting party and any other contracting party if: (a) the two contracting parties have not entered into tariff negotiations with each other, and (b) either of the contracting parties, at the time either becomes a contracting party, does not consent to such application.

According to GATT practice, a country must invoke this provision and notify the GATT Secretariat. The corresponding provision in the WTO Agreement is Article XIII. Indeed, when Egypt was in the process of acceding to the GATT, and in response to questions about its adherence to the Arab boycott, discussed infra note 81 and accompanying text, Egypt referred to its right to invoke Article XXXV. Egypt invoked it in 1970, at its accession, and withdrew the invocation in 1980, following the peace agreement with Israel. Morocco and Tunisia invoked Article XXXV with respect to Israel in 1987. World Trade Organization, Article XXVIII: Modification of Schedules, in ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE, VOLUME 2, ARTICLES XXII-XXXVIII, at 959 (6th ed. 1995). Interestingly, Israel has not invoked this provision against any country, including those three Arab states, even though Israeli law prohibits imports from countries that prohibit Israeli exports. The United States invoked Article XXXV in the beginning of the seventies against Hungary and Romania.

\textsuperscript{73} Article XXI(c) provides a general exception whenever a contracting party must take an action "in pursuance of its obligations under the UN Charter for the maintenance of international peace and security." GATT art. XXI(c). It should be noted that only the Security Council can impose binding obligations in this field. Given the veto power of the permanent members of the Security Council, it is rare that trade embargoes are imposed by this body. Thus, the GATT Analytical Index contains no reference whatsoever to Article XXI(c). \textit{Id. But see} JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 748 (1969) (asking whether perhaps the provision contemplates other measures with less legal force, such as recommendations of the UN General Assembly). As for the extent of the deference to each member state's judgment of what is necessary to protect its essential security interests, this question has been discussed somewhat among commentators and member states' delegates, but there is no clear answer.
itself outside the great political conflicts.

4.5. Decisionmaking by Consensus

In the GATT and the WTO, decisions have almost always been made by consensus. Although the WTO Agreement provides for the possibility of majority voting and for specific majority requirements in certain situations, these provisions have almost never been utilized. The practice of consensus decisionmaking has been the norm, both in the WTO and in GATT. It would seem that this practice has also contributed to a more pragmatic, functional system. It requires the chairman of any GATT/WTO forum to make sure that there is a consensus among members before bringing a resolution. Politically controversial resolutions are automatically shelved and only those that can be agreed upon by everybody—sometimes only after lengthy behind-the-scenes negotiations—are passed. This has, of course, contributed to the legitimacy of decisions adopted and to the constitutional stability of the organization. It also has prevented attempts, at least until now, by the growing number of developing countries in the organization to take advantage of their majority in order to pass one-sided resolutions, as has happened in other IGOs where majority voting is used. In practice, the consensus rule within the GATT/WTO regime has been more than a procedure; it has been an entrenched convention governing how to behave and what issues should and should not be raised. Departures from this convention are frowned upon and may entail costs for the

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74 BHALA & KENNEDY, supra note 54, at 21.
75 Article IX, paragraph 1 of the WTO Agreement provides:

The WTO shall continue the practice of decisionmaking by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. . . . Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement.

See also WTO Agreement art. VII, para. 3 (describing the majority vote necessary for adoption of financial regulations and the annual budget estimate); id. art. X (outlining the majority votes and procedures needed for amendments to the Agreement); id. art. XII (stating the majority vote provisions in place for decisions on accession).

76 Under GATT 1947 there has not been a vote on a policy matter (other than waivers and terms of accession) since 1959 (BHALA & KENNEDY, supra note 54, at 21).
infringer.

5. IS THERE A POTENTIAL THREAT OF POLITICIZATION OF THE WTO?

Having identified several explanations for the lack of politicization within the GATT/WTO until now, we can now tackle the question of whether there is currently a potential threat of politicization of the WTO. This will be done by considering the question of whether any of the circumstances described in the explanations given above have changed or are likely to change in the near future.

5.1. "Membership"

The membership of the WTO is on a steady rise. From a small, intimate organization of some 23 original GATT-contracting parties, the WTO has emerged as an organization with an almost all-encompassing membership (150 at the present). This naturally confronts the organization with greater diversity, a higher chance of disagreement and controversy, and greater difficulties in managing its decisionmaking process. On the other hand, while most formerly communist countries have by now joined the WTO (including China, which still has a communist regime) or are in the process of joining, the Cold War is over and most of them no longer espouse the same ideologies which in the past nurtured the political conflict with the West. However, the conflict in the Middle East is still unfortunately far from over, and the number of Arab states joining the WTO is on the rise. In addition to Egypt, now Bahrain, Jordan, Kuwait, Morocco, Oman, Qatar, Tunisia, and the United Arab Emirate are members. Eight more countries, namely Algeria, Iran, Iraq, Lebanon, Libya, Saudi Arabia, Sudan, and Yemen have applied for membership and are in the midst of accession negotiations. One of the obstacles connected with this accession of the above-mentioned countries is their de facto continued espousal of the Arab boycott. 77 Unless they are willing to give up this boycott, in particular the secondary and tertiary ones, 78 the political conflict will loom in the background until it

77 See Tomer Broude, *Accession to the WTO: Current Issues in the Arab World*, 32 J. WORLD TRADE 147, 154-159 (1998) (discussing the legal issues involved with the accession of various Arab nations to the WTO); Kontorovitch, *supra* note 32, at 283 (discussing the application of GATT to trade restrictions imposed solely on the basis of foreign policy).

78 A secondary boycott imposes trade restrictions on nations or firms that
breaks onto the main stage of the WTO deliberations.

As these lines are written, there is renewed hope for a possible reinstitution of the peace process in the Middle East. If this hope is realized and the century-old conflict resolved, the accession of more Arab states to the WTO may be less likely to create a risk of politicization of the WTO. However, if the peace process does not continue and hostilities break out again, experience shows that certain recurring patterns of group dynamics among the Arab states within international forums lead to radicalization and eventually mobilization of the IGO to serve as a tool in the political struggle.79 Also, the possible accession of Iran80 (and even, to a certain extent, the accession of Saudi Arabia and Libya) may have the potential of introducing the larger conflict between fundamentalist Islam and the Christian West into the WTO. The fear of such developments has probably been the motivation for the U.S. decision to block the application of the Arab League, which is an entirely political organization with no real trade mandate except for initiating and enforcing the Arab boycott,81 for WTO observer status. As a result, the Arab member states have retaliated by blocking the granting of observer status to any new trade with the nation subject to the primary boycott. A tertiary boycott goes even further by imposing such restrictions on those who trade with those who trade with the originally boycotted nation. See Raj Bhala, National Security and International Trade Law: What the GATT Says, and What the United States Does, 19 U. PA. J. INT'L ECON. L. 263, 284 (1998) (defining both primary and secondary boycotts in analyzing U.S. sanctions with regard to Iran and Libya).

79 A Swedish colleague I met at a conference in Brussels in November 2004 told me about a UN conference he had attended devoted to the problems of disabled persons. To his dismay, the conference had been hijacked by the Palestinian delegation, which managed to divert most of the discussions to the “suffering inflicted on the Palestinian handicapped by the Israeli occupation.” As a result of the energy spent on this topic and of the controversy stirred, he felt that many of the real objectives of the conference had been neglected.

80 See infra note 90 and accompanying text.

81 While the 1945 Charter of the Arab League admittedly included in its broadly-worded mandate “economic and financial affairs, including commercial relations,” in practice the League has had no significant activity in this field and none of its many committees, subsidiary bodies, or specialized organizations are devoted to trade or commercial relations (except for its “Special Bureau for Boycotting Israel”). Pact of the League of Arab States, Mar. 22, 1945, 70 U.N.T.S. 248; see also Ed Haynes Arab League General Information, http://faculty.winthrop.edu/haynese/mlas/al1.html (last visited Dec. 3, 2005) (providing the text of the 1945 Charter as well as a complete list of the various committees and general information about the League).
This current situation, whereby all IGOs—including some whose presence as observers in the discussions is important for the work of the WTO—are blocked from receiving observer status is intolerable and is in itself a manifestation of an evolving politicization of the WTO and of the harm such politicization can cause to the proper functioning of the organization. In an extreme situation of confrontation, with its current image among certain circles as the spearhead of Western capitalist imperialism, the WTO may at some point in the future become a fit arena for a political clash of civilizations, somewhat reminiscent of Huntington’s predictions.83

Another source of politicization within the WTO which has already materialized is the conflict between China and Taiwan. The People’s Republic of China insists on viewing Taiwan as a renegade province ever since the communists drove the nationalists off the Chinese mainland in 1949, and has subsequently blocked Taiwan’s accession to most of the IGOs. Taiwan’s accession to the WTO was made possible only after China acceded, and even then not as an independent state, but as “the Separate Customs Territory of Taiwan, Penghu, Kinmen and

82 See Observership, Market Access Stall at TNC, BRIDGES Wkly. Trade News Dig. (Int’l Ctr. for Trade and Sustainable Dev. Geneva, Switz.), May 2, 2002, at 1, 4–5, http://www.ictsd.org/weekly/02-05-02/2002BRIDGESWeekly16.pdf (commenting on the ongoing political disagreements over whether the Arab League should gain trade body observership status); Small Economies’ Characteristics, Problems and Solutions Examined, BRIDGES Wkly. Trade News Dig. (Int’l Ctr. for Trade and Sustainable Dev. Geneva, Switz.), Feb. 23, 2005, at 1, http://www.ictsd.org/weekly/05-02-23/BRIDGESWeekly9-6.pdf (discussing the consideration of requests for observer status by the Organization of Eastern Caribbean States and the Arab League); see also Middle East Conflict Spills Over Into WTO Negotiations, Washington Tariffs & Trade Letter, Apr. 22, 2002, at 1, available at http://www.wttlonline.com/2002/22-16.html (“[t]he bitter Israeli-Arab conflict has reached into the World Trade Organization (WTO) where Israel and the U.S. have blocked the effort of Middle Eastern countries to give the Arab League observer status in Doha Round negotiations.”). In response, Arab states led by Egypt have retaliated by blocking a similar application of the Organization of Eastern Caribbean States as well as all other IGOs. Several Arab Members demanded that the two applications be considered simultaneously. Id. The fact that the Arab League is primarily a political organization with no specific trade mandate (except for initiating and supervising the Arab boycott against Israel, a WTO member state), unlike the Organization of Eastern Caribbean States, has not prevented these Arab members from insisting on granting the League observer status within the WTO.

Matsu," utilizing the idea that the WTO doesn't require its members to be sovereign states as long as they have full autonomy in the conduct of their external commercial relations (such as the setting of tariffs and other policies on imports). Nevertheless, the relations between the two members within the WTO have been far from idyllic in the few years that have passed since their accession, and lately their political conflict has had negative spillover effects on the functioning of the organization. Thus, for over two years, China has blocked the publication of a new updated WTO Directory (the "Blue Book") because of its opposition to the listing of Taiwan's delegation as a "Permanent Mission" (as it appears in the 2002 edition of the WTO Directory), and insists on the term "Trade Office," similar to the term used in relation to the Hong Kong and Macau delegations. Taiwan opposes this change; therefore the required consensus decision could not be reached and the new directory could not be published. Furthermore, Taiwan's accession to the Agreement on Government Procurement ("AGP") is being blocked by China (even though China itself is not a member of this plurilateral agreement) because of similar political-symbolic reasons: under the AGP, each party is required to specify in an appendix to the Agreement the government entities it has agreed to subject to the rules of the Agreement. Taiwan's

84 See WTO Agreement art. XII, para. 1 (stating that entities lacking full sovereignty only need full control of their external commercial dealings to qualify for WTO membership).

85 The Blue Book is the directory of the various WTO units and their telephone numbers, as well as the addresses and contact details of all the Member States' delegations. It is an internal publication that is only distributed within the organization, to the diplomatic missions, and to other IGOs. The last version was published in October 2002 and is in urgent need of updating as a result of accessions of new members and many changes of addresses.

86 The standoff was finally resolved in June 2005 with the publication of a new directory. The new directory maintained the term "Permanent Mission" in relation to Taiwan's delegation, but dropped the original titles addressing Taiwan officials as "Counselor," "First Secretary," and "Second Secretary." They were instead listed as "Mr.," "Miss," and "Mrs." Only the titles of the permanent representative and his deputy were maintained. The Taiwan Ministry of Foreign Affairs announced that it would file a formal complaint with the WTO Secretariat in this matter, although in Taiwan the opposition claimed that this had been done with the consent of the Taiwanese delegation, perhaps as part of a compromise with the People's Republic of China. Joy Wan, Taiwan Lodges Complaint over WTO Directory, TAIWAN NEWS, June 29, 2005, available at http://www.etaiwannews.com/Taiwan/Politics/2005/06/29/1120009056.htm.

87 See Agreement on Government Procurement, Apr. 15, 1994, Marrakesh Agreement Established the World Trade Organization, Annex 4(b), art. 1, para. 1,
proposed list, like that of most other parties, contains most of its central government ministries, including the Prime Minister's Office and the Ministry of Foreign Affairs. China refuses to have such a list of entities in the AGP on the grounds that a province of China cannot have a Prime Minister or a Foreign Ministry. It has urged Taiwan to change the name of these and other entities so as to conceal any indications of sovereignty. Taiwan refuses to do so, pointing also to the impossibility of calling government entities (that need to be identified and contacted by potential bidders) by false names. Consequently, and until this political dispute is resolved, Taiwan is being blocked from joining the AGP, the procurement of its government entities cannot be opened up to international competition, and its industry is precluded from competing on an equal basis for the procurement contracts of foreign governments.

Finally, the risk of politicization may originate from other states which cannot be identified at this time. We cannot foresee the political conflicts of the future, whether they will be regional or "clashes of civilizations." But, whatever they will be, as the number of members increases the chance that the countries in conflict will all be WTO members increases correspondingly. The possibility always exists that one of the conflicting parties will try to introduce the conflict into the WTO in order to use the organization in its political battle.

5.2. "Technocrats' Domain"

The public profile of the WTO has gone through significant changes over the last decade. Ever since the "Battle in Seattle" and the emergence of the Anti-Globalization movement, the WTO is no longer a boring technical subject ignored by journalists and statesmen alike.88 As noted by to the Consultative Board to

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88 In his speech to the Council on Foreign Relations in New York on the tenth anniversary of the WTO, the WTO Director General, Supachai Panitchpakdi, expressed his amazement "that an organization which spends the vast majority of its time deciding matters of a supremely arcane nature has attracted so much media attention and controversy." Supachai Panitchpakdi, Director-General,
Director General Panitchpakdi, the issues dealt with by the WTO "increasingly touch on sensitive aspects of domestic policy-making and crucial choices among welfare objectives." Thus, in many countries international trade policy has become part of the political agenda and national election campaigns. This naturally introduces a higher degree of controversy into the dealings of the WTO, and may lead to polarization and breakdown. The collapse of the Cancún Ministerial in 2003 is a case in point. Of course, controversy in itself is not equivalent to politicization, as long as the controversy is within the realms of trade policy and the legitimate scope of the WTO's mandate. However, high-level controversy and sharp conflict create a more prominent public profile, which in turn may invite abuse for political ends. If you build a world stage, you must expect it to be used by the world's actors. Also, high-level controversy can easily deteriorate into a political conflict between states, which may lead to the introduction of political considerations into WTO decisions and politicization of the entire organization. Finally, the importance of trade and economic relations in today's world may tempt countries to use international trade policy as a tool in their foreign policy, and subject the former to the latter.

A prominent example of this is the United States' policy toward Iran's accession bid. Iran first applied for membership in the WTO in 1996, but its request has been blocked by the United States ever since. The United States' motives have been mainly political and part of a U.S. trade boycott of Iran since the Khomeini revolution in the early eighties. However, the U.S. block may also be partly motivated by the concern that Iran's accession might introduce Islamic fundamentalist politics into the WTO. Recently, the U.S. decided to change its policy and to "drop its longstanding opposition to Iran's membership in the WTO if Iran renounced its..."
nuclear ambitions." In a statement made on March 11, 2005, "the Bush administration announced that the U.S. would join the EU in offering [Iran] economic incentives, including WTO membership, if it agreed to permanently stop its production of enriched uranium." This announcement, with its express linkage between WTO membership and Iran's nuclear policies, may mark the end of the traditional separation between the WTO and "high politics." The same applies to U.S. policy in relation to Libya's accession request. U.S. trade officials have confirmed that their decision to withdraw their longstanding objection to Libya's WTO membership is part of "a larger U.S. policy with regard to Libya," and is connected to Libya's decision last year to renounce its weapons of mass destruction programs and to allow international inspectors entry into Libya. Indeed, it seems that ever since September 11th, the United States has viewed its trade policy as an important dimension of its overall foreign policy.

5.3. "Narrowly Defined Mandate"

Ever since the conclusion of the Uruguay Round, the mandate of the WTO has not been as narrow as it once was. The policy of not interfering with the domestic policies of its members is not entirely applicable anymore since the introduction of several harmonization measures. Issues such as environmental policies, protection of intellectual property (including sensitive areas such as health and agriculture), public services, public procurement, subsidization of domestic activities, and sanitary and phytosanitary measures, to name just a few, have become part and parcel of the WTO's mandate, as well as sources of contention and controversy. This too raises the political profile of the organization.

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91 Id.
92 Id.
94 One indication of this change was the recent transfer of the U.S. Trade Representative, Robert B. Zoelick, to the post of Deputy Secretary of State on February 16, 2005. See U.S. Department of State, Biography: Robert B. Zoelick, http://www.state.gov/r/pa/ei/biog/42449.htm (last visited Dec. 4 2005). This move may signify that the U.S. administration views international trade policy as part of, and subject to, its general foreign policy.
95 See Reich, supra note 71, at 329-40 (providing a more detailed discussion of the different domestic policy areas of its member states that the GATT/WTO regime is now actively working to harmonize).

https://scholarship.law.upenn.edu/jil/vol26/iss4/5
and takes it out of the exclusive domain of the technocrats. This may in turn deteriorate into politicization if the political circumstances are right.

5.4. "Decisionmaking by Consensus"

Even though decisionmaking by consensus is deeply rooted in GATT/WTO practice, lately there have been demands from various directions to change this tradition. A coalition of civil society NGOs and developing countries seems to be emerging, calling for "democratization" of the WTO. For some coalition members, this means switching to majority voting, a device used by many other international organizations, which naturally would give developing countries greater control over the decisionmaking process. A proposal currently enjoying broad support from different sectors, mainly of civil society, is that of reforming the UN Economic and Social Council ("ECOSOC") into an Economic, Social, and Environmental Security Council with effective authority over UN agencies, the Bretton Woods institutions, and the WTO. This would in effect eliminate the independence of the WTO and subject it to a much more political organ with a wider mandate in which majority voting is practiced. The Consultative Board appointed by the WTO Secretary-General Supachai Panitchpakdi has also recommended reconsideration of the consensus principle—albeit in a much more modest proposal—with a view to perhaps limit its use to substantive issues, and put other procedural reins on it. As more developing countries become WTO members, pressure to abandon the consensus system will increase. Developed countries, the United States in particular, are of course very unlikely to agree to such a change; therefore it cannot be expected to occur in the near future, except perhaps for

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96 This proposal was espoused by a declaration signed in London on April 1, 2004 called "Reforms of the System of International Institutions to Make Another World Possible," as part of the "World Campaign for In-Depth Reform of the System of International Institutions." SEMINAR ON FUTURE SCENARIOS FOR REFORM OF THE SYSTEM OF INTERNATIONAL INSTITUTIONS, REPORT app. at 8 (2004), available at http://www.reformcampaign.net/documents/memo_escenarios.pdf. The London Declaration was signed by a large number of nongovernmental organizations, including the World Forum of Civil Society Networks, and prominent former leaders, such as Butros Butros Ghali and Javier Perez de Cuellar (both former UN Secretary-Generals), Federico Mayor (former UNESCO Secretary-General), and Mario Soares (former Prime Minister of Spain). Id.

97 The Future of the WTO, supra note 89, at 63-65.
minor, less critical issues. However, the mere existence of this pressure is likely to fuel controversy and geopolitical tension within the organization, with both sides using—and abusing—the consensus system in order to exert pressure. Eventually some type of compromise may have to be reached, and the WTO may find itself without one of its depoliticizing mechanisms.

The only factor, out of the five enumerated above, that is not likely to change in the near future is the member states’ vested interest in the proper functioning of the system. In fact, as the WTO regime grows, their interest in a well-functioning system will increase correspondingly. This interest will therefore serve as a counterbalance to other potential causes of politicization. Whether this will suffice to prevent politicization, only the future can tell.

6. SUMMARY AND CONCLUSIONS

This Article has documented and analyzed an important feature of the GATT/WTO that has almost gone unnoticed in the academic literature: its relatively unpoliticized character. It has shown how unlike many of the other so-called specialized agencies of the UN, for whom the fallout of the major geopolitical conflicts of our time has caused some serious organizational dysfunctions, the GATT/WTO has hitherto largely managed to distance itself from these conflicts and thus been able to better serve its objectives. By relating the notion of “politicization” to the theory of Functionalism, one of the most central theories of international organizations, this Article has developed a definition of this notion that is theoretically defendable and legally workable.

This Article has suggested several explanations for the relative absence of politicization in the GATT. These include its historically limited membership of like-minded states, which certainly helped create a business-minded tradition of technocrats devoted to promoting the economies of their countries, the GATT’s narrowly defined mandate, and its system of decisionmaking by consensus. Legal safety valves such as the non-application clause and the security exceptions provision, as well as the GATT/WTO’s traditional deference to the domestic socioeconomic policies of its member states, contribute to the regime’s success in keeping itself outside the great political conflicts.

Based on these explanations, the last section of this Article tried to assess the risk of future politicization of the WTO and the sources of this risk. It showed that many of the characteristics that
in the past protected the GATT from politicization are not present anymore in today's WTO. The WTO's growing membership, broadened mandate in sensitive areas, and rising public profile are all likely to increase the threat of politicization, as are the recent calls, both from within and without the organization, for a revision of the consensus rule. Indeed, there are already worrying signs of politicization within the WTO that are discussed in this last section. While to date these have not been major impediments to the work of the WTO, if the situation continues to deteriorate we may be faced with some major organizational dysfunctions in the future.

What then can be done to counter the threat of politicization of the WTO? To start with, heightened awareness of the increased threat among WTO member states and functionaries could contribute to greater caution and restraint in their dealings within the organization. Member states must bear in mind that their short-term political gains may be outweighed by their long-term economic losses resulting from the WTO's organizational paralysis. There may also be a need to rethink overly ambitious plans for further broadening of the WTO mandate—in particular if such expansion will encompass politically sensitive areas. The institutions in charge of interpreting the WTO agreements (i.e., the panels, the Appellate Body, and the General Council itself) must also be careful not to create problematic doctrines or exceptions that will require the WTO judicial organs to get involved in politically sensitive controversies. For instance, a broad interpretation of the public morals exception in the first paragraph of Article XX may create an overly wide exception that will require WTO panels to rule on politically controversial issues, thus undermining their legitimacy and stirring up more conflict. Finally, in considering institutional reform, member states should think twice before abandoning the consensus principle, or even limiting it to certain instances, as has been proposed. While it may be utterly burdensome at times, the consensus principle has many

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98 See WTO Agreement art. IX, para. 2 ("The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements.").

advantages including installing a spirit of cooperation and avoiding political controversies that may undermine the WTO’s ability to function properly.

As noted above, politicization within the WTO can also be defined legally. This raises the possibility of analyzing it as an illegal phenomenon. Legal measures may also provide an option for dealing with politicization, but this is a complex issue that merits separate discussion. In fact, the entire issue of politicization of international organizations merits further discussion, and this Article should be seen as an invitation for further research on this subject, both in relation to the WTO as well as other functional IGOs.