THE TRADE ACT OF 1988 AND THE MTNs: LONG-TERM PLANNING AND REFORM

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I have taken the title of this panel, the "Overview Panel", to heart and will attempt to provide some thoughts on a somewhat broader basis, rather than looking at the specifics of the Omnibus Trade and Competitiveness Act or the Uruguay Round negotiations. It has been a challenge to consider issues in a context which is greater in scope than the completion of the Uruguay Round negotiations, particularly because these negotiations are currently the focus of such attention. I would like to begin these comments today, however, with some thoughts on current U.S. trade policies and statutes and the related regulation at the GATT level, as a background for moving into the issues of services and intellectual property.

From my perspective, we should not be satisfied that the declining dollar, breakthroughs on long simmering trade irritants and the passage of the Omnibus Trade and Competitiveness Act have eliminated tensions generated by years of enormous trade imbalances. When it comes to the actual trade disputes, petitions for U.S. import relief undoubtedly contribute to bilateral and multilateral tensions, and the fact is that American business feels perfectly justified in filing a steady stream of complaints against any nation it feels is engaging in unfair trade practices. Therefore, it is important to examine the thinking behind these "unfair" trade petitions.

In the United States, there are two basic structures for dealing with trade complaints. The first is the rule-oriented system of settling trade disputes. Under this system, problems are resolved within the framework of legal standards. The second structure utilizes the political system. Relief can be sought from either the Congress or the executive branch.

Fairness plays a major role in the first structure. To the American mind it is "fair" if there is an understood set of rules and everyone has the same chance to play by them. If the rule is not right then an effort can be made to change it, but until it is changed, everyone must adhere to the rule. This is a concept American lawyers can

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understand. This rule-of-law system is designed to produce certainty of results. When complaints allege unfair competition, the relevant statutes require investigation, with less room for political influence. Experts, evidence, data, analyses and lawyers play significant roles.

The U.S. International Trade Commission ("ITC") is the chief example of the rule-oriented approach to settling trade disputes. The ITC, an independent agency of the U.S. Government, is often referred to as the shield of Congress—an instrument that makes possible a swift, non-political resolution of trade problems that would be difficult for an elected body to resolve. All industries and countries, large and small, may have their day in court before the ITC. With the ITC anchoring the system, there is a reliance on expert opinion—the "how and when" to proceed is understood by all participants.

Most ITC investigations involve alleged unfair competition from subsidized or dumped imports. Complaints are filed under anti-dumping and countervailing duty statutes (Title VII of the Tariff Act of 1930).[1] Since 1979, the statutes governing both types of investigation have included a "material injury" test for the imposition of dumping duties by signatories to the Tokyo Round Codes of the GATT. As we know, the subsidized or dumped imports are themselves not illegal. It is only when a resulting material injury to U.S. industry can be shown that the duty applied. The duty is not intended to be punitive; rather, it is calculated to remove any future unfair advantage.

Implicit in this concept of fairness in the law is the notion that American workers and businesses should compete on the basis of comparative advantage—that they should not have to adjust to unfairly traded goods. Consumers are expected to forego the savings resulting from dumping or subsidies in the interests of the domestic producers of the product; a duty is applied when the petitioner can demonstrate that it is being materially injured. Thus, the material injury test operates as an effective compromise between diverging points of view by accommodating the concern for the welfare of workers and producers in the affected U.S. industry in a manner that minimizes the disruption of commerce, and by attempting to maximize value to the consumer.

Fairness also plays a major role in the U.S. protection of intellectual property—ownership conferring, under section 337 of the Tariff Act of 1930,[2] the right to possess, use or dispose of products and processes

1. The Tariff Act of 1930 is codified at 19 U.S.C. §§ 1202-1677k (1988).
2. 19 U.S.C. § 1337 (1988).

created by human ingenuity. Section 337 cases encompass a wide variety of intellectual property-related causes of action, such as patent, trademark, or copyright infringement, passing off, and misappropriation of trade secrets. If the ITC determines that imports are violating the intellectual property rights of a U.S. industry, the ITC may issue cease and desist or exclusion orders on the infringing imports.

The original intent of Section 337 was to protect, and consequently encourage, American production, jobs and capital from unfair import competition. Given the changes to Section 337 that were made in the Omnibus Trade Act of 1988, the law has become less of a trade law and more a type of law aimed at preventing violations of intellectual property rights. Nevertheless, if the ITC finds a violation and fashions a remedy, it still must consider public interest factors, which in some cases, might outweigh the need for relief. I have not covered in these remarks the effect of the recent GATT panel report in the *AKZO* case concerning Section 337, but this report certainly puts that statute squarely onto the negotiating table of the intellectual property arena for the rest of the Uruguay Round. I might add to the extent that I have seen the public reporting of the panel it is what was clearly anticipated by a note in the *Georgia Journal of International Comparative Law* of last year which won the Dean Rusk Award here at the law school.[3]

Historically, the United States has enacted trade legisaltion, not competitiveness legislation. While the United States has worked to liberalize international commerce, it is also a fact that the United States has created exemptions or shelters for declining or politically powerful domestic industries. In the process, the so-called fairness laws have sometimes been manipulated by practitioners in pursuit of the immediate interests of their clients so as to distort the laws' original purpose. Consequently, U.S. protection against imports — whether or not they were unfairly traded—soared in coverage from 8% of imports in 1975 to 22% in 1986. Unfortunately, the protection afforded, usually in the form of tariffs or quotas, has fallen short of the intended goal of making beneficiaries more independently competitive. Indeed, much of the recent productivity gains in U.S. manufacturing has been in industries hit hardest by foreign competition. Average productivity gains in sectors without foreign com-

3. SECTION 337 AND THE GATT: A NECESSARY PROTECTION OR AN UNFAIR TRADE PRACTICE?, 17 GA. J. INT'L & COMP. L. 47 (1988).

petition were only 2% during this period, while sectors facing competition from abroad posted gains between 7 and 8%. Clearly, if the U.S. is to regain its competitiveness, it needs a government demanding change from its domestic industries, not simply protecting them against it.

United States industry is facing fundamental competitiveness problems that will not be resolved merely by passing trade laws, nor even by a depreciated dollar. Low-wage competition, particularly from Southeast Asian nations, has hit a broad section of U.S. manufacturers very hard. Inadequate investment and management practices have also hurt American competitiveness. American's trade relations with Japan illustrate this point.

The productivity performance of U.S. industry is disappointing compared to that of industry in Japan. Thus, even a further fall in the dollar and a removal of import barriers in Japan would still likely leave the United States with a continuing problem in its ability to compete with Japanese businesses, either in the United States or in Japan. That is to say, in addition to structural micro-economic trade problems, there are broader macro problems which the GATT simply does not reach. What, then, can the world trade system and the legal mechanisms for its regulation do to adjust to the increasing pace of internationalization of world commerce?

While some important reforms of the GATT system are on the table for the Uruguay Round, I would like to suggest some longer-range concepts to build political support in individual countries for limiting unfair trade practices in those countries. The following are sharp departures from the path that we have been following, and I am not necessarily an advocate for these positions. I am simply trying to outline post-Uruguay possibilities for improvement of the process.

First, in order to build broad opposition among businesses to subsidies in their own countries, we should impose some costs on the business community in each country where subsidies exist. For example, if country X countervails against the subsidy of country Y, country Y should be able to go to a GATT panel and and have the panel determine whether country X, the original countervailing country, is in substantial compliance with the Subsidy Code, regardless of the products benefitting from country X's subsidies. If the GATT panel concludes that country X is not in substantial compliance, then country Y could ask for compensation for country X's original countervailing duty action. Eventually, in order to eliminate any liability to pay compensation, when aggrieved industries successfully convince their government to countervail against subsidized imports, other

industries in the country would have an incentive to lobby for the elimination of subsidies at home.

A second, and even more radical solution, would be to eliminate dumping and countervailing duty laws altogether. The European community has done so between its member states; Canada and the United States could move in that direction in the U.S./ Canada Free-Trade Agreement. The working group on subsidies under the Free Trade Agreement could be one of the most important discussions being held over the next few years in the international trade area.

The truth is that the average American businessperson cares much less about prices of his foreign competitor in the foreign market or whether his foreign competition receives government aid. Instead, the U.S. business person continues to be most worried about prices and competition in the United States. Thus, the anti-dumping and countervailing duty laws have little foundation in the daily lives of the injured parties and often lead the parties down an expensive, time consuming, and often unpredictable path. Because the Title VII laws are intended to exclude only unfair trade, the United States tends to label all trade that it excludes as unfair, whether or not the appellation is warranted. The United States might better promote its own interests and provoke less foreign resentment if it stopped wrapping itself in the flag of "fair trade."

A third reform would be to make it less burdensome for countries to use the "escape clause" mechanism,[4] which permits import relief even in the absence of unfair trade practices. This could help to shift the focus from the fixation on the unfair nature of import problems. Like the first proposal, it would require a new type of GATT panel. This panel would examine adjustment plans for industries receiving escape clause relief. If the panel finds the adjustment plan adequate to resolve the problems that it addresses, then there would not be a requirement for the country utilizing import relief under the escape clause to give compensation to its affected trade partners. This would reward appropriate, efficient use of the escape clause.

Even if these more radical solutions are not explored at the GATT, the administration of U.S. trade laws should not rely so heavily on the "unfair trade" laws, which are beginning to lose their meaningful place in the globalized world of commerce. Instead, Section 201 (the

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4. GATT Article XIX. The U.S. escape clause measures are contained in sections 201-203 of the Trade Act of 1974, currently codified at 19 U.S.C. §§ 2251-54.

escape clause) should be better utilized to provide industries and workers adjustment relief to changing trade patterns.

Section 201 is an amalgam of a rule-oriented and a political approach. It provides import relief for industries adjusting to new international competition even where there is no allegation of unfairness.

In sum, the United States needs to move away from this fixation on "unfair" imports as a problem, and on import relief as a sole solution. Instead it should use a more appropriate test to trigger assistance, i.e., an assessment of an industry's ability to compete in the international market. The Omnibus Trade and Competitiveness Act of 1988[5] was a first step in this direction.

In any event, as the dollar declines and U.S. firms become more price competitive, the United States will focus less on the fairness of imports sold in the domestic market and more on the fairness of access for its exports to foreign markets. For example, the Super 301 and special 301 provisions in the new Trade Act will stimulate more 301 complaints.

Section 301 underscores three major themes in the Omnibus Trade and Competitiveness Act: first Congress' desire to battle unfair trade practices overseas; second, the shift of focus of U.S. trade policy away from deference to diplomatic considerations and away from complete presidential discretion; and, third, a decision to push for export opportunities. Complaints can no longer languish on the President's desk. In fact, the authority to make legal determinations and decide what is the best action to take under Section 301 is transferred to the U.S. Trade Representative.

Meanwhile, interest in import barriers against goods, whether they are erected at home or overseas, is giving way to interest in barriers against services and capital, one of the reasons we are here today. As for capital, this is a trend which will continue as long as foreigners continue to hold American dollars, and as long as American investments remain the attractive bargains they are when denominated in depreciated dollar terms. Foreign investment will remain a source of trade disputes as long as Americans continue to perceive foreigners buying up assets in the United States while the foreigners' own domestic markets restrict similar foreign investment.

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5. Pub. L 100-418, Title I, Aug. 23, 1988, 102 Stat. 1119-1324. In particular, *see* Subtitles A-E of Pub. L. 100-418, 102 Stat. 1119-1260.

Looking beyond the Uruguay Round in the area of intellectual property, we should consider a few basic realities concerning the development of the international intellectual property system. A reality I think we tend to lose sight of in our current movement to protect intellectual property is that intellectual property protection costs money; it costs government resources and it costs private sector resources in terms of the costs of multiple searches and registrations as well as enforcement. These costs would be significantly reduced if registeration for intellectual property protection were available through one application, in the applicant's language, for the issuance of one patent, one trademark, or one copyright world-wide. I would propose such a system with enforcement to be handled under national law but with a set of common standards.

Obviously this is an objective which cannot be easily obtained and will not be reached in a single generation, so we have to begin with some goals that will lead us in that direction. If this is a legitimate objective, we need to make sure that those steps that we take in the Uruguay Round and in other intellectual property forums do not create institutional barriers to the ultimate achievement of this objective.

A first step to consider is the harmonization of the national laws of major countries. This would involve developing a consensus of what should be protected and how long such protection should last. Each major industrialized country must recognize that its current intellectual property system has been the result of growth and change, and, to some extent, historical accident. There are no absolutes in the intellectual property arena. It is always a matter of balancing the benefits of rewarding creativity and invention, by allowing a privilege which can be used in an anti-competitive manner, against the benefits of spreading the knowledge and providing protection and/or better products to consumers.

The pendulum swings between these two goals and I believe that at the present time in the United States the pendulum tends to swing toward economic protection for the creativity of the inventor, and for the owner of the intellectual property. There has, however, always been an ultimate balancing between these two goals. The point is that we should be able to negotiate a convergence of the varying national systems that currently exist, on a basis of flexibility founded on historical perspective as to what is and what is not protectable, and how the former should be protected.

A second goal, which I have already mentioned and which I think is more easily achievable, is more rapid movement toward simplified

international filing. We already have a global system in place and that is easily demonstrated. Every time you notice a U.S. patent in litigation look for the equivalent foreign patents for the same product filed by that manufacturer. However, the costs of this system, with a few exceptions, are born on a national basis. This is of course a boon for intellectual property lawyers, but that may not be a sufficient policy reason to maintain the current system.

We need to consider the possibility that developing countries may not be able to afford the types of systems we are encouraging them to adopt. Their entire GNP may not be able to support a good search and registration system of the type that we would look for under our standards. Even with the search and registration system, enforcement in the developing world will continue to be a problem, and one for which we should show some understanding. The courts and police in many developing countries have other things to concern themselves with than investigating people who are pirating tapes, despite the fact that pirating tapes is an egregious intellectual property offense.

One of the ways around this cost predicament may be to use the World Intellectual Property Organization ("WIPO") as an institution that can run a search and registration system for developing countries that would be willing to allow it. This system would allow filings to be undertaken for multiple countries. The actual registration system for a country could be run from Geneva with data flowing back to an office in the country involved. The base fee charged for the search and registration could pay for the system. The developing country itself would be left with the enforcement issues, while technical assistance, in terms of costs and effective enforcement mechanisms could be provided through WIPO.

Although it is clear that significant issues are being tackled in the GATT intellectual property negotiations, there are serious problems with resolving international intellectual property issues through the GATT. It is important to note, however, that significant steps can be made there.

The types of questions I have concerning this area may best be illustrated in the following example.

A hypothetical U.S. pharmaceutical manufacturer has a U.S. patent on a particular product that it manufactures, say for this example, in Korea. The product is then shipped to and copied in, let us say, Indonesia. Who has the GATT claim? If the GATT rights are attached to the goods, does Korea have the right to bring the claim since this is a product produced in Korea, or does the U.S. government have

the right to protect Korean goods because they utilized U.S. patents? Can the U.S. government enforce those rights even over the objections of the Korean government where the goods originated?

Another difficult area I see is the assembly of components from various countries with each component having intellectual property protection. There is also the question of what is adequate and effective when inventors in different countries register the same rights at the same time. My point is that with the trade-in-goods, or for that matter trade-in-services, approach of the GATT there are numerous problems that will be very difficult and will take much time to resolve.

Turning to the services area, in the context of intellectual property, there are persons who are much more qualified than I to speak on the substantive issues and on the status of the Uruguay Rounds. There is, however, a long-range policy issue in terms of ultimate objectives for trade in services that I would like to raise. Over the past couple of years, Ambassador Clayton Yuetter was fond of describing the U.S. position regarding agricultural subsidies in the Uruguay Round negotiations as one that not only was on "the side of the angels", but one that was recognized even by our opponents as being on that side. He repeatedly pointed out that these opponents' argument for not conceding to our position in the negotiations was based on purely political objections. I want to be clear that I tend to agree with now— Secretary Yuetter that with regard to the position of the United States, all trade distorting agricultural subsidies should be eliminated; we are on "the side of the angels" in terms of economic theory. I do recognize, however, that like the United States' willingness to accept the costs of trade distortion in the multi-fiber arrangement due to other costs associated with too rapid a shift in an industrial base, there are reasons that some countries have similar reservations about too rapid a change or exposure to comparative advantage in their agricultural sector.

Turning this idea to the services trade, there have been important achievements in the negotiations of the GATT services agreement. The time was past to move internationally in this area, and the private sector in the United States led the way. I think those who are critical of the pace of the services negotiations need to remember that the formation of the GATT system for trade in goods and its reduction of tariff barriers have been accomplished over 40 years. It began with a first step and we are now taking the first steps in services.

The developing countries, however, have objections to the services negotiations based on their coverage of "white collar" services but not the services provided by laborers. In terms of economics, the

developing countries are on "the side of the angels" in this particular argument. Our objections are really based on the obvious political inability to reach an agreement that would allow, for example, major construction contractors to bring Third World workers into the United States to complete a major construction contract.

It would be my hope that the services negotiators, while reaching an agreement as a first step in a developing international structure for ensuring greater freedom of trade in services, will recognize that they should not set in place an institutional structure that will prevent or inhibit us in the future from moving in the direction that is on "the side of the angels."

A final area of concern, on which our trade policy formulators should keep an eye in the post-Uruguay Round future, is special and differential treatment for developing countries. I am not concerned about trade preferences for developing countries in the developed countries, but I am very concerned about import substitution devices in the developing countries that are contrary to normal GATT rules. The justification for these import substitution provisions was the promotion of economic development. However, I believe that the post-war record shows that economic development is not promoted by protection, but by liberalization that encourages the subject economy to become part of the international economy. Here I am talking about import substitution policies that were adopted in good faith as measures for economic development when in fact we know that in many instances they have become nothing more than a cover for purely protectionist purposes.

In many countries these import substitution policies have developed their own constituencies for continued protection regardless of the economic effect. These constituencies pushed many governments in developing countries to argue for the continued availability under the GATT of trade restrictive measures for developing countries. Current economic thinking no longer supports these types of policies. A look at those countries that have been successful in their development policies reveals finds that those countries have followed outward oriented trade policies, as, for example, those pursued in Singapore. Two highly protectionist developing countries, Turkey and Mexico, are countries that have turned around their economic development prospects by converting their trade policies into ones of more outward oriented development.

I would argue that it is no longer in the interest of the developing countries to maintain special differential treatment such as the current balance of payments waiver in the GATT system. A long-term ob-

jective of our trade negotiators should be to not increase the differential treatment that allows protectionist policies in the developing countries, but instead to try to limit and reduce the scope of these policies with the ultimate goal of encouraging all developing countries to adopt trade liberalizing, market opening policies under the GATT system.

Peter McPherson, the former director of AID, in making this argument, has pointed out that some of the economic benefits from outward oriented trade policies would include, for the developing countries as they have for developed countries, efficiency gains from production based on comparative advantage; economies of scale resulting from production for expanded markets; lower inflation given imports of lower-priced goods; more efficient investment which frees capital saving for other investment; higher savings ratios; increased employment of labor, higher wages, and more equitable income distribution; increased technological innovation; and higher growth rates.

The Uruguay Round has for the first time genuinely included the developing countries as major negotiating partners. It is not clear, however, that the application of GATT principals will lead to greater economic growth in the developing world. In the Uruguay Round, as well as in policies for post-Uruguay, the underlying principles of GATT which are still the foundation on which trade liberalization is founded (non discrimination, transparency, and reciprocity) should remain our guides. Not only can the interest of the developing countries in economic development be achieved consistently with these principles, but these countries' economic growth can be enhanced by a world trade system that is guided by and applies these basic principles as uniformly as is possible.