

# THE CHANGING INTERNATIONAL LAW FRAMEWORK FOR EXPORTS: THE GENERAL AGREEMENT ON TARIFFS AND TRADE

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I have been asked to talk to you this morning about the General Agreement on Tariffs and Trade (GATT)<sup>1</sup> and the international regulatory framework as they focus on exports. Ten or fifteen years ago when someone said "GATT", the response was often a puzzled "What's that?" It was a relatively unknown organization at that time, and arguably it was not an organization at all. A legal quarrel arose during the late 1940's and early 1950's as to whether the GATT was an organization, and there was also dispute over whether the GATT has a binding international obligation on the United States. Now, as to both of those questions, I answer firmly "yes." GATT is an international organization regardless of what definition is used, and it is also a binding international legal obligation.<sup>2</sup>

Regardless of some of its constitutional infirmities, which I will touch on in a minute, GATT is a central part of Western international trading policy, at least in market economy societies. United States Government officials, for example, constantly reiterate the necessity of following GATT. Ambassador William Brock, the current Special Trade Representative, has said explicitly in testimony before Congress that the United States Government will refrain from taking any action which is a violation of GATT.<sup>3</sup> It is an ex-

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<sup>1</sup> The General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. parts V, VI, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter cited as GATT]. The full text of the most recent version of GATT is found in 4 CONTRACTING PARTIES TO THE GENERAL AGREEMENT ON TARIFFS AND TRADE BASIC INSTRUMENTS AND SELECTED DOCUMENTS (1969) [hereinafter cited as GATT, BASIC INSTRUMENTS]. GATT, BASIC INSTRUMENTS is supplemented yearly.

<sup>2</sup> The American courts, for example, have recognized GATT as binding United States law. See, e.g., *Baldwin-Lima-Hamilton Corp. v. Superior Ct.*, 208 Cal. App. 2d 803, 819-20, 25 Cal. Rptr. 798, 809 (1962); *Territory v. Ho*, 41 Hawaii 565, 568 (1957).

<sup>3</sup> *U.S. Trade Representative Bill Brock's Statement on Reciprocity March 24 Before the Senate Finance Subcommittee on International Trade and Finance*, [1982] 121 U.S. IMPORT WEEKLY (BNA) No. 121, at 673 (Mar. 31, 1982).

PLICIT statement that goes quite far indeed; in fact when I first read it I was a bit surprised at how far it actually goes, because I am not sure that any major country in the world is truly prepared to make such a statement about almost any legal obligation. Nevertheless, there must be reasons behind Ambassador Brock's statement.

If any of you has had a chance to look into the work of some of the congressional committees in the last two years, you will notice that the House Ways and Means Committee is studying a bill on international trade sometimes called the Gibbons Bill, named for Congressman Gibbons from Florida who chaired the subcommittee.<sup>4</sup> The Gibbons Bill has been reported to the main Committee of Ways and Means with a number of measures concerning international trade regulation, many of those touching on GATT. One of the firm principles enunciated by the subcommittee in its drafting of that bill is that it would not put anything in the bill that was a violation of GATT.<sup>5</sup>

Now, in fact, I do not think the subcommittee has succeeded in carrying out its stated principle, for provisions in the bill are at least questionably contrary to GATT. It is interesting, however, that a committee of Congress seems so diligent in recognizing the importance of GATT to United States policy. Even in the case of domestic content legislation, a bill that has passed the House and remains poised to go to the Senate which would restrict the imports of automobiles into the United States<sup>6</sup> reflects an effort by the committees involved to square the legislation with GATT.<sup>7</sup> Although I think they have failed, it is nevertheless interesting that they have made the effort to try to develop legal arguments by which they can reconcile their measures with GATT.

Now, however, one can ask whether this talk of compliance is a mere smokescreen. I think there is considerable cause for concern about whether the United States and other governments are in fact living up to their GATT obligations. There are two levels, of course, on which to look at this issue. One is the realization that we never achieve total compliance. One can watch the activity at any stop sign on almost any corner of the streets in the United States

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<sup>4</sup> H.R. 4784, 98th Cong., 2d Sess. (1984).

<sup>5</sup> H.R. REP. No. 725, 98th Cong., 2d Sess. (1984).

<sup>6</sup> H.R. 1234, 98th Cong., 1st Sess. (1983). For a comment on the interaction between domestic content legislation and GATT, see Note, *Domestic Content Requirements: A Legal and Economic Analysis of Proposed U.S. Legislation and Foreign Content Laws*, 17 GEO. WASH. J. INT'L L. & ECON. 407, 429-32 (1983).

<sup>7</sup> H.R. REP. No. 287, Part I, 98th Cong., 1st Sess. (1983).

and recognize that the law is not one hundred percent obeyed. So perfect compliance is not truly the issue. The true issue is more a question of relative compliance, of relative effectiveness. Perhaps the core issue is whether the effectiveness is sufficient to make the law functionally worthwhile. Relative compliance, however, is a talk for another day.

GATT is central both to United States policy and to the policy of other nations because of its elements of protection and predictability. If you are representing exporters, and you are interested in exporting to other parts of the world, to a very large degree the slim, perhaps paper-thin wall between you and potential disaster or bankruptcy after great efforts of developing the export market may indeed be this frail instrument called GATT. Let us take a rather concrete situation put in somewhat hypothetical but actually realistic terms. Suppose an exporter wants to develop a market and sends goods to either a Latin American country like Brazil, a European country like Germany or France, or an Asian country, like Taiwan, Singapore, or Japan. Your client, the exporter, goes out and develops that market. That takes a certain amount of capital. It takes work. It takes effort. It takes building relationships. It may take advertising. It may take warranty applications. It may even take construction of some local assembly plants and warehousing. It does not usually come free. All of that effort is expended and over a period of several years exports flourish, so that the exporter begins to develop a good market with growing profitability. Suppose that at such a moment the government in the market suddenly changes as a result of an election, a coup, or what have you. Suppose the new government notices that your business venture can serve as a profitable area for domestic businessmen who supported their election and, therefore, simply cuts off the imports. The next day your client is wiped out.

Now, there is little between you and your exporter client and that scenario for disaster; but, GATT is one thing that is there. GATT is an instrument designed to prevent arbitrary government action of just the type I have mentioned, and I think it has succeeded. The judgment of not only myself, but many others, is that in fact it has succeeded remarkably well, not perfectly, but remarkably well, given the stresses and strains during the last thirty or forty years of its existence. In fact, the success of GATT is such that many of our problems of international economic policy today are products of the enormous increase in trade that has occurred during that thirty to forty year period. We talk increasingly about

international global economic interdependence without acknowledging that the major thing that has led to that interdependence is the freeing, or liberalization, of trade flows by GATT. Other things have led to this freeing; I do not mean to give all the credit to GATT. Indeed, certain technological changes in communication and transportation have played a primary role, but GATT and other legal instruments surrounding it have been at the core of this growth in international interdependence. Whatever little degree of predictability and stability there is today in world commerce has to be credited to this somewhat imperfect, but nevertheless quite effective, system that we call GATT.

I would like to talk to you about three subjects today, trying to respond to the questions that were asked of me when I was asked to speak. First, I shall discuss a bit about GATT itself in an overview which in turn will be in three subdivided parts that I shall mention. Second, I want to turn to what is perhaps the most burning issue of international trade today, the question of rules and regulations relating to so-called unfair trade. Finally, I want to deal briefly with the question of the effectiveness of GATT in terms of its provisions for dispute settlement, implementation, and other such issues. First, let us look briefly at the background of GATT in the international setting of which it is a part. Then I shall turn my discussion to the rules of the GATT that relate to exports. Finally, for a reason I shall mention, I shall turn to imports.

GATT was one of the immediate post-World War II efforts to try to reform the international economic system because of the feeling, at least partly, that the war itself resulted from the failure of international economic institutions in the inter-war period. The consequence of national government regulation, of stringent controls, of the 1930 United States Smoot-Hawley Tariff Act,<sup>8</sup> of the manipulation of exchange rates, of the development of quota restriction on trade by a number of countries in the world, and of consequential development of certain preferential arrangements in the commonwealth countries was a tightening, a restriction, of international trade. Some blame for the great depression must be laid on those actions.

Consequently, during World War II leaders of the United States and other nations began developing thoughts about institutions

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<sup>8</sup> Tariff Act of 1930, Pub. L. No. 361, 46 Stat. 590 (1930).

that would be needed in the post-war period. Basically, their economic thoughts went along two lines. One line of thought, concentrating on monetary reform, led to the International Monetary Fund, the articles of which were negotiated in 1944 at the Bretton-Woods Conference.<sup>9</sup> The second line concentrated on trade, and there were two subsets of thought in that area. One subset was the notion that there needed to be an international trade organization, some kind of international organization that would be a counterpart to the monetary organization, because money and trade were really two sides of the same coin. Second, the thinking continued, there had been a program in existence in the United States since 1934 called the Reciprocal Trade Agreements Program,<sup>10</sup> for which Secretary of State Cordell Hull had obtained the approval of Congress in 1934. This program allowed the President and his representatives to negotiate trade agreements for the reduction of trade barriers. It had been reasonably successful, resulting in about thirty-two bilateral agreements up to the period of World War II, and this second subset of thought reflected the intent to pursue that effort and carry it out even further.<sup>11</sup>

These two ideas, one for organization and the other for continuing the Reciprocal Trade Agreements program, merged into an effort that began in 1946 at a conference in London at which the draft charter for an International Trade Organization (ITO) was completed. During these conferences not only was a charter drafted, but there was a multilateral reciprocal trade agreement which was also drawn up. This effort was GATT.<sup>12</sup>

The idea behind GATT was that there would be ITO to exist as an organizational structure. GATT would merely be a subsidiary agreement, one among many which the participants hoped would be attached to the deal. The institutional backup and support for such an agreement would be ITO. The problem was that ITO never came into being, for although its charter was completed in

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<sup>9</sup> Articles of Agreement of the International Monetary Fund and Articles of Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. Nos. 2501, 2502, 2 U.N.T.S. 39.

<sup>10</sup> Act to Amend the Tariff Act of 1930, pt. III, Pub. L. No. 316, 48 Stat. 943 (1934). For a review of the workings of the Reciprocal Trade Agreements Act, see Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249, 254-74 (1967) [hereinafter cited as *GATT in Domestic Law*].

<sup>11</sup> See J. JACKSON, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 29, 396 (1977) [hereinafter cited as *LEGAL PROBLEMS*].

<sup>12</sup> See *supra* note 1.

1948, the charter was never approved by the United States Congress. In the early 1950's the executive branch finally announced that it was dropping the ratification effort, and ITO was as a result dead.<sup>13</sup> No other country was prepared to enter ITO unless the United States did, because in the immediate post-World War II period the United States had all the bargaining chips. That failure left us with GATT alone.

GATT was finally negotiated at Geneva in 1947. Its drafting was completed in October of 1947. There was a notion that it should be implemented immediately, partly because it was drafted from the point of view of the United States as an executive agreement under the authority of the renewal of the Reciprocal Trade Agreements Act, which would expire in 1948. The executive branch desired to bring GATT into force while that Act still existed so that, from the United States point of view, the agreement could be implemented without further references to Congress. That expedited implementation is almost what happened.<sup>14</sup>

Interestingly enough, and many people are surprised when they hear this fact, the GATT itself has never come into force. What came into force was something called the Protocol for Provisional Application,<sup>15</sup> which was signed in October of 1947 to bring the GATT provisionally into force, pending the bringing into force of ITO. The idea behind provisional approval was that when ITO became a full-fledged organization the GATT would then definitely be put into force, perhaps with some modifications to make it consistent with the ITO. The ITO-GATT relationship never materialized, so instead the Protocol itself implemented GATT. Technically and legally, as a matter of international law and as a matter of United States domestic law, almost all of the text of GATT is implementable domestic United States law invocable in courts. Indeed, GATT has been invoked in courts in the United States, and every court decision so far in those cases over three decades has upheld the validity of GATT as an obligation of the United States and as domestic law in those various circumstances.<sup>16</sup>

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<sup>13</sup> The aborted effort to create the ITO is discussed in *LEGAL PROBLEMS*, *supra* note 11, at 396-99. See also J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 42-53 (1969) [hereinafter cited as *WORLD TRADE*].

<sup>14</sup> See *WORLD TRADE*, *supra* note 13, at 42-53.

<sup>15</sup> Protocol of Provisional Application of the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. pts. V, VI, 55 U.N.T.S. 308, T.I.A.S. No. 1700 [hereinafter cited as *Provisional Protocol*].

<sup>16</sup> See *supra* note 2. See also *GATT in Domestic Law*, *supra* note 10, at 280-92.

Well, there we have it. That is GATT, an agreement with basically no constitutional underpinnings and ostensibly without an organization. There is sort of a minimal organizational framework in GATT itself, which provides for the Contracting Parties to meet for the introduction of new members into GATT and for voting on certain matters such as waivers. Originally there were about twenty-two signatory countries to GATT, but now about ninety countries have signed.<sup>17</sup> The original countries were basically developed Western market economies, but today well over two-thirds of the membership of GATT is made up of developing countries. This shift has dramatically changed some of the debate in GATT.

One can point to at least two problems with GATT as it was initially structured. One is that the Protocol of Provisional Application gave rise to something called grandfather rights, which granted certain exceptions to countries for legislation that was in effect before GATT came into force.<sup>18</sup> The other problem has arisen from the institutional structure of GATT. The mechanisms that are normally associated with an international organization were largely absent, since GATT was not designed as an organization, so they had to be developed within GATT as a matter of practice, as a matter of informal accommodation.

In the last thirty or forty years the GATT has sponsored a series of negotiating rounds, seven so far. During these negotiating rounds countries have tried to develop further consensus and obligation for the reduction of trade barriers. During the first five of those rounds, which lasted through 1960-61, the emphasis of the parties was on tariffs, which they to a great extent dismantled. In the two subsequent rounds, the Kennedy Round in the early part of the 1960's and the Tokyo Round in the last half of the 1970's, we have seen a further dismantling of tariffs. In fact, many economists have commented that tariffs are largely inconsequential today. The average tariff level after the full implementation of the Tokyo Round will be in the neighborhood of four percent for the major industrial Western market economy. Four percent is, as some call it, merely a nuisance tax. It is not something that really inhibits trade.

So the first five, and to a large extent even all of the seven

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<sup>17</sup> For a list of the countries which are members, see *LEGAL PROBLEMS*, *supra* note 11, at 410 n.3.

<sup>18</sup> See Provisional Protocol, *supra* note 15, at art. I(b). For a discussion of the effects of this "grandfather clause," see *GATT in Domestic Law*, *supra* note 10, at 294-97.

rounds, have focused on tariffs. Beginning with the Kennedy Round, however, two new approaches arose. One approach was to try to develop a system of linear negotiating tariffs, that is, to have a negotiated commitment to reduce tariffs by a certain percentage amount across the board. The Kennedy Round introduced that concept because the complexity of item-by-item tariff negotiations was becoming too great, and the new approach was needed if any further progress was going to be made. In the end, progress was made. Estimates suggest that the Kennedy Round resulted in something like a thirty percent to thirty-five percent overall average cut in tariffs, a substantial achievement.<sup>19</sup>

The second approach of the Kennedy Round was to look at non-tariff barriers. These restrictions were becoming increasingly critical, and today I think we can state unequivocally that they are the most important problem for world trade, exports or imports. The Kennedy Round tried to look at the problem, but it achieved only some modest success in the question of antidumping duties and little else.

With the Tokyo Round launched in 1973 by the GATT ministerial meeting in Tokyo, attention was focused principally on non-tariff barriers. Although tariffs were an important part of that negotiation, the objective was to negotiate the elaboration of a considerable number of rules relating to non-tariff barriers. That goal was accomplished, for many agreements have resulted from the Tokyo Round.<sup>20</sup> I have also talked about the new GATT-MTN system created during the Tokyo meeting in an article written several years ago, in which I contend it amounted to basically a new con-

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<sup>19</sup> Jackson, Louis, and Matsushita, *Implementing the Tokyo Round: Legal Aspects of Changing International Economic Rules*, 81 MICH. L. REV. 267, 271 (1982).

<sup>20</sup> The list of agreements resulting from the Tokyo Round includes: the Geneva (1979) Protocol (tariff reduction); Protocol Supplementary to the Geneva (1979) Protocol; the Agreement on Technical Barriers to Trade; the Agreement on Government Procurement; the Agreement on Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (concerning subsidies and countervailing duties); the Arrangement Regarding Bovine Meat; the International Dairy Arrangement; the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (customs valuation); Protocol to the Agreement on Implementation of Article VII; the Agreement on Import Licensing Procedures; the Agreement on Trade in Civil Aircraft; the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade (antidumping); the Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation in Developing Countries; and the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance. All of these agreements are collected at GATT, BASIC INSTRUMENTS, *supra* note 1, at 3-189, 203-04, 210-18 (Supp. 26 1978-79).

stitutional system.<sup>21</sup>

I think it would be fair to estimate that the result of the Tokyo Round is something like a quadrupling of the jurisdiction and efforts and activity of the GATT. Certainly the governments are experiencing the need for more staff to handle GATT matters. In addition, the secretariat, a tiny secretariat by the standards of most organizations, is experiencing needs also, and there are considerably more meetings.

A number of these Tokyo Round agreements completed in 1979 are not terribly well known. The most prominent agreement is the one that is turning out to be the least effective: the one dealing with subsidies and countervailing duties.<sup>22</sup> In addition, however, agreements exist on valuating techniques for customs purposes and on licensing procedures. Licensing, incidentally, is largely prohibited by the GATT, but the negotiators were pragmatists. They have provided that if you are going to sin you should at least sin in a particular way. The negotiators also designed an agreement that is supposed to govern these sins, and of course there are some GATT exceptions that allow certain licensing and quota procedures. In addition to these rules, the Tokyo Round produced an agreement governing the use of various product standards, an agreement which will tend to minimize the inappropriate use of product standards as a non-tariff barrier.

I want to turn now to a brief overview of the characteristics and rules of GATT. The GATT has little to say concerning the explicit regulation of exports. Indeed, four or five years ago, when there was a great deal of concern about shortages in the world, rising oil prices, and rising commodity prices generally, commentators emphasized the problem of export controls and the need for international regulations that would assure access to supplies and materials in the world. At that time there was talk that GATT would need to be amended. Such an amending, however, was troublesome at best; indeed, one of the reasons that the Tokyo Round used a series of side agreements instead of amendments to GATT itself was the difficulty of amending GATT. So, largely these ideas of amending GATT faded away as the economic climate of the world

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<sup>21</sup> See Jackson, *The Birth of the GATT-MTN System: A Constitutional Appraisal*, 12 J.L. & POL'Y INT'L BUS. 21 (1980).

<sup>22</sup> Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, GATT, BASIC INSTRUMENTS, *supra* note 1, at 56 (Supp. 26 1978-1979). See also Barcelo, *Subsidies, Countervailing Duties, and Antidumping After the Tokyo Round*, 13 CORNELL INT'L L.J. 257 (1980).

also changed.

Nevertheless, GATT does apply to export measures of governments. For example, the "Most Favored Nation" clause of GATT, designed to assure nondiscriminatory application toward all GATT members by any other GATT member, also applies to export control.<sup>23</sup> If a government uses an export control in a way to disfavor one GATT member as compared to another, that is a violation of its "Most Favored Nation" obligation under GATT. Furthermore, article XI of GATT directly prohibits the use of quota-type restrictions on either imports or exports. This limitation is often forgotten because we have a practice that has been flourishing in recent years called voluntary export restraints (VER's).<sup>24</sup> These controls, often implemented by an exporting country at the invitation of an importing country, are used extensively, for example, by Japan and to some extent by Europe, to try to ameliorate problems in their export markets that they fear might lead to more severe restrictions. Technically, most of these VER's are a violation of GATT. The trouble with enforcing GATT rules against them is that a complainant cannot be found, for the exporter is not likely to complain. The importing country also does not want to complain, because the VER's are exactly what they wanted. Third parties, at least in most instances, do not have sufficient interest.

Other regulations in GATT which apply to exports include balance of payment measures, which are technical articles of GATT that deal with the way custom agencies go about administering the laws of the country<sup>25</sup> and the obligation to publish regulations.<sup>26</sup> In addition, there are a couple of critical provisions in GATT which deal with exports concerning subsidies and antidumping measures.<sup>27</sup> There are positive obligations in the GATT against the use of subsidies for the purpose of exports which previously were relatively weak, but they have been strengthened by the subsidies code in the Tokyo Round. On the other hand, there is no express prohibition against dumping in the GATT or in any other international agreement of any prominence. Instead, the importing nation is allowed a special exception from other obligations to apply an-

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<sup>23</sup> See GATT, *supra* note 1, art. I.

<sup>24</sup> See, e.g., *Measures on Passenger Car Exports to the United States Ministry of International Trade and Industry*, reprinted in U.S. IMPORT WEEKLY (BNA) No. 76 at A-1 (May 6, 1981).

<sup>25</sup> See GATT, *supra* note 1, arts. VII-X. See also WORLD TRADE, *supra* note 13, at 439-77.

<sup>26</sup> See GATT, *supra* note 1, at art. X.

<sup>27</sup> *Id.* arts. VI, XVI.

tidumping duties in those cases in which a foreign party is exporting dumped goods.

The import obligations of GATT are considerably more extensive. You must remember that our exports are other countries' imports. So, to a considerable extent, GATT *import* regulations are also critical for exporters. If you are an exporter or are advising an exporter, what you will be principally worried about in most cases will be the question of the import regulation of your target market. On this issue GATT is very extensive indeed. First of all, GATT controls tariff bindings, by which countries have obligated themselves to charge no more than certain specified levels of tariffs on identified products in their tariff schedules. There are six or eight volumes of tariff schedules appended to the GATT.<sup>28</sup> Almost every country in GATT has a tariff schedule; the United States tariff schedule, for example, is a volume in itself.<sup>29</sup> The schedules are elaborate lists of goods with tariff amounts specified, and a country is obligated not to charge more than that specified maximum amount under the GATT agreement. Those are the tariff bindings that have been negotiated so laboriously through seven international trade negotiating rounds.

Now, beyond the tariff bindings are a series of other obligations designed to reinforce tariff obligations. "Most Favored Nation" status, which I have already mentioned,<sup>30</sup> is a central pillar of non-discrimination policy among countries. An obligation for national treatment exists which says that a government that is importing shall treat the imports the same as it treats its domestic products, at least after those goods have passed the customs border. As to state sales taxes, for instance, the importing nation is not permitted to charge a higher sales tax on imported goods than on domestic goods. GATT also does not permit, for example, a more stringent health care standard for pharmaceuticals that are imported than for those that are produced domestically. Various groups try to design regulations domestically that will, in effect, tend to inhibit the sales of competing imports, and there is a constant series of cases in GATT and in diplomacy that have to deal with this effort.

Beyond "Most Favored Nation" regulations are a series of other

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<sup>28</sup> 1-4 CONTRACTING PARTIES TO THE GENERAL AGREEMENTS ON TARIFFS AND TRADE, GENEVA (1979) PROTOCOL (1979).

<sup>29</sup> 19 U.S.C. § 1202 (1982).

<sup>30</sup> See *supra* note 23 and accompanying text.

previously mentioned detailed regulations about the administration of customs which apply to both imports and exports. These regulations include obligations against the use of quantitative restrictions and soft regulations designed to handle the use of state trading monopolies by countries.

An increasingly important aspect of GATT is the rules regarding so-called unfair trade, but I must add that there are also a number of exceptions in this area.<sup>31</sup> Waivers that are granted by vote of the contracting parties for example, are excepted from the rules, and there are further exceptions such as the escape clause that time will not permit me to discuss.

Let me turn to my second major topic, the question of unfair trade measures. I cannot go into them all. I simply want to say, though, by way of starting, that this is the area of the most discussion in the political arena today and in recent years. One constantly hears talk about how we must stop unfair imports. The Congress has indulged in a great deal of this rhetoric, as have the executive branch and private officials. There is both a salutary and a not so salutary aspect about this discussion. The salutary aspect is something that can be described as the policy of the "level playing field," which is the notion that societies or economies in an increasingly interdependent world should have a trading system that allows the private firms, the merchants, to compete fairly and on an even level with each other. Thus, if a foreign government subsidizes the goods of one of its firms, it is intervening or interfering with the market process and distorting the market process. That intervention is unfair because, as an American manufacturer will say, we can compete against X steel company abroad, but we cannot compete against the chancellor of the exchequer abroad. So, this notion of equal competition, which has long been established in international trade law and policy still exists. There were elements of a fair competition system in the last century, and it has been developed and made more intricate. Equal market competition was established in GATT at the time it was drafted and further elaborated on in the Tokyo Round. The Tokyo Round itself has been codified into United States law by the 1979 Trade Agreements Act,<sup>32</sup> which incorporates much of the language of

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<sup>31</sup> See GATT, *supra* note 1, at arts. XIV, XX, XXI.

<sup>32</sup> Trade Agreements Act of 1979, Pub. L. No. 96-39, 95 Stat. 144 (1979). For the history of the implementation of the Tokyo Round, see S. REP. No. 96-249, 96th Cong., 1st Sess. 1, 1-2, reprinted in 1979 U.S. CODE CONG. & AD. NEWS 381, 387-88.

both the Countervailing Duty Code and the Antidumping Code written in the Tokyo Round.

We are beginning to realize, however, that although a number of government and nongovernment people talk about the need to restrain unfair imports, in fact what they are really after is protection from competition. They talk about unfair imports to try to design measures that overreach and effectively limit the amount of imports. There are a number of specifics with regard to unfair trade that can be dealt with, but time will not permit too much discussion. Let me, therefore, just raise a couple of issues. It is difficult to determine exactly what is unfair; it is hard to decide how far to go in calling imported goods the result of unfair actions abroad. When you have an interdependent world, you have increasing tensions that result from differences in economics. The United States economy, for example, obviously differs from the Soviet economy. That fact is easy to see, and we have some special means and special laws that deal with that problem. Even relatively similar economies such as the United States and France, or the European Community generally, or the United States and Japan, have sufficient differences in their structures to cause stresses and strains in our trading relationships. The degree to which other governments intervene in at least certain sectors of their markets is substantial, and it differs in that respect from that of the United States.

Furthermore, the mere structure of an industry, for instance the debt/equity ratio of an industry, or the degree of worker tenure of an industry, can exacerbate trading problems that occur, particularly in times of slack demand. Economists talk in terms of marginal cost pricing, meaning that for a firm it is always useful in times of slack demand to continue to produce and sell at any price over its marginal cost, not necessarily its average cost. The firm's fixed costs, such as interest on debt, other fixed costs, and in some countries worker tenure costs, will be paid anyway; therefore, in a slack demand period, if a firm can sell at anything over its marginal or nonfixed costs, it can gain. It is going to hurt for some years, but presumably over the average of a business cycle the firm will come out ahead. If other countries have economic structures which have higher fixed costs, as is likely the case in Japan, which has higher debt/equity ratios and higher worker tenure measures, then they have lower marginal costs. Those countries have a competitive advantage in times of slack demand. There are some aspects of unfairness relative to that unfair advantage, but the system was prob-

ably not at all designed with the notion of creating trouble in the international market. The advantage is an unintended consequence of the inherent differences between economic systems. Thus, we must be careful about the degree to which we design rules in response to unfair trade that overshoot the mark. Such rules do not appropriately allocate a balance between the competing goals of allowing governments freedom to implement policy for their own societal reasons and not allowing them to foist on other undue burdens, even at various times in the economic cycle.<sup>33</sup>

I now want to talk briefly about the implementation of rules of GATT and the problem of dispute settlement. I have mentioned the constitutional problems of GATT and how GATT is really not designed to be an organization. Yet, the ingenuity of the diplomats and some of the leaders of GATT over some thirty or forty years has led to a variety of institutional devices to try to make it more effective. At the core of this effort is the dispute settlement process. We have two articles in GATT, articles XXII and XXIII, which deal with dispute settlement, providing sort of a shadow framework, particularly in article XXIII.

Basically, article XXIII says that a country can complain against another country if it deems that the benefits it expected under the GATT are being nullified or impaired by that country. Unfortunately, the complaint is not necessarily tied to a breach of obligation but to nullification or impairment, which is roughly translated as being an injury. Through the years GATT has developed a fairly elaborate process of dispute settlement. First, a complaint is tabled, and then the monthly council meeting appoints a panel of neutral third parties. Mostly the members of the panels are government officials located at and accredited to GATT, but from countries that are not parties to the dispute. The panel listens to the disputants' arguments, both oral and written, and then it makes its findings. Those findings, then, are reported back to the council of GATT, and the council can decide whether to approve them, merely note them, or take other action, as the case may be.<sup>34</sup>

In the last several years, a problem has arisen from the increasing number of disputes. The United States has instigated more dis-

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<sup>33</sup> Jackson, *United States Policy Regarding Disruptive Imports from State Trading Countries or Government-Owned Enterprises with Particular Focus on Antidumping and Countervailing Duties*, in *INTERFACE ONE* (D. Wallace, G. Spina, R. Rawson eds. 1980).

<sup>34</sup> See GATT, *supra* note 1, at arts. XXII-XXIII. For a review of this dispute resolution procedure, see Hertzberg and McGill, *Conflict Resolution*, 6 N.C.J. INT'L L. & COM. REG. 277, 300-04 (1980-81).

putes, because it has become United States policy during the last decade to utilize fully the mechanism of GATT; indeed, there are legislative provisions, particularly in the Trade Agreements Act of 1979,<sup>35</sup> under which the United States must go to the GATT processes in a number of complaint situations. So for that and other reasons, since the United States is certainly not alone in using the GATT mechanisms, there are a larger number of disputes raised before GATT panels.

Several of the reported findings of these panels have troubled some of the disputants. One of the reported findings was against the United States in the case on the Domestic International Sales Corporation (DISC). The United States finally decided it would comply with the decision, but the case had been going on for more than ten years.<sup>36</sup> Other more recent cases have been the so-called "Pasta" case<sup>37</sup> and the "Wheat Flour" case.<sup>38</sup> In those two cases, great troubles have arisen, and considerable questions of compliance remain. As one student author recently said: "The GATT is a morass of complexity and ambiguity. Few understand it, and even fewer know how to apply it."<sup>39</sup>

GATT has also been criticized as being impotent to enforce sanctions.<sup>40</sup> The processes of GATT must be designed so that the system as a whole can be more effective. A lot of attention was given during the Tokyo Round and the 1982 ministerial meetings to this problem, but the results are not entirely satisfactory. This subject, therefore, remains on the table.

Let me end my remarks with a few general thoughts. We have a

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<sup>35</sup> The Act, for example, implements agreements negotiated in the Tokyo Round. 19 U.S.C. § 2503 (1982).

<sup>36</sup> The United States response to the DISC dispute, which was initiated by the European Economic Commission before GATT in 1972, was a flurry of bills to replace DISC with "Foreign Sales Corporations". See, e.g., S. 1804, 98th Cong., 1st Sess. (1983); H.R. 4741, 98th Cong., 2d Sess. (1984). See also *Administration Drafts Blueprint for Bill to be Introduced as Replacement for DISC*, 19 U.S. EXPORT WEEKLY (BNA) No. 14, at 501 (July 12, 1983).

<sup>37</sup> The text of the settlement may be found in *GATT Pasta Panel Report on U.S. Section 301 Complaint Against European Community Subsidies*, 8 U.S. IMPORT WEEKLY (BNA) No. 12, at 468 (June 22, 1983).

<sup>38</sup> The text of the settlement may be found in *GATT Dispute Panel Report on U.S. Complaint Concerning EC Subsidies to Wheat Farmers*, 18 U.S. EXPORT WEEKLY (BNA) No. 22, at 899 (Mar. 8, 1983).

<sup>39</sup> See Note, *United States - Japan Trade Relations: Meeting the Japanese Challenge*, 10 BROOKLYN J. INT'L L. 157, 167 (1984).

<sup>40</sup> *Id.* at 167. While the language of this author is somewhat overstated, he has documented relevant authority.

series of critical international trade issues and an institutional mechanism that has coped reasonably well in the past with these issues. International trade experts increasingly worry, however, that GATT is not well designed for the issues which will arise in the next couple of decades; indeed, they believe, it may not be well designed for the current situation and the tensions which have arisen. We have a number of areas in which GATT simply does not provide international discipline, and a number of areas exist where there are loopholes in GATT. While new mechanisms of protection, new systems, and new schemes have been created to deal with some new problems, some nations have abused the unfair trade rules in ways that create processes that are expensive and laborious in themselves.

Governments obviously are going to have to consult and attempt to improve the GATT institutions. There has been increasing talk in the last year, for example, about the need for a new trade round.<sup>41</sup> Such statements have been made both by United States Government officials and now by European Community officials. I think there is more than a fifty percent probability that we will see a new trade round, an eighth trade round, launched in the next year or two, perhaps after the United States 1984 elections. Once the trade round is announced it usually takes several years to gear up for it and then from four to six years for its completion. So, radical change in GATT is not something that is going to come overnight. Nevertheless, I strongly support and endorse these endeavors, for we have much unfinished business. We see many problems, as discussed here, that are out there festering, and there is work to do that I hope we can get on with. Thank you.

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<sup>41</sup> Address by Mr. Dunkel, Director-General of GATT, meeting of the European Atlantic Group, in London (Feb. 1984) (unpublished); *EC Prepared for New Round of GATT Negotiations*, 846 EUROMARKET NEWS (CCH), at 2 (Apr. 4, 1985) (outlines goals of the EC for the new GATT round including a halt to United States protectionist trends).

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