AFTER THE MTN: WHAT IS IN STORE FOR IMPORTERS?

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I. INTRODUCTION

The negotiating stance of the United States in the Multilateral Trade Negotiations (MTN) was derived largely from a concerted effort to increase our export potential, and particularly, our access to markets. Our negotiators properly fought hard to "get" more than we "gave." This aggressive position was productive, but one result was the "benign neglect" of those aspects of trade which speak to reduction of our barriers to the exports of other nations. In fact, protectionist pressures unleashed by the economic difficulties of the past several years raise the serious threat that the implementing legislation will be dominated by measures with the sole effect of increasing harassment of trade and adding significantly to consumer prices. If the Administration has "bought" its way to world agreement and to Congressional approval with a number of "side deals," secret agreements and promises to protectionist forces, the problems and costs of trading may be exacerbated, and the health of the international economy endangered despite the gains achieved in Geneva.

Will the U.S. importing community oppose the final Tokyo Round package? Importers wonder whether the overall results of the MTN will in fact be trade liberalizing. They ask whether the price that has been paid to obtain approval of the MTN package is too high. The question becomes—will the agreements, implementing legislation and application of the agreements offer sufficient benefit to international trade to overcome the price; or is the alternative—Congressional disapproval—so unacceptable that importers must support the package regardless of the price paid?

Nothing in the package is vital for importers. Even the agreements on valuation and tariff cuts are of less than absolute importance to them. More serious are the ramifications of rejection of the package. Brushfire trade wars are a more likely result than

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threats of a world wide trade war and a severe economic depression but any such projections are too speculative to form the basis for a decision to support or reject the President's ultimate legislative package. That decision more properly will be based on the merits of the package itself.

A major reason why the import community has delayed any decision on the package is the procedure adopted by Congress for its consideration.[1] The Trade Act of 1974 calls for submission of the agreements, implementing legislation, and statements of administrative intent for Congressional consideration without amendment and under short time constraints. The legislative intent was to force a vote on the negotiated results with minimal threat to commitments made at the bargaining table. However, the process has had other, less salutary, results. Because the President decided to invoke the ninety-day pre-submission consultation period before the negotiations had been completed, Congress and the Administration drafted the corresponding amendments to domestic law without meaningful public participation. The hearings held were perfunctory and limited in scope. The public was forced to comment on draft agreements still subject to confidential negotiation and on general descriptions of proposed amendments contained in press releases. No opportunity was given for comment on the specific language of a bill. Such language, of course, often determines the acceptability of a concept.

At best, since this is a year of rising protectionist sentiment, limited access procedures may have allowed the House Ways and Means and Senate Finance Trade Subcommittees some latitude for acting in a more restrained and statesmanlike fashion. Nevertheless, the Subcommittees' actions promoted "free trade" only to the extent that other protectionist proposals were rejected. Certainly some of the interests most affected by the package were not provided the opportunity for meaningful input. Importers' first view of the legislation may not occur until it is presented to Congress, at which time further amendment is precluded. It will never really be known whether free trade interests were better served by this closed process. The exercise clearly was a reversion to the power oriented, "behind closed doors" legislative process which Congress normally avoids in today's era of government in the sunshine. The closed door procedure is even more remark-

[1] *See* Graham, *Results of the Tokyo Round*, at 153 *supra*.

able when contrasted with the prolonged debate and negotiation which preceded passage of the Trade Act of 1974. Even with such extensive public participation, the Trade Act has been found to contain flaws. Unquestionably, the 1979 Trade Negotiations Implementation Act will need amendment in the future.

II. THE TOKYO ROUND: THE EFFECT ON IMPORTERS AND THE DIRECTION OF WORLD TRADE

The draft agreements, on first examination, appear softer than might have been expected. There appear to be more guidelines than firm rules, an excess of hortatory language, and far too many provisions excepting certain behavior from those rules that do exist. However, fundamental change was wrought in the Tokyo Round. Previously unregulated behavior will be placed within some scheme of international trade rules or guidelines.[2] Government procurement and national standard setting are covered for the first time. A uniform international rule has been proposed for customs valuation. Government subsidies, the imposition of countervailing duties, and possibly escape clause proceedings will have been placed under international regulation and supervision. In good economic times the agreements allow facilitated trade and encourage movement toward more rational trade relationships. In bad economic times, the codes leave the traditional weapons in place for trade warfare.

The Tokyo Round made other notable beginnings. For the first time multinational corporations are recognized as presenting distinctive circumstances and problems. The difficulties in regulating trade with state controlled economies also are addressed more fully. In addition, most agreements contain dispute settlement procedures in recognition of longstanding criticism of GATT's centralized system.

For the most part the accomplishments and shortcomings of the

[2] The Tokyo Round marks a logical development from the Kennedy Round where the negotiators were unable to reach agreements on most nontariff barriers. That there was agreement in the Tokyo Round to restrict a substantial number of trade-distorting activities is an advance which unfortunately is easily overlooked in the debates over amending United States law. Rejection of this fundamental, but difficult, advance will do serious, long term damage to the traditional pro-trade atmosphere throughout the world which may take decades to repair.

The Tokyo Round will probably be criticized for its failure to address adequately the problems of the less developed nations; many of these complaints will have merit. The nonbinding guidelines for special treatment in each agreement will not be viewed as solutions by the LDCs.

Tokyo Round will have little direct or immediate impact on importers. These negotiations are of far greater importance in terms of setting the atmosphere for trade in the next decade. Major commercial decisions to expand or retract, to change sources of supply or to enter new lines will be based partially on the attitudes of national governments as perceived from their actions in these negotiations. Even specific government actions under each agreement will not greatly affect importers unless they contribute to a concerted effort to restrict or encourage trade. To the extent that importers can now discern governmental policies for the future from these agreements, the MTN will be a factor in their planning. For most importers, however, a better guage is the current policy of those governments. Few business decisions will be based on the MTN's general rules for dispute settlement, on the parameters for imposition of countervailing duties or safeguard restrictions.

We must be careful not to demand far reaching visible results from these agreements. Effects on business as a result of these changes will be difficult to trace, much less predict. The effects will be numerous, their impact diffuse and everchanging, and it will be impossible to isolate single events for study from among the numerous interacting and unmeasurable forces. Even so relatively simple an event as a duty reduction may lead to complex responses in trade actualities. Still, certain patterns, as expressed in the following section, seem clear even now.

III. THE SEARCH FOR STABILITY: THE EFFECT OF THE MTN AND THE THREAT OF IMPLEMENTING LEGISLATION

Traders, and particularly importers, seek stability as a general rule. Faced with the need to contract for production of their merchandise well into the future—commonly three to eighteen months, depending on the product—importers place themselves at considerable risk concerning the future state of their selling market. For that reason they try to sell for future delivery at contract prices based on their forward purchase obligations. In some trades this is easy. In consumer goods, for instance, traders are frequently obliged to guarantee selling prices well into the future, as in sales to "catalog" retailers. In others, such as prepared foods, raw materials and some industrial goods, similar guarantees are impossible. Some secondary uncertainties, such as currency fluctuations, can be dealt with through various price-stabil-

izing techniques. Other contingencies, such as political changes in the country of export, cannot be discounted in advance. Further, in times of long-enduring inflation like the present, both exporter and importer will set prices at a level which will compensate for the expected increase in prices; both experience and profit seeking often will lead them to seek over-compensation. It is clear that for the prudent importer—and this would certainly cover the largest importers and the greatest part of the volume of trade—stability in both the producer's market and the importer's own selling market is desirable. Efforts are constantly underway both to stabilize markets and to allow for uncontrollable destabilizing forces.

It is true that some importers seek to take advantage of instability as a speculative opportunity, that many importers of all sizes speculate at times, and that many importers (particularly smaller ones) become speculators out of ignorance. Nevertheless, these actions almost certainly represent only a minimal volume of trade, with minimal economic impact. In the long run, for the major corporations doing the vast bulk of importation, stability and the elimination of uncertainty are primary goals and the focus of both buying and selling activity.

The case of the multinational corporation and the "related" exporter and importer is more difficult to analyze and assess because price plays more than a market role. Very likely stability will remain the primary goal, especially in the most monopolistic/oligopolistic situations where maximization of profit is the object.

Any "commercial" view of the MTN agreements must be based on an appreciation of the fact that risk and uncertainty are the main enemies of traders. Essentially, traders are buyers and sellers. Any business-affecting event that occurs, or may occur, in the period between commitment to a fixed purchase price and realization of profit from the sale of that merchandise, is obviously undesirable. Experience demonstrates clearly that such events are far more likely to be negative rather than positive; in the case of government intervention, they will almost invariably be negative.

Thus, for the trader, the primary impact of the MTN is that almost all of the codes will reduce areas of risk and uncertainty. The implementing legislation, however, may exacerbate existing risks and uncertainties and introduce some new ones. The injury test in the countervailing duty code, for instance, will be of some

benefit to trade simply by requiring a showing of injury.[3] But the legislation may make the test far too easy to meet. The House Ways and Means Subcommittee on Trade has recommended that the complainant be required to prove that injury is related to subsidized imports, but that there be no obligation placed on the complainant to prove that injury is not due to any other cause (such as poor management, antiquated equipment, inefficient methods, or lack of capital). Others have proposed that our present Antidumping Act[4] be amended to ease the injury test. Complaints, which have proliferated since the Trade Act of 1974, can be expected to increase further in number if these proposals are adopted. Proposed changes in our countervailing duty and antidumping laws will also permit a court challenge of any determination in the course of a case (including early termination) by any "interested" party, such as trade associations or labor unions with affected members. As a result, risk and uncertainty for the importer will be increased not only during the period between purchase and sale, but also beyond the time of sale—perhaps the worst of all possible outcomes for the importer. Since the importer cannot control, and normally is not aware of, the export subsidies or home market values in the country of exportation, this area has always been a source of surprise and uncertainty. Under the new amendments it will become more so.

The same type of analysis may be applied to the other codes and their implementing legislation. The valuation code[5] establishes a system which unquestionably will benefit trade, not only by establishing transaction value as the preferred basis for appraisement, but by establishing specific criteria which must be met before the U.S. Customs Service (Customs) may move to an alternate method. For the first time the obligation will be placed on Customs to defend its reasons for utilizing a value other than transaction value. A dispute settling mechanism, coupled with the code's firm espousal of transaction value means that for most importers dealing at arms length in dutiable goods, the code will reduce uncertainty and risk. Today, however, much dutiable merchandise enters the United States in "related parties" transactions. It can be expected that with continued growth of multinational and other large corporations and as trade increases with

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[3] *See* Graham, *Results of the Tokyo Round*, at 153 *supra*.

[4] Antidumping Act of 1921, §§ 201-213, 19 U.S.C. §§ 160-171 (1978).

[5] *See* Graham, *Results of the Tokyo Round*, at 153 *supra*.

state owned or controlled enterprises, the percentage of appraisements subject to the "related parties" test will grow. Both types of transactions provide a basis for questioning and possibly going beyond transaction value, although much movement of merchandise between "related parties" is at arms length and therefore will remain subject to transaction value under the new code. For those importers dealing with a state controlled enterprise or in a "related parties" relationship which affects the price of the merchandise, the new code offers relatively little, since a full panoply of alternatives to transaction value remains for those cases. A definition of "assists" which narrows Customs' ability to add to dutiable value and the dispute settling mechanism will be the main benefits for such traders. The dispute settlement provisions of the code are at a government-to-government level and will prove slow and expensive for importers. There is hope that in the future a customs-to-customs or, better still, an exporter-, or importer-to-foreign customs mechanism will be negotiated and installed to provide access to a dispute settlement mechanism for private parties and reduce the time required for resolution, with subsequent reduction of uncertainty and risk. It should also be noted that as much as half of United States imports have entered duty-free in recent years. As a result of the MTN duty reductions, this portion will increase significantly. Remaining duties, which will be cut, will further reduce the importance of duties. Because valuation problems are associated primarily with payment of duty, the valuation exercise will become less and less important through time.

The standards code,[6] tested against uncertainty and risk, for the most part appears to be beneficial to importers despite its limited application. Only national government standard-setting bodies are required to adhere. Even then there are numerous exceptions, and only a "best efforts" commitment to extend compliance to state and local administrations is required. Clearly, greater transparency of both standards and standard-setting procedures and the opportunity for appeals will benefit importers. It must be noted that as the code is moving through Congress, the Federal Trade Commission (FTC) will be considering rules establishing a rigorous system to regulate standard-setting procedures of private bodies. Efforts are being made by the FTC to coordinate its proposed rules with the criteria established by the in-

[6] *See* Graham, *Results of the Tokyo Round*, at 153 *supra*.

ternational code. Here again, uncertainty and risk will be reduced by the MTN agreement and the FTC rules because importers and foreign producers will have an opportunity to participate in the standard-setting procedures and will have avenues of appeal if denied certification or approval of their products.

The Code's requirement of a central registry of standards will of itself remove an important area of uncertainty. Importers for the first time will be able to determine quickly and easily whether a standard exists for their product and will be able to obtain a copy of the standards expeditiously. Unless other action is taken, however, the current problem of dispersed standards administration will be intensified by adoption of the MTN code and the FTC regulations. Responsibility for product standards now lies in numerous agencies, including the Consumer Product Safety Commission (CPSC), Federal Communications Commission (FCC), Food and Drug Administration (FDA), Bureau of Alcohol, Tobacco and Firearms (BATF) and others. Even similar standard requirements are shared by separate agencies; for example, country of origin and other marking requirements are administered by Customs while technical marking may be the responsibility of FCC or FDA and labeling may fall to FTC, CPSC or others. Transportation standards are in the province of Department of Transportation (DOT). Ironically, the National Bureau of Standards (NBS) and the Department of Commerce has little impact on imports at present, but it is likely that adoption of the code and regulations will enhance their role. (Problems exist in the FTC proposals for standard-setting bodies and certifying groups, but any discussion of such defects is beyond the scope of this article.)

There is little doubt that the codes themselves will benefit importers despite numerous and sometimes serious drawbacks, inadequacies and exceptions. The primary direct benefit will be a reduction of uncertainty and risk. Secondary benefits will lie in the immediate impact of reduced duty rates, in standardized, expedited and simplified procedures, in enhanced dispute-resolution mechanisms, and in greater transparency in the establishment of trade barriers.

IV. A WORLD TRADING SYSTEM: WHAT THE MTN BEGAN, WILL U.S. IMPLEMENTATION IMPAIR?

Perhaps the greatest benefit for all traders, including importers, lies in the fact that the sophistication of debate over a

world trading system has been raised several notches by these agreements. The "floor" of what is acceptable in this area has been elevated so that future disputes and problems will be addressed on higher levels under a new set of accepted assumptions. Although least quantifiable in benefit, this aspect of the MTN provides the heart of the achievement. We can now, for the first time, talk of a world trading *system*.

Still, we cannot be sanguine about U.S. implementation of the codes. The Administration, in its fear that protectionist pressure will result in congressional disapproval, has yielded to virtually every demand to increase the burden on importers and ease the tests and obligations which must be met before trade restricting actions can be taken. Powers to restrict, restrain or stop imports are being enhanced. Domestic competitors and trade unions, already familiar with the harassment potential of the mere filing of complaints and appeals, will now be given greater access to all procedures.[7]

Other proposals are even more damaging. Chief among these are reductions in the time limits within which the government must complete antidumping and countervailing duty cases—time limits so short that not only will importers, foreign exporters and foreign governments be unable to prepare adequate defenses, but the government itself will not have time to conduct proper investigations. The resulting reliance on government averaging and estimating and inadequate information are sure to result in increased imposition of duties and harassment of imports. A proposal to require deposits of cash or special single-entry bonds after preliminary antidumping and countervailing duty determinations has also been made. Basically this amounts to punishment before trial. In addition to frequent governmental failures in the past to protect confidential business information and a recent Supreme Court decision[8] immunizing government from suits to prevent information from being released under the Freedom of In-

[7] Two such complaints were recently terminated for lack of injury when the ITC found that in one case there had been no importations of the products in the most recent four years, and in the other there had been only one small shipment per year. The ITC commented in a case against certain gloves from Brazil that the petitioner expressed "no interest" in the investigation. The cases, in short, were intended only to harass the importers and exporters and to cause them concern and expense. *See* Wool Yarns from Brazil & Uruguay, U.S. ITC pub. no. 940 (1979) and Certain Gloves & Glove Linings with Fur on the Skin from Brazil, U.S. ITC pub. no. 941 (1978).

[8] Chrysler Corp. v. Brown, ___ U.S. ___, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979).

formation Act,[9] proposals have been made to require defendants in cases against imports to give information to complainants. It should be noted that all parties (including trade unions and trade associations) have access to the courts—where information *can* be protected—in appeal of any government decision.

Among other congressional proposals is an old red herring, conversion from an f.o.b. basis for valuation to a c.i.f. basis. Aside from its use as a "bargaining chip," little merit can be seen in this proposal from any perspective. If made trade neutral, it would have no impact and would require extensive statistical manipulation with ongoing revision and administration. If its purpose is to obtain information, we are already collecting it in as good a form as any. C.i.f. valuation has no effect as a protectionist device. Finally, if it is imposed without compensation to exporting governments and without averaging its impact in the United States, it will be discriminatory, it will distort patterns of trade and transportation and it will raise costs and prices unevenly.

Proposals also have been made to grant the President power not only to impose an automatic import licensing scheme, but also to auction quotas here in the United States. The only good thing to be said about the latter proposal is that it does *not* cover quotas set under section 22 of the Agricultural Adjustment Act[10] which includes textiles and footwear.

A 650-page compendium of the negotiated changes regarding duty rate reductions,[11] may not appear before mid- or late July. Some nasty surprises for importers are expected. Although the vast bulk of changes are reductions, their effects vary greatly, and some rates actually will be increased. Conversion from specific and compound rates to ad valorem equivalents will produce many higher rates, as will compensation for ending the American Selling Price basis for valuation of footwear and chemicals. Some higher rates reportedly have been negotiated on such items as institutional stoneware and certain stainless steel flatware. Further, a project in which the interagency Committee for the Annotation of Tariff Schedules (which is responsible for maintaining the Tariff Schedules of the United States), would "clean up" the tariff schedules is to be included. This will produce perhaps three thousand or more changes in five and seven-digit tariff item descriptions and numerous changes in duty rates, many of which would be in-

[9] Freedom of Information Act, 5 U.S.C. § 552 (1977).

[10] Agricultural Adjustment Act of 1933, 7 U.S.C. § 612(c) (1970).

[11] *See* Graham, *Results of the Tokyo Round*, at 153 *supra*.

creases.[12]

The implementing legislation, when finally introduced, probably will contain many features presently secret. It is not known, for instance, whether changes in the Generalized System of Preferences will be included. One possibility is that the annual effective date for eligibility changes will be made later than March 1 and that some minimum dollar limit will be established, below which the 50% competitive need rule would not operate. In addition to the codes, the agreements, and the implementing legislation, numerous "side deals" reportedly also have been made. Their effects will not be known until they become visible at some time in the future. The numerous protectionist concessions made between the government and domestic industries, such as steel, textiles and apparel, sugar, rubber, citrus, electronics and dairy products, will all have negative impacts on trade and inflation-boosting impacts on the economy.

V. CONCLUSION

It is nearly impossible to gauge the impact of changes in trade on the importing community. Importers have dealt with adversity for hundreds of years, have learned to profit from it, and have learned—first and foremost—how to survive.[13] However, importers, and all traders, should benefit as the codes and agreements negotiated in Geneva take effect. Chief of the benefits is commitment to a world trading system, with guidelines for preferred behavior, strictures against general and specific acts against trade, rules and standards for acceptable retaliation, and standards for dispute settlement procedures. Protectionism and nationalism will always be problems, felt most sharply in bad

[12] We cannot leave the subject of duty rates without raising, as an example of possible future benefits of the MTN, the approaching time when trading nations will be able to eliminate duties completely, except as a device for selective protection. Few nations still rely on duties as a source of revenue, and that function will diminish as duty rates go down and an increasing percentage of trade enters duty-free. If duties could be levied only as specific protective rates, all current dispute over valuation would disappear, many classification disputes would be ameliorated or would disappear, trade statistics would be far more valid than at present, and protective rates would be highly visible and certain. Much of the contention between Customs, exporters and importers would be removed; much of the present paperwork and administrative effort would be reduced. Enforcement would be focused on more serious problems of law infraction and a very different relationship between traders and their governments would be possible.

[13] It is also true that except for total embargo, some importers will gain and profit from every restriction on and impediment to trade, no matter how badly others are hurt. (The

times. But during quiet times and strong economic periods, the codes and agreements, will provide a basis for steady improvement of subsidies to exports; instead there will be debate over the acceptability of specific subsidies. No longer will standards be used for exclusion of foreign products; nations will argue instead over exemptions. Further, the MTN has at least partially disarmed what clearly would have been a worldwide protectionist attack on trade greater than any since the Smoot-Hawley tariff exercise of the Great Depression. In the short run, however, importers and exporters will suffer from protectionist anticompetitive implementing legislation in most nations. Other signatories are waiting to see how the United States acts; we can expect their extended attacks will not severely impede trade, but will make all merchandise—whether foreign or domestic in origin—more expensive and importing more burdensome until times improve.

auctioning of quotas by the United States, which may appear in the implementing legislation, will allow large importers to gain at the expense of smaller ones. Profits may increase through industry restraint in bidding up quota prices, and a new profitable business of quota brokerage will appear.)

Because domestic industry does not really want to compete with imports in the mass market, every price increase by importers as a result of trade restrictions traditionally is met by a corresponding price increase by the domestic competition. The consumer pays while both the importers and domestic interests pace their markup percentages on the resulting higher prices and make more dollars. Restrictions on trade are invariably anticompetitive. Those importers who survive appreciate the lessened competition as much as their domestic counterparts and profit from it in the same ways.