

## Most-Favored-Nation Treatment and the Multilateral Trade Negotiations: a Quiet Revolution

Seymour J. Rubin

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mjil>



Part of the [International Trade Commons](#)

---

### Recommended Citation

Seymour J. Rubin, *Most-Favored-Nation Treatment and the Multilateral Trade Negotiations: a Quiet Revolution*, 6 Md. J. Int'l L. 221 (1981).

Available at: <http://digitalcommons.law.umaryland.edu/mjil/vol6/iss2/7>

This Articles & Essays is brought to you for free and open access by DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Journal of International Law by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact [smccarty@law.umaryland.edu](mailto:smccarty@law.umaryland.edu).

**MOST-FAVORED-NATION TREATMENT AND THE  
MULTILATERAL TRADE NEGOTIATIONS:  
A QUIET REVOLUTION**

SEYMOUR RUBIN\*

INTRODUCTION

The General Agreement on Tariffs and Trade (GATT),<sup>1</sup> negotiated in 1947, has long been considered the cornerstone of the world trading system, at least as between so-called market economies. The GATT itself was to have been the central element in an International Trade Organization [ITO]. The Charter for the proposed ITO was drafted by the United Nations Conference on Trade and Employment, convened in Havana in the latter part of 1947.<sup>2</sup> The ITO never came into effect, however, at least partially because the United States, which had been its principal sponsor, failed to ratify it for a combination of reasons. Some of the reasons for this failure were: dissatisfaction with certain clauses in the ITO Charter dealing with private foreign investment;<sup>3</sup> protectionist sentiment; and sensibilities related to national sovereignty.<sup>4</sup> Had the ITO come into effect, arguably many of the changes in the economies of the world which have undermined the GATT could have been better accommodated.

---

\* Executive Vice President and Executive Director, American Society of International Law; Professor of Law, American University; LL.B., LL.M., Harvard. Member, Inter-American Juridical Committee.

1. *General Agreement on Tariffs and Trade, opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter cited as GATT]. The GATT has been modified in several respects since 1947. The current version of the agreement is contained in 4 *General Agreement on Tariffs and Trade, Basic Instruments and Selected Documents* (1969) [hereinafter cited as BISD].

2. United Nations Conference on Trade and Employment, Havana Charter for an International Trade Organization and Final Act and Related Documents (Havana, Cuba, Nov. 21, 1947 — March 24, 1948), U.N. Doc. ICITO/1/4/ (1948), reprinted in U.S. Department of State Pub. No. 3117 (April 1947) [hereinafter cited as Havana Charter for an I.T.O.].

3. The subject of private foreign investment — providing some protection for investors while satisfying the often competing nationalist sentiments of the host countries — is still the *raison d'être* of conferences in the United Nations Commission on Transnational Corporations, in the United Nations Conference on Trade and Development, in various regional and bilateral talks, and in General Assembly and United Nations Economic and Social Council resolutions.

4. See R.N. GARDNER, *STERLING-DOLLAR DIPLOMACY* 375-378 (1969) [hereinafter cited as R. N. GARDNER]; See also W. Diebold, Jr., *The End of the ITO*, 16 *PRINCETON UNIVERSITY ESSAYS IN INTERNATIONAL FINANCE* 11-21 (1952).

Within the GATT, the fundamental guiding principle was that of unconditional most-favored-nation treatment [hereinafter MFN], basically a principle of nondiscrimination. There have traditionally been two forms of MFN: conditional and unconditional.<sup>5</sup> Until the late 18th century, unconditional MFN — in which MFN is given to third nations without the requirement of a like concession — had been prevalent in world practice. However, the United States, in its first treaty as an independent nation, in 1778, agreed to grant to France, the treaty partner, any concession which the United States granted to any third nation, but provided that if any measure of compensation was obtained, similar compensation would be required as a condition of granting the concession to France.<sup>6</sup> It is of some interest to note that the reasons for this conditional MFN — which was largely adopted in Latin America — were mainly based on the fact that the United States of that day was a less developed nation, being largely a supplier of raw materials, heavily dependent on the more developed nations of Europe for industrial goods, capital and technology. In those circumstances, conditional MFN was found to be a useful tool. In the 1860s, Great Britain, which had — as a bastion of “free trade” — never entirely adopted conditional MFN, concluded a treaty which granted unconditional MFN to France.<sup>7</sup> Finding that unconditional MFN was not to its advantage when the French obligation was for conditional MFN, the British began a drive to conclude a series of treaties providing for unconditional MFN. Thereafter, the popularity of unconditional MFN rose. It was the mode generally in use thereafter. The United States provided legislative authority for unconditional MFN in its 1933 Tariff Act, and committed itself to unconditional MFN in the 1934 Trade Agreements Act.<sup>8</sup> As a major proponent of the GATT, the United States was a leader in making unconditional MFN a “cornerstone” of the GATT, and including it in Article I.

Article I of the GATT was intended to reverse the spread of preferential trading arrangements which had characterized the period between the two World Wars. The Smoot-Hawley tariff,<sup>9</sup> enacted by the United States in 1930,

---

5. See S. RUBIN, *The Most Favored Nation Clause and the Generalized System of Preference*, Cuarto Curso de Derecho Internacionale, Organized by the Interamerican Juridical Committee, 339 (1977) [hereinafter cited as *The MFN Clause and the GSP*].

6. Treaty of Amity and Commerce, art. II, *entered into force* July 17, 1778, 8 Stat. 12; T.S. No. 83.

7. Treaty of Commerce between France and Great Britain, art. XIX, *signed at* Paris, 23 Jan., 1860, 121 Parry's T.S. 243.

8. An Act to Amend the Tariff Act of 1930, ch. 474, 48 Stat. 943 (1934) (current version at 19 U.S.C. §§ 1351–1354 (1976)).

9. Tariff Act of 1930, ch. 497, 46 Stat. 590 (1930).

had engendered the British system of imperial preference.<sup>10</sup> The GATT was specifically designed to arrest and reverse this trend. But, the GATT was far from wholly successful, because of deviations or exceptions openly condoned, because of the rising desire for "special and preferential treatment" on the part of developing nations; and because of often unacknowledged but nevertheless effective methods of restricting trade and of granting preferential treatment.

The operating thesis of the GATT was its commitment to progressive reduction of both tariff and non-tariff barriers to trade. Article I of the GATT<sup>11</sup> set the tone for the document. It enunciated the obligation to grant most-favored-nation treatment to all signatories — an obligation to extend to any member those advantages which a signatory granted to any third nation.<sup>12</sup> This was the rock upon which the system was founded. It is a rock which in recent years, however, has begun to crumble.

The Multilateral Trade Negotiations [hereinafter MTN] concluded in 1979 in Geneva (the so-called Tokyo Round)<sup>13</sup> constitute, within the frame-work of negotiations administered by the GATT, a reasonably successful attempt to maintain liberal trade principles on the one hand, while departing significantly from MFN on the other hand. The broad consequences of these divergent trends are still difficult to assess. But it is clear that the GATT, and the concepts which underlay it, can no longer be considered as *the* point of reference for international trade, however much importance it may still retain.

For the world at large, including the developing countries, this departure from unconditional MFN and the GATT is an important development. Though initially the majority of subscribers to the GATT were the industrialized nations, it has grown from its original twenty-three members<sup>14</sup> to an organization of eighty-four members, with another twenty-one countries associated with it.<sup>15</sup> The GATT has, since its inception, sponsored seven

---

10. See J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 251 (1969) [hereinafter cited as *WORLD TRADE*].

11. GATT, *supra* note 1, art. I.

12. *Id.*

13. Agreements Reached in the Tokyo Round of the Multilateral Trade Negotiations, H. R. DOC. NO. 153, 96th Cong., 1st Sess. (1979) [hereinafter cited as MTN].

14. GATT, Final Act, Geneva, 55 U.N.T.S. 194 (1947); See also 55 U.N.T.S. 188 (1947).

15. GATT Press Release, GATT/1215, June 9, 1978, announcing Surinam as a Contracting Party, bringing the total to 84 members.

"rounds" of tariff and trade barrier reductions,<sup>16</sup> with considerable success. Tariffs have been lowered to such an extent that the principal subject at the last round — the MTN — was nontariff, rather than tariff, barriers. The GATT has also served as a forum for discussion of international trade issues.<sup>17</sup> The GATT had the further advantage of having been a flexible instrument. Special provisions relating to the problems of development and to the concerns of the developing countries were included from the outset.<sup>18</sup> Part IV of the GATT,<sup>19</sup> added some years after its initial negotiation, dealt specifically with those questions.

Dissatisfaction with the GATT has arisen not only because of the inadequacy of its rules and principles, but in large part because of the tendency of many states to either ignore or bend those rules. Despite its infirmities, the GATT has been a statement of belief in the virtues of an open international economic system, and has thus played a large part in the expansion of world trade — and investment — which has characterized the decades since the end of World War II.

Though the MTN, or Tokyo Round, formally reaffirms the validity of the GATT principles, it seems evident that there has been a major departure from many of those principles. Foremost among the compromised principles is that of general acceptance of most-favored-nation treatment.

#### 1. History of Exceptions to MFN Treatment.

There have been exceptions to the MFN principles from the outset<sup>20</sup> — exceptions made for preGATT situations;<sup>21</sup> for customs unions and free trade areas;<sup>22</sup> and for balance of payments quotas.<sup>23</sup> The major exception to MFN of

16. The locations and dates for these rounds are as follows: 1 — Geneva, Switzerland 1947; 2 — Annecy, France 1948; 3 — Torquay, England 1950; 4 — Geneva 1956; 5 — "Dillon Round," Geneva 1960-61; 6 — "Kennedy Round," Geneva 1964-67; 7 — "Tokyo Round," Geneva 1973-79. The first six rounds are briefly summarized in J. JACKSON, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 473 (1977) [hereinafter cited as *INTERNATIONAL ECONOMIC RELATIONS*].

17. *INTERNATIONAL ECONOMIC RELATIONS*, *supra* note 16, at 398.

18. GATT, *supra* note 1, art. XVIII.

19. Protocol Amending the General Agreement on Tariffs and Trade to Introduce a Part IV on Trade and Development, *entered into force* June 27, 1966, 17 U.S.T. 1977, T.I.A.S. No. 6139, 572 U.N.T.S. 320. GATT, *supra* note 1, arts. XXXVI-XXXVIII.

20. *See The MFN Clause and the GSP*, *supra* note 5, at 346 et. seq.

21. GATT, *supra* note 1, art. 1 § 2-4, and annex A-G, to which those sections refer. For example, by virtue of art. 2 § b, and annex D, the U.S. maintained its special tariff arrangement with the Philippines which had been established in 1946 to ease the Philippine economy into independence.

22. GATT, *supra* note 1, art. XXIV.

23. *Id.*, arts. XII and XIV.

interest to developing countries in particular is the Generalized System of Preferences [hereinafter GSP]<sup>24</sup> now a generally accepted discrimination in favor of developing nations, as indeed is the whole of Part IV of the GATT.<sup>25</sup> These latter deviations from the MFN principle were added to the original GATT structure, in response to the increasingly adamant claims that nondiscrimination in international trade is in fact a form of discrimination against the less developed and less industrialized nations. However debatable are the virtues of the GSP,<sup>26</sup> the fact is that, both because of acceptance of GSP as a principle of equity, and because of the widespread proliferation of preferential arrangements not condoned by the GATT — it underlines the progressive deterioration of the MFN principle. Nevertheless, and despite the exceptions, until the MTN, it has been possible to argue that MFN, at least for the industrialized nations, remained an article of faith, deviations from which were perhaps condoned but seldom approved, and generally regarded as exceptions.

The Codes which have been negotiated in the MTN<sup>27</sup> have demonstrated that there has been a shift in perception among the industrialized nations as to the virtues of most-favored-nation treatment. The developing nations had originally taken the initiative in making the point that MFN treatment was not suitable to their needs. In addition to their argument that the GATT terms of trade had been set when their participation in world councils was limited or nonexistent, they argued that nondiscriminatory or equal treatment, as exemplified in MFN, would not offset disabilities resulting from their long colonial status. Hence, much of their effort in past years has been to obtain special and not equal treatment. Special and preferential arrangements were thought to be necessary not only to overcome established inequalities but also to compensate for weaknesses in the economies of the developing nations, which in turn were the asserted consequence of long periods of dependency and the overhang of colonialism.

The result of this pressure, as demonstrated in the MTN Codes, has been a change in underlying convictions among the *developed* nations themselves. Those nations had for some time recognized the case for "special and differentiated" treatment for *developing* nations. The Codes now openly acknowledge that differentiated treatment may have its attractions for the

---

24. GATT Doc. L/3545, BISD 18th Supp. (April 1972).

25. GATT, *supra* note 19.

26. For the opinion that the benefits of the GSP are still far from being proved, See RUBIN, *International Trade Law: Recent Developments*, 1 HOUS. J. INT'L. L. 127, 132 (1979) [hereinafter cited as *Recent Trade Developments*].

27. MTN, *supra* note 13.

developed nations as well as for developing nations.<sup>28</sup> The implications of this change have still to be fully realized.

It is not unlikely that this basic change in perception, exemplified in the MTN Codes (and especially those on Subsidies and Countervailing Duties, and on Governmental Procurement) will have substantial consequences for both developing and developed nations.

## 2. *The Proliferation of Special Arrangements Under the GATT*

It has recently been said that "The post-war trade system . . . is dying."<sup>29</sup> Others have made that same point. In his book, John Evans had some years ago pointed out . . . that the system of trade and economic institutions which emerged after World War II was under strain, and the GATT — and its trade rules — was not least among those undergoing resultant change.<sup>30</sup> The causes of this "decline" were many and varied.

Some of these causes were in fact what might be called birth defects. Among these was that the GATT was originally designed merely as a broad trade agreement — a set of rules — not as an international organization. The GATT was to have been administered by a new international institution, the International Trade Organization (ITO).<sup>31</sup> Within the ITO there were to be, in addition to the trade rules incorporated in the GATT, rules having to do with other importantly related issues: restrictive business practices; employment and labor; commodity agreements; and rules for administration, including rules and procedures for resolution of disputes.<sup>32</sup> When the ITO failed to obtain international acceptance — an eventuality for which the United States, which had been an original and strong proponent, must take its full share of responsibility — the tripod of international economic institutions (IMF-IBRD-ITO) which had been envisaged<sup>33</sup> lost one of its essential legs. The International Monetary Fund and the International Bank for Reconstruction and Development, with its sister institutions, remained; but there was no overall institution in which trade and trade-related issues could be discussed, on the basis of at least generally accepted principles.

---

28. See H. R. REP. NO. 317, 96th Cong., 1st Sess. 5 (1979).

29. See GRAHAM, *Revolution in Trade Politics*, 36 FOREIGN POLICY 49 (Fall 1979).

30. J. EVANS, *KENNEDY ROUND IN AMERICAN TRADE POLICY: THE TWILIGHT OF THE GATT*

31. See INTERNATIONAL ECONOMIC RELATIONS, *supra* note 16, at 397.

32. See Havana Charter for an I.T.O., *supra* note 2.

33. See Meier, *The Bretton Woods Agreement — 25 Years After*, 23 STAN. L. REV. 235, 245 (Jan. 1971).

The GATT was, largely through the ingenuity of its extremely capable first Secretary General, Sir Eric Wyndham White, able to survive and to play a major and beneficial role over the years. It was able to expand, from its original limited membership of mainly industrialized nations,<sup>34</sup> to an institution to which most of the market economies of the world, including a large number of developing nations, adhered.<sup>35</sup> It found, indeed, formulas for associating a few non-market economies.<sup>36</sup> But institutionally it suffered not only from lack of formal and definitive ratification — it is even to this day in effect via a Protocol of Provisional Application<sup>37</sup>— but also from compromises within the allegedly fundamental principle of open and nondiscriminatory trade.

One major exception to the principle of nondiscrimination was that which permitted institutions like the European Economic Community (EEC) and the European Free Trade Association (EFTA) to accord special customs and tariff treatment to members of those institutions but to deny equal treatment to other nations, members of GATT, but not members of either EEC or EFTA.<sup>38</sup> The rationale for the exception was clear. The theory advanced was that economic unification among member states of customs unions would bring benefits not merely to those members but to those outside the system. A large, unified, trading entity — the EEC, for example — would, it was argued, bring about a larger volume of world trade, much as the nonexistence of tariff and trade barriers among the states of the United States of America created a trading entity the results of which were beneficial to world trade. EFTA was somewhat more remote from the customs union rationale which was the underpinning of the EEC; but it was difficult to limit the exception to “true” customs unions.<sup>39</sup> Moreover, once the exception had been agreed to,<sup>40</sup> it became necessary to extend favorable

---

34. GATT, Final Act, *supra* note 14.

35. GATT Press Release, *supra* note 15.

36. For a discussion of the formulas used by the GATT to associate the state trading economies of Poland, Romania and Hungary, see M. M. KOSTECKI, *EAST-WEST TRADE AND THE GATT SYSTEM* 91–98 (1978).

37. Protocol of Provisional Application of the General Agreement on Tariffs and Trade, done Oct. 30, 1947, 61 Stat. A2051, T.I.A.S. No. 1700, 55 U.N.T.S. 308. See also *WORLD TRADE*, *supra* note 10, at 60; *INTERNATIONAL ECONOMIC RELATIONS* *supra* note 16, at 401.

38. GATT *supra* note 1, art. XXIV; see generally *WORLD TRADE*, *supra* note 10, § 24.

39. A “true” customs union not only abolishes tariffs within the system, but applies a common external tariff; a “free trade association” need not necessarily have a common external tariff.

40. GATT *supra* note 1, art. XXIV.

treatment to such organizations in their preparatory stages, in anticipation of their attaining customs union status.

It has generally been thought that the GATT exception in favor of customs unions and similar institutional arrangements resulted in increases in world trade without the imposition of excessive costs on those nations outside the preferential systems, though on this point there have been doubts.<sup>41</sup> Since the carefully and laboriously negotiated arrangements within GATT, preferential arrangements of various sorts have proliferated. The EEC has associated itself with many nation-states in preferential arrangements. The Yaounde Convention<sup>42</sup> and later the Lomé agreements,<sup>43</sup> which were approved in 1975 and reaffirmed in May, 1980, reinforced the preferential treatment by the European Community of certain — but far from all — developing nations. Prominent among those excluded from the benefits of Lomé, are the nations of Latin America. The United States also has a preferential arrangement, with Canada, in connection with automotive products.<sup>44</sup> The United States considered it necessary to apply for an exception from GATT for this arrangement; however, Canada felt otherwise.<sup>45</sup> Many more such preferential arrangements of one sort or another exist. Even within some of these arrangements, notably that of the EEC, special arrangements prevail, such as the Common Agricultural Policy,<sup>46</sup> which tends to exclude the exports of nonmembers from European markets. Under these circumstances, it is clear that, as Wyndham White remarked some years ago, it would strain credibility to assert that most-favored-nation treatment continues as a guiding principle of world trade. This is especially so since the MTN Codes will undoubtedly increase the amount of world trade within preferential arrangements.

Among developing nations, there has also been little doubt that preferential arrangements were beneficial. Following the EEC example, the

---

41. For a general discussion of this issue, see S. RUBIN, *Recent Trade Developments*, *supra* note 26.

42. Yaounde Convention, July 20, 1963, J. O. Comm. Eur. 1430 (1964); Second Yaounde Convention, signed July 29, 1964, *entered into force* Jan. 1, 1971, 13 J. O. Comm. Eur. (No. L282) 6 (1970).

43. EEC Convention of Lomé, Apr. 1, 1975, 19 J. O. Comm. Eur. (No. L25) 2, 41 (1976).

44. United States-Canadian Automotive Products Agreement, *entered into force definitively* Sept. 16, 1966; 17 UST 1372; T.I.A.S. No. 6093.

45. Canada did not require an exception since it extended the benefit to all other Contracting Parties of GATT. See INTERNATIONAL ECONOMIC RELATIONS, *supra* note 16, at 554.

46. The Common Agricultural Policy [CAP], implemented under arts. 9, 38-47 and 110 of the Treaty of Rome, March 25, 1957, 298 U.N.T.S. 11.

developing nations formed the Latin American Free Trade Association (LAFTA) and the Central American Common Market, which were accepted by the GATT with only the request that periodic reports be filed.<sup>47</sup> Further expansion of preferential arrangements is evident in the special bilateral arrangements reportedly under negotiation between Brazil and Argentina.<sup>48</sup> The negotiations will probably result in a commitment to gradual reduction of trade barriers, not necessarily generalized to other nations. Within the framework of the MTN itself, the developing nations are now holding talks in Geneva. Whatever concessions are made will undoubtedly be limited to the developing nations. As previously indicated, this accords with the now general acceptance of the principle of "special and differential treatment"<sup>49</sup>, illustrated by the GATT's acceptance of at least the principle, if not necessarily the substance, of the Generalized System of Preferences.<sup>50</sup>

MFN has thus been under attack for many years, indeed one might say from its very incorporation into Article I of the GATT.<sup>51</sup> But in recent years, exceptions have increased and widened. MFN may have been the cornerstone of the GATT. It can hardly be said to be the cornerstone of the new arrangements negotiated under the MTN.

### 3. Reasons for the Decline of Unconditional MFN.

In discussion of this trend, it must first of all be acknowledged that the preservation of any principle may well require a certain flexibility, or perhaps deviation, in its rigid application. The principle of free speech, for example, would be threatened rather than enhanced if it were to include the right to shout "Fire!" in a crowded theatre. Many of the departures from strict MFN were and remain well-justified, and have contributed to the basic efficacy of that principle as a means of increasing world trade for the benefit of all.

Moreover, the compromises arrived at in Geneva, in the MTN, which are clearly deviations from strict MFN, have rational economic underpinnings. The MTN has set into acceptable international practice actions which reflect what nation states have for some time considered to be their own national requirements. It has taken account in a realistic manner of what nations do, as well as what they say. And it has made, in many respects the least

---

47. See F. V. MEYER, *INTERNATIONAL TRADE POLICY* 144 (1978).

48. See *BUSINESS LATIN AMERICA* April 23, 1980, at 135.

49. *Supra* note 28 and accompanying text.

50. GATT Decision of June 25, 1971. GATT Doc. (L/3545), BISD 18th Supp. (April 1972), at 24. See *INTERNATIONAL ECONOMIC RELATIONS supra* note 16, at 1016-1020.

51. *Supra* note 1, art. 1.

possible deviation from broad application of MFN principles consistent with basic preservation of those principles as an objective of international trade.

To say this is not, however, to escape the inevitable conclusion that MFN is at present only one among several principles to which nations pledge some degree of adherence. In the MTN, the nations have moved substantially away from that principle which, when the GATT was put together, seemed the linchpin of a cooperative and growing system of trade among nations.

What has happened?

First, as has been briefly stated above,<sup>52</sup> the MFN principle has been for years progressively undermined by special arrangements. Whatever the undoubted justifications of these arrangements, they have demonstrated that many nations — not only developing countries — consider that there are many situations in which MFN is not an appropriate national policy, and therefore inappropriate for an international commitment. There has probably been little question that the reasoning which led to enthronement of MFN was correct, the beggar-thy-neighbor policies of the early 1930s, with rabidly protectionist tariffs and attempts to shift economic burdens to foreign nations, were disastrous, in both the short and the long run, and that trade liberalization would have benefits for all. But application of the MFN rationale to specific circumstances, has indicated that increasingly numerous exceptions would have to be made. Among the exceptions were, as previously mentioned: 1) the regional preferences embodied in the EEC and EFTA;<sup>53</sup> 2) the special regional or bilateral preferences of the Yaounde and Lomé agreements;<sup>54</sup> 3) the Canadian-United States automotive agreement;<sup>55</sup> 4) the eventual acceptance of the Generalized System of Preferences, which was initially sponsored by UNCTAD.<sup>56</sup> However meritorious the arguments for these understanding and practices may have been, it became clear, by the time of the MTN, that MFN was a principle honored as much in the breach as in the observance.

Second, it has been increasingly apparent that clear distinctions cannot easily be made between national and international policies, insofar as trade effects are concerned. Trade with centrally directed economies tests the principle of nondiscrimination. It is difficult to determine why trade in a particular commodity with a centrally directed economy is limited. Among the possible explanations are: the products sought to be exported to that economy are over-priced; their quality is low; or consumer preferences are

---

52. See *supra* notes 47 through 50 and accompanying text.

53. *Supra* notes 38 through 40 and accompanying text.

54. *Supra* notes 42 and 43 and accompanying text.

55. *Supra* notes 44 and 45 and accompanying text.

56. *Supra* note 50.

such that they are not being bought. Suspicion leads to the conclusion — perhaps erroneous — that such trade is limited because there exists a central buying authority under governmental direction.<sup>57</sup> But if trade with centrally directed economies tests application of the principle of nondiscrimination — which lies at the heart of MFN — trade with nationalized industries, of which there are more than several examples in Western market economies, poses a similar problem. The way in which a national economy is organized may thus affect profoundly the manner in which international trade flows, even though the national measure does not purport to touch upon international trade issues.

Other national policies also potentially affect trade. An obvious example is the interrelation between environmental policy and trade. A legitimate national measure, designed to protect the human environment, may affect imports. Pollution controls on automobiles may in effect proscribe imports from nations whose vehicles do not conform. Japanese prohibition of the use of certain preservatives in effect imposes an embargo on the importation of certain American agricultural products, which cannot be transported for long distances without such preservatives. To complicate the matter, the danger of these preservatives is debatable. Thus the issue arises, also, whether such national measures are what they purport to be — legitimate enactments in the national interest — or merely cunningly disguised trade barriers. In such cases, principles of nondiscrimination may be difficult to apply.

In many other ways, measures taken by governments deeply affect trade, without those measures being explicitly recognized or acknowledged as trade measures. Thus, efforts to promote the development of economically less developed regions of a country may involve such measures as tax deferment or special credits. If the effect of such measures is to make it possible for a manufacturing facility to be established, and to export, in a situation in which it would not be able to do so in the absence of these measures, manufacturers in the importing country may charge that the exports are subsidized, and that such subsidization is an unfair trade practice. That, in fact, is practically a statement of the famous *Michelin* case,<sup>58</sup> in which Canadian "developmental" measures were alleged by American competitors to be a subsidy for Canadian exports. In the *Michelin* case, a very large part of the output of the Michelin plant was destined for the American market.<sup>59</sup>

---

57. See generally M. M. КОСТЕЦКІ, *supra* note 36, at 43–60.

58. X-Radial Steel Belted Tires from Canada, T.D. 73–10; 7 Cust. Bull. 11 (January, 1973); 38 Fed. Reg. 1018 (January 1973).

59. *Id.* at 47, statement to the U.S. Commissioner of Customs on behalf of Michelin Tire Manufacturing Corporation that 75 percent of its Canadian-made tires will go to the United States.

What would have been the result, or the argument, if only a part of those exports were so destined, remains an open question.

That such questions are not confined to any one country is evident. Extraordinary efforts, including low interest and guaranteed loans, have been made in the United States in order to save a major automobile manufacturer — Chrysler — from going out of business, and thereby increasing an already very high rate of unemployment. If Chrysler now exports, have its products been subsidized? Is such a subsidy, if it exists, unfair?

Other questions, going far beyond the "simple" issues of tariffs or outright quotas, also exist, and complicate issues of nondiscrimination and of MFN. For example, concessional rates of interest are often offered by governments or governmental agencies to exporters.<sup>60</sup> Are these an unfair trade practice? In some cases, it is argued that constraints, hidden or otherwise, on imports, divert third country exports unfairly. EEC limitations, which effectively control Japanese exports to the European Community may well have the double effect of increasing those exports to the United States and of constricting United States exports to third countries. Most-favored-nation principles, designed originally in a world which seemed to respond better to classic economic formulations, may not provide adequate answers here.

In some of these situations, in fact, the MTN has produced codes — to be discussed later<sup>61</sup> — which do discard or deviate from MFN principles, in order to deal with these issues. Such is the case in regard to governmental procurement,<sup>62</sup> and with regard to the issue of subsidies and the remedies for subsidization.<sup>63</sup>

A third reason for the demise of unconditional MFN is that application of "classic" trade principles, including MFN, may be seen as not very relevant to an increasingly important aspect of international trade — that is, the intra-enterprise transfer of goods and services. Transnational enterprises, ie, enterprises having branches or subsidiaries in many parts of the world, have come to be an increasingly prominent part of the world trading scene. It is not necessary to have a precise definition of the term "transnational

---

60. For example, to assist in the development of its steel industry, Japan allowed its commercial banks to maintain 90–100 percent loan-to-deposit ratios and encouraged large loan grants to domestic steel companies. American Iron and Steel Institute, *Steel at the Crossroads: The American Steel Industry in the 1980s*, at 76 (January 1980).

61. *Infra* note 73 *et. seq.*

62. *Infra* note 79.

63. *Infra* note 80.

corporation" to realize that enterprises which are located in different countries but which are related to each other by a common economic interest may work out trade patterns different from those which they would work out if they were completely independent and competing enterprises. When enterprises are related, no matter what the form of such relationship, the "unseen hand" of Adam Smith may affect their conduct less than does their perception of their mutual interest. In such cases an enterprise may buy from or sell to its related enterprise, even though pure competitive economics would dictate a different course. Nor is this an insubstantial issue. Years ago, it was estimated that "international business is now the dominant factor in determining changes in the patterns of world exports . . ." <sup>64</sup> Likely, transfers between related units respond only imperfectly to the doctrine of comparative advantage. If, as seems more than likely, such business is an increasingly large part of world trade, MFN loses, for that large part of world trade, its relevance.

Finally, the role of the developing countries has had and will have a major impact on acceptance or nonacceptance of MFN as a general rule. It has already been pointed out that the developing nations have always been largely exempted from the rule of reciprocity and that of nondiscrimination.<sup>65</sup> Part IV of the GATT<sup>66</sup> reflects their special situation, as does general acceptance of "special and differentiated" treatment. But other issues have arisen to muddy the waters. Commodity issues are complicated, though they seem to present a case in which there is mutual benefit in arriving at accommodation; and here, the approval of the Common Fund in Geneva in June, 1980, seems an optimistic note in a not generally bright landscape. On the other side — and most important for the developing countries — is the rise of concern in the industrialized nations as to the effects on their economies of competition from imports originating in the developing nations.

A number of developing countries have become important exporters. Some are now classified by some experts as newly-industrialized-countries,<sup>67</sup> ready for what some have termed the "graduation" process. Whatever the terminology, the underlying thought is that structural changes may be forced upon industrial nations by increasing production in the developing nations. To this thought may be traced sentiments that trade policy should not be the

---

64. Robock and Simmonds, *International Business — How Big is it?*, COL. J. WORLD BUS., Jan.-Feb. 1968, at 7; See also Rubin, *Multinational Enterprises and National Sovereignty — a Skeptic's Approach*, 3 LAW AND POL'Y. INT'L. BUS. 1 (1971).

65. *Supra* note 18.

66. *Supra* note 19.

67. See OECD Report, *The Impact of the Newly Industrializing Countries on Production and Trade in Manufactures*, (1979).

determinant of industrial policy, or that curiously contradictory phrase, coined in 1977 by the French Prime Minister, "organized free trade." The fear of a rise in industrial capacity within the developing countries revealed by this phrase is not unique. Where there have been industrial policy, or structural, consequences in the industrial nations — enterprises put out of business, rise in unemployment, etc. — it has been tempting to blame imports from developing countries. But a number of studies indicate that closures resulting from increased imports competition are not many, that technological change is a far greater source of closures, and that the effects have largely been limited to a few particularly vulnerable industries.<sup>68</sup>

A comparison of the figures over a five year period, using 1972 as one base and 1976 as the other, shows that the United States, in 1972, exported (in billions of U.S. dollars) \$7.61 in manufactures to the developing nations as against \$6.13 in imports; the 1976 comparison is \$18.47 for exports and \$14.82 for imports of such goods.<sup>69</sup> But . . . for the European Economic Community, 1972 exports of manufactures to the non-oil developing nations were \$12.79 billion, with imports of only \$4.23; 1976 exports of manufactures to those developing nations came to \$25.70 billion, with only \$11.05 of imports. Japanese statistics reflect an enormous excess of exports over imports in manufactures with the non-oil developing nations: . . . for 1976, the export figure was \$16.38 as against \$3.52 of imports of manufactures from developing nations.<sup>70</sup>

Defensive policies, designed to protect the economies of the industrial nations from the exports of the developing nations, will do little but postpone problems which will be all the more difficult to solve because of that postponement. Inevitably, some defensive policies will be carried out: unemployment resulting from imports which are subsidized, for example, compels defensive policies, whether such policies involve countervailing against subsidies, or so-called voluntary "orderly marketing agreements" which rely upon an agreed quota,<sup>71</sup> or even the "trigger price" mechanism by

---

68. *Id.*

69. Organization of American States Series Q/V.C-5, document CSI-38, August 1978, at 390.

70. *Id.*

71. "Orderly marketing agreements" are "voluntary" only in the sense that they are self-imposed. They generally come about when an importing nation, due to domestic problems, threatens to impose a quota on the exporting national unless that nation agrees to voluntarily limit the offensive export. For a brief description and outline of the history of "orderly marketing agreements," see MEYER *supra* note 47, at 98-103.

which the United States has sought to protect its steel industry from unfairly low-priced imports.<sup>72</sup> But the figures of trade with the developing countries, the comparative rates of growth in developing and developed nations, and similar factors, all suggest that the solution is one of positive adjustment, of structural changes which anticipate a growth in international trade, not its restriction.

Such policies of positive adjustment will be far from easy, either to design or to apply. It seems more than likely that such policies will have to be tailored to individual situations. In that process, the guiding principle of unconditional most-favored-nation treatment should be taken into account; but, as is indeed demonstrated by the results of the MTN, it is clear that it will not be regarded with the reverence which characterized an earlier and perhaps simpler day. It will be relevant, but not decisive.

#### 4. The Multilateral Trade Negotiations

The Multilateral Trade Negotiations, more or less concluded in June, 1979, constitute a major change in international trade policies. One of the most important aspects of that change is the return, in the MTN results, to "conditional" MFN.

The technique of the MTN was to negotiate separate codes, directed mainly to nontariff trade barriers. Six such codes were negotiated.<sup>73</sup> Under these codes, only signatories are fully entitled to the benefits of the codes, though it is of course possible for signatories to extend their benefit to nonsignatories. Every member of the GATT is legally able to sign any code.

---

72. See Twenty-Second Annual Report of the President of the United States on the Trade Agreements Program 1977, at 74-75 (1978).

73. Although other specialized or bilateral agreements were also reached, it is generally considered there six Codes negotiated under the MTN, *supra* note 13. These are: (1) Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade, done Apr. 12, 1979, NTN/NTM/W/229/Rev. 1 [The Customs Valuation Agreement], reprinted in MTN, pt. 1, at 3-65; (2) Agreement on Government Procurement, done Apr. 11, 1979, MTN/NTM/W/211/Rev. 1 [hereinafter cited as Government Procurement Code], reprinted in MTN at 67-189; (3) Agreement on Import Licensing Procedures, done Apr. 10, 1979, MTN/NTM/W/231/Rev. 2, reprinted in MTN at 191-207; (4) Agreement on Technical Barriers to Trade, done Mar. 29, 1979, MTN/NTM/W/192/Rev. 5, reprinted in MTN at 209-56; (5) Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, done Apr. 12, 1979, MTN/NTM/W/236 [hereinafter cited as Subsidies and Countervailing Measures Agreement], reprinted in MTN at 257-304; (6) Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, done Apr. 9, 1979, MTN/NTM/W/232 [Antidumping Agreement], reprinted in MTN at 309-337.

But until such signature, non-code GATT members are not entitled, as a matter of right, to the benefits of each code. The United States Trade Agreements Act of 1979,<sup>74</sup> enacted to implement the MTN, has similar provisions.

Fundamentally, the reason for this shift toward conditional MFN lies in the nature of the codes themselves. The codes are designed to deal with nontariff barriers — not with tariffs. Nontariff barriers (hereinafter NTBs) are difficult to control. Unlike tariffs, they are not always visible. They often involve "internal" national policies. Such policies often have a substantial effect on trade; but their asserted objective is generally unrelated to trade. The question of internal measures designed to facilitate economic development, as in the *Michelin* case,<sup>75</sup> is a characteristic exemplar. In order to reduce or to eliminate such NTBs nations must submit to cooperative discipline in regulation of their own affairs. From the outset, it was clear that not all GATT members were prepared either to negotiate or agree to international examination of their conduct in these respects.<sup>76</sup> In these circumstances — limiting the benefits to Code members — the conditional form of MFN was inevitable.

The MTN Codes are all conditional in one important aspect — that of procedures designed to ensure compliance with the Codes.<sup>77</sup> Problems arising from a Code's operation are to be resolved by a committee made up of signatories to that Code. Nonsignatories will, therefore, play little or no role in discussion of the interpretation or implementation of each Code. There is some possibility that dispute resolution may carry over into GATT procedures,<sup>78</sup> but basically, administration of each Code is left to the signatories to that Code.

In addition, two of the most important of the MTN Codes are conditional not only in their procedural but also in the substantive provisions. These are the Codes having to do with Government Procurement<sup>79</sup> and with the related subjects of Subsidies and Countervailing Measures.<sup>80</sup>

74. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 2, 93 Stat. 144 [hereinafter cited as Trade Agreements Act] (to be codified at 19 U.S.C. § 2503).

75. *Supra* notes 58 and 59 and accompanying text.

76. See HUFBAUER, ERB AND STARR, *The GATT Codes and the Unconditional Most-Favored-Nation Principle*, 12 LAW AND POL'Y. INT'L. BUS. 59, 67 (1980).

77. *Id.* at 68.

78. *Id.*

79. Agreement on Government Procurement, done Apr. 11, 1979, MTN/NTM/W/211/Rev. 1 [hereinafter cited as Government Procurement Code], reprinted in MTN *supra* note 13, at 67-189.

80. Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, done Apr. 12, 1979, MTN/NTM/W/236

The Government Procurement Code was designed to open up to foreign competition the markets on products purchased by governments or governmental agencies.<sup>81</sup> Here reciprocity was considered essential, though signatories need not follow that requirement.<sup>82</sup> The Code contains detailed rules, mainly designed for "transparency" of procurement practices.<sup>83</sup> It is applicable only to relatively large purchases — in excess of 150,000 Special Drawing Rights.<sup>84</sup>

The United States legislation implementing the Government Procurement Code in fact provides for extension of the rights granted under the Code to certain categories of nonsignatories. One important such category is the "least developed countries," to which Code treatment is freely extended.<sup>85</sup> But it is not likely that such countries will benefit in any major sense from the opportunity to sell what is generally rather sophisticated industrial equipment. The United States implementing legislation also provides that Code treatment can be extended to nonsignatories who, without signature, provide procurement opportunities to U.S. products and suppliers.<sup>86</sup> This provision, which looks to the reality rather than to the legal situation, is addressed to nations which do in fact provide more or less reciprocal opportunities, but which for various reasons — perhaps difficulties with the procedural aspects of the Code — may not wish to sign. But the United States Congress, in enacting this provision, has also suggested that it be used sparingly, in order to induce as many nations as possible to become signatories. Moreover, as if to counter balance this evidence of liberalism, the Trade Agreement Act also permits the United States to bar a nonsignatory from U.S. procurement; previous law merely enacted preferences for American firms, but did not permit such an absolute bar.

---

[hereinafter cited as Subsidies/Countervailing Measures Agreement (or Code)], reprinted in MTN *supra* note 13, at 257–307.

81. Government Procurement Code, *supra* note 79, preamble, cls. 5–8.

82. *Id.*, art. III, para. 11, reprinted in MTN, at 77.

83. In regard to government procurement, "transparency" means visibility of the procurement process.

84. Government Procurement Code, *supra* note 79, art. 1, para. 1(b), reprinted in MTN at 73. Special Drawing Rights (SDRs) are a creation of the International Monetary Fund (IMF) and serve as a unit of account for international reserve assets. 150,000 SDRs is approximately \$190,000 (estimate is from Trade Agreements Act of 1979; Statements of Administrative Action, H. R. Doc. No. 153, 96th Cong., 1st Sess., pt. 2, at 465). For a discussion of SDRs, see note, *Administrative Survey: October 1977 to September 1978*, 11 LAW AND POL'Y. INT'L. BUS. 375–81 (1979).

85. *Supra* note 79, § 301(b) (4) (to be codified at 19 U.S.C. § 2511(b) (4)).

86. *Id.* §§ 301(b) and (3) (to be codified at 19 U.S.C. § 2511(b) (2) and (3)).

The Subsidies/Countervailing Measures Agreement,<sup>87</sup> as pointed out, deals with a very complicated area of economic measures. Two major issues — aside from the difficulty of defining a “subsidy” — were involved: one was the U.S. practice of “countervailing” against any subsidy, without regard to proof that the subsidy had caused injury; the other was the growth of practices designed to provide incentives for exports. Others wanted the United States to limit countervailing duties to cases of proved injury;<sup>88</sup> the United States, among others, sought provisions more closely defining what measures were to be considered subsidies. The Code responds to these negotiating objectives. It leaves many questions unanswered; but this is not the place for a detailed examination of the Code provisions, or their interpretation.

Arguably, conditional MFN treatment under the Code can be reconciled with provisions of the GATT, despite the contradiction with Article I.<sup>89</sup> In general, countervailing measures under the Codes, designed to offset “unfair” trade practices, such as dumping or subsidization, can be applied under Article XX of the GATT<sup>90</sup> to individual offending exports, so long as application does not result in “arbitrary or unjustifiable discrimination.” In other instances as well, applications of the Code may give rise to claims of conflict with GATT provisions. For example, where bilateral commercial agreements contain unconditional MFN provisions, is a Code signatory required to extend its Code advantage to a nonsignatory bilateral treaty partner? These questions, perhaps especially for the United States, are likely to be a fertile source of dispute. Conceivably, some such discussion may result from attack on the concept of conditional MFN under the terms of the GATT itself.

It is clear that the Multilateral Trade Negotiations have moved the world substantially away from the GATT's general avowal of unconditional MFN in substantial areas of world trade. The tendencies of previous years: the formation of regional trading blocks; the extension of preferences to various assortments of nations; the grant of special nonreciprocal benefits to developing nations; all contributed to the renewed scepticism as to whether unconditional MFN was indeed a meaningful principle. It may be that the acknowledgement of these difficulties in the MTN, and the attempt to deal

---

87. Subsidies/Countervailing Measures Agreements, *supra* note 80.

88. See generally R. RICHARDS, *The Negotiation of a Code on Subsidies and Countervailing Measures: Bridging Fundamental Policy Differences*, 12 LAW AND POL'Y. INT'L. BUS. 1447, 1465-1495 (1979).

89. *Supra* note 1, art. I.

90. *Supra* note 1, art. XX.

with them openly, will contribute to the objective of a fair and growing world market system. But in the meantime, the MTN establishes two different sets of rules, applicable to trade between different groups of nations. Signatories to the Subsidies/Countervailing Measures Code will have one set of rules applied to their trade, nonsignatories will have different rules applied to theirs.

In explicit terms, this means that the United States — which until the Code had been legally free to countervail against subsidies without any finding of injury<sup>91</sup> — will be compelled to prove injury before countervailing against an alleged subsidy applied by a signatory;<sup>92</sup> the old standards will apply to nonsignatories. Thus if France, as a signatory, provides an export subsidy, countervailing measures could not be applied unless injury were found to exist. If, in contrast, Mexico or Brazil, both industrializing countries but nonsignatories, were to provide such a subsidy, countervailing would be automatic. Since few developing countries are signatories, this difference may have significant consequences, especially in view of the wide range of measures which may be considered, *à la Michelin*, to be subsidies.

Special provisions are contained in the Codes for developing countries, which are designed, at least in part, to make adherence to the Codes easier. The Codes all contain general language stating that in application of their terms consideration be given to the developmental, trade and financial needs of the developing countries.<sup>93</sup> This general language aside, there are also some more explicit provisions. The Subsidies Code, for example, allows developing countries to apply subsidies to the export of minerals and manufactures, but in such a manner as not to cause "serious prejudice" to the trade or production of another signatory.<sup>94</sup> The Code also contains an obligation to "endeavor" to work toward elimination of export subsidies when continuation of such subsidy is inconsistent with the competitive and

---

91. See Tariff Act of 1930, *supra* note 9, § 303(a) (codified at 19 U.S.C. § 1303(a) (1976)). Since this provision for applying countervailing duties without a finding of injury predated the GATT provision (*supra* note 1, art. VI, para. 6), which prohibited such action, under the GATT exception for legislation "existing" at the time of signature of the GATT (GATT *supra* note 1, art. I para. (b)), the United States had been free to maintain its policy of "automatic countervailing."

92. The proof of injury test was actually the GATT rule for all major GATT signatories except the U.S. by virtue of art. VI, GATT, *supra* note 1, art. VI. As a result of the Codes, the United States agreed to waive its "existing legislation" exception and abide by the GATT rule.

93. See for example, Government Procurement Code *supra* note 79, art. III, para. 1, reprinted in MTN at 75.

94. See the Subsidies/Countervailing Measures Code *supra* note 80, pt. III, art. 14, para. 3.

developmental needs of the developing country signatory.<sup>95</sup> Additionally, it would still be possible for the importing country to countervail against subsidies which do in fact cause injury.<sup>96</sup> If the subsidy is not directly applied to exports, but is a so-called "domestic" subsidy, countermeasures may be taken in a limited but important number of situations — where injury is caused in the importing country, for example.<sup>97</sup> The Government Procurement Code,<sup>98</sup> in contrast to the Subsidies/Countervailing Measures Code,<sup>99</sup> has no special provisions applicable to developing countries other than the general exhortation to take account of developing country circumstances.<sup>100</sup>

Despite provisions such as the Subsidies/Countervailing Measures Code, Argentina is the only developing country which signed the concluding *proces verbal*. The six Codes<sup>101</sup> negotiated in the MTN would seem to have little chance of substantial developing country participation. The door which has been held open to developing countries may not present a very inviting prospect, though there are some obvious advantages in so entering. Perhaps the advantages offered are not sufficient to induce developing country participation. Renewed efforts must be made. Trade now involves a world market that has grown to nearly "\$1.4 trillion per year, and includes one-sixth of everything grown or manufactured on this earth."<sup>102</sup> The fact of interdependence is too obvious to need emphasis.

#### CONCLUSION

It may be that MFN, in its GATT usage, has become outmoded, and that the conditionality emphasized by the MTN is essential to the preservation of a viable world trading system. It would be more than unfortunate if this effort to deal with real problems were to engender a series of divisive steps rather than the rapprochement which circumstances require. Among the multitude of issues, many are delicate and painful. For example, Europe charges that American chemical exports are subsidized by artificially low oil prices in the United States; United States industry retorts that European steel exports are the product of industries which are heavily subsidized. A trade war is hardly what is needed — for anyone, perhaps least of all the developing countries.

---

95. *Id.* para. 7.

96. *Id.* para. 7.

97. *Supra* note 80, pt. III, art. 11, Subsidies other than export Subsidies.

98. *Supra* note 79.

99. *Supra* note 80.

100. *Supra* note 93.

101. *Supra* note 73.

102. See Strauss, *Foreword to Symposium on the MTN*, 11 LAW AND POL'Y. INT'L. Bus. 1257 (1979).

It would seem to be fully recognized that the principle of most-favored-nation treatment still has an important role to play, and that the bilateral myopia of the 1930s — the desire to balance trade with each nation — must be avoided. According to a speech made by Ambassador William Brock at an ABA Trade Institute on April 21, 1981, the United States is now in its 60th consecutive month of balance of trade deficit. Clearly, a major part of the current U.S. balance of payments crisis is attributable to rather special causes, as for example, the deficit with the oil producing countries, alongside of which the imbalance with Japan, much bruited in the press and Congress, dwindles considerably. Bilateralism has been tried; and it has failed. It is to be hoped that the continuing discussions, which are necessary to complete and complement the MTN, will contribute to accommodation.

One way of avoiding polarization is to work toward expansion of the system set up under the MTN, with particular emphasis on adjustments which will make possible the full participation of the developing countries. A committee of the United States Congress, in recommending legislation to implement the MTN, stressed the fundamental importance of the "central principle" of most-favored-nation treatment, and the need to avoid the "bilateral myopia" of the 1930s. It can only be hoped that the discussions which are following the MTN will contribute to the necessary measures of accommodation.