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John H. Jackson

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RECENT DEVELOPMENTS

GATT AND RECENT INTERNATIONAL TRADE PROBLEMS*

JOHN H. JACKSON**

This fall (1986) has been a particularly exciting time for international trade and international trade law. We have had not only massive media coverage of the GATT negotiations in Punta del Este but all year long we have had a festering question of a large trade bill in Congress. Additionally, there have been a number of major unfair trade cases pending. International trade is a subject that has many esoteric features and it is not easy to understand. The topic has many oddities, some of which I want to address.

I.

First, I turn to the meeting in Punta del Este, Uruguay, in September 1986 which was the launching session, the so-called ministerial meeting of the GATT contracting parties. By ministerial, they mean a meeting at the level of ministers, and in fact the United States had three cabinet level ministers at that meeting as well as a whole group of sub-cabinet level offices and a number of other delegation members. Interestingly enough there were also ten persons from the private sector, including the chief executive officers of important companies dealing in international trade. This was a very large delegation from the United States and similarly from ninety or so other countries around the world. Potentially more than one hundred countries may ultimately participate in this negotiation. The purpose of this meeting was to launch the eighth round of the trade negotiations which will carry on for many years. The declaration specifies four years but I think the better predictions are ten years, and that in itself poses a number of issues. For example, this initiative now is going forward under the Reagan Administration, but clearly by the time it is completed we will have been through several administrations, possibly a change in party at the executive level. The question arises how do you manage internationally, from the point of view of the United States, a negotiation that is going to span a number of different administrations, a greater num-

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** Professor, University of Michigan Law School; Distinguished Visiting Professor of Law, Georgetown University Law Center (1986-87).

ber of different congresses and potentially a totally different economic climate.

The United States had five major points on its agenda for the Punta del Este meeting. They relate to five subjects: that of agriculture, of GATT dispute settlement, of services, of intellectual property and finally of investment. I will deal very briefly with each of those. In Washington, a number of relevant meetings took place during the week of September 26, 1986 with returning members of the delegation. There was an opportunity both from these meetings and from the press reports, as well as from the full text of the Punta del Este Declaration to begin to appraise what happened there. Each of the items on the U.S. agenda had a certain series of problems. There was, of course, a preparatory draft, a draft declaration that had been worked out with international negotiations over a year. Some matters in this draft declaration were in what diplomats call "square brackets", that is they were not completely decided upon. In other matters there were important dissenters.

Agriculture topped this list, not necessarily because of long-term priorities, but because of short-term political problems. The subject of agriculture has been very, very difficult for GATT throughout its history. The disciplines of GATT legally do apply to agricultural goods but in practice they have tended not to apply. The whole area of agriculture trade in the world has, for one reason or another, largely escaped the discipline of GATT.

The United States went into the last round, the Tokyo Round, intent on bringing agriculture into the GATT processes and largely failed. Indeed the initial ministerial meeting to launch that round was held in Tokyo in September, 1973 and I think when you compare what happened in September, 1986 at Punta del Este, one can see how much better the United States has fared this time. At Punta del Este the United States was intent on ensuring that agriculture was on the agenda, that all aspects of agriculture could be negotiated as part of GATT and to be sure that the processes that were set up for the negotiation would not undermine the potential to discuss agriculture. All of this is potential, there is no agreement yet. U.S. efforts aimed at guaranteeing that there would be talks about agriculture, and agricultural goods were quite successful. The language of the Punta del Este declaration largely permits this.

The GATT institutional structure has been criticized. Some argue that the GATT processes are greatly defective, particularly GATT's dispute settlement processes. The issue was in the draft declaration but apparently was not debated extensively at Punta del Este. Hence, the United States was able to obtain satisfactory language in the declara-

tion. Do not be fooled, however, by the fact that it looks so easy because there are some really tough disagreements in the GATT about what the GATT should be as an institution and what the dispute settlement processes should be.

Services are one of the new issues for GATT. Services are a polygot series of activities becoming increasingly important in world trade as well as in industrial economies. They include insurance, banking, engineering services, legal services, medical services, basically, the intangibles part of world trade. Services have grown in percentage of world trade but are still a relatively small percentage, about 20 percent. However, for certain economies, like that of the United States, services represent a higher percentage of the gross national product than the production of goods. Thus, services are obviously part of the wave of the future. We as professors are all engaged in services; much of the computer world is services. Some five or six years ago the United States began pushing to bring some kind of an international discipline to the subject of services. There virtually is none now. Certain areas of service activity have specialized international organizations or treaties that deal with them, but there is no general discipline on services trade. As a result many countries are beginning to discover ways to keep out the foreigner, to keep out the foreign banks, to keep out the foreign insurance companies, and so on. Of course, the economic principles of liberal trade whereby competition helps world welfare, where we want competition from all nations, would suggest that for services, just as for goods, it would be wise not to permit governments to erect these artificial barriers. The United States was very intent that we begin to have some kind of an international discipline on services and therefore, it said, let us put services in the GATT. This has been bitterly opposed by a number of developing countries, spear-headed primarily by Brazil and India, but in a number of other countries as well. Initially services were opposed by the European common market countries. It was only after the European nations did some of their homework and suddenly realized what a large percentage of their own economy services represented and what potential for exporting services existed that the European economic community decided that services ought to be addressed by GATT.

The result in Punta del Este regarding services was not unequivocal. There was a certain amount of diplomatic "papering over" differences. Those countries that oppose services being brought into the fold of the GATT were worried that the countries that had great economic weight and power in trade and goods, would be able to use that power in a way linked to services in order to get meaningful norms in international service trade that would tend to favor the powerful nations and

disfavor the less fortunate, less powerful countries. Furthermore, many of the countries, particularly the developing countries, argued that the GATT has enough work to do and that it is not wise to divert its attention from goods questions such as agriculture. Thus, there were a variety of reasons behind the opposition to putting services in GATT and that issue has not been fully resolved.

The Punta del Este declaration set up two negotiating groups. One for services and one for all others. Both of those groups report to a higher group called the Trade Negotiating Committee, which is the traditional committee that is set up to service and to supervise negotiations in the GATT. The group which is for all non-service areas is a group of the contracting parties, the GATT Members, and the other participants in the GATT Negotiation. The other group is a group of the ministers of each of the countries and so in a sense, they all wear two hats. Some tend to feel that as time goes on, these differences will tend to fade and people will become used to dealing with services in the GATT. However, for now the issue is still open and it is an interesting one.

The fourth issue on this list, intellectual property, is increasingly important. The United States, in particular U.S. businessmen, have been very annoyed by the piracy that has been going on in the world, the copying of records, of books, of TV tapes, and computer programs and computer engineering, and so forth. The argument is that if this piracy and this counterfeiting can continue so easily it is going to inhibit research and development. It is going to reduce the incentive for the advancement of these areas. As a matter of fact, these are the basic arguments of patent and copyright laws. Therefore, the United States contends, some kind of international discipline is needed and because intellectual property deals intimately with goods, GATT is an appropriate forum. That was accepted at Punta del Este.

Finally, there are investment questions. Investment questions are very complex. For centuries there have been many various kinds of international activity on investment questions such as compensation that is owed when property is expropriated or taken. Many countries in GATT opposed putting this heavy burden under the GATT umbrella. A compromise resulted that limits the scope of the investment measures that will be discussed in GATT to those called TRIMs, Trade Related Investment Measures. The investment issues that relate to trade and goods will be discussed and there are many such issues because, after all, investment goes hand-in-hand with goods trade. Often businesses must go abroad to do some of their production, they may have to assemble abroad, or they may need to have at least agencies abroad for selling and investing. There are a variety of other things too.

One of the overall things that impressed me in the reports from the Trade Round was that the United States decided consciously, as part of its strategy, not to go to Punta del Este with the view to strong-arming other parts of the world into its own view. Not that it could because I suspect the days of pure strong-arming are over for the United States. Of course the United States had plenty of negotiating "chips", plenty of bargaining power and it could have leaned quite heavily on countries such as India and Brazil. Nonetheless, the United States decided not to do so too explicitly, although obviously some of it was done. I think the United States decided to negotiate in such a way that in the end there would be a meaningful consensus by all of the countries, at least by all of the major players. From what I have read and those I have talked to it seems that the United States feels that it has achieved this goal and I think it was a significant achievement.

II.

At this point I want to turn to the GATT itself. I begin with the historical background of GATT. I love to begin talks about GATT with the following statement. Knowing that GATT is the major international institution governing international trade in the market economies and in the world today, it is fun to say the GATT has never come into force. And in fact that is true. The GATT — the General Agreement of Tariffs and Trade — has never come into force. How could an international agreement, a provisional agreement, if you will, be so significant and what is its legal affect? Well, that leads to a second statement that is sort of a foundation of this subject. And that is, whatever the GATT is today it was never intended to be that. It really is fundamental for understanding the GATT and understanding, for instance, why the GATT is different from the International Monetary Fund or different from the United Nations, to go back and examine the history of the GATT.

At the end of World War II there was a great deal of effort to try to develop a new set of international institutions regarding economics and perhaps the most important part of that was something called the Bretton Woods Conference in 1944. At that conference the allied nations of the world got together knowing that the United Nations charter would come into force, but they also wanted to develop some international institutions that they hoped would avoid some of the problems of the inter-war period — some of the problems that led to protectionism, to the Great Depression, and perhaps to the rise of Hitler and Nazism on the continent. The Bretton Woods Conference was called with a view to developing the charters of two important institutions. The International Monetary Fund and the International Bank for Re-

construction and Development. That was the monetary side of the problem. The other side of the issue was trade. You cannot really do monetary matters without looking at trade and *vice versa*. Nonetheless the Bretton Woods Conference did not deal with trade and herein lies one of the worldwide problems, institutionally, about this subject.

There has always tended to be a bifurcation between monetary and trade matters. You see it in the ministries of governments. The Bretton Woods Conference was really under the sponsorship of the Ministries of Finance, the Chancellors of the Exchequer, the Departments of the Treasury, and so on. Politically and bureaucratically the negotiators did not have jurisdiction over trade. At home other ministries, for example the Ministry of Commerce handled trade. In the United States, at that particular time, the State Department and the Department of Commerce, were fighting over who would get jurisdiction. Thus, at Bretton Woods international trade issues were deferred. Perhaps that is what led to the whole kettle of problems that we have in the GATT.

Once the war was over, the good intentions of the various nations began to falter. An attitude of returning to normalcy developed. The pressure to design new international economic institutions lessened. Trade was not given attention until after the United Nations was set up and the Economic and Social Council called for a conference to develop an international trade organization. By now it was late 1946, so passions had calmed and countries were also becoming bored or nervous about initiatives. Nevertheless, as had been foreseen in the Bretton Woods Conference, there was an initiative, spearheaded by the United States but participated in by a number of other countries, to accomplish two things. One was the development of a charter for an International Trade Organization (ITO), and the other was the development of a reciprocal tariff reduction agreement.

Those two initiatives pursued really two strands of history that came together at that time. One of those strands which I have already referred to in connection with the needs and desires for the Bretton Woods Agreement was to prevent another war. This was a basic strand frequently heard. You would hear it in the speeches of World War II leaders. These leaders emphasized the need to set up institutions that would prevent the problems that occurred in the 20 years before the war and would prevent war itself.

The other strand, however, was a bit more prosaic and a bit more pragmatic, but nevertheless, important. That is the strand that is embodied in the United States' series of legislation for reciprocal trade agreements which began in the early Roosevelt Administration, particularly in 1934. You may remember the disastrous tariff act passed by

the United States Congress in 1930 called the Smoot-Hawley Act. This tariff was very damaging to world trade, some would link it to the great depression and therefore to Hitler and to World War II. That perhaps, stretches the imagination a bit and historians argue about that. Nevertheless, there was probably some relationship between that Tariff Act and some of the disasters that followed. In any event, during the early Roosevelt Administration, Secretary of State, Cordell Hull approached Congress proposing that Congress delegate to the U.S. President the authority to enter into international agreements for a mutual and reciprocal reduction of tariffs. After the Congressional action pushing tariffs way up in the 1930 Smoot-Hawley Act, the executive was now trying to persuade Congress that the contrary was better, that trade should be done reciprocally, by swapping deals to lower barriers.

Congress gave the President the requested authority. In fact, the President's authority was two-part. First, the President was granted authority to enter into the international agreement. It was a congressionally pre-approved executive agreement. (It is one of five different kinds of international agreements into which the United States Constitution permits United States officials to enter.) The other part of the authority given to the President was the authority to proclaim the results of the international agreement into domestic U.S. law, assuming the international agreement was validly within the parameters set by Congress. The President would be allowed to do both of those things without returning to Congress. Congress granted this authority by enacting statutes. However, Congress would not give the authority for an unlimited time. Instead, Congress always set a time limit, usually three years in these statutes, and then the statutes would be renewed.

By the end of World War II in mid-1945, the United States had negotiated about thirty bilateral, reciprocal trade agreements. Also in 1945, the statute granting the authority to negotiate these agreements was renewed for a three year period. This development of reciprocal mutual reduction of tariffs through an international agreement was a policy that the United States Executive wanted to implement and was the second strand of history to which I referred. The President obtained congressional permission as well as a renewal of that permission. Therefore, in 1946 with the notion to draft the ideal ITO charter, conferences were also called to draft further reciprocal tariff reductions. The only difference this time was that the treaties would be multilateral instead of bilateral. Those two strands came together and we are still living with the result today.

In Geneva in 1947, there was a major conference, what I have called a three ring circus. One part of the conference was to negotiate the charter for an international trade organization. Another part nego-

tiated reciprocal tariff reductions, item by item, bilaterally but also brought them together into a multilateral agreement. That is the GATT, the General Agreement on Tariffs and Trade. In the third ring the so-called general language of the GATT that would be attached to the tariff reduction agreement was negotiated.

Originally it was thought that there would be an ITO that would be a supervising organization. The proposed charter contained measures for voting, for finances, for a secretariat — all of the usual organizational provisions. The GATT was simply to be appended to the charter. The GATT was just an agreement, a contract if you will.

Indeed, early drafts of the GATT contained words about organization. When the U.S. negotiators returned home and testified before Congress, the Congress said that the negotiators did not have authority to enter into a GATT with organizational clauses. Under the U.S. Constitution, it was clear that the U.S. Executive would have to submit an ITO Charter to the Congress. Because of the 1945 renewal of the reciprocal trade agreements act, the President argued he could negotiate a reciprocal trade agreement without further reference to Congress. Thus, the Executive's plan to negotiate GATT without referring it to Congress was in danger because of references in it to an organization.

The negotiators returned to Geneva and erased all of the words that said organization and substituted the words "contracting parties acting jointly." That is the phrase that you see in that agreement today. So, in theory, the GATT was not an organization.

Today, you will hear the statement that GATT is not a legally binding obligation of the United States. I disagree because the 1945 Extension Act did support what the president did as long as it was not, at that time, an organization. You may also hear it stated that GATT is not an organization. Well that is taxonomy. Look at what the GATT is, what it is doing, and how it goes about its work and I say this is an organization.

The GATT today is not what it was intended to be. It has had to move in and fill a vacuum because the ITO Charter was never approved by Congress. The proposed ITO charter was finished at a meeting in Havana in 1948, a presidential election year. Surprisingly, Harry Truman was elected, but he had a Republican congress with which to deal. So it was a Democratic president submitting the ITO Charter to a Republican congress. The mood of the nation was to return to normalcy, time to turn inward a little bit, to leave the war behind. All of these things were operating and in 1951 the U.S. negotiators realized that the charter would not be approved and that no other country in the world would enter into the GATT if the United States was not in it.

Recall that I said the GATT is not in force. In fact, it is not. There was an interesting lawyer diplomatic problem. In the Fall of 1947, at the end of the Geneva Conference, the drafting of the GATT was finished, but the drafting of the ITO Charter was not. Drafting the Charter would be continued at the Havana Conference in 1948.

The U.S. Executive Department wanted to get the GATT into force right away. First of all, they thought, GATT cannot be kept a secret very long. As soon as some of the tariff concessions that made would begin to leak out into the business world, businessmen would react accordingly. This in turn would distort world trade patterns. The Executive Department felt that it was important to get the GATT into effect immediately if it was to be done at all. Secondly, the Executive Department's authority to bring GATT into effect without going to Congress would expire in the middle of 1948.

Other countries disagreed stating that they could not implement the GATT at that time. Under their executive authority they would have to take the proposed GATT back to their parliaments. And next year, after the ITO Charter was finished they would again need to take that to their parliaments. These countries did not want to go to their parliaments with the GATT, spend political chips, twist arms, convince the parliament to go along and then six, eight or twelve months later, come back with another agreement that has similar problems and repeat the process and run the risk of losing the second time around. These nations wanted to implement the GATT and the Charter all at one time, at a later point.

The solution was the Protocol of Provisional Application. It is this Protocol that has put GATT into effect as an international legal norm. The Protocol had some important differences from GATT itself. The most important difference relates to in Part Two of the GATT, which is the code of conduct that includes measures of national treatment, anti-dumping, countervailing duty, measures of subsidies, state trading, and quantitative restrictions. According to the Protocol those clauses in GATT would be implemented only to the extent not inconsistent with prior legislation. And this is the source of the so-called "grandfather rights" in GATT, a problem that has existed all through the history of GATT. At the time, it was thought that the Protocol Provisional Application would drop away in two or three years, because the ITO would come into effect and then countries would definitively accept GATT. In actual fact we are today, still provisionally applying the GATT under that Protocol and so it is subject to these other clauses.

III.

Before I conclude I will turn to some of the other interesting

points involving the GATT. I begin with an intriguing lawyer's question. Is the GATT law in the United States? Is it law anywhere? First of all, of course, it is international law. It is an international legal norm but in many countries of the world an international legal norm is different from a domestic legal norm. That is certainly true in the United States. It is quite possible for the United States to have a domestic legal norm that violates its valid international obligations. The Courts of the United States and its domestic jurisprudence must follow the laws of the United States, including the Constitution of the United States. If the GATT, for instance, were invalid under the U.S. Constitution and yet had been validly entered into under international customary or conventional rules, we might have found ourselves in conflict. However, that is not the question because the GATT has been validly entered into. It remains to be asked whether the provisions of the GATT are part of the law of the United States.

Even though the GATT itself might be termed a self-executing treaty, and indeed there is preparatory work that suggest the draftsmen thought it was, the Protocol of Provisional Application is almost certainly not self-executing. Remember that two-part power I mentioned that was given to the president. The second part of that power was to proclaim the results of an agreement into U.S. Law and indeed the President has proclaimed the GATT into U.S. law, all except one part. Thus for most purposes, the GATT is domestic U.S. law.

Every court case that I can find that has ruled on the issue has held the GATT to be validly binding on individual citizens or on states. The GATT agreement, if you include the whole GATT agreement, is about forty volumes. It consists of this little document that we often call the "GATT agreement", plus Article II of GATT integrates into the GATT the schedules of tariff concessions and there are now about forty volumes of item by item tariff concessions that have become part of the treaty of GATT. The schedule for the United States is one volume itself. It lists thousands and thousands of products and detailed product descriptions and beside each of them is a tariff rate, which is "binding." For instance, beside bicycles it might say "five percent" and that means that the United States cannot charge more than a five percent tariff under the GATT.

Also interesting are some of the other agreements associated with GATT. There have been a series of seven trade rounds in the GATT. In each round the members of GATT and usually some other governments who intended to join GATT, gathered together and negotiated. In the early rounds they negotiated almost solely on reduction of tariffs. From 1962 to 1967, in the sixth round, the Kennedy round, there was a first attempt to look at non-tariff barriers. The seventh round, the

Tokyo Round, from 1973 to 1979, was the largest by far; it probably tripled the competence and the work of GATT.

For a variety of reasons, it is generally believed, that you cannot amend the GATT agreement because the politics are just too difficult. The treaty provisions that allow amendment call for two-thirds vote, the amendment will not apply to an abstainer, and some parts of the GATT require an unanimous vote.

However, while the negotiators feel that the GATT cannot be amended they also feel that subjects like subsidies are inadequately treated in the GATT. The solution was to negotiate a "side code", a separate treaty which was opened for signature to those nations who wish to participate. This was done with one agreement in the Kennedy Round called the Anti-Dumping Code, and it was done with about ten agreements in the Tokyo Round, a whole series of codes. Each of those codes stands alone as a treaty. The effect of those agreements in United States law is quite different than the GATT itself. Congress has never given advance authority to the president for a non-tariff barrier agreement because non-tariff barriers are too complex and they cover a lot of subjects that the Congress has struggled with for decades, like environmental protection laws, and tax laws, and so on. Instead, we designed in the 1974 Trade Act, something called the Fast Track Procedure which requires the President to negotiate the codes and then submit the results to the Congress. And the President did just that in the 1979 Trade Agreements Act. Additionally, Congress has decided not to permit those international agreements to be self-executing. Rather, Congress incorporated the language of those codes into the Trade Act of 1979. Congress did not necessarily use all of the original language, and in some cases Congress added language of its own. At times the congressional language went beyond what the international obligations required. Hence, legally there is a bit of tension now as to how you handle some of these codes. And therein lies one of the problems, I think, for improving the international dispute settlement process.

IV.

In the time permitted I have only been able to scratch the surface of what is obviously a vast and complicated subject. I think one of the remarkable facts of post-World War II economic life, is the reasonable success which can be attributed to the GATT and the other international economic institutions during the past four decades. This success is certainly more than anyone had the right to predict during the six or seven years of formation of the GATT.

Yet today we are facing conditions that are extremely different

and orders of magnitude more difficult than those for which the GATT was designed to face. Economic interdependence has become so profound, that billions of dollars move between nations with the flick of a computer key. Economic influences or disturbances, greased by the dramatic drop in transportation and transaction costs, but assisted by the GATT and other international institutions which have reduced the governmental barriers to economic transactions, now flow rapidly across borders, much to the frustration of government leaders who find matters largely out of their control.

All this raises the question whether the institutions of the GATT and the Bretton Woods system are adequate for the next decades. The Punta del Este meeting launched a major trade negotiation which is likely to be the last chance in this century to work constructively for the improvement of these institutions. The results will undoubtedly lay the groundwork for the first several decades of international economic life in the next century. In short, it is a crucial time for international policy. The Punta del Este meeting has resulted in a good "launch." Let us hope that the ensuing activities of the process begun there will prove to be equally constructive.