Brooklyn Journal of International Law

Volume 18
Issue 1
Symposium:
The Uruguay Round and the Future of World Trade

Article 2

9-1-1992

GATT and the Future of International Trade Institututions

John H. Jackson

GATT AND THE FUTURE OF INTERNATIONAL TRADE INSTITUTIONS

*John H. Jackson**

I. THE URUGUAY ROUND: IMPASSE & GATT IMPACT, IMPLICATIONS[1]

As this is written,[2] and as we discuss the subject of today's conference, it is very difficult to predict what will be the outcome of the Uruguay Round. Launched in September 1986 at a Punta del Este ministerial meeting, the Uruguay Round is clearly the most ambitious of the eight negotiating rounds sponsored by the General Agreement on Tariffs and Trade (GATT) during its forty plus years of history. Perhaps that is the trouble — the ambition of the agenda has, in the view of some, tended to weigh down the whole negotiating process.

These negotiations have faced great difficulty. At the launch, the Punta Declaration manifested great ambition for the negotiation, with some major new areas to be discussed, including trade in services (as vast and important as all the trade in goods covered by GATT), intellectual property, trade-related investment measures, and a number of items for strengthening some of the defects in the current GATT system. The most important of these latter items was yet another attempt to address the perplexing problem of trade in agricultural goods, as well as subsidies and dispute settlement.

Technically, as a matter of law, the GATT applies to trade in agricultural goods as much as it applies to trade in other goods; but for a variety of historical reasons, agriculture has largely escaped the discipline of GATT. The United States, as a

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* Hessel E. Yntema Professor of Law, School of Law, University of Michigan

1. The reader may also be interested in the following works: JOHN H. JACKSON, THE ROYAL INSTITUTE FOR INTERNATIONAL ECONOMIC AFFAIRS, RESTRUCTURING THE GATT SYSTEM (1990) [hereinafter JACKSON, RESTRUCTURING]; JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS (1989) [hereinafter JACKSON, LAW AND POLICY]; JOHN H. JACKSON, INTERNATIONAL COMPETITION IN SERVICES: A CONSTITUTIONAL FRAMEWORK (1988); JOHN H. JACKSON & WILLIAM DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS (1986) [hereinafter JACKSON & DAVEY, ECONOMIC RELATIONS]; JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT (1969) [hereinafter JACKSON, WORLD TRADE].

2. November 1991.

major agricultural exporting nation, found this particularly troublesome, and tried in both the Kennedy Round (1962-1965) and the Tokyo Round (1973-1979) to readdress the matter and establish significant GATT discipline over the agricultural sector. In these endeavors the United States (and other similarly minded nations) failed. Thus once again in the Uruguay Round, the United States made it a high priority matter to bring "agriculture into the GATT." It also, along with many other countries, is struggling to develop the new rules for trade in services, intellectual property, etc.

Much progress has been made on many of the twenty five to thirty major issues being negotiated in the Uruguay Round, but as of November 1991 very little progress has been made in the agricultural sector. The original timetable for the Uruguay Round was to see final negotiations occurring in the latter half of 1990, and culminating in a ministerial meeting in Brussels in December of 1990. This ministerial meeting occurred, but ended in failure, largely because of the agricultural question. It is on this issue that the European Community (EC) role has been crucial. The EC leaders seem to recognize that the EC agricultural policy, the Common Agricultural Policy, must be reformed for its own good. Many other members of GATT feel that the reform is essential to their own trade, and this has been particularly true of the so-called Cairns group of agricultural exporting countries. The United States pushed hard, but the EC resisted just as hard, and thus the talks broke down at the end of 1990.[3]

It might be thought that agriculture once again could be sidestepped, or put on the table, so that the rest of the vast agenda of the negotiations might result in a decent or even substantial culmination of the Round. Indeed, some may hope that will still happen. However, there is an intricate connection between the agricultural subject and many of the other important subjects of the negotiation that makes that very difficult.

First, from the point of view of the United States executive branch negotiators, it is hard once again to go back to Congress with a package that does not seriously address the agricultural

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3. *See generally News Highlights: GATT, USTR Hills Says Chances of Success in Uruguay Round Impossible to Predict*, Int'l Trade Rep. (BNA), Dec. 19, 1990, at 1912; *General Developments: GATT: U.S. Lacked 'Diplomatic Competence' at GATT Talks, French Minister Says*, Int'l Trade Rep. (BNA), Jan. 2, 1991, at 23; *News Highlights: GATT: U.S., Others Blame EC For Failure in Brussels to Agree on New Rules to Govern World Trade*, Int'l Trade Rep. (BNA), Dec. 12, 1990, at 1876.

problem in GATT. Second, the United States (as well as other industrial countries) avidly wants substantial negotiating results in the areas of trade in services and intellectual property. It has achieved considerable success in the negotiation of a draft text on these subjects (more so for intellectual property than services, the latter being so complicated). However, for many of the developing countries, these two new subjects do not offer much in the form of concrete "payoffs" from the negotiation; and yet their participation is key to adequate results on these topics. Indeed, the developing countries are often the "payers" in these matters rather than the beneficiaries. Still, many of the countries are prepared to take on substantial obligations if they would feel compensated by reciprocal advantages drawn from a substantial achievement in agriculture (as well as textiles and a few other areas). It is here that agriculture has been something of the "linchpin" of the whole negotiation, and thus some feel that without a substantial result in agriculture, it will be impossible to achieve worthwhile results in services and intellectual property, and therefore the round will fail. At that point, trading nation administrations (particularly the United States) worry whether they would be able to obtain legislative approval of the Round results.

Thus, the general perception in the fall of 1991 is that the Uruguay Round was held hostage to the approach of the EC, which in turn is discussing extensive reforms of its agricultural policy, but on a schedule that will not easily accommodate the Uruguay Round time table (which is deeply constrained by the United States statutory "Fast Track").[4]

On the other hand, a great deal of worthwhile work has al-

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4. *See generally General Developments: GATT: Uruguay Round Can Be Concluded in Five Months, EC Negotiator Says*, Int'l Trade Rep. (BNA), Oct. 2, 1991, at 1445; *General Developments: GATT: Talks Will Reach Decisive Phase in October and November, Dinkel Says*, Int'l Trade Rep. (BNA), July 31, 1991, at 1148; JACKSON & DAVEY, ECONOMIC RELATIONS, *supra* note 1, at 151-55; *News Highlights: Mexico: Senate and House Vote to Extend Fast Track for North American FTA, Uruguay Round Talks*, Int'l Trade Rep. (BNA), May 29, 1991, at 802; Keith M. Rockwell, *Europe View: Time For Delors to Take A Stand*, JOURNAL OF COMMERCE, May 21, 1991; Richard Lawrence, *EC Standing Firm on Farm Trade Offer*, JOURNAL OF COMMERCE, May 6, 1991, at 4A; David Gardener, *A Slimmer Cow*, FIN. TIMES, Jan. 24, 1991, at 14; *News Highlights: USTR Hills Opposes Setting New Deadline in GATT Talks Until EC Moves On Agriculture*, Int'l Trade Rep. (BNA), April 24, 1991, at 600; JOHN H. JACKSON, MITSUO MATSUSHITA & JEAN-VICTOR LOUIS, IMPLEMENTING THE TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES 148-150, 162-268 (1984); United States Trade Act of 1974, 19 U.S.C. §§ 2101-2487; JACKSON, LAW AND POLICY, *supra* note 1, at 73-74.

ready been accomplished in the Uruguay Round. The list of agreements prepared (as specified in the documents for the Brussels ministerial meeting) is extensive[5] and although many are extensively "bracketed" to show lack of agreement, others are nearly ready for final approval. It would be very unfortunate if all or much of this able work product were abandoned.

Thus it may be worthwhile for governments to reconsider the negotiating strategy which places so much emphasis on the relatively intractable subject of agriculture. The Uruguay Round negotiators are at this moment working in Geneva to try to break the agriculture impasse, and of course if they succeed that would be a great step forward. However, the EC has very strong internal problems with the Uruguay Round timetable, even though it seems increasingly clear that the EC will have to "reform agriculture" within some near period anyway. Thus an argument can be made that the negotiators should do as much as is feasible in the near term to maximize a result in agriculture. At the same time, they should accept the reality of what can be obtained in agriculture at that time, and "close out" the Uruguay Round before it causes more hemorrhage to the GATT (as a rule and coordination system that has been increasingly successful in constraining protectionist national constituencies from action that would greatly damage world trade). This will require adjusting aspirations regarding the other subjects of the Uruguay Round, but even after such adjustment the Uruguay Round is very likely to have a result larger than any previous GATT round, and that certainly can be characterized as a success. In addition, it is possible for the negotiators to structure a continued attention to the agriculture problem, linked to the internal efforts of the EC to reform agriculture, so that over a few more years we could see many aspects of the original Uruguay Round goals achieved. It would be ironic if the Uruguay Round were to fail now, only to find that in a few years the EC had finally managed the internal political will to achieve much of the Uruguay Round agricultural aspirations.

My topic today, however, is focused more on the institutional questions of the GATT trading system. The views I have just expressed about the Uruguay Round are an important part of the background of the institutional questions. Indeed, as I im-

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5. DRAFT FINAL ACT Embodying the Result of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. No. MTN.TNC/N/35 (26 November 1990).

plied before, the role of the GATT system to provide a stable, rule-based system for international trade is perhaps its most important attribute. Part of my concern about the Uruguay Round Brussels impasse is the effect that it will have on the ability of the GATT system to continue and to enhance that role.

Whatever the outcome of the Uruguay Round, and the institutional developments of GATT, it is clear that the task ahead for the GATT system is formidable. The accelerating international economic interdependence is putting great strain on the international institutions designed to provide the conditions for world welfare enhancement through trade and other exchanges among nations; and to prevent economic tensions from causing outbursts of violence or worse. The post World War II economic system (often termed the Bretton Woods system) no longer seems capable of efficiently managing world economic relations in a way to promote these two goals — enhancing world welfare and keeping the peace. Thus, attention to the institutional problems of GATT (and the other world organizations with economic responsibilities) is critically important. It is that subject that I wish to address.

II. Institutional Needs of the World Trading System

A. *GATT — An Institution Suffering From Birth Defects*[6]

The GATT is often described as the major international treaty discipline for world trade, and the most important international organization regarding that trade. Yet, paradoxically, the GATT treaty as such has never come into force, and that treaty was not originally intended to create an international organization. Obviously these paradoxical statements need some explanation. High government officials even today sometimes say that the GATT is not a "binding" treaty obligation, because of its strange origins. This statement is not accurate, but the complexity of the GATT and its historical origins lend themselves to such misunderstanding.

In order to fully understand the origins of the GATT, we must go back to the period at the end of World War II.[7] In 1944 the Bretton Woods Conference was held in the United States,

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6. *See generally* JACKSON, RESTRUCTURING; *supra* note 1; JACKSON, WORLD TRADE, *supra* note 1; JACKSON, LAW AND POLICY, *supra* note 1.

7. For a more detailed account of this history, *see* JACKSON, WORLD TRADE, *supra* note 1, at 35-57; *see also* JACKSON, RESTRUCTURING, *supra* note 1, at 9-17.

for the purpose of drafting the charters of the World Bank and the International Monetary Fund (IMF). This conference did not directly address the problem of regulation of trade, because that was deemed to be under the competence of different ministries, but it was recognized that the post World War II economic system would need a trade organization comparable to the IMF and the World Bank.

Thus, it was when the United Nations was formed, one of its first tasks was to launch the preparatory negotiations for a charter of a potential International Trade Organization (ITO). These negotiations continued from 1946 through the Havana meeting in 1948, and resulted in a draft charter.[8] Simultaneously, major nations of the world organized a multilateral negotiation for the reduction of tariffs (pursuing a line of policy begun in the United States by the 1934 reciprocal trade agreements act), and as a result of this strand of the negotiation, the GATT was completed at the Geneva meetings in 1947. The negotiators for these efforts were largely the same individuals, meeting at virtually the same time. The original vision was that the GATT would be merely a tariff reduction multilateral treaty, and could not be an international organization.[9] One of the reasons for this is that the GATT was, from the point of view of the United States, negotiated pursuant to authority delegated by statute to the President which authorized a tariff reduction agreement, but not entry into an organization.[10] On the other hand, it was understood that the ITO Charter would have to be submitted to Congress for approval in order for the United States to enter it as an organization. Since delegates in 1947 wished to bring the GATT into force as quickly as possible, even though the ITO Charter was not yet completed, it was decided

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8. JACKSON, WORLD TRADE, *supra* note 1, at § 2.3.

9. John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249, 270 (1967) [hereinafter Jackson, *General Agreement*]. It was recognized that certain administrative functions (e.g., arrangements for consulting on tariff negotiations) would have to be performed by the General Agreement on Tariffs and Trade (GATT), but it was hoped that the International Trade Organization (ITO) would eventually assume these functions. *Id.*

10. An Act to Extend the Authority of the President Under § 350 of the Tariff Act of 1930 and for Other Purposes, 79th Cong., 1st Sess., 59 Stat. 410, (codified as amended at 19 U.S.C. §§ 1351-1366 (1945)). While the Tariff Act of 1930 contains no *specific* authorization for the President to enter into an organization, there is a substantial argument supporting such authorization under the statute. Jackson, *General Agreement*, *supra* note 9, at 273.

to enter into a "Protocol of Provisional Application."[11] This brought the GATT into force on January 1, 1948, with some exceptions for certain types of existing legislation, in the nations accepting the protocol.[12] The thought was that after the ITO Charter was completed, both the GATT and the ITO could be submitted to various parliaments around the world as necessary, and adopted as a package with the ITO forming the organizational structure, and the GATT being merely one among possibly several subsidiary specialized agreements.

After the ITO Charter was completed in 1948, it was submitted to the United States Congress, but within several years it was clear that the United States Congress would not approve it and that the ITO Charter was dead, leaving the GATT to fill the vacuum that then existed in the overall international economic relation structure of post World War II (often called the Bretton Woods System).

Thus, the GATT treaty itself has never come definitively into force although it is applied as a matter of binding legal obligation through the Protocol of Provisional Application — over forty years of provisional application! In addition, although the GATT was not intended to be an international organization, as time went on the GATT Contracting Parties found it necessary to introduce through practice, and trial and error, a series of institutional measures that would enable them to carry on the required business of the GATT. Thus, in the late 1950's[13] a "council" was organized, and an additional large number of committees and other sub-bodies of the GATT were structured to carry on the growingly complex work of the GATT.

Over its forty plus years of existence, the GATT has completed seven major trade negotiating rounds, and is now in the midst of the eighth. The GATT has been remarkably successful, particularly with respect to certain kinds of trade barriers (especially tariffs on industrial products imported to industrial countries). But the inexorable evolution and growing interdependence of international economic affairs has resulted in a host of new problems and subject matters becoming prominent in their

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11. Protocol of Provisional Application to the General Agreement on Tariffs and Trade, October 30, 1947, 61 Stat. pt.5 a2051, T.I.A.S. No. 1700, 55 U.N.T.S. 308.

12. *Supra* note 7; *see also*, JACKSON, LAW AND POLICY, *supra* note 1, at 34-37.

13. The Council was established in the 16th GATT Session (1960). GATT Docs. SR. 16/11, at 160 (1960); w. 16/15 corrigendum 1,2 (1960); *see also* JACKSON, WORLD TRADE, *supra* note 1, at 154-57.

effect on world economic relations, and the GATT treaty text often is inadequate to respond to these various new problems.

The GATT has evolved a remarkably elaborate system of "dispute settlement procedures," based on very brief clauses in the GATT treaty itself. However, the procedures have been considerably embellished through the procedure of relying increasingly on third party "panels" to make legal and factual determinations, which are then submitted to the "Council" for approval. This dispute settlement system is probably the most extensive of any major broad-based international dispute settlement system that the world has known, dealing with far more countries and far more cases than, for example, the World Court or any other broadly based multilateral international tribunal.

Despite all these relative successes, the GATT rests on a very unfirm institutional base. Partly because of the difficulty of amending the GATT, and partly because of the need for evolution and at least agreement among subgroups of contracting parties to the GATT for the establishment of new rules, the GATT system has become an intricate web of more than 200 separate treaty instruments. I have detailed many of these problems of GATT elsewhere,[14] so I will only briefly outline some of the institutional problems found in the GATT system, to illustrate and provide examples of the broader proposition of the need for institutional reform of the GATT.

1) The "provisional" application of GATT has been very confusing to the public and experts alike. It has also involved the so-called "grandfather rights" of existing legislation, which have been the subject of the rankest debate.

2) The amending provisions of the GATT treaty structure are inadequate. It is very difficult to amend the GATT (unanimity for some clauses; two-thirds for other clauses), and even when amended, the amendments do not apply to countries that refuse to accept the amendment. Many people have felt that the GATT is impossible to amend, and one result of this feeling in the Tokyo Round of the 1970's, was the establishment of a series of separate treaty "side agreements," or "codes" which added greatly to the complexity of GATT. This rendered the GATT vulnerable to the charge that it was an "a la carte" system, which reduced the predictability and uniformity of obligations

14. *See* JACKSON, LAW AND POLICY, *supra* note 1, at 27-58; *see also* JACKSON, RESTRUCTURING, *supra* note 1, at 45-47.

among nations.

3) The relationship of some of these side agreements to the GATT itself, in some cases affected by the most favored nation clause, has been sometimes murky and difficult to apply.

4) The relationship of the GATT treaty system to domestic law in a number of GATT member countries, including the United States, is also a troublesome issue.

5) A number of problems concerning membership, or contracting party status in the GATT system exist. There are various ways by which a nation or an independent customs territory can become a GATT contracting party, but there are additional troublesome clauses in GATT, such as the opt out clause of Article XXXV by which some contracting parties can opt out of a GATT relationship with other parties.

6) The Contracting Parties have been acting jointly much in the role of an "assembly" comparable to other international organizations, but the power of the Contracting Parties so acting is very ambiguous, and could be abused (although it has not so far been abused). There are a number of unsettled and disquieting issues such as the power of the Contracting Parties to interpret the GATT agreement, and the relationship of actions of Contracting Parties to some of the side agreements. It is also very hard to develop a new rule-making process.

7) The dispute settlement processes of GATT have been among the more intriguing and, at least recently, successful experiences of that institution. But there are still some very important problems, including the situation by which a losing party can block acceptance by the Council of a panel report, and the lack of a unified procedure. More attention to this procedure is obviously needed, and to ambiguous GATT phrases such as "nullification or impairment."

8) There has long been a problem with respect to the relationship of GATT to the other Bretton Woods institutions such as the International Monetary Fund and the World Bank. The GATT has often been treated as a "country cousin," inferior to the other institutions, and there have sometimes developed certain contradictory policies as between these institutions. There is a feeling that more "coherence" is called for.

B. A Rule-Based System — Rule Oriented Diplomacy and the GATT

Economists, diplomats, businessmen, and others, have com-

mented on the desirability of a "rule-based system" for structuring international economic relations. Particularly when applied to market-oriented systems with their characteristically decentralized decision-making (millions of entrepreneurs), it can be argued that some sort of rule orientation of society's structure is a very important positive attribute for economic welfare, the processes of exchange, and the correlative economies of scale and specialization. For example, an investor in a new plant in a small country may realize that for the plant to be efficient it must produce a quantity of products much larger than that which can be absorbed by the small country itself, and thus the plant becomes very dependant upon the ability to export. If there were no rules to constrain actions of countries, that export activity might be cut off by arbitrary government actions. The risk of such an unruly situation would raise the investment return premium needed by the investor to proceed with the project.[15]

In the GATT, there has been a many decades' debate about the relative merits of a rule-based system as compared to a "negotiation and diplomacy-based system," the latter sometimes called "power-based diplomacy." However, as the activities of world trade in relation to the GATT system have become increasingly complex and influenced by a larger number of treaty instruments, the trend, at least for the last decade, has been decidedly toward a rule-oriented approach. The GATT dispute settlement system has been greatly strengthened and improved, although it still has some important defects, including the blocking possibility. One of the important initiatives in the Uruguay Round has been the desire to strengthen the rule-oriented dispute settlement procedures of the GATT. The major negotiating countries have made remarkable progress in this regard, coming to a text that even contemplates an "appellate" process, possibly to substitute for a council approval procedure which is vulnerable to "blocking."

This initiative is to be applauded, and it is certainly one of the important elements of a potential completion of the Uruguay Round. In some ways, this advance in the rule process

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15. *See* John H. Jackson, *Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT*, 13 J. WORLD TRADE L. 1 (1979); JACKSON, LAW AND POLICY, *supra* note 1, at 85-88; JAGDISH BHAGWATI, THE WORLD TRADING SYSTEM AT RISK 46-47 (1990); JAGDISH BHAGWATI AND HUGH T. PATRICK, AGGRESSIVE UNILATERALISM 4-5 (1990); *see generally* works cited *supra* note 1.

could be significantly more important than many of the substantive agreements which have been hammered out over a half decade.

There are several other aspects of an improved dispute settlement process in GATT. The existing system is a hodgepodge of several separate dispute settlement procedures, some of them, established under the separate treaty codes and side agreements of GATT. The system cries out for a unified dispute settlement process to avoid the forum shopping and the competence disputes that are inherent in a fragmented system, as well as to strengthen the public perception and the careful procedural evolution of that system. Yet, when one considers the possibility of a unified dispute settlement process, particularly as it might also apply to some of the "new issues" of the Uruguay Round (e.g. services and intellectual property), it immediately forces consideration of a broader institutional rethinking for the GATT. A rule-oriented system must have some kind of supervisory mechanism and staff and secretariat support. Is this to be accomplished solely within the GATT? Or is it to be accomplished in the context of a broader framework or umbrella agreement that can shelter and facilitate agreements that might be concluded on other issues including the new issues of the Uruguay Round, and potential other subjects which in the future will be brought under the "GATT system umbrella?"

Furthermore, although unlikely to be seriously addressed in this round, and a subject of some fear of governments, there needs to be attention to the "rule making" procedures. To require all new rules to be introduced by new treaties, or to require new rules to be developed only at periodic (decade separated) negotiating rounds, simply will not work given the complexity and pace of international economic affairs. On the other hand, whatever system for developing new rules and responses to the speedy changes of economic affairs is contemplated, it must give adequate attention to the democratic governmental processes of the contracting parties to GATT, and not simply be the product of governmental or certain economic elites. There are enormously difficult questions involved in these issues, including internal struggles of power within certain entities (such as the European Community, or the United States Government) which are participants in the GATT.

C. Restructuring the GATT System

In a small book commissioned and published by the Chatham House in London (Royal Institute of International Affairs),[16] and also published by the Council on Foreign Relations (New York), I outlined a potential restructuring of the GATT system institutions. The outline is very modest — it merely suggests that the contracting parties and Uruguay Round negotiators establish by firm and clear treaty, a simple and fairly short institutional charter for an umbrella organization, to be called either the Multilateral Trade Organization (MTO), or World Trade Organization (WTO). This charter, quite unlike the original 1948 ITO Charter, would not contain any matters of substance. It would be devoted entirely to defining an institutional structure; establishing and reaffirming the treaty base of the GATT, its status as an international organization (with attendant legal status and necessary privileges and immunities), and, the necessary staff and other resources to carry out the essential work of the agreement. In most situations, those ad hoc and evolved-by-practice "de facto" institutions of the current GATT, would be absorbed and become the institutional components of the new MTO. The MTO would supervise the dispute settlement system, and would allow for the possibility of facilitating and supporting not only the GATT itself (as extensively revised and reformed over the years and in the Uruguay Round), but also agreements on important new issues such as services and intellectual property. But in addition, the umbrella organization would be open-ended enough so that during the course of future years and decades, additional agreements could be "hung on the hooks" of the MTO.

One of the recent innovations within the GATT context has been the development of a Trade Policy Review Mechanism (TPRM), which is designed to provide a forum for an analytical look at specific government trade policy practices (somewhat along the model of the economic reviews in the Organization of Economic and Cultural Development (OECD)). There is some thought that this is a useful process for study and deliberation to enhance the world's understanding of the trade interrelations among nations, and thus should be broadened to apply to other activities such as services. A new umbrella organization could

16. *See generally* JACKSON, RESTRUCTURING, *supra* note 1.

very easily embody a TPRM with such a broadened mandate.

D. Institutional Questions After the Uruguay Round

Even though these simple and quite modest proposals for institutional restructuring during the Uruguay Round could be a positive enhancement of the role of the GATT system, after reinforcing a rule orientation, no one should be thinking that no further changes will be necessary. There are a number of other institutional issues that will have to be addressed in future years, but if the MTO/WTO simple umbrella organization is well designed, it will enable the nation participants to evolve other newer structures over time, and to "fine tune" some of the continuing institutional aggravations of the system.

III. GATT AFTER THE URUGUAY ROUND

A. Introduction

Whatever the outcome of the Uruguay Round, the GATT system faces many formidable problems in the near future and over the next few decades. In the previous part of this paper, I have focused on the institutional questions of that system. I do not want to close, however, without at least briefly mentioning a tentative inventory of some of the substantive issues facing the GATT. Many of you have noticed the remarkable explosion of opinion and criticism of the recent GATT panel ruling in the so-called Dolphin-Tuna case between Mexico and the United States.[17] This is just one example of a number of very perplexing problems facing the GATT system. Let me catalogue some of these problems, and then close my comments.

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17. United States-Restrictions on Imports of Tuna, report submitted August 16, 1991. GATT Doc. DS 21/R (Sept. 3, 1991). In this case, the panel had to determine whether the ban imposed by the United States on imports of Mexican Tuna under the Marine Mammal Protection Act was a violation of Articles III and XI of GATT. The Panel reported that the United States embargo was not related to the product itself but to the process (in this case, the use of purse seine nets by Mexican fishing vessels leading to the numerous accidental killings of dolphins). The Panel also rejected the United States argument according to which the ban would be justified under Article XX(b) (measures necessary to protect animal life) and XX(g) (measures relating to the conservation of exhaustible natural resources), considering that these exceptions only apply for domestic reasons. The United States ban represented an attempt to regulate environmental issues outside its jurisdiction. Finally, the panel argued that changes in GATT to accommodate environmental concerns should be addressed by the negotiation of GATT changes or waivers rather than by labored interpretations of the existing agreement. *Id.*

B. Post Uruguay Round Issues

For convenience and comprehension, I can group the post Uruguay Round issues facing the GATT into several categories, as follows:

Continuation of Uruguay Round Issues:

A number of the issues more or less extensively addressed in the Uruguay Round will undoubtedly continue to require important negotiation and consideration. Agriculture is obvious, and it is very likely that such subjects as subsidies, antidumping duties, safeguards, textiles, gray area measures and voluntary restraint agreements, will be just a few among a longer list of subjects that will demand further attention.

New Substantive Issues:

There are a group of issues that are more or less new to the GATT, and will be causing increasing difficulty and demanding greater attention. A few can be mentioned:

1) *Competition.* The general area of competition (or antimonopoly) policy is one that has been increasingly noticed as a prime candidate for further attention. The original ITO Charter contained an elaborate title addressing these issues, but when the charter failed, this subject largely dropped to the wayside of international trade policy for the past forty years. It is now becoming increasingly apparent that it can no longer be a wayside matter. The general objectives of facilitating world trade demand attention to the attributes of competition in that trading system. Monopolies can undo the trade liberalization effect of reduced tariffs and nontariff barriers.

2) *Nonmarket Economies.* The GATT has unsuccessfully struggled with the problem of state trading and nonmarket economies for many decades. This problem will continue, although in the light of the dramatic developments in East Europe, and a general world wide trend toward market-oriented, or "privatized" economies, it may become less severe than had been contemplated even two or three years ago. China's entry into GATT could impose great stress on the GATT system.

3) *Science, Product Standards, and Harmonization.* Product development has been accelerated, and products themselves have become increasingly complex. Thus, standards for products have become a very important issue for international trade. When standards are very diverse in a random and unthoughtful

way, trade is inhibited because economies of scale become much more difficult. This is the lesson that the European Community has learned with a vengeance, and it has been proceeding with considerable vigour in trying to overcome this problem. That lesson is now becoming a part of the deliberations at the broader multilateral scale of the GATT system, as some of the specific cases (such as hormones) have demonstrated full well.

4) *Cultural Impacts on the Flow of Trade.* We have begun to realize that trade can be importantly influenced by relatively subtle cultural, or systemic societal attributes in different countries. Much attention has been given to Japan in this regard, but there are similar issues in the other major trading countries, if not all countries. Canada, the European Community, and the United States each have a variety of cultural attitudes and societal institutions that can, in some circumstances, inhibit trade. Japan and the United States have had a series of discussions about these issues under the title of Structural Impediments Initiative (SII). These discussions have clearly demonstrated that there will be increasing future importance given to cultural impediments to international trade. Clearly, there are a number of dilemmas of competing but appropriate governmental objectives imbedded in this subject. No one wants the world to be stamped into uniformity, and cultural diversity is often a desirable attribute for a variety of reasons including recognition of freedom of individuals and small groups.

Link Issues:

Another major group of issues facing the post-Uruguay Round GATT system are what I term the "link issues." These are issues that involve linking international trade policy to important alternative considerations and governmental international policies, often not traditionally viewed as appropriate for trade policy. Nevertheless, the world and its citizens are demanding linkages, and it is increasingly clear that linkages are indeed appropriate and must be studied and understood. Examples include the following:

1) *Environmental Protection.* Most significantly, there is the question of environmental protection and trade policy. This has been raised in several of the GATT panel dispute cases already, and there has been much discussion about the possibility that trade policy can influence, for better or worse, potentials for environmental protection. In the United States Congressional

debate concerning the Mexico-United States-Canada trade negotiations, these issues came very prominently to the fore.

2) *Human Rights.* Countries have long exercised the right to undertake certain trade actions (such as embargoes, or trade sanctions), for the purpose of influencing the actions and attitudes of foreign governments on human rights. This trend will undoubtedly continue, and will demand some attention from the trade policy community with respect to appropriate limits and criteria in such cases.

3) *Arms Control.* Governments have long taken actions to restrain arms races, and to limit the sale abroad of strategic items deemed potentially dangerous to national security. The GATT has a few clauses that arguably address this question, but there has been much ambiguity about many actions, including various kinds of export controls, in their relationship to the GATT. The Gulf War demonstrated poignantly the importance of these issues, and there is no way that the GATT will be able to escape them.

4) *Relation to Monetary Policy and "Coherence."* This has been mentioned above, but needs to be included in any list of "link issues."

Rethinking Traditional Rules:

A final category of post Uruguay Round issues for the GATT system, I label "rethinking traditional GATT policies." There are a series of general policies/concepts/rules in the GATT that are considered by many to be central to the whole GATT structure, and yet have caused considerable problems to the more complex and rapidly changing questions of international trade policy. It will be necessary to rethink some of these old concepts, even though many practitioners already have manifested a resistance to such rethinking because they fear encroachments on some of the basic pillars of a GATT system. The following illustrate some of these issues:

1) *MFN — Most Favored Nation Treatment.* The MFN clause has often been considered the central rule of the GATT system, and yet when the system includes a very large number of countries such as more than 100 now participating in the GATT, MFN may make it difficult to develop new rules, and affords a particular privilege to the "free rider."[18]

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18. *See* John H. Jackson, *Equality and Discrimination in International Economic*

2) *Reciprocity*. Reciprocity has been a central driving principle in many of the GATT negotiations. It worked better when negotiations centered on tariffs, and countries could be seen to "swap" concessions, which then made it easier for governments to "sell the resulting agreement" to their home constituencies. However, as the issues have moved away from tariffs and toward nontariff barriers, with the resulting complex needs for rule structures, reciprocity often becomes relatively meaningless. Instead, there needs to be an emphasis on the policy of the rules, and presumably virtually all countries will benefit over time if those rules are applied effectively. In any event, it becomes virtually impossible at the time the rule is made to be able to predict with much accuracy which particular countries will be favored, and which not.

3) *National Treatment*. Another "nondiscrimination" principle of GATT that is quite central to that system is the national treatment rules (particularly Article III of GATT). These rules are basically structured to require nondiscrimination as between imported goods and domestically produced goods, but they do not particularly require any minimum standard of rationality, or scientific support. Thus, a government can argue that its foolish measure is perfectly appropriate if it applies it equally to the imported goods, as well as its domestic goods. We have already seen several cases, especially in the agriculture and product standards area (so-called phytosanitary rules) where negotiators do not feel that the existing GATT approach is adequate. There must be instead, it is argued, some requirement that governments show a rationale for the rules and product affecting regulations that they adopt.

4) *Regionalism*. The problem of the relationship of regional preferential arrangements (such as the European Community, or the United States-Canada Free Trade Agreement) to the GATT, has been a sore point in the GATT from its beginning. Clearly the original GATT contemplates some measure of deference to groups of nations who wish to bind together in a trading arrangement that can provide for a deeper measure of liberalization of the trade in goods, services or other matters. How that can be done while giving some recognition to the GATT MFN

Law (XI): The General Agreement on Tariffs and Trade, 37 BRIT. Y.B. WORLD AFF. 224 (1983); JACKSON, LAW AND POLICY, *supra* note 1, at 133-48; *see also* works cited *supra* note 1.

clause (nondiscrimination), is the troublesome point. The GATT rules (Article XXIV) have been utilized but are thought by many, including authors of some penetrating economic and scholarly works, to be inadequate. As we seem to be moving into a world with even greater importance given to regional trading arrangements (the European Community expanding and deepening its relationship; the North American continent developing a new North American Free Trade Agreement; potentially a Pacific Basin arrangement, etc.), clearly the GATT will have to face the issue of the relationship of these blocks to the broader multilateral system, and the GATT should play a "traffic cop" role in preventing these blocks from damaging each other.

IV. Conclusions

My conclusions for this work can be rather simply stated. They are that governments need to pay as much attention to the institutional structure of the GATT system, as they pay to the substantive measures in the GATT. This institutional structure will have a very important influence on whether the GATT will be able to play its important and constructive role on the near and farther future of international economic relations. The importance of a rule oriented system can be quite easily established — indeed, all successful domestic economic systems rely very heavily on a rule-oriented system more easily put in place by sovereign national governments with a certain monopoly on power. At the international level, there is no such monopoly on power, and it becomes much more difficult to establish an effective and efficient rule-oriented system, particularly in the face of the attitudes of a number of governments, including attitudes that still give unmerited weight to the historical notion of sovereign independence and equality of states.

Having said this, however, we must recognize that the GATT and international economic relations are only part of a much broader and more profound world structure. The events of the last three or four years have resulted in an extraordinary shift of international relationships. Many have commented that the "Cold War is over, and the West has won." In any event, the old bi-polar world seems to have almost evaporated. The Gulf War demonstrated certain elements of that, as well as for the first time reinvigorating the United Nations as part of the international institutional structure for pursuing the general goals desired so much by the world's peoples. But where will the fu-

ture lead? Is the United States to be now the new hegemon? Or will the United States public turn inward in a parochial and isolationist tendency to preserve its own well being, even if at the cost of longer term world peace and security, as well as the cost of poverty and economic tensions elsewhere in the world?

The GATT system cannot be isolated from these general trends. It must be institutionally enhanced so it can play a stronger and more effective role in this very important part of the world relations endeavors. But the GATT will also have to recognize the relationships and ties with many of the other world problems and concerns, some of which have been outlined under the catalog of new issues in the previous section.

Let us hope that the GATT can rise to this task, and that the Uruguay Round will be sufficiently successful to help it perform this role, and not flounder under the cloud of pessimism and declining prestige, which has effectively oppressed the GATT since the Brussels December 1990 impasse.