

Brooklyn Journal of International Law

Volume 18

Issue 1

Symposium:

The Uruguay Round and the Future of World Trade

Article 6

9-1-1992

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Recommended Citation

Ronald A. Brand, *GATT and the Evolution of United States Trade Law*, 18 Brook. J. Int'l L. 101 (1992).

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GATT AND THE EVOLUTION OF UNITED STATES TRADE LAW

*Ronald A. Brand**

I. INTRODUCTION

United States trade law, in a formal sense, dates from the second law passed by the first United States Congress in 1789.¹ The early enactment of "An Act for Laying a Duty on Goods, Wares, and Merchandises imported into the United States" indicates the importance of trade issues to the emerging nation.² That law, which set tariffs on seventy-five categories of goods, takes up less than four pages of the Statutes at Large. In sharp contrast, the Omnibus Trade and Competitiveness Act of 1988 covers 468 pages in Statutes at Large, and deals with tariff schedules, antidumping, countervailing duty, and other unfair trade practice procedures, intellectual property rights, telecommunications trade, trade agreement negotiating authority, export controls, export trading companies, foreign corrupt practices, technology competitiveness, and many other matters.³

It is tempting to describe United States trade law as a reflection of the increasingly complex and evolving world to which it applies. Today's world of electronic data transmissions, in-

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1. An Act for Laying a Duty on Goods, Wares, and Merchandises, 1 Stat. 24 (1789). Only the law prescribing the oath of office for members of Congress was passed before the Duty Act. An Act to regulate the Time and Manner of administering certain Oaths, 1 Stat. 23 (1789).

2. While most of the 27 laws passed in the first session of the first Congress dealt with setting up the government (e.g., establishing a judicial system, establishing executive departments, arranging for compensation of Congress, the President and Vice President and the Supreme Court), six of them dealt with trade matters. An Act for Laying a Duty on Goods, Wares, and Merchandises imported into the United States, 1 Stat. 24 (1789); An Act imposing Duties on Tonnage, 1 Stat. 27 (1789); An Act to regulate the Collection of the Duties imposed by law on the tonnage of ships or vessels, and on goods, wares and merchandises imported into the United States, 1 Stat. 29 (1789); An Act for Registering and Clearing Vessels, Regulating the Coasting Trade, and for other purposes, 1 Stat. 55 (1789); An Act to suspend part of an Act, entitled "An Act to regulate the collection of the Duties imposed by Law on the Tonnage of Ships or Vessels, and on Goods, Wares, and Merchandises, imported into the United States," and for other purposes, 1 Stat. 69 (1789); An Act to explain and amend an Act entitled "An Act for registering and clearing Vessels, regulating the Coasting Trade, and for other purposes, 1 Stat. 94 (1789).

3. Pub. L. No. 100-418, 102 Stat. 1107 (1988).

stantaneous business communications, and sophisticated service industries is a far cry from the pastoral landscape we might employ to envision United States mercantile life in 1789. As the Uruguay Round moves toward a hopeful close, it both addresses issues heretofore outside the framework of the General Agreement on Tariffs and Trade (GATT) and sets the stage for even broader coverage. As this evolutionary process advances, however, it is appropriate to return to the intellectual underpinnings of the GATT system and consider whether the developments past, present, and future are consistent with the theoretical foundations on which the GATT, and basic elements of United States trade law, are established.

In this article, I consider whether the evolution of United States trade law, and GATT as a part of that law, has been consistently with the economic theory of comparative advantage which is invariably asserted as the intellectual justification for the multilateral trading system. In doing so, I offer the observation that, in one critical aspect, the evolutionary process is at best incomplete. This aspect is the extent to which private parties have a role in the application of the rules of the international trading system. I conclude that until private parties have greater access to the rules of the GATT system, that system is not wholly compatible with the theory we use to justify its rules.

II. THE GENERAL FRAMEWORK FOR DISCUSSION

As we look at the evolution of United States trade law over more than two centuries, more has changed than just the level of the law's complexity. At least four other defining characteristics stand out. The GATT largely defines the first of these characteristics. Prior to the GATT, trade relations were handled essentially on a bilateral basis, with agreements being made with single foreign countries. While those agreements, predominately through the development of the most-favored-nation clause, had importance to trade relations with other countries, they were negotiated on an individual basis. This changed dramatically with the advent of the GATT. The availability of a multilateral framework in which to negotiate and apply trade rules has been an important contribution to the development of trade law throughout the world.

The other three defining characteristics in the evolution of United States trade law all deal with the role of tariffs, and are interrelated in terms of their nature and development. First, tar-

iffs have developed from a primary source of revenue to simply a tool for the protection of domestic business. In the first 120 years of our constitutional history, tariffs were the principal source of revenue for the federal government. After the ratification of the Sixteenth Amendment in 1913, this emphasis changed when the income tax replaced tariffs as the most important source of revenue. Tariffs remained primarily as a tool of protection, and discussion of the propriety of tariffs focused on the debate over liberal trade theory.

The second aspect of the evolution regarding tariffs is the transfer of tariff-making authority from Congress to the President. With the income tax reducing the need for tariffs as a source of revenue, Congress gradually relinquished its control over the setting of tariffs. The Reciprocal Trade Agreements Act of 1934 and the GATT multilateral tariff negotiations moved the negotiation of tariffs from the halls of Congress to the international negotiating table. Congress no longer tinkers with the tariff-setting process, but rather, views tariffs as a package when presented to it periodically by the executive branch.

Finally, the reduction of tariffs by international agreement has shifted the focus of trade law to nontariff barriers. With the development of nontariff barriers has come the parallel ripening of trade relief mechanisms designed to counter those barriers. As multilateral negotiations began to focus on defining and reducing nontariff barriers, national measures addressing such trade restrictions were developed, either as intended appendages of the multilateral system, or as substitutes for multilateral measures not yet developed. These national measures themselves, and the procedures for their implementation, have become a focus of debate as replacement or secondary protectionist tools.

All of these developments regarding tariffs have set up the Uruguay Round focus on the expansion of trade law beyond measures involving only trade in goods. Thus, the defining characteristic of complexity in the evolutionary process is directly related to the developments involving tariffs.

Throughout the development of United States trade law alongside the maturation of the GATT system, questions have arisen about the process of development. Each of the characteristics mentioned here has been subject to fluctuations in policy between free trade and protectionism throughout United States history. For instance, recent separate negotiation of bilateral and regional free trade agreements, and regional "economic areas,"

challenge the multilateral underpinnings of the GATT. While some argue that evolution on multiple fronts can be consistent with a primary focus on the multilateralism of the GATT, others see a fragile GATT structure weakened further by parallel attention to bilateral and regional arrangements.

Regardless of how one views the multiple efforts to coordinate matters with our trading partners, the agreements emanating from those efforts provide confirmation of important evolutionary trends that raise critical questions about the direction of trade law generally. Throughout United States history, the tension between protection of domestic industries and a desire for efficient access to goods and services at the lowest possible cost has defined fluctuations in trade policy.⁴ As the pendulum has oscillated between protectionism and free trade, economic theory has been used to justify limits on national regulation of international trade. Economists often imply a synergistic relationship in the fact that both the signing of the *Declaration of Independence* and the publication of Adam Smith's *Wealth of Nations* occurred in 1776. Just as the colonists were rebelling against the English crown, Smith was rebelling against traditional mercantilist theory and setting the stage for David Ricardo's exposition of the theory of comparative advantage.⁵ This latter theory has provided the foundation for liberal trading policies throughout United States history.

More important for the discussion here, the theory of comparative advantage provides the justification for, and the explanation of, the multinational regulatory system set up in the GATT.⁶ This theory tells us that even if one country is more

4. See, e.g., RICHARD W. THOMPSON, *THE HISTORY OF PROTECTIVE TARIFF LAWS* (1888).

5. Adam Smith, Professor of Moral Philosophy at Glasgow University, is seen as the "first major figure of classical Economics." BO SÖDERSTEN, *INTERNATIONAL ECONOMICS* 11 n.2 (1980) [hereinafter SÖDERSTEN]. In *THE WEALTH OF NATIONS* (1776), he preached the benefits of "the invisible hand" in the unhampered market. David Ricardo published *Principles of Political Economy and Taxation* in 1817. It is in chapter 7 of this work, "On Foreign Trade," that he expounds the theory of comparative advantage. In 1815, Robert Torrens had published a pamphlet, *Essay on the External Corn Trade*, containing perhaps the first formulation of the theory of comparative advantage. SÖDERSTEN *supra*, at 11 n.3.

6. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. pts. 5 & 6, T.I.A.S. No. 1700, 55 U.N.T.S. 187, *reprinted in* IV GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, BISD, 1-78 (1969) [hereinafter GATT]. "[B]oth U.S. foreign trade laws and the GATT essentially attempt to implement the law of comparative advantage." BRUCE E. CLUBB, 1 *UNITED STATES FOREIGN TRADE LAW* lxiii (1991) [hereinafter CLUBB]. For further discussion of the relationship between comparative ad-

productive than another in all lines of production, both can benefit from trade. It provides the argument in favor of United States adherence to the GATT system and against protectionist domestic legislation that would serve to close United States markets or unfairly aid United States businesses in international markets. While comparative advantage theory has been questioned and challenged, it remains the accepted economic explanation for trade among nations.⁷ Thus, it provides us with the template by which we can take the measure of both multinational and national regulatory principles governing international trade.

Trade specialists generally accept that the theory of comparative advantage defines the benefits of trade among nations and that any regulatory framework should seek to maximize the benefits available from trade.⁸ Thus, they implicitly assume that the test of the evolution of trade laws is the extent to which those laws bring us closer to an environment that allows the invisible hand to operate in the unhampered market. When we consider evolution of the law, unless we have wholly redefined our purposes, where we are going should be consistent with where we are coming from. With this in mind, rather than consider detailed elements of the evolutionary process, I want to look at the broader framework and ask whether United States trade law has developed consistently with the economic theory continuously asserted as the justification for trade.

Comparative advantage theory necessarily assumes the participation of private parties.⁹ Thus, we justify our system of

vantage theory and the international trading regime promoted by the GATT, see JOHN JACKSON & WILLIAM DAVEY, *INTERNATIONAL ECONOMIC RELATIONS* ch. 1 (2d ed. 1986); ANDREAS F. LOWENFELD, *PUBLIC CONTROLS ON INTERNATIONAL TRADE* 1-21 (2d ed. 1983) [hereinafter LOWENFELD]; JOHN JACKSON, *WORLD TRADE AND THE LAW OF GATT* 330 (1969) [hereinafter JACKSON, *WORLD TRADE*].

7. See, e.g., ROBERT Z. LAWRENCE & ROBERT E. LITAN, *SAVING FREE TRADE: A PRAGMATIC APPROACH* 16-23 (1989). See also SÖDERSTEN, *supra* note 5, at 11 ("The theory of comparative advantage, or, as it is sometimes called, the theory of comparative costs, is one of the oldest, still unchallenged theories of economics."). But see Jarl Hagelstam, *Mercantilism Still Influences Practical Trade Policy at the End of the Twentieth Century*, 25 *J. WORLD TRADE* 95 (1991) (asserting that, despite statements supporting comparative advantage theory, actual behavior indicates that decisions are often driven by classic mercantilist thinking).

8. See *supra* note 6 and accompanying text.

9. See JACKSON, *WORLD TRADE*, *supra* note 6, at 330.

[T]here is no general GATT obligation for nations to increase, or indeed even maintain foreign trade. If all the private firms in a country subject to GATT decide to cease sales or purchases across their national border, then the

trade laws and trade agreements largely by reference to a single economic theory that requires the participation of the private party. Those laws and agreements often fail, however, to provide private party access to the system ostensibly designed to implement the accepted theory. Intellectual honesty and procedural fairness require that we consider this inconsistency in our review of the evolution of the GATT and United States trade law.

III. FROM THE CONSTITUTION TO THE SIXTEENTH AMENDMENT: THE DUAL FUNCTION OF TARIFFS AS A SOURCE OF REVENUE AND A TOOL FOR THE PROTECTION OF DEVELOPING INDUSTRIES

Unlike the failed Articles of Confederation,¹⁰ the United States Constitution grants to the federal government, and to Congress in particular, the “[p]ower To lay and collect Taxes, Duties, Imposts and Excises,” and provides that “all Duties, Imposts and Excises shall be uniform throughout the United States.”¹¹ With the additional power to regulate interstate and foreign commerce,¹² the Constitution places authority for United States trade law squarely in the hands of the federal government.

In the exercise of this authority, the first tariff law of 1789 recognized as its purposes both raising revenue to finance the

flow of international trade for that country could stop, even though the decision might be “uneconomic.” Yet no violation of GATT would occur. GATT usually presumes that trading enterprises will act on commercial considerations and that the economic theories of comparative advantage will lead these enterprises to extend their international trade in order to reap its benefits, just as enterprises within a domestic economy desire trade as a means toward economic advantage and also desire the economies of scale that trade and its attendant specialization allow.

Id. (footnotes omitted). See also LOWENFELD, *supra* note 6, at 15-16. In developing the International Trade Organization and the GATT:

[t]he general outlook on trade issues . . . was similar to the outlook on monetary matters: international economic activity was to be encouraged; it was to be conducted primarily by private firms, governmental intervention was to be subject to a code of conduct designed to reduce restrictions; and there was to be an overriding rule of non-discrimination.

Id. (footnotes omitted).

10. The Articles of Confederation gave to the central government the sole authority to make treaties with foreign governments, but allowed each state to establish its own duties on imported goods, including goods imported from other states. Articles of Confederation, arts. IV & VI, reprinted in HENRY S. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 100-02 (9th ed. 1973). For a review of the early history of United States customs law, see CLUBB, *supra* note 6, at 3-15.

11. U.S. CONST. art. I, § 8.

12. *Id.*

new government and protecting the infant manufacturing industry of the emerging nation. While the southern states supported a free trade policy to promote agricultural exports, the northern states favored the more protectionist policies championed by Alexander Hamilton.¹³ Hamilton's efforts met with some success in this first act — “a moderately protective” measure¹⁴ — which specifically states that the imposition of duties on imports “is necessary for the support of government, for the discharge of the debts of the United States, and the encouragement and protection of manufactures.”¹⁵

Whether protectionism or free trade prevailed at any given time, the reliance on tariffs as the primary source of revenue was of overriding significance in the early history of the United States government. From 1789 until the War of 1812, customs duties consistently provided the vast majority of federal government receipts.¹⁶ This again became the case in 1819, and until the tax measures imposed to fund the Civil War, customs duties were the primary source of receipts.¹⁷ In fact, except for three years during the civil war,¹⁸ until the 1890's, customs duties were consistently responsible for nearly fifty percent or more of fed-

13. UNITED STATES TRADE REPRESENTATIVE, A PREFACE TO TRADE 3 (1982) [hereinafter UNITED STATES TRADE REPRESENTATIVE]. See ALEXANDER HAMILTON, REPORT ON THE SUBJECT OF MANUFACTURES (1790), reprinted in FRANK W. TAUSSIG, STATE PAPERS AND SPEECHES ON THE TARIFF 1-107 (Augustus M. Kelley ed., 1972) (1892) [hereinafter HAMILTON, REPORT].

14. UNITED STATES TRADE REPRESENTATIVE, *supra* note 13, at 3.

15. 1 Stat. 24.

16. UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, BICENTENNIAL EDITION, PART 1 1106 (table Y 352-57) (1975). Representative figures indicating tariff revenues and total revenues, as well as the percentage of total revenues represented by tariffs, for twenty year intervals are as follows (figures are in thousands of dollars):

<u>year</u>	<u>tariff revenue</u>	<u>total revenue</u>	<u>tariff revenue as a percentage of total revenue</u>
1792	3,443	3,670	93.8%
1800	9,081	10,849	83.7%
1820	15,006	17,881	83.9%
1840	13,500	19,480	69.3%
1860	53,188	56,065	94.8%
1880	186,522	333,527	55.9%
1900	233,165	567,241	41.1%
1920	322,903	6,648,898	4.9%

17. *Id.*

18. *Id.*

eral revenues.¹⁹ It was not until World War I that income taxes replaced customs duties (supplemented by excise taxes and the sale of public lands) as the principal source of federal revenue.²⁰

Given current acceptance of comparative advantage theory, one may question why the citizens of the nation acquiesced in the imposition of the substantial tariffs necessary to provide such a large portion of the financial needs of their government. One commentator offers three reasons for the rather placid acceptance of tariffs.²¹ First, prior to the Constitutional Convention, each of the states had its own tariff system. When the Constitution forbade state imposition of tariffs, federal legislation merely replaced what already had been imposed by the states. The change in source made no real difference to the consumer. Second, tariff duties were generally reflected in the price of a good to the consumer and tended not to appear as a separate charge. This was in contrast to more direct taxes, such as the whiskey excise tax, which were violently opposed by citizens.²² Finally, tariffs had been discussed extensively in both the *Federalist Papers*,²³ and in the debates of the Constitutional Convention.²⁴ Thus, from the beginning, the need for a tariff appears to have been taken as a given, particularly in light of the concurrent need to finance the federal government and a desire to avoid any form of direct taxation.²⁵

With the ratification of the Sixteenth Amendment, the in-

19. *Id.* See also JOHN F. WITTE, *THE POLITICS AND DEVELOPMENT OF THE FEDERAL INCOME TAX* 80 (1985).

20. SUSAN B. HANSEN, *THE POLITICS OF TAXATION* 62 (1983) [hereinafter HANSEN].

21. DALL W. FORSYTHE, *TAXATION & POLITICAL CHANGE IN THE YOUNG NATION 1781-1833*, 64-67 (1977) [hereinafter FORSYTHE].

22. *Id.* at 38-61. See also HANSEN, *supra* note 20, at 75.

23. Alexander Hamilton, *THE FEDERALIST* No. 12, at 74-79 (Jacob E. Cooke ed., 1961).

24. FORSYTHE, *supra* note 21, at 62-63.

25. One of the problems with reliance on tariffs as the principal revenue source was that the times of greatest need for funds often coincided with (and in many cases resulted from) events that operated to reduce tariff revenue. Thus, despite increases in federal spending, and the assumption of the debts of the states, the federal government retired the residual Revolutionary War debt by 1800 and cut the national debt generally by a third by 1808. HANSEN, *supra* note 20, at 75; FORSYTHE, *supra* note 21, at 68. During the War of 1812, on the other hand, the general decrease in trade required consideration of taxes on incomes and inheritances. In the words of Albert Gallatin, Secretary of the Treasury under President Jefferson, "in time of peace [the tariff] is almost sufficient to defray the expenses of a war; in time of war, it is hardly competent to support the expenses of a peace establishment." FORSYTHE, *supra* note 21, at 58. As trade resumed after the war, Congress repealed the income and inheritance taxes and again relied on the tariff. HANSEN, *supra* note 20, at 76.

come tax emerged as the principal source of revenue in the early twentieth century.²⁶ With the addition of the income tax as a source of funds, congressional jealousy over the legislation of tariffs subsided.²⁷ The Tariff Commission (later renamed the International Trade Commission) was created in 1916 in order to investigate the administrative, fiscal, and economic effect of United States customs laws, as well as our tariff relationships with other countries.²⁸ The decline in the importance of tariffs as a source of revenue coincided with the maturation of United States industry. The justification for protective tariffs was significantly diminished when the United States emerged from World War I as a creditor nation — while Europe was immersed in debt. Nevertheless, the nationalistic mood that followed the war resulted in heavy protectionist sentiment and led to the Smoot-Hawley Tariff Act of 1930 (Smoot-Hawley), which established the highest tariffs in United States history.²⁹

Events in the United States had their counterparts in other countries. Economists point to two “landmarks” of the commercial history of the nineteenth century: the repeal of the Corn Laws in England in 1846, and the Cobden-Chevalier Treaty of 1860 between France and Britain.³⁰ The repeal of the Corn Laws led to freer international trade in grain, and the Cobden-Chevalier Treaty led to reduced tariffs throughout Europe. Prior to the Treaty, France was seen as a “protectionist bastion,” as well as one of the richest markets of Europe.

26. Questions regarding the constitutionality of the income tax were resolved with the ratification on February 3, 1913, of the Sixteenth Amendment to the United States Constitution, which reads: “The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.” U.S. CONST. amend. XVI.

27. Some would say that Congress simply tired of the process of tariff-setting and readily relinquished its role over that task in 1934:

Tariff rate-making in Congress is an atrocity. It lacks any element of economic science or validity. I suspect the 10 Members of the Senate, including myself, who struggled through the 11 months that it took to write the last congressional Tariff Act, would join me in resigning before they would be willing to tackle another general congressional Tariff revision.

Senator Arthur Vandenburg’s remarks, *in* 94 CONG. REC. 8049-8050 (1948).

28. Revenue Act of 1916, Title VI, Pub. L. No. 64-271, 39 Stat. 756, 795-98 (1916).

29. Pub. L. No. 71-361, 46 Stat. 590 (1930). Smoot-Hawley followed by about two years the decision of the United States Supreme Court which, for the first time, definitively ruled that an obviously protective tariff act was constitutional. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 411-13 (1928).

30. GERARD CURZON, *MULTILATERAL COMMERCIAL DIPLOMACY* 15 (1965) [hereinafter CURZON].

The real significance of the Cobden-Chevalier Treaty was not so much in its opening up of French markets to Britain, as in its influence on subsequent treaties with France, all of which contained most-favored nation clauses. Between 1862 and 1867, commercial treaties with France were signed by Belgium, Prussia and the Zollverein, Sweden, Italy, Switzerland, Norway, the Hanse towns, Spain, the Netherlands, Austria, and Portugal.³¹ These countries also made similar treaties with each other and through the resulting system of most-favored-nation provisions, the concessions granted by one country to another were generalized to all.³²

The Franco-Prussian War, cheap wheat from America, and the resulting complaints of French farmers in the 1870's led to strong protectionist feelings, causing France to turn away from free trade policies. In Germany, agrarian conservative reaction to competition from the United States added to pressure from the National-Liberal Party's iron and steel industry base that had been protectionist for some time.³³ This combination led to the Bismarck Tariff of 1879, which broke the free-trade tradition of the Zollverein. With a German Constitution that made the central government heavily dependent on the Länder, tariff revenue was one of the few sources of income under the direct control of the Reich that could avoid Bismarck's dislike of direct taxation.

All of this accompanied tariff changes following the Civil War in the United States; changes that were the first step toward a new protectionism.³⁴ While England remained a liberal trader until the end of the nineteenth century (with as few as fifteen items on its tariff list), this changed as it too joined the protectionist trend. By World War I, all the major trading nations had moved away from free trade to various levels of protectionism.

IV. THE INTERWAR PERIOD

The period following World War I became so highly protectionist on a global basis that even the period from 1860 to 1914

31. *Id.*

32. LILLIAN C.A. KNOWLES, *ECONOMIC DEVELOPMENT IN THE NINETEENTH CENTURY, FRANCE, GERMANY, RUSSIA AND THE UNITED STATES* 250 (1932).

33. CURZON, *supra* note 30, at 17.

34. WILHELM ROPKE, *GERMAN COMMERCIAL POLICY* 4 (1934).

has sometimes been termed the "golden age" of commercial policy.³⁵ Nationalistic tendencies during the war remained as nations emerged with higher tariffs than when the war had begun. Although these tariffs were reduced somewhat prior to the early 1930's, economic depression was met with increased nationalism and resulting increased protectionism. The United States was again a leader in this process, with the 1921 Emergency Tariff Act,³⁶ imposing high duties on agricultural imports, and the Fordney-McCumber Tariff Act of 1922,³⁷ which granted the President authority to adjust rates up or down by 50 percent. This authority was used in eight years to increase rates thirty two times and to decrease rates only five times.³⁸

The increased tariffs of Smoot-Hawley were followed by reciprocal increases throughout the world. While the objective of Smoot-Hawley was the creation of new jobs for United States workers suffering from early depression problems, any new jobs resulting from the legislation were probably at least offset by the results of markets closed by other countries' retaliatory tariff increases. The reaction to these negative effects of Smoot-Hawley was an effort to temper its high tariff rates.

Realizing the need for agreements to reduce tariffs, the United States, under the influence of Secretary of State Cordell Hull, passed the 1934 Reciprocal Trade Agreements Act (1934 Trade Act), a rather short amendment to section 350 of Smoot-Hawley, which authorized the negotiation of tariff reduction agreements.³⁹ Although the 1934 Trade Act called for negotiations based on the concept of reciprocity, the resulting bilateral agreements all contained unconditional most-favored-nation clauses, generalizing concessions on a multilateral basis. History was repeating the results of the Cobden-Chevalier Treaty of 1860. For the United States, however, this process represented a significant development in the relations between Congress and the President. By authorizing Presidential adjustment of tariffs by reciprocal agreement (subject to Congressional direction and review), the 1934 Trade Act blended the Constitutional authority of Congress over foreign commerce and the President's au-

35. CURZON, *supra* note 30, at 20.

36. Antidumping Act of 1921, Pub. L. No. 67-10, 42 Stat. 9 (1921).

37. Tariff Act of 1922, Pub. L. No. 67-318, 42 Stat. 858 (1922).

38. CURZON, *supra* note 30, at 23.

39. Reciprocal Trade Agreements Act of 1934, pt. III, Pub. L. No. 316, 48 Stat. 943 (current version at 19 U.S.C. §§ 1351-1354 (1982)).

thority to enter into treaties upon the advice and consent of the Senate.⁴⁰ This grant of authority to the President has been periodically renewed and today exists in the fast track authority under the Omnibus Trade and Competitiveness Act of 1988, which was extended in the spring of 1991 in order to accommodate the completion of the Uruguay Round of multilateral trade negotiations.⁴¹

The effort to liberalize trade through reciprocal agreements and most-favored-nation provisions did not always proceed smoothly. In the 1930's and early 1940's, leading figures such as the economist, John Maynard Keynes, promoted national self-sufficiency to make the United States "as free as possible of interference from economic changes elsewhere," through "greater national self-sufficiency and economic isolation."⁴² Some economists and historians see these protectionist forces as principal contributors to the conditions leading to World War II. Thus, the inextricable link between economic and political conditions is apparent in times of international turmoil. This was the background from which the United States and the world emerged after World War II.

V. THE DEVELOPMENT OF TRADE RELIEF MECHANISMS IN UNITED STATES LAW PRIOR TO THE GATT

In addition to being the primary source of revenue during the early history of the United States, tariffs represented the principal form of protection of United States industry. Early

40. Reciprocity treaties had been negotiated with a number of countries under the Tariff Act of 1890, but terminated under the Tariff Act of 1894. The Tariff Act of 1897 authorized the President, without congressional participation, to proclaim lower duties if "reciprocal and equivalent" concessions were obtained from exporting countries. "This was the beginning of the movement toward Executive Branch tariff making, which would later form the basis for the modern trade agreement program." CLUBB, *supra* note 6, at 52. The Tariff Act of 1897 did not result in significant trade agreements. The Tariff Act of 1913 provided a two-step process for the implementation of reciprocal trade agreements, authorizing the President to negotiate trade agreements with reduced tariffs which would go into effect upon ratification by both houses of Congress. *Id.* at 83. This simplified the common understanding of prior constitutional procedure that would require Senate ratification followed by implementing legislation passed by the House of Representatives. *Id.*

41. Extension of fast-track approval occurred in 1991 when Senate and House Resolutions that would have denied extension were defeated. 137 CONG. REC. H3588 (daily ed. May 23, 1991); 137 CONG. REC. S6829 (daily ed. May 24, 1991). See *Senate and House Vote to Extend Fast Track for North American FTA, Uruguay Round Talks*, 8 Int'l Trade Rep. (BNA) 802 (May 29, 1991).

42. John M. Keynes, *National Self-Sufficiency*, 22 YALE REV. 763 (1933).

discussions of protection of United States industry generally assumed that those goals could be accomplished appropriately through the use of tariffs.⁴³ Just as trade was less sophisticated than it is today, so were the methods of protection. As governments and private parties devised new methods of creating competitive advantages for their industries, they also began to provide mechanisms for responding to the use of tariff and nontariff devices by other governments and by foreign private parties.

Reciprocal trade agreements operated to reduce the tariffs imposed by both parties in a bilateral relationship, and to generalize those benefits multilaterally through the unconditional most-favored-nation clause contained in each bilateral agreement.⁴⁴ Authorized by the 1934 Trade Act,⁴⁵ thirty-two such bilateral agreements were entered into by the United States prior to the negotiations on the GATT and the International Trade Organization Charter at the end of World War II.⁴⁶ These agree-

43. Alexander Hamilton listed "duties on those foreign articles which are the rivals of the domestic ones intended to be encouraged," as the first of his "proper" means to encourage manufactures in the United States. HAMILTON, REPORT, *supra* note 13, at 62.

Duties of this nature evidently amount to a virtual bounty on the domestic fabrics, since by enhancing the charges on foreign articles they enable the national manufacturers to undersell all their foreign competitors. The propriety of this species of encouragement need not be dwelt upon, as it is not only a clear result from the numerous topics which have been suggested, but is sanctioned by the laws of the United States in a variety of instances; it has the additional recommendation of being a resource of revenue. Indeed, all the duties imposed on imported articles, though with an exclusive view to revenue, have the effect in contemplation; and, except where they fall on raw materials, wear a beneficent aspect towards the manufactures of the country.

Id.

44. The first United States treaty with a most-favored-nation (MFN) clause was the 1778 treaty with France. Treaty of Amity and Commerce, Feb. 6, 1778, U.S.-Fr., 8 Stat. 12, reprinted in 7 CHARLES I. BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949, 763 (1971). That clause granted France the same concessions that the United States granted to a third country, "freely, if the Concession [to the third country] was freely made, or on allowing the same Compensation, if the Concession was Conditional." *Id.* at art. 2. Thus, concessions for which other treaty partners provided specific compensation were available to France only upon provision of compensation by France. The United States abandoned the conditional MFN form in 1923. CLUBB, *supra* note 6, at 12, 92-93. Unconditional MFN treatment was a cornerstone of the Reciprocal Trade Agreements Act of 1934. 19 U.S.C. §§ 1351-1354.

45. 19 U.S.C. §§ 1351-1354.

46. John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 250, 258 (1967) [hereinafter Jackson, *General Agreement*]. The agreements are listed in *Hearings on the Extension of the Reciprocal Trade Agreements Act Before the House Comm. on Ways and Means*, 79th Cong., 1st Sess. 932 (1945). Each Congressional authorization to enter into trade agreements was for a limited period. In addition to the 1934 Act, agreements prior to the GATT were

ments reduced the Smoot-Hawley rates of 1930.

Even before the reciprocal trade agreements process, however, United States law began to reflect the desire to respond to unfair trade mechanisms. When, in the 1890's, Germany subsidized sugar exports, Congress responded with a fixed countervailing duty intended to negate the subsidy.⁴⁷ Germany reciprocated with an increased bounty designed to offset the United States duty.⁴⁸ Wanting a more flexible response to the subsidy, Congress implemented a flexible countervailing duty equal to the amount of the subsidy granted.⁴⁹ Thus the birth of United States countervailing duty law.⁵⁰

In the early 1900's, Congress also was concerned with the practice of foreign companies selling their products in the United States at a price less than that which they charged in their home market. It was assumed that the foreign exporter selling at less than the home market price intended to drive its United States competitor out of business and then raise the United States price of the foreign product. In response, Congress first enacted the Antidumping Act of 1916 (Antidumping Act) as

entered into under extensions of presidential authority in 1937, Resolution of March 1, Pub. Res. 10, 50 Stat. 24 (1937); 1940, Resolution of April 12, Pub. Res. 61, 54 Stat. 107 (1940); 1943, Resolution of June 7, Pub. L. No. 66, 57 Stat. 125 (1943); and 1945, Act of July 5, Pub. L. No. 130, 59 Stat. 410 (1945).

47. Tariff Act of 1890 § 237, 26 Stat. 567, 584 (1890); Tariff Act of 1894 § 182, 28 Stat. 509, 521 (1894). See CLUBB, *supra* note 6, at 67-68.

48. CLUBB, *supra* note 6, at 68-69.

49. CLUBB, *supra* note 6, at 68-69. While the countervailing duty originally was focused only on Germany, after a complaint that this violated the most-favored-nation provision of the treaty with Germany, the duty was revised to apply to all subsidies from any country. *Id.*

50. The countervailing duty provisions of the 1897 Act were continued with minor amendment in the Tariff Act of 1909, ch. 6, 36 Stat. 11, and reenacted unchanged in the Tariff Act of 1913, ch. 16, 38 Stat. 114. This was the case even though the 1913 Act significantly reduced duties, thus retaining only the remedial (some would say "protectionist") character of the countervailing duty provision. The Tariff Act of 1922, ch. 356, 42 Stat. 858, in addition to raising tariffs once again, strengthened the countervailing duty provisions by making them applicable to subsidies not only on the "exportation" of products, but also on the "manufacture" or "production" of merchandise. SENATE COMM. ON FINANCE, S. REP. No. 595, 67th Cong., 2d Sess. 250-51 (1922). This provision was continued with no substantive change in the Tariff Act of 1930, § 303, Pub. L. No. 71-361, 46 Stat. 687, and remained unchanged until the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975). The 1974 Act for the first time made countervailing duty law applicable to duty-free products, but added an injury requirement for such goods. It also tightened procedural requirements, establishing time limits for making the administrative decisions necessary to the investigation. The Trade Agreements Act of 1979, Pub. L. No. 96-39, tit. I, § 101, 93 Stat. 150, then brought United States countervailing duty law into conformity with the Tokyo Round Subsidies Code.

part of the Wilson Tariff Act.⁵¹ That Antidumping Act made it unlawful to import articles into the United States "at a price substantially less than the actual market value . . . of such articles . . . in the principal markets of the country of their production," and "with the intent of destroying or injuring an industry in the United States."⁵² The Antidumping Act contained criminal penalties and provided civil damages for injured parties.⁵³ Proving the necessary intent requirement apparently proved such a difficult hurdle that no successful prosecutions have been reported under the Antidumping Act. The 1921 Antidumping Act began the current system, which imposes an offsetting duty on articles exported to the United States at a price less than that charged in the home market.⁵⁴

Smoot-Hawley most often is cited for raising tariffs and, as a practical matter, did little else except to continue provisions of prior acts.⁵⁵ It is the current source, however, of provisions that have become staples of United States trade remedy law. The current versions of both antidumping law⁵⁶ and countervailing duty law⁵⁷ are amended versions of provisions of the 1930 Act. The same is true for section 337 governing unfair practices in import trade.⁵⁸ The administrative process for antidumping and countervailing duty actions has since been reflected in Articles VI and XVI of the GATT and in the Tokyo Round Antidump-

51. Antidumping Act of 1916, Pub. L. No. 64-271, Title VIII, 39 Stat. 798 (current version at 15 U.S.C. § 72 (1982)).

52. *Id.* at § 801.

53. *Id.*

54. Antidumping Act of 1921, §§ 201-212, 42 Stat. at 9.

55. On the common assertion that the 1930 Act raised tariffs to their highest rates in United States history, see CLUBB, *supra* note 6, at 117 n.1:

No detailed comparison has been made between the Tariff Act of 1930 and the tariffs of earlier times, such as those of 1828 and 1832. Nor is it clear that any sensible comparison could be made with the different products involved or, if it could, that anyone would want to do it. Nonetheless, it is the conventional wisdom that the Smoot-Hawley Tariff Act of 1930 set the highest rates in U.S. history.

56. Tariff Act of 1930 §§ 731-739, Pub. L. 71-361, 46 Stat. 687 (codified as amended at 19 U.S.C. § 1673 (1979)).

57. Tariff Act of 1930 §§ 303 and 701-709 (codified as amended at 19 U.S.C. §§ 1303 and 1671).

58. Tariff Act of 1930 § 337 (codified as amended at 19 U.S.C. § 1337). Section 337 originated in the "flexible tariff" provisions of the Tariff Act of 1922 § 316, 42 Stat. 858, 943-44. Those provisions also allowed tariffs to be applied based upon a Presidentially-determined cost of production (rather than the arguably lower import price), and authorized retaliatory tariffs imposed against countries that did not accord most-favored-nation treatment to United States exports. Tariff Act of 1922 §§ 315 and 317, 42 Stat. 941, 944.

ing and Subsidies Codes.⁵⁹ Section 337 has had a less auspicious fate, having been found inconsistent with Article III:4 of the GATT in a panel report adopted by the GATT Council in November of 1989.⁶⁰

Under the antidumping, countervailing duty, and unfair trade practice provisions, private parties may petition the United States Government for relief from unfair measures of both foreign governments and private parties. Antidumping duties may be imposed in response to foreign producers selling in the United States market at less than the value at which they sell in their home market. Countervailing duties may be imposed upon imported goods that receive the benefit of export subsidies provided by the producer's government. Thus, such goods enter the United States market at what the United States Department of Commerce (Commerce Department) determines is the "fair" price at which they should compete with domestically-produced goods.⁶¹ Section 337 allows more dramatic relief, providing the possibility of a complete exclusion order should a foreign product infringe a valid United States patent, trademark, copyright, or semiconductor chip mask work, or be imported using other unfair methods of competition. In any event, each of these measures provides relief through United States governmental response to the conduct of foreign sovereigns or private parties.

During the 1930's, United States law developed the precursor to the modern "escape clause," which provides relief from import competition even when no unfair practice is involved.

59. *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* (GATT Antidumping Code), GATT, BISD (26th Supp.) 171 (1980); *Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade* (GATT Subsidies Code), L/6439 GATT, BISD (26th Supp.) 56 (1980).

60. *United States — Section 337 of the Tariff Act of 1930, Panel Report of 23 November 1988*, GATT, BISD (36th Supp.) 345 (1990).

61. In both antidumping and subsidy proceedings, the International Trade Administration of the Department of Commerce is responsible for the determination of the margin of dumping or subsidy, respectively. The statute uses the term "administering authority," which is defined as "the Secretary of the Treasury, or any other officer of the United States to whom the responsibility for carrying out the duties of the administering authority . . . are transferred by law." 19 U.S.C. § 1677(1). This responsibility was transferred from the Secretary of the Treasury to the Secretary of Commerce, effective Jan. 1, 1980. Reorg. Plan No. 3 of 1979, 44 Fed. Reg. 69, 273-75 (1979). In each case, the International Trade Commission is responsible for making the related determination of whether the domestic industry is "materially injured," or is "threatened with material injury," or "the establishment of an industry in the United States is materially retarded." 19 U.S.C. §§ 1671(a)(2) and 1673(2).

Part of the Canadian Trade Agreement of 1938 provided for a reduced tariff on silver fox.⁶² The reduction was considered a benign development because many fox furs from both Canada and Norway (the other major source) were sold in Europe.⁶³ When World War II limited demand in and access to the European markets, however, United States imports of fox surged and United States producers complained. After Tariff Commission hearings, the trade agreement with Canada was renegotiated to provide for a quota on fox fur skins.⁶⁴ Future trade agreements, however, included an escape clause allowing either party to avoid its bound duty obligations under the trade agreement if a domestic industry was subject to, or threatened with, serious injury by a sudden surge in imports.⁶⁵ This escape clause mechanism became the model for Article XIX of the GATT. Its successor in United States statutory law is the amended section 201 of the Trade Act of 1974.⁶⁶

Thus, United States trade law developed through domestic legislation and international agreements, both of which are the "supreme law of the land" under the United States Constitution.⁶⁷ With the GATT, however, the world entered a new era of trade law. This era, which saw the GATT develop as an institution as well as an agreement, brought about important new issues in United States trade law. To understand these issues, and the manner in which they developed, it is useful to review the development of the GATT itself and to look at its influence on domestic law generally.

VI. THE GATT AND ITS INFLUENCE ON TRADE LAW DEVELOPMENT IN THE UNITED STATES

A. *The United States Role in the Creation of the GATT*

The General Agreement on Tariffs and Trade had its origins in a United States Department of State publication released in 1945 that included a "Proposal for Consideration by an International Conference on Trade and Employment."⁶⁸ This document

62. Reciprocal Trade Agreement, Nov. 17, 1938, U.S.-Can., 53 Stat. 2348, 2389.

63. CLUBB, *supra* note 6, at 121.

64. Reciprocal Trade Agreement, Dec. 30, 1939, U.S.-Can., 54 Stat. 2413, 2415.

65. See, e.g., Trade Agreement with Mexico, Dec. 23, 1942, U.S.-Mex., 57 Stat. 833, 845-46.

66. 88 Stat. 2011 (current version at 19 U.S.C. §§ 2251 (1975)).

67. U.S. CONST. art. VI, cl. 2.

68. Proposals for the Expansion of World Trade and Employment, Dept of State

formed the basis for the negotiation of a Charter for an International Trade Organization (ITO).⁶⁹ As negotiations proceeded, there developed a separate agreement to lock in negotiated tariff reductions. This was the General Agreement on Tariffs and Trade.

United States participation in the negotiations, for both the ITO and the GATT, was under the trade agreement negotiating authority originating in the 1934 Trade Act and extended periodically.⁷⁰ As the deadline for the negotiating authority dele-

Pub. 2411 (Washington 1945). "The earliest glimmerings of the GATT were in discussions from 1942 onward between the United States, the United Kingdom and Canada on carrying out the provisions of Article VII of the February 1942 Lend-Lease Agreement, on planning for the postwar economic and trade system." Amelia Porges, *Researching International Law*, 83 AM. SOC'Y INT'L L. 112 (1989).

69. The International Trade Organization Charter was developed under the auspices of the Economic and Social Council of the newly-formed United Nations, which appointed a Preparatory Committee of nineteen nations in February 1946, to draft a convention to be considered at an International Conference on Trade and Employment. The draft convention was considered at sessions in London *Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Development*, U.N. Doc. E/PC/T/33 (1946), reprinted as *Preliminary Draft Charter for the International Trade Organization of the United Nations*, Department of State Pub. 2728, Commercial Policy Series 98 (1946)), and Geneva from April 10 to August 22, 1947. *Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment*, U.N. Doc. E/PC/T/186 (1947), reprinted as *Draft Charter for the International Trade Organization of the United Nations*, Department of State Pub. 2927, Commercial Policy Series 106 (1947). This Draft followed a prior revision of the "London Draft" by the Drafting Committee of the Preparatory Committee in New York which met from January 20 to February 25, 1947. *Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment*, U.N. Doc. E/PC/T/34/Rev.1 (1947). A final conference in Havana from November 21, 1947 to March 24, 1948 produced the "Havana Charter," the Charter for an International Trade Organization. *Reports of Committees and Principal Sub-Committees of the United Nations Conference on Trade and Employment*, U.N. Doc. ICITO 1/8 (1948); *United Nations Conference on Trade and Employment, Final Act and Related Documents*, U.N. Doc. E/Conf.2/78 (1948).

70. After the Reciprocal Trade Agreements Act of 1934, the United States Congress had renewed Presidential authority to negotiate reciprocal trade agreements in 1937, Joint Resolution to extend the authority of the President under § 350 of the Tariff Act of 1930, *as amended by* Pub. Res. 10, 50 Stat. 24 (1937); 1940, Joint Resolution to extend the authority of the President under § 350 of the Tariff Act of 1930, *as amended by* Pub. Res. 61, 54 Stat. 107 (1940); 1943, Joint Resolution to extend the authority of the President under § 350 of the Tariff Act of 1930, *as amended by* Pub. Res. 66, 57 Stat. 125 (1943); and 1945, An act to extend the authority of the President under § 350 of the Tariff Act of 1930 and for other purposes, Pub. L. No. 129, 59 Stat. 410 (1945). The negotiating authority under § 350 of the 1930 Act was extended again by the Trade Agreement Extension Acts of 1948, Pub. L. No. 80-792, 62 Stat. 1053; 1949, Pub. L. No. 81-307, 63 Stat. 697; 1951, Pub. L. No. 82-50, 65 Stat. 72; 1953, Pub. L. No. 83-215, 67 Stat. 472; 1954, Pub. L. No. 83-464, 68 Stat. 360; 1955, Pub. L. No. 84-86, 69 Stat. 162; and 1958, Pub. L. No. 85-686, 72 Stat. 673. Section 201 of the Trade Expansion Act of

gated by Congress to the President approached, the contracting parties concluded the "provisional" General Agreement on Tariffs and Trade, with the understanding that the ITO Charter (Charter), once completed and ratified, would provide the institutional framework for the administration of the GATT.

Once completed, the Charter suffered from congressional ambivalence toward international cooperation generally.⁷¹ Further concerns were raised because the Charter (1) dealt not only with trade, but also with the encouragement of full employment and with competition law matters, (2) may have been too legalistic for the time, and (3) like the GATT, contained many exceptions to its trade rules. When efforts to adopt the Charter failed, the United States was left with the General Agreement on Tariffs and Trade. The GATT, an executive agreement that itself was never ratified as a treaty by the United States,⁷² was adopted by the contracting parties on a "provisional" basis.⁷³ It contained no detailed provisions for a body to administer what rules it did contain, provided only vague provisions on the resolution of disputes, and contained none of the Charter's provisions on employment or restrictive business practices. Further,

1962 provided similar language in authorizing participation in the Kennedy Round of trade negotiations. Pub. L. No. 87-794, tit. II, § 201, Oct. 11, 1962, 76 Stat. 872. It was under this authority that the United States entered into some thirty-two bilateral trade agreements prior to the GATT. As part of the 1945 extension, authority had been granted to the United States President for three years to reduce tariffs to as low as 50% of their existing levels.

71. The events surrounding United States reversion to nationalistic attitudes following the perceived failure of the United Nations at the end of the 1940's are documented in CURZON, *supra* note 30, at 15-33; WILLIAM DIEBOLD, JR., *THE END OF THE ITO* (Princeton University International Finance Series No. 16, 1952) [hereinafter DIEBOLD]; KENNETH W. DAM, *THE GATT: LAW AND THE INTERNATIONAL ECONOMIC ORGANIZATION* 10-13 (1970) [hereinafter DAM]; JACKSON, *WORLD TRADE*, *supra* note 6, at 35-57. For a general history and discussion of the GATT, see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW pt. VIII ch. 1, intro. (1987) [hereinafter RESTATEMENT].

72. The General Agreement was adopted by agreement to the Protocol of Provisional Application of the General Agreement on Tariffs and Trade, October 30, 1947, 61 Stat. Part 5 at A2051 (1947), T.I.A.S. No. 1700, 55 U.N.T.S. 308 (1950) *reprinted in* IV GATT, BISD 77 (1969) [hereinafter Protocol of Provisional Application]. Consequently, both the GATT and the Protocol receive their authority in United States law, not as a result of any direct congressional act, but rather through Presidential agreement to and proclamation of the effectiveness of the Protocol of Provisional Application. Proclamation No. 3513, 28 Fed. Reg. 107, 115 (1963). *See also* Proclamation No. 2761A, 12 Fed. Reg. 8863, 8866 (1947). Proclamations also accompanied the major amendments to the GATT text in 1948 and 1955, specifically stating that "GATT and agreements supplementary thereto shall be applied." Proclamation No. 2829, 14 Fed. Reg. 1151, 1153 (1949).

73. *See* Protocol of Provisional Application, *supra* note 72.

the bulk of the provisions of the GATT, which are contained in Part II which sets out the general commercial policy rules, and, pursuant to the Protocol of Provisional Application under which the GATT has been adopted, apply only "to the fullest extent not inconsistent with existing legislation."⁷⁴

As membership in the GATT grew, amendment of its terms became difficult.⁷⁵ Under Article XXX, unanimity is required for amendment to Articles I, II and XXX, and a two-thirds majority is required for amendment of the other provisions. More recent developments have come in the form of side agreements or "codes" with their own membership lists.⁷⁶

The GATT is now both the Agreement itself, with its rules for international trade, and the organization that has grown up to fill the void left by the absence of the ITO. As an organization, the GATT provides a legal framework for the conduct of trade relations, a forum for trade negotiations and an organ for conciliation and settlement of disputes.⁷⁷

The role of the GATT as a forum for trade negotiation has

74. Protocol of Provisional Application, *supra* note 72.

75. In 1955, at the GATT Review Session, the General Agreement was re-examined and changes were made in the text. *Protocol amending the Preamble and Parts II and III of the General Agreement on Tariffs and Trade, 10 March 1955*, GATT publication, 10 March 1955, 278 U.N.T.S. 168. In 1964, the Contracting parties adopted Part IV, entitled "Trade and Development," providing in part that "the developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties." GATT, *supra* note 6, art. XXXVI:8. Later texts use the term, "developing countries" in place of "less-developed countries."

76. The Tokyo Round codes are the Agreement on Technical Barriers to Trade (Standards Code), GATT, BISD (26th Supp.) 8 (1980); Agreement on Government Procurement, GATT, BISD (26th Supp.) 33 (1980); Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, (Subsidies Code), GATT, BISD (26th Supp.) 56 (1980); Arrangement Regarding Bovine Meat, GATT, BISD (26th Supp.) 84 (1980); International Dairy Arrangement, GATT, BISD (26th Supp.) 91 (1980); Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade, GATT, BISD (26th Supp.) 116 (1980); Agreement on Import Licensing Procedures, GATT, BISD (26th Supp.) 154 (1980); Agreement on Trade in Civil Aircraft, GATT, BISD (26th Supp.) 162 (1980); and Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Antidumping Code), GATT, BISD (26th Supp.) 171 (1980). The Tokyo Round also produced five "framework" agreements for the reform of various aspects of the GATT. These agreements dealt with: 1) the role of developing countries in the international trading system; 2) trade measures taken to correct balance of payment deficits; 3) safeguard actions for development (infant industry) purposes; 4) an Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance; and 5) an agreement to reassess GATT articles on export controls following the Tokyo Round.

77. See, e.g., OLIVIER LONG, *LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM* 5 (1985) [hereinafter LONG].

been emphasized by the eight rounds of trade negotiations conducted under its auspices (Rounds).⁷⁸ At the same time, membership in the group of contracting parties has grown from the original twenty-three countries to over one hundred, with nearly thirty additional countries applying the GATT on a de facto basis.⁷⁹

B. *The Structure of the General Agreement*

The GATT framework is based on concepts laid out in its first three articles. Article I contains the most-favored-nation (MFN) "cornerstone."⁸⁰ MFN can be traced to previous efforts at multilateralization through multiple bilateral trade agreements following the Cobden-Chevalier Treaty in 1860 and the 1934 Trade Act.⁸¹ In the General Agreement, however, MFN is multilateralized in a single agreement. The idea that a state may not discriminate against trade with one foreign state in favor of another foreign state is fundamental to the GATT.⁸² All other states must be treated the same in the application of tariffs and other commercial policy rules.

By setting up a system of schedules of concessions negotiated at the successive Rounds, Article II contains both the framework for the fundamental negotiation process within the GATT system and the statement of the preferred method of

78. The dates of these "Rounds" and the city in which the principal negotiations have occurred, are as follows: Geneva 1947, Annecy 1949, Torquay 1951, Geneva 1956, Geneva 1960-61 ("Dillon Round"), Geneva 1964-67 (this round, the "Kennedy Round," provided across-the-board reductions in tariffs and unsuccessfully began to focus on nontariff barriers), Geneva 1973-79 (the "Tokyo Round" focused on nontariff barriers, producing several side agreements or "codes" that have since supplemented GATT rules), and Geneva 1986-present (the current "Uruguay Round").

79. *De Facto Application of the GATT*, GATT Focus, Aug. 1991, at 10, col. 3.

80. DAM, *supra* note 71, at 18.

81. See *supra* notes 30-34, 39-42 and accompanying text.

82. Paragraph 1 of Article I of the GATT sets out the general rule as follows:

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

GATT, *supra* note 6, para. 1, art. I.

working toward less restrictive trade.⁸³ Article II expresses the preference of the GATT system for tariffs as the accepted means of trade restriction.⁸⁴ Whereas the MFN principle of Article I requires equality of treatment among competing foreign products, the Article III principle of nondiscrimination requires equality of treatment between domestic products and foreign products in regard to internal taxes and other laws.

The Article II tariff reduction process was the focus of the first six Rounds of multilateral trade negotiations, from the initial round in Geneva in 1947 through the Kennedy Round in the second half of the 1960's. By the time of the Tokyo Round of the 1970's, tariffs had been reduced to a point where they were no longer the principal barriers to trade in industrial products throughout the world. Although negotiations to reduce tariffs were continued, the emphasis in the Tokyo Round shifted to negotiation of the reduction of nontariff barriers.⁸⁵ The Uruguay Round has continued this effort, and has been joined by a focus on the expansion of GATT rules to cover trade in services, trade-related investment, and intellectual property rights, as well as goods, and a renewed focus on agricultural trade barriers, particularly those in the United States and European Community.⁸⁶

C. The GATT as a Source of Trade Law on the International Level

Throughout the history of the GATT, there have been disagreements over both the role of its substantive rules and the application of those rules in the process of dispute settlement. Some have considered the GATT to be a source of substantive

83. This framework is set in paragraph 1(a) of Article II of the GATT which provides that, "[e]ach contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement." GATT, *supra* note 6, art. II. The schedules prepared at the successive rounds of negotiations thus become an integral part of the Agreement.

84. While Article II sets up the use of tariffs to quantify and then negotiate reductions in trade barriers, Article XI works in concert with this focus by providing for the general elimination of quantitative restrictions, thus allowing the focus on tariffs to operate. See GATT, *supra* note 6, art. XI.

85. See *supra* note 76 for the list of nontariff barrier codes resulting from the Tokyo Round.

86. *Ministerial Declaration adopted on 29 November 1982 (L/5424)*, GATT, BISD (29th Supp.) 9 (1983).

legal rules, and its dispute settlement procedures an appropriate adjudicative mechanism for the application of those rules. Others have continued to see the GATT as a forum for negotiation, with the role of dispute settlement described in terms of "consultation," rather than "litigation." The second Director-General of the GATT, Olivier Long, acknowledged the role of the GATT as a source of law as follows:

The influence of the law pervades all areas of GATT action.

The very existence of GATT law can also have important side-effects. Governments are likely to be more hesitant about taking unlawful trade measures when they know the rules are there, and that they may well come under heavy criticism for their action in an international forum. Conversely, governments can find the existence of the rules helpful in their efforts to resist pressure for protectionist measures, using the argument that, if they adopt them, other governments may take the retaliatory action permitted under the GATT.

Departures from the law are frequent in the GATT. It could hardly be otherwise with an international legal instrument dealing with world trade and trade relations. Nevertheless, the law remains central to GATT action and provides its underlying strength. Unlike most other international organizations the GATT embodies legal rights and obligations and conventional commitments. This is its main characteristic.⁸⁷

At the same time, Mr. Long, in a statement that tends to weaken this focus on the law, states that "[p]ragmatism and the legal approach should complement each other. What is important is that one should not prevail to any great extent over the other."⁸⁸

This tension between pragmatic and legal approaches to the GATT process is fundamental to any consideration of dispute settlement under the GATT and provides important insight into the role of the GATT as a source of both international and municipal law. Those favoring the pragmatic approach traditionally have viewed GATT dispute settlement as a natural extension of the negotiation process used to agree upon the rules of GATT. Former Director-General Long described this approach as follows: "GATT's aim, as perceived by the contracting parties, is to preserve the balance of concessions and the balance of advan-

87. LONG, *supra* note 77, at 64.

88. LONG, *supra* note 77, at 64.

tage and obligations between member countries, and not to resort to sanctions whenever a country is in breach of the rules."⁸⁹ Proponents of this approach take the position that, "the primary objective of dispute settlement procedures is not to decide who is right and who is wrong, or to determine a State's responsibility in the matter, but to proceed in such a way that even important violations are only temporary and are terminated as quickly as possible."⁹⁰ This focus carries with it a preference for a process of negotiation of disputes similar to the process of negotiation in multinational talks that lead to agreement on the rules and tariff concessions in the first place. Pragmatism and diplomacy are viewed as avoiding the poisoning effect of litigation, avoiding the bringing of "wrong" cases, and preventing pressure from being imposed on an already fragile system.⁹¹

The legalistic approach, on the other hand, has focused on the GATT as a system of rules by which the international trading system is to operate. Violations of these rules are to be exposed by specific findings, and dealt with through sanctions that are multilaterally authorized or perhaps unilaterally imposed. This approach is viewed as promoting compliance with the rules,⁹² being fairer by preventing the stronger party from "negotiating" an unfair solution,⁹³ allowing deflection of domestic political pressure,⁹⁴ and adding the international pressure necessary to obtain domestic compliance with GATT rules.⁹⁵

In the past, European commentators commonly have advocated the pragmatic approach, and United States commentators have defended the legalistic approach. It may be that these traditional differences of perception reflect differences in legal systems generally, with the United States placing greater faith

89. LONG, *supra* note 77, at 65-66.

90. Georges Malinverni, *Le Reglement des Differends Dans Les Organisations Internationales Economiques* 106 (Sijthoff, Leiden and Institute universitaire de hautes études internationales eds., 1974), cited in LONG, *supra* note 77, at 71. See also R. Phan van Phi, *A European View of the GATT*, 14 INT'L BUS. LAW. 150 (1986).

91. William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 70-73 (1987) [hereinafter Davey], citing John H. Jackson, *The Crumbling Institutions of the Liberal Trade System*, 12 J. WORLD TRADE L. 93, 98-101 (1978) and Robert E. Hudec, *GATT Dispute Settlement After the Tokyo Round: An Unfinished Business*, 13 CORNELL INT'L L.J. 145, 159, 166 (1980).

92. Davey, *supra* note 91, at 76.

93. Davey, *supra* note 91, at 76 n.100.

94. Davey, *supra* note 91, at 77.

95. Davey, *supra* note 91, at 77. See also Peter D. Ehrenhaft, *A US View of the GATT*, 14 INT'L BUS. LAW. 146 (1986).

in resolving disputes through litigation and Europeans preferring discussion and negotiation. Whatever the reason, Europeans have in the past tended to speak of GATT dispute settlement in terms of "conciliation" while Americans have spoken in terms of "litigation." In recent years, however, the general trend is toward increased legalization of the GATT process, including greater emphasis on dispute settlement and organizational competence.⁹⁶

The trend toward full recognition of a rule-based model is readily apparent in the Uruguay Round. If the Round is successful, there will be added to existing GATT rules (among others), measures governing agriculture, services, investment regulation, and intellectual property rights. The Uruguay Round would be a hollow exercise if it expanded the set of rules for international trade only to limit the meaning of those rules through renegotiation whenever one party alleges a violation by another party. Nowhere is the Uruguay Round's move toward a rule-based approach to international trade more apparent than in the area of dispute settlement, where procedures have been tightened and formalized with the implementation of specific time limits, and the draft agreement provides for the prevention of traditional blocking opportunities and a formal appeals system.⁹⁷

96. See *EC Wants Tough GATT To Stem Protectionism*, INT'L HERALD TRIBUNE, Mar. 6, 1990, at 9, col. 3.

97. The Montreal mid-term review included an agreement to tighten dispute resolution procedures, with specific time limits and procedures designed to reduce the opportunities to block the creation of panels and the adoption of panel reports. *Improvements to the GATT Dispute Settlement Rules and Procedures, Decision of 12 April 1989* (L/6489), GATT, BISD (36th Supp.) 61 (1990). The 1990 negotiating text goes much further, preventing a single-party veto of panel creation or report adoption, and setting up a formal appeal process. *Understanding on the Interpretation and Application of Articles XXII and XXIII of the General Agreement on Tariffs and Trade* (Brussels Negotiating Text) MTN.TNC/W/35 288-305 (1990). The draft text prepared by Director General Arthur Dunkel in December 1991 incorporates these elements of the Brussels text. *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, MTN.TNC/W/FA S.1-T.6 (Dec. 20, 1991). Other developments have emphasized the move toward a rule-based GATT. See, e.g., *European Industry Group Calls for Satisfactory End for Uruguay Round*, INT'L TRADE DAILY (BNA) (Oct 24, 1991) (President of UNICE—the European Industry Federation—states that to ensure "the credibility of the system," there must be "a dispute settlement mechanism which is semi-automatic, rapid, objective and binding."). In addition, the recent work of Pierre Pescatore to provide a system for researching and applying past GATT panel reports is likely to assist in making future panel reports look more like judicial decisions. PIERRE PESCATORE, WILLIAM J. DAVEY & ANDREAS LOWENFELD, *HANDBOOK OF GATT DISPUTE SETTLEMENT* (1991).

VII. GATT AND ITS RELATIONSHIP TO UNITED STATES TRADE LAW

A. *Coordination of Trade Relief Measures with the GATT*

United States trade relief measures that existed prior to the GATT have been continued, modified, and expanded in a manner that parallels GATT developments. These measures now serve to provide private party access not only to traditional United States trade rules, but also to some of the rules of the GATT itself. A review of the instruments providing this access presents a useful study of the way in which GATT rules have moved from the realm of public international law to a body of legal rules applicable to private party concerns.

The Tokyo Round antidumping and subsidies codes each authorize the establishment, by contracting parties, of domestic administrative procedures under which industries may bring complaints.⁹⁸ In each case, a national dispute settlement mechanism is allowed to consider both the question of dumping or subsidy (and its injurious effect) as well as the question of relief, ultimately allowing the imposition of offsetting duties.

Under the United States procedures for applying the antidumping and subsidies codes,⁹⁹ private industry complaints may result in the imposition, at the border, of additional duties on the importation of goods of a foreign competitor. In this way, private industry may use legislation effectively implementing the substantive rules of the GATT system in order to obtain direct relief from the violation of those rules by foreign private parties and governments.

In addition to antidumping and countervailing duty (anti-subsidy) procedures, the principal instrument for responding to other unfair trade practices by foreign governments is section

98. 1979 *Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade* (Subsidies Code), Articles II-IV, GATT, BISD (26th Supp.) 56, 57-67 (1980); 1979 *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade* (Antidumping Code), Articles II-XI, GATT, BISD (26th Supp.) 171, 172-83 (1980). In the case of the antidumping code, complaints may be brought against the activities of foreign private parties selling in the domestic market at less than the comparable price in the exporter's home market. *Antidumping Code*, Article II, *supra*, at 172. The subsidies code authorizes administrative systems allowing complaints against subsidies granted to foreign competitors by their governments. *Subsidies Code*, Article II, *supra*, at 57.

99. The United States antidumping law is found at 19 U.S.C. § 1673, and the countervailing duty (antisubsidy) law at 19 U.S.C. § 1671. The Community procedures for both are found in European Council Regulation 2423/88, 1988 O.J. (L 209).

301 of the Trade Act of 1974.¹⁰⁰ A petition may be filed with the Office of the United States Trade Representative (USTR) by any "interested person,"¹⁰¹ on behalf of an industry, showing that either the rights of the United States under a trade agreement are being denied, or that the act or practice of a foreign country is unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce.¹⁰²

Although the language of section 301 allows challenges of foreign government actions other than violations of GATT rules, its use has focused primarily on the rules of the GATT, at least as applied to trade in goods. Section 301 provides private industry with the means to bring to the United States Government allegations of violations of GATT rules by foreign governments. The procedural mechanism then requires that the United States Government initiate contact with the foreign government involved within the GATT dispute resolution framework (or the dispute resolution system of the appropriate GATT Code).¹⁰³ If the USTR finds that the rights of the United States under a trade agreement are being denied, or that the act or practice of a foreign country is unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce, the USTR is authorized to suspend or withdraw concessions under trade agreements, impose duties or other import restrictions, or enter into agreements to eliminate the act, policy, or practice that is the subject of the action.¹⁰⁴

In addition to these administrative mechanisms for addressing unfair trade practices upon private party complaint, the United States has established procedures for determining when "escape clause" or "safeguard" relief is appropriate under Arti-

100. The full coverage is contained in sections 301-306 of the Trade Act of 1974, 19 U.S.C. §§ 2411-2416. Section 301 replaced § 252 of the Trade Expansion Act of 1962, Pub. L. No. 87-794, 75 Stat. 879 (current version at 19 U.S.C. § 1801 (1962)). This was the provision used in the "Chicken war" with the European Community in the 1960's. See ABRAM CHAYES, THOMAS EHRLICH & ANDREAS F. LOWENFELD, *I INTERNATIONAL LEGAL PROCESS* 249-306 (1968).

101. 19 U.S.C. § 2412(a)(1).

102. 19 U.S.C. § 2411(a)(1).

103. Section 303(a)(1) provides that, "on the date on which an investigation is initiated under section 2412(b), the Trade Representative, on behalf of the United States, shall request consultations with the foreign country concerned regarding the issues involved in such investigation." 19 U.S.C. § 2413(a)(1). Section 302(a)(2) then ties this consultation into the procedure of any appropriate international agreement to which the United States is a party. 19 U.S.C. § 2413(a)(2).

104. 19 U.S.C. § 2411(c).

cle XIX of the GATT. Section 201 of the Trade Act of 1974 allows relief when "an article is being imported into the United States at such increased quantities as to be a substantial cause of serious injury" to a domestic industry.¹⁰⁵ A second provision for relief from market disruption caused by fairly-traded imports is section 406 of the Trade Act of 1974, which is similar to section 201 but applies only to imports from communist countries and contains a lower threshold on the injury test.¹⁰⁶

Last, but not least, the United States has maintained section 337 of the Tariff Act of 1930, providing for relief from unfair trade practices, particularly in the area of intellectual property rights.¹⁰⁷

These provisions of United States trade law in part address the need for private party input in the GATT process. The rationale for such input includes recognition that "business people are in a much better position than officials to know the practical effects of unfair governmental practices," and that formal complaints and open proceedings publicize the pressures on governments to act, and encourage business people to make their views known on necessary trade policy measures.¹⁰⁸ Thus, the procedures serve to facilitate redress of private industry grievances based on GATT rules in the context of administrative dispute resolution. They provide both a procedure for granting direct relief, and a channel for informing the complainant's government of concerns important to its relations with other governments.

B. Limitations on Private Party Access to GATT Rules in Administrative Proceedings

While United States trade relief mechanisms have developed over time in coordination with the development of GATT rules, the manner in which they provide access to GATT rules on the part of private parties has remained significantly limited. Those mechanisms which do exist are directed at violations of GATT rules either by foreign governments, or (in the case of antidumping measures) by foreign private parties. Through these provisions, private parties may challenge only practices

105. 19 U.S.C. § 2251. See *supra* notes 62-66 and accompanying text.

106. 19 U.S.C. § 2436.

107. 19 U.S.C. § 1337. See *supra* notes 58-60 and accompanying text.

108. Jacques H.J. Bourgeois, *EC Rules Against "Illicit Trade Practices" — Policy Cosmetics or International Law Enforcement?*, *FORDHAM CORP. L. INST.* 6-22 (Barry E. Hawk ed., 1989).

and policies of foreign persons and governments. They do not provide for private party challenge in the United States of the GATT consistency of United States laws and regulations.

The theory of comparative advantage tells us that both domestic goods and imported goods should benefit from rules promoting free trade.¹⁰⁹ As such, United States trade relief measures go only half way toward the implementation of comparative advantage theory for the private party, by providing private party access only to domestic industries complaining of competition from foreign products.

Two simple and perhaps obvious justifications may be offered for this limitation of private party access in United States trade law. First, each contracting party to the GATT may implement similar provisions, thus allowing its own industry access to the same rules and same types of relief mechanisms. The GATT-consistency of United States measures may be challenged from abroad. Second, the sovereign is the representative of its nationals in international law, and GATT rules, as rules of international law, should recognize this fundamental concept. The system for private party input should facilitate private party communication to the private party's own government, so its own government may represent it in the GATT process.

The problem with these justifications is that, while they may recognize traditional international law practice, they fail to address the needs of the international economic system. The European Community system has recognized that international trade agreement rules may be invoked by both producers and exporters of domestic goods, and producers and importers of foreign (Member State) goods.¹¹⁰ As in the United States, however, European Community GATT-related measures provide access to

109. See, e.g., LOWENFELD, *supra* note 6, at 1-9.

110. See, e.g., Case 104/81, *Hauptzollamt Mainz v. Kupferberg*, [1982] E.C.R. 3641, 3645-66 (Article 21(1) of the Free Trade Agreement between the Community and Portugal held directly effective in challenge to the German monopoly equalization duty); Case 17/81, *Pabst & Richarz v. Hauptzollamt Oldenburg*, [1982] E.C.R. 1331, 1350 (Article 53(1) of the Association Agreement between the Community and Greece held directly effective in challenge to the German monopoly equalization duty); Case 87/75, *Bresciani v. Amministrazione Italiana delle Finanze*, [1976] E.C.R. 129, 142 (Article 2(1) of the Yaoundé Convention of 1963 held to confer on Community citizens "the right, which the national courts of the Community must protect, not to pay to a Member State a charge having an effect equivalent to customs duties"). *But see* Case 270/80, *Polydor Ltd. v. Harlequin Record Shops*, [1982] E.C.R. 329, 350 (enforcement of United Kingdom copyright law was not prevented by Article 14(2) of the Free Trade Agreement between the Community and Portugal, which prohibited quantitative restrictions on imports).

trade relief mechanisms only to domestic producers and exporters.¹¹¹ While it may be that foreign producers' rights are protected by their own governments within the GATT framework, United States importers of foreign goods have no access to relief mechanisms by which to challenge domestic measures. Restricting private party access to GATT rules in the United States to the protection of domestic products represents a substantial limitation on that access.

C. *Limitations on Access to GATT Rules in the Courts*

While no domestic administrative procedures exist for challenging the GATT-consistency of United States laws and regulations, legal measures have been challenged in the courts as inconsistent with GATT rules.¹¹² Several state court decisions and state attorney general opinions have treated the General Agreement as both binding and self-executing in challenges to state laws that are inconsistent with GATT provisions. In *Territory of Hawaii v. Ho*,¹¹³ the court struck down a state statute requiring sellers of eggs of foreign origin to display a placard bearing the words "we sell foreign eggs." The Hawaii court concluded that the GATT is "a treaty within the meaning of [article VI, clause 2 of the Constitution], so that it has the same efficacy as a treaty made by the President by and with the advice and consent of the Senate."¹¹⁴ Three opinions of the California Attorney General similarly concluded that the GATT preempts state law in considering state and local "buy American" legislation under GATT Article III.¹¹⁵ Like the Ho case, these opinions found the GATT to be the "supreme law of the land" under Article VI,

111. For a discussion that includes reference to the comparable trade relief measures in the European Community, see Ronald A. Brand, *Private Parties and GATT Dispute Resolution: Implications of the Panel Report on Section 337 of the US Tariff Act of 1930*, 24 J. WORLD TRADE 5, 12-15 (1990) [hereinafter Brand, *Private Parties*].

112. For reviews of United States judicial consideration of GATT provisions, see Ronald A. Brand, *The Status of the General Agreement on Tariffs and Trade in United States Domestic Law*, 26 STAN. J. INT'L L. 479 (1990) [hereinafter Brand, *Status of GATT*]; Robert E. Hudec, *The Legal Status of GATT in the Domestic Law of the United States*, THE EUROPEAN COMMUNITY AND GATT 187 (M. Hilf, F. Jacobs & E. Petersmann eds., 1986) [hereinafter Hudec]; Jackson, *General Agreement*, *supra* note 46, at 250.

113. 41 Haw. 565 (1957).

114. *Id.* at 567.

115. 40 Op. Att'y Gen. 65 (Cal. 1962); 36 Op. Att'y Gen. 147 (Cal. 1960); 34 Op. Att'y Gen. 302 (Cal. 1959).

clause 2, of the United States Constitution.¹¹⁶

No federal court has yet dealt with a challenge to the GATT-consistency of federal law in a manner that directly required a holding that GATT is or is not either binding or self-executing. In *Sneaker Circus, Inc. v. Carter*,¹¹⁷ a federal district court found no treaty law created by the GATT, stating that the plaintiff's argument was without merit, since Congress had never ratified the GATT.¹¹⁸ Because international agreements may achieve legal status in the United States through means other than formal advice and consent of the Senate, this dictum is of limited value. Other federal cases have assumed legal status for the GATT in disputes involving private parties, but provide no clear analysis or direct authority for the proposition.¹¹⁹ Most cases have avoided the issue entirely by finding the challenged federal law to be GATT-consistent, thus making it unnecessary to consider whether an inconsistent law must be struck down because of the GATT.¹²⁰

Congress has been less than helpful in creating a record that easily demonstrates either support or opposition to the GATT as a source of law. After presidential adherence to the GATT through the Protocol of Provisional Application, Congress included a provision in each of the 1951, 1953, 1954, 1955, and 1958 Acts extending the trade agreements negotiating authority of the President, providing that, "[t]he enactment of this Act shall not be construed to determine or indicate the approval or

116. The 1960 opinion not only implied full treaty status for the GATT in the context of the supremacy clause, but also found that the national treatment obligations of Article III were self-executing and required no further legislation. 36 Op. Att'y Gen. 147, 149 (Cal. 1960): "GATT, as a multilateral trade agreement, has the legal force of a treaty under the supremacy clause of the U.S. Constitution . . . and its obligations are treaty obligations. . . . Paragraphs 4 and 8(a) of Article III indicate a mandatory duty. . . . Section 1 of the Protocol of Provisional Application . . . does not have the effect of changing the national treatment provisions requiring further congressional action to make the provisions operative." Other state cases have considered the GATT, but have not relied upon it to invalidate inconsistent legislation or contract provisions. See Brand, *Status of GATT*, *supra* note 112, at 488.

117. 457 F. Supp. 771 (E.D.N.Y. 1978).

118. *Id.* at 795 (citing *United States v. Yoshida International, Inc.*, 526 F.2d 560, 575 n.22 (C.C.P.A. 1975)).

119. See, e.g., *United States v. Star Industries*, 462 F.2d 557 (C.C.P.A. 1972), where the court assumed legal status for the GATT, finding that the MFN obligations in Article I of the GATT required that any retaliation under Article XXVIII be generalized in accordance with MFN principles. *Id.* at 562-63.

120. For a discussion of the federal cases, see Brand, *Status of GATT*, *supra* note 112, at 489-93.

disapproval by the Congress of the Executive Agreement known as the General Agreement on Tariffs and Trade."¹²¹ This attitude toward the GATT moderated over time. No such disclaimer was included in the Trade Expansion Act of 1962. The Trade Act of 1974 stated that Congress was not implying approval or disapproval "of all articles" of the GATT, and for the first time authorized the payment of the United States share of GATT expenses.¹²² Prior to the Trade Act of 1974, the United States share of GATT expenses was paid out of the general appropriation to the State Department.

Congressional ambivalence toward the GATT is further demonstrated in the Trade Act of 1974, where the President was directed to act in conformity with the GATT in regard to balance of payment restrictions,¹²³ and to give consideration in import relief actions "to the international obligations of the United States."¹²⁴ When Congress implemented the multilateral codes produced in the Tokyo Round of trade negotiations, however, it specifically provided that in the event a code conflicts with United States law, the statute is to prevail over the pertinent provisions of the code.¹²⁵ The 1979 Act also provided that the Tokyo Round agreements are not to be "construed as creating any private right of action or remedy for which provision is not specifically made in the implementing legislation."¹²⁶ For the Uruguay Round, the Omnibus Trade and Competitiveness Act of 1988 provides that any agreements negotiated will enter into force "if (and only if)" an implementing bill is submitted to Congress and "enacted into law."¹²⁷

121. Trade Agreements Extension Act of 1951 § 10, 65 Stat. 72; Trade Agreements Extension Act of 1953 § 103, 67 Stat. 472; an Act to extend the authority of the President under § 350 of the Tariff Act of 1930, *as amended by* § 3, 68 Stat. 360 (1954); Trade Agreements Extension Act of 1955 § 3(a)(1)(A), 69 Stat. 162, 163; Trade Agreements Extension Act of 1958 § 10, 72 Stat. 673, 680.

122. 19 U.S.C. § 213(d).

123. 19 U.S.C. § 2132(k).

124. 19 U.S.C. § 2253(k).

125. 19 U.S.C. § 2504.

126. 19 U.S.C. § 2411.

127. 19 U.S.C. § 2903(a)(1). In contrast to the ambivalence of Congress toward the GATT, the implementing legislation for the Canada-United States Free Trade Agreement (FTA) is quite specific. Section 102 of the FTA Implementation Act provides as follows:

Sec. 102. RELATIONSHIP OF THE AGREEMENT TO UNITED STATES LAW.

(a) United States Laws to Prevail in Conflict. No provision of the Agreement, nor the application of any such provision to any person or circumstance,

While the Restatement (Third) of Foreign Relations Law notes that most courts "assume" the binding character of the GATT,¹²⁸ three factors leave the application of its provisions in United States courts both unsettled and difficult. First, even if the GATT is binding in United States relations with other contracting parties, whether it or any of its provisions are self-executing and thus capable of providing a rule applicable in domestic litigation, has not been definitively determined.¹²⁹ Further, the Protocol of Provisional Application, through which contracting parties apply the GATT, provides that each of them "undertake[s] . . . to apply provisionally . . . Parts I and III of the General Agreement . . . and . . . Part II of that Agreement to the fullest extent not inconsistent with existing legislation."¹³⁰ While the Protocol will not prevent the application of the GATT to invalidate state legislation inconsistent with GATT provisions (even those in Part II), it will prevent the invalidation of federal legislation inconsistent with Part II if that legislation was in place prior to October 30, 1947, and has not been amended in a manner that has increased its inconsistency with GATT.¹³¹

Finally, potential application of the GATT to strike down provisions of United States law is limited by Article VI, clause 2 of the Constitution, which makes both treaties and legislation

which is in conflict with any law of the United States shall have effect.

(b) Relationship of Agreement to State and Local Law.

(1) The provisions of the Agreement prevail over

(A) Any conflicting State law; and

(B) Any conflicting application of any State law to any person or circumstance; to the extent of the conflict.

128. RESTATEMENT, *supra* note 71.

129. Professors Jackson and Hudec both find the GATT to be non-self-executing. Jackson, *General Agreement*, *supra* note 46, at 286-89; Hudec, *supra* note 112, at 204-210. For a discussion questioning this conclusion, see Brand, *Status of GATT*, *supra* note 112, at 506-07.

130. Protocol of Provisional Application, *supra* note 72.

131. It has been accepted that 'existing legislation' in the Protocol refers "to legislation existing on October 30, 1947, the date of the Protocol as written at the end of its last paragraph." *Ruling of the Chairman of the Contracting Parties, Aug. 11, 1949*, II GATT, BISD 181 (1952). Further, it has been determined that the priority of preexisting inconsistent legislation is maintained despite subsequent amendment of that legislation, provided the degree of inconsistency with the GATT is not increased. *Panel Report on Brazilian Internal Taxes*, II GATT, BISD 181 (1952). On the other hand, it has also been determined that, "the Protocol of Provisional Application did not authorize contracting parties to enact legislation increasing the degree of GATT inconsistency of 'existing legislation,' even if that degree of inconsistency remained not in excess of that which had obtained on 30 October 1947." *Panel Report on United States Manufacturing Clause, 15/16 May 1984* (L/5609), GATT, BISD (31st Supp.) 74 (1985).

the supreme law of the land. To deal with this duality of source issue, United States courts have developed the "later-in-time" rule. Under this rule, "a treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty."¹³² Thus, legislation enacted after United States adherence to the GATT may abrogate the rules of the General Agreement in terms of their application in United States courts.¹³³

As this discussion indicates, private parties wanting to challenge the GATT-consistency of a United States measure must overcome several difficult obstacles in United States law. They cannot do so in administrative proceedings — the forum for asserting the right to relief from GATT-inconsistent foreign measures, and doing so in the courts is uncertain at best and perhaps even impossible given the doctrines that must be overcome.

VIII. MULTINATIONAL CORPORATIONS AND THE LIMITS OF SOVEREIGN REPRESENTATION IN INTERNATIONAL ECONOMIC LAW

The absence of clear judicial opinion on the status of the GATT in United States law would appear to indicate that the issue simply is not likely to be raised in private litigation. This is not the case. It was raised, but side-stepped, by the Federal Circuit Court of Appeals in *Akzo N.V. v. U.S. International Trade Commission*.¹³⁴ *Akzo N.V.*, a Dutch corporation, challenged an International Trade Commission (ITC) Ruling on a section 337 action initiated by E.I. DuPont de Nemours and Co.¹³⁵ *Akzo* asserted that procedures before the ITC were discriminatory and thus violated the Article III national treatment provisions of the GATT. The court found no discrimination, determining that a foreign defendant before the ITC in a section 337 case had exactly the same right as a domestic defendant would have in a similar case.¹³⁶ After further litigation in United States courts, *Akzo* petitioned the European Commission seeking a challenge of United States procedures under section 337 through the European Community's Commercial Policy Instrument.¹³⁷ Upon a Commission finding that ITC procedures constituted an illicit commercial practice, the matter was submitted to a GATT

132. *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1870).

133. See Brand, *Status of GATT*, *supra* note 112, at 503-05.

134. 808 F.2d 1471, 1485 (Fed. Cir. 1986).

135. *Id.* at 1475.

136. *Id.* at 1485.

137. *Id.* European Council Regulation 2641/84, 1984 O.J. (L 252).

panel. More than three years after the decision by the United States Court of Appeals, the GATT Council adopted the panel report finding that section 337 procedures were in fact in violation of Article III, paragraph 4, of the GATT.¹³⁸ Consideration of the full implications of the GATT claim by the Court of Appeals might well have saved substantial time and resources.¹³⁹

The Akzo case indicates that the current system of domestic application of GATT rules at best raises questions about the efficiency of the international trade law system. Other recent situations involving multinational corporations indicate the need to reevaluate basic distinctions between international law and domestic law, at least in the international economic law framework. In many instances, international law has developed in a manner which means that it is no longer limited to traditional disputes between sovereigns. Rules of international law are applied in today's world to disputes between sovereigns and private parties.¹⁴⁰ The mechanism for this application is too often ad hoc, however, with no system whatsoever being available in some disputes. Such is the case with the rules of the GATT.

Akzo ultimately was able to obtain sovereign representation in the GATT forum through the access provided by the European Community's Commercial Policy Instrument. It is not clear, however, that such representation always will be available for a private party pursuing a legitimate challenge to the GATT-consistency of a sovereign measure. As indicated in the previous discussion, administrative procedures are incomplete in providing such access, and judicial consideration of GATT issues faces nearly insurmountable obstacles. In addition, contemporary examples indicate that the traditional practice of sovereign representation of private interests in international law matters may no longer be appropriate in the GATT context.

138. *United States — Section 337 of the Tariff Act of 1930, Panel Report of 23 November 1988*, GATT, BISD (36th Supp.) 345 (1990).

139. As of this writing, the United States has yet to introduce legislation that would bring section 337 into compliance with the GATT as interpreted in the panel report. For a discussion of the possible implications of the section 337 panel report on private party rights, see Brand, *Private Parties*, *supra* note 111.

140. See, e.g., Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), done at Washington, D.C., Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159, reprinted in 4 I.L.M. 532. See also International Arbitral Tribunal: Award on the Merits in Dispute Between Texaco Overseas Petroleum Company/California Asiatic Oil Company and the Government of the Libyan Arab Republic: Compensation for Nationalized Property, 17 I.L.M. 1 (1978).

Recent cases involving multinational corporations demonstrate strains on the traditional system of sovereign representation in international matters. One example is that of the attempt by Honda Motor company to export United States-manufactured automobiles to France.¹⁴¹ Prior to 1991, member states of the European Community imposed quantitative restrictions on the import of Japanese cars. In August of 1991, the European Community and Japan negotiated a Community-wide limit that would give Japanese automakers no more than sixteen percent of the European automobile market by 1999.¹⁴² The agreement does not cover cars built in North America. Thus, Honda plans to export United States-made cars to Europe without those exports contributing to the market share authorized by the agreement. When France balked at providing formal authorization for the importation of the Honda Aerodeck models, United States Secretary of State James Baker instructed United States diplomats to ask French officials to allow the cars into France, and the USTR took up Honda's case as an "American" company.¹⁴³

The Honda case raises serious questions about the traditional notion that the trader's sovereign provides representation in disputes with a foreign sovereign. The growth of the multinational corporation makes determination of the appropriate sovereign to represent a company in trade disputes a more complex matter. If a company has operations in multiple countries, should the sovereign of the major investors, the bulk of the employees, or the related component-supplier subsidiaries represent it in trade disputes? Who really has the primary interest in the matter from a sovereign perspective? If the theory of comparative advantage is correct, and everyone gains from the enforcement of rules designed to facilitate free trade, is the intermediary role of the sovereign any longer necessary? If a private firm has a strong case, is not the prosecution of that case (whether diplomatically or through international dispute settlement) of interest to the international community in general? One can legitimately ask whether — at least in matters of international trade — we have outgrown traditional concepts of sovereign representation in international law.

A second example demonstrates similar problems with the

141. See, e.g., *Honda Sets U.S. Exports to France*, N.Y. TIMES, Sept. 16, 1991, at D1.

142. *Id.*

143. *Id.*

application of national administrative procedures implementing GATT concepts. Two of the leading producers of typewriters in the world are Smith Corona Corporation (formerly a United States company, now a subsidiary of a British company), and Brother Industries Ltd. (a Japanese company). Smith Corona has manufactured in the United States for over 100 years and has long used United States antidumping laws to "protect" itself from foreign competition.¹⁴⁴ In 1991, the roles were reversed when Brother Industries filed an antidumping complaint against Smith Corona, alleging that Smith Corona typewriters manufactured in Singapore were being dumped on the United States market and causing injury to the United States typewriter industry.¹⁴⁵

In its petition, Brother claimed to represent the United States typewriter industry through its plant in Bartlett, Tennessee, which manufactures typewriters sold in the United States by Brother.¹⁴⁶ The case raised the question of whether United States antidumping laws are designed to protect United States companies (no matter where they might manufacture) or United States workers (no matter who profits from their employment). In answer to this question, the Commerce Department ultimately determined that Brother was not an "interested person" entitled to bring such an action. The Commerce Department did so by applying concepts developed by the ITC in its analysis of the appropriate domestic industry for purposes of the antidumping injury determination.¹⁴⁷ Even though the initiation of the

144. See, e.g., *Negative Preliminary Determination of Circumvention of Antidumping Duty Order*, 56 Fed. Reg. 46,594 (1991). See also Anne Veigle, *Keyed-up Typewriter Firms Get Down and Dirty Over "Dumping,"* THE WASH. TIMES, June 7, 1991, at C1.

145. *Initiation of Anti-Dumping Duty Investigation: Certain Portable Typewriters from Singapore*, 56 Fed. Reg. 22,150 (1991).

146. David E. Sanger, *Fair-Trade Case Has a Twist: Japanese Charge a U.S. Rival*, N.Y. TIMES, Aug. 12, 1991, at D1 [hereinafter Sanger].

147. *Recission of Anti-Dumping Duty Investigation and Dismissal of Petition*, 56 Fed. Reg. 49,880 (1991):

When faced with a standing challenge that the petitioner is an assembler and not a manufacturer of the like product and, therefore, lacks interested party status to bring the petition, it is appropriate for the Department to consider the kind of factors applied by the ITC in its domestic industry determinations. See, e.g., *PET's Circumvention Inquiry*, 56 FR 46594 (Sept. 13, 1991) and *Final Determination of Sales at Less Than Fair Value: Personal Word Processors from Japan*, 56 FR 31101 (July 9, 1991). The ITC examines the overall nature of production-related activities in the United States, including: (1) the extent and source of a firm's capital investment; (2) the technical expertise involved in the production activity in the United States; (3) the value

antidumping investigation was thus rescinded, it demonstrates the problem of line-drawing in determining, in the domestic administrative law setting, the international trade law relationship between the sovereign and the private firm.

Those who have criticized antidumping laws see the typewriter case as an example of why, in a global economy, such laws are simply unnecessary.¹⁴⁸ In any event, the case indicates the problems of applying measures designed to protect "domestic industries" when foreign-financed multinational corporations are participants in those industries. Like the Honda case, it demonstrates the tensions between relief mechanisms designed to facilitate the administration of rules originating in concepts of comparative advantage theory and traditional notions of sovereign representation in international law.

IX. RECONCILING THE GATT SYSTEM TO THE THEORY OF COMPARATIVE ADVANTAGE

Both United States trade law and the GATT have witnessed significant changes. The most basic change has been the shift in focus from tariffs to nontariff barriers. The dramatic success in reducing tariffs generally is one of the great contributions of the GATT system. Whether that system can survive the challenge of nontariff protection and extend beyond a system covering only trade in goods remains to be seen.

Over the course of this evolutionary process, two things have not changed. One is the economic theory consistently used to justify today's domestic and multilateral trade rules. The theory of comparative advantage continues to provide the focus that defines liberal trade policies and the rules of the international trade law system. The second constant is a degree of intellectual inconsistency. It is perhaps best defined in the language of one present when the GATT was created. Speaking of the failure of the International Trade Organization, William Diebold wrote in 1952:

added to the product in the United States; (4) employment levels; (5) the quantity and types of parts sourced in the United States; and (6) any other costs and activities in the United States directly leading to production of the like product. No single factor is determinative, nor is the list of criteria exhaustive. See, e.g., Cellular Mobile Telephones and Subassemblies Thereof from Japan, Inv. No. 731-TA-388 (Final), USITC Pub. 2163 (Mar. 1989) at 13-14.
148. Sanger, *supra* note 146.

It is not just political support for a wise course that is lacking. We also lack an intellectual reconciliation between multilateral international trade based on a high degree of specialization and the concept of managed and stable national economies. Perhaps there is no reconciliation. Insoluble problems exist. At some point we seem to have come to an intellectual impasse, but there is still much work to be done in clarifying issues before we can say that these problems really defy solution. Meanwhile, men must conduct their affairs and governments their foreign trade policies as best they can, improvising where known methods prove inadequate. And it would not be unprecedented if the intellectual solution followed instead of preceded the evolution of practice.¹⁴⁹

This observation is at least as appropriate today as it was forty years ago. It is both relevant to the perception of the GATT as a source of rules itself, and as a summation of the GATT's influence on United States trade law. While we may have made progress in the development of trade law, the relationship between that law and its intellectual underpinnings remains enigmatic.

We continue to use the theory of comparative advantage to justify an international regulatory system that discourages trade barriers established by sovereigns and thus promotes free trade. This theory is based upon the assumption that those who control scarce resources will move those resources to the production of goods in which their nation holds a comparative advantage. In market economic systems (those systems consistent with GATT concepts), those who control the scarce resources are private parties. Thus, an intellectually honest consideration of comparative advantage theory in today's world would require the participation of private parties in the application of the rules designed to implement the theory.

In 1947, the majority of the rules of international trade regulated the conduct of sovereign parties. The GATT system has changed. After six Rounds of multilateral trade negotiations focusing on tariff reductions — Rounds uniformly applauded as extremely successful — the focus moved to nontariff barriers in both the Tokyo Round and the Uruguay Round. The Uruguay Round goes further than ever before, expanding from the traditional focus on goods, and addressing issues heretofore absent

149. DIEBOLD, *supra* note 71.

from GATT discussion.

At the same time, however, the GATT system operates within traditional concepts of international law and diplomacy. Thus, international relations within the GATT are the relations among and between sovereign parties. The rules are negotiated and implemented by sovereign parties. They are applied in dispute resolution by an organization of sovereign parties. In both multilateral and domestic legal systems, these rules govern the relationships of sovereign parties and generally are not applied to the concerns of private litigants. Traditional concepts of international law (and of the application of international law in municipal legal systems) compel respect for the sovereignty of each GATT contracting party. The idea that private parties could assert rights against their own or other sovereigns is inconsistent with these traditional concepts. Thus, private parties are denied direct access to those rules, and have indirect access only when their governments have established administrative procedures.

Traditional notions of sovereignty in international and domestic legal regimes thus survive in tension with the realities of global trade relations. One response to this tension is to continue to live with the intellectual inconsistency between accepted economic theory and existing international trade law. Perhaps, as William Diebold remarked at the birth of the GATT, we will continue to develop the system in an ad hoc, reactionary fashion. But for those who prefer a legal system consistent with the fundamental concepts justifying its existence, discomfort is then inevitable.

The two other choices are either to change the system of international trade law to make it consistent with economic theory, or to find a new statement of economic theory that justifies denial of private party access to the system's rules. The latter alternative would require the total reversal of the normal evolutionary process. Rather than developing a rule to implement a policy, the policy would be created solely to justify the rule. This seems to be the questionable foundation of what emerges under the rubric of strategic trade policy. While it is emotionally enticing, it lacks the support of traditional economic values. Thus, the only intellectually consistent choice appears to be to bring the legal system in line with the economic theory on which it is based.

X. CONCLUSION

GATT has evolved to the point where it no longer fits neatly into traditional categories of law. It represents a legal system providing rules between and among sovereigns. In this context, the GATT system has provided one of the most successful and effective international dispute resolution mechanisms in the history of international relations. As the evolution continues, however, it increasingly provides rules that regulate and influence the conduct of private parties. This is not surprising for a system founded on economic principles that necessarily presume the participation of private parties.

While other international law rules evolved to redefine relationships between sovereigns and private parties, the same has not occurred for the rules of the GATT. GATT rules have been extended to private parties only indirectly through limited domestic administrative proceedings. Even these proceedings tend to reserve ultimate decision-making authority to the political branches of the sovereign. The development of a true rule-based system for the GATT is thus incomplete.

So long as this evolutionary process remains incomplete, we must question whether it is appropriate to continue to justify either the GATT system or domestic trade law by reference to the economic theory of comparative advantage. Until we either develop a new theory providing the justification for the existing system — including its limitations on private party access to rules directly influencing private party conduct — or adjust the rules to be consistent with the underlying economic theory, the evolutionary process will remain incomplete.

If we choose to seek compatibility between economic theory and the trade law system, the problem lies in determining just how that process can evolve. One might argue that this goal can be achieved through judicial recognition that the GATT is self-executing and thereby applicable to disputes in United States domestic courts. But the United States later-in-time rule and the grandfather effect of the Protocol of Provisional Application would continue to render most GATT rules ineffective when asserted to challenge federal laws.¹⁵⁰

150. United States law has developed a concerted ambivalence toward international law. This results at least in part from the absence of a rule of primacy in United States law. The later-in-time rule exists simply because international law is not primary authority in United States law. So long as this dualistic aspect of the United States legal sys-

Neither does it appear that negotiations in the near future will change aspects of the GATT system in a manner that will include private party access as an aspect of GATT law. Sovereigns simply are not ready for such a development. As Diebold suggests, much of GATT law has come from the codification of practice rather than from prospective legislation on a multinational scale.¹⁵¹ This makes it easier to adopt rules, because the contracting parties have already participated in their development and testing through prior ad hoc application. Yet, more is necessary to allow the development of both GATT law and United States trade law to fulfill the goals of the economic theory upon which they are founded and which they ostensibly are designed to implement.

As GATT develops, and particularly as national governments enact legislation consistent with GATT rules, those rules increasingly regulate the conduct of private parties. When the principal focus was on whether a tariff was within the schedule negotiated under GATT Article II, sovereigns were the parties primarily concerned. When, as in the Uruguay Round, the focus is on such issues as intellectual property rights, investment measures, and the regulation of the insurance, telecommunications and banking industries, the rules have direct impact on private firms. We must ask whether a system affecting so many aspects of the conduct and rights of private parties may legitimately exist without a corresponding system for private party access to interpretation and application of the rules of that system.

tem remains, it is not through judicial opinion that GATT rules are likely to be applied in a manner consistent with the underlying economic theory.

151. See *supra* note 149 and accompanying text.