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Dolphins and Hormones: GATT and the Legal Environment for International Trade after the Uruguay Round

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DOLPHINS AND HORMONES: GATT AND THE LEGAL
ENVIRONMENT FOR INTERNATIONAL TRADE
AFTER THE URUGUAY ROUND

*BEN J. ALTHEIMER Lecture, delivered November 13, 1991 in
Little Rock, Arkansas.*

*by John H. Jackson**

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I. INTRODUCTION

Reportedly an old Chinese curse says, "May you live in interesting times." If true, we are certainly accursed. A quick inventory of some of the worldwide events of the last three years will remind us of the extraordinary circumstances in which we now live:

- The map of Eastern Europe is remade as the Warsaw Pact collapses, and east or central European countries abandon socialism as an economic system, embracing market economics and privatization; other countries of the world do likewise. Socialism appears bankrupt and dead, and the Soviet Union falls apart in living color on the TV in our living rooms.

- A petty but powerful dictator in the middle-east oil region attempts a walk-in invasion and is faced by the first post-World War II cooperation of the U.S., the U.S.S.R. and the United Nations, which achieves a startling high-tech 100 hour ground war success, escaping a major oil disruption but followed by many political difficulties. The world then discovers what a close call it has had with the danger of misused nuclear power, purchased by incredible oil profits.

- Germany is reunited, and learns the economic cost of forty-five years of socialist statism and its rapacious elites: official actions harming the environment, raised risks of nuclear accidents, deteriorated infrastructure, numbed human spirit creating calls for "freiheit," freedom!

- These listed events lead many to the conclusion that the cold war is over and the West has won. They also suggest a potential for a huge

“peace dividend,” for resources to address human and economic problems which sorely need attention. However, they starkly pose a dilemma to the United States—will it be the world’s sole superpower, in a hegemonic or policeman’s role, or will it revert to an inward looking isolationism? If the U.S. won’t stomach a major world role, will that now leave a power vacuum with all its dangers?

Many other events and trends can also be mentioned:

- In the mid-East, opponents are talking about peace in a way never before experienced.

- The European Economic Community rushes towards its 1992 goal of a truly unified market, but is suddenly confronted by the costs and opportunities of the cold war collapse and the restructuring of effective borders.

- The phenomenal rise of Japanese economic strength has frightened many on this and the European continent.

- Mainland China also began a program of economic restructuring employing market oriented principles, but its leaders became frightened when societal forces began acting beyond the government’s control.

- Latin America, and to some extent Africa, have been swept with democratic movements installing democratic governments on a wider scale than ever before experienced, changing economic structures.

- The U.S. and Canada have established a treaty-based Free Trade Area after a century of unsuccessful attempts, and this is now beginning to operate in novel ways on the legal system of the parties.

- Mexico has decided not only to join the General Agreement on Tariffs and Trade (GATT), but to seek a stronger treaty relation with the U.S., and this has led to the U.S.-Canada-Mexico talks now rushing towards a North American Free Trade Area (NAFTA). Watching carefully from the sidelines are most of the other countries in this hemisphere, suggesting the possibility (perhaps after some time) of a broader hemisphere wide free trade area.

On the whole, this is an optimistic picture—perhaps more optimistic than anytime since the immediate post-World War II years which saw a remarkable flowering of new international institutions and innovative ideas for preserving the peace and raising world welfare. However, one must remember the curse. There are clouds overhead, and problems and dilemmas to solve, some of which include:

- Who controls the nuclear weapons in the republics of the Soviet Union?

- Will the European Community (EC) become a “fortress Europe”

and turn inward?

- Will religious fanatics, particularly in the volatile middle-East, prevent new efforts for peace?
- Can the disparities in living standards and culture between Mexico and the U.S. be bridged?

In my talk with you this evening, I will focus on one segment of these broader circumstances, namely the problem of international economic relations. However, this segment is very important indeed. It has a vital impact on all of us, our standard of living, our style of life, and these aspects of our children's future lives—possibly even the stability of relative peace and the durability of our democratic institutions. The reason I opened this talk with the tour of the broader horizon, however, is to emphasize how much our economic relations “segment” is related to many broader questions.

We could have decades of extremely successful economic and market oriented activity which may vastly raise our standard of living, only to see it disappear in months or even days if certain types of war occurred—even wars that somehow refrain from the use of nuclear weapons. Civil war and disarray in developing countries in Africa or Latin America have tragically undermined any opportunity for satisfactory lives for millions of people.

Loss of freedoms, possibly influenced by international institutions which were designed with good intentions to address the problems of galloping world economic interdependence, could undermine a quality of life with which we have become complacently satisfied.

I want to approach my topic this evening, however, as a law professional, and not an economist or politician or even a philosopher. I wish to discuss with you a number of what I call “constitutional issues,” but I am not referring to the constitution of any one nation, but rather I am referring to what I have called in some of my books¹ and writings the “World Trade System,” or more broadly, the international institutional structure of world economic relations.

This structure has certain parts of its foundation in international law and organizations, but other important parts of that foundation are

1. JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969); JOHN H. JACKSON AND WILLIAM DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS*, (2d ed. 1986); John H. Jackson, *International Competition in Services: A Constitutional Framework*, 1988, THE AM. INST. FOR PUB. POL'Y RES.; JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* (1989); John H. Jackson, *Restructuring the GATT System*, 1990, THE ROYAL INST. FOR INT'L AFFAIRS.

in national legal and constitutional systems. The interplay of these two parts of the foundation, such as we find in the legal connections of the GATT to the U.S. constitutional structure of separation of powers, is vitally important. It is not well understood even by knowledgeable government officials. It is, I feel strongly, an important subject for law professionals and law schools to understand and to help the public to understand, because it requires extensive use of the expertise of law professionals, whether such individuals be lawyers, government officials, professors, or law students.

I intend to discuss this subject, albeit briefly, under three topics as follows:

- The Problem
- Coping Mechanisms and Their Problems
- Institutional Aspects and Reforms: The Lawyer's Problems

Finally, I will state some conclusions. But don't hold your breath for any broad sweeping recommendations or claims that all matters will be solved by some simple mechanism or reform. That approach is not normally congenial to my style of scholarship or policy reflections, partly because I tend to feel that it is important to be extremely empirical, to build propositions on actual facts of the real world which I have personally observed in my various government, practitioner, or scholarship roles, or on observations which others similarly inclined have generously shared with me either privately or by publication or public speeches.

II. THE PROBLEM

In good law school style, I will start by stating the case, or rather, by stating several cases which I have chosen to illustrate some problems. In particular I will describe two prominent cases of international economic relations conflict, which may be known to you, namely:

- The tuna-dolphin case, recently resulting in a GATT panel report that finds a U.S. import ban on tuna from Mexico to be inconsistent with U.S. obligations under GATT.

- The EC-U.S. hormones dispute, involving an EC ban on imports from the U.S. of beef which has been raised with the assistance of artificial hormones.

A. Two Cases (Dolphins and Hormones)

First, let us examine the tuna-dolphin case between Mexico and the U.S.² This case, which involves ocean fishing practices, poignantly illustrates the coming problems of reconciling GATT rules with environmental policies. The use of so-called "purse seine nets" in fishing for tuna in the eastern Pacific territories has caused considerable loss of dolphin life, for the odd reason that dolphins tend to swim over tuna schools in that area. When fishing boats use the huge nets to enclose the school which has been spotted because of the dolphins swimming on the surface, the dolphins are captured and drowned in the harvest process.

U.S. environmental groups have pursued this issue under the 1972 U.S. statute (amended in 1988) called the Marine Mammal Protection Act, and have instigated law suits which required the U.S. government to carry out the mandates of this statute. One such mandate requires the U.S. to prohibit or embargo the importation of tuna (canned or otherwise) from any country which does not require its fishing fleet to conform to a series of statutorily required fishing practice standards designed to minimize the killing of dolphins. These requirements are imposed on U.S. fishermen, so the Congress understandably wanted to impose equal standards on the producers exporting on the U.S.

Although Mexico argues that it has taken dolphin protection actions and conforms to multilateral international standards, it did not meet the unilaterally imposed U.S. standards, so in March 1991, the U.S. imposed the embargo on imports of tuna from Mexico. Mexico then brought a complaint under the GATT, arguing a violation of GATT rules, particularly Article XI which bans the use of quotas or embargoes on products from other GATT parties.

The U.S. argued first that its embargo merely imposed a standard on Mexican products equal to that imposed domestically; and also argued that exceptions clauses in Article XX of GATT permitted the U.S. action. Without getting into the rather intricate details of this case, we can note that the GATT panel ruled that the U.S. action was inconsistent with the GATT. A major problem with the U.S. argument is that the U.S. rule focused on the process of production, rather than the characteristics of the product. If the tuna imports themselves were polluted, or were unsafe, or harmed humans or animals, there is little

2. GATT, *Restrictions on Imports of Tuna from Mexico*, GATT Doc., Sept. 3, 1991, at 21.

question that the U.S. could impose a regulation (even prohibiting sale or import) equal to that imposed on U.S. produced goods. But when the focus is on processes occurring totally outside the U.S., then the panel worried that the precedent could be used by many countries to excuse import restrictions on account of unilateral parochial or cultural views about production. These might include religious discriminations, laws regarding employment of women, rigid "safety" standards or minimum wage and vacation rules, etc. Likewise the panel felt that exceptions in GATT Article XX should not apply for protection of health of animals outside the territory of the country trying to impose import restrictions.

Thus the panel concluded that although it recognized that some exception to GATT rules was needed for various environmental policies, this should not be accomplished by a forced "interpretation" of the GATT by a panel. Rather, the GATT contracting parties needed to negotiate some changes in the GATT, such as new treaty measures or a waiver.

Another interesting case, which also illustrates some of the hard conceptual policy issues facing the world trading system, involves an EC regulation imposed in 1985 which prohibited the sale or importation of beef raised with assistance of artificial hormones, whether that beef was produced domestically within the EC or in another country for export to the EC. The regulation resulted partly from strong European consumer pressure caused by dismay at a case in Italy where infants who had ingested some baby food beef products developed opposite sex characteristics because of hormone contamination of the food.

In the U.S. many beef farmers use hormones to assist beef raising, and argue that they do so with complete safety. The scientific issues are complex, but roughly it appears that in the Italian case, beef had been injected and portions of the beef injected had found its way into the food. In the U.S. it is claimed that a "hormone patch" is put behind the ear of the cow, and this slowly bleeds the hormone into the cow (which then eats and grows more efficiently, saving production costs). Since the ear is not then put into food, and since the process introduces the hormone gradually, the U.S. claims that scientifically there was no justification for the ban on beef produced by this method.

The EC, however, refused to listen to this scientific reason. Indeed both the U.S. and the EC wanted to start a GATT dispute procedure, but each wanted a different forum: The U.S. desired a process in the "Standards Code" of the GATT, where scientific information could be

better utilized. The EC insisted that the procedure must be that of the GATT itself, where the EC would maintain that GATT's Article III "national treatment" (equal treatment for imports compared to domestic products) was the test. This argument allows each sovereign nation to choose its product regulations for itself, even if they are foolish, as long as it treats domestic products and imported products the same. There is considerable justification for this view, and it demonstrates another defect in the current GATT rules.

The U.S. proceeded unilaterally in this case also, imposing certain restrictions on imports from the EC as "sanctions," without a GATT or GATT code procedure. The EC protested, and the parties have negotiated for temporary settlements and expect or hope to have a settlement, probably in the context of the GATT Uruguay Round negotiations (where one issue discussed is that of so-called "phytosanitary rules" regarding agricultural products).³

B. Other Situations Briefly Described

There are many other cases or situations which I could relate also. Indeed under the GATT dispute settlement procedures alone, there have been over 250 cases.⁴ There are many thousands of other situations which illustrate similar problems. Let me simply outline several of these:⁵

3. *Hormone Residues in Animal Products Safe, International Committee on Food Safety Says*, INT'L TRADE REP., Nov. 9, 1988, Vol. 5, at 1484; *EC Offers Plan Aimed at Diffusing Bilateral Dispute Over Hormone Ban, De Clercq Says*, INT'L TRADE REP., Nov. 23, 1988, Vol. 5, at 1522; *The EC Ban on Hormones in Meat Will Stay*, INT'L TRADE REP., May 16, 1990, Vol. 7, at 703.

4. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* (1989).

5. Regarding the agricultural problem, see David Gardner, *Brussels Strives to Keep Farm Reform Plans on Track*, FIN. TIMES, Jan. 28, 1991, at 27; *U.S., EC Seen Reaching Broad Agreement on GATT Farm Trade by End of Next Week*, INT'L TRADE REP., Dec. 11, 1991, Vol. 8, at 1789; DALE E. HATHAWAY, NATIONAL PLAN. ASS'N, *AGRICULTURAL NEGOTIATIONS IN THE GATT. LOOKING AHEAD*, 13, at 9-12; U.S. DEP'T OF STATE DISPATCH, GIST: AGRICULTURE IN U.S. FOREIGN POLICY, (1991).

With respect to the position of the Cairns Group regarding subsidies in agriculture, see, e.g., *General Developments: GATT. Cairns Group Says It Will Not Accept a "Cosmetic" Agricultural Agreement*, INT'L TRADE REP., Dec. 11, 1991, Vol. 8, at 1807; *Export Policy: Agriculture. Cairns Group Must Be Working Together to Fight Subsidies, Australian Minister Says*, INT'L TRADE REP., Aug. 10, 1988, Vol. 5, at 1124.

Regarding the Airbus case, see, e.g., *General Developments: Trade Policy. Deadlines Approach for Two GATT Airbus Complaints, Boeing Official Tells ABA*, INT'L TRADE REP., Nov. 6, 1991, Vol. 8, at 1628; *General Developments: GATT. Panel Completes Review of U.S. Airbus*

- The U.S. is very concerned about the European Airbus manufacturers, claiming heavy government subsidies are unfair to U.S. manufacturers.
- The U.S. joined by many agriculture exporters, including the Cairns group with developing countries, Australia, Canada, and others want to negotiate reduction in government subsidies on agricultural goods.
- The U.S. argues that many third world countries do not adequately protect intellectual property, and the U.S. raised tariffs on many imports from Brazil because the U.S. felt Brazil was not adequately protecting intellectual property. The U.S. action was a clear treaty violation.
- Japanese company groupings, the Keiretsu, are argued to be unfair as effectively limiting imports.

C. Characteristics of the Problem

Now that I have presented to you the specifics of several cases, let me try to make some general propositions which describe the problem regarding international economic relations and institutions which I feel exists and must be faced today.

There are three characteristics which I intend to illustrate: (1) the rapidly evolving global economic interdependence; (2) the erosion of natural sovereignty; and (3) the potential failure of international institutions and the consequence of a power vacuum at the international level.

1. *The rapidly evolving global economic interdependence*

In the late 1970s while in Calcutta to deliver lectures, I asked a

Complaint, INT'L TRADE REP., Oct. 9, 1991, Vol. 8, at 1484; *U.S. Makes Effort to Raise Airbus Subsidy Issue in Geneva*, INT'L TRADE REP., Oct. 2, 1991, Vol. 8, at 1438; *General Developments: European Community. EC Will Block U.S. to Reopen Airbus Subsidy Dispute*, INT'L TRADE REP., Sept. 18, 1991, Vol. 8, at 1360.

Regarding the dispute between the United States and Brazil concerning the lack of protection offered by this country to U.S. intellectual property rights, see, e.g., *General Developments: Unfair Trade Practices. Hills Lifts \$40 Million in Sanctions After Brazil Pledges to Enact Patent Law*, INT'L TRADE REP., July 4, 1990, Vol. 7, at 996; *Vice President Quayle Visits Brazil. Calls for More Intellectual Property Protection*, INT'L TRADE REP., Aug. 14, 1991, Vol. 8, at 1204; *General Developments: Latin America. Brazil's Patent Office Taking Measures to Protect Trade Marks*, INT'L TRADE REP., Sept. 18, 1991, Vol. 8, at 1375. More generally, see *U.S. Business Group Calls for Comprehensive Agreement on Intellectual Property in NAFTA*, INT'L TRADE REP., Nov. 20, 1991, Vol. 8, at 1697.

number of businessmen at a reception, what was the most important influence on their business. Their answer—the U.S. Federal Reserve rediscount rate. Why? Because of the impact on sale of jute, then Calcutta's principal product. Jute was used in carpet backing, often in new houses. The U.S. was the single largest market, so new housing starts were most important. These were influenced by mortgage interest rates.

This is a story that can be related in numerous other contexts:

- During the oil price shock of the 1970s, the farmers of Arkansas directly felt the consequences of actions taken in the middle east.

- Securities brokers on Wall Street and elsewhere are beginning to talk about the "24-hour market," whereby stock could be traded at any time of the day or night, since at almost every hour of most days of the year there is a major stock exchange open some place in the world. During the stock market free fall in 1987, we heard breakfast radio newscasters give detailed reports of the Tokyo and London stock markets, which had been open for hours and already developing trends that would influence New York.

- The percentage of the U.S. economy that relies on international transactions has been rising steadily, and a rising percentage of profits and activity of large U.S. corporations is derived from international transactions.

- The fax machine, as well as computer E-mail and many other technological innovations, has tied the globe more tightly together. We now watch wars on color television in our living rooms.

- Cultural and political differences of societies thousands of miles apart are now affecting the flow of trade and therefore the economic well-being of increasing numbers of friends and neighbors. Japanese rice farmers argue the cultural importance of rice growing in Japanese society, as well as the fears of world and natural calamities that breed fears of food shortages, and play a heavy role in the ruling party of Japan so as to make these sentiments effective in stopping rice imports, thus affecting farmers in Arkansas and other parts of the U.S. and the world.

As the cases I described indicate, there is a growing problem of different national approaches to economic regulation. Different product standards—health, safety, environmental, consumer protection—cause market inefficiencies that reduce economies of scale and also reduce everyone's welfare. Different approaches to competition or antitrust policies create concerns about the fairness of the international trading system. Cultural, linguistic, and educational differences create further

tensions.

2. *The erosion of national sovereignty*

For a variety of reasons, prominently including the developing economic interdependence mentioned above, the centuries-old traditions of national sovereignty are being changed dramatically. For many countries, "sovereignty" is a relatively useless concept, since their economic well being is so dependent on forces and events occurring outside their boundaries.⁶ Canada and Mexico feel this acutely. A U.S. change in interest rate, perhaps by official action of the U.S. Federal Reserve System, conditions and constrains what government leaders in those other countries can do to influence their own economies. For many smaller developing countries, national economic policy is now effectively made at the World Bank in Washington, D.C. Such policy sometimes creates riots in those smaller countries.

Japan's remarkably high savings rate, partly a cultural phenomena, partly a result of economic systemic differences, has a large impact on world economic trade and investment flows and therefore on the United States, sometimes constraining in a major way what U.S. Federal Reserve or U.S. Treasury officials can do to implement desired economic changes in the U.S. economy.

Politicians who are known to vociferously oppose the "loss of sovereignty" involved in certain international institution decisions (such as a GATT panel decision), or in assuming certain additional treaty obligations on specified economic subjects, should be made to consider just how much sovereignty their national government enjoys anyway, given the operation of many international economic activities not effectively controlled by any one nation.

Many transnational corporations now operate on a world wide "playing field" and exercise effective economic power greater than that of many nations. A fear of this power had led some nations to take action that has harmed their own economies.⁷ On the other hand, a

6. JACKSON, THE WORLD TRADING SYSTEM, *supra* note 1; John H. Jackson, Transnational Enterprises and International Codes of Conduct: Introductory Remarks for Experts (delivered to the International Bar Association Meeting in Berlin, Aug. 27, 1980); *Law Quadrangle Notes*, 25 U. MICH. L. SCH. (1981).

7. *See, e.g.*, JOHN WHALLEY, THE URUGUAY ROUND AND BEYOND (1989); John H. Jackson, Transnational Enterprises and International Codes of Conduct: Introductory Remarks for Experts, (delivered to the International Bar Association meeting in Berlin, Aug. 27, 1980); *Law Quadrangle Notes*, 25 U. OF MICH. L. SCH. (1981) (1081); ROBERT E. HUDEC, DEVELOPING

major problem exists when certain unscrupulous international businesses effectively avoid the regulations of any nation, undermining prudential and consumer protection rules such as those for banking and insurance institutions. The recent BCCI revelations amply demonstrate some of these points. The problem of tax evasion,⁸ particularly in some poorer developing countries also emphasizes this problem.

For national leaders, including many democratically elected and conscientiously trying to carry out programs on behalf of their constituents, these world economic interdependent conditions are a source of great frustration. What they legitimately want to do on behalf of the electorate, and what they are able to accomplish are two widely separated facts, in a world where economic forces flow from nation to nation and around the world with speed beyond the comprehension of most. These conditions are even more frustrating to political leaders, and indeed sometimes electorally fatal, when the operations of our international economic system are difficult or impossible for the electorate to understand.

3. *The potential failure of international institutions and the consequence of a power vacuum at the international level*

These conditions, which I have just mentioned, call out for a better international system of coordination. Yet the complex international institutional framework that we now have in place for economics is mostly over forty years old and shows many signs of organization arteriosclerosis in not being able to cope with or keep up with the fast-paced changes in international economic activity. This refers primarily to the so-called "Bretton Woods System," which includes the GATT as well as the International Monetary Fund and the World Bank, which I will discuss below.

COUNTRIES IN THE GATT LEGAL SYSTEM, 128 (1987); Dean DeRosa, *Protection in Sub-Saharan Africa Hinders Exports*, FIN. & DEV. (IMF), Sept. 1991, at 42; Arturo Israel, *Changing Role of the State in Development*, FIN. & DEV. (IMF), June 1991, at 41; *Poor Man's Burden, A Survey of the Third World*, THE ECONOMIST (Sept. 23, 1989); See, e.g., IGNAZ SEIDL-HOVENVELDERN, *CORPORATIONS IN AND UNDER INTERNATIONAL LAW* (1987).

See generally, the publications of the Centre on Transnational Corporations, United Nations, New York, NY.

8. See Diana B. Henriques, *In World Markets, Loose Regulation*, N.Y. TIMES, July 23, 1991, at D1; Richard Waters, *The BCCI Shutdown; Leigh-Pemberton tells of 'Criminal Culture.'* FIN. TIMES, July 24, 1991, at 6.

III. COPING MECHANISMS

How then can the national and international systems cope with the problems we have discussed? First, let me briefly survey the mechanisms of the system which we now have in place.

A. Post-World War II and the Bretton Woods System⁹

During the last half of the 1940s, national leaders of the victorious world war allies put in place a series of international institutions which, regarding economics, had a two-fold purpose:

- To establish institutions that could help prevent war, insofar as war is related to economic problems of the world. (It was thought that the Great Depression and other similar economic problems between the wars, had substantially contributed to World War II.)

- To put in place institutions that would help countries undertake the necessary cooperation for policies, such as tariff reductions, which would enhance world welfare, and thus help all countries.

The core policy assumption of most of this institutional effort was that liberal trade and other freedoms for economic transactions would best promote the welfare of all in the world, based on well-established economic theories of comparative advantage, gains from trade, and economies of scale. Thus, the basic approach was to provide international institutions that would constrain national governments from undertaking national oriented policies that, when copied by other nations, would greatly damage these core economic principles and thus reduce welfare for all, including the acting countries. It was a position based largely on market oriented economic principles.

The first major conference for this institution was the Bretton Woods Conference in 1944, which established the charters for the World Bank and International Monetary Fund. This conference did not develop a program for trade, but it recognized the necessity for doing so.

Consequently, as soon as the United Nations was established, one of its first tasks was to call for preparatory work which would lead to charter for an International Trade Organization (ITO). Conferences were held from 1946 until the Havana Conference in 1948, to prepare this charter. At the same time, at the invitation of the U.S. pursuing a

9. JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969) (Treatise on a Legal Analysis of the General Agreement on Tariffs and Trade, especially Ch. 1 & 2.).

line of policy which it had begun with the 1934 Reciprocal Trade Agreements Act, countries joined together in negotiating reduction of tariffs, and embodying them in the GATT.

It was not intended, however, that the GATT would be an organization, or the central governing treaty for international trade. The GATT was designed to be subordinate to the ITO, and it was the ITO that would be the organization and broader disciplining rule system. Unfortunately, the U.S. Congress refused to approve the ITO. The GATT came into provisional force, and is still applied through the protocol of provisional application, because United States legislation renewed in 1945 granted to the U.S. President the authority to enter into a reciprocal tariff reduction agreement along the lines of the GATT. This interplay between the constitutions of the United States and of the international trading system was demonstrably extremely important in shaping the post-World War II economic system.

The GATT has existed for more than forty years, and has essentially filled the vacuum left by the failure of an ITO to come into being. But the GATT has a number of "birth defects," based upon the odd history of its origin. The GATT has a relatively inadequate and short constitutional structure, and many important problems are left unanswered. In addition, the GATT is difficult to amend, and has had problems keeping its rules up to date in the face of rapidly changing international economic circumstances. Nevertheless, the GATT has been more successful than its founders had a right to expect, given the problems of its origin. Among other things, despite very skimpy provisions in the GATT treaty itself, the GATT has developed a fairly elaborate procedure for dispute settlement, a point I will come back to later.

The GATT has also sponsored a series of trade negotiation rounds, the seventh being completed in the 1970s (Tokyo Round), and the eighth being launched in the fall of 1986, and still in process (the Uruguay Round).

It is the situation of the Uruguay Round that raises a number of matters which concern observers of the international economic scene. On the one hand, the Uruguay Round was enormously ambitious, involving vast new subject areas such as trade in services, and intellectual property, and making a major effort to finally bring trade in agricultural products under the general discipline of GATT. Although agricultural products are technically under the GATT rules, the practice of nations throughout the history of GATT has resulted in de facto avoid-

ance of those rules for many agricultural products, a problem which the United States government tried valiantly to correct in both the 1960s Kennedy Round, and in the 1970s Tokyo Round, both unsuccessfully.

The current round was supposed to culminate in a ministerial meeting in December 1990, in Brussels.¹⁰ However, once again agriculture became the rock on which other matters floundered, and since agriculture had been made such a centerpiece of the negotiation by the U.S. Government, when the European Community refused to budge on its agricultural negotiating position, the negotiations essentially came to a halt. Although there has been much background and staff work, and a considerable amount of further attention by negotiators on other issues, the situation as we now talk remains one of stalemate because of agriculture. There are some optimistic signs out of Geneva that finally some movement might be achieved in the next few weeks, but time is running out.

B. Regionalism

An important principle of the GATT has been Most Favored Nation (MFN). The basic idea of this principle is that governments that are part of the GATT system should treat each other equally, without discrimination. However, the GATT has an important exception built into it for customs unions and free trade areas, when those type of arrangements achieve liberalization on "substantially all" trade and trade barriers. Over the decades of GATT history, many groupings of nations¹¹ have taken advantage of this exception in GATT, and because the GATT discipline on these activities has been rather lax, many commentators have suggested that this is a major loophole for GATT.¹² But in any event, there has developed a number of important regional, or special trade relationships, either as a customs union or a free trade area. The most prominent among these is the EC, and this customs union must now be reckoned as a major, if not *the* major trading force in the world.

There have been some attempts to develop similar structures in

10. GATT, Draft, *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, GATT DOC., Nov. 26, 1990.

11. GATT, *Analytical Index Notes on the Drafting, Interpretation and Application of the Articles of the General Agreement*, Article XXIV:5(c), at 12-16.

12. Kenneth W. Dam, *Regional Economic Arrangements and the GATT: The Legacy of a Misconception*, 30 U. CHI. L. REV., 615 (1963).

Latin America, and in the Pacific Basin and Asia, but none with quite the success of the EC.

The U.S. has worked in this direction, however, with its northern neighbor, Canada. After smaller arrangements with Israel, and the Caribbean basin, the U.S. agreed with Canada to establish a free trade area. This had been requested by Canada which felt vulnerable to the ambiguities and unpredictability of the U.S. "unfair trade laws," particularly the countervailing duty law regarding subsidies. The U.S. countervailing duty case against Canadian lumber was a rude awakening, which shocked Canada and led it to initiate negotiations for the free trade area, an idea which had a one hundred year history, but only came to completion in 1988.¹³

Subsequent developments I think are well known. Mexico had been a major holdout from the GATT system, negotiating for entry in the Tokyo Round, but then deciding not to proceed. But in the 1980s Mexico finally recognized that its economic welfare depended on it playing a role among the major trading countries of the world, and particularly it needed some kind of treaty mechanism to guide and stabilize its relationships with the big neighbor to the north. After a variety of bilateral attempts, Mexico finally joined the GATT, but then shortly thereafter approached the United States with a proposal to negotiate a free trade area, somewhat along the model of the U.S.—Canada agreement. Since Canada felt vitally concerned about the possibility of such a negotiation, the result has been to open a three country negotiation towards a NAFTA. That negotiation is proceeding now, currently on a very fast track with a considerable amount of high level nudging to keep it on track.¹⁴

The relationship of these various regional arrangements to the broader multilateral system of the GATT is perplexing. In general, it should be quite possible for both the regional arrangements and the GATT to co-exist and complement each other. Nevertheless, it has to be recognized that the regional arrangements have posed some threat to the force and importance of GATT, and this has been worrisome.

13. PETER MORICI, MAKING FREE TRADE WORK: THE CANADA-US AGREEMENT (1990); Jeffrey J. Schott and Murray G. Smith, Editors, THE CANADA-UNITED STATES FREE TRADE AGREEMENT: THE GLOBAL IMPACT (1988).

14. See BNA ITR, *supra* note 6 at numerous pages, and President George Bush, North American Free Trade Agreement, *U.S. Dep't of State Dispatch*, May 6, 1991, Vol. 2, No. 18; U.S. Trade Representative Carla Hills, Update on NAFTA Ministerials (Opening Statement from a news briefing, Washington, D.C., Dec. 13, 1991), *U.S. Dep't of State Dispatch*, (Dec. 23, 1991), Vol. 2, No. 51.

C. Unilateral and Bi-Lateral Operations

To round out our view of the landscape of various mechanisms to manage economic interdependence, we must touch upon some unilateral and bilateral initiatives, with particular reference to the United States.

The United States developed a very powerful tool, established through congressional legislation which can be traced back to 1962, but was substantially enhanced in the Trade Act of 1974, and is now known as Section 301.¹⁵ This remarkable and quite unique provision of domestic law provided a channel by which U.S. companies could petition the U.S. Government to complain in an appropriate international form about perceived foreign government violations of U.S. trading rights, or other foreign government actions deemed unfair, or "unreasonable." In some seventy cases since the 1974 Act, the U.S. has applied pressures to a variety of foreign countries on a variety of trading subjects including some issues of trade in services and intellectual property. Overall, this pressure has been reasonably successful, but it has involved several United States actions which were taken unilaterally in rather flagrant violation of U.S. multilateral treaty obligations such as the GATT. This has caused considerable worry among U.S. trading partners, and has been a source of discussion in the Uruguay Round negotiation.

Another example of a different sort of initiative, was the opening of detailed discussions between the United States and Japan entitled the Structural Impediments Initiative (SII).¹⁶ The cultural, political, and economic systemic differences between the United States and Japan, have been perplexing to both sides for many decades. In broad geopolitical terms, these two countries should be firm friends, seeking comparable and often identical world objectives. However, the trading relationship and other economic relations have been extremely troubled, bringing charges of racism on both sides, and engendering a considerable amount of grass roots political antagonism, and much comment as well as concrete statutory actions by the Congress. It is, in short, not a healthy situation. The SII negotiations were designed to

15. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS*, 105 (1989); Trade Act of 1974, 19 U.S.C. §§ 2101-2487 (1978); JAGDISH BHAGWATI and HUGH T. PATRICK, *AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM* 91-103 (1990).

16. Mitsuo Matsushita, *The Structural Impediment Initiative: An Example of Bilateral Trade Negotiation*, 12 MICH. J. INT'L L. 436 (1991).

provide a means by which these two countries could speak to each other in rather remarkable depth about their respective cultural and economic regulatory environments, which might be affecting and damaging their economic relationships. The degree to which these discussions involve subjects normally viewed as totally within the domestic competence and jurisdiction of a national sovereign, is truly remarkable and demonstrates again how deep questions of international economic interdependence reach into national circumstances.

D. Techniques for Managing Interdependence

In discussing the various "coping mechanisms," I have so far dealt with a variety of institutions and initiatives undertaken by governments, many of which were put in place during the 1940s. Now I would like to turn to some fairly broad-based principles that motivate various techniques for managing international economic relations and interdependence.

1. *Rule based system*¹⁷

One of the persistent differences of policy approach among diplomats and officials struggling with international economic relations, is the difference in view about whether an organization like GATT should be based on "power oriented diplomacy" or "rule oriented diplomacy." I have more extensively discussed this difference in other works, but briefly explained, it refers on the one hand to those who view a GATT or another international organization as primarily a place for diplomatic discussions with diplomats on each side playing their cards, or "chips," based on how powerful their nations are. On the other hand, a rule oriented diplomacy is based on a system of agreed rules, with some kind of a rule application procedure such as a GATT dispute settlement process, to back it up in a relatively meaningfully rigorous and adjudicatory process. It is the latter process, that I and others have suggested is important for assisting the management of international economic interdependence. This is partly because the market oriented economic systems involve essentially decentralized decision-making of millions of entrepreneurs, and these entrepreneurs generally need some kind of a rule-based system to give them a certain amount of guidance

17. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* (1989).

and stability. Without such guidance and stability, the "risk premium" of investment and market decisions can rise so as to reduce economic efficiency and world welfare. An investor who plans to invest in a new shoe-making plant in a small African country, may realize that for the plant to be economically successful and have the necessary economies of scale, it must produce shoes not only for that small country, but for export. Thus, the stability of its right to export, *i.e.*, the stability of the exporting legal environment, becomes an essential ingredient in the investment decision. In today's world, it is the GATT, and almost the GATT alone which gives this additional level of stability as part of the background landscape for millions of investment and marketing decisions.

2. *Harmonization*¹⁸

Harmonization is clearly an important technique, particularly in such areas as product standards and certain types of government regulation that relate to products or services. Nevertheless, harmonization can probably only be pushed to a limited degree, at least at the broader world-wide level (as compared to regional, or federal-state systems). No one expects the world to become totally uniform, or stamped out of one mold, and indeed it is unlikely that such a world would be particularly desirable to inhabit. Instead, any system must recognize and accommodate a very large degree of diversity, based in some cases on cultural differences and in other cases on differences in level of economic attainment, or government systems, etc., as well as different, rich, historical backgrounds.

The European Community has been experimenting and proceeding further along harmonization lines, but even it has ameliorated the notion of harmonization. Rather than assuming that there must always be a complete similarity or identity of product standards, for example, the community is experimenting with a notion of certain minimal levels of product standards, accompanied by requirements upon member states to "recognize" satisfactory product standards imposed by other states, even though they differ in certain respects. Harmonization clearly will be an important driving force, but it also clearly has certain important limitations.

18. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* (1989); JOHN H. JACKSON AND WILLIAM DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* (2d ed. 1986).

3. *Reciprocity*

Another technique for managing interdependence, is the "reciprocity" notion. Under this concept, there develops a system of "swaps," or reciprocal "deals," by which different countries agree to different obligations; but try to match up their effect so that each country feels it is receiving as much benefit as it is giving. To some degree the concept of reciprocity, well known in GATT, is a fallacy. Unilateral trade liberalization measures, for example, can in certain circumstances enhance the welfare of the acting nation. Nevertheless, reciprocity has been an important political driving force for trade liberalization throughout the history of tariff reduction agreements, particularly since the 1934 U.S. Reciprocal Trade Agreements Act.

It should be noted, that the most successful achievement of GATT regards reduction of tariffs on industrial products imported into industrial countries. Yet, the approach of GATT on tariffs was not "harmonization." Rather, each country developed a list of tariff "bindings," often quite different from those of other countries. One country would bind a tariff on bicycles, another on radios, another on tractors. Over time, the system provided for extensive tariff liberalization, which in a sense drives tariffs towards a "harmonized zero level," but the notion was not based on a theory of harmonization.

Today of course, the real challenge facing international trade is less focused on tariffs, and more focused on nontariff barriers. Nevertheless, there may be ways to utilize the reciprocity notion in connection with nontariff barriers, although often it becomes much more difficult because negotiators tend to want some kind of quantitative standard by which to evaluate the fairness of trade-offs, and such quantification can be difficult, if not impossible in connection with rule-oriented code structures. For example, how can negotiators predict what will be the trade advantage of a customs valuation code, even in the first year, and much less for five or ten years in advance?

4. *The Interface Concept*

Another technique for managing interdependence, I have termed the "interface concept." The basic idea here, is that even economies which are relatively similar have important differences—structural, cultural, governmental. These differences can generate both economic and political problems, *i.e.*, a sense of "unfairness" among political constituencies. Thus, these differences, which may be as "simple" as differ-

ent debt-equity ratios in the capitalization of firms, sometimes need to be ameliorated by some kind of international buffering mechanism so as to soften their impacts, or minimize the tension—creating political if not economic effects. The GATT is an important “interface mechanism.” However, one also can focus on activities within the GATT such as “safeguards” (escape clauses unfortunately not too successful), as an interface mechanism. I have even written elsewhere that the antidumping duties may be performing such a buffering “interface mechanism” in certain kinds of contexts, although never originally intended to be for that purpose.

The injury test in a variety of trade law procedures becomes an “interface mechanism.” The basic idea is that trade between even radically different economic structures (such as nonmarket economies compared to market economies) should be facilitated, but some kind of an interface mechanism will be necessary to prevent the impression of one side having taken advantage of the other.

The above broad categories of techniques for managing interdependence undoubtedly do not exhaust the possibilities. But they illustrate the importance of the system accommodating a variety of approaches, and not just one single approach. Needless to say, a variety of approaches requires a more sophisticated international institutional structure in order to appropriately supervise these techniques.

IV. INSTITUTIONAL ASPECTS AND REFORM: THE LAWYER'S PROBLEMS

Now that we have looked at the nature of the problem, and a brief overview of the existing mechanisms designed to cope with the problem, I wish to turn to some measures that can be taken to improve these mechanisms.

I think you can see the direction of my thinking. Somehow, given the fading of importance of national sovereignty, there must be a mechanism by which governments can enter into meaningful cooperation. Essentially this means negotiated treaty norms that are reasonably effective. This is not the same as a “super sovereign” or “international government.” It is instead a pragmatic but effective and reasonably efficient international cooperative mechanism that can give governments an important tool for managing the problems of international economic interdependence. Somehow the international system has to have the capability of studying a problem, getting diplomats together to try to formulate norms or rules which can help solve the problem, and then put-

ting in place a mechanism that will make these rules reasonably effective. Does this mean "yielding sovereignty?" Of course it does—just as states have yielded sovereignty to the federal government in order to achieve cooperative approaches that are impossible when each state acts alone for only its own benefit.

A. Dispute Settlement Procedures¹⁹

One part of the negotiations in the Uruguay Round have focused on the GATT dispute settlement system, and its need for improvement. As I mentioned earlier, the GATT dispute settlement procedure is based on very skimpy treaty provisions, but forty years of trial and error practice and evolution have resulted in a remarkably sophisticated system, which indeed has a rather good record. It has handled more than twice the number of the cases during the same period of time as the World Court, and some of these cases have been far more significant than World Court cases. For the most part, the cases have resulted in panel reports adopted by the GATT Council, which if not immediately, nevertheless eventually, have been accepted and implemented by the losing party in the panel procedure. This is certainly true of the United States which on a number of occasions has found itself on the losing end of a GATT dispute panel, but has on the whole graciously accepted that position and with effort, achieved a reform of its law usually requiring congressional enactment, so as to bring its law into consistency with its GATT system obligations.

But the procedure has some major defects. One of those defects has been a principle of consensus governing the Council approval of a panel report, which has in effect, allowed the losing party to block such GATT approval. This blocking has occurred in relatively few cases, but they have been troublesome. Thus, one of the tasks of the negotiators has been to try to improve the GATT procedures so as to avoid this blocking. A proposal that is sitting on the table would create in lieu of Council approval, an appellate tribunal. This itself is quite innovative in international law terms.

Another problem of the GATT dispute settlement procedure is that a number of separate treaty agreements which are part of the GATT system have separate dispute settlement processes, so that there

19. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* (1990); JOHN H. JACKSON, and WILLIAM DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* (2d ed. 1986).

are in effect six or eight different procedures. This causes troublesome disputes as to the appropriate form, or the methodology of dispute settlement. It is proposed in the negotiation to establish one unified dispute settlement system for all of the GATT system disputes, probably including even the new areas under negotiation such as services and intellectual property.

B. Restructuring the GATT: A WTO or MTO?²⁰

Because of a number of structural "birth defects" of the GATT system, which I have more elaborately discussed in other works, but eluded to previously in this article, there has recently been some attention during the Uruguay Round about the possibility of developing a new legal structure for the GATT and the new issues of the Uruguay Round. The need for this attention is derived both from the problems now seen in wrapping up the Uruguay Round negotiation and providing for the appropriate treaty instruments to implement it, and from the developments in the negotiation for improvement of the dispute settlement system.

As part of the process of concluding the Uruguay Round and effectuating it, attention is forced to the institutional mechanism which will carry out the mandates and rules established by the negotiators. These include the new subjects of trade in services and intellectual property, which are not now under the GATT. It is generally felt inappropriate to try to simply include those subjects in the existing GATT, since so many of the GATT rules have been developed in the context of trade for goods, which do not adequately apply to these other subjects. On the other hand, if separate and separable treaty instruments are established for rule systems for services and/or intellectual property, this raises the issue of what becomes of the GATT. One most prominent approach recognizes the need for some type of overall umbrella, or supervising institution, which could service and facilitate the GATT, a services agreement, an intellectual property agreement, and possibly some agreements to be added in the future, as international economic activities continue to change. In short, the negotiation "end game" forces attention to the institutional problems of the GATT. In light of the many birth defects and difficulties of the existing GATT, it seems sensible to recognize a major opportunity at the end of the Uruguay Round for such structural change.

20. JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* (1990).

The basic idea put forward is to establish a small charter which would itself have no substantive obligations, but merely deal with the procedural and legal framework of an umbrella organization, much as an ill-fated attempt in 1955 entitled the Organization for Trade Cooperation (OTC) contemplated. This time it is proposed that such a simple institutional structure be embodied in an organization to be called a World Trade Organization (WTO) or Multilateral Trade Organization (MTO). Although time does not permit me to go into depth about some of the legal questions of this structure (I have elsewhere written more extensively about this also), the major government participants in the Uruguay Round have extensively discussed these matters, and at least several of the top four countries (U.S., EC, Japan and Canada) have taken the position favoring the establishment of such a new organizational structure.

Likewise, the problem of how to facilitate a unified dispute settlement procedure which would embrace not only GATT and goods questions, but services and intellectual property, forces attention to the institutional structure. Such a unified dispute settlement system must have a facilitating organization to back it up, including a secretariat, and certain overall rules. Once again, it seems sensible to have a structure that becomes part of an overall umbrella organization to serve the various trade rule systems, and potential new ones in the future.

V. CONCLUSIONS

In my opinion, any appraisal of the world's economic system leads to several linked conclusions:

1) Economics plays a role of enormous importance in world affairs, and relates to questions of avoiding war, as well as reducing poverty and developing satisfactory living standards for billions of people.

2) Economic interdependence is increasing very fast. It has important advantages—increasing competition and stimulating innovation to provide better living standards for all; but it also poses considerable problems.

3) Such interdependence has undermined our existing government institutions both at the national and international level:

- national sovereigns have greater and greater difficulty responding to the challenges of interdependence and find they cannot often “go it alone” anymore—international cooperation becomes essential; and

- the existing international government institutions for cooperation, including the Bretton Woods System and GATT, may be inade-

quate to the tasks of managing international economic interdependence as they are largely out of date and falling behind the pace of change.

4) The GATT and its complex trading system, faulted by birth defects from its beginning, has worked better than any one had a right to predict, but has had increasing difficulty coping with many problems confronting it. The Uruguay Round impasse and difficulties partly reflect this.

5) Thus, important attention is needed upon these international institutions, and this is a major challenge to the legal profession with its general expertise on "constitutions." The "constitution" of GATT needs restructuring.

6) The puzzle, of course, is the direction which this restructuring should take. National leaders still fear "internationalism" or "loss of sovereignty," and with some good reason because a number of our international organizations have left much to be desired. We must legitimately worry about too great concentrations of power at the international level, just as our forefathers worried about this for our own constitution. Yet to avoid the issue invites disaster—a vacuum of power at the international level will play into the hands of the unscrupulous, and will cater to short term parochial interests like those that led to the 1930s disastrous tariff increases such as the Smoot-Hawley Tariff Act. The dilemma of individual national actions causing damage to the world economy can only be broken by cooperative efforts.

7) These cooperative efforts require two conditions: A rule-based system which enhances the effectiveness of negotiated obligations as a basis for market-based entrepreneurs to make decisions; and an institutional framework which, although carefully hedged against abuse of power, can facilitate the rule-based system through dispute settlement procedures, and new rule-making opportunities.

The GATT, after the Uruguay Round, has a formidable agenda of tasks ahead of it. These include a long list of perplexing subjects, many of them posing policy dilemmas. Only a partial list includes:

Competition or anti-monopoly policies

The problem of providing rules for state trading or government-owned enterprises

The question of science and appropriate product standards

The importance of cultural differences on world trade in products and services

Environment regulation, especially the environment of the world sometimes called the global commons

The link of human rights and work place standards of trade policy

The relation of monetary institutions such as the IMF to trade policy

And the need to rethink a number of traditional GATT trade policy concepts such as:

Most favored nation treatment

National treatment and scientific justification for national treatment of products and services

Reciprocity notions

Regionalism and how a GATT institution can mediate the growing power of regional trade blocs

Safeguards and the escape clause, as well as adjustment mechanisms for workers and enterprises

Unfair trade rules and the level playing field

Let's hope that the GATT system will be able to carry out these weighty responsibilities. It is my conclusion that without some important institutional restructuring and enhancement, it is unlikely to be able to do so.