

Maryland Journal of International Law

Volume 11 | Issue 1

Article 9

Law and Its Limitations in the GATT Multilateral Trade System, by Oliver Long

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Recommended Citation

Brian V. Kennedy, *Law and Its Limitations in the GATT Multilateral Trade System, by Oliver Long*, 11 Md. J. Int'l L. 127 (1987).
Available at: <http://digitalcommons.law.umaryland.edu/mjil/vol11/iss1/9>

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LAW AND ITS LIMITATION IN THE GATT MULTILATERAL TRADE SYSTEM. By Olivier Long. Hingham, MA: Martinus Nijhoff, 1986, 158 pp., \$38.50.

In early February of 1987, The "Uruguay Round" of multilateral trade negotiations under the auspices of the General Agreement on Trade and Tariffs ("GATT") began in earnest.

Olivier Long authors this thorough outline of the functioning GATT system drawn from a series of lectures delivered at the prestigious Hague Academy of International Law. Mr. Long, a former Director-General of the GATT, is currently a professor at the Graduate Institute of International Studies in Geneva. His expertise in the subject matter is attested to by his clear and concise description of an intricate and complicated subject matter which often proves baffling to the uninitiated. Indeed, during the Senate Hearings in 1951, Senator Milliken is quoted as saying "Anyone who reads GATT is likely to have his sanity impaired." However, drawing on his twelve years experience as Director-General, Mr. Long has been able to present this complicated material in a manner so as to make the GATT accessible to readers of all backgrounds.

The book's introduction briefly discusses the history leading up to the GATT's inception describing the world trade turmoil which resulted from the "protectionism and the bilateralism of the Great Depression of the 1930's, the Second World War,"¹ and the failure of the Havana Charter's proposed International Trade Organization. The introduction goes on to present a subject which proves to be the book's theme — the strange marriage between law and international politics which is represented by the GATT.

The opening chapter deals with the legal framework of the GATT. Here, Long sets out the five fundamental principles and rules which comprise the organization's legal backbone: (1) *Most Favored Nation Treatment* — which provides that every importation privilege granted by a Contracting Party to any country shall similarly be granted to all other Contracting Parties; (2) *National Treatment* — which dictates that products imported from one member country to another shall be treated in the same manner as domestic products with regard to internal taxation and regulations; (3) *General Elimination of Quantitative Restrictions* — which proposes that GATT members are not to apply quantitative limits on imports from other member nations; (4) *Customs*

1. O. LONG, LAW AND ITS LIMITATION IN THE GATT MULTILATERAL TRADE SYSTEM 5 (1986).

Duties as a Means of Protection — which states that while customs duties are the only form of protection sanctioned by the GATT, continued reduction of these tariffs remains an objective of the organization; and (5) *Reciprocity* —which declares that the Contracting Parties shall work together on an equal footing toward the goal of free trade.

As he introduces these fundamental legal principles of GATT, Long consistently points out the various exceptions to each rule, again harkening back to the book's underlying theme; while formal rules are necessary in an organization dedicated to the creation and preservation of liberalized world trade, the political pressures which confront each of the sovereign member nations dictate that the rules be relaxed under certain conditions. As Long aptly puts it "had the GATT law remained immutable, it would certainly have lost most of its authority. The adaptations and modifications that have been made should not be looked upon as evidence of weakness but rather as an indication of the viability of the system and of a willingness to change."²

The second chapter discusses the GATT's role in promoting negotiation among the member nations and the interrelationship between such negotiations and the GATT's legal principles. In this section Long examines the various rounds of multilateral negotiations (the present Uruguay Round is the eighth in the series). Citing specific examples of progress made during the Kennedy and Tokyo Rounds, Long demonstrates the value of these meetings. According to Long:

Experience has shown that, for political, psychological and practical reasons, the occasion of an extensive trade negotiation creates the right environment for the conclusion of new instruments dealing with the difficult, and sometimes contentious areas of trade relations. Advantage can be taken of the momentum that is generated; the administrative infrastructure set up when negotiations take place and in capitals; the existence of precise terminal dates; and the fact that several areas are concurrently under negotiation with the aim of achieving an overall balance in final settlement.³

Long illustrates his assertion through a "laundry list" of some of the many accomplishments of these negotiation sessions: the Anti-dumping code, the Agreement on Subsidies and Countervailing Duties, the Agreement on Import Licensing Procedures, the Agreement on Government Procurement, the Agreement on Technical Barriers to

2. *Id.* at 8.

3. *Id.* at 26.

Trade, the agreements to provide preferential treatment to developing nations, the Multi-Fiber Arrangement and procedures providing for the accession to GATT by market-economy industrialized countries, developing countries and countries with centrally planned economies. The successes of these rounds demonstrate both the value of the GATT and the wisdom of permitting the organization to change as dictated by world political developments. Indeed, "International trade, by its nature, is dynamic and evolutive. It is, therefore, not easily amenable to the rules and procedures of a legal framework unless the framework itself remains flexible and in evolution."⁴

In the third chapter, Long discusses the GATT as it functions. All true power in the GATT is derived from the Contracting Parties themselves. Through the years the Contracting Parties have chosen to delegate certain tasks to various councils and committee systems. The Council of Representatives is the intercessional body and executive organ of the Contracting Parties. It oversees the day to day business of the organization. In addition, the GATT, from time to time, sets up committees and panels to examine issues of interest to the member nations. A consultative group of eighteen member nations has also been formed to help implement the GATT's policies in a more economical fashion than would be possible if consultation with all the Contracting Parties was necessary on every issue. Long goes on to describe the position of Director-General, a position with which he is intimately familiar. The Director-General is an initiator of action, a mediator of conflicts and the manager of the GATT's affairs. Although he has no formal mandatory authority, through his prestige and powers of persuasion he is able to wield considerable power.

In the latter part of the chapter, Long discusses the GATT's safeguard clause. Often referred to as the "escape clause," this key provision of the GATT authorizes a member nation to take protective measures when imports of certain products threaten serious injury to domestic producers. According to Long, the safeguard clause, "represents a link between two contradictory objectives: one is the respect by governments for commitments on trade liberalization, and the other is their concern to keep a margin of manoeuvre enabling them, if the economic situation makes it necessary, to protect the domestic market through the imposition of restrictive measures."⁵ The GATT must continually walk the tightrope between these two contradictory objectives and the safeguard clause is demonstrative of the GATT's pragmatic

4. *Id.* at 24.

5. *Id.* at 57.

approach to this dilemma. As Long emphasizes once again, "If the GATT had been administered in an inflexible manner if it had proved impervious to change, it would have gradually lost its influence on trade policies. The GATT has maintained its strength by pursuing its goals realistically."⁶

Chapter Four is concerned with supervision of the GATT and the operation of the General Agreement. The GATT provides no recourse to a judicial body, yet it must maintain a reasonable degree of compliance while still providing a method for the settlement of disputes. Often the GATT relies on "moral pressure" to restrain a member nation from acting contrary to the principles of the GATT. Indeed, this method proved sufficient to persuade the United States to drop a 10% surcharge which was briefly implemented in 1971. This experience illustrates that the fear of losing the advantage of tariff concessions and other GATT benefits can, in and of itself, prevent disputes.

Rather than settle disputes, the GATT has frequently been able to avoid the creation of potential problems. Long offers two examples here: trade in agriculture and the creation of customs unions and free trade areas. "Agriculture trade has been virtually excluded and insulated from the process of trade liberalization Agriculture is treated differently in the GATT for reasons that have nothing to do with the law but which are dictated by domestic political constraints."⁷ As these quotations indicate, agriculture is such a politically sensitive issue to many of the member nations that the GATT has expressly excepted agricultural trade from many of its provisions.

The creation of the European Economic Community also represented a potential threat to the viability of the GATT. For the most part however, problems were avoided through the GATT exceptions for customs unions and free trade areas. While these exceptions run contrary to the GATT's principles of Most Favored Nation Treatment and Reciprocity, Long argues persuasively that "the discriminatory effects of customs unions, free trade areas and the like have been progressively eroded by the big reductions in customs duties resulting from the GATT 'rounds of negotiations.'"⁸ Agricultural trade and customs unions are further examples of how the GATT has been able to adapt to the political climate and remain an effective organization.

The primary objective of the GATT's dispute settlement procedure is to promote an agreement which is mutually acceptable to the disput-

6. *Id.* at 62.

7. *Id.* at 68-9.

8. *Id.* at 70.

ing parties. A panel will generally monitor bilateral negotiations and, if no agreement is reached, the panel will submit its findings and recommendations to the Council. The Council then adopts (no panel report has been rejected) the panel's findings and gives them legal force. If the recommendations are not complied with, the GATT provides for recourse through retaliatory measures. In practice, retaliation has rarely been sought and occurred only once in a dispute involving dairy products brought by the Netherlands against the United States. The paucity of cases in which retaliation was sought indicates an underlying strength in the overall organization.

The fifth and final chapter deals with the GATT's system of preferences which were adopted to promote the interests of developing countries. While the concept of granting preferential treatment runs contrary to the fundamental GATT principles of Most Favored Nation Treatment and Reciprocity, the member nations saw a need to take positive action to facilitate economic expansion in the smaller and weaker countries. Long quotes former UNCTAD Secretary General, Raul Prebisch, who expressed these sentiments when he said: "However valid the MFN principle may be in regulating trade relations among equals, it is not a suitable concept for trade involving countries of vastly unequal economic strength."⁹ The member nations accomplished this goal initially by permitting "donor" Contracting Parties to waive Most Favored Nation Treatment and by relieving their commitment on reciprocity in order to allow these Contracting Parties to participate with impunity in the Generalized Systems of Preferences. Later the GATT enacted the "enabling clause" which established a permanent legal basis for preferences in favor of developing countries. Thus, the GATT was once again able to adapt itself in accordance with the desires of the world trading community.

Law and Its Limitations in the GATT Multilateral Trade System, by Olivier Long is an authoritative work on a subject of great importance. A reading of the book is particularly recommended to those who wish to follow the progress at the "Uruguay Round" as the Contracting Parties wrestle with such contentious issues as the rules on agricultural trade, investment, the nontariff barrier codes, intellectual property rights, and trade in services. The theme of Long's book is that the GATT, even though it is a system of laws, must always remain cognizant of the political pressures that confront the member nations. The current situation in the United States with its 170 billion dollar trade deficit and the resulting calls to arms in the Congress and the nation at

9. *Id.* at 90.

large provides a perfect example of just how intense the political pressures can become. If the precedent described by Long is followed, "this too shall pass" and the GATT, perhaps with minor adjustments, shall remain intact.

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