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The United States Law of Countervailing Duties and Federal Agency Procurement After the Tokyo Round: Is It "GATT Legal"?

Introduction

The General Agreement on Tariffs and Trade¹ is the principal multilateral treaty governing international trade. In its forty year history, GATT-sponsored trade rounds² have virtually eliminated the threat

1. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

By convention, the treaty which opened for signature on October 30, 1947 is referred to as the "General Agreement," while the institution which it and subsequent amendments, protocols, *proces verbaux* and other agreements created is referred to as "the GATT." K. DAM, *THE GATT* 3, n. 1 (1970). Parties to the General Agreement, when referred to individually, are designated "contracting parties"; when referred to collectively, they are designated the "CONTRACTING PARTIES." GATT, *supra*, art. XXV, para. 1.

For historical background and detailed analysis of the provisions of the General Agreement, see generally K. DAM, *THE GATT*, *supra*; J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969) [hereinafter JACKSON]; J. JACKSON, *THE WORLD TRADING SYSTEM* (1989) [hereinafter *WORLD TRADING SYSTEM*]; and J. JACKSON AND W. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* (2d ed. 1986) [hereinafter JACKSON & DAVEY].

The General Agreement became legally binding on the contracting parties under the Protocol of Provisional Application of the General Agreement on Tariffs and Trade, *done* Oct. 30, 1947, 61 Stat. A2051, T.I.A.S. No. 1700, 55 U.N.T.S. 308 [hereinafter Protocol of Provisional Application]. Under the terms of the Protocol, the contracting parties agreed to "apply provisionally on and after 1 January 1948: (a) Parts I and III of the General Agreement on Tariffs and Trade, and (b) Part II of that Agreement to the fullest extent not inconsistent with existing legislation." *Id.* Part I of the General Agreement includes the basic unconditional most-favored-nation ("MFN") commitment concerning "customs duties and other charges" as well as the tariff reduction schedules agreed upon at the 1947 Geneva conferences; Part II includes most other substantive commitments related to the reduction of trade barriers as well as a list of exceptions; Part III's provisions provide structure to the GATT system. See GATT, *supra*. For a discussion of the Protocol and its function, see JACKSON & DAVEY, *supra*, at 295; JACKSON, *supra*, at 60-62.

2. Multilateral conferences sponsored by the GATT, at which members bargain for trade concessions, are popularly known as "rounds." K. DAM, *supra* note 1, at 56. The first six rounds focussed on tariff barriers to trade. The Tokyo Round (1973-79) was the first to concentrate on nontariff barriers. JACKSON & DAVEY, *supra* note 1, at 324-25. The Uruguay Round, which is scheduled to end in 1990, was announced by 23 CORNELL INT'L L.J. 553 (1990)

posed to the international economy by high tariffs on imported goods and contributed substantially to the dramatic expansion in world trade since the Second World War.³

The Tokyo Round of trade negotiations (1973-1979) was the first GATT-sponsored trade round to focus primarily on curtailing nontariff trade barriers. Also known as the "Multilateral Trade Negotiations", the Tokyo Round produced a group of "codes" (or "MTN agreements") which attempt to control such potential nontariff trade barriers as customs valuation procedures, government procurement regulations, import licensing practices, technical specifications, subsidies and countervailing duties, and antidumping enforcement mechanisms.⁴

In form and in legal effect, the Tokyo Round codes were negotiated as "stand alone" treaties, rather than as amendments to the General Agreement.⁵ One reason the Tokyo Round negotiations were cast in the form of independent treaties was that participating Western indus-

the Ministerial Declaration on the Uruguay Round [hereinafter Uruguay Round], Declaration of 20 September 1986, GENERAL AGREEMENT ON TARIFFS AND TRADE: BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 33 Supp. 19 (1986) [hereinafter GATT, B.I.S.D.].

3. See C. AHO & J. ARONSON, TRADE TALKS 18-20 (1985); WORLD TRADING SYSTEM, *supra* note 1, at 52-53. By the close of the Tokyo Round, average tariff rates had been reduced to 4.7%. *Id.*

4. Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade, *done* Apr. 12, 1979, GATT, B.I.S.D., 26 Supp. 116 (1980); Agreement on Government Procurement, *done* Apr. 11, 1979, 26 B.I.S.D. 26 Supp. 33 [hereinafter Government Procurement Code]; Agreement on Import Licensing Procedures, *done* Apr. 10, 1979, GATT, B.I.S.D., 26 Supp. 154 (1980); Agreement on Technical Barriers to Trade, *done* March 29, 1979, GATT, B.I.S.D., 26 Supp. 8 (1980); Agreement on Interpretation of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, *done* Apr. 12, 1979, GATT, B.I.S.D., 26 Supp. 56 (1980) [hereinafter Subsidies and Countervailing Measures Code]; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, *done* Apr. 9, 1979, GATT, B.I.S.D., 26 Supp. 171 (1980). See generally WINHAM, INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATION 69, 101, 107, 109 (1986).

5. See SUBCOMMITTEE ON INTERNATIONAL TRADE OF THE SENATE COMM. ON FINANCE, 96th Cong., 1st Sess., MTN STUDIES, 8 (Comm. Print 1979) [hereinafter MTN STUDIES].

Countries which are not signatories to the General Agreement may theoretically accede to the MTN Agreements. For example, article 19 of the Subsidies and Countervailing Measures Code provides that the Code is open for acceptance to contracting parties, parties which have provisionally acceded to the GATT, and to "any other government on terms, related to the effective application of rights and obligations under this Agreement, to be agreed between that government and the signatories. . . ." Subsidies and Countervailing Measures Code, *supra* note 4, art. 19, para. 2(c).

Furthermore, the language of the codes which establishes rights and obligations purports to apply only to other code signatories. See, e.g., Government Procurement Code, *supra* note 4, art. II, para. 1; and Subsidies and Countervailing Measures Code, *supra* note 4, Art. 1.

After the MTN Agreements were drafted, GATT members who declined to participate were concerned about the impact of the codes on their rights under the General Agreement. In an official "decision," the Contracting Parties declared that "existing rights and benefits under the GATT of contracting parties not being parties to these Agreements, including those derived from Article I, are not affected by these Agree-

trialized countries feared they could not obtain sufficient support from developing country signatories for amendments to the General Agreement which address nontariff trade barriers.⁶ Another reason for the Tokyo Round's "stand alone" treaties approach was the desire of the American Congress to guarantee reciprocity. Congress thought a system of separate treaties would encourage greater participation by the major trading nations of the world in the MTN Agreements and prevent "free riders" from securing the benefits of the negotiations without undertaking domestic economic reform.⁷ Although reciprocity was also an issue during the previous trade rounds directed at tariff reductions,⁸ Congress apparently felt that the special characteristics of nontariff barriers demanded a new negotiating strategy.⁹ Departing from a fifty year

ments." Action by the Contracting Parties on the Multilateral Trade Negotiations, Decision of 28 November 1979 (L/4905), GATT, B.I.S.D., 26 Supp. 201 (1980).

6. See MTN STUDIES, *supra* note 5, at 6-7.

Article XXX of the General Agreement provides for amendments. Amendments to Part I of the General Agreement (which includes the unconditional MFN obligation that applies to customs duties) require unanimous acceptance of the parties. Amendments to other parts of the General Agreement require two-thirds acceptance by the contracting parties; however, such amendments are only effective between parties which accept them. GATT, *supra* note 1, art. XXX, para. 1. See MTN STUDIES, *supra* note 5, at 6-7. Since the majority of contracting parties are developing countries, most of which employ nontariff protectionist measures to encourage industrial growth, it appeared there would be insufficient support for amendments to the General Agreement that attempted to limit such measures. *Id.*

7. See S. REP. No. 1298, 93d Cong., 2d Sess. at 77-78 (1974) [hereinafter REPORT ON TRADE ACT OF 1974]. The Trade Act of 1974 authorized the President to participate in the Tokyo Round. Trade Act of 1974, P.L. 93-618, 88 Stat. 1978, § 101(a), 19 U.S.C. § 2111(a) (1975) [hereinafter Trade Act of 1974]. See also *Trade Agreement Authority*, Int'l Trade Rep. (BNA) at 72:0101 (Sept. 28, 1988). Writing about section 126 of the Act, which authorized the President to suspend the benefits of applicable trade legislation when a "major industrial country has not made concessions under trade agreements entered into under this Act," the Committee commented:

The Committee feels that the "unconditional" most-favored-nation principle has led, in the past, to one-sided agreements Under this principle there is an inherent incentive for countries to "get a free ride", since they would automatically receive the benefits of any trade agreement No industrialized country should be given a free ride in this negotiation. Nor should any industrialized country provide protection to its industries while expecting others to lower barriers for their exports The United States should not grant concessions to countries which are not willing to offer substantial equivalent competitive opportunities for the products of the United States in their market as we offer their products in our market.

REPORT ON TRADE ACT OF 1974, *supra*, at 94-95.

8. JACKSON, *supra* note 1, at 241-45.

9. As one commentator explained,

Fundamentally, the reason for this shift toward conditional MFN lies in the nature of the codes themselves. The codes are designed to deal with nontariff barriers—not with tariffs. Nontariff barriers . . . are difficult to control. Unlike tariffs, they are not always visible. They often involve "internal" national policies. Such policies often have a substantial effect on trade; but their asserted objective is unrelated to trade In order to reduce or eliminate such NTBs nations must submit to cooperative discipline in regulation of their own affairs. From the outset, it was clear that not all GATT

history of negotiating exclusively unconditional most-favored-nation ("MFN") trade agreements,¹⁰ the Trade Act of 1974 authorized the Executive Branch to negotiate agreements which would condition receipt of any related benefits upon satisfactory acceptance of the agreement's substantive obligations.¹¹

This Note examines whether the U.S. can limit extending privileges created by two of the Tokyo Round codes, the Government Procurement Code and the Subsidies and Countervailing Measures Code, to code signatories (and GATT members assuming substantially equivalent obligations) without violating its unconditional most-favored-nation commitment under article I of the General Agreement.¹² This Note contends that the unconditional MFN commitment of article I encompasses the method for levying countervailing duties¹³ as well as government procurement practices,¹⁴ and that no exemption is available to the

members were prepared to either negotiate or agree to international examination of their conduct in these respects. In these circumstances . . . the conditional form of MFN was inevitable.

Rubin, *Most-Favored-Nation Treatment and the Multilateral Trade Negotiations: A Quiet Revolution*, 6 INT'L TRADE L.J. 221, 236 (1980).

10. United States policy favored the negotiation of bilateral commercial treaties on an unconditional MFN basis beginning in 1922. See JACKSON, *supra* note 1, at 250.

11. Section 102(f) of the Trade Act of 1974, *supra* note 7, provides,

[t]o insure that a foreign country or instrumentality which receives benefits under a trade agreement entered into under this section is subject to the obligations imposed by such agreement, the President may recommend to Congress in the implementing bill . . . that the benefits and obligations of such agreement apply solely to the parties to such agreement, if such application is consistent with the terms of the agreement.

12. The term "privilege" is used in the sense that after the Tokyo Round, the U.S. reduced certain nontariff barriers only with respect to goods originating in code signatories or, in limited circumstances, other GATT signatories. The U.S. law concerning articles originating in countries not designated for favorable treatment by the Trade Agreements Act of 1979 was virtually unaffected by the Act.

The most comprehensive examination of the topic addressed by this Note is Hufbauer, Erb, and Starr, *The GATT Codes and the Unconditional Most-Favored-Nation Principle*, 12 LAW & POL'Y INT'L BUS. 59 (1980) [hereinafter Hufbauer] (Dr. Hufbauer was Deputy Assistant Secretary of the Treasury for International Trade and Investment Policy and apparently had a role in the readoption by the U.S. of the conditional MFN trade agreement strategy). See also Rubin, *supra* note 9; G. Hufbauer, *Should Unconditional MFN Be Revived, Retired, or Recast?*, in ISSUES IN WORLD TRADE POLICY—GATT AT THE CROSSROADS 32 (R. H. Snape ed. 1986); WORLD TRADING SYSTEM, *supra* note 1, at 143-45; R. HUDEC, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM 81-90 (1987) [hereinafter DEVELOPING COUNTRIES]; R. Hudec, *Tiger, Tiger in the House: A Critical Appraisal of the Case against Discriminatory Trade Measures*, in THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS 165 (Petersmann & Hilf eds. 1988) [hereinafter Hudec]; Snape, *Is Non-discrimination Really Dead?*, 11 WORLD ECON. 1 (1988).

While the U.S. also adopted a conditional interpretation with respect to the code on Technical Standards, this Note focuses on the Government Procurement Code and the Subsidies and Countervailing Measures Code because they generated the most controversy. See Snape, *Is Non-Discrimination Really Dead?*, *supra*; and WORLD TRADING SYSTEM, *supra* note 1, at 143-44.

13. See *infra* notes 130-60 and accompanying text.

14. See *infra* notes 161-97 and accompanying text.

U.S.;¹⁵ therefore, American practices with respect to both codes violate its obligations under the General Agreement, and injured parties may be entitled to appropriate remedies.¹⁶ Thus, many outstanding countervailing duty orders may be challenged at the GATT level.¹⁷ Similarly, the fact that federal agencies are now forbidden from procuring supplies covered by the Government Procurement Code from many GATT signatories which are non-parties to the Code is also subject to challenge.¹⁸

This Note's analysis may also provide insights to the interpretation of the results of the ongoing Uruguay Round of trade negotiations, scheduled to end in 1990. The Uruguay Round may produce nontariff trade barrier agreements which resemble the MTN agreements in structure.¹⁹ Since Congress required the President to recommend that any such agreements be applied by the U.S. on a conditional most-favored-nation basis "if such application is consistent with the terms of such agreement[s]",²⁰ an analysis similar to that presented in this Note may

15. For example, one such exemption might be found in the Protocol of Provisional Application, which "grandfathers" domestic legislation existing as of October 30, 1947. See *supra* note 1; JACKSON & DAVEY, *supra* note 1, at 300.

16. See *infra* notes 122 and accompanying text.

This Note does not explore the ramifications of these conclusions for parties seeking relief under U.S. domestic law. See generally Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249, 283 (1967); J. Jackson, *United States Law and the Implementation of the Tokyo Round Negotiation*, in IMPLEMENTING THE TOKYO ROUND (J. Jackson, J. Louis, & M. Matsushita eds. 1984).

17. See *infra* note 122 and accompanying text.

The International Trade Administration reported as of December 1, 1989, 77 outstanding countervailing duty orders, many of which involved exporting countries not entitled to the injury test. These countries include Argentina (8 orders outstanding), New Zealand (5), Peru (5), Thailand (6), Ecuador (1), Malaysia (1), Singapore (1), South Africa (1), Turkey (2), Zimbabwe (1), and possibly Mexico (12) and Brazil (7) (both countries only recently obtained from the U.S. the right to the injury test). DEPARTMENT OF COMMERCE, INTERNATIONAL TRADE ADMINISTRATION, IMPORT ADMINISTRATION, OFFICE OF COMPLIANCE, ANTIDUMPING AND COUNTERVAILING DUTY ORDERS, FINDINGS, AND SUSPENSION AGREEMENTS CURRENTLY IN EFFECT, (Dec. 1, 1989).

18. The regulations which accompany the Trade Agreements Act of 1979 forbid 54 federal agencies from acquiring foreign products from suppliers located in countries which are neither a "designated country" (generally, countries which acceded to the Government Procurement Code) nor a "Caribbean Basin country." Federal Acquisition Regulation, 48 C.F.R. §§ 25.401, 25.402(c), 25.406 (1988) [hereinafter Acquisition Regulation]. These regulations effectively blacklist 56 of the 99 contracting parties. The affected countries include Argentina, Australia, Brazil, Chile, Egypt, Greece, India, Korea, Mexico, New Zealand, Peru, Philippines, Portugal, Spain, South Africa, Thailand, Turkey, Uruguay, and 38 other GATT members. *Id.* Compare Acquisition Regulation, *supra*, with 40 USITC, OPERATIONS OF TRADE AGREEMENTS PROGRAM REP. 38 (1989).

19. See Uruguay Round, *supra* note 2. The Declaration noted, "[n]egotiations shall aim to reduce or eliminate non-tariff measures, including quantitative restrictions." *Id.* at 23. Other topics on the agenda include tariff reductions, liberalization in the trade of tropical and natural resource-based products, textiles and clothing, agriculture, GATT safeguard provisions, the functioning of the Tokyo Round Codes, dispute settlement, protection of intellectual property (including counterfeit goods), and trade-related investment measures. *Id.* at 23-24.

20. The Omnibus Trade and Competitiveness Act of 1988 provides:

lead to the conclusion that U.S. legislation related to these forthcoming codes is not "GATT legal."²¹

I. Background

A. The Objectives of the General Agreement on Tariffs and Trade and the Unconditional Most Favored Nation Principle

The Preamble to the General Agreement on Tariffs and Trade sets forth its guiding principles, which include the encouragement of free international trade, the lowering of trade barriers through multilateral trade negotiations conducted on a reciprocal basis, and the elimination of discriminatory trade practices.²²

1. *The Encouragement of Free Trade*

The drafters of the General Agreement assumed that a laissez-faire theory of international trade would best promote an efficient allocation of the world's scarce resources.²³ Laissez-faire trade theory suggests that a nation's exports will depend on the nature of that nation's "com-

[t]o ensure that a foreign country which receives benefits under a trade agreement entered into . . . [under the authority of this Act] is subject to the obligations imposed by such agreement, the President shall recommend to Congress . . . that the benefits and obligations of such agreement shall apply solely to the parties of such agreement, if such application is consistent with the terms of the agreement. The President may also recommend with respect to any such agreement that the benefits and obligations of such agreement not apply uniformly to all parties to such agreement, if such application is consistent with the terms of such agreement.

Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418, 102 Stat. 1107, § 1103(a)(3), 19 U.S.C.A. 2903(a)(3) (p.p. 1990).

21. In a commentary on the forthcoming agreement concerning international trade in services, but apparently alluding to all of the Uruguay Round agreements, one American participant in the Uruguay Round negotiating process argued that: only the parties to an agreement to do away with trade restrictions should be able to claim its benefits, which is normal, fair, and sensible international practice Among those who do participate in the process by adhering to a sectoral agreement, there should be provision for unconditional most-favored-nation treatment, limited to the subject matter of that agreement.

J. Reinstein, *Services in the Uruguay Round: The US Viewpoint*, in *LAW AND PRACTICE UNDER THE GATT* § IV.A.4, at 17-18 (1988).

22. The Preamble declares that:

[The Contracting Parties] . . . Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods,

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce

GATT, *supra* note 1, Preamble.

23. See K. DAM, *supra* note 1, at 12; GATT, *supra* note 1, Preamble. For contrary views, see *WORLD TRADING SYSTEM*, *supra* note 1, at 14-17.

parative advantage."²⁴ A country has a comparative advantage relative to other nations if it is a more efficient producer of specific goods and services, usually resulting from a greater endowment of the applicable factors of production.²⁵ Nations export goods which they can more efficiently produce and import goods for which their trading partners possess comparative advantages. The laissez-faire approach to international trade enables the world economy to realize economies of scale; it also leads to improved product quality by subjecting producers to more competition. In light of these benefits, one of the principal objectives of the drafters of the General Agreement was the removal of as many barriers to international trade as politically feasible.²⁶

2. *Reciprocity in Trade Negotiations*

The General Agreement also assures signatories that trade negotiations leading to a reduction in tariffs or other trade barriers will be conducted on a reciprocal, mutually advantageous basis.²⁷ No contracting party is expected to make trade concessions without receiving the benefits of similar concessions from other parties. The commitment to reciprocity recognizes that domestic legislators are more willing to reduce trade barriers (which reduction may cause such an increase in imports that it damages domestic producers) if domestic exporting companies obtain new markets as a result of reciprocal reductions in other countries' trade barriers.²⁸

3. *Nondiscrimination and the Most Favored Nation Principle*

a. *The Role of Trade Nondiscrimination in Promoting International Comity and Economic Efficiency*

In addition to the encouragement of free trade through multilateral reciprocal reductions in trade barriers, the General Agreement seeks to promote international comity by adopting the "nondiscrimination principle."²⁹ The nondiscrimination principle requires domestic laws which affect international trade to treat goods imported from GATT signatories equally.

Recent historical experience with discriminatory trade practices inspired the drafters of the General Agreement to include a firm commitment to nondiscrimination. After Congress passed the infamous

24. Bergsten & Cline, *Trade Policy in the 1980's: An Overview*, in *TRADE POLICY IN THE 1980s* 59, 60-61 (W. Cline ed. 1983).

25. A nation's "factors of production" include: (1) human capital (the work force and "investments" made in education to develop technical skills), (2) real capital (savings), and (3) natural endowments such as minerals, farmland, a favorable climate, etc. See generally D. SNIDER, *INTRODUCTION TO INTERNATIONAL ECONOMICS* 19-92 (7th ed. 1979).

26. See GATT, *supra* note 1, Preamble; *supra* note 22.

27. See GATT, *supra* note 1, Preamble; *supra* note 22.

28. JACKSON, *supra* note 1, at 24.

29. GATT, *supra* note 1, Preamble.

Smoot-Hawley Tariff Act of 1930,³⁰ countries responded with a variety of "beggar-thy-neighbor" trade policies which contributed immensely to the ensuing contraction in world trade.³¹ At the first session of the Economic and Social Council of the United Nations, which took place in 1946 in London, the U.S. proposed a resolution calling for the convocation of an international conference on trade and employment.³² The resolution declared that "[e]ffective action in regard to . . . trade barriers and discriminations must . . . be taken, or the whole programme of international economic cooperation will fail, and an economic environment conducive to the maintenance of peaceful international relations will not be created."³³ In support of the resolution, the American delegate summarized thirty years of history:

There is no need to dwell upon the disastrous consequences of Allied disunity following 11 November 1918; but because of the subject-matter that is before us it might be well to remember that blindly nationalistic and selfish trade policies eventually retarded all free exchange of goods across frontiers. This situation was intensified because migration from one country to another was practically stopped. These external factors, in combination with internal economic dislocation and unemployment in many countries, forced Governments to experiments that were frequently not profitable and also brought into control minorities that took on dictatorial powers. The world laboratory of that time taught even a casual observer that economic distress is followed by political disturbances and that both destroy security.³⁴

The U.S. apparently believed that a variety of economic policy blunders, including discriminatory trade practices, exacerbated the Depression and promoted the rise of European Fascism, and that a strong multilateral commitment to nondiscriminatory trade practices would help prevent similar disturbances in the future.

In addition to fostering international political harmony, the nondiscrimination principle also promotes economic efficiency. Since the nondiscrimination principle prohibits a GATT member from imposing punitive tariffs against another member, all imported goods originating from GATT members are subject to the same tariff. Therefore, any price differences to consumers in the importing country will reflect solely the comparative advantages possessed by the respective exporting

30. The Smoot-Hawley Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590 (1930). The Act raised average tariffs to 52.8% *ad valorem*, and was enacted notwithstanding formal protests from 59 countries and warnings received from over 1000 economists. Pastor, *The Cry-and-Sigh Syndrome: Congress and Trade Policy*, in *MAKING ECONOMIC POLICY IN CONGRESS* 158, 161-62 (A. Schick ed. 1983).

31. JACKSON, *supra* note 1, at 27, 351. At least 8 countries raised their tariffs in response to the Smoot-Hawley protectionist initiative, including Canada, France, Mexico, Italy, Spain, Cuba, Australia, and New Zealand. Pastor, *supra* note 30, at 162.

32. See 1 U.N. ESCOR Annex 1a, U.N. Doc. E/4 (1946) [hereinafter U.N. Resolution]. The conference called for by the U.S. laid the foundation for the negotiation of the General Agreement. See JACKSON, *supra* note 1, at 41-49.

33. U.N. Resolution, *supra* note 32, at para. 3.

34. *Id.* at 64.

countries; high-cost exporting countries will not be able to obtain special advantages for their products in importing countries through the negotiation of tariff concessions which apply only to goods originating in the exporter's market. High-cost producers must either improve efficiency or reallocate resources to the production of products for which they possess a comparative advantage. Thus, the nondiscrimination principle encourages a more efficient world economy.³⁵

b. Unconditional and Conditional Most Favored Nation Clauses and Nondiscriminatory Trade

To further the goal of nondiscriminatory trade, as well as to ensure reciprocity and promote reductions in trade barriers, the negotiators of the General Agreement borrowed from a long history of use in bilateral trade agreements the "unconditional most favored nation clause."³⁶ An unconditional MFN clause obligates the promisor country to extend to the promisee country the benefit of any tariff concession made by the promisor to a third party, without any reciprocal trade concession from the promisee country other than the same general promise by the promisee to the promisor.³⁷ As applied in the multilateral context of GATT, unconditional MFN requires that a party, to the General Agreement which offers any country a special reduced tariff must extend the new tariff to all members of the GATT, without demanding any special concession from them in return.³⁸

Historically, unconditional MFN obligations were carefully distin-

35. See WORLD TRADING SYSTEM, *supra* note 1, at 134-35.

36. See generally JACKSON, *supra* note 1, at 249-72; JACKSON & DAVEY, *supra* note 1, at 428; WORLD TRADING SYSTEM, *supra* note 1, at 133-48. An early form of the unconditional most favored nation (MFN) principle has been traced as far back as 1417, but its modern usage began in the seventeenth and eighteenth centuries. The U.S. began to negotiate trade agreements on an exclusively unconditional MFN basis in 1922. JACKSON, *supra* note 1, at 250. Pursuant to the Reciprocal Trade Agreements Act of 1934, P.L. 73-316, 48 Stat. 943, the U.S. negotiated and accepted 32 bilateral trade agreements on an unconditional MFN basis between 1934 and 1945. *Id.*

37. WORLD TRADING SYSTEM, *supra* note 1, at 136.

The principal unconditional MFN commitment in the General Agreement is found in article I. It provides:

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 [see *infra* notes 167-69 and accompanying text] any advantage, favor, 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 1, art. I, para. 1.

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

guished from conditional MFN commitments,³⁹ and American bilateral trade agreements negotiated before 1922 frequently included conditional MFN clauses.⁴⁰ Under conditional MFN clauses, the parties offer each other the opportunity to obtain the benefits of subsequent trade concessions made to third countries, but only in exchange for reciprocal trade concessions.⁴¹

In practice, the renegotiation of tariffs pursuant to conditional MFN clauses proved very difficult. In the opinion of one commentator, conditional MFN clauses resulted in "more diplomatic controversy, more variations in construction, more international ill-feeling, more conflict between international obligations and municipal law and between judicial interpretation and executive practice, more confusion and uncertainty of operation, than have developed under all the unconditional-most-favored-nation pledges of all countries combined."⁴²

c. Policies Supporting the Use of Unconditional MFN Clauses in GATT.

The unconditional MFN obligation has been characterized as "the cornerstone of the international trade rules embodied in the [GATT]."⁴³ During the 1947 GATT drafting sessions, the U.S. took the position that a firm commitment to unconditional MFN obligation in any forthcoming treaty was "absolutely fundamental."⁴⁴ The unconditional MFN obligation is important to the GATT system because it advances each of the fundamental objectives of the General Agreement: it optimizes world economic resources by encouraging free international trade, it helps lower trade barriers through multilateral trade negotiations conducted on a reciprocal basis, and it eliminates national trade practices which purposefully discriminate against particular nations.

The mechanical operation of the unconditional MFN obligation implicitly promotes nondiscriminatory trade. With respect to tariff barriers to trade, unconditional MFN establishes for each signatory a single set of rates for "customs duties and charges of any kind" applicable to

39. *See, e.g.*, *Minerva Automobiles v. U.S.*, 96 F.2d 836 (C.C.P.A. 1938); *John T. Bill Co. v. U.S.*, 104 F.2d 67 (C.C.P.A. 1939); *Balfour, Guthrie & Co. v. U.S.*, 136 F.2d 1019 (C.C.P.A. 1943).

40. JACKSON, *supra* note 1, at 250.

41. For example, if country A lowers its tariffs on goods from country B, A's other conditionally committed countries may receive the benefit of the lower tariff, but only if they offer a satisfactory package of new concessions to country A in return. *See* WORLD TRADING SYSTEM, *supra* note 1, at 137.

42. Viner, *The Most Favored Nation Clause in American Commercial Treaties*, 32 J. POL. ECON. 101, 111 (1924). As an historical example, when France followed a conditional MFN trade policy between 1919-1927, other countries simply refused to negotiate tariff concessions with it. Hudec, *supra* note 12, at 191.

43. SUBCOMM. ON INTERNATIONAL TRADE, SENATE COM. ON FINANCE, 93D CONG., 2D. SESS., EXECUTIVE BRANCH GATT STUDIES, No. 9, THE MOST-FAVORED NATION PROVISION 133 (Compilation of 1973 Studies Prepared by the Executive Branch: Comm. Print 1974) (hereinafter TARIFF COMMISSION REPORT); JACKSON & DAVEY, *supra* note 1, at 428.

44. JACKSON, *supra* note 1, at 252.

all GATT members,⁴⁵ effectively prohibiting GATT members from politicizing trade through discriminatory tariff policies. Similarly, imposing an unconditional MFN obligation on the raising of nontariff trade barriers prevents GATT signatories from using them as a subtle means of discriminating against goods originating in disfavored signatories.

An unconditional MFN clause also promotes free trade by extending the scope of tariff reductions. Parties which assume the obligations of the General Agreement must reduce tariffs to the lowest level they offer any country, whether or not a member. As the number of GATT signatories has increased from approximately two dozen in 1948 to almost one hundred today, the unconditional MFN clause has dramatically lowered average tariff levels and reduced the adverse impact of tariff trade barriers on the world economy.⁴⁶

The unconditional MFN obligation in GATT also ensures reciprocity in multilateral trade negotiations, since all parties to the General Agreement exchange commitments to unconditional MFN. A major benefit of unconditional MFN with regard to reciprocity is that it preserves for the future the balance of trade concessions reached at a particular trade round.⁴⁷ Trade negotiations are based in part on the status quo relationship between tariffs imposed by the participating countries on key products and the trade flows which result from this relationship. If, after a trade round, a few members extended each other a special low tariff on selected products, it would upset the relationship between tariffs charged on those products by countries participating in the trade negotiation and the rates charged by members who subsequently decide to offer each other reduced rates. This shift in relative tariff levels could dramatically alter the international market for those products and disrupt the assumptions about future trade flows upon which participants relied during the trade round. As explained by the U.S. during the 1947 Geneva Conferences, unconditional MFN was "necessary [not only to] safeguard tariff concessions which we negotiate on particular items, but also to provide a part of the general quid pro quo for any normal trade agreement"⁴⁸

d. The General Agreement's Exceptions to Unconditional MFN

The General Agreement includes a sophisticated system of reservations, waivers, and escape clauses from its obligations, including the unconditional MFN obligation. Although the exception provisions are often inconsistent with the basic GATT mission of promoting free, nondiscriminatory trade, they were considered politically necessary to ensure maximum overall acceptance of GATT obligations by the major trading

45. See GATT, *supra* note 1, art. I, para. 1, reproduced in *supra* note 37.

46. Hufbauer, *supra* note 12, at 38-39.

47. See *id.* at 37-38.

48. JACKSON, *supra* note 1, at 252.

nations.⁴⁹ For purposes of issues addressed in this Note, the most important reservation from the obligations of the General Agreement may be found in the Protocol of Provisional Application, which subjects the acceptance of Part II obligations to existing domestic legislation.⁵⁰

Another source of exceptions to the obligations of the General Agreement has been the formation of regional trade blocks which function as institutions outside the official GATT framework. These arrangements often include the exchange of tariff concessions by participants which are not offered to the general GATT membership and therefore derogate from unconditional MFN. Examples of such arrangements include the European Economic Community⁵¹ and the Canadian-U.S. automotive parts agreement.⁵² The amendments to the General Agreement which provide developing countries with the "Generalized System of Preferences" also derogate from the scope of the unconditional MFN obligation.⁵³ While all of these arrangements may curtail the applicability of unconditional MFN, they are nevertheless "GATT-legal." The European Economic Community is regarded as a customs union, an exception to unconditional MFN sanctioned by article XXIV of the General Agreement.⁵⁴ Although the Canadian-U.S. automotive agreement arguably violated the General Agreement, the U.S. obtained a waiver from the GATT.⁵⁵ Finally, the Generalized System of Preferences required long debate and substantial amendments to the 1947 General Agreement.⁵⁶ The efforts of the involved parties to ensure that these arrangements were "GATT legal" contrasts markedly with the actions of the U.S. Congress in enacting the Tokyo Round Government Procurement Code and Subsidies and Countervailing Measures Code on a conditional MFN basis, without detailed consideration of

49. See generally *id.* at 553-73.

50. See *supra* note 1. Other exceptions to GATT obligations include article XXV (confers general waiver power "[i]n exceptional circumstances not elsewhere provided for in [the] . . . Agreement," subject to the approval of the remaining contracting parties), article XIX (permits emergency action where particular obligations result in "unforeseen developments . . . [which] cause or threaten serious injury to domestic producers in that territory of like or directly competitive products"; such action includes the suspension, withdrawal or modification of the obligation), and article XX (lists "general" waivers from GATT obligations, including measures to protect public morals and the health of human, animal or plant life, measures to restrict the movement of precious metals, products of prison labor, and measures which protect national treasures of artistic, historic, or archeological value). See Protocol of Provisional Application, *supra* note 1.

51. See JACKSON & DAVEY, *supra* note 1, at 199-223.

52. United States-Canadian Automotive Products Agreement, done Jan. 16, 1965, 17 U.S.T. 1372, T.I.A.S. No. 6093. See JACKSON & DAVEY, *supra* note 1, at 467-75.

53. See GATT, *supra* note 1, at part IV, arts. XXXVI-XXXVIII; JACKSON, *supra* note 1, at 625-72.

54. GATT, *supra* note 1, art. XXIV; JACKSON, *supra* note 1, at 586-92.

55. *United States-Imports of Automotive Products*, in GATT, B.I.S.D., 14th Supp. 37 (1966) (decision of Dec. 20, 1965). See also *Id.*, 13th Supp. 112 (1965); *id.*, 14th Supp. 181 (1966) (working party reports).

56. JACKSON & DAVEY, *supra* note 1, at 1140 ff.

whether such an approach was consistent with its obligations under article 1.

B. The Obligations of the General Agreement Related to Countervailing Duties and Government Procurement Practices, U.S. Domestic Law, and the Tokyo Round Codes

1. *The GATT System and the Control of Nontariff Trade Barriers*

The General Agreement includes complex provisions which attempt to limit nontariff barriers to trade. Subjects addressed by these provisions include internal taxes and regulations which discriminate against imported goods,⁵⁷ onerous customs procedures,⁵⁸ import quotas,⁵⁹ exchange rate policies designed to promote exports,⁶⁰ subsidies and countervailing duties,⁶¹ and state trading enterprises.⁶² The following sections describe the dilemma presented to the GATT system by two groups of nontariff trade barriers: countervailing duties and government procurement practices.

2. *Subsidies and Countervailing Duties*

Subsidies are direct or indirect government payments to local producers which, at least in theory, reduce the selling prices of affected goods. Subsidy programs may attempt to encourage regional development, facilitate research in areas deemed too risky by private interests, promote exports, or support the incomes of "socially deserving" groups such as farmers.⁶³ Any subsidy, whatever its objective, can affect trade flows.

a. Controlling Subsidies: The General Agreement and Countervailing Duties

The General Agreement provides only limited restraints on subsidy practices because many contracting parties consider subsidy programs vitally important to their internal economic development.⁶⁴ For example, article XVI urges contracting parties to "avoid" the use of export

57. GATT, *supra* note 1, art. III.

58. *Id.*, art. VII-X.

59. *Id.*, art. XI.

60. *Id.*, art. XV.

61. *Id.*, art. XVI.

62. *Id.*, art. XVII.

63. Baldwin, *The Tokyo Round of Multilateral Trade Negotiations*, in *INTERNATIONAL TRADE AND FINANCE* 231, 233 (Baldwin & Richardson eds., 2d ed. 1981). Professor Jackson has commented that,

almost anything that assists a business could be termed a subsidy, including government financed employee welfare (such as social security schemes), which might enable a firm to pay its labor less, or excellent education facilities that provide skilled people to the firm, or even fire and police protection that gives security to the firm and lowers its insurance costs.

JACKSON, *supra* note 1, at 366.

64. See generally JACKSON, *supra* note 1, at 365-400.

subsidies⁶⁵ for primary products⁶⁶ and to eliminate other export subsidies as soon as "practicable."⁶⁷ If export subsidies on manufactured goods reduce the prices for the goods in the importing country below those charged domestically, article XVI requires the elimination of such subsidies from "the earliest practicable date."⁶⁸ With respect to other than export subsidies, the General Agreement requires subsidizing members to notify the CONTRACTING PARTIES of the nature of the subsidies and to "discuss with the . . . [affected] contracting party or parties concerned the possibility of eliminating or reducing them."⁶⁹ A U.S. Senate report relating to the Trade Agreements Act of 1979 complained that "this rule, in practice, has proved as toothless as might be surmised from its terms."⁷⁰

The General Agreement permits contracting parties to defend domestic producers from subsidized imports by imposing countervailing duties.⁷¹ The purpose of a countervailing duty, which is generally equal to the estimated value of the subsidy, is to neutralize the adverse effect of the subsidy on the competing domestic industry by raising the price of the subsidized imports by the amount of the subsidy.

A provision in article VI of the General Agreement restricts the right to impose a countervailing duty to circumstances in which the subsidy "causes" or "threatens" "material injury" to an established domestic industry, or "materially retards" the establishment of a domestic industry.⁷² This proof of injury test recognizes that a contracting party

65. Export subsidies are typically designed to help the balance of payments position of a country and to encourage "export-led" economic growth of the domestic economy. They can appear under many guises, including direct payments to producers contingent on export performance, lower domestic freight charges for export goods, special prices to exporters on products or services provided by government-controlled entities, or export credits at below market rates. See Hufbauer, *supra* note 12, at 43-44; GATT Annex: Illustrative List of Export Subsidies, GATT, B.I.S.D., 26th Supp. 80-81 (1978-79).

66. See GATT, *supra* note 1, art. XVI, para. 3. However, "if any form of subsidy . . . operates to increase the export of any primary product . . . such subsidy shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product," taking into account the traditional shares of world trade in that product and other "special factors." *Id.*

A primary product is defined as "any product of farm, forest or fishery or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade." *Id.*, Annex I, at art. XVI, § B, para. 2.

67. *Id.*, art. XVI, para. 4.

68. *Id.*

69. *Id.*, art. XVI, para. 1. Parties are reluctant to comply with the notification provision because of the sensitive nature of the information it requires them to disclose; in the hands of another party, such information could be extremely valuable during a countervailing duty proceeding. JACKSON, *supra* note 1, at 388.

70. S. REP. NO. 249, 96th Cong., 1st Sess. 39 (1979).

71. GATT, *supra* note 1, art. VI, para. 3. A countervailing duty is defined in the General Agreement as "a special duty levied for the purpose of offsetting any bounty or subsidy bestowed directly or indirectly, upon the manufacture, production or export of any merchandise." *Id.*

72. *Id.*, art. VI, para. 6(a).

could impose frequent countervailing duties as a form of disguised protection of domestic industry; domestic producers who are politically powerful and adversely affected by competitively priced imports can be very persuasive in finding alleged subsidies and demanding relief.⁷³

b. The Pre-Tokyo Round U.S. Law of Countervailing Duties

The U.S. may impose countervailing duties without proving injury to domestic industry, as required by article VI of the General Agreement. This exemption arises because the provisions concerning subsidies and countervailing measures fall within Part II of the General Agreement and are therefore subject to the "grandfather clause" included in the Protocol of Provisional Application.⁷⁴ Since the American countervailing duty statute of 1897 did not require such an injury test,⁷⁵ the U.S. was not obliged to apply the test to goods originating in other GATT signatories upon its becoming a party to the General Agreement.

c. The Tokyo Round Subsidies and Countervailing Measures Code, and the Post-Tokyo Round U.S. Countervailing Duty Law

During the drafting of the Subsidies and Countervailing Measures Code, a principal negotiating objective of the contracting parties was to convince the U.S. to modify its countervailing duty law to include the injury test requirement of article VI of the General Agreement.⁷⁶ The U.S.

73. JACKSON, *supra* note 1, at 402.

74. See GATT, *supra* note 1, art. VI; Protocol of Provisional Application, *supra* note 1.

75. Tariff Act of 1897, ch. 11, § 5, 30 Stat. 151, 205 (1897). For an excellent history of the U.S. countervailing duty law and the impact of the Trade Agreements Act of 1979, see *Cementos Anahuac Del Golfo, S.A. v. U.S.*, 689 F. Supp. 1191, 1200-05 (Ct. INT'L TRADE 1988), and *Cementos Guadalajara v. U.S.*, 686 F. Supp. 335, 342-47 (Ct. INT'L TRADE 1988).

The old law imposed a countervailing duty only when the imported goods were already subject to a customs duty. 19 U.S.C. § 1303(a)(1) (1982); *Cementos Anahuac*, 589 F. Supp. at 1201. The Trade Act of 1974, *supra* note 7, modified the U.S. countervailing duty law to permit the imposition of countervailing duties even when the goods were otherwise duty free. This expansion of the scope of the countervailing duty law would violate article VI of the General Agreement if it did not provide for an injury test. It also could not be saved by a Protocol defense because the grandfather clause applies only to legislation existing as of October 30, 1947. Therefore, the new U.S. law required proof of injury to domestic manufacturers as a condition precedent to the imposition of a countervailing duty on otherwise duty free goods, if "a determination of injury is required by the international obligations of the United States." 19 U.S.C. § 1303(a)(2) (1982); *Cementos Anahuac*, 689 F. Supp. at 1201-2.

In *Cementos Guadalajara*, 686 F. Supp. at 348-52, defendant cement exporter argued that its shipments of cement to the U.S. could not be subject to a countervailing duty without a proof of injury to U.S. industry because Mexico acceded to the GATT. The court rejected this argument because Mexico's accession became effective after the cement arrived in the U.S., and "the liability for duties is established at the time of the entry of the goods into the U.S." *Id.* at 351.

76. See generally Barceló, *The Two-Track Subsidies Code-Countervailing Duties and Trade Retaliation*, in *NON-TARIFF BARRIERS AFTER THE TOKYO ROUND* 121 (Quinn & Slayton eds. 1982); G. WINHAM, *INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATION* 117-18 (1986).

agreed to make concessions in this area, but demanded in return that contracting parties curtail their subsidy practices in the manner later reflected in the Subsidies and Countervailing Measures Code.⁷⁷

Under the provisions of the Trade Agreements Act of 1979,⁷⁸ subsidies on goods that originate in countries which (1) are signatories to the code,⁷⁹ (2) have assumed comparable obligations,⁸⁰ or (3) are non-signatories to the GATT but have bilateral trade agreements with the U.S. requiring unconditional MFN treatment⁸¹ must cause or threaten material injury to U.S. industry (or "materially retard" the establishment

77. The Subsidies and Countervailing Measures Code, *supra* note 4, requires its signatories to eliminate export subsidies on manufactured goods and minerals, regardless of whether the export subsidy results in export prices lower than domestic prices. *Id.* at art. 9, para. 1 (The General Agreement prohibited only those export subsidies on manufactured goods "which . . . result in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market." GATT, *supra* note 1, art. XVI, para. 4). The Code also requires signatories to participate in special government-to-government dispute resolution procedures when a signatory's industry is adversely affected by any form of subsidy granted by another signatory to domestic producers. Subsidies and Countervailing Measures Code, *supra* note 4, art. 12, 13, 17-19. See BARCELÓ, *supra* note 76, at 122, 137-43.

Subsidies and Countervailing Measures Code, *supra* note 4, art. 19, para. 9, permits a code signatory to refuse recognition of another signatory's accession to the code.

A Senate report noted that the U.S. had long sought to impose greater discipline over subsidy practices than found in the General Agreement. The report characterized subsidies as one of "the most pernicious practices which distort trade to the disadvantage of United States commerce." S. REP. NO. 249, 96th Cong. 1st Sess. 37, 40 (1979).

78. The Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified throughout 19 U.S.C.) authorized the Executive Branch to sign the Tokyo Round codes on behalf of the U.S., 19 U.S.C. § 2503(b), and modified American law to bring it into conformity with obligations set forth in the codes. 19 U.S.C. § 1671-1671(e) (modified U.S. countervailing duty law for goods originating in signatories to the Subsidies and Countervailing Measures Code); 19 U.S.C. § 2511(a) (authorized President to waive discriminatory government procurement practices for goods originating in signatories of the Government Procurement Code).

79. 19 U.S.C. § 1671(a) (1982); 19 U.S.C. § 1671(b)(1) (1982); 19 U.S.C. § 2503(b) (1982).

The Trade Agreements Act of 1979, *supra* note 78, required countries to do more than simply sign the code if they wished to obtain the benefits of American accession to the code; it also required the president to determine that signatories to the code "accorded adequate benefits, including substantially equal competitive opportunities for the commerce of the United States." 19 U.S.C. § 2503(b).

To foreclose the possibility that a "country under the Agreement" could sign the Agreement or promise to assume similar obligations, and subsequently not honor its commitments, the Omnibus Trade and Competitiveness Act of 1988 authorized the U.S. Trade Representative to revoke a country's status as a "country under the Agreement." 19 U.S.C.A. § 1671(c) (p.p. 1990).

80. 19 U.S.C. § 1671(a) (1982); 19 U.S.C. § 1671(b)(2) (1982).

Mexico and Taiwan obtained an injury test from the U.S. under this provision after bilateral negotiations. See, e.g., Understanding Between the United States and Mexico Regarding Subsidies and Countervailing Duties, April 23, 1985, *discussed in* *Cementos Anahuac Del Golfo v. U.S.*, 689 F. Supp. 1191, 1194-95 (Ct. INT'L TRADE 1988), and *Cementos Guadalajara v. U.S.*, 686 F. Supp. 335, 341 (Ct. INT'L TRADE 1988).

81. 19 U.S.C. § 1671(a) (1982); 19 U.S.C. § 1671(b)(3) (1982).

of an industry in the U.S.) before countervailing duties will be imposed.⁸² Goods which originate in countries that are not parties to the Code or have not assumed similar obligations will be subject to the old law, which permits the imposition of a countervailing duty without an injury test.⁸³

3. *Government Procurement Practices*

a. The National Treatment Obligation and Government Purchases Under the General Agreement

In addition to imposing high tariffs or providing generous subsidies to domestic producers, governments may also impair free trade by tailoring internal laws and regulations concerning the purchase, sale, transportation, distribution or use of goods to discriminate against foreign products. Unlike the "customs, duties and charges of any kind" considered by article I, these laws and regulations become operative after the imports have cleared customs and applicable tariffs have been paid.⁸⁴ Article III of the General Agreement establishes the "national treatment obligation," which requires such internal laws and regulations to treat other contracting parties' products "no less favourabl[y]" than domestic products.⁸⁵

A House Report stated that this provision applied to only seven countries: El Salvador, Honduras, Liberia, Nepal, Paraguay, Venezuela and North Yemen (Sana). HOUSE COMM. ON WAYS AND MEANS, TRADE AGREEMENTS ACT OF 1979, H.R. REP. NO. 317, 96th Cong., 1st Sess. 50 (1979). These countries are popularly known as "the seven dwarfs."

82. 19 U.S.C. § 1671(a) (1982); 19 U.S.C. § 1671(b) (1982).

83. 19 U.S.C. § 1303(a)(1). Although inconsistent with article VI of the General Agreement, the old law was grandfathered under the Protocol of Provisional Application. See *supra* note 1. The vast majority of GATT members who are non-signatories to the Subsidies and Countervailing Measures Code are developing countries. Cf. 40 USITC, OPERATIONS OF TRADE AGREEMENTS PROGRAM REP. 38, 39 (1989) (tables listing Code Signatories and Contracting Parties to GATT).

For cases applying these rules, see, e.g., *Alberta Pork Producers' Marketing Bd. v. U.S.*, 669 F. Supp. 445, 448 (Ct. INT'L TRADE 1987) (because Canada is a "country under the Agreement," the Commission was required to determine whether an industry in the U.S. is materially injured, or is threatened with material injury, by reason of imports of that merchandise); *Hide-Away Creations, Ltd. v. U.S.*, 584 F. Supp. 18, 20 (Ct. INT'L TRADE 1984) (inasmuch as Mexico is not a "country under the Agreement," no determination of injury was required in the countervailing duty investigation); *Ambassador Div. of Florsheim Shoe Co. v. U.S.*, 577 F. Supp. 1016, 1019 (Ct. INT'L TRADE 1983), *rev'd* on other grounds 748 F.2d 1560 (Fed. Cir. 1984) (because India was not a "country under the agreement," the old law governed); *Industrial Fasteners Group, Am. Importers Ass'n v. U.S.*, 710 F.2d 1576, 1579 (1983) (because ITA determined that India was not a "country under the Agreement" on Subsidies and Countervailing Measures, the countervailing duty investigation was governed by 19 U.S.C. § 1303).

84. See Government Procurement Code, *supra* note 4, art. II, para. 2 ("laws, regulations, procedures and practices regarding government procurement [do not include] customs duties and charges of any kind imposed on or in connection with importation, the method of levying such duties and charges, and other import regulations and formalities").

85. GATT, *supra* note 1, art. III, para. 4, provides,

The national treatment obligation is a stronger commitment to free trade principles than the most-favored-nation obligation because it completely eliminates artificial handicaps imposed on imported goods.⁸⁶ However, in a significant departure from its free trade underpinnings, the General Agreement excludes most government procurement regulations from the national treatment obligation.⁸⁷ Government procurement regulations may give domestic goods a stipulated price advantage over imports. They can also frustrate foreign company efforts to learn about domestic government bidding opportunities, to participate in the bidding process, to meet technical specifications carefully designed to favor domestic products, or to resolve procedural disputes after their bids are rejected.⁸⁸ Nations typically justify such regulations as necessary to protect their balance of payments position, preserve national security, or support local industry.⁸⁹ In most countries, the percentage of gross national product consumed by government expenditures has steadily increased; this has magnified the threat posed by government procurement regulations to the efficient operation of the international economy.⁹⁰ Although most government purchases are exempt from the

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded no less favorable treatment than that accorded to like products of national origin in respect of all laws, regulations, and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. . . .

See generally JACKSON, *supra* note 1, at 273-304; JACKSON & DAVEY, *supra* note 1, at 483-537.

86. Unlike article I, where the bench mark for measuring permissible tariff levels for goods originating in a GATT member state is the lowest tariff given to any country, the bench mark for the national treatment obligation is the treatment accorded to domestic products. Thus, while imported goods that enjoy the benefit of the national treatment obligation will be subject to a tariff, after that tariff is paid they are treated identically to domestic products.

87. GATT, *supra* note 1, art. III, para. 8(a), provides that the provisions of article III "shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale."

Occasionally, plaintiffs in American courts have successfully invoked the "commercial purpose" exception to the exclusion of government purchases from the national treatment obligation in order to invalidate state and local Buy-American laws. In *Baldwin-Lima-Hamilton Corp. v. Super. Ct.*, 208 Cal. App.2d 803, 25 Cal. Rptr. 798 (1963), the City and County of San Francisco solicited bids for the delivery of turbines, generators, valves, and pipes for the construction of an electric power facility. The California Buy-American statute required that all applicable components be manufactured in the U.S. Upon a challenge by a supplier proposing to include foreign components in its bid package, the court held that the California legislation was unenforceable to exclude products from GATT signatories because "the turbines and other equipment are for use in the generation of electric power for resale and hence for 'use in the production of goods for sale.' Electricity is a commodity which, like other goods, can be manufactured, transported and sold." *Id.* at 819. *See* JACKSON, *supra* note 1, at 292 n.14.

88. *Baldwin*, *supra* note 63, at 239.

89. *DAM*, *supra* note 1, at 199-200.

90. *Id.*

national treatment obligation, it is unclear whether the regulations governing those purchases are nevertheless subject to the unconditional MFN commitment of article I; this Note will argue that government procurement regulations are subject to unconditional MFN.⁹¹

In addition to enacting laws and regulations which require government procurement officers to favor domestic products, governments may also establish or acquire commercial enterprises and require such enterprises to favor domestic goods in their purchasing practices.⁹² While few U.S. government agencies could be considered "state trading enterprises," many other GATT members have them.⁹³ Article XVII of the General Agreement, "State Trading Enterprises," requires that "such enterprises shall, having due regard to other provisions of this Agreement, make any . . . purchases or sales [of imports or exports] solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale . . ." ⁹⁴ It is generally accepted that these provisions establish the equivalent of a most favored nation obligation.⁹⁵ Since article XVII by language and drafting intent applies only to state trading

91. See *infra* notes 161-97 and accompanying text.

92. Examples of such enterprises included companies which have been nationalized, marketing boards, and import monopolies. See U.S. TARIFF COMMISSION, REPORT TO COMMITTEE ON FIN. OF U.S. STATES SENATE AND SUBCOMMITTEE ON INT'L TRADE 52-55 (1974) [hereinafter TARIFF COMMISSION REPORT]. In its "Suggested Draft Charter for an International Trade Organization of the United Nations," see *infra* note 172 and accompanying text, the U.S. included a substantially similar provision. The State Department described its purpose as follows:

To a greater extent than ever before, governments are participating directly in foreign trade. Some, like the Soviet Union, have a complete government monopoly of foreign trade. More often, the government has a monopoly of trade in a particular product. For instance, the British government intends to import all the raw cotton needed by the United Kingdom in the future. France and other European countries have long had monopolies on such things as tobacco, salt and matches, largely for revenue purposes. A third form of state trading occurs when the government owns an enterprise which engages in foreign trade even though it is not a monopoly.

OFFICE OF PUBLIC AFFAIRS, DEPARTMENT OF STATE, INFORMAL COMMENTARY TO ACCOMPANY THE FULL TEXT (OF THE) SUGGESTED CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION OF THE UNITED NATIONS, 29 (1946) [hereinafter INFORMAL COMMENTARY].

93. TARIFF COMMISSION REPORT, *supra* note 92, at 59-65. See *supra* note 92.

94. GATT, *supra* note 1, art. XVII, para. 1.

95. JACKSON, *supra* note 1, at 346-47. Concerning the forerunner of article XVII included in the U.S. "Suggested Charter for an International Trade Organization of the United Nations," see *infra* note 172 and accompanying text, the State Department noted that,

[A]ll state trading enterprises should conduct themselves along commercial lines, buying where they can get the best goods most cheaply, selling where they get the greatest return. They are to give all members most-favored-nation treatment and not discriminate against the goods of any of them. Effective application of these principles would remove the danger that state trading enterprises would act on a political ground and would, in effect, make market forces determine their operations.

INFORMAL COMMENTARY, *supra* note 92, at 30.

enterprise purchases of imports, such purchases are not subject to the national treatment obligation.⁹⁶

However, as is the case in article III, article XVII treats purchases for government use differently than other purchases. Paragraph two of article XVII requires contracting parties to accord "imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods for sale . . . fair and equitable treatment."⁹⁷ The meaning of "fair and equitable treatment" is unclear and has never been the subject of detailed explanation. Several commentators have suggested that it establishes an unconditional MFN-type of obligation.⁹⁸

Another area of uncertainty concerning paragraph two of article XVII is its scope. Does the heading of article XVII, "State Trading Enterprises," confine the scope of paragraph two to purchases by state trading enterprises? An early GATT panel decision held that the scope of paragraph two was limited to matters considered in paragraph one, i.e., only purchases by state trading enterprises were subject to the "fair and equitable treatment" standard.⁹⁹ Nevertheless, several commentators have assumed that paragraph two applies to all government purchases, regardless of whether the purchasing entity is a state trading enterprise, and one commentator has suggested that the "fair and equitable treatment" standard would apply to procurement by U.S. government agencies.¹⁰⁰ This Note shall assume that article XVII applies only

96. See GATT, *supra* note 1, art. XVII, para. 1; JACKSON, *supra* note 1, at 347; text reproduced in footnote 95.

97. GATT, *supra* note 1, art. XVII, para. 2.

98. JACKSON, *supra* note 1, at 360 ("it appears to be a looser Most-Favored-Nation idea"); SENATE FINANCE COMM., 93D CONGRESS, 2D SESS., EXECUTIVE BRANCH GATT STUDIES 79 (compilation of 1973 studies, prepared by the Executive Branch at the request of A. Ribicoff, Chairman, Subcommittee in International Trade) (1974) ("This provision is generally regarded as a near substitute for the most-favored-nation clause"). *But see* Hufbauer, *supra* note 12, at 89-90.

99. GATT, B.I.S.D., 1st Supp. 60, para. 4 (1953) (paragraph two "referred only to the principle set forth in paragraph one of . . . [article XVII], i.e., the obligation to make purchases in accordance with commercial considerations and did not extend to matters dealt with in article III"). Although the issue at hand was whether paragraph two of article XVII affected the national treatment obligation with respect to internal taxes addressed in paragraph two of article III, this analysis would probably also apply to government procurement regulations covered by paragraph four of article III.

100. Hufbauer, *supra* note 12, at 89-90. Dr. Hufbauer argued that the "fair and equitable treatment" standard was not the equivalent of unconditional MFN, and therefore the post-Tokyo Round discrimination in favor of signatories to the Government Procurement Code was not inconsistent with U.S. obligations under the General Agreement. Hufbauer commented that "[t]here is nothing inherently equitable about unilateral access to the public procurement market of another country when a nation's own public agencies follow a 'buy national' policy." *Id.* at 90.

Two arguments may be made in response to Hufbauer's suggestion that the U.S. government procurement law after the Tokyo Round may be justified under article XVII. First, as suggested above, a strong argument can be made that article XVII generally does not apply to U.S. government agencies, rendering it unnecessary to fathom the meaning of the "fair and equitable treatment" standard of article XVII,

to state trading enterprises, that U.S. government agencies do not fall within that category, and therefore article XVII is generally inapplicable to an evaluation of whether the U.S. law of federal government procurement is "GATT-legal." Such a critique must rest on article III.

b. Preferential Treatment of Domestic Suppliers in U.S. Federal Government Procurement

The Buy American Act of 1933 and accompanying regulations generally give American products a price advantage over imported goods when a federal instrumentality acquires goods for "public use."¹⁰¹ The Act also provides for the "blacklisting" of public works contractors who use imported materials without authorization.¹⁰² Generally, if the low American bid is a "small business concern" or "labor surplus area concern," federal procurement officers must add twelve percent to the lowest foreign goods bid;¹⁰³ in all other cases, six percent is added.¹⁰⁴

c. The Tokyo Round Government Procurement Code and U.S. Law

Under the terms of the Government Procurement Code, internal regula-

paragraph 2. The drafting history of the state trading enterprise article suggests that it was intended to deal with nationalized industries, marketing boards, import monopolies and similar institutions illustrative of the "creeping socialism" prevalent in the late 1940s, and not with primarily regulatory government agencies in the American model. *See supra* notes 92-96 and accompanying text; E. MCGOVERN, INT'L TRADE REG. 213 (1986). Therefore, applying article XVII to U.S. government procurement seems inappropriate in most cases.

Second, assuming that article XVII does apply to U.S. government procurement, there is no basis for concluding that the "looser Most-Favored-Nation idea," JACKSON, *supra* note 1, at 360, encapsulated in the "fair and equitable treatment" standard of article XVII, paragraph 2 would sanction trade discrimination. Whenever an unconditional MFN-type of obligation applies, there will always be a fairness issue as to whether "free riders" can justifiably claim the benefits MFN confers. The fact that nonsignatories to the government procurement code do not commit themselves to the elimination of "buy national" policies is no more dispositive of the issue than is the failure of a GATT signatory to reduce tariffs after a trade round: notwithstanding a signatory's failure to cut its tariffs, it receives the benefits of tariff reductions made by all other signatories. In light of the fundamental importance of unconditional MFN to the GATT system, *see supra* notes 43-48 and accompanying text, as long as the "fair and equitable treatment" standard of article XVII remains unexplained by a GATT panel, there is ample foundation for concluding that unconditional MFN should apply to state trading enterprise purchases for government use.

101. 41 U.S.C. § 10(a) (1982); H.R. REP. No. 96-317, 96th Cong. 1st Sess. 131-32, 919 U.S. CODE CONG. & ADMIN. NEWS 517-18 (1979).

Notice that the Buy American Act applies only to goods purchased for "public use" 19 U.S.C. § 10(a) (1982) (For example, a recent Comptroller's General opinion held that Bureau of Mint metal purchases for use in manufacturing coins on behalf of a foreign government were not subject to the Buy American Act regulations. 58 Comp. Gen. 327 (1979)).

Recall that a similar public use limitation appears in the exemption of government purchases from the national treatment obligation under the General Agreement. GATT, *supra* note 1, art. III, para. 8(a).

102. 19 U.S.C. § 10(b) (1982).

103. Federal Acquisition Regulations, 48 C.F.R. § 25.105(a)(2) (1988).

104. *Id.* § 25.105(a)(1).

tions controlling certain purchases¹⁰⁵ by specified government entities¹⁰⁶ must treat goods from other Code signatories "no less favorably" than (1) domestic goods and (2) goods originating in other Code signatories.¹⁰⁷ The Government Procurement Code therefore explicitly extends the national treatment obligation¹⁰⁸ and the nondiscrimination principle¹⁰⁹ to purchases by instrumentalities of Code signatories.

The Government Procurement Code also introduces "transparency" to the procurement process. Detailed provisions regulate the specification of technical requirements,¹¹⁰ the tendering process,¹¹¹ and the publication of regulations concerning government procurement practice and policy;¹¹² all of these provisions enable foreign goods to compete with domestic products on a more level playing field.

As is the case with the Subsidies and Countervailing Measures Code,¹¹³ the Trade Agreements Act of 1979 enacted the provisions of the Government Procurement Code on a conditional MFN basis. The relevant provisions of that Act authorize the President to waive "any law, regulation, procedure, or practice regarding government procurement" when applied to the purchase of "eligible goods" from "eligible countries" and when application of the rule results in treatment "less favorable" than that accorded U.S. products and suppliers and products of other eligible countries.¹¹⁴

For waiver eligibility, the President must determine that the country is either: (1) a party to the Government Procurement Agreement which provides appropriate reciprocal competitive government procurement opportunities to U.S. products and suppliers, or (2) a country, other than a major industrial country, which will otherwise assume the obligations of the Agreement and will provide such opportunities to such products and suppliers, or (3) a country, other than a major industrial country, which will provide such opportunities to such products and suppliers, or (4) a least developed country, as defined by the United Nations.¹¹⁵

105. The Code applies only to purchases in excess of 150,000 Special Drawing Rights and does not apply to military purchases. Government Procurement Code, *supra* note 4, art. I, para. 1(b); *id.* at art. VIII, para. 1. In 1981, the value of the threshold amount was \$196,000; by Jan. 1, 1990, it had declined to \$172,000. Reference File: Buy American Rules, Int'l Trade Rep. (BNA) 46:103 (March 28, 1990).

106. The government entities covered by the Code are identified in an annex. The current list of 54 American agencies covered by the agreement is reproduced at 48 C.F.R. § 25.406 (1988).

107. Government Procurement Code, *supra* note 4, art. II, para. 1.

108. *See supra* notes 84-91 and accompanying text.

109. *See supra* notes 29-48 and accompanying text.

110. Government Procurement Code, *supra* note 4, art. IV.

111. *Id.* at art. V.

112. *Id.* at art. VI.

113. *See supra* notes 76-83 and accompanying text.

114. 19 U.S.C. § 2511(a) (1982).

115. 19 U.S.C. § 2511(b) (1982). The third category was included to permit flexibility in extending Code benefits to countries which could not, because of deficien-

In a significant departure from previous Buy American laws, the Trade Agreements Act of 1979 required the President to prohibit purchases of products covered by the Government Procurement Agreement from countries which did not obtain a waiver under any of the four routes described above.¹¹⁶ For major industrial countries, this prohibition took effect immediately after the first waiver of the Buy American laws became operative, but could be delayed for up to two years for other countries.¹¹⁷ The purpose of this provision was "to encourage . . . countries to participate in the agreement and to provide reciprocal competitive opportunities to the U.S."¹¹⁸

II. Analysis

The Trade Agreements Act of 1979 significantly modified American law pertaining to countervailing duties and government procurement, but the modifications apply only to merchandise from countries which have either signed the related MTN Agreement or assumed equivalent obligations.¹¹⁹ This Note argues that signatories to the General Agreement who are denied the Act's provisions providing for a material injury to domestic industry test as a precondition to the imposition of a countervailing duty can challenge that denial, at the GATT level, as a violation of the unconditional MFN commitment which the U.S. assumed upon becoming a party to the General Agreement.¹²⁰ This Note also argues that members of the GATT who are nonsignatories to the government procurement MTN agreement may also challenge, at the GATT level, discriminatory actions by the U.S. under its modified Buy American law.¹²¹ Offering a possible remedy for these violations, article XXIII of the General Agreement provides that a party injured by the failure of another party to observe the General Agreement may be authorized by the CONTRACTING PARTIES to suspend trade concessions it made in favor of the guilty party.¹²²

cies in their internal procurement policies, adopt Code-equivalent obligations in full. Hufbauer, *supra* note 12, at 86-97.

116. 19 U.S.C. § 2512(a) (1982); Federal Acquisition Regulations, 48 C.F.R. § 25.402(c) (1988).

117. 19 U.S.C. § 2512(b) (1982).

118. S. REP. No. 249, *supra* note 77, at 135; 19 U.S.C. § 2512(a) (1982). Under the Omnibus Trade and Competitiveness Act of 1988, *supra* note 20, federal agencies may not award contracts for the procurement of goods produced or manufactured in (1) a signatory to the Government Procurement Agreement which is "not in good standing" or (2) a foreign country which maintains "a significant and persistent pattern or practice of discrimination against United States products . . . which results in identifiable harm to United States businesses." *Id.* at § 10b-1. The Act includes an elaborate definition of "not in good standing" and provides for a system of override clauses. *Id.* at § 10b-1(c).

119. See *supra* notes 78-82, 114-17 and accompanying text.

120. See *infra* notes 130-60 and accompanying text.

121. See *infra* notes 161-97 and accompanying text.

122. GATT, *supra* note 1, art. XXIII, provides:

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or

To determine the legality of the Trade Agreements Act's provisions under the General Agreement, this Note follows the analytical path provided for in the Vienna Convention on the Law of Treaties, a codification of customary international legal principles concerning bilateral and multilateral treaties.¹²³ The Vienna Convention includes special provisions for "successive treaties relating to the same subject-matter."¹²⁴ Between parties to the earlier agreement, only one of whom is also a party to the later agreement, the provisions of the earlier agreement control.¹²⁵

To determine the legal obligations as between two parties to the General Agreement, only one of which is a Tokyo Round code signatory, the Vienna Convention suggests the following analytical framework.¹²⁶ First, ascertain whether the domestic law enacting the Tokyo Round code concerns subject matter which is included within the unconditional MFN obligations of the General Agreement. If the subject matter is so included, the code signatory must offer any concessions it makes upon accession to the code to any member of GATT, regardless of whether the offeree is a code signatory. If the unconditional MFN commitment of the General Agreement does not reach the subject matter in question, then conditional application of the code under domestic law is consistent with the General Agreement. Second, if the uncondi-

that the attainment of any objective of the Agreement is being impeded as the result of

(a) the failure of another contracting party to carry out its obligations under this Agreement . . . , . . . the contracting party may . . . make with representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it . . . [the party may then complain to the CONTRACTING PARTIES]. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any contracting party . . . as they determine to be appropriate in the circumstances.

GATT, *supra* note 1, art. XXIII, paras. 1-2.

123. U.N. Doc. A/CONF.39/27 (1969) [hereinafter Vienna Convention]. With respect to the legal significance of the Convention as customary international law, one commentator has noted,

[b]ecause most of its substantive provisions reflect the International Law Commission's expert judgment regarding the expectations of permissible treaty conduct that had been developed, and because a substantial number of states have reinforced those expectations by signing and then ratifying the Convention, its substantive provisions have been regarded as authoritative statements of the law even for nonparties to the Convention.

F. Kirgis, Current International Law 4-5 (unpublished manuscript 1988). See also WORLD TRADING SYSTEM, *supra* note 1, at 88.

124. Vienna Convention, *supra* note 123, art. 30(1).

125. *Id.* at art. 30, para. 4.

126. This framework is also consistent with the Action by the Contracting Parties on the Multilateral Trade Negotiations, *supra* note 5, which declared that "existing rights and benefits under the GATT of contracting parties not being parties to these Agreements, including those derived from article I, are not affected by these Agreements."

tional MFN obligation of the General Agreement does encompass the subject matter of the code, then one must ask whether the party applying the code conditionally can invoke one of the standard exceptions to the unconditional MFN.¹²⁷ If such an exception is either unavailable or unexercised, conditional application would violate the General Agreement.

Determining whether the General Agreement extends the unconditional MFN obligation to the imposition of countervailing duties and government procurement purchases involves the interpretation of ambiguous language. The Vienna Convention requires such interpretations to be "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."¹²⁸ In light of the pivotal role unconditional MFN plays in furthering the fundamental objectives of the General Agreement,¹²⁹ a strong case can be made that ambiguities in the text of the General Agreement should be read to expand the scope of the unconditional MFN obligation whenever such a construction is reasonable.

A. The Subsidies and Countervailing Measures Agreement

The Trade Agreements Act of 1979 bifurcated the U.S. law of countervailing duties with respect to dutiable merchandise: some GATT members now receive the benefits of a "proof of injury to domestic industry" requirement, while other GATT members do not.¹³⁰ To evaluate whether this dual standard violates the General Agreement's unconditional MFN obligation, it is first necessary to establish whether the General Agreement's unconditional MFN treatment encompasses the imposition of countervailing duties.¹³¹

The plain language of article I strongly suggests that the drafters of the General Agreement intended to subject countervailing duty laws to the unconditional MFN obligation. Article I extends unconditional MFN treatment to "customs duties and charges of any kind imposed on or in connection with importation . . . and with respect to the method of levying such duties and charges."¹³² In light of the General Agreement's "object and purpose"¹³³ of preventing discriminatory trade

127. See *supra* notes 49-53 and accompanying text.

128. Vienna Convention, *supra* note 123, art. 31, para. 1.

129. See *supra* notes 43-48 and accompanying text.

130. See *supra* notes 79-83 and accompanying text.

131. An American court considered this issue in connection with a bilateral commercial treaty with Italy. The treaty contained an unconditional MFN clause very similar to that found in the General Agreement. The court rejected on factual grounds plaintiff's contention that the U.S. was applying its countervailing duty law in a discriminatory manner and did not specifically reach the issue of whether countervailing duties were exempt from unconditional MFN treatment. *American Express Co. v. U.S.*, 472 F.2d 1050 (C.C.P.A. 1973). See also *Energetic Worsted Corp. v. U.S.*, 224 F. Supp. 606 (Cust. Ct. 3d Div. 1963).

132. GATT, *supra* note 1, art. I, para. 1, full text reproduced *supra* note 37.

133. Vienna Convention, *supra* note 123, art. 31, § 1.

practices, it is very easy to conclude that the "ordinary meaning"¹³⁴ of "customs duties and charges of any kind imposed on or in connection with importation . . . and with respect to the method of levying such duties and charges" encompasses the method of levying countervailing duties and the article VI injury test.

GATT precedent supports the interpretation that article I was meant to include countervailing duties.¹³⁵ In 1967, the GATT Secretariat issued a legal opinion on whether signatories to the 1967 Anti-Dumping Code¹³⁶ must apply its provisions on an unconditional MFN basis to nonsignatories. The Director-General held that article I of the General Agreement entitled nonsignatories to the same treatment with respect to anti-dumping duties as signatories:

In my judgment the words of Article I—"the method of levying duties and charges (of any kind)", and "all rules and formalities in connection with importation"—cover many of the matters dealt with in the Anti-Dumping Code, such as investigations to determine normal value or injury and the imposition of anti-dumping duties. In fact, the principle of non-discrimination in the imposition of anti-dumping duties on imports from different sources is written into the Code itself, in Article 8(b). Furthermore, for a contracting party to apply an improved set of rules for the interpretation and application of an Article of the GATT only in its trade with contracting parties which undertake to apply the same rules would introduce a conditional element into the most-favoured-nation obligations which, under Article I of GATT, are clearly unconditional.¹³⁷

Both antidumping and countervailing duties are imposed to neutralize price advantages which certain unfair trade practices confer on the affected imports. Countervailing duties mitigate the effects of government-sponsored subsidy programs, while antidumping duties limit the ability of multinational firms to strategically price their products so that excess profits in one country subsidize losses incurred to gain market share in other countries. In light of the substantial conceptual similarity between antidumping and countervailing duties, the opportunities for protectionism which both types of duties present, and the sweeping language of article I, there is ample basis to argue that the Director-Gen-

134. *Id.*

135. Professor Jackson wrote, "although there may be no strict doctrine of *stare decisis* in international organizations including GATT, it is very clear that previous practice does have an important influence on the interpretation and application of the treaty agreement in subsequent fact situations." JACKSON, *supra* note 1, at 23.

136. Agreement on Interpretation of Article VI, GATT, B.I.S.D. 15th Supp. 74(1968). This was the first attempt to clarify the language of article VI of the General Agreement through the drafting of a formal code. See JACKSON, *supra* note 1, at 410.

137. GATT, Doc. L/3149 (1968). Article 8(b) of the Anti-Dumping Code provides "[w]hen an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be levied in the appropriate amounts in each case on a nondiscriminatory basis on imports of such products." Agreement on Interpretation of Article VI, *supra* note 136, Art. 8(b). See Hudec, *supra* note 12, at 192, n.27; JACKSON, *supra* note 1, at 410-11, n.27.

eral's analysis should also be applied to the Subsidies and Countervailing Measures Code.

Recent experience illustrates the threat the American conditional MFN approach poses to international relations. Shortly after completion of the Tokyo Round, the U.S. refused to recognize India's accession to the Subsidies and Countervailing Measures Code.¹³⁸ The U.S. therefore proceeded to impose countervailing duties against Indian imports without the injury test required by the Code. India objected because it appeared that the U.S. expected less discipline over subsidies practice from Pakistan, which was providing the U.S. valuable assistance during the Afghanistan crisis.¹³⁹ At India's request, a GATT Panel considered whether this U.S. action violated its obligation under article I of the General Agreement to treat Indian imports on an unconditional MFN basis.¹⁴⁰ Before the Panel reached a decision, the U.S. reached an agreement with India and treated it as a party to the Agreement.¹⁴¹

A similar episode, never formally presented to the GATT, concerned a bilateral agreement between New Zealand and the U.S. designed to restrain New Zealand's export subsidy program. New Zealand signed the Subsidies and Countervailing Measures Code with reservations pertaining to its export subsidies program. Responding to these reservations, the U.S. accepted New Zealand as a party to the Code only on condition that New Zealand phase out certain of its export subsidies by 1985. During 1985, New Zealand trade officials began to lobby the U.S. for a two-year extension to the subsidy phase-out period, which was to end April 1, 1985. Unfortunately for New Zealand's trade lobbyists, its new Prime Minister had just announced that New Zealand would forbid the entry of nuclear-armed ships into its ports. In response to this policy, the Chairman of the U.S. Senate Armed Sea Power and Force Projection Subcommittee introduced a resolution urging no extension

138. The Code did not require Code signatories to recognize the accession of other parties to the code. *See supra* note 77. The Trade Agreements Act of 1979, *supra* note 78, provided that in order for a nation to be eligible for the domestic injury test, not only must it have "accepted the obligations of the agreement with respect to the United States," 19 U.S.C.A. § 2503(b)(2)(A) (1982), but it also "should not otherwise be denied the benefits of the agreement with respect to the United States because such country has not accorded adequate benefits, including substantially equivalent opportunities for the commerce of the United States" 19 U.S.C.A. § 2503(b)(2)(B) (1982).

139. DEVELOPING COUNTRIES, *supra* note 12, at 88-89.

140. The reference to the GATT was,

[t]o examine, in light of the relevant GATT provisions, the complaint by India that the United States action to levy countervailing duties on imports . . . without applying injury criteria referred to in paragraph 6 of Article VI, while extending the benefit of such criteria to imports from some other contracting parties, is not consistent with the obligations of the United States under GATT, including the provisions of Article I thereof, and that the benefits accruing to India under the General Agreement are being nullified or impaired thereby

Panel on United States Countervailing Duties, Report of the Panel adopted on 3 November 1981 (L/5192), GATT, B.I.S.D., 28th Supp. 113 (1982).

141. *Id.* *See also* DEVELOPING COUNTRIES, *supra* note 12, at 88-89.

of the subsidies phase-out deadline and an end to the injury test requirement on the original deadline. The Chairman further commented, "[h]ad New Zealand not adopted its policy regarding port calls, some would undoubtedly have argued that the U.S., in keeping with its special relationship with New Zealand, should honor that nation's requests for additional time and retention of the injury test."¹⁴² As of April 1, 1985, the U.S. no longer treated New Zealand as a party to the Subsidies and Countervailing Measures Code and New Zealand lost its right to a proof of injury to domestic industry requirement on countervailing duty complaints brought by American companies.¹⁴³

While neither the India nor the New Zealand episodes led to the level of political acrimony prevalent during the 1930s, they do illustrate potential dangers to harmonious operation of the world trading system should the U.S. be permitted to continue its conditional application of the Subsidies and Countervailing Measures Agreement. In light of the "object and purpose" of the General Agreement to promote international comity through nondiscriminatory trade practices, the language of article I should be construed to include the levy of countervailing duties and the accompanying injury test provided for in article VI.

Some proponents of the current American countervailing duty law argue that since the imposition of a countervailing duty is an inherently discriminatory measure¹⁴⁴ designed to neutralize the effect of "unfair" subsidy programs, any country which does not agree to the subsidy limitations of the Subsidies and Countervailing Measures Code "has a weak claim to the broad benefits of article I" of the General Agreement.¹⁴⁵ These commentators proceed to analyze the American countervailing duty law under article XX of the General Agreement. Article XX authorizes parties to adopt "measures . . . necessary to secure compliance with laws or regulations . . . including those relating to customs enforcement," so long as such measures are not "arbitrary or unjustifiable."¹⁴⁶ Therefore, the argument goes, article XX prohibits only those discriminatory practices which are arbitrary or unjustifiable and the U.S. may discriminate against subsidizing countries because such discrimination is an appropriate response to unfair subsidies.¹⁴⁷

These arguments are unpersuasive. First, in light of the weak disciplines on subsidies imposed by the General Agreement, it cannot be claimed that the drafters of the General Agreement considered subsidies inherently "unfair" trade practices.¹⁴⁸ The GATT continues to recognize the legitimacy of subsidies in appropriate circumstances; the Subsidies and Countervailing Measures Code itself declares that

142. See 2 Int'l Trade Rep. (Current Reports) (BNA) 228 (Feb. 13, 1985).

143. 50 Fed. Reg. 13,111 (1985).

144. This is true in the sense that only the products of the particular country which provides subsidies are subject to any given countervailing duty order.

145. Hufbauer, *supra* note 12, at 74; see also Rubin, *supra* note 12, at 238.

146. Hufbauer, *supra* note 12, at 75; GATT, *supra* note 1, art. XX.

147. Hufbauer, *supra* note 12, at 75-76; Rubin, *supra* note 12, at 238.

148. See *supra* notes 64-70 and accompanying text.

"[s]ignatories recognize that subsidies are used by governments to promote important objectives of social and economic policy."¹⁴⁹

A second response to arguments justifying conditional MFN application of the injury test under article XX is that it seems inappropriate, on textual grounds, to apply the standard set forth in article XX to countervailing duties or the accompanying injury test. Article XX governs "measures . . . necessary to secure compliance with laws or regulations . . . including those relating to customs enforcement."¹⁵⁰ Although this language is ambiguous, its basic thrust is to guarantee signatories the right to develop procedural rules which enable them to effectively execute customs laws and reduce the risk that they will be circumvented. The United States does not legislate for other nations acceptable subsidy practices and seek to enforce such rules through countervailing duties. Rather, the United States assumes that other nations will subsidize industries and responds through the imposition of countervailing duties. The countervailing duty law is not a procedural rule which relates to another substantive aspect of the American tariff; rather, it is in itself an important substantive component of the American tariff system. Furthermore, the injury test is not simply a procedural prerequisite to the assessment of a countervailing duty. Its presence or absence so profoundly affects the importation of subsidized products that it must be deemed a substantive feature of the American countervailing duty law. For these reasons, the countervailing duty law and accompanying injury test appear to fall outside the scope of article XX, and on the grounds developed earlier,¹⁵¹ are within the scope of article I.

Finally, even if the American countervailing duty law were governed by article XX, article XX would prohibit discriminatory laws which are "applied in a manner which would constitute . . . a disguised restriction on international trade."¹⁵² Imposing a countervailing duty on a subsidy which has not demonstrably impaired U.S. industry itself constitutes unfair protectionism which unduly restricts international trade. This was certainly the position of America's trading partners at the Tokyo Round, when they lobbied the U.S. to modify its countervailing duty law and provide an injury test.¹⁵³

Assuming that the new U.S. countervailing duty law is subject to the unconditional MFN obligation, the next step is to ascertain whether the U.S. may invoke any reservations, exceptions, or escape clauses. The Senate Finance Committee Report to the Trade Act of 1974¹⁵⁴ explained that its reasons for suggesting a conditional MFN negotiating strategy at the Tokyo Round were to guarantee reciprocity and promote

149. Subsidies and Countervailing Measures Code, *supra* note 4, art. 8, para. 1. The provision then notes that "[s]ignatories also recognize that subsidies may cause adverse effects to the interests of other signatories." *Id.*

150. GATT, *supra* note 1, article XX, para. (d).

151. See *supra* notes 132-43 and accompanying text.

152. GATT, *supra* note 1, art. XX.

153. See *supra* note 76 and accompanying text.

154. REPORT ON TRADE ACT OF 1974, *supra* note 7, at 77-78.

the widest compliance with any substantive obligations which arise as a result of the round. Aside from arguing that the unconditional MFN obligation does not encompass countervailing duties,¹⁵⁵ proponents of the U.S. policy also suggest that conditional MFN application of the injury test would be "GATT legal" under the Protocol of Provisional Application exemption.¹⁵⁶ The Protocol subjects Part II obligations, which include the article VI injury test, to existing legislation.¹⁵⁷ One commentator has suggested that since the United States did not have an injury test upon becoming a party to the General Agreement, it "might argue that grandfather rights in the area of countervailing duties can be surrendered on a country-by-country basis, without derogating from the unconditional MFN obligations of article I, paragraph 1."¹⁵⁸ Under the analysis developed above, this "protocol defense" would not permit the U.S. to offer its injury test on a conditional MFN basis. Though the injury test is a Part II obligation, this Note argues that the obligation not to discriminate in the assessment of "customs duties and other changes" is found in article I.¹⁵⁹ Article I obligations are not subject to the grandfather clause of the Protocol of Provisional Application.¹⁶⁰ Therefore, if the article I unconditional MFN commitment runs to all matters related to the assessment of countervailing duties, the U.S. may not offer the injury test only to selected signatories to the GATT. Once the U.S. elects to offer the injury test to some GATT signatories, it is committed to do so for all.

B. The Government Procurement Code

Government Procurement Code signatories must follow a detailed collection of tender notification, bidding, and dispute resolution rules which are designed to ensure that public and quasi-public agencies offer equal opportunity to goods originating in other Code signatories.¹⁶¹ The Code also requires signatories to accord goods from other signatories the benefits of the national treatment and unconditional MFN obligations.¹⁶² Pursuant to U.S. obligations under the Code, the Trade Agreements Act of 1979 permits the President to waive Buy American rules for goods originating in selected GATT member nations.¹⁶³

The express language of article III of the General Agreement excludes most government purchases from the scope of the national treatment obligation.¹⁶⁴ The issue considered here is whether routine

155. See *supra* note 145 and accompanying text.

156. S. REP. NO. 249, *supra* note 70, at 45.

157. See *supra* note 1.

158. Hufbauer, *supra* note 12, at 77.

159. See *supra* notes 132-43 and accompanying text.

160. See *supra* note 1.

161. See *supra* notes 110-12 and accompanying text.

162. See *supra* notes 105-109 and accompanying text.

163. See *supra* notes 114-18 and accompanying text.

164. GATT, *supra* note 1, art. III, para. 8(a). Note that paragraph 8(a) does not exclude from the national treatment obligation goods purchased "with a view to

government purchases are nevertheless subject to the unconditional MFN principle under the General Agreement. Although most commentators state that government purchases are exempt from both obligations,¹⁶⁵ it appears there has never been an actual controversy on whether a government's purchases are subject to the unconditional MFN obligation.¹⁶⁶

This Note departs from the accepted view that government purchases are not subject to unconditional MFN and argues an alternative based on a close reading of the language and drafting history of article III and article I: the General Agreement permits internal government procurement laws and regulations which generally favor domestic goods, but prohibits such laws which discriminate between imported goods by country of origin.

Recall that the unconditional MFN obligation of article I expressly incorporates "all matters referred to in paragraph . . . 4 of article III," and that paragraph 4 of article III establishes the national treatment obligation with respect to "all laws, regulations and requirements affecting their internal sale, offering for sale, purchase . . . or use."¹⁶⁷ Although the language of paragraph 4 of article III would include government procurement laws and regulations, paragraph 8(a) of article III provides that "[t]he provisions of this Article shall not apply to laws, regulations, or requirements governing the procurement by governmental agencies of products purchased for governmental purposes."¹⁶⁸ The issue then is whether paragraph 8(a) of article III, which clearly

commercial resale or with a view to use in the production of goods for commercial sale." Since the Buy American Act of 1933 only encompasses goods purchased by government agencies for "public use," the provisions of the General Agreement and American law agree that commercial purchases by government agencies should not discriminate against foreign goods. *See supra* note 87.

165. *WORLD TRADING SYSTEM*, *supra* note 1, at 145; *JACKSON*, *supra* note 1, at 291; *JACKSON & DAVEY*, *supra* note 1, at 522; *Hufbauer*, *supra* note 12, at 89; *Hudec*, *supra* note 12, at 97 n.26. *But see* E. McGOVERN, *INTERNATIONAL TRADE REGULATION* 213, § 6.21 (1986):

National obligations requiring government agencies to favor particular producers fall within the terms of Article III:4 of the General Agreement, but the national treatment standard imposed by that provision is set aside in regard to government procurement by Article III:8. From the wording of the General Agreement a strong case can be made for saying that no such exception is associated with the MFN obligation in Article I:1, the terms of which extend its scope to the matters "referred to" in Article III:4. Against this it can be said that Article XVII:2 provides that the nondiscrimination rule in Article XVII:1 does not apply to procurement and that the applicable standard is only one of fair and equitable treatment.

166. Before the modifications of the Trade Agreements Act of 1979, Buy American statutes and regulations treated GATT-member origin goods equally. *See* S. REP. No. 249, *supra* note 70, at 133; *supra* notes 101-04 and accompanying text. However, in its study of nontariff trade barriers the Tariff Commission noted that the U.K. government gives special preferences to Commonwealth countries and European Free Trade Association members. *TARIFF COMMISSION REPORT*, *supra* note 92, at 68.

167. *GATT*, *supra* note 1, art. III, para. 4, text also reproduced *supra* note 85; *id.* art. 1, para. 1, text reproduced *supra* note 37.

168. *Id.* at para. 8(a). *See supra* note 87.

excuses government purchases from the national treatment obligation, should also eliminate application of the unconditional MFN obligation to government purchases.

Arguably, these provisions do not excuse government procurement regulations from unconditional MFN. This interpretation borrows from a familiar canon of statutory construction: an interpretation of statutory language which renders it meaningless should be avoided. Internal laws and regulations consistent with the national treatment obligation of article III will treat foreign goods in the same manner as they treat domestic goods. Since the bench mark for the national treatment obligation is the treatment of domestic goods, the treatment of foreign goods which originate in different countries will be identical. In general, it appears that the national treatment obligation implies the equivalent of unconditional MFN treatment.¹⁶⁹ Understanding the relationship between the national treatment obligation and unconditional MFN in this way, the language in article I which extends unconditional MFN treatment to matters referred to in paragraph 4 of Article III appears superfluous at first blush. Thus, it becomes necessary to develop a construction of this language which would avoid reading it as surplussage. One such construction, which is also supported by the drafting history, is that the reference in article I to matters referred to in paragraph 4 of article III was intended to impose an unconditional MFN requirement on the "laws, regulations and requirements" which were excluded from the national treatment obligation by paragraph 8(a) of article III.

A careful analysis of the drafting history of the General Agreement's unconditional MFN and national treatment provisions supports the conclusion that the drafters intended to subject government procurement purchases which are not already covered by the state trading enterprise "fair and equitable treatment" standard¹⁷⁰ to the unconditional MFN commitment of article I. At the First Session of the Preparatory Committee of the International Conference on Trade and Employment,¹⁷¹ which took place in London, October 15 through November 26, 1946, the U.S. submitted its "Suggested Charter for an International Trade Organization of the United Nations"¹⁷² [hereinafter Draft Charter]. The Draft Charter's "General Most-Favored-Nation

169. Except, perhaps, in the highly unlikely circumstance that internal laws and regulations treat foreign goods more favorably than domestic articles.

170. See *supra* notes 92-100 and accompanying text.

171. See Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, U.N. Doc. EPCT/33 (1946) [hereinafter London Report]. Technically, the U.S. Draft Charter, *infra* note 172, the London Report, *id.*, the New York Draft, *infra* note 177, and the Geneva Draft, *infra* note 183, relate to the formation of the proposed International Trade Organization, which was to be an agency of the United Nations. However, the preparatory work for the General Agreement and the ITO Charter were closely intermingled, and the obvious similarity in the language of the provisions of the respective documents suggests that these UN documents are authoritative sources in the drafting history of the General Agreement. See JACKSON, *supra* note 1, at 902.

172. Reproduced in London Report, *supra* note 171, at 52-67.

Treatment” article extended unconditional MFN to “all matters relating to internal taxation or regulation referred to in article 9.”¹⁷³ Article 9 of the Draft Charter, “National Treatment on Internal Taxation and Regulation,” provided that:

[t]he products of any Member country imported into any other Member country shall be . . . accorded treatment no less favorable than that accorded like products of national origin in respect of all internal laws, regulations or requirements affecting their sale, transportation or distribution or affecting their mixing, processing, exhibition or other use, *including laws and regulations governing the procurement by governmental agencies of supplies for public use other than by or for the military establishment.*¹⁷⁴

In its first report, the Preparatory Committee recommended revisions to the Draft Charter, including the proposal that “governmental purchases of supplies for government use” be exempt from the national treatment obligation.¹⁷⁵ The Preparatory Committee also proposed the omission of the “commitment regarding governmental purchases of supplies for governmental use . . . from the scope of the most-favored-nation clause because a suitable clause dealing with such governmental purchases is recommended for inclusion in article 31 (Non-discriminatory Administration of State-Trading Enterprises).”¹⁷⁶ Since there was insufficient time to finish a revised Draft Charter before the conclusion of the First Session of the Preparatory Committee, the Committee formed the “Drafting Committee” to complete the revisions. The Drafting Committee met in New York from January 20 to February 25, 1947, and produced the “New York Draft.”¹⁷⁷

The New York Draft clearly effectuated the Preparatory Committee’s desire to eliminate all government procurement from the scope of the basic unconditional MFN obligation. Article 14 of the New York Draft, “General Most-Favored-Nation Treatment,” extended unconditional MFN to “all matters for which national treatment *is provided for* in article 15.”¹⁷⁸ Article 15, “National treatment on internal taxation and regulation,” extended the national treatment obligation “in respect of all laws, regulations or requirements affecting their internal sale, offering for sale, transportation, distribution or use of any kind whatsoever,”¹⁷⁹ and deleted the reference to “laws and regulations governing the procurement by government agencies of supplies for public use other than by or for the military establishment” included in the Ameri-

173. Draft Charter, *supra* note 172, art. 8, para. 1.

174. *Id.*, art. 9, para. 1 (emphasis added).

175. London Report, *supra* note 171, at chapter III(d)(iv). The Preparatory Committee thought that any attempts to negotiate for the elimination of “buy national” laws “would lead to exceptions almost as broad as the commitment itself.” *Id.*

176. *Id.* at chapter III(d)(iii). See *supra* notes 92-100 and accompanying text, for a discussion of the state trading enterprise issue.

177. See U.N. Doc. EPCT/34, at 1 (1947) [hereinafter New York Report]; *Id.* at 3-52 [hereinafter New York Draft].

178. New York Draft, *supra* note 177, art. 14., para. 1 (emphasis added).

179. *Id.* at art. 15, para. 3.

can Draft Charter.¹⁸⁰ To eliminate any possibility of ambiguity, article 15 of the New York Draft also stipulated that “[t]he provisions of this Article shall not apply to the procurement by government agencies of supplies for governmental use and not for resale (nor in production of goods for resale).”¹⁸¹ In summary, the provisions of the New York Draft clearly precluded any argument that government purchases were subject to either the unconditional MFN of article 14 or the national treatment obligation.

During the months after the release of the New York Draft,¹⁸² it appears that the attitude against subjecting government procurement regulations to the basic unconditional MFN commitment of article 14 shifted. In the Draft Charter included in the report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment [hereinafter Geneva Draft],¹⁸³ the New York Draft language of the articles concerning the unconditional MFN and national treatment obligations was substantially revised. Article 16 of the Geneva Draft, “General Most-Favored-Nation Treatment,” extended unconditional MFN to include “all matters referred to in paragraphs 1 and 2 of article 18”¹⁸⁴ (the national treatment provisions), rather than “to all matters in regard to which national treatment is provided for in [the national treatment article].”¹⁸⁵ Article 18 of the Geneva Draft, “National Treatment on Internal Taxation and Regulation,” extended the national treatment obligation “in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use,”¹⁸⁶ rather than “in respect of all laws, regulations or requirements affecting their internal sale,

180. Draft Charter, *supra* note 172, art. 9, para. 1.

181. New York Draft, *supra* note 177, art. 15, para. 5 (emphasis added).

182. The official UN printed version of the New York Report is dated May 29, 1947. See *id.* at front cover.

183. U.N. Doc. EPCT/186 (1947). The draft charter produced at the Second Session of the Preparatory Committee [hereinafter Geneva Draft] is reproduced *id.* at 7-58. The report was adopted by the Preparatory Committee on August 22, 1947. *Id.* at 5.

184. Geneva Draft, *supra* note 183, art. 16 (emphasis added). Note that this language is identical to the corresponding provision in the General Agreement, except for the different numbering of the articles and paragraphs. GATT, *supra* note 1, art. I, para 1.

185. New York Draft, *supra* note 177, art. 14, para. 1.

186. Geneva Draft, *supra* note 183, art. 18, para. 2. Note that this language is identical to the corresponding provision in the General Agreement. GATT, *supra* note 1, art. III, para. 4.

The phrase “all laws, regulations and requirements affecting . . . purchase [of imports]” is broader in scope than “laws and regulations governing the procurement by governmental agencies of supplies for public use,” as recommended by the U.S. in its Draft Charter, *supra* note 172. If article 18, paragraph 2 of the Geneva Draft omitted the word “purchase,” paragraph 5 of Article 18, see *infra* note 188 and accompanying text, which creates the exception to the national treatment obligation for government procurement purchases, would be redundant and no claim could be made that government purchases were incorporated by reference into the unconditional MFN obligation of the Geneva Draft’s article 16.

offering for sale, transportation, distribution or use.”¹⁸⁷ While the Geneva Draft’s article 18 provided that “[t]he provisions of this article shall not apply to the procurement by governmental agencies of products purchased for governmental purposes and not for resale or use in the production of goods for sale,”¹⁸⁸ a literal reading of this language in conjunction with the Geneva Draft’s article 16 would exempt government purchases from the national treatment obligation, not from the unconditional MFN obligation. Since the New York Draft’s provisions unambiguously exempted government procurement from the scope of the unconditional MFN obligation,¹⁸⁹ the substantial revisions which appeared in the Geneva Draft strongly suggest actual intent to subject government purchases not already covered by the draft’s state trading enterprise article¹⁹⁰ to the unconditional MFN obligation of article 16.

The language of the Geneva Draft affecting the relationship between the unconditional MFN obligation and government procurement regulations and the corresponding provisions of the General Agreement are substantially identical.¹⁹¹ Therefore, reading the unconditional MFN language in article I of the General Agreement to include government procurement regulations is fully consistent with its drafting history. Such a reading of articles I and III would permit a GATT signatory such as the U.S. to enact government procurement laws and regulations which favor domestic goods, but prohibit it from treating merchandise originating in different GATT signatories unequally for government procurement purposes. Therefore, the provisions of the Trade Agreements Act of 1979 authorizing the President to waive the requirements of the Buy American Act in favor of particular GATT signatories is not “GATT legal” under article I.

Assuming Buy American Act waivers which discriminate between GATT members violate article I commitments to unconditional MFN, we must again determine whether the U.S. may claim an exemption under the Protocol of Provisional Application. In an annex to the General Agreement, the parties stipulated that “[t]he obligations incorporated in paragraph 1 of article I by reference to paragraphs 2 and 4 of article III . . . shall be considered as falling within Part II for the purposes of the Protocol of Provisional Application.”¹⁹² Recall that under the terms of the Protocol, Part II obligations are accepted only to the extent “not inconsistent with existing legislation.”¹⁹³ Since the Buy American Act was such existing legislation, the U.S. could claim certain “grandfather privileges.”¹⁹⁴

187. New York Draft, *supra* note 177, art. 15, para. 3.

188. Geneva Draft, *supra* note 183, art. 18, para. 5.

189. *See supra* notes 178-81 and accompanying text.

190. Geneva Draft, *supra* note 183, art. 30.

191. *See supra* notes 167-68, 184-88 and accompanying text.

192. GATT, *supra* note 1, annex I, art. I, para. 1.

193. *See supra* note 1 and accompanying text.

194. In 1955, the GATT Secretariat took an inventory of laws and regulations inconsistent with obligations under the General Agreement but retained under the

It appears, however, that as of October 30, 1947, the original Buy American laws and regulations did not offer special treatment to particular foreign suppliers.¹⁹⁵ Therefore, a Protocol defense would not render the Presidential authority to selectively waive application of the Buy American rules "GATT legal." This conclusion also applies to the provisions in the 1979 and 1988 trade bills which completely blacklist selected GATT signatories from eligibility as suppliers to certain federal agencies.¹⁹⁶ The blacklist extends far beyond the scope of the original Buy American rules, which only gave domestic manufacturers a price preference and did not purport to completely ban particular countries from bidding on U.S. government contracts.¹⁹⁷

Thus, U.S. government purchases are subject to the unconditional MFN obligation, and a "Protocol" defense is unavailable to permit discriminatory practices. Therefore, it appears that the Trade Agreements Act of 1979 authorizes action inconsistent with U.S. obligations under the General Agreement.

Conclusion

This Note has argued that the conditional MFN approach adopted by the U.S. with respect to two of the MTN Agreements, the Subsidies and Countervailing Measures Code and the Government Procurement Code, is not "GATT legal." The analysis presented in this Note is admittedly legalistic, of interest to those GATT members (primarily the developing world) who believe that the GATT system should be governed by "rule-oriented diplomacy," as distinguished from "power-oriented diplomacy."¹⁹⁸ It does not purport to address the more fundamental question of whether unconditional MFN should be replaced by conditional MFN in the GATT system's efforts to deal with nontariff trade barriers. These policy questions are best answered by economists and experienced trade negotiators.¹⁹⁹

Protocol of Provisional Application's grandfather clause. The U.S. did not report any Buy American laws or regulations in that inventory, and therefore it arguably waived such rights. JACKSON & DAVEY, *supra* note 1, 301, n.22, 306.

195. See S. REP. NO. 249, *supra* note 70, at 131-33; *supra* note 166 and accompanying text. In light of the ambiguity in articles I and III concerning whether government purchases are subject to unconditional MFN, the fact that the U.S. did not claim any grandfather privileges with respect to the Buy American Act supports this conclusion. See *supra* note 194.

196. See *supra* notes 116-18 and accompanying text.

197. See *supra* notes 101-4 and accompanying text.

198. See WORLD TRADING SYSTEM, *supra* note 1, at 85-88.

199. See, e.g., Hufbauer, *supra* note 12, at 51 ("unconditional MFN cannot play the lead role in trade negotiations because, if scrupulously followed, the principle would inhibit trade liberalization . . . unconditional MFN can usefully play the role of good housekeeper. From time to time, it should be used to clean up the attic of trade policy."); GATT FOCUS, Sept.-Oct. 1984, at 3 ("The GATT economists consider essential a return to the most-favored-nation system . . ."); Hudec, *supra* note 12; Snape, *supra* note 12.

Whatever the merits of retaining unconditional MFN obligations in future trade negotiations, most of the major industrial countries, including the European Community, Japan, and Canada, acceded to both MTN Agreements discussed in this Note.²⁰⁰ As U.S. law accords those signatories the full benefits of the Codes, it appears that the principal victims of its discriminatory trade practices are developing countries.

It has been observed that the need to protect domestic manufacturers from foreign competition "constituted the chief theoretical or intellectual basis for the American tariff during the 19th century and the early part of the 20th."²⁰¹ It is therefore ironic that the U.S. today imposes the equivalent of a penalty on third world countries which attempt to use nontariff barriers to further the same objective which the U.S. formerly realized through high tariffs. Whatever the merits of American conditional MFN policy from a trade negotiator's perspective, it is clearly inconsistent with a 50-year tradition of furthering the interests of international free trade through vigorous application and support for the unconditional MFN principle.

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200. 40 USITC, OPERATION OF THE TRADE AGREEMENT PROGRAM REP. 39 (1989).

201. D. SNIDER, *supra* note 25, at 211.

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