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Post-war planning for an international trade agreement began well before Pearl Harbor. Multilateralizing the reciprocal trade agreements of the 1930s and eliminating trade discrimination were important objectives of Secretary of State Cordell Hull and other U.S. officials concerned with foreign economic policy. The Lend-Lease Agreement ("Agreement") with Britain provided an opportunity to commit Britain to cooperate in the establishment of a multilateral trading system in place of the network of bilateral trade and payments agreements under which most non-U.S. trade was conducted in the 1930s. The State Department proposed that the Lend-Lease Agreement commit the two countries to eliminate all forms of discriminatory treatment in international commerce, and to reducting tariffs and other trade barriers. Article VII of the Agreement obligated Britain to give up Imperial Preference (which provided favorable tariff treatment among members of the Commonwealth); the sterling area (which discriminated against U.S. exports by limiting the availability of dollars for making payments by sterling area countries); and the network of bilateral payments agreements between the sterling area and a number of nondollar countries. This was hard for John Maynard Keynes, who headed the British delegation in 1941, to accept at first, but once he became convinced that Britain could not be a major trader in the future under the prewar trade and foreign exchange regime, he undertook to convince the British administration and Parliament that Britain should adopt multilateralism and nondiscrimination. The Mutual Aid Agreement, with Article VII, was signed in February 1942.

Article VII set the stage for the preliminary agreement with Britain to hold an international trade conference. This agreement, together with a joint statement on trade policy, became a part of the Anglo-American Financial and Commercial Agreements of December

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1945, which provided for a loan of $3.75 billion dollars to Britain.[1] The Financial Agreement was a major condition for Britain's ratification of the Bretton Woods Agreement, which committed members of the International Monetary Fund ("IMF") to eliminate foreign exchange discrimination following a post-war transition period. Trade and foreign exchange restrictions are closely related because either trade or foreign exchange measures may be used to restrict current trade. Thus, without an agreement on foreign exchange restrictions, an agreement on trade restrictions would have little significance.

I joined the Treasury Department as an economist in 1942 and immediately began working with my colleagues in the Division of Monetary Affairs on Harry Dexter White's plan for an international stabilization fund and international bank for reconstruction and development. Work on these plans occupied much of my time for the next four years and I was privileged to attend the Bretton Woods and Savannah conferences. I was also Treasury representative on an interdepartmental working group chaired by State for the preparation of U.S. proposals for the International Trade Organization ("ITO"). I missed the 1947 GATT conference in London and the Havana ITO conference in 1948. My wife attended the GATT conference, and I gained from her some of the flavor of the conference by osmosis.

I. ORIGINS OF ITO AND IMF

There was a close association between the evolution of the trade policies embodied in the GATT and ITO and the formulation of the provisions on foreign exchange restrictions in the IMF. In both cases, the purpose was to eliminate nontariff barriers to trade.

The bilateral reciprocal trade agreements negotiated under the Trade Agreements Act of 1934 contained so-called general clauses designed to safeguard the value of the tariff concessions in the agreement from being undermined by quotas or other nontariff restrictions. These general clauses differed among the twenty-one reciprocal trade agreements negotiated before World War II and were more expressions of intent and agreement on principles than a set of enforceable trade laws. The U.S. proposals for the ITO published in November 1945, contained a set of provisions based on those in the earlier bilateral agreements and designed to avoid trade discrimination and to limit the use of quantitative restrictions.[2] The Preparatory

1. DEPARTMENT OF STATE, ANGLO-AMERICAN FINANCIAL AND COMMERCIAL AGREEMENTS (1945).

2. DEPARTMENT OF STATE, PROPOSALS FOR EXPANSION OF WORLD TRADE AND EMPLOYMENT (1945).

Committee for the 1947 GATT conference in London, which was designed to negotiate the first multilateral tariff pact, formulated a complex code of trade law designed to reconcile the principle of eliminating all nontariff barriers to trade with existing protectionist legislation in the U.S. and other countries. This trade code was embodied in the ITO charter negotiated in Havana in 1948, and the ITO was expected to administer and enforce the code. With the failure of the U.S. Congress to ratify the ITO, the administration of the code was left to a weak GATT Secretariat which lacked authorization from the governments of GATT members to administer anything, or to enforce adherence to the code.

Paralleling the negotiation of the reciprocal trade agreements in the 1930s was the negotiation of foreign exchange agreements for short-term exchange rate stabilization, most important of which was the Tripartite Agreement of 1936 with Britain and France, joined by Belgium, Netherlands and Switzerland. Exchange rate stabilization and avoiding competitive exchange depreciation were regarded as important conditions for expanding world trade. The Treasury-Department also negotiated exchange stabilization agreements with several Latin American countries. At a conference of ministers of foreign affairs at Rio de Janeiro in January 1942, Harry White proposed a conference for the establishment of an international stabilization fund, which contained some of the provisions later embodied in the IMF. As the international trade and the financial cooperation proposals evolved, their interdependence and common objectives became more and more evident. Had the history of the IMF and the ITO been somewhat different, the functions of the two institutions might well have been merged in a single organization. In fact, White's April 1942 proposal for an international stabilization fund combined international trade and foreign exchange rules in one agreement.[3]

White's 1942 plan for an international stabilization fund (IFS) required members to abandon their foreign exchange restrictions on current trade, to not enter into bilateral trade and exchange arrangements, and to gradually reduce their existing trade barriers. Special attention was given in the plan to the elimination of trade and foreign exchange discrimination and to the liquidation of blocked currency

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3. *See The White Plan: Preliminary Draft Proposal for a United Nations Stabilization Fund and a Bank for Reconstruction and Development of the United and Associated Nations, in* 3 THE INTERNATIONAL MONETARY FUND, 1945-1965 37-55 (1969).

balances, such as the sterling balances which were used to finance trade among members of the sterling area. In the final agreement on the IMF at Bretton Woods, the references to trade restrictions to be administered by the IMF were eliminated, but the GATT provided for the harmonization of the provisions on trade restrictions with the IMF's provisions on exchange restrictions.

The requirement that IMF members abandon or reduce their exchange restrictions on current trade found in the original plan were not rigid or set out as a code of law. There were exceptions for balance of payments and other reasons and, in any case, the Fund could give its permission to use restrictions for a variety of purposes. In his April 1942 draft, White stated that "[t]here are periods in a country's history when failure to impose exchange controls, or import or export controls, have led to serious economic and political disruption. It probably would be fatal to the Fund if conditions of participation in it were based on the assumption that no restrictions upon exchange or upon trade were permissible."[4] Although later versions of the ISF plan were more legalistic, the liberal approach to the behavior of members in their foreign exchange transactions was retained in the final text of the IMF. Perhaps it was realized that because some exchange controls would always be present, there should be tolerance for the sinner. Moreover, the reason for limiting exchange restrictions on trade was not to abolish all impediments to trade, but to avoid discrimination and unfair competitive advantage. To quote White again: "[t]he task before us is not to prohibit instruments of control, but to develop those measures of control, those policies of administering such controls, as will be the most effective in obtaining the objectives of world-wide sustained prosperity."[5]

The planners who gave us the Fund and the GATT realized that most of the members would, from time-to-time, use trade and exchange controls, but the planners were seeking to create a world in which there would be less need for controls on trade for dealing with balance of payments deficits and unemployment. They were especially concerned with terminating trade and exchange discrimination among countries because the network of bilateral trade and exchange agreements that arose during the 1930s fettered world competition and the growth of trade. However, the GATT recognized important exceptions to the principle of nondiscrimination by permitting members to form customs unions or free trade areas under GATT supervision and to

4. *Id.* at 63.
5. *Id.* at 64.

remove barriers to frontier trade, even though these arrangements would provide a degree of discrimination against other countries.

By the end of World War II, it was recognized by both the U.S. and British governments that trade discrimination could not be significantly lessened until sterling, the world's second most important currency, became convertible into dollars and that this would not occur until Britain was able to deal with her large dollar deficits and her large external liabilities in the form of sterling balances. Therefore, both the Bretton Woods agreements and the convening of an international trade conference depended upon the negotiation of an Anglo-American financial agreement which provided for (1) sterling convertibility; (2) the elimination of British trade discrimination against the U.S.; and (3) an agreement to call an international trade conference based on principles that were later embodied in the GATT and the ITO. Although the Anglo-American Financial Agreement was negotiated in 1945 and ratified by both governments in 1946, Britain was only able to maintain sterling convertibility for a few months and trade and exchange restrictions by Western countries continued on a large scale until the end of the 1950s. Substantial progress in achieving the objectives of the GATT and the IMF for the trade of the industrial countries was delayed until European economic recovery with the aid of the Marshall Plan.

II. Conclusions on Original Purposes of ITO and IMF

In reviewing the background of the ITO and its foreign exchange counterpart, the IMF, I have reached several conclusions regarding their original purposes and the motivations of their founders. I believe these conclusions have relevance for the revision of the GATT text in the Uruguay Round, including the proposed World Trade Organization ("WTO").

My first conclusion is that while nontariff trade and foreign exchange restrictions on current trade were to be eliminated as soon as possible, it was expected that nations would employ restrictions from time to time for dealing with balance of payments deficits, promoting development, and for other national economic and political problems. Therefore, the principal means of reducing restrictions were consultation and mediation where disputes between members were involved. Moreover, I find nothing in this history to suggest that the proposals were designed to remove all nontariff impediments to trade. Rather, the proposals sought the removal of practices that gave a competitor in one country an unfair advantage over a competitor in another country as a consequence of deliberate governmental meas-

ures. This is different from the concept that governments are to be prevented from using trade restrictions to carry out national objectives not related to achieving a competitive advantage in trade, such as preventing imports of food subjected to toxic pesticides.

A second conclusion is that the ITO was not designed simply to enforce a set of trade rules, but was to be an organization for dealing with a range of post-war international economic problems, including the moderation of fluctuations in international commodity prices, promoting balance of payments equilibrium (in cooperation with the IMF), eliminating restrictive business practices, and promoting employment. I am quite sure that had environmental protection, the conservation of natural resources, and global sustainability been major concerns 50 years ago, they would have been included among the major objectives of the ITO.

A third conclusion is that the ITO was expected to cooperate with other specialized international organizations, and its executive board was authorized to enter into agreements with such organizations. Under this general policy, one could imagine that today the trade organization might cooperate closely with international organizations concerned with the environment and be in close consultation with members seeking to negotiate international conventions, such as the Montreal Protocol on the Ozone Layer, or the Convention on International Trade in Endangered Species, which contain trade provisions. In the negotiations on the draft charter of the ITO that took place in Geneva in 1946, the U.S. delegation proposed that Article XX(d), which provides an exception to the rules on trade restrictions as they apply to the conservation of exhaustible natural resources, go on to state "if such measures are taken pursuant to international agreements." Unfortunately, this qualification was dropped at the request of another country.[6]

III. LEGALISM AND THE ITO

An issue raised by many students of the ITO and the GATT is whether a multilateral trade agreement should be primarily a legal document with provisions for judicial determination and penalties for

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6. *See* Robert Repetto, *Trade and Environment Policies: Achieving Complementarities and Avoiding Conflicts, in* ISSUES AND IDEAS (World Resources Institute, Washington, D.C.), July 1993, at 8.

I can only touch on it here, but the question arises whether it was the intention of the U.S. government officials that formulated the proposals for the ITO for there to be a detailed code of trade law that was to be administered by the ITO.

violations, or a set of guidelines for realizing mutually agreed objectives and procedures for achieving the objectives through consultation and mediation. The question that arises is—whether it was the intention of the U.S. government officials that formulated the proposals for the ITO for there to be a detailed code of trade law that was to be administered by the ITO?

Although the U.S. proposal for an ITO published in November 1945 was not rigid or legalistic, there is considerable evidence that many State Department officials saw the primary purpose of the ITO as the application and enforcement of substantive rules of law, and this was clearly the view of then Secretary of State Dean Acheson.[7] There are certainly persuasive arguments for a substantive code of trade laws with a treaty commitment by governments to obey the laws and a strong organization to interpret and enforce them. However, there are several difficulties in applying this approach to an international trade agreement. First, for the agreement to be acceptable to a number of countries, there must be exceptions for dealing with existing domestic laws and for pursuing a variety of national interests, and these exceptions tend to be ambiguous and imprecise. Second, governments are generally reluctant to accept international interpretation and enforcement of rules governing their trade practices. There is also an unwillingness on the part of governments to submit issues in dispute to judicial procedures outside their domestic court system or to accept such decisions. This attitude is likely to hamper the dispute settlement mechanism contained in the GATT. Fourth, sanctions for violating a trade code usually take the form of giving the plaintiff in the dispute the right to retaliate by violating some aspect of the code that has an adverse impact on the offending member. This form of sanction presents the possibility of counter-retaliation by the defendant and a general unraveling of the multilateral trade agreement. Ken Dam points out in his criticism of the detailed code of trade laws in the GATT and ITO, that the code was in considerable measure responsible for the failure of the ITO in Congress and its rejection by important sectors of the American public.[8] But those favoring a

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7. Dean Acheson, *Economic Policy and the ITO Charter*, *in* 20 DEP'T STATE BULL. 626 (1949). Acheson argued: "No code of laws is worth very much without an authoritative body to interpret it and administer it." *Id.*

8. Kenneth W. Dam, who has been a law professor at the University of Chicago Law School and a Deputy Secretary of State, was highly critical of the legalistic approach in the GATT and ITO. *See* KENNETH W. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATIONS 3-8 (1970).

legalistic approach argue that a trade agreement without a code of trade law and an organization to interpret and provide procedures for enforcing the law with credible sanctions will have little value. Yet, the GATT has stumbled along for nearly a half century without a strong administrative structure or enforcement procedures, and has been expanding in membership and prestige. Despite a few unpopular decisions by dispute panels and some rejections of their findings, the GATT has had a remarkable record of observance, in part because nations believe it is too important to be allowed to fail.

The issue of legalism versus pragmatism arose during the debates on the IMF prior to Bretton Woods. White's original plan provided a broad statement of objectives for removing exchange restrictions and discrimination, but in subsequent drafts of the IMF plan, the rules on exchange practices became highly specific although subject to a complex set of exceptions. This was in contrast to Keynes' proposal for an International Clearing Union in which the rules relating to exchange restrictions were of a more general nature. In the debates over the two plans during 1943 and 1944, Keynes objected strongly to the legalism in the U.S. proposal and placed the blame on the Treasury Department lawyers. In his memoirs, Dean Acheson, who was a lawyer and favorably disposed to a legalistic approach, recalled his dialog with Keynes on the subject and reported that Keynes told him "the Mayflower, when she sailed from Plymouth, must have been entirely filled with lawyers."[9] In practice, the IMF code on foreign exchange restrictions has been administered by consultation between members and the Fund and there is no formal mechanism for dealing with disputes between members. The Fund does have a powerful sanction in denying credits to countries that violate the provision of its charter, but these sanctions do not apply to countries not borrowing from the Fund and, in any case, there has been little attempt at rigid enforcement of the code. To a substantial degree, the Fund has relied on so-called "stand-by agreements" and other conditional agreements setting forth conditions under which a member may receive a certain amount of credit from the Fund over a given period, with the conditions having to do with the member's monetary, financial, fiscal and other policies. The IMF has been rather liberal with respect to its code of exchange restrictions.

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9. DEAN ACHESON, PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT 83 (1969).

IV. Lessons for the Uruguay Round

Among the purposes of the Uruguay Round was a revision of the technical provisions of the GATT and the establishment of a WTO, as the administrative organ similar to the ITO that was rejected by the U.S. Congress. A draft final act embodying the results of the Uruguay Round was issued by the GATT Trade Negotiations Committee on December 20, 1991. This draft, which was circulated by the GATT Secretariat, undoubtedly improved the code of trade law from a technical standpoint, but it did little to satisfy the criticism that the GATT is too legalistic. The draft was strongly opposed by environmental groups on the grounds that the trade rules were in conflict with trade restrictions for safeguarding the environment. In an attempt to answer the environmental critics, the GATT Secretariat published a report entitled *Trade and the Environment*,[10] but this report has been almost universally condemned by conservation organizations. The principal criticisms by environmentalists of the GATT, as interpreted by this report, are as follows:

1. Article XX of the GATT on exceptions to trade restrictions does not permit trade restrictions for a number of environmental proposes, including restrictions on imports produced under conditions that harm the environment in the producing country or are harmful to the global environment;[11]

2. Protection of the environment is not regarded as an objective in the administration of the trade rules on a par with removing obstacles to trade; and

3. There is no provision for including environmental specialists on the dispute settlement panels or for presenting testimony by environmentalists in hearings before the panels.

The GATT Secretariat report appeared to be sympathetic to environmental objectives, but is nevertheless rigid in its interpretation of trade rules. For example, the exemption in Article XX for trade measures relating to conservation of exhaustible natural resources is interpreted to apply only to resources within the national jurisdiction of the country applying the measure. However, a broader interpretation would include global natural resources in which a nation may have an interest just as vital as its interest in those resources within its boundaries. This issue applies to the tuna-dolphin dispute between

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10. *Trade and the Environment*, *in* 1 International Trade, 1990-1991 19-47 (1992).

11. For an analysis of this issue, see Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 27 J. World Trade 37, 37-53 (1993).

the U.S. and Mexico.[12] The Secretariat report also opposed amending the GATT to recognize the importance of environmental considerations.

The Secretariat report might have recommended a protocol to the GATT making environmental protection and global sustainability major objectives to be taken into account in administering trade rules. Nevertheless, there are elements in this report suggesting a more liberal interpretation of the GATT. I believe that the key to reconciling GATT trade rules with environmental objectives is to be found in the following statement in the Secretariat report:

> The rules of the General Agreement are concerned *primarily* with preventing discrimination, that is, with limiting the extent to which countries can discriminate between home products and imports, between imports from different countries, and between goods sold in the home market and those exported. It is reasonable to conclude, therefore, that even though the General Agreement does not mention the environment explicitly, non-discriminatory environmental policies ordinarily would not be subject to any GATT constraints.[13]

The above statement is in line with the initial purposes of both the ITO and the IMF. What the founders of the ITO and IMF wanted to achieve was the elimination of trade discrimination undertaken to provide producers in one country a competitive advantage over producers in other countries. Therefore, there should be no fundamental conflict between trade measures taken for environmental protection and trade rules that prohibit discrimination for commercial purposes. A problem does arise when restrictive trade measures for achieving environmental objectives *incidentally* provide a competitive advantage to producers in the country employing the restrictions, or when a government is alleged to impose restrictions disguised as being for environmental purposes but are actually for commercial protection. Conflicts over the purpose of trade restrictions will inevitably arise and resulting disputes must be settled by consultation, mediation, or some form of judicial procedure.

A major argument of the Secretariat report against import restrictions on goods produced under environmentally harmful conditions is that importing countries should not *unilaterally* dictate the domestic policies of exporting countries. For example, if the United States has

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12. *See* Repetto, *supra* note 6; Charnovitz, *supra* note 11.
13. *Trade and the Environment*, *supra* note 10, at 23.

more rigorous or different environmental regulations relating to producing particular goods than those in force in Mexico, the United States might either prevent the importation of these goods from Mexico or apply countervailing duties on such imports. One solution to this problem is for production standards, including taking wildlife, to be determined by international agreement on conditions of production. Another solution, which is preferred by environmentalists, is that an importing country should have the right to restrict imports on environmental grounds so long as the primary purpose is not to realize a competitive advantage in trade. I believe both these approaches are more in line with the original purpose of the ITO than the position taken in the GATT Secretariat report.

Let me conclude by saying that I believe the revised GATT and WTO would be more acceptable if its objective on nontariff barriers were defined in terms of avoiding commercial discrimination in trade.[14] This would take the issue of the compatibility between trade rules and measures in support of the environment largely out of contention. I also think the success of the WTO will depend largely on consultation with members and the mediation of disputes among members. The GATT dispute mechanism has not been successful, and the widespread disapproval of the decisions of the panels has detracted from GATT's reputation as a highly desirable and indispensable institution for promoting world trade.

14. The Final Act of the Uruguay Round, which was completed in December 1993 and submitted to Congress by President Clinton on December 15, was not fundamentally changed from the draft issued by the GATT on December 20, 1991. *See* FINAL ACT EMBODYING RESULTS OF URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (1993).