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Dam: The GATT, Law and International Economic Organization

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THE GATT, LAW AND INTERNATIONAL ECONOMIC ORGANIZATION. By *Kenneth Dam*. Chicago: University of Chicago Press. 1970. Pp. xvii, 480. \$15.

WORLD TRADE AND THE LAW OF GATT. By *John H. Jackson*. New York: Bobbs-Merrill. 1969. Pp. xl, 948. \$27.50.

The General Agreement on Tariffs and Trade,¹ popularly known as GATT, is the basic international instrument regulating imports and exports of its seventy-six member countries, including the United States. Recent events in this country have pointed up the immediacy of the need to promote understanding of this vital document's main purpose—the liberalization of international trade. These excellent books by Professors Dam and Jackson should prove to be useful tools in this educative process.

On November 19, 1970, the House of Representatives passed H.R. 18970, entitled "The Trade Act of 1970."² This bill was reported by the Senate Finance Committee but had not yet been acted upon when the 91st Congress expired; it provided that the "total quantity of each category of textile articles . . . and the total quantity of each category of footwear articles . . . produced in any foreign country which may be entered in 1971 shall not exceed the average annual quantity of such category produced in such country and entered during 1967, 1968 and 1969."³ Annual quantitative limitations were provided for subsequent years as well,⁴ and the President was granted authority to suspend the application of the import quotas to any textile or footwear article, upon a determination that imports of such article "are not contributing to, causing, or threatening to cause market disruption in the United States."⁵

In addition to these mandatory quotas, the proposed bill authorized the United States Tariff Commission to recommend not only tariff increases, but quantitative restrictions, if it determined that the latter were necessary to prevent further imports from contributing "substantially . . . toward causing or threatening to cause serious injury to . . . domestic industry . . ."⁶ In order to exercise this discretionary power, the Commission would have been required to make two findings: first, it would have had to determine that the imported article undersold the domestic article, constituted "an increasing proportion of apparent domestic consumption," and was

1. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3 (1947), T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

2. H.R. 18970, 91st Cong., 2d Sess. (1970).

3. H.R. 18970, 91st Cong., 2d Sess. § 201(a) (1970).

4. H.R. 18970, 91st Cong., 2d Sess. § 201(b) (1970).

5. H.R. 18970, 91st Cong., 2d Sess. § 201(d) (1970).

6. H.R. 18970, 91st Cong., 2d Sess. § 111(a) [proposed § 301(b)(1)] (1970). Section 111 of H.R. 18970 contains a proposed amendment of § 301 of the Trade Expansion Act of 1962, 19 U.S.C. § 1901 (1964).

produced at unit labor costs substantially below those of the domestic article;⁷ second, the Commission would have had to ascertain *either* that domestic production and employment were declining substantially *or* that import penetration "constitute[d] more than 15% of apparent United States consumption" and was increasing "by at least 3 percentage points"⁸

Congressional enactment of these provisions would have violated the obligations of the United States under GATT. Indeed, GATT contains a general prohibition of quantitative restrictions,⁹ a prohibition that, ironically, was inserted in response to American pressure. Professor Dam quotes one of the chief American negotiators, Clair Wilcox, who said that "quantitative restrictions are among the most effective methods that have been devised for the purpose of restricting trade."¹⁰ Professor Jackson notes that the longest and most difficult preparatory negotiations concerned the efforts to dismantle quotas,¹¹ which the United States condemned as rigid political devices that ignore consumer demand and are thus more harmful than the restrictionism of the 1930's.¹² Both authors emphasize that quotas have a much more stifling effect on trade than do tariffs.¹³

It is true that the GATT prohibition of quotas is subject to certain exceptions;¹⁴ the most important of these are "Restrictions to Safeguard the Balance of Payments,"¹⁵ which both authors discuss in some detail.¹⁶ Briefly, quotas may be used when necessary "to forestall the imminent threat of, or to stop, a serious decline in . . . monetary reserves" of the importing country, or "in the case of a contracting party with very low monetary reserves, to achieve a reasonable rate of increase in its reserves."¹⁷ Obviously, the quota provisions of the proposed trade bill could not have been justified under these clauses of GATT; indeed, the report of the House Committee on Ways and Means refers to the unfavorable United States balance of payments and to the declining balance of trade without even raising the question whether the proposed quotas could be reconciled with

7. H.R. 18970, 91st Cong., 2d Sess. § 111(a) [proposed § 301(b)(5)(C)] (1970).

8. H.R. 18970, 91st Cong., 2d Sess. § 111(a) [proposed § 301(b)(5)(A)] (1970).

9. GATT art. XI, para. 1.

10. K. DAM, *THE GATT, LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 148 (1970) [hereinafter DAM].

11. J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 307 (1969) [hereinafter JACKSON].

12. JACKSON at 310.

13. DAM at 148-49; JACKSON at 306.

14. GATT art. XI, para. 2, allows member states to enact import restrictions on agricultural or fisheries products when such restrictions are necessary to enforce domestic legislation limiting production; the U.S. has such legislation. For details, see JACKSON at 316-21.

15. GATT art. XII.

16. DAM at 151-57; JACKSON at 681-87.

17. GATT art. XII, para. 2(a).

GATT.¹⁸ Consequently, our principal trading partners in GATT could have claimed "nullification or impairment" of their rights pursuant to article XXIII of the treaty.¹⁹ Thus, the threats of widespread retaliation against American exports in the event that the trade bill should become law²⁰ may have a sound legal foundation. This threat of a trade war, widely echoed in the press,²¹ was probably the most powerful reason for the Senate's inaction. Such a war would have had serious adverse effects on our balance of trade and thereby would have damaged our balance-of-payments position; these results would be directly opposite to those expected by the bill's proponents. In short, passage of the Trade Act of 1970 would have compelled this reviewer to compose an obituary of the institution so brilliantly explored by our two authors.

Although at this writing—January 1971—new trade bills with the same quota provisions have been introduced,²² there are indications that the assault on GATT may not be resumed. Indeed, Congressman Mills, Chairman of the House Committee on Ways and Means and author of the trade bill, stated in the closing days of the 91st Congress that quotas would not be needed if the United States and Japan could come to an agreement on textiles.²³ Perhaps we can expect international arrangements comparable either to the informal understandings with Germany and Japan concerning voluntary cut-backs in imports of steel²⁴ or to the existing Long Term Arrangement on Cotton Textiles, which was negotiated within the framework of GATT and which permits, under specified conditions, import restrictions to avert market disruption.²⁵ In any event, Mr. Mills seems now to recognize that even so powerful a country as ours should try to avoid unilateral tampering with international trade, and that acceptable solutions of the problems in this field must be found by international negotiations. Hence, the abortive Trade Bill of 1970 has enormously increased the timeliness and usefulness of the study of GATT by our authors.

18. H.R. REP. NO. 1435, 91st Cong., 2d Sess. 12-15 (1970).

19. JACKSON at 182.

20. See Keefe, "Made in Japan" Fuels the Antitrust Furnace, 56 A.B.A.J. 1214, 1215-16 (1971):

The real loser by this bill is the American farmer who uses one of every five of his acres to produce for overseas consumption, because Japan . . . can shift its purchases to Australia and Canada. The European Economic Community would like nothing better than to shut off the \$500 million annual trade in American soybeans used for margarine. . . . Ralf Dohrendorf, the Common Market's Commissioner for Foreign Commerce, . . . stated that if the United States imposes quotas . . . , the EEC would . . . take steps for equivalent retaliation.

21. *E.g.*, Wall St. J., Oct. 14, 1970, at 1, col. 1.

22. S. 4 & H.R. 20, 92d Cong., 1st Sess. (1971).

23. Wall St. J., Dec. 30, 1970, at 3, col. 2.

24. C. FULDA & W. SCHWARTZ, REGULATION OF INTERNATIONAL TRADE AND INVESTMENT 256 (1970).

25. For a detailed account, see DAM at 300-09.

The difference in length of the two books—Jackson's is twice as long as Dam's—does not reflect a difference in quality, which is extraordinarily high in both cases. Professor Jackson's treatise is a detailed and exhaustive analysis of every provision of GATT. The text is interspersed with valuable ancillary information—including a list of all waivers granted by the contracting parties,²⁶ a catalogue of all practices that have been considered subsidies,²⁷ and a compilation of all regional arrangements notified to GATT;²⁸ the book also supplies detailed data on all relevant tariff schedules, protocols, and agreements, as well as bibliographical references.²⁹ In short, those who wish to penetrate deeply into every corner of the complicated GATT language must have the Jackson book. Professor Dam's work, on the other hand, is a succinct survey of the same field; it is indispensable for those who need a concise, illuminating treatment of all of the important problems but who do not wish to work through a more detailed elaboration.

The central feature of GATT is the commitment of the parties to limit tariffs on imports of specific goods. Concessions, which are called "bindings," are negotiated through tariff bargaining, and these concessions are generalized among member states through the treaty's most-favored-nation clause and through its prohibition of discriminatory treatment.³⁰ The enforcement of this system is described by Professor Dam in a particularly felicitous passage³¹ in which he notes that ". . . domestic contract law and public international law are more concerned with assuring that commitments made are carried out than with promoting the making of agreements in the first place," while GATT ". . . has a special interest in seeing that as many agreements for the reduction of tariffs as possible are made."³² If withdrawal of a "binding" were forbidden, the making of such concessions would be discouraged. Therefore, the principal treaty sanction for an increase of a tariff in violation of a previous concession is the right of retaliation; injured and interested parties may respond to a violation by suspending concessions they have previously granted to the offending party.³³ This scheme is preferable to less flexible enforcement mechanisms because, as Professor Dam convincingly explains, "[i]t is better, for example, that 100 commitments should be made and that 10 should be withdrawn than that only 50 commitments should be made and that all of them should

26. JACKSON at 549-52.

27. JACKSON at 385.

28. JACKSON at 592-98.

29. JACKSON at 883-916.

30. JACKSON at 29, 763-64.

31. DAM at 79-81.

32. DAM at 80.

33. GATT arts. XXIII, XXVIII.

be kept."³⁴ Thus, "retaliation," a self-help type of device generally frowned upon in domestic law, is, "[subject] to established procedures and kept within prescribed bounds, . . . made the heart of the GATT system."³⁵ Retaliation works and will continue to work so long as the parties find that continued adherence to the GATT tariff system furthers their mutual interests.³⁶

Insofar as quotas are concerned, we see a different picture. Quotas, as noted above, are more pernicious than tariffs, but the GATT's balance-of-payments exception³⁷ encourages inflation-ridden countries to adopt quotas rather than tariffs. Professor Dam notes that many countries have kept quotas even after their balance-of-payments position has vastly improved, and that a list of such presently illegal quotas, primarily involving agricultural products, fills over 100 pages.³⁸ It follows, then—as both authors note³⁹—that the GATT's regulation of quotas and other nontariff barriers has proved less satisfactory than that of tariffs.

Emergency withdrawal of tariff bindings is explicitly permitted under article XIX of GATT, the so-called escape clause.⁴⁰ This adjustment mechanism is designed to afford temporary relief—usually in the form of a tariff increase—to a country whose producers are threatened with serious injury from increased imports resulting from tariff concessions. Both authors discuss article XIX,⁴¹ but Professor Dam does not mention the United States domestic law on the subject, and Professor Jackson devotes only one page to it.⁴² Jackson does note that the 1962 Trade Expansion Act⁴³ added, for the first time, the remedy of adjustment assistance—by way of direct payments, technical and tax assistance, retraining programs, and the like—for firms injured and workers made jobless by imports. He also observes that the requirements for escape-clause relief were "tightened" by the 1962 Act and that "few if any applications" for relief under that Act have been granted.⁴⁴ In fact, no application for escape-clause relief or adjustment assistance under the Trade Expansion Act has been successful because the Tariff Commission has con-

34. DAM at 80.

35. DAM at 81.

36. Professor Jackson's proposals for a new International Trade Institution, which may consist of a "mandatory code" and an "optional code," do not seem to contain anything that would be preferable to the GATT retaliation system. See JACKSON at 780-85.

37. See notes 15-17 *supra* and accompanying text.

38. DAM at 165-66.

39. DAM at 166; JACKSON at 519. Conceivably, Congress might have attempted to justify the trade bill quotas as retaliation for the illegal quotas of other contracting parties, but this approach was not taken.

40. Emergency Action on Imports of Particular Products, GATT art. XIX.

41. DAM at 99-107; JACKSON at 553-73.

42. JACKSON at 566-67.

43. 19 U.S.C. §§ 1801-1991 (1964), *as amended*, (Supp. V, 1965-1969).

44. JACKSON at 567.

strued the language of that Act⁴⁵ in such a way as to preclude the possibility of affirmative recommendations for relief.⁴⁶ Beginning in November 1969, too late for inclusion in either book, a new majority of the Commission, reversing previous interpretations of the 1962 Act, granted petitions for adjustment assistance to firms and workers in several cases,⁴⁷ and for industry-wide escape-clause relief in two cases.⁴⁸ This development is of crucial importance; the practical impossibility of obtaining relief in the United States was inconsistent with the philosophy of article XIX of GATT, which recognizes the necessity of an internal-adjustment mechanism in cases in which real hardship can be traced to the liberalization of import policies. The situation in the United States prior to November 1969 was all the more regrettable because individual-adjustment assistance for firms and workers is more consistent with the policies underlying GATT than is industry-wide tariff relief under the escape clause. The latter withdraws previous concessions and thus interferes with international reciprocity, possibly setting in motion retaliating increases; the former compensates individual victims of the national policy of free trade. The new interpretation of the Trade Expansion Act by the reconstituted membership of the United States Tariff Commission thus makes available a safety valve against pressures for protectionist legislation, thereby strengthening the GATT system.

A close interrelationship between GATT and domestic law exists, of course, in other areas as well. Perhaps most noteworthy is the antidumping law enacted in the United States in 1921,⁴⁹ a quarter of a century before the enactment of GATT, which deals briefly with

45. The Tariff Commission must find that ". . . as a result in *major part* of concessions granted under trade agreements, an article is being imported . . . in such increased quantities as to cause, or threaten to cause, serious injury to [a] . . . domestic industry . . ." (19 U.S.C. § 1901(b)(1) (1964) (emphasis added)). ". . . [I]ncreased imports shall be considered to cause . . . serious injury . . . when the Tariff Commission finds that such increased imports have been the *major factor* in causing . . . such injury . . ." (19 U.S.C. § 1901(b)(3) (1964) (emphasis added)).

46. For details, see C. FULDA & W. SCHWARTZ, *supra* note 24, at 399-415, and the sources cited therein.

47. Hoy, *Adjustment Assistance Under the Trade Expansion Act: A Critique of Recent Tariff Commission Decisions*, 6 TEXAS INTL. L.F. 67 (1970). In addition to the cases cited by Hoy, the Commission recommended relief in at least three cases brought by firms—Barbers Chairs and Parts Thereof, T.C. Pub. No. 320, April 1970; Women's and Misses' Dress Shoes, T.C. Pub. No. 323, June 1970; Certain Woven Fabrics, T.C. Pub. No. 342, November 1970—and five cases brought by individual workers—Plastic- or Rubber-Soled Footwear, T.C. Pub. No. 321, April 1970; Piano Actions, T.C. Pub. No. 331, July 1970; Protective Footwear of Rubber or Plastics, T.C. Pub. No. 330, July 1970; Stainless Steel Table Flatware, T.C. Pub. No. 347; Silver-Plated and Stainless-Steel Table Holloware, T.C. Pub. No. 348, December 1970.

48. Pianos and Parts Thereof, T.C. Pub. No. 309, December 1969; Proclamation 3964, Modification of Trade Agreement Concession and Adjustment of Duty on Certain Pianos, 35 Fed. Reg. 3645 (1970). In Nonrubber Footwear, T.C. Pub. No. 359, at 24a, January 1971, the Commission recommended by an equally divided vote an increase of duties "by a modest amount on a few key categories of imported footwear." Note the contrast with mandatory quotas!

49. Antidumping Act, 1921, 19 U.S.C. §§ 160-73 (1964).

this same subject in article VI. In 1967, as a part of the Kennedy Round, the GATT members agreed on an elaborate antidumping code,⁵⁰ which elaborates in considerable detail substantive and procedural rules with regard to the imposition of antidumping duties. This code was ratified by the legislatures of numerous signatories, but was not even submitted to the United States Congress. Both authors, in discussing the code,⁵¹ fail to give sufficient attention to the controversy within the Tariff Commission concerning the code's consistency with American law,⁵² nor do they adequately deal with the United States statute that directs the Tariff Commission to "resolve any conflict between the International Antidumping Code and the Antidumping Act, 1921, in favor of the Act as applied by the agency administering the Act"⁵³ Indeed, the Tariff Commission has not mentioned the code in the increasing number of antidumping cases that have recently been brought to it for decision. The relevant domestic law that impinges on particular provisions of GATT should not be so neglected.

Perhaps it should be added that the authors might have improved their treatments of the GATT dispute settlement procedure⁵⁴ by including more detailed discussions of case studies of particular disputes.⁵⁵

We may conclude that the two books under review are impressive and most useful achievements. They enrich and deepen our understanding of the complicated problems of world trade at a time when the strongest protectionist movement in decades, one which may have suffered only a temporary setback by the defeat of the 1970 trade bill, makes such enlightenment more necessary than ever before. A healthy economic world order cannot be achieved by torpedoing the GATT machinery. Instead, GATT—along with other international organizations, imperfect and incomplete as they are—should be strengthened and expanded. In short, "[t]he primary goal of policy should be expansion, not contraction, of trade."⁵⁶ Professors Dam and Jackson have shown the way.

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50. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, GATT Doc. L/2812 app. C (1967), set out in full in JACKSON at 426-38.

51. DAM at 167-77; JACKSON at 401-38.

52. See C. FULDA & W. SCHWARTZ, *supra* note 24, at 449-50, 454-60.

53. Renegotiation Amendments Act of 1968, P.L. No. 90-634, § 201(a)(1), 82 Stat. 1345.

54. See, particularly, DAM at 351-73.

55. See Hudec, *The GATT Legal System: A Diplomat's Jurisprudence*, 4 J. WORLD TRADE L. 615, 636-65 (1970).

56. First National City Bank of New York, *Monthly Letter*, Oct. 1970, at 119.