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Jeffrey E. Garten

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American Trade Law in a Changing World Economy**

As America becomes more intertwined with the world economy, our trade laws have expanded dramatically, becoming more comprehensive and more complex. At the same time, there are an increasing number of major areas of trade policy that the law does not effectively reach, and that will require not more law but more far-reaching economic diplomacy. This speech reviews where we have been, and where we may be headed with regard to our country's legal framework for trade.

I begin with several trends in American trade law: the extension of law from tariffs and quotas to a wide range of other issues such as services, investment, and regulatory issues; the growing congressional involvement in the making and administering of trade law; the increasing importance and complexity of our antidumping and countervailing duty statutes; the evolution of section 301; the growth of free trade areas; the expansion of mechanisms to resolve international disputes; the increasing importance of laws regarding intellectual property rights; and the changing framework for export controls.

Next, I discuss several issues for the future, issues for which U.S. laws are not completely effective, or are still evolving. These include dealing with the new multilateralism embodied in the NAFTA and the new World Trade Organization; addressing fundamental barriers to market opening in Japan, such as Japan's

*M.A. and Ph.D., School of Advanced International Studies, Johns Hopkins University. The author is Under Secretary for International Trade, U.S. Department of Commerce. He gratefully acknowledges the assistance of Eleanor Roberts Lewis, Chief Counsel for International Commerce, and Arthur R. Watson, Senior Counsel for International Business and Investment (both in the Office of the General Counsel, U.S. Department of Commerce) in the preparation of this paper.

**This paper was presented at the Spring Meeting of the American Bar Association's Section of International Law and Practice on April 29, 1994. It is one in a series called "America in a Changing World Economy." Other speeches in the series have dealt with Asia, Latin America, Europe, the Big Emerging Markets, Japan, China, Brazil, India, the National Export Strategy, Trade and Technology, the Antidumping Law, Trade and National Security, and the Changing Face of the North American Economy. Copies are available from the Office of Public Affairs, International Trade Administration, Department of Commerce [telephone: (202) 482-3808; fax: (202) 482-5819].

corporate industrial structure (*Keiretsu*); working with former communist countries attempting to enter the global trading system as full members; and dealing with the links between trade and such issues as environmental protection, workers' rights, and human rights.

I suggest that the heyday for the extension of American or Anglo-Saxon legal principles and practices abroad is over, and that we will be dealing increasingly with other systems, particularly in Asia, that will put pressure on us to find new ways to bridge different systems. Many of these bridges will require a degree of diplomacy that goes beyond the usual preoccupation with immediate negotiating strategy, embodies ever-increasing political sophistication in our foreign economic policy, and is designed to head off crises long before they reach the boiling point.

I am not referring to some fuzzy internationalism. I am talking about hard-headed international politics in the post-Cold War era where trade has become a centerpiece of foreign and domestic policy. It is not a call to retreat from our historical leadership role in developing the global framework for trade, but to think hard about what really constitutes the best way to be effective in pursuing our interests.

I. Evolution of Trade Law in the Post-War Era

From the end of World War II through 1992 trade grew well over sixfold in constant dollars, while global GDP more than tripled. The nature of trade became ever more complex, with more multinationalization of production, more trade in intermediate products as opposed to finished goods, more trade in services as opposed to merchandise, more countries participating in the trading system, and more variations of government involvement in promoting trade or blocking it.

At the same time, an increasing number of transborder commercial transactions have become subject to legal regimes. For example, in the past five years the United States has negotiated the establishment of two free trade areas—first with Canada and then with Canada and Mexico—that now cover 30 percent of our exports and 26 percent of our imports. We have also negotiated a free trade area with Israel. Since 1989 we have concluded nine bilateral intellectual property rights agreements and thirteen bilateral trade agreements that contain intellectual property rights provisions. We have concluded thirty bilateral investment treaties (sixteen now in force). We have just concluded a major GATT negotiation that covers virtually all of our merchandise trade and much of our services sector—such as banking and construction—as well.

To get a better idea of the current setting for trade law, let us look at the evolution of the GATT, in particular, to see how it has evolved from a tariff-reduction mechanism to what it is today: an organization on the threshold of

becoming a true mechanism for establishing the disciplines of world trade and overseeing the resolution of trade disputes.

A. DEVELOPMENTS IN THE GATT

The history of the GATT is, in part, the story of how the focus of trade negotiations has changed from an emphasis on tariffs to an effort to reduce and harmonize a much broader set of nontariff barriers to trade. With this shift in focus has come a variety of new legal codes and, among other things, a new and more comprehensive means of settling disputes. With the Uruguay Round, we have entered new terrain: services, investment, and more emphasis on intellectual property rights. With the post-Round work statements, the GATT now promises to look even further, toward environmental and other concerns.

1. *Post-1948 Era*

In 1947 tariffs were applied to virtually all of world trade. The initial rounds of multilateral negotiations—through the Kennedy Round—were limited primarily to reducing, if not eliminating, tariffs. The Tokyo Round and the Uruguay Round continued this process toward the inevitable diminishing point, so successfully that tariffs now account for only a small percentage of the total value of global trade in goods.

2. *Expanded Focus; Nontariff Barriers*

Of course, tariffs are only one way of limiting and distorting trade flows. And, as tariff barriers have receded in terms of their economic significance, the GATT, with the support and encouragement of the United States, has expanded its horizons and has sought to address a variety of nontariff barriers that either distort market-driven trade flows or block them entirely.

During the Tokyo Round, for example, we started to look more carefully at other, nontariff, impediments to trade flows. We addressed such issues as the need for improvement and harmonization of technical standards, customs valuation, and dumping and subsidies.

3. *Developing Country Issues*

GATT members also began to pay much more attention to “north-south” issues: the important relationships—and the important differences—between developed and developing nations.

Dissatisfaction among developing countries with the results of the Kennedy Round had already led to pressure in the GATT for improved access to markets of developed countries. In response, in 1971, GATT members had approved a ten-year waiver from the provisions of article I (MFN treatment) to permit preferential tariff treatment to products of developing countries; in 1979, such preferences were extended for an indefinite period.

The United States responded to these developments by establishing, in Title V of the Trade Act of 1974, the General System of Preferences (GSP). The Generalized System of Preferences Renewal Act of 1984 reauthorized and amended the GSP. Under the program, the United States provides duty-free treatment to eligible products imported from any country that has been designated as a beneficiary developing country. Currently, the program provides duty-free treatment to imports of over 4000 products from approximately 140 developing countries.

4. Uruguay Round Goes Further

In the Uruguay Round further efforts were made to reduce nontariff barriers, and new areas previously considered off limits were addressed, including services, agriculture, investment issues, protection of intellectual property rights, and textiles. For example, we now have new disciplines on the provision of international financial services. The so-called GATS Agreement (General Agreement on Trade in Services) contains legally enforceable provisions dealing with both cross-border trade and investment in services, and sectoral annexes on financial services, labor movements, telecommunications, and aviation services.

The entrenched global system of agricultural subsidies and quotas, while not eliminated, has been trimmed back, and further advances are now possible.

The Multifiber Arrangement will be phased out over a ten-year period, bringing textiles and apparel under the general rules of the new World Trade Organization. In addition, the GATT Agreement significantly improves market access for U.S. textiles and clothing by eliminating many tariff and nontariff barriers and requiring countries to take further market opening measures.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) establishes improved standards for protecting the full range of intellectual property rights in many important areas. For example, the agreement provides for protection of computer programs as literary works under copyright laws, product and process patents for virtually all inventions (including pharmaceuticals), and enhanced protection for internationally well-known trademarks. The TRIPS Agreement also includes strong enforcement provisions that are critical to obtaining effective enforcement of the agreed standards and is subject to the improved dispute-settlement procedures of the World Trade Organization.

The Agreement Establishing the World Trade Organization will facilitate the implementation of trade agreements in the diverse areas of trade in goods, services, and the protection of intellectual property rights by putting all the disciplines on government practices affecting trade under one institutional umbrella. In the past, many arrangements did not include the entire GATT membership. The implication is that there will be more coherence to the global framework for trade, more discipline, and more systematic evolution of the law.

If you doubt that the new GATT is comprehensive, or that it will provide work for an increasing number of trade lawyers, consider the fact that the Uruguay

Round legal texts, together with the revised tariff schedules that result, will run over 20,000 pages and weigh over 350 pounds. If you add to this the new volumes relating to NAFTA, it is clear that it will take years to digest the statutes that have evolved in 1993 alone.

II. Increasing Scope and Complexity of U.S. Trade Law

America's is a highly legalistic society, and becoming more so. While it may be true that the entire corpus of federal statutory law, as contained in the United States Code, may still fit onto one large bookshelf, these volumes—as you are all too aware—represent only the smallest fraction of U.S. law embodied in millions of pages of federal and state regulations and rulings and in federal and state court precedents and interpretations.

So it should not be surprising that U.S. trade law has followed the larger model. We have increasing numbers of statutes that are, as the following discussion will suggest, increasingly complex, not only in their wording but in their administration. Following are six more precise examples of these trends.

A. TREND NO. 1: INCREASING CONGRESSIONAL ROLE IN TRADE POLICY

Foremost among these domestic trends is the increasing role in the formulation of U.S. trade law and policy. Among the developed nations the United States is unique in the fact that the legislature plays a major role in the development and enunciation of international trade policy. Congress's increased involvement is, at least in part, a function of increasingly energetic private-sector participation in the trade legislative process, both within and outside the Advisory Committee program.

Fundamentally, the congressional role is provided for in article I of the Constitution, which provides, in section 8, that the Congress shall: "lay and collect Taxes, Duties, Imposts, and Excises" (clause 1), and "regulate commerce with foreign nations" (clause 3).

Within this constitutional framework, the congressional role has expanded significantly in the post-War era. This development looms large on today's landscape as the Administration prepares to submit the GATT Round implementing legislation to Congress.

1. *History of Congressional Involvement*

Beginning with the Reciprocal Trade Agreements Act of 1934, Congress has provided the President with authority to negotiate trade agreements on an ever-larger universe of subjects. However, since the 1960s Congress has also provided increasingly specific direction with respect to both the negotiating process and the results expected. Successive delegations of negotiating authority have included more and more detailed negotiating objectives, while asserting more and more

forcefully Congress's right to be consulted before, during, and after the negotiations.

2. *Framework for Negotiations*

Congressional guidance on the negotiating process began in earnest with a limited delegation of tariff-negotiating authority for the Kennedy Round. It grew into the development of significantly more detailed procedural and substantive standards and negotiating objectives. Today it involves the determination of many of our national policies relating to trade with foreign nations, as embodied in section 301 of the 1974 Trade Act and a variety of other trade or trade-related statutes.

As an example of increased congressional participation in the trade policy process, it is instructive to examine the negotiating objectives offered by Congress, in anticipation of the Tokyo Round, in sections 103 and 104 of the 1974 Trade Act. The overall and sector-specific objectives consume just over one page of the United States Code.

Compare these objectives with those Congress developed in connection with the Uruguay Round. In 1988, only fourteen years after the beginning of the Tokyo Round, the objectives consume almost five full pages of fine print.

3. *Conduct of Negotiations*

The enunciation of specific, detailed negotiating objectives in connection with a multiyear, multilateral negotiation is only the beginning of Congress's involvement in the process. Congress has also participated in the negotiations process, through close consultations with the executive branch—before and during the negotiations, and even after their conclusion.

For example, the President must provide ninety days' notice to the Congress of his intention to enter into an agreement. The notice requirement serves Congress's interests because it affords a substantial opportunity to study the terms of the agreement and, where necessary, identify and consult on concerns that need to be addressed.

4. *Importance of "Fast Track"*

These notice and consultation requirements are part of the larger fabric of the fast-track process that Congress devised for the legislative approval of major trade agreements. Developed for the Tokyo Round in 1974, fast track offers the President the opportunity of an expedited "up-or-down" vote on the legislation that would give effect to the deal he has struck, while preserving to the Congress its article I prerogative to "regulate commerce with foreign nations" and to "lay and collect . . . duties."

However, while Congress has in essence delegated these authorities to the President, it tied a number of strings to the delegation. It made prior notice and consultations a prerequisite for the granting of fast-track consideration of the

implementing legislation. In addition, Congress indicated its desire to have an affirmative role in the development of the legislation. This has resulted in the development of a legislative process unique to the United States, through which congressional committees participate in the drafting of the implementing legislation that the President will submit and that will be referred to them. These mock "mark-ups" assure that the bill actually presented (which, under fast-track procedures, is not subject to amendment) is one that the Congress is likely to pass.

Finally, Congress built in a sunset provision to the entire fast-track process. After a short extension for the Uruguay Round, the sun finally set on fast-track negotiating authority on April 15, 1994, when Ambassador Kantor signed the Uruguay Round Agreements on behalf of the President. Renewal of fast-track authority will thus be necessary before the President can enter into any new negotiations.

B. TREND NO. 2: INCREASING COMPLEXITY OF U.S. ANTIDUMPING AND COUNTERVAILING DUTY LAWS

Two decades ago, practitioners had available to them a wide array of trade law remedies. For example, section 201 of the 1974 Trade Act (the "escape clause") was originally expected to be a widely used remedy for injuries resulting from increased imports of fairly traded goods. However, because of various legal requirements and interpretations, as well as economic developments, the trend in recent years has been to bring almost all trade remedy cases under the countervailing duty or antidumping laws, and section 301.

Let us look at the countervailing duty and antidumping statutes. Originally, countervailing duty cases focused primarily on government practices that could be easily identified as subsidies (for example, export bounties), and an antidumping investigation was intended to take place on the docks with the customs officer making the determination and assessing the duty on the spot. Today, countervailing or antidumping duty investigations can take up to a year to complete and can be subject to appeals in the courts for a number of years. They require enormous legal resources, as well as specialized knowledge of accounting, economics, and the industry under review. This increased complexity is due to two main factors: first, the procedural safeguards that have been added to enhance the openness and transparency of the system and, second, substantive developments in the laws.

Since the Trade Act of 1974, Congress has amended U.S. law several times to provide a wide variety of procedural safeguards. These procedural safeguards include, among many others, expanded judicial review, access to business proprietary data through administrative protective orders, and a sophisticated verification process. While these procedural safeguards have increased the transparency and discipline of the system, they have also increased the complexity of the cases.

In terms of substantive development, the antidumping law has become more

complex as it has been expanded to address a greater variety of unfair practices. One example is the anticircumvention provision. During the 1980s, industries began to shift production and alter products in order to circumvent an antidumping order. The anticircumvention provision was added to the statute to provide a remedy to stop this evasion. This provision and other changes to the law were made to ensure that the law continues to provide an effective remedy against unfairly traded imports.

Finally, antidumping cases themselves are becoming more complex. As business practices change, the Department of Commerce is called upon to make complex decisions in order to make certain that the law is fairly administered. For example, the foreign exporter may not produce the merchandise under investigation, but instead may control production through a group of interrelated subcontractors. In these circumstances, the issue of who is actually the producer of the merchandise is often in question and can lead to difficult factual determinations.

Countervailing duty law has also become increasingly complicated. This complexity reflects, in part, the changing nature of government involvement in the marketplace, as well as a growing sophistication in the kind of analyses we employ to identify and measure subsidies.

As tariffs have declined over the decades since World War II, subsidies have necessarily assumed greater importance and attention—in terms of how governments may influence economic and commercial events in their own jurisdictions, and how they can distort trade flows internationally. However, in the absence of clear and enforceable international rules either to regulate the use of subsidies or to address their distortive effects, the United States has had to forge its own rationales and approaches to deal with this problem. Moreover, many of the concepts and methodologies we have developed have been incorporated into the Uruguay Round subsidies agreement.

At the same time, we are also witnessing an evolution of our own law and practice to grapple with the changing landscape of government support and intervention. The days of straightforward government grants and bounties are nearly a relic of the past. Today, governments must take account of the prevalence of various trade remedies, stricter subsidy disciplines, and broader fiscal and political constraints in considering whether and how they may choose to take certain measures to assist industries. These developments have led to more intricate and less direct methods of intervention. We have, in turn, had to adopt more involved analyses and tests to determine whether in fact these practices provide countervailable subsidies and, if so, the nature and amount of benefit provided.

The so-called upstream subsidy phenomenon is a good example, because it illustrates how a producer of merchandise situated “downstream” in the manufacturing chain may benefit from the provision of government aid, even if such aid has not been directly provided to the producer in question. The benefit can be clear in the “real world,” but it can be legally established only through a complicated inquiry involving the “upstream” input supplier and an analysis of the

transaction between those two parties and a comparable arm's-length transaction. Such complex analyses are necessary if we are to deal with the practices and activities that matter most in today's competitive markets.

For example, suppose that a producer of steel sheet in Country *A* receives subsidies from that country's government. A pipe and tube producer in Country *A* purchases steel sheet from that producer and exports it to the United States, where it is covered by a countervailing duty order. The question arises whether the subsidies which the steel sheet producer received should be included in the U.S. government's calculation of subsidies benefiting the pipe and tube producer. The Department of Commerce will say "yes" and include such "upstream" subsidies, if the agency determines that a competitive benefit has passed to the pipe and tube producer based on an examination of a comparable benchmark transaction at arm's length, and that the subsidy has a significant effect on the cost of manufacturing the pipe and tube.

The increased complexities in both the antidumping and the countervailing duty laws have required the Department of Commerce's Import Administration Bureau to assemble a group of professionals not only thoroughly knowledgeable in antidumping law but also with expertise in areas of international trade, accounting, economic and financial analysis, and computer programming.

C. TREND NO. 3: INCREASING SCOPE AND COMPLEXITY OF SECTION 301

Section 301 of the 1974 Trade Act is a paradigm for both the substantial increase in congressional activity in the trade field and the evolution of U.S. trade law toward forms that are both more specific and more complex.

Section 301 is the principal statutory authority under which the President, through the United States Trade Representative (USTR), may impose retaliatory trade sanctions against countries that either fail to honor their international trade commitments or maintain unfair policies and practices that adversely affect U.S. trade interests. Over the years, Congress has consistently attempted to make section 301 a more effective tool to open foreign markets to U.S. goods, services, and technology.

1. *Early History*

Congress included section 301 in the 1974 Trade Act. (A predecessor provision, section 252 of the 1962 Trade Expansion Act, provided roughly comparable authority.) Section 301 authorized the President to take action against, among other things, "unjustifiable" or "discriminatory" foreign trade practices, or "unreasonable" foreign trade practices that burdened, restricted, or discriminated against U.S. foreign commerce. Section 301 identified the Office of the Special Representative for Trade Negotiations—now USTR—as the forum for receiving and reviewing petitions complaining about unfair trade practices; for investigating the allegations; and for making recommendations to the President.

A great deal of discretion was given to the President to define unfair trade practices and to determine what type of remedy (if any) was appropriate.

In 1979, as part of the implementing legislation for the GATT Tokyo Round Agreements, Congress amended section 301 to provide the President with additional specific authority to take action to enforce U.S. rights under trade agreements and clarified that the executive branch could self-initiate section 301 cases.

In 1984, concerned by the mounting U.S. merchandise trade deficit (and particularly by the growing U.S.-Japan trade deficit), Congress revisited section 301. In the Trade and Tariff Act of that year, Congress expanded section 301 to permit action against any goods and services of the offending country (not merely those goods associated with the allegedly unfair trade practice) and specifically provided that section 301 could be used to address barriers to foreign direct investment and inadequate protection of intellectual property rights.

2. *The 1988 Amendments to Section 301*

Notwithstanding more aggressive use of section 301 after the 1984 Amendments (including several cases that were self-initiated by the executive branch), by 1987 the global merchandise trade deficit was headed toward \$160 billion, and the bilateral trade deficit with Japan was approaching \$56 billion. Delays in obtaining market access persuaded Congress that section 301 as then drafted was not providing an effective enough remedy for U.S. industry.

Therefore, Congress returned once again to section 301 in the Omnibus Trade and Competitiveness Act of 1988. This time Congress made major changes intended to increase the effective pressure on those foreign countries whose doors remained closed to American goods and services.

Congress removed the final decision on retaliatory action from the President's desk and placed it with the USTR. Congress attempted to minimize the USTR's discretion not to act by making retaliation mandatory in some cases. And it specified in new detail both the circumstances, policies, and practices that could trigger retaliation—including, for example, export targeting practices and failure to provide for adequate worker rights—and the actions that were available to the USTR under section 301 to address such practices. Congress also tightened up the deadlines for investigations and determinations under section 301.

3. *Special 301*

Congress also added a provision to section 301 targeted specifically at protection of U.S. intellectual property rights. So-called Special 301 requires the USTR, on an annual basis, to identify those foreign countries that do not provide adequate and effective protection to intellectual property rights, and to further identify as "priority countries" those countries whose practices and policies are particularly egregious and costly to U.S. exporters. The price of intransigence is automatic

investigation under section 301, with shorter time frames and deadlines for both the investigation and any subsequent determination to retaliate.

4. *Super 301*

In addition, Congress added a temporary provision, so-called Super 301. Super 301 required, for a two-year period (1989 and 1990), that USTR list "priority foreign countries" whose unfair trade policies and practices are particularly numerous, egregious, or costly to U.S. exporters, and begin a section 301 investigation of those practices. Although the statutory authority for Super 301 has now expired, the President effectively reinstated it by executive order in September 1994. Under the executive order, USTR must submit a report on priority foreign country practices no later than September 30 of 1994 and 1995. Within twenty-one days of submitting the reports USTR must initiate section 301 investigations with respect to all priority foreign country practices identified.

5. *Telecommunications 301*

Finally, Congress enacted a section 301-like provision targeted specifically at telecommunications trade. The deregulation of the U.S. telecommunications market had opened U.S. markets to foreign competition without any reciprocal moves by our trading partners. This unilateral U.S. move had created, virtually overnight, a windfall for foreign suppliers and a significant telecommunications trade deficit. Accordingly, "telecommunications 301," section 1377 of the 1988 Trade Act, requires the USTR to perform an annual review of all outstanding telecommunications trade agreements to determine the level of compliance. A USTR determination of noncompliance is treated as an affirmative "unfairness" determination under section 301, requiring the imposition of sanctions within thirty days. Congress specifically instructed that sanctions be first targeted at telecommunications products and services—a unique feature of this provision.

The effectiveness of section 301 as a "crowbar" to open foreign markets is difficult to assess precisely. However, there is a strong basis for the conclusion that section 301 has had a positive impact on the efforts of a series of Administrations to open foreign markets. Continued vocal pressure from the Congress, plus the statutory authority of the President and, now, the USTR to act, have clearly persuaded some countries—particularly Japan—to take reasonable steps to accommodate U.S. concerns rather than risk the consequence of denial of access to the U.S. market. Even without the necessity of formal retaliatory actions, section 301 cases have often resulted in agreements that were satisfactory to the U.S. Government as well as to domestic industry.

D. TREND NO. 4: INCREASING PREVALENCE OF FREE TRADE AREAS AND CUSTOMS UNIONS

Over the last twenty years the world trading system has increasingly moved toward regional trading blocs. This evolution is part of a recognizable trend: as

nations move toward market-oriented systems, volumes of trade increase. As volumes of trade increase, pressure to remove trade barriers increases.

Free trade areas and customs unions are permissible under the GATT. Although they were not a major factor in 1948, these regional arrangements are now playing a significant role both in the western hemisphere and elsewhere. The North American Free Trade Agreement, the U.S.-Israel Free Trade Agreement, the European Union, and the European Free Trade Area now account for a major portion of world trade—approaching 33 percent of global trade in 1992.

Other such arrangements are in the offing as regional interests seek to enhance—or in some cases secure—the advantages of geographic proximity and economic integration. For example, currently five major trade pacts are at various stages of development linking most of the nations of Latin America and the Caribbean.

Mercosur will unite Argentina, Brazil, Uruguay, and Paraguay in a free trade area by the end of this year. The so-called G-3 Agreement between Mexico, Colombia, and Venezuela is in the final stages of negotiations and will create the second largest free trade area in the region. Colombia and Venezuela have been a customs union since 1992, and along with Bolivia and Ecuador form the Andean Free Trade Zone, under the Andean Pact, which hopes to establish a common external tariff later on this year. The five Spanish-speaking countries of Central America (with the exception of Panama) have revitalized the Central American Common Market and are seeking, as a group and individually, bilateral free trade agreements with Mexico, Colombia, and Venezuela. The Caribbean Common Market (CARICOM), established in 1973 and comprising the English-speaking Caribbean countries, is taking further steps to lower its common external tariff and further liberalize intramarket trade. CARICOM is also seeking free trade agreements with Mexico, Colombia, and Venezuela.

In addition, in 1980 Mexico and most of the South American countries became members of the Latin American Integration Association, known by its Spanish acronym ALADI. ALADI has supplied the institutional and legal framework for many bilateral and multilateral intraregional agreements. Significant among these are the bilateral free trade agreements concluded by Chile, which does not belong to any of the area's trade pacts, with Mexico, Colombia, Venezuela, Argentina, and Bolivia within the last three years.

Europe has a longer history of free trade areas and customs unions. The customs union founded by Belgium, West Germany, France, Italy, Luxembourg, and the Netherlands in 1957—the European Economic Community (EEC)—grew to include an additional six Member States by 1986. In a parallel development, several non-EEC Member States established the European Free Trade Association (EFTA) in 1960, creating a customs union among Austria, Denmark, Norway, Portugal, Sweden, Switzerland, and the United Kingdom that was separate and independent from the EEC. In 1973 the EEC and EFTA Member States concluded a series of free trade agreements that led to the gradual establishment of a free trade area between the two customs unions for industrial and certain agricultural

processed products. The European Economic Area Agreement, which entered into effect on January 1, 1993, further strengthened the economic ties between the EEC and the EFTA by providing for the free movement of goods, persons, services, and capital among their respective Member States. During the course of this period, the EEC evolved into the European Community (EC) and then into the European Union (EU), with an ever-increasing number of members, including some countries that transferred from the EFTA.

While the concept of regional arrangements, such as customs unions and free trade areas, predates the GATT, the current legal framework is found principally in article XXIV of the GATT, which provides an exception for such arrangements provided that (1) "duties and other regulations of commerce" are eliminated on "substantially all" of their internal trade; and (2) in general, duties and other regulations of commerce on imports from nonparties are not higher or more restrictive than they were prior to the effective date of the arrangement.

There is a necessary tension between the objectives of a regional-preference system such as a free trade area and the fundamental concept of most-favored-nation treatment. By definition, a customs union or free trade area is a system based on preference for its parties over nonmember contracting parties. And it is perhaps too early to tell whether these regional arrangements are in the long-term best interests of the world trading community. While unquestionably they contain provisions and offer efficiencies not yet universally available, and thus afford immediate advantages to their parties, they may also prove to be a distraction from further multilateral progress toward the same ends.

On the other hand, regional arrangements may serve (and in some instances have already served) as models for various disciplines, liberalizations, and procedures whose adoption ultimately could improve the multilateral trading system. For example, certain features of the NAFTA, and its predecessor the U.S.-Canada Free Trade Agreement, were beneficial to the Uruguay Round process, and others will serve as a model for future GATT discussions.

E. TREND NO. 5: GROWTH IN THE ROLE OF DISPUTE SETTLEMENT MECHANISMS

A fifth important trend involves the settlement of disputes. Over the last twenty-odd years we have seen a substantial movement toward universal coverage of all transborder commercial activities through increasingly complex procedures and standards—particularly in the area of dispute resolution. Dispute resolution, once the subject only of obscure treatises and law review articles, has now come into its own. My sense has been that international dispute resolution was where you ended up when the system failed. Now, dispute resolution has become an effective way for the contracting parties to interpret and refine their rights and obligations. Rather than an example of the system's failure, it is becoming yet another example of how the system is supposed to work.

The use of dispute resolution mechanisms is a welcome development. Our international trade structure should not stop where agreement ends. It should anticipate that disputes are part of the process itself, and provide mechanisms that are responsive and workable.

1. U.S.-Canada Free Trade Agreement

For example, the U.S.-Canada Free Trade Agreement (CFTA) created a binational dispute-resolution process involving quasi-judicial panels, replete with rules of procedure, standing rosters of panelists, and a limited appellate process.

Chapter 19 of the CFTA created a unique system for binational review of final antidumping and countervailing duty determinations made by the U.S. and Canadian Governments. Article 1904 establishes a mechanism for replacing judicial review of final determinations with review by independent binational panels composed of five members selected from the affected countries. These panels expeditiously review final determinations to determine whether they are consistent with the antidumping or countervailing duty law of the importing country.

Chapter 19 of the CFTA also created a unique appellate process to safeguard against impropriety or gross panel error that could threaten the integrity of the binational panel review process. The United States or Canada may appeal a binational panel's decision to a three-member "extraordinary challenge committee" composed of U.S. and Canadian judges or former judges.

The CFTA's antidumping and countervailing duty dispute-resolution architecture has created a number of challenges for Canada and the United States. The mechanics of selecting panelists, the number of panelists, and the fact that all of them may not be lawyers, raise new issues for the practitioner and for the administering authorities. In addition, the mix of Canadian and U.S. panelists has meant, for example, that Canadian panelists serving on U.S. panels may be experiencing U.S. antidumping/countervailing duty law for the first time, and vice versa.

Reaction to panel determinations has been mixed. U.S. industry has, on occasion, been chagrined by CFTA panel determinations. On the other hand, U.S. industry has also been reasonably satisfied by many panel decisions. By and large, the U.S. experience with this dispute-settlement mechanism has been favorable.

2. North American Free Trade Agreement

As another example, the NAFTA provides for even more complex procedures outside the antidumping and countervailing area. Under chapter 20 of the NAFTA (the successor to chapter 18 of the CFTA), the NAFTA Trade Commission will attempt to resolve disputes among the parties. If the Commission is not successful, a panel may be formed under either the GATT or the NAFTA—the choice of which itself may require further consultations. A host of special rules applies to the decision of whether and when to proceed under either the GATT or the NAFTA.

Five-member panels are selected from rosters that themselves are subject to trilateral agreement through reverse selection. Special rosters may be made up

of financial experts. Elaborate rules of procedure provide for written submissions, rebuttals and at least one oral hearing. There are strict time limits to ensure prompt resolution. A special procedure permits the formation of scientific boards to provide expert advice to panels on factual questions related to the environment and other scientific matters.

Strict time limits apply and, if a panel determines that the responding country has acted in a manner inconsistent with its NAFTA obligations, and the disputing countries do not reach agreement within thirty days or other mutually agreed period after receipt of the report, the complaining country may suspend the application of equivalent benefits until the issue is resolved. Any country that considers the retaliation to be excessive may obtain a panel ruling on this question.

3. *GATT Dispute Settlement Understanding*

The Dispute-Settlement Understanding negotiated during the GATT Uruguay Round agreements is far more defined and comprehensive than was previously the case. When Congress identified the negotiating objectives for the Uruguay Round in the 1988 Trade Act, the very first principal objective listed was the establishment of a more effective process for the settlement of GATT disputes: "to provide for more effective and expeditious dispute mechanisms and procedures" and "to ensure that such mechanisms within the GATT and the GATT agreements provide for more effective and expeditious resolution of disputes and enable better enforcement of United States rights."

The reasons are clear. Not only was the previous system prone to frustration and delay, but too often the United States was forced to live with continuing violations by our trading partners because the GATT was unable or unwilling to give effect to its decisions.

Although the system has been working reasonably well in recent years, the Uruguay Round Dispute-Settlement Understanding goes further toward resolving these problems. It establishes a comprehensive, transparent dispute-settlement regime intended to cover disputes arising under any of the Uruguay Round Agreements. Among other things, the Understanding limits the time frames for resolution of GATT disputes. It provides a comprehensive mechanism for the resolution of GATT disputes and requires that GATT parties adhere to its rules. It prevents a party from frustrating the rulings of GATT dispute panels by refusing to recognize them: under current GATT rules, unanimous agreement is required to implement a panel decision; under the new rules, unanimous agreement will be required to reject a panel decision. Further, the new rules explicitly recognize the right of an aggrieved party to retaliate if an adequate and appropriate remedy is not secured.

F. TREND NO. 6: INCREASING FOCUS ON INTELLECTUAL PROPERTY RIGHTS PROTECTION

Intensive focus on intellectual property rights is trend number six. In the maturing U.S. economy, intellectual property and advanced technology are our cutting-

edge assets. The Clinton Administration is committed to maximizing the value of these assets by ensuring that international protection of intellectual property is strengthened, thereby encouraging increased exports by U.S. companies.

1. *Billions of Lost Revenues*

Intellectual property has clearly become an ever-increasing factor in U.S. exports in recent years. In August 1991 Ralph Oman, Register of Copyrights, estimated that intellectual property accounted for an estimated 25 percent of U.S. exports, up from 12 percent just eight years before. My guess is that even 25 percent would be much too low an estimate in 1994.

Equally apparent is that despite some progress in recent years, the United States is continuing to lose billions of dollars a year in exports because of inadequate intellectual property rights protection in foreign countries. For example, earlier this year the International Intellectual Property Alliance estimated that "copyright industries lose an estimated \$15-17 billion annually due to piracy outside the United States." Similarly, the Pharmaceutical Manufacturers Association has estimated that in 1993 its member companies lost more than \$500 million in Brazil and \$60 million in Turkey, and that pharmaceutical research companies in general lost \$150 million in India, among other examples.

2. *Commitment to Strengthen Intellectual Property Rights*

The Clinton Administration is firmly committed to strengthening the international protection of U.S. intellectual property rights. The NAFTA, and the recently concluded Uruguay Round Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (TRIPS Agreement) are two critically important elements of the Administration's strategy for better protecting U.S. intellectual property rights. The NAFTA and the TRIPS Agreement are, in turn, complemented by a variety of bilateral tools such as Special 301 consultations, bilateral intellectual property rights agreements, technical assistance to foreign intellectual property rights agencies, and bilateral investment treaties.

But the benefits of our policies are not limited to American inventors, workers, and companies. A higher level of intellectual property rights protection throughout the world benefits everyone—host countries seeking foreign investment, countries seeking to export high technology goods and services, consumers that benefit from improved goods and services, and workers that find higher paying jobs in new industries based upon intellectual property rights protected discoveries. Adequate and effective protection of intellectual property rights is not a zero-sum game, but rather the classic win-win situation for both industrialized and developing countries.

In recent years, many countries have improved their laws and regulations on intellectual property protection. We expect that the intellectual property laws on the books in most developing countries—including the "Big Emerging Mar-

kets''—will steadily improve as a result of our bilateral efforts and the implementation of the Uruguay Round TRIPS Agreement.

Much has been said in the United States about the perceived shortcomings of the TRIPS Agreement. We would have preferred a TRIPS Agreement without such features as a ten-year transition period for the adoption of pharmaceutical product patent protection by developing countries. However, even with its shortcomings, the TRIPS Agreement represents a very important milestone in the international protection of intellectual property rights. The TRIPS Agreement generally raises the baseline of intellectual property rights protection throughout the world and—equally importantly—permits the United States to use World Trade Organization dispute resolution procedures to enforce its provisions. Whereas in the past there was no international consensus on the use of trade sanctions against countries that failed to provide adequate protection for U.S. intellectual property rights, the new World Trade Organization dispute-resolution provisions will enable the United States to use trade sanctions against any member that fails to comply with the TRIPS Agreement.

3. *Need for Greater Enforcement*

The focus of our international intellectual property rights activities has begun to shift in the last couple of years from seeking the adoption of sound foreign intellectual property rights laws to ensuring the enforcement of such laws. This shift in focus is both a sign of progress and an important new challenge in the U.S. government's effort to secure adequate and effective intellectual property rights protection internationally.

Ensuring that laws are adequately enforced is an even more difficult task than drafting and enacting good intellectual property rights agreements and laws. Enforcement is a matter of workable procedures; willingness of courts and government agencies to apply improved laws; the technical expertise of courts, judges, police, and IPR agencies; public respect for intellectual property rights in a country.

4. *The Case of China*

The People's Republic of China is a classic case in point. The United States and other industrialized countries have, in recent years, encouraged China to adopt a relatively good set of laws and regulations on intellectual property rights protection. Indeed, China is to be commended for having, in a relatively short amount of time, adopted relatively modern intellectual property rights laws and joined such important international conventions as the Berne Convention for the Protection of Literary and Artistic Works and the Paris Convention for the Protection of Industrial Property.

Yet, in practice, China's level of intellectual property rights enforcement has ranged from poor to virtually nonexistent. The good intellectual property rights laws China has adopted have not yet resulted in truly adequate and effective

protection for intellectual property rights. In part, this ineffective protection is due to a lack of adequate criminal penalties and enforcement, especially in the copyright area. As a result, improvement of intellectual property rights enforcement in China has been, and continues to be, a very important priority for this Administration.

This Administration is not singling China out for special attention on the issue of intellectual property rights enforcement. Effective intellectual property rights enforcement also has been an issue the United States has raised in various industrialized (for example, Italy) and developing countries. It is a subject that will receive even greater attention in the years ahead as we increasingly shift our focus to evaluating the effectiveness of foreign intellectual property rights enforcement.

G. EXCEPTION TO THE TREND: CHANGES IN EXPORT CONTROLS

Export controls is one area—perhaps the only area—in which the forces of change in international trade law have results that may only be described as deregulatory.

Since 1949 a mainstay of U.S. national security policy has been the careful review of proposed exports of U.S. goods and technology to certain countries where their contribution to those countries' military potential could prove detrimental to the security of the United States and its allies. The Export Administration Act of 1969 and the Export Administration Act of 1979 (EAA) laid down fundamental precepts that remain valid to this day.

Continuous amendment, interpretation, and implementation of the EAA by successive congresses, administrations, and the international trade bar has become a fact of life so necessary and so obvious that it is difficult to imagine Washington without it.

1. *Wide Reach of Export Controls*

The EAA controls the export or reexport to various foreign countries of U.S.-origin goods and technology that are classified as "dual-use." Dual-use goods are those primarily commercial items that could have a military application. Licensing of certain exports of nuclear materials and technology is the responsibility of the Nuclear Regulatory Commission, while the Department of State is responsible for licensing exports of defense articles and services. Under current law, controls may be maintained for national security or foreign policy reasons, or in the event of limited domestic supply. The Department of Commerce's Bureau of Export Administration implements export control responsibilities under the authority of the EAA and through the Export Administration Regulations.

The EAA has seen many modifications and refinements since 1949 (most recently in 1988); however, the basic structure of the Act, as well as its fundamental premises, has remained relatively unchanged. The EAA authorizes controls on not only exports of U.S.-origin goods and technology, but

subsequent reexports. Similarly, the Export Administration Regulations apply to any person who exports such goods and technology from the United States. They also apply to a person who reexports these items from any foreign country, and also to certain products of U.S. goods and technology. The reach of the Act and its implementing regulations is therefore very broad, extending to persons—including foreign companies—that may have no other legal or corporate affiliation with the United States.

2. *Sea Change in Approach*

It is now apparent that we are on the edge of a sea change in our approach to export controls and their appropriate role. Once again, the EAA is about to expire. The Administration submitted to Congress in February a comprehensive revision of the EAA that reflects both changes in the post-Cold War world and the new focus on the growing threat of the proliferation of weapons of mass destruction. It also firmly commits the Administration to making the cumbersome export licensing process more efficient and effective. We are working closely with the Congress to ensure the passage of legislation that is both responsive to the needs of U.S. exporters and tough on proliferation.

Even as we speak, however, the export control regime that has existed since the end of World War II—the primary regime that most of us have known—is undergoing massive and wrenching changes. The Coordinating Committee on Multilateral Export Controls (COCOM) is no more. Certain multilateral export controls will be administered by a successor regime that will focus on the sale of conventional arms and sensitive dual-use items to countries of concern, such as Iran, Iraq, Libya, and North Korea. Members of this regime are likely to include formerly COCOM-proscribed nations, such as Russia, that agree to adhere to nonproliferation norms and control regimes and to exercise restraint in conventional arms transfers.

In recognition of the changed international security situation, the Clinton Administration has implemented a sweeping liberalization of Cold War export controls, particularly on high-value products such as computers and telecommunications equipment. For example, computers have been generally decontrolled to almost all destinations up to 260 MTOPS (millions of theoretical operations per second). A general license to free world destinations and civilian end-users in formerly proscribed COCOM countries, such as Russia and China, is now available up to 1000 MTOPS. Computers used to be controlled at 12.5 MTOPS—roughly an old Apple MacIntosh computer. The new levels decontrol most office desktop computers—which are readily available from foreign suppliers.

We have agreed with the Japanese to raise the supercomputer threshold to 1500 MTOPS—only recently, it was a mere 195 MTOPS—and are continuing discussions regarding further revision to 2000 MTOPS. We have also recently removed most validated licensing requirements for telecommunications equipment shipments to all but a few sensitive destinations, such as those countries

supporting acts of international terrorism. In addition, following the determination in COCOM to liberalize controls on many items, we have implemented a new authorization, known as General License GLX, to permit exports of a wide range of items to civil end users in formerly COCOM-proscribed countries.

3. *New Opportunities for Business*

Notwithstanding the problems and uncertainties that undoubtedly lie ahead, these developments present major new opportunities for U.S. businesses. In furtherance of the many recommendations intended to bring our export controls further into line with the economic security needs of the 1990s, as reflected in the Report of the Trade Promotion Coordinating Committee, chaired by Secretary Brown, the Department of Commerce is also undertaking a major new initiative to review, restructure, and clarify the Export Administration Regulations. Anyone practicing in this area will recognize the need for this initiative, for the regulations have not seen a comprehensive review in decades.

Restructuring the multilateral system of export controls, as well as establishing new ground rules for unilateral controls, will not be an easy task. The current and prospective working environment differs in many respects from that which existed only a few short years ago. First, we are entering an era that will define its goals principally in terms of nonproliferation: nuclear, chemical/biological, missile technology, and other weapons of mass destruction. In this post-Cold War era the Western allies no longer have a monopoly on either hardware or technology. Still, working together, we can take great strides to effectively stem the proliferation of these materials and technologies. Second, many of the countries in which these nonproliferation concerns have arisen or will arise are also our trading partners.

Does this mean the end of dual-use controls? Assuredly not. However, we are now operating in an environment that better focuses controls on critical goods and technology and allows U.S. businesses greater opportunities to export dual-use goods to legitimate civilian end users. Do a number of rules of play remain to be fleshed out? Absolutely. For example, the entire field of export controls will be operating in a new environment, as the debate shifts from the Cold War paradigm to a greater focus on multilateral controls and nonproliferation.

III. Looking Ahead

As I look ahead, I see several imperatives for U.S. trade law, and also several major challenges. Let me describe them briefly.

A. GATT IMPLEMENTATION

On April 15th Ambassador Kantor signed, on behalf of the President, the protocols embodying U.S. accession to the agreements negotiated during the Uruguay Round. This action marks an important milestone in the GATT process.

The President will now submit, and the Congress must pass, implementing legislation that fully and faithfully implements our new commitments, assures that the commitments of our trading partners will be honored, and maintains the strength of our trade laws.

The job of drafting legislation that remains true to these goals is not proving to be easy. Our success, however, will be measured by at least two criteria. First, antidumping and countervailing duty laws must remain strong. They are essential to the overall framework of U.S. trade law. The United States must retain freedom reasonably to interpret and carry out U.S. law, provided we do so in a manner that is GATT-consistent.

The GATT Dispute Settlement Understanding, discussed earlier, presents particularly thorny legal and policy problems. Under the new system, no single GATT member will have the ability to block unilaterally the adoption of an adverse panel decision.

Thus, the day may come when our government will have to implement a GATT decision with which it disagrees, or face retaliation from other governments. But we will not permit the GATT to provide a remedy to private parties and become a substitute for domestic courts. The implementing legislation will therefore provide that, if we accept the panel decision, we will implement it in a prospective manner, as has been our consistent practice, through changes to U.S. law if necessary.

Second, we must maintain the strength of section 301. Section 301 constitutes one of our critical tools for achieving market access. The new GATT dispute settlement procedures achieved U.S. objectives of a predictable and timely GATT dispute settlement process, which could not be blocked indefinitely and which contains time frames consistent with the deadlines of section 301. The new procedures will significantly enhance the ability of the United States to enforce its GATT rights without affecting the ability of the United States to use section 301 to open markets whether or not GATT rules apply. Super 301, as extended last month by the President, will continue to enhance our ability to pry open the most egregious closed markets.

Consistent with existing law, and in conformity with the Uruguay Round text's multilateralism commitment, the United States will have recourse to, and will be required to abide by, GATT dispute settlement procedures for practices covered by GATT disciplines, including GATT approval of retaliation. As a result, because of the expanded GATT disciplines, more section 301 cases will have to go through GATT dispute settlement procedures. This development is consistent with the current section 301, which requires the United States to initiate GATT dispute settlement procedures when it undertakes a section 301 investigation involving GATT issues. This commitment will not prevent the United States from using section 301 for foreign unfair practices not covered by GATT rules, however.

Once the GATT Agreements come into effect, we will need to monitor carefully the performance of our trading partners. The Clinton Administration is committed to an activist approach to tracking performance of our trading partners under the

GATT Agreements. The Department of Commerce will be particularly vigilant in the area of dumping and subsidies. For example, the Subsidies Agreement provides that nonactionable "Green Light" subsidies must nonetheless conform to all of the criteria set forth for the relevant category and establishes procedures for ensuring that subsidizing governments do not cheat. It is essential that the United States take maximum advantage of these procedural safeguards to ensure that our trading partners play by the rules.

B. THE JAPAN PROBLEM

As we all know, one of the major trade issues that has bedeviled successive American administrations since the late 1960s has been how to encourage Japan to open its market wider and faster. The Clinton Administration, no less than the others, has been searching intensely for a formula—so far, without dramatic breakthroughs.

The inability to open Japan's market has not stemmed from a lack of analysis, studies, commissions, or negotiations. To date, the major successes have come only with targeted pressure from Washington, usually backed by the threat of sanctions, as in the recent case of cellular telephones.

Such pressure is likely to continue, and my guess is that it will work for a while longer. But because sanctions are targeted on one sector or one product, the larger issue—Japan's industrial organization itself, which includes interlocking relationships among firms that would never be permitted to exist in the United States—has really been outside the ambit of American trade law, or any trade law. Past administrations have tried to get through this gigantic trade barrier via talks about structural impediments to trade, but made little headway. Our own Federal Trade Commission and Justice Department have from time to time considered the application of antitrust law to Japan, but thus far we have not pursued this complicated option.

C. ECONOMIES IN TRANSITION

Another major issue which we face is integrating those nonmarket economies that are former communist nations into the global trading arena. Such integrations present numerous issues, including a host of necessary domestic reforms in those countries and assistance from the IMF and other international organizations. A major part of the question, however, concerns how our dumping laws—and the antidumping laws of other OECD countries—deal with these "economies in transition."

"Economies in transition" are countries moving from one economic system to another. Many of these economies, such as Russia, Hungary, and the Czech and Slovak Republics, are emerging from fifty years of central planning under communist systems, and the United States supports their efforts to become market-oriented. This transformation cannot happen overnight, and these countries have yet to fully achieve their goal.

At present, most of the economies in transition are still considered nonmarket economies under the U.S. antidumping law. The United States strongly believes that increased international trade is their best opportunity for development. Because we are the most open large economy in the world, many nations are tempted to think that we will be the dumping ground of last resort—much as we have been in the past. The Clinton Administration will not allow this primary source of foreign aid. We cannot absorb all of the world's excess production. We want to encourage trade with these countries, but we cannot allow domestic industries to be injured by unfair pricing.

To this end, we will continue to work with the economies in transition so that they understand how the antidumping law works and how to avoid having unnecessary problems under it. Moreover, as the economies of these countries develop, the Department of Commerce will change their designation from a nonmarket to a market economy as it did for Poland in 1993.

However, the statute gives the Department limited discretion in the administration of the law. If a case is filed providing sufficient evidence that injurious dumping is occurring, the Department must initiate the investigation. Furthermore, the law specifies the methodology to be used in nonmarket economy cases. The existence of antidumping investigations should not be interpreted as a policy decision to discourage trade with economies in transition, but a realization of our responsibility under the law not to become the dumping ground for the world's excess production.

Russia and the other economies in transition are going to need help in making the transition to market economy status, and they are going to have to make major adjustments themselves. In dealing with these complicated issues we will need to keep certain factors in mind:

- First, the integration of economies in transition into the world economy is a challenge on the order of importance and difficulty as the challenge of reintegrating Japan, Germany, and many former colonies into the global economy after World War II. It will not happen overnight, and it will require a herculean effort.
- Second, the burden of adjustment must be spread. The effort must be multilateral and include both the economies in transition and the market economies.
- Finally, we need policies that really are appropriate to transition. This requirement means having policies with enough flexibility to reward economies in transition that are taking tough adjustment measures, and the procedures to differentiate those nations from others not making those efforts.

Thus far the global framework for helping them is barely developed. We will need to think through the balance between macro adjustments and industry-by-industry adjustments. We will need to look again at barriers to market access that these countries face, barriers that could keep them out of world markets. We will have to think about sensible ways to work with our own industries as they feel the brunt of new production from economies in transition, and we

must work closely with the European Union, Japan, and other industrial market economies so that none of us is forced to accept disproportionately the twin burdens of increased imports and escalating foreign aid.

D. DEVELOPING TRENDS

More generally, I see a number of trends and imperatives developing in the law of international trade. Most of these are related in some way to the fact that the world is growing smaller in economic, political, legal, social and environmental terms.

1. *Convergence and Clash of Laws and Values*

One consequence of a smaller world is the convergence of rules of law—and the cultural values represented in rules of law—into the same small space. Convergence is a good watchword for a process we are going to see in a variety of contexts in coming years.

In both the NAFTA and the GATT Round we have seen for the first time attempts to build in the recognition of policy goals that go beyond traditional trade goals. The NAFTA side agreements were intended specifically to ensure that the NAFTA does not have unforeseen environmental effects or affect adversely the rights of North American workers. In Geneva we have supported an initiative to create a standing Committee on Trade and the Environment. Earlier this month, we were able formally to place worker rights on the GATT's table. GSP renewal, later this year, already depends on adequate recognition of worker rights and will likely see a variety of environmental criteria built in to the process.

I am a strong believer that we should promote our values abroad. I also forcefully support the need to press for standards of environmental protection and workers' rights—not just because it's the right thing to do, but because we have hard economic interests at stake. The big issue is how to link the pursuit of these values and goals to trade policy. I say "how," and not "whether," because realistically I believe the NAFTA set the precedent for us. Nevertheless, the exact nature of the linkage for the future needs to be carefully thought out by both policy makers and lawyers.

There is a parallel with respect to human rights considerations as well. Under the Jackson-Vanik Amendment, for example, China's most-favored-nation status is linked to annual presidential determinations of significant overall progress in human rights, with a determination to be made by June 3, 1994. The deficiencies of this situation are, it seems to me, quite clear. As one of the world's largest and fastest-growing economies, China is an important member of the international economic community. We all want China's most-favored-nation status to be renewed; equally clearly, we need to see significant progress on human rights. Between now and June 3, 1994, the policy is clear and set by the President's Executive Order, which stipulates the need for significant overall progress in human rights as a condi-

tion for most-favored nation renewal. However, after June, attempting to accomplish both goals in the context of an annual confrontation over most-favored nation status and human rights is not a truly workable way to proceed year after year. We need to find a better way to pursue both our commercial and our human rights goals in a way that leads to results in both cases.

With the growing volume of world trade, and with the importance of such commerce to all countries, we will see an escalation of tensions as countries' differing policy priorities and legal systems clash. The effort to link trade policy to other areas not historically considered part of trade—such as environmental protection or workers' rights—will make these problems more intense. Whatever one wants to say about the policy priorities or the proposed linkages themselves, one thing is clear: we will need more of an underlying consensus among the trading nations of the world before there can be a well-developed and effective framework to deal with the issues.

2. Limits of Anglo/Western Legal Framework

This leads me to a broader point. In thinking about the way the world trading system has evolved these past several decades, one may reasonably conclude that it has been an era in which American ideas and American legal principles have been profoundly influential around the globe. I have heard it said, for example, that the GATT system was originally based on an implicit premise: countries could have access to the U.S. market. They had to play by American rules. As evidence of this thesis, we need look no farther than the GATT itself (many of whose original features were U.S.-inspired), the various GATT codes, and the new GATT agreements recently concluded, all of which contain U.S.-inspired provisions and principles.

However, even this predominant American influence—over half a century—which followed naturally from U.S. economic and political leadership during the Cold War, could not fundamentally alter the legal and cultural thinking of societies whose origins predated ours—in some cases by thousands of years. Western legal and cultural traditions may not be well-equipped to bridge the differences that now seem to be emerging with greater force.

I have in mind especially Asia. Here is a geopolitical region that is of immense importance to U.S. interests. Some of the Asian economies are among the wealthiest and fastest-growing on earth. Yet, Asian cultures and values and legal systems are significantly different than ours. Compared to many Asian countries, we have, for example, different commercial systems, based on different legal concepts in many areas that are the cornerstone of business activity, such as intellectual property rights, taxation, securities and corporate law, competition law, bankruptcy law, and dispute settlement. Some of these fields of law are not found at all in certain Asian economies and legal systems.

I do not know how this clash of styles will play out, but we can see that the force of our law has not been overly successful in Japan and China, and my

guess is that this will increasingly be the case as time goes on and as the "Pacific Century" enters into full force. We may have to find ways to be more flexible in our approach to issues that others perceive from different angles. At a minimum, we must blend styles and legal concepts, something that we have not had to do in the post-war era.

The Department of Commerce has conducted a number of legal exchanges and seminars in recent years, as a way of helping to resolve these issues. For example, we have held six joint legal seminars with China between 1983 and 1988, in which we discussed our legal regimes governing trade and investment. These seminars offered an excellent opportunity for each country to learn more about the other's legal system.

Exchanges of this nature are evolving into more elaborate structures, such as the Commercial Law Development Program (CLDP) that the Department has established in Eastern Europe. The CLDP, funded in part by the Agency for International Development to support the economic and political reforms underway in Eastern Europe, focuses on laws and regulations affecting both domestic and international trade and investment. It emphasizes supporting the host government's identification of policy objectives and building the skills and structures necessary to implement those objectives.

The CLDP has placed expert advisors in the region for periods ranging from one week to one year and has conducted workshops, seminars, and individual consultations in both the United States and the host countries. The programs have covered international project financing, the negotiation and documentation of international joint ventures, government ethics, public procurement, and export controls.

The CLDP has also sponsored internships in the United States for law students and attorneys. U.S. law firms, the legal departments of U.S. corporations, accounting firms, and trade associations have hosted interns. These activities have been instrumental in facilitating progress in the legal regimes of the host countries.

IV. The Limits of Legalism: The Need for Better Economic Diplomacy

This brings me to the limits of "legalism." The trend in our trade law, as I have tried to show, is towards more specific laws with less discretion in their administration. The statutes require ever-stricter timetables and increasingly precise measures.

There is no question that we must be firm in pursuing our interests. Nor do I deny for a minute that we have the world's most open market and hence that we are fully justified in pressing others to open theirs. The issue, however, is not what makes us feel vindicated or good, but what will work in a world marketplace that is so interconnected, one in which so many new and powerful players are emerging, and one in which our interests as both the world's largest importer and exporter—and as home to many of the world's most truly international companies—complicate the definition of our national interests.

To this end, I believe that we need to take a harder look at how we conduct our global diplomacy in the trade arena. We have developed an effective style when it comes to imposing pressure and sanctions—first attempt to negotiate, then, if negotiations fail, threaten sanctions and, if necessary, escalate to the highest political levels. But all this assumes that the unilateral exercise of American law is the only way to go.

As I have stated, in many cases we have no choice, and we should be as aggressive as necessary. But other occasions will call for more quiet and private negotiations so that the problem never reaches the level of public confrontation. These situations will entail anticipating problems long before they reach the crisis point; a quiet but full court press by American officials, led by the ambassador on the spot; and serious consultations at an early stage with the local business community—not just American executives, but those who are citizens of the country in question and who often can exert pressure on their governments if they can do so out of the public spotlight. It will require a rethinking of multilateral diplomacy and an elevation of its importance in order to get more countries on our side at an early date, perhaps with the use of more horsetrading on issues they deem extremely important.

I am not saying that we do not put a tremendous amount of time or effort into economic diplomacy now. But the truth is that most of our preoccupation is with negotiating tactics. What is now called for is an additional emphasis on medium-term strategies that lay the foundation for more multilateral support for our efforts and goals and that emphasize the tools of quiet persuasion rather than eleventh-hour crisis management—although there will always be some of that. Such an emphasis will in turn require that more effort go into the sophisticated analysis of how trade policy is made abroad, which individuals and groups in foreign countries can be our allies, and how we can best deal with them in an early stage. Such an effort will no doubt require a reorganization of our key embassies to build up the staffs with professionals knowledgeable about trade and politics—not just one or the other. It will also require a changed mindset at home, including a broad dialogue between the Administration and Congress devoted to the new challenges we face in a changing world economy.

V. Conclusion

I am sure that as a layman I have missed several important issues, not to mention many nuances. Nevertheless, as change engulfs our country and the world, I do believe that we need a better interchange between lawyers and others involved in the making of trade policy. Amidst the mind-boggling changes in the international economy, I doubt that any of us really sees the entire picture or that, if we do, it is sufficiently balanced. For all these reasons I appreciate this chance to throw out these ideas to the legal community, and I look forward to our discussion—which I hope can begin today and continue well into the future.

