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COUNTERVAILING DUTIES,
STATE PROTECTIONISM
AND THE CHALLENGE OF THE URUGUAY ROUND

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INTRODUCTION

There is a conflict between the ambition of reducing "tariffs and other barriers to trade" embodied in the General Agreement on Tariffs and Trade (GATT),¹ and the state protectionism this same GATT allows in today's world economy.²

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1. See Preamble of the GATT, reprinted in Jackson & Davey, Legal Problems of International Economic Relations (2d ed. Supp. 1986) at 3. In the Preamble, the contracting parties affirm their desire to contribute to their objectives of "raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods ...§ by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce." *emphasis added*

2. As our working definition of protectionism, we will adopt the one elaborated by Donald Regan in his study on the American Supreme Court and state protectionism within the United States; see, e.g., Regan, The Supreme Court and States Protectionism : Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091 (1986) at 1094-1095:

"... a state statute (or administrative regulation, or local ordinance, or whatever) is protectionist if and only if:

(a) the statute (or whatever) was adopted for the purpose of improving the competitive position of local (in-state)
State protectionism can take many forms, the most readily understandable — apart from a tariff or a quota — being the outright gift of financial advantages by states to increase the competitive position of their industries. Other forms of subsidization are more pervasive, being indirect, and can in some instances be very difficult to identify. But there is another — in a sense, ironical — form of protectionism: as a reaction against the subsidizing practices of some states, other states — in particular the United States — have adopted laws to counteract foreign subsidies, and reestablish "fairness" in the international markets. Such practices, in turn, can themselves be protectionist, catching more than the purely protectionist actions of other states. Be it clear right now that we do not pretend that all the countervailing duties assessed are guilty of protectionism, if all are protectionist: there are legitimate protectionist answers to illegitimate disruptive practices. But in some instances, it is the imposition of countervailing duties which is the illegitimate

(Footnote continued from previous page)

economic actors, just because they are local, vis-à-vis their foreign (by which [he] means simply out-of-state) competitors; and (b) the statute (or whatever) is analogous in form to the traditional instruments of protectionism — the tariff, the quota or the outright embargo (all of which can be on
action, answering to a practice which should not be open to criticisms.

The self-interested protectionism of states - trying to increase their market shares in the world economy at the expense of others, or trying to protect themselves from competition - is anything but surprising. \(^3\) GATT itself - although often described as an instrument to increase the international exchange of goods - aimed only at increasing the benefits derived by states from an enhanced international economic activity. \(^4\) Certainly, by reducing the weight imposed by states on the international exchange of goods through the use of tariffs, GATT had for result to expand the international markets. \(^5\) However, the expansion of the markets through a global reduction of tariff bariers was not an end in itself for self-interested governments, which were trying to increase their benefits from the international exchange of goods. The fact that benefits derived by states are central in the Agreement is clearly shown by numerous provisions designed to protect them. \(^6\) A particular mechanism - that of nonviolation

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3. It is perfectly coherent with the rational-choice model used in political science, which will serve as our background in this paper. See generally Keohane, After Hegemony (1984), especially at 65-84.

4. Cf. GATT Preamble, supra, note 1, were the contracting parties express their desire to enter into "reciprocal and mutually advantageous arrangements."


6. Id. at 332-333.
nullification or impairment of a benefit under the Agreement found in Article XXIII - is thus central to the law of countervailing duties. Under this mechanism, even a legally valid act by a state, when it nullifies or impairs the benefits of another one, triggers a right to "compensation" in favor of the injured states. This global mechanism - and its particular implementation in countervailing duty law - was adapted to the states' classical political economy, and to classical international law. However, countervailing duty law in its actual form conflicts with the new world economy in which one of the main task of states is to pursue industrial strategies, targeting strategies oriented toward world trade, which completely changes the nature of the game played by states in international economic relations. The international economy is nowadays a primary concern for state leaders, the game in which they strive to increase their gains. The rules of the new game are nevertheless unclear, and in particular, states oriented toward the strategic positioning of their national economy in the international markets often meet the tests for allowing protectionist answers from the part of importing states, under which they look like the spoilers of the existing legal regime, the ones responsible for provoking protectionism. There is a strong possibility, however, that the international strategic positioning of states evidences a change in the structure of the world economy, to which GATT countervailing duty law is ill-adapted. As a result, protectionism expands, which is against
GATT's spirit of increasing the gains from the internationalization of the economy.

The legal nature of GATT — which is not an international organization but only an agreement — and the two important consequences this had on the overall structure of GATT countervailing duty law, are partly responsible for these shortcomings.

First, the fact that GATT is not an organization made necessary the use of the loose concept of "nullification or impairment" of "benefits" under the Agreement found in Article XXIII. No limit was put on the sovereignty of states by GATT, and to keep the value of the tariff "deals" made, a result oriented clause such as the one found in Article XXIII was a necessity. On the other hand, the definition of what the "benefits" under the Agreement are is extremely unclear.

The relevance of the nonviolation nullification or impairment mechanism found in Article XXIII to the overall structure of GATT countervailing duty law can be questioned. It is true that if one looks at the way Article VI (on antidumping and countervailing duties) functions, it allows a specific and measured protectionist

7. e.g. Jackson & Davey, supra note 1, at 37.
8. e.g., id., at 10.
answer to a specific and damaging event, independent from the conditions of application of Article XXIII.

But presumably, this automatic "retaliation" response should fit in the overall concept of "nullification or impairment" of a "benefit" under the agreement due to the structural justification of such a concept. The problem then is that Article VI allows the countervailing of subsidies that do not impair or nullify any identifiable benefit under the Agreement.

As a second consequence of the legal nature of GATT, countervailing duty law is mostly applied by states courts under state law. Each state, then, has its own conceptions. This is perfectly legal and maybe politically necessary. But limits have to be put so that states can oppose the protectionist answer of countervailing duty only to other states' policies that unwarrantably burden international trade. Otherwise, protectionism will expand, which is against the spirit of GATT.

9. Although, in theory, there is no element of sanction in the imposition of a countervailing duty. In practice, this is always felt like a "smash in the face".
II. DUTIES, COUNTERVAILING DUTIES AND STATE PROTECTIONISM

Because duties and countervailing duties have effects on the "interests" of a state and afford protection to a domestic industry, a thorough understanding of duties as an instrument of state policy is essential to an analysis of countervailing duties.

As a means used for the isolation of national economies, the constitution of national markets and industries, duties have played a truly fundamental role in the constitution of the so-called state-system.\(^\text{10}\) By allowing the edification of quasi-independent economies - of monopolized sources of resources for the different states - they participated in giving de facto the independence of decision-making states were claiming to have de jure when affirming their absolute sovereignty. But by isolating economies and nations, they also increased the likeliness and the sheer possibility of war.

After the unprecedented disasters of World War II, a global reduction of state protectionism was initiated with the signature

\(^{10}\) Formalized in the so-called Treaties of Westphalia of 1648. See Carreau, Droit international (1986) at 17.
by twenty-three states of the GATT. Fighting against the economic roots of war, and at the same time instrument of the expansion of the world markets in goods, the GATT has greatly contributed in making today's world economy global.

However, the GATT is far from being a perfect instrument to challenge state protectionism. In particular, the rules against subsidies are largely inadequate. In the same manner, the rules concerning the imposition of countervailing duties by a state to compensate the competitive advantage of a competitor judged unfair because due to a subsidy are ill-suited to their screening purpose.

Subsidization is a largely run down practice by international trade scholars. On the other hand, the protectionism exercised through the imposition of countervailing duties is commonly defended as a proper answer to a disruptive initiating practice. However, once it is recognized that countervailing duties have absolutely the same rationale than "normal" duties, the inadequacy of GATT countervailing duty law should raise as much concern for the antiprotectionists than the protectionist practices that countervailing states pretend to police.

11. See Jackson & Davey, supra note 5 at 294. There are now 94 members in GATT, with 11 more countries having begun a procedure of accession to the general agreement. See e.g. 47 Focus June 1987.
A. The Changing Role of Duties

Duties have historically been one of the instruments of the division of the economy in quasi-independent national economies, markets and industries. Helping in the creation of antagonistic state powers, they also played a role in providing them with tax resources.

However, since World War II - and GATT - duties have been largely reduced, the economy has become global, and duties are now a meaningless source of revenues for states. The diminution of the importance of duties evidences a change in the structure of the world economy - now global - and the need felt by states to find new ways to increase their benefits derived from the international exchange of goods.

1. The Classical Nature of Duties

Duties are a kind of protection from the competition brought by imports provided by a state to the economic activity on its territory. This makes of duties a kind of subsidy provided by a state to favor its national economy, its national industry, or both. At the same time, though, duties are a kind of tax paid by the importer. The are - for the state - a resource and not an expenditure. Their subsidizing effect, however, does not consist in a direct payment by the state to the subsidized economic actor,
and is paid by the consumers, and not by the state taxing the duty.

This dual nature of resource for the state and of protection for the national industry - but not directly paid by the state - is essential to the understanding of duties as an instrument of state policy. As protective devices in favor of the economic activity on a given territory, they have been in the past an essential tool in the creation of national economies by states. 12 In an era when the creation of a quasi-independent national market was an essential result to achieve in order to increase one's competitive position in the game of states at the moment - war duties have been one of the instruments of the closure of the economy in national markets. 13 At the same time that states were striving to reduce the transaction costs of the economic exchange on their respective territories, 14 these transaction costs were generally kept at a higher level with regards to international trade. Inside the national territories, governments were using their expanding power to reduce the transaction costs of the exchange through a multitude of policies, going from the construction of roads, ports, the unification of weights and

13. Id. at 80.
14. Id. at 93-94.
measures, of currencies, etc... to the elimination of internal tariff barriers. With regards to international trade, though, all these transaction costs remained at a much higher level. No superior authority could impose unifying measures to interface the national economies in a relatively frictionless manner. And states were initially lacking the common interest in a development of the international exchange to agree on a reduction of the transaction costs involved in all the different areas quickly identified above. In fact, from the perspective of the classical state, the international economy is radically different from the national one. Expanding the market internally implies an increase in the state's power. Expanding the markets at the international level, however, is extremely risky in that it can potentially benefit enemies, and can potentially favor them in the always likely event of a war. It has to be borne in mind that during the period of construction of the state-system, the major concern of rulers was what can be seen as a particular kind of competitive game - that is war.15 Hence their concern for an increase in their revenues, for the edification of an independent economy and what is seen today as a weird attitude toward international trade - their mercantilism. Trying to export as much as one can and to import the least possible is puzzling economists as making sense only if

15. Id. at 94-95.
the accumulation of wealth is of value in itself. But this is precisely the point: trying to maximize one's wealth during the periods of peace made sense in states facing a great likeliness of war, the issue of the conflicts depending in great part from the amount of resources which could be put in the battle.

The protectionist attitude of states toward trade during the ultra-competitive game of the elaboration of the state-system was therefore a rational answer to a particular structure of the economy and of the struggle for political power.

It is only progressively, with a reduction in the frequency of war, that the reduction of the transaction costs associated with the international exchange of goods started to make sense. International treaties were used over the XIXth century to unify weights and measures, to expand the networks of the means of communication and transportation support of the market, etc...

However, with regards to duties, only Great-Britain effectively dismantled its tariff system in the XIXth century. The first international treaties were used over the XIXth century to unify weights and measures, to expand the networks of the means of communication and transportation support of the market, etc...

16. e.g. Jackson & Davey, supra note 5 at 18.
18. It has been estimated that 16,000 international treaties were concluded worldwide between 1815 and 1924, while the first international organizations (The International Telegraphic Union of 1865 and the General Union of Post Offices in 1874) - in the form of administrative unions - appeared during the second half of the XIXth century. See Carreau, supra note 10 at 20-21.
part of the XXth century didn't see any positive change in this respect, and on the contrary, it is only after the Kennedy Round (1963-1967) that the level of tariff protection in industrial countries felt below the level of 1913... 20 Between the two world wars, the use of duties as a protectionist device to export economic difficulties reached a peak with the Great Depression. In particular, the role of the Hawley-Smoot Tariff Act of 1930 in converting the American depression of the 1930s into a major world depression is often cited, and some have claimed that the seeds of the Second World War were sown by Hoover's signing of the Act into law. 21

2. Duties under GATT

To re-create an international economy in the post-World War II period, under the aegis of the United States, the progressive elimination of duties was an essential item on the agenda. Fighting against the economic roots of wars - the technological progress making it an impossible game to play anymore for the major industrial nations - was a clear concern. However, a renewed expansion of the international economy - itself made possible by

20. Id. at 70.
21. See Cooper, Trade Policy and Foreign Policy, reprinted in Jackson & Davey, supra note 5, at 28-29.
an ever increasing technological progress - was also a concern. The goals pursued by the architects of the post-World war II international economic system were therefore both the maintainance of the peace, and the maintainance of the American economic predominance, through the extension of international markets, allowing the U.S to convert its war economy to a civilian one - conversion for which the American national market would not have been large enough.

The liberal trade principles provided the rationale for the reduction of duties: the expansion of trade induced by such a reduction would imply increased revenues and benefits for the

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22. That some have called the Pax Americana, following the Pax Britanica, another great agent of the expansion of freer trade; see Gilpin, War and Change in World Politics (1981). But see Strange, The Persistent Myth of Lost Hegemony, 41 Int'l Org. 551 (1987). Incidentally, the USSR and its allied created a concurrent world economy; see Pisar, Coexistence and Commerce (1970) at 14-16.

23. The US, on the other hand, reestablished the economic imbalance created by the war by the mere help they granted to the devastated countries. It was clear that economic expansion could not have been kept by the US in a world of destroyed economies, and that in order to reach an equilibrium where exports could be compensated by imports, it was first needed to export without retribution. See Plaisant, L'organisation internationale du commerce, 1950 R. G. D. I. P. 161, at 166.
The expansion of the market implied by GATT is thus a by-product of an agreement between states to reduce the level of their duties in order for them to gain enhanced political and economic gains. The Agreement is therefore not liberal per se, which is made clear by the possibility for states to protect their benefits under the Agreement by the use of protective measures, of which countervailing duties are only one kind.

Hence, if liberal trade principles provided the rationale for a reduction of tariff barriers, they did not prevent states from following free rider strategies in subsidizing their economies and imposing non-tariff barriers – countervailing duties being only part of them.

**B. The Protectionism of Countervailing Duties**

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24. The advocacy of this rationale was helped by the lobbying of multinationals for which the expansion of the market was also of clear benefit. They wanted more, though, in the form of enhanced freedom of investment (which was not in the initial US proposal for an ITO, but was added because of this lobbying). The impossibility of convincing the other contracting parties to agree on this was one of the reasons for the failure of the ITO in the US Senate; see Hart, The mercantilist's Lament: National Treatment and Modern Trade Negotiations, 21 J. W. T. L. 37 (1987).

25. In the form of economic stability and order, for example.

26. But countervailing duties are the only kind of protection, of subsidization, that states can use without the fear of retaliation under GATT.
Article VI(3) of GATT provides that "

No countervailing duty shall be levied on any product of the territory of any contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise."

Further, Article VI(6)(a) states:

No contracting party shall levy any [...] countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the [...] subsidization [...] is such as to cause or threaten to cause material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry."

Countervailing duties have the dual nature of protecting the "revenues"27 of a state or - in what would be GATT's terminology

27. Since 1897, the purpose of countervailing duty law in the US - for example - has been to protect the integrity of US tariffs, to protect the revenues gained from duties; see Wallace, Spina & Rawson (eds.), Interface One - Conference Proceedings on the Application of US Antidumping and Countervailing Duty Laws to Imports from State-Controlled and State-Owned Enterprises (1980) [hereinafter Interface
its "benefits under the Agreement", and of subsidizing the national industry competing with the foreign industry whose goods are countervailed. The difference with "normal" duties is that the imposition of countervailing duties is a protection ad hoc, in response to something considered by the countervailing state as unfair (if legal under GATT for most of it).

The problem with this mechanism of allowing a state to counteract a legally valid action by another state when it has a negative impact on its industry is that it leaves to each state to decide under what circumstances and how to react. In the absence of clear international standards for the imposition of countervailing duties, this allows states to attempt to export their own conceptions and to protect themselves from foreign

(Footnote continued from previous page)

One at ix. Since duty revenues are negligible nowadays for industrial countries, countervailing duties are not aiming at protecting them anymore. However, they arguably still protect a kind of "revenue": The benefits derived from the General Agreement. That Article VI poses technical conditions (the identification of a subsidy and of injury) to the unilateral imposition of countervailing duties by a contracting party is an aspect that we will investigate later. At this point, only a structural argument is made as to what is the purpose of countervailing duty law.

28. But not as efficiently as a counter-subsidy, because it affords protection only from competition in the national market of the importing country, and not on the market of the exporting country or on third markets.

29. Which fits within the overall mechanism of "nullification or impairment" of benefits under the Agreement.
practices which are "unfair" for the sole reason that they are not in fashion in the importing state.

There appears to be a loophole in the international trade regime which is to be explained and if possible remedied. Leaving to states - which are inherently inclined toward protectionism - the almost unbound right to fight the protectionism of others with countervailing duties opens the door to resentment/retaliation mechanisms that all anti-protectionists reject.
III. INTERNATIONAL TRADE LAW, INTERFACES AND THE PRISONERS' DILEMMA OF INTERNATIONAL TRADE

International trade law can usefully be described as serving two purposes, both aiming at a reduction of the transaction costs of international trade. The first purpose consists in an interfacing of the different national economies. It is served through a reduction of the "real" transaction costs of the exchange— that is of the costs to evaluate the object of the exchange (weight, measures, value, etc...), the costs to agree on the terms of the exchange (contract law, etc...), and the costs of enforcement of the terms of the exchange (recognition of decisions,...).\(^{30}\) The "real" costs of the exchange cited are merely examples, and there are in practice myriads of them, more or less efficiently reduced by international law. The second purpose of international trade law is to reduce the "artificial" costs of the international exchange, that is the ones due to the existence of states. The aim here is not to prohibit states from

\(^{30}\) For a rapid description of the transaction costs involved in exchange relationships, see for example North, The New Institutional Economics, \textit{142 J. of Institutional and Theoretical Eco. 230} (1986).
having policies - which necessarily burden international commerce
but to prevent the burdening of international commerce per se. This second function of international trade law is only to limit
the incentives to national governments to use protectionism. Duties - because they consist in an artificial increase of the
transaction costs of importers simply because they trade from the
outside - are, together with quotas and embargos, the paradigm of
state protectionism and therefore were the first field in which
a general agreement on the reduction of state protectionism should
and could be reached.

However, like most international law, international trade law
is "horizontal". It is made, administered and enforced by the
national governments to which it applies. It is consensual and
therefore consists primarily of explicit reciprocal undertakings
by national governments to restrain their own actions and to
recognize as legitimate the sanctions imposed by other governments if they fail to do so. The question arising first is why
governments agree to be bound by such an "horizontal" law?

A. The Prisoners' Dilemma of International Trade

31. See generally Abbott, The Trading Nations Dilemma : The
Functions of the Law of International Trade, 26 Harv. Int'l
32. e.g. Regan, supra note 2 at 1110.
33. See Abbott, supra note 31 at 502.
If governments jealous of their sovereignty agree to limit their freedom of action by rules of law, it is because this allows them to reach a satisfactory solution of the Prisoners' Dilemma of international trade.\(^{34}\)

The dilemma of international trade first appears in domestic decision making. There are, on the one hand, short-run political gains to be made by granting protection. On the other hand, granting protection may conflict with principles or values connected with the national interest or the interests of consumers.\(^{35}\) The very structure of the decision-making procedure in a democracy leads public officials to opt in favor of short-run political gains and thus in favor of protection, even when their values or long-run political agendas are best served by an open market.\(^{36}\)

On the international level, trading nations governments will find themselves in a situation akin to the scenario known as the Prisoners' Dilemma.\(^{37}\) With international economic interdependence, protectionist measures create adverse effects external to the nations imposing them. A protectionist measure taken by one government will tend both to harm the economy of

\(^{34}\) Id. at 518-525, for the thesis that the public law of international trade, as contained in the GATT, is an answer to the Prisoners' Dilemma of international trade.

\(^{35}\) Id. at 503.

\(^{36}\) Id. at 521.

\(^{37}\) Id. at 503.
other nations and to create political costs for these other nations governments. If all governments choose to impose protection, the adverse consequences are multiplied. The advantage of a regime of law limiting protectionist responses is that public officials can act to further their nationals' interests or their long-run domestic political agendas and can avoid the mutually destructive tendencies of protection in a situation of interdependence while minimizing the short-run political costs to themselves.

B. The Weakness of Horizontal Legal Systems: The Dispute Settlement Mechanism

Horizontal legal systems - that is regimes not creating an organization to the orders of which the different members can be authoritatively subjected - often face difficulties at the level of their dispute settlement mechanisms, the losing party having to agree to the imposition of a sanction. Hence, under Article XXIII of GATT - GATT's main dispute settlement mechanism - following the inability of two contracting parties to resolve a dispute through consultations, the appointment of a panel to adjudicate

38. Id. at 504.
39. Id. at 503.
the dispute can be required. However, an important "losing" party can always hold up the adoption of a panel report interminably... It is no wonder than that the GATT's dispute settlement mechanism has become one of its most controversial aspects.

In the field of countervailing duties, though, another mechanism exists for the imposition of "sanctions" against a subsidizing state. Article VI(3) allows the levy of a countervailing duty "... for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise."

This broad power left to states - arguably necessary because of the inadequacy of GATT dispute settlement mechanisms - leaves open the possibility for states to sanction actions which are not condemnable under the spirit of the regime (fighting protectionism), even though they technically meet the criteriums for the sanction.

This inadequacy in GATT is more and more troublesome in today's world economy which seems to have changed of structure. States which seem to act like free riders under the old regime -

42. Id. at 60.
43. Id. at 52.
44. e.g. Jackson & Davey, supra note 1 at 11.
their exporters being the objects of the imposition of countervailing duties - might be only adapting themselves to the change. The reaction within GATT to the change in the world economy has been a progressive prohibition of certain kinds of subsidies - export subsidies - clearly damageable for the system and the elaboration of a code on subsidies and countervailing duties in an attempt to restore "fairness" in international trade. But GATT left to states the power to impose countervailing duties in any case. This can be - and is used in a protectionist mode by states, at odd with the kind of benefits GATT aims at protecting.

45. This prohibition was only introduced at the 1955 Review Session. See Horlick, Quick & Vermulst, Government Actions Against Domestic Subsidies: An Analysis of the International Rules and an Introduction to the American Practice, 1 Legal Issues of Eur. Integration 1 (1986).
46. See Lowenfeld, Fair or Unfair: Does it Matter?, 13 Cornell Int'l L. J. 205 (1980), who states that the "Tokyo Round was sold to all the participants - and certainly the Americans - as a way of restoring fairness in international trade."
IV. STATE PROTECTIONISM UNDER GATT: ARTICLE XXIII AND ARTICLE VI

A. An Agreement for Benefits

There is no International Trade Organization. Provisionally—and because the ITO Treaty was never ratified, until today—it is through a particular kind of mechanism that "sanctions" against protectionism are imposed, when there is no other specific remedy. This particular mechanism, of "nonviolation nullification or impairment", is specifically found in Article XXIII(1)(b) of the General Agreement. This mechanism is due to the rather unusual structure of GATT law generally which doesn't rest on conventional ideas of legal obligations per se, but on a root concept of mutual and reciprocal "benefits".47

The specific problem which was faced during the GATT negotiations to protect these benefits is that if custom duties are a kind of subsidies, they are only one of the possible forms

of subsidization. Accordingly, a tariff concession can have value only if alternative trade barriers are held constant. If GATT rules prohibit some of the most obvious nontariff measures which might impair the value of a tariff concession, the rules by no means cover every possibility. In a sense, one can say that custom duties are the only kind of protection allowed by GATT, which aims at reducing them progressively. This allowed to make multilateral trade negotiations manageable, all other kinds of protection being either forbidden by some specific provision or covered under the nonviolation "nullification or impairment" mechanism found in Article XXIII. The scope of the nonviolation nullification or impairment remedy will accordingly depend on the meaning that is given to the expression "benefit ... accruing under the Agreement". And if GATT were entirely coherent in its antiprotectionism, its Article VI should not allow the imposition

48. See Plaisant, supra note 23 at 162. A definition of "subsidy" suggested by Malmgren embodies "any government action which causes a firm's, or a particular industry's total net private costs of production to be below the level of costs that would have been incurred in the course of producing the same level of output in the absence of the government's action". This presumably includes the subsidizing effect of tariff protection. See, e.g. Horlick, Quick & Vermulst, supra note 45 at 2.

49. For example, quotas; Cf. Jackson & Davey, supra note 5 at 367.

50. Id. at 367; see also Long, Law and its Limitations in the GATT Multilateral Trade System (1985) at 10. This probably explains why no countervailing duty has ever been filed against a duty.

51. See Hudec, supra note 47 at 4; Davey, supra note 41 at 56.
of countervailing duties in other circumstances. Article VI is arguably only a specific application of the mechanism, but applied by each state, and for apparently specific wrongdoings.

B. The Benefits of the Agreement (with regards to subsidies)

1. Not Laissez Faire

Let's first make it clear that furthering the functioning of national economies according to *laissez faire* principles is not one of GATT's aims. GATT is certainly assuming that contracting parties have market economies — for the mere reason that a tariff deal makes sense only between market economy countries. Furthermore, although the term "benefits accruing ... under the Agreement" has no precise definition, the underlying idea is that the benefits derived from GATT rules are the greater commercial opportunities that will exist if tariff barriers are reduced or eliminated.\(^{52}\) Obviously, commercial opportunities cannot be increased by the reduction of tariff barriers if the importing

\(^{52}\) See Hudec, supra note 47 at 2.
country is not a market economy. Accordingly, it is clear that GATT presupposes that the national economies of the contracting parties are market economies.

But this doesn't mean that GATT has for unavoidable consequence to push states to adopt more market-like principles of organization. The reduction of trade barriers is only a means, a way to give reciprocal benefits to states under the Agreement. The General Agreement itself does not promote free market: it aims at providing benefits to states and then at more or less preserving the equilibrium of benefits. It does not aim at increasing the freedom of markets, which it does, but only indirectly. Furthermore, the demand for reciprocity is an aspect of market economy trade policy that rests on essentially

53. For the problems posed by non-market economies in GATT, see especially Patterson, Improving GATT Rules for Non-Market Economies, 20 J. W. T. L. 185 (1986). The problem has long been avoided as a minor one. The difficulty can less easily been avoided now that China and the USSR have shown interest in GATT; see Herzstein, China and the GATT: Legal and Policy Issues Raised by China's Participation in the General Agreement on Tariffs and Trade, L. & Pol. Int'l Bus. 371 (1986). Given the original goal of GATT in protecting the peace, it is probably worth the cost of thinking how it could be possible to interface these economies within GATT. The apparently increasing decentralization in these economies might ease the problem; see Barraclough, "The United States Approach to Issues of East-West Trade in the Current Round of Multilateral Trade Negotiations", in Interface One at 142. A possibility would be to link GATT benefits with increased rights to direct investments.

54. See Section II.A.2 supra.
mercantilist attitudes toward trade, and thus owes little to free
market principles in the first place.55

Because GATT is classical international law, not limiting the
sovereignty of states, it cannot prevent them from becoming less
market oriented if they wish so. Even if this nullifies or impairs
the expectations of other contracting parties, states can alter
the functioning of the market, although they will have to pay the
price imposed by an injured contracting party, if the contracting
party is willing to make them pay for it.

A clear illustration that what matters under GATT is the
benefits to states and not the increased expansion of the market
mechanism is the Australian Subsidy case.56 In the Australian
case, it has been possible to hold that the suppression of a
subsidy was a nullification or impairment of a benefit accruing
under the Agreement!57

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55. See Hudec, "Interface Revisited: "Unfair Trade" Policy After
the Tokyo Round", in Interface Two: Conference proceedings
on the Legal Framework of East-West Trade (Wallace & Flores,
eds. 1982) [hereinafter Interface Two] at 9. See generally
Keohane, Reciprocity in International Relations, 40 Int'l
Org. 1 (1986).

56. The Australian Subsidy on Ammonium Sulphat. GATT Doc. No CP.

57. The tariff concession at issue was a concession on one of two
competing fertilizer products. At the time the concession was
made, purchases of both fertilizers were subsidized under the
same consumption subsidy. Later, the consumption subsidy was
eliminated on the imported fertilizer, creating a commercial
disadvantage that was claimed to impair the value of the
concession. The GATT decision agreed with this claim. See
generally on this case, Hudec, supra note 47 at 4-6.
If GATT doesn't prevent the Contracting Parties from altering the market mechanism in their national economy — and accordingly to subsidize, per se — the issue remains of what is the definition of the "benefits" under the Agreement the states should be able to protect using countervailing duty law.

2. Freedom from protectionism

In the first place, GATT is a tariff deal. The first benefits under the Agreement are benefits from tariff concessions protected by Article XXIII, and concern the access to the national market of the would-be importing country. We have seen that subsidy can be a "nullification or impairment" of such "benefit", but in a rather unusual situation.

The GATT has never considered a claim of nonviolation nullification or impairment under Article XXIII in which the claim was based on "benefits" accruing under GATT obligations other than a tariff concession. There are nevertheless some GATT rules dealing with subsidies which contemplate "benefits" distinct from the benefits of a tariff concession.

58. Id. at 6-7.
59. Like in the Australian subsidy case, were a change in consumption subsidy was held a nullification or impairment.
60. e.g. Hudec, supra note 47 at 6-7.
61. Id. at 7.
(1) The clearest examples are the Article XVI(3) and (4) rules against export subsidies, which concern government conduct affecting exports. This kind of subsidies and the problem they pose has nothing to do with tariff concessions and their prohibition by the mechanism of "nullification or impairment" is - since 1955 - a different one than for the other kinds of subsidies.

Article XVI originally only required the contracting parties to notify the GATT Secretariat of their subsidies and to consult with other parties whenever their subsidies caused injurious effects. It is only at the Review Session of 1955 that an international obligation prohibiting the use of subsidies apparently clearly disruptive of the world markets was introduced. The CONTRACTING PARTIES amended Article XVI by adding a Section B (Article XVI, paragraphs 2 to 5), which dealt solely with export subsidies and established limitations on their use. It is this Amendment which incorporated into GATT the distinction between export and domestic subsidies, and also the different treatment of export subsidies on primary and non-primary products. But these subsidies do not share the same relationship with the concept of "nullification or impairment" of Article XXIII than domestic subsidies. They are not a nonviolaion "nullification of

62. Id.
impairment", are illegal per se, and as a violation of the Agreement, are under Article XXIII(1)(a) a prima facie "nullification or impairment". The remedy to which they give rise at GATT's level is the normal remedy under Article XXIII. It has nothing to do with the automatic and theoretically well-balanced remedy under Article VI, which deals with all kinds of subsidies.

Presumably, Article XVI protects from protectionism, the form of protectionism against which it is directed being presumably the most damaging for international trade because clearly motivated by a protectionist purpose.

(2) Article VI allows a unilateral imposition of countervailing duties "for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture:

63. See Horlick, Quick & vermulst, supra note 45 at 3-8.; see generally Jackson, World Trade and the Law of GATT (1969) at 178-187.
64. The Article XXIII "sanction" is a "suspension of concessions" which has been utilized once only. It must be noted that Article XXIII "suspending" are not limited to "compensatory" amounts and are not limited to actions by a nation which has been armed. Theoretically, a "sanction" could authorize suspensions of major concessions by many, if not all, GATT members and could even be the basis for an effective expulsion. See Jackson & Davey, supra note 5 at 351-352.
65. Article VI states that "the term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty bestowed (...)"; e.g. Jackson & Davey, supra note 1 at 11.
production or export of any merchandise". Accordingly, countervailing duties can be levied against any form of subsidy, whether export or domestic, prohibited or allowed. Some limits are imposed, though, in the sense that Article VI requires that the subsidized imported product must "cause or threaten material injury to an established domestic industry or is such as to retard materially the establishment of a domestic industry." This seems to go further than the mere concept of "nullification or impairment" of a tariff concession under the Agreement: like in the case of export subsidies, the "benefit" under the Agreement cannot be the benefit of a concession due to the orientation of the trade (protection against (subsidized) imports). It has to be something different. This benefit can only be the protection of the market mechanism in the importing state, if this particular state wants to protect it. It is true that Article VI doesn't speak about the protection of the market mechanism in the importing state, but of injury to a domestic industry, which arguably is a very different thing. But on the other hand, the drafters of GATT could not intend to protect from any injury: market competition injures inefficient market competitors all the time, and furthermore, they incorporated

66. e.g. Jackson & Davey, supra note 1 at 11.
67. See Horlick, Quick & vermulst, supra note 45 at 8.
68. e.g. Jackson & Davey, supra note 1 at 11-12.
Article XIX into the Agreement to protect contracting parties from an excessive level of injury coming from imports.\textsuperscript{69} The avoidable injury under Article VI must somehow be unwarranted under the GATT system. It must come from a kind of competition which nullifies or impairs a benefit under the Agreement, benefit which then can be defined as an undisturbed market competition in the importing state. It is true, too, that one of the conditions for the triggering of Article VI is the identification of a subsidy granted by the exporting state. But the benefit under the Agreement cannot be the absence of subsidization, due to the impossibility to define what subsidies are in a vacuum.\textsuperscript{70} The obligation to isolate an identifiable subsidy results from the fact that countervailing duty law aims only at preventing market distortions in the importing state due to the actions of other states.\textsuperscript{71} What matters is clearly not the subsidy per se, but the protection of the market mechanism: it is in Article VI that one finds also rules against dumping, which share the same purpose of protecting the market, but from the actions of business enterprises.\textsuperscript{72}

\textsuperscript{69} Id. generally at 538-647.
\textsuperscript{70} See generally Tarullo, Beyond Normalcy in the Regulation of International Trade, 100 Harv. L. Rev. 546 (1987).
\textsuperscript{71} Cf. Jackson & Davey, supra note 5 at 725.
\textsuperscript{72} e.g. Jackson & Davey, supra note 1 at 10-12.
C. Article VI and the Structure of GATT Law

Article VI, within the GATT system, should then protect only against disruptive competition allowed by an action of a contracting party. But procedurally, Article VI is an imperfect mechanism for avoiding that kind of "nullification or impairment" of benefits under the Agreement: it allows states to countervail in more cases than the ones where there is objectionable subsidization, and accordingly, allows protectionism in these kinds of cases. To see this, one must first have a look at the general mechanism of protection from nullification or impairment under Article XXIII. The reason and justification for doing so is the structural argument we made about GATT's law. The "nullification or impairment" mechanism is an overall encompassing mechanism to protect the value of a tariff deal between sovereigns. If the impairment-of-a-tariff-concession theory doesn't work in the case of Article VI, the legal mechanism dealing with subsidies is an "impairment or nullification"-like system: subsidies are not forbidden but they can be offset by a countervailing duty under the condition that they materially injure or risk to materially injure an established domestic

73. See Horlick, Quick & vermulst, supra note 45 at 10.
74. See Sub-section IV.B.2., supra.
industry or materially retard the establishment of a domestic industry.

Under Article XXIII, one party's benefit may be nullified or impaired by another party's violation of the General Agreement but also by "any measure" taken by another party, even if not a violation of the General Agreement. The broad scope of Article XXIII has been explained by the divergent functions that the drafters of the General Agreement apparently wanted it to fulfil. On the one hand, they wanted a procedure for adjudicating claims that the General Agreement had been violated; on the other hand, they also wanted a sort of mandatory negotiation procedure for settling more general grievances applicable when one party had somehow impinged on another's interests or when the balance of concessions needed adjusting even in the absence of a violation of the Agreement. Accordingly, in cases where there is no violation of GATT rules, there is a balancing aspect which has to be borne in mind.

"The benefit a government is entitled to have protected under Article XXIII is not total freedom from any subsequent impairment of the commercial opportunity represented by a tariff concession. Rather, "benefit" is

75. See Davey, supra note 41 at 55-56.
76. See Jackson & Davey, supra note 5 at 346; see Jackson, supra note 63 at 167-169.
77. See Davey, supra note 41 at 57.
defined as freedom from these forms of impairment which are somehow wrong — not illegal or even immoral, but still sufficiently improper that the defendant government deserves to suffer some compensating adjustment in the original bargain from having caused them."

If Article VI fits within the overall concept of "nullification or impairment", by analogy, Article VI should protect from subsidies "somehow wrong". But the text of Article VI doesn't say it. And given the unilateral character of Article VI, applied by states courts, these don't exercise a motive review. This would clearly be extremely cumbersome for them. But there is a deeper reason: GATT is classical international law and didn't create an effective international forum for the resolution of these disputes, which would have the authority to exercise a motive review. States courts not having this possibility, Article VI describes automatic situations in which to impose countervailing duties. But this is arguably only a mean to approximate the "somehow wrong" subsidies it aims at countervailing.

The problem is this one: the general system of protection from non-violation nullification or impairment encompasses a "motive review". But Article VI is applied unilaterally — and has for reasons of efficiency and international law — by states

78. See Hudec, supra note 47 at 6.
courts. Whatever was intended by the drafters, this solution was
to lead to a kind of protectionism. Since Article VI gives
extremely little guidance on the use of countervailing duties
against subsidized imports, the contracting parties were quite
free to adopt their own countervailing duty laws. This lack of
precision gave them the possibility to apply their countervailing
duty laws in a manner which can and has been regarded as a
nontariff barrier in itself.79

D. The Verification of the Structural Argument: The
Countervailing Duties Code

But one can ask the validity of the analogy drawn between the
general system of protection from "nullification or impairment" of
Article XXIII and the mechanism of Article VI. To make clear that
this analogy is correct, we will now study the approach on
subsidies made under the Subsidies code.

The MTN Subsidies Code is recognized to make a significant use
of the "nonviolation nullification or impairment" concept.80 On
the one hand, Article 11(1) of the Code states that the
signatories

79. See Horlick, Quick & vermulst, supra note 45 at 10.
80. See Hudec, supra note 47 at 1.
"do not intend to restrict the right of signatories to use [domestic] subsidies to achieve [social, economic]... and other important policy objectives which they consider desirable."81

On the other hand, in Article 11(2), the signatories

"recognize that [domestic subsidies] may cause or threaten to cause injury to a domestic industry of another signatory or serious prejudice to the interests of another signatory, or may nullify or impair benefits accruing to another signatory under the General Agreement, in particular when such subsidies would adversely affect the conditions of normal competition."

The Code balances these opposing considerations by reaffirming the legal right to use subsidies while providing a nullification or impairment-type remedy for the three kinds of adverse consequences listed.82 That the Code cares about balancing the different interests involved is made even clearer in the third sentence of Article 11(2):

"... signatories, when drawing up their policies and practices in this field, in addition to evaluating the essential internal objectives to be achieved, shall also weight, as far as practicable, taking account of

81. Emphasis added.
82. The three "causes of action" listed do not import distinctive legal theories. These labels merely are meant to give distinctive names to the three different market effects being made actionable, and the only theory that explains these three remedies is the old Article XXIII theory of nonviolation nullification or impairment; see Hudec, supra note 47 at 18.
the nature of the particular case, possible adverse effects on trade.\textsuperscript{83} Countervailing duty law follows the general mechanism of "nullification or impairment". It aspires to a balancing of interests - when it speaks to signatories - or motive review of the use of domestic subsidies. But because countervailing duty law is applied by states courts, it is protectionist, because it does not include this motive review.\textsuperscript{84}

E. Transition: The Automaticity of Article VI and its Success

Article VI is an automatic response by states without going through the cumbersome process of dispute resolution in GATT. This automaticity is the main reason for the success of this particular form of "retaliation".\textsuperscript{85} But whereas the goal of the mechanism was probably to avoid "nullification or impairment" of the benefits accruing under GATT, it let to states the authority to decide where there is subsidization, and when to react. Even if the "benefit" under GATT was that the signatories would act "fairly", "nullification or impairment" of this benefit cannot be judged by a national court without a motive review. The structural

\textsuperscript{83} Emphasis added. 
\textsuperscript{84} On the importance of the motive review, See Sub-section IV.C. infra.  
\textsuperscript{85} See Jakson & Davey, supra note 5 at 334.
limit faced by the horizontal nature of classical international law is reached. The question, then, if we want to avoid protectionism, is whether we need vertical law, a real organization of the international trade, or if it can be avoided in some other way.
V. ANTI-PROTECTIONISM IN INTEGRATED MULTI-STATE ECONOMIES AND THE U.S. EXAMPLE

If there is one point on which international trade scholars agree, it is on the internationalization and globalization of the economy since World War II. By whatever standard used, today's economy is global: markets are global, firms are global, competition is global. This major change of this side of the XXth century has important implications for the position of the state as an actor in international trade relations. Most of the states cannot and should not even try to have self-sufficient economies; and those which could isolate themselves would clearly lose the gains from an enhanced world division of work in doing so.

The incentive for states is to get as much benefits from international trade as they can, possibly by using free riding strategies. Given the global interest in keeping the economies open, there is however another incentive to develop a system to avoid protectionism by the states without preventing them from adopting strategies of development of their economies taking account their position on the international markets.

The actual regime of GATT, allowing the unilateral imposition of countervailing duties in more cases than the purely protectionist ones, is structurally misfit to today's world.
economy in that it prevents states from playing what in effect is a new kind of game as support for their competition. (?)

The US law provides a very good example of what should not be done, and also of what – maybe – could be done to fight protectionism in an integrated world economy. The US countervailing duty law, as the most advanced law in the field, in absolute legality under GATT and for very legitimate short-term reasons, provides the exact example of what we want to prevent on the long run. On the other hand, the modern decisions of the American Supreme Court in Dormant Commerce Clauses cases relating to the free movement of goods within the US provides a fairly principled case law on the avoidance of protectionism in integrated multi-state economies. 86

A. The Structural Inadaptation of GATT to Today's World Economy

Article VI of GATT is partly supposed to protect states from protectionist measures by other states. But by allowing to

86. A somewhat similar argument could be made with regards to the EEC case law on the prevention of equivalent measures to quantitative restrictions within the EEC system; see Rob{, Systemic Problems in the Prevention of State Protectionism against the Free Movement of Goods – The US, the EEC and the GATT in Perspective, unpublished paper (1989).
countervail every time there is "material injury" to a domestic industry plus a "subsidy", it allows countervailing states to catch more than protectionist measures. GATT - as "horizontal" law - allows this result. But it is contrary to the ultimate goal of GATT, and we have this outcome because of the structural inadaptation of GATT to today's world economy. In the post-World War II era,

"the nature of the competitive game between states is not what it was. Instead of competing for territory (because land was the prime source of wealth and therefore wealth and political power for the state could be achieved through control over the territory), states are now increasingly engaged in a different kind of game: they are competing for world market shares as the surest means to greater wealth and therefore greater economic security."  

The globalization of the economy in a sense creates a market for states: for the localization of multinational enterprises and for the most efficient state industrial organization. The economy - as we have seen - has always created a "market" for the most efficient states. But what has changed is the kind of game

87. See Preamble of GATT, supra note 1.
88. But this inadaptation is also partly a result of GATT's success in creating interdependence among the states; Cf. Jackson, "Foreign Trade Fairness Issues and United States Policy", in Hearings Before the Senate Finance Committee, 1985, C.I.S. Index s361-70.8, 289 (1986) at 295.
89. e.g. Strange, supra note 22 at 564.
90. Which can be a non-organization, i.e. the market.
which allows the selection of the most efficient states. It is not
war anymore, followed by a transmission of territory. It is the
competition for world market shares, the extraction of trade
surpluses and, when possible, the acquisition of producing
facilities in the indebted countries. Those states which have
an industrial policy seem to be very efficient players in this new
game, but under the old rules. Accordingly, other states consider
many of the trading practices of heavily exporting countries as
"unfair" and countervail what they consider to be an undue
advantage. As a result, protectionism answers to what is decried
as a protectionist practice. To know whether it is the subsidizing
practice or the countervailing practice which is protectionist is
beside the point. The point is that GATT, in allowing unilateral
impositions of countervailing duties, might prevent the
functioning of the new game by allowing states' protectionism —
that is, the countervailing of subsidies which are not
protectionist. At the same time, though, it is clear that states
face sovereignty problems when they don't react to policy
decisions made abroad, and that challenge their own industrial
policy — or lack thereof. They get hurt by political decisions
made abroad and can hardly remain inactive in the face of mounting
domestic pressures. Two answers are then theoretically possible:

protectionism, or a new international trade regime with the most anti-protectionist legal mechanism in existence actually as a goal: the Dormant Commerce Clause of the American Constitution.

B. The US Counter-Example: The US Countervailing Duties Law

As we have seen, there is no world organization to achieve the interfacing of the national economies and states mostly do the job themselves, for example through treaties ad hoc for the creation of uniform norms, etc... but also using their countervailing duty laws (and to a lesser extent antidumping laws). 92

The use of the term "interface" with regards to countervailing duties is however probably improper in that it is a neutral term for something which is not neutrally written and administered. 93 States' countervailing duty laws - in particular the United States law, which is the most developed in the field - rest on notions of "fair" and "unfair" competition, 94 which

92. See Jackson, "United States Policy Regarding Disruptive Practices Imports from State Trading Countries or Government-Owned Enterprises" in Interface One at 2, noting that "...the U.S. laws on countervailing duties, and to a lesser extent antidumping duties, are in effect shouldering most of [the] interfacing responsibility, even though these may have been designed for different purposes.

93. See the remark by Hudec, in Interface One at 27.

94. Id. at 27-28.
themselves depend on some "first principles" deeply rooted in each society. According to Peter Ehrenhaft

"First among those critical values is "freedom of opportunity". It is no idle slogan. It was the idea that fueled the discovery of the New World. It inspired the Founding fathers of our country. It is the premise on which our antitrust laws are based, as vital to our concepts of freedom as our civil rights laws. Why? because they attempt to assure to all access to our markets and to prevent the control of that economic wealth by any person or group of persons without a political mandate.

Our antidumping and countervailing duty laws must be seen as a piece of that heritage. They are not statutes designed to protect particular entities in our markets; they are intended to assure that all particular players in the game play fairly and by comparable rules. They seek to stop at our borders those who won't play by the rules by offsetting the unfair advantages a foreign trader may have either from the aid of his government or from a home economic environment that permits price discrimination, if those advantages cause injury to our industry."

Clearly, the rest of the world doesn't necessarily agree with the American perception of what constitute fair or unfair

95. See Ehrenhaft, "The Treasury's Proposed Approach to Imports from State-Controlled Economy Countries and State-Owned Enterprises under the Antidumping and Countervailing Duty Laws", in Interface One 75 at 77.
96. Ex-Deputy Assistant Secretary and Special Counsel for Tariff Affairs in the United States Department of Treasury.
97. See Ehrenhaft, supra note 94 at 77.
practices. And this will go on so long as we are not willing to legislate world-wide uniformity on wage-scales, exchange rates, environmental controls, debt/equity ratios, depreciation, interest rates and accounting techniques, and indeed comparable relations between government and industry... Certainly, calling something unfair when foreigners do it and fair when the United States does it creates problems for the debate. At the same time, there is no doubt that each country has a sovereign right to prescribe whatever "rules of the game" to be played by foreign competitors on its territory. The United States have a perfectly legitimate right to attempt to prevent industrial policies made abroad to influence their own economic structure, and to refuse to have...
their faith in the market being destroyed by the voluntaristic attitudes of foreign states. They should be conscious—though that a stubborn obstinacy to fulfil the dream of keeping absolute economic sovereignty would end-up with a partitioned world-economy where the US would—at last!—have "capitalism in one country"... but without the benefits accruing from international economic exchange...

However, even if some have advocated the use of an injury-only regime for the treatment of damaging imports, on the rationale that cheap imports—be they from innovation or from subsidization—are generally a boon, the use of unfair trade laws goes on. According to Hudec, this is because:

"In any market economy, the private owners of firms injured by foreign competition will normally seek governmental protection when the competition becomes damaging. International economic competition has intensified in the 1970s. Domestic producers have responded with mounting demands for protection. The numerous complaints about foreign dumping and subsidies illustrates this protectionist trend. (...) The "unfairness" rationale appears to offer advantages at several levels. At the simple business level, the firm's managers do not have to admit competitive failure. (...) At the political level, the managers can obtain relatively greater attention from legislators... Third, at the legal level, once a particular practice has been defined as "unfair", trade laws typically grant relief at a much lower threshold of injury to domestic industry. Moreover, the relief is mandatory and remains

103. See Hudec, supra note 55 at 23.
104. See, for example, Barcello, "An "Injury-Only" Regime (For Imports) and Actionable Subsidies", in Interface Three at 19.
in effect so long as the unfair practice continues. Fourth, on the international level, compensation is not due, nor is the international reaction as severe, when the trade being restricted can be shown to be dumped or subsidized."

The perfect legitimacy of each individual state's attempt to preserve its constituents from what is perceived as an "unfair" comparative advantage is insufficient to make forget that the extension of such a solution would imply a drastic rise in protectionism. Thus our desire to investigate over a possible development of the international regime to prevent state protectionism. We won't deal here with "high-track" protectionism (protectionism in steel, car, textile... industries) which asks for a development of the rules on managed trade, possibly through a codification of the Escape Clause mechanism of Article XIX in GATT. What we would like to initiate is a reflection on the possibility to develop the legal regime to prevent "low-track" - hidden - state protectionism. By hidden protectionism, we mean the one exercised through the adoption of regulations by states with the aim to burden international trade.

The prevention of such protectionism raises tough issues on states' sovereignty. However, there is a precedent of a system allowing states to adopt whatever policies they wish as long as they do not aim at burdening interstate commerce: the case law of

the American Supreme Court in Dormant Commerce Clause cases. As Professor Regan has demonstrated in his recent Article on the subject, the only rationale of this case law (in Movement-of-Goods cases) is to avoid state protectionism. Because his analysis is structural, the solution he describes the Supreme Court to have reached can serve as a useful starting point to imagine the one which could be reached in a world economy free of "world government".

C. The US Example: The Dormant Commerce Clause

As we have seen, one of the roles of international trade law, besides the interfacing of national economies, is to prevent state protectionism. The striking parallel with the Commerce Clause jurisprudence of the American Supreme Court is that in Movement-of-Goods cases (the ones relevant for a comparison with GATT), the Court has been concerned exclusively with preventing states from engaging in purposeful economic protectionism. One can immediately object that making the parallel between the federal law of interstate commerce within a federal state and the law of an Agreement which can barely qualify as an organization is senseless. However, the objection— which is sufficient to make

106. Supra note 2.
107. Id. at 1092.
appear the federal law in question as an ideal only - is not enough to render the comparison useless in giving an idea of what direction the regulation of international trade should take. First, as stated above, avoiding state protectionism is the only interest involved in Movement-of-Goods cases and GATT itself doesn't aim at anything else. But second, what makes the "descriptive and prescriptive thesis" of Professor Regan so useful in an analysis of anti-state protectionism is that the main argument he makes for forbidding state protectionism is structural. This makes a comparison between anti-protectionism within a federal state and anti-protectionism in an international trade system with no supra national power much easier.

First and foremost, the main - in fact essential - difference between a federal union and GATT is that GATT has no central legislature with broad powers, enabling it to deal with matters that touch on the general interest of the contracting parties or that contracting parties for some reason cannot deal with effectively on their own. This clearly is a tremendously important factor in putting competitors from different GATT contracting parties in very different competitive positions. The

108. Id. at 1100.
109. Id. at 1102.
110. Id. at 1111.
111. As is the case with the federal government of the United States; See Regan, supra note 2 at 1111.
regulatory environments vary enormously - in almost any field - from country to country, without the possibility of a central legislature stepping-in and providing uniform norms. This makes the comparative advantages of economic competitors in the world economy very dependent on the regulatory environment they enjoy in the countries within which they operate. This allows also a strategic use of regulation - regulation being used not so much because of a genuine concern over the subject matter regulated than to create non-tariff barriers against outside competitors.

However, arguing in favor of the introduction of a central legislature at the world level, even if it would have its authority limited to the economic regulation (sic), would be absurd under actual political conditions. Even within the US, the complexity and pervasiveness of modern economic activity argues strongly against treating the central authority as exclusive. 112 At the world level, the complexity and pervasiveness of modern economic activity argues strongly against having a central authority at all.

The competition between states in their "interventions" in the economy - be it through regulation or otherwise - has to be accepted a priori as a positive consequence of a decentralized system. What we want to avoid is only disruptive competition.

112. Id. at 1112.
Disruptive competition can come under two forms — protectionism being only one of them — both forms asking for different legal regimes to prevent them.

The decentralized regulation of the world economy raises Prisoners' Dilemma issue and a Free Rider issue.

A typical case of Prisoners' Dilemma problem is the case of production pollution regulation. An intervention by an isolated states typically creates a comparative economic disadvantage for this state, and therefore the decentralized political structure of the world economy creates a bias against intervention.

But the decentralization of the world economy does not prevent states from agreeing by Treaty to a uniformization when necessary to deal with matters that touch on the general interest of the states or that states for some reason cannot deal effectively on their own. In absence of agreement, imposing countervailing duties against a non-intervening state in such circumstances except in very specific cases,¹¹³ would be nothing but a wrongful

¹¹³ These cases being the ones where the non-intervening state would refrain from intervening against his own interests. The countervailing state making its own estimation as to what the interests of the non-intervening state are, its decision should be subjected to a motive review; see infra. The main interest of a countervailing decision would be to serve as an incentive for negotiation.
protectionist answer to a problem which should be addressed otherwise.

Second, disruptive competition can also come under the form of Free Riding. In effect, this amounts to a spoiling of the game by a player who is cheating either under the rules or under the spirit of the game. This is what protectionism amounts to in a system devoted to a progressive increase in the freedom of trade. The problem then is one of determining what it is that amounts to protectionism. And here, the case law of the American Supreme Court is very useful: in the American federal system, in contrast to the solution in GATT, the only kind of state actions prohibited under the Dormant Commerce Clause are those purposively protectionist. That a statute has a protectionist effect does not make it protectionist and illegal under US constitutional law.

In GATT – as we have seen – the emphasis in countervailing duty law is on effect, with the need to combine the existence of material injury with the identification of a subsidy. Now, the obligation to identify injury has good screening consequences. But a review of the purpose behind an alleged disruptive subsidy is a necessity for the development of a more coherent system.

In a decentralized world economy, there is need for a system to manage over time bad effects due to imports. However, this is a Prisoners' Dilemma issue, and the legal regime to be developed to
address it - here, mostly a development of the Escape Clause system - should be clearly separated from the regime addressing free riding within the trading system. Free riding then can be effectively addressed only with a development of the procedures to single-out purposively protectionist measures, be they under the form of subsidies or otherwise.

If the most important feature of state protectionism is that it has to be purposive, fighting against protectionism asks for the creation of a system allowing a motive review of allegedly protectionist measures - be they subsidies, countervailing duties, or whatever. Once again, the conclusion is that an improvement in the GATT trading system warrants an improvement in the dispute resolution process. Only with the juridification of this procedure will it be possible to reduce state protectionism under a regime of law.
VI. THE URUGUAY ROUND AND THE NEW GATT

The key to the struggle against state protectionism is to adopt effective procedures allowing for a motive review of allegedly protectionist states' practices. As we have seen, a motive review on states' decisions is impossible as long as the procedure of imposition of countervailing duties remains a purely national one. A state court cannot review the motive of the granting of a "subsidy", or of whatever done by a foreign state; and what it can do, that is, identify a protectionist effect - which is what a state does when it countervails where there is identification of a "subsidy" (which could potentially be anything) plus "material injury" - is only approximating protectionist measures, which sometimes amount to a surpression of comparative advantage.

Clearly, agreeing to set-up a dispute resolution process which would allow to inquire in the motives of state's regulation - or of a state's imposition of a countervailing duty - would require states to be less picky about their sacrosanct sovereignty. Such a motive review would not - anyway - prevent states from adopting protectionist measures if they want to do so. It would only allow a reaction by others merely in legitimate cases, when confronted with an action really protectionist.
The paradox is that such a procedure would probably have in real terms the effect to enhance states' sovereignty. In today's world economy, the economic sovereignty of states is so much challenged by economic decisions made by others that an agreement to check actions voluntarily aiming at exporting a cost onto others can only restore states' sovereignty while improving the openness of the world markets.
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