I first became aware of the General Agreement on Tariffs and Trade ("GATT") on January 1, 1962 — New Year's Day — when everyone else was sleeping off New Year's Eve parties. The fifth, or Dillon Round, of periodic trade negotiations under the auspices of the GATT — the first round in which the European Economic Community ("EEC") had participated as a unit — had essentially been completed, but President Kennedy had not formally signed off on the result of the negotiations. Some time between Christmas 1961 and New Year's Day 1962, Orville Freeman, the U.S. Secretary of Agriculture, had sent a brief to the President, urging him not to accept the outcome of the Dillon Round. In particular, Secretary Freeman urged against acceptance of the nominally separate negotiations under Article XXIV(6) of the GATT, which were supposed to compensate outsiders such as the United States and (at the time) the United Kingdom for disadvantages resulting from the formation of the customs union. Secretary Freeman warned the President that the EEC was creating a Common Agricultural Policy ("CAP") that was protectionist not only in effect but in objective. In his view, the United States, as a major supplier of wheat, corn, and other products of agriculture, had a great deal to lose from the CAP, and should assert its rights — and its power — before it was too late.

On the other side, George Ball, the Under Secretary of State, wanted to avoid a break between the EEC and the United States at all costs. A break over agriculture, he feared, might well doom the "bold new instrument of American trade policy" that President Kennedy was to announce in his State of the Union message a few weeks later,1 a Trade Expansion Act designed to

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1 See PUBLIC PAPERS OF THE PRESIDENTS: JOHN F. KENNEDY 1962 14 (1963). Under Secretary Ball had outlined the need for new negotiating authority "sufficiently broad in scope to meet the opportunity and challenge of the European Community" in a speech to the National Foreign Trade
authorize and stimulate a new round of trade negotiations.

At the time, I was a junior member of the Office of Legal Adviser of the State Department, but as Special Assistant I was supposed to be ready for anything, at any time. This time my job was not to become an expert on GATT, but to gather together the various experts from Geneva, Brussels, and several offices in the State Department and prepare a document in plain English that would persuade President Kennedy to find in favor of State rather than Agriculture. Under Secretary Ball, himself a lawyer, thought a lawyer's brief, freed from the jargon of the GATT experts, would do the job. Of course, Under Secretary Ball wrote the final version of the memorandum put before the President. My role was only to write the first draft.

The outcome was that President Kennedy sided with the State Department. The Dillon Round concluded without an agreement on agriculture, except for some vague reference to further negotiations on the basis of previous negotiating rights. The Trade Expansion Act of 1962 was adopted in the fall of 1962, authorizing the strategy of overcoming the potential diversionary effect of the customs union created by the EEC by reducing all barriers to international trade. On the whole, that strategy was a success, in that the European Common Market did not become a protectionist bloc — agriculture excepted. As for the CAP, it formally entered into effect on July 1, 1962, without serious challenge.

At the time, I knew too little, and like any lawyer, was easily persuaded of the correctness of my client's position. Over the years, as I learned more about the subject and moved from the


2 Note that at the time there was no Office of U.S. Trade Representative. That office, originally known as the Office of the Special Representative for Trade Negotiations (“STR”), was created at congressional initiative in the Trade Expansion Act of 1962, precisely to provide a balance between competing domestic and international interests in formulating U.S. trade policy. See Trade Expansion Act of 1962, Pub. L. No. 87-794, § 241, 76 Stat. 872, 878 (1962).


4 See generally Trade Expansion Act of 1962.
role of advocate to the role of academic observer, I have often
wondered whether the State Department’s position, and President
Kennedy’s acceptance of that position, was right.

As a legal matter, the proposed challenge to the CAP would
have been fairly persuasive. The centerpiece of the CAP was the
variable levy, in effect a duty on imports measured not by their
price or value, but by the difference between their price and the
“threshold price” related to a target price determined solely by the
EEC.\(^5\) Article VII of the GATT says that tariffs are to be based
on actual value of imported merchandise — the reverse of the
variable levy, which increases as the import price falls. Further-
more, under Article II of the GATT, duties are supposed to be
bound, or at least eligible to be bound, pursuant to negotiation;
by definition the variable levy does not lend itself to binding.
Finally, even if the variable levy and associated devices were not
technically in violation of Article XI, which (with some excep-
tions) prohibits quantitative restrictions, a policy aimed at
autonomy and indeed autarchy was surely contrary to the spirit
of the GATT.\(^6\)

The CAP was clearly central to the European Common
Market, and the variable levy was central to the CAP. If the
European Communities (as they were then called) had to choose
between complying with the GATT and insisting on its design for
the CAP, one can well imagine that the CAP would have
prevailed, and the GATT would have been gravely wounded.

In any event, the challenge that Secretary Freeman wanted to
bring was never brought.\(^7\) It could certainly be said that in the
tension between GATT as a code of rules and the GATT as a

\(^5\) For a detailed and roughly contemporaneous account of the variable levy
system, see Kenneth W. Dam, *The European Common Market in Agriculture*, 67

\(^6\) *Cf.* John H. Jackson, *World Trade and the Law of GATT* 520-21
(1969). Jackson wrote that “spiritual violations” do not assume the status of
concrete inconsistencies with the GATT — a statement that I might not have
agreed with. *Id.* He was surely correct, however, in pointing out that in the
context of the CAP “the law has not kept pace with the technology of trade
protection.” *Id.*

\(^7\) A largely symbolic surrogate challenge was brought by the United States
in the fall of 1963, the so-called Chicken War, which ended in a partial victory
for the United States in that it was permitted to raise some duties by way of
retaliation, but did nothing to alter, or even criticize, the CAP. *See 2 Abram
Chayes ET AL., INTERNATIONAL LEGAL PROCESS* 249 (1968).
In each round, the CAP was a major source of contention, and in each round the parties decided at the end — the very end — to settle for a modest improvement and not to risk sacrificing the greater achievements in other areas for the sake of agriculture or principle.

All of this is well known. Yet, everyone likes to play “what if...?” On one hand, the CAP of the EEC, which had not formally entered into effect as of early 1962, became entrenched and led to an ever greater misallocation of resources, as well as a continuing drain on the budgets of all the member states of the EEC. Moreover, there is no denying that the tolerance of the CAP by the United States and other outsiders led to some measure of loss of respect for the GATT as a source of law. What if the United States had made a serious effort in 1962 to understand the CAP, and had insisted on regular negotiation of the target price for wheat and feed grains, the major determinants of the many elements of the CAP? What if the target prices had been subject to international scrutiny each time a new member state was admitted to the EEC? Would Europe’s agricultural system today be more rational, more efficient, more consistent with the doctrine of comparative advantage?

On the other hand, would the maturing of the GATT have

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8 See, e.g., IF IT HAD HAPPENED OTHERWISE, (J.C. Squire ed., 1932) (containing contributions by Winston Churchill, If Lee Had Not Won the Battle of Gettysburg; Harold Nicolson, If Byron Had Become King of Greece; André Maurois, If Louis XVI Had Had an Atom of Firmness; and eight other essays in similar vein).

9 As of summer 1962, France’s threshold price for wheat was 66% above the landed price for imports, and Germany’s threshold price was about 106% above landed prices. See GERARD CURZON, MULTILATERAL COMMERCIAL DIPLOMACY 204 (1965).
been frustrated before it really got started? After all, the growth from a fragile forum for tariff cutting and tariff binding into a full-fledged organization with rules, adjudication and enforcement powers, and an ever widening jurisdiction, took more than thirty years as it was. We will never know. The footnote to history which I have described here, however, may serve as a reminder that the development of the international law of international trade has not been along an inevitable path. There were in fact, quite a few forks in the road. A friend of mine advises: "When you see a fork in the road, take it." That is what President Kennedy did in 1962. The rest is history.10

10 I have not seen the Freeman-Ball contest for the mind of President Kennedy discussed in any book or article, either about President Kennedy or about the trade negotiations. See, e.g., JOHN W. EVANS, THE KENNEDY ROUND IN AMERICAN TRADE POLICY 146-47 (1971); ERNEST H. PREEG, TRADERS AND DIPLOMATS 39-56 (1970); ARTHUR M. SCHLESINGER, JR., A THOUSAND DAYS 846-47 (1965); THEODORE SORENSEN, KENNEDY 410-12 (1965). Nor does Under Secretary Ball mention it in his memoirs. See GEORGE BALL, THE PAST HAS ANOTHER PATTERN (1982). The suggestion that an opportunity was missed to tighten agricultural trade rules in the Dillon Round before finalization of the CAP is made "with the benefit of hindsight" in ROBERT L. PAARLBerg, FIXING FARM TRADE 47 (1988), but without reference to the debate within the U.S. administration in the early months of 1962.

As for Secretary Freeman, by March 1962, he had gotten the message, though perhaps with a hint of uneasiness. In testifying in favor of the Trade Expansion Act before the House Ways and Means Committee, Secretary Freeman said:

The Common Market poses the biggest and most immediate challenge in our efforts to keep open the flow of our farm products to foreign consumers... We have gone about as far as we can go in our negotiations with the Common Market under existing legislation.... An important element of [the common agricultural] policy with which we have to deal is a system of variable import levies.... This system can be used to promote a policy of self-sufficiency. This is the root of our problem in negotiations with the EEC....

From the point of view of American agriculture, we must be very firm in negotiations with the Common Market, making sure we get full value for every concession we make. Perhaps the biggest test of Atlantic trade cooperation in the next few years is going to be the test of agricultural trade policy....
We must throw our weight behind those forces in Western Europe who argue that heavy import duties will be detrimental to their own economic interest.