Hunger, Agricultural Trade Liberalization, and Soft International Law: Addressing the Legal Dimensions of a Political Problem

by

Jonathan Carlson

Originally published in IOWA LAW REVIEW
70 IOWA L. REV. 1187 (1985)

Hunger, Agricultural Trade Liberalization, and Soft International Law: Addressing the Legal Dimensions of a Political Problem

*Jonathan Carlson**

Solving the multifaceted problem[1] of world hunger requires an understanding of the forces that fuel global hunger and an identification of international policies that will assist in overcoming the causes of hunger.[2] Yet by itself recognition of the conditions underlying hunger, even international agreement on a response to those conditions, will not guarantee success in combating the hunger problem. Success depends also on the international community's ability to influence national behavior and ensure that individual nations act consistently with those policies adopted by the international community to assist in eradicating hunger. In this context as in others, conforming national conduct with international goals is a slow and arduous process, often impaired by domestic political pressures that induce nations to act contrary to international objectives.

Law is critical to the process of transforming international ideals into reality. As this Symposium on Law and World Hunger recognizes, even

---

* Associate Professor of Law, University of Iowa College of Law. B.A. 1976, McGill University; J.D. 1979, University of Chicago. I am appreciative of the helpful comments of Professors Burns Weston and Steven Burton. Of course I bear sole responsibility for the contents of this article, especially any errors or analytical weaknesses therein.

1. The problem of global hunger actually consists of a set of separate, but interrelated, food problems: chronic food shortages in certain regions, undesirable instability in food supplies leading to excessive price and supply fluctuations, insecurity of food imports in nations which must rely on such imports, low agricultural productivity, and chronic malnutrition among the poorer classes in many nations. *See* Hopkins & Puchala, *Perspectives on the International Relations of Food*, 32 INT'L ORG. 581, 582-83 (1978).

2. The primary source underlying global hunger is poverty and underdevelopment in Third World nations. There does not appear to be an insurmountable global shortage of food or food-producing capacity. *See generally* FOOD AND AGRICULTURE IN GLOBAL PERSPECTIVE 10 (T. Miljan ed. 1980) [hereinafter cited as Miljan]; Austin, *Institutional Dimensions of the Malnutrition Problem*, 32 INT'L ORG. 811 (1978); Christensen, *World Hunger: A Structural Approach*, 32 INT'L ORG. 745, 745-49 (1978); Eicher, *Facing Up to Africa's Food Crisis*, 61 FOREIGN AFF. 151, 156 (1982); Hopkins & Puchala, *supra* note 1, at 595; Timmer, *Food Aid and Malnutrition*, in ECONOMICS, STATISTICS, AND COOP. SERVS., U.S. DEP'T OF AGRIC., INTERNATIONAL FOOD POLICY ISSUES, A PROCEEDINGS 29 (Foreign Agricultural Economic Report No. 143, 1978). *But see* McNamara, *Time Bomb or Myth: The Population Problem*, 62 FOREIGN AFF. 1107, 1115-19 (1984) (rapid population growth perhaps most significant factor pressing food supplies and impeding Third World development).

the most propitious international policy goals tend to fail when they are not supported by international legal norms that can influence national behavior. Developing solutions to global hunger therefore requires not only an identification of sound international policies, but also an understanding of how legal norms can assist or detract from the effective implementation of those policies when domestic political pressures are present that propel nations toward actions contrary to international goals.[3]

The conflict between national and international policies, and the importance of international legal norms in overcoming that conflict, is particularly vivid in the area of international agricultural trade. Agricultural

---

3. When used in this paper the term "international legal norm" means any prescriptive communication embodying values or demands for international behavior, whether those values or demands are expressed as rules, principles, standards, or guidelines. A prescriptive communication, which in my view is essential to identify a norm as a "legal norm," is one which designates policy in some fashion, is viewed by the target audience as emanating from an authoritative source, and creates some expectation in the target audience that the policy content of the communication is intended to be controlling—that is, that the values stated in the communication are meant to be adhered to. *See generally* McDougal, Lasswell & Reisman, *The World Constitutive Process of Authoritative Decision*, in INTERNATIONAL LAW ESSAYS 191, 274 (S. McDougal & W. Reisman eds. 1981). The term "norm" itself may be used to refer to both directives "that coerce as well as those that seek voluntary compliance." P. SOPER, A THEORY OF LAW 17 (1984) (noting broad use of the term norm, but adopting a narrower interpretation); *see, e.g.*, J. RAZ, THE CONCEPT OF A LEGAL SYSTEM 121-40 (1970). The broad definition of a legal norm used here does not necessarily require a norm to be accepted as absolutely binding in order for it to have legal effect. *See infra* text accompanying notes 54-75.

Within the broad category of legal norms, it is common to attempt to distinguish among types of norms. For example, legal norms that are quite clear in terms of the behavior they demand or forbid, or which have a fairly settled "core" content, have been termed "rules." *See, e.g.*, Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-89 (1976); Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 838-39 (1972). By contrast, norms that more vaguely state a behavioral model have been termed "standards." *See* Kennedy, *supra*, at 1687-89. There are also numerous efforts to distinguish in the broad category of norms those that are "principles" from those that are "rules." *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 22-28, 71-80 (1977); Raz, *supra*, at 838.

This Article attempts similar distinctions among norms, using the broad categories "hard law" and "soft law." *See infra* text accompanying notes 54-67. The distinction focuses on the clarity of the content of a norm and the strength of the command to comply with it, a distinction not unlike the distinction sometimes drawn between rules and other types of legal norms. *Cf.* Kennedy, *supra*, at 1687-89 (rules vs. standards); Raz, *supra*, at 838 ("Rules prescribe relatively specific acts; principles prescribe highly unspecific actions."). This categorization is made, of course, with due recognition that no bright lines can be drawn among legal norms on the basis of their clarity or strength, characteristics that fall on a continuum rather than into rigid categories. *See infra* text accompanying note 68; *see also* Raz, *supra*, at 838 (distinction between rules and principles is "one of degree"). Nevertheless, such a categorization can provide a useful tool for analysis and discussion if one accepts at the outset that norms will not fall neatly into one category or another, but instead will have characteristics that are more or less like those associated with one category or another.

trade reform, particularly the liberalization of the agricultural trade policies of developed countries, is one of the international community's most widely accepted aims in the struggle against world hunger.[4] Despite international endorsement of this goal, however, its attainment has proved intractably difficult. The General Agreement on Tariffs and Trade (GATT), through which the international community has sought to achieve trade liberalization, has generally failed in the agricultural sector.[5] Moreover, the developing nations' response to GATT's failure, to wit, the New International Economic Order (NIEO), while it has had limited diplomatic success,[6] has not resulted in substantial liberalization of developed nation agricultural trade policies.[7]

---

4. A broad consensus on this goal is revealed in a recent compilation of United Nations materials on the hunger problem. *See* Miljan, *supra* note 2. For example, the necessity for liberalized agricultural trade policies in developed nations has been recognized by the United Nations Food and Agricultural Organization, *id.* at 186-87, Australia, *id.* at 246-47, Argentina, *id.* at 247, Poland, *id.* at 248, and the European Community (implicitly), *id.* at 248-49. *See also* GATT, Ministerial Declaration, Adopted on 29 November 1982, 29 B.I.S.D. Supp. 9, 11-12, 16-17 (L/5424) (1983); GATT, Report Presented to the Contracting Parties at their Thirty-ninth Session, 30 B.I.S.D. Supp. 72 paras. 8, 10, 14, 55 (L/5580) (1984); *cf.* TRADE & DEV. BD., COMM. ON COMMODITIES, U.N. CONFERENCE ON TRADE & DEV., REPORT BY THE UNCTAD SECRETARIAT ON INTERNATIONAL ARRANGEMENTS FOR INDIVIDUAL COMMODITIES WITHIN AN INTEGRATED PROGRAMME 9 (TD/B/C.1/188) (July 8, 1975) (recognizing importance of agricultural trade liberalization even in context of international management of commodity trade). Following the world food crisis of the early 1970's liberalization was among the proposals endorsed by the international community to combat global hunger problems. Res. 19, Report of the World Food Conference, Rome, U.N. Doc. E/CONF.65/20 (1974), *reprinted in* 1 THE WORLD FOOD SITUATION 455, 474-75 (J. Willett ed. 1976).

5. *See* K. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 257 (1970); R. HUDEC, *Adjudication of International Trade Disputes*, in THAMES ESSAY NO. 16, at 15-20 (1978). *But cf.* SPECIAL ADVISORY PANEL TO THE TRADE COMM. OF THE ATL. COUNCIL, GATT PLUS—A PROPOSAL FOR TRADE REFORM 25-30 (1976) [hereinafter cited as ATL. COUNCIL] (substantial number of agricultural products move in ordinary channels of trade under GATT rules, but many important products are not subject to GATT disciplines).

6. Part IV of the GATT, for example, endorses the NIEO principle of nonreciprocity in trade negotiations between developed and developing countries. *See* Protocol Amending the General Agreement on Tariffs and Trade to Introduce a Part IV on Trade and Development, Feb. 8, 1965, 17 U.S.T. 1977, T.I.A.S. No. 6139, 572 U.N.T.S. 320 (entered into force June 27, 1966) [hereinafter cited as Protocol]. The Generalized System of Preferences was first approved by GATT waiver, R. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 210-11 (1975), then finally endorsed after the Tokyo Round trade negotiations. GATT, Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries, 26 B.I.S.D. Supp. 203 (L/4903) (1980).

7. *See generally* A. BORRMANN, C. BORRMANN & M. STAGGER, THE ECs GENERALIZED SYSTEM OF PREFERENCES 179-80 (1981); W. CLINE, N. KAWANABE, T. KRONSJÖ & T. WILLIAMS, TRADE NEGOTIATIONS IN THE TOKYO ROUND: A QUANTITATIVE ASSESSMENT 221 (1978); A. YEATS, TRADE AND DEVELOPMENT POLICIES 2, 74-79 (1981); A. YEATS, TRADE BARRIERS FACING COUNTRIES 113-15, 127-43, 151-60 (1979); *cf.* Sawyer & Sprinkle, *Caribbean Basin Economic Recovery Act*, 18 J. WORLD TRADE L. 429, 435-36 (1984) ("In quantitative terms the increase in economic activity in the region attributable to the CBERA

The failure of the GATT and the continuing ineffectiveness of the NIEO have produced numerous demands for a major renegotiation of the legal framework that governs international agricultural trade policy.[8] Most proponents of revised norms for international agricultural trade regulation probably would prefer norms that evince a clear commitment to the behavioral values sought to be implemented.[9] But reformers often accept or endorse less firm approaches to reform, premised on the adoption of "understandings"[10] or principles and goals to be "implemented . . . through general consultation."[11] The developing nations in particular have been willing to pursue NIEO objectives by adopting vague and weak international norms[12] often described as international economic soft law.[13]

---

will in all probability be minuscule.").

8. Proposals for reform tend to focus on the substantive content of rules, *see, e.g.*, ATL. COUNCIL, *supra* note 5, at 25-30; Cuddy, *The Common Fund and Earnings Stabilization*, 12 J. WORLD TRADE L. 107 (1978), or on the necessity for procedural and institutional changes in the legal order governing trade relations, *see, e.g.*, Harris, *The Post-Toyko Round GATT Role in International Trade Dispute Settlement*, 1 INT'L TAX AND BUS. LAW. 142, 157-76 (1983); Ibrahim, *Developing Countries and the Tokyo Round*, 12 J. WORLD TRADE L. 1, 26 (1978); Jackson, *The Crumbling Institutions of the Liberal Trade System*, 12 J. WORLD TRADE L. 93 passim (1978).

9. The desirability of clear rules is not, however, uncontested. While early GATT negotiations focused on formulating specific, binding rules to govern international trade relations, *see* R. HUDEC, *supra* note 6, at 6-7, later events led to an increasing conviction that legal rules were an undesirable basis upon which to resolve trade policy disputes. *Id.* at 263-64. As a result, international behavior under GATT has often reflected conflict between nations favoring a "legalist" approach to GATT—which focuses on the promulgation of clear rules and their enforcement through an adjudicatory procedure—and an "antilegalist" approach—which prefers consultation and negotiation with norms serving only as guidelines for discussion. Hudec, *GATT Dispute Settlement After the Tokyo Round: An Unfinished Business*, 13 CORNELL INT'L L.J. 145, 151 (1980); *see also* K. DAM, *supra* note 5, at 3-5. Professor Dam argues that both "legalism" and "pragmatism" are based on a "naive" view of law as substantive rules only and that GATT's history reflects increasing recognition of the importance of procedures in international trade regulation. *Id.* at 4-5. Certainly, well-developed institutional and procedural mechanisms are critical to the success of international legal organizations. But it is clear that substantive rules also have importance. *See* R. HUDEC, *supra* note 5, at 23-24. Even in a system that relies primarily on consultation and negotiation to resolve trade disputes, outcomes will differ according to whether negotiation proceeds with reference to agreed norms and rules or with reference to the political power of the conflicting parties. *See* Jackson, *The Birth of the GATT-MTN System: A Constitutional Appraisal*, 12 LAW & POL'Y INT'L BUS. 21, 27-28 (1980).

10. ATL. COUNCIL, *supra* note 5, at 75-76 app. A (containing Illustrative Text of Proposed Code of Trade Liberalization, sec. VI, pt. B, para. 1).

11. ORG. FOR ECONOMIC CO-OPERATION AND DEV., PROBLEMS OF AGRICULTURAL TRADE 132 (1980) [hereinafter cited as OECD 1980].

12. *See, e.g.*, Protocol, *supra* note 6; *see also* R. HUDEC, *supra* note 5, at 43-44. Advocates of the NIEO appear willing to treat even the vaguest adherence to their principles as diplomatic victory and progress. *See, e.g.*, Miljan, *supra* note 2, at xi-xii.

13. *See generally* Seidl-Hohenveldern, *International Economic "Soft Law"*, 163 RECUEIL DES COURS 165 (II 1979).

This Article examines, in the context of agricultural trade, the twin problems of developing sensible policies that can assist in combating world hunger and of devising international legal norms that can effectively assist in the implementation of such policies. The basic thesis of the Article is that the international community's past reliance on soft international economic law to implement its policies toward agricultural trade has impeded its ability either to make those policies effective or to adopt sensible alternative strategies for confronting international agricultural trade problems. Beginning with the assumption that the purpose of any international economic regulatory structure is to create pressures that will influence governments to act in conformity with international policy goals[14] the Article first argues that the legal characteristics of the international norms contained in a regulatory structure—principally the clarity and obligatory strength of those norms—can profoundly influence the general effectiveness of the regulatory structure.[15] Norms that do not provide clear guidance to the nations accepting them or that are said to be nonbinding legally, including norms of international economic soft law, are not likely to produce significant alterations in national behavior. When norms are firmer—when their policy content, behavioral standards, or obligatory character are clearer—they are more likely to influence national behavior.

This argument is then examined in the context of the world hunger problem. Section II of the Article discusses the goal of agricultural trade liberalization, its importance to the international community's efforts to combat hunger, and GATT's failure to achieve liberalization.[16] Section III of the Article evaluates the critical role soft law has played in the GATT's continued ineffectiveness in the agricultural sector.[17] The final section of the Article examines the lessons of this analysis of soft law and suggests that continued international reliance on norms of soft law to resolve difficult issues of agricultural trade policy will not improve national behavior or worldwide agricultural trade conditions.[18] To the contrary, such reliance may interfere with efforts to devise effective international agricultural trade policies and may impede international resolution of agricultural trade policy disputes, a result that will hinder efforts to combat hunger.

I. Law and Soft Law in International Economic Relations

Skepticism about the capacity of international law to influence world affairs is often expressed by those attributing overriding significance to domestic political pressures in their explanations of the international community's general failure to liberalize international agricultural trade.[19] This

14. Hudec, *supra* note 9, at 149; *see also* K. Dam, *supra* note 5, at 5.
15. *See infra* text accompanying notes 19-88.
16. *See infra* text accompanying notes 89-171.
17. *See infra* text accompanying notes 172-380.
18. *See infra* text accompanying notes 381-401.
19. Some commentators believe that domestic impediments to agricultural trade

section of the Article examines the shortcomings of that position, the symbiotic relationship between the effectiveness of international law and domestic political processes, and the effect of that relationship on national conduct. The concept of soft international law and the ability of soft legal norms to influence national behavior then is examined.

A. Political Will and Agricultural Trade

Deep-rooted political support for domestic agricultural policies often has had international repercussions. In substantial part, the international agricultural trade policies pursued by developed nations are a response to the needs of their domestic agricultural programs, particularly the income maintenance orientation of many of those programs.[20] For example, certain congressional farm policies of the 1950's violated key GATT provisions that had been tailored to accommodate the earlier domestic policies of the United States.[21] The executive branch responded by seeking and receiving a waiver from the relevant GATT rules. That waiver has continued in place for three decades and is justly blamed for much international unwillingness to comply with GATT.[22] Similarly, the domestic political difficulties attending European economic unity generated the European Community's common agricultural policy,[23] perhaps the single most disruptive farm policy currently affecting world trade.[24] Both the United States'

---

liberalization are almost absolute. *E.g.*, Comment, *United States/Common Market Agricultural Trade and the GATT Framework*, 5 NW. J. INT'L L. & BUS. 326, 347 (1983): "In a world of sovereign states, political leaders look to help their own before seeking to benefit mankind in general. No electorate will accept a policy promising to leave domestic producers at the mercy of more efficient foreign competitors." Of course, such rhetoric ignores a great deal. The electorate may well choose to open national borders to imports if the result would be lower prices at home and greater market access abroad for domestic producers. What is telling about this type of comment, however, is the degree to which it reflects the view that political interests in agriculture have veto power over any movement toward liberalization, no matter how beneficial liberalization would be. Other commentary is more restrained, but still appears to regard political interests as a near absolute bar to trade liberalization. *See, e.g.*, Boger, *The United States-European Community Agricultural Export Subsidies Dispute*, 16 LAW & POL'Y INT'L BUS. 173, 178 (1984): "The national security importance of farm production and the political powers of farmers on both sides, however, make it very difficult for either the U.S. or the Community to reduce agricultural support programs that promote exports."; *see also* Houck, *U.S. Agricultural Trade and the Tokyo Round*, 12 LAW & POL'Y INT'L BUS. 265, 269-70, 276-82 (1980). On the political power of agricultural interests, see generally H. GUITHER, THE FOOD LOBBYISTS (1980). For a review of the political influence of both consumer and producer interests on the European Community's agricultural policies, see R. FENNELL, THE COMMON AGRICULTURAL POLICY OF THE EUROPEAN COMMUNITIES 63-67 (1979). My intent is not to deny the importance of political forces, only to suggest that their impact is not absolute and that GATT's failures cannot be blamed entirely on political factors.

20. *See infra* text accompanying notes 90-98.

21. *See infra* text accompanying notes 180-82.

22. J. JACKSON, WORLD TRADE AND THE LAW OF GATT 736-37 (1969).

23. R. HUDEC, *supra* note 6, at 195-202.

24. Although the EC is little different than most developed countries in its protec-

waiver and the common agricultural policy of the European Community are testimony to the fact that international legal norms mandating trade liberalization will not always overcome domestic political pressures that oppose trade liberalization.[25]

It might be tempting to conclude, therefore, that the ineffectiveness of international rules in liberalizing agricultural trade is entirely a consequence of domestic political pressures and that illiberal agricultural trade practices may be explained solely by the absence of political will to implement the international goal of liberalized trade in the face of domestic interests opposing that objective. Although this view cannot be proved or disproved empirically, there are sound reasons to doubt arguments that blame the failure to achieve agricultural trade liberalization *solely* on the political power exercised by the developed-country (or OECD)[26] farm interests. Political pressure forced the compromise of nonagricultural international trading rules in the early post-war period without undermining those rules as completely as in agricultural trade.[27] Moreover, declining farm populations and concomitant declines in the political power of agricultural interests in developed countries[28] have not been accompanied by a renewed practical commitment to trade liberalization or to the

---

tionist attitudes toward domestic producers, its heavy reliance on export subsidies to dispose of large agricultural surpluses has been responsible for much recent friction in agricultural trade. *See* INTERNATIONAL MONETARY FUND, WORLD ECONOMIC OUTLOOK 153 (Occasional Paper No. 27, supplementary note 6, 1984); *see also* Boger, *supra* note 19, at 173-76.

25. The belief that domestic protectionist sentiments *can* be overcome, at least partially, is implicit in efforts to negotiate agricultural trade reform. The question is how best to accomplish that goal, recognizing that domestic political considerations will affect a nation's international behavior.

26. When used in this Article "OECD" is intended to refer generally to developed market economy countries. The Signatories of the Convention on the Organization for Economic Co-operation and Development (OECD) are Austria, Belgium, Canada, Denmark, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. *See* Convention on the Organization for Economic Co-operation and Development, Dec. 14, 1960, 12 U.S.T. 1728, T.I.A.S. No. 4891, 888 U.N.T.S. 179. Japan, Finland, Australia and New Zealand also have acceded to the Convention. *See* U.S. DEP'T OF STATE, TREATIES IN FORCE 230 (Jan. 1, 1985).

27. *See infra* text accompanying notes 189-93, 225-29.

28. In the United States, for example, the political base of agriculture "was both weakening and changing" during the 1950's and 1960's. "Most important was the rapid decline in farm population: from 25% of the American total in the early 1930's (when farm commodity programs were inaugurated), to 15% in 1950, 9% in 1960, and below 5% in the 1970's. Fewer farmers and congressional redistricting meant reduced congressional support for farm commodity programs, particularly in the House of Representatives." Destler, *United States Food Policy 1972-1976: Reconciling Domestic and International Objectives*, 32 INT'L ORG. 617, 620 (1978). Similar changes in farm population have occurred in Europe and Japan. *See* A. LOWENFELD, PUBLIC CONTROLS ON INTERNATIONAL TRADE DS-754, Table II-1 (2d ed. 1983) (international comparisons of economic performance, Japan and major Western industrialized countries).

GATT.[29] This raises at least some doubt that GATT's weakness is solely the consequence of domestic political forces.

The "political will" explanation of GATT failures also cannot be squared with the growing recognition in most OECD nations that trade liberalization often would be the best approach to domestic farm policy. The United States has recognized increasingly that its comparative advantage in agriculture requires an open agricultural trading system.[30] Yet, despite the declining power of agricultural interests in the United States, the government has been unable to fully liberalize its own international policies or to secure international liberalization. The OECD, too, has come to recognize that agricultural trade liberalization would solve many of the domestic problems that generate support for protectionism and other trade-distorting measures;[31] the developed nations as a group, in fact, regularly call for liberalization.[32] But these exhortations are not accompanied by

---

29. For example, a recent report by a group of Japanese economists and political scientists concluded that Japan's rate of protection for agricultural products rose from 15% in 1955, to over 45% in 1980. *See, e.g., Country Briefs*, in FOREIGN AGRIC., Mar. 1984, at 20, 21; *see also* W. COYLE, JAPAN'S RICE POLICY 1-5 (Foreign Agricultural Economic Report No. 764, USDA, 1981). During the 1960's, the level of agricultural protection in the EC soared dramatically. *See* Malmgren & Schlechty, *Rationalizing World Agricultural Trade*, 4 J. WORLD TRADE L. 515, 517 (1970).

30. *See, e.g.*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, TWENTY-SIXTH ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 1981-1982, at 13-17 (1982) [hereinafter cited as ANNUAL REPORT]; *see also* COMM'N ON INT'L TRADE AND INV. POL'Y, UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD, REPORT TO THE PRESIDENT 154 (1971) [hereinafter cited as REPORT TO THE PRESIDENT]. *But see* Wadley, *The Future of Government Regulation of Agriculture: Biting the Hand that Feeds Us*, 1983 N. ILL. L. REV. 299, 311 (1983) (arguing that United States farm policies should continue to protect family farms).

31. *See* OECD 1980, *supra* note 11. Trade liberalization would raise and stabilize prices for most temperature zone farm products. The OECD has therefore argued:

> [T]he arsenal of protective measures devised by practically all countries in favor of their producers would probably become unnecessary in most of the cases, for some commodities at least, if all countries were to act together to reduce them and eventually to eliminate them . . . . [E]fficient and low-cost producers in the world could greatly benefit from lower (or, no) protection in high-cost countries, without this situation causing undue adjustment difficulties to the majority of importing countries. In fact savings in export subsidies which would result from such free trade could be used in some cases to compensate for any reduction in farmers' incomes . . . .

Id. at 104-05. The hitch, of course, is obtaining simultaneous action toward liberalization. It is here that international law holds the greatest promise of contributing to agricultural trade improvements. *See infra* text accompanying notes 41-46. It is here that it has failed. *See infra* text accompanying notes 250-79.

32. *See, e.g.*, GATT, Ministerial Declaration, *supra* note 4. The European Community, however, often appears to favor a management approach to agricultural trade reform. *See* Comment, *supra* note 19, at 337-38. At the Tokyo Round, for example, the EC's primary objective in the agricultural sector was the negotiation of commodity agreements to manage trade in particular products. J. JACKSON, J.-V. LEWIS & M. MATSUSHITA, IMPLEMENTING THE TOKYO ROUND 26 (1984).

practical action. In view of the widespread support for liberalization, the ability of liberalization to mitigate many of the domestic problems that lead to trade intervention, and the declining political power of agricultural interests in OECD nations, blaming GATT failures on domestic political factors alone is too simplistic. To acknowledge the role these factors play need not lead one to deny the additional influence of law.

In fact, international law does influence the behavior of nations, including behavior in their economic relations. Although it is somewhat artificial to attempt to isolate the impact of law from the impact of the social, economic, and political factors that shape nation-state behavior, the effort facilitates an understanding of law's unique function as an international policy tool. In what follows, I attempt this separation, focusing on international law as a set of legal norms and examining the manner in which the characteristics of international legal norms can affect their ability to influence the international political process and the behavior of nation-states within that process.[33]

B. International Law and the Implementation of International Policy

International law and national political behavior are symbiotically related: to a certain extent each influences and is influenced by the other.[34]

---

33. This theoretical treatment of international law as a set of legal norms focuses its analysis on those norms and on the categorization of such norms according to the degree to which they clearly state the values they embody and the obligation of nations to adhere to those values. This analysis is, I think, consistent with theoretical frameworks that treat international law itself as a process of prescription and application, rather than a set of norms. For example, when one discusses the manner in which a norm is formulated (i.e., the clarity of its substantive content or the command to obey it), one is discussing what some process theorists have called "the final strategic sequence of prescription [which] involves communication to the target community of the policy content of the prescription, activation of authority signals, and the modulation of credible control intentions." McDougal & Reisman, *The Prescribing Function in the World Constitutive Process: How International Law is Made*, 6 YALE STUD. WORLD PUBLIC ORD. 249, 284 (1980). Such communication "involves a set of techniques . . . aimed at creating shared common subjectivities in the target audience." *Id.* The contention developed in this Article is that norms characterized by vaguely stated behavioral values and weak commands for compliance are less likely to influence nation-state behavior than norms characterized by clearer behavioral standards and commands. That the verbal formulation of prescriptive communication will affect the outcomes it generates is not at all inconsistent with process theory. *Cf.* Reisman, *Sanctions and Enforcement*, in 3 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER: CONFLICT MANAGEMENT 273, 307 (C. Black & R. Falk eds. 1971) ("The verbal formulation of a decision can at times soften a material loss; conversely, a bluntly worded judgment, though precipitating long-range prescriptive effects, may force a litigant to repudiate the decision.") Indeed, my contentions concerning soft law could be restated as a criticism of various techniques for communicating prescriptions within the international community. The particular weaknesses that I identify in norms of soft law are basically analogous to weaknesses in the articulation by a prescriptive communication of a policy content or the creation of control expectations in the target audience.

34. Some commentators take the position that international law and the political pro-

This relationship is important to international trade affairs because it presents the possibility of formulating international legal norms that will discourage national conduct that inhibits attainment of international goals and encourage conduct that promotes international policies. When domestic political pressures propel a nation toward undesirable international behavior, a well-formulated international legal norm can alter the outcome of the domestic political process by creating foreign policy reasons for nations to adhere to the norm and corresponding domestic pressures for national compliance with the norm.[35]

On the broadest level, an international legal norm can promote international goals by increasing the political power of domestic interests that support internationally desired conduct.[36] Some domestic groups and decisionmakers favor compliance with international law simply because they value international order;[37] the mere existence of an international rule will align these groups in opposition to national policies contravening it.[38] Other domestic interests may favor particular international policies because adherence to those policies serves their economic, political, or ideological interests.[39] To the extent that international norms embodying

---

cess cannot meaningfully be divorced from one another. *See* McDougal, *International Law, Power and Policy: A Contemporary Conception*, 82 RECUEIL DES COURS 137 (1953). I find more congenial the limited observation that "legal activity has political significance." Hoffman, *The Study of International Law and the Theory of International Relations*, 57 AM. SOC. INT'L L. PROC. 26, 33 (1963).

35. L. HENKIN, HOW NATIONS BEHAVE 39-87 (2d ed. 1979).

36. *See generally id.* at 60-68.

37. *Id.* Quite apart from general national desire for a good international reputation, law has a moral force that induces persons to honor it.

> The ultimate explanation of the binding force of all law is that man, whether he is a single individual or whether he is associated with other men in a state, is constrained, in so far as he is a reasonable being, to believe that order and not chaos is the governing principle of the world in which he has to live.

J. BRIERLY, THE LAW OF NATIONS 56 (6th ed. 1963). Professor Henkin adds the parochial observation that "[w]hether it be virtue or vice, the people of the United States have had moral, perhaps moralistic, attitudes toward their relations with other nations, and respect for international law has been included in that morality." L. HENKIN, *supra* note 35, at 62. There is no reason to believe that other participants in the GATT do not share this predilection, at least to a certain extent. Domestic elites may also support international law by virtue of their training or their position in an institutional organization the existence of which rests in some respect upon international law: for example, the Legal Advisors Office in the State Department or the United States Special Trade Representative. *See generally id.* at 64-65.

38. L. HENKIN, *supra* note 35, at 63-64. Political competition within a nation will also generate pressures for national compliance with international law. "An opposition party, an independent and umbiquitous press, a scholarly community, various pressure groups—all vigilant to criticize the government—will also seize on violations of international law . . . ." *Id.* at 64.

39. For example, "some groups, like importers, . . . have a direct stake in resisting trade restrictions." Schwartz, *The Social Costs of Intervention*, in NON-TARIFF BARRIERS AFTER THE TOKYO ROUND 79, 84 (J. Quinn & P. Slayton eds. 1982).

these policies are clear, these groups have more powerful arguments to support national action consistent with the policies than they would in the absence of the norm.[40]

An international norm may also serve as a catalyst to stimulate and solidify domestic political support for the policy it embodies by clarifying and formalizing the benefits expected from adherence to that policy. For example, one of the most powerful arguments supporting liberal international trade policies is that, through the law of comparative advantage, an open trading system ultimately will assist export industries and promote general national well-being in all nations.[41] But, for some, the force of this argument depends on the assumption that other nations also will reduce trade barriers and eliminate trade distorting practices.[42] Absent some credible guarantee that other nations will adhere to open trade policies, protectionist interests would generally prevail in domestic policy disputes. The existence of international norms mandating liberal trade policies can give credibility to the assumption of favorable action by other nations,[43] and serve as "a means of counteracting the advantage that producer (protectionist) interests enjoy in the 'normal' political process."[44] By providing some guarantee of foreign market access to domestic producers, international norms mandating free trade permit "domestic producer interests to trade less success in their own political process for greater success in the political processes of foreign countries." Domestic interests advocate lower trade barriers not necessarily because "they derive direct benefit, but because these reductions are the 'prices' paid for the lower-

---

40. *See, e.g., U.S. Auto Trade Problems, The Fair Practices in Automotive Products Act: Hearings on H.R. 1234 Before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 76-77, 660-61, 679-84 (1983).

41. *See* C. KINDLEBERGER, INTERNATIONAL ECONOMICS 19-37 (4th ed. 1968).

42. From the perspective of economic theory a nation may benefit by lowering its trade barriers even if other nations maintain high trade barriers. Politically, however, reciprocal trade liberalization by other nations appears necessary to maintain national commitment to free trade. *See, e.g., U.S. Approach to 1982 Meeting of World Trade Ministers on the GATT, Hearing Before the Subcomm. on International Trade of the Senate Comm. on Finance*, 97th Cong., 2d Sess. 13-14 (1982) (statement of Hon. William E. Brock, U.S. Trade Representative) [hereinafter cited as *Senate Hearings*]. In agriculture, for example, trade liberalization will require governments to expose their producers to world competition. To do this governments must be "sufficiently convinced of the longer-term benefits to allow them to resist the temptation to intervene for shorter-run objectives." Josling, *World Food Production, Consumption and International Trade: Implications for U.S. Agriculture*, in FOOD AND AGRICULTURAL POLICY FOR THE 1980s, at 83, 107 (D. Gale Johnson ed. 1981).

43. *See, e.g., Senate Hearings, supra* note 42, at 14, 26-28. Thus, in the context of agricultural trade, "the key to . . . maintaining an open trade stance is for other countries to be perceived as relatively open to trade as well." Schuh, *U.S. Agriculture in an Interdependent World Economy: Policy Alternatives for the 1980s*, in FOOD AND AGRICULTURAL POLICY FOR THE 1980s, at 157, 172 (D. Gale Johnson ed. 1981). The existence of international rules not only provides some assurance of openness abroad, it also provides standards against which to determine whether "other countries" are "relatively open to trade." *Id.*

44. Schwartz, *supra* note 39, at 79, 84.

ing of barriers aborad."[45] The existence of an international norm will help ensure that paying such a price will, in fact, bring the predicted benefits.[46]

Perhaps the most important considerations that inhibit nations from engaging in behavior that would violate an international norm are the shame or opprobrium accompanying a clear violation,[47] and the threat of retaliation by the victim of the violation.[48] Even without an international legal norm, the threat of international condemnation and retaliation would deter some internationally undesirable behavior. But the existence of an international legal norm can enhance the deterrent force of international opinion in several ways: it formalizes the international judgment that a practice is harmful and legitimizes future international condemnation of the practice;[49] it makes international condemnation of particular national practices more likely;[50] and it renders illegitimate national

45. *Id.* at 88-90.

46. These considerations are particularly important in agricultural trade relations. Because trade in agricultural products is severely restricted, movement toward liberalization depends upon a package of agreements among nations that will convince special interest groups that it is desirable. For exporters the package "must offer either an opportunity to expand sales abroad or, at the very least, an assurance that policies which restrict market outlets are brought under control." Josling, *Agricultural Trade Policies: Issues and Alternatives*, in ECONOMICS, STATISTICS, AND COOP. SERVS., U.S. DEP'T. OF AGRIC., INTERNATIONAL FOOD POLICY ISSUES, A PROCEEDINGS 59, 67 (Foreign Agricultural Economic Report No. 143, 1978). Moreover, if trade liberalization is to occur, it must occur through a gradual adjustment of domestic support levels to world prices. "It is the security of the world market which will allow such adjustments" and that security depends on other nations making similar adjustments. *Id.* at 67. International rules make it easier to rely on that desirable action by other nations. *See also* OECD 1980, *supra* note 11, at 105. It has been argued, for example, that the promulgation of an effective international export subsidies code "may allow governments who use such subsidies only reluctantly in the face of domestic pressure to resist the blandishments of those who see the world market as a natural repository for production in excess of normal market needs." Josling, *supra* note 42, at 108-09.

47. Gold, *Strengthening the Soft International Law of Exchange Arrangements*, 77 AM. J. INT'L L. 443, 446-47 (1983). As Professor Henkin notes, governments "desire a reputation for principled behavior," they "do not like to be accused or criticized," and they "desire their relations with other countries to be friendly." These considerations make law-abiding behavior preferable to violations and provide some counterpoint to domestic political pressures urging lawlessness. L. HENKIN, *supra* note 35, at 51-52.

48. L. HENKIN, *supra* note 35, at 54. The United States has regularly turned to international condemnation of other nation's practices and threats of retaliation in its efforts to enforce GATT's rules concerning agricultural trade. *See* Comment, *supra* note 19, at 343-46.

49. Law elevates to the level of principle arguments that might otherwise be made on the basis of expediency. It "has a distinct solemnity of effects: it is a normative instrument that creates rights and duties. Consequently, it has a function that is both symbolic and conservative; it enshrines, elevates, consecrates the interests or ideas it embodies." Hoffman, *supra* note 34, at 34.

50. For example, by "mobilizing international support behind the legal rules," law serves as the device by which individual nations harmed by another nation's conduct may

justifications for certain practices.[51] In trade affairs, the heightened risk of retaliation arising from the violation of established legal norms is likely to increase the opposition to national practices that derogate from such norms by domestic interests that would suffer from retaliation and by domestic elites to whom the desire for a good international reputation is generally important.

Finally, in addition to increasing the danger of retaliation in any particular case, an international norm may increase domestic support for international policy because the existence of the norm broadens or increases the adverse effects of any particular departure from the policy it expresses. For example, if an international norm is an important keystone of a system of international economic regulation, violation of the norm can risk the collapse of the whole system, in addition to risking more limited retaliation.[52] Similarly, if domestic violations of international norms will lower overall international respect for a particular norm or set of norms, domestic interests that benefit from the existing legal order will come to its defense, even if there is no danger of immediate retaliation in any particular case. In trade affairs, the prospect of a debilitated free trade environment will mobilize a broad range of domestic political opposition to norm violations and not simply opposition from those who fear the possibility and consequences of immediate retaliation.

In short, embodying international policy in a legal norm improves the likelihood of successful implementation of that policy by linking issues in ways that call attention to reciprocal interests in international affairs. This linkage may alter the domestic political balance in individual nations

---

"internationaliz[e] [their] national interests." It thereby forms the "cement of a political coalition. States that may have political misgivings about pledging direct support to a certain power whose interests only partly coincide with theirs . . . may find it both easier and useful to rally to the defense of a legal principle in whose maintenance or promotion they may have a stake." Hoffman, *The Uses and Limits of International Law*, in INTERNATIONAL LAW AND POLITICAL CRISIS (1968), *reprinted in* INTERNATIONAL POLITICS 81, 83 (R. Art & R. Jervis eds. 1973).

51. One of the unavoidable conflicts of international economic relations is the conflict between national sovereignty and international interests. All states recognize that the principle of national sovereignty may legitimate behavior that favors national over international goals. By its consent to an international norm, however, a nation accepts the proposition that the international interests served by the norm are paramount to its own narrower national interest. Subsequent assertions of the perquisites of sovereignty and self-interest become illegimate to justify conduct that violates the international norm.

52. For example, under the original Articles of Agreement of the International Monetary Fund, fixed exchange rates were considered the central pillar of international monetary regulation and "the floating of a currency outside the margins around parities was considered the most disturbing breach of the system." Gold, *supra* note 47, at 446. The IMF found it unnecessary to use sanctions to enforce this norm, even when national governments had strong incentives to violate it. Until the United States rejected the system and forced reform, "[t]he international shame that followed the obvious breach of the firm obligation to maintain fixed exchange rates on the basis of parities was the chief practical deterrent to breach." *Id.* at 446-47.

and thus promote adherence to international policy goals for several reasons. First, embodying policy in an international legal norm calls attention to the strength of that policy, the benefits of widespread adherence to it, and its importance to the international community. The existence of a norm is therefore helpful in mobilizing and strengthening domestic political support for the policy it expresses because it identifies for domestic interests (e.g., exporters, importers, or domestic elites who value world order) those national actions that are likely to have international repercussions. Second, support for international policy will be enhanced when the policy is expressed as a legal norm because of the heightened risk of international condemnation, opprobrium, or retaliation that is present if national practice contrary to international policy objectives also violates an international legal norm. Domestic groups that might otherwise be indifferent to international policy will support the international norm because of their fear of the effects of an adverse international response to its violation. Finally, by fostering an identification of national practices that derogate from international values, the existence of an international legal norm may deter such practices by increasing the risk that the practices will generally debilitate international order, even when the practice in question does not pose a risk of immediate retaliatory responses by other nations.

Thus, the outcome of most international problems in trade relations will reflect the interaction of applicable international law with economic and political considerations. When national and international policies collide, the existence of an international norm can change the calculus of costs and benefits that otherwise would attend a national decision to surrender to domestic political pressure. While international rules may not be "the paramount or determinant motivation in national behavior," they do "add an important increment of interest" that induces nations to adhere to practices that promote international policy goals.[53]

In this web of law and politics the legal dimension is not only an important influence on political behavior, it may be a more persistent influence on international conditions than political behavior not solemnified in legal form. While economic and social changes may alter political behavior fairly rapidly, legal reactions tend to persist even when their purpose and utility have long since expired. This tenacity means that legal norms may continue to influence behavior even in the face of changed circumstances that mandate a new approach to trade problems.

C. Soft Law and the Implementation of International Policy

The label "soft law" usually is applied to international norms that contain a mixture of ethical and political values or economic claims in a form not traditionally regarded as a source of international law.[54] In

53. L. HENKIN, *supra* note 35, at 321.

54. Horn, *Normative Problems of a New International Economic Order*, 16 J. WORLD TRADE L. 338, 347 (1982).

particular, the label is often applied to international instruments that do not purport to be binding on the nations accepting them. For this reason, the idea of soft law is theoretically unsettling to some commentators and has been criticized as a "confusion of normative categories," a confusion that mistakenly designates as law international pronouncements that reflect principles or values but that do not create legal obligation.[55] Nevertheless, the concept of soft law can be a useful tool to categorize and discuss many of the instruments and decisions generated by the extensive international bureaucracy.[56] Although terming the content of these instruments "law" may be troublesome conceptually, particularly when they explicitly eschew direct legal effect,[57] it is accepted that "to a limited extent" they "meet the technical requirements of legal norms" and are made "with the intention to create a legal effect sooner or later."[58]

---

55. *Id.* at 347-48. Some commentators do, however, treat such international pronouncements as law. *See* Chowdbury, *Legal Status of the Charter of Economic Rights and Duties of States*, in LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER 82 (K. Houssain ed. 1980). *See generally* Seidl-Hohenveldern, *supra* note 13, at 192-93.

56. *See* Seidl-Hohenveldern, *supra* note 13, at 178-81, 183-93. For some time commentators have recognized that "the growing interdependence of States . . . has vastly increased patterns of cooperation and reciprocal behavior which have not been institutionalized in the traditional modes of lawmaking." Schachter, *Towards a Theory of International Obligation*, in THE EFFECTIVENESS OF INTERNATIONAL DECISIONS 12 (1971). This "developing 'co-operative' law of nations" differs from older approaches by binding nations, "not in the traditional rules of abstention and respect, but in positive principles of cooperation for common interest." W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 89 (1964). In this new structure of international obligation the strength and clarity of norms will vary widely. Thus, norms will fit somewhere along a continuum rather than falling into neat categories. The concept of soft international law may therefore be criticized for attempting to categorize the world without taking account of the differences in that world. *Cf.* Schachter, *supra*, at 31 ("To impose hard-and-fast categories on a world filled with indeterminances and circularities can only result in a pseudo-realism which does justice neither to our experience nor to our higher purposes."). Nevertheless, the concept of soft international economic law focuses on certain essential attributes of this "cooperative" law of nations that provide a basis for analyzing its effectiveness, although the degree to which any particular norm has these attributes will vary. *See infra* text accompanying notes 62-67.

57. For example, the OECD Declaration and Guidelines for Multinational Enterprises of 1976 are "expressly declared to be 'voluntary and not legally enforceable.' " Horn, *supra* note 54, at 347. Nevertheless it has been argued that while they do not constitute "instant international law," they can be "transformed into customary international law through state practice" and they are "declarations of general principles of international public policy which the declarant states are legally obliged to respect . . . ." Baade, *The Legal Effects of Codes of Conduct for Multinational Enterprises*, 22 GER. Y.B. INT'L L. 11, 39 (1979).

58. Horn, *supra* note 54, at 347-48. Horn argues that "soft law" fails to achieve the "isolation of the newly-drafted legal norm from the ethical values that preceded the lawmaking process" and therefore neglects an "invariabl[e]" part of the process of lawmaking. Absent this separation of law and "implied ethical and political values and principles" it is impossible to determine "those rules and principles" that "deserve and obtain international recognition as common rules with a legal effect." *Id.* at 347, 350-51; *cf.* G. TUNKIN, THEORY OF INTERNATIONAL LAW 117-18 (1974) (criticizing, from Marxist perspective, view

1. A Definition of "Soft Law"

Although this Article will not address the question whether "soft law" is really "law" in terms of jurisprudential theory, it is necessary to resolve two definitional questions concerning the concept of soft law. First, what justifies attaching the label "law" to international instruments that do not purport to be absolutely binding? Second, if those instruments are law, why label them "soft" law? To answer these inquiries, and to provide a basic definition of the term "soft law" as it will used herein, this Article draws on an analysis of the concept recently presented by Sir Joseph Gold.[59]

The "essential ingredient" of soft *law*, in Gold's analysis, is "an expectation that the states accepting these instruments will take their content seriously and will give them some measure of respect."[60] Two attributes thus attach some "legal" character to soft law norms: international consent to the norm, which gives it an authoritative base, and an international expectation that the norm will be taken seriously, which communicates an intention that nations will adhere to the behavioral values expressed in the norm. The behavioral values or policy content of the norm are reflected in "the common intent . . . implicit in the soft law as formulated" which "when elucidated . . . is to be respected."[61]

Internationally agreed-upon norms to which there is consent, that create an expectation that nations will respect the norms, and that have

---

that existing international custom or usage is source of legal norms, Tunkin insists that custom is only a "stage in the formative process" of law which is completed "when states recognize a custom as legally binding; that is to say, recognize a customary rule of conduct as a norm of international law"). *But cf.* Falk, *The Adequacy of Contemporary Theories of International Law—Gaps in Legal Thinking*, 50 VA. L. REV. 231, 249-250 (1964) (suggesting that difficulties with uncertain norms in international law is not that they are non-law but that there is no theory in international law adequate to recognize degrees of compliance or violation of legal obligations); Laing, *International Economic Law and Public Order in the Age of Equality*, 12 LAW & POL'Y INT'L BUS. 727, 746-48 (1980) (arguing that general principles must be the basis of development of new rules in the international order). Despite the "uncertainty as to the legal authority of emerging principles" in international economic affairs, they nevertheless "exhibit some measure of practical efficacy and give rise to widespread expectations as to their future application." Schachter, *supra* note 56, at 14. Because of the explanatory power of the soft law concept and its ability to deal with norms that, while they are not law as it is traditionally understood, are nevertheless perceived as sources of international obligation, this paper accepts the concept without any effort to resolve the theoretical dispute.

59. *See* Gold, *supra* note 47. Gold, in turn, relied heavily upon the analysis presented in Seidl-Hohenveldern, *supra* note 13.

60. Gold, *supra* note 47, at 443.

61. *Id.* Gold also postulates three other elements of soft law: (1) that "its legitimacy," as promulgated, "is not challenged"; (2) that its "quality as law" is not destroyed simply because failure to observe it is not a breach of obligation; and (3) that "conduct that respects soft law cannot be deemed invalid." *Id.* Each of these characteristics would appear to flow fairly directly from the proposition that consent and expectations form the basis of the legal obligation of soft law.

an implicit, if indeterminate, policy content might reasonably be characterized as "law," dropping the pejorative adjective "soft." The term *soft* law, however, can appropriately be used for norms that are characterized by "the intended vagueness of the obligations [they impose] or the weakness of [their] commands."[62] Those characteristics may be evident from language that designates the norms as "guidelines" or "declarations of principles,"[63] that explicitly states that compliance with the norm is "voluntary,"[64] or that indicates that the nature and degree of adherence to the norm is a matter of national discretion.[65] But even when the command for compliance with a norm is strong, the norm is soft if the scope of that command is rendered uncertain by ambiguity or vagueness in the statement of what behavior is expected of nations that accept the norm.[66]

Thus, even when norms are supported by "an expectation that the states accepting [them] will take their content seriously and will give them some measure of respect"[67] such norms are here characterized as "soft law" in either of two circumstances: first, the norm is soft when the obligation it imposes is intentionally so unclear that it is impossible to determine with particularity what behavior is expected or required; alternatively, law is soft if its stated normative standard is clear, but there is only a weak command for national compliance with that standard. In other words, soft law includes international norms characterized by an unclear policy content or a weak command for national compliance with the international policies expressed in the norm.

Of course, the strength and clarity of legal norms will vary widely, falling more on a continuum than into particular categories. To the extent that the concept of soft international law does not clearly distinguish among degrees of softness or firmness in legal obligation it may be criticized for attempting to categorize a complex reality too rigidly.[68] Nevertheless, I believe the concept of soft law, by focusing attention on obligatory strength and clarity of content as important characteristics of legal norms, provides a basis for analyzing the norm's effectiveness. Thus, I use the terms "hard" or "firm" law and "soft" law advisedly, fully recognizing that these are relative terms and that many, perhaps most, international legal norms will differ not by virtue of falling clearly into one category or another, but only in the degree to which, on a hard-soft continuum, they possess firm or soft characteristics.

---

62. *Id.*

63. *Id.*

64. *See supra* note 57.

65. *See, e.g.*, General Agreement on Tariffs and Trade, Oct. 30, 1947, 4 Bevans 639, T.I.A.S. No. 1700, 55 U.N.T.S. 187, art. XXXVII(3) [hereinafter cited as GATT] ("The developed contracting parties shall . . . make every effort . . . to maintain trade margins at equitable levels; . . . give active consideration to . . . have special regard to . . . .").

66. *See, e.g., id.* art. XXXVII(1)(a).

67. Gold, *supra* note 47, at 443.

68. *See supra* note 56.

2. *Alternative Uses of Soft Law*

One can identify at least two distinct uses of soft law. First, soft law may be used in situations in which the inability of nations to reach agreement on general principles threatens to block negotiations on the practical details of international relations. Such negotiating impasses can sometimes be overcome by adopting deliberately ambiguous statements of principle that can be interpreted to reflect any or all of the competing positions.[69] When deliberate ambiguity is used in international instruments precisely because there is no clear common intent concerning basic principles, each nation is likely to interpret the norm consistent with its own understanding at the time the norm was promulgated and the norm will not provide any resolution of the issue. Indeed, the purpose of adopting soft law in this example is to create a norm that is incapable of resolving the disputed issue of principle. In special circumstances, however, the use of deliberate ambiguity to bypass disputed issues of principle may permit nations to move on to address and reach agreement on the practical issues raised by international negotiations.[70]

For example, when states disagree on issues involving territorial sovereignty they may use deliberate ambiguity to avoid resolving conflicting territorial claims while still reaching agreement on how the claimed sovereignty is to be exercised. Deliberate ambiguity may therefore serve the laudable function of permitting nations to reach binding agreements on appropriate international behavior without forcing them to bind themselves to any particular interpretation of the broader legal principles applicable to the subject matter at issue.[71]

A second, very different use of soft law is somewhat more prevalent in international affairs. When firm rules governing the practical details of international relations cannot be agreed upon, agreement may be reached on vague or ambiguous general principles without specifying how those principles are to be achieved or without stating a clear command to adhere to those principles. Some commentators, whose emphasis generally is on the legal process within which norms are thought to function rather than on the content of those norms, see virtue in this use of soft law. When

---

69. *See* Burton, *New Stresses on the Antarctic Treaty: Toward International Legal Institutions Governing Antarctic Resources*, 65 VA. L. REV. 421, 466-67 & n.190, 478-79 & n.224 (1979).

70. *E.g.*, Agreement Concerning Shrimp, Mar. 14, 1975, United States-Brazil, 27 U.S.T. 1377, T.I.A.S. No. 8253, 1049 U.N.T.S. 57 (not in force) (use of deliberate ambiguity to avoid issue of territorial sea claims while reaching details on United States fishing rights off Brazilian coast); *see* Burton, *supra* note 69, at 467 n.190.

71. Burton, *supra* note 69, at 466-67 & n.190, 478-79 & n.224. When there are three or more conflicting positions on basic principles a deliberately ambiguous norm may be fashioned which also effectively rejects one or more of the conflicting positions without endorsing a single position. *Id.* at 479 n.224. In this manner deliberate ambiguity may limit the range of permissible international positions without eliminating basic disagreement on principle.

firm rules cannot be generated, soft law is said to provide an "alternative to anarchy" that over time may produce an "accretion of firm law,"[72] through an international analogue to the common law process. Unclear or weak soft law principles conceivably might generate clearer and stronger rules as they are followed in practice by states, adopted in domestic law, or applied internationally to condemn or condone particular cases of national behavior.[73] Even if the development of firm rules is impossible, soft law at least establishes guidelines to facilitate international cooperation and to assist identification of national behavior that is contrary to or consistent with international objectives.[74] It thus can serve an important regulatory function in the international political process, even if it does not itself clearly identify improper international behavior. This approach to international law-making is regarded as particularly beneficial in addressing the difficult issues raised by developed-developing nation relations.[75]

In trade and economic relations, soft law usually is used in this second manner. Its function is not to avoid large issues of principle so that agreement on details can be reached. To the contrary, it is used to paper over important disagreements on the implementation of international goals by fashioning agreement on broad principles with the expectation that a present agreement on principles eventually will lead to agreement on methods to implement the principles.[76] Thus, in contrast to its use as a device to facilitate agreement on the practical details of international relations, soft law is most often used in economic relations precisely because agreement on the practical details of those relations is difficult. To avoid the appearance of failure in international negotiations, agreements on ambiguous and unclear norms are reached in place of agreements on how, in practice, nations should act to achieve broad international policy goals. It is this use of soft law with which this Article is primarily concerned.

---

72. Gold, *supra* note 47, at 444.

73. *See* Baade, *supra* note 57, at 34-50; Laing, *supra* note 58, at 780; Roessler, *Law, De Facto Agreements and Declarations of Principle in International Economic Relations*, 21 GER. Y.B. INT'L L. 27, 33 (1978); Seidl-Hohenveldern, *supra* note 13, at 198-213.

74. The existence of soft law codes or formulates will help "ensure that in most scientific or political debates both sides will have recourse to these ready-made formulae." Seidl-Hohenveldern, *supra* note 13, at 197.

75. *See* Seidl-Hohenveldern, *supra* note 13, at 175-77, 182-93; *see also* Laing, *supra* note 58, at 743-48, 780-81.

76. *Cf.* Laing, *supra* note 58, at 746-47, 780-81 (international norms regulating developed/developing country relations should be articulated "in the form of broad principles rather than narrow rules" because "a heterogenous community of sovereign states is likely to find broad principles more acceptable than explicit rules"). Laing argues that "flexible techniques of legal reasoning," including deducing rules from broad principles, can improve legal order in the international community. *Id.* at 748-51, 780-81; *see also* R. HUDEC, *supra* note 5, at 43-44. Professor Hudec, however, criticizes the practice of avoiding diplomatic failures by "patching together a vague and heavily qualified argument which concedes some general legitimacy to the goals espoused by one side but calls for only token or illusory commitments by the other." *Id.* at 43.

3. Soft Law and the Conditions for Effective International Norms

There are several reasons to be wary of the use of soft law, even as a temporary solution to complex problems, when soft law norms are intended to substitute for agreement on clearer rules governing national behavior. First, such a use of soft law may appear to reconcile disputes in a principled manner when it in fact simply postpones a solution, legal or otherwise. Under such circumstances soft law may create false expectations of progress toward resolving international problems. When those expectations are unrealized in practice, they may become the source of enhanced international tension and conflict.[77] Second, although soft international law depends on an "implicit" common intent that "when elucidated . . . is to be respected," soft law generally provides few, if any, clues to the content of this "common intent;" there may simply be no clear "common" understanding of a soft norm.[78] As a consequence the "common intent" may become fictionalized, distorted, or manipulated. When it is, it may fail to guide states to internationally acceptable behavior and may be used to defend behavior that undermines the framework of which it is a part.[79] Instead of acting as a catalyst to firm law, intentionally weak obligations may give international lawlessness a "stamp of approval."[80] If, as some argue, conduct that respects the "common intent" of soft law "cannot be deemed invalid,"[81] then the ability to assert widely differing views of the law's common intent permits a nation to legitimize a wide variety of conduct, some of which may not contribute to international goals.

Finally, and most importantly, soft law's qualities—an unclear content or a weak command—are not of a nature that suggests they will effectively influence national decisionmaking or contribute to national compliance with international policy goals. Soft characteristics diminish the ability of a norm to generate political pressures, domestic or international, that can alter a nation's international behavior. In particular, when a government considers action contrary to international policy, an international

---

77. Seidl-Hohenveldern points out the danger that nations benefiting from soft rules may "interpret the acceptance of a mere principle as a firm promise" thus leading to "unpleasant tensions between the States concerned" when the promise is unfulfilled. Seidl-Hohenveldern, *supra* note 13, at 195. This danger includes the risk that states will believe they have achieved more than "soft law" in fact gives them and will therefore abandon the effort to achieve clear rules. Other states, however, may readily accept weak soft law rules, but with no real intention of providing the promised benefits.

78. Gold, *supra* note 47, at 443. Because vague and ambiguous agreements generally reflect a basic policy disagreement, there is "no underlying consensus that can inform application of the words of the agreement." R. HUDEC, *supra* note 5, at 43.

79. *See infra* text accompanying notes 211-54.

80. For example, see the United States' treatment of its GATT agricultural waiver, discussed *infra* text accompanying notes 232-41.

81. Gold, *supra* note 47, at 443.

norm formulated with soft characteristics is likely to have a diminished capacity to perform the three key functions identified previously as the means by which international law induces national adherence to the policies it expresses: generating external pressure for norm compliance, mobilizing domestic support for international interests, and ensuring substantial domestic benefits from adherence to international policy.

There are at least three reasons why an international norm's ability to deter undesirable national behavior through the threat of international condemnation or retaliation is likely to be significantly impaired when the norm takes the form of soft law. First, an international judgment that national conduct violates a norm will not be easily, strongly, or clearly made if the norm is unclear in content or weak in command. A lack of clarity also may imply that the international community does not view the norm as representing a particularly important principle. International criticism of a departure from a soft norm therefore is likely to be less severe or emphatic than it would be for the violation of a firm obligation.[82] Second, a soft norm's ambiguity or vagueness may permit individual nations to legitimize their noncompliance with the norm by offering justifications that partially avoid or blunt international criticism.[83] A clearer rule would often make it obvious that such justifications were illegitimate. Third, ambiguity or vagueness may create a nonreciprocity in legal obligation that can hinder both national willingness to comply with the norm and international willingness to condemn violations.[84] For example, to the extent that soft law does not establish clearly what is and is not legal, or does not require any particular form of adherence to its principles, it does not provide for uniformity or symmetry among the approaches taken by individual nations toward compliance with its norms. This asymmetry can generate situations in which no nation will fully implement soft law because the law provides no assurance that other nations must respond in a similar fashion.

The potential weakness of soft law as an external constraint on national behavior is mirrored in its likely influence on domestic political processes. Soft law cannot expect to attract the same degree of support from

---

82. *See* L. HENKIN, *supra* note 35, at 72-74; *cf.* Gold, *supra* note 47, at 466-67.

83. *Cf.* Gold, *supra* note 47, at 476-77 (IMF surveillance of compliance with soft law provisions is weak partially because "[g]overnments are not subject to the reproach that they are neglecting obligations if they give decisive effect to national, rather than international interests").

84. *Id.* at 480 (discussing problems of nonuniformity in soft law of exchange arrangements). Gold distinguishes between uniformity, which "is a characteristic of the treatment of the members that are deemed to constitute a class" and symmetry, which "is a characteristic of the treatment of classes." *Id.* Rules can distinguish between the treatment accorded to various groups and not be asymmetrical or nonuniform, so long as some facts justifying differences in treatment are present. Such rules may still appear to be evenhanded and promise future benefits if they are limited in their scope and application. See, for example, the hard-core waiver discussed *supra* text accompanying notes 187-210.

domestic forces as would a firmer rule. Difficulties in interpreting ambiguous rules and the ability to offer justifications for ignoring soft law's weak commands will erode the force of arguments that domestic interests might offer in support of such norms. Breach of a soft rule generally will not amount to such a serious affront to international cooperation that internationally-minded domestic groups are likely to be concerned. Domestic groups may simply be unwilling to put their political credit on the line in support of a rule that has unclear substantive content, weak commands, and is of suspect importance.[85]

Domestic pressure to comply with an international rule is also created by the belief that national compliance will be accompanied by international compliance. But soft law can promise that such benefits will follow national compliance only weakly.[86] When international norms are unclear in content or weak in command the ability to predict the behavior of other nations is diminished and, consequently, the ability to predict future benefits from compliance is lost. Domestic support for the norm is likely to be undermined by this uncertainty, particularly when the ability to condemn the undesirable actions of other nations is weakened by a norm's soft characteristics.[87]

Understanding these limitations on the potential effectiveness of soft law is particularly important in the context of the global hunger problem. Because implementation and enforcement of international policies in this area depend in part on the effectiveness of legal norms in securing national compliance with international goals, an understanding of what makes norms effective and what diminishes their influence is critical to intelligent international policy formation.[88] The remainder of this Article examines

---

85. *Cf.* R. HUDEC, *supra* note 5, at 36-37. "Formal rules also add to the weight of those officials who decide to advocate the [international] policy position." *Id.* In internal policy debates, "[d]efense of an international rule commands more attention" than the presentation of personal predilection. Moreover, international rules may permit officials to assert the international position to domestic constituents. The "shelter" of an international rule "may often be a critical factor" in the willingness to advocate a liberal trade position. *Id.* at 37.

86. *Cf.* Jackson, *supra* note 9, at 25-26 (necessity for rules and need to predict reasonable compliance with rules in international economic relations).

87. *Cf.* R. HUDEC, *supra* note 5, at 38 (domestic adherence to international trade policy requires the reciprocity that is provided by "a visible system of common rules, with some assurance that the rules are in fact observed and enforced").

88. This critique of the use of soft law to regulate international economic relations is not intended to suggest that soft law is necessarily inappropriate in other contexts. Nor is it intended to criticize the practice of denominating imprecise norms as "law." In the context of international human rights, for example, the ability to attach legal character to soft norms like the right to food may facilitate the process of ensuring that the objectives expressed in human rights norms are considered in the formulation of more particular rules governing international economic relations. *See generally* Alston, *The Relevance of Law to World Hunger*, in THE RIGHT TO FOOD: FROM SOFT TO HARD LAW 7 (1984). My criticism is directed primarily at the formulation of soft norms which are themselves expected to alter nation-state behavior in economic affairs.

the international community's use of soft law in the GATT to implement the international policy of agricultural trade liberalization—a policy vitally important to solving the world hunger problem. The goal of this examination is both to present the case for an international policy of trade liberalization as part of the battle against world hunger and to examine in the GATT context the thesis that soft law is, at best, an ineffective tool for influencing nation-state behavior.

II. HUNGER, AGRICULTURAL TRADE LIBERALIZATION, AND THE GATT

Liberalizing the agricultural trade policies of developed nations is widely recognized as a critical international goal particularly important in the battle against hunger and underdevelopment.[89] But the current domestic agricultural policies of the developed nations are characterized by substantial governmental interference with market forces.[90] These policies, designed

---

89. *See supra* note 4. A complete picture of agricultural trade conditions requires an understanding of the practices of developed market economies, developing market economies, and centrally planned economies. For example, the state trading regimes in centrally planned economies and some developing countries are a source of much instability in international agricultural markets. *See* ORG. FOR ECONOMIC CO-OPERATION AND DEV., AGRICULTURAL TRADE WITH DEVELOPING COUNTRIES 72 (1984) [hereinafter cited as OECD 1984]. The domestic agricultural policies of developing nations also influence international markets and contribute to their own hunger problems. For discussions of the agricultural policies of developing nations, see R. FOX, BRAZIL'S MINIMUM PRICE POLICY AND THE AGRICULTURAL SECTOR OF NORTHEAST BRAZIL 22-27 (International Food Policy Research Institute, Research Report No. 9, 1979); C. KANGARAJAN, AGRICULTURAL GROWTH AND INDUSTRIAL PERFORMANCE IN INDIA 8-16 (International Food Policy Research Institute, Research Report No. 33, 1982); OECD 1984, *supra*, at 64-65, 72-78, 94-96; G. SCOBIE, GOVERNMENT POLICY AND FOOD IMPORTS: THE CASE OF WHEAT IN EGYPT 17-22 (International Food Policy Research Institute, Research Report No. 29, 1981); G. TOLLEY, V. THOMAS & C. WONG, AGRICULTURAL PRICE POLICIES AND THE DEVELOPING COUNTRIES 2-7 (1982); J. VON BRAUN & H. DE HAEN, THE EFFECTS OF FOOD PRICE AND SUBSIDY POLICIES ON EGYPTIAN AGRICULTURE 12-20 (International Food Policy Research Institute, Research Report No. 42, 1983). *See generally* essays collected in DISTORTIONS OF AGRICULTURAL INCENTIVES (T. Schultz ed. 1978).

This article focuses on the agricultural trade policies of the developed nations of the Organization for Economic Co-operation and Development for three reasons. First, these nations are by far the most significant importers, exporters, and producers of agricultural commodities. Second, their policies are of central importance in this area and their action will determine the outcome of any effort to achieve agricultural trade liberalization. Finally, because the OECD nations have generally committed themselves to trade liberalization and to the establishment of legal rules to achieve that goal, their conduct permits an examination of the impact of international law on national behavior in the agricultural sector.

90. *See generally* OECD 1984, *supra* note 89; OECD 1980, *supra* note 11. Price support programs are the most common form of agricultural market interference used by OECD nations. In general, price support programs guarantee producers a minimum level of farm commodity prices. Price supports stimulate production, stifle demand, and generate surpluses of the supported commodity. If production is not controlled, the surplus generated by price support programs must be stored or disposed of in some manner, usually by means of concessional sales to domestic consumers, concessional sales abroad (food aid),

primarily to maintain domestic farm income,[91] inevitably distort international agricultural prices and production, and generate significant national

---

or subsidization of commercial export sales. Farm incomes may also be maintained by direct supplementary income payments to farmers whose sales are made at prices too low to provide an adequate income or cover production costs. While such deficiency payments do not reduce demand and have less tendency to stimulate production, they nevertheless do contribute to surplus problems by encouraging production even when market price levels do not justify it. Moreover, the cost of deficiency payments produces an incentive for governments to take steps to maintain prices at a remunerative level and may therefore lead to other interventions in the market. *See generally* OECD 1980, *supra* note 11, at 91-94. An increasingly common form of government regulation of the agricultural sector is the use of centralized buying and selling agencies. Such agencies may control domestic prices, limit imports, and set export prices. The activities of such agencies can create the same problems of artificially high prices and domestic surpluses that more traditional agricultural policy instruments produce. *See* Hathaway, *Agricultural Trade Policies for the 1980's*, in TRADE POLICIES FOR THE 1980's, at 435, 447 (W. Cline ed. 1983).

The incidence and degree of intervention in domestic agriculture varies among nations, among products, and over time. Historically, however, the trend is toward increasing levels of domestic intervention in the agricultural sector. Some indication of this trend is reflected in the cost of farm support programs in the European Community and the United States. In the European Community expenditures on market price supports grew at a 23% per year average during 1975-1979. Efforts to reduce this trend were successful during the early 1980's, although community agricultural price support levels still increased. Avery, *The Common Agricultural Policy: A Turning Point*, 21 COMMON MARKET L.R. 481, 483-87 (1984). The United States has moved steadily toward a more market-oriented agricultural policy since the 1960's. *See* Johnson, *Agricultural Policy Alternatives for the 1980's*, in FOOD AND AGRICULTURAL POLICY FOR THE 1980's, at 183, 183 (1984). But United States farm program costs have soared in recent years, primarily through spending on income maintenance programs. M. ABEL & L. DAFT, FUTURE DIRECTIONS FOR U.S. AGRICULTURAL POLICY, FINAL REPORT ON AGRICULTURE, STABILITY AND GROWTH: TOWARD A COOPERATIVE APPROACH 10-11 (Curry Foundation 1984). Moreover, to the extent that real prices in the farm sector do not rise in the future, "the price support mechanism will probably be important again," undercutting recent moves toward a market-oriented system. Hoover, *Comment*, in FOOD AND AGRICULTURAL POLICY FOR THE 1980's, at 224, 226 (1983). Most commentators believe that government interference in agriculture is inevitable, although the degree of interference may change from time to time. "[G]overmental intervention in agriculture exists in market economies and is likely to continue to exist, a judgment confirmed by the fact that even [the] most conservative and market-oriented of any U.S. administration in recent memory has made no fundamental change in domestic farm programs and has in several ways intervened in markets more than at any time in a decade." Hathaway, *supra*, at 442; *see also* Johnson, *World Food Institutions: A "Liberal" View*, 32 INT'L ORG. 837, 843 (1978).

91. Hathaway, *supra* note 90, at 442-45. The OECD identifies a number of objectives other than income maintenance that its members pursue through their domestic agricultural policies, including maintenance of food production for national security reasons, stabilization of domestic prices, and the preservation of traditional farm structure and rural community life. OECD 1980, *supra* note 11, at 88-98. In general, however, OECD member nations pursue policies designed to increase farm sector income.

> [I]t is apparent that the ultimate effect of the various measures used by Member countries is to improve sector welfare through direct and indirect transfers of resources from other sectors of the economy. Some of these transfers . . . improve market transparency, and enhance the functioning of the market. Other

interference with international agricultural trade.[92]

The developed nations' interference with international agricultural trade takes two principal forms. First, farm support programs usually are accompanied by import restrictions on products that compete with the supported commodity.[93] Import barriers are created through a variety of devices such as tariffs, quotas, variable levies, and state-trading activities.[94] Second, developed-country domestic farm programs often require the subsidized disposal on world markets of surpluses generated by domestic farm support programs.[95] The primary methods for disposing of surplus

---

> measures result in large transfers of income to the rural sector which, even though they are done with specific social objectives in mind, may cause price distortions which inhibit the functioning of the market.

OECD 1984, *supra* note 89, at 63. Even when income maintenance is not the explicit objective of farm policy, increasing farm income is often the tool used to pursue the desired objectives. *E.g.*, OECD 1980, *supra* note 11, at 90. For the view that income objectives are central, even when other objectives are given primary emphasis in policy statements, see Johnson, *Agricultural Trade—A Look Ahead—Policy Recommendations*, in 1 COMM'N ON INT'L TRADE AND INV. POL'Y, UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD, Papers II 873, 875 (1971).

Food self-sufficiency is also an important policy objective increasingly pursued by some developed and developing countries. *See* Seevers, *Food Markets and Their Regulation*, 32 INT'L ORG. 721, 729-30 (1978); *see also* K. DAM, *supra* note 5, at 70-71. The desire for minimal self-sufficiency may place a practical limit on trade liberlization among OECD countries.

> Even the most ardent defenders of the international free trade system admit that beyond a certain point it is unrealistic to expect nations to place at risk their sources of basic food supply, whatever the benefits which might accrue to their consumers and to their economy as a whole.

ANNUAL REPORT, *supra* note 30, at 35. Current policies, however, involve far more intervention than is required to meet this basic goal. *See id.*

92. *See* Paarlberg, *Domestic Agricultural Policy—Its Interrelationship with U.S. International Trade Policy*, in 1 COMM'N ON INT'L TRADE AND INV. POL'Y, UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD, Papers II 851, 855-56; Sorenson & Hathaway, *The Competitive Position of U.S. Agriculture*, in 1 COMM'N ON INT'L TRADE AND INV. POL'Y, UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD, Papers II 811, 820-21; *see also* Johnson, *supra* note 91, at 873, 878-79.

93. The necessity for import restraints depends upon the support mechanism used and its impact on output and prices. When price support mechanisms, "the most common and important means of income support," are used "some form of protection at the border is almost unavoidable." OECD 1980, *supra* note 11, at 93.

94. *Id.* at 99-100, 102. Whatever the form of protection used, the "prevailing situation is that of discrimination against foreign suppliers, no matter what the differential in efficiency levels is between national producers and foreign suppliers." *Id.* at 104.

95. When domestic production exceeds demand at the domestic price, domestic surpluses are generated. Export aids are often used by OECD countries to dispose of these surpluses on the international market. *Id.* at 100. The primary purpose of export aids is to encourage exports by ensuring that national producers "obtain for their exports the same price they obtain for the sales in the domestic market . . . ." *Id.* A secondary purpose is to develop export markets. *Id.* Export aids are commonly used in connection with other programs to accommodate domestic surpluses, such as storage or concessional sales in the domestic market. *Id.* at 100; *see* K. DAM, *supra* note 5, at 271; J. JACKSON, *supra* note 22, at 717-19. *See generally* G. HUFBAUER & J. ERB, SUBSIDIES IN INTERNATIONAL TRADE 7 (1984); Boger, *supra* note 19, at 173.

agricultural commodities are the subsidization of commercial exports[96] and the sale of agricultural commodities on concessional terms as food aid to developing nations.[97] A variety of credit aids and other devices also are used to artificially promote agricultural exports.[98] As a result of the import restrictions and export subsidies of the developed countries, the international agricultural commodities market is "a residual market which reflects the total global forces of supply and demand only partially and often in a distorted form."[99] High support prices and substantial import restrictions ensure that most food is produced and consumed locally. This market isolation reduces overall demand on the world market. And, when production cannot be sold domestically, the world market becomes a dumping ground for surpluses. These factors combine to artificially depress international prices[100] and destabilize the international market. Ordinary production fluctuations tend to be "exacerbat[ed]" by OECD domestic interventions in agriculture, and the price and supply effects of production fluctuations are transferred to international markets by OECD domestic policy interventions.[101]

---

96. *See, e.g.*, Johnson, *supra* note 90, at 183, 187 (implicit subsidies on dairy products); *U.S. Makes Wheat Flour Sale to Egypt to Meet French Competition Head-On*, 18 U.S. EXPORT WEEKLY (BNA) 644 (Jan. 25, 1983). For a general discussion of the subsidies war between the United States and the EC, see Boger, *supra* note 19, at 173-79.

97. The United States' food aid program originated in the Agricultural Trade Development and Assistance Act of 1954, Pub. L. No. 480, 68 Stat. 454 (current version at 7 U.S.C. §§ 1691, 1691(a), 1701-1736 (1982)). Its primary purposes were surplus disposal, the development of export markets, and combatting anti-United States propaganda in the Third World. Humanitarian motives were, at the outset, minor considerations, although this has since changed. *See* Walczak, *New Directions in United States Food Aid: Human Rights and Economic Development*, 8 DEN. J. INT'L L. & POL. 543, 545-49 (1979); *see also* R. BARD, FOOD AID AND AGRICULTURAL TRADE 18-24 (1970). As the commercial justification for food aid has diminished, so has its importance in United States policy. *See* Destler, *supra* note 28, at 633-35.

98. *E.g.*, Agricultural Trade Act of 1978, Pub. L. No. 95-501, 92 Stat. 1685; *see* Comment, *supra* note 19, at 342.

99. Seevers, *supra* note 91, at 726.

100. *See, e.g.*, GATT, Report of the Panel, European Communities—Refunds on Exports of Sugar—Complaint by Brazil, 27 B.I.S.D. Supp. 69 (1980) (effect of EC sugar policy on world market); Malmgren & Schlechty, *supra* note 29, at 523-24 (effect of Japan's rice policy on world market). It is possible, however, that domestic farm programs may actually increase world prices. To the extent that artificially high domestic price support levels keep domestic supplies from entering the international market, this may permit other nations to sell at a higher price in that market than they could otherwise obtain. It has been argued, for example, that high United States support levels, combined with a United States refusal to sell below those prices on the world markets, permits the European Community to export at higher prices than would otherwise be available. *See, e.g.*, *How Tough Export Title of Farm Bill Becomes Depends on European Attitude, Amstutz Says*, 2 INT'L TRADE REP. (BNA) 223 (1985).

101. OECD 1980, *supra* note 11, at 111. An uncommonly productive year for farm products can seriously depress international prices because OECD policies limit the domestic price impact of excessive supplies and, as surpluses move out of the country at subsidized prices, direct downward price pressure onto the international market. In the case of a

It is impossible to quantify precisely the degree to which the policies of developed nations distort international agricultural trade, but the effects are undeniably severe. One recent study concluded that a fifty percent reduction in OECD agricultural import barriers would increase world trade by 8.5 billion dollars per year.[102] The OECD itself has conceded that its members' policies increase the quantities of temperate agricultural products available to world markets, reduce the general level of world prices, redirect trade flows, and transfer domestic instability to the international market.[103] These conditions harm nearly every nation that participates in international agricultural trade, particularly the developing nations.

A. OECD Agricultural Trade Policies and the Hunger Problem

OECD domestic agricultural trade policies injure developing nations and contribute to hunger problems in several ways. First, the market distortions caused by developed-nation domestic policies significantly reduce the export earnings of less developed countries (LDCs) and contribute to overspecialization in their agricultural sectors. Second, developed-nation policies endanger LDC short-term food security by destabilizing international food prices and supply. Finally, in terms of long-term food security, the market distortions and artificial incentives created by domestic OECD policies obstruct LDC development, particularly agricultural development. These effects do not occur uniformly throughout the developing world;[104] they are common enough, however, to be identified as major impediments to a solution to the global hunger problem.

---

modest production shortfall, all production, and much of the stored surplus, may simply be sold at the domestic support prices, leaving no surplus for export and increasing the international price. *Id.* at 112. Serious production shortfalls may bring export restraints, which would drive the international price still higher and would reduce international food supplies. Under any situation it is the international market that generally absorbs the impact of production changes and, as a consequence, international prices are much more unstable than domestic prices. *See* Seevers, *supra* note 91, at 732. The United States, however, has been more willing than most OECD countries to allow its internal price and consumption patterns to shift when international supplies are low and prices are high. *Id.* at 734.

102. A. VALDÉS & J. ZIETZ, AGRICULTURAL PROTECTION IN OECD COUNTRIES: ITS COST TO LESS-DEVELOPED COUNTRIES 9 (International Food Policy Research Institute, Research Report No. 21, 1980); *see also* A. YEATS, TRADE BARRIERS FACING DEVELOPING NATIONS 135-43 (1979); Johnson, *Impact of Farm Support Policies on International Trade*, in IN SEARCH OF A NEW ECONOMIC ORDER (H. Corbet & R. Jackson eds. 1974).

103. OECD 1984, *supra* note 89, at 63-64; *see, e.g.*, Tsadik, *The International Sugar Market: Self-Sufficiency or Free Trade?*, 16 J. WORLD TRADE L. 133 (1982).

104. OECD 1984, *supra* note 89, at 67. The importance of agricultural trade varies among LDCs depending upon their resource endowments and the stage of their development. For low-income LDCs exports of food and agricultural raw materials amounted to 42% of total exports in 1979. The figure for middle-income LDCs was 15%. *See id.* at 58. Domestically, "agriculture is the major economic activity in most developing countries," and low growth in agriculture has "been reflected in both low economic growth

1. OECD Policies and LDC Agricultural Export Earnings

The depressing effect of OECD agricultural trade practices on LDC export earnings results primarily from OECD import restrictions on LDC exports. Such restrictions deny LDCs access to major consuming markets and artificially reduce world market prices. In addition, the exportation of OECD agricultural surpluses at artificially low prices (whether as food aid or through subsidization of commercial exports) depresses world prices and may deprive LDCs of markets for their own exports.[105] This combination of artificially low prices, limited access to OECD markets, and competition from OECD subsidized exports reduces LDC export earnings by billions of dollars annually.[106]

High OECD domestic support prices also adversely affect LDC export earnings by reducing demand for the supported commodity and promoting the development and use of substitutes for that commodity.[107] The resulting decline in absolute market size increases the risk that LDC exports to OECD markets will be restricted. If substitutes become prevalent and continue to be used even after import restrictions are relaxed, the smaller market size may become permanent.

OECD policies also induce unhealthy LDC specialization in tropical agricultural products. A few agricultural products—primarily tropical products that cannot be produced in significant quantities in temperate climates—can enter OECD countries relatively freely while other products face severe entry restrictions. Developing nations interested in increasing export earnings naturally focus their agricultural efforts on the production of tropical products that have duty free access to OECD markets.[108] This specialization in tropical products causes serious problems. Increased production and slow growth in the tropical products market contribute

---

rates and a worsening external financial situation." ECONOMICS, STATISTICS, AND COOP. SERVS., U.S. DEP'T OF AGRIC., GLOBAL FOOD ASSESSMENT v (Foreign Agricultural Economic Report No. 159, 1980).

105. Even LDCs which export food crops face these difficulties. *See, e.g.*, OECD 1984, *supra* note 89, at 46-48 (sugar). *See generally id.* at 67-69; Malmgren & Schlechty, *supra* note 29, at 529-31.

106. *See generally* A. VALDES & J. ZIETZ, *supra* note 102.

107. *See* Sorenson & Hathaway, *The Competitive Position of U.S. Agriculture*, in COMM'N ON INT'L TRADE AND INV. POL'Y, UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD, Papers I 811, 822 (1971) (impact of EC policies on domestic demand); *see, e.g.*, OECD 1984, *supra* note 89, at 46-48 (high price supports for sugar stimulate sugar substitutes).

108. *See* Christensen, *supra* note 2, at 761 (trade structure promotes specialization). One "important condition" for investment in LDC export sectors is "reasonable certainty of access to markets without the imminent threat of quantitative restrictions." REPORT TO THE PRESIDENT, *supra* note 30, at 240-42; *cf.* ECONOMIC RESEARCH SERV., U.S. DEP'T OF AGRIC., WORLD FOOD SITUATION AND PROSPECTS TO 1985, at 24-25 (Foreign Agricultural Economic Report No. 98, 1976) (food production increase requires market access).

to excess supply and long-term international price declines.[109] Moreover, the long growing seasons of many tropical products make supply and price trends difficult to predict. Agricultural planning in such circumstances becomes guesswork, and the oversupply that results when too many LDCs produce a single commodity can lead to devastatingly low world prices. Thus, the trade policies of OECD nations, which create incentives for LDC product specialization and disincentives for LDC production of temperate zone agricultural commodities, bear much of the responsibility for the price uncertainties, planning difficulties, and overproduction that have continuously obstructed LDC efforts to develop reliable sources of export earnings.[110]

2. *OECD Policies and LDC Food Security*

The impact of OECD policies on LDC food security is somewhat ambiguous. It occasionally has been argued that OECD domestic farm policies contribute to world food security by stimulating surplus grain production and depressing world grain prices. Presumably the surplus production is beneficial because it reduces LDC food import bills, leads to food aid, and provides a world reserve that can be used to stabilize prices and counteract production shortfalls. These benefits, however, are purchased at the price of LDC food supply insecurity. Because the international food market is a residual market, low prices and stable supplies are not guaranteed. Even a modest global production shortfall can cause international food supplies to plummet and prices to skyrocket.[111] Once the shortfall occurs, developed countries may exacerbate its effects by reducing food aid and restraining commercial food exports in an effort to maintain stable internal prices.[112] Thus, while LDC dependence on cheap food imports is sometimes beneficial, the dependence also is accompanied by periodic extreme food shortages and excessive prices.[113]

---

109. *See* Christensen, *supra* note 2, at 761.

110. On the serious effects of primary price fluctuations on LDCs, see REPORT TO THE PRESIDENT, *supra* note 30, at 242-44; Upchurch, *Competitive Position of U.S. Agriculture*, in COMM'N ON INT. TRADE AND INV. POL'Y, UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD, Papers I 842 (1971).

111. For a detailed analysis demonstrating that government policies seriously exacerbate the supply and price problems arising from production variability in the wheat market, see T. JOSLING, DEVELOPED-COUNTRY AGRICULTURAL POLICIES AND DEVELOPING-COUNTRY SUPPLIES: THE CASE OF WHEAT 11-12 (International Food Policy Research Institute, Research Report No. 14, 1980).

112. *See, e.g.*, Destler, *supra* note 28, at 627-29 (U.S. soybean embargo in 1973).

113. On the adverse effect of OECD policies on world food price and supply stability see generally Hathaway, *The Relationship Between Trade and World Food Security*, in ECONOMICS, STATISTICS, AND COOP. SERVS., U.S. DEP'T OF AGRIC., INTERNATIONAL FOOD POLICY ISSUES, A PROCEEDINGS 55-56 (Foreign Agricultural Economic Report No. 143, 1978); Hjort, *The Relationship Between Domestic and International Food Policy*, in ECONOMICS, STATISTICS, AND COOP. SERVS., U.S. DEP'T OF AGRIC., INTERNATIONAL FOOD POLICY ISSUES, A PROCEEDINGS

3. OECD Policies and LDC Development

OECD trade policies also impede LDC agricultural development and, consequently, long-term economic development. Artificially low world market prices and concessional sales or grants from developed nations depress domestic farm prices in developing nations, lowering rural incomes and reducing incentives to produce food crops.[114] In addition, low import prices may contribute to long-term changes in consumer preferences from local to imported food products.[115] These factors hinder LDC efforts to achieve food self-sufficiency and injure the economic well-being of rural communities—the largest, poorest, and hungriest segment of the developing world's population. Cheap food imports and depressed international market prices also induce LDC governments to concentrate their resources on problems other than rural development and food production and often to subsidize urban consumers at the expense of rural agricultural producers.[116]

Even when OECD countries freely admit LDC agricultural products, they do so primarily for unprocessed agricultural products, maintaining relatively high tariffs against processed agricultural imports.[117] These tariffs deprive LDCs of markets for processed products and effectively deny them

---

7 (Foreign Agricultural Economic Report No. 143, 1978); Josling, *supra* note 46, at 61. For a discussion of the role of OECD policies in the food crisis of the early 1970's, see Johnson, *International Food Security: Issues and Alternatives*, in ECONOMICS, STATISTICS, AND COOP. SERVS., U.S. DEP'T OF AGRIC., INTERNATIONAL FOOD POLICY ISSUES, A PROCEEDINGS 81, 82-83 (Foreign Agricultural Economic Report No. 143, 1978).

114. *See* Hopkins & Puchala, *supra* note 1, at 593; Seevers, *supra* note 91, at 726. *See generally* Christensen, *supra* note 2, at 761; Peterson, *International Farm Prices and the Social Cost of Cheap Food Policies*, 61 AM. J. AGRIC. ECON. 12-21 (1979); Scrimshaw, *Nutritional Considerations in Food Aid*, in ECONOMICS, STATISTICS, AND COOP. SERVS., U.S. DEP'T OF AGRIC., INTERNATIONAL FOOD POLICY ISSUES, A PROCEEDINGS 37, 42-43 (Foreign Agricultural Economic Report No. 143, 1978). *But see* Lewis, *Comment*, in ECONOMICS, STATISTICS, AND COOP. SERVS., U.S. DEP'T OF AGRIC., INTERNATIONAL FOOD POLICY ISSUES, A PROCEEDINGS 25, 26 (Foreign Agricultural Economic Report No. 143, 1978).

115. *See* DE VRIES & RICHTER-ALTERSCHAFFER, WORLD FOOD CRISIS AND AGRICULTURAL TRADE PROBLEMS 25-26 (The Washington Papers No. 17, 1974); OECD 1984, *supra* note 89, at 70, 80.

116. For example, artificially low wheat prices, created in part by OECD policies, have contributed to LDC policies which favor consumption, not production. "Producers in developing countries commonly receive few price incentives, and often find themselves taxed to pay for social programs. Therefore the evidence may be interpreted as showing a bias toward stimulating production in high-income countries at the expense of farmers elsewhere." T. JOSLING, *supra* note 111, at 45; *see also* Josling, *supra* note 46, at 61. Many LDCs pursue cheap food policies that inhibit "investment in agriculture" and induce producers to "shift from food crop to cash crop production." OECD 1984, *supra* note 89, at 64-65.

117. This is achieved by increasing the degree of protection the more a good is processed. For example, to the extent a nation permits importation of raw agricultural commodities it will often impose higher tariffs or nontariff barriers on finished goods, "thus discriminating

the opportunity to develop income-producing processing industries.[118] This particularly injures LDCs' development because the processing of agricultural products is generally well suited to their comparative advantage: the required technology is simple, low-cost, and labor intensive, and the raw materials may be close at hand.[119] Hindering LDCs' development of processing industries deprives them of "a natural first step in the evolution" of their economies and forces them to develop industries in which they lack a significant comparative advantage and in which they cannot compete.[120] In short, when the developed world protects its rural sector—against both ordinary internal adjustment processes[121] and external comparative advantage—it constrains LDC development efforts, channeling them away from their logical focus, agriculture, into stop-gap industrialization.

These developmental constraints are critical because, in the long run, agricultural development is vital to solving hunger problems in most LDCs. Over forty-four percent of the labor force in middle-income LDCs and seventy-one percent in low-income LDCs is employed in the agricultural sector and depends on it for survival.[122] Because hunger problems are most severe among these predominantly rural groups, increasing rural incomes and agricultural production is a necessary step toward alleviating hunger.[123] As a general proposition, rapid LDC industrial development cannot replace LDC agricultural development. Most LDCs lack the industrial base to productively employ any significant segment of the rural population, and the establishment of such an industrial base is unlikely in the foreseeable future.[124] Development must occur where people and resources are located; for most LDCs that is in the agricultural sector.

---

against the processing of agricultural goods in LDCs." Developed countries tend to increase levels of protection in this manner even when they freely admit the agricultural commodity in its raw form. A. VALDES & J. ZIETZ, *supra* note 102, at 10-11; *see* OECD 1984, *supra* note 89, at 69-70; *see, e.g.*, Wipf, *Tariffs, Nontariff Distortions, and Effective Protection in U.S. Agriculture*, 53 AM. J. AGRIC. ECON. 423, 426 (1971).

118. Cochrane, *Agricultural Aspects of U.S. Economic Relations with Developing Countries*, in COMM'N ON INT'L TRADE AND INV. POL'Y, UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD, Papers II 257, 260 (1971). *See generally* A. YEATS, *supra* note 102, at 74-99.

119. *See* Cochrane, *supra* note 118, at 266-67.

120. OECD 1984, *supra* note 89, at 67-70.

121. By artificially maintaining farm income, price support policies that are not based on market realities "can be a disincentive to structural changes and adjustment that may be much needed" in the farm sectors of developed nations. OECD 1980, *supra* note 11, at 92.

122. *Id.* at 57. In Africa, which has been said to present "the most intractable food problem facing the world," three out of every five people work in agriculture. Eicher, *supra* note 2, at 151-53; *see also* J. MCINTIRE, FOOD SECURITY IN THE SAHEL: VARIABLE IMPORT LEVY, GRAIN RESERVES AND FOREIGN EXCHANGE ASSISTANCE 13 (International Food Policy Research Institute, Research Report No. 26, 1981).

123. *See* Miljan, *supra* note 2, at xi.

124. *See* Cochrane, *supra* note 118, at 272-73. Agricultural development is an impor-

Moreover, a healthy agricultural sector would itself stimulate overall economic development. Agricultural development promotes indigenous industrial development because agricultural development requires industrial inputs and provides the raw materials for process industries, which, because of their high-labor, low-capital, and low-technology configurations, are often ideally suited to serve as a foundation for LDC industrial development. Increasing rural income provides a further basis for industrial development by stimulating rural demand for low-technology consumer goods (clothing, footwear, furniture) and processed agricultural products. Finally, a rural income surplus would increase savings, investment, and government tax revenues,[125] and thus provide a capital base to support development efforts.

4. Trade Liberalization and Hunger

Liberalization of OECD agricultural trade policies would provide significant benefits to LDCs in the form of increased export earnings, more stable world agricultural prices, and a more conducive environment for economic development. Nevertheless, some commentators contend that agricultural trade in any form is part of the hunger problem, not part of the solution. According to this argument, structural inequalities in LDC societies preclude the poor from deriving the economic benefits attending trade; trade leads to a pattern in which LDCs export agricultural products to wealthy industrial nations and import luxury goods for the upper strata of LDC society. The battle against hunger, therefore, must be fought

---

tant prerequisite to industrial development for several reasons. First, "that is where the bulk of human resources is to be found." *Id.* at 272. Second, "there is no place for the surplus workers of agriculture to go, in any important sense." *Id.* Third, until the large rural populations in LDCs become self-supporting, they will continue to be a large and potentially debilitating drain on LDC resources. The important links between agricultural development and general economic progress have been recognized for some time. *See, e.g.,* Okawa & Johnston, *Traditional Agriculture*, in THE ROLE OF AGRICULTURE IN ECONOMIC DEVELOPMENT 277 (1969). Nevertheless, until recently the literature and practice of development focused upon industrialization, with agriculture primarily serving as "a provider of basic human needs." *Forward* 5 (International Food Policy Research Institute, Research Report No. 33, 1982) (comments of John W. Mellor). International organizations increasingly are recognizing, however, that:

> [W]here industrialization has been successful, agricultural progress has not been sacrificed. It may seem strange that it has taken so long to learn the lesson from the universal experience of those countries which are now developed, or on the verge of being developed, that industrialization is not successful without a prior or simultaneous agricultural revolution. But the lesson is now being learned.

Ewing, *Annual Reports on the World Economy*, 16 J. WORLD TRADE L. 540, 544 (1982).

125. For an analysis attempting to provide an economic model to measure these linkages between agriculture and industry, see C. KANGARAJAN, *supra* note 89, at 17-22; *see also* ERH-CHENG HWA, THE CONTRIBUTION OF AGRICULTURE TO ECONOMIC GROWTH 2-7 (World Bank Staff Working Papers No. 619, 1983); Nicholson & Esseks, *The Politics of Food Scarcities in Developing Countries*, 32 INT'L ORG. 679, 704-05 (1978).

with efforts to reform LDC social structures and provide the rural poor with the economic tools for local food production; international trade is thought to be irrelevant or harmful.[126]

These arguments have undeniable force in one sense: overcoming economic inequalities in developing countries must be part of any successful campaign against global hunger. But it does not necessarily follow that agricultural trade liberalization is an inappropriate part of international efforts to overcome global hunger. To the contrary, trade liberalization may assist in overcoming structural inequities in LDC societies even if, by itself, it is an inadequate answer to the hunger problem. The much-decried "export trade trap" facing developing nations is partly a consequence of current distortions in agricultural trade.[127] Illiberal OECD trade practices make tropical product production the most profitable alternative for LDC agricultural development, albeit a dangerously unstable alternative. These same practices create significant disincentives for LDC food production and for LDC investment in food production. Liberalized trade would increase incentives for local food production, promote rural agricultural development, and facilitate the development of agriculture-related industries in developing countries. Economic growth in agricultural sectors would, at least, assist in correcting the inequities present in LDCs.[128]

Moreover, combating hunger and structural inequality requires resources. Rural development and increased incomes for poor populations cannot be accomplished without an infusion of basic resources such as fertilizer, pesticides, and irrigation technology, which must be purchased from abroad. Capital investment to improve rural infrastructures is also necessary. Agricultural exports are, for many LDCs, the primary means of obtaining the resources required to make these investments.[129] Thus, although greater LDC food production for internal consumption is a necessary goal, export-oriented agriculture must continue to play an important role in some LDC economies if the investments necessary for

---

126. *See* F. LAPPE & J. COLLINS, FOOD FIRST 209-33 (1978). For a more moderate and scholarly view, but one critical of export agriculture and insistent that the poverty-hunger link must be addressed directly by correcting social inequalities, see Christensen, *supra* note 2, at 773-74.

127. *See supra* text accompanying notes 108-10.

128. *See* Nicholson & Esseks, *supra* note 125, at 704-05. Even if the income from agricultural development is poorly distributed, a growth-oriented approach to agriculture would help reduce poverty. Falcon, *Food Self-Sufficiency: Lessons from Asia*, in ECONOMICS, STATISTICS, AND COOP. SERVS., U.S. DEP'T OF AGRIC., INTERNATIONAL FOOD POLICY ISSUES, A PROCEEDINGS 13, 20 (Foreign Agricultural Economic Report No. 143, 1978).

129. For many LDCs the exportation of a single agricultural product accounts for the bulk of foreign exchange earnings. Some examples include: Columbia (coffee—63%); El Salvador (coffee—63%); Burundi (coffee—89%); Ethiopia (coffee—72%); Rwanda (coffee—78%); Uganda (coffee—93%); Ghana (cocoa—69%); Mauritius (sugar—66%); Reunion (sugar—83%); Fiji (sugar—55%); Martinique (bananas—52%); Chad (cotton—78%); Sudan (cotton—57%). OECD 1984, *supra* note 89, at 59.

economic development are to be made. Exporting agricultural commodities also is a sensible food security strategy in some circumstances. Selling tropical products abroad and importing necessary foodstuffs is a wise use of resources if the cost of domestically producing basic foodstuffs far exceeds the cost of food imports.[130] Although there has been significant detrimental reliance on export agriculture, the injury done to LDC agricultural exports by OECD policies is the major cause of current problems, not export agriculture per se.

While agricultural trade liberalization is not the answer to hunger problems, it would bring large advantages to the battle against hunger.[131] Increased access to OECD markets would improve LDC export earnings and draw resources into areas previously neglected, such as food production and agricultural processing.[132] Liberalized trade would stabilize world food prices, reduce barriers to world adjustment to production changes, and "contribute significantly to short-term food security."[133] Finally, if trade were liberalized, world food production would increase more rapidly because resource investments would be concentrated in areas that yield the highest agricultural returns.[134]

B. The GATT Framework for Trade Liberalization

The desirability of agricultural trade liberalization and, in particular, its importance to the problem of underdevelopment, has been recognized for several decades. To assist both agricultural and industrial trade liberalization, the international community adopted the General Agreement on Tariffs and Trade (GATT). The GATT seeks to attain trade liberalization through the "reciprocal and mutually advantageous" reduction of national trade barriers.[135] The GATT negotiations reflected a shared

130. Sanderson, *The Role of International Trade in Solving the Food Problem of the Developing Countries*, in ECONOMICS, STATISTICS, AND COOP. SERVS., U.S. DEP'T OF AGRIC., INTERNATIONAL FOOD POLICY ISSUES, A PROCEEDINGS 69, 71 (Foreign Agricultural Economic Report No. 143, 1978). Moreover, many LDCs depend on food imports to compensate for low domestic food production. *See* J. MCINTIRE, *supra* note 122, at 9; Eicher, *supra* note 2, at 156. *See generally* B. HUDDLESTON, CLOSING THE CEREALS GAP WITH TRADE AND FOOD AID 10 (International Food Policy Research Institute, Research Report No. 43, 1984).

131. The issues of trade liberalization and world food security "are [so] closely related . . . that progress on either depends on progress on both." Hathaway, *supra* note 113, at 55.

132. In fact, trade liberalization may not only be important, but vital, to LDC development. There appears to be no other "significant opportunity" for LCDs "that export raw products for higher and more stable international market prices." Moreover, absent liberalization, high effective tariff rates will continue to make it "virtually impossible for the country producing the raw material to engage in even relatively simple processing operations." Johnson, *World Food Institutions: A "Liberal" View*, 32 INT'L ORG. 837, 841 (1978).

133. Hathaway, *supra* note 113, at 56.

134. *Id.* at 55.

135. GATT, *supra* note 65, preamble (as amended by the Protocol Amending the Preamble and parts II and III of the General Agreement on Tariffs and Trade, Mar. 10, 1955, 8 U.S.T. 1767, T.I.A.S. No. 3930, 278 U.N.T.S. 168).

view that any agreement should "abstain from . . . lovely rhetoric and get down to operating details, in binding form." To a large extent, the GATT reflects this consensus to strive for firm international obligations and imposes fairly clear restrictions on national conduct.[136]

There are three central components to the GATT's trade liberalization plan. First, import barriers other than tariffs are generally prohibited. In particular, quantitative restrictions are allowed only in exceptional circumstances.[137] Second, tariff rates may be bound at agreed levels and those rates are subject to periodic attempts at reduction through negotiations.[138] Third, GATT members must extend most-favored-nation treatment to one another.[139]

These basic rules provide a reasonably strong structure within which to pursue trade liberalization. By limiting import restrictions to tariffs, the GATT permits easy identification of existing restrictions, cross-country comparisons of import restraint, and reciprocal negotiations to reduce trade restrictions. In addition, unlike quotas, tariffs can be overcome by more efficient foreign producers. Moreover, the ability to gradually lower tariffs facilitates the liberalization process by permitting a gradual domestic adjustment to international competition.[140] The most-favored-nation requirement eliminates discrimination and encourages negotiations and concessions.[141]

This basic framework is qualified by many exceptions that are designed to cope with two situations: the presence of domestic political pressures that make some trade restriction nearly inevitable,[142] and cases in which initial ratification of GATT was conditioned on a qualification of a basic

---

136. R. HUDEC, *supra* note 6, at 6. The original negotiators of the agreement were concerned that the "sweeping affirmations of the best principles" would not produce concrete results. *Id.* They were then wary of soft law, although this early tendency to favor a legalist attitude about international rules gradually lost favor in GATT practice. *See* Hudec, *supra* note 9, at 151-53.

137. GATT, *supra* note 65, art. XI. The GATT does not prohibit all forms of nontariff barriers that inhibit imports. But its basic prohibition on quantitative restrictions was designed to eliminate the most restrictive and trade-distorting nontariff barriers. *See* K. DAM, *supra* note 5, at 19-21, 148-166.

138. GATT, *supra* note 65, art. II.

139. *Id.* art. I.

140. K. DAM, *supra* note 5, at 17-19, 62-63, 148-49.

141. Whether the requirement that tariff concessions be extended to all GATT members actually contributed to increased tariff concessions is uncertain. Nevertheless, the multilateral character of GATT's approach to liberalization "probably contributed to greater tariff reduction than would have occurred if the pre-GATT system had been continued." *Id.* at 63.

142. For example, the General Agreement permits members to withdraw tariff concessions permanently or temporarily when imports are creating political problems because of their adverse effects on domestic industries. *See* GATT, *supra* note 65, art. XXVIII (as amended by part W of the Protocol Amending the Preamble and parts II and III of the General Agreement on Tariffs and Trade, Mar. 10, 1955, 8 U.S.T. 1767, T.I.A.S. No. 3930, 278 U.N.T.S. 168); GATT, *supra* note 65, art. XIX (as amended by part O

rule.[143] Generally, such exceptions were carefully limited. Their basic purpose was to provide a means for nations to utilize politically necessary protectionist measures without violating their GATT obligations and defeating the legal force of the GATT. Consequently, most GATT exceptions were intended to have a fairly narrow application.[144]

In order to garner national acceptance of the GATT rules, the GATT framers included major concessions to domestic farm policies. The article XI prohibition on quantitative restrictions, for example, is qualified by an agricultural exception that was created at the insistence of the United States and that was tailored to fit the then current agricultural policies of the United States.[145] Under the exception a nation may impose quantitative barriers to agricultural imports when such action is necessary to protect against the disruption of the market conditions created by domestic

---

of the Protocol Amending the Preamble and parts II and III of the General Agreement on Tariffs and Trade, Mar. 10, 1955, 8 U.S.T. 1767, T.I.A.S. No. 3930, 278 U.N.T.S. 168). Such withdrawals entitle other nations to compensation. The purpose of such escape clauses is "to prevent the system of concessions from becoming too rigid a yoke on the commercial policies of contracting parties." K. DAM, *supra* note 5, at 18.

143. *See, e.g.*, GATT, *supra* note 65, art. I(2). Other exceptions to the basic rules have been created to address the needs of developing countries. *See, e.g.*, GATT, *supra* note 65, art. XVIII (as amended by part E of the Protocol Modifying part II and article XXVI of the General Agreement on Tariffs and Trade, Sept. 14, 1948, 4 Bevans 769, T.I.A.S. No. 1890, 62 U.N.T.S 80); GATT, *supra* note 65, art. XXXVI (as enacted by the Protocol, *supra* note 6).

144. For example, the restriction on quantitative restrictions is qualified by a balance-of-payments exception. *See* GATT, *supra* note 65, art. XII (as amended by part I of the Protocol Amending the Preamble and parts II and III of the General Agreement on Tariffs and Trade, Mar. 10, 1955, 8 U.S.T. 1767, T.I.A.S. No. 3930, 278 U.N.T.S. 168). The circumstances in which the exception may be used are limited, *see* Gatt, *supra* note 135, art. XII(2)(a) (as amended by part I of the Protocol Amending the Preamble and parts II and III of the General Agreement on Tariffs and Trade, Mar. 10, 1955, 8 U.S.T. 1767, T.I.A.S. No. 3930, 278 U.N.T.S. 168), and the IMF is given authority to determine whether balance-of-payments problems justifying the exception exist. *See* GATT, *supra* note 65, art. XV(2) (as amended by part K of the Protocol Amending the Preamble and parts II and III of the General Agreement on Tariffs and Trade, Mar. 10, 1955, 8 U.S.T. 1767, T.I.A.S. No. 3930, 278 U.N.T.S. 168). This tends "to limit greatly the scope for GATT decision." K. DAM, *supra* note 5, at 156. The GATT also includes provisions designed to prevent discriminatory application of quantitative restrictions imposed for balance-of-payments purposes. GATT, *supra* note 65, arts. XIII, XIV (as amended by Special Protocol Modifying Article XIV of the General Agreement on Tariffs and Trade, Mar. 24, 1948, 4 Bevans 712, T.I.A.S. No. 1764, 62 U.N.T.S. 40, and part J of the Protocol Amending the Preamble and parts II and III of the General Agreement on Tariffs and Trade, Mar. 10, 1955, 8 U.S.T. 1767, T.I.A.S. No. 3930, 278 U.N.T.S. 168). A similar set of rules applies to developing countries. *See* GATT, *supra* note 65, art. XVIII(9) (as amended by part E of the Protocol Amending the Preamble and parts II and III of the General Agreement on Tariffs and Trade, Mar. 10, 1955, 8 U.S.T. 1767, T.I.A.S. No. 3930, 278 U.N.T.S. 168). The GATT exception has been criticized because it encourages nations to use quantitative restrictions, rather than monetary and fiscal policy, to solve balance-of-payments problems. K. DAM, *supra* note 5, at 157.

145. *See* J. JACKSON, *supra* note 22, at 319.

programs. To ensure minimal interference with trade and trade liberalization, GATT's framers imposed two critical limitations on this exception. First, nations imposing nontariff restrictions on agricultural imports must also restrain domestic marketing or production of the commodity or, at least, eliminate temporary domestic surpluses of the product by concessional disposal of food to consumers otherwise unable to purchase it. Second, import restrictions imposed under the exception cannot be applied to alter the share of the domestic market that is supplied by imports. These two limitations were intended to minimize the adverse consequences of import restrictions by protecting against the development of large domestic agricultural surpluses and by guaranteeing market access for foreign goods.[146]

A second major concession to domestic farm policies was the GATT's limited approval of export subsidies on primary products, including agricultural commodities. A 1955 amendment to article XVI generally forbade new subsidization of industrial exports but permitted such subsidization of primary product exports.[147] However, export subsidies on primary products are permitted under that article only if they are not applied "in a manner which results in the [subsidizing nation] having more than an equitable share of world export trade in that product."[148] Again, the GATT's objective is to accommodate domestic farm policies while minimizing their interference with international trade.

These GATT provisions appear to be a reasonable compromise between national sovereignty over farm programs and international regulation of trade-distorting national policies. While they recognize that direct international regulation of domestic policies is not feasible and that domestic agricultural policies will be supported by undesirable international trade practices, the GATT rules attempt to limit the distortions caused by such policies.[149] But in spite of this accommodation of domestic farm policies, the GATT rules were ignored almost from their inception and continue to be ineffective. Despite their enormously disruptive effects on world markets, both export subsidization[150] and nontariff restrictions on agricultural imports are widespread.[151] The current agricultural trade practices of most nations comply with neither the letter nor the spirit of the GATT provisions.

---

146. *See* K. DAM, *supra* note 5, at 258-60.

147. GATT, *supra* note 65, art. XVI(B) (added by part L of Protocol Amending the Preamble and parts II and III of the General Agreement on Tariffs and Trade, Mar. 10, 1955, 8 U.S.T. 1767, T.I.A.S. No. 3930, 278 U.N.T.S. 168).

148. *Id.* art. XVI(B)(3) (added by part L of Protocol Amending the Preamble and parts II and III of the General Agreement on Tariffs and Trade, Mar. 10, 1955, 8 U.S.T. 1767, T.I.A.S. No. 3930, 278 U.N.T.S. 168).

149. R. HUDEC, *supra* note 6, at 200-01.

150. *See, e.g.*, Boger, *supra* note 19, at 186-90, 197-98, 230-32.

151. *See* K. DAM, *supra* note 5, at 258.

C. Bases of the GATT's Agricultural Trade Failures

The collapse of the GATT's agricultural trade liberalization structure was evident by the early 1970's. The substantive rules were not adhered to,[152] and even if they could have been enforced, they could not adequately have addressed the plethora of trade-distorting practices used by developed nations.[153] The GATT's dispute settlement mechanism did not satisfactorily resolve agricultural trade disputes and was generally ignored.[154] Efforts toward broad agricultural trade negotiations had not generated significant reductions in trade-distorting practices or led to important reforms.[155] Efforts to negotiate agreements covering specific commodities had only modest success.[156] These problems continue to characterize GATT practice.[157]

Past examinations of agricultural trade practices[158] have identified several interrelated factors that prevented the GATT from effectively addressing agricultural trade problems. First, beginning in the 1950's and continuing into the 1960's there was increasing disunity among national governments on how to handle agricultural trade policy.[159] This disunity was reflected in the United States' repudiation of GATT rules on agricultural import restrictions in 1951,[160] the United States' blockade of an effort to create GATT rules on surplus disposal,[161] and the development of the European Community's highly restrictive common agricultural policy in the early 1960's.[162] Simply stated, widely differing national in-

---

152. *See generally id.*

153. J. JACKSON, *supra* note 22, at 517-22.

154. *See generally* R. HUDEC, *supra* note 6, at 200-08, 216-27, 230-40; R. HUDEC, *supra* note 5, at 5-13. The United States was a notable exception to this rule. It sporadically attempted to revitalize the dispute settlement procedures. R. HUDEC, *supra* note 5, at 5-13.

155. J. JACKSON, *supra* note 22, at 737-40.

156. *See, e.g.*, Schram, *International Repercussions of National Farm Policies: A Look at American Wheat Programs*, 3 LAW & POL'Y INT'L BUS. 239, 296-318 (1971). *See generally* J. JACKSON, *supra* note 22, at 721-32.

157. *See* Bergland, *Preface*, 12 LAW & POL'Y INT'L BUS. 257, 257-64 (1980). The Tokyo Round Subsidies Code has not succeeded in resolving problems concerning agricultural export subsidies. *See* Boger, *supra* note 19, at 214-17. The International Dairy Agreement negotiated at the Tokyo Round similarly has been unsuccessful. In late 1984, the United States withdrew from the agreement because of a dispute over minimum export prices. *See U.S. Tells GATT It Intends to Leave Dairy Agreement, Cites Butter Sale*, 1 INT'L TRADE REP. (BNA) 770 (1984).

158. *See, e.g.*, G. CURZON, MULTILATERAL COMMERCIAL DIPLOMACY 166-208 (1965); K. DAM, *supra* note 5, at 257-273; J. JACKSON, *supra* note 22, at 717-740.

159. *See* R. HUDEC, *supra* note 6, at 193-203.

160. *See* J. JACKSON, *supra* note 22, at 734.

161. *See* GATT, Report Adopted on 3 March 1955, 3 B.I.S.D. Supp. 222, 229 (L/334 and Addendum) (1955); *see also* G. CURZON, *supra* note 158, at 168-77.

162. *See* R. HUDEC, *supra* note 6, at 200-03; *see also* Dam, *The European Common Market in Agriculture*, 67 COLUM. L. REV. 209, 209 (1967).

terests and national views of agricultural trade prevented international consensus on how to solve agricultural problems.

This breakdown of the GATT's earlier consensus was closely linked to the effects of developed nations' postwar agricultural programs and the political pressures those programs generated. During the 1950's most developed nations were pursuing income maintenance agricultural policies that created enormous domestic agricultural surpluses. Consequently, there was substantial domestic political support for import restraint and for export subsidization programs to alleviate increasing surplus difficulties. These pressures made it difficult, and in some cases impossible, for developed nations to subject their policies to GATT discipline.[163] Their departure from GATT rules generated a widespread conviction that the rules were no longer effective and that there was a lack of balance or overall reciprocity in the operation of the General Agreement. This perception further undermined the basic consensus on agricultural trade policy that was reflected in the GATT rules.[164]

GATT's institutional weaknesses compounded its problems. Its dispute settlement procedures proved ineffective and fell into desuetude.[165] In part, this may be a consequence of the absence of a normative consensus on agricultural trade policy. Professor Hudec has argued that GATT dispute settlement relies largely on the "force of normative pressures,"[166] and therefore its success depends on its ability "to define and declare authoritative norms."[167] Thus, the various weaknesses that have been perceived in GATT's dispute settlement process may originate in the absence of any consensus that can generate an authoritative statement of international norms. At the same time, however, ineffective dispute settlement is certain to reduce the willingness of nations to abide by even those rules that rest on a clear consensus. Thus, these factors are mutually reinforcing.[168]

Finally, the GATT's shaky origins left it without an institutional framework to facilitate compromise and experimentation in the absence of an effective set of rules limiting national conduct.[169] When GATT's substantive rules became inoperative, its weak and incomplete legal processes could not fill the resulting void.[170]

---

163. R. HUDEC, *supra* note 6, at 200-01.
164. R. HUDEC, *supra* note 5, at 17-20.
165. *Id.* at 11-20.
166. R. HUDEC, *supra* note 6, at 185.
167. *Id.* at 186.
168. R. HUDEC, *supra* note 5, at 2-4.
169. *See* Jackson, *supra* note 8, at 96.
170. *See, e.g.*, J. JACKSON, *supra* note 22, at 737-39. The GATT, of course, has sought throughout its history to develop procedures for negotiation and consultation to handle situations in which its substantive rules do not resolve disputes. *Id.*; *see also* K. DAM, *supra* note 5, at 4-5.

The GATT's decline thus reflects a confluence of several factors: domestic political pressure, inadequate institutional arrangements, the absence of a normative consensus on agricultural trade policy, and ineffective dispute resolution. Attentive to these sources of the GATT's weakness, most reform efforts and proposals concentrate on institutional improvements and the creation of a new consensus on general agricultural trade policies or, at least, agreements on national practice in particular agricultural sectors.[171] An additional lesson, as yet unexplored in depth, that can be learned from the GATT's failure in agricultural trade concerns the impact of soft law on the effectiveness of the GATT structure for regulating agricultural trade relations.

The interrelationship of soft law and domestic political processes is critical to understanding GATT's failures. When domestic forces overcame firm international rules or prevented international agreement on firm rules, the international community sought to solve agricultural trade problems through a soft law approach. The hope was that the retention of some legal framework, even a soft framework, would permit gradual improvement in agricultural trading conditions when domestic problems diminished and the political climate changed. But the diminished capacity of soft law to influence domestic political decisionmaking prevented it from gradually improving conditions. At the same time, soft law created international expectations that made it impossible to replace the existing international legal order with potentially more effective alternatives.

III. Soft Law in the GATT

The GATT's use of soft law to solve problems created by developed-nation agricultural trade policies is a particularly instructive case study of soft law for several reasons. First, if soft law is a beneficial alternative to anarchy because it permits the development of firm rules and facilitates international cooperation,[172] one would expect those advantages to emerge most clearly when soft law is used to address disputes among developed nations. Those nations generally share common political goals, similar economic interests, and relatively comparable stages of development. Presumably, soft law's prospects for success are greater under such circumstances than in the context of developed-developing nation disputes.[173] Second, soft law also might be expected to succeed when it is used, as

171. *See supra* text accompanying notes 8-12.

172. *See supra* text accompanying notes 72-75.

173. *Cf.* Gold, *supra* note 47, at 443-44 ("A substantial amount of soft law can be attributed to differences in the economic structures and economic interests of developed, as compared with many developing, countries."); Seidl-Hohenveldern, *supra* note 13, at 175-77 (partially explaining soft law as product of disparate economic interests of developed and developing nations).

in the GATT, within an established legal framework based on a preexisting consensus concerning the goals of international trade regulation.[174] Third, although GATT procedures are less than ideal, the GATT does have procedures that could facilitate the resolution of disputes involving soft law.[175]

The substantive context in which GATT relied on soft law also suggests reasonable prospects of success. Soft law was relied upon initially to address problems involving agricultural import restrictions and export subsidies.[176] Although the domestic economic problems and political pressures that generated such activities were substantial, there was an expressed international consensus that such practices were undesirable and could be harmful to international goals.[177] In the case of import restrictions there was firm international agreement that certain practices should be prohibited;[178] soft law was originally used only to address violations of that prohibition.[179] Soft law was not used in the GATT to promulgate a broad text of rules or guidelines aimed at a wide range of national actions. It was used in a fairly narrow context to address specific problems among nations whose basic international interests and objectives were similar. The failure of soft law in such a setting portends a dim future for its use in less congenial contexts.

---

174. The strength of this preexisting consensus should not be overemphasized. GATT's legal underpinnings are weak, *see* R. HUDEC, *supra* note 6, at 44-51, and some commentators have regarded the GATT generally as an example of "soft law." *See, e.g.*, J. KOLASA, LAW-MAKING AND LAW-ENFORCING FOR INTERNATIONAL TRADE: SOME REFLECTIONS ON THE GATT EXPERIENCE 32 (Princeton World Order Studies Program 1976); Harris, *supra* note 8, at 145. The manner of GATT's acceptance certainly has created some doubt as to the "binding status" of its rules under traditional principles of international law. R. HUDEC, *supra* note 5, at 31-33. It can be argued that GATT rules are basically nonbinding, imposing only an obligation to negotiate. Harris, *supra* note 8, at 145. Nevertheless, GATT does represent an international agreement on basic trade policy goals combined with a "code of relatively detailed rules governing the major instruments of trade policy." R. HUDEC, *supra* note 5, at 1. The GATT rules, moreover, "do make an authoritative normative claim upon governments." *Id.* at 32. This Article, therefore, analyzes the GATT rules as "soft law" only insofar as those rules have the characteristics of "soft law" identified in section II. *See supra* text accompanying notes 62-67. The purpose of this Article is to examine the effectiveness of rules with such characteristics, not to provide a universally acceptable definition of "soft law."

175. *See generally* R. HUDEC, *supra* note 5.

176. *See infra* text accompanying notes 211-21, 289-91, 307-321.

177. *See* GATT, *supra* note 65, arts. XI, XVI (as amended by part L of the Protocol Amending the Preamble and parts II and III of the General Agreement on Tariffs and Trade, Mar. 10, 1955, 8 U.S.T. 1767, T.I.A.S. No. 3930, 278 U.N.T.S. 168).

178. GATT, *supra* note 65, art. XI. This prohibition was, of course, qualified by the limited agricultural exception discussed *supra* text accompanying notes 145-46.

179. *See infra* text accompanying notes 211-21.

A. Soft Law and the United States' Waiver

Perhaps the most important GATT decision concerning agricultural trade is a decision granting a waiver permitting the United States to impose quantitative restrictions on agricultural imports which, absent the waiver, would have violated article XI of the GATT.[180] The waiver decision was a clear example of domestic political pressure overcoming international law. After an early period during which it affirmed the supremacy of international obligations over domestic farm programs, Congress reversed its position and required the executive branch to enforce farm programs[181] that conflicted with GATT obligations. To avoid the unfortunate scenario of the GATT's major supporter ignoring one of the Agreement's most basic requirements, the United States sought a waiver of its GATT obligations. Recognizing political realities, the GATT contracting parties granted the waiver.[182]

It is not self-evident that this waiver should have precipitated GATT's failure to achieve agricultural trade liberalization. First, the United States' attitude in requesting the waiver was not one of defiance toward international rules. To the contrary, it expressed regret and assured GATT that it would work toward removal of the offending agricultural restrictions.[183] The waiver did not, therefore, presage a permanent departure from GATT rules, particularly when viewed in the light of Congress' earlier position of respect for GATT. Second, the waiver demonstrated GATT's ability to address in a flexible manner those situations that threaten legal order in trade relations. Such flexibility is advantageous if it minimizes tensions and facilitates a resolution of problems. The waiver at least suggested these results. The United States, after all, had not attempted to conceal its departure from GATT; nor had it sought to evade responsibility by placing the blame for its violation on the restrictive agricultural policies of other nations. Instead, it acted within the established legal framework, promised to work toward GATT compliance, and accepted the right of other nations

---

180. GATT, Decision of 5 March 1955, 3 B.I.S.D. Supp. 32, GATT Sales No. 1955-2 (1955) (Waiver Granted to the United States in Connection with Import Restrictions imposed Under Section 22 of the United States Agricultural Adjustment Act (of 1933), as Amended). For the report on this decision, see 3 B.I.S.D. Supp. 141 (1955). *See generally* K. DAM, *supra* note 5, at 260-61; J. JACKSON, *supra* note 22, at 733-37.

181. *See* Agricultural Act of 1948, ch. 827, § 22(f), 62 Stat. 1247, 1250 ("No proclamation under this section shall be enforced in contradiction of any treaty or other international agreement to which the United States is or hereafter becomes a party."), *as amended by* Act of June 16, 1951, ch. 141, § 8(b), 65 Stat. 72, 75 ("No trade agreement or other international agreement heretofore or hereafter entered into by the United States shall be applied in a manner inconsistent with the requirements of this section."); *see also* J. JACKSON, *supra* note 22, at 733-35.

182. *See* K. DAM, *supra* note 5, at 260-62; J. JACKSON, *supra* note 22, at 735-37.

183. *See, e.g.*, GATT, Decision of 5 March 1955, *supra* note 180, at 33-34; GATT, Report Adopted on 5 March 1955, 3 B.I.S.D. Supp. 141, at 142-43 (L/339) (1955).

to retaliate against its conduct. In spite of the United States' departure from article XI, it was hoped and assumed that the waiver would strengthen international respect for GATT procedures and rules in the face of the occasional inevitable violation.[184]

Although the waiver per se did not necessarily threaten to undermine the GATT's approach to agricultural import restrictions, it did in fact have this result.[185] The soft law nature of the waiver was a significant factor leading to the waiver's deleterious impact on the GATT structure. To understand fully these soft characteristics, it is useful to begin by contrasting the United States' waiver with the GATT's so-called "hard-core waiver" decision[186] on residual import restrictions.

1. Firm Law and Soft Law in the Waiver Process

The superficial parallels between the hard-core waiver and United States waiver decisions are striking.[187] Both decisions were reached by GATT on the same day. Both authorize the imposition of quantitative restrictions that would otherwise violate the GATT. Each decision was an attempt to maintain the GATT's legal effectiveness while accommodating politically necessary action. But, although both decisions may be said to be the result of political necessity,[188] they are extraordinarily different from a legal perspective.

The hard-core waiver decision involved trade restrictions imposed by nations emerging from balance-of-payments difficulties.[189] Under GATT article XII, a nation with serious balance-of-payments problems is entitled

---

184. While the waiver "constituted a grave blow to GATT's prestige," K. DAM, *supra* note 5, at 260, "without a waiver, damage to the legal principles of GATT could, it was thought, ensue and indeed one result might be the withdrawal of the United States from GATT." J. JACKSON, *supra* note 22, at 735. The United States waiver made it plain that the GATT could not, by the force of its rules alone, eliminate agricultural protection among its members. But the United States' apparent willingness to work toward resolving its farm problems, combined with attempts by the GATT in the late 1950's and early 1960's to negotiate solutions to agricultural trade problems, gave cause for hope to some that the GATT could "act as a catalyst" to erode agricultural protection by providing a forum where "the conflicting interests of different countries can be isolated and analyzed and where by an exchange of concessions a universally acceptable solution can be arrived at." G. CURZON, *supra* note 158, at 208.

185. *See* J. JACKSON, *supra* note 22, at 736-37.

186. GATT, Decision of 5 March 1955, 3 B.I.S.D. Supp. 38, GATT Sales No. 1955-2 (1955) (Problems Raised For Contracting Parties in Eliminating Import Restrictions Maintained During a Period of Balance of Payments Difficulties); *see also* Report Adopted on 2, 4, and 5 March 1955, 3 B.I.S.D. Supp. 170 (L/332/Rev. I and Addenda) (1955). *See generally* R. HUDEC, *supra* note 6, at 242.

187. *Compare* GATT, Decision of 5 March 1955, *supra* note 180 *with* GATT, Decision of 5 March 1955, *supra* note 186.

188. *See* J. JACKSON, *supra* note 22, at 735-36 (political necessity for United States waiver); R. HUDEC, *supra* note 6, at 242 (political necessity for hard-core waiver).

189. *See* J. JACKSON, *supra* note 22, at 709.

to impose quantitative restrictions to protect its trade position.[190] Most GATT members took advantage of article XII in the years following World War II.[191] When balance-of-payments positions began to improve in the 1950's, GATT members realized that removing quantitative restrictions would be difficult because inefficient industries that had been protected by quotas would be seriously threatened if the quotas were removed too rapidly.[192] Absent some method to cope with this problem, GATT faced the possibility that one of the GATT's most important provisions—the article XI prohibition on quantitative restrictions—would be disregarded, perhaps destroying the entire legal framework.

The hard-core waiver decision, which established procedures for members to seek temporary waivers of their article XI obligations, was designed to avoid this threat by preserving GATT's legal force without demanding politically impossible sacrifices by GATT members.[193] The decision attempted to craft a waiver which would ensure that temporary derogations from article XII did not undermine GATT's overall strength.[194] First, waivers were authorized only in "exceptional" circumstances.[195] To qualify, an applicant had to establish that the sudden removal of an existing trade restriction "would result in serious injury to a domestic industry having received incidental protection therefrom;"[196] that "temporary maintenance of the restriction [was] necessary to enable the industry to adjust" to eventual removal of the restriction;[197] that no measures consistent with GATT could avoid serious injury to the domestic industry;[198] and that there was a "reasonable prospect of eliminating the restriction over a comparatively short period of time."[199] These conditions clearly established that waivers were to be granted only when extraordinary economic conditions prevailed, and that eventual compliance with GATT was required.

---

190. GATT, *supra* note 65, art. XII. *See generally* K. DAM, *supra* note 5, at 151-57; J. JACKSON, *supra* note 22, at 681-87, 693-707.

191. *See* J. JACKSON, *supra* note 22, at 707-08; *see also* GATT, Report Adopted by the Contracting Parties on 2 March 1955, 3 B.I.S.D. Supp. 63, 63-64 (L/331) (1955).

192. J. JACKSON, *supra* note 22, at 709.

193. *See* R. HUDEC, *supra* note 6, at 242.

194. As Professor Hudec puts it, with the "stern waiver procedure" the United States and others "drew back from full enforcement of their legal rights—but just a little." *Id.*

195. GATT article XXV authorizes waivers only "in exceptional circumtances not elsewhere provided for in this Agreement." GATT, *supra* note 65, art. XXV, para. 5 (as amended by the Protocol Modifying Certain Provisions of the General Agreement on Tariffs and Trade, Mar. 24, 1948, 4 Bevans 708, T.I.A.S. No. 1763, 62 U.N.T.S. 30, and the Protocol Amending the Preamble and parts II and III of the General Agreement on Tariffs and Trade, Mar. 10, 1955, 8 U.S.T. 1767, T.I.A.S. No. 3930, 278 U.N.T.S. 168).

196. GATT, Decision of March 5, 1955, *supra* note 186, at 40.

197. *Id.*

198. *Id.*

199. *Id.*

A second factor protecting against a hard-core waiver's potentially destructive effect was the emphasis on the function of the hard-core waiver procedure as a means to achieve GATT compliance. The decision's first two clauses reiterate the obligation to comply with article XI and note the prejudice that "deviation" from article XI causes other GATT members.[200] The third clause emphasizes the continuing obligation to remove "without delay" restrictions imposed pursuant to article XII "as soon as they are no longer justified . . . ."[201] Only the fourth clause mentions, in limited and qualified terms, the need for a "transitional measure of protection."[202] Thus, although the decision authorizes departures from article XI, it also stands as an unqualified statement of the obligation to comply eventually with article XI, the importance of article XI to GATT success, and the limited nature of a hard-core waiver.[203]

Finally, waivers authorized by the hard-core procedure were subject to reasonably clear substantive standards. To receive a waiver, an applicant nation was required to (1) implement measures designed to eliminate quantitative restrictions within a "comparatively short period of time";[204] (2) grant other contracting parties "a reasonable share of the market for the product concerned";[205] (3) avoid increasing the protection accorded domestic industry under any authorized quantitative restriction;[206] and (4) "carry out a policy for a progressive relaxation of each restriction."[207] The contracting parties were authorized to limit any waiver in scope or time.[208] No waiver could exceed five years.[209] If a nation did not comply with the terms and conditions of its waiver, the contracting parties were required to cancel the waiver.[210] These substantive limits supported the normative principles expressed in the decision and reflected a firm commitment to limit the decision to its expressed purposes and to foster compliance with article XI.

Although the agricultural waiver granted the United States also authorizes quotas to address domestic economic problems, it is a remarkably different decision than the hard-core waiver decision. The United States'

---

200. *Id.* at 38-39.
201. *Id.* at 39.
202. *Id.* at 38-39.
203. According to one GATT commentator, the hard-core waiver turned out on examination "to be more of an affirmation of the integrity of GATT than a future escape clause. It stated that be there hardship or not the final elimination of all restrictions on trade must be carried out." G. CURZON, *supra* note 158, at 139; *see also* R. HUDEC, *supra* note 6, at 242; J. JACKSON, *supra* note 22, at 709.
204. GATT, Decision of 5 March 1955, *supra* note 186, at 40.
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.* at 41.
210. *Id.*

waiver was not a response to extraordinary and temporary economic problems. Rather, it was a response to the United States' use of farm price supports and the resulting need for import restraints to protect farm programs against interference from lower-priced imports.[211] Article XI already had addressed the problems affecting the United States. In fact, it did so by a rule that, like the hard-core waiver, authorized departures from article XI's basic obligations, but only within narrow limits.[212] Because Congress was unwilling to accept the limits of article XI, the United States demanded and received a broader exception for its trade restrictions.[213] The waiver was a bow to the United States' power and an effort to affirm the rule of law in the face of unlawfulness by ensuring technical compliance with GATT.[214]

The terms of the waiver reflect this foundation. Although the decision expresses regret that the United States must take actions that harm other nations, impair GATT concessions, and impede GATT goals,[215] it has no statement obliging the United States to comply eventually with article XI. There also is nothing in the United States' waiver decision comparable to the hard-core waiver decision's strong reaffirmation of the importance and obligatory nature of article XI. Moreover, in contrast to the hard-core waiver decision's limitations on the time and scope of residual restrictions maintained pursuant to its authority, the GATT retained no express authority to terminate the United States' waiver and placed no clear conditions on it. Time and scope limitations had been proposed during negotiations, but the United States delegate refused to accept them, arguing that any limitation was inconsistent with the waiver's political purpose: to excuse GATT violations that were required by Congress.[216] Similarly, the waiver does not require the United States to adopt measures to correct the conditions that gave rise to the illegal farm policy. The decision simply notes "the intention of the United States Government to continue to seek a solution of the problems of surpluses."[217]

The GATT did attempt to impose some limited substantive commitment on the United States. The relevant provision provides that "[t]he United States will remove or relax each restriction permitted under this waiver as soon as it finds that the circumstances requiring such restriction no longer exists or have changed so as no longer to require its imposition in its existing form."[218] This provision may be read to express a common conviction that the United States is obligated to work toward achieving GATT compliance. But the provision is clearly one of soft law.

211. *See* GATT, Report Adopted on 5 March 1955, *supra* note 183, at 142-46.
212. *See* GATT, *supra* note 65, art. XI(2)(c).
213. *See supra* text accompanying notes 180-82.
214. J. JACKSON, *supra* note 22, at 735-36.
215. GATT, Decision of 5 March 1955, *supra* note 180, at 35.
216. GATT, Report Adopted on 5 March 1955, *supra* note 183, at 142.
217. GATT, Decision of 5 March 1955, *supra* note 180, at 34.
218. *Id.* at 36.

The commitment to remove restrictions rests entirely within the discretion of the United States. It exists only insofar as the United States, not the GATT, "finds" that conditions no longer require restrictions. Moreover, the commitment is triggered only if the "circumstances" requiring the waiver "no longer exist or have changed"; but the decision does not specify what those "circumstances" are or how they must change to trigger American responsibilities. Third, even if circumstances were to change, the United States would not be required to comply with article XI. It is given discretion to "remove" *or* merely "relax" its unlawful restrictions.

This combination of weak commands and unclear obligations is paralleled by weak procedural provisions that contemplate surveillance, not enforcement. The United States is required to consider the views and concerns of other GATT members whenever it takes action on restrictions;[219] it must notify GATT of the restrictions in force[220] and it is required to submit a report for an annual GATT review of the waiver.[221] But these review procedures do not give GATT the authority to interpret or enforce any provision of the waiver.

From a legal perspective, therefore, the two waiver decisions are starkly different. The hard-core waiver decision affirmed the international rule against quantitative restrictions and created a limited, well-crafted, and temporary exception supported by GATT enforcement authority. Although the United States' waiver clearly was intended to be temporary and was granted on the basis of American assurances that it would solve its surplus problems and promptly terminate restrictions, the waiver did not reaffirm the overriding obligation of the United States to comply with article XI nor did it establish firm conditions to bring United States agricultural policy in line with international law. The United States' waiver eliminated the basic international rule prohibiting quantitative restrictions or agricultural trade—at least insofar as the United States was concerned—and replaced that rule with a vague, discretionary obligation to seek a solution to agricultural trade problems relating to quantitative restrictions.

2. *International Response to the Hard-Core Waiver*

With a single exception, no nation adhered to the hard-core waiver decision when imposing residual restrictions no longer justified by balance-of-payments considerations.[222] By the summer of 1960 the international

219. *Id.* at 35.

220. *Id.*

221. *Id.* at 36.

222. The exception was Belgium. *See* GATT, Decision of 3 December 1955, 4 B.I.S.D. Supp. 22, GATT Sales No. 1956-1 (1956). Both West Germany and Luxembourg also received waivers, although in neither case were the hard-core waiver procedures followed. *See* GATT, Decision of 30 May 1959, 8 B.I.S.D. Supp. 31, GATT Sales No. 1960-1 (1960); GATT, Report Adopted on 30 May 1959, 8 B.I.S.D. Supp. 160 (L/1004) (1960)

community had abandoned the rigor of the decision, although the basic principle that nations should remove residual restrictions as quickly as possible continued to be accepted.[223] In place of the hard-core waiver procedure, GATT required nations to submit lists of residual restrictions and suggested that GATT procedures be used to resolve disputes concerning such restrictions.[224]

Despite the failure of GATT members to observe the hard-core waiver procedure, the decision appears to have contributed significantly to the removal of quantitative restrictions on industrial trade among developed nations.[225] By the 1960's quantitative restrictions on industrial products had been eliminated in large part, and article XI was generally honored in industrial trade.[226] The hard-core waiver's strong reaffirmation of article XI's importance and the disciplined manner in which the decision addressed residual restrictions were potent influences supporting that development. By confirming article XI's prohibition on quantitative restrictions, the hard-core waiver reinforced "an international moral climate where such restrictions, though still resorted to, need defending, explaining, justifying."[227] The strength and clarity of the decision's position on residual restrictions supported the imposition of substantial international pressure on nations that did not open their domestic markets quickly enough after improvement in their international payments positions.[228] Even after formal abandonment of the hard-core waiver procedures, the normative con-

---

(West Germany); GATT, Decision of 3 December 1956, 4 B.I.S.D. Supp. 27, GATT Sales No. 1956-1 (1956); GATT, Report Adopted on 3 December 1955, 4 B.I.S.D. Supp. 102 (L/467) (1956) (Luxembourg). *See generally* G. CURZON, *supra* note 158, at 140; K. DAM, *supra* note 5, at 164, 261-62; J. JACKSON, *supra* note 22, at 709.

223. R. HUDEC, *supra* note 6, at 245. The hard core waiver decision did not actually expire until 1962. G. CURZON, *supra* note 158, at 140; R. HUDEC, *supra* note 6, at 245 n.15.

224. *See* R. HUDEC, *supra* note 6, at 245 nn.17-19; *see also* GATT, Approved on 16 November 1960, 9 B.I.S.D. Supp. 18, 19, GATT Sales No. 1961-1 (1960).

225. *See generally* G. CURZON, *supra* note 158, at 139-65.

226. J. JACKSON, *supra* note 22, at 707.

227. G. CURZON, *supra* note 158, at 165. Both the article XI prohibiton and the hard-core waiver worked to create a "sense of decent shame" among nations that maintained illegal quantitative restrictions. *Id.* at 136 (quoting E.W. WHITE, THE ACHIEVEMENTS OF GATT 9 (Geneva, March 1957)).

228. G. CURZON, *supra* note 158, at 136. Professor Curzon provides a detailed case study of the imposition of such pressure on the Federal Republic of Germany. *Id.* at 146-55. Professor Dam, however, while conceding that GATT procedures generally may have accelerated the liberalization process during this period, nevertheless takes the view that GATT succeeded by abandoning a "legalistic" approach and focusing on review and consultation. K. DAM, *supra* note 5, at 164-66. In his view, the widespread prevalence of residual restrictions caused "the concept of illegality" to lose "whatever moral connotations it might ever have had." *Id.* at 166. Solutions depend upon pragmatic, procedure-oriented approaches. *Id.* While it is true that negotiation, consultation, and continuing international pressure were critical to GATT's successes, much of that pressure must be attributed to the hard-core waiver, which made it "clear that sovereignty over domestic policies was recongized provided only it did not interfere with the trade of other Contract-

sensus favoring rapid removal of residual restrictions generated the effective use of GATT dispute settlement procedures to pressure nations that were slow to remove restrictions.[229]

This relative success in industrial trade was not mirrored in the agricultural sector. Removal of residual restrictions was strongly resisted in this sector, and by the early 1960's most of the remaining restrictions were agricultural.[230] The hard-core waiver thus led to results resembling current conditions: a relatively strong international commitment to an open industrial trading environment,[231] but a disappointing lack of commitment to agricultural trade liberalization. In part this disparity was, and is, a response to the soft characteristics of the United States' agricultural waiver.

3. The United States' Response to Soft Law

When it first sought a waiver, the United States assured GATT members that it was taking, and would continue to take, positive steps to reduce surpluses and eliminate quantitative restrictions.[232] These

---

ing Parties." G. CURZON, *supra* note 158, at 137. The important force exerted by the normative pressure of the hard-core waiver decision on the problem of residual restrictions is perhaps best evidenced by the fact that "the majority of residual restrictions" that were not eliminated by GATT actions "cover agricultural and food products." K. DAM, *supra* note 5, at 165. As the next section explains, it was in the agricultural sector that the normative consensus expressed by GATT's substantive rules did *not* survive the waiver procedure. *See infra* text accompanying notes 232-79.

229. *See* R. HUDEC, *supra* note 6, at 246-51. Procedures were initiated involving both France and Italy in which GATT consultations were used to prod governments toward liberalization while "[t]he threat of an Article XXIII lawsuit was kept alive," albeit "far in the background." *Id.* at 251. The United States did file complaints against both France and Italy, but did not insist upon immediate compliance with article XXIII. The cases were settled on the basis of agreements to cooperate better in attaining the objective of liberalization. *Id.* Throughout this process there was a recognition that France and Italy had made substantial progress in removing industrial restrictions, but had not satisfactorily addressed the problem of agricultural restrictions. *Id.* at 247-48.

230. J. JACKSON, *supra* note 22, at 710. The United States' waiver and the impending development of the EC (and a unified European approach to agricultural trade policy) both assist in explaining why progress in the agricultural sector was slow. *Id.*; *see also* K. DAM, *supra* note 5, at 260-63; R. HUDEC, *supra* note 6, at 200-03. In particular, the soft law characteristics of the waiver undermined the normative force of article XI. *See infra* text accompanying notes 250-79.

231. Although the developed nations generally comply with article XI in the industrial sector, they have been able to avoid its impact when imports seriously threaten domestic industries. The primary method to accomplish this result has been the negotiation of voluntary restraint agreements (VRAs) and orderly marketing agreements (OMAs). These practices distort trade in much the same way as import quotas and are particularly effective against developing countries with little bargaining power.

232. GATT, Decision of 5 March 1955, *supra* note 180, at 34.

assurances were not expressed as firm conditions of the waiver primarily because the "measures contemplated" to solve the United States' agricultural problems would require congressional action and therefore could not be promised by the executive branch.[233] Nevertheless, there was an implicit commitment by the United States to pursue actions that would bring its conduct in line with GATT rules.[234]

The first annual GATT review of the United States' waiver suggested that the waiver would achieve its objectives. The review identified those restrictions imposed under the waiver that were of the greatest international concern and various means were discussed by which the United States could adjust its agricultural sector to overcome the problems requiring import restrictions.[235] The review was promising: it indicated an intention of all parties to use the flexibility of the waiver procedure as a means of assisting the United States to constructively address its domestic problems and to correct the conditions that led to the waiver.

This constructive approach did not last. The United States' approach to the waiver quickly took a form that was difficult to reconcile with the waiver's underlying assumptions. At the second annual review of the waiver several GATT members expressed concern that the United States was not taking the firm steps to solve its domestic surplus problem that were contemplated when the waiver was granted. In an area of particular concern, dairy products, the United States had taken no significant action

---

233. GATT, Report Adopted on 5 March 1955, *supra* note 183, at 142-43.

234. *See supra* text accompanying notes 215-21. There was a certain degree of ambiguity concerning the scope of this commitment. While the United States agreed that it was its "intention" to "continue to seek a solution of the problem of surpluses of agricultural commodities" it would not accept, as a condition of the waiver, an obligation "to remove the underlying causes of the situation." *Id.* One reason was that the administration could not promise the required legislative action. A second reason was that the "underlying causes were beyond the control" of the United States government. It is not clear whether the United States meant by that observation only that the administration could not act without legislative authority, or that United States difficulties were the product of actions by other nations. The former interpretation is indicated by the waiver decision, which explains that in some situations the United States government cannot limit production or marketing of products because it "is without legislative authority to do so." GATT, Decision of 5 March 1955, *supra* note 180, at 34. The decision's notation of United States intentions to seek a solution to its surplus problems and to terminate promptly any restrictions when they are no longer necessary suggests that the waiver was granted on the basis of an implicit obligation to comply with GATT eventually, although it was impossible, given existing United States legislation, for the executive branch to make a firm commitment to those points.

235. GATT, Report Adopted on 1 December 1955, 4 B.I.S.D. Supp. 96 (1955). The United States again reiterated its "intention to terminate the restrictions as soon as they were no longer needed to protect the agricultural programmes as required by law and to continue to seek a solution of the problem of surpluses." *Id.* at 98.

to reduce production, limit surpluses, or expand market access.[236] In response to these concerns the United States announced that it would not accept unilateral responsibility for correcting the surplus problem that necessitated its use of import restrictions. Instead, it argued, a solution to that problem depended on "action which other producing nations may

---

236. GATT, Report Adopted on 16 November 1956, 5 B.I.S.D. Supp. 136, 137-40 (L/590) (1957). The GATT and the United States executive branch's response to the United States dairy restrictions when they were first imposed in 1951 and their later reactions to continuing restrictions of dairy imports under the waiver provide one interesting contrast between the influence of hard and soft law on national behavior. United States import restrictions on dairy products became a major issue in GATT in 1951, when the United States Congress passed a bill imposing "severe quantitative restrictions on a wide range of farm products," including dairy products. R. HUDEC, *supra* note 6, at 165-66. GATT proceedings were initiated almost immediately in response to the earlier United States legislation and the United States conceded its GATT violation. The GATT members responded to the original United States restrictions at a plenary meeting on September 24, 1951. The response was unqualifiedly harsh and was designed to pressure the United States into GATT compliance.

> Almost everyone who spoke stressed that the U.S. restrictions had created a crisis of major proportions . . . . GATT would be virtually meaningless without U.S. leadership, or without a liberal U.S. trade policy. If the United States would react this way against a demonstrably harmless quantity of imports, the GATT code was a dead letter. . . . [The Contracting Party] had threatened everything that could be threatened, including the collapse of the Agreement itself. . . . The purpose of the exercise was to bring these concerns to the attention of the Congress *before* the final decision [on repeal of the quota legislation] was made.

Id. at 167-68. After the quota legislation expired the GATT's concerns influenced congressional consideration of the quota provisions in proposed amendments to section 22 of the Agricultural Adjustment Act of 1933. The administration argued that dairy imports would not hurt United States producers and that quotas would create a danger of lower United States export sales by prompting GATT retaliation and injuring Europe's exports in a manner that would delay European recovery and therefore delay United States access to European markets. In addition, the administration noted the illegality of the United States legislation. The Senate repealed the offending section, apparently because of the influence of the international arguments. The House, however, rejected the Senate position, although it allowed for some liberalization of the quotas. *Id.* at 168-73. GATT members were not satisfied and continued to contend that "the restrictions seriously threatened the achievement of GATT's objectives." *Id.* at 174. Several governments began to suggest that retaliation was warranted, and the Netherlands requested authorization to retaliate. The United States delegate recognized the right of other countries to retaliate, but indicated that the United States' goal was "the complete elimination of these restrictions." *Id.* at 175. Ultimately, some retaliation was authorized, but it served merely a "symbolic purpose," *id.* at 181, "a further extension of those essentially verbal and symbolic devices of moral suasion which are GATT's real (and only) powers of coercion." *Id.* at 176.

The dairy quota story really ends in its early form with the United States' waiver, which authorized the quotas and "removed much of the didactic edge to the Netherlands retaliation." *Id.* at 181. The lesson of the dairy products study is that GATT does not rely "on the economic sanction as a coercive force. It uses sanction, and more often the threat of sanction, as an escalated form of the same, essentially diplomatic, pressure which its rulings and recommendations create." *Id.* at 184. This diplomatic pressure, in turn, is

take as well as action" by the United States.[237] The United States representative criticized other nations' agricultural production subsidies and implied that the United States was unwilling to resolve its own surplus problems and eliminate quantitative restrictions unless other nations changed their domestic agricultural policies.[238]

Two years later United States intransigence concerning the continuing imposition of quantitative restrictions was so plain that several members of the Working Party concluded that the United States was assuming "indefinite maintenance of the restrictions."[239] Such an assumption was contrary to the waiver's purpose of temporarily authorizing restrictions while the United States endeavored to resolve its agricultural sector's structural problems.[240] Nevertheless, the United States did not explicitly repudiate this interpretation of its conduct. Thus, the review proceedings suggested that the United States no longer viewed the waiver as a temporary device, but as a quasi-permanent authorization sanctioning agricultural trade policies that otherwise would violate GATT.[241]

---

used to strengthen GATT in the face "of the domestic political values with which GATT policy competes." *Id.* at 172. It does so primarily by influencing executive officials and by legitimizing the threat of retaliation. Because United States policy was clearly a GATT violation, Congress could not ignore the international response, question its propriety, or accuse other governments of having "unclean hands." Finally, it was clear that the GATT obligations had some impact on United States behavior, "at least at the margin." *Id.* at 173. In the dairy products situation, "[t]he gap between the international obligation and the perceived needs of domestic policy was simply too great" for full GATT compliance to result. *Id.* Although the retaliation authorized by GATT was insignificant, it appeared to quell the specter of a major GATT breakdown. Once the United States' waiver was in place, however, GATT pressure on the United States was reduced, and the United States began to produce the type of arguments in support of its policies that it could not raise so long as the quotas were a clear GATT violation. *See infra* text accompanying notes 238-41.

237. GATT, Report Adopted on 16 November 1956, *supra* note 236, at 137.

238. *Id.*

239. GATT, Report Adopted on 20 November 1958, 7 B.I.S.D. Supp. 124, 125 (L/918) (1959); *see also* GATT, Report Adopted on 19 November 1960, 9 B.I.S.D. Supp. 259, 260 (L/1371) (1961); GATT, Report Adopted on 19 November 1959, 8 B.I.S.D. Supp. 173, 173 (L/1107) (1960).

240. GATT, Report Adopted on 20 November 1958, *supra* note 239, at 124-25.

241. At the review of its waiver a year earlier, the United States had also refused to discuss its international surplus disposal activities, arguing that they were beyond the scope of a waiver addressed to import restrictions. *See* GATT, Report Adopted on 28 November 1957, 6 B.I.S.D. Supp. 152, 154 (L/754) (1958). While it is true that import restrictions and export subsidization are separate issues, both were the result of United States farm programs that stimulated production and dampened demand through high support prices. The international difficulty with these programs rested in the creation of surpluses that foreclosed exporters from United States market access and, to the extent the surpluses were exported on concessional terms, also drove other exporters out of third-country markets. Consequently, the GATT parties had a strong interest in consultations and discus-

There are at least two serious legal shortcomings in the United States' position. First, it ignored, or at least distorted, the purpose of the waiver. The waiver's fundamental goal was to avert the international disrespect for GATT rules that would result from congressional repudiation of GATT.[242] It was anticipated that serious injury to GATT could be avoided by accommodating the United States with a waiver constructed to authorize the United States' action, while also imposing some GATT obligations, however minimal, on the United States. The United States' decision to ignore the soft obligations of its waiver generated the very perception the waiver was designed to avoid—that the United States did not take seriously its GATT agricultural responsibilities.

The deleterious effect of the United States' position, however, went beyond merely altering the meaning of the waiver. By justifying its import restrictions with the claim that no improvements were possible unless other nations altered their own domestic agricultural policies, the United States rejected GATT's fundamental approach to agricultural trade. Instead of confronting other nations' production subsidies within the legal rules established by the GATT, the United States took the issues out of the GATT framework and introduced them into the waiver discussions, a forum that lacked both the scope and the legal framework to deal with such problems.[243] Ironically, during the annual reviews the United States refused to discuss its own export subsidization because, in its view, the annual waiver review concerned only import restrictions.[244] But the United States insisted that production subsidization practices and surplus problems of other countries were relevant to its own ability to comply with GATT. Moreover, the United States did not merely raise issues concerning the unlawful policies of other nations; its assertion that policies of other nations had to change before the United States would comply with its GATT obligations made no distinction between lawful and unlawful trade practices. This amounted to a repudiation of the GATT approach to agricultural trade, which does not seek to eliminate such practices as subsidization and quantitative restrictions, but only to limit their international impacts.[245] The United States' position amounted to a refusal to

---

sions of all aspects of United States farm policy, particularly policies on surpluses which—under the waiver—the United States was obliged to attempt to reduce. United States refusal to discuss its surplus disposal activities could have led the Working Party only to the conclusion that the United States was unwilling to accept international scrutiny of its policies except to the minimum extent required by the waiver.

242. J. JACKSON, *supra* note 22, at 735.

243. When West Germany later echoed the United States arguments in order to justify its own agricultural restrictions, the United States response was vitriolic. *See infra* text accompanying notes 264-67.

244. *See supra* note 241.

245. *See* GATT, *supra* note 65, arts. XI(2)(c), XVI(3) (as amended by part L of the Protocol Amending the Preamble and parts II and III of the General Agreement on Tariffs

comply with GATT until agricultural trade was liberalized. It apparently did not perceive any contradiction in conditioning its compliance with rules designed to achieve liberalization on the prior attainment of liberalization.[246]

It is impossible to say whether the United States would have acted similarly without the waiver. It is clear, however, that the soft law characteristics of the waiver provided the legal basis for the United States' conduct. By failing to impose a clear obligation the waiver created a situation in which the United States could, without obviously violating the terms of the waiver, avoid the obligation to bring its domestic policies into line with GATT provisions by conditioning changes in its policy on the conduct of other nations.[247] The waiver was too ambiguous to clearly condemn the United States' interpretation of its responsibilities and, even if that interpretation was incorrect, the waiver did not command the United States to comply with its terms.

Had the waiver not been granted, the United States would nevertheless have violated GATT. There would have been no authorization of the violation, however, and no basis upon which the United States could have demanded alterations in other nations' domestic policies as a condi-

---

and Trade, Mar. 10, 1955, 8 U.S.T. 1767, T.I.A.S. No. 3930, 278 U.N.T.S. 168). *See generally supra* text accompanying notes 145-49.

246. The United States government's insistence upon general improvements in trading conditions as a prerequisite to its willingness to comply with GATT was to begin a process of widespread argument against GATT compliance on these grounds. *See infra* text accompanying notes 274-79, 358-64. Professor Hudec has attributed much of the weakness in GATT dispute settlement in part to the tendency, since the late 1960's, of "defendant government[s]" to insist that their problems are "inextricably 'linked' to one or more unsolved or unregulated problems in other related areas." R. HUDEC, *supra* note 5, at 18. In fact, this tendency began with the second annual review of the United States' waiver in 1956 and is closely connected with the development of soft law in the GATT. *See infra* text accompanying notes 307-24.

247. *Compare supra* note 236 (United States response to GATT criticism of its early dairy quotas). Before obtaining the waiver, the United States had been forced to accept responsibility for its GATT violations in the dairy sector and was open to substantial GATT pressure and condemnation. It was unable to blame other governments for its action because the GATT rules "authoritatively legitimized" the claims of those governments, regardless of their own activities. R. HUDEC, *supra* note 6, at 173. Professor Hudec notes that "complaining governments always have some items on the debit side of the ledger, and unless their claim is authoritatively legitimized in some fashion, those debits will be seized upon." *Id.*; *cf. supra* text accompanying notes 49-50 (legitimating function of international law). Moreover, the earlier GATT condemnation of United States activities and the threat of retaliation it posed had some influence on domestic political processes in the United States, R. HUDEC, *supra* note 6, at 168-73, an influence that apparently ended once the waiver was in force. *Cf. supra* text accompanying notes 82-86 (influence of soft law on domestic political processes).

tion of its GATT compliance, unless those policies violated GATT.[248] Although a firmer waiver may have precipitated the United States' withdrawal from GATT, it also may have created strong incentives for the United States to alter its agricultural policy.[249] In retrospect, at least in terms of agricultural policies, the withdrawal of the United States may have left agricultural trade liberalization in no worse a state than that created by the waiver.

4. Soft Law and Residual Restrictions

The soft characteristics of the United States' waiver also influenced the international response to residual restrictions. Ironically, the international consequences are most vividly illustrated by an event that usually is analyzed in connection with the demise of the hard-core waiver decision: West Germany's continued use of residual import restrictions that were not legitimized by the hard-core waiver procedure.[250]

In the summer of 1957 the International Monetary Fund declared the Federal Republic of Germany (FRG) financially sound and no longer entitled to impose quantitative restrictions for balance-of-payments purposes.[251] In response, the FRG issued a statement that outlined a partial liberalization of quantitative restrictions and that contained a lengthy justification of its position. In essence, that position was that the FRG could not, under current conditions, comply with GATT.[252] No formal request for a hard-core waiver was made. West Germany's statement "seemed to stun many of the [GATT] delegations" and initially was vociferously protested.[253] Its rejection of both the hard-core waiver procedure and its GATT obligations was seen as a serious blow to GATT's efforts to establish the rule of law in trade affairs.[254] Nevertheless, West

---

248. *See supra* notes 247, 236.

249. *Cf.* G. CURZON, *supra* note 158, at 146-55 (successful pressure on West Germany to remove quantitative restrictions after initial German refusal); Hudec, *supra* note 9, at 176 ("Governments always *say* that their violations are politically imperative, but when faced with an imminent legal ruling, many find that compliance is possible after all.").

250. *See, e.g.*, R. HUDEC, *supra* note 6, at 242-44; J. JACKSON, *supra* note 22, at 710. Professor Dam also treats the West German action primarily in the context of the problem of residual restrictions, although he recognizes that West Germany's refusal to seek a hard-core waiver rested largely upon its unwillingness to undertake any commitments on its future agricultural policy. *Compare* K. DAM, *supra* note 5, at 164 *with* R. HUDEC, *supra* note 6, at 262. Most residual restrictions were in fact imposed on agricultural products. R. HUDEC, *supra* note 6, at 261-62.

251. R. HUDEC, *supra* note 6, at 242.

252. *See* GATT, Report Adopted on 30 November 1957, 6 B.I.S.D. Supp. 55, 63-68 (L/768) (1958) (statement by Representative of Federal Republic of Germany).

253. R. HUDEC, *supra* note 6, at 243.

254. *Id.* at 243; *see also* G. CURZON, *supra* note 158, at 146-47.

Germany's arguments eventually gained some support,[255] and after a period of intense negotiations in which West Germany agreed to significantly alter its original plans,[256] a waiver was granted, although it did not comply with the provisions of the hard-core waiver.[257]

The influence of the United States' waiver on this event is reflected in the predominance of agricultural quotas in West Germany's residual restrictions, the arguments presented by West Germany in support of its restrictions, and the international response to West Germany's action. First, the FRG's refusal to lift all quantitative restrictions affected primarily its agricultural sector. The unrelaxed agricultural restrictions in West Germany's initial liberalization plan affected 16.5% of total imports while restrictions on industrial products affected only 2.1% of total imports.[258] In the negotiations and consultations leading to the final plan, the FRG made substantial concessions on its industrial product quotas, but remained firmly committed to maintaining the most important agricultural quotas. As a result, the final compromise with West Germany "was paid for by the agricultural exporters,"[259] and according to some GATT members, the West German plan was symptomatic of "the overwhelming lack of balance in the operation of the General Agreement" between industrial and agricultural products.[260]

Because the FRG's refusal to comply with the hard-core waiver decision disproportionately involved agricultural trade, it appears that the action was motivated in large part by agricultural issues, not by an overall dissatisfaction with the firm approach to residual quantitative restrictions

---

255. For example, Denmark and Sweden supported West Germany's argument that it should delay liberalization of agriculture until problems relating to the formation of the European Common Market were resolved, and Denmark further agreed that a "purely legal approach" to West Germany's problems was not possible without a general solution to agricultural trade problems. *See* GATT, Report Adopted on 30 November 1957, *supra* note 252, at 58-59.

256. For an extensive description of these negotiations and their influence on West Germany's conduct, see G. CURZON, *supra* note 158, at 146-55.

257. GATT, Decision of 30 May 1959, *supra* note 222; GATT, Report Adopted on 30 May 1959, *supra* note 222. *See generally* K. DAM, *supra* note 5, at 164, 262.

258. *See* GATT, Report Adopted on 30 November 1957, *supra* note 252, at 67-68 (statement by Representative of Federal Republic of Germany). Other nations maintaining residual restrictions after they resolved their balance-of-payments difficulties also disproportionately restricted agriculture. *See* K. DAM, *supra* note 5, at 261-63; *see, e.g.*, GATT, Report Adopted on 14 November 1962, 11 B.I.S.D. Supp. 94, 94-95 (L/1921) (1962) (France); GATT, Report Adopted on 16 May 1961, 10 B.I.S.D. Supp. 117 (L/1468) (1961) (Italy); GATT, Decision of 3 December 1956, *supra* note 222 (Luxembourg); GATT, Decision of 3 December 1955, *supra* note 222 (Belgium).

259. G. CURZON, *supra* note 158, at 152.

260. GATT, Report Adopted on 30 May 1959, *supra* note 222, at 161 (statement of New Zealand).

that was embodied in the hard-core waiver.[261] The FRG's explanation of its agricultural trade position confirms this conclusion. It argued that it could not reduce significantly quantitative restrictions on agricultural products because of worldwide agricultural protectionism, the inapplicability of GATT rules to such trade-distorting devices as the "subsidization of producers," the existence of "waivers and special arrangements" excusing GATT violations, and the "world-wide application of export subsidies."[262] These considerations led West Germany to conclude that GATT agricultural rules were no longer realistic and needed to be revised. Until such a revision was made, "import controls [were] necessary in order to avoid prejudicial disturbances in the markets."[263]

A majority of the Working Party assigned to review the West German position, including the United States, responded harshly to these arguments. First, the need for a rule revision did not justify noncompliance: "[c]ontracting parties were obliged to operate under the Agreement as it stood and not as it might be revised."[264] With respect to West Germany's comments on worldwide agricultural policies, the majority construed them "to imply that the Federal Republic was reserving to itself the unilateral right to maintain quantitative restrictions whenever it considered that the commercial policies of other contracting parties might be distorting the pattern of international trade."[265] This, said the Working Party, was improper. These problems "should be dealt with by measures permitted under the Agreement."[266] Moreover, "[e]ven if some provisions of the Agree-

---

261. West Germany's arguments on industrial restrictions confirm this impression to some extent. *See* GATT, Report Adopted on 30 November 1957, *supra* note 252, at 64 (statement by the Representative of the Federal Republic of Germany). West Germany's general view was that it was undertaking a "controlled expansion of imports rather than restrictions" in industrial products and that gradual liberalization was the best that could be achieved. *Id.* This argument suggests some commitment to the hard-core waiver principles. It did, however, also complain that, even in industrial products, the "trade policy and the commercial methods of our partners in trade have a considerable influence on our possibilities to abolish import controls." *Id.* at 66. It did not, however, view the GATT rules as ineffective in the industrial area.

262. *Id.* at 65-66.

263. *Id.* at 66. In addition to these general problems with the agricultural sector, West Germany presented two further arguments in support of its position. First, it noted that its ability to alter agricultural restrictions was hindered by ongoing negotiations on the European Economic Community which would change its approach to agricultural relations. *Id.* at 67. Second, it argued that its restrictions were permitted under the Torquay Protocol. This latter argument was rejected by GATT. *See* GATT, Report Adopted by the Intersessional Committee on 2 May 1958, 7 B.I.S.D. 99, 106 (L/821) (1959).

264. GATT, Report Adopted on 30 November 1957, *supra* note 252, at 58. The members of the Working Party joining this position were Australia, Canada, Ceylon, India, Japan, New Zealand, Pakistan, the United Kingdom, and the United States. *Id.*

265. *Id.* at 59.

266. *Id.*

ment were not entirely satisfactory, this did not entitle a contracting party to disregard its obligations under the Agreement. Such an approach would undermine the Agreement and prejudice the rights of other contracting parties."[267] Nevertheless, a waiver was granted for most of West Germany's agricultural restrictions[268] and at least one delegation agreed with West Germany's view that agricultural problems could not be solved through a "purely legal approach."[269]

The Working Party's objections to the FRG's position have a hollow ring insofar as the United States joined those objections. To a remarkable extent, West Germany's position echoed the earlier arguments made by the United States during the review of its waiver[270] and reflect the lack of uniformity in legal obligation that the United States' waiver had introduced in the GATT's agricultural trade rules. The West German claim that GATT compliance was impossible as long as the commercial policies of other nations disrupted agricultural trade is precisely the argument made by the United States in its waiver review one year earlier. The United States, not West Germany, had first claimed the unilateral right to maintain agricultural quotas when the commercial policies of other nations distorted international trade.[271] The West German statement also pointed to precisely the same problem that the United States insisted must be resolved before it would fulfill its article XI obligations—production subsidization.[272] When the United States made worldwide reduction of production subsidization a condition of its compliance with article XI, it had implicitly rejected exclusive reliance on the GATT to correct trade distortions. West Germany simply took the same position. Moreover, as an additional reason for its noncompliance, West Germany pointed to "waivers and other special arrangements" that excused GATT violations.[273]

Thus, the overall decline of GATT's rules on agricultural import restrictions is intimately connected to use of soft law in the United States' waiver. The arguments presented by the United States to justify noncompliance with the waiver were immediately used by the FRG to justify noncompliance with the clearer, but related, obligations of article XI and the hard-core waiver decision. Moreover, the presence of the soft waiver, which

267. *Id.*
268. GATT, Decision of 30 May 1959, *supra* note 222, at 32.
269. GATT, Report Adopted on 30 November 1957, *supra* note 252, at 59.
270. *Cf. supra* text accompanying notes 236-41.
271. *Id.*
272. GATT, Report Adopted on 30 November 1957, *supra* note 252, at 65.
273. *Id.*

gave no guarantee of future United States compliance with GATT, was seized upon by the FRG as proof of the nonuniformity in GATT rules and their consequent ineffectiveness, facts that, in its view, both justified its own departure from GATT rules and procedures and required a renegotiation of the basic GATT framework.

After the hard-core waiver decision was abandoned in 1961, efforts to enforce article XI against nations that maintained illegal residual restrictions were made through consultations and the GATT dispute settlement procedures.[274] These efforts continued to display the pattern established by West German negotiations—acceptable progress on the removal of quantitative restrictions on industrial products, and continued restrictions in agriculture[275] that were purportedly justified by the general lack of liberalization in the area and the need for "concerted joint action" to improve agricultural trade, rather than action by individual countries.[276] Such justifications encountered claims that the GATT should be respected and that "there was no reason why agricultural products should be regarded as deserving special treatment."[277] But after the formation of the European Community and the adoption of its common agricultural policy,[278]

---

274. *See* R. HUDEC, *supra* note 6, at 244-46.

275. *Id.*; *cf.* J. EVANS, THE KENNEDY ROUND IN AMERICAN TRADE POLICY 86 (1971) (prior to Kennedy Round, quantitative restrictions generally had been eliminated in industrial sector, but not in agriculture).

276. *See, e.g.*, GATT, Report Adopted on 16 May 1961, *supra* note 258, at 119. In consultations concerning its residual restrictions Italy argued that its limited progress toward removing agricultural product was due "to the lack of response of other European governments when Italy had endeavored to take a lead" in the liberalization process. *Id.* at 119. This fact, combined with the general problems in agriculture, led Italy to the view that only joint action outside the "legal context of Article XI" could solve the problem of residual restrictions in agriculture. *Id.* at 120.

277. *Id.* Although France agreed with Italy's position, other members of the Working Party continued to argue that article XI applied and that "the balance of rights and obligations between the agricultural and industrial exporting countries would be fundamentally upset if it were accepted that agricultural products could be regarded as falling outside the coverage of the rules of the Agreement." *Id.* The United States had initiated the effort to force further liberalization by Italy and was a member of the Working Party. Its agricultural restrictions, of course, fell outside the coverage of GATT's rules.

278. Under its common agricultural policy the European Community imposes a variable levy which, although nominally a tariff, operates much like a quota. It imposes an import levy equal to the difference between the domestic support price and the import price, ensuring that imports will be as costly as domestic products to EC consumers. Under such conditions, importation will occur only if domestic producers cannot satisfy domestic demand. The effect is to wholly exclude imports except where domestic production is insufficient. Moreover, lower-cost foreign producers cannot overcome the variable levy as they can on ordinary tariffs because the levy increases when import prices fall. *See* K. DAM, *supra* note 5, at 265; J. JACKSON, *supra* note 22, at 520-21, 739-40.

these claims became unrealistic; for practical purposes the GATT's approach to agricultural import restrictions was dead.[279]

5. *Summary—The Impact of Soft Law on the Problem of Agricultural Import Restrictions*

It is tempting to conclude that the United States' waiver, in combination with the serious problems confronting domestic agriculture in most developed nations during the 1950's and 1960's, would have prevented any successful international regulation of agricultural import restrictions regardless of the legal characteristics of the waiver. It is, of course, impossible to determine how much the soft law characteristics of the waiver,

---

Because it is unique, the variable levy's legality is ambiguous under the GATT. The EC insists it is legal. Other nations have argued that it is not a traditional tariff and is therefore banned by article XI's prohibition on any trade restrictions "other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures." GATT, *supra* note 65, art XI; *see also* R. HUDEC, *supra* note 6, at 201.

Despite requests to do so, GATT has never ruled on the legality of the variable levy. In part, this may be due to the uncertain status of the variable levy under article XI. It also may be attributed to the European Community's importance. When the variable levy was first brought before GATT, the European Economic Community was in a formative stage, and it was clear that the community could not survive a challenge to the common agricultural policy. GATT condemnation of the variable levy would have forced a renegotiation of the common market and probably resulted in the demise of the entire enterprise. Consequently, the leading members of GATT did not force a confrontation. R. HUDEC, *supra* note 6, at 195-96, 201.

A complete explanation of the absence of a serious challenge to the variable levy, however, should include attention to the GATT's soft law characteristics. By the early 1960's the GATT's approach to agricultural import restrictions was well entrenched in a soft law mode. The United States' article XI obligations had been waived and replaced by vague and weak commands. The United States had conditioned compliance with the soft terms of the waiver on the development of a general solution to agricultural trade problems outside the GATT framework. West Germany followed the United States' lead with GATT's acquiescence. The basic GATT concept that nations would agree to limit their trade-distorting practices and negotiate remaining problems within the GATT framework had been repudiated, therefore, by both the United States and the GATT itself. In the place of trade-liberalizing provisions GATT had substituted an approach to agricultural trade that sanctioned protectionism, imposed only ineffective controls on import restrictions and permitted nations to condition their compliance with GATT on their own judgments concerning the propriety of other nations' agricultural policies.

Under such circumstances a legal challenge to the variable levy would not have been successful. The obligatory power of article XI and the basic premises of the GATT framework for agricultural trade were no longer effective. Moreover, the EC argued, quite correctly, that United States export subsidies and import restrictions were themselves important factors in the distorted world market conditions that required a highly protective device like the variable levy. There was simply no basis for the United States, the most influential GATT participant, to insist upon technical compliance with a rule it had avoided through waiver. *See* J. EVANS, *supra* note 275, at 84.

279. *See* R. HUDEC, *supra* note 6, at 200-03. Assessments of the GATT's record on agricultural trade vary. Professor Hudec, for example, suggests that the results in agriculture

in contrast to other factors, contributed to results in this sector. Nevertheless, the previous analysis suggests two key weaknesses of a soft law approach to agricultural trade disputes that might have been ameliorated by the imposition of clearer obligations on the United States. First, casting obligations in soft law terms undermines the normative force of those obligations and hence their ability to constrain national conduct. For example, because the waiver contained no clear conditions and was phrased in discretionary terms, the United States was able to eschew the responsibility to conform its conduct to GATT within any particular time frame. Instead the United States treated its quantitative restrictions as if they were of indefinite duration. In contrast to the hard-core waiver, which made it "clear that sovereignty over domestic policies was recognized provided only it did not interfere" with international policies,[280] under the soft waiver the United States was able to prefer national interests to international interests without facing effective criticism that it was violating the terms of the bargain.[281] Moreover, absent a clear international legal obligation to eliminate its quantitative restrictions, the United States was free to, and did, condition its willingness to eliminate quotas on the willingness of other nations to adjust their commercial policies in ways suitable to the United States. The United States did not claim the right to retaliate against GATT violations of other nations. Rather, it claimed the right to ignore the waiver's implicit soft law obligation to work toward removal of restrictions, whether or not the practices of other nations violated GATT, if those practices—in the United States' view—distorted agricultural trade. Had the waiver imposed clearer obligations, or at least established a procedure for declaring and enforcing the implicit obligations of the waiver, the United States' position on GATT would have been difficult to maintain. Indeed, the United States condemned West Germany when it took

---

have been less disappointing from a pragmatic viewpoint than from a legal viewpoint. The volume of agricultural trade has generally increased over the years, despite the proliferation of various trade-distorting practices. *Id.* at 203. Moreover, not all agricultural products are subject to such restrictive practices as quotas or variable levies. Many are traded under tariffs bound according to GATT rules. *See* ATL. COUNCIL, *supra* note 5, at 27. Nevertheless, even from a pragmatic viewpoint, GATT's record is hardly outstanding. In 1970 Professor Dam observed that "[t]here is every reason to believe that the degree of agricultural protection has increased" despite GATT efforts to achieve a pragmatic solution to the problem. K. DAM, *supra* note 5, at 265.

280. G. CURZON, *supra* note 158, at 137.

281. Such criticism was, however, directed at other nations that sought to avoid the hard-core waiver or too long delayed elimination of residual restrictions. *See, e.g., supra* text accompanying notes 264-68, 275-77; *cf.* Gold, *supra* note 47, at 477 (One motive for soft law may be that under such rules "governments are not subject to the reproach that they are neglecting obligations if they give decisive effect to national, rather than international interests.").

a similar position to escape firmer obligations. But the soft law of the waiver did not provide a clear basis for condemning the United States' decision to condition its compliance. What appears to be critical is that the waiver did not clearly or authoritatively legitimate the international claim that the United States must liberalize its agricultural trade policy.[282] Without such legitimation the United States was able to offer excuses for noncompliance, particularly excuses resting on other nations' actions. By diluting the normative command imposed on the United States, the GATT also diluted the pressure that would ordinarily operate to influence the United States' behavior.[283]

The second key weakness of the soft law waiver was the nonuniform legal structure generated by it: one nation was not required to comply with article XI while others were. There is much to suggest that this development undermined international willingness to abide by or to enforce article XI in the agricultural sector.[284] The nonuniformity of obligation created by the waiver was an important factor in West Germany's decision to ignore its GATT obligations and restrict agricultural trade until improved agricultural trade rules were established. More importantly, this nonuniformity apparently contributed to international unwillingness to condemn too strongly West Germany's agricultural trade restrictions. Although West Germany's attitude toward residual restrictions was soundly condemned by the international community, international negotiations

---

282. *See supra* text accompanying notes 215-21.

283. Compare, for example, the international condemnation of the initial United States imposition of dairy quotas in the early 1950's, described *supra* note 236. As Professor Hudec points out, the ability of the GATT to influence a member's policies stems largely from the force of the normative pressures it can bring to bear. Once the soft law of the United States' waiver diluted the normative command to avoid quantitative restrictions, there was little constraint on United States action. *See* R. HUDEC, *supra* note 6, at 186-89. Gold has noted the same phenomenon when soft law is used to govern exchange rate policies. *See* Gold, *supra* note 47, at 479.

284. In the context of the GATT, nonuniformity could be perceived as a function of the status of soft law as a GATT exception, rather than a product of the soft characteristics of the exception. But, in fact, the problems nonuniformity creates could have been ameliorated by a firmer approach to the United States' waiver. Had the United States' waiver imposed some clear obligations on the United States and subjected United States compliance with those obligations to GATT scrutiny, willingness to enforce the basic GATT rule against others, and their willingness to accept it, may have been enhanced by the belief that the United States' exception was temporary, limited, and designed to ensure eventual United States GATT compliance. As matters stood, by the time the question of compliance with article XI in agricultural trade was raised for other nations, it was clear that the United States was unwilling to accept the implicit obligations of its waiver and would utilize the soft characteristics of the waiver as an excuse to prefer national to international interests. It was the combination of the exception and its soft character that contributed to an overall deterioration in GATT's effectiveness by permitting nations to use the lack of reciprocity as an excuse for their own GATT departures.

on the issue produced major changes only in West Germany's position on industrial products. West Germany retained substantial agricultural restrictions, and its argument that a legalistic approach to agricultural trade was inappropriate had a somewhat sympathetic audience. Thus, rather than strengthening respect for GATT processes, the United States' waiver simply called into question the validity of GATT's agricultural trade norms.[285] At least a partial consequence was that West Germany resisted complying with article XI and made the broader (and realistic) assertion that the entire system of legal rules governing agricultural trade needed reexamination because nations appeared unwilling to adhere to them. Significantly, this argument was not made in the context of industrial trade, in which, despite the presence of illegal quantitative restrictions and the adoption of the hard-core waiver decision, there had been a clear reaffirmation of article XI's normative force and the scope of the obligation it imposed.

Even when soft law is cast as the basic rule and not as an exception to the basic rule, as it was in the waiver, it will be hard to avoid nonuniform application. Soft law obligations often must be infused with content through a process of interpretation. During this process the rule will inevitably be subject to varying interpretations, with nations complying to differing degrees and in various ways. This inherent asymmetry of compliance and application, combined with the inability of a nation to depend upon other nations' compliance, quite plainly will reduce national willingness to abide by the rule and international willingness to enforce it.[286] Such asymmetries

---

285. The United States' rejection of GATT's agricultural trade rules was particularly destructive of GATT's effectiveness because, as the economic hegemon of the time, its leadership in complying with GATT was essential to the agreement's success. *See, e.g.*, GATT, Report Adopted on 19 November 1959, *supra* note 239, at 177. United States agricultural restrictions created severe pressures on exporting countries. As a result, "[g]overnments of other nations were under constant pressure from their producers to follow protectionist policies and even small progress toward the removal of restrictions by the United States would be an encouragement to other countries to take similar action." *Id.*; *cf.* R. HUDEC, *supra* note 6, at 241 ("GATT itself, if reduced to a single basic bargain, could be described as the exchange of U.S. tariff reductions for a commitment by the countries of Europe to eliminate their balance-of-payments restrictions just as soon as conditions permitted"; but the United States rejected this bargain and bowed out of GATT and Europe and the rest of the GATT membership responded in kind.). For a general discussion of the leadership role of an economic hegemon in securing a stable and open world trading system, see Kindleberger, *Dominance and Leadership in the International Economy*, 25 INT'L STUD. Q. 242 (1981); Kindleberger, *Systems of International Economic Organization*, in MONEY AND THE COMING WORLD ORDER 15 (D. Calleo ed. 1976); Stein, *The Hegemon's Dilemma: Great Britain, The United States, and the International Economic Order*, 38 INT'L ORG. 355 (1984).

286. On the demand for legal reciprocity and its influence on national compliance with international rules of trade relations, see R. HUDEC, *supra* note 5, at 37-38.

give domestic opponents of the rule a powerful "unfairness" argument and provide them with evidence that the rule will not bring long-term benefits. The demand for legal reciprocity, as well as reciprocity in application, is simply not satisfied by rules that are uncertain in interpretation and uneven in application. The FRG's conduct illustrates the problems that arise when rules do not contain reliable guarantees that other nations will adhere to them. The FRG was unable to foresee substantial benefits from adherence to the international rules and hence concluded that those rules were moribund.[287] The ephemeral character of the potential benefits attending compliance with soft rules is likely to have this effect whether a soft rule is an exception to a firmer rule or is itself the sole international obligation.

B. Soft Law and Export Subsidies

The problem of agricultural import restrictions cannot be considered apart from the related problem of export subsidies. Export subsidies distort world prices and permit the subsidized products to compete in markets they otherwise could not reach. The widespread use of export subsidies has therefore contributed to the maintenance of import restrictions on agricultural products.[288] An examination of GATT's efforts in this area confirms the previous analysis of soft law and adds a corollary—soft law can adversely affect dispute settlement processes.

Article XVI of the GATT admonishes governments to "seek to avoid the use of subsidies on the export of primary products" and prohibits nations from operating subsidy programs "in a manner which results in that contracting party having more than an equitable share of world export trade in that product."[289] This rule fits the soft law model in two respects. First, the general rule does not prohibit subsidies; it requires only that a nation "seek to avoid" them. Second, the meaning of the vague prohibition against using export subsidies to obtain "more than an equitable

---

287. *See supra* text and accompanying notes 261-63; *cf.* Gold, *supra* note 47, at 480 (necessity for uniform application of safeguards against the dangers of soft law); R. HUDEC, *supra* note 5, at 38 (In the context of trade policy, "expert assurances of reciprocity" have no impact on national behavior. "The only way to satisfy the political demand for reciprocity is through a visible system of common rules, with some assurance that the rules are in fact observed and enforced."). Professor Hudec argues that legal reciprocity requires both acceptable substantive rules and "a working 'disputes' procedure." *Id.*

288. *See supra* text accompanying notes 238, 262; *see also infra* text accompanying notes 340-41.

289. GATT, *supra* note 65, art. XVI(3) (as amended by part L of Protocol Amending the Preamble and parts II and III of the General Agreement on Tariffs and Trade, Mar. 10, 1955, 8 U.S.T. 1767, T.I.A.S. No. 3930, 278 U.N.T.S. 168).

share'' of trade can be determined only through interpretation by the GATT contracting parties. As a result of these soft characteristics, subsidization of agricultural exports per se is not a clear violation of GATT norms, except perhaps in flagrant cases.[290] For subsidization to be found violative of GATT provisions, the GATT usually must reach, through its dispute settlement procedures, a potentially difficult judgment that the exporting nation's world market share is inequitable.[291]

GATT procedures allow a contracting party to challenge another contracting party's trade practices on the grounds that the practices violate GATT rules and nullify or impair benefits guaranteed by GATT.[292] In theory at least, proceeding through GATT channels could lead to a definitive interpretation of article XVI and the condemnation of violations. Through this process article XVI could be given a clearer content, and firmer rules could be developed for future cases. In 1957 Australia attempted to utilize this procedure to clarify the meaning of article XVI.[293] Somewhat surprisingly, the effort appeared to succeed in clarifying the ambiguous terminology in article XVI. However, the GATT's previous resort to other soft law principles to solve one aspect of the subsidy problem—like its resort to the soft law waiver in the area of quantitative restrictions—made article XVI an ineffective tool to deal with the problem as a whole.

In the *French Wheat* complaint Australia asserted that French wheat and wheat flour subsidies violated article XVI. The GATT panel established to review the complaint reached judgment on all of the relevant legal issues. It concluded that the French system in fact resulted in export subsidization of wheat and wheat flour,[294] that the French share of world ex-

---

290. J. JACKSON, *supra* note 22, at 393-96. Even in flagrant cases it has proved difficult for GATT panels to interpret and apply article XVI(3). *See, e.g.*, GATT, Report of the Panel Adopted on 10 November 1980, 27 B.I.S.D. Supp. 69, 97 (L/5011) (1981). *See generally infra* text accompanying notes 361-64.

291. *Cf.* Gold, *supra* note 47, at 465 ("If obligations cannot be formulated in language that will make breach obvious when it occurs, effectiveness will depend on the explicit expression of censorious judgments by peers whenever censure is justified.").

292. GATT, *supra* note 65, art. XXII (as amended by part Q of Protocol Amending the Preamble and parts II and III of the General Agreement on Tariffs and Trade, Mar. 10, 1955, 8 U.S.T. 1767, T.I.A.S. No. 3930, 278 U.N.T.S. 168); GATT, *supra* note 65, art. XXIII (as amended by part R of the Protocol Amending the Preamble and parts II and III of the General Agreement on Tariffs and Trade, Mar. 10, 1955, 8 U.S.T. 1767, T.I.A.S. No. 3930, 278 U.N.T.S. 168). *See generally* K. DAM, *supra* note 5, at 353-64; R. HUDEC, *supra* note 5, at 5-13; Harris, *supra* note 8, at 146-51.

293. *See* GATT, Report Adopted on 21 November 1958, 7 B.I.S.D. Supp. 46 (L/924) (1959) (French Assistance to Exports of Wheat and Wheat Flour) [hereinafter cited as *French Wheat Case*].

294. *Id.* at 50-52.

port trade was "more than equitable,"[295] and that Australia's GATT benefits had been impaired.[296] Despite this willingness to give substance to vague GATT terminology and obligations, the contracting parties did not grant concrete relief. The panel's recommendations, adopted by GATT, did not even note the fact that France had violated article XVI or recommend that France abandon the subsidized exports. The final GATT decision simply recommended that France consider measures to avoid the adverse impact of its subsidy program and urged France to consider particularly the possibility of consultations with Australia to avoid future disruptions of Australian markets.[297]

Because the GATT did not hesitate to interpret the vague provisions of article XVI, this limited relief is not clearly a consequence of any inherent weakness in soft law. To the contrary, it appears that the soft rules were workable and that the ultimate decision not to take strong action against France can be explained as the typical pattern of GATT dispute settlement—an identification of a GATT violation combined with "rather gentle recommendations encouraging further exploration of a solution."[298] Moreover, France and Australia ultimately did reach an arrangement satisfactory to the latter country.[299] Therefore, one could view the panel's action as a manifestation of the general caution exercised by GATT panels and the diplomatic nature of the interpretation process under GATT.[300]

This explanation, however, is incomplete. It does not satisfactorily explain why the panel felt obliged to exercise caution, and why, if it could resolve the legal issues, its recommendations did not include a clearer statement of its resolution of those issues and a stronger command that France alter its practices. One reason for the panel's caution may have been that it had interpreted vague GATT provisions contrary to France's reading of those provisions; the panel may have feared that adopting an overly rigid position would precipitate a major confrontation.[301]

---

295. *Id.* at 52-53.

296. *Id.* at 54-55.

297. *French Wheat Case*, Recommendation of 21 November 1958, 7 B.I.S.D. Supp. 22, 22-23 (1959).

298. R. HUDEC, *supra* note 5, at 9.

299. J. JACKSON, *supra* note 22, at 380.

300. *See* R. HUDEC, *supra* note 5, at 9.

301. *Cf.* R. HUDEC, *supra* note 6, at 229 (describing the increasing resistance to GATT complaint procedures on grounds that they were too confrontational). Professor Hudec argues, however, that the fear of confrontation was merely a method to convey the view that "appeal to legal obligations" was not accepted as "a legitimate form of pressure" in part because exceptions to the rules "had so unbalanced the rest of the legal structure that the entire legal code had become subject to challenge." *Id.*

A second explanation for caution—rooted in soft law—was provided by the panel itself. In explaining its final recommendation the panel noted that French subsidization was motivated by France's displacement from its traditional Asian markets.[302] That displacement was caused by the agricultural policies of other nations, which permitted exporters to obtain substantial governmental assistance and resulted in noncommercial concessional sales of wheat throughout Asia.[303] These practices had not only driven France from its traditional markets, they had generally distorted wheat trade. According to the panel, the only remedy that would avoid further market disorganization was intergovernmental consultation.[304] Thus, the decision only requiring France to consult with Australia was consistent with the panel's view that negotiation and consultation among governments engaging in noncommercial or subsidized exportation of wheat and wheat flour was necessary to resolve the problems that prompted French subsidization.

What is most interesting about this conclusion is that in essence the panel rejected an opportunity to use GATT dispute settlement processes to reduce the market disequilibrium caused by export subsidies. The panel had concluded that "substantial assistance to exporters" violated article XVI if it seriously disrupted world markets.[305] The panel arguably should have condemned France's behavior, leaving it to France to challenge the practices of other nations if France believed those practices were injuring its export trade. In theory at least, such enforcement would have contributed significantly to eliminating the disruptive practices that had led France to engage in its own aggressive subsidy policies.[306]

Yet the panel apparently concluded that GATT's complaint processes would not solve the general problem and that broad intergovernmental consultations were necessary for any long-term solution. Thus, the *French Wheat Case* does not reflect simply a lack of political will or procedural

---

302. *French Wheat Case, supra* note 293, at 56.

303. *See id.* at 56-57. The United States was at the time shipping substantial quantities of food aid to Southeast Asia. *See id.* at 58.

304. *Id.* at 57; *cf.* GATT, Report Adopted on 22 November 1958, 7 B.I.S.D. Supp. 42, 45 (L/930) (1959) ("[C]ontracting parties, when contemplating action on problems arising in commodity trade, should consider the possibility of initiating consultations . . . with a view to arriving at mutually acceptable solutions . . . .").

305. One problem, however, was that the "equitable share" concept was to be applied in the context of world markets, not individual markets. *French Wheat Case, supra* note 293, at 52; *see also* J. JACKSON, *supra* note 22, at 394-95.

306. Criticizing the "mild recommendation" of the contracting parties in this case, Professor Dam noted that "however prudent and pragmatic . . . it is doubtful that occasional, isolated interventions of this character can reduce competitive subsidization." K. DAM, *supra* note 5, at 267.

weaknesses in GATT. It reflects, instead, a conscious determination by the GATT contracting parties to attempt to solve a serious problem caused by governmental subsidies with action outside the GATT dispute settlement framework. Part of the explanation for the panel's cautious exercise of the GATT dispute settlement procedures lies in the GATT's prior endorsement of a soft law approach to the general problem of surplus disposal.

In 1955 the same GATT Working Party that promulgated the article XVI provisions on export subsidies also addressed the problem of the concessional disposal of agricultural surplus commodities as food aid to developing countries.[307] Although a majority of the Working Party favored an Australian proposal to establish a set of surplus disposal rules, that proposal was thwarted when the United States refused to agree to formal commitments on surplus disposal.[308] As an alternative the Working Party prepared a resolution, later adopted by GATT, that noted the disruptive effects of surplus disposal and urged GATT members to "undertake a procedure of consultation" on surplus disposal in order to achieve "orderly liquidation of such surpluses, including where practicable disposals designed to expand consumption of the products . . . ."[309] This resolution intentionally paralleled the approach to surplus disposal endorsed by the United Nations Food and Agriculture Organization (FAO) in its 1954 Principles and Guidelines for Surplus Disposal.[310] The Working Party stated "that [the FAO] principles would be useful to contracting parties engaged from time to time in consultations with respect to the disposal of surpluses."[311]

Like article XVI, FAO's Principles and Guidelines for Surplus Disposal sought to minimize the damage to international trade "inflicted by uncontrolled disposal policies" of nations burdened with agricultural surpluses.[312] Recognizing that undisciplined surplus disposal can seriously

307. GATT, Report Adopted on 3 March 1955, *supra* note 161, at 229. The line between export subsidies and noncommercial or concessional sales of agricultural surpluses is quite "indistinct." K. DAM, *supra* note 5, at 268. Generally the distinction appears to rest on the purported purpose of the sale—aiding commercial exports or providing aid to the recipient country. Whatever the purpose, however, concessional sales and export subsidies on commercial sales pose similar problems for commercial exporters in other nations. *Id. See generally* R. BARD, *supra* note 97, at 35-74. Moreover, the United States' concessional sale programs were, during the 1950's at least, primarily motivated by commercial and political concerns, not humanitarian objectives. *See* Walczak, *supra* note 97, at 545.

308. GATT, Report Adopted on 3 March 1955, *supra* note 161, at 229.

309. GATT, Resolution of 4 March 1955, 3 B.I.S.D. 50, GATT Sales No. 1955-2 (1955).

310. *See* U.N. FOOD AND AGRIC. ORG., DISPOSAL OF AGRICULTURAL SURPLUSES—PRINCIPLES RECOMMENDED BY FAO 2-3 (Rome, Dec. 1954).

311. GATT, Report Adopted on 3 March 1955, *supra* note 161, at 229.

312. R. BARD, *supra* note 97, at 114.

disrupt commercial markets, the FAO, like the GATT, sought to minimize such disruptions. Surpluses were to be exported "in an orderly manner" to prevent "undue pressure" on world prices,[313] and concessional sales to developing countries were to "be made without harmful interference with normal patterns of production and international trade."[314] In addition, however, the FAO was attentive to the developing nations' need for food aid and, to that extent, was supportive of concessional surplus disposal.[315] Therefore, the FAO Principles advocated that the surplus problems of the developed countries be solved by increasing consumption in the developing world rather than by reducing agricultural production.[316]

The FAO surplus disposal policies were implemented through soft law norms. The principles are exceptionally ambiguous and do not command nations to comply with them.[317] A nation's only obligation under the guidelines is to notify and consult with other nations that are affected by its surplus disposal programs.[318] There is no obligation to modify programs in response to the consultations[319] and the FAO has no enforcement power.[320] In constrast, the GATT at least contains a command not to acquire more than an equitable share of trade and it has procedures to determine whether a violation has occurred. The FAO guidelines combine vague standards with the absence of interpretation and enforcement procedures.

---

313. *Id.* at 115.

314. *Id.* at 116.

315. *See id.* at 114-16.

316. *Id.* at 115. The position arguing against decreasing agricultural production is somewhat contrary to GATT, *supra* note 65, art. XI(2), which mandates that domestic agricultural programs be structured to reduce excess production and marketing of agricultural commodities.

317. An indication of their character is provided by Professor Bard:

> The basis of the FAO control system is a set of often vague general substantive standards . . . which have been accepted by most of [the] world's agricultural trading nations . . . . [I]n most important respects, these standards are too general to be self-executing. Indeed, they are so vague that they could not be applied by an adjudicative body operating within the usual limits of such institutions.

R. BARD, *supra* note 97, at 116.

318. *Id.* at 116-17.

319. *Id.*

320. *Id.*; *cf.* Report of the Secretary-General: Current Activities of International Organizations Related to the Harmonization and Unification of International Trade Law, 12 Y.B. INT'L TRADE L. COMM'N 200 (1981) (U.N. Doc. A/CN.4/SER.A/1981) (FAO Intergovernmental Commodity Groups generally follow "voluntary consultative approach in seeking solutions to commodity problems"). The FAO has no explicit constitutional authority to impose binding obligations on its members. It may only promote and recommend national and international action. *See* Constitution of the Food and Agricultural Organization of the United Nations, art. I, International Governmental Organizations (pt. 2), at 98 (A. Peaslee ed. 3d rev. ed. 1975) (reprinting 1 FAO, BASIC TEXTS (13th ed. Italy 1966)).

Thus, at the time of the *French Wheat Case* the GATT was committed to a dual and contradictory approach to export subsidization of agricultural products. In article XVI the GATT prohibited export subsidization to attain more than an "equitable" share of export trade. However, it also endorsed the FAO's different and softer approach to concessional disposal of surplus agricultural commodities. The softer approach was less precise than article XVI and was not susceptible to firm administration.[321]

With this background in mind one can analyze the role of soft law in the *French Wheat Case*. A strict application of GATT standards to French activities could not have improved overall trading conditions in the agricultural sector because much of the underlying problem was the consequence of noncommercial surplus disposal governed by other, softer rules and procedures.[322] Given GATT's general focus on reciprocal and mutual efforts to correct trade distortions, it is unsurprising that the panel chose to treat France in the manner it would be treated under noncommercial surplus disposal rules. The apparent opportunity to resolve the export subsidies problem was in fact not present so long as surplus disposal practices

---

321. A procedure was established within the FAO to exercise surveillance over surplus disposal activities. Nations injured by such activities could raise their complaints with the FAO's consultative subcommittee on surplus disposal, although the subcommittee had no enforcement authority. Exporting nations were required to notify the committee of any changes in surplus disposal policy prior to making such changes. K. DAM, *supra* note 5, at 269; *see also* R. BARD, *supra* note 97, at 137-55. Professor Bard concluded in his extensive analysis of the FAO system that the FAO's Committee on Surplus Disposal "has operated over the years as an effective, purposeful and responsible body, largely fulfilling, within the context of the demands made upon it, the role mapped out in 1954." *Id.* at 150. According to Professor Bard, that role primarily concerned ensuring that the United States fulfilled the FAO consultation and notification requirements and avoided unduly interfering with the agricultural trade of other nations. *Id.* This apparent success of the soft law of the FAO must be tempered by two observations. First, the United States itself denied that its willingness to consult and negotiate was a response to political pressures or legal requirements related to the FAO principles. *Id.* at 146. Second, Professor Bard is careful to note that his favorable attitude to the FAO is limited to concluding that it served its strictly circumscribed function of "providing a forum for consultations and negotiations [and] making recommendations which are not binding upon the governments concerned." *Id.* at 178. That limited success has not convinced the nations injured by United States concessional agricultural exports that the FAO principles have resolved the problems generated by noncommercial exports. *See, e.g.*, Boger, *supra* note 19, at 190 (EC criticism of United States food aid). Ultimately, it is impossible to ascertain whether the FAO principles or changes in economic factors have contributed to minimizing international disputes over food aid. *See* K. DAM, *supra* note 5, at 270.

322. At the time of the *French Wheat Case* the country whose noncommercial surplus disposal exports were disrupting the Southeast Asian market was the United States. In its waiver discussions the same year the *French Wheat Case* was before the GATT, the United States refused to discuss its surplus disposal programs. *See supra* note 241. Despite the humanitarian purpose generally associated with food aid, the purpose of the United States program during this period was largely surplus disposal and the creation of commercial

were outside GATT rules. Moreover, the United States, whose surplus disposal policies were responsible for the disequilibrium in the Asian market, had defeated the attempt to establish a GATT code in the area, thus indicating its unwillingness to submit to clear international rules governing its practices.[323]

The *French Wheat Case* illustrates, at least, this modest proposition concerning soft law: attempting to paper over a lack of consensus with principles or guidelines for international cooperation is unlikely to start a common-law process toward firmer law. The GATT's effort to resolve its internal disagreement on surplus disposal and export subsidies by adopting a two-track approach to these problems simply served to undermine the firmer approach of article XVI. The two-track approach created a nonuniformity of legal obligation, which made the effort to enforce the firmer approach fruitless. After the *French Wheat Case* there was little further effort to control export subsidization through GATT procedures and little progress toward the elimination of competitive subsidization.[324]

C. Soft Law and Efforts to Revitalize the GATT Framework

The early ineffectiveness of the GATT's rules on import protection and export subsidization did not prevent the international community from continuing its efforts to achieve agricultural trade liberalization. Major agricultural exporters, particularly the United States, pursued the liberalization objective throughout the 1960's and 1970's, and it remains a major goal of United States trade policy. It is useful, therefore, to examine the impact of soft law on efforts to reinvigorate the GATT's agricultural provisions.

1. Soft Law and the Effort to Limit Import Restrictions

The Kennedy Round trade negotiations of the mid-1960's aptly illustrate some of the problems soft law created for efforts to revitalize the

---

markets. *See* Walczak, *supra* note 97, at 545. Food aid, therefore, was a disturbing factor in the GATT legal system, and the inability to address both food aid and export subsidies through article XVI would have made any effort to address French subsidies through that legal device unavailing. GATT's ineffectiveness in controlling agricultural subsidies after this case led, ironically, to disagreements within the FAO over the proper scope of the FAO principles. Nations that were dissatisfied with GATT's ability to protect their interests against competitive subsidization sought to bring commercial export aids, as well as food aid, within the jurisdiction of the FAO. *See* R. BARD, *supra* note 97, at 161.

323. *See supra* text accompanying note 308.

324. Recent efforts to revitalize the GATT in this area have been unsuccessful. *See* Boger, *supra* note 19, at 179.

GATT framework.[325] In the early negotiations preceding the Round, major agricultural exporters sought an agreement that negotiations would proceed on the basis of an across-the-board reduction in agricultural tariff levels.[326] This proposed focus on tariff reductions was unrealistic for two reasons. First, it ignored the major exporters' widespread use of nontariff measures.[327] Second, it failed to address the interrelationship between the distortions caused by the trade practices of exporters and the protectionist attitudes of importers.[328] The latter regarded their use of trade barriers as, in part, a consequence of the import and export policies of the major exporters. The EC, a major importer, would not agree to any negotiating format that did not take account of this interrelationship.[329] It was particularly unwilling to accept any format requiring tariff levels to be bound on major commodities because that would endanger its variable levy.[330] The GATT Ministerial Declaration preceding the Kennedy Round, therefore, adopted "market access," rather than across-the-board tariff reductions, as the goal of the agricultural sector negotiations.[331] Thus, the impact of soft law on specific GATT principles insinuated itself into the GATT's overall approach to agricultural trade negotiations, forcing negotiations to abandon the goal of reciprocal reductions of identifiable import barriers in favor of an ambiguous market access objective.

This soft approach to trade negotiations encountered serious difficulties. Agreement could not be reached on either the form in which market access would be provided or how reciprocal improvements in market access would be measured. To overcome the impasse, the EC offered a complicated plan that would have bound "margins of support" (essentially the difference between world and domestic prices) at existing levels, with periodic negotiations to reduce those levels.[332] The United States rejected this plan for several reasons. First, the United States believed the

---

325. For general discussions of the Kennedy Round, see ECONOMIC RELATIONS AFTER THE KENNEDY ROUND (F. von Geusau ed. 1969); J. EVANS, *supra* note 275; FOREIGN AGRIC. SERV., U.S. DEP'T OF AGRIC., REPORT ON THE AGRICULTURAL TRADE NEGOTIATIONS OF THE KENNEDY ROUND (1967) [hereinafter cited as USDA].

326. J. EVANS, *supra* note 275, at 203-04.

327. *Id.* at 203. Nontariff barriers were extensive enough to characterize tariffs as "irrelevant to determining international trade flows for agricultural products." K. DAM, *supra* note 5, at 70.

328. J. EVANS, *supra* note 275, at 203.

329. *Id.* at 204-05, 209-12.

330. *See generally id.* at 203-17.

331. GATT, Conclusions and Resolutions Adopted on 21 May 1963, 12 B.I.S.D. Supp. 36, 48 ¶¶ II, III(A)(7), GATT Sales No. 1964-1 (1964).

332. *See* J. EVANS, *supra* note 275, at 209-12; Albregts & van de Gevel, *Negotiating Techniques and Issues in the Kennedy Round*, in ECONOMIC RELATIONS AFTER THE KENNEDY ROUND 20, 37-38 (F. von Geusau ed. 1969).

plan would validate and extend the variable levy, and as a result the United States would lose prior tariff concessions granted by the EC to the United States.[333] Second, the plan did not ensure continued or increased access to EC markets.[334] Finally, the plan would not have liberalized trade, it would only have affirmed the status quo.[335] The EC viewed the United States' reluctance to endorse the EC's plan as a product of the United States' unwillingness to include its own domestic agricultural policies, sanctioned by the waiver, within the negotiating process.[336] The plan was not put into effect, and without agreed principles to anchor the negotiations, the Kennedy Round concluded with tariff reductions that were relatively insignificant in view of the primary importance of nontariff barriers and the variable levy.[337]

Soft law's impact on GATT was an important factor in the inability of the United States and the European Community to agree to an effective negotiating format for the agricultural sector in the Kennedy Round. Much of the dispute over the EC's "margin of support" proposal reflected differences in national approaches to agricultural trade issues that were, in part, a response to soft law's creation of nonreciprocity of legal obligation. In particular, the EC's position was shaped by the GATT framework's lack of reciprocity, while American attitudes were significantly influenced by the refusal of other nations to adhere to GATT rules, a refusal that also was precipitated by the GATT framework's lack of reciprocity.

From the EC's perspective the primary problem afflicting agricultural trade relations was the obvious ineffectiveness of the GATT rules and

---

333. J. EVANS, *supra* note 275, at 209; Albregts & van de Gevel, *supra* note 332, at 41.

334. Albregts & van de Gevel, *supra* note 332, at 39-41.

335. J. EVANS, *supra* note 275, at 211; Albregts & van de Gevel, *supra* note 332, at 39.

336. J. EVANS, *supra* note 275, at 212.

337. J. JACKSON, *supra* note 22, at 718; Hudges, *Kennedy Round Agricultural Negotiations and World Grains Agreement*, 49 J. FARM ECON. 1332, 1335 (1967). *But see* USDA, *supra* note 325, at 1. According to Evans, the results were "far from negligible" and "greater than appeared possible," although "considerably short of accomplishments in the area of nonagricultural products." *See* J. EVANS, *supra* note 275, at 290. The Kennedy Round also included negotiations on the terms of an international wheat agreement that became effective on July 1, 1968. International Grains Arrangement, Nov. 30, 1967, 19 U.S.T. 5501, T.I.A.S. No. 6537, 727 U.N.T.S. 3. The price provisions of this agreement quickly fell apart under the pressures of an international export price war. *See* Schram, *supra* note 156, at 306-16. These results indicate the difficulty of conducting negotiations in the absence of preexisting guidelines regarding appropriate national practices. *See* Gundelach, *The Kennedy Round of Trade Negotiations: Results and Lessons*, in ECONOMIC RELATIONS AFTER THE KENNEDY ROUND 146, 151 (F. von Geusau ed. 1969). This was true even though "the United States, Britain, and the EEC were committed in principle to bringing domestic policies within the scope of the negotiations where they constituted the principal impediments to trade." The problem was that no agreement on how to achieve that desideratum could be reached. Schram, *supra* note 156, at 292-94.

nations' "unlimited autonomy" to pursue trade-distorting practices.[338] In large part this problem was a consequence of the soft law waiver and the FAO surplus disposal principles, neither of which promised to control effectively import protection or surplus disposal by the United States. The EC's margin of support proposal was designed to correct that lack of legal reciprocity by adopting an approach to trade liberalization that legitimized all forms of import restriction and subjected them to a single method of international control.[339] Although the approach would freeze matters in their existing state, it was perceived by the EC as an improvement over the "unlimited autonomy" that characterized GATT practice.[340] Moreover, the EC believed that the margin of support proposal would make clear to exporters the important connection between their export activities and protectionism in importing nations. By permitting the margin of support to increase when world prices fell below an agreed "reference price," the plan would create an incentive for major exporters to maintain prices and avoid subsidizing exports.[341]

The proposal, therefore, served several EC objectives. It tacitly recognized that the GATT framework was a dead letter and that all methods of import restriction, whatever their legal status in GATT, should be included in the negotiations. Second, the plan would not affect significantly the variable levy or commit the EC to reduce import barriers substantially. Finally, the plan expressly recognized the link between the protectionist attitudes of importers and the export and import policies of major exporters.

The United States' perspective on agricultural trade issues was very different. Although international departures from GATT rules and maintenance of restrictive trade practices were in part a response to practices of the United States,[342] they were not viewed in this light in domestic United States politics.[343] Instead, there was a widespread conviction that the EC was unfairly erecting barriers to United States' agricultural exports and was not living up to its GATT obligations.[344] There was particular apprehension about the common agricultural policy and the variable levy, the protective effects of which were beginning to be recognized.[345]

---

338. Albregts & van de Gevel, *supra* note 332, at 39. *But see* K. DAM, *supra* note 5, at 71 (arguing that EC was "pursuing a conscious policy of seeking agricultural self-sufficiency").

339. J. EVANS, *supra* note 275, at 209-10; *see* Gundelach, *supra* note 337, at 175, 177-79.

340. Albregts & van de Gevel, *supra* note 332, at 39.

341. J. EVANS, *supra* note 275, at 211-12.

342. *See supra* text and accompanying notes 250-79, 307-24.

343. The political backgound of United States participation in the Kennedy Round is described at length in J. EVANS, *supra* note 275, at 133-59.

344. *Id.* at 146-47.

345. *Id.*

Finally, there was an insistence in the United States that reciprocity be maintained. Although there was no clear agreement on what this meant, discussions in the United States focused largely on reciprocity in terms of equivalent market access and ignored the problems that the United States' waiver and the FAO principles created for legal reciprocity.[346] The United States' Kennedy Round negotiators operated under the constraints of those political pressures and a congressional mandate that agricultural market access be obtained in return for any concessions by the United States.[347]

Under such circumstances the United States' negotiators could not have agreed to a plan that legitimized the variable levy and froze, rather than liberalized, existing agricultural protectionism. In particular, an EC plan that would impair existing United States rights under GATT was politically impossible for the United States to accept. No matter how unimportant those rights were in contrast to the necessity of developing a realistic approach to agricultural trade issues, the negotiators could not return with an agreement that not only failed to improve trading conditions, but also threatened existing rights.

The ramifications of the introduction of soft law into the GATT framework run throughout this dispute. From the European perspective, soft law had created a significant lack of uniformity in legal obligation. The EC, therefore, entered the negotiations with the desire to replace the existing GATT framework with a framework containing more uniform legal obligations. The EC was unwilling to move toward significant agricultural discussions without an approach which accomplished that objective. But for the United States, the basic GATT rules—soft and firm—still bound the contracting parties. Other nations' unwillingness to adhere to those rules was seen by United States domestic interests as an affront to the GATT and as unfair treatment of the United States' agricultural trade.

This suggests a further difficulty with disguising basic disagreement on international policy behind soft norms. To the extent that those norms prove ineffective—as in the case of the United States' waiver—at overcoming the fundamental disagreement, they will cause some nations to reject the approach they are designed to serve. For example, much of the international community rejected the GATT rules after the United States' waiver and the adoption of the FAO principles for surplus disposal. At the same time, by leaving an international framework of rules intact, even if it is ineffective, soft law will create expectations that those rules will be followed. Those expectations may lead to increased international ten-

---

346. *Id.* at 147-51.

347. *See* Trade Expansion Act of 1962, Pub. L. No. 87-794, § 252, 76 Stat. 872 (1962). *See generally* K. DAM, *supra* note 5, at 71; J. EVANS, *supra* note 275, at 157-58.

sion when they are unsatisfied.[348] Moreover, commitment to those expectations may make reform of the basic rules difficult, particularly when reform appears to require the abandonment of established "rights." Thus, the expectations GATT rules created among domestic interests in the United States generated a climate in which enforcement of GATT, not reform, was the order of the day.[349] This attitude prevailed even though the United States itself managed to avoid the GATT rules through waiver.

Precisely this type of difficulty impeded the efforts after the Kennedy Round to resolve the continuing problem of residual restrictions in the agricultural sector. Those nations that were called upon to remove their remaining residual restrictions insisted that any GATT negotiations should not concentrate only on technically "illegal" restrictions, but on all agricultural import barriers, including quantitative restrictions authorized by the United States' waiver or by the variable levy.[350] The basis for this position was that uniformity in legal obligation could not be maintained in practice without such a global focus.[351] But this proposal to discuss all import restrictions, regardless of their legal status, ran into the same problem that afflicted the Kennedy Round negotiations. Several nations refused to negotiate on both legal and illegal restrictions, arguing that they "should not have to negotiate (and pay for) the removal of illegal restrictions."[352] Ultimately, no effective solution was reached,[353] thus confirming the Kennedy Round lesson: those injured by soft law exceptions to basic rules will not accept enforcement of the firmer rules, while other nations will not agree to negotiating principles that require the surrender of their legal rights under these firmer rules.[354] Thus, even after the entire GATT

---

348. *Cf.* Seidl-Hohenveldern, *supra* note 13, at 195:

> The party which is to benefit from "soft rules" will do its best to render them as hard and fast as possible. This party thus will tend to interpret acceptance of a mere principle as a firm promise to be fulfilled within a reasonable time. Should this expectation be disappointed, it may lead to unpleasant tensions between the States concerned.

349. United States negotiators knew that "the variable levy system could not itself be dislodged." J. EVANS, *supra* note 275, at 212, but they hoped to ensure that it would not be expanded to include products for which fixed tariffs had been bound in the Dillon-Round negotiations. *Id.* Subsequent events confirm United States solicitude toward its GATT rights. Between 1970 and 1975 the United States conducted an aggressive campaign in GATT to enforce GATT provisions, including those involving agricultural import restrictions. *See* R. HUDEC, *supra* note 6, at 230, 235-37. In 1976 the United States attempted to enforce article XI(2) against Canada, despite the clear uselessness of that provision at that time. *See* Canadian Import Quotas on Eggs, 23 B.I.S.D. Supp. 91, 91-93 (L/4279) (1977). *See generally* Hudec, *supra* note 9, at 160, 190-91.

350. *See* R. HUDEC, *supra* note 6, at 255-57. The discussions concerned all residual quantitative restrictions, but it had been generally acknowledged since 1961 that "most of the restrictions were only symptoms of a deeper problem with agriculture generally." *Id.* at 252.

351. *See id.* at 256-57.

352. *Id.* at 257.

353. *Id.* at 258.

354. *Id.* at 257. This unwillingness to abandon established rights does not necessarily

framework on agricultural import restrictions was reduced in practice to a soft obligation to consult and negotiate, the existing legal rules continued to structure the GATT dialogue and create expectations that impeded reform. Soft law failed to induce nations to comply with GATT; at the same time it failed to signal clearly the need for GATT reform.[355]

2. *Soft Law and Current Trade Liberalization*

Soft law's impact on GATT enforcement during the 1950's and 1960's arguably could be dismissed as a consequence of domestic economic and political pressures. But despite altered economic and political conditions, current efforts to reassert GATT control in the agricultural sector continue to face the problems encountered in the 1950's and 1960's.[356] Perhaps

---

reflect a lack of recognition by governments of the need to address both legal and illegal restrictions simultaneously. It reflects, instead, the constraints of political pressure that make it difficult "to pay new value to enforce 'legal rights' that had already been paid for and advertised to constituents as valuable assets." *Id.*

355. *Cf.* Hudec, *supra* note 9, at 167 ("[O]ne or two dramatic failures under an obsolete provision could actually help the legal system if such failures stimulated renegotiation of the rule.").

356. Agriculture was a separate item on the agenda of the Tokyo Round of trade negotiations. *See* GATT, Declaration of Ministers Approved at Tokyo on 14 September 1973, 20 B.I.S.D. Supp. 19, 21 (MIN (73)1) (1974) [hereinafter cited as GATT Declaration]. The negotiations were again hampered by the differences in the approach of the United States and the EC toward the sector. The United States urged liberalization, while the EC refused to engage in any negotiations that would question the legitimacy of its basic approach to agriculture and advocated the conclusion of commodity agreements to stabilize world markets in particular areas. *See generally* ENV'T AND NAT. RESOURCES POL'Y DIV., CONG. RESEARCH SERV., ENR No. 84-169, AGRICULTURE IN THE GATT: TOWARD THE NEXT ROUND OF MULTILATERAL TRADE NEGOTIATIONS 20-26 (1984) [hereinafter cited as ENR No. 84-169]. Ultimately the Tokyo Round "did not produce major breakthroughs in protectionist agricultural trade policies." Houck, *supra* note 19, at 292. "[T]he U.S. and the EC failed to reach agreement on measures to moderate the effects of domestic policy on agricultural trade or on international commodity agreements with significant economic provisions." ENR No. 84-169, *supra*, at 22. In bilateral negotiations with the EC, Japan, Canada, and the United States received some concessions on tariffs and quotas. The United States itself slightly increased quotas on dairy imports and reduced tariffs on a number of products. On an import value basis, the concessions made were far below those of the Kennedy Round. *Compare* Houck, *supra* note 19, at 276-88. There was also an effort to strengthen the GATT's approach to export subsidies and to improve international attention to domestic health and safety standards for food products. The Subsidies Code, Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT, Apr. 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619, *reprinted in* 18 I.L.M. 579 (1979) [hereinafter cited as Subsidies Code], has not been effective in controlling agricultural export subsidies. Boger, *supra* note 19, at 214. The Standards Code, Agreement on Technical Barriers to Trade, Apr. 12, 1979, 31 U.S.T. 405, T.I.A.S. No. 9616, *reprinted in* 18 I.L.M. 1079 (1979), sought only to support cooperation on standards practices, not to regulate domestic standards. Houck, *supra* note 19, at 289-90. Finally, the Tokyo Round resulted in two commodity agreements, one for dairy products and the other for beef products. *Id.* at 290-91. Neither agreement has proven very successful. The Bovine Meat Arrangement seeks only to promote consultation. ENR No. 84-169, *supra*,

the most striking example of soft law's continuing impact is the United States' continued adherence to its waiver. In the face of GATT protests that the purpose of the waiver—to give the United States time to solve the extraordinary surplus problems of the 1950's—has been satisfied time and again, the United States continues to insist that the waiver requires it to do nothing until overall world practices change and trading conditions improve.[357]

GATT efforts to control the EC's export subsidization practices similarly are impeded by attitudes the genesis of which is partially attributable to the effects of soft law. In a recent GATT review of EC sugar subsidies, the EC resisted any careful GATT discussion of its behavior by arguing that its "sugar policy was . . . of the same type as those of other countries" and should be discussed "only on the condition that sugar policies of other countries could be examined simultaneously."[358] The targets of this attack insisted with equal vehemence that the GATT should address only activities properly challenged and brought before it through dispute settlement mechanisms.[359] Soft law's nonuniform obligations per-

---

at 26. The Dairy Arrangement sought, in addition, to establish minimum export prices. But the United States recently withdrew from the arrangement and the remaining participants have been unable to agree on a minimum export price policy. *See supra* note 157. Overall the Tokyo Round failed to substantially liberalize agricultural trade or to come to grips with the basic problems in that sector. In the economic atmosphere of the recent worldwide recession, agricultural trade policies became increasingly protectionist, and a 1983 GATT ministerial returned to the basic approach of agreement on principle "[t]o bring agriculture more fully into the multilateral trading system by improving the effectiveness of GATT rules [and] to seek to improve terms of access to markets . . . and to bring export competition under greater discipline." GATT, Ministerial Meeting Communiqué, *printed at* Annex Three(A), para. 7(v) of MANAGING TRADE RELATIONS IN THE 1980's, at 239-40 (S. Rubin & T. Graham eds. 1984). In effect, therefore, the Tokyo Round has left agricultural trade in the same structure it held following the Kennedy Round: ineffective rules, widespread protectionism, and calls for more effective GATT enforcement.

357. *See, e.g.*, GATT, Report of the Working Party Adopted on 9 March 1983, 30 B.I.S.D. Supp. 221, 226-27 (L/5569) (1984) ("The United States continued to try to liberalize its Section 22 actions where possible, but could not unilaterally renounce its defensive measures."); GATT, Report of the Working Party Adopted on 9 October 1980, 27 B.I.S.D. Supp. 206, 211, 213 (L/4999) (1981) (in view of United States' representative, "the use of import restrictions on agricultural products should be regarded as a global problem, one that the United States could not be expected to try to solve alone"); GATT, Report of the Working Party Adopted on 22 November 1967, 15 B.I.S.D. Supp. 197, 203 (L/2927) (1968). During the Tokyo Round the United States offered to seek legislation removing section 22 of the Agricultural Adjustment Act (for which the waiver was granted), but only if other nations promised to remove their own similar restrictions. Echols, *The GATT Ministerial and International Trade in Agricultural Products*, in MANAGING TRADE RELATIONS IN THE 1980's, at 109 (S. Rubin & T. Graham eds. 1983).

358. GATT, Report to the Council Adopted on 31 March 1982, 29 B.I.S.D. Supp. 82, 86 (L/5294) (1983).

359. *Id.* at 86-88.

mitted both sides to make assertions that could not be deemed invalid.[360]

Similar arguments have determined the outcome of contracting party complaints involving export subsidies. In three recent cases challenging EC export subsidies, decision turned on interpretation of the vague "more than an equitable share" standard of article XVI.[361] In all three cases the panel concluded that, given the ambiguities of the "equitable market share" concept, it could not judge whether the EC had an inequitable share of world trade.[362] The panels claimed to be unable to determine whether trends in world market shares were the result of EC policies, the market-creating effects of concessional sales by other countries, of the complaining party's actions, or "other developments in the world . . . market."[363] In effect, general conditions in world markets became an excuse for refusing to condemn subsidy practices that clearly had distorted trade, depressed prices, and resulted in vast increases in the EC's market share.[364] Again, the vague nature of the applicable legal standard and the perception that application of the standard against the EC would be unfair allowed the panels to reach their decisions legitimately.[365]

---

360. *Cf.* Gold, *supra* note 47, at 443 ("[C]onduct that respects soft law cannot be deemed invalid.").

361. *See* GATT, Report of the Panel Adopted on 10 November 1980, 27 B.I.S.D. Supp. 69 (L/5011) (1980); GATT, Report of the Panel Adopted 6 November 1979, 26 B.I.S.D. Supp. 290 (L/4833) (1979); Draft Report of the Panel; European Economic Community—Subsidies on Export of Wheat Flour, *reprinted in* U.S. EXPORT WEEKLY (BNA) 900-16 (Mar. 8, 1983). *See generally* Boger, *supra* note 19, at 203-14. The *Wheat Flour Case* involved a complaint by the United States and was brought before the Committee on Subsidies and Countervailing Measures established by the Subsidies Code negotiated at the Tokyo Round. Subsidies Code, *supra* note 356, art. 16; *see* GATT, Report (1982) Presented to the Contracting Parties at their Thirty-Eighth Session, 29 B.I.S.D. Supp. 42, 46 (L/5402) (1983). The Subsidies Code provisions on agriculture export subsidies do not significantly change the GATT provisions. *Compare* Subsidies Code, *supra* note 356, art. 10 *with* GATT, *supra* note 65, art. XVI(3).

362. Boger, *supra* note 19, at 206, 211-12.

363. GATT, Report Adopted on 10 November 1980, *supra* note 290, at 97.

364. The panel itself concluded that EC policies "constituted a permanent source of uncertainty in world sugar markets and . . . a threat of serious prejudice." *Id.*

365. The failure of the Subsidies Code to significantly change the GATT's approach to export subsidies in dispute settlement is particularly telling evidence of the impact of substantively soft rules on theoretically firm international procedures. The negotiation of the Code was regarded by the Carter Administration's Secretary of Agriculture as a major achievement of the Tokyo Round:

> The Codes provide new rules that will be applied on a case-by-case basis over the next generation. The new rules, consultation procedures and carefully drawn dispute settlement procedures will enable all signatory countries to bring agricultural problems under closer international scrutiny . . . . Skeptics believe that only an unequivocal prohibition of subsidies will prevent subsidy practice, but even an absolute rule is only as good as the means available to enforce it. The new rules provide for the first time an opportunity to test what other governments will allow and to exact a price from those who fail to meet the test. This kind of discipline over export subsidies for agricultural products was perhaps

D. Summary—The Role of Soft Law in GATT's Decline

The 1950's and early 1960's saw a rapid decline in the international consensus concerning the GATT's approach to agricultural trade liberalization. GATT's efforts to avoid the consequences of the emerging dissensus by resolving difficult trade problems with soft rules actually contributed to the demise of its most basic agricultural trade norms. The United States' conduct under its soft waiver, the international response to the problem of residual restrictions, and the decision in the *French Wheat Case* illustrate the weak control that soft rules have on the conduct of nations and the effect that the resulting lack of legal reciprocity will have on stronger rules theoretically subject to some degree of international enforcement. The analogy to the common-law process is instructive here. Just as a process of interpretation and application of legal principles may generate a movement from general principles to firm rules, it may also promote an opposite movement from firm rules to general principles. When soft law legitimized the United States' import restrictions and sheltered surplus disposal activities from firm GATT control, its influence inevitably extended to the bulk of agricultural trade relations. Recent efforts to enforce article XVI through GATT procedures have foundered on the twin obstacles of unclear legal obligations and a lack of reciprocity in the substantive rules governing export trade practices.[366]

---

the United States highest objective in the MTN.
Bergland, *supra* note 157, at 260-61.

Thus far skepticism has been confirmed by experience, at least insofar as enforcement of the Subsidies Code was the United States' objective. While it may be that even absolute rules require enforcement procedures, it is also true that even the strongest procedures are undermined by vague substantive rules. It is not economic sanctions, but normative pressure, that has worked in international economic regulation. Without rules that are firm enough to produce normative pressure, strong procedures are unlikely to succeed. With clear enough rules, it is often unnecessary to use whatever strong procedures exist. *See* R. HUDEC, *supra* note 6, at 185-86; Gold, *supra* note 47, at 447. A telling example of how the existence of some basis for condemnation can generate effective dispute settlement is provided by Professor Hudec in his discussion of efforts to review the GATT disputes procedure in the early 1970's. In most cases it was not easy "to move the GATT legal machinery to a sharp decision—even when the plaintiff was the United States." In the case of a 1972 United States complaint against French residual restriction, however, "the case was settled on the basis of a promise to remove almost all the restrictions" even though "the existence of illegal residual restrictions had become an accepted fact" and "GATT had already deflected several other attempts to assert such legal claims." R. HUDEC, *supra* note 6, at 235-36. The United States' complaint against France was successful because a 1962 GATT decision had recommended elimination of the offending residual restrictions. "The existence of that decision cut off GATT's normal defense mechanism of trying to smother such claims, for the decision had put GATT itself on record in a way that was impossible to evade . . . . Faced, then, with retaliation which GATT was going to have to certify as legitimate, the French government apparently found the embarrassment sufficiently disagreeable to take some painful decisions." *Id.* at 235-36.

366. As Professor Hudec notes, problems of dispute settlement lie "in the GATT's substantive rules, rather than in the procedures of dispute settlement *per se*." R. HUDEC,

Soft law, therefore, must be seen as a cause, as well as an effect, of the substantive and institutional breakdown[367] that impeded GATT's effectiveness in the agricultural sector. Its derivative aspects are most obvious. In the face of the United States' unwillingness to comply with article XI and international inability to agree on a firm approach to export subsidies and surplus disposal, soft norms were utilized to avoid too rigid or too confrontational an approach to these problems while still retaining some international control or supervision over national conduct.[368]

But soft law had three glaring weaknesses that exacerbated, rather than mitigated, the problems it addressed and which operated to increase international dissensus. First, because it did not clearly delineate the scope or nature of its obligations, soft law did not allow the application of strong normative pressure when those obligations were neglected.[369] Second, the uncertainty inherent in soft obligations permitted the presentation of justifications and excuses for ignoring international responsibilities that, if presented to avoid clearer obligations, would have been condemned.[370] Finally, soft law failed to provide members of the international community with any substantial assurance that deleterious national behavior would be altered or eventually abandoned.[371] Absent such assurances international confidence in the effectiveness and benefits of the GATT's

---

supra note 5, at 23. To be sure, process is important. But effective process requires that rules be defined and established in advance so that disputes can be settled under standards already accepted as legitimate. *Id.* at 27. Without a clear normative standard, disagreements over the scope of issues relevant to a dispute may foreclose effective process. *Id.* Moreover, so long as the nations involved have control over how coercive the dispute settlement process is in practice (as opposed to its theoretical power), soft law is likely to reduce the willingness to resort to coercive tactics of condemnation: "soft law does not predispose [nations] to accept firm administration." Gold, *supra* note 47, at 480. One other problem currently afflicting the effectiveness of GATT's institutional mechanisms is a tendency of nations, organized together in preferential trading groups, to engage in block voting on political grounds, with apparent disregard of the merits of a controversy. *See* R. HUDEC, *supra* note 5, at 21-23. Again, the enunciation of clearer rules might assist in overcoming this tendency by permitting nations to support the rule rather than their economic or political allies. *See supra* note 50.

367. *See supra* text accompanying notes 152-71.

368. In the case of the United States' waiver, soft law was a response to the impossibility of achieving GATT compliance and the necessity for maintaining GATT's legal structure in the face of the United States' departure. *See supra* text accompanying notes 180-82. In the case of export subsidies and surplus disposal, there was simply an inability to agree on firm rules. *See supra* text accompanying notes 307-11.

369. For example, the soft law of the United States' waiver did not limit the United States' departure from GATT as anticipated; to the contrary, it provided the basis for its indefinite continuation.

370. *Compare supra* text accompanying notes 236-41 *with* text accompanying notes 264-67.

371. For example, members of the Working Party reviewing the United States' waiver were soon convinced (correctly it now appears) that the United States did not plan quickly to comply with GATT. *See supra* text accompanying note 240.

agricultural trading rules was shattered,[372] leading to further departures from those rules. One cannot unequivocally conclude, of course, that absent soft law an international consensus on agricultural trade policy would have emerged with enough strength to permit nations to resist domestic protectionist pressures. One can conclude, however, that soft law hindered, rather than facilitated, the development of such a consensus.[373]

Soft law's role in GATT's decline illustrates the important influence that the legal characteristics of substantive rules have on their effectiveness as tools of international economic regulation. GATT's ability to regulate national conduct generally has rested on the "normative force of organized community condemnation" which GATT can bring to bear on nations that depart from an "underlying consensus" on "correct governmental behavior."[374] International rules strengthen the normative force of an underlying consensus "by clarifying its substantive content, having governments freely subscribe to that substantive content, and adding a further normative obligation in the form of reciprocity owed to other governments who observe the rules."[375] It is precisely these features that are absent in soft law, which does not clarify the content of broad international policy goals and generates no agreement on particular behavioral norms.[376]

Soft law's weaknesses are important constraints on regulatory effectiveness whether one favors an adjudicatory procedure or a procedure of consultation and negotiation to resolve conflicts that arise in the international trading system.[377] In either case the GATT experience indicates

372. *See supra* text accompanying notes 261-63; *see also supra* text accompanying notes 302-04.

373. A further sense of the causative role played by soft law in GATT's breakdown can be developed by considering the "antilegalist surge" in GATT during the 1960's. Hudec, *supra* note 9, at 152. The antilegalist ideology was marked by the rejection of a rule-oriented and adjudication-oriented approach to GATT in favor of "consultation-style diplomacy" that seeks "to resolve conflicts through negotiation." *Id.* at 151. Professor Hudec traces the prominence of the "antilegalist" position in GATT to changes in the political power structure of GATT and to the inoperative character of many GATT rules, including the agricultural provisions of article XI, by the late 1960's. *Id.* at 152, 160. But much international behavior that is said to reflect the emergence of this "antilegalist" approach to GATT regulation during the late 1960's may, in fact, be viewed as a continuation of responses to soft law that developed much earlier. In particular, the tendency to resist legal claims by linking individual rule departures to broader problems of trade relations, although most evident in later periods when GATT's substantive breakdown was clear, R. HUDEC, *supra* note 6, at 225-26, was clearly evident in the responses of the United States and West Germany to the United States' waiver and also in the panel's decision in the *French Wheat Case*. Similarly, resistance to the application of GATT rules on the basis of claims that the GATT rule structure lacked reciprocity and overall balance became a major theme of GATT diplomacy in the late 1960's. *See id.* at 225-26, 229. This resistance again was an almost immediate reaction to the uncertainties of the soft United States waiver. *See supra* text accompanying notes 282-85.

374. Hudec, *supra* note 9, at 150; *see also supra* text accompanying notes 47-53.

375. Hudec, *supra* note 9, at 150.

376. *See supra* text accompanying notes 62-84.

377. *See supra* note 373.

that the international community's ability to influence national behavior will be more effective if it is able to exert normative pressure in the dispute resolution process.[378] The ability to create such pressure is diminished when the existing international consensus is formulated in soft law terms, whatever institutional framework is used to alter national behavior.[379]

Finally, soft law raised substantial barriers to GATT reform. By purporting to maintain an effective legal framework, soft law disguised the fact that the expectations created by the basic legal framework were unrealistic. Thus, while some nations ignored GATT rules, other nations legitimately continued to insist on the rules' authority. The latter nations were unable or unwilling to pursue significant GATT reform when that required a departure from the GATT legal framework which could be viewed domestically as a surrender of established legal rights. Soft law thus not only proved unenforceable, it also impeded the development of enforceable rules.

In the final analysis one cannot assess definitively the impact of soft law, as opposed to other factors, on the course of agricultural trade liberalization under the GATT. Nevertheless, the GATT experience suggests that soft law greatly contributed to GATT's failure to provide governments "with a mechanism or an excuse to do that which they wanted to do but were unable to do because of domestic pressures."[380] Soft law did not generate the kind of international pressures that induce nations to comply with their basic soft law obligations because it did not provide assurances that other nations would eventually comply, nor did it operate with the uniformity and reciprocity that is critical to international willingness to enforce or adhere to legal obligations.

IV. Some Concluding Observations on Soft Law and Agricultural Trade Reform

When the GATT turned to soft law it was not anticipated that soft law would contribute to the decline of basic GATT obligations rather than promote movement toward trade liberalization. Moreover, while the nature of GATT's problems in agricultural trade—lack of a normative consensus, ineffective dispute settlement, and an unwillingness to adhere to rules—has been thoroughly examined by other commentators, soft law's contribution to these problems has not been fully appreciated. It is my hope, therefore, that this examination of soft law will increase recognition that international behavior is affected by the legal characteristics, as

378. *See generally* R. Hudec, *supra note* 5, at 18-21.

379. For example, GATT consultations and negotiations with West Germany were more effective in minimizing West German quotas on industrial products when a well-established international standard was in place than in combating agricultural restrictions when the United States' waiver had undermined the applicable norm. *See supra* text accompanying notes 258-69.

380. K. Dam, *supra* note 5, at 5.

well as the policy content, of substantive international rules and thereby assist the international community in recognizing and avoiding the pitfalls of soft law.

In this spirit I will conclude the Article with some general observations about the lessons of the GATT experience and their implications for ongoing efforts to reform the international agricultural trade. Whether or not trade liberalization is the goal of reform, the preceding analysis of soft law has important implications for three reform issues: the demand for flexibility, the need for a uniform legal framework, and the accommodation of the claims of the New International Economic Order.

A. Flexible Rules and Soft Rules

The exigencies of political and economic pressures require flexible international trading rules. Too rigid a system of rules and an undue insistence on legalism can quickly undermine international cooperation. Consequently, the GATT has always fostered flexibility in its approach and has been willing to accommodate nations which, for one reason or another, are unable to comply with GATT rules.

There is a difference, however, between flexible rules and soft rules. The comparison drawn earlier between the hard-core waiver decision and the United States' waiver demonstrates that flexibility and softness are not synonymous or analogous concepts. Flexible rules that permit temporary and limited deviations from important norms may contribute to respect for those norms by permitting gradual compliance with the norms, by minimizing the harmful impact of the norms on particular nations, and by assuring other nations that the basic norms retain force. Flexible rules that create nonuniform obligations can also minimize their inherent unfairness and nonreciprocity if they clearly define the circumstances in which departure from a basic norm is acceptable and provide mechanisms for the international community to judge the necessity of a departure.

Rules of soft international economic law create national freedom of action, but have few of the other virtues of flexible rules. Their ambiguity and weakness foster derogation from, and disrespect for, their implicit intent and the broader goals they seek to achieve. These same factors contribute to a lack of reciprocity, both legally and in practice, that diminishes a soft rule's chances for successfully influencing national behavior. The GATT experience with such rules indicates that they tend more toward debilitating basic norms than toward strengthening them.[381]

---

381. *Cf.* J. JACKSON, *supra* note 22, at 97:

> [T]he GATT, which has been called flexible, is actually very rigid. Its flexibility lies in the ease with which parties can evade its rules. Because of the rigidity [institutional weaknesses preventing amendments, experimentation, and compromise], it has been impossible to keep the trade rules up to date . . . . The result has been flagrant rule violations tolerated by the GATT community. Once

To the extent that agricultural trade rules must contain a degree of malleability to accommodate problems arising in the reformation process, that flexibility must be tempered by clear limits. Without such limits the international community risks recreating the GATT experience. If firmer rules cannot be achieved, soft rules should be adopted only with the knowledge that they simply postpone underlying problems and are unlikely to develop into firmer rules.

B. Soft International Economic Law and the Need for a Firm Law Framework for Agricultural Trade Reform

GATT experience also informs us that successful trade reformation requires a general framework of rules governing all areas of agricultural trade. Agricultural trade problems are integrated problems and cannot be addressed on a piecemeal basis.[382] The United States' waiver, for example, although it concerned only a single country and was exercised with some restraint, was devastating in part because of its impact on one area of trade—dairy products—in which many European countries had a significant comparative advantage. By closing United States markets to dairy imports, the United States exacerbated the problems caused by a world dairy product surplus and hindered the Europeans from making the agricultural adjustments that would have occurred naturally in a freer market. Ultimately the GATT's efforts to address the United States' problems in a manner different from its approach to trade problems elsewhere proved unsuccessful. Similarly, its two-track approach to export subsidization failed; the softer approach corrupted the firmer rules and became controlling. Finally, the interrelationship of export subsidization and import restrictions and their contribution to adverse world market conditions requires that these issues be addressed together; world market conditions will not improve if one of the related problems is ignored or regulated only by soft law.

This raises the question whether it would be beneficial to reform efforts either to enforce the existing GATT obligations or to create more effective dispute settlement mechanisms.[383] At present one must answer that question in the negative. So long as nations can avoid important GATT rules through soft law,[384] the GATT lacks the reciprocity, in law and

---

some rule breaches are tolerated then it becomes easier to get away with the next infraction . . . .

382. This problem is present throughout GATT. *See* K. DAM, *supra* note 5, at 8.

383. The United States, for example, continues to hope that aggressive efforts to enforce its GATT rights in the agricultural sector will achieve some measure of trade reform. *See generally* Waldman, *Lessons Learned from the GATT Ministerial Meeting*, 3A PUB. L. FORUM 143 (1984).

384. It would be most unlikely that the existing GATT rules could be made effective so long as the United States retains its GATT waiver and so long as article XI remains ineffective to prevent the EC from maintaining its variable levy. Because United States

application, that is needed to create domestic and international support for its rules. We have seen, moreover, that soft law rules are difficult to enforce and make equally difficult the enforcement of other nations' related international obligations. Strengthening GATT procedural mechanisms would not itself eliminate the barriers to effectiveness that inhere in the soft rules themselves.[385]

C. Trade Reform and the New International Economic Order

As part of their broad demand for the creation of a New International Economic Order (NIEO) and because they believe the GATT inadequately serves their economic interests, the developing nations have endorsed an alternative method of trade reform focusing on nonreciprocal, preferential reductions of barriers to LDC exports and international

---

quotas and the variable levy protect the major consuming markets of the world from import competition, the battle for those national markets that are open to imports will be fierce and export subsidization, which the United States has undertaken to challenge in GATT, is not likely to abate. Moreover, some current practices in agricultural trade, particularly the nationalization and centralization of buying and selling agencies in market-economy developed nations, pose a serious threat to liberalized trade, but are not subject to adequate international regulation under current GATT rules. *See* Hathaway, *supra* note 90, at 446-48.

385. *But cf.* Jackson, *supra* note 8, at 97 ("Even if a rule were clear and up to date, however, it is doubtful that absent good faith of at least *all* major trading countries, the rule could prevent inappropriate conduct in the face of the extraordinarily ambiguous GATT procedures for handling disputes and transgressions." (emphasis in original)).

Recent events indicate increasing recognition of the need for broad reform of GATT's agricultural trade rules and a developing commitment to achieving such reform. In late 1984 an apparent GATT agreement banning agricultural export subsidies broke down when the EC refused to participate. The EC suggested, however, that it would accept a compromise plan banning subsidies in exchange for the removal of import barriers in other developed countries. *See EC Blocks GATT Committee Effort to Ban Agricultural Export Subsidies*, INT. TRADE REP. (BNA) 364 (Oct. 3, 1984). In November of 1984 the impasse was apparently overcome when the GATT Agriculture Committee reached agreement on draft recommendations designed to reinforce the linkage between article XI (import restrictions) and article XVI (export subsidies). The draft agreement is also reported to address national agricultural policies and national agricultural trade measures in a way that "more clearly defines the limits to the impact of domestic agricultural policies on trade." INT. TRADE REP. (BNA) 613 (Nov. 21, 1984). At this writing it is uncertain whether this agreement will become effective. It does, however, suggest increasing sensitivity to the need both for firm rules and for a unified approach to agricultural trade problems.

More recently, the United States surprised the GATT Agriculture Committee with a proposal that all GATT members phase out their nontariff barriers to agricultural imports and return to the tariff-based liberalization format of the original GATT. *U.S. Proposes Phase-Out of Non-Tariff Farm Trade Barriers in GATT Agricultural Committee*, INT. TRADE REP. (BNA) 283-84 (Feb. 27, 1985). The proposal offers hope for substantial improvement in agricultural trade both because it promises to permit the development of clear agreements on the elimination of nontariff import restrictions (in connection with similar agreements on subsidy practices) and because it indicates a willingness on the part of the United States to give up its waiver.

management of commodity trade.[386] Although the GATT has endorsed and adopted the NIEO principles of nonreciprocal, preferential treatment of LDC exports through soft law,[387] there is widespread agreement that this endorsement has had a relatively modest impact on LDC trade and has usually been ineffective when LDC export products pose a significant

386. After LDC efforts to pursue their trade interests through GATT dispute settlement and through measures to strengthen GATT procedures failed in the early 1960's, "the emphasis of the [LDC] campaign against [developed country trade restrictions] changed. The effort to enforce the legal obligations of the old GATT code was abandoned." R. HUDEC, *supra* note 6, at 227. The LDCs shifted to the demand for a new international economic order and "a more basic claim—that developed countries should help developing countries *if they could.*" *Id.* (emphasis in original).

387. Nonreciprocity implies that developing nations may receive trade concessions without being required themselves to grant concessions. The principle has been endorsed several times, always in the form of soft law. GATT article XXXVI(8), for example, provides that "[t]he developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties." GATT, *supra* note 65, art. XXXVI(8). The impact of this provision is reduced by the fact that article XXXVI is titled "Principles and Objectives" and its final paragraph provides that "[t]he adoption of measures to give effect to these principles and objectives shall be a matter of conscious and purposeful effort," not a matter of obligation. *See* Protocol, *supra* note 6, at 324. The "ambiguous language" of article XXXVI "represents a compromise between developing countries' demands for obligatory nonreciprocity and developed countries' concerns that concessions be negotiated and controlled to prevent excessive advantage being given to developing countries." Note, *Technical Analysis of the Group "Framework"*, 12 LAW & POL'Y INT'L BUS., 299, 310-11 (1980). An interpretive note to article XXXVI(8) added further language (subsequently used in the Tokyo Record declaration) making clear that "non-reciprocity does not imply that developed countries expect no committments [sic] from LDCs in exchange for . . . concessions." Ibrahim, *supra* note 8, at 4. The Declaration of Ministers of September 14, 1973, which initiated the Tokyo Round, phrased the principle in equally inconclusive terms: "The developed countries do not expect reciprocity for commitments made by them . . . , i.e., the developed countries do not expect the developing countries, in the course of the trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs." GATT Declaration, *supra* note 356, at 21. The central ambiguity in this statement is, of course, the phrase "inconsistent with their individual development, financial and trade needs." In addition to seeking nonreciprocity, the developing nations have also sought preferential treatment in the GATT. Such treatment was initially authorized through GATT waivers. A permanent legal basis for the Generalized System of Preferences (GSP) was provided by point one of the Agreement Concerning a Framework for the Conduct of World Trade, negotiated during the Tokyo Round. *See* MTN/FR/W/20 Rev. 2, at 1/1, *reprinted in* H.R. Doc. No. 96-153, 96th Cong., 1st Sess. 619, 622 (1979). Again, the authorization is soft: "Contracting parties *may accord* differential and more favorable treatment to developing countries . . . ." *Id.* (emphasis added). Moreover, a parallel soft obligation is imposed on developing countries:

> Less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and movement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.

Id. at 625.

threat to established industries in developed countries.[388] Ambitious LDC trade-management schemes[389] have received some endorsement in principle, but are not yet genuinely effective.[390] The slow progress on NIEO demands, even after they have been accepted by the international community, is a source of continuing tension in the North-South dialogue. The developing nations believe NIEO's failures result from a lack of political will in developed countries.[391] Developed countries view the developing nations' complaints as resting on a distorted view of reality that ignores the weaknesses in the policies of the developing nations themselves.[392] The prior analysis of soft law suggests another explanation: the use of soft law to adopt NIEO principles is unlikely to influence significantly the conduct of developed nations.

Soft law has been the central mechanism by which the international community has fashioned a "realistic" response to the "conflicting views" of the developed and developing world.[393] The "market-economy industrialized states" generally have been willing to accept NIEO demands in principle only. The developing nations, by characterizing the NIEO as "a continuous process rather than an act to be accomplished in a determined period of time," have accommodated this approach.[394] Progress toward NIEO objectives is perceived in the bare adoption of NIEO "sentiments," even in the absence of agreement on how to achieve the

---

388. *See, e.g.*, A. YEATS, *supra* note 102, at 74-84, 151-60; Horn, *supra* note 54, at 340; Ibrahim, *supra* note 8, at 16-19; Note, *supra* note 387, at 313-14. *But see* Finger, *Effects of the Kennedy Round Tariff Concessions on the Exports of Developing Countries*, 86 ECON. J. 87 (1976); OECD 1984, *supra* note 89, at 85-90.

389. The developing countries have pursued international commodity agreements designed to stabilize and raise LDC export earnings through proposals for an Integrated Programme for Commodities and a Common Fund for Commodities. *See* Proceedings of the United Nations Conference on Trade and Development (6th Sess.), Res. 153(VI)-158(VI), U.N. Doc. TD/326(vol.I) (1984); Proceedings of the United Nations Conference on Trade and Development (5th Sess.), Res. 124(V), U.N. Doc. TD/269(vol.1) (1979); Proceedings of the United Nations Conference on Trade and Development (4th Sess.), Res. 93(IV), U.N. Doc. TD/218(vol.I) (1976). *See generally*, Avramovic, *Common Fund: Why and of What Kind?*, 12 J. WORLD TRADE L. 375 (1978).

390. *See* OECD 1984, *supra* note 89, at 81-84; Wassermann, *Gamani Corea, Secretary-General of UNCTAD: Interview*, 18 J. WORLD TRADE L. 377, 378 (1984).

391. *See, e.g.*, Miljan, *supra* note 2, at 19 (statement of Romesh Bhandari, Representative of India, before the U.N. Committee of the Whole); Manila Declaration and Programme of Action, *reprinted in* 3 THE GROUP OF 77, at 34, 35, 39, 41 (K. Sauvant ed. 1981); Multilateral Trade Negotiations: Declaration by the Group of 77, *reprinted in* 3 THE GROUP OF 77, *supra*, at 525-28.

392. *See UNCTAD: A Declaration of United States Policy*, 16 J. WORLD TRADE L. 455 (1982) (statement of Gerald B. Helman on behalf of the United States delegation to the meeting on 5 October 1981 of the Trade and Development Board of UNCTAD).

393. Seidl-Hohenveldern, *supra* note 13, at 193.

394. Miljan, *supra* note 2, at xi (quoting Idriss Juziary, the first Chairman of the United Nations Committee of the Whole).

sentiments.[395] Thus, NIEO proposals in the trade area have been implemented, if at all, through soft international law.[396]

The NIEO's reliance on rules of soft law has been fraught with weaknesses similar to those created by soft law in GATT agricultural trade relations. The ambiguity of the rules, combined with the absence of any clear command to obey them, has permitted developed countries to discount the soft law obligation of nonreciprocity and preferential treatment to LDC imports.[397] Although a lack of political will in developed countries is certainly a cause of the problem, one must not forget that this lack of political will is to some extent made more difficult to overcome by soft law. Soft law lacks the characteristics that would generate effective domestic political support for its principles.

Soft law's lack of clarity has also hampered implementation of NIEO policies. The GATT's endorsement of nonreciprocity, for example, is so vaguely worded that developed and developing countries cannot agree on its meaning. Developing countries insist that no trade concessions are expected from them and that developed countries must liberalize unilaterally. The developed countries view nonreciprocity as a temporary mechanism to integrate the developing world into the existing economic order, and insist that the developing countries make some effort to reduce trade barriers.[398] These differences in interpretation of soft law norms and in expectations concerning those norms repeatedly have impaired successful North-South negotiations.[399]

The mere fact that the NIEO advocates preferential, nonreciprocal treatment for LDCs need not be disruptive of legal order. To the extent it is viewed as a temporary concession to the particular economic problems of LDCs, it is much like the hard-core waiver: it acknowledges the primacy of basic international goals, but applies them flexibly and allows gradual accommodation of the particular problems of individual nations.[400] The difficulty is that the vague rules of the NIEO do not clearly establish the

---

395. *Id.* at xii.

396. *See supra* note 387. Ideological differences between developed and developing nations will often prevent the adoption of NIEO principles in the form of firm law. *See* R. OLSON, U.S. FOREIGN POLICY AND THE NEW INTERNATIONAL ECONOMIC ORDER—NEGOTIATING GLOBAL PROBLEMS, 1974-1981, at 117-19 (1981); *see e.g., UNCTAD: A Declaration of United States Policy, supra* note 392, at 456 ("[W]e do not agree with the assumption that the world economy is something to be managed.") (statement of Gerald B. Helman).

397. For general discussions of developed countries' responses to nonreciprocity in trade negotiations, see Ibrahim, *supra* note 8, at 3-5, 15-19; Vingerhoets, *The Kennedy Round and the Developing Countries*, in ECONOMIC RELATIONS AFTER THE KENNEDY ROUND 48, 58-64 (F. von Geusau ed. 1969).

398. Ibrahim, *supra* note 8, at 18-19.

399. *Id.*

400. In this respect the United States currently implements the GSP through schemes that "graduate" LDCs from GSP benefits when they are determined to be capable of participating more fully in the international free-market economy. *See* Graham & Rubin,

scope of the rules or limits of their application for either the developed or developing world.

The combination of asymmetry and lack of clarity in NIEO norms has actually intensified the marginalization of the developing nations in the international economic order, a problem the NIEO was intended to correct. So long as developed and developing countries cannot agree in clear terms on the extent to which developing countries are entitled to special treatment, as opposed to the extent of their obligation to comply with GATT's basic rules, developing nations run the real risk of being regarded as second-class GATT participants. NIEO obligations will be regarded as soft, unilateral obligations by which developed nations bestow largesse upon the developing world's claim for special treatment. Such treatment will create a perception that the developing nations are free riders on the trading system and that they therefore have no cognizable claim even to the enforcement of normally applicable GATT rules.[401]

The NIEO's dependence on soft rules suggests that, as a practical matter, the NIEO approach is not a practical approach to international trade problems. Trade reform might better be pursued through improvement in the basic trade-liberalizing approach of the GATT, compromising NIEO principles when necessary to ensure that firm rules benefitting developing nations are adopted. Unfortunately, as became evident with the GATT, soft law can be a powerful supporter of the status quo. Enshrining NIEO principles in soft law norms, no matter how ineffective, makes any future effort to compromise on less ambitious, but more realistic rules, appear as a diplomatic defeat for developing nations. Nevertheless, the willingness to accept such apparent defeat may be the price of real progress toward improving the trading conditions facing the developing world.

V. CONCLUSION

Agricultural trade liberalization is a critical step toward a successful, long-term solution to the problem of hunger and underdevelopment. Although liberalization has been the goal of the international community for several decades, efforts to achieve that goal have been unsuccessful. This Article has argued that the adoption of soft law solutions to basic agricultural trade problems contributed to GATT's failures and should be avoided in future reform efforts. Retreating to the expedient of vague

---

U.S. Trade Policy Toward Developing Countries in MANAGING TRADE RELATIONS IN THE 1980's, at 152, 158 (S. Rubin & T. Graham eds. 1983). Developing nations' willingness to accept this principle as a firm part of the concept of preferential treatment could promote a more effective application of that device.

401. *Cf.* R. HUDEC, *supra* note 6, at 211 (by latter part of 1960's most developed nation GATT members viewed developing countries as nonpaying participants, without standing to enforce legal claims).

and ambiguous legal rules when agreement on firmer obligations is difficult to achieve may be an attractive alternative to anarchy. But soft law rules are simply ineffective in the area of agricultural trade. Not only do soft rules constrain national behavior, their major impact has been counterproductive: they generate a general unwillingness to comply with the international legal order while nevertheless erecting expectations that impede changes in that legal order. In the final analysis it may not be true that such rules necessarily provide a beneficial alternative to anarchy; anarchy at least provides a strong incentive for change, does not hide differences behind chimerical agreements, and does not generate expectations that impede the search for real solutions to difficult problems.