Agriculture and Textiles: The Fare and Fabric of Current GATT Negotiations

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I. INTRODUCTION

On December 7, 1990,[1] the most recent round of negotiations on the General Agreement on Tariffs and Trade (GATT) broke down in Brussels largely because of a major impasse in the area of agriculture.[2] The United States, the Cairns Group,[3] and most of the developing countries of the world pressed for significant expansion of agricultural trade through the removal of Non-Tariff Barriers[4] (NTB's).[5] The negotiators for the European Community (EC) opposed these efforts, showing a clear intent to preserve the EC's Common Agricultural

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1. 137 CONG. REC. S4498 (daily ed. Apr. 16, 1991) (statement of Sen. Hollings) [hereinafter Hollings].

2. 137 CONG. REC. H832 (daily ed. Jan. 31, 1991) (statement of Rep. Bereuter) [hereinafter Bereuter].

3. The Cairns Group is composed of Argentina, Australia, Brazil, Canada, Chile, Colombia, Hungary, Indonesia, Malaysia, New Zealand, Philippines, Thailand, and Uruguay. CONGRESSIONAL BUDGET OFFICE, THE OUTLOOK FOR FARM COMMODITY PROGRAM SPENDING, FISCAL YEARS 1989-1994 (1989) [hereinafter FARM SPENDING].

4. Non-Tariff Barriers include the use of import quotas, regulations on labeling and standards, export and producer subsidies, and countervailing duties. These barriers are used in place of tariffs (taxes or duties imposed on goods when they are imported into a country) to disrupt free trade. Tariffs reduce the quantity of goods imported by raising the price of a good above market levels. Non-Tariff Barriers reduce import quantities by lowering the market price of the good within a country (through the use of producer subsidies by an importing country), or, in the case of an exporting country, by lowering the price of the good below world market prices (through the use of export subsidies) and thus discouraging other countries from entering the market. Countervailing duties are those duties imposed by an importing country to off-set the effects of an exporting country's producer and export subsidies. Regulations covering standards or labeling can be used by an importing country to raise the production costs (due to the added costs of compliance with the regulations) of the potential exporting countries. Import quotas are the most explicit of the Non-Tariff Barriers, imposing quantitative limitations on importation. Such barriers disrupt free trade, and thus are outside the spirit of GATT rules. *See* James M. Lutz, *GATT Reform or Regime Maintenance: Differing Solutions to World Trade Problems*, 25 J. WORLD TRADE 107 (1991); John J. Barceló III, *Subsidies, Countervailing Duties and Antidumping After the Tokyo Round*, 13 CORNELL INT'L L.J. 257 (1980).

5. Bereuter, *supra* note 2, at 832.

Policy (CAP)[6] which contains many NTB's.[7] Japan and South Korea joined the EC in its opposition to agricultural trade reform; however, these countries indicated a greater willingness to compromise following the collapse of the round.[8]

A second area of collapse in the negotiations occurred in the area of textiles. The United States, which had been a proponent of trade expansion in the area of agriculture, exhibited much greater protectionism in this area. The United States approached the negotiations in Brussels with demands for a globally based system of import quotas.[9] These demands were subsequently reduced to a request for a twenty-nine month extension of the Multi-Fiber Arrangement (MFA).[10] A compromise was reached which allowed for a seventeen-month extension of the MFA.[11] This result greatly disappointed the Least Developed Countries (LDC's) which had hoped to see the rules governing textiles reconciled with the philosophies of GATT.[12]

The ultimate failure of this round of GATT negotiations may have occurred because the intended result of the round was to be a set of rules regulating NTB's rather than the mere reduction of tariffs (the primary goal of prior rounds).[13] This paper will examine the state of current GATT rules and negotiations in the areas of agriculture and textiles. These areas are particularly important to developing countries,[14] and are affected by the significant use of NTB's.[15] Two possible solutions are proposed: the abandonment of world trade in favor of a regional

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6. *See infra* text accompanying notes 68-73.

7. Judith H. Bello & Alan F. Holmer, *U.S. Trade Law and Policy Series No. 19: The Uruguay Round: Where Are We?*, 25 INT'L LAW. 723, 731 (1991) [hereinafter Bello].

8. Bereuter, *supra* note 2, at 833.

9. HOUSE COMM. ON WAYS AND MEANS, TEXTILE, APPAREL, AND FOOTWEAR ACT OF 1990, H.R. REP. No. 649, 101st Cong., (1990) [hereinafter TEXTILE TRADE ACT].

10. *Id.*, *see infra* text accompanying note 57 for a definition of the MFA.

11. *Id.*

12. *Id.*

13. J. Michael Finger, *That Old GATT Magic No More Casts Its Spell*, J. WORLD TRADE, Apr. 1991, at 19, 21.

14. An agreement in the area of agriculture is particularly significant. Several countries (Argentina, Brazil, Colombia, Chile, and Uruguay) have threatened to withhold approval of agreements in the areas of intellectual property rights and international trade in services if an agricultural agreement is not reached. FARM SPENDING, *supra* note 3, at 75.

15. *See infra* note 29 and accompanying text.

trading structure, or the creation of a central authority to adjudicate trade questions.

II. THE HISTORY OF GATT NEGOTIATIONS

GATT[16] has been the primary document defining U.S. trade policy for over four decades. Although never ratified by Congress, and thus not having the constitutional effect of a treaty,[17] GATT and all subsequent rounds of multilateral negotiations are congressionally approved executive agreements, and are the law of the land.[18] The legal effect of GATT is subject to the limitations of the Protocol of Provisional Application,[19] the later in time rule,[20] and the doctrine of self execution.[21] The Protocol of Provisional Application provided that the United States would undertake to apply articles III-XXIII of GATT "to the fullest extent not inconsistent with existing legislation" in force on October 30, 1947, insuring that GATT would not alter existing law.[22] The later in time rule provides that Congress may enact a statute superseding a prior treaty, subject to the condition that "a treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."[23] The final limitation on the effect of GATT, the doctrine of self-execution, provides that executive agreements and treaties are applicable in U.S. courts only if the language of the agreement is self-executing in nature.[24] Thus, only those GATT articles which do not require additional enabling legislation can be considered to have legal effect.

The first six rounds of multilateral negotiations concentrated on the global reduction of tariff levels and were successful in stimulating

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16. General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. Pts. 5 & 6, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

17. *See* U.S. CONST. art. VI, cl. 2.

18. Ronald A. Brand, *The Status of the General Agreement on Tariffs and Trade in United States Domestic Law*, 26 STAN. J. INT'L L. 479 (1990).

19. Protocol of Provisional Application of the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. Pt. 5 at A2051, T.I.A.S. No. 1700, 55 U.N.T.S. 308; Brand, *supra* note 18, at 503.

20. Brand, *supra* note 18, at 503.

21. *Id.* at 505.

22. Protocol of Provisional Application of the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. Pt. 5 at A2051, T.I.A.S. No. 1700, 55 U.N.T.S. 308.

23. Cook v. United States, 288 U.S. 102, 120 (1933).

24. United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).

world trade.[25] Developing countries were further assisted through the grant of tariff preferences by the industrially advanced nations.[26] These preferences increased the quantity of exports from the poorer countries and effectively raised the price of the exports to above market levels, thereby transferring resources from developed to developing nations.[27] The effectiveness of these tariff concessions has been greatly reduced through the use of protectionistic devices (such as NTB's) by the developed nations;[28] the greatest restrictions are present in the areas where developing countries could most easily expand production.[29]

In 1975, the Tokyo Round of multilateral trade negotiations was initiated. This round of negotiations was the first which sought not only to reduce tariffs, but also to eliminate or reduce the use of Non-Tariff Barriers.[30] At the conclusion of the round, GATT codes had been produced in the areas of subsidies, countervailing measures,[31] anti-dumping standards,[32] and government procurement, and most, if not

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25. Bello, *supra* note 7, at 723-24.

26. To illustrate the effects of tariff preferences, assume that developed country *A* imports shoes from both *B*, another developed country, and from *C*, a developing country. Developed country *B*'s export price is 100 compared with developing country *C*'s export price of 120. If country *A* initially imposes a 50% *ad valorem* duty on all imported shoes, the import price plus duty of *B*'s and *C*'s shoes are 150 and 180 respectively. In this situation, country *A* clearly chooses to import from the other developed country *B*.

Suppose, however, that *A* retains the 50% duty on *B*'s exports while levying no duty on developing country *C*'s exports (a 100% preferential margin). Country *C*'s exported shoes will now be competitive in country *A* at a price up to 150 (price plus duty of imports from *B*). Prior to granting the preference, *A* paid customs receipts of 50 (the duty imposed on developed country *B*) to itself. By granting such preferences, therefore, the developed country *A* will now import shoes from developing country *C*, resulting in a transfer of real resources to *C* in an amount equal to the foregone customs revenue.

Gerald M. Meier, *The Tokyo Round of Multilateral Trade Negotiations and the Developing Countries*, 13 CORNELL INT'L L.J. 239, 240 (1980).

27. *Id.* at 240.

28. *Id.*; Lutz, *supra* note 4, at 109.

29. Meier, *supra* note 26, at 240.

30. Bello, *supra* note 7, at 724.

31. *See supra* note 4 for an explanation of subsidies and countervailing measures.

32. Anti-dumping trade practices were first recognized during the Kennedy Round of Negotiations. Anti-dumping codes were renegotiated during the Tokyo Round. Dumping is the practice of selling a commodity at a lower price in one national market than in another, such as selling in foreign markets at prices below the home market price. Dumping is not prohibited by GATT. A country into which goods are

all, of the contracting parties had subscribed to them.[33] The inefficacy of these agreements has been noted by both developing and developed countries since this round concluded.[34] Currently, GATT does not place any effective limits on the trade practices of developing countries, and "GATT legal" remedies can be promulgated by the developed countries for virtually any perceived trade problem.[35]

The Uruguay Round, the next and current round of negotiations, was initiated in Punta del Este in September of 1986. The objectives of this round were to strengthen the current GATT rules where deficiencies were felt to exist, particularly for agriculture and dispute settlement, and to expand the area of GATT coverage to include trade in services, intellectual property rights, and investment.[36] Negotiations broke down on December 7, 1991, as a result of significant disputes in the area of agriculture.[37]

The National Treatment principle and Most Favored Nation (MFN) principle are the two underlying principles of GATT. The principle of National Treatment requires that a GATT signatory extend the same treatment to foreign participants in its economy that it extends to domestic producers.[38] Under this principle, a country which does not regulate its domestic industry is prohibited from applying regulations to foreign industries wishing to sell goods in its markets. The second principle, that of Most Favored Nation status, requires that the terms of any bilateral agreements reached between GATT signatories must be extended to all the remaining GATT signatories.[39] The purpose of MFN status is to insure that countries do not use bilateral agreements to create an unfair trading environment. All signatories therefore enjoy the benefits of trade agreements negotiated between countries participating in GATT.

The philosophy behind GATT is that the presence of markets free of regulation and unrestricted by tariffs and other barriers would result in an improvement in the standard of living worldwide.[40] Nations would

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being dumped is simply allowed to apply duties to off-set the margin of the dumped goods. Roshani M. Gunewardene, *GATT and the Developing World: Is a New Principle of Trade Liberalization Needed?*, 15 MD. J. INT'L L. & TRADE 45, 57 (1991).

33. Bello, *supra* note 7, at 724.
34. Finger, *supra* note 13, at 20.
35. *Id.*
36. *Id.*
37. *See* Hollings, *supra* note 1, and accompanying text.
38. Hollings, *supra* note 1, at 4498.
39. *Id.* at 4499.
40. *Id.* at 4502.

be free to adhere to the "comparative advantage" concept, under which they could pursue markets in which their climate, natural resources, population, and location make them best suited to compete.[41] A country's industry would develop in those areas where it would be competitive on a global scale rather than in areas where it had merely been successful in negotiating trade restrictions. The end result would be lower market prices and a resulting higher standard of living on a global scale.

A. *Current Rules Governing Trade in the Area of Agriculture*

The GATT principles of nondiscrimination and reciprocity are intended to apply to both agricultural and nonagricultural trade. However, numerous exceptions to these provisions effectively remove agriculture from GATT regulation.[42] For example, Article XI of GATT imposes a general prohibition on the use of quantitative import and export restrictions.[43] Quantitative restrictions, however, are allowed for agricultural products in three situations: 1) when a country is experiencing temporary shortages of food, 2) when restrictions are necessary to enforce domestic marketing or production restriction programs, or 3) when a country uses such restrictions in conjunction with the application of standards for classification, grading, or marketing of the products.[44] These exceptions are broad enough to permit a country to impose import and export quotas effectively at will.[45]

The subsidization of agricultural exports is permitted under GATT, with member nations merely being required by GATT to "seek to avoid" the use of such subsidies.[46] Where subsidization of exports occurs, nations are directed to limit their use such that the nation does not receive "more than an equitable share of the world export trade."[47]

The special treatment which agriculture receives under GATT was originally intended to permit the contracting members to protect their domestic farmers when global conditions, such as regional drought, would have a temporarily disruptive effect.[48] However, the result has

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41. *Id.*
42. Charles E. Hanrahan, *Agriculture in the Uruguay Round of Multilateral Trade Negotiations*, THE FLETCHER FORUM, Winter, 1987, at 33, 34.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 35.

been that these "GATT legal" exceptions are used on a long-term basis as trade barriers, and therefore run counter to the basic GATT goal of trade liberalization.[49]

B. *Current Rules for Trade in Textiles*

The current set of rules regulating international trade in textiles, referred to as the Multi-Fiber Arrangement, evolved from rules developed in 1961.[50] The evolution of the "arrangements" regulating textile trade began in the mid-to-late 1950's when newly developed countries such as Japan, Hong Kong, India, and Pakistan greatly increased their textile production capabilities.[51] The United States and the United Kingdom applied pressure to reduce the quantity of textiles exported from these countries, culminating in the Short-Term Arrangements on Textiles in 1961 and 1962.[52] These rules were replaced by a series of Long-Term Arrangements until 1973, when the Multi-Fiber Arrangement (MFA) was created.[53] The MFA was extended both in 1978 and 1986, and was most recently scheduled to expire in 1991,[54] but was granted an additional seventeen-month extension (through December 1992) as part of an eleventh-hour agreement at the Uruguay Round of Negotiations.[55] The extension of seventeen months can be viewed as a minor victory for the developing countries; the United States entered the Uruguay Round seeking a twenty-nine-month extension, claiming that the shorter deadline would give insufficient time for industry to adapt to the new agreement if GATT negotiations progressed at the projected rate.[56]

The Multi-Fiber Arrangement is a mechanism through which the industrialized countries negotiate bilateral agreements with the developing countries for the purpose of setting quotas on textile imports.[57] The bilateral agreements stipulate the types and quantities of textiles and textile products which the individual developing countries may

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49. *Id.*
50. Gunewardene, *supra* note 32, at 54.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at 55.
55. William Dullforce, *World Textiles; So Near, and Yet So Far*, FIN. TIMES, Oct. 3, 1991, at 31.
56. *Multi-Fiber Arrangement Gets 17-Month Extension under GATT*, 8 INT'L TRADE REP. 1170 (1991) [hereinafter *MFA 17-Month Extension*].
57. Dullforce, *supra* note 55.

export to each developed country. The original intent behind the arrangements was to provide time for the mature textile industries of the developed nations to adapt to the new Third World competition springing up in the late 1950's.[58] This was in accordance with GATT philosophies, which allow for trade restraints to be implemented for a limited time to enable an industry to adapt to increased competition resulting from trade liberalization.[59] However, the MFA and prior arrangements have persisted over a period of three decades. These arrangements are, therefore, a derogation of GATT principles in that they eliminate the Most Favored Nation (MFN) principles, and legalize the selective application of quantitative restrictions.[60] The use of these quantitative restrictions is not conditioned on the importing countries' demonstration of "serious injury" or the "threat of serious injury," as normally required by GATT.[61] Still worse, these arrangements also forbid exporting countries from asserting retaliatory rights in response to the imposition of quantitative restrictions.[62]

III. CURRENT PROPOSALS IN THE URUGUAY ROUND

A. *Agriculture*

By the mid-term review of the Uruguay Round, the elements of the negotiating proposals for the liberalization of agricultural trade were believed to have been identified.[63] Rules were to be developed to govern three areas. First, all measures which directly or indirectly affect import access and export competition were to be brought under GATT regulation — in particular, the areas of both tariffs and NTB's affecting import access.[64] Second, subsidies,[65] in the form of internal price supports or export assistance, were to be controlled.[66] Finally, rules were to be developed covering export prohibitions and restrictions.[67]

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58. *Id.*

59. CONGRESSIONAL BUDGET OFFICE, THE GATT NEGOTIATIONS AND U.S. TRADE POLICY, 102 (1987) [hereinafter GATT NEGOTIATIONS].

60. Gunewardene, *supra* note 32, at 54.

61. *Id.* at 55.

62. *Id.*

63. *General Agreement on Tariffs and Trade: Decisions Adopted at the Mid-Term Review of the Uruguay Round*, 28 INT'L LEGAL MATERIALS 1025, 1026 (1989) [hereinafter *Mid-Term Review*].

64. *Id.*

65. *See supra* note 4 for a discussion of producer and export subsidies.

66. *Mid-Term Review*, *supra* note 63, at 1026.

67. *Id.*

The United States proposed that the use of all agricultural subsidies be eliminated over a ten-year period.[68] By the time of the Brussels Ministerial,[69] however, the EC was demonstrating its determination to continue the use of export subsidies[70] in support of its Common Agricultural Policy (CAP).[71] Since the collapse of negotiations in December 1990, Ray MacSharry, the EC's Agricultural Commissioner, has indicated that the EC is willing to negotiate reforms in the areas of export subsidies, market access, and trade-distorting internal subsidies;[72] only the percentages of change which the EC will accept remain to be resolved.[73]

B. *Textiles*

As part of the decisions adopted at the mid-term review of the Uruguay Round, the Ministers, recognizing negotiations in the area of textiles as one of the key elements of the Round, set a deadline of June 30, 1989, for participants to submit proposals for integrating textiles into GATT.[74] The proposals were to cover the phasing out of restrictions under the Multi-Fiber Arrangement and other restrictions not consistent with GATT rules and disciplines.[75] Special treatment was to be accorded to the Least Developed Countries under the new agreements, as the participants reaffirmed their commitments to improve the trade situation and to pave the way for the integration of textiles into GATT.[76]

The hopeful outlook present at the mid-term review did not come to fruition, however. Three issues in the area of textiles remain to be resolved by the trade ministers: 1) the length of the transition period

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68. Hollings, *supra* note 1.

69. The Brussels Ministerial was hosted by the EC in Brussels from December 3-7, 1990. Bello, *supra* note 7, at 725.

70. *Id.*

71. The operation of the EC's CAP with its internal price supports higher than prevailing world market prices means that the EC has to rely on export subsidies to make its exports competitively priced in world markets. Export subsidies are almost automatically provided under the CAP whenever price-supported commodities are in surplus in the Community. Hanrahan, *supra* note 42, at 37.

72. Specifically, producer subsidies. 137 CONG. REC. H3909 (daily ed. June 4, 1991) (statement of Rep. Bereuter).

73. *Id.*

74. *Mid-Term Review*, *supra* note 63, at 1026.

75. *Id.*

76. *Id.*

from the current MFA rules to GATT rules, 2) the percentages by which import quotas should be reduced at each stage of the transition period, and 3) the list of products to be covered by the Uruguay Round agreement.[77] The timetable for completing the MFA phase-out appears to be the most contentious, with the EC holding out for a fifteen-year transition period, while the developing countries are pushing for fully liberalized trade within 6 1/2 years; a compromise of a ten-year transition seems probable.[78] The developing countries are also dismayed by the fact that half of the textile trade would remain subject to quotas at the end of the ten-year transition period under the percentage increases currently proposed by the industrialized countries.[79]

The area of trade in textiles will therefore continue to be regulated by the Multi-Fiber Arrangement through December 31, 1992, with the expectation that the final results of the Uruguay Round negotiations will come into force immediately thereafter.[80] The United States and the EC praised this extension, stating that it will provide stability until the results of the Uruguay Round can be implemented.[81] Developing countries were understandably disappointed with this development, and indicated during the July 31, 1991, meeting that they had been railroaded into accepting the extension without their true feelings being taken into account.[82] Indonesian Ambassador, Darry Salim, speaking for the Association of Southeast Asian Nations, referred to the extension as "at best, a bridging operation which would enable the world's textile trade to eventually be incorporated into the trade pact which will theoretically emerge from the Uruguay Round."[83] The dissatisfaction of the developing countries arose from the fact that three months of effort to incorporate "standstill" and "roll back" provisions into the seventeen-month extension were unsuccessful.[84] The incorporation of such provisions would have insured that the textile trade would have continued to be governed by the rules currently in place, excluding the possibility that major importers would write new bilateral agreements during this period in an effort to stifle exports from the developing countries.[85]

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77. Dullforce, *supra* note 55.
78. *Id.*
79. *Id.*
80. *MFA 17-Month Extension*, *supra* note 56.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*

IV. THE RATIONALE FOR THE CURRENT PROGRAMS

When a developed country acts protectionistically on behalf of its industry, the result frequently seems irrational. There is a reduction in access to the developed country's market experienced by developing countries wishing to export goods, coupled with a corresponding increase in the market price of the affected goods within the developed country. In Japan, for example, seventy percent of all agricultural production is covered by support prices,[86] which are frequently set significantly higher than world market prices. The resulting price that consumers pay for rice is often two to three times higher than the world market price.[87] Similarly, the present system of protectionistic quotas and high duty rates practiced by the United States in the area of textiles is estimated to cost American consumers between $11.7 and $13.1 billion per year.[88] The pursuit of these seemingly irrational economic practices by developed countries can be better understood when examined in conjunction with the policies underlying those practices.

A. *Agricultural Policies*

The purpose of United States farm policy has been to stabilize and support farm prices and incomes over time, particularly during weak market conditions.[89] For crops which are exported, and whose producers therefore rely on strong demand in the world market, support is provided during deteriorating market conditions through direct government subsidies[90] rather than high consumer prices.[91] Producers of commodities who cannot maintain internationally competitive prices, and thus face competition from imports, are subsidized by domestic consumers through prices which are kept artificially high and defended through import quotas and government purchases.[92] The overall result

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86. Support prices are artificial floors below which the price of goods is not permitted to drop. These floors are determined administratively rather than by market forces. GATT NEGOTIATIONS, *supra* note 59, at 85.

87. *Id.*

88. Gunewardene, *supra* note 32, at 64.

89. GATT NEGOTIATIONS, *supra* note 59, at 79.

90. The subsidies frequently take the form of a non-recourse loan, where the crop is used as collateral. If market prices are high enough when the loan comes due, the farmer will repay the loan with interest and sell the crop. If the market prices are too low, the farmer will forfeit the crop to the USDA at no penalty. This effectively sets a floor price for a particular commodity. *Id.* at 81.

91. *Id.* at 80.

92. *Id.*

is higher agricultural prices for American consumers. These higher prices do, however, permit the farming industry to maintain manufacturing capacity at a high and stable level, thereby preventing the occurrence of food shortages within this country.

The EC has integrated its various countries' farm programs into a Common Agricultural Policy (CAP).[93] The CAP is based on three principles. First, the principle of "common pricing" attempts to maintain a single level of price support throughout the Community.[94] Second, the "Community preference" principle ensures that EC products have a competitive advantage over imported products.[95] Finally, all financing for CAP activities is provided by the EC under the "common financing" principle.[96] The purpose of the CAP is to permit the farming industry easier access to a larger market, promoting higher levels of and more stability in production. Since the inception of the CAP, the production of many commodities has flourished but the result has been ever-increasing levels of surplus and government export subsidy costs.[97] There is internal pressure for reform of the CAP policies. However, the process will be slow because of the requirement for unanimity among the EC members.[98]

The social policy of maintaining large numbers of small farms coupled with a desire for a high level of self-sufficiency in staple food products drives Japan's farming programs.[99] Support prices are provided for the majority of the country's agricultural production.[100] The government uses intervention purchases[101] to withdraw excess supply from the market when the quantity of a commodity produced exceeds domestic demand.[102] For commodities where the domestic supply is inadequate, importation is allowed, with import restrictions used to keep prices at the desired levels.[103]

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93. *Id.* at 83.

94. Under this principle, all EC countries would adopt a single price floor for a given commodity. *Id.* at 84.

95. Agricultural products produced within the EC are to be preferentially purchased by the EC members. *Id.*

96. The source of funding for the CAP subsidies is provided by a central fund, with EC members sharing the costs. *Id.*

97. *Id.* at 85.

98. *Id.*

99. *Id.*

100. *Id.*

101. In an intervention purchase, the government buys the excess supply of a good at the established floor price, thereby supporting that price. *Id.*

102. *Id.* at 86.

103. *Id.*

B. *Policies Governing Textiles*

The textile industry, along with the automobile manufacturing and steel production industries, are among the oldest and largest industries in the industrially developed nations.[104] As international competition has increased, governments have sought to shield these industries from the effects of such competition through the granting of subsidies and the erection of trade barriers.[105] In the area of textiles, these barriers typically take the form of quotas, which are created through a bilateral agreement between the exporting and importing countries.[106] GATT applies only to unilateral restraints imposed by importing countries, and therefore does not regulate these agreements, referred to as Voluntary Export Restraints (VER's).[107]

The Multi-Fiber Arrangement is the current pact in a series of multilateral agreements under which countries negotiate the bilateral agreements governing textiles.[108] The United States has negotiated over 1000 individual quotas under this arrangement.[109] It is estimated that approximately sixty-five to seventy percent of the $200 billion in annual world textile trade is governed by this agreement.[110] The original purpose of the MFA was, as indicated previously, to provide temporary protection so as to allow the mature textile industries in the developed nations time to adjust to the increase in Third World competition.[111]

The continued presence of the MFA is evidence of the greatest danger of this type of Non-Tariff Barrier: its quasi-permanence. Although the arrangements have always been negotiated with expiration dates, they are invariably renewed or extended.[112] These extensions take place in spite of the fact that tariffs in the textile industry are higher than those in other manufacturing industries.[113] The purpose behind the agreement is no longer to provide a temporary haven for the textile industry in a new environment of world trade, but rather to simply maintain the current size of the domestic industry.[114]

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104. *Id.* at 99.
105. *Id.*
106. *Id.* at 102.
107. *Id.* at 99.
108. *See supra* text accompanying notes 50-62 for a discussion of the history and effect of the Multi-Fiber Arrangement.
109. TEXTILE TRADE ACT, *supra* note 9.
110. Dullforce, *supra* note 55.
111. *Id.*
112. GATT NEGOTIATIONS, *supra* note 59, at 102.
113. *Id.*
114. *Id.*

V. THE CAUSE OF THE COLLAPSE

The breakdown of the Uruguay Round of negotiations was due to an apparent stalemate in the area of agriculture.[115] This stalemate was not the result of disagreements regarding tariff concessions, the major area of GATT progress in prior rounds, but rather was due to an inability to agree on rules regulating trade restrictions in the form of NTB's.[116] A similar attempt to negotiate rules governing non-tarrif trade restrictions, made during the International Trade Organization negotiations, also failed, while the previous rounds of GATT negotiations concentrating on tariff reductions have been uniformly successful.[117]

Tariffs are visible, easily quantified, and are international in effect. Tariffs comply with the GATT principle that trade barriers should be transparent and non-discriminatory.[118] These qualities make the elimination of tariffs an obvious target for trade reform because agreements can be set down in quantitative terms and breaches of those agreements are easily detectable.[119]

Non-Tariff Barriers, by comparison, are typically grounded in the domestic policies of the individual countries.[120] NTB-type activities frequently reflect strong and legitimate concerns for environmental protection, consumer protection, and governmental technology promotion efforts.[121] Attempts to regulate these activities result in conflicts regarding the sovereign rights of the various GATT members.[122] An additional reason for the particular difficulties in the negotiation of trade rules is that typically such rules do not provide new limits to which prevailing trade practices must now conform, but rather define a larger arena in which a country may operate to accomplish retaliatory purposes.[123]

The second reason for the collapse of negotiations was due to the decline in the influence of the United States on world trade, combined with the structure of the original GATT agreement. During the early

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115. *See supra* text accompanying notes 1-4.
116. *See* Finger, *supra* note 13.
117. *Id.* at 21.
118. Lutz, *supra* note 4, at 111.
119. Hollings, *supra* note 1, at 4500.
120. Lutz, *supra* note 4, at 113.
121. Hollings, *supra* note 1, at 4500.
122. *Id.* at 4498.
123. The antidumping and countervailing duty codes developed during the Tokyo Round resulted in a significant increase, rather than a reduction, in the use of antidumping and countervailing duty measures by the GATT signatories. *Id.*

days of GATT, the U.S. economy was much more powerful than that of the other GATT signatories, and all of the parties had similar priorities and domestic structures.[124] The economic strength of the United States enabled it to "purchase" compliance with GATT principles from the less developed countries by simply absorbing the costs of this economic leadership.[125] As the desired effect of GATT was accomplished and the economic gap between the United States and the rest of the world diminished,[126] the United States experienced a decline in its ability to either absorb the cost of trade inequities or successfully influence other countries to adopt similar trade philosophies.[127] The problem was also compounded by the fact that as the number of countries participating in GATT increased, there was a corresponding increase in the variety of trade policies which needed to be reconciled.[128]

The principles of Most Favored Nation (MFN) status and National Treatment, on which GATT was founded, appeared to promote open and fair trade when adopted in 1948,[129] but have been used as tools to create unbalanced trade in recent years. The principle of National Treatment requires that a GATT signatory treat both foreign and domestic industries participating in its economy in the same fashion. This principle would effectively reduce trade imbalances if all countries treated their domestic producers in similar ways. When some countries adopt more restrictive economic policies for their domestic producers, however, their industries will enjoy greater penetration into the markets of the more liberal countries,[130] and claims of unfairness result.

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124. *Id.* at 4499;

> [T]he GATT was rooted in the Atlantic Charter discussions between Roosevelt and Churchill during the war. The United States agreed to reduce its traditionally high across-the-board Tariffs if Britain would relax its practice of 'Imperial Preference' — favoring trade with countries within the Commonwealth. The two countries further agreed to include other 'like-minded' countries under the auspices of the charter.

Id. at 4502.

125. The costs associated with the granting of preferential treatment to LDC's were willingly absorbed by the United States. *Id.*

126. *Id.* at 4500.

127. *Id.*

128. *Id.*

129. *Id.* at 4502.

130. *E.g.*, United States anti-trust laws require that automakers allow car dealerships to market more than one line of cars, while Japan's customs and lack of enforcement of anti-trust laws require that each company develop its own chain of dealers. The result is that Japanese cars are sold through existing U.S. dealerships without bearing the costs of developing new dealerships, while U.S. cars are effectively

The principle of Most Favored Nation status prevents discrimination resulting from bilateral trade agreements between the GATT signatories by extending the terms of such agreements to all GATT members.[131] However, the countries outside a bilateral agreement are afforded a windfall under this principle; they enjoy the benefit of the agreement without having extended any concessions to the parties thereto.[132] Countries are thus encouraged to retain high barriers to trade, albeit on a non-discriminatory basis, and reap the benefits of agreements entered into by other countries. The resulting trade inequities were palatable to the United States during the early days of GATT, but with the decline of the United States position as the economic leader, so came the decline in the acceptability of trade imbalances.

VI. PROPOSED CHANGES TO GATT

The question of how to appropriately regulate trade among competing entities has been addressed previously in a different context. The problems of protectionistic behavior in the area of trade were confronted by the framers of the United States Constitution and are recorded in United States history. Following the signing of the Declaration of Independence, which resulted in the removal of British regulation of commerce in the colonies, the new states began to set up a variety of trade barriers in an effort to gain a more solid economic position in the new limited market.[133] Individual states imposed economic sanctions against competing products, and levied taxes on products brought in from other states at such high rates as to foreclose access to their markets.[134] During the Constitutional Convention, concern was expressed that the "economic warfare" being waged between the states would result in a dissolution of the union.[135] The framers solved this problem by incorporating into the Constitution the enumerated power of the federal government, through the Congress, to "regulate Commerce . . . among the several States."[136]

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barred from the Japanese market by the absence of a dealership infrastructure. *Id.* at 4503-04.

131. *Id.* at 4499.

132. *Id.*

133. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 4.3 (4th ed. 1991).

134. *Id.*

135. *Id.*

136. U.S. CONST. art. I, § 8.

In the United States, certain limits have been imposed on a state's power to impose taxes; states may extract from commerce a fair share of the expenses of state or local government without unduly restricting the flow of interstate commerce.[137] The modern test for a state's ability to impose a tax is composed of four parts: the tax is permissible if it 1) is "applied to an activity with a substantial nexus with the taxing state, 2) is fairly apportioned, 3) does not discriminate, and 4) is fairly related to the services provided by the state."[138] Taxes which are imposed by a state for the purpose of discriminating against business from other states will be invalidated[139] under the Equal Protection Clause.[140] Once goods have entered the stream of commerce, they are immune from state or local taxation, so long as they remain in that stream of commerce.[141]

Non-tax barriers to interstate commerce are also subjected to similar congressional regulation. The superiority of federal law in the regulation of interstate trade was established in *Gibbons v. Ogden*,[142] where the Supreme Court, in an opinion by Chief Justice Marshall, held that a federal statute controlled the regulation of the coastal shipping trade in spite of the presence of a conflicting state statute. States, however, do retain the power, free from federal intervention, to control matters having effects which are limited to their territory, as recognized in *Wilson v. Black-Bird Creek Marsh Co.*[143]

This division of power over the regulation of interstate trade proved to be a workable solution. Practices which distorted trade between the states were disallowed, while matters primarily concerning a single state remained under state control. This result was contingent, however, on the presence of an external body (the judicial branch) having the ability to make the determination of which practices were disruptive to interstate trade, and which merely had effect within a single state. Having made that determination, the judiciary also had the power to enforce its decision.

Similar issues are being confronted by the Europeans during the EC negotiations to formulate the European Monetary Union (EMU).[144]

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137. NOWAK, *supra* note 133, § 8.11.
138. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).
139. Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 874 (1985).
140. U.S. CONST. amend. XIV, § 1.
141. Eureka Pipe Line Co. v. Hallanan, 257 U.S. 265, 272 (1921).
142. 22 U.S. 1, 210 (1824).
143. 27 U.S. 245, 250 (1829).
144. Hollings, *supra* note 1, at 4504.

The principle of subsidiarity (the principle that governmental decisions should occur at the lowest appropriate level) has become a significant issue during current negotiations.[145] The majority of EC states wish to reinforce the federal character of the Community, in spite of strong objections being posed by the United Kingdom.[146] References to the Community's "federal goal" have therefore been removed from the EC's treaty draft during negotiations in Maastricht, the Netherlands, and were replaced with a reference to an "ever closer union," as a result of the U.K.'s insistence that the "federal" reference was an indication that governments would surrender their national independence to the EC authorities in Brussels.[147]

A second area of contention during the EC negotiations has been the establishment of specific economic convergence criteria for government spending and inflation rates.[148] Such criteria are required to determine which EC countries have brought their economies sufficiently in line with EC norms to participate in the EMU.[149] Decisions as to which countries should have the right to vote on the date for the EC to move to the final stage of the EMU (the creation of a single EC currency) posed similar problems for the negotiators.[150]

The difficult progress in the EC Maastricht negotiations stems from the conflict between the member countries' recognition that the granting of a federal character to the union will speed decision-making and aid enforcement of EC policies, and from the member countries' resistance to yielding further sovereignty to Brussels.[151] Additional review and evolution of the EC treaty is expected to occur through the mid-1990's.[152]

Similarly, the ability of GATT to effectively enforce regulations concerning Non-Tariff Barriers requires the presence of an organization empowered to make decisions as to the true effect of a country's practice which has been labeled a barrier to trade. The creation of a truly integrated market requires that the participants have similar legal,

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145. David Buchan, *EC Becoming World Financial Colossus*, FIN. POST LTD., Dec. 10, 1991, at 47.

146. *Id.*

147. *EC Leaders Agree to Remove "Federal Goal" From Treaty*, THE REUTER LIBRARY REPORT, December 10, 1991.

148. *EC, On Second Day of Summit, Poised to Agree on Deadline for Economic Union*, BNA INT'L BUSINESS DAILY, December 10, 1991.

149. *Id.*

150. *Id.*

151. *EC Becoming World Financial Colossus*, *supra* note 145.

152. *Id.*

regulatory, and social philosophies.[153] Without this, a new set of GATT-style rules will never be able to out-pace the strategies which nations devise in an effort to gain economic superiority.[154]

The development of a more rigorous set of rules and a more effective enforcement procedure will not come without costs. External regulation of activities classified as NTB's will result, to a degree, in the curtailment of a country's sovereignty.[155] Countries will face increasing pressure as the concerns of domestic constituents are forced to compete with the dictates of an international agreement.[156] Political leaders may successfully argue that compliance with the agreement is required, and disregard those domestic concerns. In some instances, however, domestic pressures will force a country to disavow its obligations under GATT and to comply with the demands of the populace.[157] The lack of compliance could either be disregarded by the other GATT signatories, thereby weakening the effect of the rules and enforcement procedures, or it could result in that country's ejection from the group of GATT participants, thereby weakening the organization as a whole.[158]

A second possible solution to this problem is to simply abandon the goal of world-wide free trade and concentrate on the continued establishment of regional trading blocks. Many countries are already pursuing this approach. The EC has used this philosophy for over thirty years, culminating in EC '92.[159] The United States has established a free trade agreement with Canada,[160] and is pursuing similar agreements with Mexico[161] and other Latin American countries.[162] A *de facto* trading-block has also been created by the Japanese through the expansion of giant multi-national corporations in the Pacific.[163]

The primary advantage of the regional trading-block approach is that it would likely minimize the differences between the members'

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153. Hollings, *supra* note 1, at 4501

154. *See generally id.* at 4500.

155. *See supra* text accompanying notes 89-114.

156. Lutz, *supra* note 4, at 114.

157. *Id.*

158. *Id.*

159. Hollings, *supra* note 1, at 4503.

160. *Id.*

161. Mexico-United States: Understanding Regarding Trade and Investment Facilitation Talks, Oct. 3, 1989, 29 INT'L LEGAL MATERIALS 36 (1990).

162. Argentina-Brazil-Paraguay-United States-Uruguay: Agreement Concerning a Council on Trade and Investment, June 19, 1991, 30 INT'L LEGAL MATERIALS 1034 (1991); Chile-United States: Agreement Concerning a United States-Chile Council on Trade and Investment, Oct. 1, 1990, 29 INT'L LEGAL MATERIALS 1404 (1990).

163. Hollings, *supra* note 1, at 4503.

trade policies, making non-coerced agreements on trade regulations more probable. Thus, a country having different trade policies from its neighbors could potentially join the regional block where the best "policy match" was present.

The ultimate losers from the regional trading-block approach would most likely be the Least Developed Countries. GATT policies mandate special preferences for LDC's;[164] such preferences would not be assured under the regional trade system. Reciprocity[165] has been heralded as the key to a truly free market trading system,[166] but such a trade system does not take into account the temporary concessions needed by a developing country for the establishment of a production base.

The poverty of the Least Developed Countries might also result in their exclusion from such regional trading blocks. Low wages, a factor included in the "comparative advantage" of the LDC's, might be expected to induce the rapid industrialization of these countries. Such industrialization would be financed by foreign corporations desiring to capitalize on the low-cost labor present in LDC's. However, concerns of the industrialized countries regarding the potential loss of jobs due to wage disparities between the developed and developing countries would result in intense lobbying for barring LDC's from any regional trade agreements.[167]

VII. CONCLUSION

The creation of a free market trading environment, coupled with the concessions required to allow the development of the LDC's will require more than additional rounds of tariff cuts. The use of Non-Tariff Barriers by the developed countries to disrupt trade in the areas where LDC's have the greatest potential to develop should, in clear conscience, be halted. Historically, GATT rules intended to regulate the use of NTB's have been ineffective and the result has been an

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164. *See supra* text accompanying note 26.

165. Reciprocity should not be interpreted as a balance of volume for every item traded with every country, but rather an opportunity for each country to participate in the other country's market to a comparable degree to which the other participates in its own market. Hollings, *supra* note 1, at 4503.

166. Hollings, *supra* note 1, at 4503; 137 CONG. REC. S9028 (daily ed. June 27, 1991) (statement of Sen. Simon).

167. Similar lobbying has occurred in the industrialized countries over a period of three decades for the continuation of the MFA. This arrangement is used protectionistically to impose qualitative limits on the textile production of LDC's. *See supra* notes 50-62 and accompanying text.

increase, rather than a decline, in the use of the regulated barrier.

Regulation of activities classified as NTB's is difficult because such regulation typically intrudes upon a country's sovereignty. The degree of this intrusion could be reduced through the establishment of regional trade blocks, with participation limited to countries with similar trade philosophies. LDC's will most likely be excluded from such trading blocks because they will not be able to participate without significant concessions from the other countries in the block.

The solution most likely to succeed is, unfortunately, the most difficult. The establishment of an organization having both jurisdiction over the various parties to a trade agreement and the power to enforce decisions made under that agreement has successfully created a free trade environment in the United States. Therefore, such an organization should be established on a world level, regardless of intrusions on sovereignty. Participation in this organization should be voluntary. The impetus for such participation should be significant trading penalties imposed by the participants upon those countries who "opt out" of the organization.

The eventual result of this system will be the accomplishment of the basic GATT goals: an increase in the overall standard of living worldwide, and a decrease in the disparity between the standards of living of the LDC's and the developed countries.

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