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COMMENTS

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I. Introduction

The Western World is suffering from its worst recession since the depression of the 1930s.[1] While many nations have been successful in reducing inflation, the level of unemployment continues to rise appreciably.[2] Western governments have shielded domestic industries from foreign competition in an effort to preserve jobs.[3] Political pressures have prompted those governments to fix the blame for their countries' economic ills on foreign culprits.[4] They have turned away from international free trade and sought political salvation in protectionist policies.[5] The international economic system has undergone severe strain.[6]

This Comment focuses on the response of one element of that international economic system to recession—the General Agreement on Tariffs and Trade (GATT).[7] In particular, it analyzes the GATT ap-

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1 The newspaper literature on the recession is voluminous. For a general summary, emphasing the rising debt burden of many Third World states, see Longworth, *Is The Whole World Going Broke?*, CHICAGO TRIBUNE, Oct. 10, 1982, § 2, at 1, col. 2; for the plight of the American agriculture industry, see N.Y. TIMES, Nov. 30, 1982, at 41, col. 4 (national ed.).

2 *See generally* Longworth, *supra* note 1.

3 *See, e.g.*, N.Y. TIMES, Oct. 23, 1982, at 19, col. 3 (national ed.) (discussing American protection of its steel industry); N.Y. TIMES, Jan. 14, 1983, at 25, col. 4 (national ed.) (discussing French restrictions on the import of Japanese video recorders); WALL ST. J., Jan. 14, 1983, at 1, col. 6 (midwest ed.) (discussing rising protectionist feelings in Europe and the United States).

4 *Id.*

5 *Id.*

6 *Id.*

7 General Agreement on Tariffs and Trade, *done* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 194. Complete text in force as of Mar. 1, 1969, is *reprinted in* 4 GENERAL

proach to agricultural export subsidies, emphasizing the reform of agricultural trading policies undertaken during the Tokyo Round of negotiations.[8] In an effort to evaluate the results of that reform, this Comment will discuss the Tokyo Round's impact on agricultural trading relations between the United States and the European Economic Community (EEC).[9] It will also refer to developments that occurred during GATT's ministerial meeting in November 1982.[10]

While the GATT's future remains bleak, the prospects for a resolution of the United States/EEC dispute are bright. GATT's faith in free trade has proved unrealistic for two reasons. First, the recession has rendered the ideal politically unattractive, prompting states to evade GATT regulations.[11] Second, even if the international environment was amenable to free trade, GATT has proved unable to define precisely the export subsidies it wishes to curtail.[12] Instead of providing clarity, the Tokyo Round has obscured issues and contributed to a souring of relations between the United States and the EEC.[13] The Geneva conference has not improved those relations, which now lie at their lowest ebb in recent history.[14]

The prospects for a resolution of the United States/EEC dispute appear promising despite GATT's failings. Neither side can benefit from a trade war and that realization has persuaded both to agree to bilateral negotiations.[15] Those negotiations are likely to produce a compromise settlement that will include semi-protectionist provisions. GATT can either turn its back on the negotiations or seek to aid the parties in their deliberations. While hoping that GATT follows the second approach, it appears that GATT will continue to preach the gospel of free trade and that the United States and the EEC will simply ignore it.[16]

AGREEMENT OF TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 1-76 (1980).

8 *See infra* notes 18-79 and accompanying text.

9 *See infra* notes 82-168 and accompanying text.

10 *See infra* notes 169-177 and accompanying text.

11 *See infra* notes 178-194 and accompanying text.

12 *Id.*

13 *Id.*

14 The agricultural trading dispute is just one of several bones of contention that have bedeviled United States/EEC trading relations. Similar issues are at stake in a long-running quarrel over EEC steel exports to the United States. Policy differences are most strikingly evident over the issues of sanctions against Poland and defense expenditures.

15 *See infra* notes 178-194 and accompanying text.

16 *Id.*

II. Agricultural Export Subsidies

A. The Inclusion of Agriculture in the GATT Framework

The international trading system that emerged after World War II rested on the precept of free trade.[17] Advanced western industrial states institutionalized that ideal in GATT. When initially adopted, GATT worked to erase tariff barriers to trade and to foster a liberalization of international trading relations.[18] GATT focused on the industrial and manufacturing sectors of the world economy, leaving agriculture heavily protected and less prone to the pressures of the marketplace.[19]

During the Dillon Round of GATT negotiations,[20] the United States sought to incorporate agricultural issues into the GATT framework. The newly created EEC sought and obtained a delay on the grounds that it was in the process of formulating a joint policy on agriculture.[21] The Common Market continued to resist United States efforts to discuss international trade in agriculture during the Kennedy Round of negotiations.[22] At that time, the common agricultural policy was the Common Market's only joint program, and the Europeans proved reluctant to enter into a dialogue that might lead to international criticism of that policy.[23]

American persistence finally paid off during the Tokyo Round of negotiations.[24] The Tokyo Round dealt not only with agriculture, but also considered the broad range of non-tariff trade barriers, such as the use of export subsidies and dumping.[25] Those barriers had supplanted traditional tariffs as the most significant impediments to international free trade.[26] The longstanding United States/EEC quarrel over the inclusion of agriculture reappeared and procedural wranglings over that issue slowed the progress of the negotiations.[27] Nevertheless, the GATT agreements produced by the Tokyo Round contained a variety

[17] *See generally* MAYNE, THE RECOVERY OF EUROPE (1970); POSTAN, AN ECONOMIC HISTORY OF WESTERN EUROPE (1967).

[18] *See* REPORT BY THE DIRECTOR-GENERAL OF GATT: THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS 18 (1979) [hereinafter cited as REPORT BY THE DIRECTOR-GENERAL OF GATT].

[19] *Id.*

[20] *Id.* The Dillon Round of negotiations took place between 1959 and 1962.

[21] S. REP. No. 249, 96th Cong., 1st Sess. 206 (1979).

[22] *Id.* The Kennedy Round of negotiations took place between 1963 and 1967.

[23] S. REP. No. 249, 96th Cong., 1st Sess. 206 (1979).

[24] *Id.* The Tokyo Round of negotiations took place between 1963 and 1967. *See* REPORT BY THE DIRECTOR-GENERAL OF GATT, *supra* note 18, at 13, 49.

[25] *Id.*

[26] *Id.*

[27] *Id.*

of new provisions, including those for agriculture and a revamped subsidies code.[28]

The Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (Agreement),[29] represented a major achievement of the Tokyo Round negotiations. The Agreement attempted to regulate the use of subsidies in agriculture, industry, and manufacturing, and to ensure that their operation did not impede international trade.[30] The core of the Agreement lay in two distinctions. GATT distinguished between impermissible export subsidies and permissible domestic subsidies.[31] It also treated agriculture differently from industry and manufacturing.[32] Although both distinctions contained considerable superficial appeal, their practical implementation has been unsatisfactory.[33]

B. The Distinction Between Domestic and Export Subsidies

The reasoning behind GATT's domestic subsidy/export subsidy distinction stemmed from a recognition that states used "subsidies other than export subsidies" as important instruments for the promotion of domestic social and economic policy objectives.[34] Those policy goals involved efforts to develop backward regions, sustain employment, and encourage research and development.[35] While GATT applauded those goals, it also noted that domestic subsidies were likely to cause injury to the industries of other states.[36] Rather than prohibiting domestic subsidies entirely, GATT urged member states to "seek to avoid causing" such injuries.[37] In particular GATT requested that states evaluate the aims of the policy and its likely impact on other states when formulating their policies.[38]

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28 *Id.*

29 Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade [hereinafter cited as Agreement on Articles VI, XVI, and XXIII], Apr. 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619, — U.N.T.S. — (entered into force for U.S. July 26, 1979), *reprinted in* GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 56 (26th Supp. 1980) [hereinafter cited as GATT, B.I.S.D. (26th Supp.)].

30 Agreement on Articles VI, XVI, and XXIII, *supra* note 29, preamble, *reprinted in* GATT, B.I.S.D. (26th Supp.), at 56.

31 *See infra* notes 50-79 and accompanying text.

32 *Id.*

33 *See infra* notes 34-49 and accompanying text.

34 Agreement on Articles VI, XVI, and XXIII, *supra* note 29, art. 11(1), *reprinted in* GATT, B.I.S.D. (26th Supp.), at 69.

35 *Id.*

36 *Id.* art. 11(2), *reprinted in* GATT, B.I.S.D. (26th Supp.), at 70.

37 *Id.*

38 *Id.*

The practical efficacy of the distinction depended on the ease with which member states could determine whether a particular policy represented a domestic or export subsidy. GATT made no effort to define precisely the twin categories and instead provided an illustrative list of domestic and export subsidies, in the hope that such guidance would present governments and businessmen with the clarity they required.[39] GATT outlined its category of permissible domestic subsidies in Article 11(3) of the Agreement.[40] In so doing, GATT specifically endorsed five areas of government operations, permitting: (i) "government financing of commercial enterprises, including grants, loans or guarantees; (ii) government provision or government-financed provision of utility supply distribution and other operational or support services or facilities; (iii) government financing of research and development programmes; (iv) fiscal incentives; and (v) government subscription to, or provision of, equity capital."[41]

GATT's catalog of proscribed export subsidies was both broader and longer.[42] While GATT provided no formal definition of export

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[39] GATT hoped that the illustrative lists would provide a standard against which state practices could be judged. In fact, the standard has proved imprecise and riddled with inconsistencies. *See infra* notes 47-49 and accompanying text.

[40] Agreement on Articles VI, XVI, and XXIII, *supra* note 29, art. 11(3), *reprinted in* GATT, B.I.S.D. (26th Supp.), at 70.

[41] *Id.*

[42] The full text (footnotes omitted) of the illustrative list of export subsidies, reads:

(a) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance.
(b) Currency retention schemes or any similar practices which involve a bonus on exports.
(c) Internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favorable than for domestic shipments.
(d) The delivery by governments or their agencies of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for delivery of like or directly competitive products or services for ue in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available on world markets to their exporters.
(e) The full or partial exemption, remission, or deferral specifically related to exports, of direct taxes or social welfare charges paid or payable by industrial or commercial enterprises.
(f) The allowance of special deductions directly related to exports or export performance, over and above those granted in respect of production for domestic consumption, in the calculation of the base on which direct taxes are charged.
(g) The exemption or remission in respect of the production and distribution of exported products, of indirect taxes in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.
(h) The exemption, remission or deferral of prior stage cumulative indirect taxes on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that [those] . . . taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the . . . taxes are levied on goods that are physically incorporated . . . in the exported product.

subsidy, the illustrative list seemed to indicate that an export subsidy was any government aid that favored goods destined for export over those produced for internal consumption.[43] Thus, while Article 11(3)(i) permitted government financing of commercial enterprises, "the provision by governments of direct subsidies to a firm or an industry contingent upon export performance," was deemed illegal.[44] Similarly, the Agreement condemned special tax treatment for exported products and rejected export credit guarantee programs.[45] Item (l) redundantly included "any other charge on the public account constituting an export subsidy in the sense of Article XVI of the General Agreement."[46]

The domestic export subsidy distinction appeared to represent a sensible compromise between the competing interests of state sovereignty and international free trade. It recognized the demand on governments to combat domestic ailments and avoided regulating government redevelopment programs that offered no special aid to exports. At the same time, it vigorously opposed government efforts to boost exports directly through export subsidies.

The distinction, however, is illusory. GATT permits governments to finance regional development programs so long as they do not discriminate in favor of export production.[47] In effect, GATT proscribes direct export subsidies, while embracing indirect export subsidies that masquerade as domestic subsidies. A government grant to a corporation contingent on its export performance represents a direct export subsidy, because the grant encourages the corporation to expand ag-

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(i) The remission or drawback of import charges in excess of those levied on imported goods that are physically incorporated . . . in the exported product; provided, however, that in particular cases a firm may use a quantity of home market goods equal to, and having the same quality and characteristics as, the imported goods as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, normally not to exceed two years.

(j) The provision by governments . . . of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the costs of exported products or of exchange risk programmes, at premium rates, which are manifestly inadequate to cover the long-term operating costs and losses of the programmes.

(k) The grant by governments . . . of export credits at rates below those which they actually have to pay for the funds so employed . . . or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms . . . .

(l) Any other charge on the public account constituting an export subsidy in the sense of Article XVI of the General Agreement.

Id. annex (a), *reprinted in* GATT, B.I.S.D. (26th Supp.), at 80.

43 GATT itself does not provide a definition of export subsidy. The definition used here is this author's distillation extracted from the illustrative list.

44 Agreement on Articles VI, XVI, and XXIII, *supra* note 29, annex (a), *reprinted in* GATT, B.I.S.D. (26th Supp.), at 80.

45 *Id.* annex (f) & (j), at 81.

46 *Id.* annex (l), at 82.

47 *See supra* notes 42-46 and accompanying text.

gressively overseas. A government grant without that contingency may not constitute the same type of direct export subsidy, yet its consequences may be identical. Armed with government aid, many corporations may look to exports regardless of whether its government makes the grant contingent on export expansion. Indeed, similar results may occur even if the government regulation provides an opposite contingency, making the grant dependent on increased production for the domestic market. A domestic subsidy may allow the corporation to undercut the price that foreign competitors charge, thus permitting the corporation to recapture part of its domestic market and providing another barrier to international free trade. A domestic subsidy is nothing more than an indirect export subsidy. Government action cannot be so rigidly compartmentalized into "domestic" and "export"—the two categories greatly overlap and should not be distinguished.

All subsidies, whether domestic or export, invariably harm international free trade. As the United States Secretary of Commerce, Malcolm Baldrige, has commented, "domestic adjustment policies profoundly affect the international transfer of goods, services and capital. Adjustment does not occur in a vacuum. . . ."[48] National economies are inextricably intertwined. One state's defensive measures to combat recession necessarily have an impact on the economies of other states.[49]

C. The Distinction Between Agriculture, Industry, and Manufacturing

In seeking to apply the domestic subsidy/export subsidy distinction, GATT developed a second distinction between its treatment of agriculture, industry, and manufacturing. The basis of this approach lies in a compromise struck between the United States and the EEC.[50] The American achievement consisted of incorporating agriculture in the GATT framework for the first time.[51] The European success arose from the Tokyo Round's less stringent treatment of agriculture.[52] The

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48 Address by Malcolm Baldrige, Organization of Economic Cooperation and Development, in Paris (May 10, 1982), *quoted in U.S. Officials Warn of Protectionism Dangers at OECD, Urge Services Talks*, [Apr.-Sept. 1982] INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) No. 407, at 195 (May 11, 1982).

49 This is in part the product of technological advances that have shrunk the world and made it physically easier to conduct international trade. Technological advances have also helped to increase production, thereby increasing the quantity of goods available for trade.

50 *See supra* notes 20-24 and accompanying text.

51 *Id.*

52 *See infra* notes 54-64 and accompanying text.

Agreement's solution represented the maximum possible infringement acceptable to a Common Market ever sensitive to criticisms of its common agricultural policy.[53]

GATT produced a straight-forward formulation with respect to industry and manufacturing. Article 9(1) stated unequivocally that "[s]ignatories shall not grant export subsidies on products other than certain primary products."[54] Article 9(2) defined export subsidy in terms of the practices listed in the annex.[55]

The approach to agriculture was more complicated. GATT dealt with domestic subsidies in the agricultural sector as it had with domestic subsidies in industry and manufacturing, permitting domestic subsidies, but urging states to minimize the harm they caused other states.[56] A marked change occurred, however, in handling the problem of export subsidies. In place of the outright ban on export subsidies in industry and manufacturing, Article 10 required only that signatories refrain from granting subsidies that result in that state acquiring "more than an equitable share" of world export trade in the subsidized product.[57]

Definitional uncertainties in Article 10 allowed governments considerable latitude in devising and implementing a wide range of export subsidies in the agricultural sector. Article 10(1) required that an assessment of "equitable share" should take account of "the shares of the signatories in trade in the product concerned during a previous representative period, and any special factors which may have affected or may be affecting trade in such product."[58] The concept of "equitable share" included cases in which the grant of an export subsidy resulted in the "displace[ment of] the exports of another signatory bearing in mind the developments on world markets."[59] When export subsidies allowed a state to penetrate new markets, "equitable share" was to be determined by an analysis of "traditional patterns of supply of the product concerned to the world market, region or country, in which the new market is situated. . . ."[60] GATT defined a "previous representative period" as "normally" the three most recent calendar years in

53 *See supra* notes 20-24 and accompanying text.

54 Agreement on Articles VI, XVI, and XXIII, *supra* note 29, art. 9(1), *reprinted in* GATT, B.I.S.D. (26th Supp.), at 68.

55 *Id.* art. 9(2), *reprinted in* GATT, B.I.S.D. (26th Supp.), at 69.

56 *Id.* art. 11(2), *reprinted in* GATT, B.I.S.D. (26th Supp.), at 70. This provision applies to all sectors of the economy.

57 *Id.* art. 10(1), *reprinted in* GATT, B.I.S.D. (26th Supp.), at 69.

58 *Id.*

59 *Id.* art. 10(2)(a), *reprinted in* GATT, B.I.S.D. (26th Supp.), at 69.

60 *Id.* art. 10(2)(b), *reprinted in* GATT, B.I.S.D. (26th Supp.), at 69.

which "normal market conditions existed."[61] Finally, signatories agreed not to grant export subsidies on agricultural products in such a way as to result in prices "materially below those of other supplies to the same market."[62]

The distinction's principal weakness is that it rests on a static view of world trade. Adherence to the GATT position creates a danger that market shares will be locked at present levels. GATT requires that the equitable share test depend on an analysis of the market over the three previous years of normal market conditions, but fails to define those "normal" conditions. Furthermore, GATT's formulation presupposes that agricultural free trade existed during a recent three-year period.[63] Although GATT allows consideration of "special factors" in the analysis,[64] it offers no clue as to what they might include and how they might be weighted. Hence, faithful adoption of the GATT rules would reward those farmers who recently enjoyed high government subsidies, while placing the unsubsidized at a permanent disadvantage.

An effort to assess the amount of damage that export subsidies cause further compounds the problem. To avoid freezing market shares at present levels, it is necessary to separate unnatural trade advantages created by subsidies from natural trade advantages. In contrast to other sectors of the economy, agriculture relies not only on economic and technological factors, but also on natural factors, such as soil, climate, and geography. Demand for agricultural goods remains relatively stable, while supply is both hard to predict and susceptible to wide fluctuations.[65]

Violent storms in California that decimated 1982 raisin and tomato crops provide an example of this difficulty.[66] The storms struck without warning and, with one stroke, destroyed as much as seventy percent of the crop.[67] That development renders worthless any assess-

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61 *Id.* art. 10(2)(c), *reprinted in* GATT, B.I.S.D. (26th Supp.), at 69.

62 *Id.* art. 10(3), *reprinted in* GATT, B.I.S.D. (26th Supp.), at 69.

63 The Tokyo Round aims to regulate agricultural export subsidies, and to lessen their damaging effects. *See* Agreement on Articles VI, XVI, and XXIII, *supra* note 29, preamble, *reprinted in* GATT, B.I.S.D. (26th Supp.), at 56. But GATT seeks to do this by restricting market shares to those presently existing although they were achieved by the very subsidies GATT wishes to curtail.

64 Agreement on Articles VI, XVI, and XXIII, *supra* note 29, art. 10(1), *reprinted in* GATT, B.I.S.D. (26th Supp.), at 69.

65 *See generally* Barcelo, *Subsidies, Countervailing Duties and Anti Dumping After the Tokyo Round*, 13 CORNELL INT'L L.J. 257, 280 (1980) (on distinction between natural and unnatural trade advantages).

66 N.Y. TIMES, Sept. 28, 1982, at A17, col. 1 (late city ed.).

67 *Id.*

ment of the impact of subsidized raisins and tomatoes from abroad competing with American raisins and tomatoes for United States and foreign markets.[68]

Two independent reports on the state of agriculture in the United States reveal that the problems of that sector stem from an innumerable variety of factors.[69] The United States Department of Agriculture bemoaned a situation in which record United States crops faced weak internal and external demand.[70] United States agriculture suffered because of a substantial appreciation in the value of the dollar abroad, world recession, hard currency shortages in Eastern Europe and the Third World, and larger harvests elsewhere.[71] The grant of export subsidies by foreign governments affected only that last item. In a report prepared for a Chicago bank, emphasis was again placed on the increasing value of the dollar.[72] A massive collapse in the value of the Mexican peso particularly hurt since Mexico is the third largest purchaser of the United States' agricultural products.[73]

These complexities defy precise statistical analysis. The GATT world of export subsidies consists of educated guesswork and intelligent speculation that export subsidies cause a certain monetarily quantifiable amount of damages.[74] In the spring of 1982, David Stockman, director of the United States Office of Management and Budget, attempted to discover the Export-Import Bank's success rate in generating exports through its programs of export credit guarantees.[75] The Export-Import Bank calculated that every additional $1 billion worth of exports produced 24,000 extra jobs.[76] Stockman's office suggested that the figure might run closer to 12,000 extra jobs,[77] while past Agri-

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68 *Id.*

69 For a discussion of reports by the United States Department of Agriculture and Continental Illinois Bank of Chicago, see *U.S. Agriculture Exports Expected to Dip About 4 Percent in Fiscal 1982, USDA Says*, [Apr.-Sept.] INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) No. 412, at 410 (June 15, 1982).

70 *Id.*

71 *Id.* at 411.

72 *Id.*

73 *Id.*

74 *Id.* As both reports indicate, current problems plaguing United States agriculture have resulted from a variety of factors. It is impossible to calculate precisely the respective weight of those factors. The impact of export subsidies cannot be isolated and the effort to do so is scarcely worthwhile.

75 *Number of Jobs Related to Loans Disputed in Office of Management and Budget Memo*, [Apr.-Sept.] INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) No. 412, at 399 (June 15, 1982).

76 *Id.*

77 *Id.*

culture Department research has indicated a figure of 35,000 jobs.[78] Such divergence indicates that efforts to calculate the impact of export subsidies may entail more work than they are worth. If that is so, then GATT's second distinction only promises to inflict on the world a static conception of international trade and to spawn as many inconsistencies as it cures.

III. THE UNITED STATES/COMMON MARKET QUARREL OVER AGRICULTURAL EXPORT SUBSIDIES

On January 1, 1980, the GATT agreement on agricultural export subsidies came into force.[79] Despite its good intentions, the GATT formulation has served only to confuse, because it fails to provide government and business with clear directives as to which practices are permissible and which are not.[80] The GATT Director-General, Arthur Dunkel, has acknowledged this criticism, asserting that some states' inability to discover what trading practices were impermissible represented a major weakness of GATT.[81] He noted that confusion tempted some states to interpret the GATT requirements as best suited their interests.[82] GATT officials themselves encounter difficulties in finding their way through the mire of detail that comprises much of the Agreement.[83] In his official report on the Tokyo Round negotiations, Dunkel's predecessor, Olivier Long, suggested that government research grants for universities might constitute an impermissible subsidy.[84] In fact, Article 11(3) of the Agreement indicated that "government financing of research and development programmes" is a permissible domestic subsidy.[85] William Brock, the United States Trade Representative, has stated bluntly that the agricultural code was so vague that the United States government did not know what it covered.[86] As a result, he continued, "[w]e are taking them [the EC] to

78 *New Billion Dollar Revolving Fund Would Increase Prices, Create Jobs*, [Apr.-Sept.] INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) No. 411, at 368 (June 8, 1982).

79 Agreement on Articles VI, XVI, and XXIII, *supra* note 29, art. 19(4), *reprinted in* GATT, B.I.S.D., (26th Supp.), at 78.

80 *See supra* notes 29-78 and accompanying text.

81 Address by Arthur Dunkel, National Press Club, in Washington D.C. (July 15, 1982), *discussed in GATT Director Dunkel Criticizes Trend To Unilateral Trade Law Interpretation*, [Apr.-Sept.] INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) No. 416, at 557 (July 20, 1982).

82 *Id.*

83 REPORT BY THE DIRECTOR-GENERAL OF GATT, *supra* note 18, at 54.

84 *Id.*

85 Agreement on Articles VI, XVI, and XXIII, *supra* note 29, art. 11(3), *reprinted in* GATT, B.I.S.D. (26th Supp.), at 70.

86 *EC Official Charges U.S. with Risking Protectionism in Protests Over Exports*, [Apr.-Sept.] INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) No. 412, at 398 (June 15, 1982).

GATT to see if the rules are valid. . . . If not, we are going to change the rules to make them adequate to open markets to our goods abroad."[87]

Brock's rhetoric is symptomatic of the long-running saga of United States/EEC agricultural trade relations. The dispute provides a case-study of the practical operation of the GATT scheme. The results are sobering, amply underscoring Dunkel's dismal summary. Both the United States and the EEC favor agricultural free trade when it suits their interests; both develop rationalizations to explain the recurrent occasions when the exigencies of the domestic political scene demand semi-protectionist policies.[88] GATT remains ineffective, powerless to intervene to bolster the ideals it upholds.

A. Differences of Philosophy

The United States/EEC conflict, and the failures of GATT, arise in part from differing philosophies with respect to trade policies. GATT stands firmly wedded to the creed of agricultural free trade.[89] The United States, despite its frequent lapses into protectionism, affirms that ideal.[90] By contrast, the EEC's position is at best ambivalent. The basis of this ambivalence is the belief that the agricultural sector of the economy is in the process of major transformation.[91] Due to technological advances, the previously familiar family farm has given way to the much larger commercial farm.[92] A result of that change has been the ability of the agricultural sector to boost production while trimming its workforce.[93] The trend has been in progress for several decades and continues today.[94] The farm community is experiencing a traumatic transition in which some farmers must learn to adapt to the new technology, while others must seek alternative employment.[95] Common Market policy attempts to cushion the effects of this transition. At least in theory, the common market agricultural policy's protectionist elements act as a means to such an end and would be

87 *Id.*

88 *See infra* notes 145-177 and accompanying text.

89 *See supra* notes 18-78 and accompanying text.

90 *See infra* notes 123-141 and accompanying text.

91 For a summary of Common Market philosophy on agriculture, see REPORT BY THE DIRECTOR-GENERAL OF GATT, *supra* note 18, at 19-20.

92 For a summary of technological advances and their effects in the United States, see Rasmussen, *The Mechanization of Agriculture*, 247 SCI. AM. 76 (1982).

93 *Id.*

94 *Id.*

95 *Id.*

removed once the transition concludes.[96] In practical terms, the EEC favors international measures to stabilize agricultural trade through commodity arrangements and a sufficiently high income level for farmers.[97] It seeks managed markets involving multinational arrangements on prices, stockpiling procedures, and coordination of exports.[98]

The Treaty of Rome,[99] which created the EEC, contains the philosophical underpinning for these ideas. Article 39(1) lists the objectives of Community agricultural policy.[100] They include the desire to increase the earnings of individual farmers so as to ensure a "fair standard of living" for Common Market farmers, and to stabilize markets.[101] The common agricultural policy is to assure availability of supply at reasonable prices.[102]

The Treaty of Rome sought the establishment of free trade within the Common Market and a united front in Community relations with the outside world. Article 111(1) provides that member states "shall" coordinate trade relations with third countries so as to bring about the conditions needed for a common policy in external trade.[103] Article 112(1) requires member states to harmonize their export subsidy systems to ensure that competition between undertakings of the Community is not distorted.[104] There is no concern for possible distortions of competition with non-member states.[105]

The common agricultural policy consists of a series of regulations that the Common Market's Council of Ministers[106] has issued throughout the Community's twenty-six year existence.[107] The regulations apply either to a single agricultural commodity, or to a group of commodities, and together form a detailed system of levies, price supports, and export refunds.[108] The regulations also create rules of competition, quantity and quality control, safeguard measures, and

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96 REPORT BY THE DIRECTOR-GENERAL OF GATT, *supra* note 18, at 19-20.

97 *Id.*

98 *Id.*

99 Treaty Establishing the European Economic Community, *done* Mar. 25, 1957, 298 U.N.T.S. 3 [hereinafter cited as Treaty of Rome].

100 Treaty of Rome, *supra* note 99, art. 39(1)(b), (c).

101 *Id.*

102 *Id.*

103 *Id.* art. 111(1).

104 *Id.* art. 112(1).

105 The Treaty is silent on this subject.

106 The Council of Ministers consists of the Agriculture Ministers of the ten members of the EEC.

107 For an explanation of the operation of the common agricultural policy, see ECONOMIST, Oct. 23, 1982, at 52.

108 *Id.*

financial regulations.[109] The main areas of contention with the United States, and indeed within the Common Market itself, concern the price support and export refund systems.[110] These systems require the Council of Ministers to select a Community price for farm products, usually far above world prices.[111] The EEC permits its farmers to sell at world prices and then makes up the difference between world prices and the Common Market prices itself.[112] Thus, EEC farmers can enjoy large profits even if their production costs exceed market prices.[113]

The EEC makes little effort to hide its GATT violations.[114] Although the EEC has endorsed the GATT formulation,[115] the common agricultural policy ignores the GATT limitations on the use of export subsidies. For example, the Council of Ministers' regulation dealing with pigmeat, promulgated in 1975, states that the Common Market may grant export refunds so as to ensure that Community producers are competitive on the world market.[116] The regulation dealing with sheep and goatmeat, announced after the conclusion of the Tokyo Round, permits export refunds to the extent necessary to enable the products to be exported.[117] There is frequently no reference to GATT notions of "equitable share."[118] Indeed, the regulation concerning fruits and vegetables, announced in 1972, stresses the use of export refunds, to the extent necessary to enable export in economically significant quantities.[119]

The reasoning of both the Treaty of Rome and the Council regulations has enjoyed support from the European Community's Court of Justice. The Court has frequently stressed the Treaty's aim to promote internal free trade.[120] At the same time, it has proved equally unequivocal as to the purpose of the common agricultural policy. In *Muras v.*

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109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.*

113 *Id.*

114 The official EEC position is not to deny charges of subsidization, but to stress that the Community is no more to blame than anyone else. *See, e.g.*, Dalsager, *Why is the EEC Being Blamed for the Plight of American Farmers?*, EUROPE, Sept. 1982, at 12.

115 *See supra* notes 24-78 and accompanying text.

116 18 O.J. Eur. Comm. (No. L 282) 1 (1975).

117 23 O.J. Eur. Comm. (No. L 183) 1 (1980).

118 *See supra* notes 57-64 and accompanying text.

119 15 J.O. Eur. Comm. (No. L 118) 1 (1972), *reprinted in* SPECIAL ENGLISH EDITION (II) 437 (1972).

120 *See, e.g.*, Hauptzollamt Bremen-Freihafen v. Waren-Import-Gesellschaft Krohn & Co., 1970 E. Comm. Ct. J. Rep. 451, COMMON MKT. REP. (CCH) ¶ 8094.

Hauptzollant-Hamburg-Jonas,[121] it stated that "the [export] refund serves two purposes: to reduce surpluses and, more particularly, to compensate for the higher price levels within the Community as compared with the world market."[122]

The United States government welcomed the Tokyo Round amendments to GATT more enthusiastically than the EEC. The Trade Agreements Act of 1979[123] provided the mechanism under which the GATT provisions became American law. The Act's most important change lay in the incorporation of a "material injury" requirement into American countervailing duty law.[124] Prior to the Trade Agreements

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121 Muras v. Hauptzollamt Hamburg-Jonas, 1973 E. Comm. Ct. J. Rep. 963, COMMON MKT. REP. (CCH) ¶ 8224.

122 *Id.* at 969, COMMON MKT. REP. (CCH) ¶ 9051.

123 Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified in scattered sections of 19 U.S.C.).

124 The Trade Agreements Act defines "material injury" at 19 U.S.C. 1677(7) (Supp. IV 1980). The text of the provision reads, in pertinent part:

(A) In general.—The term "material injury" means harm which is not inconsequential, immaterial, or unimportant.
(B) Volume and consequent impact.—In making its determinations . . . the Commission shall consider, among other factors—
  (i) The volume of imports of the merchandise which is the subject of the investigation,
  (ii) The effect of imports of that merchandise on prices in the United States for like products, and
  (iii) The impact of imports of such merchandise on domestic producers of like products.
(C) Evaluation of volume and of price effects.—For purposes of subparagraph (B)—
  (i) Volume.—In evaluating the volume of imports of merchandise, the Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.
  (ii) Price.—In evaluating the effect of imports of such merchandise on prices, the Commission shall consider whether—
    (I) there has been significant price undercutting by the imported merchandise as compared with the price of like products of the United States, and
    (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.
  (iii) Impact on affected industry.—In examining the impact on the affected industry, the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry, including, but not limited to—
    (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
    (II) factors affecting domestic prices, and
    (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment.
(D) Special rules for agricultural products.—
  (i) The Commission shall not determine that there is no material injury or threat of material injury to United States producers of an agricultural commodity merely because the prevailing market price is at or above the minimum support price.
  (ii) In the case of agricultural products, the Commission shall consider any increased burden on government income or price support programs.
(E) Special rules.—For purposes of this paragraph—

Act, the government could impose countervailing duties whenever a country employed export subsidies on goods imported into the United States.[125] Under the Act, the government may initiate countervailing duties only if the export subsidies caused material injury to American enterprises.[126]

In one area the Trade Agreements Act went further than the GATT formulation. While endorsing the Agreement's illustrative list of export subsidies, the Act also placed limits on the use of certain domestic subsidies.[127] Where GATT had permitted domestic subsidies in recognition of their role in achieving domestic economic and social objectives, the Trade Agreements Act outlined four impermissible domestic subsidies: (i) the provision of capital, loans or loan guarantees on terms inconsistent with commercial considerations; (ii) the provision of goods and services at preferential rates; (iii) the grant of funds or forgiveness of debt to cover operating losses sustained by a specific industry; and (iv) the assumption of costs or expenses of manufacture, production or distribution.[128]

The Trade Agreements Act promotes international free trade by eliminating some domestic subsidies. American trade policy, however, offsets this laissez-faire approach. The United States employs a mecha-

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> (ii) Standard for determination.—The presence or absence of any factor which the Commission is required to evaluate under subparagraph (C) or (D) shall not necessarily give decisive guidance with respect to the determination by the Commission of material injury.

19 U.S.C. § 1677(7) (Supp. IV 1980).

125 *See, e.g.*, Tariff Act of 1913 which reads, in pertinent part:

> That wherever any country . . . shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country . . . and such article or merchandise is dutiable under the provisions of this Act, then upon the importation of any such article or merchandise . . . there shall be levied and paid . . . in addition to the duties otherwise imposed by this Act, an additional duty equal to the net amount of such bounty or grant. . . .

Tariff Act of 1913, ch. 16, 38 Stat. 114 (1913).

126 The incorporation of a "material injury" standard represents a change of form rather than substance.

Before Tokyo Round, American law permitted the imposition of a countervailing duty whenever a foreign state gave aid or advantage to its exports to the United States. The impact of the exports on American industry was irrelevant. *See*, G.S. Nicholas & Co. v. United States, 7 Ct. Cust. App. 97 (1916), *aff'd*, 249 U.S. 34 (1919).

The rigors of that law were mitigated, however, by granting the Treasury Department broad discretion in defining subsidies. The Treasury Department remained hostile to the countervailing duty weapon, and dragged its feet, delaying investigations and employing a disguised "material injury" test. *See generally* Jacobs & Hove, *Remedies for Unfair Import Competition in the United States*, 13 CORNELL INT'L L.J. 1 (1980), and Note, *Subsidies and Countervailing Duties Under the Trade Act of 1979*, 5 N.C. J. INT'L L. & COM. REG. 533 (1980).

127 Trade Agreements Act, 19 U.S.C. § 1677(5)(B) (Supp. IV 1980).

128 *Id.*

nism of price support systems and export incentives for farmers, perhaps on a smaller scale than those of the common agricultural policy, but no less pervasive.[129]

The Agricultural Trade Act of 1978[130] reflects one effort to boost exports through the use of government aid and expertise. It reveals the inconsistency between American acceptance of GATT and the realities of a policy that is, at best, contrary to the spirit of international free trade. The Act included an intermediate credit program to finance commercial sales of agricultural goods on credit of from three to ten years.[131] The aim of the scheme was to fill a vacuum between existing long-term financing programs for the poorest states and the more short-term financing available through the Commodity Credit Corporation.[132] The Act loosened regulations concerning deferred payment sales.[133] For the first time it allowed a private American exporter to negotiate an importing country's financing arrangements with the Commodity Credit Corporation, thereby permitting the importing country to utilize the American exporter's greater familiarity with administrative procedures.[134] The Act also authorized the upgrading of the title of chief agricultural officer in a number of American diplomatic missions and permitted the establishment of agricultural trade offices around the world.[135] The offices were to channel information on foreign markets back to American farmers, while promoting the desirability of American farm products in those potential importing countries.[136]

The bill's proponents attempted to down-play subsidization.[137] They made it clear that the intermediate credit program was aimed solely at securing new markets and must not be a vehicle for provoking a credit war with foreign states over existing markets.[138] That assertion seemed to presume that the United States could roam the world searching for new customers on its own. In fact, exporting states throughout

129 The United States spent more than $14 billion for farm supports in 1981-82. ECONOMIST, Oct. 23, 1982, at 52.

130 Agricultural Trade Act of 1978, Pub. L. No. 95-501, 92 Stat. 1685 (1978) (codified in scattered sections of 7 U.S.C.).

131 *Id.* 7 U.S.C. § 1707a(b)(1) (Supp. IV 1980).

132 Note, *Promoting Agricultural Exports: The Agricultural Trade Act of 1978*, 5 N.C. J. INT'L L. & COM. REG. 263, 266-68 (1978).

133 7 U.S.C. § 1707b(b) (Supp. IV 1980).

134 *Id.*

135 7 U.S.C. § 1762(b) (Supp. IV 1980).

136 7 U.S.C. § 1761 (Supp. IV 1980).

137 S. REP. No. 1142, 95th Cong., 2d Sess. 5, 7-8 (1978).

138 *Id.*

the world are constantly involved in a struggle to acquire fresh markets. The intermediate credit program represents an export subsidy, similar to those offered in most states, designed to promote the attractiveness of American exports. The fact that Congress intended that the program only be used to secure new markets does not make it any less of an export subsidy.[139]

At times, the veil of free trade drops entirely. One commentator has noted that a motivation for the intermediate credit program stems from official efforts to aid in the export of livestock.[140] America suffers from competition with the EEC for third country markets that are geographically closer to the EEC nations. The intermediate credit program helps to blunt that European competitive edge. In that respect, the Act flagrantly violates GATT.[141] Geographic proximity to markets is a natural trade advantage and export subsidies cannot be used to neutralize it.[142]

B. Deteriorating Relations

During 1982, agricultural trade relations between the United States and the EEC steadily deteriorated.[143] The GATT ministerial meeting, at the end of 1982, did little to prevent the parties from drifting further apart.[144] In March 1982, United States Deputy Secretary of Agriculture, Richard E. Lyng, spent more than a week touring European capitals.[145] He concluded that little hope existed that the Reagan administration could persuade the EEC to reduce subsidies.[146] In April 1982, the parties confronted each other at a meeting of major world grain producers in Ottawa.[147] The United States urged production cuts and threatened to implement subsidies and credit competition to en-

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139 *Id.*

140 Note, *supra* note 132, at 267-68.

141 *Id.* A reading of the illustrative list of export subsidies indicates that aid to negate geographical disadvantages must be an export subsidy. Item (c) of the illustrative list of export subsidies, states that the payment of internal transport and freight charges on export shipments are an impermissible export subsidy. Agreement on Articles VI, XVI, and XXIII, *supra* note 29, annex, *reprinted in* GATT, B.I.S.D. (26th Supp.), at 80. It is reasonable to assume that aid for external transportation would be similarly impermissible.

142 *Id.*

143 *See infra* notes 145-168 and accompanying text.

144 *See infra* notes 169-177 and accompanying text.

145 *Lyng Disappointed Over European Unwillingness to Stem Subsidies*, [Apr.-Sept.] INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) No. 403, at 35 (Apr. 13, 1982).

146 *Id.*

147 *World Grain Suppliers' Talks Show Little Agreement on Reducing Supply*, [Apr.-Sept.] INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) No. 405, at 112 (Apr. 27, 1982).

courage exports in the event of a failure to agree.[148] The EEC blandly asserted that it was working to reduce agricultural subsidies.[149]

During 1982, threats developed into action. In March, at the request of the United States, GATT set up investigation panels to evaluate Common Market subsidies on processed peaches, pears, and raisins.[150] The EEC counterattacked, urging GATT to rule illegal the United States' domestic international sales corporation program.[151] United States Agriculture Secretary, John R. Block, informed the United States Senate's Joint Economic Committee that "we are going to be taking a very hard, tough stand" at forthcoming GATT meetings.[152] Seeley Lodwick, United States Undersecretary of Agriculture for International Affairs and Commodity Programs, vigorously criticized the EEC, asserting that "we've been talking with them about this for 18 months. We have not been heard, and we've seen no progress."[153] Poul Dalsager, the Common Market's Commissioner for Agriculture, speaking to Community agriculture ministers, maintained that, since the United States was becoming "increasingly aggressive" in its export policies, the EEC must develop a "more coherent strategy" for exporting farm products.[154] The Common Market, he continued, must identify its best potential customers and coordinate its export credit policies.[155]

The United States has pursued two additional parallel initiatives in its struggle against the EEC: increased promotion of its farm products abroad and stepping up of direct export subsidies to agriculture at home.[156] Promotional activities focus on a partnership between the Foreign Agricultural Service of the Department of Agriculture and private organizations.[157] The Foreign Agricultural Service deals with more than fifty non-profit, product-specific trade associations, such as the Cotton Council International, the American Soybean Association,

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148 *Id.*

149 *Id.* at 112-13.

150 *GATT Agrees to Set Up Dispute Panels on Canada's FIRA, EC Fruit Subsidies*, [Apr.-Sept.] INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) No. 402, at 15-16 (Apr. 6, 1982).

151 *Falkland Islands Crisis Preempts DISC Attack in GATT But EC Taking Hard Line*, [Apr.-Sept.] INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) No. 407, at 192 (May 11, 1982).

152 *Block Tells Congress Long-Term Soviet Grain Agreement Would Be Beneficial*, [Apr.-Sept.] INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) No. 404, at 79-80 (Apr. 20, 1982).

153 CHICAGO TRIBUNE, Sept. 26, 1982, § 1, at 5, col. 1.

154 *Agricultural Export Subsidies Expected to Remain Key Policy, EC Official Says*, [Apr.-Sept.] INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) No. 416, at 560 (July 20, 1982).

155 *Id.*

156 *See infra* notes 158-168 and accompanying text.

157 *See infra* notes 158-161 and accompanying text.

and the Poultry and Egg Institute.[158] Together, the government and those private groups seek to advertise the quality of American farm products to potential overseas customers. In fiscal year 1982, the Department of Agriculture planned to spend $25 million to support those groups;[159] the groups hoped to raise twice that amount themselves.[160] Typical projects include government sponsorship of United States booths at trade fairs abroad and high-level visits abroad by government officials and farmer representatives.[161]

The Reagan administration had hoped to limit agricultural export subsidies as part of its general pruning of the budget.[162] The government has nevertheless been under considerable pressure to increase subsidies in the face of distress on American farms.[163] A proliferation of bills and amendments have appeared in Congress seeking to extend the President's powers to loosen export credit regulation and to grant the Export-Import Bank further funds to use to finance exports.[164] The Omnibus Budget Reconciliation Act of Fiscal Year 1983[165] specifically directs the Agriculture Department to use between $175 million and $190 million of Commodity Credit Corporation funds to combat foreign government subsidies of exports. The American Farm Bureau, a private group and perennial champion of free trade, has urged extension of export subsidies.[166] Last year the United States government purchased nine percent of the United States' production of milk, butter, and cheese.[167] In September 1982, Seeley Lodwick, United States Undersecretary of Agriculture for International Affairs and Commodity Programs, answered " 'emphatically yes,' " when reporters asked him if the administration planned to extend agricultural export subsidies.[168]

The United States/EEC dispute reached a climax at GATT's ministerial meeting in November 1982. The United States had eagerly pressed for such a meeting in the early months of the Reagan administration, hoping to use it to expand GATT's rules to reduce trade barri-

158 *Study Examines Private Sector Takeover of Government Trade Promotion Duties*, [Apr.-Sept.] INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) No. 410, at 318-19 (June 1, 1982).

159 *Id.*

160 *Id.*

161 *Id.*

162 *Effort to Raise Bank's Direct Credit Authorization Defeated on House Floor*, [Apr.-Sept.] INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) No. 411, at 360 (June 8, 1982).

163 *Id.*

164 *See generally Farm Bureau Supports Legislation to Counter EC Subsidized Finance*, [Apr.-Sept.] INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) No. 424, at 885 (Sept. 14, 1982).

165 Omnibus Budget Reconciliation Act of 1982, Pub. L. No. 97-253, 96 Stat. 763 (1982).

166 N.Y. TIMES, Sept. 15, 1982, at 38, col. 4.

167 CHICAGO TRIBUNE, Sept. 25, 1982, § 1, at 3, col. 1.

168 *Id.* Sept. 26, 1982, § 1, at 1, col. 1.

ers in the service sector of the economy and to set a "trade agenda for the 1980s."[169] Deepening world recession and increasingly acrimonious relations between the United States, EEC, and Japan extinguished the Americans' early optimism.[170] By the time the Geneva meeting finally convened, doubts for the very survival of GATT had replaced ambitious plans for expanding its reach. As two American officials succinctly stated on the eve of the conference, "[i]f this month's ministerial meeting . . . fails to re-establish the momentum for trade liberalization, the system could eventually collapse under protectionism."[171]

The November 1982 GATT meeting did not spell doom for international free trade, but neither did it ensure its salvation. At the eleventh hour, delegates drafted a ministerial declaration "reaffirming their commitment to abide by their GATT obligations and to support and improve the GATT trading system."[172] The United States and the EEC broke an impasse over agriculture by delaying the need for a decision. The ministers created a committee to review the state of agricultural trade and to make recommendations with a view to prompting greater liberalization.[173]

Opinions as to the success of the meeting varied. GATT Director General Arthur Dunkel optimistically asserted that the final declaration "amounts to a clear commitment to fight collectively against protectionism."[174] William Brock proved more circumspect, commenting that "over all, the results might get a grade of C."[175] The agriculture committee must submit its suggestions for reform in 1984 and it is perhaps unwise to completely evaluate the 1982 ministerial meeting until that time.[176] Nevertheless, GATT's future looks ominous. It is likely that history will consign the ministerial meeting to an insignificant footnote and chide the delegates of the United States and the EEC for skirting an issue that demanded serious consideration.[177]

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169 WALL ST. J., Nov. 5, 1982, at 28, col. 1 (midwest edition).

170 *Id.*

171 Aho & Bayard, *World Trade's Future*, N.Y. TIMES, Nov. 13, 1982, at 21, col. 5 (C. Michael Aho is deputy director of the Labor Department's Office of International Economic Affairs. Thomas O. Bayard is an economist there.).

172 *Excerpts from Ministerial Declaration at GATT Conference*, N.Y. TIMES, Nov. 30, 1982, at 34, col. 1.

173 *Id.*

174 N.Y. TIMES, Nov. 30, 1982, at 35, col. 1.

175 *Id.* at 29, col. 4.

176 *Id.* at 34, col. 1.

177 The editorial stance of the New York Times the day after the conclusion of the conference presents perhaps the most likely favorable verdict: "Anything is preferable to rearming for trade war. And by that sober standard, what happened in Geneva was a welcome, if weak, blow for peace." N.Y. TIMES, Nov. 30, 1982, at 26, col. 1.

C. A Suggested New Role for GATT

The clearest signal to emerge from Geneva is that states will continue to tamper with GATT rules when it suits their interests and that bilateral negotiations offer the only genuine prospect of a resolution to the United States/EEC agricultural trade dispute.[178] Indeed, while the future for GATT appears bleak, the chances of an amicable agreement between the United States and the EEC over agricultural trade have brightened. The delegates who procrastinated in Geneva are spending the early months of 1983 locked in intense bilateral negotiations.[179] In all likelihood, the two trading blocks will avert a trade war and produce a mutually satisfactory agreement. That agreement will probably involve a voluntary reduction in EEC farm exports in the same way as the EEC has voluntarily limited its steel exports to the United States[180] and Japan has curbed its automobile exports to the United States.[181]

In both those cases resolution emerged as the result of bilateral negotiations and involved a diminution of international free trade.[182] Political pressures dictated solutions which ignored the philosophical underpinnings of GATT. International free trade only makes sense in the context of a world of states wedded to domestic free enterprise. That world does not exist and GATT faces an uphill task in attempting to force free market conditions on a mixed-economy international marketplace. The reality of recession limits GATT's effectiveness. 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.[183]

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178 *See infra* notes 179-180 and accompanying text.

179 WALL ST. J., Jan. 5, 1983, at 10, col. 3 (midwest edition).

Rhetoric has also turned into action. In January 1983, the United States government subsidized the sale of one million-tonnes of wheat flour to Egypt, thereby breaking into a market that France has traditionally served. The EEC responded in February 1983 with the sale of over one million-tonnes of subsidized wheat to China, a traditional United States market. ECONOMIST, Feb. 26, 1983, at 40.

These events reveal again both the danger of trade war and the impotence of GATT. The stage is set for a major confrontation between the United States and the EEC. The result will be either trade war or a negotiated settlement—the role of GATT is unlikely to be significant.

180 *U.S., E.C. Reach Agreement on European Export Curbs, Complaints Withdrawn*, [Oct.-Mar.] INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) Vol. 7, No. 4, at 99 (Oct. 27, 1982).

181 *House Commerce Committee Opens Debate on Local Content with Approval Expected* [Apr.-Sept.] INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) No. 144, at 727 (Sept. 15, 1982).

182 *Id.*, *U.S., E.C. Reach Agreement on European Export Curbs, Complaints Withdrawn*, *supra* note 180.

183 The point has been put most aptly by the Common Market's president, Gaston Thorn. Speaking in Bruges, Belgium, Thorn stated:

The particular details of the United States/EEC dispute underscore GATT's shortcomings. The sheer size of the common agricultural policy decrees that a dismantling of trade barriers cannot be achieved overnight. The common agricultural policy accounts for sixty-six percent of total Common Market spending.[184] Eliminate the policy and the EEC disappears with it.[185]

It is futile to attempt to apportion blame between the United States and the EEC. As Claude Veillain, the EEC's Director-General of Agriculture, has noted, it is "almost impossible" to obtain a precise idea of the financial support governments provide to agriculture.[186] Government aid does not involve just direct budgetary support, "but all the direct and indirect transfers of resources to the farm sector."[187] Policies affecting land, production costs, direct and indirect taxes, and transfer costs all have an impact on agricultural incomes.[188]

The inability to define export subsidy further compounds the problem. Former GATT Director Olivier Long admitted prior to Tokyo Round that "because of the range and extent of measures that might be considered subsidies, it's been impossible to agree on precise definitions of criteria to be applied."[189] Despite ostensible agreement, Tokyo Round failed to provide clarity.[190] Its effort to distinguish export subsidies from domestic subsidies was unavailing.[191] If successful, it might reduce overall subsidies, yet many government stimuli would remain permissible and the problems of market distortion would not change appreciably. The effort to distinguish agriculture from industry and manufacturing creates its own definitional problems and has been

> At a time when the number of EEC jobless is approaching 11m, no government can afford to act in line with theoretical models of perfect competition and indulge in free trade at any price. What is important is to find, along with our trading partners, an acceptable balance between the advantages of free competition and the social and political constraints which can at times require protectionist measures.

Reprinted in ECONOMIST, Oct. 9, 1982, at 51.

184 ECONOMIST, Oct. 16, 1982, at 80.

185 *See generally* Joslin & Pearson, *Developments in the Common Agricultural Policy of the European Community, discussed in Agriculture Department Report Shows Shortcomings of High E.C. Subsidies*, [Apr.-Sept.] INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) No. 415, at 515-17 (July 13, 1982).

186 Address of Claude Veillain, University of Minnesota, *quoted in E.C. Official Talks Tough on Exports, Vows Battle Against U.S. Aggression*, [Apr.-Sept.] INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) No. 407, at 199 (May 11, 1982).

187 *Id.*

188 *Id.*

189 REPORT BY THE DIRECTOR-GENERAL OF GATT, *supra* note 18, at 54.

190 *See supra* notes 29-78 and accompanying text.

191 *Id.*

easy for the United States and the EEC to evade.[192]

Bilateral agreement compromises international free trade, but at least it avoids the dangers of piece-meal protectionism and trade war. Free trade remains a principle which is most attractive during periods of prosperity. Bilateral agreements, involving a degree of market management, provide perhaps the most practical means for states to weather recession.[193] Above all, they solve the problem of definition. GATT sought to define precisely which practices are permissible and which are not. It tried valiantly to provide a set of rules against which state actions could be judged. One of GATT's flaws is that the definitions have proved imprecise and the inconsistencies suggest that a narrow definition would similarly fail. By contrast, the problem of definition does not arise with bilateral negotiations. Each party devises its ideal scenario and, in the course of the negotiations, attempts to persuade the other side to accept that scheme. The final result is a compromise, in which each side permits the other to engage in certain policies regardless of whether GATT might deem them domestic or export subsidies.

GATT faces two options. It can persist in espousing the cause of free trade. If it follows that course, its exhortations will continue to fall on deaf ears. States will repeatedly evade the rules GATT has enunciated and the organization will become impotent. Alternatively, GATT can lower its sights and learn to live with political reality. GATT can play a valuable, constructive role in aiding states in their bilateral negotiations. It can act as a forum to allow states to marshall world opinion behind a particular policy and as a conduit to disseminate information to all states. While such a role might not comport with the gradiose visions of GATT as the standard-bearer of international free trade, it is preferable to irrelevance.

An illustration of the role GATT might perform is provided by an analysis of its participation in the Multi-Fiber Agreement (MFA).[194] The MFA is a multi-lateral agreement that seeks "the orderly and equi-

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192 *See supra* notes 34-78 and accompanying text.

193 *See supra* notes 182-183 and accompanying text.

194 For text of the MFA, see GATT, Arrangement Regarding International Trade in Textiles, TEX. NG/1, *done*, Geneva, Dec. 20, 1973, *reprinted in* 25 U.S.T. 1001, T.I.A.S. No. 7840, [hereinafter cited as MFA]. The MFA structure should not be blindly superimposed on the agricultural sector. The purpose of this reference to the MFA is to examine briefly an occasion when GATT, despite its faith in free trade, became heavily involved in a market management arrangement. The experience of the MFA has two lessons of importance to the present discussion. First, it shows the valuable administrative assistance GATT can offer to individual countries. Second, it reveals the pit-fall inherent in any effort to establish market management—namely, the tendency of such arrangements to become permanent.

table development of . . . trade [in textiles] and avoidance of disruptive effects in individual markets."[195] The agreement provides for a degree of market management and a reduction of free trade.[196] GATT supervises the arrangement seeking to minimize the diminution of free trade.[197]

The MFA created a Textiles Committee "within the framework of GATT."[198] The Committee's function is to prepare studies on the current state of world production and trade in textile products, to suggest measures to aid adjustment and to collect and disseminate statistical data on the industry.[199] The Textiles Committee must report annually to the GATT Council on the operation of the MFA.[200] Meanwhile, responsibility for the daily operation of the MFA belongs to a Textile Surveillance Body.[201] The MFA states that the body "may rely for technical assistance on the services of the GATT secretariat."[202]

The MFA supports the ideal of free trade, while accepting the political need to permit some market management to cushion the effects of economic recession.[203] A similar approach might enjoy success in the agricultural sector. Market management is acceptable if it is of limited duration and aimed solely at allowing the industry in question to adjust to changed economic circumstances. The danger is that short-term market management will become permanent cartelization. Free trade in textiles is an unlikely prospect and the MFA might be conveniently dismissed as cartelization under the name of GATT. Such a development must not be allowed to occur with agriculture.

IV. Conclusion

Three years have passed since GATT's attempt to foster agricultural free trade came into force. As the United States/EEC dispute indicates, the attempt has been met with seemingly insurmountable difficulties. The shortcomings of GATT mirror problems encountered in both early and contemporary efforts at international cooperation.[204] The fate of the GATT initiative demonstrates the difficulties of impos-

195 *Id.*, art. 1(2), at 1004.
196 *See infra* notes 198-203 and accompanying text.
197 *Id.*
198 *Id.*, art. 10(1), at 1012.
199 *Id.*, art. 10(2), at 1013.
200 *Id.*, art. 10(4), at 1013.
201 *Id.*, art. 11(1), at 1013.
202 *Id.*, art. 11(2), at 1013.
203 *Id.*, Preamble, at 1003-04.
204 The most obvious examples are the League of Nations and United Nations.

ing order on a world of unruly sovereign states and of promoting free trade during recession.

It is necessary for GATT to acknowledge the realities of an imperfect world. If it fails to do, it will atrophy and stand immobile while the individual states move toward economic and social disaster. During a recession, political pressures stimulate protectionism. An active, if less ambitious, GATT could play an important role in countering these pressures and aid the world in overcoming barriers to international free trade.

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