The Nontariff Trade Barrier Challenge: Development and Distortion in the Age of Interdependence

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INTRODUCTION

Since the time of Ricardo\(^1\) it has been recognized that the world's real income can be maximized only if free trade exists among nations. The principle of free trade places all nations in the most efficient production configuration, wherein each produces only those goods and services in which it has an efficiency advantage and trades for all other goods and services it desires.\(^2\) While political, social, and economic

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\(^1\) David Ricardo (1772-1823)—British economist who developed the Doctrine of Comparative Advantage to demonstrate the benefits which can be achieved through free trade in order to secure repeal of the British Corn Laws. For a brief overview of Ricardo's life and economic theory see R. HEILBRONER, THE WORLDLY PHILOSOPHERS, 73-101 (4th ed. 1972).

\(^2\) The free trade principle is based on the fact that there exists among nations a diversity of production conditions. This diversity of production conditions results from each nation possessing a unique blend of natural resources, capital goods, kinds of labor, and technical knowledge. If each nation makes optimal use of its productive factors, it is inevitable that each nation can produce certain goods and services more efficiently than other nations. Moreover, within each nation some goods and services can be produced more efficiently than others. For example, labor "rich" nations are more efficient than labor "poor" nations in producing such labor-intensive goods as textiles and shoes. Therefore, the world's level of real income is maximized to the extent
factors have prevented a universal free trade system from existing, the postwar era has brought significant progress toward liberalizing world trade. In Geneva a drama is unfolding, the outcome of which may determine the shape of international trade, economic and political patterns for the rest of this century. This drama will determine whether postwar progress toward liberalized trade will be continued, stymied or reversed.

The title of the Geneva drama is the Multilateral Trade Negotiations, the seventh round of trade negotiations held since 1947, when the General Agreement on Tariffs and Trade (GATT) was subscribed by the Contracting Parties. These current negotiations are the most important to be conducted by the Contracting Parties, because they are a continuation of the aborted Tokyo Round of 1973 which that each nation trades for goods which can be more efficiently produced abroad. This prescription for maximizing world income is known as Ricardo's Doctrine of Comparative Advantage.

An important corollary to the Doctrine of Comparative Advantage is that two nations can engage profitably in trade, even when one nation has an absolute advantage over the other in producing every item to be traded, if there is a difference between their relative efficiencies of production. This corollary can be illustrated by a hypothetical world economy consisting of two nations (A and B) and two products (food and cloth). Nation A produces one unit of food per one unit of production cost and one unit of cloth per two units of production cost. It costs Nation B three production units to produce one unit of food and four production units to produce one unit of cloth. Clearly, Nation A has an absolute efficiency advantage over Nation B with respect to producing both products. However, an examination of each nation's domestic production cost ratio reveals that Nation B has a relative advantage over Nation A in producing cloth. This is because it costs Nation B only 1.33 units of food to produce one unit of cloth, as compared to Nation A's cost of two units of food per unit of cloth. Under these circumstances the incomes of such nations can be maximized by Nation A producing food and importing cloth and Nation B producing cloth and importing food. If there are no trade distortions and negligible transportation costs, through free trade, Nation A's production cost per unit of cloth will be reduced from two units to 1.33 units of food and Nation B's production cost per unit of food will be reduced from .75 units to .5 units of cloth. For more technical explanations of how world income can be maximized by free trade, see R. Harrod, International Economics 9-52 (rev. ed. 1962) [hereinafter cited as Harrod Economics]; P. Kenen, International Economics 7-30 (2d ed. 1967) [hereinafter cited as Kenen Economics]; P. Samuelson, Economics: An Introductory Analysis 645-78 (8th ed. 1970) [hereinafter cited as Samuelson].


4. The Tokyo Round of 1973 was to be a major offensive against nontariff trade distortions. However, the United States was without negotiating authority, since all such authority granted under the Tariff Expansion Act of 1962 had expired in 1967. Rather than risk expending efforts to develop agreements concerning nontariff distortions, into
marked the beginning of the GATT initiatives to "reduce or eliminate nontariff measures, or, where this is not appropriate, to reduce or eliminate their trade restricting or distorting effects, and to bring such measures under more effective international discipline."  

Prior to the Tokyo Round, the primary emphasis of GATT negotiations had been the achievement of multilateral tariff reductions. Tariff reduction was a logical target because tariffs are easily identifiable trade barriers, generally are associated with national trade policies, and produce measurable trade effects. As a result of these negotiations, in particular the Kennedy Round (1963-67), the tariff rates of the major trading nations have fallen to moderately low levels.

In contrast with a tariff, "a nontariff trade distortion is any measure or policy that causes internationally traded goods or productive factors to be allocated in such a way as to reduce potential world income." This definition of nontariff trade barriers (NTB's) encompasses any government policy or measure other than tariff rates which produces effects on world trade. Examples of these government measures include regional development programs involving subsidies, embargoes on exports to fight inflation, and environmental programs which impose strict product standards. NTB's are difficult to identify, involve government programs for achieving social, economic and environmental goals, and produce effects on trade which are not susceptible to accurate measurement. As a consequence, negotiations concerning which the United States might not be able to join, the negotiators agreed to postpone the negotiations until all of the principals had received negotiation mandates from their governments. The Tokyo negotiators did succeed in establishing the Trade Negotiations Committee which, through its working groups, prepared the guidelines and agenda for the current multilateral trade negotiations. 

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7. As a result of the GATT resolutions, the "average most-favored-nation industrial tariff levels in major industrial countries are in the moderate order of 10 percent, probably well below half the levels prevailing at the beginning of the postwar period." E. PREEG, ECONOMIC BLOCS AND U.S. FOREIGN POLICY 14 (1974) [hereinafter cited as PREEG BLOCS].

8. Baldwin, Non-Tariff Distortions To International Trade, in 1 UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD 641 (Williams Commission ed. 1971) [hereinafter cited as Baldwin Non-Tariff Distortions].

9. 1 UNITED STATES INTERNATIONAL TRADE COMMISSION, REPORT ON TRADE BARRIERS 45 (1974) [hereinafter cited as 1 TRADE COMMISSION REPORT].

10. After the Kennedy Round, an inventory of NTB's was compiled under GATT auspices by having each member nation list the policies and measures of other member nations it felt imposed restrictions on world trade. The inventory when completed con-
NTB's raise such issues as (1) which government measures and policies should be treated as NTB's, (2) whether economic goals should have priority over other goals, (3) which criteria should be used to determine whether NTB reductions have resulted in equivalent benefits accruing to participating nations, and (4) to what degree national sovereignty must be sacrificed to supranational entities in order to achieve further trade liberalization.11

Furthermore, any change in the configuration of the worldwide structure of trade barriers leads to changes in the patterns of international trade and domestic income distributions. This requires negotiators to be sensitive to the problems of less-developed countries and to those investors, workers and communities closely connected with import-displaced industries if they are to succeed in controlling the use of NTB's. These latter problems raise the broad issue of the continuing conflict between economic efficiency and economic justice, and the specific issues of trade preferences for less-developed countries, market disruption safeguard mechanisms, and domestic adjustment programs.

Although the issues confronting the negotiators at the multilateral trade negotiations are complex, they should not be allowed to obscure the high economic stakes involved. For example, one source estimates that the cost of the United States' protective measures to its consumers is as high as $15 billion annually.12 The United States International Trade Commission estimates that current restraints on textiles and apparel cost American consumers $1 billion per year and that $37 billion would be saved over a fifteen-year period if all United States quantitative restrictions in place in 1972 were eliminated.18

At present, the Geneva drama is bogged down in bickering and unanswered proposals. Furthermore, the participants face legal restrictions in the form of GATT trade principles and the parameters of...
their negotiation mandates, political restrictions in the form of increased domestic protectionism and the pressing demands of the less-developed countries, and economic restrictions because of the slow worldwide recovery from the recession. It is in this context that the following policy recommendations, designed to reduce NTB's, are offered. These recommendations were developed by examining selected trade laws of the United States, trade principles of GATT, and specific NTB's in light of traditional arguments for protectionism and the current economic and political environment.

**CLASSIFYING NONTARIFF DISTORTIONS**

NTB's reduce the world's real income level by diverting productive resources from their most efficient uses. They erect obstacles to international trade which prevent countries from trading for those products which are more efficiently produced abroad, thereby forcing inefficient production at home. For simplicity, NTB's are classified in this article into four general categories of excluders, withholders, handicappers and promoters based on the type and severity of impact they have on world trade.

**Excluders**

Excluders are NTB's which are used by countries to destroy or render meaningless the comparative advantages imports have over domestic products. Excluders operate either by limiting the supply of imports the excluding country permits to enter its boundaries, or by raising the prices of imports to uncompetitive levels. When a country applies excluders to a particular product, domestic industries which produce these products are insulated from import competition.

The elimination of import competition within the excluding country causes the domestic price of the restricted product to rise, because domestic demand for the restricted product remains constant or increases while the domestic supply decreases. However, the price of the restricted product decreases within the remaining markets, since the supply of the restricted product within those markets is increased by the quantity which was produced to be sold within the excluding country.

16. *See* HARROD ECONOMICS, *supra* note 2, at 31-32, 44-49; MALMGRN PEACEKEEP-
The use of excluders also causes misallocation of the world's productive factors. Imports enjoy comparative advantages over domestic products because foreign producers are more efficient than domestic producers. The elimination of import competition shifts domestic sales of the restricted product from efficient foreign producers to inefficient domestic producers. As a result of this sales shift, a greater amount of the world's productive resources must be expended if worldwide production of the restricted product is to remain at the level which existed prior to the excluding country's implementation of excluders. 17

Quantitative restrictions and similar limitations on imports 18 are the classic excluders. Other NTB's which may fall into this category include nontariff charges on imports, 19 government procurement policies that give preferences to domestic products, health and product safety standards, 20 and customs procedures. 21

**Withholders**

Withholders are NTB's which prevent the exportation of domestic products either directly, by imposing quantitative restrictions on the amount of exports, or indirectly, by raising the prices of the exports to levels which render them uncompetitive in the world market. Included within this category of NTB's are export licensing requirements, export quotas, embargoes, export restraints, exchange and other monetary controls, restrictive business policies, discriminatory bilateral agreements, "border" taxes, and export taxes and fees.

The application of withholders to a product causes that product's domestic price to decrease and its world price to increase. These price

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17 Inglis, supra note 11, at 83, 122-31; Samuelson, supra note 2, at 657; Baldwin Non-Tariff Distortions, supra note 8, at 644.
18 Id.
19 Quantitative restrictions and similar limitations on imports include such practices as licensing requirements, quotas, embargoes, exchange and other monetary or financial controls, minimum/maximum price regulations, local content and mixing requirements, restrictive business requirements, discriminatory bilateral agreements, and discriminatory sourcing. 4 TRADE COMMISSION REPORT, supra note 13, at 3.
20 Nontariff charges on imports include "border" taxes, port and statistical taxes, use and excise taxes, registration fees, government controlled insurance, film taxes, commodity taxes, sales taxes, prior import deposits, variable levies, consular fees, and stamp taxes. Id.
21 Health and product safety standards include pharmaceutical standards, product content requirements, processing standards, industrial standards, requirements on weights and measures, labeling and container requirements, marking requirements, packaging requirements, and trademark problems. Id.
22 Customs procedures include antidumping practices, customs valuation, consular formalities, documentation requirements, classification of merchandise, regulations on samples, returned goods and reexports, and countervailing levies. Id.
changes are the result of a relatively constant demand for the product within and without the withholding country, coupled with an increase in the domestic supply and a decrease in foreign supply.\textsuperscript{22}

Withholders also create misallocations of the world’s productive resources. In the long run, domestic producers in the withholding country reduce their production of the restricted product to conform to the smaller size of their markets. During the same period, foreign producers increase their output of the restricted product to fill the worldwide supply gap created by the discontinuation of exports from the withholding country. Thus, in the withholding country productive resources are shifted away from an efficient industry, and the remaining countries’ productive resources are shifted to inefficient industries.\textsuperscript{23}

The degree to which withholders dislocate the world’s economy depends upon the nature of the products withheld and the scope of the export restrictions on those products. The use of withholders produces a minimal impact on world trade if the product is one for which substitutes or other sources of supply are readily available. On the other hand, the massive recession that followed in the wake of the worldwide oil embargo of the Organization of Petroleum Exporting Countries (OPEC) illustrates the disastrous economic dislocations which may result from the use of withholders when the product is vital to all economic enterprises, has no effective substitutes, and is withheld from the world market by all or most of its suppliers.\textsuperscript{24}

\textsuperscript{22} Walter, Barriers to International Competition: The Nature of Nontariff Distortions, in THE UNITED STATES AND INTERNATIONAL MARKETS—COMMERCIAL POLICY OPTIONS IN AN AGE OF CONTROLS 63, 71 (R. Hawkins & I. Walter eds. 1972) [hereinafter cited as Walter Nature of NTB’s]. See R. Baldwin, Nontariff Distortions of International Trade 30 n.2 (1970) [hereinafter cited as Baldwin NTB’s]; Prieg Blocs, supra note 7, at 76, 155.

\textsuperscript{23} See note 16 supra.

\textsuperscript{24} Walter Nature of NTB’s, supra note 22. See Amuzegar, The North-South Dialogue: From Conflict to Compromise, 54 FOREIGN AFFAIRS 547, 561 & n.10 (1976) [hereinafter cited as North-South Dialogue]. A principal negotiating objective of the United States during the current GATT negotiations is to insure against other countries applying withholders to prevent the United States from obtaining “fair and equitable access at reasonable prices to supplies of articles of commerce which are important to [its] economic requirements . . . and for which [it] does not have, or cannot easily develop, the necessary domestic productive capacity to supply its requirements.” Trade Act of 1974 § 108, 19 U.S.C. § 2118(a) (Supp. IV 1974). The United States’ concern over access to supplies is also reflected in its intent to deny the benefits of its Generalized System of Preferences to any developing country which belongs to the Organization of Petroleum Exporting Countries, or to any other organization of which the United States is not a member that takes measures to deny the United States access to vital supplies. Trade Act of 1974, § 502(b)(2), (e), 19 U.S.C. § 2462(b)(2), (e) (Supp. IV 1974).
Handicappers

Handicappers are NTB’s which partially destroy the advantages products enjoy over their competitors by increasing the sales prices of the handicapped products to a point near that at which they are totally uncompetitive. This category of NTB’s includes all NTB’s mentioned as possible excluders or withholders which cause increases in the prices of internationally traded goods. By definition, handicappers do not restrict international trade as greatly as excluders and withholders.25 Handicappers do not create absolute ceilings on the entry of products into international markets; therefore, producers can reduce the negative impact handicappers have on international sales by becoming more efficient.26 Unlike excluders and withholders, handicappers also generate revenues for the countries which use them.27

Promoters

Promoters are actions or policies that allow producers to offer their products in international markets on better terms than would be possible if normal market conditions prevailed. Into this category of NTB’s falls government assumption of all or part of a domestic producer’s capital, production or marketing expenses. Such government actions include export and domestic subsidies, exchange rate preferences for exports, remission of direct taxes, remission of indirect taxes in excess of those assessed on the promoted product, government delivery of goods below the prevailing world delivery price, government sponsored insurance with below-average premiums, guaranteed credit at less than market rates, government assumption of the cost of acquiring credit, government financing of promotional schemes, and tax incentives designed to encourage exportation.28 Producers sometimes engage in international price discrimination, a promoter commonly referred to as dumping, by charging a high price for a product in a market in which

25. In fact, handicappers may not reduce the volume of trade of a product for which the demand is relatively inelastic. See Harrod Economics, supra note 2, at 31-32.
26. This conclusion is based on material contrasting the trade effects of tariffs and quantitative restrictions. This material should also be applicable to handicappers, since, like tariffs, they affect trade through the price mechanism. See K. Dam, The GATT Law and International Economic Organization 148-49 (1970) [hereinafter cited as DAM GATT].
27. Baldwin NTB’s, supra note 22, at 33; H. Malmgren, Trade for Development 35 (1971) [hereinafter cited as Malmgren Trade]. See Samuelson, supra note 2, at 671, 675; Baldwin Non-Tariff Distortions, supra note 8, at 657.
28. See Golt Guide, supra note 5, at 34; Baldwin Non-Tariff Distortions, supra note 11, at 348.
they have a competitive advantage to offset the losses they incur by charging a lower price for the same product in a market in which they are seeking entry or a stronger position. 29

Promoters misallocate productive resources to the extent that they enable inefficient producers to capture business which would have gone to more efficient producers under normal market conditions. This is particularly true in cases where promoters are all that prevent an inefficient producer from going out of business. 30 However, there are instances when promoters allow producers to overcome short-run problems. These instances are cases where producers require government aid in order to purchase capital equipment needed for modernization 81 or to finance foreign promotion of products which have a comparative advantage over domestic products, but suffer from low consumer familiarity. 32 Whatever their effects may be on the allocation of productive resources, promoters increase international price competition, thereby increasing the incentive for producers to become more efficient. 33 Consequently, those who consume the promoted products are provided with a greater range of choices at or below the previously prevailing market prices.

ILLUSTRATIVE NTB'S

The use of NTB's creates a myriad of international trade problems. Since the list of NTB's is limitless, the depth and diversity of the trade problems can best be illustrated by focusing upon three prom-

29. BALDWIN NTB's, supra note 22, at 141.
30. Id. at 48. See also Baldwin Non-Tariff Distortions, supra note 8, at 657-58; Malmgren & Marks Negotiating, supra note 11, at 347.
31. For example, governments often use nontariff barriers to establish and protect new industries which they hope will displace imports and eventually become competitive in international markets. See HARROD ECONOMICS, supra note 2, at 44-48; KENEN ECONOMICS, supra note 2, at 28-29; SAMUELSON, supra note 2, at 677-78. Most developed countries would prefer that developing countries would utilize subsidies to aid their infant industries rather than impose restrictions on imports. G. VERBIT, TRADE AGREEMENTS FOR DEVELOPING COUNTRIES, 157 (1969) [hereinafter cited as VERBIT TRADE AGREEMENTS].
32. It has been noted that marketing competition is assuming a greater importance in international trade than price competition. See S. WEINTRAUB, TRADE PREFERENCES FOR LESS-DEVELOPED COUNTRIES: AN ANALYSIS OF UNITED STATES POLICY 120 (1967) [hereinafter cited as WEINTRAUB PREFERENCES]. Robert Baldwin has suggested that governments should bear the losses of developing new markets for industries which should become competitive in the world market. Baldwin Non-Tariff Distortions, supra note 8, at 657.
33. See Malmgren & Marks Negotiating, supra note 11, at 347; Comment, The Anti-Dumping Act of 1921: Primary Lead Metal and the Injury Standard, 10 TEX. INT'L L.J. 357, 364 (1975) [hereinafter cited as Antidumping Comment].
inent NTB’s: the import quota, buy-national policies and border tax adjustments.

**Import Quota**

The import quota belongs to the category of NTB’s which is most disruptive of trade. This category includes all excluders which impose absolute ceilings on the quantity of the restricted product allowed to enter the domestic market from foreign sources. Such restrictions prevent the foreign supplier from acquiring an increased share of the domestic market through greater production efficiency and prevent the domestic consumer from choosing to purchase imports over their cheaper domestic counterparts.\(^3\)\(^4\)

The import quota may be administered on a global or an allocated basis. Global quotas fix the permissible quantity of imports without reference to the sources of supply. Allocated quotas designate permitted suppliers and allot specific shares of the total quota to each.\(^3\)\(^5\) In theory, global quotas are non-discriminatory in the sense that only commercial considerations such as price and quality should govern which suppliers receive which shares of the total quota amount.\(^3\)\(^6\) In practice, global quotas make it difficult for each supplier to estimate what share of the domestic market it will be able to capture. The resulting uncer-

\(34\). Restrictions on import items increase demand and raise the prices which those with permission to import are able to charge. BALDWIN NTB’S, supra note 22, at 32-33; J. JACKSON, WORLD TRADE AND THE LAW OF GATT § 13.1, at 305 (1969) [hereinafter cited as JACKSON WORLD TRADE].

\(35\). VERBIT TRADE AGREEMENTS, supra note 31, at 68-69. See Wall, Opportunities for Developing Countries, in TRADE STRATEGY FOR RICH AND POOR NATIONS 25, 35 (H. Johnson ed. 1971) [hereinafter cited as Wall Opportunities].

\(36\). The GATT requires that quotas be applied on a non-discriminatory basis as follows:

No prohibition or restriction shall be applied by any contracting party on the importation of any product . . . of any other contracting party . . . unless the importation of the like product of all third countries . . . is similarly prohibited or restricted.

GATT, art. XIII, para. 1. This non-discrimination requirement is fulfilled when the following rule is complied with:

In applying import restrictions to any product, contracting parties shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions . . . .

GATT, art. XIII, para. 2. Furthermore, GATT appears to favor global quotas as the import restriction best suited for achieving the desired trade distribution since:

No mention was made of “commercial considerations” as a rule for the allocation of quotas because it was considered that its application by governmental authorities might not always be practicable . . . .

GATT, annex I, ad art. XIII, para. 2(d) (emphasis added). See JACKSON WORLD TRADE, supra note 34, § 13.5 at 323, 327.
tainty causes a surplus of imports to develop within the domestic market early in the quota period, as each supplier rushes its goods to port in an attempt to maximize its sales before the quota is exhausted.\textsuperscript{37} This race to market favors suppliers who are first to market, regardless of whether they are the most efficient producers of the restricted product.\textsuperscript{38} As the quota period ends, shortages may develop as suppliers, fearful of having their goods excluded at the port due to quota exhaustion, reduce shipments to the importing country.\textsuperscript{39} While the use of allocated quotas relieves the suppliers' market share uncertainty, it also raises the issue of how the quota shares should be allotted. Quotas which are not allotted on the basis of past market shares may be condemned as discriminatory.\textsuperscript{40} On the other hand, quotas allotted solely on the basis of past market shares prevent new and increasingly more efficient suppliers from receiving the share of the market they would have captured in the absence of quotas.\textsuperscript{41}

\textit{Buy-National Government Procurement Policies}

All nations exercise buy-national policies with respect to the purchase of goods for governmental use.\textsuperscript{42} Such discriminatory policies

\textsuperscript{37} JACKSON WORLD TRADE, supra note 34; VERBIT TRADE AGREEMENTS, supra note 31, at 68.
\textsuperscript{38} JACKSON WORLD TRADE, supra note 34, at 323.
\textsuperscript{39} See VERBIT TRADE AGREEMENTS, supra note 31, at 68.
\textsuperscript{40} The GATT rules for allocating quotas among suppliers state a preference for the importing country and its suppliers attempting to reach an agreement as to the quota's allocation. If such an agreement cannot be reached, the importing country is to allot quota shares among the suppliers on the basis of their historical market shares, giving appropriate consideration for any special factors in the market which affect the trade in the restricted product. GATT, art. XIII, para. 2(d).
\textsuperscript{41} JACKSON WORLD TRADE, supra note 34, at 324; VERBIT TRADE AGREEMENTS, supra note 31, at 69. The Contracting Parties dealt with this problem by drafting an interpretative note to explain the meaning of the \textit{special factors} requirement in the GATT quota allocation rules, as follows:

The term "special factors" includes changes in relative productive efficiency as between domestic and foreign producers, or as between different foreign producers, but not changes artificially brought about by means not permitted under the Agreement.

GATT, annex I, ad art. XIII, para. 4, incorporating by reference ad art. XI, para. 2. See also MALMGREN PEACEKEEPING, supra note 11, at 149-50 which suggests that allocation formulas also take into account the annual growth of the importing country's economy.

\textsuperscript{42} Discriminatory government procurement systems are approved by GATT. GATT art. III, para. 8(a) specially exempts government procurement policies from the GATT requirement that nations not apply their laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products ... to imported or domestic products so as to afford protection to domestic production. See GATT, art. III, para. 1. GATT, art. XVII, para. 2 exempts government procure-
restrict international trade because each government is its nation's largest single consumer. Buy-national policies are especially restrictive when they are operated in a manner which negates the comparative advantages imports have over domestic products.

The Buy-American Act of 1933 constitutes the backbone of the United States' buy-national program. On its face, this act grants domestic suppliers an absolute preference over foreign suppliers with respect to government purchases, except in cases where such a preference would be unreasonably expensive or against the public interest. However, the procurement regulations established for the administration of the Buy-American Act state that the purchase of domestic goods is unreasonable and inconsistent with the public interest in cases where the low domestic bid exceeds the low foreign bid by six percent (twelve percent if the low domestic bid is from a small business concern or a small business concern).

The GATT requirement that state trading enterprises are to be operated "in a manner consistent with the general principles of non-discriminatory treatment prescribed . . . [by GATT] for governmental measures affecting imports or exports by private traders . . . ." GATT, art. XVII, para. 1(a). Government procurers need not "make any . . . purchases or sales solely in accordance with commercial considerations . . . ." GATT, art. XVII, para. 1(b). Within some nations, subnational governments also practice discriminatory procurement. BALDWIN NTB's, supra note 22, at 68 & n.16.

Within the United States some state and local governments have discriminatory procurement policies. Id. at 68. However, such subnational procurement policies have been held invalid by every court which has ruled on the question of their legality. Malmgren & Marks Negotiating, supra note 11, at 400. In Bethlehem Steel Corp. v. Board of Comm'rs, 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 (1969), a California Buy-American statute was invalidated on the grounds that it was unconstitutional and that the power of the federal government in foreign affairs is inherent, exclusive, and plenary.

It has been estimated that 25 to 40% of most nations' gross national products pass through their public budgets. DAM GATT, supra note 26, at 199. In the United States, government purchases represent approximately 21% of the gross national product. See 4 TRADE COMMISSION REPORT, supra note 13, at 56.

The Act provides:

1. The department or independent establishment concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, shall be acquired for public use. . . .

2. The Act requires that contractors, subcontractors, materialmen, or suppliers shall use only articles, materials and supplies of United States origin, as determined in accordance with Section 10a of the Buy-American Act, in performing contracts for the construction, alteration, or repair of a public building or public work in the United States.

See Federal Procurement Regulations, 41 C.F.R. § 1-1.701 (1976) for the definition of a small business concern.
labor surplus area concern, 47 or if the award exceeds $100,000 and the twelve percent figure would allow a domestic firm to receive it, which otherwise would not be so. 48 If this Buy-American Act price handicap were the only restriction placed on imports, the United States’ procurement practices would have a small impact on foreign trade. Department heads are granted broad discretion in administering the Act, 49 and have increased the import price handicap up to fifty percent during a period of balance of payments difficulties. 50 Other restrictions are imposed upon imports by procurement policies falling outside the scope of the Buy-American Act. 51 The combined force of these procurement restrictions produces a bias against imports equivalent to that which would result from a forty-two percent tariff duty. 52

Bidding practices are the chief sources of import exclusion within government procurement systems. 53 There are three widely recognized forms of bidding practices; the public tender, the selective tender, and the single tender. 54 The public tenders are the least discriminatory, since they are invitations to the public-at-large to submit bids. 55 Conversely, under selective and single tenders, low-cost suppliers may

47. See Federal Procurement Regulations, 41 C.F.R. § 1-1.801 (1976) for the definition of a labor surplus area concern.
49. Federal Procurement Regulations, 41 C.F.R. § 1-6.104-4(d) (1976) specifies that “Deviations from the requirements of . . . § 1-6.104-4 may be authorized by the head of the agency in accordance with the Buy-American Act and Executive Order No. 10582, as amended.”
50. See BALDWIN NTB’s, supra note 22, at 67; DAM, GATT, supra note 26, at 202-03.
52. 4 TRADE COMMISSION REPORT, supra note 13, at 59. The United States’ discriminatory government procurement policies also inflict heavy costs on the taxpayers. In 1954, it was estimated that each year the Buy-American Act cost the United States government $100,000,000 in higher prices and another $100,000,000 in foregone customs revenues. See DAM GATT, supra note 26, at 199 n.1.
53. See 4 TRADE COMMISSION REPORT, supra note 13, at 57.
54. Id.
55. See BALDWIN NTB’s, supra note 22, at 59-60.
be eliminated from the bidding process in the discretion of the purchaser.\textsuperscript{56} Unfortunately for world trade, the selective and single tender systems are more prevalently used for government procurements.\textsuperscript{57} Even when the public tender system is employed, discrimination against imports can arise if the notice of the intent to purchase gives inadequate information from which to prepare a bid, or is timed so close to the final bid submission date that foreign suppliers do not have adequate time within which to prepare a proper bid.\textsuperscript{58}

\textit{Border Tax Adjustments}

Any tax which is shifted forward onto consumers raises the price of the taxed product, reducing its competitiveness in international markets. Since every country has an internal taxing system, internationally traded goods face potentially crippling double taxation from both the importing and the exporting countries. The method of avoidance of this double tax is a subject of considerable disagreement. A major dispute concerns the question of which taxes are shifted forward and are therefore reflected in the taxed article's price. Historically, economists have believed that indirect taxes are shifted forward and that direct taxes are borne completely by the producer or are shifted backward to be borne by labor or capital.\textsuperscript{59} This economic belief is the underlying rationale behind GATT rules which allow indirect but not direct taxes to be adjusted.\textsuperscript{60} GATT's unequal treatment of direct and indirect taxes is criticized by those countries, especially the United States, which rely heavily on direct taxes to generate government reve-

\textsuperscript{56} Id., at 60-61.

\textsuperscript{57} Id. For a brief summary of the procurement policies of each major trading nation, see Comment, \textit{The Buy-American Act: Examination, Analysis, and Comparisons}, 64 MIL. L. REV. 101, 141-46 (1974).

\textsuperscript{58} See BALDWIN NTB'S, supra note 22, at 61-63.

\textsuperscript{59} Indirect taxes are those applied to the output of productive processes such as sales taxes, excise taxes, and value added taxes. Direct taxes are applied directly to income such as corporate income taxes and profits taxes. See DAM GATT, supra note 26, at 214-15; JACKSON WORLD TRADE, supra note 34, § 12.7, at 301 n.26; Malmgren & Marks Negotiating, supra note 11, at 351.

\textsuperscript{60} The relevant GATT rules are art. III, para. 2, requiring that imports and like domestic products receive equal tax treatment in the importing country; art. II, para. 2(a) permitting importing countries to impose upon imports the same tax they impose upon like domestic products; and art. VI, para. 4, which provides that antidumping or countervailing duties cannot be applied to imports from countries which exempt their exports from the taxes applied to like products sold in their domestic markets. Since these rules uniformly refer to the taxing of products, they have been interpreted as applying only to indirect taxes. See JACKSON WORLD TRADE, supra note 34, § 12.7, at 285, 297.
These countries point to more recent studies which indicate that while there may not be a connection between direct taxes and consumer prices, it is practically certain that indirect taxes are not completely shifted forward. To the extent that direct taxes are shifted forward and indirect taxes are not, the present GATT rules discriminate against the countries which make heavy use of direct taxes.

Another troublesome border adjustment problem is how to calculate the amount of tax to be imposed on imports and removed from exports. This problem arises because, to the extent that tax adjustments are overestimated, imported goods are handicapped and exported goods are promoted. The calculations problem is most apparent in countries which have cascade-type turnover taxes. Turnover taxes are those levied on the total value of a product at each transaction the product passes through, from its initial production stage until the final retail stage. Thus, the tax burden a specific item bears depends on the degree to which its manufacturer is vertically integrated, which may vary widely from manufacturer to manufacturer.

Calculation problems also result when countries attempt to include as a part of the tax burden borne by end-products the indirect taxes assessed on capital equipment and other items expended in producing the end-products. Obviously, such calculations problems make it difficult for a country to determine, with any degree of accuracy, the tax rate it applies to like domestic products so that adjustments can be made in accordance with GATT rules.

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61. The United States is sufficiently disturbed about the bias it feels current GATT rules impose upon direct tax countries that the Trade Act of 1974 specifically provides the negotiating authority to the President to seek, "the revision of GATT articles with respect to the treatment of border adjustments for internal taxes to redress the disadvantage to countries relying primarily on direct rather than indirect taxes for revenue needs" (emphasis added). Trade Act of 1974, § 121(a)(5), 19 U.S.C. § 2131(a)(5) (Supp. IV 1974).

62. See DAM GATT, supra note 26, at 214-16. Actually, empirical data on the question of which direction a particular tax shifts is fairly inconclusive. JACKSON WORLD TRADE, supra note 34, § 12.7, at 301; 5 UNITED STATES INTERNATIONAL TRADE COMMISSION, REPORT ON TRADE BARRIERS 42 (1974) [hereinafter cited as 5 TRADE COMMISSION REPORT]. The available empirical data indicate that if shifting occurs, the degree of the shift depends upon the demand for the product, the actions of monetary and fiscal authorities, the stage of the business cycle, the degree to which producers are oligopolistic, etc. Id.

63. Id.

64. See DAM GATT, supra note 26, at 212.


66. See DAM GATT, supra note 26, at 212.

67. These include such taxes as sales taxes on stationery, motor vehicle license levies, and taxes on fuel sources. Supra note 65, at 138.
rules. This leads to the use of arbitrary averaging procedures for estimating assessed taxes which, in turn, generates criticism that the averaging procedures subsidize exports and handicap imports. 68

Relieving internationally traded goods from double taxation requires agreement among trading partners as to whether such goods should be relieved of the taxes of the importing country (origin principle) or the exporting country (destination principle). Under the origin principle, there are no border adjustments, so the adjustment problems previously discussed do not exist. 69 Eliminating border adjustments disputes should provide a strong incentive for the trading nations to embrace the origin principle, but most have not done so because of the differences between the origin and destination principles in their effects on international trade. 70 Under the origin principle, each nation applies its tax structure only to the products of its domestic producers. 71 Imports bear only the tax burdens of the country from which they are exported. 72 As a consequence, any change a nation makes in its tax rates applies only to the prices of domestically produced products. 73 Domestic businessmen and workers oppose the origin principle because tax increases raise the prices of domestically produced products above the prices of similar foreign products, thereby transferring business and jobs from domestic industries to their foreign competitors. 74 Furthermore, nations generally apply selective taxes on certain industries as a means of controlling domestic consumption patterns, 75 or to raise extra revenues. 76 Under the origin principle, a nation’s selective tax policies are rendered ineffective if other countries apply lower tax rates to the targeted products, and the relative efficiencies between domestic producers and foreign producers are approximately equal. 77

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68. See DAM GATT, supra note 26, at 212.
69. Liesner Harmonization, supra note 65, at 136-37. The elimination of border adjustments also eliminates the administrative delays associated with the tax frontiers which must be maintained to make border adjustments effective. Id.
70. Id. at 133-34. Thus, GATT contains rules permitting the border adjustments required by the destination principle. See note 60 supra.
71. This is so regardless of whether the domestic products are described for domestic or international markets. BALDWIN NTB’s, supra note 22, at 88.
72. Id.
73. Id. at 91, 101-02.
74. However, it must be remembered that if the tax rates are those of general indirect taxes (i.e., those applying across the board to all product lines), the initial shift in trade balances and patterns will be offset by economic forces such as flexible wages and currency exchange rates. See Id. at 91-92; 5 TRADE COMMISSION REPORT, supra note 62, at 56.
75. Liesner Harmonization, supra note 65, at 135.
76. See BALDWIN NTB’s, supra note 22, at 103.
77. Liesner Harmonization, supra note 65, at 135.
In contrast, under the destination principle, a nation's tax rates do not affect the foreign competitiveness of its products, since such taxes apply equally to the nation's domestic products, and their foreign competitors within the domestic markets, and do not apply at all to the nation's exports.\(^7\)\(^8\) Thus, the destination principle, unlike the origin principle, is consistent with free trade because it insures that within each nation's markets the differences between the prices of imports and domestic products are attributable only to efficiency differences among producers.\(^7\)\(^9\)

**WHY TRADE DISTORTIONS EXIST**

Notwithstanding the negative impacts NTB's have on international trade and the world's real income level, each nation has contributed to the creation of the present labyrinth of NTB's. Since the end of the Kennedy Round, NTB's have become increasingly important in terms of their use and the attention they receive in international trading circles. The rising prominence of NTB's is, in part, due to the decline of tariff barriers,\(^8\)\(^0\) but it is primarily attributable to the rising tide of protectionism engendered by recent international economic crises,\(^8\)\(^1\) and the fact that governments are becoming more active in managing the social and economic affairs of their countries.\(^8\)\(^2\) As a consequence, before the trade practices of any country are attacked it is important that negotiators thoroughly understand the purposes served by the target country's trade distortions.

**Political Expediency**

NTB's are often the most politically expedient means of solving governmental problems. A prime example is the almost universal use of NTB's to correct balance of payments disequilibriums.\(^8\)\(^3\) NTB's

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\(^7\) Id. at 133.
\(^8\) Id.
\(^8\) See Golt Guide, supra note 5, at 3; Bergsten Trade War, supra note 14.
\(^8\) See OECD Policy, supra note 80; Malmgren & Marks Negotiating, supra note 11, at 328.
\(^8\) Recent examples of trading nations using NTB's to alleviate balance of payments difficulties include France's general imposition of import quotas in 1968, the United Kingdom's use of prior import deposits from 1967 through 1969, and the United States' import duty surcharge of 1971. Hawkins & Walter, Trends in International Commercial Policy—Implications for the United States, in The United States and Interna-
correct balance of payments problems by restricting the international trade of products from surplus countries and promoting the international trade of products from deficit countries. Unfortunately, this solution reduces world income levels to the extent that the comparative advantages enjoyed by products of surplus countries are destroyed. Less trade-restrictive balance of payments solutions include domestic economic policies which are appropriate to each nation's balance of payments condition, and exchange rate adjustments to insure that the value of each country's currency accurately reflects its true international buying power. However, each of the foregoing balance of payments solutions presents certain disadvantages to the government considering using them. Within countries experiencing business stagnation and high levels of unemployment, it is politically impossible to maintain restrictions on economic growth for extended periods of time. Balance of payments adjustments are usually considered admissions of governmental failure and can result in violent shifts in the adjusting country's pattern of income distribution. Additionally, constantly adjusting exchange rates make it difficult for international trade to be conducted with any degree of certainty as to the values of the transactions being made. In contrast, by using NTB's as balance of payments controls, a country confines income distribution shifts to discrete sectors of the

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1976] economy, avoids politically embarrassing exchange rate adjustments, and gains some flexibility in pursuing policies of economic growth. In view of this political context, it is understandable that the use of quantitative restrictions for balance of payments purposes is a major exception to GATT's general ban on quantitative restrictions.

Nations often choose to control domestic inflation by imposing export controls on economically important products, such as food and raw materials, instead of resorting to unpopular deflationary measures, such as raising interest rates. Such action allows a nation to reduce its inflation without depressing its entire economy by exporting its inflation to its trading partners. GATT indirectly approves of the use of

90. See PREEG BLOCS, supra note 7, at 27; VERBIT TRADE AGREEMENTS, supra note 31, at 84, 92.

91. This fact is given explicit recognition in the GATT balance of payment rules which provide that as a result of domestic policies directed towards the achievement and maintenance of full and productive employment or towards the development of economic resources, a contracting party may experience a high level of demand for imports involving a threat to its monetary reserves . . . . Accordingly, a contracting party . . . shall not be required to withdraw or modify restrictions on the ground that a change in those policies would render unnecessary restrictions which it is applying under this Article (emphasis added).

GATT, art. XII, para. 3(d).

92. The balance of payments exception to GATT's ban on the use of quantitative restrictions permits nations to impose import restrictions in order to safeguard their external finances and balances of payments. GATT, art. XII, para. 1. This exception is not unqualified, since import restrictions may not exceed those necessary to prevent a serious decline in monetary reserves or achieve a reasonable increase in monetary reserves if they are at a very low level. GATT, art. XII, para. 2(a). Less-developed countries having economies which can only support low standards of living and are in the early stages of development are subject to somewhat less strict qualifications on their use of import restrictions for balance of payments purposes. These less-developed countries may impose import restrictions to prevent a threat, rather than an imminent threat, of a decline in their monetary reserves, (compare GATT, art. XII, para. 2(a)(i) with GATT, art. XVIII, para. 9(a)) and to achieve a reasonable increase in inadequate, as opposed to very low level, monetary reserves (compare GATT, art. XII, para. 2(a)(ii) with GATT, art. XVIII, para. 9(b)). All balance of payments import restrictions are to be applied on a nondiscriminatory basis, GATT, art. XIII (See discussion at note 36 supra), unless they are used in lieu of restrictions on international payments and transfers authorized by the Articles of Agreement of the International Monetary Fund (IMF) or a special exchange agreement between the Contracting Parties at GATT and a contracting party not a member of the IMF. GATT, art. XIV, para. 1. The IMF is to be consulted on trade matters involving monetary reserves, balances of payments, or foreign exchange arrangements, GATT, art. XV, para. 1 & 2, and the contracting parties are bound by IMF findings of fact and IMF determinations as to what constitutes a serious decline in monetary reserves, a very low level of monetary reserves, inadequate monetary reserves, a reasonable increase in monetary reserves, etc. GATT, art. XV, para. 2.

93. See PREEG BLOCS, supra note 7, at 152.

94. Within the nation's domestic economy, only the sector producing the restricted product is adversely affected. Inflation is exported because export controls decrease the international supply of the restricted product, thereby raising its international price. See note 22 supra.
export controls for purposes of controlling inflation in rules that broadly state the rights of nations to use export controls to accumulate adequate supplies of economically important resources. One rule permits the use of export controls to prevent the export of materials having domestic prices held below their world prices as a part of a government's general price stabilization plan.95 Another rule flatly announces the right of nations to impose controls to acquire or distribute products in general or local short supply, as long as the rights of others to an equitable share of such products are cared for.96 Although the language of this rule is quite broad, it only applies to instances where shortages or surpluses are created by war or natural catastrophe.97 The most important of these rules is a major exception to GATT's general ban on the use of quantitative restrictions. It condones the temporary use of export restrictions "to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party."98 What constitutes critical shortages or essential products are questions open to subjective interpretation, but generally a critical shortage is present when an item's price rises considerably because of a rise in prices abroad, and essential products are exhaustible natural resources.99 In this age of diminishing resources, it is unfortunate these GATT rules on export restrictions are so vague and subject to varying interpretations. It is particularly unfortunate that the short-supply exception to the ban on quantitative restrictions is not qualified by a requirement that products in short supply be distributed equitably among all nations. Supply restraints on essential resources can produce severe dislocations in the world economy, as the aftermath of the OPEC countries' oil embargo so graphically demonstrated. Under these circumstances, it is understandable that the United States has enacted contradictory laws which, on one hand, declare its right to impose controls on products in short supply,100 and, on the other, reserve its right to retaliate against nations

95. GATT, art. XX, para. (i). See JACKSON WORLD TRADE, supra note 34, § 19.2, at 504-06.
96. GATT, art. XX, para. (j).
97. See JACKSON WORLD TRADE, supra note 34, § 28.3.
98. GATT, art. XI, para. 2(a). The United States took advantage of this rule in 1973 by imposing export controls on most food products. See PREEO BLOCS, supra note 7, at 155 (emphasis added).
99. See JACKSON WORLD TRADE, supra note 34, § 13.4, at 316-17.
100. The Export Administration Amendments of 1974, § 2, 50 App. U.S.C. § 2402 (2) (Supp. IV 1974), give the United States the right "to use export controls . . . to the extent necessary to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand . . ." This section amended the Export Administration Act of 1969, § 5(2), 50 App. U.S.C.
it feels unfairly deny the United States access to such products.\(^{101}\)

**Protectionism**

Although free trade suffers from political expediency, it suffers more because of the policies of protectionism. In a free trade system, trading patterns are not static over time, since adjustments are made to accommodate the shifts in comparative advantages among nations.\(^{102}\) Shifts in international trading patterns produce shifts in domestic income distribution patterns, and therein lies the basis for protectionist politics.\(^{103}\) Protection biased forces, composed of domestic producers in actual, or potential, competition against foreign producers and the regions, communities, domestic suppliers, and employees to whom such domestic producers are economically vital, want their economic interests to be protected.\(^{104}\) Moreover, in the United States, organized labor has become a powerful opponent of free trade, as shifts in trading patterns export unionized jobs and provide domestic workers with the incentive to seek jobs in the non-unionized service sector.\(^{105}\) On the other side of the debate are the trade biased forces, composed of three broad interest groups: (1) the export-oriented producers and the regions, communities, suppliers and employees to whom they are important; (2) the import-oriented groups including importers, distributors,
retailers and consumers; and (3) businesses, financial institutions and individuals having substantial foreign investments, which may be jeopardized by domestic investment controls or foreign measures designed to retaliate against domestic protectionist activities. The export-oriented groups are concerned with access to foreign markets and the domestic availability and prices of imported articles used in the production of exported articles. The import-oriented groups are concerned with sales volumes, costs, prices and product choices.

The debate is tilted in favor of the protection biased forces. First, the protection biased forces usually can demonstrate immediate and direct losses, or the threat thereof, resulting from import competition, whereas the trade biased sector usually is limited to pointing to some potential gain which may be foregone in the absence of free trade. Often, trade biased forces are not aware of the losses they suffer because of protectionism, and thus fail to mobilize. Second, organized labor is a much more effective political force than are consumers. This is because consumers are not organized, have protectionist interests, have difficulty in perceiving their losses attributable to protectionism, and are not easily aggravated by marginal losses when the economy is going well. Finally, protection biased forces can achieve their objectives through governmental activity which is not in the limelight, while trade liberalization actions cannot occur without the full political process operating.

107. Id. at 28.
108. Id. at 29.
109. Id. at 28, 31.
110. Id. at 31.
111. Id. at 29, 30. See Malmgren Peacekeeping, supra note 11, at 84.
It is a tribute to the political power of the protectionist forces that a body of trade law has developed which, in essence, gives nations the right to erect trade barriers to protect their domestic industries from the natural operation of the doctrine of comparative advantage. This body of law originated from the desire of trading nations to reduce protectionist opposition to trade liberalization agreements. An “escape clause” procedure allows nations temporarily to suspend trade agreement obligations for such time as is necessary to prevent or eliminate injuries to their economies which occur “as a result of unforeseen developments and of the effect of the obligations [they have] incurred . . .” 113 In the 1950’s, Japan and less-developed countries were dramatically successful in expanding their exports. This expansion was so large, and occurred so quickly, that massive economic dislocations developed within the recipient countries. In response, recipient countries began erecting blatantly discriminatory trade barriers against so-called low-wage imports in violation of the doctrine of comparative advantage and the law of GATT. 114 In response to a United States initiative aimed at blunting this protectionist surge, GATT took up the issue of how market disruption can be avoided in a manner consistent with continued trade liberalization. GATT set up a working party to study this issue, but all that was accomplished was a determination that GATT safeguards, such as the “escape clause” provision, were not adequate devices for avoiding market disruption, 115 and the formulation of a description of market disruption as:

[s]ituations [which] generally contain the following elements in combination:

(i) A sharp and substantial increase or potential increase of imports of particular products from particular sources;

(ii) these products are offered at prices which are substantially below those prevailing for similar goods of comparable quality in the market of the importing country;


113. GATT, art. XIX. See Dam GATT, supra note 26, at 99.
114. See Dam GATT, supra note 26, at 297.
115. Id. at 298-99.
(iii) there is serious damage to domestic producers or the threat thereof;
(iv) the price differentials referred to in paragraph (ii) above do not arise from governmental intervention in the fixing or formation of prices or from dumping practices.

In some situations other elements are also present and the enumeration above is not, therefore, intended as an exhaustive definition of market disruption.\textsuperscript{116}

It is significant that this description does not refer to reasons why a country suddenly experiences a substantial influx of imports into its domestic markets, thus bypassing GATT's "escape clause" requirement that import injuries result from the effects of trade liberalization agreements and unforeseen developments.\textsuperscript{117} This description also implies that there are situations which justify a nation taking action to negate temporarily another nation's comparative advantages with respect to a particular product. Such action was soon forthcoming in the guise of achieving orderly adjustments to the expansion of international trade.

Developing nations historically have begun their industrialization process by building domestic textile industries.\textsuperscript{118} At the start of the 1960's, the textile industries of most developed countries were facing severe import competition from the textile industries of Japan and less-developed countries.\textsuperscript{119} Since textile industries occupied economically significant positions within the developed countries, a movement arose for the creation of an international arrangement for the orderly development of the cotton textile trade.\textsuperscript{120} The arrangement was called the Long-Term Arrangements Regarding International Trade in Cotton Textiles (LTA).\textsuperscript{121} The objective of the LTA was to give developed countries a five-year breathing space within which to wind down their textile industries, so that the less-developed countries could eventually fully exercise their comparative advantages in this field.\textsuperscript{122} This rationalization of the cotton textile industry was to be brought about by re-

\begin{thebibliography}{99}
\item \textsuperscript{116} Id.
\item \textsuperscript{117} GATT, art. XIX, para. 1(a).
\item \textsuperscript{118} This phenomenon arises from the fact that textile industries are labor intensive, have modest capital requirements, involve easily imparted job skills, and possess no important economies of scale. H. Kanamuri, G. Fels, E. Fried et al., World Trade and Domestic Adjustment 7 (1973).
\item \textsuperscript{119} Id.
\item \textsuperscript{120} Id.
\end{thebibliography}
requiring importing nations to reduce in stages any barriers which were
directed against cotton imports at the outset of the LTA.\textsuperscript{123} New bar-
riers could be imposed only in cases where cotton imports threatened
to disrupt a country’s domestic market.\textsuperscript{124} Market disruption barriers
were not to reduce the imports of any nation below the level attained
during a twelve-month period, ending three months prior to the date
the importing country requested consultation with the exporting coun-
try concerning the situation.\textsuperscript{125} These barriers were to be effective
only long enough to remedy the offending market disruption\textsuperscript{126} and,
in any case, were to be relaxed by a five percent quota increase every
twelve months of their existence.\textsuperscript{127}

The LTA did not bring about the demise of inefficient cotton tex-
tile industries in developed countries. Instead, the LTA was extended
twice for a total life of eleven years.\textsuperscript{128} This was attributable to the
myriad of new barriers imposed on cotton imports in the name of mar-
ket disruption, as interpretations of what constitutes market disruption
became increasingly liberal, to the point that any increase in a country’s
exports was considered disruptive.\textsuperscript{129} Today the LTA has been ex-
panded into a textile agreement covering wools and man-made fibers,
as well as cotton textiles.\textsuperscript{130} Thus, it appears that the LTA has been
converted from a temporary procedure for rational adjustment in the
international trade of cotton textiles into a permanent protectionist de-
vice to guarantee inefficient domestic textile industries a share of their
countries’ markets.

\begin{footnotes}
\item[123.] L.T.A., art. 2, [1962] 3 U.S.T. 2674. In connection with their Article 2 obli-
gations, Austria, Denmark, the European Economic Community, Norway, and Sweden
agreed to expand their markets to cotton textile imports at the end of the 5 year period
by 95\%, 15\%, 88\%, 15\% and 15\% respectively. L.T.A. annex A, [1962] 3 U.S.T.
2680.
\item[127.] L.T.A., annex B, para. 2, [1962] 3 U.S.T. 2681. In exceptional cases the five
percent figure could be departed from within a range of 0 to 5 percent in light of the
importing country's market conditions and other relevant factors if the concerned export-
ing country was consulted beforehand. \textit{Id}.
\item[128.] Protocol Extending the Arrangement Regarding International Trade in Cotton
(entered into force Oct. 1, 1967); Protocol Extending the Arrangement Regarding In-
\item[129.] \textit{See} DAM GATT, \textit{supra} note 26, at 303-08.
\item[130.] Arrangement Regarding International Trade in Textiles, \textit{done} Dec. 20, 1973,
3 and 4, Jan. 1, 1974, and entered into force with respect to art. 2, paras. 2, 3 and 4
\end{footnotes}
The liberalization of the definition of market disruption has been reflected in the “escape clause” provisions of the United States Trade Act of 1974. Previous United States “escape clause” provisions authorized impositions of quotas when: (1) an article is imported in increased quantities; (2) the increase is attributable in major part to trade concessions; (3) a domestic industry producing comparable articles is seriously damaged or threatened with serious damage; and (4) the increase in imports is the major factor causing, or threatening to cause, serious injury. Under these tests, only a small minority of petitioning industries were granted import relief. The Trade Act of 1974 has lessened the “escape clause” requirements. No longer must petitioners demonstrate a link between a trade concession and the offending increases of imports. An even more liberal modification was made to the injury causation test. Now petitioners must establish that the increase in imports is a substantial factor, rather than the major factor, in causing, or threatening to cause, serious injuries to their industries. In applying these new tests, the Trade Commission has recommended that import relief be granted six times during the first half of 1976.

April 1, 1974) [hereinafter cited as the I.T.A.] Except for its expanded scope this arrangement is nearly identical to the L.T.A. and is to remain in force for 4 years. I.T.A., art. 16, [1974] 1 U.S.T. 1016.


134. The Trade Expansion Act of 1962 required that market disruption arise “as a result in major part of concessions granted under trade agreements”...” Trade Expansion Act of 1962, Pub. L. No. 87-794, § 301(b), 76 Stat. 884 (emphasis added). This language is not included in § 201(b) of the Trade Act of 1974, § 201(b), 19 U.S.C. § 2251(b) (Supp. IV 1974).

135. Compare § 301(b)(1) of the Trade Expansion Act of 1962, Pub. L. No. 87-794, § 301(b)(1), 76 Stat. 884, with § 201(b)(1) of the Trade Act of 1974. This change means that under the Trade Act of 1974 an “escape clause” petition will be valid even though injury to a domestic industry was caused as much by another factor as by an increase of imports. Trade Act of 1974, § 201(b)(1), (4), 19 U.S.C. § 2251(b)(1), (4) (Supp. IV 1974).

though imports have not increased absolutely or relatively vis-à-vis domestic production, and even though other factors injured the petitioning industry as much, if not more, than did import competition. Should the President uphold these rulings, the United States "escape clause" mechanism will cease to be a device for aiding inefficient domestic industries in adjusting gracefully to changing patterns in world trade, and instead will become a method by which domestic industries can impose unwarranted restrictions on imports.

Perhaps the most trade-restrictive development of the market disruption controversy is acceptance of the use of voluntary export restraints as a valid market disruption remedy. This practice was started by Japan as a means of preventing importing countries from imposing restraints on its imports. The rationale behind this action is that, once implemented, import restrictions tend to become permanent trade barriers because they stimulate the formation of vested interest groups which lobby for their retention. Therefore, by its use of voluntary export restraints, Japan hoped to prevent the erection of permanent


138. The Trade Commission's finding that the "specialty" steel (stainless steel, alloy tool steel, and silicon electrical steel) has been import injured has been severely criticized by those who feel that the "specialty" steel industry's woes are almost entirely attributable to a decrease in domestic demand resulting from the current economic recession. See Bergsten Trade War, supra note 14, at 31; N.Y. Times, June 14, 1976, § L, at 30, col. 1; N.Y. Times, June 16, 1976, § A, at 20, col. 4.

139. So far the President has imposed import quotas only in the case of specialty steel. Presidential Procl. 4445, June 11, 1976, 41 Fed. Reg. 24101 (Temporary Quantitative Limitation on the Importation into the United States of Certain Articles of Stainless Steel or Alloy Tool Steel). In four cases the President has recommended that adjustment assistance be given the import injured industry in lieu of imposing import quotas. Memorandum from Gerald R. Ford to Special Representative for Trade Negotiations, April 16, 1976, 41 Fed. Reg. 16545 (Footwear); Memorandum from Gerald R. Ford to Special Representative for Trade Negotiations, April 30, 1976, 41 Fed. Reg. 18403 (Stainless Steel Flatware); Letter from Gerald R. Ford to the Secretary of Labor, May 13, 1976, 41 Fed. Reg. 20151 (Mushrooms); Letter from Gerald R. Ford to Secretary of Labor, July 1, 1976, 41 Fed. Reg. 27709 (Shrimp); Letter from Gerald R. Ford to Secretary of Commerce, July 1, 1976, 41 Fed. Reg. 27711 (Shrimp). In one case the President determined that no relief should be granted. See note 137 supra, (Iron Blue Pigment).

140. See DAM GATT, supra note 26, at 299; Malmgren Peacekeeping, supra note 11, at 43.

141. See Consumers Union of the United States, Inc. v. Kissinger, 506 F.2d 136, 138 (D.C. Cir. 1974); Baldwin NTB's, supra 22, at 43.
trade barriers against its products. However, the use of voluntary export restraints has spawned the notion that domestic producers are entitled to a "fair share" of their country's markets, even though foreign producers are more efficient.\footnote{142} Furthermore, even though voluntary export restraints are as restrictive as quantitative import restrictions in their impact on world trade, their use is not regulated by the law of GATT.\footnote{143} As a result, the number of voluntary export restraints has mushroomed in the forms of government-to-government bilateral agreements and intra-industry market sharing arrangements.\footnote{144} This trend further damages worldwide trade relations because it encourages nations to enter into discriminatory trade arrangements outside of GATT's multilateral consultative framework.

**Policing**

Protectionism can serve a useful policing function, insuring that importers do not use NTB's to gain artificial advantages within the domestic markets of importing countries. For example, GATT authorizes importing countries to apply extra import duties on the products of foreign producers who are either engaging in dumping ( antidumping duties) or receiving subsidies ( countervailing duties).\footnote{146} But these policing procedures become purely protectionist devices to the extent that they do more than just eliminate the artificial advantages of the offending imports. The United States has been charged with administering its antidumping and countervailing laws in a protective fashion.

Criticism of the United States' antidumping policy stems from its failure to fully implement the International Antidumping Code, a mul-

\footnote{142. See Hawkins & Walter Trends, supra note 83, at 8.}
\footnote{143. Although voluntary export restraints violate GATT's ban on the use of quantitative restrictions, GATT, art. XI, para. 1, there has been little effective enforcement of GATT's export control policy. See Jackson World Trade, supra note 34, § 19.2, at 502 and n.29. There are practical reasons why this ban on quantitative restrictions has not been enforced. First, producing nations will not complain since they are the contracting parties which either have imposed the restraints or have sought the erection of the restraints in order to insulate their domestic producers from import competition. Second, the consuming nations do not have the incentive to complain because they enjoy lower prices for the restricted product since the supply of the restricted product in their markets is increased by the quantity of the restricted product which the export restraints prevent from being exported to producer nations. Finally, intra-industry market sharing agreements are beyond the jurisdiction of GATT since GATT applies only to the official government activities of its Contracting Parties.}
\footnote{144. See Hawkins & Walter Trends, supra note 83, at 8.}
\footnote{145. GATT, art. VI, para. 1 ( antidumping duties); GATT, art. VI, para. 3 ( countervailing duties).}
tilateral agreement on the implementation of GATT's Article VI. 146 The United States subscribed to the Code in an executive agreement,147 but Congress refused to pass the legislation necessary for the United States' complete adoption of the Code. Instead, the United States has adopted the Code only to the extent that it is consistent with United States' antidumping policies, as formulated through enforcement of the Antidumping Act of 1921.148 Critics allege that inconsistencies between the antidumping enforcement procedures followed by the United States under the Act and those prescribed by the Code subject producers charged with dumping in the United States to undue delays and expense.149 A major criticism concerns the fact that the

147. Id.
148. Act of Oct. 24, 1968, Pub. L. No. 90-634, § 201, 82 Stat. 1347. This Act directed the United States Tariff Commission to (1) resolve any conflict between the International Antidumping Code and the Antidumping Act of 1921 [§§ 201-202, 19 U.S.C. § 160 (1970)], in favor of the Act as applied by the agency administering the Act, and (2) take into account the provisions of the International Antidumping Code only insofar as they are consistent with the Antidumping Act, 1921, as applied by the agency administering the Act... .
149. The I.A.C. requires that there be a simultaneous determination of sales at less than fair value and material injury during an antidumping investigation. I.A.C., art. 5(b). In contrast, the Antidumping Act of 1921 mandates a bifurcated antidumping investigation wherein the Secretary of Treasury is to determine if sales of less than fair trade value have occurred and the United States International Trade Commission is to determine whether a domestic industry has been injured. Antidumping Act of 1921, § 201, 19 U.S.C. § 160 as amended by the Trade Act of 1974, § 321(a), 19 U.S.C. § 160. This bifurcated process not only delays the termination of antidumping investigations, see Comment, The Administration by the Department of the Treasury of the Laws Authorizing the Imposition of Antidumping Duties, 14 Va. J. INT'L L. 463, 476-77 (1974) [hereinafter cited as Administration of Antidumping Duties], but also costs the accused importers money before there is a determination of injury, since the Antidumping Act authorizes the Treasury Secretary to withhold appraisal of the accused importers' products pending the final outcome of the investigation. Such withholding prevents the accused importers from introducing their products into United States markets. The Trade Act of 1974, § 321(a)(2), 19 U.S.C. § 160(b) (Supp. IV 1974); see Administration of Antidumping Duties, supra, at 478-79.

The I.A.C. prohibits the retroactive assessment of antidumping duties unless the alleged dumping actually produces a material injury. I.A.C., art. 11, paras. (i) and (iii). Under the Antidumping Act of 1921 antidumping duties may be assessed retroactively to the effective date of the Treasury Secretary's withholding of appraisement order, even if the investigation reveals that the dumping only threatens a material injury to a domestic industry. Timken Co. v. Simon, Civ. No. 75-0180 (D.D.C. Feb. 19, 1975).

As to the question of provisional measures, the I.A.C. does not permit withholding of appraisement orders to be issued unless a preliminary finding of dumping has been made and there is sufficient evidence of injury. I.A.C., art. 10(a). This conflicts with the Treasury Department's right under the Antidumping Act of 1921 to issue withholding of appraisement orders upon finding sales at less than fair value. Trade Act of
Code attaches greater importance to the petitioning industry's alleged injuries than does the United States. In order to secure the desired relief, the petitioning industry must show a greater injury and a stronger causal connection between its injury and the dumping under the Code than under the Act. Moreover, the Code allows antidumping duties to be assessed only to the extent necessary to eliminate the domestic industry's injuries, while the Act requires the antidumping duty to equal the entire difference between the dumped product's fair value and its selling price in the United States. As a consequence, critics claim that the United States' antidumping policy overprotects its domestic industries.

The fact that the United States' antidumping policy has less-restrictive injury requirements than does the Code may be attributable to the Act's antitrust origins. The primary emphasis of the United States' antitrust policy is toward eliminating business practices which


150. Under the I.A.C. "A determination of injury shall be made only when the authorities concerned are satisfied that the dumped imports are demonstrably the principal cause of material injury... to a domestic industry..." I.A.C., Art. 3(a) (emphasis added). In contrast, under the Antidumping Act of 1921 the injury need only be more than de minimis. Elemental Sulfur from Mexico, AA 1921-92, 37 Fed. Reg. 9417 (U.S.I.T.C. 1972); Cast Iron Soil Pipe from Poland, AA 1921-50, 32 Fed. Reg. 12925, 12926 (U.S.I.T.C. 1967); see Senate Comm. on Finance, 90th Cong. 2d Sess., Report of the U.S. Tariff Commission on S. Con. Res. 38, Regarding the International Antidumping Code Signed at Geneva on June 30, 1967, 11-12 (Comm. Print 1968); Comment, The Antidumping Act of 1921: Primary Lead Metal and the Injury Standard, 10 Tex. Int'l L.J. 357, 363-73 (1975) (suggesting that the de minimis injury standard was applied by the U.S.I.T.C. in its finding of injury in Primary Lead Metal from Australia and Canada, AA 1921-134-35, 39 Fed. Reg. 2156 (1974) so as to border on creating a per se violation standard with respect to antidumping actions) [hereinafter cited as Primary Lead Metal]; but see Malmgren & Marks Negotiating, supra note 11, at 377 n.205 (stating that the de minimis injury standard has not been used in an injury determination since Elemental Sulfur from Mexico, supra note 150), and the dumped imports need not be the principal cause, the major cause, or even a substantial cause of injury to a domestic industry, but must be merely an identifiable cause of such injury. Water Circulating Pumps from the United Kingdom, AA 1921-152, 41 Fed. Reg. 22635, 22637 (U.S.I.T.C. 1976).

151. I.A.C., art. 8(a), which states in relevant part that "[i]f it is desirable that the imposition [of an antidumping duty] be permissive... and that the duty be less than the margin [of dumping], if such lesser duty would be adequate to remove the injury to the domestic industry."


153. See B. Epstein, The Illusory Conflict Between Antidumping and Antitrust, 18 Antitrust Bull. 1 (1973) [hereinafter cited as Epstein Illusory Conflict]; Primary Lead Metal, supra note 150, at 358-60.
are injurious to competition. The United States considers it anticompetitive for a producer to engage in price discrimination when its lower price cannot be justified by its cost structure or by existing competitive conditions. Such price discrimination is especially anticompetitive when a producer supports a lower price in one market by high profits accumulated in another market in which it enjoys some degree of monopoly power. In international trade, almost invariably a producer is able to charge less for its products abroad than it does at home only when it enjoys some degree of monopoly power at home. Since the business practices which enable a foreign producer to gain monopoly power within its home markets are not readily subject to United States antitrust laws, the United States negates any dumping which minimally injures a domestic industry. By doing so, the United States affords some protection to its industries from the exercise of monopoly power which other countries have allowed to develop.


157. See Epstein Illusory Conflict, supra note 153, at 7, 18.

158. Foreign defendants may be reached under the antitrust laws of the United States when they commit anticompetitive acts abroad with the intent of affecting imports into the United States and the imports are affected by the anticompetitive acts. United States v. Aluminum Company of America, 148 F.2d 416 (2d Cir. 1945); See United States v. Watchmakers of Switzerland Information Center, Inc., 1963 CCH Trade Cas. ¶ 70,600 (S.D.N.Y. 1962). However, the United States antitrust laws rarely reach this situation because of the lack of jurisdiction over the parties, see United States v. DeBeers Consolidated Mines, Ltd., 1948 CCH Trade Cas. ¶ 62,248 (S.D.N.Y. 1948) (holding that occasional sales of its products within the United States did not subject a foreign corporation to the jurisdiction of the United States courts); K. Brewster, Jr., Antitrust and American Business Abroad 54-63 (1958). When the government wishes to avoid embarrassing foreign affairs conflicts with other nations it treats such matters as political problems rather than legal problems. See United States v. The Watchmakers of Switzerland Information Center, Inc., 1965 CCH Trade Cas. ¶ 71,352 (S.D.N.Y. 1965), modifying, 1963 CCH Trade Cas. ¶ 70,600 (S.D.N.Y. 1963) (The previous judgment was modified to remove any conflicts with the decree and the exercise of sovereignty by the Swiss Confederation upon the request of the defendants and advice from the State Department that such action would be advantageous from the standpoint of American foreign policy). Furthermore, anticompetitive behavior which is mandated by a foreign government is shielded from the United States antitrust laws by the act of state doctrine, on the basis that the executive branch is more competent than the judicial branch to pass upon the acts of a foreign government. Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971), aff'd per curiam, 461 F.2d 1261 (9th Cir. 1972).
In contrast, the Code originated within GATT's legal framework, which is designed to promote higher world real income levels by providing internationally traded goods with the broadest access to international markets consistent with efficient and fair allocation of the world's productive resources.\textsuperscript{159} Price discrimination is not inconsistent with GATT goals when it facilitates the opening of new markets through necessary promotional pricing.\textsuperscript{160} Furthermore, price discrimination can lead to permanently lower prices by stimulating firms to become more efficient so that their products will be competitive with the price discriminating producer's products.\textsuperscript{161} In proscribing the assessment of antidumping duties, unless dumping is the principal cause of a domestic industry's injuries,\textsuperscript{162} and by restricting the permitted antidumping duty to that which remedies those injuries attributable to dumping,\textsuperscript{163} the Code is more sensitive to the foregoing considerations, and more conducive to free trade, than is the United States' antidumping policy under the Act.

The lack of an injury requirement is also the focus of criticism against the United States' countervailing policy. The United States' countervailing laws require that imports which benefit from any direct or indirect bounty or grant be assessed a duty equal in amount with the offending bounty or grant,\textsuperscript{164} unless this assessment would jeopardize the outcome of negotiations leading to "internationally agreed rules and procedures governing the use of subsidies (and other export incentives) and the application of countervailing duties."\textsuperscript{165} In determining whether to countervail a particular subsidy, the Secretary of the Treasury is to consider whether the subsidy injured a domestic industry only if the United States is bound to do so under an international agreement and the offending imports are classified as duty-free.\textsuperscript{166} From an antitrust perspective, this lack of an injury requirement is more justified in the countervailing context than is the weak injury requirement of the United States' antidumping policy. Certainly, a producer receiving governmental aid is more able to engage in uncompetitive pricing

\textsuperscript{159} See GATT, Preamble, 61 Stat. pts. 5, 6, T.I.A.S. No. 1700.
\textsuperscript{160} See note 32 supra.
\textsuperscript{161} See note 33 supra.
\textsuperscript{162} L.A.C., art. 3(a).
\textsuperscript{163} L.A.C., art. 8(a).
and marketing activities than one relying on its own financial resources. Nevertheless, the United States' treatment of countervailing subsidies, as if they were illegal per se, is unnecessarily protective when applied to subsidies which are granted for development purposes. Many less-developed countries have a shortage of private capital, making industrial development nearly impossible without government financial aid.167 Often the markets of less-developed countries are too small to accommodate the growth their industries must undergo to achieve economies of scale.168 Industries can remedy this condition only by expanding into international trade. Developing export markets is a risky and expensive process which many producers cannot undertake without government export subsidies.169 Many governments pursue regional economic development programs in order to bring jobs to economically deprived areas of their countries.170 To encourage producers to locate in these areas, subsidies are offered producers to defray additional expenses they incur by participating in the development program.171 Since these subsidies are merely compensatory, they are not translatable into trade distorting prices and should not be countervailed.

**Economic Development**

As indicated above, the temporary use of NTB's is justified if, in the long run, it facilitates an improvement in the world's real income position. The infant industry theory of protection is such a justification. Advocates of this theory feel that industries which are not competitive, because they have yet to reach maturity or economies of scale, should be protected from import competition.172 These advocates assume that such industries will be self-sufficient, at least within their home markets, and no longer need protection upon reaching maturity and achieving economies of scale.173 Less-developed countries argue that if they are allowed to protect their industries from import competition without suffering retaliation at the hands of aggrieved developed country competitors, they eventually will be able to develop the indus-

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167. See VERBIT TRADE AGREEMENTS, supra note 31, at 150.
168. See MALMgren TRADE, supra note 27, at 57; VERBIT TRADE AGREEMENTS, supra note 31, at 11.
169. See Baldwin Non-Tariff Distortions, supra note 8, at 647.
170. See BALDWIN NTB's, supra note 22, at 120-21.
171. Id. at 127-28.
172. HARROW ECONOMICS, supra note 2, at 44-49; KENEN ECONOMICS, supra note 2, at 28-29; SAMUELSON, supra note 2, at 677-78.
173. Id.
trial infrastructure and the supplies of capital, skilled labor and managerial talent that are needed to make their industries competitive.\textsuperscript{174} Although the infant industry theory seems sound, in practice it is very difficult to implement properly. The first problem the implementing country encounters is selecting the industries to be protected. In some industries, firms must achieve significant economies of scale to be competitive.\textsuperscript{175} The domestic markets of many less-developed countries are too small to accommodate the growth a firm must undergo to attain the necessary economies of scale.\textsuperscript{176} Since the prices of the protected products are greater than those of the excluded imports, a less-developed country must exercise care in selecting protected industries to avoid burdening its economy with an oppressively high internal cost structure. Such an economy would retard the development of competitive export industries since these industries would have to purchase high-cost inputs from protected domestic companies.\textsuperscript{177} Another problem is that industries which are protected from competition tend to remain permanently inefficient.\textsuperscript{178} Less-developed countries facing the specter of complacent industries have to make the unpleasant choice between continuing to endure costly inefficiencies or removing the complacent industry's protection, thus risking the loss of one of their few domestic industries.\textsuperscript{179} Finally, elimination of the protective barriers erected in implementing the infant industry theory is very difficult. Vested interests form around protected industries, exerting political pressure on their governments to retain these trade barriers. No one connected with a protected industry will admit that his industry either has become self-sufficient and no longer needs support, or can never become self-sufficient and no longer deserves support.\textsuperscript{180}

Recognizing the potential within the infant industry theory for promoting the economic development of the less-developed nations, GATT's Article XVIII, entitled "Governmental Assistance to Economic Development," authorizes less-developed countries to employ temporarily protective measures which are inconsistent with GATT ob-

\textsuperscript{174} See \textit{Verbit Trade Agreements}, \textit{supra} note 31, at 29.

\textsuperscript{175} Examples of industries requiring significant economies of scale include the automotive, chemical fertilizer, paper and pulp, and steel industries. See \textit{Weintraub Preferences}, \textit{supra} note 32, at 67.

\textsuperscript{176} \textit{Supra} note 168; \textit{Weintraub Preferences}, \textit{supra} note 32, at 70.

\textsuperscript{177} See \textit{Malmgren Trade}, \textit{supra} note 27, at 34.

\textsuperscript{178} See \textit{Weintraub Preferences}, \textit{supra} note 32, at 73.

\textsuperscript{179} See \textit{Verbit Trade Agreements}, \textit{supra} note 31, at 11.

\textsuperscript{180} See \textit{Kenen Economics}, \textit{supra} note 2, at 28; \textit{Verbit Trade Agreements}, \textit{supra} note 31, at 11.
ligations, in order "to promote the establishment of a particular industry with a view to raising the general standard of living of [their] people . . . ." Recognizing the difficulties of properly administering an infant industry development program, Article XVIII qualifies its infant industry authority by approving its exercise only in cases where a development program cannot otherwise succeed, subjecting its exercise to annual review by the Contracting Parties, and allowing countries adversely affected by its exercise to seek compensation from the exercising country. The review procedure insures that protective measures are approved only as long as they are essential to the viability of a development program which is progressing adequately. The compensation provisions insure that protective measures are not adopted unless the development advantages accruing to the adopting country outweigh the damages inflicted on others. Mindful of early decisions of the Contracting Parties which proved that Article XVIII does not authorize carte blanche impositions of restrictions, resentful of Article XVIII's review procedures, and able to justify most of their protective measures on grounds of balance of payments problems, the less-developed countries rarely invoke Article XVIII to justify their development programs.

The Contracting Parties reacted to the development issues, which were eloquently and forcefully brought to the world's attention during the first United Nations Conference on Trade and Development (UNCTAD), by adding a fourth part to GATT, entitled "Trade and Development." Most of Part IV is concerned with promoting development of less-developed countries by committing the developed countries to the reduction or elimination of trade barriers and governmental programs which have detrimental impacts upon less-developed countries. But Part IV is also significant to the discussion of NTB's be-

181. GATT, art. XVIII, para. 13.
182. GATT, art. XVIII, paras. 13, 16.
183. GATT, art. XVIII, para. 6.
184. GATT, art. XVIII, paras. 18, 21.
185. See DAM GATT, supra note 26, at 228.
186. Id. at 237.
188. See GATT, art. XXXVII, which commits the developed countries to reducing and eliminating trade barriers affecting products of particular export interest to the less-developed countries, to refraining from introducing or increasing trade barriers on products of particular export interest to the less-developed countries, and to refraining from imposing and reducing or eliminating any fiscal policies which hamper the growth of the consumption of primary products produced mainly in less-developed countries.
cause it affirmatively encourages the Contracting Parties to "devise measures designed to stabilize and improve the condition of world markets in [primary] products, including in particular measures designed to attain stable, equitable, and remunerative prices . . . ." The support for programs to stabilize the prices of primary products evolved from the fact that the prices of primary products historically have been prone to wild and sudden fluctuations because the demand for primary products is relatively price inelastic. Since many less-developed countries are dependent upon exporting a few primary products for the bulk of their foreign exchange, fluctuations in the prices of primary products produce parallel fluctuations in the foreign exchange levels of these countries, making the economic stability, which is conducive to steady economic development, an impossibility. Despite the approval of the commodity agreement concept in Part IV, no commodities agreement has been successfully implemented. Nevertheless, the concept is still very much alive, and will result in the erection of new NTB's should it come to fruition.

Still another development concept of significance to a discussion of NTB's is that of trade preferences for less-developed countries. The preference concept was originally confined to a system of tariff preferences designed to encourage the development of viable manufacturing industries within the less-developed countries. As the level of tariff

189. GATT, art. XXXVI, para. 4.
190. See Jackson World Trade, supra note 34, § 27.1, at 717-20 (citing as one example the 6 to 1 price ratio fluctuation of sugar and the 2 to 1 price ratio of cocoa, coffee, oils and fats from 1961-65); Verbit Trade Agreements, supra note 31, at 84; Erb Systems, supra note 88, at 31; Wall Opportunities, supra note 35, at 32.
191. See Jackson World Trade, supra note 34, § 27.1, at 719.
192. The major problem is to achieve agreement between the producers and consumers. Producers want the commodities agreements to maintain permanently higher level prices through the use of organized supply restraints. Conversely, the consumers, lead by the United States, desire to stabilize commodity prices around a long-run market price, thus giving a freer hand to market forces in determining the price. See Freeb Blocs, supra note 7, at 166; North-South Dialogue, supra note 24, at 555.
193. New NTB's will arise from the need to impose some controls on supply in order to stabilize prices. See Freeb Blocs, supra note 7, at 166.
194. The model of the tariff preference is as follows: Country A protects a domestic price of $100 with a customs duty of $25 on a product which has a world market price of $80. Country B, a developing country, produces the product at $90, and therefore cannot compete in country A's market unless it subsidizes its producers or receives (from country A) a tariff preference over other world producers. If country A lowers its customs duty to 10 on the products being produced in country B, country B will be able to make sales in country A and may eventually achieve the economies of scale necessary to reduce its production costs to the prevailing world market price of $80. Once country B's producers become competitive, country A can remove its tariff preference. See Verbit Trade Agreements, supra note 31, at 151-52.
NONTARIFF TRADE BARRIERS

barriers has been reduced through multilateral trade negotiations, the level of tariff preferences to the less-developed countries has declined, thereby increasing the incentive to maintain trade preferences through the use of NTB's.\textsuperscript{195} It is alleged that trade preferences create market disruptions to which the developed countries overreact, and erect new NTB's by resorting excessively to safeguard procedures.\textsuperscript{198}

Noneconomic Objectives

Economic welfare is just one component of over-all social welfare. As governments become more active in promoting the social, political, and environmental welfare of their countries, they create trade distortions which are inconsistent with a free trade system. All nations, for example, institute trade distortions in the interest of national security. Export restrictions are imposed on items of strategic importance to keep them beyond the reach of potential enemies.\textsuperscript{197} Uncompetitive, inefficient domestic industries are supported so that adequate supplies of strategic materials are available during times of war or international economic upheavals.\textsuperscript{198}

As a matter of social justice and political acumen, many nations engage in income redistribution programs which involve the use of

\begin{footnotesize}
\begin{enumerate}
\item[195.] Thus, continuing with our model, if country A negotiates a tariff reduction and lowers its customs duty on the product from $25 to $15, country B's preference margin is reduced from $15 to $5, which may make its products uncompetitive in country A's markets. In fact, it has been alleged that tariff preferences systems may create barriers to further tariff reductions as the preference givers may be unwilling to disadvantage their favored trading partners by lowering the prevailing tariff rates. See \textit{Weintraub Preferences}, supra note 32, at 130-31.
\item[196.] \textit{Id. at} 123.
\item[197.] See Export Administration Amendments of 1974, § 9, 50 U.S.C. app. § 2403 (h) (Supp. IV 1974), authorizing the President to disapprove of and prevent the exportation of goods and technology having military significance to communist countries as defined by the Foreign Assistance Act of 1961 § 620(f), 22 U.S.C. § 2370(f), \textit{amending} 22 U.S.C. § 2370 (1961), upon receiving the recommendation from the Secretary of Defense, who is authorized under this section to monitor all exports to Communist countries to the extent that such export shipments are not in the interest of the United States, defense posture. Such action falls under GATT's security exemptions. GATT, art. XXI, paras. (a) & (b).
\item[198.] The United States has a legal provision entitling the President to restrict the imports of any product which he and the Secretary of Treasury find is being imported into the United States in such quantities or under such circumstances as to impair the national security. In making their determinations, the President and the Secretary of Treasury are to "give consideration to domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements . . . [and] the requirements of growth of such industries . . . ." \textit{Trade Expansion Act of 1962, § 232, 19 U.S.C. § 1862, as amended, Trade Act of 1974, § 127(d), 19 U.S.C. § 1862 (Supp. IV 1974).}
\end{enumerate}
\end{footnotesize}
NTB's. Subsidies are used to enlist businesses in regional development programs. 99 Desiring to avoid the social disruptions which accompany massive rural-to-urban migrations, and responding to the intense political pressures of those who do not wish to leave the farming community, governments of most developed countries use NTB's to prevent further deterioration in the income position of their agricultural sectors vis-à-vis their industrial sectors. 200

NTB's are used as weapons in the battleground of international politics. Arab nations boycott firms which do business with Israel. For humanitarian reasons, most members of the United Nations have imposed economic embargoes on Rhodesia and South Africa. In its Trade Act of 1974, the United States reserved the right to withhold most-favored-nation treatment, credit guarantees, and the benefits of all its commercial agreements from countries which unduly restrict the emigration rights of their citizens, 201 or fail to cooperate with United States' efforts to account for and recover all its military and civilian personnel missing in Southeast Asia. 202

Currently, considerable attention is being given to the trade restricting potential of product standards. Product standards are specifications dealing with quality, safety, performance, environmental compatibility and other product characteristics which nations require producers to comply with before allowing the producers' goods, services,

199. See BALDWIN NTB's, supra note 22, at 120-21.

200. In the United States the President has the authority to limit imports of any agricultural product which is being imported into the country in such quantities as to interfere with any federal agricultural program. Agricultural Adjustment Act § 22, Act of Aug. 24, 1935, ch. 641, § 31, 49 Stat. 773, as amended, 7 U.S.C. § 624 (1970). At various times under the authority of § 22 of the Agricultural Adjustment Act the United States has imposed import quotas on certain dairy products, cotton, certain cotton wastes, and cotton products, wheat, wheat flour, peanuts, rye, rye flour, rye meal, barley, barley malt, oats, ground oats, shelled filberts, tung nuts and tung oil. See SELECTED PROVISIONS, supra note 133, at 286-310.

The Common Market countries impose quantitative restrictions on agricultural products to support their agricultural price stabilization program entitled The Common Agricultural Plan, the goals of which are to 1) increase agricultural production, 2) maintain a fair standard of living for the rural population, 3) stabilize agricultural markets, 4) assure regular supplies of agricultural products, 5) maintain reasonable consumer prices. This program is a serious barrier to United States agricultural exports, as indicated by the United States' declining share of the Common Market's agricultural markets, which fell from 14% in 1961 to 11% in 1970. 5 TRADE COMMISSION REPORT, supra note 62, at 13-19.

201. Trade Act of 1974, § 402, 19 U.S.C. § 2432 (Supp. IV 1974). This section is the famous Jackson Amendment which led to the Soviet Union rejecting the United States' offer to extend to it Most Favored Nation trade treatment.

and manufacturing processes to enter their domestic markets.\textsuperscript{203} Because of the differences among nations in customs, standards, social and economic needs, climates, geography, and attitudes, there is a lack of coordination in formulating product standards, conducting tests and inspections, and establishing certification systems.\textsuperscript{204} This subjects internationally traded goods to such trade distortions as unnecessarily repetitious tests and inspections, reduced levels of product and part interchangeability, and outright exclusion from some markets.\textsuperscript{205}

Certain noneconomic objectives are recognized as valid reasons for a nation to use NTB’s and, accordingly, nations are exempted from their GATT obligations with respect to implementing measures to accomplish them. These miscellaneous objectives include protecting the public morals and protecting national treasures of artistic, historic, or archaeological value.\textsuperscript{206}

\textbf{RECOMMENDATIONS}

As previously illustrated, nations often have sound historical, social, economic, environmental, and political justifications for using NTB’s, many of which have been recognized in GATT. For this reason, countries tend to feel that any attack upon their use of NTB’s is an attack upon their exercise of sovereignty.\textsuperscript{207} Moreover, with the possible exception of quantitative restrictions, the effects of NTB’s on trade cannot be precisely measured.\textsuperscript{208} Therefore, countries are hesitant to enter into NTB reduction agreements because they cannot be sure of receiving reciprocal trade advantages.\textsuperscript{209} Given these conditions, the current GATT multilateral trade negotiations will not produce effective trade rules for reducing the use of NTB’s unless the negotiators adopt a motivational analysis approach and thoroughly examine each proposal to see that it adequately considers the purposes served by NTB’s, the availability of equally effective alternative measures for serving those purposes, and the diversity of social, economic,

\textsuperscript{203} See 4 Trade Commission Report, supra note 13, at 62.
\textsuperscript{204} Id. at 63.
\textsuperscript{206} GATT, art. XX, paras. (a), (f).
\textsuperscript{207} See Malmgren & Marks Negotiating, supra note 11, at 327-29.
\textsuperscript{208} See Golt Guide, supra note 5, at 35; Malmgren Peacekeeping, supra note 11, at 86-88; OECD Policy, supra note 80, § 179, at 61.
\textsuperscript{209} Id.
and political circumstances which exists among nations. The general rules for implementing this approach are (1) the use of NTB’s for purely political or protectionist reasons should not be tolerated, (2) the use of NTB’s for valid development purposes should be encouraged, (3) the use of NTB’s to achieve noneconomic objectives should be harmonized, and (4) whenever the use of trade barriers is appropriate, the barrier which least distorts trade should be chosen.

Eliminating Protectionism

The first step toward eliminating protectionism must be to establish mechanisms for collecting and dispersing accurate information to the public concerning the costs of protectionism, alternative methods for dealing with inflation and balance of payments disequilibriums, supplies of and the need for commercially essential materials, reasons why differences exist in prices and quality of internationally traded goods, and employment and job training opportunities. Widespread distribution of this information will strengthen the political position of trade-biased forces by enabling the public to intelligently assess the relative merits of trade distortive methods and alternative methods of achieving national objectives.210 In an era of diminishing natural resources, it is particularly important that the public understand and accept the conservation measures necessary to prevent shortages of commercially important materials from escalating into global economic or military conflicts.211 Accurate knowledge of the differences in prices and quality among internationally traded goods will facilitate early detection of impending shifts in international trade patterns, so that adjustment plans can be implemented in time to forestall drastic economic displacements.212 A thorough understanding of price differentials is essential to the formulation of adjustment plans which are consistent with the

211. See Hesburgh Introduction, supra note 12, at 2, 3, 13.
212. Since the less-developed countries' comparative advantages lie in the area of labor-intensive industries, their ability to sustain economic growth depends upon the willingness of the developed countries to open their domestic markets to imports from low wage sources. However, the developed countries cannot open their markets to low-wage imports unless they have correctly anticipated the number of workers which will be displaced and have made the technological innovations necessary to create the needed amount of new jobs within their capital and technology-intensive industries. See Secretary-General of the United Nations Conference on Trade and Development, Towards a Global Strategy of Development, 56-57 (1968); United Nations Committee for Development Planning, Towards Accelerated Development-Proposals for the United Nations’ Second Development Decade 24 (1970).
long-range international comparative advantage configuration.\textsuperscript{213} Finally, employment and job training information will increase the job mobility of workers who are displaced by changing patterns of international trade. Increased job mobility not only will ease the fears and discomforts of displaced workers, but also will insure that the most efficient sectors of the economy have work forces of optimum size.\textsuperscript{214}

The International Monetary Fund (IMF) is in the process of completing a major reform of the world’s international monetary system. This reform is directly concerned with preventing fundamental balance of payments disequilibriums. To this end, the new monetary system being devised provides for an increase in each country’s reserve asset holdings, more emergency funding to aid countries with serious balance of payments problems, and greater exchange rate flexibility.\textsuperscript{215} In view of the IMF reforms, GATT should recognize the primary jurisdiction of the IMF over balance of payments problems by eliminating the Article XII balance of payments exception to its ban on the use of quantitative restrictions. At a minimum, Article XII should be revised to permit trade restrictions to be imposed for balance of payments reasons only when the corrective procedures of the IMF prove to be inadequate, and to establish the import surcharge as the only permissible trade-restricting balance of payments remedy.\textsuperscript{216} However, GATT’s Article XVIII balance of payments preference for less-developed countries should be retained. Because of their dependency upon the sales

\textsuperscript{213} See MALMGREN PEACEKEEPING, supra note 11, at 158-60; MALMGREN TRADE, supra note 27, at 52.

\textsuperscript{214} For example, a Brookings Institute study discovered that by protecting its weak domestic textile industry the United States contributed to the labor shortage within its apparel industry which has export potential. WORLD TRADE ADJUSTMENT, supra note 103, at 8; See generally Bale Adjustment, supra note 103, at 166.

\textsuperscript{215} The IMF’s Interim Committee on Monetary Reform reached an understanding known as the Jamaica Accord on January 8, 1976, which when fully implemented will legalize floating exchange rates and increase the total resources available to developing countries with balance of payments difficulties by $3 billion. See 5 IMF SURVEY 17-20, 30 (1976).

\textsuperscript{216} This change would not be drastic since the IMF already exerts considerable control over the exercise of GATT’s balance of payments exception under article XII. See discussion in note 92 supra. The Trade Act of 1974 authorizes the President to seek a revision of GATT’s balance of payments provisions to “recognize import surcharges as the preferred means by which industrial countries may handle balance-of-payments deficits insofar as import restraint measures are required.” Trade Act of 1974, § 121(a)(6), 19 U.S.C. § 2131(a)(6) (Supp. IV 1974). Furthermore, the Trade Act of 1974 does not permit the use of quantitative restrictions for balance of payments purposes unless a fundamental imbalance has occurred which cannot be dealt with effectively by an import surcharge. Trade Act of 1974, § 122(a), 19 U.S.C. § 2132(a) (Supp. IV 1974). See FREEG BLOCS, supra note 7, at 157-58.
of primary products for foreign exchange, less-developed countries often experience sudden and violent shifts in their balance of payments positions which can be corrected through the IMF's exchange rate flexibility mechanism only by drastic changes in their exchange rates. Drastic exchange rate changes produce shifts of undesirable magnitudes in a country’s domestic income distribution patterns, and are therefore politically unpopular. Requiring the less-developed countries to exhaust their IMF credits before resorting to trade restrictions for balance of payments purposes is counter-productive to development programs. Such a requirement makes it nearly impossible for the less-developed countries to maintain the foreign exchange they need for importing the capital goods essential to their development programs, but not produced economically at home.

GATT’s rules pertaining to materials in short supply are inadequate to meet the economic problems arising from the developing shortages of commercially essential materials. With the exception of the requirement in Article XX, paragraph j, that short supply measures should be adopted which are consistent with assuring each nation an equitable supply of essential resources, these rules do little more than recognize that, in some instances, a nation may be justified in using NTB’s in order to conserve its supply of essential resources.

Devising an equitable resource distribution system is such a complex undertaking that it is beyond the scope of the present GATT multilateral negotiations. The present system, using the price function of the law of supply and demand, may have to be replaced by an international planning and rationing system as the mechanism for determining how much of a given resource is to be produced each year and how that annual production is to be distributed. The rationing system would prevent both the early exhaustion of the world’s supply of essential resources, and the creation of resource distribution patterns which are skewed unduly in favor of the wealthy nations. Clearly, to be

217. See Verbit Trade Agreements, supra note 31, at 83; Erb Systems, supra note 88, at 31-32.
218. In fact, the less-developed countries’ balance of payments problems are severe enough for it to be suggested that less-developed countries should protect their industries on a basis of how much foreign exchange could be saved through import substitution, rather than whether the protected industry could become self-sufficient. S. Linder, Trade Policy for Development 93 (1967).
219. If price is to be the sole determinant of how much resources shall be produced and how such production shall be distributed, the wealthy nations will be able to continue their high rates of resource consumption patterns regardless of the facts that reserves of some resources are approaching exhaustion and that less-developed countries
equitable, the new distribution schemes must be designed to avoid massive dislocations of the developed countries' economies without dooming the less-developed countries to perpetual poverty through rigid adherence to historical distribution patterns. The price of this international scheme will be a decrease of efficiency in the world's overall production configuration and a loss by all nations of a portion of their sovereign control over their domestic economies. As a consequence, the measures that must be taken to fully implement an equitable resource distribution system are too great a departure from the free trade principles that form the basis of GATT to be assimilated during the current trade negotiations.

It is possible, however, for the current GATT multilateral trade negotiations to produce rules and principles which encourage the contracting parties to reduce their demands for essential resources through resource conservation programs, and to begin collecting the data which will be vital to rational planning. Each contracting party should be required to report annually to the Contracting Parties the amount of essential resources it produces and consumes, its source of essential resources, to whom and in what amounts it supplies essential resources, the reserves of essential resources it possesses, and the purposes for which it consumes essential resources. This data must be collected, otherwise it will be impossible to construct an equitable resource distribution system. No country should be allowed to use NTB's to restrict international trade of scarce resources unless it has implemented a resource conservation program approved by the Contracting Parties. Producing nations which unduly restrict the flow of scarce resources should be subject to complaint procedures entitling those aggrieved consuming nations which have implemented approved conservation programs to apply restrictions to the imports and exports of the offenders. Hopefully, resource conservation programs will reduce demands for scarce essential resources to the point that international

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will not be able to secure the supplies of raw materials they need for development. See North-South Dialogue, supra note 24, at 555-59; Hesburgh Introduction, supra note 12, at 2-3.

220. This is because enough scarce resources must be set aside for the inefficient infant industries of less-developed nations if the less-developed world is to be given the opportunity to grow economically.

221. The loss of national sovereignty to a supranational resource distribution agency would represent a formal expression of the fact that all nations are becoming economically interdependent, which reduces the degree to which each nation can unilaterally act in its own economic interest without affecting other nations and possibly triggering a trade war as a result. See PREG BLOCS, supra note 7, at 10, 24, 139, 146, 152.
Tensions arising from imminent resource shortages can be controlled long enough to prevent economic warfare from erupting before an equitable resource distribution system is devised and implemented.

GATT's antidumping and countervailing policies strike an appropriate balance between protecting domestic economies from the NTB's of others, and providing the flexibility in pricing and subsidization practices that stimulate international price competition and allow less-developed nations to develop badly needed export industries. Two minor changes should be made in GATT's countervailing policy which would make it even more consistent with GATT's pro-competitive and pro-development principles. The first change would be to modify Article VI so that development subsidies which are merely compensatory, and do not affect the international price of goods, are not subject to countervailing. Although the injury standard of Article VI theoretically should insulate compensatory development subsidies from countervailing, specific language to that effect would prevent liberal interpretations of the injury standard from producing a contrary result. 222 Secondly, an addition should be made to Article VI to insulate the subsidies that less-developed countries employ, pursuant to Article XVIII's development exceptions, from countervailing actions by developed countries. 223 Because one less-developed country should not be allowed to gain at the expense of another, the present Article VI countervailing rules should apply when subsidized goods penetrate the markets of less-developed countries.

Approval of the GATT antidumping and countervailing policies leads to the disapproval of those antidumping and countervailing policies of the United States which are inconsistent with those of GATT. The benefits of the United States' antidumping and countervailing policies to its domestic industries are outweighed by the harm inflicted upon its consumers and upon its status as an advocate of free trade.

222. GATT's art. VI permits the countervailing only of those subsidies which materially injure a domestic industry. However, the material injury standard may leave room for a country to countervail subsidies which were granted to a producer to compensate it for disadvantages it incurred by cooperating in national development programs when such a producer succeeds in capturing a large amount of export business which it could not have captured without benefit of the subsidy. In recognition of this danger a rule of reason should be adopted so that compensatory subsidies are not subject to countervailing if their recipients would have been competitive without the subsidy and without undertaking the burdens of cooperating in a national development program. See Malmgren & Marks Negotiating, supra note 11, at 356-57.

223. Since GATT's art. VI does not specifically prohibit a country from countervailing a subsidy granted under the authority of GATT's art. XVIII, this change is required to prevent countervailing under art. VI from frustrating GATT's development policies.
In view of these circumstances, the United States should be prepared to bring its antidumping and countervailing policies in line with those of GATT during the current GATT trade negotiations. If the United States is determined to use its antidumping policy as an antitrust device, rather than as a device to protect free trade, it should at least be willing to extend to alleged dumpers the "meeting competition" and "cost justification" defenses of the Robinson-Patman Act. This modification of the United States' antidumping policy would prevent the Antidumping Act of 1921 from becoming an instrument for squelching legitimate international price competition.

GATT must be modified to dispel the idea that domestic producers are entitled to a "fair share" of their countries' domestic markets. To be effective, this modification must bring voluntary restraint agreements within the scope of GATT's prohibition on the use of quantitative restrictions and tighten up the market-disruption concept, so that it cannot be invoked by domestic producers to guarantee their survival.

Only slight changes in GATT's Article XI are needed to bring voluntary restraint agreements under GATT's ban on the use of quantitative restrictions. Article XI, paragraph one, should be expanded to include

224. Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1970), permits price discriminations which arise due to "differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . .", and section 2(b) permits sellers to rebut a prima facie case against them by showing that their lower prices were made in good faith to meet equally low prices of a competitor. The Robinson-Patman Act, 15 U.S.C. § 13(b) (1970). As a practical matter, given the transportation expenses associated with exporting, a cost justification defense would not be relied on too often unless the exporter achieves great savings through large volume sales. On the other hand, the meeting competition defense would allow exporters to engage in necessary promotional pricing to enter markets which are more competitive or have greater price elasticities than their home markets. Such a result would allow exporters to maximize their revenues and utilize their full productive capacity while providing domestic consumers with a greater range of produce choices at competitive prices. Perhaps the best criteria to use would be to determine if the exporter's international prices are self-supporting or are subsidized by the high prices prevailing in its home market. When the exporter's prices are not self-supporting, the price discrimination should be condemned as predatory and antidumping duties assessed against the dumped products. See Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967), reh. den., 387 U.S. 949, on remand, 396 F.2d 161 (10th Cir. 1968), cert. den., 398 U.S. 860; Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954), reh. den., 348 U.S. 932 (1955). In the absence of predation, the Trade Commission could determine if the exporter was the price aggressor and if so assess dumping duties on its products if its low prices result in the impairment of the profitability of domestic firms to such a degree that a significant number of them will be weakened as competitive forces should the price discrimination continue. See Dean Milk Co. v. FTC, 395 F.2d 696, 711-14 (7th Cir. 1968) (holding that the record failed to disclose substantial evidence that Dean Milk Co.'s price discrimination caused the diversion of business and loss of profits of its competitors).
outlaw any activity on the part of a contracting party which directly or indirectly aids its domestic producers or forces foreign producers to enter into voluntary restraint agreements. The list of prohibited activities should include (1) extending governmental diplomatic and negotiation services to producers wishing to negotiate voluntary restraint agreements,\textsuperscript{225} (2) blackmailing foreign producers into reducing their imports to domestic markets of other nations, without utilizing GATT’s multilateral consultative procedures, by threatening to impose quantitative restrictions on their products,\textsuperscript{226} and (3) establishing customs procedures which enable participating producers to enforce or comply with the voluntary restraint agreements they have joined.\textsuperscript{227} A more fundamental change would be to impose on all contracting parties an affirmative obligation to treat voluntary restraint agreements as illegal restraints of trade and take appropriate actions against those domestic producers which impose, or conspire to impose, such illegal restraints on international trade.\textsuperscript{228}

\textsuperscript{225} Voluntary Restraint Agreements were negotiated with steel producers of Japan, Great Britain and Western Europe affecting 85 percent of the United States’ steel imports during the years 1968-74. Consumers Union of United States, Inc. v. Rogers 352 F. Supp. 1319, 1321 (D.D.C. 1973), affirmed, Consumers Union of United States, Inc. v. Kissinger, 506 F.2d 136, 139 (D.C. Cir. 1974); cert. den., 421 U.S. 1004 (1975). These Voluntary Restraint Agreements were initiated by the United States Secretary of State at the direction of President Nixon. The circuit court held that the executive branch did not exceed its authority in participating in these negotiations because the agreements were not enforceable and therefore not covered by the Trade Expansion Act of 1962 by which Congress delegated to the President certain powers for negotiating enforceable import restraints. Consumers Union of United States, Inc. v. Kissinger, 506 F.2d 136, 142 (D.C. Cir. 1974).

\textsuperscript{226} In the case of the voluntary restraint agreements on steel imports the United States used as leverage attempts by Congress to impose mandatory quotas on steel imports in violation of GATT. Consumers Union of the United States, Inc. v. Kissinger, 506 F.2d 136, 138 (D.C. Cir. 1974). Similar legislative proposals plus an evenly divided Trade Commission “escape clause” ruling, which gave the President the opportunity to impose quotas, were used in 1971 as leverage to negotiate a voluntary restraint agreement on shoe imports with Italy. Oman, The Clandestine Negotiation of Voluntary Restraints on Shoes from Italy: An Augury of Future Negotiations Under the Trade Reform Act of 1973, 7 CORNELL INT’L J. 6, 9-11 (1973) [hereinafter cited as Clandestine Negotiation].

\textsuperscript{227} To implement and enforce the Voluntary Restraint on shoes the Italian government initiated a statistical visa program which required Italian producers to provide the government with statistical data concerning their shoe imports to the United States before they could receive new visas allowing them to make subsequent shipments of shoes to the United States. Clandestine Negotiation, supra note 226, at 11. Not surprisingly, the level of shoe imports from Italy to the United States fell 3.2% in 1971 after the initiation of the statistical visa program, and increased only 2.5% the following year. Id. at 16.

\textsuperscript{228} In Consumers Union of the United States, Inc. v. Rogers, 352 F. Supp. 1319 (D.D.C. 1973) the court stated as dicta that executive branch participation in negotiating Voluntary Restraint Agreements would not shield the participating steel companies
Tightening up the market-disruption concept so that it facilitates free trade, instead of creating more NTB's, is a most complex task. Specifically, stricter guidelines must be devised to control when and how trade restrictions are to be erected during periods of market disruption. Trade restrictions should not be used when adjustment assistance programs can make a temporarily uncompetitive industry self-sufficient within a reasonably brief period of time. Similarly, adjustment assistance programs are preferable for preventing displaced workers from suffering financial hardships by facilitating their re-employment elsewhere and providing financial aid to compensate them, pending re-employment. 229

Trade restrictions may be necessary in a secondary role to provide an industry a respite from import competition so that it can take full advantage of adjustment assistance in order to improve its competitive position. For example, an industry may need a short period of time within which to coordinate its production techniques with new capital equipment purchased with adjustment assistance funds. 230 During periods of economic recession, a nation's economy may be incapable of absorbing import-displaced workers for a socially undesirable length of time, 231 making adjustment assistance unduly expensive and ineffective. Trade restrictions would provide the displaced workers with productive employment until improvements in the economy reduce their unemployment periods to acceptable lengths. 232

When the objective is to protect potentially displaced workers, trade restrictions should be used only until adjustment assistance adequately protects the affected workers, at which point the protected in-

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229. See Free Trade Politics, supra note 103, at 152.
230. This justification for the use of trade restrictions is analogous to the infant industry justification, which recognizes that uncompetitive industries often experience a lead-lag time between their creation or modernization and the point at which they become competitive through the proper coordination of modern capital equipment, well-trained managers and workers, adequate supplies of resources, and adequate support services (i.e., transportation, legal, accounting, etc.). See Verbit Trade Agreements, supra note 31, at 29.
231. See Malmgren Trade, supra note 27, at 30.
232. The concern here is to avoid producing disincentives to work among workers by keeping them out of work and on adjustment assistance for a long period of time. See Free Trade Politics, supra note 103, at 167. The maximum length of time adjustment assistance is extended to workers under the Trade Act of 1974 is 78 weeks. Trade Act of 1974, § 233(a), 19 U.S.C. § 2294 (Supp. IV 1974).
dustry should be subjected to the full force of trade competition. \(^{233}\)

When the objective is to restore a domestic industry to self-sufficiency, until the protected industry begins to recover, the market shares of imports should never be reduced below previous levels, \(^{234}\) should be allowed to grow as fast as the relevant market in an expanding market, and should be allowed to grow at least five percent every twelve months in a static or contracting market. \(^{235}\) The restrictions on trade should be imposed only to the extent necessary for sufficient profits to be earned by those engaged in the protected industry. \(^{236}\) If the protected industry does not show signs of recovery after five years, the trade restrictions should be removed altogether, or reduced to the level necessary to protect the financial status of workers during the phase-out period. \(^{237}\) Putting these recommendations for handling market disruptions into practice will relegate trade restrictions to measures of last resort for dealing with market disruptions. More importantly, if followed, these recommendations will prevent uncompetitive industries from surviving longer than they should under the protection of so-called orderly marketing agreements, like the Long-Term Arrangement Regarding International Trade in Cotton Textiles. \(^{238}\)

Pareto's theory of efficiency holds that a transaction is efficient only if it allows some to gain without causing anyone to lose. \(^{239}\) Adjustment assistance is an attempt to put this theory into practice by using public funds to compensate those who lose when domestic industries are displaced by imports, which provide consumers with lower priced goods and services. Compensating the losers of free trade for

\(^{233}\) See Malmgren Trade, supra note 27, at 31.

\(^{234}\) See OECD Policy, supra note 80, ¶ 260, at 84.

\(^{235}\) The object of this recommendation is to insure that the foreign producers enjoying comparative advantages will be allowed to exploit their advantages to a reasonable extent without defeating the purpose of the market-disruption program. This recommendation is based on the growth provisions of the long-term Agreement Regarding International Trade in Cotton Textiles. L.T.A., supra note 121, annex B, par. 2, [1962] 3 U.S.T. 2681.

\(^{236}\) Under the Trade Act of 1974, one of the criteria used to determine if imports are seriously injuring a domestic industry for purposes of granting import relief is "the inability of a significant number of firms to operate at a reasonable level of profit..." Trade Act of 1974, § 201(b)(2)(A), 19 U.S.C. § 2251(b)(2)(A) (Supp. IV 1974).


\(^{238}\) See note 121 supra.

their losses should reduce the political pressure to impose trade restrictions against imports.\textsuperscript{240}

Unfortunately, the adjustment assistance process is not this simple. The losers of free trade are so varied that it is impossible to compensate all of them. These losers include workers and investors associated with displaced domestic industries, the unions to which the displaced workers belong, the communities to which the displaced industries are economically important, and the firms to which the displaced industries represent a substantial volume of business.\textsuperscript{241} The present adjustment assistance policy of the Trade Act of 1974 provides compensation to business firms seriously damaged by import competition,\textsuperscript{242} to workers who are separated from their jobs as a result of import related damage to their employers,\textsuperscript{243} and to communities which suffer economically from high unemployment and business failures attributable in part to import competition.\textsuperscript{244}

Since adjustment assistance cannot compensate all of the losers of free trade, it is important that adjustment assistance benefits are carefully tailored to meet the problems they are to alleviate. If the benefits are too generous, business firms may lose some of their incentive to operate efficiently because they are insured against the normal attrition associated with vigorous business competition,\textsuperscript{245} and workers may have their incentive to work impaired because they can remain unemployed for long periods of time without suffering financial damage.\textsuperscript{246} On the other hand, it is essential that workers are completely reimbursed for the loss of salaries and the expenses of job training, job searching, and relocating, and that they receive compensation for such externalities as loss of seniority, loss of job satisfaction and security, and the emotional upheaval of leaving communities in which family roots have been established.\textsuperscript{247} Lesser benefits will not overcome worker opposition to free trade, since labor unions as uncompensated losers from free trade, maintain political pressure for the erection of trade barriers.\textsuperscript{248} Effective community aid programs can lessen some of the problems of displaced workers by making it possible for import-dam-

\begin{footnotesize}
\textsuperscript{240} Malmgren Trade, supra note 27, at 75.
\textsuperscript{245} See Free Trade Politics, supra note 103, at 164-65.
\textsuperscript{246} Id. at 167.
\textsuperscript{247} See Walter Trade Policy Systems, supra note 104, at 23-25.
\textsuperscript{248} Id. at 27-28.
\end{footnotesize}
aged communities to attract new industries to replace those which succumbed to import competition, thereby providing displaced workers with alternative job opportunities within their home communities.

The adjustment assistance provisions of the Trade Act of 1974 are adequate with respect to business firms and trade impacted communities, but are inadequate with respect to displaced workers. Business firms which have been seriously damaged by import competition may receive technical and financial aid for the purpose of formulating and implementing an economic adjustment plan. In order to preserve the incentives of the firms to operate efficiently, financial aid comes only in the form of loans and loan guarantees, and will not be granted if the petitioning company can acquire the needed funds through the private capital market, its own resources, or if there is no reasonable expectation that the recipient will be able to repay the sums loaned. Recipient firms can use adjustment assistance loans only as working capital or to acquire, construct, install, modernize, develop, convert, or expand land, plant, buildings, equipment, facilities, or machinery in furtherance of an economic adjustment plan.

Communities which have been damaged economically by import competition may receive direct grants, loans, and loan guarantees to develop and implement economic rejuvenation plans under the Act. The loan guarantees include loans made to private borrowers by private lending institutions in connection with a community's economic rejuvenation program. To ensure that the recipient communities diligently pursue their economic rejuvenation plans, the affected communities and the states in which they are located may have to enter into agreements with the Secretary of Commerce binding them to pay up to 50% of any liabilities arising from loan guarantees made pursuant to the community adjustment assistance programs.

The adjustment assistance programs for displaced workers are inadequate because they do not completely compensate displaced workers for their salary losses, job search expenses, and relocation expenses,

and provide no compensation to these workers for the previously mentioned externalities. Even if he works at a lower-paying temporary job to supplement his adjustment assistance benefits, a displaced worker is allowed to receive a maximum of only 80% of his previous average weekly wage or 130% of the average manufacturing wage, whichever is less. This benefit package destroys worker incentive to seek temporary employment during the adjustment period, since a worker can receive the average weekly manufacturing wage or 70% of his previous average weekly wage, whichever is lower, without working. There is no sensible reason why this provision should not be changed to allow a worker to receive 100% of his previous average weekly wage by working to supplement his adjustment assistance benefits, particularly in cases when the work includes on-the-job training for a future permanent job. Job search allowances are limited to 80% of the expenses involved up to a maximum of five hundred dollars, while maximum relocation allowances equal 80% of the expenses involved plus three times the worker's average weekly wage or five hundred dollars whichever is less. Given the safeguard measures attached to the job search and relocation allowance provisions, it is unjustifiable to deny displaced workers complete compensation for their job search and relocation expenses.

Inadequate benefits may reflect the feeling that, other than being displaced from their jobs because of import competition, import-displaced workers are in no different position than any other worker who loses his job because his employer is suffering financially. This being the case, it is not justifiable to discriminate heavily in favor of the import-displaced worker over the rest of the unemployed.

260. These safeguards include the requirement that workers must seek jobs in their own areas before searching elsewhere. Trade Act of 1974, §§ 237, 238, 19 U.S.C. §§ 2297-98 (Supp. IV 1974). Workers will not receive relocation expenses unless they cannot reasonably be expected to secure suitable employment in the commuting areas in which they reside and have obtained suitable employment or a bona fide offer of such employment of long-term duration in the areas to which they wish to relocate. Trade Act of 1974, § 238(b), 19 U.S.C. § 2298 (Supp. IV 1974).
261. Unemployment often is caused by factors unrelated to increased importation such as changing labor requirements resulting from economic growth and technological progress within the developed countries. See MALMÖREN TRADE, supra note 27, at 74.
262. However, the inadequate adjustment assistance benefits may also reflect the difficulty in measuring exactly the losses to be compensated, the desire to not promote inefficiencies, and the normal reluctance of those who gain from free trade to part with
Rather than providing a rationale for granting inadequate benefits to import-displaced workers, however, these circumstances point to the need for the United States to develop a single comprehensive jobs program which treats all workers equally and adequately by establishing improved unemployment insurance benefits and job training programs for all workers who become unemployed through no fault of their own. A comprehensive jobs program of this nature not only would dramatically improve the mobility of this country's labor, but also would reduce political pressures for erecting trade barriers by removing the present emphasis on import competition as a reason for workers becoming unemployed.

**Encouraging Development**

Economic development of the less-developed world would stimulate an increase in world trade and prosperity that would benefit all nations, since rising incomes lead to increased spending on goods and services other than the basic food, shelter and clothing requirements. However, current economic conditions are not favorable to development. Energy costs have risen rapidly in the wake of OPEC's oil embargo, creating massive balance of payments disequilibriums among the less-developed nations. Many developed countries have resorted to the market-disruption mechanism to erect trade barriers against the most competitive of the less-developed countries' products. The generalized system of tariff preferences for less-developed countries, as implemented by most developed nations, operates within narrow quantitative limits, is subject to the market-disruption mechanism, and a portion of their gains in order to compensate the losers. See Walter Trade Policy Systems, supra note 104, at 23-25.

263. Such a comprehensive jobs program would shift the emphasis from protecting jobs on a sector-by-sector basis to providing overall job security within the general economy. See Malgren Peacekeeping, supra note 11, at 158-60.

264. See North-South Dialogue, supra note 24, at 547-50.

265. See Weintraub Preferences, supra note 32, at 123-24.

266. For a description of how the generalized system of tariff preferences is supposed to work, see note 194 supra. The United States has adopted its own generalized tariff preference system in the Trade Act of 1974, §§ 501-05, 19 U.S.C. §§ 2461-65 (Supp. IV 1974).

267. For example, under the United States' generalized system of preferences, a less-developed country loses its preferred status with respect to a given article as soon as it exports to the United States a quantity having an appraised value either (1) in excess of \( \frac{\text{U.S. G.N.P. for Previous Year}}{25,000,000} \) or (2) equal to or exceeding 50% of \( \frac{\text{U.S. G.N.P. for 1974}}{\text{the appraised value of the total imports of the article in the United States in any calendar year. Trade Act of 1974, § 504(c), 19 U.S.C. § 2464 (Supp. IV 1974).}} \)

268. See note 265 supra. The United States Generalized System of preferences indi-
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and therefore does not produce significant benefits for the developing world. Moreover, the benefits which are generated by the generalized system of tariff preferences are eroded by multilateral trade negotiations which lead to a lowering of tariff barriers. The economies of those less-developed countries which rely heavily on sales of primary producers for their foreign exchange continue to be buffeted by wild price fluctuations because comprehensive commodities agreements which would stabilize these prices have not been reached. Finally, for a multiplicity of reasons, the developed nations are failing to live up to their commitments to devote 0.7% of their gross national products to direct transfers of financial resources to less-developed countries.

The developed countries should aid the less-developed countries by eliminating protectionism. The products of the less-developed nations are among the most import-sensitive products sold within the developed countries' domestic markets. This is especially true of labor-intensive products. As a consequence, trade barriers which arise through the market-disruption mechanisms, market-sharing agreements such as the Long-Term Arrangement Regarding International Trade in Cotton Textiles, and voluntary restraint agreements have a particularly severe impact on the products in which the less-developed countries enjoy comparative advantages. If the less-developed countries

rectly safeguards import-sensitive industries from market distortion by not including their products as articles eligible for preferred status. Articles which are ineligible include textile and apparel articles covered by textile agreements, watches, import-sensitive electronic products, import-sensitive steel articles, certain footwear articles, import-sensitive semimanufactured and manufactured glass products, any other article the President deems to be export sensitive, or any article subject to escape clause proceedings. Trade Act of 1974, § 503, 19 U.S.C. § 2463 (Supp. IV 1974).

269. In 1968 the United States imported $8.5 billion of products from the less-developed countries. The import duties collected on all the imports amounted to approximately $3 billion. One author estimated that the increased earnings that accrue to less-developed countries from a United States generalized preference system would not exceed $1 billion, and that this result would be paralleled in Europe and Japan. This is a relatively small figure when compared to the $45 billion the less-developed countries expected to receive from world-wide exports. See MALMGREN TRADE, supra note 27, at 75-76.

270. See note 195 supra.
271. See note 190 supra.
272. At the second UNCTAD conference in 1968, the developed countries agreed to make direct transfers of financial resources to less-developed countries in an amount equal to 1% of their individual G.N.P.'s. See Johnson Seventies Strategy, supra note 105, at 19. Despite the fact that this figure has been lowered to .7%, only Sweden has lived up to this agreement by transferring .72% of its G.N.P. for aid to less-developed countries. The United States and Japan are twelfth on the list at .25%, and Switzerland is last at .14%. TIME, June 28, 1976, at 10.
were allowed to exploit fully their comparative advantages, the result
could be stable domestic export-oriented industries, which would gen-
erate steady streams of foreign exchange and the capital resources
needed for product diversification. Furthermore, more rational coun-
tervailing practices among the developed nations would prevent the de-
struction of the less-developed countries' development programs invol-
ving government subsidization. Allowing the less-developed countries
greater latitude in the use of subsidies is important, because it reduces
the need for these countries to use more trade-distortive measures in
developing infant industries.273

The less-developed countries' use of NTB's to develop their infant
industries should be encouraged when it is an integral part of carefully
drafted and coordinated development plans. Coordination among the
less-developed countries of development plans is essential, because
haphazard development programs spawn costly infant industries which
cannot survive without continual protection.274 Counterproductive
trade competition is encouraged as each country seeks to establish the
same large scale industries in areas which can adequately support only
one or a few.275 More importantly, it is unreasonable to expect other
nations to tolerate the burdens of trade restrictions imposed on
their producers in the name of development without receiving some
assurance that the desired development will occur. Although GATT's
Article XVIII calls for the Contracting Parties to annually review all
measures adopted by less-developed countries for the development of
their infant industries, this provision has not been complied with, be-
cause the less-developed countries resent having other parties overlook
their economic policies.276 In view of the developed countries' poor
response to the needs of the less-developed countries, their resentment
of Article XVIII's oversight procedure is understandable. Neverthe-
less, for the foregoing reasons this resentment must be overcome. A
good beginning point would be for the developed countries to reduce
their protectionist measures against the products of the less-developed
countries, and to exhibit some evidence that they take seriously their
development obligations under part IV of GATT.277 This provision
is particularly important because it subjects the developed countries to
GATT complaint procedures, insuring that they effectively carry out

273. See Verbit Trade Agreements, supra note 31, at 180.
274. See Malmgren Trade, supra note 27, at 34.
275. Id. at 57-60.
276. See note 185 supra.
277. See note 187 supra.
their development obligations. 278 A demonstration that GATT procedures apply equally to developed countries as well as the less-developed countries should weaken objections to GATT oversight of development programs.

In connection with infant industry development, Article XVIII, which gives a nation damaged by infant industry protection measures the right to receive compensation from the protecting country, should be modified to confer compensation rights only on less-developed countries. 279 Developed countries should be able to bear the cost of such protectionist measures, but a less-developed country should not be allowed to gain at the expense of another. Precedent for this recommendation is found in GATT’s Article XXXVI, Paragraph 8:

The developed contracting parties do not expect reciprocity for commitments made them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties. 280

This GATT development principle was implemented in recognition of the fact that less-developed countries have little to offer in the way of bargaining concessions, so that to expect reciprocity from them would deny them the benefits of multilateral trade negotiations. 281 The less-developed countries also have little to offer as compensation to those

278. GATT, art. XXXVII, para. 2, provides that whenever a contracting party feels the development commitments of Part IV are not being complied with, upon request the Contracting Parties shall consult with the offending contracting party and all interested contracting parties to resolve the problem.

279. Specifically, GATT, art. XVIII, para. 22, gives contracting parties which are detrimentally affected by development actions taken by a less-developed country, as authorized by art. XVIII, the right to suspend unilaterally the application to the trade of the offending less-developed country concessions or GATT obligations which are substantially equal to the damage suffered by their economies.

280. This provision already applies to actions taken by a less-developed country to aid the development of a specific industry under Section A of article XVIII, which allows a less-developed country to withdraw or modify a tariff concession it has agreed to under GATT in the furthestance of development. GATT, Annex I, ad. art. XXXVI, para. 8. To carry out this recommendation, GATT, art. XXXVI, para. 8 should be extended to actions taken by less-developed countries under Section C of article XVIII, which allows less-developed countries to use governmental assistance inconsistent with those authorized by GATT to aid in the development of specific industries.

281. See GATT, annex I, ad. art. XXXVI, para. 8; Wall Opportunities, supra note 35, at 42. This principle has been applied in the United States Trade Act of 1974 which contains a provision authorizing the President to evaluate all trade agreements entered into under the authority of the Trade Act of 1974 and modify those which have not provided the United States substantially equivalent competitive opportunities as such agreements have provided other major industrialized countries. Trade Act of 1974, § 126, 19 U.S.C. § 2136 (Supp. IV 1974). The Trade Act of 1974 contains no comparable provision which applies to trade between the United States and less-developed countries.
developed countries injured by infant industry development programs. To require the less-developed countries to extend such compensation would deny them the development rights of Article XVIII.

As tariff reductions diminish the value of tariff preferences to less-developed countries, pressure should increase for the retention of trade preferences by the use of NTB's. Using NTB's to maintain trade preferences for the less-developed nations is undesirable because it destroys the central development feature of the tariff preference systems. In order for a less-developed country to take advantage of a tariff preference, its industries have to achieve a certain level of efficiency and competitiveness. NTB preference systems which operate through the use of excluders would guarantee the industries of less-developed countries an uncontested percentage of the developed countries' markets, thus removing the efficiency incentives competition engenders. This problem might be avoided if the developed countries granted a fixed level of subsidies to their citizens who purchased the products of less-developed countries. Like the tariff preference system, this subsidization would only benefit the industries of less-developed nations which achieved a certain level of efficiency.

A better way to encourage development among less-developed countries is to allow them to enter into preferential trading arrangements among themselves. Such arrangements permit the less-developed countries to coordinate the establishment of large-scale industries, so that each country will not unilaterally create industries which its own economy cannot support and which must compete with identical industries in surrounding countries. Technically, these preferential trading arrangements violate GATT's nondiscriminatory most-favored-nation policy. GATT permits departures from its nondiscriminatory most-favored-nation policy only when contracting parties propose to escalate a preferential trading arrangement covering one product sector into a full-fledged customs union or free-trade area covering substantially all product sectors. At present, the only way for contract-

282. See note 195 supra.
283. See WEINTRAUB PREFERENCES, supra note 32, at 73.
284. See MALMGREN TRADE, supra note 27, at 57-60.
285. GATT requires that if one contracting party wishes to extend an advantage to another contracting party with respect to a given product, that advantage must be extended immediately and unconditionally to all other contracting parties. GATT, art. I, para. 1.
286. GATT, art. XXIV, paras. 5, 8. A customs union consists of two or more countries which eliminate trade barriers on substantially all trade between them, and maintain a common trade barrier scheme against all other countries. GATT, art. XXIV,
ing parties to legally enter into preferential trading arrangements affecting only one or a few product sectors is to apply to GATT for a waiver of their nondiscriminatory most-favored-nation obligations or to enter into side agreements under GATT auspices, such as the Long-Term Arrangement Regarding International Trade in Cotton Textiles. This situation should be modified to recognize the need of less-developed nations to enter into limited preferential trading arrangements by adding a development exception to GATT's Article XVIII, legalizing limited preferential trading arrangements entered into by less-developed contracting parties in the interest of economic development. These limited preferential trading arrangements should dismantle trade barriers in the less-developed countries and lead to the formation of new customs unions and free-trade areas.

Finally, it is time that workable commodities agreements are created to stabilize the prices of primary products. Without stabilization, it will be impossible for many less-developed countries to formulate orderly development programs. The major issue now is whether commodities arrangements should merely stabilize prices around a long-term average price, or should result in a transfer of resources from the developed countries to the less-developed countries by supporting prices above the market average. The best economic method for achieving the desired transfer of resources is direct financial transfers; but they are becoming politically unpopular within the developed countries. Therefore, transfers of financial resources may have to be dis-

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287. GATT permits a contracting party to apply for a waiver of its GATT obligations which is not otherwise provided for when the Contracting Parties feel such a waiver is justified by exceptional circumstances by a two-thirds majority of those voting which comprise more than half of the Contracting Parties. GATT, art. XXV, para. 5.

288. See Malmgren Trade, supra note 27, at 48; Preeg Blocs, supra note 7, at 37.

289. This reform would not radically distort GATT's free trade principles since economists now question whether customs unions and free-trade areas produce trade creation or trade diversion and whether some preferential trade agreements might promote trade creation. See Dam GATT, supra note 26, at 283-90.

290. See Preeg Blocs, supra note 7, at 166; North-South Dialogue, supra note 24, at 555; N.Y. Times, June 25, 1976, § A, at 6, col. 1.

291. Among the reasons why there is a lower priority in the United States for pro-
guised in the form of commodities price support systems. Before such support systems are created, it must be remembered that they transfer financial resources from consuming nations to producing nations. Less-developed nations consume as well as produce primary products, and many developed countries also produce primary products, so that the commodities arrangements, if not carefully drawn, may retard rather than accelerate the development of many less-developed countries.

Harmonizing the Rest

Harmonization is a technique for reducing the trade-distortive propensities of government policies which have incidental impacts upon trade. The guiding principle of this technique is the recognition that social, political, and environmental objectives are often as important as economic objectives in the promotion of overall social welfare, making it not only impossible, but also undesirable, to eliminate all government policies which produce trade distortions. Proceeding from the recognition that governments must pursue policies which are inconsistent with free trade and economic efficiency, harmonization requires governments to implement methods of achieving their non-economic objectives which least distort international trade. Harmonization also requires that all trading nations seek to coordinate their domestic policies, so that one nation does not achieve its goals at the expense of another, and so that producers of internationally-traded goods face minimal inconsistencies in the customs, business, safety, and environmental regulations with which they must comply in order to sell their products in international markets.

In some cases, harmonization must be achieved by the unilateral actions of nations. For reasons of national security or in order to achieve income redistribution goals, all nations have sought to insulate...
uncompetitive sectors of their economies from import competition. This protection not only forces domestic consumers and foreign producers to bear the cost of such noneconomic goals, but also conceals the full cost of these programs from the electorate. A less-trade-distortive method of achieving defense and income distribution goals through the private sector is to subsidize the relevant uncompetitive industries. Subsidization gives domestic consumers a greater range of products at lower prices and makes it possible for citizens to obtain an accurate estimate of the cost of their government's noneconomic objectives. If the electorate feels such objectives are too expensive, it can force the government to abandon or reduce the scale of the programs adopted to achieve these objectives. For example, a nation may feel compelled to maintain a capability of producing minimal amounts of security-sensitive products such as steel. It can do so with the least trade distortion by producing these security-sensitive products through government facilities and leaving the private consumers free to purchase cheaper imported steel.

In other cases, harmonization can be accomplished only by multilateral consultation and coordination among nations with respect to their national policies. Each nation must recognize that to receive the benefits of international trade it must give up a certain amount of economic independence, since any action it takes which restricts international trade harms its trading partners and subjects its trade to retaliatory measures. In recognition of this growing interdependence among nations, when a nation takes actions which could restrict international trade it should analyze the probable trade effects of these actions and inform all nations whose trade will be detrimentally affected. This kind of consultation not only will allow the trade-restricting nation to determine to what extent its export trade will be subjected to retaliation, but also the trade-affected nations can assess how much damage will be done to their trade, so that rational adjustment plans can be implemented, and the trade-restricting nation can avoid trade wars by offering appropriate trade concessions. More importantly, international cooperation among nations in pursuing their domestic goals can prevent the need for trade restrictions to be imposed.

296. See Malmgren Peacekeeping, supra note 11, at 82.
297. Id. at 83–84.
298. See Samuelson, supra note 2, at 669.
299. See Preeg Blocs, supra note 7, at 139, 146, 152–53; Malmgren & Marks Negotiating, supra note 11, at 330.
300. An example of such preventive harmonization was furnished recently when the twenty-four members of the Organization for Economic Cooperation and Development

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Allison: The Nontariff Trade Barrier Challenge: Development and Distortion

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During the multilateral trade negotiations, harmonization could produce fruitful results in the area of international product standards. An international standards organization should be established to compile on a product-by-product basis the variations in product standards among nations and to resolve those variations into uniform standards for each product sector by the consensus of the participating nations. The international standards organization should follow a similar procedure to develop uniform testing and inspection standards. Nations should participate in the international standards organization through national standards agencies charged with the responsibility of formulating the product, testing, and inspection standards their nations wish to implement. Once the international standards organization adopts a standard, the participating nations should attempt to adopt it as their national standard through reference legislation. Importing nations should agree to accept without further tests and inspections, the products of exporting nations which are certified as complying with the international standards, unless their national standards are significantly more stringent. The international standards organization should

(O.E.C.D., which is composed of Western Europe, North America, and developed Asia) agreed to coordinate their collective economic recovery by gearing their individual economic growth rates to a 5% mark, so that one country's inflationary practices will not create inflation among all of the industrialized nations. N.Y. Times, June 22, 1976, at 49.

301. At the present, there exists an organization entitled The International Organization for Standardization which attempts to perform this function. See Product Standards, supra note 205, at 174-75.

302. Id.

303. The United States participates in the International Organization for Standardization through American National Standards Institute (A.N.S.I.), which unfortunately receives neither government recognition nor government aid. Id. at 176.

304. A major problem with the reference legislation approach is that the federal governments of many countries, including the United States, lack the power to commit smaller governmental entities and their private sectors to the use and adoption of federally-promulgated standards. See 4 TRADE COMMISSION REPORT, supra note 13, at 66. In the United States there is also a question as to whether such legislation would improperly delegate legislative authority to a private organization. See Product Standards, supra note 205, at 178. Additionally, there is a question as to whether such a procedure would violate the due process standards of the opportunity to be heard, notice of the proposed standard, fairly conducted hearings, support for a decision in a record of a hearing, submission of findings and a tentative report, and an opportunity to appeal from the decision and report. See Hearings on H.R. 7506 Before the Subcomm. on Commerce and Finance of House Comm. on Interstate and Foreign Commerce, 93rd Cong., 1st Sess., Ser. 107, at 196 (1974). This hearing concerned the proposed International Voluntary Standards Cooperation Act of 1973, H.R. 7506, 93rd Cong., 1st Sess. (1973), which had as its purpose to enact a formal arrangement between industry and the federal government with respect to harmonizing product standards. To date, this bill has not been enacted.

mediate any disputes which arise between exporting and importing nations. Although these recommendations will not harmonize all products standards problems, they should reduce trade distortions, foster technological innovation, increase the interchangeability of products, decrease production and sales costs, increase the reliability and dependability of products, and end the wasteful duplication of quality control testing. 306

CONCLUSION

A great percentage of the world's population and supplies of natural resources is located in less-developed countries where poverty abounds. Paradoxically, it is the small minority of the world's population which lives in developed countries, consumes most of the resources produced each year, and owns most of the world's wealth. Since the supplies of natural resources are depleting rapidly, the less-developed countries are exerting greater control over their supplies of natural resources in order to gain more remunerative prices today, and to insure adequate supplies for future economic growth and development. At the same time, within the developed countries the demand for natural resources continues to rise as their citizens' pursuit of higher standards of living continues unabated. Consequently, the prices of natural resources are rising dramatically, the developed nations' access to natural resources is declining relative to their future needs, and tensions are developing which threaten world peace and welfare. To blunt this threat, economic policies must be implemented immediately which minimize waste and promote economic justice. NTB's create waste by diverting productive resources from their most efficient uses. Therefore, the NTB policy for the future must be that the use of NTB's is prohibited unless it contributes significantly to economic development, social welfare, or environmental safety.

NTB's which are implemented for politically expedient or protectionist motives perform no useful function and should be eliminated. Politically expedient NTB's are substitutes for non-distortive methods of solving national problems, such as balance of payments deficits and inflation. When used to solve these problems, NTB's merely transfer them from one nation to another, rather than eradicating their underlying causes. Protectionist NTB's also benefit the utilizing country at the expense of others. These NTB's allow uncompetitive domestic indus-

306. See Product Standards, supra note 204, at 173.
tries to survive which make inefficient use of productive resources and take business from efficient foreign producers. Thus, the notion that uncompetitive domestic industries are entitled to a “fair share” of their nations’ markets must be repudiated. To this end, voluntary export restraint agreements must be outlawed, and market-disruption procedures must be reformed so that they are truly temporary measures designed to forestall sudden economic dislocations. However, this repudiation will not occur unless each nation educates its electorate as to the benefits of liberalized trade, the costs of protectionism, and the appropriate methods of solving national problems. It is natural for those whose economic well-being is tied to uncompetitive industries to oppose their demise through liberalized trade. This opposition can be lessened by the implementation of adjustment assistance programs to compensate the losers of liberalized trade, train displaced workers for jobs in competitive industries, and hasten the transfer of capital from the inefficient to the efficient producers.

The economic problems of the less-developed nations cannot be solved unless the developed nations make greater efforts to advance economic development through trade. The developed nations must cease protecting uncompetitive domestic industries such as textiles in which the less-developed nations enjoy the comparative advantages. This would permit the less-developed nations to expand their competitive industries, thereby lowering unemployment and acquiring increased revenues. Within the developed nations, consumers would enjoy a wider range of product choices at lower prices, and productive resources would be released for use by efficient industries. The developed nations should be tolerant when the less-developed nations use NTB’s in furtherance of their development programs. Specifically, the developed nations should neither countervail the subsidies that less-developed nations grant their industries, nor ask to be compensated for trade damage resulting from the less-developed nations’ use of NTB’s to protect infant industries. In many industries firms cannot be competitive unless they attain significant economies of scale. These economies of scale cannot be achieved within the small markets of individual less-developed nations. To provide the expanded markets needed for such industries, the developed nations should allow the less-developed nations to grant trade preferences among themselves on a sector-by-sector basis when the formation of customs unions or free-trade areas is politically unfeasible. Less-developed nations which rely heavily on the sales of commodities for their foreign exchange cannot sustain their
development efforts, because the prices of commodities fluctuate wildly over short periods of time. These nations must be helped by multilateral cooperation to stabilize the prices of commodities. A price stabilization effort will involve the use of NTB's to the extent that international commodities agreements are formed to stabilize prices through supply controls. Obviously, these development measures impose economic burdens on the developed nations. In the future these burdens should produce benefits, since increased prosperity in less-developed areas will provide the developed nations with increased investment opportunities and new markets for their industrial goods.

It must be recognized that NTB's are essential elements of most nations' programs for achieving foreign policy objectives, national security, regional economic development, and environmental goals. NTB's which are used for such purposes cannot be eliminated because attacks on their usage are regarded as attacks on national sovereignty. However, it is necessary for the trading nations to harmonize their efforts to pursue national goals since those efforts often distort trade. Each nation must select the least distortive methods for pursuing national goals. Multilateral cooperation is also required. Environmental and product safety standards must be made as uniform as possible. Product testing and certification procedures should also be standardized. More importantly, multilateral consultation must be employed to reduce the frictions that result when nations take retaliatory measures because their trade was damaged by another nation's pursuit of valid national objectives. Consultation would permit each nation to assess in advance the impact proposed national programs would have on trade, so that it could forestall the retaliatory measures of other nations by negotiating compensatory trade adjustments.

The NTB policy recommended for the future encompasses proposals which are inconsistent with free market principles in their use of international economic planning and trade restrictions. The western nations with market economies cannot, in good conscience, object to the recommended NTB policy because it departs from free market principles. These nations often depart from free market principles to redress internal problems caused by imbalances within their economies. Observing this phenomenon, one writer issued this challenge to the developed nations:

In nearly all Western countries, farm prices are presently stabilized and farmers subsidized in one way or another, often through price parities, i.e., "indexation." Antitrust laws are
enforced against unfair competition. Favorable treatment is accorded to domestic business and workers. Giant corporations "affected with the public interest" are regulated. Why, the Third World wonders is something good for the home-grown goose not equally good for the foreign gander?\footnote{North-South Dialogue, supra note 24, at 560.}