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GATT and the Developing World: is a New Principle of Trade Liberalization Needed?

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GATT AND THE DEVELOPING WORLD: IS A NEW PRINCIPLE OF TRADE LIBERALIZATION NEEDED?

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The General Agreement on Tariffs and Trade ("GATT") has been a focal point in international trade relations and law for over forty years. A creation of the post-World War II era, GATT was designed to satisfy the trade needs of the developed countries, particularly the United States. The developing countries were largely ignored during the initial stages of GATT, and did not gain bargaining power until the mid-1970s.

This article analyzes GATT's role in promoting or neglecting the trade objectives of the developing countries, mainly those in Asia and Africa. The first section traces the evolution of GATT. The second section addresses devices for regulating trade and their effect on developing countries with respect to commodities, textiles, and related products. The third section examines how the political forces within the developing countries have affected GATT. The fourth section analyzes proposals from the recent Uruguay Round. The article concludes with an analysis of GATT's role in the future.

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I. EVOLUTION OF GATT

Developing countries were not a powerful bargaining force in the formulation of the legal rules of GATT. The Depression of the 1920s and 1930s, "Beggar-thy-neighbor" policies followed by Western European countries, and the Second World War left an unsettling array of economic conditions in the late 1940s. The victors of World War II, the United States and Western Europe, with the United Kingdom leading the European bloc, decided to enact a multilateral forum to propagate "free trade" throughout the world to avoid the economic mistakes of the first half of the twentieth century.[1] The principles of international trade formulated during the Havana Conference were adopted as the General Agreement on Tariffs and Trade on January 1, 1948.

When the United States drafted its proposal for a postwar trade policy, it included only three economic development exceptions to "free trade": the right to protect infant industries by raising "bound" tariffs; the imposition of quantitative restrictions; and the securing of preferential tariffs from other developed or developing countries.[2]

While the United States espoused free trade for other contracting parties, it requested free trade exceptions for the benefit of developed country producers.[3] These exceptions included the right to implement export subsidies for agricultural commodities and the right to use quantitative restrictions on agricultural imports.[4] Britain and France's demands to retain tariff preferences for their colonies and ex-colonies, as well as the right to use discriminatory restrictions to cope with balance of payments problems, were also accepted into GATT's structure.[5] During the first decade of GATT, special provisions were not included to address the peculiar needs of the developing countries. This forced developing countries to request waivers from the GATT rules.[6] Developing countries were often required to use formal GATT procedures at times when formalities were not required of the developed nations.[7] For example, Sri Lanka (formerly Ceylon) requested formal waivers in 1952. The GATT Working Party not only insisted that Sri Lanka follow formal procedures, but also required it to withdraw some of its

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1. *See* S. GOLT, THE GATT NEGOTIATIONS 1986-90: ORIGINS, ISSUES & PROSPECTS 2 (1988) [hereinafter GOLT].

2. *See id.*

3. *Id.*

4. *Id.* at 16.

5. *Id.*

6. *See id.* at 30-31.

7. *See id.* at 30-31. Until 1983, developing country waivers accounted for 116 of the 169 waiver decisions, in comparison to only 51 waivers for developed countries. *Id.*

original requests.[8] The Sri Lankan delegation made a statement that the stringency of the review procedure under Article XVIII nearly destroyed the benefit it sought to confer.[9]

As the 1960s approached, the number of developing country members in GATT increased.[10] However, their behavior as a bloc was not yet seen as a major force in implementing rules beneficial to developing countries.[11] Meanwhile, the Soviet Union attempted to organize a rival trade organization within the United Nations: the United Nations Conference on Trade and Development (UNCTAD).[12]

As a result of this atmosphere, the major trading partners convened a ministerial meeting in 1957.[13] The Ministers cited three major problems affecting developing countries: excessive short-term fluctuations in the prices of primary products; failure of the developing countries' trade to grow as rapidly as developed countries' trade; and widespread resort to agricultural protection.[14] They recognized that the developing countries had no real bargaining power to negotiate lower tariffs[15] and identified two types of discrimination — origin-based discrimination[16] and discrimination on the basis of the degree of processing.[17]

As a result of these findings, in 1961, contracting parties to GATT made a Declaration for the Promotion of Trade in Less Developed

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8. *Id.* at 25.

9. *Id.*

10. By 1970, there were 77 GATT signatories, 52 of which were developing countries. *Id.* at 24.

11. *Id.* at 39.

12. *Id.* at 39-40.

13. *Id.* at 41.

14. *Id.*

15. *Id.* at 229-30.

16. *Id.*; *see, e.g.*, T. MURRAY, TRADE PREFERENCES FOR DEVELOPING COUNTRIES 10 (1977) [hereinafter MURRAY] The United Kingdom and France violated the GATT non-discrimination principle whenever it suited their political interests. The Commonwealth Preference Area, Free Union of the European Economic Community (EC), Africal Association Agreements under the Yaounde' Convention, and the community associations with 46 countries of Africa, the Caribbean, and the Pacific under the Lome Convention, all had a discriminatory effect against developing countries outside these regions. *See also* DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 230 (1970).

17. MURRAY, *supra* note 16. The tariff increased as the degree of processing increased for any given developing country export product. This impeded the growth of processing industries in the developing countries. *Id.* These differential tariff structures also resulted in a high level of protection for the processing industries in developed countries. *Id.* Committee III recognized that developing counties were relegated to the traditional position of suppliers of raw materials. *Id.*

Countries. In 1963, the Programme Action was announced and specific measures to ameliorate this situation were recognized: a halt on new tariffs and non-tariff barriers to trade for products of export interest to developing countries; elimination of quantitative restrictions by December 31, 1965; duty-free entry of tropical products from developing countries; and reduction and elimination of tariffs on developing countries' exports of semi-processed products.[18]

The Kennedy Round Negotiations (1964-1967) required developing countries to make some sort of contribution towards trade liberalization.[19] A linear approach was used, requiring all developed countries to make a 50% "across-the-board cut" in tariffs.[20] Agricultural products were not included in the offer, and most developing countries were allowed to opt out of the linear approach offer.[21] Moreover, each nation was permitted to file a "table of exceptions list." As a result, agricultural products were negotiated on an item-by-item basis.[22]

When the GATT signatories launched the Tokyo Round Negotiations (1973-1979), the world trading system had changed, requiring a different set of tariff rules.[23] The United States industries were facing grave competition from imports. Protectionist policies of the European Community and Japan had brought about a growing economic strength. Thus, tariff reductions on a linear basis were not as favored as during the Kennedy Round.[24]

The "most favored nation" principle and the "national treatment" principle are among the most important themes of GATT.[25] The most favored nation (MFN) principle, which espouses equality between trading partners, was never a clear-cut response to the developing countries' needs.[26] Rather, many argue that it was a tool to promote United

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18. MURRAY, *supra* note 16, at 10-11.

19. Hudec, *Developing Countries in the GATT Legal System*, 4 THAMES ESSAY 45 (1987) [hereinafter Hudec].

20. J.H. JACKSON, THE WORLD TRADING SYSTEM 121 (1989) [hereinafter JACKSON].

21. *Id.*

22. *Id.*

23. Hudec, *supra* note 19, at 72.

24. *See* JACKSON, *supra* note 20, at 121.

25. *See* GOLT, *supra* note 1, at 3-4. The "most favored nation" principle requires a contracting state to grant all other members of the agreement the same trade policy treatment that it grants any other country. *Id.* at 3. The "national treatment" principle allows a state to grant preferences to its domestic producers, through the use of a customs tariff. *Id.*

26. Hudec, *supra* note 19, at 6-7.

States' accessibility to other markets.[27]

As a result of requests for waivers from the MFN clause, the Generalized System of Preferences was enacted.[28] In response to these demands, however, the developed countries also requested that a Principle of Graduation be applied toward those countries that were developing more rapidly than the rest of the least developed nations.[29] For example, developing countries would contribute toward the framework of rights and obligations of the GATT when they were economically self-reliant. No specific provisions or rules were formulated for implementing the graduation principle at that time.[30]

Recent developments in the world economy have prompted a new round of negotiations — the Uruguay Round. Exchange rate fluctuations and third world debt[31] have been unsettling factors in international trade.[32] The developed countries are faced with ever-increasing imports from newly developing countries, such as Taiwan, Korea, and Hong Kong.[33] Therefore, it is in the best interests of the developed countries, particularly the United States, to halt the negative impact of these unsettling factors on its domestic markets.[34] Similarly, the debt-riddled, least developed countries have a high stake in promoting more preferential trade through formal GATT rules.

In summary, GATT was established to police "free trade" and liberalize trade barriers among contracting parties. Paradoxically, the most favored nation principle, non-discrimination among trading partners and reciprocity have, in effect, led to anti-free trade or anti-MFN rules such as the graduation principle, generalized system of preferences, voluntary export restraints, orderly marketing arrangements, trading blocs and free trade areas. These are not unexpected, considering the tension that exists in the division of economic resources between the developed and the developing countries.

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27. *Id.*

28. T. Frank, *Trade Policy Issues of Interest to the Third World*, THAMES ESSAY 29 (1981) [hereinafter Frank].

29. *Id.* at 15.

30. *Id.*

31. *Poor in a Rich Man's World*, The Economist, July 22, 1989, at 59 [hereinafter *Poor in a Rich Man's World*].

32. GOLT, *supra* note 1, at 8.

33. *Id.* at 11-12.

34. *Id.* at 12.

II. EXCEPTIONS TO GATT LEGAL STRUCTURE

In 1964, after the establishment of UNCTAD, the Generalized System of Preferences (GSP) was implemented. Yet, GSP violated two of GATT's primary principles — the most-favored nation principle and the non-discrimination principle. After much debate, contracting parties granted legal authorization to implement the GSP in June 1971.[35] The method under which the developed countries would grant these preferences, however, was left to their own discretion. In addition, the grantor nations (developed countries) determined which countries were developing countries through highly technical and specialized means.[36] The United States used GSP as a means to award its allies and punish its political opponents, primarily communist and OPEC countries.

At the Tokyo Round negotiations, contracting parties to GATT adopted a declaration entitled "Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries."[37] This declaration stated that the contracting parties "may accord differential and more favorable treatment to other contracting parties —notwithstanding the provisions of the GATT most favored nation clause."[38] The declaration instructed developing countries to make some contribution to the overall GATT legal structure of trade relations, which reflects the GSP's "graduation requirement."[39] The declaration also required newly developing countries to exempt themselves from the GSP scheme or specific areas of coverage if they had benefitted disproportionately from the GSP scheme.

The GSP scheme continues to permit too much leverage in the hands of the developed countries. It sets a precedent for more discriminatory trade practices in the international trading system.[40] It also fails to include a number of products which are important sources of export earnings for developing countries.[41] Moreover, it has regionalized trade along inefficient lines of production.[42]

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35. MURRAY, *supra* note 16, at 17.
36. JACKSON, *supra* note 20, at 278.
37. *Id.* at 279.
38. *Id.*
39. *Id.*
40. MURRAY, *supra* note 16, at 16.
41. *Id.* at 57.
42. *Id.* This latter point is debatable, because countries such as Singapore, Taiwan, Hong Kong, and South Korea may have originally begun their industrialization process through the manufacture and export of textiles and clothing. These countries are not endowed with natural resources and have a large labor force. Therefore, industrialization of the sort encouraged by textile industry exports may have been the most

The most damaging aspect of GATT to the developing countries is the derogation of the MFN clause, equality of treatment among trading partners.[43] Non-reciprocity is not enforced with respect to trade between developed and developing countries' multilateral trade negotiations.[44] In addition, under the GSP "graduation" requirement, the ability of the grantors of GSP to withdraw any or all benefits from the developing countries constitutes a breach of the principle of good faith.[45] The GSP system is extremely weak with respect to the criteria for designation of its beneficiaries, safeguard mechanisms, rules of origin, and the definition of product coverage.[46]

Although trade for developing countries has increased, the benefits of the GSP for many developing countries are questionable.[47] A large part of GSP excludes import-sensitive products such as textiles, leather, and most agricultural products.[48]

Because the GSP is a unilateral concession by developed countries, developd countries have manipulated the rules of origin, ceiling limits, product categories, and MFN tariff rates to reduce the potential market disruption to their respective economies.[49]

Another problem with the GSP is the principle of non-discrimination among beneficiaries.[50] Donor countries can discriminate among beneficiaries by broadly defining product coverage or by forming political guidelines in their GSP schemes. Discrimination among beneficiaries had to be implemented through general GSP guidelines, not by conscious selection of beneficiaries based on needs perceived by the donors.

Consequently, available product coverage has narrowed because donor countries could modify their product lists to deliberately exclude

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efficient line of production available to them at the time.

43. A. YUSEF, LEGAL ASPECTS OF TRADE PREFERENCES FOR DEVELOPING STATES 115 (1982).

44. *Id.*

45. *Id.*

46. *Id.*

47. For example, imports for nations in the OECD between 1976 and 1980 grew by an average annual rate of 21% compared with 19.6% growth from all sources to the OECD. JACKSON & DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 1157 (2d ed. 1986) [hereinafter JACKSON & DAVEY].

48. MURRAY, *supra* note 16, at 54.

49. *See generally id.*, at 64-70. Two examples of manipulation include Japan's system of ceilings, and the United States' flexible provisions to revise the list of beneficiaries and product categories.

50. *Id.* at 37, 61.

a large number of beneficiaries.[51] To remedy this situation, developed countries should be given the discretion to choose which developing countries they cover, thereby giving the GSP scheme greater benefits.[52] Presently, donor countries find ways to exclude certain legitimate developing countries. Nevertheless, if each donor country were permitted to select which developing countries deserved GSP benefits, there would be two-fold discrimination: exclusion on the bases of ineligibility under "developing country status" and of "product coverage." The legal concept of tariff preferences has been embodied in the Global System of Trade Preferences (GSTP).[53] Although this concept was conceived during the 1971 Protocol Relating to Trade Negotiations Among Developing Countries, UNCTAD has only recently discussed its potential application.[54] The GSTP is intended to facilitate "an equitable distribution of benefits to all participating parties."[55] The UNCTAD scheme proposes a linear tariff cut of 10% whereas developed countries would be permitted to cut tariffs by only 5%. These tariff reductions would only apply to products from other developing countries.[56] Depending on the level of development of each country, the developing countries could either reduce tariffs or raise MFN tariffs (with appropriate GATT waivers) to bring the entire tariff structure to as equitable a scheme as possible.[57]

Theoretically, the GSTP system is an equitable solution to disparities between trading partners, particularly where tariffs are concerned. Nevertheless, the current trend is toward active protectionism among most developed countries and institutionalized barriers to trade in developing countries. Thus, even if the GSTP scheme is fully implemented, benefits to all those participating could be negligible.

A. International Commodity Agreements

International commodity agreements are formulated to protect commodity exports between governments which derogate the principles of the Multi-Fibre Agreement and non-discrimination among states embodied in GATT.[58] These include a "special class" of trade agree-

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51. *Id.*
52. *Id.*
53. Hudec, *supra* note 19, at 108.
54. *Id.* at 109.
55. *Id.* at 110.
56. *Id.*
57. *Id.*
58. B.S. CHIMNI, INTERNATIONAL COMMODITIY AGREEMENTS: A LEGAL STUDY 34-36 (1987).

ments which "segregate a given commodity for special handling under special rules and arrangements going beyond and departing from those governing the generality of goods."[59] Developing country members of GATT have classified these specific commodity agreements as exceptions found in Article XX of GATT.[60]

The International Commodity Agreements are acceptable under GATT as long as they do not constitute arbitrary or unjustifiable discrimination between countries or are disguised restrictions on international trade.[61] Certain GATT articles have been interpreted to permit the operation of International Commodity Agreements, in particular Article XI, which allows quantitative import/export restrictions for governmental and economic structural purposes; Article XII, which permits import restrictions for balance of payments reasons; and Article XXV, which permits contracting parties to waive a GATT obligation by a two-thirds majority vote.[62]

International Commodity Agreements are designed to bring about price stabilization, export income stabilization, and long-term commodity development measures. However, they continue to create cartelization[63] and trade regionalization. The New International Economic Order recognizes these agreements as a major part of their program.[64] Whether or not they can be legitimately regarded as part of GATT's multilateral "free trade" oriented scheme is yet to be seen.

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59. *Id.* at 33.

60. These exceptions read:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
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> (h) undertaken in pursuance of obligations under any inter-governmental commodity agreement which conforms to criteria submitted to the Contracting Parties and not disapproved by them, or which is itself so submitted and not so disapproved.

See id. at 35.

61. *Id.* at 35-36.

62. *Id.* at 36-37. Some of the International Commodity Agreements which could have been established under the above guidelines include the Internatioanl Coffee Agreement (1976 and 1983); International Sugar Agreement (1977 and 1984); International Natural Rubber Agreement (1979); International Olive Oil Agreement (1979); International Cocoa Agreement (1980); International Tin Agreement (1981); International Agreement on Jute and Jute Products (1982); International Tropical Timber Agreement (1983); and the International Wheat Agreement (1986).

63. *See id.* at 45-50.

64. *Id.* at 127.

B. The Multi-Fibre Agreement

Developed countries have been successful in promoting and implementing devices which minimize tariff structures and restrain imports from developing countries.[65] The Multi-Fibre Agreement, which regulates textiles and related trade, is a classic example of this type of device.

The Multi-Fibre Agreement began when several developing countries started to excel in textile and garment industry exports. As early as 1956, the United States requested Japan to curb its textile exports. In 1959, industry to industry quotas were established between the United Kingdom and Hong Kong, India, and Pakistan.[66] In 1961 and 1962, the Short-Term Arrangements on textiles were formulated, followed by a succession of Long-Term Agreements which continued until 1973.[67] The Long-Term Agreements were replaced by the Multi-Fibre Agreement in 1974, which was extended until 1978. The third Multi-Fibre Agreement came into effect in 1986 and expires in 1991.[68]

Initially, these agreements focused only on cotton and related textiles, but they now include silk, ramie, jute, sisal, abaca, and maguey, among others.[69] These agreements permit government intervention in regulating imports of textiles, particularly in the developed countries. It has been suggested that developed countries with overly protected textile industries should dismantle the industry and divert the labor and capital to more productive enterprises.[70] It is doubtful, however, that the political constituencies of the developed countries, particularly the United States, will adopt such a policy.

The Multi-Fibre Agreement is a derogation of GATT. Technically, it is in accord with GATT because paragraph 6 of Article I of the Multi-Fibre Agreement states that it does not affect the rights and obligations of the participants under GATT.[71] This, however, is a contradiction in terms. The Multi-Fibre Agreement legalizes quantitative restrictions and replaces GATT's Most Favored Nation principles with

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65. Orderly Marketing Arrangements (OMAs) and Voluntary Trade Restraints (VERs) are two of these devices.

66. D. TUSSIE, THE LESS DEVELOPED COUNTRIES AND THE WORLD TRADING SYSTEM: A CHALLENGE TO THE GATT 4 (1987) [hereinafter TUSSIE].

67. JACKSON, *supra* note 20, at 181.

68. *Id.*

69. TUSSIE, *supra* note 66, at 67.

70. Note, *Textiles and Apparel Trade Liberalization: The Need for a Strategic Change in Free Trade*, 1989 COLUM. BUS. L. REV. 205-225 (1989).

71. H.R. ZHENG, LEGAL STRUCTURE OF INTERNATIONAL TRADE 93 (1988) [hereinafter ZHENG].

the Multi-Fibre Agreement selective application of quantitative restrictions.[72] Furthermore, it requires that Multi-Fibre Agreement contracting parties (exporters of textiles) not assert GATT rights, such as retaliatory measures, for the quantitative restrictions imposed upon the parties.[73] In addition, the developed countries, who generally import these products, may actually limit their imports without demonstrating the existence of "serious injury" or a "threat of serious injury" as required by GATT Article XIX.[74] Despite this feature, contracting parties may resort to compensatory or retaliatory remedies under GATT Article XXIII.[75]

Multi-Fibre Agreements may create incentives for developing countries to diversify when exports stagnate.[76] However, the practical effect of the Multi-Fibre Agreements has been to perpetuate the newly developing countries'[77] leverage in the textile field at the expense of less developed countries which are trying to create a niche in the market.[78] The Mutli-Fibre Agreements have also raised the price of textiles and clothing by 15% to 40%. This extra income has not been evenly distributed among developing countries. Instead, it has benefited a select few newly industrialized countries.[79] Thus, the newly industrialized countries and the major developed countries may extend the MFA's beyond 1991 because it is in their best interests to do so.[80]

C. Regional Preference Systems

The current level of protectionism, the general deterioration of the economies of major powers, and the preference systems have led the way towards increased bilateralism and regionalism.[81] GATT recognizes regional trading as an exception to the MFN principle.[82] For ex-

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72. *Id.* at 93-94; *see also* I. LITTLE, T. SEITOVSKY & M. SCOTT, INDUSTRY TRADE IN SOME DEVELOPING COUNTRIES 278-280 (1970).

73. ZHENG, *supra* note 71, at 93-94.

74. *Id.* at 93.

75. *Id.* at 105.

76. D.B. KEESIG & M. WOLF, TEXTILE QUOTAS AGAINST DEVELOPING COUNTRIES 124 (1980); *see also*, TUSSIE, *supra* note 66, at 67-69.

77. Taiwan, Hong Kong, Singapore, and South Korea.

78. TUSSIE, *supra* note 66, at 131. For example, when the European Community imposed heavy quotas against Sri Lanka when it was beginning to enter the world textile and garment market. *Id.*

79. *See* TUSSIE, *supra* note 66, at 95.

80. *See generally, Poor in a Rich Man's World, supra* note 31, at 59.

81. Koopermann, *Reorganization or Disorganization of the World Economy?*, Intereconomics, Jan./Feb. 1989, at 11 [hereinafter Koopermann].

82. GATT Secretariat, *GATT Activities 1988* (1989) [hereinafter GATT

ample, the European Community (EC) has been a major regional bloc for nearly three decades and may become a fortress after European economic integration occurs in 1992. One major area in which the EC has been extremely successful is in its Common Agricultural Policy. Under this policy, tariffs charged on most foreign agricultural goods vary frequently to the disadvantage of foreign agricultural imports that may have leverage within the EC. This variable tariff structure has insulated the EC's agricultural sector from foreign competition, and in effect, defeated the basic policies behind GATT's preference for tariffs as a trade restriction.[83]

The Association of South East Asian Nations, another exception to the MFN principle, has been effective in encouraging bilateral trade among its members. In addition, the proposed Australasian trading bloc and the newly formed South Asian Association of Regional Cooperation may carve out more trade protectionist trading blocs. The United States has also attempted to promote trade, economic investment, and tax incentives in the Caribbean region.[84]

The current trend toward trade regionalization should be discouraged because of its deleterious effect upon the GATT multilateral trade rules.[85] The success of these regional groupings comes at the early stages when imports from the region are substituted for non-bloc commodities.[86] However, when trade diversion is complete and the pace of regional production is geared solely towards the growth of the domestic gross national product, their value as a trade mechanism becomes marginal.[87] These systems also cause inefficient production structures and accentuate income disparities within the bloc of those nations of those nations that are at different developmental stages.[88]

Secretariat].

83. JACKSON, *supra* note 20, at 131; *see also* Filipek, *Agriculture in a World of Comparative Advantage: The Prospects for Farm Trade Liberalization in the Uruguay Round of GATT Negotiations*, 30 HARV. INT'L L.J. 123, 133 (1989).

84. From the outset, the Caribbean Basin Economic Recovery Act of 1982 has encountered obstacles in its implementation, because the United States has applied protectionist measures against sugar imports, a major export of the Caribbean nations. Note, *Interaction of the Caribbean Basin Initiative and U.S. Domestic Sugar Price Support: A Political Contradiction*, 8 MISS. C.L. REV. 198-205 (1988).

85. Koopermann, *supra* note 81, at 11.

86. Frank, *supra* note 28, at 46.

87. *Id.*

88. *Id.*

D. Anti-Dumping and Countervailing Duties

Anti-dumping and countervailing duties constitute another set of trade regulating devices which affect developing countries. Dumping is usually defined as selling commodities at a lower price in one national market than in another, such as selling below the seller's home market price or below cost.[89] GATT recognized this trade practice during the Kennedy Round Negotiations and formulated provisions under Article VI, which allow contracting parties to use anti-dumping duties to offset the margin of dumped goods.[90] The Anti-Dumping Code was renegotiated during the Tokyo Round and the new Anti-Dumping Code came into effect in 1980.[91]

The Anti-Dumping Code does not require contracting parties to refrain from dumping.[92] Nor does it bind individual firms and persons in contracting states to cease dumping. The Anti-dumping Code merely allows the affected states to apply anti-dumping duties, provided they can show that the dumping causes or threatens to cause "material injury" to competing domestic industries.[93] The United States, the European Economic Community, Australia, and Canada rely most heavily on the anti-dumping laws.[94] Through loopholes in GATT, these countries have adopted protectionist and trade restrictive anti-dumping laws.[95] Indeed, some political leaders in developed countries consider dumping a criminal or tortious act,[96] and argue for a "private right of action."

Anti-dumping duties adversely affect developing countries which try to gain access to larger markets, such as the United States and the EC. Countries manipulate these duties to assist special interest groups such as competing domestic industries or producers.[97] In order to avoid potential adverse exposure, these minor, but competitive exporters (usually developing countries), may refrain from entering markets where anti-dumping duties are assessed in a protectionist manner. Any hope for liberal trade practices are thereby thwarted.

GATT should refine its Anti-Dumping Code and add several ele-

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89. JACKSON & DAVEY, *supra* note 47, at 654.

90. *Id.* at 225-26.

91. GATT Secretariat, *supra* note 82, at 115.

92. JACKSON, *supra* note 20, at 227.

93. *Id.* at 225-26.

94. E.A. VERMULST, ANTIDUMPING LAW AND PRACTICE IN THE UNITED STATES AND THE EUROPEAN COMMUNITIES 698-702 (1987) [hereinafter VERMULST].

95. *Id.* at 702.

96. *Id.*

97. *See* JACKSON, *supra* note 20, at 219.

ments to the "material injury test," including proof of the industry's typical practice[98] and a requirement that the injured domestic industry show that they have not engaged in dumping.[99]

Most developing countries do not consider dumping to be an adverse action, particularly because it results in lower costs for goods in their own economies.[100] However, anti-dumping duties, as well as countervailing duties, tend to adversely affect the trade shares of developing countries rather than those of developed countries.

The GATT signatories negotiated the Subsidies Code during the Tokyo Round. The Subsidies Code permits the application of countervailing duties to imports in order to neutralize any advantage the exporter may gain through domestic or import subsidies.[101] Countervailing duties are used in nearly the same manner as anti-dumping duties, namely, to protect local industries or producers from foreign competition. The effects of countervailing duties on developing countries are similar to those of anti-dumping duties. Countervailing duties may amount to trade harassment, particularly when there is no evidence of either subsidies or damage to the importing country.[102] The United States was accountable for 90% of the countervailing duties imposed during the 1980s,[103] indicating that the developed countries are the more aggressive users of countervailing duties against developing country exporters. Some observers propose that anti-dumping and countervailing duty provisions be subject to an international panel to determine which duties are legitimate under the "material injury test."[104]

In sum, exceptions to the GATT legal framework, particularly the Multi-Fibre Agreement's, regional blocs, and anti-dumping and countervailing duties, have an adverse impact upon developing countries. Moreover, the benefits of the GSP scheme are frequently questioned. Currently, protectionism plays a major role in world trade. The GSP system and the Multi-Fibre Agreement have established the groundwork for similar protectionist forces in contravention to the GATT legal structure.

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98. VERMULST, *supra* note 94, at 709.

99. *See generally, id.*

100. *Id.* at 703.

101. GATT Secretariat, *supra* note 82, at 48.

102. *Id.* at 47.

103. *Id.* at 117.

104. J.M. FINGER, THE URUGUAY ROUND - A HANDBOOK FOR THE MULTILATERAL TRADE NEGOTIATIONS 153, 158-59 (ed. J.M. Finger & A. Olechowski) (1987).

III. GATT Legal Policy and the Political Forces in Developing Countries

GATT has not been the only force in stabilizing the world economic system. Political forces within the developing countries have also contributed to the impact of the GATT upon developing countries.

Most developing countries have managed to obtain a "no-obligations policy" with GATT.[105] In other words, they can place high tariffs against imports and devise import quotas, export retention quotas, and import entitlement programs in order to protect infant industries and encourage economic development.[106] Developing countries with successful industries, however, face pressure from developed nations to restrain exports and export-oriented developmental programs. Therefore, it is difficult for many developing countries to adhere to the GATT in a systematic manner.

For many developing countries, GATT has had a marginal impact on internal policy. Even if developing countries attempted to liberalize trade barriers, there would be immense opposition from import-substitute and traditional export-oriented trading groups.[107] Therefore, most developing countries do not feel a need to dismantle protectionist trade barriers. If GATT became more binding, Third World governments might be forced to comply with international legal obligations.

Sri Lanka illustrates this situation. Sri Lanka's experiment in trade liberalization ended in a dismal failure, partly because of the protectionist political forces within the country and the inability of the economy to manage "free trade" forces.[108] In 1977, the government of Sri Lanka made a conscious effort to liberalize trade. The government removed quantitative restrictions and assessed nominal tariffs on an ad valorem basis.[109] The government also dismantled pervasive exchange control systems.[110] However, the world market price of Sri Lanka's commodity exports such as, tea, rubber, and coconut, continued to decline steadily.

Sri Lanka's trade liberalization policies have encountered many problems, as did trade liberalization in other developing countries. The major impediment to a smooth transition from protectionism to non-

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105. Hudec, *supra* note 19, at 159.

106. *See generally,* A. Rubner, The Export Cult, 149-52 (1987).

107. Hudec, *supra* note 19, at 161-63.

108. Lal and Rajapatirana, *Impediments to Trade Liberalization in Sri Lanka,* Thames Essay 51 (1989).

109. *Id.* at 27.

110. *Id.* at 26.

protectionism has been the overall structure of the economy. State-run enterprises have been an inefficient force in the Sri Lankan economy for over two decades. Additionally, politically powerful import-substitute sectors have encouraged the government to be cautious in the dismantlement of the protectionist forces.[111]

The role of GATT in these domestic policies was negligible, and it is unlikely that GATT would have been able to coerce the government of Sri Lanka to adopt a more comprehensive trade liberalization policy.[112] Even though developing country members may officially adopt GATT rules, the political constituency that usually governs developing countries determines trade or development policies. Thus, in implementing rules, internal political and social forces play a substantial role in effecting trade policy.

IV. URUGUAY ROUND PROPOSALS

The Uruguay Round negotiations present developing countries with an opportunity to negotiate favorable GATT rules. Whether the results of negotiations will receive political acceptance in their respective countries remains to be seen. The Uruguay Round was initiated by the Ministerial Declaration at Punta del Este in 1986. The proposals submitted at the Uruguay Round are worth noting, particularly those regarding agricultural products, textiles, and tariffs, because they may influence developing countries' trade activities in the foreseeable future.

A. Tariff Proposals

Tariff escalation, tariff peaks, low "nuisance" tariffs, and the need to increase the level of bindings (fixing of duties in GATT against future increases) have caused tariffs to be a primary point of discussion in the Uruguay Round.

The United States has proposed a primary program of tariff cuts in order to improve access to markets, but insists that these concessions must be matched by the United States' major trading partners, namely Japan and the European Community.[113] The United States has also proposed a case-by-case approach to tariff reductions. Smaller trading partners, as well as the EC, are concerned that the United States may

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111. For example, only the nominal tariff rates were reduced in the late 1970s. *See generally id.* at 27.

112. *See generally*, *Slip Sliding Away*, The Economist, May 27, 1989, at 38.

113. *Japan Submits Proposals on Tariff at GATT Trade Talks* (Daily Report for Executives March 21, 1990) (LEXIS, NEXIS library, Nwsltrs file) [hereinafter *Japan Proposals*].

use this method to gain bargaining strength with respect to agricultural products and the textile industry.[114]

The EC, on the other hand, has proposed an average industrial cut on tariffs from 5.44% to 3.86%.[115] The EC's tariff proposal is composed of three parts: (1) a detailed illustration of a tariff line-by-line basis of base rates and reductions after the application of the EC formula, (2) a summary showing the duty structure and the average duties before and after the application of the formula, and (3) a calculation of the impact of the EC formula on duties of 0.5% and above.[116] In addition, the EC proposes tarriff cuts of 100% on tropical products and raw materials, 25% on semifinished tropical products, and 50% on finished tropical products.[117] The EC proposal also includes reductions on tropical drink tariffs, such as coffee, cocoa, and tea. In this area, the EC is requesting concessions from its major trading partners, in particular, Japan and the United States.[118]

The Japanese proposal calls for a tariff cut well beyond the one-third limit.[119] The proposed tariff reduction covers 6,800 products and urges the implementation of reductions prior to the end of the Uruguay Round.[120] The United States responded to the Japanese proposal by recommending an even higher tariff reduction amounting to 67%.[121]

B. Agricultural and Tropical Products

Agriculture has been another focus of the Uruguay Round. The United States proposed eventual elimination of all subsidies over a five-year period and conversion of non-tariff barriers into tariffs. In addition, the European Community is willing to "re-balance" existing supports, shifting agricultural protection to sectors where it is now weak.[122] The United States Department of Agriculture indicates that farm supports cost $165 billion annually in developed countries alone.[123] It has

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114. *EC Submits Detailed Uruguay Round Proposal for Across-the-Board Reductions in Tariffs*, 7 Int'l Trade Rep. (BNA) 262 (Feb. 12, 1990) [hereinafter *Reductions*]; *Meetings in Tokyo Attempt to Lay Plans for Final Year of Uruguay Round*, 6 Int'l Trade Rep. (BNA) 1514 (Nov. 14, 1989) [hereinafter *Tokyo*].

115. *Tokyo*, *supra* note 114.

116. *Reductions*, *supra* note 114, at 262.

117. *Japan Proposals*, *supra* note 113.

118. *See id.*

119. *See id.*

120. *Id.*

121. *Id.*

122. *Negotiators Press for Changes in the Last Year of the Uruguay Round* (Daily Report for Executives January 17, 1990) (LEXIS, NEXIS library, Nwltrs file).

123. *See Reductions*, *supra* note 114.

been estimated that the EC and the United States account for 40% of all farm exports in the world market.

The United States is heavily dependent upon export markets for two-thirds of its wheat production and more than one-half of its cotton and other grains.[124] Therefore, it is pressing vigorously for lower tariffs with little or no subsidies on agriculture. However, not all farmers in the United States support the U.S. proposals at the Uruguay Round. For example, the sugar and dairy sectors and the National Farmer's Union, supported by the 3.8 million member American Farm Bureau Federation, have expressed concern over the proposals.[125]

Japan has proposed to phase out farm supports, export subsidies, and import tariffs.[126] It has not, however, agreed to dismantle its ban on the importation of rice, Japan's staple food, which is heavily subsidized by the Japanese governmens.[127]

The Philippines has called for special and preferential treatment for developing countries with respect to agriculture. In addition, it also wants reductions or elimination of tariffs and non-tariff barriers for Philippine agricultural-based products.[128]

Australia's support programs for agriculture have also been attacked during the latest negotiations. Here, objections have been raised as to certain content requirements and standards, as well as health, quarantine and safety requirements.[129] Some of these subsidized sectors are of particular interest to the developing countries, which have requested that Australia phase out its protectionist policies for agricultural producte.[130] However, compared to most other developed countries which have adopted the MFN principle, Australia has a minimal amount of bilateral trade.[131]

Tropical products have received much attention from the developing countries at the Uruguay Round. As a result, the EC has proposed

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124. *See The Fifteen Negotiating Groups of the Uruguay Round*, 7 Int'l Trade Rep. (BNA) 88 (Jan. 17, 1990) [hereinafter *Groups*].

125. *Remarks by Carla Hills, US Trade Representative, to the National Association of State Departments of Agriculture* (Federal News Service March 12, 1990) (LEXIS, NEXIS library, Wires file).

126. *Groups*, *supra* note 124.

127. Japan asserts that its policy of food security must be maintained. *Tokyo*, *supra* note 114.

128. *Philippines States its Position on GATT Talks* (Xinhua General Overseas News Service, March 19, 1990) (LEXIS, NEXIS library, Wires file).

129. *Australia's Trade Policy Critisised at GATT Council Trade Review Session*, 6 Int'l Trade Rep. (BNA) 1662 (Dec. 20, 1989).

130. *Id.*

131. *Id.*

a annual tariff cut of 35% to 100% on imports of tropical products worth 10.4 billion European Currency Units ($12.5 billion in U.S. currency).[132] The EC has proposed to eliminate duties on unprocessed agricultural products such as coffee, industrial raw materials, and cut tariffs on semi-finished products.[133] The EC has also agreed to reduce internal taxes on beverages such as coffee, tea, and cocoa progressively, if the other trading partners, particularly Brazil and Colombia, can clearly prove that these taxes affect their trade.[134]

Developing countries have voiced concerns over the use of GATT's Article XIX, which provides for protective action in emergency situations. The developing countries maintain that this practice limits their agricultural and tropical products' access to developed country markets.[135] Viewed as way to circumvent the most favored nation requirement, developing countries' main objective is to secure increased access to developed country markets and to reduce tariffs for processed tropical and agricultural products. Whether any of these proposals will be adopted depends on the United States' willingness to reach a compromise with the EC on its reduction of subsidies.

C. Textiles and Clothing

Negotiations concerning textiles and clothing have created controversy. The success of the Uruguay Round negotiations depends heavily on whether the developed and developing countries can agree on how to bring textiles and clothing within the GATT rules. For example, a recent World Bank study has urged the developed countries to "scrap curbs on Third World textile exports."[136] The study proposes the dismantlement of all the import bans on developing country textile imports. This, however, will cost the developing countries $8 billion per year in lost export earnings by the year 2000.[137] The developing countries support this policy because textiles are the first step towards

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132. *EC Tables Tropical Products Offer at GATT Talks*, (The Reuter Library Report March 16, 1990) (LEXIS, NEXIS library, Nwsltrs file).

133. *Id.*

134. *Id.*

135. *Developing Countries Uneasy Over Progress of Uruguay Round, U.N. Says*, (Daily Report for Executives October 11, 1989) (LEXIS, NEXIS library, Nwsltrs file).

136. *Scrap Curbs on Third World Textile Exports, World Bank Study Says* (The Reuter Library Report March 14, 1990) (LEXIS, NEXIS library, Nwsltrs file) [hereinafter *Scrap*].

137. *Id.*

industrialization.[138]

The developing countries insist that the Multi-Fibre Arrangement be completely dismantled immediately or phased out. They argue that voluntary trade restraints cost developed country consumers an additional $10 billion per year.[139] Thus, if the Multi-Fibre Agreement were to be dismantled, the developing countries would gain at least $3 billion per year.[140]

Fearing that their needs would be ignored in the final agreement reached at the Uruguay Round,[141] developing countries are concerned that the emerging open market economies in Eastern Europe might squeeze their share of textile exports from the EC market within the next decade.[142] Textile prices may fall as a result, and the least developing countries, particularly, Bangladesh, Sri Lanka, and Angola may suffer in the process.[143]

The United States, Canada, the EC, and Japan are at an impasse on the issue of textiles and additional "free trade" rules.[144] The United States and Canada prefer a global quota system with a short transition period from the voluntary export restraint arrangement to most favored nation rules.[145] The global quota system is not without cost to the developing countries. According to the United States International Trade Administration, the United States textile and apparel industries use a system of quota protection and high duty rates, over six times higher than the average tariff on all other imports. This existing system of quotas is estimated to cost the American economy between $11.7 billion and $13.1 billion per year.[146]

Canada supports the United States proposal generally, but favors a more flexible approach. Canada proposes terminating all measures inconsistent with GATT (including those under the Multi-Fibre Agreement), and requiring that Article XIX Safeguards to be used to protect

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138. *Id.*

139. Brezina, *Textile Quotas Cost Developing Countries Billions* (Proprietary to the United Press International March 14, 1990) (LEXIS, NEXIS, Wires file).

140. *Id.*

141. *Canada Fails to Break Deadlock Over Textiles at GATT Negotiations*, 7 Int' Trade Rep. (BNA) 339 (March 7, 1990) [hereinafter *Deadlock*].

142. *Scrap*, *supra* note 136.

143. *See id.*

144. Percival, *Trade: Differences Abound Over Moving Textiles Sector into GATT* (Inter Press Service, March 9, 1990) (LEXIS, NEXIS library, Wires file) [hereinafter Percival].

145. *Id.*

146. *Importers Press Bush Administration to Submit Textiles Proposal at GATT*, 6 Int'l Trade Rep. (BNA) 1441 (Nov. 8, 1990).

injured countries against "market disruption" during the transition from Multi-Fibre Agreement to GATT rules.[147] Additionally, Canada proposes that the range of products covered by the mechanism should be progressively reduced. Canada further argues that any restrictions imposed under the safeguard mechanism should be subject to minimum growth.[148]

The EC favors the inclusion of textiles under GATT rules, but recommends a very long "phase out period." The EC also advocates the opening of markets for raw materials and similar goods and the lowering of tariffs in Third World countries.[149] The EC proposes an overall safeguard system under GATT to protect industries faced with difficulties in adapting to the gradual abolition of the Multi-Fibre Agreement,[150] and insists that the other GATT members be granted reciprocal access to developing countries' markets.[151]

Nevertheless, developing countries are reluctant to dismantle their protectionist trade policies. They argue that global quotas restrain the totality of imports and create tougher competition between suppliers.[152] They also argue that the competition would be of limited value because the proportion of restricted imports would be very high with respect to developing countries.[153] They urge developed nations to continue to grant developing countries differential and most favored treatment.

The treatment of textile and clothing industries present the most controversial issue at the Uruguay Round. The developed countries want to extend the Multi-Fibre Agreement or replace it with a similar protectionist system, while the developing countries want full-scale dismantlement of the Multi-Fibre Agreement. It is conceivable that the textile and agricultural trade liberalization issues will determine the outcome of the agreement reached at the Uruguay Round.

V. THE FUTURE ROLE OF GATT

The negotiating parties at the Uruguay Round, as in previous multilateral trade negotiations, have failed to take into account the divergent needs of its economically differentiated membership in formulating comprehensive trade policies. For example, negotiating parties

147. *Id.*
148. *Id.*
149. Percival, *supra* note 144.
150. *Id.*
151. *Id.*
152. *Deadlock*, *supra* note 143.
153. *Id.*

cannot continue to categorize the developing countries as one homogeneous group. Instead, they should be classified as newly developing countries, less developed countries, and least developed countries.[154] Before formulating trade policies, it is important for contracting parties to categorize the various members of GATT according to their stage of development, gross national product, trade surplus or deficit, and general standard of living. While it is difficult to compartmentalize a member country into a particular category, some superficial compartmentalization is necessary to create better trade rules.

In the current Uruguay Round, most developed nations want to perpetuate restrictive trade policies, national farm subsidies in the case of agriculture and tropical products, and the Multi-Fibre Agreement, with respect to the textile trade. GATT's most favored nation principle does not seem to be a catalyst in the current negotiations.

Comparative advantage and trade interdependency should be acknowledged and accepted as a realistic phenomena in today's commercial world. By preventing voluntary export restraints and orderly marketing arrangements, developed countries would gain in the long-term. Exporting Third World nations would receive more revenue and be able to purchase technology and products from the developed countries, and consequently, generate export earnings for the developed world.

GATT rules should be binding on all contracting parties. Singling out those countries that most frequently circumvent GATT's legal policies should be a part of GATT's enforcement mechanism. At times, developed and developing countries alike have deviated from GATT rules or created bilateral or trilateral arrangements outside of GATT because GATT rules were seen as harmful to their interests.

The Uruguay Round could be a catalyst for the developed and developing worlds to reach a consensus that trade rules be beneficial to all, not just a few select members. Developed nations should also realize that the longer developing countries remain economically disadvantaged, the longer it will take for them to repay debts owed to developed countries. International trade is a means for these developing countries to earn foreign exchange to repay those debts owed to developed countries and purchase capital and consumer goods for further development. In the past, the most powerful GATT signatories gained leverage in adjusting the trade rules to suit their needs. In the future, GATT

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154. Cooper, *Exporters Versus Importers: LDC's, Agricultural Trade, and the Uruguay Round*, Intereconomics 13 (Jan./Feb. 1990). In the area of agriculture and tropical products, the developing countries can be categorized under the Cairns group, which has some middle income developing countries, the Food Importer's group, and export-oriented developing countries, particularly with respect to tropical products.

should move from a power-oriented to a rule-oriented system[155] to promote the progress of developing countries.

VI. CONCLUSION

GATT has never been viewed as the champion of developing countries. While UNCTAD was created as a counter-organization to deal with the bias of GATT against developing countries, GATT has not been able to create more favorable trading policies for developing countries. Instead, the Generclized System of Preferences scheme has been beneficial to only a few developing countries. On the whole, the Generclized System of Preferences has favored political allies of specific industrialized groups; a classic example of neo-colonialism. Furthermore, because the bargaining power of developing countries has been negligible under GATT, the ability of developing countries to promote trade or reduce trade barriers for themselves has been minimal.

If GATT is to be effective in promoting "free trade," it will have to create neutral safeguard mechanisms against contracting parties with a protectionist bias. It is arguable whether the developing or the developed countries will find this legal policy acceptable. GATT should also take into account the reality of the world trading system and the inequities that exist in various countries when applying these policies.

Contracting parties should, in effect, acknowledge GATT's inapplicability to today's trade regimes. Lower tariffs and fewer or no quantitative restrictions are certainly desirable. Nevertheless, there are political ramifications attached to dismantling trade barriers. If, for instance, developing countries were to completely dismantle trade barriers, the internal economic inequities would likely be sharper, causing political instability. If the political situation becomes unstable as a result of trade or financial liberalization policies, the economy, as a whole, might deteriorate, and the developing county's government might revert back to protectionist policies.

GATT should revise its fundamental principles, most favored nation status and non-discrimination, and adopt a tiered system applicable to four main economic categories: developed, newly developing, developing, and less-developed countries. Trade policies should be geared towards a particular nation depending upon its economic classification. The relative strength of each country's sectors should also be taken into account. When a nation develops economically and becomes a developing rather than a less-developed country, GATT should re-classify it

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155. Nicolaides, *Safeguards and the Problem of VERs*, Intereconomics 22-24 (Jan./Feb. 1990).

and require the country to take on more obligations and responsibilities.

Under the present system, GATT encourages elaborate mechanisms for negotiations and procedures which are counterproductive. GATT should include a mechanism to enforce retaliatory economic sanctions if any contracting party refuses to abide by trading rules. Unless GATT can revise its policies to account for the diverse trading capabilities of the contracting parties, it will continue to be a pawn in the hands of developed countries.