

The Tokyo Round of Multilateral Trade Negotiations and the Developing Countries

Gerald M. Meier

Follow this and additional works at: <http://scholarship.law.cornell.edu/cilj>

 Part of the [Law Commons](#)

Recommended Citation

Meier, Gerald M. (1981) "The Tokyo Round of Multilateral Trade Negotiations and the Developing Countries," *Cornell International Law Journal*: Vol. 13: Iss. 2, Article 4.

Available at: <http://scholarship.law.cornell.edu/cilj/vol13/iss2/4>

This Article is brought to you for free and open access by Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell International Law Journal by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS AND THE DEVELOPING COUNTRIES

Gerald M. Meier†

The intensifying economic tension between rich and poor nations is a crucial issue confronting the international legal community. At no time has the dilemma of accommodating the needs of developing countries been more apparent than during the Seventh Round of Multilateral Trade Negotiations. Following an examination of the results of the Tokyo Round, this Article will address the fundamental question whether the agreements sufficiently meet the demands of the less developed countries to justify their signature.

I

THE CONTEXT

The need for international trade reform was greater than at any time in the postwar period, but the legal-economic context was unfavorable. According to the Tokyo Declaration of September 1973, the negotiations had two basic goals: first, to expand and liberalize world trade and, second, to improve the trading strength of the developing countries.¹ Since the

† Professor of International Economics, Stanford University. Consultant to the World Bank. B.A. 1947, Reed College; B. Litt. 1951, University of Oxford; Ph.D. 1952, Harvard University. The views expressed in this paper are the sole responsibility of the author and do not purport to represent those of the World Bank, its officers, or other staff members.

1. 2. The negotiations shall aim to:

- achieve the expansion and ever-greater liberalization of world trade and improvement in the standard of living and welfare of the people of the world, . . . *inter alia*, through the progressive dismantling of the international frame work for the conduct of world trade.
- secure additional benefits for the international trade of developing countries so as to achieve a substantial increase in their foreign exchange earnings, the diversification of their exports, the acceleration of the rate of growth of their trade . . . and a better balance between developing and developed countries in the sharing of the advantages resulting from this expansion. . . .

Tokyo Declaration,² commentators in the international development field have increasingly urged the liberalization of trade regimes in the developing countries, and have advocated outward-looking export policies coupled with a comprehensive incentive program to promote exports.³ To remove trade barriers resulting from an inward-looking import substitution strategy, the developing countries must have the opportunity to promote their exports under more liberal trade arrangements.

The developing nations have long demanded that industrially advanced countries grant tariff preferences on manufactures and semi-manufactures imported from poorer countries. Besides increasing the developing country's exports, tariff preferences effectively raise prices in the importing countries above the world market price. The result, therefore, is to transfer resources from the developed to the developing nations.⁴

The developing countries view preference systems as a form of positive compensatory discrimination. Critics in the developed countries, however, speak of "inverted protectionism" and "trade diversion."⁵ The developed countries have begrudgingly granted preferences, but have limited their effectiveness through the use of exemptions, tariff quotas, and "market disruption" escape clauses.⁶ Although preferences may have symbolic value from the standpoint of international equity and distributive justice, the less developed countries have begun to realize that other forms of trade liberali-

Declaration of Ministers Approved at Tokyo on 14 September 1973, para. 1, *reprinted in* GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS (20th Supp.) 19, 19-20 (1974) [hereinafter cited as Tokyo Declaration].

2. *Id.*

3. See, e.g., B. BALASSA, POLICY REFORM IN DEVELOPING COUNTRIES (National Bureau of Economic Research 1977); J. BHAGWATI, ANATOMY AND CONSEQUENCES OF EXCHANGE CONTROL REGIMES (National Bureau of Economic Research 1978); A. KRUEGER, LIBERALIZATION ATTEMPTS AND CONSEQUENCES (National Bureau of Economic Research 1978).

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

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

5. See generally H. JOHNSON, ECONOMIC POLICIES TOWARD LESS DEVELOPED COUNTRIES (1967).

6. See Jacobs & Hove, *Remedies for Unfair Import Competition in the United States*, 13 CORNELL INT'L L.J. 1 (1980).

zation may prove more beneficial in increasing their foreign exchange earnings and promoting nontraditional exports.

Although the developed countries' average tariffs on manufactures are low, their impact is comparatively greater on products imported from the less developed nations. Prior to the Tokyo Round of Multilateral Trade Negotiations, one study of market access revealed that, overall, the most restricted products are those whose export the developing countries could most easily expand.⁷ Moreover, the most heavily protected products in the developed countries tend to be those whose impact would be most responsive to a trade liberalization policy.⁸ These manufactures and semi-manufactures are especially attractive to developing nations because they lend themselves to labor-intensive production on a small or medium scale based on local natural resource supplies.⁹

Another severe obstacle to the trading strength of less developed nations is the escalation in developed country tariffs according to the imported goods' degree of processing, resulting in different tariff rates on products at the intermediate and final output production stages.¹⁰ The resulting high rate of effective protection on domestic value added imposes extreme handicaps on potential developing country exports. Moreover, by discriminating against imported *processed* goods, developed country escalated tariffs offset the cost advantages the developing countries possess with respect to many processed commodities.

The rise of the "New Protectionism" since the Tokyo Declaration in 1973, however, is the most serious threat to the less developed countries' prospects for new exports of manufactures and semi-manufactures.¹¹ Under the guise of preventing "market disruption," nations have imposed numerous quantitative restrictions in the form of Orderly Market Agreements (OMAs)¹² and Voluntary Export Restraints (VERs).¹³ A striking

7. See generally H. LYDALL, *TRADE AND EMPLOYMENT: A STUDY OF THE EFFECTS OF TRADE EXPANSION ON EMPLOYMENT IN DEVELOPING AND DEVELOPED COUNTRIES* (1975).

8. Examples of exports of special importance to developing nations include textiles, clothing, footwear, and certain food products. These products are heavily protected in the developed countries. *Id.* at 19.

9. See generally United Nations Conference on Trade and Development, *Comprehensive Measures Required to Expand and Diversify the Export Trade of Developing Countries in Manufactures and Semi-Manufactures*, U.N. Doc. TD/230 & Supp. 1 (1979) [hereinafter cited as UNCTAD Report on Manufactures and Semi-Manufactures].

10. See *id.* at 4.

11. See INTERNATIONAL MONETARY FUND, *THE RISE IN PROTECTIONISM* (Pamphlet Series No. 24, 1978); Balassa, *The "New Protectionism" and the International Economy*, 2 J. WORLD TRADE L. 409 (1978); United Nations Conference on Trade and Development, *Implications for Developing Countries of the New Protectionism in Developed Countries*, U.N. Doc. TD/226 (1979).

12. See *THE RISE IN PROTECTIONISM*, *supra* note 11, at 62-64.

13. See *id.* at 65-66.

example of this form of protectionism were the textile quotas.¹⁴ The number of unreported government-to-government and industry-to-industry "understandings" to limit exports to a "reasonable level" may greatly exceed the number of reported OMAs and VERs. The less developed countries fear that developed countries will continue such practices as textile quotas, OMAs and VERs with respect to new developing country exports.

Since 1976, the industrialized nations have introduced new restrictive trade measures through government aids to domestic industry. Examples of defensively subsidized industries include: the British textile, clothing and footwear industries; the shipbuilding industry in a majority of developed countries; and the French automobile, data processing, pulp and paper, steel and watch industries.¹⁵ Further potential restrictions stem from proposals for international market sharing agreements in shipbuilding and steel within the framework of the Organization for Economic Cooperation and Development (OECD).

With the alarming rise in oil prices since the Tokyo Declaration and its consequent damage to the balance of payments of non-oil-producing developing countries, the less developed countries' need for export revenue is now greater than ever.¹⁶ Because these unfavorable developments have also adversely affected oil-importing developed countries, the transfer of resources from rich to poor in the form of official development assistance has declined.¹⁷ In addition, the International Monetary Fund has not been a net lender over the past three years, as members' repurchases have exceeded their purchases from the Fund.¹⁸ Because of persistent international economic inequality, the World Bank has advocated redistribution of income with growth in developing economies. The international community, however, has done little to effectuate such redistribution. With only about seventeen percent of world population, OECD member countries still account for some sixty-three percent of total world output. The less developed countries have seventy-five percent of world population, in-

14. *See id.* at 14-25. *See also* notes 37-41 *infra* and accompanying text.

15. Balassa, *supra* note 11, at 418-20.

16. Anthony M. Solomon, former Under Secretary of the Treasury for Monetary Affairs, estimated that the current account deficits of oil-importing developing countries will total fifty billion dollars in 1980. *N.Y. Times*, Feb. 23, 1980, at 103, col. 1.

17. Although official assistance from members of the Development Assistance Committee did not decline in real terms in 1979, such assistance "shows no signs of a major advance." ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, DEVELOPMENT CO-OPERATION, EFFORTS AND POLICIES OF THE MEMBERS OF THE DEVELOPMENT ASSISTANCE COMMITTEE 76 (1979). During the 1970's, however, the low-income developing countries' share of total resource flows decreased. *Id.* at 68-70.

18. *See IMF SURVEY*, Feb. 4, 1980, at 33, 45.

cluding about 800 million people living in absolute poverty, but share only twenty percent of world product.

Because the probability of directly transferring real resources from rich to poor nations through concessional aid has diminished, the less developed countries now advocate indirect transfers through commercial policies favoring developing countries. By discriminating in favor of imports from their nations, the developing countries hope to improve their terms of trade with the developed countries. As early as 1947, in the initial negotiations for the International Trade Organization (ITO), representatives of the less developed countries wanted "to incorporate wide authority for all waiver of discriminatory practices, if these were intended to foster economic development."¹⁹ When the ITO did not absorb the General Agreement on Tariffs and Trade (GATT),²⁰ the "Economic Development and Reconstruction" chapter of the Havana Charter became moot.²¹ The fundamental issue of whether different trade rules should apply to countries according to their different stages of economic development, however, has persisted.

Against this background of increasingly restrictive trade policies, spokesmen for developing countries stress the need for trade liberalization. Liberalization, they feel, will permit the poorer countries to develop fully their export potential in low-cost manufactured goods.²² Because of deteriorating economic conditions in the developed countries since the beginning of the Tokyo Round, however, the task of liberalization has become more difficult. Stagflation has intensified concern over unemployment, and hence the need to protect domestic jobs from competitive low-cost imports. Furthermore, balance-of-payments problems of the oil-importing nations have also discouraged trade liberalization.

The most fundamental impediment to trade liberalization, however, has been the disintegration of the Bretton Woods System. The GATT's role is inseparable from those of the IMF and the World Bank. The IMF lost its power as a code of conduct in 1973, when nations turned to floating exchange rate regimes. Since that time, international monetary affairs have taken a course of "abandonment." Nations have eliminated fixed exchange rates, currency convertibility, an official price for gold, and a multifaceted

19. G. PATTERSON, *DISCRIMINATION IN INTERNATIONAL TRADE: THE POLICY ISSUES 1945-1965*, 323 (1966).

20. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194. The current version is contained in 4 *GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS* (1969) [hereinafter cited without cross reference as GATT].

21. See G. PATTERSON, *supra* note 19, at 324.

22. See UNCTAD Report on Manufactures and Semi-Manufactures, *supra* note 9, at 1.

reform system.²³ During this period of abandonment, the GATT, the World Bank, and the IMF have remained separate institutions, with only minimal consultation among the three.

Unlike the IMF or the World Bank, the GATT was neither the economists' nor the lawyers' creation. It was, in Professor Hudec's language, "diplomats' jurisprudence," a factor that may explain GATT's legal malaise.²⁴ These legal deficiencies of the General Agreement combined with deteriorating global economic conditions to place the Tokyo Round of MTN in a most inhospitable environment.

Attaining true international economic order may require the establishment of supranational economic decision units. A system of functional federalism among nations would allocate different economic functions to different levels of government.²⁵ The difficulty lies in finding the international analogues to the national public policies of maintaining economic stability, redistributing income, and correcting market failure. Achieving world economic stability is a difficult task without an international fiscal authority or an international central bank. Because of the absence of an international mechanism for wealth redistribution through taxes and subsidies, the world community must find alternative arrangements to transfer resources from rich to poor countries. Finally, the search continues for effective remedies for international market failure.

Absent policy coordination among nations and supranational decision units, the world community will continue to seek international economic order through a variety of regulatory alternatives. These alternatives range from the self-regulating market price system to international codes of conduct,²⁶ negotiating and bargaining, forms of arbitration, adjudication, and simple unilateral action.

II

AN ASSESSMENT OF THE SEVENTH ROUND FROM THE STANDPOINT OF THE DEVELOPING COUNTRIES

After five years of intensive negotiations, the seventh round of Multilateral Trade Negotiations yielded mixed results for the less developed countries. Some benefits will flow from tariff reductions²⁷ and from some

23. IMF SURVEY, Jan. 7, 1980, at 4.

24. R. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 267-68 (1975).

25. See R. COOPER, *ECONOMIC MOBILITY AND NATIONAL ECONOMIC POLICY* 59 (1974).

26. See notes 49-55 *infra*.

27. See notes 31-48 *infra* and accompanying text.

of the new non-tariff barrier codes.²⁸ The new Framework Agreement²⁹ is a potentially significant source of benefit to the developing countries. A major failure of the negotiations, however, stems from the failure to revise the multilateral safeguard system under Article XIX of the GATT.³⁰

A. TARIFFS

Tariff reductions granted in the Tokyo Round will result in a general tariff reduction of about one-third.³¹ The negotiations will result in greater percentage cuts in higher tariffs than in lower tariffs, but the most significant reductions will affect traditional industrialized country exports such as machinery, chemicals, and transport equipment.³² Moreover, on industrial products of particular interest to the developing countries, the weighted average reduction in tariffs is only about one-fourth, compared with the approximately one-third weighted average reduction in all industrial tariffs.³³ Among sectors receiving less than average tariff reductions are textiles, leather, and rubber, traditionally important exports of developing countries.³⁴

Negotiated bilaterally or multilaterally, the tariff reductions apply to the less developed countries through the Most-Favored-Nation (MFN) provision of the GATT.³⁵ Under other GATT provisions,³⁶ the less developed countries are not bound to extend full reciprocity. The nations will carry out most reductions in equal installments over an eight-year period beginning January 1, 1980. In so-called "sensitive" sectors such as steel and textiles, however, the reductions will not begin until January 1982. Moreover, a pre-condition to the reduction in tariffs on textiles is the further extension of the Multifiber Arrangement, now scheduled to expire in 1981.³⁷

Important developing country exports exempt from any tariff reduction include certain textiles, apparel, leather goods, footwear, and steel.³⁸ Significant textile exporters like Hong Kong, Taiwan, Korea, India, Mex-

28. See notes 49-73 *infra* and accompanying text.

29. See notes 74-102 *infra* and accompanying text.

30. See notes 103-08 *infra* and accompanying text.

31. See GENERAL AGREEMENT ON TARIFFS AND TRADE, THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS 118-19 (1979) [hereinafter cited as GATT, THE TOKYO ROUND OF MTN].

32. *Id.* at 120.

33. *Id.* at 121.

34. *Id.* at 119.

35. GATT Art. 1.

36. See note 83 *infra* and accompanying text.

37. Arrangement Regarding International Trade in Textiles, BISD (21st Supp.) 3-18 (1975) [hereinafter cited as Multifiber Arrangement].

38. Most of these products were already admitted duty-free or subject to very low tariffs. See GATT, THE TOKYO ROUND OF MTN, *supra* note 31, at 120.

ico, the Philippines, Singapore, and Brazil had already negotiated quota agreements.³⁹ As a political price paid to obtain congressional approval of the multilateral agreements, the United States has taken even more restrictive action in regard to textiles, slowing the growth rate of quotas from six percent under the Multifiber Arrangement⁴⁰ to the rate of domestic market expansion, about one percent to three percent annually.⁴¹

To the extent of the erosion of preference margins under the Generalized System of Preferences (GSP),⁴² the overall tariff cuts will actually weaken the trading position of the developing countries. Although experts disagree on the relative reliability of estimates in this area, trade liberalization should result in export increases sufficient to offset the loss in export revenues due to reduced preferences.⁴³

One positive result of the tariff reductions may be to diminish the long-standing concern of developing nations over tariffs escalated according to their product's stage of production.⁴⁴ The less developed countries view tariff structures imposing higher duties on semi-processed and manufactured imports than on imports of raw materials as an impediment to industrial transformation in primary product exporting countries. Believing that these high effective rates of protection in the developing countries condemn them to remain hewers of wood and drawers of water, the less developed countries have called for removal of tariff escalations of this type. In this respect, the Tokyo Round will produce the most marked tariff reduction in the area of finished industrial manufactures, where reductions based on simple averages will amount to about thirty-nine percent, compared with

39. THE RISE IN PROTECTIONISM, *supra* note 11, at 16.

40. Multifiber Arrangement, note 37 *supra*.

41. Textile imports from developing countries amounted to about five billion dollars in 1978. If the quota growth rate is cut from six percent to two percent annually, tariffs on textiles imported from developing nations will total about one billion dollars less than they otherwise would.

42. See generally United Nations Conference on Trade and Development, Review and Evaluation of The Generalized System of Preferences, U.N. Doc. TD/232 (1979).

43. An UNCTAD Report reaches a different conclusion, calculating that a \$1.7 billion expansion in industrial exports from the developing countries due to tariff reductions on non-GSP products would be more than offset by a \$2.1 billion decline in exports because of the erosion of preferences under the GSP. United Nations Conference on Trade and Development, Multilateral Trade Negotiations: Evaluation and Further Recommendations Arising Therefrom, at 12-13, U.N. Doc. TD/227 (1979).

Bela Balassa argues, however, that the methodology used to arrive at the estimates seriously biases the results and that, under reasonable assumptions, increase in the exports of developing countries should exceed by several times the decline in exports caused by a partial loss of preference margins. B. BALASSA, THE TOKYO ROUND AND THE DEVELOPING COUNTRIES 9-14 (World Bank Staff Working Paper No. 370, 1980). See also Birnberg, *Tariff Reform Options: Economic Effects on Developing and Developed Countries*, in POLICY ALTERNATIVES FOR A NEW INTERNATIONAL ECONOMIC ORDER 217, 237-39 (W.R. Cline ed. 1979).

44. See note 10 *supra* and accompanying text.

thirty-two percent for industrial raw materials and only seven percent for agricultural products.⁴⁵

A final source of potential benefit to the less developed countries involves reductions of tariffs imposed on tropical products. In this area, the developed countries approved 2,930 of the developing countries' 4,400 initial requests for concessions.⁴⁶ The most important concessions involve products such as coffee, tea, spices, cocoa, and animal products.⁴⁷ Although the developed countries did not accede to the developing countries' demands for complete abolition of internal taxes on tropical products like coffee and tobacco, some developed countries did agree not to increase existing levels of taxation of these products.⁴⁸

B. NON-TARIFF BARRIER CODES

The most significant accomplishment of the Multilateral Trade Negotiations is its series of codes and agreements regarding non-tariff matters. The agreements cover: agricultural products, including dairy and beef products;⁴⁹ valuation for customs purposes;⁵⁰ government procurement;⁵¹ technical barriers to trade relating to national product standards;⁵² import licensing;⁵³ antidumping duties;⁵⁴ and subsidies and countervailing duties.⁵⁵ The latter two hold the greatest significance for the less developed countries.

45. GATT, THE TOKYO ROUND OF MTN, *supra* note 31, at 122.

46. *Id.* at 157, 162-63.

47. *Id.* at 157.

48. *Id.* at 159.

49. At the multilateral level, the negotiators agreed to the International Dairy Arrangement, GATT Doc. MTN/DP/8, *reprinted in* AGREEMENTS REACHED IN THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS, H.R. DOC. NO. 153, 96th Cong., 1st Sess., 341-412 (1979) [hereinafter cited without cross reference as H.R. DOC. NO. 153]. With respect to cheese, other dairy products and meat, numerous bilateral agreements resulted from the Tokyo Round. *See* H.R. DOC. NO. 153, at 414-618.

50. Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade, GATT Doc. MTN/NTM/W/229/Rev. 1, *reprinted in* H.R. DOC. NO. 153, at 5-65.

51. Agreement on Government Procurement, GATT Doc. MTN/NTM/211/Rev. 2, *reprinted in* H.R. DOC. NO. 153, at 69-172.

52. Agreement on Technical Barriers to Trade (Relating to Product Standards), GATT Doc. MTN/NTM/W/192/Rev. 5, *reprinted in* H.R. DOC. NO. 153, at 205-56.

53. Agreement on Import Licensing Procedures, GATT Doc. MTN/NTM/W/231/Rev. 2, *reprinted in* H.R. DOC. NO. 153, at 193-208.

54. Agreement on Implementation of Article VI of The General Agreement on Tariffs and Trade, GATT Doc. MTN/NTM/W/232, *reprinted in* H.R. DOC. NO. 153, at 311-38 [hereinafter cited as 1979 Antidumping Code]. *See* notes 56-59 *infra* and accompanying text.

55. Agreement on Interpretation and Application of Articles VI, XVI and XXII of the General Agreement on Tariffs and Trade, GATT Doc. MTN/NTM/W/236, *reprinted in* H.R. DOC. NO. 153, at 259-307 [hereinafter cited as Code on Subsidies and Countervailing Measures]. *See* notes 60-73 *infra* and accompanying text.

1. *The 1979 Antidumping Code*

The 1979 Antidumping Code⁵⁶ reinterprets Article 6 of the GATT⁵⁷ in an attempt to bring the existing Code⁵⁸ into conformity with the new Code on Subsidies and Countervailing Measures.⁵⁹ With the exception of Yugoslavia and Malta, no member of the Group of 77 acceded to the 1967 Antidumping Code. At the Tokyo Round, therefore, the developing countries pressed for substantial modification of the Code, seeking in particular: special and more favorable treatment for developing countries; determination of "normal value" through comparison of the export price with the price of like products exported to third countries; a requirement that "dumped imports should be the principal cause of material injury;" and that, when imports from developed and developing countries are together causing the injury, investigation into developing country practices be commenced only when such imports are clearly the principal cause of material injury. The developed countries refused to accept these provisions, however, and the developed and developing countries submitted alternative texts for the new Code. Both texts appear in the Proces-Verbal for signature, and reconciliation of the two will likely be difficult.

2. *Subsidies Code*

The new Subsidies Code⁶⁰ prohibits the use of export subsidies on industrial and mineral products,⁶¹ precisely defines the rule on export subsidies on agricultural products,⁶² and provides guidelines for the use of domestic subsidies in general.⁶³ The developing nations will receive special and differential treatment under the new Code.⁶⁴ Moreover, the Code provides for further restrictions on the use of countermeasures.⁶⁵

In the interest of developing countries, the Subsidies Code recognizes the integral role of domestic subsidies in development programs.⁶⁶ Government financial support measures of developing countries, therefore,

56. 1979 Antidumping Code, *supra* note 54, H.R. Doc. No. 153, at 259.

57. GATT Art. VI.

58. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, BISD (15th Supp.) 24-35 (1968) [hereinafter cited as 1967 Antidumping Code].

59. Subsidies Code, note 55 *supra*.

60. *See* note 55 *supra*.

61. Subsidies Code, *supra* note 55, art. 10, H.R. Doc. No. 153, at 278-79.

62. *Id.*

63. Subsidies Code *supra* note 55, art. 14, H.R. Doc. No. 153, at 279-81.

64. *Id.* art. 14, H.R. Doc. No. 153, at 284-85.

65. *Id.* art. 15, H.R. Doc. No. 153, at 286. The United States, for example, will adopt an injury requirement for countervailing action against other code signatories.

66. *Id.* art. 15(7), H.R. Doc. No. 153, at 285.

"shall not, *per se*, be considered subsidies."⁶⁷ Moreover, developing countries are exempt from the commitment of the developed countries not to use export subsidies on industrial and mineral products.⁶⁸ Developing country signatories do agree, however, not to use such subsidies "in a manner which causes serious prejudice to the trade or production of another signatory."⁶⁹ Developing nations are nonetheless subject to the imposition of countervailing duties if their subsidized exports cause "material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry"⁷⁰

The Code requires that developing countries endeavor to enter into commitments to reduce or eliminate subsidies inconsistent with development needs.⁷¹ The Agreement also extends special and differential treatment to developing countries in cases of third market subsidization.⁷² Finally, the Code envisages the possibility that the Committee of Signatories might extend this preferential treatment when authorizing countermeasures against developing country subsidies.⁷³

In the hope of joining the ranks of "newly industrializing countries," many developing nations are currently instituting incentive programs to promote exports. Determinations of legitimate subsidization levels on exports will, therefore, be crucial to the developing countries. Indeed, the future interpretation and application of the Subsidies Code will largely determine the overall value to developing nations of the entire Tokyo Round of MTN.

C. FRAMEWORK FOR CONDUCT OF INTERNATIONAL TRADE

The results of the "Framework" negotiations may represent one of the most significant accomplishments in recent years in the area of North-South relations.⁷⁴ Consistent with the Tokyo Declaration, the Framework negotiations were to "seek to negotiate improvements in the international framework for the conduct of world trade, particularly with respect to trade between developed and developing countries and differential and more

67. *Id.*

68. *Id.* art. 14(2), H.R. Doc. No. 153, at 284.

69. *Id.* art. 14(3), H.R. Doc. No. 153, at 284.

70. *Id.* art. 2(1), H.R. Doc. No. 153, at 261 n.1.

71. *Id.* art. 14(5), H.R. Doc. No. 153, at 284.

72. *Id.* art. 14(6), H.R. Doc. No. 153, at 284-85.

73. *Id.* arts. 8 & 9, H.R. Doc. No. 153, at 285.

74. The various texts of the Group "Framework" are contained in GATT Doc. MTN/FR/W/20/Rev. 2, reprinted in H.R. Doc. No. 153, at 621-62 [hereinafter cited as Framework Agreement]. See R. KEMPER, THE TOKYO ROUND: RESULTS AND IMPLICATIONS FOR DEVELOPING COUNTRIES ii (World Bank Staff Working Paper No. 372, 1980).

favorable treatment to be adopted in such trade."⁷⁵ The only GATT provisions presently giving a degree of differential and favorable treatment to developing countries are those in Article XVIII⁷⁶ and Part IV.⁷⁷ Moreover, the GATT did not incorporate the GSP, negotiated in the United Nations Conference on Trade and Development,⁷⁸ in this framework. Instead, the GSP gave only temporary legal cover through waivers permitting deviation from the basic GATT principle of unconditional MFN treatment.⁷⁹ The developing countries, therefore, viewed the framework negotiations as another area in which to press for special treatment.

Several developing countries, led by Brazil, made detailed proposals to the Framework Group. These proposals treated the subjects of differential treatment for developing nations, safeguard action for purposes of balance-of-payments and economic development, consultations, dispute settlement and surveillance under Articles XXII and XXIII and, for the purposes of future negotiations, applicability of the reciprocity principle and the developing countries' broader participation in an improved GATT framework, taking into account development needs. Although the substantive negotiations fell short of the developing nations' objectives, the Framework Group made notable progress toward integrating the "differential and more favorable treatment" notion into the GATT itself, thus eliminating the need to obtain waivers.⁸⁰

In its final enabling clause, the Framework Group combined the topics of a "legal framework" and "reciprocity and fuller participation by developing countries."⁸¹ The final text of this agreement calls for special treatment in tariff preferences under the GSP, non-tariff measures under codes negotiated pursuant to the GATT, tariff and non-tariff preferences negotiated regionally or globally among developing countries, and special treatment of the least developed among developing countries.⁸² The agreement also recognizes the special needs of developing countries by excusing the latter from extending reciprocity to developed country trade liberalization commitments.⁸³

75. Tokyo Declaration, *supra* note 1, at 22.

76. GATT Art. XVIII.

77. GATT Arts. XXXVI-XXXVIII.

78. See GATT, THE TOKYO ROUND OF MTN, *supra* note 31, at 98.

79. See *id.*

80. See GATT, THE TOKYO ROUND OF MTN, *supra* note 31, at 99; R. KEMPER, *supra* note 74, at 30.

81. See Framework Agreement, note 74 *supra*, H.R. DOC. No. 153, at 622.

82. *Id.*

83. The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariff and other barriers to the trade of developing countries Developed contracting parties shall therefore not seek, neither

Point 2B of the Framework Agreement permits less developed countries to invoke relevant GATT safeguard provisions to modify existing production structures to promote economic development.⁸⁴ Because Article XVIII of the GATT allows use of such measures as the withdrawal or modification of granted preferences and imposition of special measures only "to promote the establishment of a particular industry,"⁸⁵ Point 2B extends Article XVIII of the GATT in favor of the the less developed nations.⁸⁶

Point 2A of the Framework Agreement imposes additional restrictions on the developed nations' use of safeguard action for balance-of-payments purposes.⁸⁷ Such action would be appropriate only when the measure involved is that having "the least disruptive effect on trade,"⁸⁸ when only one type of measure is involved,⁸⁹ and when the developed country "publicly announce[s] a time schedule for the removal of the measures."⁹⁰ Developed countries taking safeguard action of this type are to consider the adverse effects of the measures on the export interests of the developing countries.⁹¹ The Agreement would authorize "simplified consultation procedures"⁹² for less developed countries wishing to impose their own balance-of-payment restrictions.⁹³ In the event of consultations, developing countries may request that the committee focus on possible external causes of their balance-of-payment difficulties⁹⁴ and may request the technical assistance of the GATT secretariat in preparing for the consultations.⁹⁵

A final aspect of the Framework negotiations of special importance to the developing countries involves the "graduation" principle.⁹⁶ Unfortunately, the Enabling Clause is vague and ambiguous in its recognition of

shall less-developed contracting parties be required to make, concessions that are inconsistent with the latter's [*sic*] development, financial, and trade needs.

Id., H.R. Doc. No. 153, at 624.

84. *Id.* Point 2, H.R. Doc. No. 153, at 632.

85. GATT Art. XVIII, secs. A & C.

86. *See* GATT, THE TOKYO ROUND OF MTN, *supra* note 31, at 104.

87. Framework Agreement, *supra* note 74, Point 2A, H.R. Doc. No. 153, at 626.

88. *Id.* Point 2A, para. 1(a), H.R. Doc. No. 153, at 627.

89. *Id.* para. 1(b), H.R. Doc. No. 153, at 627.

90. *Id.* para. 1(c), H.R. Doc. No. 153, at 627.

91. *Id.* para. 2, H.R. Doc. No. 153, at 627.

92. Basically, this procedure involves prior consideration of balance-of-payments restrictions by a Committee on Balance-of-Payments Restrictions whenever a developing country is involved. Submitting to such consideration may avoid the need for a full consultation under Article XVIII of the GATT. *See* Procedures for Regular Consultations on Balance-of-Payments Restrictions with Developing Countries, GATT Doc. L/3772/Rev. 1 (1972), BISD (20th Supp.) 47-49 (1974).

93. Framework Agreement, *supra* note 74, Point 2A, para. 6, H.R. Doc. No. 153 at 628.

94. *Id.* Point 2A, para. 12, H.R. Doc. No. 153, at 631.

95. *Id.* para. 10, H.R. Doc. No. 153, at 629.

96. *See generally* I. FRANK, THE "GRADUATION" ISSUE IN TRADE POLICY TOWARDS LDCs (World Bank Staff Working Paper No. 334, 1979).

the graduation concept, providing merely that, as poorer nations develop and their trade situations improve, "they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement through participation in the operation of the GATT System."⁹⁷

The "graduation" principle merits more attention than it received in the final Framework Agreement. The principle should apply, for example, to the non-reciprocity rule.⁹⁸ The World Bank recognizes such a concept by "graduating" developing nations from eligibility for International Development Association credits, and applies the principle in formulating ceilings for most generalized preferences.⁹⁹

A modified principle of reciprocity must necessarily depend on more effective safeguards against market disruption. Special and differential treatment may be legitimate under certain conditions, but it is exceedingly difficult to maintain a reasonably open international trading system when the rules apply to the small group of OECD nations while all other nations, without regard to their stage or rate of development, are indefinitely free of such constraints. The best approach would be to establish a graduation principle requiring newly industrializing countries with rapidly expanding exports and satisfactory per capita incomes progressively to relinquish the right to favorable treatment. Such an approach would gradually bring the trade policies of developing countries into accord with regular GATT and code obligations.

One meritorious proposal would establish a new GATT Committee on Graduation.¹⁰⁰ This Committee might develop criteria for graduation, encourage qualifying countries to participate in the process, and enlist the cooperation of other countries to facilitate a smooth transition for the graduating country.¹⁰¹ Moreover, the Committee might mobilize the World Bank and the International Monetary Fund to help graduating countries overcome any short-term balance-of-payments problems and long-term structural problems associated with the program.¹⁰²

D. ABSENT THE SAFEGUARD CODE

The effectiveness of the GATT has suffered most in recent years in the area of safeguards. Nations have routinely circumvented Article XIX of

97. Framework Agreement, *supra* note 74, Point 2A, para. 7, H.R. Doc. No. 153, at 629.

98. See note 83 *supra* and accompanying text.

99. See I. FRANK, *supra* note 96, at 13.

100. *Id.* at 20-24.

101. *Id.* at 20-21.

102. *Id.* at 21.

the Agreement¹⁰³ through the use of OMAs and VERs.¹⁰⁴ The negotiators have been unable, however, to reach an agreement in this crucial area. The parties have managed only to establish a Safeguards Committee that is to continue negotiations on a Multilateral Safeguard System and to report by June 30, 1980 on its progress.

The primary difficulty in the negotiations has been the less developed countries' refusal to accept the European Community's insistence on each member's right to impose unilateral safeguards on individual suppliers without multilateral approval. Resolving this "selectivity" issue may require a broader approach to the revision of Article XIX. An improved international mechanism is necessary, for example, to regulate the actions of countries claiming "injury" from imports. The Tokyo Declaration called for consideration of "the modalities of application of Article XIX,"¹⁰⁵ but this remains to be done.

Reform of Article XIX should begin with a recognition that the provision is at the same time overly exacting and overly lenient; too restrictive to maintain nondiscrimination, but insufficiently restrictive to impose other obligations on those who invoke the GATT rules. Elsewhere, this author has proposed a number of possible revisions to remove these Article XIX weaknesses.¹⁰⁶

Effective revision of Article XIX requires the establishment of an international body to review national determinations of "serious injury." Such a system would require countries whose national finding of injury is deemed unacceptable internationally to offer compensation to its trading partners or, alternatively, to suffer corresponding retaliations. If, however, the national finding were deemed acceptable, other GATT members would waive their rights to compensation or retaliation. If nations refused to waive these rights, they should at least agree to permit the country invoking the safeguards not to compensate through MFN¹⁰⁷ concessions on selected exports from adversely-affected countries. Once nations adopt an adversary posture toward one another, the danger is that the MFN provision may provoke a downward spiral in the bargaining process.

A nondiscriminatory Article XIX may appear particularly inequitable to developing countries that are new suppliers or entrants. These countries may not gain access to the safeguard-invoking country's market even

103. GATT Art. XIX.

104. See notes 12-14 *supra* and accompanying text.

105. Tokyo Declaration, *supra* note 1, at 21.

106. Meier, *Externality Law and Market Safeguards: Applications in the GATT Multilateral Trade Negotiations*, 18 HARV. INT'L L.J. 491, 508-17 (1977). See notes 107-08 *infra* and accompanying text.

107. See note 35 *supra* and accompanying text.

though the safeguard was initially a response to exports from developed countries. The MFN provision adversely affects all countries. If the legitimate purpose of retaliation is punitive, the MFN clause should not apply to retaliatory increases. There is no justification for injuring other contracting parties unnecessarily. Waiver of the MFN rule and reciprocity does not, however, mean there should be no international discipline concerning the use of Article XIX. On the contrary, the use of common responsibilities, joint decisions, and international surveillance might actually strengthen the multilaterality principle, without use of the MFN provision.

Another essential Article XIX reform would require a commitment and a procedure to assure countries continually growing access to protected markets and a foreseeable removal of market safeguards. Such assurances are especially important for less developed countries entering new export markets. At least three requirements should be pre-conditions to the imposition of safeguards. First, protective measures should be degressive over a designated number of years and should terminate at the end of this period. Second, the scheme should require the invoking country to promote adjustments designed to reduce dislocation costs in the invoking country in order to hasten the removal of the safeguards. Third, the use of safeguard measures and adjustment efforts must be subject to multilateral surveillance. Moreover, to encourage adjustment assistance that will convert resources to more productive use, the Safeguard Code should permit retaliation or require additional and proportionately larger concessions whenever reduction or removal of the safeguards does not occur within the designated time period. At the least, a system of international surveillance would serve to disclose prevailing types of adjustment policies and to monitor their progress.

Finally, the less developed countries should receive special and differential treatment in the application of market safeguards on a variation of the graduation principle.¹⁰⁸ This approach would exempt nations from being subject to safeguards until they graduate out of the category of least developed countries. The clause should also allow any least developed country to maintain its prior share of the safeguard imposing country's market. For new entrants into the market, an exemption should be available that would remain in effect until exports of the product in question to the country invoking the clause exceed a certain volume or value.

A revised Article XIX might also accord favorable treatment to the developing countries through a more favorable scale for any quota or tariff quota imposed. Instead of permitting every country to expand its exports to

108. See notes 96-99 *supra* and accompanying text.

the importing country by a set rate per annum, the rate should be graduated according to market penetration. Such an approach would grant to a developing nation the right to expand its exports without limit as long as it has, for example, less than one percent of the market. This growth rate might then decline toward, for example, five percent as the country's share of the market rises to, for example, five percent. Moreover, a developing country should be able to increase its exports to each developed country by a minimum percentage (ten percent, for example), even though the share-of-market formulation would call for a slower rate of export growth.

III

TO SIGN OR NOT?

The Group of 77 Declaration on the Multilateral Trade Negotiations adopted at UNCTAD V¹⁰⁹ indicates that the results of the Tokyo Round are unsatisfactory to the developing countries. In fact, these nations complain that the negotiations failed in every respect to achieve the objectives of the Tokyo Declaration.¹¹⁰ Although the Tokyo Round did not live up to initial expectations of both developed and developing countries, the developing nations still have an interest in becoming signatories.

Immediate direct benefits will accrue to the developing countries under the new agreements. More importantly, however, future benefits depend on the developing nations' participation in shaping the interpretation and application of the codes, and on their participation in dispute settlement and surveillance procedures. The future interpretation and implementation by code committees will ultimately determine the real significance of the Multilateral Trade Negotiations. Furthermore, this process will depend less on loosely-worded legal and quasi-legal language that lacks adequate institutional basis than on economic and political factors. Although the developed countries will likely have even more power in the committees than they have had under the GATT alone, the developing nations have no better way to protect their interests than by actively participating in the implementation and future revisions of the agreements.

An important conclusion is that nations must still acquire access to multilateral mechanisms designed to solve on-going trade problems and new ones as they arise. Nations cannot await an eighth round of negotiations. This problem recalls initial complaints that the GATT was "diplomats' jurisprudence" and that the results of the Tokyo Round represent

109. Report of the United Nations Conference on Trade and Development on its Fifth Session, U.N. Doc. TD/268/Add. 1, at 3-14 (1979).

110. See *id.* at 10-11; Tokyo Declaration, *supra* note 1, at 19-22.

“trade negotiations” and not the still-needed “law reform negotiations.”¹¹¹

The basic question whether developing countries should receive special and differential treatment will undoubtedly arise repeatedly in the future. Another question is how the graduation principle should relate to such treatment.¹¹² These issues raise, in turn, the ultimate question whether new efforts are necessary to effectively integrate the activities of the GATT, the International Monetary Fund, and the World Bank. Despite language to the contrary in the Tokyo Declaration,¹¹³ the negotiations had a fragmentary and *ad hoc* character. Only the Framework Group possessed any quality approaching vision. To attain the International Monetary Fund's goals of international monetary reform and a stronger code of international conduct, to increase the efficacy of the World Bank's efforts, and to liberalize trade and foster development through trade in the developing countries, the IMF, the Bank, and the GATT must share more common activities.¹¹⁴ Like another familiar subject, development policy is a seamless web. In the McDougal-Laswell-Reisman tradition, therefore, the international community must adopt a macro-legal approach to the problem.

111. R. HUDEC, *supra* note 24, at 265.

112. See notes 96-99 *supra* and accompanying text.

113. The Tokyo Declaration speaks of “comprehensive multilateral trade negotiations” designed to achieve “an overall balance of advantage at the highest possible level.” Tokyo Declaration, *supra* note 1, at 19-21.

114. In this vein, the chairman of the OECD Development Assistance Committee stated:

The hidden agenda of OECD policymakers in the early 1980s should be to open their system by every honorable and politically viable means to the astringent challenge of developing-country competition. If they should be so motivated, they will also need to design measures that cushion and mitigate the social costs of structural adjustment—for humane as well as political reasons. Yet the principal balm to the particularized and localized pains of adjustment would be provided by the accelerated growth that the expanded trade would permit . . . Instead of backing reluctantly into post-Tokyo Round negotiations on grounds of high principle, the impulse of the OECD negotiators should be to converge enthusiastically with those of the “77” who have also come more clearly to appreciate the usefulness of the international market.

The Tokyo Round ended a chapter but not the book.

Lewis, *A Possible Scenario for the Development Strategy*, 101 THE OECD OBSERVER 3, 6 (1979).