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The International Law and Politics of Agricultural Trade

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As the millennium approaches, the Four Horsemen of the Apocalypse—War, Famine, Pestilence, and Death—still ride defiantly across the face of the planet. From Central America to Southeast Asia in the 1970s and 1980s, and to Europe and Africa in the 1990s, war has been a seemingly constant fixture of everyday life. Cholera struck thousands in Peru and Bangladesh in 1991 and threatened many more. Thousands worldwide have fallen victim to acquired immune deficiency syndrome. But millions more since the end of World War II have been visited by the cruelest of all the Four Horsemen, Famine. Cruelest because Famine works the slowest, affects more people, and kills with a horrible efficiency as good as his brother riders.

According to recent World Bank studies, the number of persons suffering from chronic malnutrition is estimated between 340 million and 730 million, excluding China. This is the case even though overall food production has grown faster than population in developing countries. In the World Bank’s view, the root cause of malnutrition and famine is not insufficient food production, but poverty and uneven distribution of income. The short prescription for alleviating hunger, therefore, is to increase growth and the competitiveness of an economy, a conclusion reached by Adam Smith more than 200 years ago when he wrote in The Wealth of Nations that “a famine has never arisen from any other cause but the violence of government attempting, by improper means, to remedy the

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2. Id.
inconveniences [sic] of a dearth." For most of the world's developing countries, that means pursuing reform of those economic policies in the agricultural sector that retard the growth of agricultural output.

The direct cause of famine and malnutrition is not always inadequate income. Take the case of Ethiopia. Plagued by intermittent droughts and thirty years of civil war, Ethiopians experienced terrible famine and malnutrition as a direct consequence. Even if they had had the income to buy imported food, rebel and government troops would have slowed or interdicted its distribution. And, of course, the people do not have the income in the first place to purchase imported food because they depend on agriculture for their livelihood, an occupation they cannot pursue either because of the drought or because of the war which forced them to flee their farms.

The plight of developing countries is not entirely of their own making nor that of Mother Nature. In its 1986 World Development Report, the World Bank concluded that

trade barriers in industrial countries have become more restrictive, and most developing countries pursue policies that inhibit the growth of agricultural output and of rural incomes. As a result, most of the world's food exports are grown in industrial countries, where the costs of food production are high, and consumed in developing ones, where the costs are lower.5

Distressingly, calls for protectionism from the agricultural industry within the developed countries have not subsided. Protectionism in the agricultural sector has derailed the General Agreement on Tariffs and Trade (GATT) Uruguay Round of multilateral trade negotiations, where the United States, with 3.5 million farmers, and the Cairns Group (Canada, Australia, Brazil, Argentina, and a handful of developing countries) want domestic farm subsidies lowered by 75% and export subsidies slashed by 90% over ten years. The European Community (EC), with ten million farmers, has refused to budge from a

5. Poverty and Hunger, supra note 1, at 8-9.
30% reduction in domestic subsidies. In Japan, the domestic rice market remains completely closed to imports.\(^6\) Considering that agricultural trade represents approximately only 10% of total world trade, the intransigence of the EC and Japan on this issue is a case of the tail wagging the dog. Back at home, as free trade negotiations between the United States and Mexico have concluded, Florida farmers have asked that winter fruit and vegetables be exempted from any free trade agreement.\(^7\) California tomato growers have asked that the agreement be phased-in over twenty years,\(^8\) double the ten year time period allowed for the elimination of tariffs under the U.S.-Canada Free Trade Agreement.

By one estimate, the Organization for Economic Cooperation and Development (OECD) member countries paid over $200 billion, and perhaps as much as $300 billion, in 1990 in agricultural subsidies and artificially high consumer food prices.\(^9\) In Canada, for example, the regulation of food products such as chickens, eggs, and dairy products, whose prices are set by marketing boards, cost twice as much as the same products in the United States.\(^10\) In the United States, the blatantly protectionist Export Enhancement Program (EEP) masquerades as a free trade measure. In 1989, $2.5 billion in commodity bonuses were paid under the EEP, boosting the sale of $8.5 billion in agricultural products to sixty-five countries.\(^11\) In the face of congressional charges that the EEP is little more than a handout to grain exporting companies, an Undersecretary of Agriculture defended the EEP as a challenge to the unfair trade practices of competitors that would pressure them to

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\(^8\) Id.


negotiate the reduction of trade barriers that injure American farmers.\footnote{12}

In the Uruguay Round the United States' opening "zero option" position that all agricultural subsidies be eliminated eventually softened to one of eliminating all export subsidies and 90\% of all domestic farm subsidies over ten years, with "tariffication" of all other non-tariff trade barriers.\footnote{13} In the United States, the American Farm Bureau Federation supported the U.S. proposal,\footnote{14} while the National Association of State Departments of Agriculture remained skeptical whether the reform proposal would benefit U.S. farmers in the long run.\footnote{15} In Australia, the Australian National Farmers' Federation launched an initiative to speed agricultural reform along on the Uruguay Round agenda.\footnote{16} A 1990 OECD/World Bank estimate is that if developed countries cease granting farm and export subsidies, food prices would rise resulting in a shift of food production to lower-wage developing countries, with a net annual economic gain to OECD countries of approximately $50 billion and $12 billion to developing countries.\footnote{17}

With so much evidence existing to support the view that tremendous gains can be reaped from liberalizing agricultural trade, why has there been and why does there continue to be so much resistance to proposals for reform, especially from the EC and Japan? How did we get where we are today? Why is the EC so intransigent on the issue of reforming its extremely expensive $9 billion annual Common Agricultural Policy? Why does Japan keep its rice market closed to imports? Let's first take a brief look at the question of why the agricultural sector has escaped basic GATT disciplines, and then consider the Common Agricultural Policy (CAP).

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12. Id.
15. State Farm, supra note 13.
I. GATT AND AGRICULTURAL TRADE

In its basic design, GATT reflects liberal trade principles to which contracting parties agree to adhere, even if that means that contracting parties must amend their domestic trade legislation to accommodate GATT rules. In the case of agricultural trade, however, this fundamental design was turned on its head: The GATT rules for agricultural trade were written largely by the United States to accommodate U.S. domestic agricultural policy. This accommodation resulted in a major departure from two GATT disciplines: (1) the general prohibition against imposing quantitative restrictions (QRs) on imports (quotas); and (2) the prohibition against granting export subsidies except under specific conditions. In the case of QRs, Article XI:2(c) permits quotas on agricultural imports provided the import quotas are part of a government program that also restricts domestic production of the like product or removes a temporary surplus of the like product. In the case of export subsidies, Article XVI in essence exempts agricultural products from GATT disciplines with regard to such subsidies. Although Article XVI is an admittedly weak restraint on the use of export subsidies.


19. Two kinds of subsidies exist under international trade law, export subsidies and domestic subsidies. Export subsidies, as the name suggests, is a government payment conditioned on the export of a designated product or on export performance. A domestic subsidy is a government assist on the production or manufacture of a product without regard to its ultimate destination. See Kevin C. Kennedy, An Examination of Domestic Subsidies and the Standard for Imposing Countervailing Duties, 9 Loy. L.A. Int’l & Comp. L.J. 1, 2 n.10 (1986); John Barcelo, Subsidies, Countervailing Duties and Antidumping After the Tokyo Round, 13 Cornell Int’l L.J. 257, 261 (1980).


2. The provisions of paragraph 1 of this Article [generally prohibiting quotas and import licenses] shall not extend to the following:

   * * * *

   (c) Import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate:

   (i) to restrict the quantities of the like product permitted to be marketed or produced . . . or

   (ii) to remove a temporary surplus of the like domestic product . . . .
subsidies in the first place,\textsuperscript{21} paragraphs 2 and 3 strongly counsel against their use. Paragraph 2 provides:

The contracting parties recognize that the granting of a subsidy on the export of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this Agreement.

Paragraph 3 continues this theme with the general admonition, but not command, against the use of export subsidies for "primary" products (i.e., products of farm, forest, or fisheries): "Accordingly, contracting parties should seek to avoid the use of subsidies on the export of primary products."\textsuperscript{22} But in the event that contracting parties are unable to resist the temptation and do provide export subsidies for primary products, paragraph 3 urges restraint:

If, however, a contracting party grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory, such subsidy shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product, account being taken of the shares of the contracting parties in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product.

This "soft" GATT discipline on the use of export subsidies was partially hardened in 1979 in the seventh GATT round of multilateral trade negotiations, the Tokyo Round, which led to the negotiation of the GATT Subsidies Code.\textsuperscript{23} Under

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\textsuperscript{21} In the case of subsidized imports that cause injury to a domestic producer of the like product, article VI:3 & 6(a) permits the imposition of a countervailing duty to offset the government subsidy. GATT, at art. VI:3(a).

\textsuperscript{22} \textit{Id.} Article XVI defines a "primary product" to be "any product of farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade." GATT, art. XVI(B)(2).

Article 9:1 of the Subsidies Code, it was agreed that "[S]ignatories shall not grant export subsidies on products other than certain primary products." Once again, little progress was made on ending the use of subsidies to promote exports of agricultural products. In connection with export subsidies on agricultural products, Article 9 of the Subsidies Code narrowed the exemption by eliminating minerals from the definition of "primary products." Article 10 in turn reiterated the provisions of Article XVI:3, and then went on to define the three critical terms in that original GATT article: (1) "equitable share of world export trade;" (2) "more than an equitable share of world export trade;" and (3) "a previous representative period."

In short, while significant progress has been made in disciplining the use of export subsidies on non-primary products, neither GATT nor the Subsidies Code has brought any appreciable discipline to the use of export subsidies in connection with primary products. With regard to quotas on imports of agricultural products, the problem of liberalizing agricultural trade was exacerbated in 1955 when the GATT Contracting Parties granted the United States a waiver permitting it to impose quotas on agricultural imports in a manner inconsistent with Article XI:2(c). One silver lining in this otherwise dark cloud is the Canada-U.S. Free Trade Agreement in which both countries agreed to a ban on export subsidies on agricultural

25. Subsidies Code, art. 10:2. Article 10:2 provides:
   For purposes of article XVI:3 of the General Agreement:
   (a) "more than an equitable share of world export trade" shall include any case in which the effect of an export subsidy granted by a signatory is to displace the exports of another signatory bearing in mind the developments on world markets; (b) with regard to new markets traditional patterns of supply of the product concerned to the world market, region or country, in which the new market is situated shall be taken into account in determining "equitable share of world export trade;" (c) "a previous representative period" shall normally be the three most recent calendar years in which normal market conditions existed. Id.
trade inter sese,\textsuperscript{27} and a further commitment to work toward the elimination of all agricultural subsidies, both domestic and export, on a global basis.\textsuperscript{28}

The long and the short of it is that if agricultural trade is to be liberalized, GATT has to be reformed. What hurdles stand in the way of such reform? That question leads to an examination of the EC’s Common Agricultural Policy and Japan’s import quotas and bans on agricultural trade.

II. THE COMMON AGRICULTURAL POLICY (CAP)

The genesis of the CAP is the Treaty of Rome,\textsuperscript{29} which laid the foundation for a common agricultural policy in Articles 38 and 39. Article 38 provides that the common market is to include agriculture and trade in agriculture, and that as a precondition to such inclusion the Member States are to establish a common agricultural policy. Article 39 in turn sets forth five objectives which the common agricultural policy is to meet:

(a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilization of the factors of production, in particular labor;
(b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;
(c) to stabilize markets;
(d) to assure the availability of supplies;
(e) to ensure that supplies reach customers at reasonable prices.

On this basic treaty foundation, the CAP has laid three cornerstones: (1) common prices for agricultural products in

\begin{itemize}
\item \textsuperscript{28} Article 701:2 of the Free Trade Agreement provides that “[n]either Party shall introduce or maintain any export subsidy on any agricultural goods originating in, or shipped from, its territory that are exported directly or indirectly to the territory of the other Party.” Article 701:1 provides that “[t]he Parties agree that their primary goal with respect to agricultural subsidies is to achieve, on a global basis, the elimination of all subsidies which distort agricultural trade, and the Parties agree to work together to achieve this goal, including thorough multilateral trade negotiations such as the Uruguay Round.”
\item \textsuperscript{29} Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11.
\end{itemize}
all EC-member countries; (2) an absolute preference for EC producers over outside producers; and (3) common funding of agricultural programs through the EC Commission.\footnote{Hathaway, supra note 18, at 72.} The CAP is essentially a price-support mechanism, with substantial expenditures (12\% of the 1987 EC budget) going for agricultural research and technological development.\footnote{AGRICULTURAL TRADE LIBERALIZATION AND THE EUROPEAN COMMUNITY 3 (Secondo Tarditi et al eds., 1989).} The EC Commission uses a mechanism of variable import levies and export refunds to defend the threshold price that the Commission sets for EC farmers. The net effect of this system on imports is that imported products can never undersell the EC product. The variable import levy ensures that the price of the imported product, once the levy is assessed, is at or above the threshold price set for the EC product. Thus, variable import levies operate in much the same way as quotas: No matter how competitive third-country imports are, variable import levies assure that EC threshold prices cannot be undercut.

With regard to EC agricultural exports, surplus is sold on the world market, and EC farmers are guaranteed a price equal to the threshold price through the use of export subsidies. When world prices are lower than the EC threshold price (which is generally the case), the EC farmer will not have to take a loss, the export subsidy will make up the difference.

The net effect of the CAP has been to encourage overproduction. The most significant adverse effects of CAP’s price-support policies come in two forms. The first is inflated food prices for EC consumers, who in effect shoulder the burden of a regressive income tax. The second is the encouragement of investment decisions that result in greater agricultural production, but in the absence of sufficient demand to justify the increased production. One of the side effects of this overproduction is environmental degradation and exhaustion of the land. The resulting surplus must in turn be destroyed or sold on world markets at below market prices. The agriculture industry in developing countries is harmed or destroyed because they cannot afford to compete with the subsidized EC exports. Worse still, when the United States gets into a bidding war...
with the EC over an agricultural export sale (say, for example, the sale of wheat to Pakistan), developing countries, as well as some developed countries like Australia, that are efficient food producers but who abstain from export subsidies, become the innocent bystanders caught in the crossfire.

III. JAPAN’S IMPORT QUOTAS AND BANS

Japan’s agricultural policy is driven mainly by its wartime legacy of food shortages, which has in turn led to a desire for food self-sufficiency. This desire for food self-sufficiency is reflected in Japan’s ban on rice imports, a powerful symbol for the Japanese, but a major friction point in Japan’s trade relations. Besides the ban on rice imports, Japan maintains import quotas on twenty-two agricultural items, applied mostly to final products rather than to raw materials. Japanese agricultural interests are very resistant to opening markets to products which they produce, and are able to exercise influence with the Japanese Diet greater than their numbers because of the disproportionate representation of rural voters in the Diet (not unlike the disproportionate influence of American farm interests in the U.S. Senate). Although Japan’s agricultural policies have impacted food imports, as a net food importer its policies have not directly affected export markets.

IV. U.S. AGRICULTURAL SUBSIDIES

Although the United States is responsible for initiating this latest foray against farm subsidies, it did not enter the arena

35. Hathaway, supra note 18, at 79.
36. Id. at 80.
with clean hands. As noted, the present international legal regime governing agricultural trade reflected U.S. farm policy, a protectionist policy that involved a great deal of government intervention into the market. Through a haphazard system of price-support loans and deficiency payments made to farmers when the market price is less than a government mandated target price, U.S. farmers are encouraged to overproduce. Surpluses are then sold on world markets through export subsidies provided under the Export Enhancement Program when the world price is below the U.S. target price.

V. THE CHALLENGE

The challenge of reforming agricultural trade is formidable. Food security is a powerful concept, particularly in countries that have experienced famine in the past fifty years. Farm lobbies are powerful in the EC, Japan, and the United States. The image of the rugged farmer pitted against the vagaries of the weather is evocative. Farmers are subject to the whims and caprices of weather and markets. Farmers must plant their crops and harvest them according to a fixed cycle that may not always coincide with the best time for selling their products. Prices and markets may conspire against them. And consumers and/or voters want a stable supply of food at stable prices.

But the gains to be achieved by shifting to a market-driven model of farming are no less formidable. If the law of comparative advantage was allowed to operate, farming would occur where production costs are lowest. The winners from farm-trade liberalization would include the United States, Thailand, Turkey, India, Argentina, Brazil, Zambia, and Zimbabwe. Consumers, taxpayers, and the environment would be the immediate beneficiaries. Consider the following figures. In 1989, agricultural subsidies and quotas cost EC taxpayers and consumers $45 billion and $55 billion, respectively; Japanese taxpayers and consumers $20 billion and over $50 billion, respectively; and American taxpayers and consumers $45 billion

38. Amy Kaslow, Farm Subsidies Create Bounty, Boondoggles, CHRISTIAN SCI. MONITOR, Nov. 4, 1992, at 12.
and $20 billion, respectively.\textsuperscript{39} In 1991, the United States and the EC together spent over $220 billion supporting their farm sector.\textsuperscript{40} In marked contrast, by 1992, Australia and New Zealand had phased out all farm subsidies.\textsuperscript{41} Clearly, where there is a political will, there is a political way.

VI. RADICAL FARM REFORM AS PART OF A TOTAL URUGUAY ROUND PACKAGE

A fundamental axiom of free trade is “no pain, no gain.” The prospects of successfully achieving lasting farm reform that is implemented gradually and not multilaterally are dim for at least two reasons. First, gradual reform is open to sniping from special interest groups who may wage a war of attrition to slow and eventually stall genuine reform. Second, farm reform that is not multilateral does not stand a good chance of defeating politically powerful farm lobbies. On the other hand, radical farm reforms that are multilateral, linked to trade reforms in non-farm sectors, and implemented against a backdrop of solid economic indicators offer the best hope for lasting reform with the least pain to farmers. Reforming agriculture radically on a multilateral basis and as part of a greater Uruguay Round trade reform package should mitigate the pain felt by farmers who are displaced by farm reforms. If countries cut farm subsidies simultaneously, world prices will rise and provide some cushion to farmers. In the United States farmers enjoy a comparative advantage in agriculture, so American farmers who want to continue to farm will be able to do so if radical farm reforms are adopted. In Europe and Japan, which do not enjoy a similar comparative advantage, farmers are nevertheless close to alternative jobs outside of agriculture. If radical farm reforms are adopted as part of a total Uruguay Round package, then new jobs in services as well as manufacturing will be created to absorb European and Japanese farmers who suffer job dislocation as a result of

\textsuperscript{39} Jones, \textit{supra} note 34.
\textsuperscript{40} Kaslow, \textit{supra} note 38, at 9.
\textsuperscript{41} \textit{Id.} at 12.
farm reform. And if radical farm reforms are linked to a multilateral Uruguay Round trade package, it will become exceedingly difficult for farm lobbies to defeat farm reform in their national legislatures. Politicians will be able to just say “no” to protectionism.