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Furthering the Reforms of Agricultural Policies in the Millennium Round

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I. INTRODUCTION

Since thirty percent of U.S. agricultural production is exported, the prosperity of American farmers depends on international trade.¹ Exports of agricultural commodities and

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1. See *U.S. Efforts to Reduce Barriers to Trade in Agriculture: Hearings before the Subcomm. On Trade of the House Comm. on Ways & Means*, 105th Cong., 2nd Sess. (Feb. 12, 1998) (statement of Rep. Robert F. Smith, Chairman of the House Committee on Agriculture).

processed products, valued at nearly \$60 billion, support nearly one million U.S. jobs and leave American farmers nearly twice as reliant on foreign trade as the U.S. economy as a whole.² The agriculture sector has consistently been the largest positive contributor to the U.S. balance of trade.³

International trade will be even more important in the future.⁴ The "Freedom to Farm" Act of 1996⁵ terminated the federal government's domestic subsidy payments that had been tied to farm production.⁶ The "golden parachute" of decoupled transition payments has been declining and will leave almost no federal transfer of funds to farmers after the year 2002.⁷ The 1996 farm bill also terminated acreage reduction programs. As a result, 15 million set aside acres have been returned to production, further increasing agricultural surpluses.⁸ For several years farm productivity has been increasing at a rate of 3 to 4 percent annually, and advances in biotechnology promise even greater surpluses in the future.⁹ Clearly, the growing market for the products of American farmers are overseas, where millions of new middle class consumers each year are adding to the world's demand for food and fiber, far above the small increase in domestic demand resulting from nearly zero population growth in the United States.¹⁰

Despite or perhaps because of the tremendous productivity of American farms, many farmers once again have been facing a financial crisis in the past two years as the prices of hogs, wheat,

2. See Testimony of Ambassador Charlene Barshefsky, U.S. Trade Representative, before the Senate Committee on Agriculture, Nutrition and Forestry, May 7, 1998 [hereinafter Testimony of Ambassador Barshefsky].

3. See *id.*

4. See Stewart Truelsen, *Farm Exports: The Driving Force for U.S. Agriculture*, American Farm Bureau Focus on Agriculture (Mar. 16, 1998).

5. See the Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888 (1996).

6. For a colorful discussion of prior commodity programs, see P.J. O'ROURKE, PARLIAMENT OF WHORES 142-153 (1991).

7. See Economic Research Service, *Provisions of the Federal Agriculture Improvement and Reform Act of 1996* (Commercial Agriculture Division, Agriculture Information Bulletin No. 729, Frederick J. Nelson and Lyle P. Schertz, eds.) <<http://www.econ.ag.gov/epubs/pdf/aib729/index.htm>>. See also Scott Kilman, *Weaning Farmers: Crop Deregulation Is Put to the Test in New Rural Crisis*, WALL ST. J., Nov. 9, 1998, at A1.

8. See Dennis T. Avery, *U.S. Farmers Struggle with Stagnant Domestic Market: Why Fast Track Trade Authority Matters*, 23 GLOBAL FOOD QUARTERLY 1 (1998).

9. See *id.*; see also Eldon Ball & Richard Nehring, *Productivity: Agriculture's Engine of Growth*, AGRIC. OUTLOOK, May 1996, at 25-28.

10. See Testimony by Ambassador Barshefsky, *supra* note 2.

corn, soybeans and other farm commodities collapsed to levels lower than in the past decade.¹¹ Some blame the new farm bill for eliminating most agricultural price supports.¹² Some point to the economic recession that started in Japan and spread to much of the rest of Asia and other regions of the world, resulting in sharp reductions of U.S. agricultural commodity exports and depressed domestic and world prices.¹³ Almost all agree that there is an urgent need to expand exports by reducing foreign barriers to imports of U.S. agricultural products.¹⁴

The principal role of the General Agreement on Tariffs and Trade¹⁵ since 1947 has been to facilitate the expansion of world trade by sponsoring multilateral trade negotiations for progres-

11. See 145 CONG. REC. S5659-5662 (online ed. May 20, 1999) (statement of Sen. Dorgan); see also Lane Kugler, *Farmers Hit the Skids*, J. Com., June 11, 1998 at 4a; ECON. RES. SERV., World Agricultural Supply and Demand Estimates (May 12, 1999) <<http://usda.mannlib.cornell.edu/reports/waobr/wasdeb/1999/wasde350.pdf>>. and historical data maintained by the National Agricultural Statistics Service; ROBERT N. COLLENDER, *Agricultural Boom & Bust: Will History Repeat in the 1990's?*, AGRIC. OUTLOOK, April 1999, at 22.

12. See 145 CONG. REC. S4215-4216 (online ed. Apr. 27, 1999) (statement of Sen. Dorgan); see also C. David Kelly, *The High Cost of Freedom?* AM. FARM BUREAU FOCUS ON AGRIC., Feb. 1, 1999; See also Scott Kilman, *Weaning Farmers: Crop Deregulation Is Put to the Test in New Rural Crisis*, WALL ST. J., Nov. 9, 1998, at A1. Cf. John R. Block, *Hands Off the Farm Law*, J. Com., July 29, 1998, at 7a.

13. See Chairman Alan Greenspan, *The Farm Economy*, Address at the Annual Convention of the Independent Bankers Association of America (Mar. 16, 1999) (transcript available at Colorado State University Library); ECON. RES. SERV., GLOBAL AGRIC. TRADE (Mar. 8, 1999) <<http://www.econ.ag.gov/briefing/baseline/trade.htm>>; see also Dennis T. Avery, *Farm Policies Play a Role in Global Economic Turmoil* (1999) <<http://www.hudson.org/averydoc8.htm>>, and Dennis T. Avery, *Asian Tigers Still Not Feeding on US Farm Imports*, BRIDGE NEWS FORUM, May 28, 1999. Data published by the WTO showed declines in exports of agricultural products from North America to Asia of 4% in 1996 and 10% in 1997.

14. See *U.S. Efforts to Reduce Barriers to Trade in Agriculture: Hearings before the Subcomm. on Trade of the House Comm. on Ways & Means*, 105th Cong., 2nd Sess. (Feb. 12, 1998)(statements of Congressman Robert F. Smith, Chairman of the House Committee on Agriculture, Ambassador Peter L. Scher, Special Trade Negotiator for Agriculture, Office of the U.S. Trade Representative, August Schumacher Jr., Under Secretary of Agriculture, Dean R. Kleckner, President, American Farm Bureau Federation, Nicholas D. Giordano, Assistant Vice President for Trade, National Pork Producers Council, Leonard W. Condon, Vice President for Trade, American Meat Institute, and David Moore, President, Western Growers Association); see also Dennis T. Avery, *Aid to Farmers a Poor Substitute for Farm Trade* (1999) <<http://www.hudson.org/averydoc9.htm>>.

15. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]. The original GATT was superceded by the GATT 1994. General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter

sively reducing tariffs and by restraining or eliminating other governmental trade-distorting practices.¹⁶ However, the rules of the GATT have always contained exceptions that permitted governments to pursue protectionist and mercantilist policies in the agricultural sector, through import restrictions and domestic and export subsidies.¹⁷ The disparate treatment of agriculture gave rise to the widespread use of measures that were not permitted or were highly questionable under GATT rules.¹⁸ The European Union's Common Agricultural Policy has often been cited as the most egregious example of agricultural protectionism.¹⁹ U.S. agricultural policies and the GATT waiver²⁰ for U.S. quotas and fees on imports of agricultural products have also been cited as a factor in fostering noncompliance with GATT commitments.²¹

Attempts had been made in previous rounds of multilateral trade negotiations to bring agricultural trade practices under stricter disciplines.²² These attempts were mostly jettisoned at the end of the negotiations because the trade-distorting policies and their constituencies were too entrenched.²³ Finally, during the Uruguay Round, all members of the newly-established

WTO Agreement], Annex 1A, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 21-38 (1994)[hereinafter GATT 1994].

16. See KENNETH W. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 17-21 (1970).

17. See JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF THE GATT* 317-321, 392-396 (1969); JOHN CROOME, *RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND* 104-105 (1995).

18. See DALE E. HATHAWAY, *AGRICULTURE AND THE GATT: REWRITING THE RULES*, Policy Analyses in Int'l Economics 1-4, 103-113 (1987); see also JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 57 (1998).

19. See Kenneth W. Dam, *The European Common Market in Agriculture*, 67 COLUM. L. REV. 209 (1967). Professor Dam wrote that "the variable levy is to protection what the wheel was to transportation. *Id.* at 217; see also BERNARD HOEKMAN & MICHEL KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: FROM GATT TO WTO* 197 (1995).

20. See Waiver Granted to the United States in Connection With Import Restrictions Imposed Under Section 22 of the United States Agricultural Adjustment Act (of 1933), As Amended, GATT B.I.S.D (3d Supp.) 32 (1955).

21. See JACKSON, *supra* note 17, at 318-320, 737-738.

22. See JACKSON, *supra* note 17, at 225, 729, 737-739; JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 313-314 (2d ed. 1998); see also FRANKLIN R. ROOT, *INTERNATIONAL TRADE AND INVESTMENT* 192 (4th ed. 1978); GATT, *THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS* 18-36 (1979); U.S. DEP'T OF AGRIC., FOR. AGRIC. SERV., *REPORT ON AGRICULTURAL CONCESSIONS IN THE MULTILATERAL TRADE NEGOTIATIONS* 1-3 (1981).

23. See *id.*

World Trade Organization²⁴ agreed upon disciplines on agricultural policies relating to domestic support, market access, export competition and sanitary and phytosanitary measures.²⁵

The Uruguay Round Agreement on Agriculture²⁶ has resulted in reforms of agricultural policies in many countries around the world and has been credited with expanding the world trade of agricultural commodities and products.²⁷ Nonetheless, the reforms were modest and left substantial impediments and distortions in the world market.²⁸ The Agreement contained a continuation clause intended to force the parties to negotiate further reforms.²⁹ The WTO Ministerial Conference in Singapore commenced an Analysis and Information Exchange process to prepare for the next round of multilateral negotiations on agriculture.³⁰ Those negotiations were scheduled to begin in Seattle by the end of 1999 with the Ministerial Conference which was expected to commence the next round of multilateral trade negotiations.³¹

If what is past is prologue,³² the mosaic of existing provisions of the GATT and the WTO Agreement on Agriculture, as well as other agreements administered by the WTO, will largely determine the shape of the new negotiations on further reforms of agricultural policies. The Seattle Round Agricultural Com-

24. See JOHN CROOME, *RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND* (1995) for a thorough discussion of the Uruguay Round and the creation of the WTO.

25. See Kevin J. Brosch, *The Uruguay Round Agreement on Agriculture in THE GATT, THE WTO AND THE URUGUAY ROUND AGREEMENTS ACT 876-877* (H. Applebaum and L. Schlitt eds. 1995).

26. See Agreement on Agriculture, Apr. 15, 1994, WTO Agreement, *supra* note 15, Annex 1A, 39-68 [hereinafter Agreement on Agriculture].

27. See ECON. RES. SERV., *AGRICULTURE IN THE WTO* 3 (1998).

28. See U.N. FOOD & AGRIC. ORG. (hereinafter FAO), *IMPACT OF THE URUGUAY ROUND ON AGRICULTURE* (1994); see also FAO, "The UN Food and Agriculture Organization to Begin New Assessment of the Impact of the Uruguay Round on Agricultural Markets," Press Release 99/1, which notes a FAO study that found "little evidence of the impact of the Uruguay Round on the volume of trade and level of prices on the world market in a majority of cases."

29. See Agreement on Agriculture, art. 20.

30. See Singapore Ministerial Declaration, WT/MIN(96)/DEC, para. 19 (Dec. 13, 1996); WTO Committee on Agriculture: General Council Overview of WTO Activities (1998), Report by the Chairman, WTO/G/L/276 (Nov. 20, 1998).

31. See Agreement on Agriculture, art. 20; Office of the U.S. Trade Rep., Solicitation of Public Comment Regarding U.S. Preparations for the World Trade Organization's Ministerial Meeting, Fourth Quarter 1999, 63 Fed. Reg. 44500 (August 19, 1998); Office of the United States Trade Representative, "1999 World Trade Organization Ministerial to be Held in Seattle," Press Release 99-09 (January 25, 1999).

32. See WILLIAM SHAKESPEARE, *THE TEMPEST*, Part II, act i, line 251.

mittee, comprised of a wide range of agricultural companies and associations, has endorsed adoption of the Uruguay Round framework,³³ and the U.S. Trade Representative has indicated that the future negotiations will build on the Uruguay Round agreements, as explained by Ambassador Peter Scher in this symposium.³⁴ As a prelude to the impending agricultural talks in Geneva, this article will discuss the relevant provisions of the GATT 1994 and the Agreement on Agriculture and make predictions on the course of the upcoming negotiations.

II. GATT RIGHTS AND OBLIGATIONS WITH RESPECT TO AGRICULTURAL POLICIES

A. DOMESTIC SUPPORT

The frequently cited problems of farm price supports include high prices for consumers, onerous restrictions and centralized control of farmers' activities, spreading governmental bureaucracy, and the hindrance of foreign policy objectives such as liberalized trade.³⁵ The GATT, however, only provides that WTO members utilizing any trade-distorting subsidy³⁶ notify the GATT Parties/WTO.³⁷ The only limitation on trade-distorting domestic subsidies is an obligation of the Member providing the subsidies to consult, on request, with other members on "the possibility of limiting the subsidization."³⁸ The GATT also exempts the payment of subsidies exclusively to domestic producers and subsidies effected through governmental purchases of domestic products from the normal obligation to provide non-discriminatory or "national" treatment to imported products³⁹ and provides special treatment of domestic subsidies on agricultural products with respect to anti-dumping and countervailing duties.⁴⁰ However, GATT panels have found that do-

33. See *Agriculture Coalition Sets Priorities for WTO, Sidesteps Radical Reform*, INSIDE U.S. TRADE, May 21, 1999.

34. See Testimony of Ambassador Barshefsky, *supra* note 2.

35. See MILTON FRIEDMAN, *CAPITALISM & FREEDOM* 182 (1962).

36. A trade-distorting domestic subsidy is a subsidy, including any form of income or price support, which operates, directly or indirectly, to increase exports or to reduce imports of any product.

37. The notification must be in writing and must describe the extent and nature of the subsidization, the estimated effects of the subsidization on products imported into or exported from its territory, and the circumstances making the subsidization necessary.

38. See GATT, *supra* note 15, art. XVI:1.

39. See GATT, *supra* note 15, art. III:8(b).

40. See GATT, *supra* note 15, art. VI:7, which provides: "A system for the stabilization of the domestic price or of the return to domestic producers of a

mestic subsidies on agricultural commodities can nullify or impair tariff concessions.⁴¹ Other than these relatively modest disciplines prior to the Uruguay Round, domestic support for agricultural commodities, as a practical matter, was not subject to significant international disciplines under the provisions of the GATT 1947.⁴² During the period 1986 to 1990, the cost of domestic support both to taxpayers and consumers averaged \$92 billion per year in the EC, \$35 billion in Japan, and \$24 billion in the United States.⁴³

B. MARKET ACCESS

Prior to the Uruguay Round, market access for agricultural commodities and processed food products was often subject to unbound tariffs and a variety of protectionist non-tariff barriers designed to limit imports and maintain high domestic prices.⁴⁴ During previous rounds of multilateral trade negotiations, few tariff concessions or bindings (under which a WTO member cannot impose any higher rate of duty than the bound rate on products originating in other WTO members)⁴⁵ have been made for imports of agricultural products due to negotiations on a re-

primary commodity, independently of the movements of export prices, which results at times in the sale of the commodity for export at a price lower than the comparable price charged for the like commodity to buyers in the domestic market, shall be presumed not to result in material injury within the meaning of paragraph 6 if it is determined by consultation among the contracting parties substantially interested in the commodity concerned that: (a) the system has also resulted in the sale of the commodity for export at a price higher than the comparable price charged for the like commodity to buyers in the domestic market, and (b) the system is so operated, either because of the effective regulation of production, or otherwise, as not to stimulate exports unduly or otherwise seriously prejudice the interests of other contracting parties.

41. See EEC - Payments and subsidies paid to processors and producers of oilseeds and related animal-feed proteins, GATT B.I.S.D. (37th Supp.) at 86 (1992).

42. See Paul C. Rosenthal & Lynn E. Duffy, *Reforming Global Trade in Agriculture* in THE WORLD TRADE ORGANIZATION: MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION 168 (1996).

43. See BERNARD HOEKMAN & MICHEL KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: FROM GATT TO WTO* 197 (1995).

44. See Kevin J. Brosch, *The Uruguay Round Agreement on Agriculture* in THE GATT, THE WTO AND THE URUGUAY ROUND AGREEMENTS ACT 876-877 (H. Applebaum and L. Schlitt eds. 1995).

45. See GATT, *supra* note 15, art. II:1(b); see also DAM, *supra* note 16, at 30-31; JACKSON, *supra* note 17, at 201-217 (1969). WTO Members are prohibited from imposing "fees and charges of whatever character" (other than import duties, internal taxes, or countervailing or antidumping duties) on or in connection with importation unless they are user fees limited in amount to the approximate cost of services rendered and do not represent an indirect protec-

quest/offer basis, even in the Kennedy Round and Tokyo Round where formula cuts were made in tariffs on industrial products.⁴⁶ Before the Uruguay Round, only 58 percent of agricultural tariffs were bound, as compared with 78 percent of industrial tariffs, and agricultural tariffs averaged well over 50 percent ad valorem in developed countries compared with an average of 6 percent for industrial tariffs.⁴⁷

GATT tariff bindings can be modified or withdrawn⁴⁸ through renegotiations with any other member with whom the concession was initially negotiated⁴⁹ and any other member determined to have a principal supplying interest in the concession.⁵⁰ The negotiations must "endeavor to maintain a general level of reciprocal and mutually advantageous concessions not less favorable to trade than that provided for . . . prior to such negotiations."⁵¹ If agreement on compensation cannot be reached with the members having negotiating rights, the applicant is nevertheless free to modify its schedule.⁵² In the event of such unilateral action, the members with negotiating rights and all members with substantial supplier interests are entitled, for

tion to domestic products or a taxation of imports or exports for fiscal purposes. See GATT, art. VIII:1.

46. See DAM, *supra* note 16, at 70-71; GATT, THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS 24 (April, 1979); FOR. AGRIC. SERV., REPORT ON AGRICULTURAL CONCESSIONS IN THE MULTILATERAL TRADE NEGOTIATIONS 3 (1981).

47. See ECON. RES. SERV., AGRICULTURE IN THE WTO 6 (1998).

48. See GATT, *supra* note 15, art. XXVIII. Tariff bindings may be modified or withdrawn during (1) "open Season" renegotiations, which apply to the withdrawal or modification of concessions to take effect on the first day of each 3-year period since January 1, 1958 (see Art. XXVIII:1); (2) "special circumstances" (or "out-of-season") renegotiations may be authorized by the Council "at any time, in special circumstances" (see art. XXVIII:4); or (3) "reserved" renegotiations may occur, without prior authorization, if the member initiating them had notified the Council during the previous 3-year period that it was reserving the right to modify its Schedule for the duration of the following 3-year period. (see art. XXVIII:5).

49. See *id.* Parties have "initial negotiating rights" or INRs if they requested the relevant concession(s) in rounds of request/offer negotiations or if they are deemed to have INRs due to having current principal supplier status for purposes of linear concessions during the Uruguay Round.

50. See *id.* The applicant is also required to *consult* with any member determined to have a "substantial interest" in the concession. It has been said that "substantial interest is not capable of a precise definition" but is intended to cover those contracting parties which have "a significant share" in the market of the applicant. See art. XXVIII:1 note 7. The Committee on Tariff Concessions, in July 1985, noted that the "10 per cent share" rule had been generally applied for the definition of "substantial supplier." GATT Doc. TAR/M/16 p.10.

51. GATT, *supra* note 15, art. XXVIII:2.

52. See *id.* art. XXVIII:3 and 4(d).

the following 6 months, to retaliate by withdrawing substantially equivalent concessions.⁵³

The GATT generally prohibits quantitative restrictions on imports and exports through quotas, import or export licenses or other measures.⁵⁴ This ban comprehensively applies to all governmental measures instituted or maintained that prohibit or restrict imports, other than duties, taxes or other charges.⁵⁵ A major exception applies to quotas and other restrictions on imports of agricultural products.⁵⁶ This exception allowed import restrictions on agricultural commodities and products that were still in an early stage of processing to implement if necessary a domestic supply control program. But important cases during the Uruguay Round severely limited the value of the exception.⁵⁷ Other import quotas were justified by waivers or other derogations, including the waiver for U.S. quotas on agricultural products which was upheld during the Uruguay Round.⁵⁸

Finally, WTO members generally must accord nondiscriminatory most-favored-nation (MFN) treatment to imports from all

53. See GATT, *supra* note 15, art. XXVIII:3(a).

54. The ban on quantitative restrictions provides: "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party. . . ." GATT, *supra* note 15, art. XI:1.

55. See Japan Trade in Semi-conductors, GATT B.I.S.D. (35th Supp.) at 115; EEC Programme of Minimum Import Prices, Licenses and Security Deposits for Certain Processed Fruits and Vegetables, GATT B.I.S.D. (25th Supp.) at 98-100.

56. See GATT, *supra* note 15, art. XI:2(c)(i), which provides: "The provisions of paragraph 1. . . 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 domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted. . . ." An interpretive note defines the term "in any form" to cover "the same products when in an early stage of processing and still perishable, which compete directly with the fresh product and if freely imported would tend to make the restriction on the fresh product ineffective." GATT art. XI.

57. See Japan - Restrictions on Imports of Certain Agricultural Products, GATT B.I.S.D. (35th Supp.) at 163 (1988); Canada - Import Restrictions on Ice Cream and Yogurt, GATT B.I.S.D. (36th Supp. 68) (1989).

58. See Waiver Granted to the United States in Connection With Import Restrictions Imposed Under Section 22 of the United States Agricultural Adjustment Act (of 1933), As Amended, GATT B.I.S.D (3d Supp.) at 32 (1955); United States - Restrictions on Imports of Sugar and Sugar-Containing Products applied under the 1955 Waiver and under the Headnote to the Schedule of Tariff Concessions, GATT B.I.S.D. (37th Supp.) at 228 (1990).

other WTO members.⁵⁹ Tariff preferences, or import duties at rates lower than the MFN rates, are permitted under the Generalized System of Preferences (GSP), a preferential tariff arrangement intended to promote the export earnings and economic development of less-developed countries by exempting their exports from the imposition of ordinary MFN customs duties.⁶⁰ Other tariff preferences are permitted by the GATT, such as the provisions for customs unions and free trade areas or waivers.⁶¹

C. EXPORT SUBSIDIES

Prior to the Uruguay Round, the GATT had very weak disciplines on export subsidies for agricultural commodities and other primary products.⁶² As noted before, the GATT provides that if any WTO member grants or maintains any trade-distorting subsidy,⁶³ the member shall notify the WTO and consult, on request, with other members on "the possibility of limiting the subsidization."⁶⁴ The GATT rules on export subsidies distinguish between primary products, defined as "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"⁶⁵ and other products.

The GATT exhorts WTO members to "avoid the use of subsidies on the export of primary products."⁶⁶ However, in the event that any form of subsidy is directly or indirectly granted on the export of any primary product, the GATT provides that "such subsidy shall not be applied in a manner which results in that

59. See GATT, *supra* note 15, art. I:1.

60. On June 5, 1971, the contracting parties of the GATT granted a waiver from the most-favored-nation (MFN) obligations of Article I to permit developed contracting parties to accord preferential tariff treatment to products originating in developing countries and territories on a "generalized, non-discriminatory, and non-reciprocal" basis. GATT B.I.S.D. (18th Supp.) at 24 (1971).

61. See GATT, *supra* note 15, art. I:2&3 and XXIV; the waivers for the Caribbean Basin Economic Recovery Act, GATT B.I.S.D. (31st Supp.) at 20 (1985) and ANDEAN Trade Preference Act, GATT B.I.S.D. (40th Supp.) at 188 (1993).

62. See Kevin J. Brosch, *The Uruguay Round Agreement on Agriculture in THE GATT, THE WTO AND THE URUGUAY ROUND AGREEMENTS ACT 866-867* (H. Applebaum and L. Schlitt ed. 1995).

63. A trade-distorting domestic subsidy is a subsidy, including any form of income or price support, which operates, directly or indirectly, to increase exports or to reduce imports of any product.

64. See GATT, *supra* note 15, art. XVI:1.

65. See GATT, *supra* note 15, art. XVI.

66. *Id.*, art. XVI:3.

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.⁶⁷ GATT dispute settlement panels had considerable difficulties determining what constitutes an equitable share of world export trade.⁶⁸ By contrast, the GATT rules essentially prohibit export subsidies on non-primary products, including processed agricultural products, if such subsidies “result in the sale of the product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market.”⁶⁹ As a practical matter, this rule now virtually prevents export subsidies on non-primary products.⁷⁰

III. THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS

Meeting during the world economic crisis of the early 1980's,⁷¹ the contracting parties of the GATT noted an increase in protectionist pressures, a growing disregard of GATT disciplines, and shortcomings in the functioning of the GATT system.⁷² With respect to agricultural trade, they undertook a work program “to bring agriculture more fully into the multilateral trading system by improving the effectiveness of GATT rules, provisions and disciplines and through their common interpretation; to seek to improve terms of access to markets; and to bring export competition under greater discipline.”⁷³ To do this they established a Committee on Trade in Agriculture, chaired by Mr. Aert De Zeeuw.⁷⁴ In November 1984, the contracting parties

67. *Id.*

68. See EEC - Refunds on exports of sugar - complaint by Australia, GATT B.I.S.D. (26th Supp.) at 290 (1979); EEC - Refunds on exports of sugar - complaint by Brazil, GATT B.I.S.D. (27th Supp.) at 69 (1980).

69. See GATT, *supra* note 15, art. XVI:4.

70. See DAM, *supra* note 16, at 144-146; JACKSON, *supra* note 17, at 371-376, 396-399.

71. See Mary Ann Normile and Mark Simone, U.S. DEP'T. OF AGRIC., ECON. RES. SERV., AGRICULTURE IN THE URUGUAY ROUND 2 (Mar. 29, 1999) <<http://www.econ.ag.gov/briefing/wto/issues/uraa.htm>>.

72. See Ministerial Declaration of 29 November 1982, GATT B.I.S.D. (29th Supp.) at 9 (1982).

73. *Id.* at 11-12.

74. See *id.* at 16-17. The Committee met during 1983 and 1984 to examine market access and subsidies affecting trade. See Committee on Trade in Agriculture, Progress Report, GATT B.I.S.D. (30th Supp.) at 100 (1983); Committee

adopted the Committee's recommendations which called for "substantially all measures affecting trade in agriculture [to be] brought under more operationally effective GATT rules and disciplines" including quantitative restrictions (even if maintained under waivers or exceptions), state trading enterprises, voluntary restraint agreements, variable levies and charges, unbound tariffs, minimum import price arrangements, all subsidies affecting trade, and sanitary and phytosanitary regulations.⁷⁵

In September 1986, a Special Session of the GATT contracting parties meeting at the Ministerial level in Punta del Este, Uruguay, launched the Uruguay Round of multilateral trade negotiations.⁷⁶ With respect to agriculture, the contracting parties agreed that there was an "urgent need to bring more discipline and predictability to world agricultural trade by correcting and preventing restrictions and distortions including those related to structural surpluses so as to reduce the uncertainty, imbalances and instability in world agricultural markets."⁷⁷ The Punta del Este Declaration called for bringing "all measures affecting import access and export competition under strengthened and more operationally effective GATT rules and disciplines" by improving market access, increasing discipline on the use of all direct and indirect subsidies, and minimizing the adverse effects that sanitary and phytosanitary regulations and barriers can have on trade in agriculture.⁷⁸ An Agricultural Negotiation Group,⁷⁹ to be chaired by Mr. De Zeeuw, was established to carry out the Puente del Este mandate.⁸⁰

On July 7, 1987, the United States advanced its first proposal for agricultural reform calling for a complete phase-out, over 10 years, of "all agricultural subsidies which directly or indirectly affect trade" and all import barriers, as well as the harmonization of health and sanitary regulations based on

on Trade in Agriculture, Final Report, GATT B.I.S.D. (31st Supp.) at 209 (1984); see also CROOME, *supra* note 17, at 110-111.

75. GATT B.I.S.D. (31st Supp.) at 11 (1984).

76. See Ministerial Declaration, GATT B.I.S.D. (33rd Supp.) at 19 (1986).

77. *Id.* at 24.

78. *Id.* at 24, 40.

79. It has argued that the creation of a separate negotiating group for agriculture in previous rounds had operated to prevent a trade-off between agriculture and industry. See TIMOTHY JOSLING, AGRICULTURE IN THE TOKYO ROUND NEGOTIATIONS 11 (Thames Essay no. 10) (Ashford: Headly Brothers for the Trade Policy Research Centre) (1977).

80. See CROOME, *supra* note 17, at 111-112.

international standards.⁸¹ This bold proposal was not supported by the other participants in the negotiations, even the pro-reform Cairns Group,⁸² and may have impeded progress in the negotiations.⁸³ More than a year later, on August 28, 1988, Congress authorized the President to enter into trade agreements in the Uruguay Round⁸⁴ and provided for "fast track" implementation by the Congress.⁸⁵ Congress also established trade negotiating objectives with respect to agriculture designed to protect existing farm programs.⁸⁶ These objectives were substantially less ambitious than the United States proposal in Geneva.⁸⁷

After working from December 1988 through April 1989, the Trade Negotiations Committee (TNC) concluded the Mid-Term

81. See GATT Secretariat, *United States Proposal for Negotiations on Agriculture*, MTN.GNG/NG5/W/14 (July 7, 1987). Elaborations of the proposal with respect to developing countries and food security were made in 1988. See GATT Secretariat, *Elaboration of United States Agriculture Proposal with Respect to Developing Countries*, MTN.GNG/NG5/W/55 (April 20, 1988); GATT Secretariat, *Elaboration of US Agriculture Proposal with Respect to Food Security*, MTN.GNG/NG5/W/61 (June 6, 1988).

82. The Cairns Group, formed in 1986, consisted of predominately agricultural exporting countries: Argentina, Australia, Brazil, Canada, Chile, Columbia, Fiji, Hungary, Indonesia, Malaysia, Philippines, New Zealand, Thailand, and Uruguay. See CROOME, *supra* note 17, at 30.

83. See CROOME, *supra* note 17, at 114.

84. See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988).

85. *Id.* at §1103. The original deadlines for reaching an agreement were extended to December 15, 1993. See *Kemet Elecs. Corp. v. Barshefsky*, 969 F. Supp. 82 (Ct. Int'l Trade 1997).

86. See Omnibus Trade and Competitiveness Act §1101(a)(7). The agriculture negotiating objectives were: (A) developing, strengthening, and clarifying rules for agricultural trade, including disciplines on restrictive or trade-distorting import and export practices; (B) increasing United States agricultural exports by eliminating barriers to trade (including transparent and nontransparent barriers) and reducing or eliminating the subsidization of agricultural production consistent with the United States policy of agricultural stabilization in cyclical and unpredictable markets; (C) creating a free and more open world agricultural trading system by resolving questions pertaining to export and other trade-distorting subsidies, market pricing and market access and eliminating and reducing substantially other specific constraints to fair and more open market access, such as tariffs, quotas, and other nontariff practices, including unjustified phytosanitary and sanitary restrictions; and (D) seeking agreements by which the major agricultural exporting nations agree to pursue policies to reduce excessive production of agricultural commodities during periods of oversupply, with due regard for the fact that the United States already undertakes such policies, and without recourse to arbitrary schemes to divide market shares among major exporting countries.

87. See *United States Proposal for Negotiations on Agriculture*, *supra* note 81.

Review of the Uruguay Round.⁸⁸ The Ministers agreed that the long-term objective of the agricultural negotiations was “to establish a fair and market-oriented agricultural trading system” and “to provide for progressive reduction in agricultural support and protection . . . resulting in correcting and preventing restrictions and distortions in world agricultural markets.”⁸⁹ The agreement on the agricultural provisions for the mid-term review reinvigorated the negotiations.⁹⁰ The United States proposed “tariffication” of non-tariff barriers to imports, the European Communities elaborated the concept of an aggregate measure of support, and the Nordic countries, Switzerland, Japan and other countries sought special treatment of non-trade concerns.⁹¹ The U.S. proposal also introduced the traffic light concept for domestic support: the most trade distorting subsidies would be banned (red light), less trade-distorting policies would be subject to specific disciplines (yellow or amber light), and non-trade distorting subsidies would be permitted (green light).⁹²

In mid-1990, Mr. De Zeeuw advanced a draft framework agreement that encompassed tariffication and an aggregate measure of support and was broadly accepted by the United States and the Cairns Group.⁹³ In October, 1990, the EC submitted an offer calling for a 30 percent cut in an aggregate measure of support, with credit for reductions already taken, and conversion of variable levies into fixed tariffs with a variable corrective factor; the EC proposed nothing on export subsidies and demanded the “rebalancing” of prior tariff concessions to account for its duty free bindings for oilseeds.⁹⁴ The United States softened its position and called for a 90 percent cut in export subsidies, a 75 percent cut in red light subsidies, and a 30 percent cut in amber subsidies.⁹⁵ At the closing conference in Brussels, the

88. See *Mid-Term Review: Final Agreement at Geneva*, GATT: Focus Newsletter, May 1989, at 4.

89. *Id.*

90. See CROOME, *supra* note 17, at 233.

91. *Id.*

92. See *id.* at 234.

93. See CROOME, *supra* note 17.

94. *Id.* at 240.

95. See *id.*

participants deadlocked on agriculture⁹⁶ and the Uruguay Round broke down.⁹⁷

Following a year of technical discussions, Mr. Arthur Dunkel,⁹⁸ who had taken over as chairman of the Agriculture Negotiating Group, issued a Draft Final Act, consisting of a part A that became the basis for the negotiation of the Agreement on Agriculture and a part B that was ultimately jettisoned.⁹⁹ The Draft Final Act provided for comprehensive tariffication with tariff reductions averaging 36 percent and minimum reductions of 15 percent; a 20 percent reduction of an aggregate measure of support; and reduction of outlays of export subsidies by 36 percent and volumes of subsidized exports by 24 percent.¹⁰⁰ The following year, farmers in Japan and Korea engaged in violent riots and European farmers staged large disorderly demonstrations.¹⁰¹

The European Communities rejected the Draft Final Act and began negotiations with the United States in 1992 for amendments which became known as the Blair House agreement.¹⁰² These amendments provided for a 21 percent reduction in the volume of subsidized exports and flexibility to make up excesses in following years; allowed an additional exemption from domestic support reductions for certain direct payments to farmers (known as the "blue box"); and elaborated on a "peace clause" to exempt, under certain conditions, agricultural subsidies from the provisions of the GATT 1994 and the Subsidies

96. The Swedish Agriculture Minister, Mr. Mats Hellstrom, attempted at the last minute to procure a compromise by proposing essentially 30% reductions in domestic support, export subsidies and market access barriers, but this was rejected by the EC, Japan and Korea. *Id.* at 278-279.

97. See CROOME, *supra* note 17.

98. Mr. Dunkel was the Director-General of the GATT until 1993. See *id.* at 2.

99. See *id.* at 294-7; see also GATT Secretariat, *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, MTN.TNC/W/FA (Dec. 20, 1991); Dale E. McNeil, *The NAFTA Panel Decision on Canadian Tariff-Rate Quotas: Imagining a Tariffing Bargain*, 22 *YALE J. INT'L L.* 345, 359 (1997).

100. See CROOME, *supra* note 17, at 296.

101. See *id.* at 337. The Korean Minister of Agriculture was fired for agreeing to open the Korean rice market to imports. See *Review of the Uruguay Round GATT Agreement Implications for Agricultural Trade: Hearings Before the House Comm. on Agriculture*, 103d Cong., 2d Sess., 54 (1994)(statement of Mike Espy, U.S. Secretary of Agriculture).

102. See CROOME, *supra* note 17, at 340.

Agreement¹⁰³ for the 6-year transition period.¹⁰⁴ This accord was supplemented in the final days of the round by the Blair House II agreement which extended the peace clause by 3 years and reduced the pace of export subsidy reductions.¹⁰⁵ Switzerland, Japan and Korea also negotiated last minute changes in the market access provisions of the draft text with the United States during the final week.¹⁰⁶ A quad group (known as the G-4) finalized the legal language of the Agreement on Agriculture during the last week of the negotiations.¹⁰⁷

IV. THE AGREEMENT ON AGRICULTURE AND ISSUES FOR THE NEXT ROUND

A. DOMESTIC SUPPORT

The Agreement on Agriculture calls for reductions by 20 percent¹⁰⁸ in a "Total Aggregate Measurement of Support" (or "Total AMS") over a 6-year implementation period from 1995 to 2000.¹⁰⁹ The Total AMS is essentially a measure of all domestic subsidies for all agricultural commodities, with certain excep-

103. See Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, WTO Agreement, *supra* note 15, Annex 1A [hereinafter Subsidies Agreement].

104. See CROOME, *supra* note 17, at 340.

105. See *id.* at 368, 372.

106. See *id.* at 373; see also McNIEL, *supra* note 99, at 359.

107. The author participated in the meeting of this group.

108. The 1990 U.S. proposal in the Uruguay Round agriculture negotiations called for reductions in commodity-specific support by 75 percent over 10 years and a 30 percent reduction in non-commodity-specific support. See UNITED STATES OFFER SUBMITTED PURSUANT TO MTN.TNC/15 [hereinafter "U.S. PROPOSAL"] 1 (October 15, 1990). This position was supported by the Cairns Group. See ARGENTINA, AUSTRALIA, BRAZIL, CHILE, COLOMBIA, HUNGARY, INDONESIA, MALAYSIA, NEW ZEALAND, PHILIPPINES, THAILAND, URUGUAY OFFER SUBMITTED PURSUANT TO MTN.TNC/15 [hereinafter "CAIRNS GROUP PROPOSAL"] 1 (October 15, 1990). The European Communities proposed 30 percent reductions in support for bulk commodities and 10 percent reductions for other products. See EUROPEAN COMMUNITIES OFFER SUBMITTED PURSUANT TO MTN.TNC/15 [hereinafter "EC PROPOSAL"] 3 (November 6, 1990). Japan and Korea generally supported the EC position.

109. See Brosch, *supra* note 25, at 872. The Total AMS is "the sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, all non-product-specific aggregate measurements of support and all equivalent measurements of support for agricultural products." See Agreement on Agriculture, *supra* note 26, art. 1(h). The AMS must be calculated on a product-specific basis for each basic product receiving market price support, non-exempt direct payments, or any other subsidy not exempted from the reduction commitment. Support which is non-product specific is totaled into one non-product-specific AMS. *Id.* art. 1(a).

tions.¹¹⁰ The calculation of the Total AMS was skewed to allow WTO members to count “blue box” direct payments to farmers¹¹¹ for purposes of the base Total AMS (from which the 20 percent reduction commitment is measured) but to exclude such payments from the calculation of the current Total AMS which is used to determine annual compliance.¹¹² This allowed U.S. deficiency payments under the 1985 and 1990 Farm Bills¹¹³ and EC compensation payments under the 1992 CAP reform to be counted in calculating the base total AMS but to be excluded from the calculation of the current total AMS.¹¹⁴ As a consequence of the smoke and mirrors, the major players received a huge credit for using direct government expenditures and for reforms undertaken since Puente del Este, more than offsetting the required 20 percent reduction, and were not required to make any real reductions in domestic support.¹¹⁵

The “peace clause” provides that domestic support that conforms fully to the reduction commitments and exempt payments consistent with the exemption provisions as well as domestic

110. See Brosch, *supra* note 25, at 872.

111. Direct payments under “blue box” production-limiting programs are not subject to the reduction commitments, if such payments are based on fixed area and yields, are made on 85 per cent or less of the base level of production or are livestock payments made on a fixed number of head. See Agreement on Agriculture, *supra* note 26, art. 6.5.

112. See Agreement on Agriculture, *supra* note 26, art. 1(h). Note that the difference between the base total AMS and the current total AMS. The “Base Total AMS” refers to support provided during the 1986-1988 base period, and does not exclude blue box payments under Article 6.5. The “Annual and Final Bound Commitment Levels” refer to the maximum support permitted to be provided during any year of the 6-year implementation period or thereafter. Compliance is measured by the “Current Total AMS” which refers to the level of support actually provided during any year and excludes blue box payments. *Id.* Article 6.3 and 6.5.

113. See Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, 104 Stat. 3359 (1990).

114. See Mary Anne Normile, *Uruguay Round Agreement on Agriculture: The Record to Date*, AGRIC. OUTLOOK 28 (Dec. 1998); see also Paul C. Rosenthal & Lynn E. Duffy, *Reforming Global Trade in Agriculture*, in THE WORLD TRADE ORGANIZATION: MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION 145, 169 (Terence P. Stewart, ed., 1996).

115. See Frederick J. Nelson, *Measuring Domestic Support for U.S. Agriculture*, WTO BRIEFING ROOM, 24-25 (Nov. 1997) <<http://www.econ.ag.gov/briefing/wto/ams/august.htm>>; U.S. Agriculture will Satisfy WTO Domestic Support Commitments through 2000. See Frederick J. Nelson, *U.S. Ag Policy — Well Below WTO Ceilings on Domestic Support*, AGRIC. OUTLOOK 26 (Oct. 1997). See also 103d Cong., 2d Sess., *supra* note 101, at 56; *World Trade and Agriculture: The Challenges Ahead*, Eur. Comm’n 2 (Nov. 4, 1996).

support within *de minimis* levels,¹¹⁶ are exempt until 2003 from the imposition of countervailing duties, unless there is a determination of injury or threat thereof domestic support is also exempt from actions based on the GATT 1994, the Subsidies Agreement, or non-violation nullification or impairment of tariff concessions, provided that such measures do not grant support to a specific commodity in excess of that provided during the 1992 marketing year.¹¹⁷

Domestic support in the "green box," which is provided through a publicly-funded government program that does not involve consumer transfers or provide price support to producers and that has no, or at most minimal, trade distorting effects or effects on production, are exempt from reduction commitments, if specific criteria are met.¹¹⁸ Such permitted policies include certain general services or benefits to agriculture or the rural community involving research, pest and disease control, training services, extension and advisory services, inspection services, marketing and promotion services, infrastructural services, public stockholding for food security purposes, domestic food aid as well as direct payments to producers, including decoupled income support, government financial participation in income insurance and income safety-net programs, disaster relief payments, structural adjustment assistance provided through producer retirement programs, resource retirement programs, or investment aids, and payments under environmental programs and regional assistance programs.¹¹⁹

Domestic support measures that conform fully to the green box provisions are non-actionable subsidies for purposes of countervailing duties, are exempt from dispute settlement complaints based on the GATT 1994 and the Subsidies Agreement,

116. *De minimis* domestic support is also exempt from reduction. See Agreement on Agriculture, *supra* note 26, art. 6.4. For developed country members, this includes product-specific domestic support which does not exceed 5 per cent of the total value of production of a basic product during the relevant year and non-product-specific domestic support which does not exceed 5 per cent of the value of the total agricultural production. For developing country members, the *de minimis* percentage is 10 per cent. *Id.*

117. See Agreement on Agriculture, *supra* note 26, art. 13(b).

118. See Agreement on Agriculture, *supra* note 26, Annex 2.1

119. See Agreement on Agriculture, *supra* note 26, Annex 2.2-2.13. Data submitted to the WTO by mid-1998 indicate that food aid accounts for \$40.6 billion of green box expenditures, infrastructure funding accounts for \$27.8 billion, investment aids were \$12.0 billion, nonseparated general services were \$8.8 billion, research, extension & training totalled \$7.9 billion, miscellaneous general services came to \$6.0 billion, and other green box expenditures were \$23.5 billion. See AGRICULTURE IN THE WTO, *supra* note 27 at 16.

and are exempt from complaints based on non-violation nullification or impairment of tariff concessions under the peace clause.¹²⁰

1. *Domestic Support Issues that will be Addressed in the next Round*

The first major issue is whether amber box domestic subsidies should be subject to further reduction commitments or should be eliminated. Few countries are constrained by their commitments on AMS reductions.¹²¹ Using the Total AMS approach, WTO members can increase subsidization of certain commodities while reducing subsidization of other commodities.¹²² Australia and the United States have called for further substantial reductions and tightening of the AMS.¹²³ Both countries have substantially reduced amber category subsidies.¹²⁴ This move is likely to be resisted by the European Union, Japan, Norway, Switzerland, Korea and others¹²⁵ with some further AMS reductions finally agreed upon.

The second major issue is whether "blue box" direct payments under production limiting programs should continue to be exempt from reduction commitments. The United States and Australia have questioned the basis for continuing the exemption from reduction commitments for direct payments to producers that are based on current production and characterize the measures as "transitional."¹²⁶ New Zealand has noted that only the EU, Norway and the Slovak Republic are currently using blue box measures and argues that such measures are not consistent with the long term objective of substantial and progres-

120. See Agreement on Agriculture, *supra* note 26, art. 13(a).

121. See Agreement on Agriculture, *supra* note 26, art. 18. Only Switzerland, Korea, Brazil, Slovenia and Tunisia reported providing domestic support at a level of 80 percent or more of their WTO commitments in 1995.

122. See *Globalization And Liberalization: Development in the Face of Two Powerful Currents*, U.N. CTAD, 9th Sess., ¶ 46-47, U.N. Doc. TD/366/Rev. 1 (1996).

123. See *Reforming Domestic Support for Agriculture*, GATT Doc. AIE/27 (June 5, 1998) (paper by Australia).

124. The calculations show the United States and Australia at a level of 20 to 39 percent of their commitment levels. See AGRICULTURE IN THE WTO, *supra* note 27, at 18, Table 4.

125. The percentage of amber support in these countries is European Union - 54%, Japan - 52%, Norway - 47%, Switzerland - 61%, and Korea - 33%. See *id.*

126. See Article 6.5: *Direct Payments Under Production-Limiting Programs*, GATT Doc., AIE/10 (Oct. 31, 1997) (paper by the United States); Article 6.5: *Direct Payments Under Production-Limiting Programs*, GATT Doc., AIE/15 (Jan. 27, 1998) (comments by Australia).

sive reductions in support and protection.¹²⁷ The EU supports the current blue box exemption and denies that it was considered transitional.¹²⁸ The EU is moving away from market price support toward direct blue box payments with the Common Agricultural Policy (CAP) reforms and in the Agenda 2000.¹²⁹ This power struggle could produce a further reform of exempt payments, particularly if the EU Commission moves toward reducing the share of the EU budget devoted to supporting agriculture, but it is not likely that the next round will totally ban domestic support that does not qualify for the green box of permitted policies or the *de minimis* exemption.

A third major issue concerns whether green box permitted policies need fine tuning. The specific criteria for decoupled income support may not insure that such payments have no or minimal effects on production and trade.¹³⁰ Countries in Eastern Europe that are in transition to market economies have advocated special treatment for domestic support measures used by countries in transition to fully-fledged market systems or in post-transition situations.¹³¹

The transitional direct payments to farmers adopted by the United States in the 1996 Farm Bill are claimed to be decoupled income supports that belong in the green box even though they are very substantial payments and have recently been increased.¹³² Both Australia and Canada, leading members of the Cairns Group, have questioned the adequacy of green box conditions to insure that the measures do not increase production or distort trade and have suggested fine tuning of the criteria.¹³³ The United States has suggested that the green box is accepta-

127. See *Domestic Support: Article 6.5 of the Agreement on Agriculture Blue Box*, GATT Doc., AIE/49 (Mar. 3, 1999) (paper by New Zealand).

128. See *Direct Payments under Production-Limiting Programmes*, GATT Doc., AIE/14 (Jan. 20., 1998) (paper by the European Community); *Domestic Support Policy Reform: The Role of Article 6.5 Direct Payments*, GATT Doc., AIE/29 (June 19, 1998) (paper by the European Community).

129. *Domestic Support Policy Reform: The Role of Article 6.5 Direct Payments*, *supra* note 129.

130. See AGRICULTURE IN THE WTO, *supra* note 27, at 19.

131. See *The Future Treatment of Domestic Support Commitments in the Case of Transition and Post-Transition Economies*, GATT Doc., AIE/45 (Nov. 19, 1998) (paper by Bulgaria, the Czech Republic, Hungary, Poland, the Slovak Republic and Slovenia).

132. See AGRICULTURE IN THE WTO, *supra* note 27, at 19.

133. See "Green Box" Domestic Support, GATT Doc., AIE/4 (May 16, 1997) (paper by Australia); *Annex 2: Domestic Support Measures Exempted From Reduction Commitments*, GATT Doc., AIE/23 (June 2, 1998) (paper by Canada).

ble,¹³⁴ and the European Union, which favored loose criteria in the Uruguay Round, is unlikely to demand reforms. Thus, changes to the green box are not likely.

B. MARKET ACCESS

The Uruguay Round negotiations on agricultural market access focused on binding and reducing all agricultural tariffs, tariffication of non-tariff barriers, maintaining current access opportunities, providing for minimum access opportunities and requiring progressive tariff reductions.¹³⁵ Tariffication meant that non-tariff barriers on imports (e.g., embargoes, quotas, variable levies, minimum import prices, discretionary licensing, non-tariff measures maintained by state trading enterprises, voluntary export restraint agreements and similar border measures) were to be converted into equivalent tariffs based on the difference between domestic and world prices resulting from the non-tariff measures.¹³⁶ The Agreement on Agriculture prohibits WTO Members from maintaining, resorting to, or reverting to any of the kinds of non-tariff measures which were required to be converted into tariffs during the tariffication process.¹³⁷

“Current access opportunities,” defined as no less than the average of annual import quantities for the years 1986 to 1988, was to be maintained usually in the form of tariff-rate quotas.¹³⁸ In case there were no significant imports during the base period, “minimum access” opportunities were to be provided equal to 3 percent of domestic consumption during the 1986-88 base period as of the first year of implementation rising to 5 percent of base

134. See *Domestic Support: Response to AIE/23 and AIE/27*, GATT Doc., AIE/38 (Sep.15, 1998) (Paper by the United States).

135. See Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, *Text on Agriculture*, MTN.TNC/W/FA, L.1 (December 20, 1991) [hereinafter Draft Final Act].

136. See Brosch, *supra* note 25, at 875-876; see also ROSENTHAL, *supra* note 42, at 155-158.

137. See Agreement on Agriculture, *supra* note 26, art. 4.2. A footnote lists the prohibited measures as follows: “These measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state trading enterprises, voluntary export restraints and similar border measures other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of the GATT 1947, but not measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of the GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the MTO.”

138. See Draft Final Act, *supra* note 136, ¶ 6 at L.19, ¶ 11 at L.26.

consumption by 2000.¹³⁹ Exceptions to tariffication, known as "special treatment," were negotiated with Japan and Korea in return for greater minimum access volumes.¹⁴⁰

All tariffs, including those resulting from tariffication, were to be bound and reduced by an average of 36 percent (24 percent by developing countries), with a minimum rate of reduction of 15 percent (10 percent by developing countries) for each tariff item.¹⁴¹ The reductions were to be straight line over 6 years, from 1995 to 2000, for developed countries and over 10 years for developing countries.¹⁴² Such tariffs are subject to the normal provisions of the GATT on tariff obligations.¹⁴³ Least developed countries were subject to tariffication and tariff binding but were exempted from reductions of tariffs.¹⁴⁴

The use of an escape clause is permitted by the GATT 1994.¹⁴⁵ During the Uruguay Round, a Safeguards Agreement was reached which imposes disciplines on the use of the escape clause.¹⁴⁶ Special safeguard provisions of the Agreement on Agriculture allow the imposition of additional duties on agricultural products that were subject to the tariffication of NTB's when there are either import surges or particularly low prices compared with 1986-88 levels.¹⁴⁷

139. *See id.*

140. *See* Agreement on Agriculture, *supra* note 26, Annex 5; John Dyck, et al., *Rice Tariffication in Japan: What Does it Mean for Trade?* AGRIC. OUTLOOK 13 (April 1999). Japan, Korea and the Philippines invoked minimum access on rice, and Israel invoked minimum access on sheep meat. Japan has since tariffified its rice quota. *See Japanese Plans on Rice Tariffication, Self-Sufficiency Stir Simmering Concerns*, 15 INT'L TRADE REP. (Dec. 9, 1998); Gary G. Yerkey, *U.S. Will Not Take Japan to WTO on Rice Import Regime for Now, Scher Says*, 16 INT'L TRADE REP. 488 (Mar. 24, 1999).

141. *See* Draft Final Act, *supra* note 136, ¶ 5 at L.19.

142. *See* Uruguay Round Trade Agreements, Texts of Agreements, Implementing Bill, Statement of Administrative Action, and Required Supporting Statements, Message from the President, H.R. Doc. 103-316, 103d Cong. 2d Sess. (1994), at 713.

143. *See id.*

144. *See id.*; *see also* ROSENTHAL, *supra* note 42, at 158.

145. *See* GATT, *supra* note 15, art. XIX:1(a). Resort to the escape clause requires that a surge in imports results from unforeseen developments and from obligations incurred under the GATT such as tariff concessions.

146. *See* Agreement on Safeguards, Apr. 15, 1994, WTO Agreement, *supra* note 15, Annex 1A, 315 *reprinted in* THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS.

147. *See* Agreement on Agriculture, *supra* note 26, art. 5.

The results have been applauded for eliminating a plethora of non-tariff measures as well as criticized for leaving many markets essentially closed.¹⁴⁸ The widespread departure from the modalities for tariffication,¹⁴⁹ known as "dirty tariffication,"¹⁵⁰ resulted in tariff equivalents that far exceeded price gaps¹⁵¹ and some tariffs that exceeded prior tariff bindings.¹⁵² Some countries offered other commitments for certain commodities, such as the EC bindings on margins of preference for cereals and rice.¹⁵³ The flexibility to reduce some sensitive tariffs only by 15 percent meant that countries, in meeting the 36 percent average, could choose to make big reductions in other tariffs for which there was little or no trade.¹⁵⁴ Even after the tariff reductions, many imported commodities will be facing very high tariff peaks in many coun-

148. See UNITED STATES TRADE REPRESENTATIVE, *The President's Advisory Committee for Trade Policy and Negotiations, Report on WTO Implementation: Cementing and Improving Existing Agreements* (Mar. 11, 1996).

149. See Draft Final Act, *supra* note 136, at Part B, para.3-7 (page L.19) and Annex 3 (page L.26); see also *Agricultural Provisions of the Uruguay Round Draft Final Act* ("The Dunkel Text") U.S. DEP'T OF AGRIC. 16-17 (Sep. 1992); *Implications of a GATT Agreement for World Commodity Markets, 1993-1998: An Analysis of the Dunkel Text on Agriculture, Food and Agricultural Policy* Research Institute (FAPRI), April 1992.

150. See TROY PODBURY AND IVAN ROBERTS, *WTO AGRICULTURAL NEGOTIATIONS: IMPORTANT MARKET ACCESS ISSUES*, ABARE Research Report 99.3, 15-17 (Feb. 1999); see also ROSENTHAL, *supra* note 42, at 158.

151. See AGRICULTURE IN THE WTO, *supra* note 27, at 8. On average, EU tariff equivalents were in excess of actual price gaps by 60% and U.S. tariff equivalents were 45% above actual price gaps. See *ESCAP Agricultural Policy Reform under the Uruguay Round: Implications for Developing Countries of the ESCAP Region* (1996); U.N. *Asian and Pacific Developing Economies and the First WTO Ministerial Conference: Issues of Concern*, United Nations (1996).

152. See McNIEL, *supra* note 99, at 365-376.

153. See Brosch, *supra* note 25, at 876; see also *European Communities - Duties on Imports of Grains*, GATT Doc., WT/DS13/1 (July 26, 1995) (complaint by the United States concerning EC regulations which imposed a duty on wheat imports based on reference prices rather than transaction values. On 30 April 1997, the US withdrew its request for a panel due to the EC implementing an agreement on this matter.)

154. See Brosch, *supra* note 25, at 875. An FAO study found that most tariff wedges decreased as a result of the Uruguay Round despite the flexibility on tariff reductions. See JOSTEIN LINDLAND, *THE IMPACT OF THE URUGUAY ROUND ON TARIFF ESCALATION IN AGRICULTURAL PRODUCTS* 27 (Sep. 1997); see also *Uruguay Round Agreement on Agriculture: The Record to Date*, *supra* note 114.

tries¹⁵⁵ such as the Japanese tariffs on imported rice at 450 percent.¹⁵⁶

The principal market access issue for the next round will be the extent of tariff reductions and whether to use a formula for tariff reductions or the request/offer method.¹⁵⁷ Some countries have also raised issues on the administration of tariff quotas in the Analysis and Exchange of Information Process under the WTO Committee on Agriculture.¹⁵⁸

The rate of tariff reductions for agricultural imports could become one of the central issue of the negotiations. Agricultural market access has been separated from the negotiations on industrial goods in the past three rounds, and with the great disparity in average tariff rates it is not likely that the negotiations will combine these subjects in the upcoming round.¹⁵⁹ The United States Trade Representative's Office has been vague about the issue, saying at most that WTO Members "should agree to pursue an outcome that is ambitious" and "should agree

155. See *The Post-Uruguay Round Tariff Environment for Developing Country Exports*, U.N. CTAD, 2d Sess., at 4-6, TD/B/COM.1/14 (Oct. 6, 1997). This study found the highest tariffs rates and highest frequencies of tariff peaks in the area of major agricultural staple foods, particularly meat, sugar, milk, butter and cheese, and cereals, as well as tobacco, and cotton. *Id.* at 4. See also *Access to European Union Markets for Agricultural Products After the Uruguay Round, and Export Interests of the Mediterranean Countries*, U.N. CTAD at 8, INT/93/A34 (Apr. 9, 1997).

156. Japan has undertaken delayed tariffication of its former ban on rice imports. See *Rice Tariffication in Japan*, *supra* note 141; see also *Japanese Plans on Rice Tariffication*, *supra* note 141.

157. The WTO Secretariat has prepared numerous background papers on tariff issues for the Analysis and Exchange of Information Process under the WTO Committee on Agriculture. See *Tariffs and Other Quotas*, GATT Doc., AIE/S1 (Sep. 9, 1997) (background paper by the Secretariat); *Tariff Quota Administration Methods and Tariff Quota Fill*, GATT Doc., AIE/S4 (Nov. 6, 1997) (background paper by the Secretariat); *Ad valorem, Specific and other Tariffs*, GATT Doc., AIE/S5 (Feb. 6, 1998) (background paper by the Secretariat); *Uruguay Round Agricultural Tariff Reductions for Selected WTO Members According to Stage of Processing*, GATT Doc., AIE/S11 (June 23, 1998) (background paper by the Secretariat).

158. See *Tariff Quota Administration Methods and Tariff Quota Fill*, GATT Doc., AIE/S4 (Nov. 6, 1997) (background paper by the Secretariat); *Administration of Tariff Quotas*, GATT Doc., AIE/1 (May 13, 1997) (paper by Australia); *Tariff Quota Administration*, GATT Doc., AIE/5 (Aug. 12, 1997) (paper submitted by New Zealand); *Administration of Tariff Quotas*, GATT Doc., AIE/7 (Oct. 22, 1997) (submission by the United States); *Tariff Quota Administration: First-Come First-Served*, GATT Doc., AIE/9 (Oct. 29, 1997) (paper by Australia); *Administration of Tariff Quotas*, GATT Doc., AIE/46 (Mar. 2, 1997) (paper by the United States).

159. See *supra* text accompanying note 22.

that the results will improve and expand market access.”¹⁶⁰ Meanwhile, Vice President Gore has announced that the United States “will call for broad and deep reductions in agricultural tariffs.”¹⁶¹ The American Farm Bureau Federation has been calling for the progressive elimination of tariffs on all agricultural commodities and products.¹⁶² The Cairns Group has supported substantial reductions in agricultural tariffs,¹⁶³ and a recent Australian study estimated that a 50 percent reduction of all agricultural protection would generate an additional US \$ 90 billion of net global welfare.¹⁶⁴ However, with agricultural tariffs averaging over 21 percent (as compared to 9 percent in the United States),¹⁶⁵ the European Community is not likely to favor substantial tariff reductions.

The methodology for tariff reductions raises related issues: whether a request/offer approach or formula approach should be used, and if the latter, whether it should reduce tariff peaks more than lower tariffs.¹⁶⁶ The flexible reduction formula used in the Uruguay Round allowed participants to make the small-

160. See *Preparations for the 1999 WTO Ministerial General Council Discussion on Mandated Negotiations and the Built-In Agenda*, (Nov. 23, 1998) (Submission from the United States of America).

161. See Speech by Vice President Al Gore Before the World Economic Forum, Davos (Jan. 29, 1999) (transcript available at <<http://www.whitehouse.gov/WH/EOP/OVP/speeches/davos.html>>).

162. See *Hearing on the Committee's Trade Agenda for the 106th Congress Before the Senate Finance Comm.*, 106th Cong. (Jan. 27, 1999) (Statement of Dean Kleckner, President of the American Farm Bureau Federation); *U.S. Farm Leader Echoes Cairns Group Concerns*, (Mar. 31, 1998) <<http://www.cairnsgroupfarmers.org/ni/press/march31.htm>>.

163. See Cairns Group, *Cairns Group 'Vision' for the WTO Agriculture Negotiations: 'Completing the Task'* (Apr. 3, 1998), available at <http://orpheus.dfat.gov.au/trade/negotiations/cairns_group/vision.html>. The vision statement provides as follows: “Access opportunities for agricultural products should be on the same conditions as those applying to other goods and should be commercially viable. Tariffs must be the only form of protection, tariff escalation must be removed and tariff peaks curtailed. The 1999 negotiations must result in deep cuts to all tariffs, tariff peaks and tariff escalation. They must provide a major expansion of market access opportunities for agricultural products, including value-added products. The removal of non-tariff barriers must be completed without exception. Trade volumes under tariff rate quotas must be increased substantially. The administration of tariff rate quotas must not diminish the size and value of market access opportunities, particularly in products of special interest to developing countries.”

164. See AUSTRALIAN DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, *GLOBAL TRADE REFORM: MAINTAINING MOMENTUM* 27 (1999).

165. See United States Ambassador Genta Hawkins Holmes, Address Before the Pastoralists and Graziers Association of Western Australia (Feb. 24, 1999).

166. See Ag in the WTO, *supra* note 27, at 10.

est reductions on their trade sensitive products.¹⁶⁷ If a request/offer approach is used, countries can be expected to try to maintain protection for their most trade sensitive crops.¹⁶⁸ The so-called Swiss formula used in the Tokyo Round for industrial tariffs reduced higher tariffs by greater percentages than for lower tariffs and could serve as a model for those countries seeking major reductions in high tariffs.¹⁶⁹ At this point it would appear likely that the Cairns Group would favor tariff reductions of at least 50 percent or more across the board for tariff peaks.¹⁷⁰ It is uncertain what position the United States will take, and it is likely that the European Union and Japan will favor much more modest reductions.¹⁷¹

The principal issue concerning tariff quota administration involves who will receive the quota rents or premiums, represented roughly by the difference between the world price for the product and the importing country's domestic price resulting from the tariff quota, taking account of transportation and other costs.¹⁷² Generally, tariff quotas¹⁷³ are either global or allocated among supplying countries.¹⁷⁴ In either case, a tariff quota may be administered on a first-come, first-served basis or administered through licensing.¹⁷⁵ If licensing is used, either importers

167. See *id.* at 8.

168. See *id.* at 10.

169. See *id.*

170. See Cairns Group, *supra* note 164.

171. The U.S. Trade Representative has endorsed "across-the-board" tariff reductions, but has been reticent about reduction rates. See Testimony of Ambassador Barshefsky, *supra* note 2, at 6; U.S. Trade Representative Charlene Barshefsky, *America's Agricultural Trade Agenda*, Address Before the National Association of Agricultural Journalists, Washington, D.C. (April 19, 1999) (transcript available at <http://www.ustr.gov/speeches/barshefsky/barshefsky_34.html>).

172. See Philip C. Abbott, *Market Access and Quota Rents in European Community Beef Trade*, INVESTIGACION AGRARIA ECONOMIA (1993); Thomas Grennes, *The Collision Course on Textile Quotas*, CATO Institute, Policy Analysis No. 140 (Sept. 12, 1990) available at <<http://www.cato.org/pubs/pas/pa-140es.html>>; Patrick D. Henneberry and S.L. Haley, *Implications of NAFTA Duty Reductions for the U.S. Sugar Market*, ERS, SUGAR AND SWEETENER (Feb.2, 1999); GARY CLYDE HUFBAUER AND KIMBERLY ANN ELLIOTT, MEASURING THE COSTS OF PROTECTION IN THE UNITED STATES (1994); Jonathan Tolman, *Consumers Shell Out For Peanut Program*, THE ST. LOUIS POST DISPATCH, Aug. 31, 1995 at 7B.

173. A tariff quota allows a specified quantity of imports to enter at a "low" duty rate or duty free and subjects any additional imports to a higher, "over-quota," rate of duty. See ROOT, *supra* note 22 at 135.

174. See *id.* at 134.

175. See JACKSON, *supra* note 17, at 305-306.

or exporters may be licensed.¹⁷⁶ The licenses may be issued to importers (or exporters) on the basis of historical performance, by lottery, by auction, on the basis of first-come/first-served or on some other basis.¹⁷⁷

Very few tariff quotas are deliberately administered in a manner that results in exporters obtaining quota rents.¹⁷⁸ Argentina has pursued WTO dispute settlement consultations with the United States on a claim that during the Uruguay Round trade negotiations it was promised quota rents on peanuts and peanut butter exported to the United States.¹⁷⁹ However, the importing country normally must cooperate in order for foreign exporters to receive quota rents.¹⁸⁰ During the Uruguay Round, there was no real attempt to reach a consensus on quota rents, and it is not likely that there will be any general agreement on this subject in the upcoming trade negotiations except possibly on a case-by-case basis in bilateral talks.

A second major issue involves whether the administrative burden of complying with the conditions of entries restricts or distorts importations in addition to the tariff quota effects which may cause under-utilization of a tariff quota.¹⁸¹ Quota allocations or license quantities that are not commercially viable quantities, licenses issued to domestic producers or processors with interests adverse to imports, imposing end-use conditions, and other actions can limit import access.¹⁸² A share of a tariff

176. See David W. Skully, *Auctioning Tariff Quotas for U.S. Sugar Imports*, ERS, SUGAR AND SWEETENER 17 (June 30, 1998). The exporting countries under U.S. sugar tariff-rate quota receive certificates of quota eligibility that are essentially export licenses issued by the importing country. See 15 C.F.R. pt. 2011, Subpt. A. This enables the exporters to capture the quota rents. See Skully *supra*.

177. See WTO Secretariat, *Tariff Quota Administration Methods and Tariff Quota Fill 2* GATT Doc. AIE/S4 (Nov. 6, 1997).

178. The U.S. tariff quota for raw sugar is an example of a tariff quota administered so that exporters receive quota rents. See 15 C.F.R. pt. 2011, subpt A.

179. See United States - Tariff Quota for Imports of Groundnuts, (Dec. 19, 1997) (Request for Consultations by Argentina) available at <http://www.wto.org/newsroom/media/no95.htm>.

180. See for example U.S. TRADE REPRESENTATIVE, *Record of Understanding Between the Governments of the United States of America and Canada Regarding Areas of Agricultural Trade* 14 (Dec. 4, 1998), in which the United States agreed to enforce export permits issued by Canada for sugar-containing products under U.S. tariff-rate quotas.

181. See WTO Secretariat, *supra* note 178.

182. See *id.*; see also UNCTAD, *Non-Tariff Barriers Affecting the Trade of Developing Countries and Transparency in World Trading Conditions: The Inventory of Non-Tariff Barriers* (1983).

quota may be reserved for a party of a free trade agreement with the importing country.¹⁸³

Most of the concerns about tariff quota administration are already covered by the provisions of the GATT and the WTO Agreement on Import Licensing Procedures.¹⁸⁴ These have been determined to be applicable to agricultural tariff quotas in the infamous EU banana case.¹⁸⁵ The GATT generally requires non-discriminatory administration of quantitative restrictions.¹⁸⁶ With respect to the allocation of quotas and tariff quotas, the GATT mandates an effort to maintain the distribution of trade that would exist without the restriction, and requires that the allocations be negotiated with substantial suppliers or that they be based on a prior representative period.¹⁸⁷ The Licensing Agreement prohibits non-automatic import licensing that has additional trade restricting or distorting effects or that is more administratively burdensome than necessary.¹⁸⁸

Auctioning import licenses, which results in the importing country collecting a fee or charge for the license, raises another legal issue. The GATT prohibits imposing "on or in connection with importation" of any product any fees or charges of any kind other than ordinary customs duties, grandfathered charges, antidumping or countervailing duties, internal taxes or certain user fees.¹⁸⁹ Accordingly, the existing GATT rules would appear to prohibit auctioning import licenses because the license fee would be imposed "in connection with" importation. In addition, since traders could be expected to bid up to the amount of the quota rents less transaction costs for auctioned licenses, the importing country effectively raises the in-quota tariff rate to virtually the same level as the out-of-quota tariff rate when the cost of the license is factored in, which would impair the value of the tariff quota concession.

183. See Panel on Newsprint, Nov. 20, 1984, GATT B.I.S.D. (31st Supp.) at 114 (1984).

184. See Agreement on Import Licensing Procedures, Apr. 15, 1994, WTO Agreement, [hereinafter Licensing Agreement], Annex 1A., *supra* note 15, in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 255-263 (1994).

185. See GATT Dispute Panel Report on the United States Complaint Concerning EC - Regime for the Importation, Sale and Distribution of Bananas, May 22, 1997, WTO Doc. WT/DS27/R/USA, 331 (1997).

186. See GATT, *supra* note 15, at art. XIII:1.

187. See *id.* at art. XIII:2.

188. See STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103-316, AT 902, 908 (1994).

189. See GATT, *supra* note 15, art. II:1(b) and art. VIII:1(a).

Concerns about special agricultural safeguards have been expressed by the United States and New Zealand.¹⁹⁰ The principal issue is whether the special safeguard should be retained after the Uruguay Round implementation period.¹⁹¹ The special safeguard was intended to encourage participants in the Uruguay Round negotiations to undertake tariffication, specifically to reduce the perceived risks of converting non-tariff barriers to tariff equivalents.¹⁹² Experience has demonstrated that it generally has not been necessary, and only Japan and the EU have made extensive use of it.¹⁹³ The limited use of the special safeguard undermines the justification for its continuation. However, the Agreement on Agriculture clearly provides for its continuation throughout the reform process.¹⁹⁴ Further reductions of over-quota tariff rates will make imposition of the special safeguard more likely and more frequent, creating uncertainties among exporters and undermining the effects of tariff reductions. It is likely that the United States and the Cairns Group will support elimination of the special safeguard in the next round.

C. EXPORT SUBSIDIES

In 1776, Adam Smith argued against the British use of export subsidies on corn by noting that their effect "can only be to force the trade of a country into a channel much less advantageous than that in which it would naturally run of its own accord."¹⁹⁵ Two hundred years later, the U.S.-EC trade war, fought with agricultural export subsidies designed to deal with chronic overproduction, may have been the single most impor-

190. See WTO Secretariat, *Committee on Agriculture: Summary Report of The Meeting Held on 19-20 March 1998*, at 6, WTO Doc. G/AG/R/14 30 (April 1998). The concerns were described as follows: "The use of the special safeguard involved no injury test and thus had the potential to be used in an arbitrary fashion; that the volume-based special safeguard could be implemented on the basis of a zero trigger level or when tariff quotas were under-filled; that the price-based safeguard was being applied to minuscule import quantities; and that greater transparency regarding the use of the special safeguard was required."

191. See *id.*

192. See Brosch, *supra* note 25, at 877. See also Rosenthal, *supra* note 42, at 160-161.

193. See WTO Committee on Agriculture, *Special Agricultural Safeguard*, GATT Doc. AIE/12, (1999) (Corrigendum).

194. See Agreement on Agriculture, *supra* note 26, at art. 5.

195. See ADAM SMITH, *THE WEALTH OF NATIONS* 446 (Everyman's Library Ed.) (1776).

tant element in the push to launch the Uruguay Round.¹⁹⁶ The reduction of export subsidies became the most controversial issue in the agriculture negotiations and the crux of the Blair House deal that allowed a conclusion.¹⁹⁷

In the Uruguay Round WTO Members agreed to ban all export subsidies for non-agricultural products in the Subsidies Agreement¹⁹⁸ and to bind and reduce the level of budgetary outlays for agricultural export subsidies and the quantities of exported agricultural products benefitting from export subsidies in the Agreement on Agriculture.¹⁹⁹ Agricultural export subsidies were conditionally exempted from the general ban in the Subsidies Agreement for 9 years by the so-called peace clause.²⁰⁰

In general, the developed countries were expected to make reductions of 36 percent in budgetary outlays and 21 percent in volumes over six years (1995-2000), from a 1986-1990 base period.²⁰¹ The precise commitments are reflected in twenty-five WTO Member's Schedules of Concessions.²⁰² The export subsidy commitments are on the basis of 18 standard commodity groups, and a Member cannot shift subsidization from one group to another.²⁰³ The budgetary outlay and quantity commitments are for each commodity group and are independent; a Member is prohibited from exceeding either commitment.²⁰⁴ More than 80% of the budgetary outlays for agricultural export subsidies are made by the European Union.²⁰⁵

The Agreement on Agriculture permitted some flexibility in the use of export subsidies in order to accommodate the EC sys-

196. See Alan Charles Raul & Kevin J. Brosch, *Global Trade in Agricultural Products*, in TRADE LAW AND POLICY INSTITUTE 1989, at 239-243 (PLI Comm. Law & Practice Course Handbook Series No. 510, 1989); Thomas J. Schoenbaum, *Agricultural Trade Wars: A Threat to the GATT and Global Free Trade*, 24 ST. MARY'S L. J. 1165-1168 (1993); Susan Leetma & Karen Ackerman, *Export Subsidies* 1, ERS WTO Briefing Room at <<http://151.121.66.126/Briefing/WTO/issues/export.htm>>.

197. See CROOME, *supra* note 17, at 340.

198. See Agreement on Subsidies and Countervailing Measures WTO Agreement, *supra* note 15 at art. 3.

199. Article 1(e) of the Agreement on Agriculture defines "export subsidies" by providing that they refer to "subsidies contingent upon export performance, including the export subsidies listed in Article 9 of this Agreement."

200. See Agreement on Agriculture, *supra* note 26, at art. 13(c).

201. See Brosch, *supra* note 25, at 868.

202. See *id.*; see also Economic Research Service, *supra* note 27, at 3.

203. See *id.* at 869.

204. See *id.*

205. See Leetmaa and Ackerman, *supra* note 197. South Africa has since terminated the use of export subsidies. See *id.*

tem of automatic export restitutions, which could not be finely tuned to stop when the ceilings were reached.²⁰⁶ Subsequently, the European Union claimed that the flexibility provision permit a rollover of unused outlays and quantities for future years, and the United States has also invoked the rollover option.²⁰⁷

Only export subsidies listed in the agreement are subject to reduction.²⁰⁸ Export subsidies not subject to reduction commitments are subject to the anti-circumvention provisions, which prohibit a WTO Member from providing export subsidies not provided for in its Schedule of Concessions in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments or using non-commercial transactions to circumvent reduction commitments.²⁰⁹ Many have viewed this as a virtual prohibition on export subsidies that are not subject to reduction.²¹⁰

A WTO dispute settlement panel has ruled that Canada violated its export subsidy quantity commitments for butter, cheese and certain other milk products by providing milk for producing products for export at prices lower than for making domestic

206. See Agreement on Agriculture, *supra* note 26, art. 9.2(b).

207. See Daniel Pruzin, *U.S. Defends Agriculture Subsidy Rollover at WTO, Despite Commitment to Phaseout*, 16 INT'L TRADE REP. (BNA), No. 13, at 538-39 (Mar. 31, 1999); *Major Farm Producers Clash Over WTO Export Subsidies Rules*, Inside U.S. Trade, available at <<http://www.insidetrade.com>> (Oct. 10, 1997). The United States initially objected to the EU rollover on grounds of the intention of the negotiators, and the Cairns Group has continued this interpretation. See *id.*

208. These include the provision by governments or their agencies of direct subsidies, including payments-in-kind, to a firm, to an industry, to producers of an agricultural product, to a co-operative or other association of such producers, or to a marketing board, contingent on export performance; the sale or disposal for export by governments or their agencies of non-commercial stocks of agricultural products at a price lower than the comparable price charged for the like product to buyers in the domestic market; payments on the export of an agricultural product that are financed by virtue of governmental action, whether or not a charge on the public account is involved, including payments that are financed from the proceeds of a levy imposed on the agricultural product concerned or on an agricultural product from which the exported product is derived; the provision of subsidies to reduce the costs of marketing exports of agricultural products (other than widely available export promotion and advisory services) including handling, upgrading and other processing costs, and the costs of international transport and freight; internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favorable than for domestic shipments; subsidies on agricultural products contingent on their incorporation in exported products. See Agreement on Agriculture, *supra* note 26, Arts. 3.3 and 9.1.

209. See Agreement on Agriculture, *supra* note 26, art. 10.1.

210. See Brosch, *supra* note 25, at 869; Rosenthal, *supra* note 42, at 163.

products violates Canada's commitments on export subsidies.²¹¹ The panel decided that Canada's differential pricing scheme, adopted in response to the Uruguay Round commitments, constitutes an export subsidy subject to reduction both in the form of payments in kind provided by governmental agencies to processors/exporters contingent on export performance²¹² and as payments on the export of an agricultural product that are financed by virtue of governmental action.²¹³ In the alternative, in the event that the Canadian policy did not amount to export subsidies subject to reduction, the panel found that the differential pricing scheme nonetheless circumvented Canada's reduction commitments by exceeding the commitment levels.²¹⁴

The major issue is whether export subsidies for agricultural products should be further reduced or eliminated.²¹⁵ The Cairns Group has advocated a total elimination of export subsidies²¹⁶ and the United States has formally proposed a ban as well.²¹⁷ Since the Subsidies Agreement's outright ban on the use of export subsidies will apply to agricultural products in 2003 unless there is an agreement to extend the exemption provided by the peace clause, the countries desiring to continue to provide export subsidies, primarily those in the European Union, will have to pay a price for the privilege in terms of other concessions. Other Members which may side with the EU on other issues, like Japan and Korea, may have no common ground on the export subsidy issue, since such subsidies depress world prices and threaten their own internal prices.

Another issue is whether there should be an additional trade remedy for violations of export subsidy commitments. The normal practice in WTO disputes is for the panel finding a WTO agreement violation to recommend that the offending party

211. See Canada — Measures Affecting the Importation of Milk and the Exportation of Dairy Products at 203 (WT/DS103/R) (Mar. 17, 1999) (Final Report of the Dispute Settlement Panel).

212. See *id.* at 182.

213. See *id.* at 189.

214. See *id.* at 196-197.

215. See Gary G. Yerkey, *U.S., EU Continue to Be on Course For Fight Over Farm Trade in WTO Talks*, 16 INT'L TRADE REP. (BNA) No. 15, at 626-27 (April 14, 1999).

216. See World Trade Organization, *Special Session of the General Council: Cairns Group Ministerial Statement on Export Subsidies*, (WT/GC/12) (Sept. 24, 1998).

217. See World Trade Organization, *Special Session of the General Council*, (Sept. 23, 1998) (Submission from the United States of America).

bring its practice into conformity with its obligations.²¹⁸ The current agreement provides an explicit remedy for violations of export subsidy reduction commitments in the “payback” under the flexibility provisions under which the quantities or outlays exceeding export subsidy commitments in one year would have to be deducted from the commitment levels for the following year.²¹⁹ Such exports could also be subject to countervailing duties imposed by the importing countries and would not be shielded by the peace clause.²²⁰ A remedy in the form of ordinary retaliation, by imposing tariffs on products imported from the offending country, might be possible after completing the dispute settlement process.²²¹

D. STATE TRADING ENTERPRISES

The United States Trade Representative has identified transparency and improved disciplines for state trading enterprises as priority issues for the next round of multilateral trade negotiations on agriculture.²²² Such entities are common in agricultural trade²²³ and may have monopoly control over imports or exports or both.²²⁴ State trading enterprises with import monopolies can restrict imports and subsidize domestic production.²²⁵ As single desk exporters, they can subsidize exports of agricultural products.²²⁶ The accession of China, Russia and

218. See Richard O. Cunningham, *Dispute Settlement in the WTO: Did We Get What the United States [Wanted], Or Did We Give Up the Only Remedy that Really Worked? in THE GATT, THE WTO AND THE URUGUAY ROUND AGREEMENTS ACT 1990*, at 547, 559 (PLI Comm. Law & Practice Course Handbook Series No. A-722, 1995).

219. See Agreement on Agriculture, *supra* note 26, art. 9.2.

220. See McNiel, *supra* note 99, at 302-305.

221. This remedy has not been used yet, but there is no obvious reason why it might not be used. See Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Agreement *supra* note 15, Annex 2, art. 22.

222. See Testimony of Ambassador Barshefsky, *supra* note 2, at 6.

223. See *State Trading Enterprises - Summary of Country Notifications Submitted to the World Trade Organization under Title XVII 4(a) of the GATT*, available at <<http://www.dairytrade.com/stetable.htm>>

224. See Karen Ackerman, *State Trading Enterprises in World Agricultural Trade*, AGRICULTURE IN THE WTO 43 (Dec. 1998); John H. Jackson, *State Trading and Nonmarket Economies*, 23 INT'L LAWYER 891 (Winter 1989).

225. See Karen Ackerman, *State Trading Enterprises: Their Role as Importers*, AGRIC. OUTLOOK 31-32 (Nov. 1997). Major single desk state trading enterprise importers in agricultural trade include COFCO (China), the Food Agency (Japan), BULOG (Indonesia), LPMO (Korea), Ministry of Food, Agriculture and Cooperatives (Pakistan); and CONASUPO (Mexico). See *id.* at 32.

226. See Karen Ackerman, Praveen Dixit, & Mark Simone, *State Trading Enterprises: Their Role in World Markets*, AGRIC. OUTLOOK 11, 14 (June 1997).

other non-market or transition countries highlights the difficulties of disciplining state trading enterprises operating in the world market of private traders and competitive markets.

1. GATT Obligations

The GATT applies to any state trading enterprise established or maintained by a WTO Member and any other enterprise which has been granted, formally or in effect, "exclusive or special privileges"²²⁷ with respect to imports or exports.²²⁸ This includes all "governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports."²²⁹ Thus, a privately-owned firm operating under a governmentally-created import or export monopoly is covered as well as marketing boards which engage in buying and selling under exclusive or special rights or privileges.²³⁰

A state trading enterprise is required to conform to the most-favored-nation (MFN) principle,²³¹ which prohibits discriminating between countries with respect to imports and exports, in its purchases or sales involving either imports or exports.²³² However, a state trading enterprise does not violate the GATT simply because it is controlled by domestic producers.²³³ GATT dispute settlement panels have indicated that the disciplines on discrimination by state trading enterprises do not include the national treatment principle²³⁴ which bans discrimi-

Major single desk exporters include the Canadian Wheat Board (Canada), the New Zealand Dairy Board (New Zealand), AWB (Australia), Queensland Sugar Corp. (Australia), and COFCO (China).

227. This does not include government measures to insure standards of quality and efficiency in the operation of external trade or privileges granted for the exploitation of natural resources. See GATT, *supra* note 15, Annex I, ad art. XVII:1(a).

228. See GATT, *supra* note 15, art. XVII:1(a).

229. See Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994, April 15, 1994, WTO Agreement, *supra* note 15, para. 1 [hereinafter Understanding on Article XVII].

230. See GATT, *supra* note 15, Annex I, ad art. XVIII.

231. See GATT, *supra* note 15, art. I:1.

232. See GATT, *supra* note 15, art. XVII:1(a).

233. See Republic of Korea - Restrictions on Imports of Beef, Nov. 7, 1989, GATT B.I.S.D. (36th Supp.) at 268, 301-02 (1989).

234. See GATT, *supra* note 15, art. III.

nation between imports and like domestic products.²³⁵ If the state trading enterprise maintains an import monopoly for a product which has a bound tariff, the state trading enterprise must not "afford protection on the average in excess of the amount of protection" provided for by the bound tariff rate.²³⁶

A state trading enterprise must make any imports or exports "solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale."²³⁷ A state trading enterprise is also required to "afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales." State trading enterprise activities for government procurement is explicitly exempted from the GATT disciplines.²³⁸ The GATT also authorizes trade negotiations to limit or reduce obstacles to trade resulting from the operation of state trading enterprises.²³⁹

Several GATT disciplines on state trading enterprises address transparency. WTO Members are required to notify the WTO of the products which are imported into, or exported from, their territories by state trading enterprises.²⁴⁰ Moreover, the WTO may, at the request of a Member which has reason to believe that its interests are being adversely affected by the operations of an state trading enterprise, request the Member

235. See *Belgian Family Allowances* Nov. 7, 1952, GATT B.I.S.D. (1st Supp.) at 59, 60 (1952). *But see* *Canada - Administration of the Foreign Investment Review Act*, Feb. 7, 1984, GATT B.I.S.D. (30th Supp.) at 140, 163 (1984).

236. See *id.* If the state trading enterprise maintains an import monopoly for a product which has an unbound tariff, that WTO Member must, on the request of another Member having a substantial trade in the product concerned, inform the WTO of "the import mark-up on the product during a recent representative period, or, when it is not possible to do so, of the price charged on the resale of the product." See GATT, *supra* note 15, art. XVII:4(b).

237. See GATT, *supra* note 15, art. XVII:1(b). A panel has ruled that the "commercial considerations criterion becomes relevant only after it has been determined that the governmental action at issue falls within the scope of the general principles of non-discriminatory treatment." *Canada - Administration of the Foreign Investment Review Act*, Feb. 7, 1984, GATT B.I.S.D. (30th Supp.) at 140, 163 (1984). A tied loan is a commercial consideration that may be taken into account in making import decisions. See GATT, *supra* note 15, at Annex I, ad art. XVII, para. 1(b).

238. See GATT, *supra* note 15, art. XVII:2.

239. See GATT, *supra* note 15, art. XVII:3.

240. See GATT, *supra* note 15, art. XVII:4(a).

maintaining the state trading enterprise to supply relevant information about its operations.²⁴¹

2. *The Uruguay Round and Issues for the Next Round*

An Understanding reached during the Uruguay Round required the reporting of state trading enterprises to the WTO and established a working party to review the notifications.²⁴² WTO Members are required to notify²⁴³ the Council for Trade in Goods of state trading enterprises "in order to ensure the transparency of the activities of state trading enterprises"²⁴⁴ whether or not imports or exports have in fact taken place.²⁴⁵ Each WTO Member is called upon to "ensure the maximum transparency possible in its notifications so as to permit a clear appreciation of the manner of operation of the enterprises notified and the effect of their operations on international trade."²⁴⁶ Any WTO Member which believes that another Member has not provided adequate notification may complain to the other Member. If the matter is not satisfactorily resolved, the member may make a counter-notification for consideration by the working party.²⁴⁷

The working party²⁴⁸ reviews notifications and counter-notifications.²⁴⁹ The working party meets at least once a year and reports annually to the Council for Trade in Goods, which is authorized to make recommendations with regard to the adequacy of notifications and the need for further information.²⁵⁰

241. *Id.* at art. XVII:4(c). Certain confidential information which would "impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises" is exempt from disclosure. *Id.* art. XVII:4(d).

242. *See* UNDERSTANDING ON ARTICLE XVII, *supra* note 231, para. 1.

243. State trading enterprises which import goods solely for governmental use or in use by the state trading enterprise and not otherwise for resale or use in the production of goods for sale are exempted from the notification requirement. *See id.*

244. *Id.* para. 1. WTO Members are instructed to use a form adopted in 1960. *See* GATT B.I.S.D. (9th Supp.) 184-185.

245. *See* UNDERSTANDING ON ARTICLE XVII, *supra* note 231, para. 3.

246. *Id.* para. 2.

247. *See id.* para. 4.

248. *Id.* para. 5. Membership on the working party is open to all Members.

249. *See id.* The working party is instructed to develop an illustrative list showing the kinds of relationships between governments and enterprises, and the kinds of activities, engaged in by these enterprises, which may be relevant for the purposes of Article XVII.⁴

250. *See id.* The WTO Secretariat has prepared a background paper on state trading for the working party. *See* WTO, OPERATIONS OF STATE TRADING ENTERPRISES AS THEY RELATE TO INTERNATIONAL TRADE (G/STR/2)(Oct. 26, 1995).

The role of state trading enterprises in international agricultural trade was discussed during the Uruguay Round of agricultural negotiations, but there was no consensus on requiring any major new disciplines on their activities.²⁵¹ The Agreement's prohibition on non-tariff barriers applies to such measures maintained by state trading enterprises.²⁵² In addition, the WTO Committee on Agriculture has required information about the activities of state trading enterprises which are used to administer market access commitments.²⁵³ However, an attempt to get a price transparency provision into the export subsidies provisions failed to reach a consensus.²⁵⁴

The principal concerns regarding state trading enterprises with import monopolies are that they could be used to provide protection for domestic producers by setting resale prices of imports at high levels, thereby impairing or nullifying expected benefits of tariff concessions.²⁵⁵ Single desk buyers are able to charge mark-ups to capture quota rents or reduce the demand for the imported products.²⁵⁶ These entities provide insufficient transparency regarding import pricing, resale pricing, grade and quality of supply and demand, and availability of supply,²⁵⁷ thereby interfering with the communication between manufacturers and ultimate buyers. Single desk buyers also could disguise import restrictions and effect the type, grade and quality of imports.²⁵⁸

Tariffication of all non-tariff border measures and the binding of all agricultural tariffs should reduce the role of state trading enterprises in light of the GATT rule on import mark-ups on products subject to tariff bindings. However, state trading enter-

251. See GENERAL ACCOUNTING OFFICE, *STATE TRADING ENTERPRISES: COMPLIANCE WITH THE GENERAL AGREEMENT ON TARIFFS AND TRADE* 14 (Aug. 30, 1995) [hereinafter GAO].

252. See AGREEMENT ON AGRICULTURE, *supra* note 26, art. 4.2, n.1.

253. See GAO, *supra* note 253, at 15.

254. See MERLINDA INGCO & FRANCIS NG, *DISTORTIONARY EFFECTS OF STATE TRADING IN AGRICULTURE: ISSUES FOR THE NEXT ROUND OF MULTILATERAL TRADE NEGOTIATIONS* 7 (World Bank, Feb. 1998).

255. See *id.* at 5; Karen Ackerman, *State Trading Enterprises in World Agricultural Trade*, *AGRICULTURE IN THE WTO* 43 (Dec. 1998).

256. See *id.* Japan negotiated maximum markups on imports of rice and wheat by the Food Agency. See Ackerman, *supra* note 227, at 32-33.

257. See, e.g., PRAVEEN DIXIT & TIM JOSLING, *STATE TRADING IN AGRICULTURE: AN ANALYTICAL FRAMEWORK*, International Agricultural Trade Research Consortium Working Paper 9-12 (July 1997).

258. See *id.*; see also Ackerman, *supra* note 227, at 33-36; JUNG-SUP CHOI, DANIEL A. SUMNER AND JOO HO SONG, *IMPORTING STES IN KOREA AND JAPAN: EVOLUTION, OPERATION, AND IMPLICATIONS* 5 (Nov. 19, 1998).

prises which have exclusive import rights under tariff quotas have a very good record of fill rates compared to other types of administration of tariff quotas.²⁵⁹ Of 21 tariff quotas administered by state trading enterprises in WTO Members, 81 percent were 80 to 100 percent filled in 1996.²⁶⁰ By contrast, the percentages of comparable fill rates by other administration methods were 33.3 percent for auctioning, 38 percent for automatic licensing, 50.6 percent for first-come/first-served, and 62.7 percent for tariff quotas allocated pursuant to historical shares.²⁶¹ This data undermines the argument for modifications to the rules on state trading enterprises with import monopolies.

Another concern is that single desk sellers may benefit from financial backing by the government, and the provision of subsidies could enable them to export products at artificially low prices and circumvent export subsidy disciplines.²⁶² Such entities may be able to practice price discrimination and price pooling more easily than private competitors, and the lack of price transparency makes it difficult to determine if there has been compliance with commitments on export subsidies.²⁶³ Both Australia and New Zealand have disputed that single desk sellers have any significant advantage over private sector exporters with respect to price transparency, price discrimination, price pooling or negotiating long term contracts.²⁶⁴ This disagreement between the United States and two key members of the Cairns Group means that it is unlikely that negotiators could "fine tune" the rules for state trading enterprises in any meaningful manner, especially considering that Japan, China, Canada, India, Indonesia, and several other major developing countries would not be likely to support any substantial reforms due to the state trading enterprises they maintain.

259. See WTO, TARIFF QUOTA ADMINISTRATION METHODS AND TARIFF QUOTA FILL 16 (Nov. 6, 1997).

260. See *id.*

261. See *id.*

262. See JOSLING, *supra* note 79, at 7-8. See also Karen Ackerman, *State Trading Enterprises in World Agricultural Trade*, Agriculture in the WTO 43, 44-45 (Dec. 1998).

263. See *id.*

264. See *State Trading Enterprises (Single Desk Buyers and Single Desk Sellers)*, Paper by Australia, WTO AIE/16:- 27 (Jan. 27, 1998); *Paper Based on New Zealand's Comments (20 January 1998) on the US paper on State Trading Enterprises*, Paper by New Zealand WTO AIE/11 (Feb. 5, 1998).

E. BIOTECHNOLOGY

American farmers are increasingly planting the seeds of genetically modified organisms (GMO) for crop varieties that are designed to improve productivity.²⁶⁵ New GMO varieties of soybeans and corn are resistant to herbicides, such as Roundup or Liberty Link, and reduce farmers need to use multiple treatments.²⁶⁶ Since Roundup Ready soybeans were placed on the market in 1996, farmers are expected to plant them on half the total U.S. soybean acreage this year.²⁶⁷ A variety of genetically altered corn, known as Bt corn, is resistant to European corn borers and could be planted this year on 15 to 18 million acres, roughly 20 percent of corn acreage.²⁶⁸ Farmers are also planting GMO sunflowers, canola, cotton, and other crops for resistance to pests and pesticides, as well as a host of other value-enhanced crops for improved output traits, such as varieties of soybeans, corn and canola that produce superior oil qualities.²⁶⁹

Jurisdiction over the approval of GMO products is divided among three federal agencies.²⁷⁰ The Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture is responsible for protecting domestic crops from pests and diseases and has jurisdiction over the introduction into the environment of genetically modified organisms and products that are plant pests or that there is reason to believe are plant pests.²⁷¹ The Environmental Protection Agency (EPA) ensures the safety of pesticides and regulates the distribution of plants and microbes producing pesticidal substances.²⁷² The Food and Drug Administration (FDA) of the Department of Health and

265. See Peter A. Riley, Linwood Hoffman, & Mark Ash, *U.S. Farmers Are Rapidly Adopting Biotech Crops*, AGRICULTURAL OUTLOOK 21-22 (Aug. 1998).

266. See *id.* at 22.

267. See *id.*

268. See *id.*

269. Peter A. Riley, Linwood Hoffman, *Value-Enhanced Crops: Biotechnology's Next Stage*, AGRICULTURAL OUTLOOK 18 (March 1999).

270. See ANIMAL AND PLANT HEALTH INSPECTION SERVICE, *United States Regulatory Oversight in Biotechnology*, at <http://www.aphis.usda.gov/biotech/OECD/usregs.htm>; See also KELCH, *supra* note KK, at 34-35; BRUCE A. LARSON AND MARY K. KNUDSON, *Public Regulation of Agricultural Biotechnology Field Tests: Economic Implications of Alternative Approaches*, American Journal of Agricultural Economics 174-179 (Aug. 1991).

271. See the Federal Plant Pest Act, 7 U.S.C. § 150aa et seq.; Introduction of Organisms and Products Altered or Produced Through Genetic Engineering Which are Plant Pests or Which There is Reason to Believe are Plant Pests, 7 C.F.R. § 340.0 et seq.

272. See the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136; Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 9; 40 C.F.R. Parts

Human Services regulates foods and feeds derived from genetically engineered plant varieties.²⁷³ The Food and Drug Administration's policy on biotechnology is to treat substances intentionally added to foods through genetic engineering as food additives if they are significantly different in structure, function, or amount from substances otherwise found in food.²⁷⁴ The spectacular success of GMO products launched into commercial use in the United States may be due to the public policy of treating these new products the same as traditional products for purposes of risk assessments.²⁷⁵

The future of biotech crops, however, has been clouded by foreign governmental policies inspired by fear of the unknown and hostility toward technology.²⁷⁶ While the European Union began by approving the use of Roundup Ready soybeans and Bt corn,²⁷⁷ the EU Commissioner of Agriculture later called for segregation of GMO crops from non-GMO crops and for mandatory labeling at all levels down to the retail level.²⁷⁸ The EU ultimately adopted mandatory laboratory testing and labeling requirements for food processors.²⁷⁹ Japan is considering a labeling requirement, even though Japanese consumers accept biotech foods.²⁸⁰ Several other countries have also adversely re-

152, 172, & 180; Toxic Substances Control Act, 15 U.S.C. § 53; 40 C.F.R. Part 725.

273. See Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 9; Statement of Policy: Foods Derived from New Plant Varieties, 57 Fed. Reg. (May 29, 1992).

274. See *id.*; see also Henry I. Miller, *Biotechnology and Food*, JOURNAL OF COMMERCE, Sep. 1, 1998.

275. See David R. Kelch, Mark Simone, and Mary Lisa Madell, *Biotechnology in Agriculture Confronts Agreements in the WTO*, AGRICULTURE IN THE WTO 34 (Dec. 1998).

276. See CHARLES E. HANRAHAN, *U.S.-European Agricultural Trade: Food Safety and Biotechnology Issues*, CONGRESSIONAL RESEARCH SERVICE 3 (Oct. 21, 1998). This report describes the position of Greenpeace, shared by consumer groups, that the long term effects of GMOs are unknown and therefore labeling is warranted. See also EUROPEAN COMMISSION, WHITE PAPER ON GROWTH, COMPETITIVENESS, AND EMPLOYMENT, COM(93) 700 Final, para. 5.5-5.9 (Dec. 5, 1993); Michael Specter, *Europe, Bucking Trend in U.S., Blocks Genetically Altered Food*, WALL ST. J., July 20, 1998.

277. See HANRAHAN, *supra* note 278.

278. See *id.* at 4; see also Glickman Repeats Threat To Use WTO on GMO Labeling Issue in EU, REUTERS, July 9, 1997.

279. See HANRAHAN, *supra* note 278, at 4; EU Ministers Establish Labeling Rule for Genetically Modified Organisms, INTERNATIONAL TRADE REPORTER, May 27, 1998.

280. See The Government of Japan's Comments on the 1999 National Trade Estimates (NTE) Report, para. 3(1) (April 16, 1999) < <http://www.infojapan.org/region/n-america/us/economy/date/416/index.html>.>; Thomas J. Hoban, *How Japanese Consumers View Biotechnology*, FOOD TECHNOLOGY (July, 1996).

acted to the biotechnology revolution.²⁸¹ In the United States, a proposed rule by the Department of Agriculture on organic farming which would have allowed the use of GMOs provoked a storm of protests.²⁸² The U.S. Trade Representative has identified biotechnology as a priority issue for the next round of multi-lateral trade negotiations.²⁸³

Both the Uruguay Round Agreement on the Application of Sanitary and Phytosanitary Measures (the "SPS Agreement")²⁸⁴ and the Agreement on Technical Barriers to Trade (the "TBT Agreement")²⁸⁵ apply to labeling requirements for imports of agricultural goods as well as industrial goods.²⁸⁶ The SPS Agreement applies to "sanitary and phytosanitary measures" which affect international trade.²⁸⁷ The TBT Agreement applies to "technical regulations other than sanitary and phytosanitary measures."²⁸⁸

"Sanitary and phytosanitary measures" is defined in the SPS Agreement and specifically includes "labeling requirements directly related to food safety."²⁸⁹ Thus, a GMO labeling requirement is covered by the SPS Agreement if it is a sanitary or phytosanitary measure affecting international trade and it is directly related to food safety. "Technical regulations" are defined in the TBT Agreement as a "[d]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory"²⁹⁰ and includes technical regulations which "deal exclusively with . . . labelling requirements as they apply to a product, process or production

281. See, e.g., *Canberra Organic Growers Society, GE Foods to be Labelled in Australia* > *Brazil Caves in to US Transgenic Soya, Genetic Resources Action International* < <http://www.purefood.org/News/brazil.html>>.

282. See National Organic Program, Proposed Rule, 62 FR 65849 (Dec. 16, 1997); the Organic Foods Production Act of 1990, as amended (7 U.S.C. § 6501 et. seq.).

283. See *America's Agricultural Trade Agenda*, Speech by U.S. Trade Representative Charlene Barshefsky to the National Association of Agricultural Journalists, Washington, D.C. (April 19, 1999).

284. See Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, WTO Agreement, *supra* note 15, Annex 1A, 69-84 [hereinafter SPS Agreement].

285. See Agreement on Technical Barriers to Trade, Apr. 15, 1994, WTO Agreement, *supra* note 15, Annex 1A, 138-162 [hereinafter TBT Agreement].

286. See Kelch et al., *supra* note 277.

287. See SPS Agreement, *supra* note 286, art. 1.1.

288. See TBT Agreement, *supra* note 287, art. 2.1 and 1.5.

289. See SPS Agreement, *supra* note 286, Annex A, para. 1.

290. See TBT Agreement, *supra* note 287, Annex 1, para.1.

method”²⁹¹ Accordingly, a GMO labeling requirement is covered by the TBT Agreement if it applies to a product, process or production method and does not consist of an SPS measure.²⁹²

The difficult issue is determining whether a measure is a “sanitary or phytosanitary measure” which is defined in terms of the purpose of the measure: to protect humans or animals from food-borne risks (arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs) or from diseases carried by animals and plants; to protect animals or plants from pests or diseases; or to prevent or limit other damage from pests.²⁹³ The underlying purpose most commonly cited for GMO labeling requirements is the protection of humans from risks arising from potential contaminants in foods.²⁹⁴ The presence of the GMO in a commodity shipment or the presence of the altered DNA or the residue of the GMO in meat or a processed product could be viewed as a contaminant.²⁹⁵ In any event, the invocation of a public health concern to justify a GMO labeling requirement would make it an SPS measure.

291. *Id.*

292. The TBT Agreement clearly provides that it does not apply to sanitary and phytosanitary measures as defined in the SPS Agreement. See TBT Agreement, *supra* note 287, art. 1.5.

293. See SPS Agreement, Annex A, para. 1. This provision defines sanitary or phytosanitary measure as “any measure applied: to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms; to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs; to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.” This approach yields the curious result that the applicability of the SPS Agreement depends on the purpose ascribed to it by the party defending it, with the anomalous possibility that a country would choose to deny that its purpose is to protect health. In most SPS situations, the historical record for the measure will be replete with references to public health concerns.

294. See GREENPEACE, *Genetically-Engineered Food Claims Are Hard to Swallow* (1997) <<http://www.greenpeace.org/~usa/campaigns/biodiversity/factsheet/gefacts.html>>.

295. The term “contaminants” includes “pesticide and veterinary drug residues and extraneous matter” for purposes of the SPS Agreement, but this is not an exhaustive list. See SPS Agreement, Annex A, n.4. In the EU hormone ban controversy, the presence of residues of natural hormones in addition to those that occurred naturally, was a contaminant. See *EC Measures Concerning Meat and Meat Products (Hormones) – Complaint of the United States*, Report of the Panel, para. 8.22, WT/DS26/R/USA (August 18, 1997).

The EU has cited the consumer's "right to know" or "right to choose" as the basis for its GMO labeling requirements.²⁹⁶ The EU unsuccessfully argued for including such a right (referred to as the "4th criterion" during the negotiations) in the SPS Agreement.²⁹⁷ To justify a trade restriction on the basis of consumer concerns, the EU must explain how the consumer has an interest protected by the SPS Agreement in terms of the protection of human, animal or plant life or health or an interest protected by the TBT Agreement as achieving some other legitimate objective. In other words, the consumer's rights to know and choose are not a defense to a claimed violation of the SPS Agreement.²⁹⁸

The SPS Agreement provides a number of fundamental disciplines on the use of sanitary and phytosanitary measures.²⁹⁹ Each SPS measure must be based on science in that it is based on scientific principles and is not maintained without sufficient scientific evidence and in that it is applied only to the extent necessary to protect human, animal or plant life or health.³⁰⁰ An SPS measure also must be based on an appropriate risk assessment.³⁰¹

The SPS Agreement incorporates the most-favored-nation and national treatment concepts of the GATT: WTO Members cannot use SPS measures to arbitrarily or unjustifiably discriminate between WTO Members where identical or similar conditions prevail, including between their own territory and other Members.³⁰² This is reinforced by an exhortation to Members to avoid arbitrary or unjustifiable distinctions in the levels of protection that it finds appropriate in different circumstances.³⁰³

In general, SPS measures should be based on international standards, guidelines or recommendations, such as those of the

296. See EUROPEAN COMMISSION, *The European Commission Agrees on an Orientation for EU Labelling of GMO Products* (July 25, 1997); Kelch et. al, *supra* note 277.

297. See GRETCHEN H. STANTON, *Implications of the WTO Agreement on Sanitary and Phytosanitary Measures*, in UNDERSTANDING TECHNICAL BARRIERS TO AGRICULTURAL TRADE, 75

298. 298 See WTO, UNDERSTANDING THE WORLD TRADE ORGANIZATION AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES 4 (July 15, 1996); Michele D. Carter, *Selling Science under the SPS Agreement: Accommodating Consumer Preference in the Growth Hormones Controversy*, 6 MINN. J. GLOBAL TRADE 625 (1997).

299. See *id.*

300. See SPS Agreement, *supra* note 286, art. 2.1.

301. See *id.* art. 5.1.

302. See *id.* art. 2.3.

303. See *id.* art. 5.5.

Codex Alimentarius Commission, where they exist,³⁰⁴ and measures based on such international standards are immune from challenges under the SPS Agreement.³⁰⁵ SPS measures must not be more trade-restrictive than required to achieve a WTO Member's chosen appropriate level of sanitary or phytosanitary protection,³⁰⁶ and must not constitute a disguised restriction on international trade.³⁰⁷

The TBT Agreement establishes a number of disciplines designed to ensure that a Member's technical regulations do not create unnecessary obstacles to trade.³⁰⁸ These include the fundamental obligations that products imported from the territory of any WTO Member shall be accorded treatment no less favorable than that accorded to like products of national origin and to like products originating in any other country,³⁰⁹ and technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective.³¹⁰ The national treatment provision of the TBT Agreement closely parallels the GATT.³¹¹ Article III has been interpreted to permit governments to distinguish between otherwise like products for legitimate regulatory purposes.³¹² A panel has said that the primary purpose of the GATT was "to lower barriers to trade between markets, and not to harmonize the regulatory treatment of products within them."³¹³

The principal mandate of the TBT Agreement requires that "technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to

304. See *id.* art. 3.1. International organizations, such as the Codex Alimentarius Commission, are beginning to examine the health implications of GMOs but have yet to adopt standards.

305. See *id.* art. 3.2.

306. See *id.* art. 5.6.

307. See *id.* art. 2.3.

308. See TBT Agreement, *supra* note 287, art. 2.2.

309. See *id.* art. 2.1.

310. See *id.* art. 2.2.

311. See GATT, *supra* note 15, art. III:4.

312. See United States - Measures Affecting Alcoholic and Malt Beverages, Report of the Panel, GATT B.I.S.D. (39th Supp.) at 206 (June 19, 1992). The panel explained: "The purpose of Article III is . . . not to prevent contracting parties from using their fiscal and regulatory powers for purposes other than to afford protection to domestic production. . . ." *Id.* Consequently, in determining whether two products subject to different treatment are like products, it is necessary to consider whether such product differentiation is being made "so as to afford protection to domestic production." *Id.*

313. *United States - Taxes on Automobiles*, Report of the Panel, para. 5.8 (DS31/R).

international trade.”³¹⁴ Technical regulations must not be more trade-restrictive than necessary to fulfil a legitimate objective, including national security requirements, the prevention of deceptive practices, and the protection of human health or safety, animal or plant life or health, or the environment.³¹⁵ In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.

It is clear that either the SPS Agreement or the TBT Agreement applies to the regulation of GMOs, depending on the purpose of the regulation. Neither agreement permits a policy of banning trade in GMO products while awaiting scientific evidence. Negotiators in the next round of multilateral trade negotiations may undertake to clarify rules for the regulation of GMOs or may defer to activities already underway in the Convention on Biodiversity or the Organization for Economic Cooperation and Development. Any redrafting of the Uruguay Round agreements to accommodate GMOs is likely to be in the nature of fine-tuning rather than a major revision.

V. CONCLUSION

The central issues to be addressed in the upcoming agricultural talks are questions of how far and how fast: the rates of reductions of subsidies and tariffs and the lengths of transition periods. To a large extent, the next round will be the Uruguay Round, Part II. If the texts of the Agreement on Agriculture and the SPS Agreement remain substantially intact, the negotiation could be completed in three years.

The negotiations will once again pit countries with extensive state intervention in agriculture—principally the European Union and Japan supported by Switzerland, Norway and Korea and some developing countries—against the advocates of reform and liberalization among countries with substantially less intervention in agriculture—principally the Cairns Group and the United States, supported by developing countries with strong export interests. The expiration of the peace clause gives leverage to the reform camp to extract major concessions in return for a further extension. On the other hand, the inability of the Congress to reassemble the old bipartisan coalition in favor of trade liberalization to enact a fast track bill could hamstring the re-

314. TBT Agreement, *supra* note 287, art. 2.2.

315. *See id.*

form movement by sharply reducing U.S. negotiating leverage. And the failure of the European Union's Agenda 2000 to produce substantial reductions in domestic support under the Common Agricultural Policy will limit the EU negotiators' flexibility.