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Henricus A. Strating

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# The GATT Agriculture Dispute: A European Perspective

## **Cover Page Footnote**

International Law; Commercial Law; Law

# The GATT Agriculture Dispute: A European Perspective

*Henricus A. Strating†*

*Editor's Note: This Article was completed in November, 1992. Since then, a tentative agricultural agreement has been reached between the United States and the European Economic Community. This "agreement" can only be called tentative because France threatens to block any accord that negatively impacts its farming industry. The author addresses this development in the epilogue to this Article.*

*Insofar as agriculture is concerned, all nations live in glasshouses and none, therefore, can throw stones.‡*

## Introduction

In 1986, the General Agreement on Tariffs and Trade (GATT or "the Agreement") launched the Uruguay Round, its most ambitious series of Multilateral Trade Negotiations. Among the fifteen different negotiating groups, the agricultural trade group was considered not only the most important, but also the most contentious. It was considered the most important because a number of participating countries pointed out that failure to reach an agreement on agriculture would block an agreement in any of the other fourteen fields; it was considered the most contentious because domestic agricultural policies remained virtually unchallenged during the forty-five years of GATT, causing serious international trade distortions. Although one hundred eight countries are currently participating in the Uruguay Round, the lack of agreement on agriculture between two participants, the United States (U.S.) and the European Community (EC or Community), is the focus of attention and has stalled the Round since December 1990, threatening the very existence of the GATT as a trade organization.

Much is at stake: collapse of the Uruguay Round may lead to a loss of \$1 trillion in increased economic output for both the United

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† Master of Dutch Law Groningen State University, The Netherlands (1988); LL.M. University of Arkansas School of Law (1992). I thank J.W. Looney, P.J. Teunissen, Eric Wailes and especially John Harbison for providing valuable comments on earlier versions of this essay.

‡ Palmeter, *Agriculture and Trade Regulation: Selected Issues in the Application of U.S. Antidumping and Countervailing Duty Laws*, 23 J. WORLD TRADE 47 (1989).

States and the EC.<sup>1</sup> The developing countries will also be substantial losers. Because they rely more than anyone else on agricultural exports, agricultural trade liberalization will benefit developing nations most.<sup>2</sup> Moreover, these negative effects of the failure to achieve agreement may be intensified by increased protectionism and regional trade bloc formation on a global scale, creating more trade barriers and trade distortions. In short, no one will gain by a GATT failure.

Nevertheless, the Uruguay Round is close to collapse. Because the disagreement on agricultural trade liberalization is most acute between the United States and the EC, a relevant and obvious question is which of the two is to blame. U.S. politicians and negotiators mainly argue that the EC is solely responsible for the fact that a compromise on agriculture has not yet been reached.<sup>3</sup> Although the Community indeed has been reluctant to modify its controversial Common Agricultural Policy (CAP), this passing of the blame to the EC not only over-simplifies the complexities of agricultural trade negotiations, but also overlooks the history and origin of the GATT, the EC and its CAP, as well as the Uruguay Round itself. In each of these entities, the U.S. historically played an essential role, and helped lay the foundation for the present situation by imposing a number of important constraints on the negotiating process in the Uruguay Round with regard to agriculture. Additionally, in May 1992, the EC adopted a far-reaching overhaul plan that substantially reforms the CAP.

This article identifies and analyzes the main constraints on agricultural trade liberalization in the current GATT Uruguay Round

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<sup>1</sup> Estimation of U.S. Trade Representative Carla Hills. See *Uruguay Round of Multilateral Talks Tops U.S. Trade Agenda for 1991 as Administration, Congress Also Prepare to Deal with Range of Other Issues*, 8 INT'L TRADE REP. (BNA) 62 (Jan. 9, 1991) (loss to occur over ten years).

<sup>2</sup> The overall net effect of agricultural trade liberalization for the developing countries is expected to be positive. Consumers in Third World countries, however, will be worse off as a result of higher commodity prices, as will be the net food importing developing countries. See, e.g., IAN GOLDIN & ODIN KNUDSEN (eds.), *AGRICULTURAL TRADE LIBERALIZATION: IMPLICATIONS FOR DEVELOPING COUNTRIES* (1990); B. KRISOFF, J. SULLIVAN, J. WAINIO & B. JOHNSON, *AGRICULTURAL TRADE LIBERALIZATION AND DEVELOPING COUNTRIES* (U.S. Dep't of Agric., 1990).

<sup>3</sup> For example, Clayton Yeutter, Counselor to the President, former U.S. Trade Representative, and U.S. Secretary of Agriculture during the crucial Ministerial meeting in Brussels (December 1990) puts the responsibility for the failing Uruguay Round exclusively on the EC. *USDA Preparing \$1 Billion Increase in Export Subsidies if GATT Talks Fail*, 9 INT'L TRADE REP. (BNA) 572 (Apr. 1, 1992). In addition, the United States Senate signed a letter to President Bush saying: "The refusal of the EC to make meaningful commitments in those (GATT) negotiations has been the primary stumbling block to progress in the Uruguay Round." Scheid, *Senators Urge Retaliation Against EC Oilseed Policy*, FEEDSTUFFS, Apr. 29, 1991, at 4. For an overview of corresponding opinions of the U.S. executive and the American commodity organizations, see *Review of the Uruguay Round of Multilateral Trade Negotiations under the General Agreement on Tariffs and Trade: Hearing before the Subcomm. on Department Operations, Research, and Foreign Agriculture of the House Comm. on Agriculture*, 102d Cong., 1st Sess. (1991).

from a strictly European perspective. However, today can never be fully understood without an understanding of yesterday. Therefore, the identification and analysis of the constraints needs to be placed in the context of a historical foundation. Accordingly, Part 1 gives an overview of the origin and development of the GATT and the position of agriculture within the Agreement. The next two parts will shift the focus to the EC. Part 2 introduces the EC and addresses the Community's position in the GATT. After a brief description of the origin and development of the CAP, Part 3 provides a fairly detailed description of the EC's agricultural policy, using the grain market as an example. The recent agricultural reform package adopted by the Community will be introduced in this section. This part concludes with a number of important notions necessary to fully understand the CAP. Part 4 addresses the developments on agriculture in the Uruguay Round so far. Part 5 identifies and analyzes the constraints that have prevented an agreement on agriculture in the GATT Uruguay Round. Finally, Part 6 identifies a number of current and future developments in Europe and contains a proposal to break the current stalemate in the Uruguay Round.

## I. The General Agreement on Tariffs and Trade

### A. Background and History

An international trade organization was planned originally to be part of the preparatory negotiations to design a new postwar international economic system. At the Bretton Woods conference in 1944, devoted to monetary and banking issues, the representatives of forty-four nations established the charters of the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD, commonly known as the World Bank). However, the conference failed to take up the problems of trade, although it recognized the need for a comparable institution for trade to complement the other institutions.<sup>4</sup>

In 1945 the United Nations (U.N.) was formed. The Economic and Social Council (ECOSOC), a United Nations subordinate body, adopted a resolution at its initial meeting calling for a conference to draft a charter for an International Trade Organization (ITO).<sup>5</sup> The ITO was to be the equivalent of the IMF in the area of trade, overseeing a system of international trade rules.<sup>6</sup> In 1947-48, the representatives of fifty-three nations drafted the Havana Charter, which would have set up such an organization.<sup>7</sup> During the negotiation of

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<sup>4</sup> JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 31-32 (1989).

<sup>5</sup> *Id.* at 32.

<sup>6</sup> JOAN E. SPERO, *THE POLITICS OF INTERNATIONAL ECONOMIC RELATIONS* 94 (3d ed. 1985).

<sup>7</sup> DETLEV F. VAGTS, *TRANSNATIONAL BUSINESS PROBLEMS* 11 (1988).

the Havana Charter, a smaller group of nations put together a temporary or stop-gap agreement to put into immediate operation many of the Charter's terms. This General Agreement on Tariffs and Trade (GATT) became effective on January 1, 1948.<sup>8</sup>

Although the U.S. was a principal initiator of both the Havana Charter and the ITO, the United States Congress was unwilling to join more international organizations. United States ratification of the Charter could not be secured.<sup>9</sup> When the United States withdrew, the Charter died, along with the idea of an ITO.<sup>10</sup> As a result, GATT, which initially was to be a *temporary* agreement, became by default the expression of the international consensus on trade.<sup>11</sup> Forty-five years later, this agreement, intended to be effective only in the interim, is still in place.

### B. Basic Provisions and Principles

In its Preamble, the GATT member states (called contracting parties) agreed to enter into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.<sup>12</sup> The principal purpose of GATT was to promote a freer and more orderly international trading system.<sup>13</sup> GATT was created to reduce barriers to international trade, not to completely eliminate them. Accordingly, GATT does not aim at completely free trade, but aims at freer trade,<sup>14</sup> and as such, has been relatively successful.<sup>15</sup> GATT is both a written set of rules for the conduct of international trade and an organization that administers those rules.

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<sup>8</sup> *Id.* at 11-12.

<sup>9</sup> Although the Havana Charter was never submitted to Congress, Congress did indeed prevent the United States from adhering. The Charter faced opposition from the traditionally high tariff policy of the Republican Party, from both the protectionists, who felt that the Charter went too far, and the liberals, who felt that it did not go far enough, and finally from business groups opposing compromises on free trade and afraid of increased government involvement in trade. After delaying for three years, the Truman administration decided in 1950 that the Charter would not be submitted to Congress, where it would face inevitable defeat. SPERO, *supra* note 6, at 95.

<sup>10</sup> SPERO, *supra* note 6, at 95.

<sup>11</sup> SPERO, *supra* note 6, at 95.

<sup>12</sup> THE GENERAL AGREEMENT ON TARIFFS AND TRADE, *opened for signature* Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 187, pmb [hereinafter "GATT"].

<sup>13</sup> Lyn MacNabb & Robert Weaver, Comment, *The General Agreement on Tariffs and Trade (GATT): Has Agriculture Doomed the Uruguay Round?*, 26 LAND & WATER L. REV. 761 (1991) (discussing failed negotiations of Uruguay Round).

<sup>14</sup> VAGTS, *supra* note 7, at 12.

<sup>15</sup> GATT membership has risen from the 23 original founders to 108 contracting parties, accounting for over 90% of world trade. The tariffs on manufactured goods have fallen from an average of 40% (1947) to roughly 5% today. Between 1950 and 1975, the volume of trade expanded by 500%, against an increase of global output of 220%. The GATT was highly instrumental in this spectacular change. See *The ITO That Never Was*, ECONOMIST, Sept. 22, 1990 at 7.

The basic GATT provisions and principles can be summarized as follows:

(1) The major rule for implementing freer trade is the GATT principle of *non-discrimination*, also known as the *most favored nation* (MFN) provision. Every contracting party should be treated as favorably as the most favored. This is the general rule of equal treatment for all.<sup>16</sup>

(2) A second element of the non-discrimination principle is that imported products must receive *national treatment* once imported into the territory of another contracting party. Imports are to be accorded treatment no less favorable than similar domestic products.<sup>17</sup>

(3) A third principle is that of *tariffication*, with the goal to replace non-tariff barriers (quantitative restrictions, for instance)<sup>18</sup> with tariffs,<sup>19</sup> and to promise not to raise them;<sup>20</sup> in other words, to bind those tariffs at fixed maximum levels.<sup>21</sup> Tariff levels agreed upon under GATT obligate each contracting party.<sup>22</sup> Because the impact of tariffs is easier to appraise, tariffication will create a trade environment of greater certainty and openness.

(4) Contracting parties should meet from time to time to engage in *multilateral trade negotiations* (MTN's), directed to the substantial reduction of tariffs and other charges.<sup>23</sup>

(5) Finally, the Agreement contemplates *settlement of disputes* through consultation, conciliation and, as a last resort, dispute settlement procedures.<sup>24</sup>

### C. The GATT Dispute Settlement Procedure

To truly understand the character of GATT, it is necessary to

<sup>16</sup> "[A]ny advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." GATT, *supra* note 12, art. I(1).

<sup>17</sup> GATT, *supra* note 12, art. III(4).

<sup>18</sup> Non-tariff barriers are "[r]egulations, other than traditional customs duties, used by governments to restrict imports from, and exports to, other countries." Examples are import quotas, licensing, variable levies and health and sanitary standards. These types of non-tariff trade barriers have increased after World War II, while tariff rates have declined significantly. KATHRYN L. LIPTON, U.S. DEP'T OF AGRIC., AGRICULTURE TRADE AND THE GATT: A GLOSSARY OF TERMS 30 (Agriculture Info. Bull. No. 625, 1991) (italics omitted).

<sup>19</sup> A tariff is a "tax imposed on commodity imports by a government. A tariff may be either a fixed charge per unit of product imported (specific tariff) or a fixed percentage of value (ad valorem tariff)." *Id.* at 40 (italics omitted).

<sup>20</sup> GATT, *supra* note 12, art. XI(1).

<sup>21</sup> For an explanation of bound tariffs, see *infra* note 165.

<sup>22</sup> GATT, *supra* note 12, art. II.

<sup>23</sup> GATT, *supra* note 12, art. XXVIII bis(1). The first GATT Round of MTN's was held in Geneva (Switzerland, 1947), the second in Annecey (France, 1949), the third in Torquay (England, 1951) and the Fourth again in Geneva (1956). Subsequent Rounds were the Dillon Round (1961-62), the Kennedy Round (1964-67), the Tokyo Round (1974-79), and the current Uruguay Round (launched in 1986).

<sup>24</sup> GATT, *supra* note 12, arts. XXII-XXIII.

make the distinction between the GATT as an organization and the GATT as a treaty. GATT, though initially merely a multilateral agreement, is now considered a full-time international organization.<sup>25</sup> The contracting parties have constructed a large organization with many branches, headed by the executive GATT Council, the body through which the contracting parties act. A significant implication of the history of the origin of GATT, however, is that it never became a "specialized agency"<sup>26</sup> affiliated with the U.N., like the IMF and the World Bank. Therefore, GATT as an organization functions outside the framework of the U.N. and lacks the ability to put pressure on its contracting parties the way U.N. organizations often can, through use of its mechanisms.<sup>27</sup> Most of the specialized agencies have designed means whereby the decisions of the particular organization can be rendered virtually binding upon its member states.<sup>28</sup> GATT, on the contrary, has no independent authority to act nor any independent enforcement powers.<sup>29</sup> The Agreement scarcely mentions voting, rulemaking, finance and administration,<sup>30</sup> thus emphasizing its lack of legal structure and enforcement.

Whereas the Havana Charter recognized the jurisdiction of the International Court of Justice (ICJ) in certain circumstances, no such provision is included in the GATT. Consequently, no dispute under GATT has ever been taken to the ICJ.<sup>31</sup> Instead, the Agreement provides for its own dispute settlement procedure.<sup>32</sup> A complaining party must first attempt to settle a dispute with another contracting party through consultations<sup>33</sup> and conciliation.<sup>34</sup> If consultations fail, a complaining party can request the creation of a GATT panel of independent experts to investigate the complaint. The decision to establish a panel is made by a consensus that includes the disputing members. The GATT panel requests information from the parties

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<sup>25</sup> KENNETH W. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 335-39 (1970).

<sup>26</sup> Specialized agencies of the U.N. are organizations established by intergovernmental agreement and have wide international responsibilities in economic, social, cultural, educational, health and related fields. Such an organization becomes a specialized agency by means of an agreement made by the agency with the Economic and Social Council and approved by the General Assembly (GA). Most of the specialized agencies agree to consider recommendations made by the GA, and many of them are given a right to request opinions from the International Court of Justice on questions falling within their competence. Although most of the specialized agencies have no power to make decisions binding on their members, their constituent treaties often provide for means of putting pressure on member states to act in a particular way. See MICHAEL BARTON AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 196 (5th ed. 1984).

<sup>27</sup> *Id.* at 197.

<sup>28</sup> *Id.* at 123.

<sup>29</sup> BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 494 (1991).

<sup>30</sup> MacNabb & Weaver, *supra* note 13, at 763.

<sup>31</sup> JACKSON, *supra* note 4, at 91.

<sup>32</sup> GATT, *supra* note 12, arts. XXII-XXIII.

<sup>33</sup> GATT, *supra* note 12, art. XXII.

<sup>34</sup> GATT, *supra* note 12, art. XXIII(1).



and writes a report of its conclusions. The report is given to the disputing parties in the hope that they will find a solution using the panel report. If a bilateral settlement is not reached, however, the panel report is submitted to the Council of contracting parties. The Council decides whether or not to adopt the report. The decision is made by a consensus that includes the disputing parties. If the Council adopts the panel report, the charged party can decide whether to comply and how to comply. If the complaining party is not satisfied with the action or inaction of the charged party, it may raise the problem again with the contracting parties. As a last resort, the GATT Council may authorize the complaining party to retaliate against the charged party.<sup>35</sup>

The procedure has often been called complicated, cumbersome and inadequate.<sup>36</sup> Progress can be stalled at various stages of the procedure. Consultations can be delayed by an interested party simply by their refusal to cooperate. Likewise, a single party can delay the creation of a GATT panel by opposing its establishment in the GATT Council. Even when the procedures are completed, a single contracting party, including a party to the dispute to whom the panel report is adverse, can indefinitely block the adoption of the panel report in the GATT Council. Finally, there is no right of appeal of an adverse panel report.<sup>37</sup>

Nevertheless, for the most part, the cases have resulted in panel reports adopted by the GATT Council, which eventually were accepted by the losing party in the panel procedure.<sup>38</sup> The implementation of these adopted panel reports by the losing states, however, often is still a problem. In most instances, cases blocked by a contracting party include agriculture and the European Community.<sup>39</sup>

#### D. GATT and Agriculture

GATT rules cover trade in both agricultural and industrial products. It has been suggested that one of the objectives in the multilat-

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<sup>35</sup> GATT, *supra* note 12, art. XXII(2).

<sup>36</sup> CARTER & TRIMBLE, *supra* note 29, at 495.

<sup>37</sup> See Judith H. Bello & Alan F. Holmer, *U.S. Trade Law and Policy Series No. 16: Settling Disputes in the GATT: The Past Present and Future*, 24 INT'L LAW. 523 (1990). In light of these shortcomings, the Uruguay Round includes a negotiating group on dispute settlement, which attempts to improve the system. See *id.* 523-25.

<sup>38</sup> John H. Jackson, *Dolphins and Hormones: GATT and the Legal Environment for International Trade After the Uruguay Round*, 14 U. ARK. LITTLE ROCK L. J. 429, 450 (1992).

<sup>39</sup> Famous examples of disputes between the U.S. and the EC on agricultural issues are the "Chicken War" and the pasta-citrus dispute of the 1960s. In both cases, the EC ignored adverse GATT panel reports. The parties eventually negotiated settlement outside of the GATT process. See also *infra* note 167 and accompanying text. More recently, the need for improvement is painfully illustrated by the present soybean dispute between the United States and the EC. The Community refuses to comply with two GATT panel findings that EC oilseeds subsidies are a violation of GATT. The United States threatens to retaliate. See *U.S. to Proceed with Sanctions Against EC over Oilseeds Dispute if no Offer Received*, 9 INT'L TRADE REP. (BNA) 961 (June 3, 1992).

eral trade negotiations is to "make GATT rules apply to agriculture."<sup>40</sup> The fact is that GATT rules *do* apply to agriculture. However, the rules relating to agriculture are inconsistent with the way GATT deals with industrial products.<sup>41</sup> Agriculture has been explicitly excluded from the tight disciplines that govern industrial products.<sup>42</sup> Moreover, the GATT seems to accept agricultural trade barriers.<sup>43</sup> Furthermore, although agricultural trade issues were discussed at a number of MTN Rounds of the GATT, the negotiations have produced few results.

During the negotiation of the Havana Charter, the U.S. delegation recognized that the United States Senate would not ratify an international agreement that would force the U.S. to dismantle or suspend its agricultural programs. Thus, the U.S. insisted on special rules for agriculture, even though special treatment was strongly opposed by a number of other countries.<sup>44</sup>

As a result, the GATT rules were written to fit existing agricultural support programs, whereas for industrial products, contracting parties often brought their domestic rules in line with the GATT rules. New GATT rules have been adopted and interpreted to fit national agricultural programs.<sup>45</sup> For instance, agreement provisions allowing agricultural exceptions from the ban on export subsidies and quantitative restrictions were written to fit U.S. agricultural programs that were in place at the time.<sup>46</sup> Article XVI of the GATT prohibits the use of export subsidies for non-primary products, but does not extend this prohibition to agricultural commodities, which are mostly primary products.<sup>47</sup> As far as farm products are concerned, the contracting parties are merely directed to *seek to avoid* subsidies on the export of primary products. Primary products may not be subsidized to acquire more than an equitable share of world export trade in that product.<sup>48</sup> However, "equitable share" is not defined in the Agreement, and thus is open for debate.

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<sup>40</sup> DALE E. HATHAWAY, *AGRICULTURE AND THE GATT: REWRITING THE RULES* 103 (1987).

<sup>41</sup> *Id.*

<sup>42</sup> Filipek, *Agriculture in a World of Comparative Advantage: The Prospects for Farm Trade Liberalization in the Uruguay Round of GATT Negotiations*, 30 HARV. INT'L L.J. 136 (1989). For a description of the disciplines governing industrial products, see *supra* notes 16-22 and accompanying text.

<sup>43</sup> Rose & Lansing, *Third World Agricultural Development: A Proposal*, 19 N.Y.U. J. INT'L L. & POL. 71 (1986).

<sup>44</sup> HATHAWAY, *supra* note 40, at 103.

<sup>45</sup> HATHAWAY, *supra* note 40, at 103-04.

<sup>46</sup> HATHAWAY, *supra* note 40, at 109.

<sup>47</sup> Primary products are products which have not gone through any kind of manufacturing process. In the agricultural context, all trade in raw commodities is trade in primary products. For example, tomatoes are primary products, but canned tomato sauce is a non-primary product.

<sup>48</sup> GATT, *supra* note 12, art. XVI Section B(3). This article was adopted and put in the Agreement in 1955. HATHAWAY, *supra* note 40, at 105.

In addition, Article XI of the GATT contains two important agricultural exceptions to its general prohibition of quantitative restrictions. First, it excepts import and export restrictions necessary to the application of standards or regulations for the classification, grading and marketing of commodities in international trade.<sup>49</sup> This exception is crucial to the U.S. system of marketing orders of fruits and vegetables, which may be considered a system of non-tariff trade barriers.<sup>50</sup> Furthermore, it permits the use of quotas on agricultural imports to protect domestic farm programs.<sup>51</sup> The quota exception allows import controls on products that have domestic price support and production-control programs.<sup>52</sup> The U.S. sugar quotas are an example. Article XI imposes an important restriction, however, on the application of quotas to agricultural products. Imports may not be restricted unless the domestic production is restricted to approximately the same extent as the imported product.<sup>53</sup>

Even after these rules were written, largely to fit U.S. domestic programs, the U.S. insisted in 1955 upon a "temporary" waiver from applicable GATT provisions requiring the restrictions on domestic production. Section 22 of the Agricultural Adjustment Act (as amended in 1951) requires import restrictions on agricultural products that interfere with the domestic farm programs notwithstanding the provisions of any "trade agreement or other international agreement heretofore or hereafter entered into by the United States."<sup>54</sup> Today, the waiver is still in place and is highly controversial.<sup>55</sup> Moreover, the breadth of the waiver granted to the most vocal pro-

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<sup>49</sup> GATT, *supra* note 12, art. XI(2)(b).

<sup>50</sup> Brosch, *Impact and Implications of the Current GATT Talks*, in CONVENTION HANDBOOK, 12TH ANNUAL MEETING OF THE AALA 33-3 (1991). A marketing order is a "means authorized by legislation for agricultural producers to promote orderly marketing and to collectively influence the supply, demand, price, or quality of particular commodities." LIPTON, *supra* note 18, at 18. The (often) very detailed quality, labeling or packaging standards set forth in marketing orders are hard to meet for potential importers and thus tend to limit access of foreign produce to the U.S. market.

<sup>51</sup> GATT, *supra* note 12, art. XI(2)(c). An import quota is the "maximum quantity or value of a commodity allowed to enter a country during a specified time period." LIPTON, *supra* note 18, at 23.

<sup>52</sup> HATHAWAY, *supra* note 40, at 109. Price-support programs are "[g]overnment programs that aim to keep farm prices received by participating producers from falling below specific minimum levels." Price support programs can be carried out through nonrecourse loans to farmers, direct purchases or other government payments. Most major U.S. commodities are supported through price-support programs. LIPTON, *supra* note 18, at 33-34.

<sup>53</sup> GATT, *supra* note 12, art. XI(2)(c)(i). The contracting parties, however, have mostly ignored this provision.

<sup>54</sup> For a more in depth treatment of Section 22 and agriculture, see Rex J. Zedalis, *Agricultural Trade and Section 22*, 31 DRAKE L. REV. 587-620 (1981-82). Through the Trade Agreements Extension Act (1951), Congress amended section 22 to provide that no international agreement entered into by the United States shall be applied in a manner inconsistent with the authority of the U.S. President to impose import limitations. In effect, this provision directs that obligations under the GATT shall not be followed to the extent that they would be inconsistent with section 22. Thus, section 22 prevails over all other inconsistent bilateral and multilateral international commitments. *Id.* at 616.

<sup>55</sup> HATHAWAY, *supra* note 40, at 109.

ponent of freer international trade constituted a grave blow to GATT's prestige.<sup>56</sup>

Finally, Article III of the Agreement provides an exception from the "national treatment" disciplines by permitting subsidies that are given exclusively to domestic producers. Although not limited by its term to agriculture, Article III has broad application in the agricultural sector and arguably makes a number of domestic farm support programs consistent with GATT. For example, this provision makes U.S. practices such as deficiency payment programs (government payments to farmers) compatible with GATT provisions.<sup>57</sup>

## II. The European Community

### A. Background and History

In 1957, six sovereign states of Western Europe adopted the Treaty of Rome<sup>58</sup> and created the European Economic Community or Common Market (commonly referred to as the European Community or EC).<sup>59</sup> Currently, the EC has twelve member states, while applications for membership from a number of other states are being considered.<sup>60</sup> The ultimate goal is free movement of capital, goods, persons and services within the Community (a process that is supposed to be completed at the end of the magic year "Europe 1992"), together with a common tariff and commercial policy for states outside the Community.<sup>61</sup> Most important for the scope of this article is that the Community adopted a Common Agricultural Policy.<sup>62</sup>

The EC was initially created with full U.S. support to rebuild Europe politically and economically from the ruins of the Second World War. The then new Federal Republic of Germany had to be incorporated in economic and political arrangements with the rest of

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<sup>56</sup> DAM, *supra* note 25, at 260.

<sup>57</sup> GATT, *supra* note 12, art III.8 (b). Brosch, *supra* note 50, at 33-2. Deficiency payments are government payments to farmers who participate in price-support programs. The payments are "based on the difference between the price level established by law (target price) and either the market price" or a government loan rate, whichever is higher. LIPTON, *supra* note 18, at 11. See also *infra* note 210 and accompanying text.

<sup>58</sup> TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [hereinafter EEC Treaty]. The six initial members of the EC were Belgium, France, Italy, Luxembourg, the Netherlands, and West Germany.

<sup>59</sup> Technically, there are three European Communities: the European Coal and Steel Community (ECSC) established in 1951, the European Economic Community (EEC) established in 1957 and the European Atomic Energy Community (Euratom), also established in 1957. A Merger Treaty, officially known as THE TREATY ESTABLISHING A SINGLE COUNCIL AND A SINGLE COMMISSION OF THE EUROPEAN COMMUNITIES, entered into force in 1965. This treaty did not merge the Communities themselves, but did merge the respective Community institutions. See T. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW: AN INTRODUCTION TO THE CONSTITUTIONAL AND ADMINISTRATIVE LAW OF THE EUROPEAN COMMUNITY 3-4 (1986).

<sup>60</sup> Denmark, Ireland, and the United Kingdom joined the EC in 1973; Greece joined in 1981; Portugal and Spain joined in 1986. HARTLEY, *supra* note 59, at 5-6.

<sup>61</sup> EEC Treaty, *supra* note 58, art. 3(a)-(c).

<sup>62</sup> EEC Treaty, *supra* note 58, arts. 38-47.

Europe.<sup>63</sup> An important objective was to forge a closer bond between the nations and people of Western Europe.<sup>64</sup> The main feature of the EC is the supra-national character (or supremacy) of EC legislation that has *direct effect*. Community provisions are directly effective if they become binding on the member states independent of the implementation by national legislators. Consequently, directly effective EC legislation prevails over national law in the event of a conflict. Although the concepts of direct effect and supremacy are not expressed in the Treaty of Rome, the European Court of Justice, one of the Community's institutions,<sup>65</sup> established both doctrines in the early 1960s.<sup>66</sup> The Court decides on a case-by-case basis whether Community legislation has direct effect.

### B. GATT and the European Community

An important exemption to the principle of most favored nation treatment and other GATT provisions is formulated in Article XXIV of the Agreement. This article provides that the Agreement shall not prevent the formation of customs unions or free trade areas and furnishes a very large loophole for a wide variety of preferential agreements.<sup>67</sup> The EC based its Community on the customs union exception to the Agreement.<sup>68</sup> Because of its status as a customs

<sup>63</sup> CARTER & TRIMBLE, *supra* note 29, at 504-05.

<sup>64</sup> RICHARD PLENDER, PLENDER AND USHER'S CASES AND MATERIALS ON THE LAW OF THE EUROPEAN COMMUNITIES 1 (1989).

<sup>65</sup> The institutional structure of the EC consists of the Commission, the Council of Ministers, the European Parliament, and the European Court of Justice. *The Commission* (the EC's executive branch) represents the Community's interest and formulates proposals for new Community policies, mediates between the member states, co-ordinates national policies and oversees the execution of existing Community Policies. It consists of independent Commissioners, not being representatives of their national governments.

*The Council* (the legislative branch) is the body representing the member states interests. It takes the final decision on most EC legislation, concludes agreements with foreign countries and, together with the Parliament, decides on the Community budget. It consists of the delegates of the member states, each state being represented by a government minister who is responsible for the matter being discussed.

*The Parliament* is intended to represent the people of the Community. In 1976, agreement was reached on direct European elections. Members of the Parliament sit according to their party, not their country. Most of the functions of the Parliament are advisory (the Parliament only needs to be consulted), and there is hardly any legislative power. HARTLEY, *supra* note 59, at 8-21.

Finally, *the Court* (the judicial branch) ensures the enforcement of Community law, acts as a referee between member states and Community institutions as well as between Community institutions themselves and protects the right of the individuals. *Id.* at 26. The Court established in its case law the doctrines of direct effect of Community law in the legal systems of the individual member states and supremacy of Community law over national law.

<sup>66</sup> Case 26/62, NV Algemene Transport-en Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 1, 1963 C.M.L.R. 105. See also case 6/64 Flaminio Costa v. ENEL, 1964 E.C.R. 585, 1964 C.M.L.R. 425 (1964).

<sup>67</sup> JACKSON, *supra* note 4, at 141.

<sup>68</sup> "The Community shall be based upon a customs union", EEC Treaty, *supra* note 58, art. 9(1). A customs union is a form of regional economic integration in which all barriers on trade (like tariffs and quotas) between member states are removed, and a com-

union under GATT, the EC member states need not grant the Community's internal trade privileges to the other GATT contracting parties.<sup>69</sup>

The EC's accession to GATT in 1963 entailed complex negotiations. All of the EC member states were individual contracting parties to GATT before the establishment of the Community. After the establishment of the EC, the European Court decided that the Community assumed the powers previously exercised by its member states in the area governed by the GATT.<sup>70</sup> It may be argued that the EC could itself become a contracting party to GATT.<sup>71</sup> The Community is charged with most of the activities of the member states in GATT. The Treaty of Rome states that the Commission, a Community institution, is to ensure the maintenance of appropriate relations with the GATT.<sup>72</sup> In fact, in the field of external trade relations, the member states have now delegated their authority to the Community.<sup>73</sup> Moreover, it is commonly accepted that the Community's power over commercial policy is exclusive and leaves no room for individual member states.<sup>74</sup> Consequently, the EC Commission provides a mission at GATT, which has the exclusive authority to negotiate on trade matters for the member states.<sup>75</sup> The actual conclusion of a GATT agreement, however, is to be undertaken by the Council of Ministers, representing the member states.<sup>76</sup> Thus, although the Community negotiates in GATT, the member states make the ultimate and politically sensitive decision of whether or not to accept a trade agreement.

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mon barrier is established on trade with third countries. Ritson, *Introduction to the CAP, in THE COMMON AGRICULTURAL POLICY AND THE WORLD ECONOMY: ESSAYS IN HONOUR OF JOHN ASHTON I* (C. RITSON & D. HARVEY eds. 1991). Clearly, the EC has evolved beyond the stage of a customs union into a common market. A common market is similar to a customs union, but, in addition, provides for the free movement of all factors of production, capital, goods, personnel, and services. LIPTON, *supra* note 18, at 7, 11. Moreover, the EC is well on its way to an Economic and Monetary Union (EMU) with a common economic and monetary policy, a single currency and European Central Bank. See, e.g., *Economic and Monetary Union*, available in LEXIS, Europe Library, Alleur File (Feb. 27, 1992). For current setbacks on the way to further economic and monetary integration, see *infra* notes 258-60 and accompanying text.

<sup>69</sup> For a more in depth treatment of the relation between the EC and the GATT, see Frederick M. Abbott, *GATT and the European Community: A Formula for Peaceful Coexistence*, 12 MICH. J. INT'L L. 1-58 (1990); MEINHARD HILF, FRANCIS G. JACOBS & ERNST U. PETERSMANN (eds.), *THE EUROPEAN COMMUNITY AND GATT* (1986).

<sup>70</sup> Cases 21-24/72, *International Fruit Company N.V. v. Produktschap voor Groenten en Fruit*, 1972 E.C.R. 1219, 2 C.M.L.R. 1 (1975).

<sup>71</sup> JACKSON, *supra* note 4, at 47.

<sup>72</sup> EEC Treaty, *supra* note 58, art. 229.

<sup>73</sup> EEC Treaty, *supra* note 58, art. 113.

<sup>74</sup> Schwartz, *Towards a European Foreign Policy: Legal Aspects*, reprinted in CARTER & TRIMBLE, *supra* note 29, at 523. The problem, however, is the exact definition of "common commercial policy" in the Treaty. The scope of art. 113 is subject to basic disagreement between the Commission (representing the Community's interest) and the Council (representing the interest of the member states). *Id.*

<sup>75</sup> JACKSON, *supra* note 4, at 47.

<sup>76</sup> JACKSON, *supra* note 4, at 81.

### III. The Common Agricultural Policy of the EC

#### A. Background and History

The Treaty of Rome required the Common Market to "extend to agriculture and trade in agricultural products."<sup>77</sup> In the effort to create a Common Market, it became clear to the six initial member states of the Community (the Six) that agriculture could not be excluded, and moreover, that a common policy was needed.<sup>78</sup> At the time the Treaty of Rome was signed, more than twenty percent of the working population of the Six was employed in agriculture.<sup>79</sup> European farms were small and fragmented,<sup>80</sup> agricultural income was low, and the geographical area of the Six included many differing climatic regions.<sup>81</sup> In short, agriculture was a problem sector.

Because of the peculiar nature of agriculture and its problematic character,<sup>82</sup> national governments in Europe heavily supported their agricultural sectors, just as most other countries did.<sup>83</sup> Before the creation of the CAP each EC member state had its own agricultural policy.<sup>84</sup> The different systems of the Six worked as much against each other as against imports from elsewhere.<sup>85</sup> To assure the free movement of agricultural products and commodities within the Six, it was necessary to reconcile an estimated thirty thousand different rules and regulations relating to agriculture.<sup>86</sup> A common policy in the field of agriculture was a necessary vehicle to create a free and common market for agricultural products. In addition, numerous wars and conflicts in Europe over the centuries often caused serious food shortages. The CAP was considered a useful instrument to increase agricultural production and to attain food security by self-sufficiency in food production.<sup>87</sup> It would also reduce the Community's

<sup>77</sup> EEC Treaty, *supra* note 58, art. 38(1).

<sup>78</sup> Ritson, *supra* note 68, at 1.

<sup>79</sup> BRIAN E. HILL, *THE COMMON AGRICULTURAL POLICY: PAST, PRESENT AND FUTURE* 20 (1984).

<sup>80</sup> The average farm size was only about five hectares (or twelve acres). OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES, *A COMMON AGRICULTURAL POLICY OF THE 1990s* 14 (5th ed. 1989).

<sup>81</sup> HILL, *supra* note 79, at 21.

<sup>82</sup> The agricultural sector differs from other sectors of the economy because of its dependence on resources (land and water), climate, pests, diseases and time (growing season).

<sup>83</sup> A number of specific reasons can be identified why governments traditionally intervene in agriculture: (1) to support and stabilize farm prices and income; (2) to ensure sufficient food supply at reasonable prices (food security); (3) to ensure the safety of food supply; (4) to protect the capacity of agriculture by conserving the soil. RONALD K. KNUTSON, J.B. PENN & WILLIAM BOEHM, *AGRICULTURAL & FOOD POLICY* 14-15 (2d ed. 1990).

<sup>84</sup> HILL, *supra* note 79, at 18-19.

<sup>85</sup> Gavin Strang, *E.E.C. Agricultural Policy*, in *THE YEARBOOK OF WORLD AFFAIRS* 1979 55, 56 (1979).

<sup>86</sup> ROSEMARY FENNELL, *THE COMMON AGRICULTURAL POLICY OF THE EUROPEAN COMMUNITY: ITS INSTITUTIONAL AND ADMINISTRATIVE ORGANIZATION* 6 (1979).

<sup>87</sup> STANLEY ANDREWS, *AGRICULTURE AND THE COMMON MARKET* 13-14 (1973).

dependence on imports and the unpredictable world market.<sup>88</sup>

Finally, the seeming incompatibility between the two largest initial member states, France and Germany, needed to be resolved. It became clear that France, a major low-cost agricultural producer, would never agree to open its market for industrial goods if Germany, with its vast, modern and efficient industrial complex, would not open its market for agricultural products. The CAP gave France what it desired without harming the interests of Germany.<sup>89</sup>

### B. *The Common Agricultural Policy*

Because of the social, economic and political importance of agriculture, the EC adopted a Common Agricultural Policy. This CAP is a set of regulations by which the member states of the EC seek to merge their individual agricultural programs into a unified effort to reach certain objectives.<sup>90</sup> The CAP defines principles, guidelines and mechanisms for controlling agricultural markets and for reshaping farming practices and structures in the Community.<sup>91</sup> It is generally viewed as the world's most highly developed form of supra-national law and institutional regulation.<sup>92</sup>

The Treaty of Rome mentions five broad objectives of the CAP:

- (a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilization of the factors of production, in particular labour;
- (b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;
- (c) to stabilize markets;
- (d) to assure the availability of supplies; and
- (e) to ensure that supplies reach consumers at reasonable prices.<sup>93</sup>

An alternative way of characterizing the CAP is by its three basic principles: the single market, Community preference, and financial solidarity. These were formulated somewhat obscurely during the early 1960s, but eventually provided the basis of agricultural policy in Europe. The EC has pointed out numerous times that any reform of the CAP must not call into question the three principles upon which it was founded.<sup>94</sup>

The principle of a *single market*, or market unity, means the free

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<sup>88</sup> *Agriculture, available in* LEXIS, Europe Library, Alleur File, at 4 (Feb. 13, 1992).

<sup>89</sup> P. J. G. KAPTEYN & P. VERLOREN VAN THEMAAT, *INLEIDING TOT HET RECHT VAN DE EUROPESE GEMEENSCHAPPEN* [Introduction to the Law of the European Communities] 418 (3rd ed. 1980).

<sup>90</sup> LIPTON, *supra* note 18, at 7. For a description of those objectives, see *infra* note 93 and accompanying text.

<sup>91</sup> *Agriculture, supra* note 88, at 2.

<sup>92</sup> IAN R. BOWLER, *AGRICULTURE UNDER THE COMMON AGRICULTURAL POLICY: A GEOGRAPHY* xi (1985).

<sup>93</sup> EEC Treaty, *supra* note 58, art. 39(1).

<sup>94</sup> Ritson, *supra* note 68, at 2.



movement of agricultural products within the Community, without any customs duties, equivalent charges or subsidies, or any other obstacles. It requires the common organization of commodity markets, the introduction of common prices, a uniform import and export policy at the EC's external borders, the harmonization of regulations, and stable currency parities.<sup>95</sup>

*Community preference* means that priority must be given to the sale of Community produce over imports from non-member states. Since these Community products are usually higher-priced than those on the world market,<sup>96</sup> a variable levy on cheaper imports from third countries was established to protect the internal market from low priced imports and excessive world market fluctuations.<sup>97</sup> Finally, *financial solidarity* means that the costs and benefits of the CAP should be shared by all concerned. Accordingly, the funds required to finance the CAP should be provided jointly by the member states, irrespective of which will benefit most from the expenditure on agriculture. Also, the income generated by the operation of the policy is part of the Community's resources.<sup>98</sup> The total EC budget is formed by the proceeds from customs duties, the variable import levies of the CAP, and a value added tax (VAT), currently 1.4%, imposed on the member states. Approximately two-thirds of the Community's budget is spent on agriculture.<sup>99</sup>

The European Agricultural Guidance and Guarantee Fund (the EAGGF) was created to put the principle of financial solidarity into practice. As its name indicates, EAGGF consists of two parts. The guarantee section finances Community expenditures under the market and price policies of the CAP and picks up sixty percent of the money spent on agriculture. The various types of intervention (such as the purchase and storage of commodities) and the export refunds are financed from this section of the fund.

The guidance section provides the resources for the common policy of agricultural structures.<sup>100</sup> This policy attempts to address the structural problems within and the disparities between different agricultural regions of the EC member states at a Community level. The structural policy aims at increasing production at small inefficient agricultural holdings, provides extra support for hill-farming

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<sup>95</sup> ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, NATIONAL POLICIES AND AGRICULTURAL TRADE: STUDY ON THE EUROPEAN COMMUNITY 60 (1987).

<sup>96</sup> For an explanation of the reasons for the choice for a system of high guaranteed prices above world market levels, see *infra* notes 148-57 and accompanying text.

<sup>97</sup> ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 95, at 61. For a discussion of the variable levy, see *infra* notes 119-22 and accompanying text.

<sup>98</sup> ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 95, at 61-62.

<sup>99</sup> *Id.* at 58.

<sup>100</sup> OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES, *supra* note 80, at 34-36.

and other less-favored areas in agriculture, offers early retirement for older farmers and retrains younger farmers willing to discontinue their operation.<sup>101</sup>

*C. The Market and Price Policies*

To achieve the goals of the CAP, formulated in the Treaty of Rome, the EC created a common organization of agricultural markets.<sup>102</sup> This organization consists of several different forms of market intervention which are specific to each sector of agricultural production. The extent of Community intervention varies by commodity. The diversity and complexity of the measures the CAP employs to implement the different forms of organization are immense.<sup>103</sup> Some of these measures are similar for all sectors, others are common to several sectors, while others apply to one sector only. Obviously, not every type of agricultural produce is available in European agriculture. In this context, the reader should be reminded that, despite its market and price policies, the EC is the world's biggest importer of agricultural products.

The common organization of the market in grains may be taken as the basic model of a fully developed Community-market organization. First, because grains are an important cash crop on a large number of farms in Europe,<sup>104</sup> the common organization of the market in grains was the first CAP support system to be adopted and worked out in depth. The arrangements adopted served as a model for other products requiring full support regimes.<sup>105</sup> Second, because grains are major cost components for the livestock industries, the common organization of the markets in pigmeat, poultrymeat and eggs is treated as auxiliary to the market in cereals.<sup>106</sup> Although dairying and beef production are mainly grass-based in Europe, grains are also a major cost item in these sectors.<sup>107</sup> Finally, because grains are easy to store and transport, they play an important role in agricultural trade.<sup>108</sup> Traditionally, grain has been the sector in which the U.S. and the EC have been furthest apart.

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<sup>101</sup> See *id.* at 25-32.

<sup>102</sup> EEC Treaty, *supra* note 58, art 40(2)(c).

<sup>103</sup> SIMON HARRIS, ALAN SWINBANK & GUY WILKINSON, *THE FOOD AND FARM POLICIES OF THE EUROPEAN COMMUNITY* 44 (1983).

<sup>104</sup> BOWLER, *supra* note 92, at 112.

<sup>105</sup> HARRIS ET AL., *supra* note 103, at 61-62.

<sup>106</sup> J. A. USHER, *LEGAL ASPECTS OF AGRICULTURE IN THE EUROPEAN COMMUNITY* 53 (1988).

<sup>107</sup> HARRIS ET AL., *supra* note 103, at 61.

<sup>108</sup> ALLAN E. BUCKWELL ET AL., *THE COST OF THE COMMON AGRICULTURAL POLICY* 101 (1982).

(i) *The Price Regime of the Grain Market*<sup>109</sup>

The Council of Agricultural Ministers of the member states of the EC sets a *target price* for grains at the beginning of each marketing year. This price is the outcome of a process of political negotiation and is usually set above world market price levels, to reflect the higher production costs in the Community compared to other major agricultural producers.<sup>110</sup> The target price is the price producers are supposed to obtain, but is not in itself available to farmers.<sup>111</sup>

The *intervention price*, on the other hand, is the price guaranteed to the producer. It is the price at which national intervention agencies will purchase grains from producers to raise prices to target price levels; hence, it represents the guaranteed minimum price for farmers.<sup>112</sup> Purchased grains are eventually put back into the market by the intervention bodies under conditions avoiding market deterioration,<sup>113</sup> or are disposed of on the world market at knock-down prices.<sup>114</sup> The target prices are set at Duisburg (Germany), which represents the point of maximum deficit for grains in the Community.<sup>115</sup> The intervention price is set at Ormes (France), the area of maximum grains surplus in the Community.<sup>116</sup> Although both target and intervention prices are set by the Council in response to political pressures, the difference between the target price and the intervention price is intended to reflect, first, the transport costs between Ormes and Duisburg, and second, a certain marketing

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<sup>109</sup> Because of the enormous complexity of the matter, the following description is only an outline of the Community's agricultural market and price regimes. Many details will be left unstated, and small amendments will not be covered.

<sup>110</sup> ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 95, at 60. Because of the different currencies of the member states, agricultural prices are initially set in European Currency Units (ECU). The ECU is a weighted average of EC currencies which is currently used for internal EC accounting purposes. The common prices are then converted into the national currencies of the twelve member states by using *green rates*, special rates of exchange established to create stable agricultural prices. A complicated system of *monetary compensatory amounts* compensates for currency fluctuations. The system was created to avoid fluctuation in national farm prices and speculation. This agrimonetary system is considered incompatible with the completion of the common market of "Europe 1992" and needs to be eliminated. See Timothy E. Josling and Walter H. Gardiner, *Dismantling the EC's Agrimonetary System: Effects on European Agriculture*, in EC 1992: IMPLICATIONS FOR WORLD FOOD AND AGRICULTURAL TRADE 7-20 (D. KELCH ed. 1991) (U.S. Dep't of Agric., Staff Rep. No. AGES 9133, 1991). Recent plans for further monetary integration in the Community anticipate the ECU as the EC's single European currency by no later than January 1, 1999. See *infra* note 259 and accompanying text.

<sup>111</sup> USHER, *supra* note 106, at 54, 59.

<sup>112</sup> USHER, *supra* note 106, at 54, 59.

<sup>113</sup> Giancarlo Olmi, *Common Organization of Agricultural Markets at the Stage of the Single Market*, 5 COMMON MKT. L. REV. 359, 373 (1967-68).

<sup>114</sup> FENNELL, *supra* note 86, at 108.

<sup>115</sup> Duisburg is located in the heart of the German Ruhr area, the most industrialized area of Europe, representing the area of maximum grain deficit in the EC.

<sup>116</sup> Ormes is located in the heart of the Paris Basin, Europe's grain basket, representing the area of maximum grain surplus in the EC.

margin.<sup>117</sup>

(ii) *Border Protection Mechanisms*

To protect the internal Community market from cheaper imports, a *threshold price* is applied at the borders of the Community as the minimum import price for grains. The threshold price is calculated so that the selling price for imported grains on the Duisburg market will be the same as the target price for Community produced grains.<sup>118</sup> It ensures that the EC target price cannot be undercut by cheaper imports from third countries.<sup>119</sup> Accordingly, the threshold price is derived from the target price by allowing for transportation costs from the Community frontier to Duisburg, the point of maximum grain deficit.<sup>120</sup> Threshold prices are fixed for Rotterdam (The Netherlands), the EC's main grain import harbor. In the case of imports, a *variable import levy* is charged, which covers the full difference between world prices (c.i.f. Rotterdam) and EC threshold prices.<sup>121</sup> The levy increases when world market prices decrease relative to the threshold price and vice versa. Consequently, the levy has the effect of raising the world market price for grain imports into the EC to the Community's threshold price level.

In the case of exports of Community grains, which are usually higher-priced than on the world market, *export restitutions* or *refunds* are granted to enable EC-produced grains to be competitive. The export restitution represents the difference between the average world price and the usually higher internal Community price, the intervention price.<sup>122</sup> Most of the time, however, the amount of the refund awarded to an EC exporter is higher than the actual difference between world market price and EC intervention price, thus enabling EC exporters to undercut other exporters in third country markets.<sup>123</sup> Therefore, it has been the system of export refunds that has given rise to the greatest number of complaints from the EC's trading partners. The United States, in particular, established its Export Enhancement Program (EEP) to counter the effects of this form of EC export subsidies.<sup>124</sup>

Although not very likely, it is also possible that world market

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<sup>117</sup> HARRIS ET AL., *supra* note 103, at 66.

<sup>118</sup> USHER, *supra* note 106, at 55.

<sup>119</sup> FENNELL, *supra* note 86, at 109.

<sup>120</sup> HARRIS ET AL., *supra* note 103, at 66.

<sup>121</sup> HARRIS ET AL., *supra* note 103, at 66.

<sup>122</sup> FENNELL, *supra* note 86, at 110.

<sup>123</sup> HARRIS ET AL., *supra* note 103, at 67.

<sup>124</sup> The EEP program was created in the spring of 1985, mainly to counter EC export subsidies. The program was designed to help U.S. exporters meet competitors' prices in subsidized markets by awarding generic commodity certificates which are redeemable for Commodity Credit Corporation-owned commodities. This enables the exporters to sell certain commodities to specified countries at prices below those of the U.S. market. LIP-  
TON, *supra* note 18, at 15.

prices may rise above EC's threshold prices. In that event, the Community can impose *export levies* on its own exports, to prevent internal prices from rising to the then higher world market prices. This scenario actually happened during the world commodity boom in the years 1973-75.<sup>125</sup> In a situation like this, *import subsidies* can be granted on imports to bring import prices down to Community levels.<sup>126</sup>

(iii) *Mechanisms to Limit Over-production*

In its original form, the common organization of the market in grains created an open ended commitment of the intervention agencies to buy whatever is produced. The guaranteed outlet at a guaranteed high price isolates EC grain farmers from the correction mechanism of demand and supply and hence encourages significant over-production.<sup>127</sup> For example, in the period from 1960 to 1985 the EC's self-sufficiency in grain production rose from 84% to over 125%.<sup>128</sup>

In an attempt to reduce and possibly prevent over-production, the EC introduced a number of mechanisms in the 1980s to better control the production of grains. Under a system of agricultural budget *stabilizers*, maximum guaranteed quantities (MGQ) of production are adopted at a political level by the Council of Agricultural Ministers. MGQ serve as a production ceiling beyond which costs and other penalties apply. If production of grains exceeds this production level, *co-responsibility levies* will automatically lower the intervention price up to five percent.<sup>129</sup> If farmers enroll in a set-aside program and put fifteen percent of their land under grains out of production, however, they can escape part of this levy. In addition, grain farmers can also qualify for per hectare set-aside payments.<sup>130</sup> Unfortunately, these mechanisms have failed to limit grain production. EC grain intervention stocks climbed to a record high of 18.8 million tons in 1991, and are estimated to substantially increase in 1992.<sup>131</sup>

The market regime for grains, though the most important, is certainly not the only mechanism of market intervention. The CAP consists of twenty different market organizations. Most other markets follow the basic structure adopted for the grain market. However, the terminology and ramifications differ according to the

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<sup>125</sup> KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 89, at 413.

<sup>126</sup> *Agriculture*, *supra* note 88, at 15-16.

<sup>127</sup> USHER, *supra* note 106, at 56.

<sup>128</sup> JULIUS ROSENBLATT ET AL., *THE COMMON AGRICULTURAL POLICY: PRINCIPLES AND CONSEQUENCES* 28, Table 9 (1988).

<sup>129</sup> *Agriculture*, *supra* note 88, at 16-17.

<sup>130</sup> *Grains*, in U.S. DEP'T OF AGRIC., R.S.-91-4, *WESTERN EUROPE: AGRICULTURE AND TRADE REPORT* 22 (Situation and Outlook Series, Oct. 1991).

<sup>131</sup> *EC Intervention Stocks of Grain Reach Record High*, *id.* at 60.

product concerned. Every product and group of products available in European agriculture is subject to its own particular market organization.<sup>132</sup>

Some markets adopted measures specific for a certain commodity. For instance, heavy surplus production in the dairy sector has given rise to drastic remedies. *Quotas* for milk production were introduced in 1984 and their levels were reduced in subsequent years. In the quota system, a reference quantity is allocated at either the farm level or the level of the milk purchaser. If the quota is exceeded, the farmer or purchaser is subject to a *superlevy* equal to 100% of the intervention price<sup>133</sup> (in 1989 enhanced to 115% of the intervention price),<sup>134</sup> effectively prohibiting production beyond quota levels. Despite these adjustments, dairy stocks reached record levels in 1991.<sup>135</sup>

(iv) *Recent Reforms of the Grain Market*

The Commission of the EC expressed deep concern about the surplus production and excessive stocks in the MacSharry Proposal of February 1991.<sup>136</sup> The Commission emphasized the need for fundamental reform. First, it proposed a thirty-five percent cut in support prices for grains by 1996. The existing stabilizer arrangements, including the co-responsibility levies and the MGQ's, would subsequently be withdrawn.<sup>137</sup> Furthermore, it introduced direct payments (more or less de-coupled payments)<sup>138</sup> to compensate farmers for this decrease in support prices.<sup>139</sup> In addition, grain farmers would have to comply with certain set-aside provisions. Farms larger than twenty hectares<sup>140</sup> would have to set aside fifteen percent of

<sup>132</sup> *Agriculture*, *supra* note 88, at 11.

<sup>133</sup> Graham Avery, *Agricultural Policy: The Conclusions of the European Council*, 25 COMMON MKT. L. REV. 523, 529 (1988). Although the author mentions 100% of the target price, I think that 100% of the intervention price is more correct, since that is the price directly available to producers.

<sup>134</sup> P.J. TEUNISSEN, *EUROPEAN COOPERATION AND INTEGRATION: THE RESHAPING OF A CONTINENT* 13.6 (1990).

<sup>135</sup> See generally *Dairy*, in U.S. DEP'T OF AGRIC., *supra* note 130, at 36.

<sup>136</sup> Ray MacSharry, *Foreward*, COMMISSION OF THE EUROPEAN COMMUNITIES, *THE DEVELOPMENT AND FUTURE OF THE COMMON AGRICULTURAL POLICY: PROPOSALS OF THE COMMISSION* (Feb. 1991) [hereinafter *MacSharry Proposal*]. Ray MacSharry is the Irish Agricultural Commissioner of the EC Commission.

<sup>137</sup> *Id.* at 9.

<sup>138</sup> De-coupled payments are income support in the form of direct payments to the farmer unrelated to the level of production. They represent a radical departure from the EC's traditional commodity-based support policy. Obviously, there is a welfare stigma associated with direct payments. David Harvey, *The Production Entitlement Guarantee (PEG) Option*, in *THE COMMON AGRICULTURAL POLICY AND THE WORLD ECONOMY: ESSAYS IN HONOUR OF JOHN ASHTON*, *supra* note 68, at 314. The direct payments proposed by the MacSharry plan, however, would not be completely de-coupled. See *infra* note 145 and accompanying text.

<sup>139</sup> *MacSharry Proposal*, *supra* note 136, at 9-10.

<sup>140</sup> One hectare is 2.47 acres.

their arable cropland to be eligible for the direct payments. Farms smaller than twenty hectares would not have to set aside any land.<sup>141</sup>

These proposals amount to the most fundamental reform to date of the mechanisms of the CAP, while keeping intact the three basic CAP principles outlined above.<sup>142</sup> Furthermore, the proposed EC agricultural support system would function more like the U.S. system than before, thus increasing the chances for a compromise on agriculture in the Uruguay Round.<sup>143</sup> Although the Council of Agricultural Ministers of the EC indicated that it would not accept the proposal in the form in which it was initially presented, it did agree to a far-reaching reform package in May 1992.<sup>144</sup> The centerpiece of the reforms is that in the grain sector, guaranteed support prices will be cut by twenty-nine percent over a three-year period ending in 1996. The grain co-responsibility levy will be abolished. To receive direct subsidies as a compensation for the cut in support prices, bigger farmers must set fifteen percent of their grain acreage aside. The direct payments will not be de-coupled completely from production: payments will be linked not to output itself, but to the area of land under grains and to a regional measure of yields.<sup>145</sup> The price cut in the grain sector opens the door to price cuts in other sectors as well. As a result of the cut in support prices, export subsidies will fall significantly by 1997.<sup>146</sup> The reform package was hailed by the Community as "the most important development in the 30-year history of the CAP."<sup>147</sup>

#### D. *The Choice for High Guaranteed Prices*

An important objective of the Treaty of Rome was to ensure a fair standard of living for the agricultural community. The creators of the CAP opted for a system of high guaranteed minimum prices to grant the farmer income parity with the non-agricultural sectors. As a result, the main characteristic of the CAP is that for over seventy percent of agricultural production, EC farmers are guaranteed a high minimum price on the Community market, thus isolating them from

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<sup>141</sup> MacSharry Proposal, *supra* note 136, at 12-13.

<sup>142</sup> EC Farm Commissioner Ray MacSharry, MacSharry Proposal, *supra* note 136, Foreword.

<sup>143</sup> An EC system with lower guaranteed prices and compensation through de-coupled payments corresponds roughly with the U.S. system of relatively low target prices and deficiency payments as a means of making up for the difference between market price and target price.

<sup>144</sup> See *Farm Ministers Approve Overhaul of EC's Common Agricultural Policy*, 9 INT'L TRADE REP. (BNA) 914-15 (May 27, 1992).

<sup>145</sup> *The CAP and the GATT: America Must Let Europe's New Farm Deal Unlock the Uruguay Round*, ECONOMIST, May 23, 1992, at 20.

<sup>146</sup> *EC Farm Policy: Getting Better*, ECONOMIST, May 23, 1992, at 55-56.

<sup>147</sup> *EC Council Approves CAP Reform Plan*, FEEDSTUFFS, May 25, 1992, at 1 (quoting EC Agricultural Commissioner Ray MacSharry).

the world market.<sup>148</sup> The choice for high Community prices resulted in a system with obligatory intervention purchases, variable levies on imports, refunds on exports, serious over-production, and a soaring budget. The costs of purchasing, storing and disposing of the surplus production are almost unbearable for the Community.<sup>149</sup>

A number of factors resulted in the choice for high internal prices to support agricultural income. First, formulating a common policy to suit and reconcile a diversity of existing support systems was a necessary, but not an easy, task. Agreement on prices, for instance, was reached with great difficulty. In the end, it was politically more acceptable for the Ministers of Agriculture of the member states to agree to prices that were higher than their own national prices.<sup>150</sup> Furthermore, price support was initially considered less expensive and less bureaucratic than direct financial aid, because of the large number of farmers involved and the different national economic conditions.<sup>151</sup> It was also the most common type of market intervention in the member states, and thus radical change was avoided.<sup>152</sup> In addition, the Six already had a long tradition of protectionism,<sup>153</sup> making it relatively easy to incorporate the necessary variable levy to limit access to the Community market and to protect the higher-priced European agricultural products. As a result, the Community became far more protectionist after the CAP was introduced than when its component states acted separately.<sup>154</sup> Finally, because production costs were higher in the EC than in the other main producing countries, it was believed that EC prices could, and had to be, established above world market prices, without necessarily leading to serious over-production.<sup>155</sup> Significant surplus production was simply not foreseen. Additionally, the world commodity price boom of the early 1970s "led the architects of the CAP to believe that EC price levels were not grossly out of line with world market prices."<sup>156</sup> That circumstances worked out quite differently was mainly due to the fact that the introduction of the CAP coincided with a period of technological progress and massive explosion in world productivity resulting in chronic over-production of many ag-

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<sup>148</sup> *Agriculture*, *supra* note 88, at 8. Currently, about 90% of agricultural production in the EC is in one way or another covered by the CAP. The only major farm products not covered by CAP are potatoes and agricultural alcohol.

<sup>149</sup> OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES, *supra* note 80, at 53. For a specific dollar amount in comparison with the U.S., see *infra* note 245.

<sup>150</sup> HILL, *supra* note 79, at 26.

<sup>151</sup> OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES, *supra* note 80, at 21.

<sup>152</sup> OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES, *supra* note 80, at 21.

<sup>153</sup> Strang, *supra* note 85, at 59.

<sup>154</sup> BUCKWELL ET AL., *supra* note 108, at 11.

<sup>155</sup> ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 95, at 60.

<sup>156</sup> HARRIS ET AL., *supra* note 103, at 38.



ricultural products.<sup>157</sup>

*E. The External Effects of the CAP*

Apart from the drawbacks of the system of high guaranteed minimum prices at a national level (high food prices for the consumer and a burden on the taxpayers) and at a Community level (surplus production and mounting cost), the EC's CAP has serious trade consequences on a global scale. Consequently, the CAP has given rise to a large number of complaints from the EC's trading partners.

The first controversial external effect of the system of high prices is that access to the Community market needs to be limited. Because world commodity prices tend to fluctuate, flat import duties would not be sufficient to protect EC production from cheaper imports. Therefore, the CAP established its variable import levies, adjustable to the level of world prices. The result is that no matter how competitive third countries' agricultural products are, import into the Community will not be possible at prices below the threshold price level,<sup>158</sup> and may not be possible at all. Effectively, the variable levy is a means of keeping cheaper foreign farm products out of the Common Market to protect the position of EC farmers.<sup>159</sup>

Second, because of the high prices, EC production of agricultural commodities is much higher than it otherwise would have been at world market prices. Equally, consumption is lower. Export is the only way to dispose of resulting surpluses. Over-production and high "domestic" prices create the necessity of an export subsidy to make the agricultural surpluses competitive on the world market. The chances for EC exporters to sell produce on the world market at Community prices would be virtually nonexistent under normal market conditions. However, the export subsidy not only makes Community products more competitive, but it often provides the Community exporter with a means to undercut the world price as well. This enables her to move into export markets that traditionally belonged to third countries, hence grabbing a greater share of the world market. Furthermore, the export subsidies tend to have a depressing effect on prices at the world market by making it a dumping place for Community surpluses, thus seriously lowering both the export revenues of agricultural exporting countries and the incomes of producers in food importing countries.<sup>160</sup> This can be especially harsh on developing countries that often completely rely on agricul-

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<sup>157</sup> HILL, *supra* note 79, at 35.

<sup>158</sup> HARRIS ET AL., *supra* note 103, at 254.

<sup>159</sup> J. Kodwo Bentil, *Attempts to Liberalize International Trade in Agriculture and the Problem of the External Aspects of the Common Agricultural Policy of the European Economic Community*, 17 CASE W. RES. J. INT'L L. 335, 358 (1985).

<sup>160</sup> *Id.* at 360-365.

tural exports for economic development.<sup>161</sup>

Finally, but more indirectly, European agriculture is protected by a number of other measures both under the CAP and national legislation. These include tax allowances, capital grants and subsidies for research and development. All these measures have the effect of expanding the volume of produce available for export and thus intensifying the impact on the rest of the world.<sup>162</sup>

#### F. *The CAP and the GATT*

The CAP has been severely criticized for its external effects by a number of countries, especially the United States. The United States can be held primarily responsible, however, for the adoption of the GATT as a trade agreement with broad exceptions for domestic agricultural programs.<sup>163</sup> This, together with the 1955 GATT waiver obtained by the United States, gave the EC the opportunity to establish the CAP without seriously violating GATT customs and practices. Since GATT rules and mechanisms do not prevent import restrictions on agricultural products,<sup>164</sup> the CAP's variable levy, for example, is probably legal under GATT as a tariff on products that are not *bound*.<sup>165</sup> However, the variable aspect of the levy certainly defeats one of the basic policies behind the GATT's preference for fixed tariffs as trade restrictions. If the tariff were fixed, efficient foreign producers would be able to penetrate the EC market by lowering their prices.<sup>166</sup> Because most other GATT contracting parties have import restrictions of some kind, there has been little official objection to the EC's variable levy from third countries.<sup>167</sup> Consequently, the legality of the variable levy has never been the subject of a GATT ruling.<sup>168</sup> Nevertheless, the U.S. has pushed for a dismantling of the variable levy during the Kennedy and Tokyo Rounds of the GATT.<sup>169</sup> The Community, however, made it clear that this levy

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<sup>161</sup> Rose & Lansing, *supra* note 43, at 64.

<sup>162</sup> Allan Buckwell, *The CAP and World Trade*, in *THE COMMON AGRICULTURAL POLICY AND THE WORLD ECONOMY: ESSAYS IN HONOUR OF JOHN ASHTON*, *supra* note 68, at 223, 268.

<sup>163</sup> See *supra* notes 44-57 and accompanying text.

<sup>164</sup> Bentil, *supra* note 159, at 357.

<sup>165</sup> JACKSON, *supra* note 4, at 44. A binding is a maximum tariff: contracting parties are obligated under the GATT treaty not to allow their tariffs on a particular product to exceed the GATT binding. When no binding exists, which is the case with most agricultural products, a country may charge any tariff amount it pleases. *Id.* at 119. For a discussion of the CAP's variable levy, see *supra* note 122 and accompanying text.

<sup>166</sup> JACKSON, *supra* note 4, at 131.

<sup>167</sup> Bentil, *supra* note 159, at 357. There have been, however, significant disputes between the United States and the EC. For instance, during the "Chicken War", the United States complained of being excluded by CAP restrictions from the German poultry market. The GATT panel decision favoring the United States was ignored by the Community. The U.S. was allowed to retaliate. Filipek, *supra* note 42, at 146.

<sup>168</sup> *Agriculture*, *supra* note 88, at 55.

<sup>169</sup> The Kennedy and Tokyo Rounds are the two GATT rounds of multinational trade negotiations that preceded the current Uruguay Round. Both Rounds hesitatingly attempted to address agricultural issues, but little was accomplished. For an overview of

was part of one of the basic CAP principles, and therefore was not negotiable.<sup>170</sup>

The export restitution or subsidy is criticized more frequently, especially by the U.S. and other large agricultural exporters.<sup>171</sup> However, in 1958, the U.S. was foremost among those countries that refused to endorse an absolute prohibition on the use of export subsidies.<sup>172</sup> Therefore, GATT allowed export subsidies to continue to be used for agricultural ("primary") products, subject to the condition that a country was not allowed to gain "more than an equitable share of world trade", a term nowhere defined.<sup>173</sup> During the Tokyo Round, the contracting parties adopted a Subsidies Code, which attempted to strengthen existing GATT disciplines on the use of agricultural subsidies. Although an attempt was made to refine the "equitable share of world trade" rule, application of the Code to agricultural subsidies has been ineffective.<sup>174</sup> In recent years, contracting parties have initiated dispute settlement complaints against EC export subsidies. The complaints have not resulted, however, in a prohibition of the export restitution system.<sup>175</sup>

### G. *The Difficulties of Reform*

Because of its obvious drawbacks at national, Community and international levels, the CAP has been subject to endless proposals for reform. Apart from the recently adopted reform package,<sup>176</sup> little has been accomplished. As is the case with agricultural policy in general,<sup>177</sup> the CAP is hard to reform for a number of reasons. First, Community policy-making is far more complex than at a national level, since it requires a considerable degree of consultation, negotiation and compromise between the member state bureaucracies.<sup>178</sup> Although not formally demanded by the Treaty, decisions require

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agricultural issues during the Kennedy and Tokyo Rounds, see Bentil, *supra* note 159, at 338-49.

<sup>170</sup> MICHEL PETIT, INTERNATIONAL FOOD POLICY RESEARCH INSTITUTE, DETERMINANTS OF AGRICULTURAL POLICIES IN THE UNITED STATES AND THE EUROPEAN COMMUNITY 57-58 (1985). For an explanation of the CAP's basic principles, see *supra* notes 94-99 and accompanying text.

<sup>171</sup> Among the most critical countries are the Cairns Group members Australia, Canada, Argentina and Brazil. For a discussion of the CAP's export restitution, see *supra* notes 122-124 and accompanying text.

<sup>172</sup> HARRIS ET AL., *supra* note 103, at 275.

<sup>173</sup> See *supra* note 48 and accompanying text.

<sup>174</sup> Filipek, *supra* note 42, at 145.

<sup>175</sup> OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 1991 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 73 (1991).

<sup>176</sup> For a discussion of the reform plan, see *supra* notes 142-147 and accompanying text.

<sup>177</sup> See James T. Bonnen & William P. Browne, *Why is Agricultural Policy So Difficult to Reform?*, in THE POLITICAL ECONOMY OF US AGRICULTURE CHALLENGES FOR THE 1990s 7, 7-29 (Carol S. Kramer ed., 1989).

<sup>178</sup> BOWLER, *supra* note 92, at 27.

unanimity among the member states.<sup>179</sup> National interests usually differ considerably, often making unanimity almost impossible.<sup>180</sup> The large political influence wielded by the national farm lobbies within the member states on the national departments of agriculture hinders significant reforms.<sup>181</sup> Moreover, with the possible exception of the United Kingdom and the Netherlands, EC member states represent agricultural interests almost to the exclusion of all other interests.<sup>182</sup>

Second, the entry of new member states in 1973, 1981 and 1986 further complicated the decision-making process. Expansion also caused more over-production, a greater financial burden on the budget and more frequent and bitter trade disputes.<sup>183</sup> New member states were basically unable to effect any fundamental changes in Europe's agricultural policy in their negotiations for membership.<sup>184</sup>

Finally, CAP was and still is considered the cornerstone of the EC, the glue that holds the Community together. Changing the basic principles of the CAP would change the basis of the EC itself. Therefore, the basic principles of the CAP have so far been virtually untouchable. Agriculture became the first area in which member states transferred national sovereignty to the Community.<sup>185</sup> It thus became the EC's first and most important common policy, far more important than anything else. As a result, progress in a number of other fields took place only as a result of the accomplishments of the CAP,<sup>186</sup> effectively preparing sovereign states for the things to come.

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<sup>179</sup> The Treaty of Rome states: "Save as otherwise provided in this Treaty, the Council shall act by majority of its members." EEC Treaty, *supra* note 58, art. 148(1). In 1966, however, the Council adopted the so-called Luxembourg Compromise, providing that the Council would try to reach a decision unanimously whenever a member state pleads that its vital national interest is involved. Effectively, this gave each individual member state a veto over the decision process. HARTLEY, *supra* note 59, at 12-14. Although the Single European Act, which came into force in 1987, re-introduced the majority voting in a number of fields, decisions on agriculture are extremely hard to reach and generally are taken unanimously. Agricultural decision-making by majority will take place only in exceptional situations.

<sup>180</sup> ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 95, at 137.

<sup>181</sup> BOWLER, *supra* note 92, at 43. For an explanation of the significant role of farm lobbies in the EC, see H. WAYNE MOYER & TIMOTHY E. JOSLING, AGRICULTURAL POLICY REFORM: POLITICS AND PROCESS IN THE EC AND THE USA 42-48 (1990).

<sup>182</sup> MOYER & JOSLING, *supra* note 181, at 100.

<sup>183</sup> Christian H. Jensen, *The European Community's Common Agricultural Policy Predicament: Exacerbation by Spain and Portugal's Entry and Proposed Solutions*, 1990 B.Y.U. L. REV. 1709, 1713. In addition, the re-unification of Germany in October 1990 made the CAP also applicable in the former East Germany. The adjustment and integration process is expected to take a considerable amount of time. *German Unification One Year Later*, in U.S. DEP'T OF AGRIC., *supra* note 130, at 52. For instance, bringing former East Germany into the EC, added about twelve tons of grain production, but only increased consumption by an estimated eight million tons, thus increasing EC intervention stocks for grains. *Grains*, *supra* note 130, at 20; *EC Intervention Stocks of Grain Reached Record High*, *supra* note 131, at 60.

<sup>184</sup> BOWLER, *supra* note 92, at 56.

<sup>185</sup> HILL, *supra* note 79, at 119.

<sup>186</sup> Strang, *supra* note 85, at 56.

The CAP called for more coordination in the economic and monetary policies of the member states. The necessity to harmonize and centralize decision-making strengthened the position of Community institutions, in particular the Commission and the European Court of Justice. The agricultural case law before the Court significantly contributed to the development of the principles and the supra-national character of Community law.<sup>187</sup> Moreover, the CAP is generally considered as having prevented the Community from falling apart at various times of stagnation and crisis.<sup>188</sup> It is only a modest exaggeration to say that without the CAP, the Community itself would never have been formed.<sup>189</sup>

#### IV. The GATT Uruguay Round and Agriculture

##### A. *The Initial Phase*

After little success on the issue of agriculture in seven subsequent GATT Rounds, a GATT Ministerial Declaration called in November 1982 for the establishment of a Committee on Trade in Agriculture (CTA) to make recommendations for achieving greater liberalization in world agricultural trade.<sup>190</sup> The Declaration paved the way for a new GATT Round with considerable attention to be focused on agriculture. Accordingly, in September 1986, the eighth GATT round of trade negotiations was launched in Punta del Este, Uruguay. There, the contracting parties of GATT formally agreed to a new series of multilateral negotiations known as the Uruguay Round. "The official statement of principles and objectives for the talks, the Punta del Este Ministerial Declaration, devoted more time to agriculture than to any of the other subjects scheduled for negotiations."<sup>191</sup>

The Punta del Este Declaration stated that the

Contracting Parties agree that there is an urgent need to bring more discipline and predictability to world agricultural trade by cor-

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<sup>187</sup> KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 89, at 418-20. For a discussion of the supra-national character of Community law, see *supra* notes 65-66 and accompanying text.

<sup>188</sup> Strang, *supra* note 85, at 56.

<sup>189</sup> Mahler, *Domestic & International Sources of Trade Policy: The Case of Agriculture in the European Community & the United States* 24 POLITY 33 (1991). France, for example, might not have entered the Common market without the CAP, and European integration in its current form is hard to imagine without France's participation. See *supra* note 89 and accompanying text.

<sup>190</sup> U.S. GEN. ACCT. OFF. [GAO], AGRICULTURAL TRADE NEGOTIATIONS: INITIAL PHASE OF THE URUGUAY ROUND 12, Pub. No. GAO/NSIAD-88-144BR (May 1988).

<sup>191</sup> Filipek, *supra* note 42, at 126-27. The other 14 negotiating groups are: Tariffs, Nontariff Measures, Natural Resources, Textiles, Tropical Products, GATT articles, Multilateral Trade Negotiations Codes, Safeguards, Subsidies, Trade-Related Intellectual Property, Trade-Related Investment Measures, Dispute Settlement, Functioning of the GATT System, Services, Government Procurement and Steel. Judith H. Bello & Alan F. Holmer, *U.S. Trade Law and Policies Series No. 19: The Uruguay Round: Where Are We?*, 25 INT'L LAW. 727-30 (1991).

recting and preventing restrictions and distortions including those relating to structural surpluses so as to reduce the uncertainty, imbalances and instability in world agricultural markets.

Negotiations shall aim to achieve greater liberalization of trade in agriculture and bring all measures affecting import access and export competition under strengthened and more operationally effective GATT rules and disciplines.<sup>192</sup>

An agriculture negotiating group was established in early 1987, and six nations and nation groups submitted negotiating proposals for agricultural trade liberalization. The four main players were the United States, the EC, the Cairns Group<sup>193</sup> and Japan.<sup>194</sup> The initial U.S. proposal called for the complete removal over a ten-year period of all agricultural subsidies that directly or indirectly distort trade, and the elimination of all import barriers. "President Reagan spoke of his commitment 'to achieve the goal of free agricultural trade by the year 2000.'"<sup>195</sup> This proposal was totally opposed by the EC negotiators. In its counter-proposal, the EC clearly indicated that its price and support system was not negotiable. It called, instead, for a gradual reduction in agricultural subsidies and for short-term emergency measures to reduce surpluses.<sup>196</sup>

The Cairns Group submitted a proposal generally viewed as a compromise between the U.S. and EC positions. Under the Cairns Group proposal, "[a]ll measures not explicitly provided for in GATT, including variable levies, . . . would be prohibited. All tariffs on agricultural products . . . would be set at low levels or zero."<sup>197</sup> Government support measures, except structural adjustment and direct income support, would be prohibited.<sup>198</sup> Finally, the Japanese proposal was more along the lines of the EC plan. It "recommended reducing export subsidies and improving rules on market access while noting the need for taking into account the special characteristics [of agriculture] within each country" and the importance of food-security.<sup>199</sup>

### B. *The Second Phase*

The second phase of the Uruguay Round began in January 1988. While various GATT participants put forward additional and

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<sup>192</sup> *Ministerial Declaration of Punta Del Este, of 20 September, 1986, reprinted in K.R. Simmonds, The Community and the Uruguay Round, 25 COMMON MKT. L. REV. 95, 112 (1988).*

<sup>193</sup> The Cairns Group is a heterogeneous block of net agricultural exporters that includes both developed and developing countries that consider themselves "fair traders in agriculture." Member states are Argentina, Australia, Brazil, Canada, Chile, Colombia, Hungary, Indonesia, Malaysia, New Zealand, the Philippines, Thailand, and Uruguay.

<sup>194</sup> Proposals were also submitted by the Nordic Countries (Finland, Iceland, Norway, and Sweden) and Canada.

<sup>195</sup> GAO, *supra* note 190, at 17.

<sup>196</sup> GAO, *supra* note 190, at 25-26.

<sup>197</sup> GAO, *supra* note 190, at 26-27.

<sup>198</sup> GAO, *supra* note 190, at 26-27.

<sup>199</sup> GAO, *supra* note 190, at 28.

more realistic proposals, no agreement on agriculture could be reached during the so-called "mid-term" review meeting in Montreal in December 1988. Although agriculture was only one of fifteen different topics to be discussed, the Cairns Group of agricultural exporters, backed by the United States, made the liberalization of agricultural trade a precondition for the successful completion of the Round as a whole.<sup>200</sup> Whereas the contracting parties reached framework agreements in eleven of the fifteen negotiating groups, they were not able to agree on the subject area of agriculture.<sup>201</sup> After further negotiations, however, GATT participants reached a framework agreement on agriculture and the other remaining areas during a meeting in Geneva in April 1989.<sup>202</sup> This framework agreement called for "substantial progressive reductions in agricultural support and protection, sustained over an agreed period of time, resulting in correcting preventing restrictions and distortions in world agricultural markets."<sup>203</sup> Subsequently, new proposals were submitted by the United States, the EC, the Cairns Group and Japan, but there appeared to be very little progress in moving towards a compromise.<sup>204</sup>

After political commitments were made at the highest levels<sup>205</sup> to reach some form of agreement on agricultural trade, new proposals were formulated and submitted in preparation for the final talks which were scheduled in December 1990. The proposals concentrated on three areas: internal support, market access and export subsidies. The United States called, in October 1990, for a 75% reduction in the most trade-distorting *internal support* measures and a 30% cut in less trade-distorting measures over ten years. *Market access* would be granted by converting nontariff import barriers to tariffs (tariffication), whereafter existing tariffs would be bound. Both the new and existing tariffs would be reduced by an average of 75% over ten years. Finally, *export subsidies* on primary agricultural products would be reduced by 90% over ten years, and export subsidies on non-primary processed agricultural products would be phased out in six years.<sup>206</sup>

In November 1990, the EC counter-proposal did not come close

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<sup>200</sup> Mahler, *supra* note 189, at 39.

<sup>201</sup> There was also no agreement on import safeguards, intellectual property, services, and textiles.

<sup>202</sup> U.S. GEN. ACCT. OFF. [GAO], AGRICULTURAL TRADE NEGOTIATIONS: STALEMATE IN THE URUGUAY ROUND 8, Pub. No. GAO/NSIAD-91-129 (Feb. 1991).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 9.

<sup>205</sup> The difficulties concerning liberalizing agricultural trade were addressed at the ministerial meeting of the Organization of Economic Cooperation and Development (consisting of 24 industrialized nations) in May 1990, and at the Economic Summit of the G-7 countries (Canada, France, Germany, Italy, Japan, the United Kingdom and the United States) in July 1990. *Id.*

<sup>206</sup> *Id.* at 10-11.

to the United States' demands. The EC called for a commodity specific reduction of *internal supports* by 10% to 30% from 1986 to 1996.<sup>207</sup> With respect to *market access*, the EC was willing to convert its variable levies and other nontariff barriers to tariffs. However, the tariffs would still consist of a fixed and a variable component. A corrective factor would continue to take into account world market price fluctuations. There was no specific commitment to reduce the newly converted tariffs. The EC proposal also called for *rebalancing*,<sup>208</sup> which would allow for the reduction of support and protection for one commodity to be accompanied by an increase in the traditionally low protection of other commodities. Finally, the proposal did not contain a precise commitment on *export subsidies*. It was assumed that the proposed reduction of internal support and import barriers would automatically lead to a considerable lowering of export subsidies.<sup>209</sup>

The Uruguay Round was scheduled to conclude during the first week of December 1990 in Brussels. However, participating countries failed to reach an agreement on agricultural reform. The EC insisted that credit must be given for reforms taken since 1986, that tariffication would be subject to rebalancing, and that commitments on export subsidies would also have to apply to U.S. deficiency payments.<sup>210</sup> The EC was supported by South Korea and Japan,<sup>211</sup> two countries traditionally concerned with protecting domestic agricultural production, especially rice. As a result, the entire round of negotiations was suspended, and the ultimate outcome remains uncertain.

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<sup>207</sup> A 30% cut in internal support was offered for such commodities as cereals, rice, sugar, oilseeds, livestock and dairy products, while a 10% cut was offered for fruits and vegetables and tobacco. The EC insisted that credit should be given for reforms taken since 1986. In 1986 internal EC support was at its peak, and subsequently lowered in the following years. Effectively, the proposed reductions in internal support would thus only be 15% and 5%, respectively, for the period 1991-96.

<sup>208</sup> "During the Dillon Round (1961-62) the U.S. managed to secure a 'zero-duty-binding' for oilseeds, oilseed meals, and some other feed substitutes from the EC. Although not considered of major importance at that time, this concession has proven to be one of the most significant ever achieved by the United States" J. ZIETZ & A. VALDÉS, *AGRICULTURE IN THE GATT: AN ANALYSIS OF ALTERNATIVE APPROACHES TO REFORM* 13 n.3 (1988). A major goal of the EC in the Uruguay Round is to renegotiate these low tariff bindings, under the rebalancing concept, a proposal fiercely rejected by the U.S. Filipek, *supra* note 42, at 140.

<sup>209</sup> GAO, *supra* note 202, at 11.

<sup>210</sup> Deficiency payments are direct income subsidies providing farmers with a per bushel payment equal to the difference between a legislated target price, and the higher of either the market price or the government nonrecourse loan rate. When the target price is set above the world market price, deficiency payments encourage increased production, expand total world supply, and depress worldmarket prices. KNUTSON ET AL., *supra* note 83, at 244-46. In fact, this operates somewhat like a straight EC export subsidy which aims at undercutting the world market price.

<sup>211</sup> GAO, *supra* note 202, at 11-12.



### C. *The Dunkel Proposal*

By February 1991, the GATT's Trade Negotiations Committee (TNC) agreed to restart the trade talks. The agriculture negotiations resumed on March 1, 1991, but little progress has been made since that time. The latest proposal was presented by Arthur Dunkel, General Director of the GATT, on December 20, 1991. Under the Dunkel Proposal, *domestic support* programs delivered to agriculture would be cut by 20% between 1993 and 1999. Countries would not be obliged to reduce domestic support if those supports made up no more than 5% of domestic prices. The value of *export subsidies* would have to be reduced by 36% between 1993 and 1999. Volumes would be reduced by 24%. *Market access* would be improved by a 36% cut in border restrictions between 1993 and 1999. Finally, contracting parties would have to reduce their use of *sanitary and phytosanitary* (SPS) measures to restrict imports.<sup>212</sup>

It took the EC only three days to decide that these proposals were inadequate. The EC's main argument was, again, that the proposals continue to call into question the foundation of the Community's CAP.<sup>213</sup> Also, the EC still insists on its rebalancing concept.<sup>214</sup> Dunkel refused to reopen his proposals for fresh negotiations. Instead, he has instructed the EC to settle differences over agricultural trade with the other negotiators, principally the United States, and bring back a compromise solution acceptable to all.<sup>215</sup>

Although the EC refused to accept the Dunkel Proposal as a basis for further negotiations, the reform package of May 1992 does come closer to the Dunkel plan than previous EC proposals. The centerpiece of the reform plan is a 29% cut in grain subsidies that is expected to meet the Dunkel demands of a 20% cut in domestic grain support. On the other hand, the 20% reduction of internal support set forth by the Dunkel Proposal would include many of the direct payments the Community wants to grant to farmers under the May 1992 reform plan. The EC does not regard those payments as a distortion of trade and does not want the GATT to interfere with the internal reform process.

The 36% cut in the *value* of the export grain subsidies demanded by Dunkel is also expected to be met. When the gap between the EC target price and the world market price gets smaller,

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<sup>212</sup> Sanitary and phytosanitary measures are border restrictions imposed by countries to ban imports of certain commodities because of health related concerns, or fear of pests and diseases. Sanitary and phytosanitary measures are often considered artificial trade barriers by the exporting country. For example, the EC bans import of U.S. beef treated with hormones, allegedly because of health concerns. For a recent discussion of GATT and the EC hormone ban, see Jackson, *supra* note 38, at 435-36.

<sup>213</sup> Elliott, *GATT Negotiators to Discuss Dunkel's Package*, FEEDSTUFFS, Dec. 30, 1991, at 1.

<sup>214</sup> David Dodwell, *GATT Wobbles on the Brink: The Failure of the Deadlocked Uruguay Round is Almost Unthinkable, but it is Looming Dangerously Near*, FIN. POST, Apr. 3, 1992, at 39.

<sup>215</sup> *Id.*

export subsidies will fall. Moreover, with any recovery of the world market prices, market forces will push EC prices down even further and move CAP close to world prices by 1996. The main problem area, however, is formed by the 24% cut in the *volume* of subsidized exports of grain. The reform plan is expected to fail to substantially curb excess grain production. The export of subsidized grain will still be necessary to dispose of surplus production.<sup>216</sup>

#### V. Why there is no Agreement on Agriculture: A European Perspective

When looking at agriculture and the Uruguay Round from a European perspective, several obstacles can be identified that preclude a compromise agreement on agriculture. First, constraints are caused by GATT as an organization and a treaty. Second, the CAP forms an obstacle in that it is more important for the EC than agricultural policy in general is for other countries. Third, the Uruguay Round established a clear negotiating scope in its 1986 Ministerial Declaration that launched the Round, as well as in its subsequent mid-term Review. Both documents set a limitation on what is negotiable. Finally, the United States attitude and negotiating stand forms a considerable obstacle. It is not always obvious that the Community can be held primarily liable for these constraints, as is often charged. On the contrary, the United States may be held responsible, directly or indirectly, for most obstacles.

##### A. Constraints Caused by the GATT

A first constraint in the Uruguay Round that prevents an agreement on agriculture results from the structure of GATT as an *organization*. An ITO within the U.N. framework with broad powers and a carefully worked out charter could have been a more effective body in regulating and liberalizing trade in agricultural goods. However, the United States prevented the ITO from coming into existence and thus provided the basis for the current situation with a "temporary" GATT, which not only lacks any enforcement powers, but also has to function with virtually no constitution designed to regulate its activities and procedures.<sup>217</sup> Furthermore, the GATT does not have an adequate dispute settlement procedure, whereas the ITO provided for the ICJ to fill this gap. The ICJ could have played a leading role in the settlement of trade disputes. The GATT dispute settlement procedure is ineffective in that it provides ample room for the contracting parties to block progress at various stages of the

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<sup>216</sup> See *The CAP and the GATT: America Must Let Europe's New Farm Deal Unlock the Uruguay Round*, *supra* note 145, at 20; *EC Farm Policy: Getting Better*, *supra* note 146, at 55-56.

<sup>217</sup> MacNabb & Weaver, *supra* note 13, at 763. See also *supra* notes 27-30 and accompanying text.

proceedings.<sup>218</sup>

In the field of agriculture, an adequate dispute settlement procedure is all the more necessary because of the formulation of the GATT as a *treaty*. Trade in agricultural products was basically excluded from the strict GATT regime for industrial and manufactured products. The GATT provisions on agriculture were originally designed, and subsequently interpreted, to fit existing U.S. domestic agricultural support programs. The United States insisted on special treatment for agriculture, whereas a number of other countries strongly opposed this idea. Furthermore, by achieving the formal GATT waiver in 1955, the United States emphasized and legitimized the primacy of domestic farm programs over international trade obligations.<sup>219</sup>

This provided an opportunity for the EC, which was created ten years *after* the adoption of GATT and three years *after* the acquired waiver, to establish its CAP without violating existing GATT convictions. Thus, the creation of the CAP in its current form, with the use of variable import levies and export restitutions as the principal agricultural trade measures, was only possible as a result of earlier actions by the United States.<sup>220</sup> Moreover, the establishment of the CAP was originally *welcomed* by the United States for important political reasons. The United States wished a stronger and more united Europe, and the CAP was viewed as a bold and serious attempt to meet this considerable challenge.<sup>221</sup> It was felt that if the CAP was the price for European unity, and thus for strengthening the European pillar of the Atlantic Alliance, it was a fair price to pay.<sup>222</sup> Accordingly, the CAP was not seriously challenged during its initial years. For example, during the Kennedy Round (1963-67) there was very little talk about the CAP's trade distorting effects. Only when it became clear in the late sixties that the growth in EC export subsidies was detrimental to U.S. agricultural interests did the United States' attitude change.<sup>223</sup>

#### *B. Constraints Caused by the CAP*

It is often suggested that no agreement on agriculture has been reached in the Uruguay round because the EC is simply unwilling to change the CAP. Although the EC's unwillingness is quite obvious, it cannot be the sole reason for a failure to reach an agreement, because the Community has, from the start, taken the position that the

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<sup>218</sup> See *supra* notes 36-37 and accompanying text.

<sup>219</sup> See *supra* notes 44-57 and accompanying text.

<sup>220</sup> HARRIS ET AL., *supra* note 103, at 275.

<sup>221</sup> Strang, *supra* note 85, at 56.

<sup>222</sup> These concerns were expressed by the State Department, the National Security Council, as well as in the office of the U.S. Trade Representative. PETIT, *supra* note 170, at 57.

<sup>223</sup> ZIETZ & VALDÉS, *supra* note 208, at 13.

basic principles of the CAP are not negotiable. The trinity of CAP principles—single market, Community preference, and financial solidarity<sup>224</sup>—are still so important for the EC that they cannot be called into question. During the Tokyo Round, the first GATT Round in which the EC participated with a fully developed CAP, the Community stated that the CAP's "principles and mechanisms [could] not be called into question and therefore [would] not constitute a matter for negotiation."<sup>225</sup> Subsequently, the United States took the position that it did not envision weakening the CAP in any way.<sup>226</sup>

Since the CAP is the "central pillar in the Community's institutional system" and "the political . . . cement which holds together the different parts of the Community",<sup>227</sup> the EC is indeed unwilling to change the three basic principles of the CAP.<sup>228</sup> However, since such fundamental change was never intended by the Community, the proposals submitted by the United States and the Cairns Group, in particular the sections on export subsidies, are beyond a realistic agreement. As export subsidies are an integral part of the CAP's principles of Community preference and market unity, a ban or significant reduction in export subsidies would be equivalent to fundamentally changing the nature of Europe's internal agricultural policy regime. This would not be the case for any other country to the same extent.<sup>229</sup> In addition, comprehensive tariffication would mean an end to the variable levies, a keystone of the CAP principle of Community preference.<sup>230</sup> The Community is simply not ready to undertake this commitment, and has been open and honest about it during the negotiating process.

Likewise, the Council of Ministers of the EC has stated that the Dunkel proposal does not conform to the fundamentals of the CAP.<sup>231</sup> It not only reduces the volume of subsidized exports substantially, but also interferes with the recently adopted plan for inter-

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<sup>224</sup> For a discussion of the basic CAP principles, see *supra* notes 94-99 and accompanying text.

<sup>225</sup> Quote from the EC's negotiating mandate during the Tokyo Round, cited in HARRIS ET AL., *supra* note 103, at 278.

<sup>226</sup> This was stated in 1979 in a letter by Robert Strauss, the U.S. Trade Representative written to F. Gundelach, vice-president of the EC Commission. The EC considered subsequent pressures from the U.S. to change the CAP in 1982 as a breach of this gentlemen's agreement. PETIT, *supra* note 170, at 58 and n. 76.

<sup>227</sup> *Commemorating 30 Years of the Common Agricultural Policy*, Speech by Mr. Ray MacSharry, EC Commissioner for Agriculture, at a reception for the Dublin Horse Show, July 19, 1990, reprinted in EUR. COMMUNITY NEWS, No. 30/90, July 19, 1990, at 1.

<sup>228</sup> "We are fully engaged in the Uruguay Round process. But let me make it clear, we are doing so on the basis of our commitment to the CAP and to its basic principles and mechanisms of market unity, community preference and financial solidarity. . . . There can be no question of setting aside these achievements or to put [sic] them at risk." *Id.* at 3.

<sup>229</sup> ZIETZ & VALDÉS, *supra* note 208, at 76.

<sup>230</sup> ZIETZ & VALDÉS, *supra* note 208, at 76. See also *supra* notes 96-97 and accompanying text.

<sup>231</sup> Carlson, *Farm Groups Say GATT Plan Falls Short*, FEEDSTUFFS, Jan. 13, 1992, at 23.

nal reform.<sup>232</sup> Thus, the range of a possible agreement on agriculture in the Round has been limited from the start. However, an agreement has never been excluded by these limitations. In fact, the reforms adopted by the EC in May 1992 show that it is possible to substantially reform the CAP without changing its basic principles.

### C. Constraints Caused by the Uruguay Round

The EC's unwillingness to negotiate its fundamentals is fully consistent with the Punta del Este Ministerial Declaration. The declaration, fully subscribed to by the United States calls only for *greater liberalization* of trade in agriculture, and strengthened and more effective GATT rules and disciplines on agriculture. Nevertheless, in Montreal in 1988, the United States demanded the *total elimination* of all support to agriculture and, consequently, no agreement could be reached. This demand was set aside in Geneva the following year when the framework agreement on agriculture called for *substantial reductions* in agricultural support and protection. The position taken by the Community, that the basics of the CAP are beyond the scope of the Uruguay Round, is not inconsistent with either the Punta del Este, or the Geneva declarations, and provides a framework for the scope of the negotiations. The reform plan adopted by the Community suits these declarations by providing substantial reductions in agricultural support prices, while at the same time keeping the basics of the CAP intact.

### D. Constraints Directly Caused by the United States

Apart from America's historical responsibility for the GATT in its current form, and the American failure to adequately recognize the EC's negotiation limits or the limited scope of the Uruguay Round, the United States may have caused even more harm by its method of negotiation. Its inflexible all-or-nothing approach prevented any progress during the first four years of the GATT.<sup>233</sup> Moreover, it convinced the EC that the U.S. proposal was not aimed at the liberalization of world trade in agriculture, but rather at the destruction of European agriculture.<sup>234</sup> In short, the extreme American approach to agricultural reform was a non-starter.<sup>235</sup>

<sup>232</sup> For a discussion of the reform plan, see *supra* notes 142-147 and accompanying text.

<sup>233</sup> Arthur Dunkel (Chairman of the GATT) stated: "It is from the day we came down to more realistic numbers that the negotiations started . . . In fact it is not so far away that we started the real negotiations in agriculture. Sorry to say it. The maximalist approach was bringing nothing." *Dunkel: GATT Leader Optimistic About Completion of Trade Negotiations*, FEEDSTUFFS, Mar. 9, 1992, at 6.

<sup>234</sup> *Agriculture*, *supra* note 88, at 63.

<sup>235</sup> This view is clearly shared at least among some Americans. For example, "[C]learly, the U.S. is losing on every front. The U.S. strategy is wrong. Bush must give up his ag reform game plan that's been a failure from the beginning. Instead of winning sub-

The belief that Europe could be *forced* into agricultural reform, however, is demonstrated by the U.S. implementation of its Export Enhancement Program (EEP).<sup>236</sup> The EEP enables the U.S. exporter to export agricultural commodities at prices below U.S. domestic prices. While the international effects of the CAP are largely unintended consequences of a *domestic* policy,<sup>237</sup> the United States aggressively set up EEP to combat EC subsidies, despite serious Australian and Canadian complaints.<sup>238</sup>

As is the case with the EEP, the U.S. condemnation of EC export subsidies often sounds a little deceptive. First, the Community can point at the Marketing Promotion Program,<sup>239</sup> the GSM-102 short term<sup>240</sup> and the GSM intermediate credit programs,<sup>241</sup> and the Public Law 480 program<sup>242</sup> as American trade-distorting export subsidies. Second, the EC considers the U.S. system of deficiency payments as a "direct" export subsidy at a low level in the production chain.<sup>243</sup> The United States requests the EC to make a specific commitment on export subsidies without admitting that deficiency payments may have many of the same effects. Third, other examples of indirect agricultural subsidies include federal water programs for farmers<sup>244</sup> and low grazing fees on the public lands for livestock producers. In addition, the *total* amount spent on agriculture in Europe is less than the total amount spent in the United States,<sup>245</sup> and per-

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stantial concessions from the EC, it's won harsh, and deserved, criticism from U.S. allies in world trade." Editorial in FEEDSTUFFS, Jan. 20, 1992, at 20.

<sup>236</sup> For an explanation of the EEP, see *supra* note 124.

<sup>237</sup> Buckwell, *supra* note 162, at 238.

<sup>238</sup> House, *Despite Complaints, Bush Says EEP Won't End Until Europe Cuts Subsidies*, FEEDSTUFFS, Jan. 20, 1992 at 6. See also *Administration Urges more EEP Funds to Pressure EC in Multilateral Talks*, 8 INT'L TRADE REP. (BNA) 300-301 (1991).

<sup>239</sup> The Marketing Promotion Program (MPP) is a U.S. export promotion program designed to encourage development, maintenance, and expansion of commercial farm export markets. Under the program, eligible participants receive generic commodity certificates in payment for promotional activities approved by the Secretary of Agriculture. LIPTON, *supra* note 18, at 27.

<sup>240</sup> GSM-102 is the largest U.S. agricultural export promotion program. It guarantees repayment of private, short-term credit for up to 3 years. LIPTON, *supra* note 18, at 27.

<sup>241</sup> GSM-103 is an export promotion program complementing GSM-102. It guarantees repayment of private credit for 3-10 years. LIPTON, *supra* note 18, at 24.

<sup>242</sup> Public Law 480 (P.L. 480) is an agricultural export program which seeks to expand foreign markets for U.S. agricultural products, combat hunger, and encourage economic development in developing countries. Title I (Food for Peace Program), makes U.S. agricultural commodities available through long-term dollar credit sales at low interest rates for up to 30 years. Title II provides for donations for emergency food relief and nonemergency assistance. Finally, Title III (Food for Development Program) provides government-to-government grant food assistance to least developed countries. LIPTON, *supra* note 18, at 35.

<sup>243</sup> For an explanation of deficiency payments as export subsidies, see *supra* note 209.

<sup>244</sup> Scheid, *EC Highlights U.S. Farm Trade Barriers, Subsidies*, FEEDSTUFFS, Apr. 29, 1991, at 4.

<sup>245</sup> On May 2, 1991, the EC Commission agreed to a total 1992 Community budget of \$81.3 billion. Support to agriculture is expected to take \$43.3 billion in 1992, up 6.6% from the 1991 allocation. Expenditures by the individual member states are expected to be in excess of \$12 billion. *Spending on EC Agricultural Support Continues To Escalate*, in U.S.

haps more significantly, the amount of government support received *per farm* is at least double in the United States than it is in the EC.<sup>246</sup> Finally, the Community will point out that despite all American accusations, the EC has remained a substantial net importer of agricultural products, whereas the United States itself is a net exporter. Moreover, the EC is the leading foreign market for American agricultural exports, and consistently registers a deficit in its agricultural trade with the United States.<sup>247</sup>

## VI. The Future of Agriculture in the GATT

Before addressing the question of what can and needs to be done with regard to the present situation in the GATT Uruguay Round, a number of current and future developments concerning agriculture need to be taken into account. These developments offer substantial hope for the future of agricultural trade liberalization.

### A. Developments in Europe

The Single Market of "Europe 1992" is planned to come into effect on January 1, 1993, and will complete the elimination of all internal borders within the Community. Obviously, the threat of a fully integrated "Fortress Europe" worries American agricultural exporters. However, the most important effect of "Europe 1992" on agriculture will be the lower political profile accorded to agriculture on the EC agenda, as broader economic and political goals dominate the effort to create a more united Europe.<sup>248</sup> The CAP, a unifying force historically, may lose part of its importance in the years to come. Furthermore, EC agricultural production is intended to drop, consumption is expected to increase, and U.S. agricultural producers may well benefit from a borderless EC with fewer import restric-

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DEP'T OF AGRIC., *supra* note 130, at 46. In the United States, the Bush administration proposed a \$59.4 billion budget for 1993 fiscal spending by the U.S. Department of Agriculture. Spending would fall four percent from the previous year. David Wessel, *Proposal Indicates Bush is Willing to Bend on the Issue of the Deficit*, WALL ST. J., Jan. 30, 1992, at A6. Note that it is extremely hard to adequately compare these two budget figures. The figures, most importantly, show that the EC as well as the United States spend enormous sums on the support of their respective agricultural sectors.

<sup>246</sup> Interview with the EC agricultural attache in Washington, Jacques Vonthron. *What Iron Curtain? EC Attache Challenges Protectionist Charge*, FEEDSTUFFS, Feb. 17, 1992, at 3. Moreover, the EC charged that in 1987, for instance, the U.S. spent \$11,250 per farmer in farm aid, almost five times what the CAP cost per farmer. OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES, *supra* note 80, at 43. It should also be noted that considering the much larger average farm size in the U.S., the support *per acre or hectare* will be considerably lower in the U.S. Again, these figures may only show that both the U.S. and the EC support their agricultural sector to a considerable extent.

<sup>247</sup> Mahler, *supra* note 189, at 41.

<sup>248</sup> *Summary and Post-Conference Update*, in EC 1992: IMPLICATIONS FOR WORLD FOOD AND AGRICULTURAL TRADE, *supra* note 110, at 288.

tions.<sup>249</sup> Although in some instances agricultural export into the Community market will be restricted, the overall net effect for U.S. agriculture should be positive.<sup>250</sup>

The astonishing developments in Eastern Europe may, in the short run, provide additional export markets for Community produce, but in the long run will put more pressure on the EC for reforms. The performance of the agricultural sectors in Eastern Europe and the former Soviet Union will be strengthened when their economic systems improve and become more efficient. Agricultural production will probably outclass EC production because of more favorable conditions for agriculture in Eastern Europe.<sup>251</sup> The biggest help the EC could provide the emerging democracies would be to open its market for Eastern European products. It will be politically very difficult for the Community to refuse entry to cheaper imports from Eastern Europe. Relaxation of the CAP's import regime and a further decrease of EC agricultural production is a possible outcome.

Likewise, agricultural trade liberalization may be accelerated by the creation of the European Economic Area (EEA). In October 1991, the EC agreed to form a free trade zone for the movement of goods, services, capital and workers with the seven current European Free Trade Association (EFTA) members.<sup>252</sup> The EEA will create, beginning on January 1, 1993, the world's largest trading bloc with 380 million consumers accounting for over forty percent of world trade. The seven EFTA countries will, for the present, maintain their own domestic agricultural policies rather than implement the Community's CAP. Nevertheless, the EEA agreement does obligate participating countries to harmonize national legislation, including regulation in the field of agriculture. Consequently, it may obligate countries like Norway and Switzerland with a very high level of agricultural subsidies to lower those levels. Furthermore, both the EFTA and EC countries will work towards further liberalizing agricultural trade within the Area.<sup>253</sup> Agricultural trade negotiations on a global scale may benefit in the long run.

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<sup>249</sup> *Summary and Post-Conference Update*, in EC 1992: IMPLICATIONS FOR WORLD FOOD AND AGRICULTURAL TRADE, *supra* note 110, at 288.

<sup>250</sup> *Summary and Post-Conference Update*, in EC 1992: IMPLICATIONS FOR WORLD FOOD AND AGRICULTURAL TRADE, *supra* note 110, at 288.

<sup>251</sup> For example, Eastern Europe as a region may become a net exporter of 5-6 million tons of non-subsidized grains by the end of this decade. *Summary and Post-Conference Update*, in EC 1992: IMPLICATIONS FOR WORLD FOOD AND AGRICULTURAL TRADE, *supra* note 110, at 287.

<sup>252</sup> The current EFTA states are Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland. The EFTA was created in 1960 by European states that were then unwilling or unable to join the EC. The initial member states were Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom. Some states subsequently left EFTA to join the EC, and new states joined EFTA.

<sup>253</sup> *EC-EFTA Agree to Form EEA*, AGRICULTURAL TRADE UPDATE, Dec. 9, 1991, at 6.



Finally, the most important incentive for the EC to further reform the CAP is its price tag. The financial burden of the high guaranteed prices in combination with the purchase, storage and disposal of over-production cannot be borne much longer. The adopted reform plan does not lower EC spending on agriculture. On the contrary, EC farm spending is expected to increase by fourteen percent over the next five years as a result of the direct income support to farmers.<sup>254</sup> The EC is fully aware of the need for other and more significant changes. However, the delicate reform process takes time and patience, and too much pressure and interference from the trading partners may prove to be counter-productive.<sup>255</sup>

*B. What Needs to Be Done?*

In light of these historical, present and future developments, a number of options are worth mentioning. First, to reach any form of agreement in the future, it is essential that the United States change its attitude and negotiating position. The United States must accept some responsibility for the stiff GATT procedures, the agricultural loopholes in the Agreement, and the relatively limited scope of the Uruguay Round. At the same time, it must recognize the EC's negotiating limits, which are neither unfair nor unreasonable nor unexpected, considering the historical context. Consequently, the United States must lower its expectations of how far the EC can go in reforming its CAP. It must recognize that it is currently politically impossible for the Community to go beyond the May 1992 reform proposals.<sup>256</sup> If the United States and the EC can agree on the non-trade distorting character of the direct support payments adopted by the Community to compensate EC farmers for the loss in agricultural income as a result of substantial price cuts, the possibilities of a compromise on agriculture will multiply. Finally, the United States must negotiate, not demand. As British Agricultural Minister John Gummer has said: "The U.S. must realize that it is not an imperial power that can dictate an agreement."<sup>257</sup>

A serious danger attached to this change in the U.S. stance, however, may be formed by a possible rejection by the United States Congress of an agreement in the Round. Taking into account the recognized limits and lowered expectations of the Round, the con-

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<sup>254</sup> *Farm Ministers Approve Overhaul of EC's Common Agricultural Policy*, *supra* note 144, at 915.

<sup>255</sup> For example, in the past U.S. pressure seems to have helped overcome deep internal differences over agriculture in the Community. Britain, normally a U.S. ally on agriculture, recently displayed a surprising unity towards its EC partners, in order not to bow for American pressure.

<sup>256</sup> *Farm Ministers Approve Overhaul of EC's Common Agricultural Policy*, *supra* note 144, at 914.

<sup>257</sup> *USDA Preparing \$1 Billion Increase in Export Subsidies if GATT Talks Fail*, *supra* note 3, at 573.

tent of an agreement will undoubtedly be distant from initial U.S. proposals and will possibly be considered less favorable for American agriculture than no agreement at all. In addition, the so-called fast-track procedure, under which Congress has to vote on a Uruguay Round agreement before mid-1993, will put additional pressure on GATT negotiators and the United States Congress.<sup>258</sup> The discussion and acceptance of a compromise on agriculture in the Uruguay Round are further complicated by recent election year politics, making efficient negotiating more complex.

At the same time, the present-day political scene in Europe may be even more troublesome. In June 1992, the Danish voters unexpectedly rejected the Community's plans for further economic, monetary, and political integration embodied in the Maastricht Treaty of December 1991.<sup>259</sup> Although neither required by the Maastricht Treaty nor by domestic legislation, the French had their referendum in September 1992 while Europe held its breath. French voters accepted the Treaty by a minimum margin. It is unclear what the status of the Treaty and the European integration process is now that the Community is confronted with Denmark's rejection and France's apparent hesitation. The French farmers, angered by the recent CAP reforms, overwhelmingly rejected deeper European unity through the referendum. The French government cannot be expected to anger its farmers even more by striking a GATT agreement that would lead to more and unpopular CAP reforms.<sup>260</sup>

Additional pressure is put on the European integration process by the sudden collapse of the exchange-rate mechanism (ERM) of the European Monetary System (EMS).<sup>261</sup> The British pound ster-

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<sup>258</sup> Under the so-called "fast-track" authority for the President, the U.S. Congress will not be able to formulate any amendments to the GATT agreement, but is limited to a straight up or down vote concerning the agreement and its implementing legislation. Without fast-track, a GATT agreement would be subject to endless amendments by Congress unacceptable for the other parties to the agreement. Fast track authority will expire on June 1, 1993. Under the current trade act, fast-track cannot be renewed again, as it was last year. Only a completely new trade act can give the President new fast-track authority. *The Uruguay Round: Death by Procrastination*, *ECONOMIST*, July 18-24, 1992, at 68-69.

<sup>259</sup> Maastricht is the Dutch city where, during a European summit meeting in December 1991, the EC member states agreed to form an Economic and Monetary Union (EMU) including a European central bank and the European Currency Unit (ECU) as its single European currency by no later than January 1, 1999. A great number of other provisions were to ensure a closer political union. The Treaty will not come into force before it has been ratified by all twelve member states. The parliaments of Luxemburg and Greece already adopted the Treaty. The Danish and Irish constitutions require a referendum. Ireland adopted the Treaty, but the Danish voters rejected. France also organized a referendum. The Parliaments of the other member states still need to ratify. It is yet unclear what is going to happen to the European union now that Denmark rejected the plans.

<sup>260</sup> See *Half-Maastricht*, *ECONOMIST*, Sept. 26-Oct. 2, 1992, at 15; Stuart Auerbach, *Denmark's Vote on EC Called A Threat to Free-Trade Talks. Officials: Referendum Hurts GATT Efforts*, *WASH. POST*, June 9, 1992 at C1, C8.

<sup>261</sup> The EMS was introduced by the Community in 1979 to stabilize exchange rates between EC member countries and is based on the ECU, a basket of specific amounts of member states' currencies. The ERM preserves the monetary stability within the EMS. It

ling and the Italian lira quit the system. The route to monetary union intended in the Maastricht Treaty was through a step-by-step evolution of the ERM. The Britons argue that the Treaty's core, the plan for economic and monetary union, cannot proceed now that the ERM is breaking apart. The monetary union seems farther away than ever. The Community will have to solve these problems before it can move on to anything else. Therefore, it is hard to imagine any progress on agricultural trade issues from the side of the EC during this period of turmoil and uncertainty.

Thus, the scenario pictured above consists of a number of highly uncertain elements and does not seem to form the right political background for a GATT agreement on agriculture. Another route, although certainly not without obstacles of its own, may be more successful. Agriculture could simply be withdrawn from the present negotiations. Looking back, the biggest miscalculation in the Round may have been the linkage between agriculture and the other negotiating groups. Making the agreements in fourteen important fields in the GATT Uruguay Round subject to an agreement on the complex issue of agriculture on American terms has contributed to the current deadlock, and threatens the very existence of the GATT as a trade organization. Withdrawing agriculture from the Round will not hurt the Community's reform plans. The EC is going to internally reform its agricultural policy independent of the outcome of the Round, simply because it must change to meet modern needs. The reforms will be carried out in the years 1993-1996 even without comparable U.S. concessions, and more reforms will follow beyond 1996.<sup>262</sup>

On the other hand, for the majority of Uruguay Round participating countries, agricultural trade constitutes their prime interest.<sup>263</sup> By making agricultural trade liberalization a *conditio sine qua non*, they attempted to force the United States and the EC into an agreement on agriculture. This attempt, however, has been unsuccessful. In a recent interview, GATT Director General Arthur

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obliges participating member states to maintain their currency exchange rates within specified bands of their central rates against the ECU. These central rates are fixed. Most member states are required to maintain their currency rates within a 2.25% band of their central rates. Spain and the UK are permitted a 6% band, Greece and Portugal do not participate. The central banks of the ERM participating countries are required to take corrective action to maintain currency rates within these bands. Josling & Gardiner, *supra* note 110, at 9-11.

<sup>262</sup> The U.S., on the other hand, has begun to implement legislation requiring the Department of Agriculture to increase subsidies on U.S. agriculture exports by \$1 billion beginning October 1, 1993 and ending September 30, 1995 if no agreement in the Uruguay Round is reached by the end of June, 1992. *USDA Preparing \$ 1 Billion Increase in Export Subsidies if GATT Talks Fail*, *supra* note 3, at 572.

<sup>263</sup> According to Carla Hills, U.S. Trade Representative, 60 of the 108 countries participating in the Uruguay Round do so only because of their interest in agriculture. *USTR Hills Says Passage of Quota Bill Could Bring Collapse of Uruguay Round*, 7 INT'L TRADE REP. (BNA) 1358, 1359 (1990).

Dunkel refused to withdraw agriculture from the current GATT negotiations. In his view, a "piecemeal" approach would undermine the possibilities to strike a package deal between the contracting parties in which every country will have to give and take.<sup>264</sup>

Another hurdle that needs to be overcome is the conception that withdrawing agriculture from the Uruguay Round is a defeat for the U.S. government, considering the emphasis the United States has placed on agricultural policy reform. The recent presidential election may solve this problem. In any event, it will be hardly tenable that agreement in fourteen important negotiating groups, though not on agricultural trade, can be considered a defeat, while no agreement at all can be hailed as a victory.

Withdrawing the agricultural negotiating group from the Uruguay Round may be the only viable possibility left for the Uruguay Round to survive. Technical complexities, political sensitivities, national peculiarities, and economic and social consequences of agricultural policy reform in the United States, the EC, and Japan will prevent further modifications of domestic farm policies in the short run. These are political realities we will have to live with. This does not mean, however, that all efforts to liberalize global agricultural trade will have to be put aside. On the contrary, efforts to reach an agreement on this crucial issue need to be doubled. But time, patience and mutual understanding are required in this delicate and slow moving process.

### **Concluding Remarks**

The United States has become increasingly unhappy with the EC's CAP. The CAP causes serious trade distortions on the international market, severely limits access to American products and creates unfair competition on the world market by heavily subsidizing the export of surpluses. Nevertheless, while seeking reform in the Uruguay Round, the United States must not disregard the historical and political realities within the GATT and Europe which it helped to create. At the same time, the United States must give the EC credit for its unprecedented reforms of the CAP, which offer hope for the future.

Europe will ultimately have to, and is going to, further reform its CAP, but this process will take decades. More than anything else, the EC needs time. The political structure of the Community and the importance of agriculture in Europe prevent any significant short-term reforms beyond the ones already adopted and suggested. Severe pressure by the United States has been counterproductive. Under the assumption that the Community's recent reform plan will

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<sup>264</sup> Dunkel: *GATT Leader Optimistic About Completion of Trade Negotiations*, *supra* note 233, at 6.

be considered insufficient by the American negotiators and politicians, the only way to break the current stalemate in the GATT Uruguay Round, and thus to save the Round, may be the withdrawal of agriculture from the negotiations, a choice that will be very hard to accept for the developing countries and agricultural exporters. Some would say that the Uruguay Round will still have failed if an agreement is reached without agriculture. However, after forty-five years of GATT, the Uruguay Round has now made domestic agricultural policy finally subject to multilateral negotiation. Apart from results in any other field, this may form the most prominent result of the Round for future generations.

### Epilogue

After the manuscript of this article had been finished, a number of important developments took place that need to be addressed. The United States and the EC finally solved their agricultural dispute with the Washington Agreement of November 1992. Although not a GATT agreement in itself, this bilateral accord not only unlocked the stalled Uruguay Round, but also solved the oilseeds dispute, another thorny agricultural dispute between the United States and the EC. The agreement prevented a transatlantic trade war from becoming reality.

#### *A. The Oilseeds Dispute*

In 1962, the United States managed to secure a "zero-duty-binding" for oilseeds from the EC during the GATT Dillon Round. Accordingly, U.S. exporters may enter the EC duty-free. Since then, European oilseeds farmers have been awarded direct subsidies by the Community. A GATT panel has twice found that the subsidies undermine the United States' right to duty-free access in the EC and limit U.S. export possibilities. The Community basically ignored the GATT reports. The oilseeds conflict has been pulled into the agricultural trade talks of the Uruguay Round, even though it is not a Round topic in itself. After long and painful negotiations a shaky compromise was reached. In 1993, subsidized oilseeds production in Europe will be cut by idling fifteen percent of the Community's acreage normally under oilseeds. In the years thereafter, Community producers will have to at least idle ten percent of their oilseeds acreage. The Agreement also mentions binding arbitration as the method to settle future disputes in this area.<sup>265</sup>

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<sup>265</sup> The oilseeds acreage of the Community was set at 5,128 hectares (around 11,795 acres). *Akkoord Tussen EC en VS in Twee Geschillen Doorbraak [Accord Between EC and U.S. is Break-through in Two Disputes]*, FINANCIELE DAGBLAD, Nov. 21/23, 1992, at 3.

### B. Uruguay Round

The other part of the Washington Agreement dealt with the main stumbling block of the Uruguay Round: the farm subsidies. It was based on the earlier Dunkel proposal, accepted by the United States, but rejected by the Community.<sup>266</sup> The EC's internal reform plan (the MacSharry Plan)<sup>267</sup> already met the Dunkel demands of a 20% cut in domestic subsidies and a 36% reduction of the value of subsidized exports. The remaining problem area was the limitation of the *volume* of subsidized exports. Whereas the Dunkel Proposal called for a 24% cut in the volume of subsidized exports, the United States and EC finally agreed on a 21% cut over a period of six years. The deal will start in 1994 and takes the 1986-88 export situation as the reference period. This reduction from 24% to 21% seems to be a compromise. It may be considered a victory for the EC because it does not even come close to the original U.S. demands, which included elimination of all farm subsidies by the year 2000. On the other hand, the EC initially did not want to make any commitments at all on export subsidies. The 21% cut is also expected to go beyond the reforms of the MacSharry Plan.<sup>268</sup> Thus, it may be considered a U.S. victory since the EC swore it would not go beyond MacSharry.

Furthermore, the direct payments afforded by the MacSharry reforms to the EC farmers to compensate them for a loss of income as a result of price cuts were accepted by the United States. The direct compensation payments, which form the centerpiece of the CAP reforms, are no longer an issue between the United States and the EC. The Community considers acceptance of these payments as international recognition of their new CAP. They are not included in the internal subsidies that need to be cut by 20%, but then neither are the American deficiency payments.<sup>269</sup> Finally, the concept of rebalancing<sup>270</sup> is not part of the Washington Agreement. This is a clear U.S. victory since rebalancing has been an important EC demand throughout the Round.

With the compromise on the agricultural subsidies, the United States and the EC can finally go back to the other GATT participating countries in Geneva to try to work out a general Uruguay Round agreement. Because a number of serious hurdles remain, such an agreement is not expected before the first months of 1993.

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<sup>266</sup> See *supra* notes 212-16 and accompanying text.

<sup>267</sup> See *supra* notes 136-147.

<sup>268</sup> *The Uruguay Round: Coup de Grace, Coup de Foudre*, *ECONOMIST*, Nov. 28, 1992, at 70, 79.

<sup>269</sup> *Accord Between EC and U.S. is Break-through in Two Disputes*, *supra* note 265. For a description of deficiency payments, see *supra* note 210 and accompanying text.

<sup>270</sup> See *supra* notes 208 and 214 and accompanying text.

C. *Still No Agreement on Agriculture in the GATT Uruguay Round*

In order to secure a general GATT agreement with all participating countries, three main hurdles still need to be overcome. First, despite their EC membership, the French have threatened to "veto" any deal that would hurt their vital national interests. Without proper compensation in other areas, the French consider the Washington Agreement in its current form unacceptable. French farmers, who are already in trouble, will be hit hard by the oilseeds compromise and the volume reduction in the subsidized agricultural exports.

From a strictly legal perspective, however, France does not have a veto. Under Community law, the European Commission negotiates a trade agreement, and the Council of Ministers (representing the member states) decides with a qualified majority whether to accept the agreement.<sup>271</sup> "Qualified majority" means fifty-four votes out of the total seventy-six weighted votes.<sup>272</sup> Accordingly, France would have to rope in enough allies in the Council to gather the votes it needs to block a final GATT deal negotiated by the Commission. France has no veto power by itself.

The French, however, would rather refer to the Luxembourg Compromise which was agreed to by the original six Community member states in 1966. One of the provisions of this Compromise states that "the French delegation considers that where very important interests are at stake the discussion must be continued until unanimous agreement is reached. The six delegations note that there is a divergence of views on what should be done in the event of a failure to reach complete agreement."<sup>273</sup> This Compromise, which has never been ratified and cannot be considered to have any legal force at all,<sup>274</sup> is often referred to as "an agreement to disagree." Nevertheless, the French claim the right to eventually veto a final GATT agreement if there will be no consensus in the Council because of their own opposition. So far, France has not used this controversial option to reject the Washington Agreement. However, it still has the option to invoke the Compromise in the near future when the Council votes on a general GATT Uruguay Round agreement between all one hundred eight GATT parties. By determining that the agricultural part of the general agreement would hurt its vital national interests, France can block this final deal. It is unclear what would happen if that situation occurred.

Second, now that the United States and the EC have settled their

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<sup>271</sup> EEC TREATY art. 113.

<sup>272</sup> In the Community system of weighted voting, Germany, France, Italy and the U.K. have 10 votes, Spain has 8, Portugal, Greece, the Netherlands and Belgium have 5, Denmark and Ireland have 3, and Luxembourg has 2 votes. EEC TREATY art. 148.

<sup>273</sup> HARTLEY, *supra* note 59, at 14.

<sup>274</sup> *Id.*

farms disputes, the other GATT parties need to go along. Japan, for example, will have to open its heavily protected rice market. Rice is sacred in Japan. The Dunkel Proposal contained a provision to convert import restrictions on rice into tariffs. Japan, supported by South Korea, views the bilateral United States-EC Agreement as a revision of the Dunkel Proposal. Accordingly, Japan claims to also have a possibility to amend the Dunkel draft by excluding the Japanese ban on rice imports from the tariffication provisions. It is highly unlikely that the other GATT parties (especially the United States) will accept a rice exception.<sup>275</sup> On the other hand, the big agricultural producers united in the Cairns group may think the Washington Agreement does not go far enough. They seem to have no choice but to accept a United States-EC dictate on farm subsidies.

Finally, just as a general GATT Agreement must be approved by the EC Council of Ministers before it is ultimately accepted, the Agreement must also pass through the United States Congress. Current fast-track legislation prevents Congress from amending a trade agreement.<sup>276</sup> Fast-track authority expires on June 1, 1993. If a general GATT agreement is not initiated by March 1, 1993, new legislation extending the fast-track is required. If adopted at all, new legislation is likely to carry far more conditions on the terms of negotiation than the current law does. It seems unlikely that the final GATT deal will be initiated in time to avoid new legislation and further complications.

#### *D. Conclusion*

At the moment of writing, there is still no agreement on agriculture in the GATT Uruguay Round. Now that the first cheers about the Washington Agreement have faded, agriculture remains a time-bomb under a general GATT Uruguay Round Agreement.

The option suggested at the end of this article—withdrawing agriculture from the Round—has never received much attention and now seems further away than ever. Nevertheless, it would have been a better option than the current situation, and perhaps it still is. Most importantly, despite the Washington Agreement, there is still no agreement on agriculture, causing further delay in a time of worldwide economic recession. The United States-EC dispute has been replaced by a United States-France dispute and an internal EC dispute. There is still no guarantee that we will conclude the final, comprehensive and much needed GATT Uruguay Round Agreement in 1993.

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<sup>275</sup> See *Japan: Rice Pudding*, *ECONOMIST*, Nov. 28, 1992 at 37.

<sup>276</sup> See *supra* note 258 and accompanying text.