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Cover Page Footnote

International Law; Commercial Law; Law

A Critical Examination of the Targeted Export Assistance Program, Its Transformation into the Market Promotion Program and Its Future

David R. Purnell, B.A., J.D., LL.M.†

I. Introduction

Agricultural commodities have long played a major role in the export markets of the United States. Despite serious declines in volume and value in the early 1980s, agricultural products continue to make up a very substantial block of exports. The expansion of export markets for agriculture seems to be the aspiration of many in the agricultural sector and in Congress as both seek solutions to tough problems such as a negative balance of trade, a huge federal budget deficit, severe financial distress, and dislocation in the agricultural sector. In addition to the longstanding programs, several federal programs have been developed in recent years to assist and to encourage the export of U.S. agricultural commodities and products.

A principal focus of this article is one such program—the Targeted Export Assistance program (TEA program). Authorized in the Food Security Act of 1985 (1985 Farm Bill), the TEA program offered federally funded financial assistance in the short-term development of export markets for U.S. agricultural commodities, especially High Value Products (HVPs).¹ Conceived as a partial response to aggressive and allegedly unfair trade practices of some competitors, the TEA program generated controversy regarding its effectiveness and desirability. There were also charges of serious difficulties in its administration and implementation. The General Accounting Office (GAO) twice reported to Congress on problems in the administration of the TEA program, the Office of Inspector General (OIG) of the U.S. Department of Agriculture (USDA) conducted at least

† Brigham Young University, B.A., 1980; Brigham Young University, J.D., 1983; University of Arkansas, LL.M., 1991.

¹ High Value Products are those agricultural commodities, which because of some unique or particular characteristic, are valued and priced above the standard for the commodities sold as standard bulk commodities. HVPs include value added products that are commodities processed or refined in some way changing the nature of the commodity and differentiating it from the raw commodity from which it was derived.

two substantial audits of the program, and participants experienced significant delays in receiving benefits.

In the Food, Agriculture, Commerce and Trade Act of 1990 (the 1990 Farm Bill) the TEA program was repealed² and replaced by the Market Promotion Program (MPP)³. However, the basic nature of the TEA program was carried forward in the MPP. Many of the TEA program regulations were codified intact and others were codified with some modification. Although significant changes were made addressing some of the main concerns raised by the GAO and OIG, not all of their recommendations were implemented.

This Article explores the nature, formation, and evolution of the TEA and MPP programs as well as their role in the larger U.S. agricultural trade policy and legislative framework. These programs are further examined within the context of the international legal framework, in particular, the General Agreement on Tariffs and Trade (GATT). Finally, some options for the future elimination, continuation or transformation of the MPP will be examined.

II. The U.S. Policy and Program Framework for the Targeted Export Assistance Program

As one of the world's most abundant food and feed⁴ producing countries, the United States can legitimately lay claim to a particularly strong interest in international agricultural trade. This interest influences not only the formulation and implementation of U.S. agricultural export policy, but of domestic agricultural policy as well.

The U.S. government is involved extensively in the agricultural sector. Through intervention, the government hopes to achieve policy objectives such as income stabilization for the farm sector, market stabilization for both the farm and consumer sectors, and price stabilization for consumers. The policy tools of government intervention include disaster relief payments, production limitations of various types, resource conservation, and excess supply management through storage, food aid, and export promotion. A variety of federal farm programs have been drafted, authorized and implemented over the years, particularly since the Great Depression and the development of more intervention-oriented policies of the New Deal. Some programs are still in effect, others have become inactive, while others have never been implemented.⁵

² Food Security Act of 1985, § 1124, 7 U.S.C. 1736s (1988) *repealed by* Food, Agriculture, Commerce and Trade Act of 1990, Pub. L. No. 101-624, Title XV, § 1572(3), 104 Stat. 3702 (1990).

³ 7 U.S.C.A. § 5623 (West Supp. 1993).

⁴ Feed is consumed by livestock, as distinguished from food which is consumed by people.

⁵ Since the 1930s, Congress has enacted an amazing volume of commodity legislation. From first to last, there has been a strong sense in the language

In recent years, there has been an increased policy emphasis on export promotion. In order to encourage and to enhance export opportunities for domestic business, the U.S. government has created, revived and implemented a number of export enhancement and assistance programs. Some of the programs are unique to agriculture, while others are available to a cross-section of business interests. The convoluted history and piecemeal implementation of agricultural policy and programs resulted in a remarkably complex structural and policy framework to which the TEA program was added.⁶ A brief review of the major trade programs affecting agriculture should help provide a better understanding of the TEA program.

A. The Foreign Market Development Program

1. Origin of the Cooperator Program

The Foreign Market Development Program (the Cooperator program) was the conceptual precursor of the Targeted Export Assistance program. Accordingly, an understanding of the Cooperator program is essential to an understanding of the TEA program. As is the case with so many agricultural programs, the early history of the Cooperator program is convoluted. Its roots go back to Public Law 480, commonly known both as the Food for Peace program and as P.L. 480. P.L. 480 was created in the Agricultural Trade Development and Assistance Act of 1954. It drew together, under one umbrella, several pre-existing programs and added several more programs and functions.

The Cooperator program was one of the new programs created under the P.L. 480 umbrella. It was conceived as a program to main-

of the bills, in the hearings held, and in Congressional committee reports that the programs legislated are to be regarded as experimental. They often have been set up to last only a few years. There is some "permanent" legislation, however, from the 1930s and 1940s, and many later laws are expressed as amendments to it. Thus, our commodity legislation as of 1980 is a hodgepodge of pieces of laws dating from the 1930s to the present, with many provisions lying inactive or never clearly spelled out in practical terms of programs. In consequence, one could read the entire substantial compilation of farm-commodity legislation in law today and at the end have only the foggiest notion of what is actually being done in farm policy.

B. L. GARDNER, *THE GOVERNING OF AGRICULTURE* 17 (1981).

⁶ Two features of the institutional framework for federal farm commodity policy make economic[*] analysis difficult: (1) the legislation in the area is extremely complex; and (2) wide and often imprecisely defined discretionary authority is given to the executive branch.

The complexity of legislation arises not so much from any particular law but from the way in which many laws fit together The legal basis for policy . . . is contained in separate laws, written at different times, which have widely varying policy instruments and executive authorities.

Id. Even more confusing is the process by which these laws change over time. *Id.*

*For the word "economic" in this quotation, I suggest the word "legal" would be equally appropriate. The difficulties engendered by the factors outlined in this description are at least as challenging for legal analysis as for economic analysis.

tain, to expand, and to develop long-term foreign markets for surplus U.S. agricultural commodities.⁷ Foreign currency revenues generated under Title I of P.L. 480⁸ were authorized to be used for foreign market development.⁹ Because the Cooperator program was oriented to the development of markets for *surplus* commodities, basic commodities such as wheat, cotton and soybeans were the primary commodities promoted.¹⁰ The legislation authorizing the Cooperator program remains in force and Congress continues to appropriate funds for its operation.

2. Operation of the Cooperator Program

The Cooperator program is administered by the Foreign Agricultural Service (FAS) which is a part of the United States Department of Agriculture (USDA). The FAS may enter into a "Cooperative Program Agreement" with "Cooperators" who agree to undertake development of foreign markets for surplus U.S. agricultural commodities.¹¹ From the inception of the Cooperator program, the idea was to involve the private sector, much as its name suggests. Cooperators are typically non-profit agricultural commodity organizations whose membership includes farmers, processors, and traders.¹² The FAS contributes foreign currencies derived from sales under Title I of the Food for Peace program, and the Cooperator "*contributes or causes to be contributed* dollars, foreign currencies, property, services, or combinations thereof" toward the cooperative foreign market development efforts.¹³ The fact that the Cooperator has the flexibility to *cause to be contributed* dollars, foreign currencies, property, services, or combinations thereof as *its own* contribution to the cooperative market development effort represents a great opportunity for the U.S. Cooperator to obtain third party contributions, in

⁷ 7 U.S.C.A. § 1704 (West Supp. 1992).

⁸ Public Law 480 has three significant titles. Title I, which is relevant to the Cooperator program, provides for concessional sales of surplus commodities. *See infra* note 61.

⁹ As early as 1961 Congress began appropriating money to make up the difference between the revenues generated under Title I of P.L. 480 and the amounts used in the operation of the Cooperator program. Subsequent years saw a continuation of the process of appropriating money for the Cooperator program until, eventually, the Cooperator funding came entirely from appropriations. KAREN Z. ACKERMAN & MARK E. SMITH, COMMODITY ECONOMICS DIV., ECONOMIC RESEARCH SERV., U.S. DEP'T OF AGRIC., AGRICULTURAL EXPORT PROGRAMS: BACKGROUND FOR 1990 FARM LEGISLATION, 36 (1990) [hereinafter ACKERMAN].

¹⁰ From the context of the legislation it is clear that the surplus agricultural commodities referred to are not surplus stocks of government-owned commodities, but privately owned stocks of commodities resulting from surplus production capacity in the United States.

¹¹ 7 C.F.R. § 11.51(b) (1991).

¹² JAMES O. HOWARD ET AL., U.S. AGRICULTURAL EXPORT DEVELOPMENT COUNCIL, PARTNERS IN DEVELOPING FARM MARKETS OVERSEAS: A HISTORY OF THE COOPERATIVE PROGRAM BETWEEN U.S. AGRICULTURAL COMMODITY ORGANIZATIONS AND THE FOREIGN AGRICULTURAL SERVICE, 4, 5 (1989) [hereinafter HOWARD].

¹³ 7 C.F.R. § 11.51(c) (1991) (emphasis added).

cash or in kind, from foreign distributors, governments or others who have an interest in developing the foreign market for the U.S. commodity.¹⁴

The efforts of the Cooperator to develop the foreign markets are governed by a "Cooperative Project Agreement" that is entered into pursuant to the Cooperative Program Agreement.¹⁵ Pursuant to the Cooperative Project Agreement, the Cooperator conducts a "Cooperative Project" which consists of market development activities with the support of the FAS administered funding.¹⁶

Acceptable market development activities under the Cooperative Program Agreements are defined as trade servicing, technical assistance to potential or actual foreign buyers, and consumer promotion.¹⁷ Trade servicing consists of activities designed to demonstrate or to promote a U.S. commodity or product or to influence foreign commodity traders, importers, wholesalers, distributors, promoters, and government officials, to handle, promote or purchase the U.S. agricultural commodity or product.¹⁸ Technical assistance addresses "problems related to the sale, movement, processing, marketing or utilization of U.S. agricultural products."¹⁹ Consumer promotion activities involve activities designed to reach the ultimate consumer by changing their attitudes toward or making them aware of the advantages of U.S. agricultural commodities and products.²⁰ The technical assistance and trade servicing functions have been the main focus of the Cooperator program while the consumer promotion aspect has comprised less than twenty percent of the program.²¹

The "Cooperative Projects" are conducted by the Cooperator and are carried out under annual marketing plans which are budgeted over a five-year period.²² This five-year budgeting process helps maintain continuity in the Cooperative Projects and permits the successful implementation of multi-year Cooperative Projects.²³ The Cooperator marketing plans must contain detailed information on trade constraints and export projections, and descriptions of how the marketing plan will work to overcome or alleviate the con-

¹⁴ The foreign contributors are known as Third Party Cooperators and are most often businesses, rather than governments. HOWARD, *supra* note 12, at 23.

¹⁵ 7 C.F.R. § 11.51(c) (1991).

¹⁶ *Id.*

¹⁷ FOREIGN AGRIC. SERV., U.S. DEP'T OF AGRIC., FOREIGN AGRICULTURAL SERVICE GUIDELINES, 11 FASG § 105.1 (October 1985).

¹⁸ *Id.* at § 105.1, § 105.1 Exhibit A.

¹⁹ *Id.*

²⁰ *Id.* Eligible consumer promotion activities consist of activities such as media advertising, trade fair promotions, public relations activities and point of sale promotions. Ineligible expenses are things such as price discounting, travel, entertainment, salaries and product samples. *Id.*; see also ACKERMAN, *supra* note 9, at 34.

²¹ ACKERMAN, *supra* note 9, at 34.

²² *Id.*

²³ *Id.*

straints.²⁴ Historically, the contribution of resources to the Cooperative Projects has been one third from the FAS, one third from the Cooperator and one third from foreign third-party cooperators.²⁵

3. *Export Incentive Program*

The Cooperator program did not seem to work effectively for many of the High Value Products (HVPs) such as fruits and vegetables. As a result, the Fruit and Vegetable Division of the FAS, through the Cooperator program, developed and introduced a pilot project in 1969 to promote branded products rather than generic commodities.²⁶ In 1971, this pilot project became an entire sub-program within the Cooperator program.²⁷ Known as the Export Incentive Program (EIP), this initiative focuses on HVPs, and takes a radically different approach from the regular Cooperator program. EIP agreements are made with private companies to promote branded products and are exclusively conducted as consumer promotion activities.²⁸

III. **Agricultural Development and Trade Promotion Programs**

In contrast to the long-term export market development focus of the Cooperator program, other federal export development and trade promotion programs have been oriented towards activities with immediate results, such as direct credit, credit guarantees, direct export subsidies, food aid, domestic price support and disposition of surplus commodities. In 1982, as U.S. agricultural exports began declining rapidly, the export-promotion policies of the United States were labeled as "antiquated" by the Chairman of the Center for Strategic and International Studies at Georgetown University.²⁹ Since that statement was made, several initiatives have been advanced and a number of programs have been introduced, others revamped and yet others revived. A brief review of these programs will illustrate their difference from the market development programs,

²⁴ The marketing plans are submitted by the Cooperators to the FAS at the beginning of each year. Only activities approved by the FAS subsequent to the submission of the marketing plans are reimbursable. The Cooperator may take up to 12 months to implement the marketing plan and 12 more months to submit claims for reimbursement for activities conducted in the previous plan year. *Id.*

²⁵ All domestic administrative costs must be born by the Cooperators. *Id.*

²⁶ HOWARD, *supra* note 12, at 57.

²⁷ ACKERMAN, *supra* note 9, at 4, 32.

²⁸ ACKERMAN, *supra* note 9, at 34.

²⁹ The statement that the U.S. export-promotion policies are antiquated was apparently based on the premise that the relative decline in U.S. exports from a 28 percent share of world markets in 1962 to a 20 percent share of world markets in 1980 was in some way a result of the failure of the United States to implement policies and programs to effectively address the decline. David M. Abshire, *Introduction* to PENELOPE HARTLAND-THUNBERG & MORIS H. CRAWFORD, *GOVERNMENT SUPPORT FOR EXPORTS: A SECOND-BEST ALTERNATIVE*, ix (1982).

thus putting the TEA and MPP programs in the overall context of the agricultural trade policy of the United States.

Agricultural export promotion programs can be broken down into several categories.³⁰ The principal categories that effectively encompass most of the programs are market development, price subsidies, direct credit, credit guarantees, and food aid. A catch-all miscellaneous category is required for those few programs, such as the Barter program that do not fall easily or naturally within the principle categories. Some of the broader programs are designed to span several categories, others are more narrowly focused and fit only one category.³¹

A. Market Development

The primary focus of this Article is a review and discussion of the Targeted Export Assistance program and the Market Promotion Program. Necessarily included is a discussion of the Cooperator program. The MPP and the Cooperator program are the backbone of the U.S. agricultural market development activities.

1. U.S. Agricultural Trade and Development Missions

The objective of the U.S. Agricultural Trade and Development Missions program, implemented in 1988, is to develop stronger agricultural trade ties with countries that are eligible to participate in established U.S. trade or food aid programs.³² Stronger ties are developed by sending trade missions to explore future possibilities for initiatives and programs, determining ways of effectively using existing programs, providing technical assistance and working on immediate commitments for commodity sales and food assistance programs.³³ Missions are led by the FAS with participants drawn from the USDA, the United States Department of State, the United States Agency for International Development (USAID), and the private sector.³⁴ Mission participants from the private sector are not paid, but are reimbursed *per diem* and travel expenses.³⁵

³⁰ The definitions of categories used in this paper are adopted directly from ACKERMAN, *supra* note 9.

³¹ This program review will focus on the programs that are currently in effect and operative. All were in effect at the time the TEA program was created, or they were created simultaneously with the TEA program. Many other programs have come and gone, but their treatment in this article will be restricted to a mere mention at most.

³² 7 U.S.C.A. § 1736bb(a) (West 1988 & Supp. 1993).

³³ 7 U.S.C. § 1736bb(b) (1988). See also FOREIGN AGRIC. SERV., U.S. DEP'T OF AGRIC., U.S. AGRICULTURE TRADE AND DEVELOPMENT MISSIONS PROGRAM FACT SHEET (rev. Sept. 1990).

³⁴ 7 U.S.C.A. § 1736bb(b)(1) (West 1988 & Supp. 1991). Private sector participants were drawn from Cooperator program participants, cooperatives, private voluntary organizations and other entities. 7 U.S.C.A. § 1736bb(b)(2) (West 1988 & Supp. 1991).

³⁵ 7 U.S.C.A. 1736bb(d) (West 1988 & Supp. 1991).

2. *Export Enhancement Program*

Introduced in 1985 by the FAS, the Export Enhancement Program (EEP) has been a major trade policy program since its inception.³⁶ Congress codified the EEP in the 1985 Farm Bill.³⁷ In clear contrast to the TEA program, which was also authorized in the 1985 Farm Bill, the EEP is unabashedly an export subsidy program.

The Export Enhancement Program was intended to perform three basic functions: "challenge unfair trade practices that hurt U.S. exports, especially those of the European Community (EC); encourage serious negotiations on agricultural trade under the auspices of the General Agreement on Tariffs and Trade (GATT); and boost U.S. agricultural exports."³⁸ The mechanism for accomplishing these objectives is the EEP bonus. This bonus is a payment (subsidy) to U.S. exporters to enable them to sell specifically targeted commodities to specifically targeted destinations.³⁹ The subsidy is

³⁶ Not only has the EEP been one of the major programs in the federal government's arsenal of export enhancement and trade policy programs, it has like so many of the others, been the source of some significant problems for the Administration. Once the Administration created the EEP to implement one aspect of the broad mandate of the Commodity Credit Corporation Charter, Congress immediately stepped in and attempted to take control of the EEP, both from a policy and administrative perspective. The immediate incorporation of the EEP into the Food Security Act of 1985 was the first step in which Congress articulated policy goals for the EEP and established budgetary parameters. The Food Security Improvement Act of 1988 and the Omnibus Trade and Competitiveness Act of 1988 both established further funding constraints and guidelines. Hearings in Congress to review the EEP in 1989 and 1990 are studded with statements such as the following found in the Congressional Research Service Report to Congress stating that the "claims of EEP accomplishments cannot be proven or refuted definitively." *Review of the Export Enhancement Program, (1989): Hearings Before the Subcomm. on Wheat, Soybeans, and Feed Grains of the House Comm. on Agric., 101st Cong., 1st Sess. 141 (1989)* (Epstein, S.B. Congressional Research Service Report for Congress: Will The Export Enhancement Program Survive?). Extensive discussion and opposing points of view are provided by the above quoted report, the report of the Administrator of the FAS and the report of the General Accounting Office's review of the EEP. This problem brings to mind the serious difficulty that is faced in evaluating the success of the various programs in meeting their policy objectives as articulated by the Congress and the Administration. Is it possible that the formulation of the policy objectives is in some way deficient?

³⁷ The EEP was originally announced by the USDA under the CCC charter authority (Commodity Credit Corporation Charter Act of 1948), in May of 1985 in response to large and increasing commodity stocks held by the CCC, and dwindling export markets. *Id.* The EEP was shortly thereafter codified in the Food Security Act of 1985, which passed in December of the same year. 7 U.S.C.A. § 5651 (West Supp. 1991).

³⁸ *Review of the Export Enhancement Program (1990): Joint Hearings Before the Subcomm. Department Operations, Research, and Foreign Agriculture and the Subcomm. on Wheat, Soybeans, and Feed Grains of the House Comm. on Agric., 101st Cong., 2d Sess. 31 (1990)* (statement by F. Paul Dickerson, Associate Administrator and General Sales Manager, Foreign Agricultural Service) [hereinafter *EEP Joint Hearing 1990*]. Additional requirements imposed on the EEP were that it create a net increase in U.S. commodity exports over what would have been experienced in the absence of the program, that it provide a net benefit to the economy, that exports under the program be targeted particularly to challenge EC exports and that it do this without incurring budget outlays beyond what would have been expended in the absence of the program.

³⁹ The targeted commodities and the targeted countries are identified and selected by the CCC. The CCC will issue periodical press releases announcing "initiatives" to facil-

designed to make U.S. exporters competitive with their subsidized competitors. The bonus is authorized to be made either by payment in kind from Commodity Credit Corporation (CCC) stocks, or by generic commodity certificates issued by the CCC and redeemable for commodities, or even by cash payments.⁴⁰ The amount of the bonus is represented by the "difference between the *landed* cost of the U.S. commodity in the target country and the *landed* cost of our competitors."⁴¹

3. Dairy Export Incentive Program

The Dairy Export Incentive program (DEIP) provides U.S. dairy product exporters with the CCC generic commodity certificates as a bonus designed to make the exporters price competitive with that of foreign exporters who are subsidized by their countries.⁴² This permits U.S. exporters to compete with subsidized foreign exporters, and purports to counter or offset the unfair trade practices of those foreign exporting nations. An additional objective of the program is to develop, expand or maintain export markets for the covered dairy products. It is important to note that this program is very narrow in the scope of commodities it covers.⁴³ As a direct export subsidy program the DEIP stands in sharp contrast to the TEA program.

4. Sunflower and Cottonseed Oil Assistance Programs

Also conducted as bonus programs, the Sunflowerseed Oil Assistance Program (SOAP), authorized by the Rural Development,

itate agricultural exports to targeted markets. The office of the General Sales Manager ("GSM") of the FAS subsequently issues an "Invitation for Offers" which identifies the targeted market and the eligible commodities and describes additional details relating to eligible commodity quantity limitations, quality requirements, eligible buyers and all other requirements and limitations. After the Invitation is issued, exporters who have contracts with eligible buyers may submit an offer to the CCC detailing how much of a "bonus" is required to make the exporter competitive with foreign subsidized exporters. After receiving the offers, the CCC selects the offers it will accept, enters into Agreements with the chosen exporters and makes bonus payments to those exporters based upon proof that the physical transaction has actually taken place in accordance with the requirements of the Agreement. Export Enhancement Program Operations, 56 Fed. Reg. 25,011 (1991) (to be codified at 7 C.F.R. § 1494.101). Between the time the EEP was announced in May of 1985 and it came up for renewal consideration before Congress in May of 1990, 105 Initiatives were announced for 12 commodities and 65 countries, with CCC bonuses of \$2.72 billion awarded. ACKERMAN, *supra* note 9, at 7.

⁴⁰ 7 U.S.C.A. 5651(b)(1) (West Supp. 1991). All payments actually made by the CCC under this program have been in the form of generic commodity certificates. FOREIGN AGRIC. SERV., U.S. DEP'T OF AGRIC., EXPORT ENHANCEMENT PROGRAM FACT SHEET 2 (rev. April 1991).

⁴¹ *EEP Joint Hearing 1990, supra* note 38, at 41.

⁴² The generic commodity certificates issued under the DEIP are paid to the U.S. exporter after the approved export is made, are for a specified value, and are redeemable for designated commodities at the CCC warehouse. FOREIGN AGRIC. SERV., U.S. DEP'T OF AGRIC., DAILY EXPORT INCENTIVE PROGRAM: FACT SHEET (rev. March 1991).

⁴³ *Id.*

Agriculture and Related Agencies Appropriations Act of 1988 and the Cottonseed Oil Assistance Program (COAP), added to the SOAP by the Agricultural Appropriations Act of 1989, assists in exports of quantities of these oils to targeted countries such as Egypt and Algeria.⁴⁴

B. Direct Credit and Credit Guarantees

1. Export Credit Guarantee Program and Intermediate Export Credit Guarantee Program

The Export Credit Guarantee Program (GSM 102) and the Intermediate Export Credit Guarantee Program (GSM 103) were originally introduced in 1981 and 1985 respectively.⁴⁵ These export credit guarantee programs, as opposed to direct credit programs, are designed to encourage U.S. banks to provide credit to U.S. exporters selling U.S. agricultural commodities on credit terms,⁴⁶ and to encourage U.S. exporters to explore export opportunities which they might otherwise ignore due to perceived risk.⁴⁷ Not all export transactions are eligible for a GSM guarantee. In order to be eligible, a sale must be of an eligible commodity to an eligible country.⁴⁸ The program is administered by the FAS and funded through the CCC. The U.S. government, through the CCC, agrees to pay U.S. exporters or their assigns (financial institutions), in the event that the foreign bank, for any reason, fails to honor sight or time drafts presented pursuant to the terms of the letter of credit it issued on

⁴⁴ ACKERMAN, *supra* note 9, at 41.

⁴⁵ Although the CCC charter, which was passed in 1948 (Pub. L. No. 806), provided authority for the CCC to export or cause to be exported agricultural commodities, or to aid in the development of export markets for agricultural commodities, it did not undertake to provide export credit guarantees until 1956 when it implemented the Export Credit Sales Program (GSM-5). Since the CCC has no staff or facilities to administer the programs itself, other agencies of the USDA administer programs for the CCC. The foreign sales credit programs of the CCC are administered by the General Sales Manager of the Foreign Agricultural Service, thus the designation GSM for those programs. In 1981 the CCC introduced the GSM 102. In the Food Security Act of 1985 Congress mandated the GSM-103 and dictated the levels of support to be made available by the CCC in the years 1985-1990 in both GSM-102 (\$500 million to \$1 billion per year) and GSM-103 (\$5 billion per year). U.S. GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS INTERNATIONAL TRADE: COMMODITY CREDIT CORPORATION'S EXPORT GUARANTEE PROGRAMS (1988).

⁴⁶ FOREIGN AGRIC. SERV., U.S. DEP'T OF AGRIC., CREDIT PROTECTION FOR U.S. AGRICULTURAL EXPORTERS I (rev. Dec. 1990).

⁴⁷ By transferring some of the risk of loss due to defaults by foreign banks from the exporters or their assignees to CCC, GSM-102 and GSM-103 are intended to: facilitate exportation; forestall or limit declines in exports; permit exporters to meet competition from other countries; and increase commercial exports of U.S. agricultural commodities. 7 C.F.R. § 1493 (1991).

⁴⁸ The FAS announces yearly the credit guarantee allocations that will be available that year. The credit guarantee allocations list the eligible countries and the eligible commodities for each eligible country (country-by-commodity credit guarantee allocations). ACKERMAN, *supra* note 9, at 14, 15.

behalf of the buyer.⁴⁹

The basic distinction between the GSM 102 and GSM 103 programs is the fact that GSM 102 guarantees payment for sales with credit terms of six months to three years, while GSM 103 guarantees payment for sales with credit terms of more than three years but not more than ten years. GSM 102 guarantees amounted to nearly \$4 billion in 1990, whereas, GSM 103 guarantees amounted to over \$332 million. GSM 102 covered exports to twenty-five markets, whereas, GSM 103 covered exports to only nine markets.⁵⁰

Because these are export credit guarantee programs, the actual payout by the CCC is limited to the times when the foreign banks fail to pay. To qualify for GSM 102 or GSM 103 guarantees, the foreign market must offer "good prospects for market development for U.S. agricultural products" and "be in a country whose foreign exchange reserves or debt situation may make repayment prospects more 'risky' than the private U.S. banking community would like, but which still offers a reasonable prospect for repayment."⁵¹

C. *Export-Import Bank of the United States*

The purpose of the Export-Import Bank of the United States (Eximbank) is to "facilitate export financing of U.S. goods and serv-

⁴⁹ The CCC rules for the GSM 102 and GSM 103 programs dictate the structure of the transactions receiving credit guarantees from the CCC. The importer must provide an irrevocable letter of credit in favor of the exporter from an approved foreign bank specifying the terms of payment and meeting other detailed requirements. The exporter then applies for a guarantee of payment by the CCC for the letter of credit in case of default by the foreign bank for any reason, be it commercial or political. Once the guarantee is granted, participating domestic banks will pay the exporter and accept an assignment of the letter of credit. CCC Export Credit Guarantee Programs 56 Fed. Reg. 25,998 (1991) (interim rule, to be codified at 7 C.F.R. § 1493).

⁵⁰ FOREIGN AGRIC. SERV., U.S. DEP'T OF AGRIC., CREDIT PROTECTION FOR U.S. AGRICULTURAL EXPORTERS 1 (rev. Dec. 1990).

⁵¹ *Id.* But see U.S. GEN. ACCOUNTING OFFICE, INTERNATIONAL TRADE: IRAQ'S PARTICIPATION IN THE U.S. AGRICULTURAL EXPORT PROGRAMS (1990), in which the GAO criticizes the FAS for approving guarantees to Iraq in the administration's tilt toward Iraq, when the risk analysis indicated too high a risk to make the guarantees under normal program parameters. As noted in testimony before Congress, the FAS was aware of certain risk factors that mitigated against the approval of guarantees for Iraq in 1988. *Iraq's Participation in the Commodity Credit Corporation's GSM-102/103 Export Credit Guarantee Programs: Hearing Before the Subcomm. on Department Operations, Research and Foreign Agriculture of the House Comm. on Agriculture*, 102d Cong., 1st Sess. (1991) (statement of Allan I. Mendelowitz, Director, Trade, Energy and Finance Issues, National Security and International Affairs Division, General Accounting Office) [hereinafter GAO Testimony on Iraq]. In spite of the excessive risk factors, GSM guarantees were made to Iraq based on foreign policy and Agricultural trade considerations in 1988 through 1990. GAO Testimony on Iraq, 12, 13. After 1990, legislative and regulatory changes prohibited granting guarantees on policy grounds, but required FAS to make the guarantee decisions based on risk, export enhancement or maintenance and competitiveness considerations. See *supra* note 47. A recent GAO report, U.S. Gen. Accounting Office, Loan Guarantees: Export Credit Guarantee Program's Costs are High (1993), criticizes the GSM programs as being costly to the U.S. as a result of past and expected defaults by Iraq and the U.S.S.R. Defaults by Iraq are expected to be at the 2 billion dollar level.

ices by neutralizing the effect of export credit subsidies from other governments and by absorbing reasonable credit risks that are beyond the current reach of the private sector."⁵² Eximbank is not an agriculturally oriented institution, but it, nevertheless, provides significant assistance for U.S. agricultural exports under three programs: direct loans, credit guarantees, and payment insurance.⁵³ Agriculture is one of the industries that Eximbank supports, although there are some limitations on its support for agricultural exports.⁵⁴ Although Eximbank is federally chartered, it is run as a profit making institution.⁵⁵ The programs are currently funded out of the revenues which are generated by the fees charged participants for the services rendered. Eximbank provided assistance in exporting \$139.6 million in agricultural commodities and products and \$412.5 million in agricultural equipment, supplies and services in Fiscal Year 1990.⁵⁶ This is in comparison to total Eximbank assisted exports of almost \$9.3 billion.⁵⁷

D. Food Aid

1. Public Law 480 - Food For Peace

Public Law 480, P.L. 480, is also known as the Mickey Leland Food for Peace program.⁵⁸ Passed in the Senate in 1953, in the House in 1954, signed into law in 1954, it was first implemented in 1955.⁵⁹ This massive program has evolved over the years and has

⁵² JOHN D. MACOMBER, CHAIRMAN, EXIMBANK, AN INTRODUCTION TO EXIMBANK (undated).

⁵³ The Eximbank was chartered by the Congress with the Export-Import Bank Act of 1945. 12 U.S.C. § 635 (1988). However, that was not the beginning of the Eximbank. It was originally organized in 1934 under Exec. Order No. 6581, February 2, 1934, as a District of Columbia banking corporation. Through a series of Acts of Congress it was continued until the passage of the Export-Import Bank Act of 1945. A thorough discussion of the legislative history of the Eximbank can be found in two booklets published by the Bank: EXIMBANK, EXPORT-IMPORT BANK ACT OF 1945, AS AMENDED THROUGH OCTOBER 15, 1986; and EXIMBANK, EXPORT-IMPORT BANK ACT OF 1945, AS AMENDED THROUGH OCTOBER 15, 1986; SUPPLEMENT: AMENDMENTS THROUGH MARCH 1, 1990 (undated).

⁵⁴ AN EXIMBANK HANDOUT, EXIMBANK, COMPARISON OF MAJOR FEATURES OF PROGRAMS OFFERED BY EXIMBANK/FCIA AND COMMODITY CREDIT CORPORATION FOR SUPPORT OF BULK AGRICULTURAL COMMODITIES (1990) provides a valuable review and comparison of the terms and conditions of FCIA's (Foreign Credit Insurance Association) Short-Term Credit Insurance Coverage, FCIA's Bank Letter of Credit Insurance and the CCC's Export Credit Guarantee Program (GSM-102). Apparently there is not much overlap of the programs.

⁵⁵ What is particularly interesting is that the Eximbank credit guarantee programs can be tailored to cover commercial and political risks. EXIMBANK, EXPORT-IMPORT BANK OF THE UNITED STATES MEDIUM- AND LONG-TERM EXPORT LOANS AND GUARANTEES PART I: PROGRAM DESCRIPTION 1 (1991). (EIB Form 87-14).

⁵⁶ EXIMBANK, 1990 ANNUAL REPORT, EXPORT-IMPORT BANK OF THE UNITED STATES 12 (1990).

⁵⁷ *Id.* at 15.

⁵⁸ This is now known as the Mickey Leland Food for Peace program, in honor of the Texas Congressman who lost his life in a plane crash in Ethiopia in 1989 while trying to ascertain how we could do better in that situation.

⁵⁹ American agricultural output has increased over time, but the productivity was re-

been the delivery mechanism for an enormous volume of surplus agricultural commodities exported from the United States. P.L. 480 is an amorphous and somewhat confusing set of programs rather than a narrowly defined single purpose program. Over time, significant changes have been made by legislation, with some parts being removed, others being added and yet more being combined with other programs.⁶⁰ It was originally passed with three major Titles, was later expanded to four major Titles and has now combined some activities to leave it once again with three major Titles.⁶¹ It is truly the

markable in the World War II era and during the subsequent period of the Marshall plan and food aid to Europe before its agricultural output came back to normal levels. The resulting decline in export markets left the vigorous U.S. agricultural production sector with excess supplies and, consequently, falling prices. Congress considered many proposed remedies in the 1953-54 session. Public Law 480 was originally introduced in the Senate as S. 2475 on July 24, 1953, and passed the Senate on July 28, 1953. It was signed into law almost one full year later. CONGRESSIONAL RESEARCH SERVICE, THE LIBRARY OF CONGRESS, PREPARED FOR THE SUBCOMM. ON FOREIGN AGRICULTURAL POL'Y, COMM. ON AGRICULTURE, NUTRITION, AND FORESTRY, 96TH CONG., 1ST SESS. (1978), FOOD FOR PEACE, 1954-1978—MAJOR CHANGES IN LEGISLATION (Comm. Print 1979) [hereinafter MAJOR CHANGES].

⁶⁰ For an effective review of the evolution of P.L. 480, up to 1978, refer to MAJOR CHANGES, *supra* note 59. For more recent developments, see *Issues Related to the Reauthorization of Food for Peace and Agricultural Export Promotion Programs, Hearings and Markup on H.R. 3950 before the Subcomm. on International Economic Policy and Trade of the Comm. on Foreign Affairs*, 101st Cong., 2nd Sess. 60-65 (1990).

⁶¹ Title I.

Food for Peace. Under Title I (known as Food for Peace), of this program, commodities are provided to friendly, needy nations on a concessionary basis. Sales are paid for in the currency of the nation purchasing the food and repayment periods for the commodities can extend over a forty year period. Title I also deals with the utilization of funds realized under Public Law 480 for market development. This is where the Cooperator program enters the picture. In 1981 Title I was expanded to include development programs for literacy and health programs for the rural poor.

Title II.

Title II provides for emergency food relief on a donation, rather than concessionary sale basis. This was the humanitarian aspect of the program and was not limited to friendly nations. Commodities from CCC stockpiles are used to provide assistance in times of dire need, disaster or emergency.

Section 416(b). Section 416(b) is a food aid donation program under which a quantity of foodstuffs is made available to needy nations. This is the next most significant food aid program sponsored by the United States. It predated P.L. 480 by about 5 years (it was introduced in 1949), was supplanted by Title II of P.L. 480, was reintroduced on a limited basis in 1982 and was expanded and incorporated into the function of Title III of P.L. 480 in the Food Security Act of 1985.

Title III.

Barter. The Barter program was authorized under the CCC charter and was conducted pursuant to that charter from 1949-54. The Barter program was brought under P.L. 480 and was the original heart of Title III of P.L. 480 in 1954. The idea was to barter agricultural commodities for scarce strategic materials. The Barter program was conducted under P.L. 480 until 1963 at which time it was continued under the CCC charter authority. The Barter program was suspended in 1973. The Food Security Act of 1985 authorized the Barter program to be conducted once again under P.L. 480.

Food for Development. The Food for Development concept was introduced in 1977 as a new aspect of Title III. The proceeds from the concessional sales under Title I may be used, on specific terms, to conduct specified types of development projects and activities. The objective of the Food for Development program is to develop agricultural production

backbone of the U.S. food aid programs,⁶² but is also used as a tool for long-term market development and credit guarantees and has been the vehicle for barter procurement of strategic materials.

P.L. 480 has, as a matter of policy, several basic objectives. The policy objectives of the original P.L. 480, articulated on the floors of the Senate and House, were disposal of surplus U.S. commodities, reduction in storage costs, facilitation of the convertibility of currency, promotion of stability in U.S. agriculture, expansion of commercial export markets, promotion of the foreign policy of the United States, and assistance to friendly nations to stem the tide of communism.⁶³ Subsequent policy objectives of P.L. 480 were expressed as the world situation changed over time. The 1959 amendments to P.L. 480 were motivated by policy objectives which placed increased emphasis on the humanitarian aspects of the program. Previous objectives concentrated on the use of P.L. 480 to solve the surplus and storage problems of the United States. In the early 1960s the humanitarian aspects of P.L. 480 were clearly emphasized in the administration of the programs. After several years of this emphasis, the Food for Peace Act of 1966 was passed, motivated by the policy objective of increased development assistance.⁶⁴ The policy

capabilities and the structure to adequately utilize those capabilities, rather than to develop markets for U.S. commodities.

Under specific conditions, Title III of P.L. 480 authorizes forgiveness of debt incurred by nations purchasing commodities under Title I.

Food for Progress. This program was instituted in the Food Security Act of 1985 as another food aid by donation program under Title III but found its authority in Section 416(b) of the Agricultural Act of 1949, so is in effect a revival of the old Section 416(b) that was supplanted by Title II in 1954.

Title IV.

Modifications of P.L. 480 in 1959 added Title IV permitting the extension of long-term credit for dollar sales of commodities rather than sales for foreign currencies. The purpose was to provide an alternative to sales for foreign currencies and thus slow down the buildup of foreign currencies held by the United States. Additional provisions of the 1959 Act provided for Food for Work projects and grants for the buildup of stockpiles in foreign countries. The Food for Peace Act of 1966 made significant modifications to P.L. 480, one of which was to combine Title IV into Title I.

MAJOR CHANGES, *supra* note 59; ACKERMAN, *supra* note 9.

⁶² The Food for Peace program has been credited with saving the lives of millions around the world. Mary McGrory, *Sharing The Nation's Bounty*, WASH. POST, Nov. 23, 1989, at A1.

⁶³ The effort to arrest the spread of communism through efforts such as P.L. 480 was described by some as using food as a weapon. 100 CONG. REC. H8287 (daily ed. June 15, 1954) (statement of Rep. Marshall).

⁶⁴ Some significant U.S. factions, such as President Lyndon Johnson, were particularly concerned that humanitarian assistance without development assistance would create a long-term detrimental reliance on the United States as a food supplier. LYNDON B. JOHNSON, A WAR ON HUNGER, H.R. DOC. No. 378, 89th Cong., 1st Sess. 3, 4 (1966). Ultimately the most significant change in focus of P.L. 480 from the 1966 amendments was an added directive from Congress that the administration of the program be oriented to emphasize participation by countries that were engaged in development projects. In 1968 hearings on legislative amendments to P.L. 480, reaffirmed the original concept that the concessional sales and donation programs of P.L. 480 would eventually be supplanted by commercial marketing of U.S. commodities as nations "graduated" from their more

objectives of the Food for Peace program have been articulated more recently as "influencing development strategy and policies, influencing the undertaking of specific development projects, feeding the hungry, promoting economic development, promoting U.S. agricultural exports, and furthering U.S. foreign policy."⁶⁵

E. Miscellaneous

1. Barter

The Barter program was in existence prior to P.L. 480, but was drawn under its umbrella in 1954.⁶⁶ In the early years it was used to help the United States acquire stockpiles of foreign-produced strategic materials.⁶⁷ From 1963 until the program was suspended in 1973, it was used to assist the U.S. military and other agencies in procuring goods abroad.⁶⁸ The policy goals of Congress in reviving the Barter program were articulated in the Farm Bill of 1990 as the expansion of agricultural trade.⁶⁹

IV. Export Program Review

Historically, the United States has maintained a large agricultural export base. It is calculated that from 1920 until the early 1970s, over twenty percent and as much as thirty percent of all U.S. exports have been agricultural commodities.⁷⁰

While the United States is still the world's largest agricultural

dependent status by virtue of the development assistance provided by P.L. 480. The early 1970s saw a dramatic decrease in food surpluses and a corresponding reduction in food aid under P.L. 480. The combination of these factors and the increased use of P.L. 480 to support the U.S. war efforts in Southeast Asia resulted in directives of Congress in 1972-74 that the uses of P.L. 480 should be directed to humanitarian aid rather than be diverted by foreign policy considerations. As a follow up to these directives in 1975 Congress passed some significant amendments to P.L. 480 in the International Development and Food Assistance Act of 1975. The policy considerations of humanitarian food aid and development assistance were primary motivations for the changes at that time. In effect, Congress continued the trend that had been developing over the years to take tighter control of the way in which the legislation was implemented to assure that the implementation was consistent with the Congressional policy goals rather than the Administration's policy goals. MAJOR CHANGES, *supra* note 59. In 1981, the Agriculture and Food Act of 1981 again emphasized the development objectives of P.L. 480 and implemented new development programs under Title I. The clear policy thrust of the 1985 and 1990 amendments to P.L. 480 has been the market development theme. ACKERMAN, *supra* note 9, at 30, 31.

⁶⁵ *Issues Related to the Reauthorization of Food for Peace and Agricultural Export Promotion Programs, Hearings and Markup on H.R. 3950 before the Subcomm. on International Economic Policy and Trade of the Comm. on Foreign Affairs, 101st Cong., 2d Sess. 60-65 (1990)* (statement of Allan I. Mendelowitz, Director, Trade, Energy and Finance Issues, National Security and International Affairs Division, General Accounting Office).

⁶⁶ Section 416(d) of the Agriculture Act of 1949 included Barter provisions. 7 U.S.C.A. § 1431(d) (West 1988 and Supp. 1991).

⁶⁷ ACKERMAN, *supra* note 9, at 30.

⁶⁸ *Id.*

⁶⁹ Pub. L. No. 100-418 § 4309.

⁷⁰ R.C. STANLEY, *FOOD FOR PEACE: HOPE AND REALITY OF U.S. FOOD AID 3* (1973).

exporting nation, accounting for approximately one-sixth of the world's agricultural trade,⁷¹ it has faced some difficulty in maintaining consistent levels of agricultural exports.⁷² Many countries provide assistance for their agricultural exporters to make them more competitive.⁷³ Such assistance can take many forms which the United States considers to be unfair.⁷⁴ Because the export markets are perceived to be so important to U.S. agriculture, Congress, as previously noted, attempted to address the trends of declining agricultural exports and increasing foreign unfair trade practices affecting U.S. agricultural exports by introducing programs to assist U.S. agricultural exporters in the 1985 Farm Bill.⁷⁵

The TEA program, now the MPP, and the long established Co-operator program do not provide the direct price subsidies of the EEP and the other bonus programs. Nor do they provide the direct loans, credit guarantees or credit insurance as can be found in the Eximbank offerings, or the credit guarantees found in GSM 102 and GSM 103. They also omit the humanitarian, development, concessionary sales, and food aid thrust of the Food for Peace and related programs. Rather, they aim at developing foreign markets for U.S. agricultural products.

⁷¹ FOREIGN AGRIC. SERV., U.S. DEP'T OF AGRIC., U.S. FARMERS' EXPORT ARM (rev. Dec. 1990).

⁷² H.R. REP. NO. 271, 99th Cong., 1st Sess., pt. 1, at 9 (1985), *reprinted in* 1985 U.S.C.C.A.N. 1112, 1113.

⁷³ *Id.* at 68-70, *reprinted in* 1985 U.S.C.C.A.N. 1172-1174.

⁷⁴ For a detailed description of the trading practices engaged in by our trading partners and competitors that are considered by the U.S. to be unfair see OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 1991 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS (1991). For a sense of the feeling in Congress regarding unfair trade practices, see *Agricultural Export Trade, 1983, Hearings on S. 14, S. 18, S. 77, S. 100, S. 124 (Title V), S. 251 & S. 398, S. 490 and S. 575 (Title XI) Before the Senate Comm. on Agriculture, Trade and Forestry, 98th Cong., 1st Sess. 1, 1-2 (1983)* (statement of Hon. Jesse Helms, U.S. Senator).

⁷⁵ This further underscores the importance of increasing our focus on marketing, especially overseas marketing. But it should be stressed that this will add further complexities to the process of developing farm legislation. Over the last few decades, the farm policy environment has become more and more complex. In the early years, the trade-offs were primarily between different sectors of the total economy—more for agriculture meant less for other sectors. Today, the trade-offs are within agriculture—higher price supports mean greater farm income but less foreign sales, and more excess production capacity and more federal expenditures to hold down farm output or store the excess.

Farm policy has become complex for other reasons as well. Food is now an international issue, made so by the shortages of the early 1970's and the continuing growth of population in most of the developing world. As an international issue, farm policy has taken on characteristics associated with foreign policy, international economic policy, and even national security. These additional elements increase the number of interested participants in farm policy deliberations and food program administration and make the dialogue more complicated. Perhaps the most succinct description of the whole farm and food policy agenda is that U.S. foreign policy has always been complex, and U.S. farm policy is slowly joining it. L.V. MAYER, *AGRICULTURAL POLICY IN AN CHANGING DOMESTIC AND INTERNATIONAL ENVIRONMENT, UNITED STATES AGRICULTURAL POLICY 1985 AND BEYOND 150-51* (J.S. Hillman ed., 1985).

The rationale for government involvement in developing foreign markets for agricultural commodities was articulated before a hearing of the United States Industrial Commission in 1900.⁷⁶ The rationale expressed was that the farmer does not have the means at his disposal to develop foreign markets without the aid of government, that industry, although more capable than agriculture of developing foreign markets, has received more government aid in the process; and that the U.S. government had not done nearly enough to develop foreign agricultural markets, especially when compared to the actions of other national governments in expending time, effort, and money developing foreign agricultural markets.⁷⁷ Half a century later, the Cooperator program was introduced and provided the focus for some long-term market development, but the real effort to develop foreign markets at the grass roots consumer level arrived with the TEA program in 1985. It provided for a touch of Madison Avenue overseas, some real government assistance, and support in direct consumer promotion activities. The Cooperator program set the stage. A discussion of the TEA program and its successor, the MPP follows in detail.

V. A Case Study Of U.S. Agricultural Export Promotion

A. *The Evolution of the TEA Program and the MPP*

1. *Origin and History of the TEA Program*

One of the flurry of programs to come out of the 1985 Farm Bill, the TEA program was intended to help counter foreign unfair trade practices by developing foreign markets for U.S. agriculture.⁷⁸ While the TEA program was repealed and replaced in the 1990 Farm Bill by the MPP, it continued to govern certain existing multi-year contracts, and it is the key to understanding the MPP.⁷⁹

The original legislation authorizing the TEA program does not give any guidance on the development, organization or administration of the program. The text of the relevant U.S. Code section reads as follows:

Funds or commodities made available for use under this section shall be used by the Secretary only to counter or offset the adverse effect on the export of a United States agricultural commodity or the product thereof of a subsidy (as defined in paragraph (2)), import quotas, or other unfair trade practices of a foreign country.⁸⁰

⁷⁶ U.S. DEP'T. OF AGRIC., REPORT NO. 67, FOREIGN MARKETS FOR AMERICAN AGRICULTURAL PRODUCTS 44-45 (1901) (testimony of Frank H. Hitchcock, Chairman of the Section of Foreign Markets before the Industrial Commission (June 13 & 15, 1900)).

⁷⁷ *Id.*

⁷⁸ Food Security Act of 1985 § 1124, 7 U.S.C. § 1736s (1988), *repealed by* Food, Agriculture, Conservation and Trade Act of 1990, 104 Stat. 3702.

⁷⁹ 7 U.S.C.A § 5623 (West Supp. 1991).

⁸⁰ 7 U.S.C. § 1736s(b)(1) (1988).

This type of Congressional approach is cited as a major reason for why it is extremely difficult to analyze U.S. agricultural legislation.⁸¹

The duty of designing the TEA program was placed squarely on the Secretary of Agriculture. With the minimal program description found in the legislation, the Secretary had a great deal of latitude in designing the TEA program. The Secretary delegated the program design and administration to the Foreign Agricultural Service (the FAS). How the FAS chose to implement the broad mandate from Congress is particularly interesting and significant.

The FAS decided that market development was the best way to accomplish the goals of the TEA program's enabling legislation. Once that decision was made, it was a natural and logical step for the FAS to model, in some measure, the TEA program after the Cooperator program,⁸² which, until the advent of the TEA program, was the only program primarily oriented to export market development.

2. Operation of the TEA Program

As a result, the TEA program became another export market development program, providing assistance for trade servicing, technical assistance, and consumer promotion.⁸³ Approximately seventy-five percent of the TEA program funds have been used exclusively in consumer promotion activities, whereas over eighty percent of the Cooperator program funds are used for technical assistance and trade servicing activities.⁸⁴

The level of funding for the TEA program was much higher than

⁸¹ See GARDNER, *supra* note 5.

⁸² The timing of the legislation, leaving little lead time for the USDA to implement a program to effectively utilize the allocation of \$200 million may have had some impact in persuading the USDA to pattern the program after an existing model. The legislative history of the TEA program actually shows very little effort on the part of Congress to give the USDA specific guidance on the implementation of Food Security Act of 1985 § 1124, 7 U.S.C. § 1736s (1988), the section authorizing the TEA program. See S. REP. NO. 145, 99th Cong., 1st. Sess. 92, 364, 436 (1985), reprinted in 1985 U.S.C.C.A.N. 1761, 2030, 2362.

⁸³ Trade servicing involves efforts to influence traders and other distributors to handle or promote U.S. products. Technical assistance involves providing U.S. exporters with assistance in solving technical problems with the export process and providing foreign distributors with assistance in use of the products. Consumer promotion involves marketing to the prospective consumers of the products in such a way as to change their attitudes toward and make them aware of the advantages of U.S. agricultural products. *U.S. Farm Policy: Proposals for Budget Savings, 1990: Hearings Before the Task Force on Urgent Fiscal Issues of the House Comm. on the Budget*, 101st Cong., 2d Sess. 88 n.3 (1990) (Appendix I to prepared statement of Allan I. Mendelowitz, Director, Trade, Energy and Finance Issues, National Security and International Affairs Division, General Accounting Office) [hereinafter *GAO Farm Policy Testimony 1990*]; see also *Review of GAO's Report on the U.S. Department of Agriculture's Targeted Assistance Program, 1988: Hearing before the Subcomm. on Department Operations, Research, and Foreign Agriculture of the House Comm. on Agriculture*, 100th Cong., 2d Sess. 64 (1988) (statement of Allan I. Mendelowitz, Senior Associate Director, National Security and International Affairs Division) [hereinafter *Review of GAO's Report 1988*].

⁸⁴ *GAO Farm Policy Testimony 1990*, *supra* note 83, at 88.

that provided for the Cooperator program.⁸⁵ In 1986 the funding for the Cooperator program was \$34.7 million.⁸⁶ That represented the peak of funding for the Cooperator program.⁸⁷ The TEA program was funded at a level of \$110 million per year from 1986 until 1988, and \$200 million per year for 1989 and 1990. The initial legislation allotted \$325 million for years 1989 and 1990, but this was reduced to \$200 million.⁸⁸ The MPP had been funded at the \$200 million level for 1991 and 1992, but was reduced to \$147.7 million in 1993⁸⁹ and President Clinton's economic plan unveiled on February 17, 1993 proposes leaving funding at the 1993 level for the next several years.⁹⁰ Compensation under the TEA program was authorized to be paid in dollars or in dollar-denominated generic commodity certificates which were redeemable for CCC commodities of the value specified on the certificates. The practice of the CCC was to make the payments in CCC certificates which the participants sold on the open market.⁹¹ Purchasers of the certificates could then redeem the certificates for CCC commodities.

Although the TEA program was modeled after the Cooperator program, there were some notable differences, the most significant of which was the requirement of the TEA program legislation that the funds be used to counter or to offset unfair trade practices. An important observation about the nature of the program envisioned by the FAS is the definition given by the FAS in the TEA Guidelines to the terms "counter" and "offset" as used in the legislation.⁹² The FAS determined that it would provide TEA funds for activities designed to "counter" unfair trade practices in "[t]he market responsible for the unfair trade practice", or "[t]he market(s) which

⁸⁵ In contrast to the Cooperator program, Congress did not appropriate any money for the TEA program. Instead, it authorized the CCC to use its commodities to provide financial support for the TEA program. FOREIGN AGRIC. SERVICE, U.S. DEP'T OF AGRIC., TARGETED EXPORT ASSISTANCE GUIDELINES, REVISED AND EFFECTIVE OCTOBER 1, 1988 [hereinafter TEAG 1988].

⁸⁶ U.S. GEN. ACCOUNTING OFFICE, INTERNATIONAL TRADE: REVIEW OF EFFECTIVENESS OF FAS COOPERATOR MARKET DEVELOPMENT PROGRAM, REPORT TO CONGRESSIONAL REQUESTERS 8 (1987).

⁸⁷ The Cooperator program budget in the early 1980s hovered at roughly \$18 million per year, during 1985 and 1986 exceeded \$30 million and by the late 1980s had subsided to roughly \$28 million per year. ACKERMAN, *supra* note 9, at 33.

⁸⁸ See 7 U.S.C. § 1736s (1988).

⁸⁹ Agriculture, Rural Development, Food and Drug Administration, and Related agencies Appropriation Act of 1993, Pub. L. No. 102-341, 106 Stat. 873 (1992).

⁹⁰ Executive Office of the President of the United States, *A Vision of Change for America*, 91, 126 App., tbl. 3 (Feb. 17, 1993).

⁹¹ Interestingly, the CCC had permitted the holders of Certificates in other programs to exchange those certificates for cash from the CCC. However, the CCC did not choose to permit the exchange of Certificates for cash from the CCC on Certificates issued under the TEA program. U.S. GEN. ACCOUNTING OFFICE, AGRICULTURAL TRADE: REVIEW OF TARGETED EXPORT ASSISTANCE PROGRAM, REPORT TO CONGRESSIONAL REQUESTERS 2, 13, 14 (1988) [hereinafter GAO REPORT 1988].

⁹² TEAG 1988, *supra* note 85.

have been adversely affected by the practice from the viewpoint of the u.s.[sic] exports." The activities could also be designed to "offset" the effects of the unfair trade practice by conducting promotional activities in alternative markets."⁹³ "Alternative markets" are any markets other than those affected by the unfair trade practices. For example,⁹⁴ if an EC exporting country, such as France, was engaging in an unfair trade practice that harmed a U.S. exporter in a foreign market, such as Japan, an activity in the offending country, France, or in the affected market, Japan, designed to *counter* the unfair trade practice could be approved by the FAS under the TEA program. Significantly, a market development activity in Korea, India, Pakistan or in any foreign market other than France or Japan, designed to *offset* the unfair trade practice could be approved under the TEA program. This set of definitions takes into account the possibility that no effective market development can be accomplished through head to head competition in the face of the unfair trade practice being conducted by the foreign exporting country. The affected U.S. exporter was thus given the option of developing additional markets to offset the ill effects of the unfair trade practice.

The focus of the TEA program was on achieving increased sales through immediate market development in order to assist U.S. exporters damaged by unfair foreign competition. The Cooperator program, on the other hand, has focused on long term market development.⁹⁵ Recognizing the need to serve agricultural interests other than the few basic commodity groups served by the Cooperator program, the FAS focused the TEA program on processed, high value, and non-traditional products.⁹⁶

Although the objectives of the TEA program and the MPP include increasing sales in the short term, the program was not designed to actually make direct sales. For those TEA program participants who had a little difficulty differentiating between market development and direct sales, the acceptable actions were defined and the unacceptable actions prohibited in conflict of interest rules promulgated by the FAS and CCC in 1989.⁹⁷ Direct sales by participants were prohibited when those direct sales were made during promotional activities funded in whole or in part by TEA funds. Par-

⁹³ TEAG 1988, *supra* note 85, at 5-6.

⁹⁴ There is no ulterior motive in the selection of the country names used in this example. The purpose of using actual country names is to avoid the invariably confusing technique of labeling the actors with designations such as Country A, Country B, etc.

⁹⁵ U.S. AGRIC. EXPORT DEV'T COUNCIL, PROMOTING U.S. AGRICULTURAL PRODUCTS ABROAD: A PARTNERSHIP 28 (undated).

⁹⁶ *Id.*

⁹⁷ A set of rules was promulgated for the TEA program and a similar set was promulgated for the Cooperator program. The TEA program rules were codified in pt. 1485 and the Cooperator program rules were codified in pt. 1550. 54 Fed. Reg. 37, 781-84 (1989) (to be codified at 7 C.F.R. §§ 1485, 1550).

ticipants could make sales contacts, either as members of sales teams on CCC sponsored or approved trade missions or as participants in U.S. brand-identified export promotions. Those sales contacts had to be reported to the FAS which would attempt to see that "the benefits generated by agreements . . . [were] as broadly distributed throughout the relevant agricultural sector as feasible and, particularly, that no program participant [derived] an unfair advantage or benefit from activities conducted pursuant to the agreement."⁹⁸ This requirement hypothetically gave all participants from the same industry a shot at making the potential sale generated through the sales contacts made by members of the trade mission or brand-identified export promotion, but it still allowed for the fact that sales contacts would inevitably be made during the promotional activities.⁹⁹

3. TEA Program Structure

The TEA program had two parts. The first part contemplated the promotion of generic or branded products through nonprofit commodity-specific trade organizations or regional state organizations. The difference in participation in the TEA program through a nonprofit, commodity-specific trade organization, or a regional or state-related organization can be significant.

Some representative nonprofit, commodity-specific trade organizations such as the Alaska Seafood Marketing Institute, the California Cling Peach Advisory Board, the National Potato Promotion Board, and the U.S. Meat Export Federation, participated in the TEA program in each of the five years of its existence.¹⁰⁰ These organizations display the diversity of interests represented under this part of the TEA program.

Some agricultural exporters have products that are not effectively represented by any existing commodity-specific nonprofit trade organization. This may be because no such trade association exists for their products, or it may be because their representative trade organization chooses not to participate in the TEA program. For these exporters or prospective exporters, TEA program participation was still feasible through one of the four regional trade organizations sponsored by the state departments of agriculture: the Eastern United States Agricultural and Food Export Council, Inc. (EUSAFEC), the Mid-America International Agricultural Trade Council (MIATCO), the Southern United States Trade Association

⁹⁸ 7 C.F.R. § 1485.5 (1992).

⁹⁹ See Discussion of Comments, 54 Fed. Reg. 37, 781-82 (1989) (to be codified at 7 C.F.R. §§ 1485, 1550).

¹⁰⁰ U.S. GEN. ACCOUNTING OFFICE, AGRICULTURAL TRADE: IMPROVEMENTS NEEDED IN MANAGEMENT OF TARGETED EXPORT ASSISTANCE PROGRAM, REPORT TO THE HONORABLE CHARLES E. SCHUMER, HOUSE OF REPRESENTATIVES, 42, 43 (1990) [hereinafter GAO REPORT 1990].

(SUSTA), and the Western United States Agricultural Trade Association (WUSATA). These organizations work to increase export markets for the agricultural commodities and products that are produced within their respective regions.

Another standard arrangement was for nonprofit, commodity-specific trade organizations or regional state organizations, as described above, to administer the Branded TEA Promotion programs. The organization entered into an agreement with the CCC to administer the program. A business wishing to export a specific branded product could enter into an agreement for reimbursement with the trade organization administering the program. Nonprofit trade organizations administered the program under the same rules as the FAS used to administer TEA/Export Incentive Program (TEA/EIP).¹⁰¹ Approximately one-third of the TEA funds expended in 1990 were expended on branded product promotion activities.¹⁰²

The second part consisted of the promotion of branded products through an Export Incentive Program but is distinguished from the program administered under the Cooperator program by the designation TEA/Export Incentive Program (TEA/EIP),¹⁰³ now EIP/MPP. A business marketing a specific branded product may enter into an agreement directly with the CCC to be reimbursed for "a prearranged percentage of direct promotional expenses incurred in foreign markets to increase sales of private brands of a specific U.S. agricultural commodity or product."¹⁰⁴ The CCC has entered into direct contracts with only a few participants who are unable to work through nonprofit commodity-specific organizations or regional state organizations.

Not every applicant for TEA program funds was successful. The law authorizing the TEA program in the 1985 Farm Bill included a requirement giving priority to

- (1) agricultural commodities and the products thereof with respect to which there has been a favorable decision under section 2411 of Title 19; or
- (2) agricultural commodities and the products thereof for which exports have been adversely affected, as defined by the Secretary, by retaliatory actions related to a favorable decision under section 2411 of Title 19.¹⁰⁵

Beginning in 1987, and thereafter on an annual basis, the FAS issued a listing in the Federal Register of the commodities which qualified

¹⁰¹ TEAG 1988, *supra* note 85, at 103.

¹⁰² TEAG 1988, *supra* note 85, at 29.

¹⁰³ TEAG 1988, *supra* note 85.

¹⁰⁴ TEAG 1988, *supra* note 85.

¹⁰⁵ 7 U.S.C. § 1736s(c) (1988). The decision under Section 2411 of Title 19 referred to in this legislation is the determination by the President that action is necessary to enforce U.S. trade agreements or to respond to actions by foreign competitors that are inconsistent with existing trade obligations with the United States or are otherwise discriminatory and burdensome to U.S. commerce.

for priority assistance under section 2411 of Title 19.¹⁰⁶ Once the applicants qualifying for assistance under a priority were given "adequate" assistance, the FAS could "enter into agreements to provide export assistance for other commodities or products thereof," with any funding left to service those remaining applicants.¹⁰⁷

The process of receiving funding for TEA program activities followed a fairly simple, but time-consuming path. The potential participants had to submit an *application* to the FAS. The FAS would process the application, and either deny, approve in part, or approve the application. Once the application was approved, a participant would then be required to submit an *activity plan*. The activity plan requires a much more detailed description of the proposed activities than that in the application.¹⁰⁸

B. FAS Administration of the TEA Program

In 1986, the FAS promulgated the original set of guidelines for the TEA program, entitled the Targeted Export Assistance Guidelines (TEAG), which were based in large measure on 11 FASG, the guidelines for the Cooperator program. The TEAG were not published in the Federal Register or Code of Federal Regulations. After two years of experience, the FAS issued a revision (TEAG 1988).¹⁰⁹ Under the TEAG 1988, participants in the TEA/EIP branded promotion program could enter into an agreement with the CCC for up to three years. That version is still effective for participants who have ongoing funding under applications and activity plans which were approved prior to the implementation of the MPP, which is operating under Uniform Market Promotion Program (MPP) Provisional Rules beginning on March 6, 1991 (Interim Contract Provisions).¹¹⁰ The CCC promulgated proposed rules for the TEA in April of 1990, prior to its repeal in the 1990 Farm Bill.¹¹¹ Due to the creation of the MPP in the 1990 Farm Bill, the final rules for TEAG 1990 were never issued and the proposed rules were never implemented. The FAS administered the TEA program under TEAG 1988 until the TEA contracts were completed, and the MPP under the Interim Contract Provisions, and the Interim Rules which were published August 16, 1991.¹¹² Eventually, the approvals authorized under the earlier regulations will expire and the FAS will be left with a single set of

¹⁰⁶ See, e.g., 52 Fed. Reg. 20,764 (1987).

¹⁰⁷ 52 Fed. Reg. 10,915 (1987).

¹⁰⁸ TEAG 1988, *supra* note 85.

¹⁰⁹ TEAG 1988, *supra* note 85.

¹¹⁰ Telephone interview with David McGuire, Director of Program Operations Staff, FAS (July 1991).

¹¹¹ Targeted Export Assistance Guidelines, 55 Fed. Reg. 17,618 (proposed rules, 1990) [hereinafter TEAG 1990].

¹¹² 56 Fed. Reg. 40,745 (1991).

operative regulations. Eventually, it must be assumed, the Interim Rules will be finalized.

1. *Problems of the TEA Program*

a. *General Accounting Office Audits and Reviews*

One criticism leveled at the FAS was that the solicitation of applications of potential participants in the TEA program was limited because the FAS did not announce and describe the TEA program in the Federal Register for the 1986 program year and that the FAS did not solicit applications in the Federal Register for the 1986 and 1987 program years.¹¹³ Rather, a publicity campaign was mounted in trade publications, among trade associations, and through press releases. According to the GAO, this left a large number of smaller potential applicants in a disadvantaged position and ultimately created a preference for entities already involved with the Cooperator program.¹¹⁴

This preference was deemed to be a result of the superior communication already established between the FAS and the participants in the Cooperator program. The GAO testimony and report did not make any allowance for the fact that many entities most likely to be interested in the TEA program could very well have been those already participating in the Cooperator program. The advantage to the participants in the Cooperator program, if any, surely came more from their familiarity with 11 FASG, the guidelines governing the implementation of the Cooperator program, due to the similarity between 11 FASG and TEAG.

The GAO proceeded to level criticism at the FAS's handling of the TEA program in several other areas. In statements contained in the previously mentioned GAO Testimony, July 1988, and the GAO Report 1988, the GAO complained that the funding allocation process was not clearly documented and that there was little, if any, documentation demonstrating the bases on which funding allocation decisions were made. This supposedly left the allocation system vulnerable to charges of unfairness and baseless distinctions between applicants. Although the Federal Register in June of 1987 carried a list of ten formal criteria for funding decisions, the GAO expressed a strong desire to see documentation that established how those criteria were applied in each individual case. The FAS claimed to have inadequate manpower to maintain the extensive records for the decision making process as advocated by the GAO.¹¹⁵

The GAO Report 1988 and the GAO Testimony July 1988 also contained significant expressions of dissatisfaction with the decision

¹¹³ *Review of GAO's Report 1988, supra* note 83, at 6, 7.

¹¹⁴ GAO REPORT 1988, *supra* note 91, at 19, 20.

¹¹⁵ GAO REPORT 1990, *supra* note 100.

of the FAS to allocate funds based on TEA applications rather than to require the potential participants to submit detailed activity plans for evaluation prior to the allocation of funds. The FAS rationale was that the time and expense burden would be too great for applicants to create full-fledged activity plans prior to the allocation of funds. If applicants were required to prepare activity plans and were then denied an allocation of funds, the FAS maintained that the applicants would be carrying too large a burden. The GAO countered that it would be necessary to require the activity plans before deciding on the allocation of funds in order to optimize the use of government funds. The FAS indicated that the fact that the funds were not actually dispersed until an activity plan was in place provided the government with a safeguard against the misuse of funds, even if it did not guarantee absolute optimal use.¹¹⁶

b. Office of the Inspector General Audits

According to the GAO reports cited above and the Audit Reports of the Office of the Inspector General of the USDA, submitted to the Administrator of the FAS on March 25, 1988 and September 28, 1990, there have also been significant problems in the way the TEA program participants have participated and maintained records of their participation.¹¹⁷ The primary concerns articulated revolve around the accuracy and reliability of the reports made by the participants in accounting for the activities conducted with the program funds.¹¹⁸ The foregoing issues were by no means the only areas of concern expressed by the GAO and OIG, but are a good sampling.

c. Additional Observations

From the participants' viewpoint, timing may also be an important problem with the administration of the TEA program. For example, activity plans were required to be submitted in April of 1990 for companies participating through the Western United States Agricultural Trade Association (WUSATA), one of the regional trade associations participating in the TEA program. Approval of the activity

¹¹⁶ GAO REPORT 1988, *supra* note 91.

¹¹⁷ OFFICE OF INSPECTOR GEN., U.S. DEP'T OF AGRIC., AUDIT OF THE FOREIGN AGRICULTURAL SERVICE TARGETED EXPORT ASSISTANCE PROGRAM FISCAL YEAR 1986: AUDIT REPORT NO. 07099-14-HY (1988) [hereinafter OIG AUDIT 1988]; OFFICE OF INSPECTOR GEN., U.S. DEP'T OF AGRIC., AUDIT REPORT: FOREIGN AGRICULTURAL SERVICE TARGETED EXPORT ASSISTANCE PROGRAM PARTICIPANT CONTRIBUTIONS, AUDIT REPORT NO. 07020-02-HY (1990) [hereinafter OIG AUDIT 1990].

¹¹⁸ The Office of Inspector General found two particularly distressing facts. First, the end of year reports required of TEA program participants were not submitted in a timely fashion, were inconsistent and contained significant errors, to the extent that the reports were not useful for monitoring participant contributions. This seems to be evidence that the participants did not take the end of year reporting requirements seriously. Second, the FAS end of year reports were so inaccurate that they were not useful for monitoring or administrative purposes. OIG AUDIT 1990, *supra* note 117, at 8, 9.

plans was received from the FAS by the administrator of WUSATA in late May, 1991.¹¹⁹ Since no expenditures are reimbursable if expended prior to the approval of the activity plans, a serious lag time existed. Depending on the type of market promotion activity contemplated, many windows of opportunity can be missed by the participants during the one-year wait. Delays of this magnitude cannot be conducive to effective planning and utilization of the TEA program by many potential participants.¹²⁰

C. *Introduction to the MPP*

In spite of, or perhaps because of, the many criticisms of the TEA program, the TEA program was not renewed but was replaced with the Market Promotion Program in the 1990 Farm Bill. In the process of fashioning the MPP, some of the more distinctive features of the TEA program were eliminated. Primarily, the requirement that the program assistance be provided only to offset or counter an unfair trade practice was eliminated. Under the MPP the FAS must now give "preference" to commodities which have been adversely affected by unfair trade practices. This loosening up of one of the basic tenets of the program may be desirable, but with the funding remaining level at \$200 million under the MPP, it is currently meaningless. The MPP legislation states that "[t]he Secretary shall provide export assistance under this section on a priority basis in the case of an unfair trade practice."¹²¹ Applications for priority funding requested was in excess of \$600 million for Fiscal Year 1991.¹²² Once the allocation is made to qualifying applicants, the FAS has no

¹¹⁹ Telephone interview with James Bradley, Director of Marketing, Utah Dep't of Agric. (Mar. 1991).

¹²⁰ The regional state government sponsored trade associations, such as WUSATA, followed an entirely different approach to the application process for participation in the TEA program than the nonprofit commodity specific trade organizations. This certainly contributed significantly to the excessive delays experienced by some of the participants in the programs administered by the regional trade associations. The approach followed was for the associations to publicize to potential agricultural exporters in the region that the TEA program existed and to encourage the potential exporters to submit applications to participate in the program. Once the regional trade association had gathered the applications, it would submit its formal application to the FAS based on the volume of applications it received. From the time the formal application was submitted to the FAS by the association, the approvals would be received by the participants within about five months. However, since this process was transparent to the participants, the waiting period seemed much longer because of the time lag between their application to the association and the association's application to the FAS. On the other hand, the commodity specific trade organizations approach was to submit applications to the FAS and once the approvals were issued by the FAS the organization would announce the TEA program for the year to its members. The members of the association could then apply to participate. This way the apparent time lag for participants was reduced considerably. Telephone interview with David McGuire, Director of Program Operations Staff, FAS (July 1991).

¹²¹ 7 U.S.C.A. § 5623(c)(2) (West Supp. 1991).

¹²² Telephone interview with David McGuire, Director of Program Operations Staff, FAS (June 1991).

funds left to allocate to commodities which do not qualify for the priority assistance.

The FAS has promulgated a new set of rules to regulate the MPP (Interim Contract Provisions) modeled on the rules found in TEAG 1988, but with some concessions made to the GAO criticisms.¹²³ Although the FAS has stoutly resisted some changes which it has considered to be unfair or unduly burdensome to participants, the trend of the legislation and the regulation is still towards increased record-keeping and administrative controls as advocated by the GAO. Many of the additional details specified in the MPP legislation seem to respond directly to the GAO criticisms.

The FAS strongly resisted the GAO's notion that participants should be required to submit complete activity plans before funding allocation decisions are made. The burden of creating an activity plan is substantial, since the level of detail required by an activity plan is so great.¹²⁴ The legislation creating the MPP addresses this issue, calling for the allocation of funds to be made after the submission of marketing plans but omits any mention of applications or activity plans.¹²⁵ This suggests quite convincingly a requirement to submit a document more thorough and detailed than the application, but still leaves some room for the FAS to recognize the needs of the applicants and require something less detailed than an activity plan.

A requirement for TEA/EIP participants was that they match the TEA funds on as much as a dollar for dollar basis, with funds which the participant would not have spent on the funded activity in the absence of the TEA program.¹²⁶ Other participants were encouraged, but not required, to contribute dollars on the funded activity which they would not have spent in the absence of the TEA program.¹²⁷ The GAO was dissatisfied, in both the 1988 and 1990 reports, with the FAS process for determining which participants should contribute and at what level. Congress has responded by requiring contributions from participants.¹²⁸ The FAS felt it was important to recognize varying abilities to contribute since the participants represented interests injured by unfair trade practices. The GAO found this variability in required levels of contribution to be too flexible.¹²⁹ The MPP legislation requires the participants to contribute at least "50 percent of the cost of implementing the marketing plan," except in cases where "there has been a favorable deci-

¹²³ FOREIGN AGRIC. SERVICE, UNIFORM MARKET PROMOTION PROGRAM (MPP) AGREEMENT PROVISIONS (undated) (effective Mar. 6, 1991) [hereinafter INTERIM CONTRACT PROVISIONS].

¹²⁴ TEAG 1988, *supra* note 85.

¹²⁵ 7 U.S.C.A. § 5623(e) (West Supp. 1991).

¹²⁶ TEAG 1988, *supra* note 85, at 106.

¹²⁷ GAO REPORT 1990, *supra* note 100, at 13.

¹²⁸ 7 U.S.C.A. § 5623(g)(2) (West Supp. 1993).

¹²⁹ GAO REPORT 1990, *supra* note 100, at 16, 17.

sion by the United States Trade Representative (USTR) under section 2411 of Title 19."¹³⁰ The "favorable decision" referred to may be under the mandatory or discretionary powers of the United States Trade Representative in making a determination that the United States is being denied rights under any trade agreements or is being subjected to some burden by an unfair or unreasonable trade practice.¹³¹ In the cases where there has been a favorable decision by the USTR, the FAS is required to apply consistent and documented criteria when waiving the 50 percent minimum contribution requirement.¹³²

1. *Creation of the MPP*

The TEA program was authorized in the 1985 Farm Bill to help U.S. agricultural exporters counter or offset unfair trade practices that had an adverse impact on their ability to export. The FAS designed a market development program to achieve that objective. The implementation of the program by the FAS was not perfect and the GAO was given some significant opportunities to criticize the FAS. The recommendations made by the GAO would create significantly increased administrative burdens on the FAS, and increased documentation and compliance burdens on the participants. Although the FAS has tried to retain as much flexibility as possible in administering a program of such diverse application, the trend, both in the FAS regulations and practices, and the Congressional mandate in the MPP has been to move to a more structured, controlled, and burdensome administrative process. As a matter of logic, the more rigidly structured a program is, the less flexible it tends to be. Participants in the MPP are not likely to see many meaningful changes from the TEA program, but MPP participation will be more structured and require more effort to meet the administrative requirements. In effect, Congress has taken the TEA program created by the FAS under Congressional mandate and codified it with some modifications.

An understanding of the context of the changes made by Congress in the 1990 Farm Bill is vitally important to an understanding of the possible future direction of the MPP. Just as the Cooperator program provided a foundation and framework for the structuring of the TEA program when it was introduced in response to declining agricultural export markets and increasing unfair foreign agricultural trade competition, the TEA program provided a foundation and framework for the MPP in the face of a very uncertain future for international trade as a whole, agricultural trade included. With the

¹³⁰ 7 U.S.C.A. § 5623 (g)(2) (West Supp. 1991).

¹³¹ *Id.*

¹³² *Id.*

uncertainty of the international framework for agricultural trade, the future of the MPP is fraught with uncertainty. The final portion of this Article will briefly review the current struggle over the future of the international framework for the conduct and regulation of international trade, especially as it relates to agriculture and more precisely the MPP.

VI. U.S. Agricultural Trade Policies

Regulation of international trade is an extraordinarily complex affair, involving a wide variety of organizations and institutions.¹³³ It is something that no single nation or government can control or manage without the consent and cooperation of its trading partners and even its competitors. Efforts have been made to create a structure for the regulation of international trade, the most significant of which is the General Agreement on Tariffs and Trade (GATT). The GATT was an indirect product of the Bretton-Woods conference of 1944 which established the International Bank for Reconstruction and Development (IBRD), better known as the World Bank, and the International Monetary Fund (IMF).¹³⁴ The Bretton-Woods conference also contemplated but did not directly approach the creation of an International Trade Organization (ITO), which was intended to become the governing body overseeing and regulating international trade.¹³⁵

A. *The General Agreement on Tariffs and Trade*

1. *Origins*

In 1946, the United States proposed a draft charter for the ITO and was instrumental in arranging a series of international conferences held from 1946 to 1948 in which the ITO charter was to be developed and finalized.¹³⁶ The work which was conducted at the conferences was directed not only to the drafting of the ITO charter, but also to the creation of a subsidiary agreement on multilateral tariff reductions and the general obligations (general clauses) relat-

¹³³ JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 11 (1969) [hereinafter *LAW OF GATT*].

¹³⁴ JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 27, 28 (1989) [hereinafter *WORLD TRADING SYSTEM*].

¹³⁵ *Id.* at 31, 32.

¹³⁶ The primary role of the United States in creating and promoting the GATT and other trade liberalizing policies was well demonstrated by the following quote from the U.S. delegate to the 1946 London conference, which was one of the series of international trade conferences from 1946-1948.

The proposed charter would no doubt require changes in the United States Statutory Law. It was not the intention of the drafters of the suggested charter to impose upon other countries a finalized document drawn to United States requirements, although it was of course true that the charter has been prepared on the basis of the United States experience.

LAW OF GATT, *supra* note 133, at 32 n.1.

ing to the tariff obligations.¹³⁷ By the final meeting in 1948 in Havana, it was apparent that the U.S. Congress was not going to agree to the ITO. The GATT had already been provisionally adopted.¹³⁸ Through remarkable ingenuity, the GATT is still around, although the ITO concept has long since faded from the scene. The GATT has been influential in the development and implementation of U.S. trade policy, but there have been particularly important exceptions to the GATT obligations for agricultural trade.

A common thread running through the agricultural trade legislation of the 1980s and continuing into the 1990s is the theme that the United States must make efforts to enhance its agricultural exports in the face of subsidies, import restrictions, and other unfair trade practices on the part of competing nations. What is often overlooked is the position of the United States leading up to the present conditions and how the U.S. position may have invited unfair trade practices of the nations competing with the United States in the agricultural export markets.¹³⁹

2. *Agricultural Waiver Under the GATT*

In the late 1940s and the early 1950s, the U.S. Congress was unwilling to honor U.S. obligations under the GATT regarding agricultural trade.¹⁴⁰ It passed legislation that contained protectionist clauses, namely quotas on specified agricultural products, and authority for the President to impose quotas and tariffs on agricultural imports when those imports negatively affected certain domestic agricultural programs.¹⁴¹ As a result, the United States, the primary

¹³⁷ WORLD TRADING SYSTEM, *supra* note 134, at 32.

¹³⁸ For an excellent discussion of the technical aspects of the adoption and implementation of the GATT, see WORLD TRADING SYSTEM, *supra* note 134, at 27-57.

¹³⁹ The natural instability of agricultural markets due to inelastic demand and fluctuating supplies dictated by the vagaries of nature on which agricultural production depends so completely, promotes significant swings in the price of agricultural commodities on world markets. Production regulation in the United States and abroad helps to overcome some of the large price swings based on big supply changes. Market regulation is also common in many countries, through domestic regulation, subsidies, price maintenance, and import restrictions. The import regulation, combined with the other domestic production and subsidy programs might be effective at promoting domestic market stability, but they may be reducing the foreign market to a residual market. These actions result in the insulation of the domestic market from the world market, which, when enough countries take these insulating actions, renders the world market a residual market and causes much greater fluctuations of the world market prices for commodities effected. LAW OF GATT, *supra* note 133, at 719.

¹⁴⁰ LAW OF GATT, *supra* note 133, at 718 (1969). For a discussion of the E.E.C.'s attempts to support prices in a deficit area, see Kenneth W. Dunn, *The European Common Market in Agriculture*, 67 COLUM. L. REV. 209, 217 (1967).

¹⁴¹ United States Defense Production Act of 1950 as amended in 1951, and the Agricultural Adjustment Act of 1938 as amended in 1951. The 1948 amendments to the Agricultural Adjustment Act of 1938 contained specific provisions prohibiting the enforcement of any quota proclamation under this act that would be in contravention of the U.S. duties under an international agreement. Agricultural Adjustment Act, 62 Stat. 1250 (1948). However, the Congress further amended this Act in 1951 and did an about face on this

sponsor of the GATT, found itself in direct contravention of two of the most fundamental provisions of the GATT—Article II mandating tariff concessions and Article XI prohibiting quantitative import restrictions on agricultural products.¹⁴² Consequently, U.S. negotiators at the GATT extracted in 1955 a waiver for the United States obligations under Articles II and IX insofar as was “necessary to prevent a conflict” with Section 22 of the Agricultural Adjustment Act,¹⁴³ which was the particularly problematic U.S. legislation standing in direct conflict with the GATT obligations.¹⁴⁴ This waiver, which gives the United States extensive flexibility, has been the source of a great deal of backlash from other nations who have not received the same waiver. The response of those nations is typically that if the United States does not have to abide by the terms of the GATT, then they cannot be expected to do so.¹⁴⁵ The U.S. protectionist import policies did not increase its bargaining power in negotiating for more liberal agricultural trade policies from trade partners engaged in protectionist and other unfair trade practices.¹⁴⁶

The U.S. response has, thus, included government export promotion efforts. As used in this Article, government export promotion is defined as “all public policy measures that actually or potentially enhance exporting activity either from a firm, industry or national perspective.”¹⁴⁷ If the definition of subsidy proposed by the U.S. Export Competitiveness Project is accepted, then government-sponsored agriculture programs that have been traditionally viewed as domestic agricultural programs are clearly subject to the scope of the GATT. This view is reinforced by some of the provisions of the GATT Articles.¹⁴⁸ However, in this Article the discus-

particular policy. In fact, the 1951 revisions dictated that no trade agreement could override the operation of U.S. agricultural programs. Agricultural Adjustment Act, 65 Stat. 141 (1951).

¹⁴² LAW OF GATT, *supra* note 133, at 734-35.

¹⁴³ Section 22 of the Agricultural Adjustment Act is still in force today, even though it has undergone a series of amendments since it was originally passed in 1935. For a thorough and detailed analysis of Section 22, see Rex J. Zedalis, *Agricultural Trade and Section 22*, 31 *DRAKE L. REV.* 587 (1981-82).

¹⁴⁴ LAW OF GATT, *supra* note 133, at 735 (quoting *Decision of the Contracting Parties of GATT of March 5, 1955*, GATT, 3d Supp. BISD 32 (1955)).

¹⁴⁵ LAW OF GATT, *supra* note 133, at 718.

¹⁴⁶ LAW OF GATT, *supra* note 133, at 734-35.

¹⁴⁷ F.H. Rolf Seringhaus, *The Impact of Government Export Marketing Assistance*, 3 *INT'L. MARKETING REV.* 55 (1986).

¹⁴⁸ A good discussion of the types of activities which are addressed in the original Articles of the GATT can be found in Philip Raworth, Chapter Four: Legal Barriers to Government Export Promotion, in F.H. ROLF SERINGHAUS & P.J. ROSSON, *GOVERNMENT EXPORT PROMOTION: A GLOBAL PERSPECTIVE* 113-50 (1990) [hereinafter Raworth]. Some of the areas discussed are taxation (Article III), import quotas (Article XI), and assistance for economic development (Article XVIII). (This list is representative, not comprehensive.) The principal regulation of export promotion programs is found in Article XVI containing the rules on subsidies. *Id.* at 118-27. Additionally, under the Subsidies Code, finalized in 1979 as a part of the Tokyo Round, much more specific rules and regulations concerning subsidies were promulgated. *Subsidies and Countervailing Duties, Agreement on In-*

sion is limited to the programs that are specifically designed as export promotion programs, and focus on the TEA and MPP programs in particular.

Under the GATT, there are certain restrictions on the export promotion activities of the various governments that are signatories (the Contracting Parties or CPs). Under the GATT, an export promotion activity is only regulated if it constitutes a subsidy *and* consequently distorts normal trading patterns, thus causing some prejudice to the interests of other Contracting Parties.¹⁴⁹ This is reminiscent of U.S. tort law which requires an injury as a result of a wrongful act in order for the objectionable behavior to be actionable.

GATT barriers to government export promotion operate, therefore, only against those measures that confer a measurable economic advantage on domestic exporters that distorts trading patterns by increasing exports to a higher level than would otherwise be the case. The question is which government export promotion measures fall into this category.¹⁵⁰

As early as 1978, when U.S. agricultural exports were near a zenith, it was recognized that U.S. competitiveness in export markets was less than optimal due to "the fact that U.S. government taxation, export credits, and other policies and programs relating to exports are less favorable than those found in competing countries."¹⁵¹ Granted, the above quote is related to exports of manufactured goods. However, the U.S. government policies and programs have not been so much more advantageous and favorable to agricultural exporters as to negate the basic assertion. In addition, the agricultural export promotion programs of competing countries have increased dramatically since the quoted statement was made. As some commentators noted: "The 1980s appear to be witnessing a more-sophisticated version of the beggar-thy-neighbor depreciation strategy of the 1930s Subsidies to exports will permit exportables to be sold abroad more cheaply; taxes, quotas, administrative delays, and red tape can limit imports and make them more expensive."¹⁵²

The GATT, through seven rounds of negotiation, each one named as a specific round (i.e., the Kennedy Round and the Tokyo Round), has succeeded in reducing tariffs and has attempted to regulate and reduce non-tariff barriers. However, agriculture has been a

Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, April 1979, 26 BISD 56 (1978-79).

¹⁴⁹ Raworth, *supra* note 148, at 114-15.

¹⁵⁰ Raworth, *supra* note 148, at 115 (citations omitted).

¹⁵¹ Raymond F. Mikesell and Mark G. Farah, *U.S. Export Competitiveness in Manufactures in Third World Markets*, 2 SIGNIFICANT ISSUES SERIES (Georgetown Univ. Center for Strategic and Int'l Studies, Wash., D.C.), No. 9 at 7 (1980), *quoted in* PENELOPE HARTLAND-THUNBERG & MORIS H. CRAWFORD, *GOVERNMENT SUPPORT FOR EXPORTS: A SECOND-BEST ALTERNATIVE* 16 (1982) [hereinafter *Export Competitiveness*].

¹⁵² *Export Competitiveness*, *supra* note 151, at 7.

sensitive issue for many countries and so it has been the subject of special treatment and exemptions under the GATT.¹⁵³ The eighth and current round of GATT negotiations, named the Uruguay Round, has, at the insistence of the United States, focused on bringing agricultural trade more fully under the rubric of the GATT.

As of this writing [Fall 1990], the U.S. government is taking the very firm position that if the European Community does not make significant concessions on the elimination of agricultural subsidies, the Uruguay Round talks will fail because the United States and/or the developing countries will not find the result worthwhile.¹⁵⁴

The most significant aspect of agricultural trade that the United States wants to bring under the rubric of the GATT is the subsidy aspect. Several definitions of subsidy have been put forward.¹⁵⁵ The report by the U.S. Export Competitiveness Project at the Center for Strategic and International Studies at Georgetown University argues that all programs designed to support exports are subsidies: the only question is whether the subsidies are direct or indirect.¹⁵⁶ An analysis of the quality of the MPP as a subsidy or non-subsidy program is obviously relevant to the question of whether or not it violates any obligations under the GATT.

3. *Competing Approaches to Agricultural Trade in the Uruguay Round of the GATT*

a. *The U.S. Position*

It is maintained by the U.S. government that a free trade environment will enhance opportunities for all to develop and benefit from their comparative advantages. The United States commenced advocating a new approach to agricultural trade in the Uruguay Round.¹⁵⁷ In its proposal, the United States called for the elimination, over a ten-year period, of all subsidies that affect trade, both domestic and export subsidies, and all barriers to market access (the zero option).¹⁵⁸ The United States has since moderated its approach and reduced its stated goal from the zero option to one of reduced trade and production distorting subsidies together with tariffication

¹⁵³ LAW OF GATT, *supra* note 133.

¹⁵⁴ Fredrick M. Abbott, *GATT and the European Community: A Formula for Peaceful Coexistence*, 12 MICH. J. INT'L L. 1, 3 n.7 (1990) (citing, for example, *Trade Talks Stalemated After U.S.-Europe Clash*, N.Y. TIMES, May 31, 1990, at D2).

¹⁵⁵ One definition offered is "a measurable economic advantage afforded to an enterprise by or at the direction of a government." EDMOND MCGOVERN, INTERNATIONAL TRADE REGULATION § 11.12 (2d ed. 1986).

¹⁵⁶ *Export Competitiveness*, *supra* note 151, at 1.

¹⁵⁷ U.S. GEN. ACCOUNTING OFFICE, AGRICULTURAL TRADE NEGOTIATIONS: INITIAL PHASE OF THE URUGUAY ROUND, BRIEFING REPORT TO CONGRESSIONAL REQUESTERS 17 (1988).

¹⁵⁸ *Id.*

of import barriers.¹⁵⁹ Successful implementation of the U.S. strategy would require the elimination of the agricultural import quota waiver that the United States extracted from the GATT Contracting Parties, as discussed previously. Some skepticism has been expressed about the likelihood of the United States relinquishing the waiver.¹⁶⁰ The free trade result would be the ultimate trade liberalization of the agricultural sector, giving each nation the opportunity to take advantage of its comparative advantages.

This basic economic principle is challenged by some. In one article, the premise is sharply criticized and the United States proponents of the GATT are derisively branded "GATTists", while their support of the concept of the GATT is compared to a religious zeal.¹⁶¹ The criticisms of the GATT system are three-fold. First, preeminence or hegemony of the U.S. in world trade is fading fast; second, the elimination of non-tariff barriers is much more difficult than tariff reductions due to sovereignty considerations, and third, the trade liberalization process is inherently more advantageous to those who hold out and maintain the least liberal policies and take advantage of those with the most liberal policies.¹⁶²

(1) *The MPP Under the U.S. Proposal*

Under the U.S. proposal any export subsidy would be eliminated, if not immediately, then over the course of the next ten years. Under the broad definition of subsidy offered previously in the article from the U.S. Export Competitiveness Project, export promotion as defined in the MPP will be a subsidy, and therefore prohibited. Obviously, the exporters are not offered a price support or a bonus payment, but the cost of exporting is reduced by the government assistance in developing the markets for the products. The current proposal provides a clear definition of programs like the MPP, and permits them to be conducted by all parties.

b. *The EC Position*

The European Community's EC 1992 market unification is widely discussed and evaluated in terms of the impact on exports to EC countries, but the unified agricultural market has not held the same sway in the public consciousness. The Common Agricultural

¹⁵⁹ Conference Report, *One Day Conference on World Commodity Market and the Uruguay Round of the GATT*, 15 FOOD POL'Y 539 (1990).

¹⁶⁰ Dan Paarlberg, *Responding to the CAP, Alternative Strategies for the USA*, 11 FOOD POL'Y 157, 161 (1986).

¹⁶¹ Clyde V. Prestowitz et al., *The Last Gasp of GATTism*, HARV. BUS. REV., Mar.-Apr. 1991, at 130.

¹⁶² *Id.* at 130-131; see also John M. Culbertson, *The Folly of Free Trade*, HARV. BUS. REV., Sept.-Oct. 1986, at 122; Jagdish N. Bhagwati & Douglas A. Irwin, *The Return of the Reciprocity - US Trade Policy Today*, WORLD ECON., June-Aug. 1987, at 109, 110-11.

Policy (CAP) established in principle in 1962, has been a market-unifying force resulting in significant price increases in the agricultural sector of the EC countries.¹⁶³ The EC countries have granted the central EC authority the ability to set the agricultural price supports at consistent levels for all EC countries, but have, until EC 1992, maintained autonomy for the remaining aspects of their economies.¹⁶⁴ The support prices under CAP are set at a high enough level to encourage production, but are high enough that the resulting commodity surpluses cannot be sold on the world market without massive subsidies.¹⁶⁵

The European Community opposes the free market approach and advocates an export market sharing system permitting it to continue with the domestic agricultural subsidies it has undertaken in recent years, but permitting it to control some of the costs of export subsidies.¹⁶⁶

(1) *The MPP Under the EC Proposal*

Under the EC approach, there would be a substantial level of subsidization expected. The MPP would not suffer any disabling conflicts with the GATT if the EC proposal were adopted in the Uruguay Round. However, since the EC proposal advocates a market sharing approach rather than a competitive marketing approach, the need for the preference found in the MPP to assist in exporting commodities that suffer from unfair trade practices would be somewhat obviated. The focus of the MPP would then be almost indistinguishable from the Cooperator program. The suggestions of the GAO and others that the programs be combined might then have considerably more weight. One potential problem pointed out with this outcome is the difficulty in working effectively with the EC.¹⁶⁷ The U.S. experience has not always been positive, so the MPP could become more significant than ever if the cooperation between the United States and the European Community broke down.

c. *The Cairns Group of Fair Trading Nations Proposal*

The Cairns Group of Fair Trading Nations (the Cairns Group) is

¹⁶³ Schmitt, *Agricultural Policy Decisions in the EC: Consequences of Institutional Imbalances*, 11 FOOD POL'Y 334 (1986). Quantitative support is found in Masayoshi Homma & Yujiro Hayami, *Structure of Agricultural Protection in Industrial Countries*, 20 J. INT'L. ECON. 115, 120 (1986).

¹⁶⁴ Schmitt, *Agricultural Policy Decisions in the EC: Consequences of Institutional Imbalances*, 11 FOOD POL'Y 334, 335 (1986).

¹⁶⁵ Stefan Tangermann, *Evaluation of the Current CAP Reform Package*, WORLD ECON., June-Aug. 1989, at 175.

¹⁶⁶ Conference Report, *One Day Conference on World Commodity Market and the Uruguay Round of the GATT*, 15 FOOD POL'Y 538 (1990).

¹⁶⁷ Dan Paarlberg, *Responding to the CAP, Alternative Strategies for the USA*, 11 FOOD POL'Y 157, 168-170 (1986).

a group led by significant agricultural exporting countries, particularly Australia and Canada.¹⁶⁸ It has advanced a proposal pressing for an intermediate position which advocates trade liberalization by setting up the tariffication of agricultural trade barriers.¹⁶⁹ The tariff schedules could then be negotiated as has been done in the seven previous GATT Rounds.

(1) *The Future of MPP Under the Cairns Group Proposal*

Only strictly-defined government support programs would be permitted under the Cairns Group proposal. This would leave the MPP subject to interpretation to determine whether or not it fits within the scope of the permissible programs. Because the type of programs permitted would be direct income support programs, the MPP does not look eligible at first blush. If it were not eligible, the MPP would be very difficult to rework in compliance with the permissible standard. The future of the MPP under the Cairns Group proposal would be questionable.

d. *Third World View*

Finally, although the position of the Third World countries is by no means unanimous and cannot be articulated briefly, in relation to the basic concepts proposed by the other major players in the GATT negotiations, the Third World importing countries, represented by the Group of 77, are taking a fourth position generally opposing trade liberalization proposals since the result would likely be higher prices for imported commodities.¹⁷⁰ This could represent the lobby for maintaining the *status quo* in relationship to the proposals put forward by the various actors in the current round of GATT negotiations. A failure of any one of the proposals to be adopted could actually result in a success of the Third World point of view.

B. *Maintenance of the Current System*

With the various positions being vigorously advocated and defended, the Uruguay Round has continued well beyond the planned

¹⁶⁸ The Cairns group is composed of Argentina, Australia, Brazil, Canada, Chile, Colombia, Fiji, Hungary, Indonesia, Malaysia, the Philippines, New Zealand, Thailand, and Uruguay. Higgott & Cooper, *Middle Power Leadership and Coalition Building: Australia, the Cairns Group, and the Uruguay Round of Trade Negotiations*, 44 INT'L ORGANIZATION 589 (1990).

¹⁶⁹ The proposal has three basic components: First, the establishment of long term rules and framework for agriculture second, that the total support by governments to agriculture be systematically reduced by reducing trade distorting activities, and, third, immediate steps for the alleviation of severe distortions currently being experienced. U.S. GEN. ACCOUNTING OFFICE, *AGRICULTURAL TRADE NEGOTIATIONS: INITIAL PHASE OF THE URUGUAY ROUND, BRIEFING REPORT TO CONGRESSIONAL REQUESTERS* 26 (1988).

¹⁷⁰ Conference Report, *One Day Conference on World Commodity Market and the Uruguay Round of the GATT*, 15 FOOD POL'Y 539 (1990).

date for the culmination of the negotiations without any clear signs of an agreement. If no solution is reached one of two outcomes could be anticipated. First, the current system could be maintained. This would give the Third World countries a better solution than those proposed by the three major groups at the GATT negotiating table since the market prices would remain lower than with the proposals.¹⁷¹

The question of whether or not the MPP would survive under the present conditions is quite interesting. The U.S. government position is that the MPP does not violate any obligations under the GATT, since it is not a direct or indirect subsidy.¹⁷² The payments received by the cooperators do not amount to price enhancements or bonuses for commodities sold. The contribution by the CCC represents an increased opportunity to do business. Of course, this definition contradicts that quoted earlier, but could reasonably be advanced in GATT negotiations, especially since few nations adopt the strict interpretation of subsidies offered previously.

C. *Failure of the GATT*

As one of the major proponents of the GATT, the United States might not be the first to acknowledge the possibility of the failure of the GATT as a whole, but two closely-related factors make it a serious concern. The functioning of the GATT System (FOGS) is one of the main negotiating topics of the Uruguay Round and maintains some real urgency in the minds of prominent authorities. "Whether this or other endeavors can succeed in time to bring into effect sufficient improvement in the 'trade constitution' as to avoid a worldwide economic disaster, no one can say for certain."¹⁷³ This is a vast topic worthy of independent analysis and far beyond the scope of this inquiry. However, it is important to acknowledge the possibility.

VII. Future of the MPP

The first question to consider is whether or not the MPP as it currently exists is consistent with or in violation of the existing U.S. obligations under the GATT. Although Congress and the Administration are both bound to maintain the compliance of the MPP to the GATT obligations, not all of our trading partners are bound to agree. The fact that Congress addressed the issue as recently as the 1990 Farm Bill and came up with the MPP at that time supports the argument that Congress was not of the opinion that the MPP would be in violation of existing GATT obligations.

¹⁷¹ *Id.*

¹⁷² Telephone interview with David McGuire, Director of Program Operations Staff, FAS (July 1991).

¹⁷³ WORLD TRADING SYSTEM, *supra* note 134, at 308.

The MPP represents a much larger commitment to foreign market development than does the Cooperator program, yet the Cooperator program, with its focus on long-term market development would have a much greater likelihood of conforming to the U.S. obligations under the GATT. One conceivable approach may be a reconstituting of the MPP as part of the Cooperator program. The existing Cooperator program funding could then be supplemented by appropriations currently devoted to the MPP. The overall cost of the two programs combined might be less than the two programs administered separately, and the economies of consolidation could provide a measure of savings. Since the 1990 Farm Bill replaced the TEA program with the MPP, which is notably closer in description and form to the Cooperator program than the TEA program ever was, the additional changes needed would not be that drastic. Some modifications would have to be made to each program to allow them to mesh effectively.

The advent of a new administration in the United States also poses interesting questions as to the possibility of a significant change in policy toward the GATT or the MPP. As to the attitude about the MPP, the position paper issued by the Clinton Administration recommends retaining the MPP for the next five years at the level of funding established in 1993 of \$147.7 million.¹⁷⁴

The second question is whether the answer would be the same or different under each of the competing proposals advocated during the Uruguay Round. Under the Cairns Group proposal, the MPP could end up in contravention of U.S. GATT obligations, which would probably result in the elimination of the MPP. Under the EC proposal, the MPP would not be in violation of the U.S. GATT obligations, but it would be anachronistic and would, therefore, be left unfunded or would be eliminated. If the negotiators at the Uruguay Round fail to come to an effective agreement, or if the GATT as a whole fails, is the MPP likely to remain in place for the long term?

Additional analysis of the various GATT proposals and their impact on the MPP as well as other U.S. agricultural trade promotion programs would be a highly interesting study. However, the future of the GATT is not certain with the negotiations of the Uruguay Round still underway. The MPP is fairly secure in the near term, and subject to the vagaries of domestic as well as foreign agricultural policy in the long term. With the advent of the Clinton administration, there is a great deal of uncertainty about the GATT as well as about the MPP.

¹⁷⁴ EXEC. OFFICE OF THE PRESIDENT OF THE UNITED STATES, A VISION OF CHANGE FOR AMERICA 91 (Feb. 17, 1993).