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An Agricultural Law Research Article

**Agricultural Reform: The European
Community, the Uruguay Round, and
International Dispute Resolution**

by

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INTRODUCTION

The European Community ("EC") perceives that it is liberalizing international trade on two parallel tracks. First, it is creating a single market within the Community and reforming its own Common Agricultural Policy ("CAP"). Second, it is prepared to make significant changes in its agricultural trading relations with nations outside the Community through the Uruguay Round of negotiations under the General Agreement on Tariffs and Trade ("GATT").¹

This Article examines the Community's Common Agricultural Policy under the Treaty of Rome,² including its successes, failures, and recent reforms within the EC. It shares the view of one author that even pursuing the single subject of milk quotas under the Common Agricultural Policy "resembled that of chasing a moving target through a thick fog."³ The Article further examines and compares the European Community's and United States' proposals for reform of world agricultural trade and the so-called *Dunkel Draft* compromise proposal for conclusion of the Uruguay Round of negotiations under the GATT.⁴ Finally, it examines dispute resolution under the Treaty of Rome and compares it with the GATT's dispute resolution system, looking particularly at the two recent panel reports on oilseeds.

The Uruguay Round of multilateral negotiations began in 1986 and is yet to be concluded, as each promised deadline has passed without final agreement. A principal cause of de-

1. See European Economic Community, Press Release, *Community Report for GATT Trade Policy Review Mechanism 2-4* (April 12, 1991); General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A11, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

2. Treaty of Rome, March 25, 1957, 1 *Treaties Establishing the European Communities* 207ff (1987 ed.).

3. J.A. USHER, LEGAL ASPECTS OF AGRICULTURE IN THE EUROPEAN COMMUNITY vii (1988) [hereinafter LEGAL ASPECTS OF AGRICULTURE]. Mr. Usher was a Legal Secretary at the European Court of Justice. His remark was prompted by "the frequency and bulk of the legislation to which [the Common Agricultural Policy] has given rise." *Id.*

4. DRAFT FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, Dec. 20, 1991, GATT Doc. MTN.TNC/W/FA [hereinafter DRAFT FINAL ACT or *Dunkel Draft*]. This draft was proposed by Arthur Dunkel, former Director General of the General Agreement on Tariffs and Trade, who resigned effective July 1, 1993.

lay in the Uruguay Round has been the demand, made largely by the United States, for substantial changes in the EC's Common Agricultural Policy. To the extent that particular sources of dispute between the EC and other parties in the Uruguay Round can be ascertained, they will be explored here as well.

President Bill Clinton has continued the presidential tradition of supporting a successful conclusion of the Uruguay Round, urging completion by December 15, 1993, when the President's "fast-track" authority expires.⁵ President Clinton is also seeking approval of the North American Free Trade Agreement ("NAFTA") with Canada and Mexico, further affecting U.S. trade.⁶ Although the NAFTA agreement is beyond the scope of this Article, the Clinton Administration reportedly states that the agreement "will be a big winner" for the U.S. agriculture industry.⁷

Peter Sutherland became the new Director General of the GATT on July 1, 1993 and set a tight schedule of continuing negotiations, which were to resume on August 31, 1993. Director General Sutherland stated bluntly that the entire Uruguay Round agreement would be in jeopardy if any country proposed major changes without widespread consensus. United States officials, however, have insisted that further changes in the draft agreement may be required.⁸

Disputes over agriculture remain a serious barrier to a successful conclusion of the Round. The United States and the European Community reached agreement in resolving

5. *GATT: Senate Approves Fast Track Bill; Kantor Pledges Avert Amendments*, 10 Int'l. Trade Rep. (BNA) 1110 (July 7, 1993).

6. *NAFTA: Clinton to Name NAFTA Coordinator to Run 'Campaign' to Win Passage*, 10 Int'l. Trade Rep. (BNA) 1236 (July 28, 1993).

7. *NAFTA: Kantor Says NAFTA Side Agreements Not Likely to be Completed This Week*, 10 Int'l. Trade Rep. (BNA) 1235 (July 28, 1993). The United States Trade Representative also said that the North American Free Trade Agreement would create "the world's largest single market, ahead of the 12-nation European Community." *Id.*

8. See *GATT: Focus on Uruguay Round Talks Shifts to Foreign Capitals During August*, 10 Int'l. Trade Rep. (BNA) 1293, 1294 (Aug. 4, 1993); *GATT: U.S. Rejects Call by GATT Director General to Keep 'Dunkel Text' Essentially Inactive*, 10 Int'l. Trade Rep. (BNA) 1253 (July 28, 1993); *GATT: Uruguay Round Talks Resume Full Time After Quad Agreement*, *Sutherland Says*, 10 Int'l. Trade Rep. (BNA) 1154, 1155 (July 14, 1993); Roger Cohen, *New GATT Chief Turns Up Heat*, N.Y. TIMES, July 2, 1993, at D1.

their disputes over oilseeds in the Blair House Agreement of November, 1992. France, however, has vehemently objected, and has threatened a veto within the European Community because the agreement requires reductions in subsidized exports.⁹ European Community ministers are hopeful that France's threatened veto can be avoided.¹⁰ But, as the United States Trade Representative has indicated, "the issue of agriculture" is one of the more difficult areas to be addressed.¹¹

Both within the EC and in the Uruguay Round, the pressure for reform of the Common Agricultural Policy must be seen in the context of the fundamental, often unwritten policies of nations and peoples to assure an adequate supply of food for their own people from their own resources to avoid undue dependence on foreign sources for this necessity of life. The EC and its international trading partners are all generally committed to free trade in most sectors. However, it is no accident that the *Dunkel Draft* states that the reforms in agriculture must be equitable, "having regard to non-trade concerns, including food security . . ."¹² "Non-trade concerns" about "food security" are most likely a significant force behind the resistance of the EC and of other countries to reform. For example, while Japan's severe restrictions on rice imports may drive the price of domestic rice higher, their more important purpose is to avoid dependence on other countries.

This concern for food security explains the persistent willingness of most governments, including the European Community and the United States, to provide subsidy and support programs for agriculture, even when they are not economically efficient. The ultimate goal is to ensure adequate food supplies and to avoid total dependence on others for an essential resource for which there is no substitute. Food supplies, in turn, depend upon a factor over which humanity has

9. See David Gardner, *They'll Huff and They'll Puff*, Financial Times, Sept. 17, 1993, at 17; *GATT: Anglo-French Summit Fails to Resolve Difficulties Over Uruguay Round*, 10 Int'l. Trade Rep. (BNA) 1253 (July 28, 1993).

10. David Gardner, *Hopes Rising That Deal Can Be Saved*, Financial Times, Sept. 20, 1993, at 3.

11. *GATT: Kantor Expresses Optimism on Completion of Global Trade Talks*, 10 Int'l. Trade Rep. (BNA) 1166, 1167 (July 14, 1993).

12. DRAFT FINAL ACT, *supra* note 4, pt. A, *Uruguay Round Agreement on Agriculture* at L.2 (emphasis added).

little control — the weather. As confirmed by Mr. Usher, the European Community's "aim of stabilizing markets must in reality be read with the aim of assuring the availability of supplies."¹³

The European Community is explicit about its primary concern for food security when justifying its Common Agricultural Policy: "Self-sufficiency in foodstuffs does not, of course, rule out trade with the rest of the world but such trade must be kept in balance and must not lead to one-sided and therefore potentially dangerous dependence on other countries."¹⁴ In addition, the Community has an express policy of keeping a sufficient number of farmers on the land "to preserve the natural environment, traditional landscapes[,] and a model of agriculture based on the family farm as favoured by the society generally."¹⁵ These goals are but one factor prolonging the conclusion of the Uruguay Round.

A second, but unstated, factor in reaching a successful conclusion of the Uruguay Round may also be the fundamental differences in dispute resolution and in enforcement mechanisms available under the GATT. The GATT provisions are generally far less effective and precise than those under the Treaty of Rome. Since the GATT lacks a real governing body, dispute resolution ultimately comes down to consensus. Furthermore, although GATT dispute panel decisions are judicial in nature, they ultimately depend on the goodwill of the nation charged with failure to meet GATT obligations for their effectiveness. This lack of enforcement is in sharp contrast to the Treaty of Rome.

Under the Treaty of Rome, the Community's common market is largely supreme under Article 2, and within the common market, Article 40(3) prohibits discrimination between producers or consumers in the agricultural sphere. The European Commission ("Commission") has significant powers of enforcement, and decisions of the European Court of

13. LEGAL ASPECTS OF AGRICULTURE, *supra* note 3, at 38.

14. A COMMON AGRICULTURAL POLICY FOR THE 1990s 9 (EC Periodical 5/1989, 5th ed. 1989) [hereinafter POLICY FOR THE 1990s].

15. THE DEVELOPMENT AND FUTURE OF THE COMMON AGRICULTURAL POLICY 12 (Bulletin of the European Communities Supplement 5/91) [hereinafter CAP - REFLECTIONS PAPER].

Justice ("Court of Justice" or "Court") have played a critical role in establishing and maintaining the common market and in eliminating trade discrimination among EC Member States.

The differences in the dispute resolution and enforcement mechanisms must have significant bearing on the reluctance of the EC and of other nations to allow fully competitive markets in agriculture. Although these seemingly intractable disputes among the nations of the EC, as well as in the GATT, often seem to come down to an invisible drawing of a line in the sand between "us" and "them," the lack of a fully adjudicative mechanism under the GATT often leads to more political solutions.

I. THE COMMON AGRICULTURAL POLICY: FUNDAMENTAL PART OF THE EUROPEAN COMMUNITY

The Treaty of Rome of 1957, which established the European Economic Community, states that "[t]he common market shall extend to agriculture and trade in agricultural products" and also provides for "the establishment of a common agricultural policy among the Member States."¹⁶ The Treaty specifies five broad objectives of the common agricultural policy:

- (a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilization of the factors of production, in particular labor;
- (b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;
- (c) to stabilize markets;
- (d) to assure the availability of supplies;
- (e) to ensure that supplies reach consumers at reasonable prices.¹⁷

The Treaty also allows coordinated vocational training, research, and education, and joint financing of projects, institu-

16. Treaty of Rome, *supra* note 2, art. 38(1), 38(4). Agricultural products encompass "products of the soil," livestock, fish, and "products of first-stage processing" of these products. *Id.* art. 38(1).

17. *Id.* art. 39(1).

tions, and product promotion as part of the CAP.¹⁸

Although the other provisions of the Treaty apply to agricultural products, subject to any special provisions concerning agriculture in Articles 39-46, the Treaty's general rules on competition in Articles 85 and 86 do not apply to agriculture, except to the extent established by the European Council ("Council") as part of the CAP.¹⁹ Under the Council's regulations, however, the general rules on competition have been made applicable to agriculture with the exception that Article 85(1) does not apply where the matter is part of a national agricultural market organization or is necessary to the objectives of Article 39.²⁰

To accomplish the objectives of the CAP, the Treaty required the establishment of a common organization which would structure the agricultural markets of the Community in one of three ways: "(a) common rules on competition; (b) compulsory coordination of the various national market organizations; [or] (c) a European market organization."²¹ Most importantly, this common organization was given broad authority to employ all measures necessary to accomplish the purposes of the CAP established in Article 39, including "regulation of prices, aids for the production and marketing of the various products, storage and carryover arrangements[,] and common machinery for stabilizing imports or exports."²² In addition, the Treaty authorizes the granting of aid in two special circumstances: (1) where necessary to protect "enterprises handicapped by structural or natural conditions" and (2) as part of "economic development programmes."²³

Under the Treaty, the authority to establish and implement the common agricultural policy is divided among the governing bodies of the Community. The Treaty provides that the European Commission is to make recommendations

18. *Id.* art. 41.

19. *Id.* art. 42.

20. Council Regulation 26/62, O.J. EUR. COMM. 129 (Spec. Ed. 1959-62). See BERMAN, GOEBEL, DAVEY AND FOX, *THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY*, Ch. 40, at 18 (Manuscript 1992) [hereinafter *LAW OF THE EEC*].

21. Treaty of Rome, *supra* note 2, art. 40(2).

22. *Id.* art. 40(3). Several other articles in the Treaty provided for the transition from the multiple policies of the Member States to the single market. *Id.* arts. 40-47.

23. *Id.* art. 42.

on the CAP to the Council, which consults the European Parliament. The Council, now by qualified majority, may "make regulations, issue directives, or take decisions"²⁴

A great deal of authority has now been delegated to the Commission to implement and oversee the CAP.²⁵ Although the Common Agricultural Policy is determined by the Community, it is largely implemented by agencies of the Member States. This local enforcement of EC-determined policy may also be a significant source of the persistent national protectionism apparent in many cases brought before the European Court of Justice. However, compliance with the CAP is to a certain extent assured by the fact that Member States cannot be reimbursed for their agricultural expenditures unless they comply with Community CAP requirements. Not surprisingly, agriculture has provided a bountiful source for litigation in the Court of Justice concerning various aspects of the CAP.²⁶

A. Source of Independence and Prosperity

When viewed in terms of its original goals, the CAP appears to have been quite successful. The goals were established "at a time when Europe was in deficit for most food products."²⁷ As former European Commissioner Ray Mac Sharry succinctly stated:

When the common agricultural policy was agreed in 1962, a primary objective of the Commission and the six original Member States . . . was to attain self-sufficiency in food production. They also identified as other main priorities a fair standard of living for farmers, stabilized markets, secure supplies of food[,] and reasonable prices for consumers.

As we approach 1992, the world we live in is vastly different from that of 30 years ago. The common agricultural policy has been successful, arguably too successful, in ensuring sufficiency of food supply in a Community

24. *Id.* art. 43(2). During "the first two stages" of development of the CAP, unanimous action of the Council was required. *Id.*

25. LAW OF THE EEC, *supra* note 20, at 18.

26. See LEGAL ASPECTS OF AGRICULTURE, *supra* note 3, at vii.

27. CAP - REFLECTIONS PAPER, *supra* note 15, at 9.

now enlarged to 12 Member States.²⁸

The goal of self-sufficiency has largely been achieved by the Community in most agricultural sectors. The Community has been self-sufficient in production of wheat, sugar, and cheese since at least 1974 and in production of cereals, eggs, butter, fresh vegetables, and beef since 1985.²⁹ Furthermore, its self-sufficiency in citrus fruit was seventy-five percent and in other fresh fruit was eighty-five percent from 1987 to 1988.³⁰

B. The Burden of Agricultural Subsidies

Although the CAP has been successful in attaining its principal goals, it has been achieved at a very high cost. The CAP's success has led to enormous surpluses in some commodities, for which no market can be found. As a result, the Community has been forced to pay costly storage expenses for these surpluses. The burden of this cost is readily apparent; fully two thirds, and sometimes more, of the EC's budget is required for agricultural market support.³¹ In 1990, total agricultural expenditures of the European Agricultural Guidance and Guarantee Fund were ECU 26,453 million, even excluding fisheries and certain other agricultural expenditures.³² In 1991, the comparable budget amount was ECU 31,516, with a Guideline of ECU 32,511.³³ In 1992, the EC's expenditures for the CAP was ECU 36,417; 58.2 percent of the total Community budget.³⁴

While largely achieving its goals, the CAP has not been so successful in its effects on small individual farmers. The EC has reflected the same trend as agriculture in the United States — a substantial drop in the number of persons employed in agriculture. The drop in the EC has been dramatic: "In 1960 some 15.2 million people were still employed in agri-

28. *Id.* at 5.

29. THE AGRICULTURAL SITUATION IN THE COMMUNITY: 1991 REPORT Table 3.7.3, at T/158-59 [hereinafter AGRICULTURAL SITUATION: 1991 REPORT].

30. *Id.*

31. POLICY FOR THE 1990s, *supra* note 14, at 53.

32. AGRICULTURAL SITUATION: 1991 REPORT, *supra* note 29, at 105. ECU 30,630 million was the Guideline for this period. *Id.*

33. *Id.*

34. OUR FARMING FUTURE 23 (EEC Office for Official Publ. 1993).

culture in the Community of Six. By 1987 their number had dropped to 5.2 million, i.e. by almost two-thirds."³⁵

The Community itself describes this situation as "[a] flagrant paradox."³⁶ Community support expenditures are enormous, while farm income has steadily declined, and, "[a]s a consequence, the average real income of European farmers in 1988 was below the level of the mid-1970's."³⁷ Moreover, more than half of the farmers in the EC are over 55 years old.³⁸

In light of these changed circumstances since the establishment of the CAP, the European Commission has drawn the following conclusion:

The mechanisms of the CAP as currently applied are no longer in a position to attain certain objectives prescribed for the agricultural policy under Article 39 of the Treaty of Rome, namely to ensure a fair standard of living for the agricultural Community, stabilize markets, ensure reasonable prices to consumers, take account of the social structure of agriculture and of the structural and natural disparities between the various agricultural regions.³⁹

C. Reform of the Common Agricultural Policy

The movement for reform of the CAP began as early as 1985 with the Commission's issuance of a GREEN PAPER on the subject,⁴⁰ which it soon followed with guidelines. As explained, the CAP has been a victim of its own success, leading to enormous commodity surpluses and their corresponding costs, largely because agricultural subsidies have been pegged to price support on unlimited production.⁴¹ The Commission reported "that 80% of the support provided . . . is devoted to 20% of farms which account also for the greater part of the land used in agriculture."⁴² As a result, the CAP has failed to

35. POLICY FOR THE 1990s, *supra* note 14, at 6.

36. *Id.* at 53.

37. *Id.* at 54.

38. CAP - REFLECTIONS PAPER, *supra* note 15, at 9.

39. *Id.*

40. *Id.* at 9-10 (citing GREEN PAPER ON AGRICULTURE (European Community 1985) and European Economic Community, Memorandum (Dec. 18, 1985)).

41. CAP - REFLECTIONS PAPER, *supra* note 15, at 9.

42. *Id.*

provide adequate support for other farmers because “[t]he existing system does not take adequate account of the incomes of the vast majority of small and medium size family farms.”⁴³ Not surprisingly, there is enormous income disparity among farmers in various Member States and within Member States.⁴⁴ This result is ironic because one of the explicit objectives of the CAP is to maintain the traditional family farm and countryside.⁴⁵

The reforms proposed by the Commission are summarized in a recent *Reflections Paper* as follows:

- progressive reduction of production in surplus sectors, by means of a price policy reflecting market demand
- taking into account the income problems of small family farms in a more effective and systematic manner
- supporting agriculture in areas where it is indispensable from the point of view of regional development, maintaining social balance and protecting the environment
- promoting an increased awareness among farmers of environmental problems[.]⁴⁶

Despite the recognized needs and the proposals for reform, the Commission also reiterated an important policy objective unrelated to economic performance or foods security per se: “Sufficient numbers of farmers must be kept on the land. There is no other way to preserve the natural environment, traditional landscapes and a model of agriculture based on the family farm as favoured by the society generally.”⁴⁷

Some reforms were undertaken in 1988, including a reduction in price supports when production exceeds certain levels, lowering intervention guarantees, and placing limits on total EC agricultural expenditures.⁴⁸ Other measures were proposed which would set aside land from production with accompanying financial aids.⁴⁹

However, the Commission recognized that, as of February 1991, the fundamental problem had not been fully ad-

43. *Id.*

44. AGRICULTURAL SITUATION: 1991 REPORT, *supra* note 29, at 37-40.

45. CAP - REFLECTIONS PAPER, *supra* note 15, at 12.

46. *Id.* at 10.

47. *Id.* at 12.

48. *Id.* at 10.

49. *Id.*

dressed because EC agricultural "support . . . remains proportionate to the quantity produced . . ." and other changes involving aids had been merely "tacked on to a system whose mechanisms have not changed."⁵⁰ Thus, the Commission proposed nine objectives and six guidelines for future changes in the CAP.⁵¹

In March 1991, the Commission issued specific proposals for changes in the Common Agricultural Policy which included proposed legislation and explanatory memoranda.⁵² Additional proposed legislation was issued in October 1991.⁵³

In July 1991, the Commission submitted to the Council and the European Parliament a follow-up to its Reflection Paper. This revision provided a more detailed description of its proposals for change in specific agricultural sectors, environmental proposals, reforestation proposals, and an early retirement program for farmers.⁵⁴

The EC finally adopted far reaching reforms of the CAP in May and June of 1992. "The main thrust of the reform has been to switch from a price support policy to one geared more towards direct aid for producers, but taking account also of growing concerns over the environment and the social and economic development of rural areas."⁵⁵ To ease the adjustment for EC farmers, the reforms are being phased in over a three year period, beginning in 1993.⁵⁶ The goals of the CAP reforms are as follows:

- (i) a better balance of agricultural markets, both through more effective control of production and through keener efforts to stimulate demand;

50. CAP-REFLECTIONS PAPER, *supra* note 15, at 11.

51. *Id.* at 12-14.

52. COMMISSION PROPOSALS ON THE PRICES FOR AGRICULTURAL PRODUCTS AND ON RELATED MEASURES (191/1992), COM(91) final (Vol. I, Explanatory Memoranda, (March 1, 1991); Vol. II, Financial Implications (March 1, 1991); Vol. III, Legal Instruments (March 13, 1991); and Corrigendum to Vol. III (March 19, 1991)).

53. REFORM OF THE COMMON AGRICULTURAL POLICY, LEGAL TEXTS (ARABLE CROPS, SHEEPMEAT, BEEFMEAT), COM(91) 379 final (Oct. 18, 1991).

54. COMMUNICATION OF THE COMMISSION TO THE COUNCIL AND TO THE EUROPEAN PARLIAMENT, THE DEVELOPMENT AND FUTURE OF THE COMMON AGRICULTURAL POLICY, COM(91), 258 final/3 (Revised Version, July 22, 1991).

55. THE AGRICULTURAL SITUATION IN THE COMMUNITY: 1992 REPORT 10 [hereinafter AGRICULTURAL SITUATION: 1992 REPORT].

56. *Id.*

- (ii) more competitiveness in European agriculture, both internally and on the international market, through substantial price reductions, the aim being to encourage greater internal consumption and at the same time find readier outlets on the world market;
- (iii) more extensive methods of production, thereby helping to conserve the environment and reduce agricultural surpluses;
- (iv) a certain redistribution of support to the benefit of more vulnerable enterprises;
- (v) continued employment for a sufficiently high number of farmers, while encouraging a certain mobility as regards production factors, notably land, in order to create more efficient production structures.⁵⁷

These reforms have left unchanged the fundamental principles of the CAP—a single market, Community preference, and Community-wide financial support of the CAP.⁵⁸ However, the structure has been changed so that EC food prices are more competitive and EC farmers are part of a direct benefit program. These changes are designed to reduce surpluses by encouraging less intensive production methods, thereby benefiting the environment as well.⁵⁹

II. AGRICULTURE AND THE EUROPEAN COMMUNITY IN THE URUGUAY ROUND

A. Agricultural Trade Under the GATT

Four of the six nations which originally formed the European Economic Community under the Treaty of Rome in 1957 were also contracting parties to the General Agreement on Tariffs and Trade, which was concluded in 1947.⁶⁰ The European Community is a “customs union” under the GATT.⁶¹ As such, the EC as a body undertook the obligations of its Member States as contracting parties to the GATT.

The ultimate purposes and goals of the GATT for global

57. *Id.*

58. OUR FARMING FUTURE, *supra* note 34, at 7

59. *Id.* See AGRICULTURAL SITUATION: 1992 REPORT, *supra* note 55, at 10-11

60. The EC has now doubled in size to include twelve nations. Similarly, some 108 nations have now acceded to the General Agreement.

61. GATT, *supra* note 1, art. XXIV:8(a).

trade are, in many ways, comparable to those of the single market in the Community. The preface to the GATT states that international trade and economic activity "should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world[,] and expanding the production and exchange of goods."⁶² These goals are largely the same as those of the European Economic Community that were originally set forth in the Treaty of Rome:

The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote through the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living[,] and closer relations between the States belonging to it.⁶³

In addition to its purely economic and trade goals, the Treaty of Rome contains social policy and other goals to which purely economic and trade considerations must sometimes give way. Likewise, the individual social policies of GATT contracting parties sometimes seem to take precedence over the articulated common goals of the GATT. The emphasis placed on maintaining European agriculture in its traditional form may be an example of such conflicting social policies.

62. *Id.* Preface, ¶ 1.

63. Treaty of Rome, *supra* note 2, art. 2. This Article of the Treaty of Rome was amended to further broaden its scope and goals in the Treaty on European Union (known as the Maastricht Treaty) as follows:

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3A, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard and quality of life, and economic and social cohesion and solidarity among Member States.

Treaty on European Union, Title II, Provisions Amending the Treaty Establishing the European Economic Community with a View to Establishing the European Community, art. G(b)(2) (Feb. 7, 1992), O.J. C191 (July 29, 1992). This Treaty entered into force on November 1, 1993, following notification by Germany on October 15, 1993, the last member state to do so. *Id.*, Part VII, Final Provisions, art. R(2).

The operative provisions of the GATT show that its goals are similar to the goals of the Treaty of Rome — to establish “arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.”⁶⁴ To accomplish these goals the GATT accords “general most favored nation treatment” among all contracting parties. Most favored nation treatment means that each contracting party will generally receive identical treatment (with specified exceptions) as to tariffs, charges, advantages, privileges and immunities applicable to goods sold among the parties.⁶⁵ To avoid evasion of the most favored nation principle, the GATT prohibits internal discrimination against imported merchandise on the basis of internal taxation or regulation which might otherwise be used “so as to afford protection to domestic production.”⁶⁶ The GATT also mandates that imported merchandise “shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations[,] and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution[,] or use.”⁶⁷

The GATT generally prohibits restrictions on imports or exports among contracting nations which take the form of quotas or import or export licenses.⁶⁸ However, this prohibition is subject to major and sometimes vaguely defined exceptions.⁶⁹ One such exception is generally neutral and allows for “standards or regulations for the classification, grading[,] or marketing of commodities in international trade.”⁷⁰

There are two other major exceptions to the general prohibition against quantitative restrictions. Not surprisingly, they relate largely to agricultural products. Under the first of

64. GATT, *supra* note 1, Preface, ¶ 2.

65. *Id.* art. I:1, 2. The contracting parties specify the treatment to be accorded other parties in Schedules of Concessions which are annexed to the Agreement. *Id.* art. II:1.

66. *Id.* art. III:1.

67. *Id.* art. III:4. As with many provisions of the GATT, these principles are not without exceptions. *See e.g.* *Id.* art. III:8 (concerning government procurement and certain subsidies) and III:9 (concerning internal price control measures).

68. *Id.* art. XI:1.

69. GATT, *supra* note 1, art. XI:2.

70. *Id.* art. XI:2(b).

these exceptions, a contracting party can prohibit or restrict exports of "foodstuffs or other products essential to the exporting contracting party" in order "to prevent or relieve critical shortages."⁷¹ The other agricultural exception expressly allows governmental import restrictions in three circumstances: (1) where the restriction also applies to the marketing or production of the same kind of domestic products or direct substitutes; (2) where imposed to remove a temporary surplus of the same or a direct substitute product; and (3) where the restriction relates to the quantities of an animal product produced primarily from an imported commodity, if the domestic production of that commodity is relatively negligible.⁷² Any such restrictions must be publicly noticed and are subject to some requirements of proportionality between domestic and imported products.⁷³

Although the GATT does not absolutely prohibit subsidies by contracting parties, under specified circumstances, Article VI:3 authorizes other parties adversely affected by subsidies to impose countervailing duties on imports which have benefited from subsidies.⁷⁴ Such duties cannot be imposed by a contracting party unless it has determined that "the effect of the . . . subsidization . . . cause[s] or threaten[s] material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry."⁷⁵ A special provision concerning primary commodities generally validates domestic price stabilization systems if they are not pegged to export prices. However, this provision applies only after the contracting parties determine by consultation that the systems meet certain conditions.⁷⁶

The GATT generally discourages, but does not prohibit, the use of subsidies by contracting parties,⁷⁷ even though it

71 *Id.* art. XI:2(a).

72. *Id.* art. XI:2(c).

73. *Id.*

74. "[C]ountervailing dut[ies]" are "special dut[ies] levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise." GATT, *supra* note 1, art. VI:3.

75. *Id.* art. VI:6(a).

76. *Id.* art. VI:7.

77 *Id.* art. XVI.

recognizes, as does the Treaty of Rome,⁷⁸ that such "aids" distort international trade. In contrast, the EC under the Treaty of Rome absolutely prohibits most aids by Member States, except for Community sanctioned agricultural subsidies.⁷⁹

Article XVI of the GATT discourages subsidies by requiring notification from any contracting party granting subsidies, such as income or price supports, which would increase its exports or reduce imports of the products involved.⁸⁰ The notification must include the extent of such subsidies, their nature, and likely effect.⁸¹ Where another contracting party's interests would be seriously prejudiced, discussions, with a view toward limiting the subsidies, must be held upon request.⁸²

Although they are largely hortatory, additional provisions which further discourage export subsidies were incorporated into Article XVI. For example, Article XVI:3 states that "contracting parties should seek to avoid the use of subsidies on the export of primary products."⁸³ If a contracting party does grant subsidies, however, they are not to result in that party "having more than an equitable share of world export trade in that product"⁸⁴

Even though Article XVI on subsidies is general and largely advisory, the 1973 Tokyo Round of multilateral trade negotiations resulted in the adoption of an Agreement on Subsidies and Countervailing Duties ("Subsidies Code")⁸⁵ by many contracting parties, including the EC and the United States. The Subsidies Code provides detailed provisions on the application of the GATT article on subsidies (Article

78. Treaty of Rome, *supra* note 2, art. 92, generally declares "incompatible with the common market" any aid by Member States "which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods" affecting trade between the States. *Id.*

79. *Id.*

80. GATT, *supra* note 1, art. XVI:1.

81. *Id.*

82. *Id.*

83. *Id.* art. XVI:3.

84. *Id.*

85. *Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade*, Sept. 12-14, 1973, 18 I.L.M. 579 [hereinafter SUBSIDIES CODE].

XVI) and the procedures for imposing countervailing duties under Article VI. The Subsidies Code includes an illustrative list of prohibited export subsidies and aims to prohibit any form of subsidy from governmental funds which is based upon a company's exports.⁸⁶

The GATT Subsidies Code's restrictions on export subsidies for certain defined primary products are more limited. Export subsidies for these products are prohibited only to the extent that they might result in a particular nation "having more than an equitable share of world export trade in [that] product"⁸⁷ Thus, the difficulty for purposes of the GATT Uruguay Round is that the general prohibition on export subsidies in the Subsidies Code does *not* apply to certain primary products defined as "any product of farm, forest[,] or fishery"⁸⁸ In short, because direct export subsidies on agricultural products are not prohibited by the GATT, they are widely used by many, if not most, nations in one form or another or for one product or another.

Both the GATT and the Treaty of Rome recognize that certain subsidies serve other social and governmental purposes and are not banned by the GATT prohibition on export subsidies or the Treaty's Article 92(1). The GATT Subsidies Code notes that such subsidies are widely used to promote social and economic policy objectives.⁸⁹ Permitted subsidies include those which eliminate industrial, economic, and social disadvantages of specific regions; restructure industry sectors affected by changes in trade or economic policies; provide employment and retraining benefits; and encourage research and development programs.⁹⁰

86. *Id.* Annex. Specific examples include: "direct subsidies to a firm or an industry contingent upon export performance." *Id.* (a); exemptions from taxes or other governmental charges based on exportation. *Id.* (e); special deductions or allowances on direct taxes for exports, *Id.* (f); export credit guarantees or similar programs, where the premiums paid do not adequately cover long-term costs. *Id.* (j); or "[a]ny other charge on the public account constituting an export subsidy . . . within the meaning of Article XVI." *Id.* (l).

87. *Id.* art. 10:1.

88. *Id.* art. 9, note 29. The term "certain primary products" in the Subsidies Code is defined by reference to Note Ad Article XVI of the General Agreement, Section B, paragraph 2, excluding minerals.

89. *Id.* art. 11:1.

90. SUBSIDIES CODE, *supra* note 85, art. 11:1

Article 92 of the Treaty of Rome has a much shorter list of aids which are considered absolutely compatible with the common market. The list includes certain social aid to individual consumers, natural disaster or exceptional circumstances aid, and a now-obsolete provision for aid necessitated by the division of Germany.⁹¹

A separate provision in Article 92 describes a number of other types of aid which "*may* be considered . . . compatible with the common market . . ."⁹² These include various aids similar to permissive subsidies allowed under the GATT Subsidies Code. The examples of *possibly* permitted aids in Article 92(3) include aids in areas with abnormally low standards of living or high unemployment, aids for important projects of common European interest, or aids to assist in the development of certain economic activities or of certain economic areas as long as they do not have an adverse effect on the common interests of the Community.⁹³ Finally, aids established by a qualified majority of the European Council based on Commission proposals also *may* be permitted.⁹⁴

The Treaty of Rome contains powerful enforcement mechanisms to prevent or challenge the use of aids by Member States which are prohibited or considered inconsistent with the common market. The Commission can give notice to Member States that certain aids are incompatible and require their termination or modification.⁹⁵ Furthermore, it can refer the matter to the Court of Justice if compliance is not forthcoming.⁹⁶ In addition, Member States must notify the Commission of plans to create or modify aid schemes in order to allow the Commission to evaluate and challenge them, if such actions are deemed appropriate.⁹⁷ However, the European Council can issue regulations relevant to aids and establish categories of aids which are exempted from the notice provisions of Article 93(3).⁹⁸

91. Treaty of Rome, *supra* note 2, art. 92(2).

92. *Id.* art. 92(3) (emphasis added).

93. *Id.*

94. *Id.* art. 92(3)(d).

95. *Id.* art. 93(2).

96. Treaty of Rome, *supra* note 2, art. 93(2).

97. *Id.* art. 93(3).

98. *Id.* art. 94.

B. Agriculture in the Uruguay Round

The Uruguay Round began in Punta del Este in 1986 with a Ministerial Declaration "that there is an urgent need to bring more discipline and predictability to world agricultural trade"⁹⁹ The Uruguay Round has been described as "the most significant GATT trade negotiating round since the Geneva Conference of 1947."¹⁰⁰ The general aim of the Ministerial Declaration toward agriculture was to liberalize world agricultural trade in three principal areas by improving market access, improving competitive conditions through increased discipline regarding subsidies and other causes, and reducing the adverse effects of sanitary and phytosanitary regulations.¹⁰¹

Disputes over agriculture have been the most intractable and vociferous of many since the Uruguay Round commenced in 1986. The inability of the parties to reach agreement in the agricultural sphere appears to be the principal stumbling block to a successful and long-overdue conclusion of this Round of negotiations. Although there appears to be consid-

99. *Ministerial Declaration on the Uruguay Round*, BISD 33S/19 (September 20, 1986) [hereinafter MINISTERIAL DECLARATION].

100. JOHN H. JACKSON, *Strengthening the International Legal Framework of the GATT-MTN System: Reform Proposals for the New GATT Round*, in THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS 4 (E. Petersmann and M. Hilf eds.).

101. MINISTERIAL DECLARATION, *supra* note 99, at 24. The full text of the mandate on agriculture provides:

The CONTRACTING PARTIES agree that there is an urgent need to bring more discipline and predictability to world agricultural trade by correcting and preventing restrictions and distortions including those related to structural surpluses so as to reduce the uncertainty, imbalances and instability in world agricultural markets.

Negotiations shall aim to achieve greater liberalization of trade in agriculture and bring all measures affecting import access and export competition under strengthened and more operationally effective GATT rules and disciplines, taking into account the general principles governing the negotiations, by:

(i) improving market access through, *inter alia*, the reduction of import barriers;

(ii) improving the competitive environment by increasing discipline on the use of all direct and indirect subsidies and other measures affecting directly or indirectly agricultural trade, including the phased reduction of their negative effects and dealing with their causes;

(iii) minimizing the adverse effects that sanitary and phytosanitary regulations and barriers can have on trade in agriculture, taking into account the relevant international agreements. *Id.*

erable agreement on many of the agricultural goals, there apparently remains strong division over the particular means used and the timetable for achieving these goals.

Hope seemingly sprang eternal for former GATT Director General Arthur Dunkel, who was repeatedly forced to extend the deadline for completion of the Round.¹⁰² Former Director General Dunkel left office in July 1993. No significant progress was made after he presented his *Dunkel Draft* proposal in December of 1992. Director General Sutherland is pushing aggressively to successfully conclude the Round by December 15, 1993, but agriculture remains a major unsolved issue.¹⁰³ Moreover, the negotiating group on agriculture was to use the GATT 1982 Ministerial Work Programme, now more than ten years old, as its point of departure.¹⁰⁴

1. The United States Proposal

The United States proposed a comprehensive and detailed proposal on agriculture in the Uruguay Round on October 25, 1989.¹⁰⁵ This proposal covers virtually all agricultural products and has several key elements. First, internal support programs related to levels of production and price levels, as well as other trade-distorting policies, would be phased out over a ten year period. Second, "[a]ll non-tariff import barriers would be converted to tariffs and, along with pre-existing tariffs, would be reduced over time."¹⁰⁶ Third, all export subsidies on agriculture would be eliminated over a five year period. Fourth, short-supply restrictions on exports and export tax differentials would be eliminated. Finally, the parties' sanitary and phytosanitary rules for agricultural products would be based on sound scientific evidence established by recognized international scientific organizations and would be subject to new procedures for notification, consultation, and dispute settlement. The proposal also recognized that devel-

102. *High Noon for GATT, Australia's Kerin Says*. THE REUTER LIBRARY REPORT, Mar. 18, 1992.

103. *See supra* note 102.

104. MINISTERIAL DECLARATION, *supra* note 99, at 24.

105. SUBMISSION OF THE UNITED STATES ON COMPREHENSIVE LONG-TERM AGRICULTURAL REFORM, MTN.GNG/NG5/W/118 (Oct. 25, 1989) [hereinafter SUBMISSION OF THE UNITED STATES].

106. *See* USITC Reports on Tariffication, ITC Publ. 2276 and 2280 (Apr. 1990).

oping nations might need unspecified, but longer, time periods to phase in these reforms.¹⁰⁷

On the very important issue of domestic agricultural subsidies, the United States proposed the following action for different types of subsidies:

Policies to be phased out:

1. Administered price policies;
2. Income support policies linked to production or marketing;
3. Any input subsidy that is not provided to producers and processors of agricultural commodities on an equal basis;
4. Certain marketing programs (e.g. transportation subsidies);
5. Any investment subsidy that is not provided to producers and processors of agricultural commodities on an equal basis;

Policies to be disciplined:

Other [unspecified] programs . . . including . . . input or investment subsidies provided to any producer or processor of agricultural commodities on an equal basis and certain policies from categories listed elsewhere that do not meet the agreed upon criteria for permitted policies or policies to be phased out.

Permitted Policies:

1. Income support policies not linked to production or marketing;
2. Environmental and conservation programs;
3. Bona fide disaster assistance;
4. Bona fide domestic food aid;
5. Certain marketing programs (e.g. market information, most market promotion programs, inspection and grading);
6. General services (e.g. research, extension and education);
7. Resource retirement programs;
8. Certain programs to stockpile food reserves.¹⁰⁸

Annex 2 to this proposal is an *Illustrative List of Prohibited Export Subsidies* taken directly from the Annex to the existing GATT Subsidies Code. Under the U.S. proposal these pro-

107. SUBMISSION OF THE UNITED STATES, *supra* note 105, at 2-3.

108. *Id.* at 8.

hibited subsidies would become applicable to the agricultural sector.¹⁰⁹

Several months after the U.S. tabled its 1989 agriculture proposal, and after further negotiations, the Dutch Chairman of the Negotiating Group on Agriculture tabled a comprehensive draft entitled *Framework Agreement on Agriculture Reform Programme*. This reform proposal also provided for reductions in internal support and export subsidies and tariffication of other import barriers.¹¹⁰ The Dutch proposal included guidelines on tariffication and a detailed proposal for establishing rules on sanitary and phytosanitary measures similar to those proposed by the United States.¹¹¹

2. The European Community Proposal

Perhaps the most frustrating aspect of the negotiations on agriculture is that while the parties seem to be in general agreement on their long-term goals, they cannot agree on the particular mechanisms to be employed, the degree of reduction of various protective measures, or the number of years in which to phase in the reforms. The EC noted as much at the Mid-term review of the Round, stating that "participants have agreed on the long term objective to provide for substantial progressive reductions in agricultural support and protection, sustained over an agreed period of time."¹¹²

The EC's proposal is summarized as follows:

109. *Id.* at Annex 2. The U.S. proposal on export subsidies is consistent with the *Dunkel Draft Agreement* which also includes a new *Agreement on Subsidies and Countervailing Measures* which would absolutely prohibit all export subsidies and other subsidies contingent on use of domestic rather than imported merchandise. *Agreement on Subsidies and Countervailing Measures*, DRAFT FINAL ACT, *supra* note 4, art. 3, at I.3.

110. *Framework Agreement on Agriculture Reform Programme, Draft Text by the Chairman*, GATT Doc. MTN.GNG/NG5/W/170 (July 11, 1990).

111. *Id.* Annexes I and II. The Chairman of the Trade Negotiations Committee reported that "it has been agreed that the de Zeeuw text is a means to intensify the negotiations," and that the parties are to submit responses by October 15, 1990. *Chairman's Summing-up at Meeting of 26 July 1990* 3, GATT Doc. MTN.TNC/15 (July 30, 1990).

112. *European Community Offer on Agriculture for the Uruguay Round of the GATT Negotiations* at 1 (Nov. 7, 1990). The EC had made an earlier proposal in 1987, as did other parties, after the U.S. first tabled a negotiating proposal on July 8, 1987. See *Remarks at a Briefing for Fast-Track Trade Negotiation Authority Extension*, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, 102d Cong., 1st Sess. (Mar. 5, 1991) [at 34, typed rpt.].

The Community is prepared to reduce its support and protection by 30% for main products. More specifically this implies:

- a reduction of support by 30%, expressed by an Aggregate Measure of Support (AMS) . . . [including price and direct supports and input subsidies];

- the tariffication of certain border measures and a concomitant reduction of the fixed component resulting therefrom, together with a corrective factor; the tariffication being subject to rebalancing;

- a concomitant adjustment of export restitutions.

For other products, for which the calculation of an [AMS] is not practicable, specific commitments will be taken as explained below [in attached Annexes].¹¹³

Other EC commitments include freezing supports not covered by this regime at their 1986 levels, enforcing the notion of equitable market share in Article XVI of the GATT, and introducing no new internal supports.¹¹⁴ Although the EC proposal is substantial, it appears to be much less far-reaching than the United States proposal. The U.S. proposal would ultimately eliminate *all* significant trade-distorting export subsidies while the EC proposal would significantly reduce some, but not all of these subsidies.

3. The *Dunkel Draft* Final Act Proposal on Agriculture

Negotiations in the Uruguay Round continued throughout 1991. On December 20, 1991, as the year was coming to an end with no end to the Round in sight, then Director General Dunkel tabled a comprehensive and complete *Draft Final Act* embodying his proposals for agreement on all subjects encompassed by the Uruguay Round.¹¹⁵

The *Dunkel Draft* would apply to essentially all agricultural products but not to fish or fish products.¹¹⁶ Like the EC proposal, the *Dunkel Draft* establishes an Aggregate Measure of Support to calculate domestic and export subsidies and convert them to tariffs.¹¹⁷ Existing non-tariff barriers would also

113. *Id.*

114. *Id.* at 4.

115. DRAFT FINAL ACT, *supra* note 4, Annex 1.

116. *Id.* Annex 1.

117. *Id.* arts. 1(a), 6, 9; Annex 5.

be converted to tariffs, and all tariffs would be lowered in stages during the six-year period from 1993 to 1999.¹¹⁸ The *Dunkel Draft* would reduce the tariffs established under its scheme by 36% over that six-year period.¹¹⁹ A safeguard provision would protect countries against a flood of new imports by allowing them to impose additional duties if there were an increase of imports of 25% over a three-year period.¹²⁰

A detailed agreement on sanitary and phytosanitary measures is also part of the *Dunkel Draft*. It recognizes that nations can properly impose health and safety standards, but it would require that they be harmonized according to recognized international standards and avoid "a disguised restriction on international trade."¹²¹

Some traditional governmental support programs are exempted from reduction commitments if they meet specified criteria, and, except in specified circumstances, if they do not involve product price supports or direct payments to producers or processors.¹²² Thus, governments can continue to support research programs, training programs, pest and disease control programs, extension services and promotional services.¹²³ Food security programs, such as public stockholding of food commodities, are exempted from the reductions, but purchases and sales in these programs are required to be at current market prices.¹²⁴ Exemption criteria are also established for a number of other government support programs, such as domestic food aid, income support to producers which is not linked to production or product prices, income security programs, disaster relief, and retirement programs.¹²⁵

The formal responses of the parties to the *Dunkel Draft* have not been made available to the public because negotia-

118. *Id.* art. 4; Annex 3.

119. *Id.* Part B, *Agreement on Modalities for the Establishment of Specific Binding Commitments Under the Reform Program*, ¶ 3, at L.19.

120. DRAFT FINAL ACT, *supra* note 4, at L.4.

121. *Id.* Pt. C, *Decision by Contracting Parties on the Application of Sanitary and Phytosanitary Measures*, at L.35 ff.

122. *Id.* Annex 2, *Domestic Support: The Basis for Exemption from the Reduction Commitments*, at L.13 ff.

123. *Id.* at L.13-14.

124. *Id.* at ¶ 3, at L.14.

125. DRAFT FINAL ACT, *supra* note 4, at ¶¶ 5-13, at L.15-18.

tions continue. In general, the United States has described it as an acceptable framework for final agreement while the European Community has been critical. Both have made varying predictions on the likelihood of a successful conclusion of the Round.¹²⁶

Since President Clinton took office, United States support for a successful conclusion of the Round has continued. However, the United States Trade Representative urges that further changes in the *Dunkel Draft* are required. France, meanwhile, has threatened to block approval within the Community of a compromise agreement between the EC and the United States over their long-standing oilseeds dispute, contained in the Blair House Agreement. This will have a significant impact upon any final agreement in the Round. The outcome is anyone's guess; agriculture remains a principal spoiler.

As has been explained, there are several policies of the European Community within the agricultural sector which lead to tension in its relations with other countries and the GATT. Some policies, such as concern for food security and varying degrees of perennial protectionism, are shared with other countries. Others, such as the EC's strong social policy toward preservation of small farms, farmers, and its traditional landscape, may be stronger than in other nations. One remaining factor is the significant difference between the mechanisms for dispute resolution and enforcement of the GATT agreement *vis-à-vis* the Treaty of Rome.

III. COMPARISON OF DISPUTE RESOLUTION AND ENFORCEMENT UNDER THE TREATY OF ROME AND UNDER THE GATT

A. Introduction

Within its sphere, the EC largely has the power of a sovereign, whose predominate purpose is to establish and main-

126. See, e.g., *GATT: New Proposals Proffered by Bush, Delors Fail to Break Logjam in Uruguay Round*, 9 Int'l. Trade Rep. (BNA) 750 (Apr. 29, 1992). See also, *GATT: Dunkel Says Uruguay Round Stalemate Is Not Insurmountable*, *Id.* at 752 (Apr. 29, 1992); *Agriculture: U.S., EC Fails to Narrow Differences Over Farm Subsidies In Uruguay Round*, *Id.* at 596 (Apr. 1, 1992); *European Community: EC Farm Commissioner Sees Progress in GATT Talks. But Says More Needed*, *Id.* at 541 (Mar. 25, 1992).

tain a single economic community. Because it consists of sovereign nations, the Community has faced many of the same problems facing the GATT, such as the reluctance of individual states to relinquish control and become dependent on other nations. This is particularly true in agriculture, which has been an enormously fertile ground of dispute and litigation both within the EC and in the GATT. Despite Treaty mandates against national favoritism and discrimination in the area of agriculture, the European Court of Justice has been required to resolve numerous disputes involving aids and discrimination which favor the agricultural trade of one Member State over that of another.

Notwithstanding the disputes, there are precise loci of power and authority under the Treaty of Rome which have made it possible for the EC to more nearly achieve its goal of a common market than has been possible on a global basis under the GATT. As shown by the myriad of cases it has addressed, the Court of Justice has played a seminal role in creating and maintaining the common market declared by the Treaty of Rome. The GATT, however, has been less successful in achieving its established goals largely because it is not an entity with sovereign power. Unlike the EC, the GATT lacks a dispute resolving body with the power to construe and enforce its mandates. Despite the absence of an enforcement mechanism similar to the European Court of Justice, the GATT panel dispute process has worked reasonably well in adjudicating disputes between contracting parties for alleged violations of the Agreement.

B. Disputes and Enforcement in the EC

The European Court of Justice plays a pivotal role in the EC in at least two ways. First, it ensures that the substantive rules of the Treaty of Rome concerning the common market are complied with and enforced by Member States and Community institutions. Second, it ensures that the constituent governmental bodies of the Community perform and remain within the spheres assigned to them under the Treaty. Under various jurisdictional articles of the Treaty, cases can be brought before the Court of Justice by other bodies of the Community, by Member States, by private parties, and by re-

ferral of Member State courts or agencies. Not surprisingly, agriculture has frequently been the subject of cases in the evolution of the CAP and of the common market.

The Court of Justice has made it clear that the Treaty of Rome is a constitution which the Court has the responsibility to construe and the power to enforce:

[T]he European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. In particular, in Articles 173 and 184 . . . and in Article 177 . . ., the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions.¹²⁷

Similarly, the Court has stated that each Community institution must exercise its powers with regard for the powers of other institutions in the Community and has held that, in some circumstances, the Parliament could bring an action to annul a Council regulation.¹²⁸

In ruling that the Treaty is the supreme law of the Community, the Court has invalidated a Commission regulation which authorized a Member State to impose an emergency import duty on goods from another Member State, contrary to the mandate of the Treaty.¹²⁹ The Court's decision was grounded in various Treaty provisions involving agriculture, including Article 40(3), which prohibits national discrimination in the organization of agricultural markets in the Community. The Court also relied on other Treaty provisions which progressively eliminate duties and quantitative restric-

127. Case 294/83, *Parti Écologiste 'Les Verts' v. Parliament*, 1986 E.C.R. 1339, 2 C.M.L.R. 343 (1987). The Court held that a particular political party had standing to challenge Parliament's allocation of EC funds for political party activities under Article 173 of the Treaty, which provides for an action where a decision is of direct and individual concern to the challenging party.

128. Case 70/88, *Parliament v. Council*, 1990 E.C.R. 2041, 1 C.M.L.R. 91 (1992). This case dealt with permitted levels of radioactivity in food which Parliament claimed had been issued without consultation as was required by Article 100A.

129. Cases 80 and 81/77, *Société Les Commissionnaires Réunis S.a.r.l. v. Récepteur des Douanes*, 1978 E.C.R. 927. The case arose in the context of a claim under Article 177 by an Italian wine producer for refund of an emergency duty imposed by France.

tions in the common market.¹³⁰

The general rule in Article 38(1) is that the common market includes agriculture and agricultural trade. Article 38(2) further provides that the rules promulgated for the establishment of the common market apply to agricultural products except as to the extent provided in Articles 39-46. The Court of Justice rejected the Commission's argument that its regulation permitting emergency national protection was valid under this proviso of Article 38(2). The Court found that there was nothing in Articles 39-46 "which either expressly or by necessary implication provides for or authorizes the introduction of such charges" as had been allowed under the Commission's regulation.¹³¹

A second principle exemplifying supremacy of the Treaty is that the national law of a Member State cannot be enforced to the extent it is contrary to Community law. As the Court explained:

[the Community has] real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community [and that] the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.¹³²

The Court ruled that under Article 92, Member States agreed not to introduce "new aids 'in any form whatsoever' which are likely, directly or indirectly to favor certain undertakings or products in an appreciable way, and which threaten, even potentially, to distort competition."¹³³ Thus, the Court of Justice allowed the national court to determine whether a newly-nationalized Italian electrical utility company violated Article 37's prohibition on new state monopolies which discriminate against products of other member nations.¹³⁴

Another crucial principle in the Community's constitutional structure is that the national courts of Member States lack the power to invalidate Community actions, a power re-

130. Treaty of Rome, *supra* note 2, arts. 12-17, 30-35.

131. *Les Commissionnaires Réunis*, 1978 E.C.R. at 944.

132. Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585, 592, 1964 C.M.L.R. 425, 432.

133. *Id.* at 594-95.

134. *Id.* at 597.

served exclusively to the European Court of Justice.¹³⁵ Article 173 gives the Court of Justice jurisdiction to hear challenges to Council or Commission acts, other than recommendations or opinions, on a variety of grounds. Actions can be brought under Article 173 by Member States, the Council, or the Commission. Private parties can bring similar actions under Article 173, even when the act is in the form of a regulation or decision involving another person, *if* it "is of direct and individual concern" to the person bringing the action.¹³⁶

The Court of Justice has addressed questions involving various Member State barriers to the common market as well as questions regarding Community protective measures which favor products of Member States over products originating outside the Community. For example, the Court has held that Article 12, which bars new customs duties or equivalent charges within the Community, prevented the Netherlands from changing its tariff laws to reclassify a product. The reclassification resulted in the imposition of a higher rate of duty on imports of the product from Germany.¹³⁷ The Court rejected the argument that this was a narrow question of local tariff classification and explained that an illegal increase prohibited by Article 12

may arise from a re-arrangement of the tariff resulting in the classification of the product under a more highly taxed heading and from an actual increase in the rate of duty.

It is of little importance how the increase in customs duties occurred when, after the Treaty came into force, the same product in the same Member State was subjected to a higher rate of duty.¹³⁸

The Court further held that Article 12 had direct effect and that private parties affected by an increased duty could challenge the duty directly in the national courts.¹³⁹

135. Case 314/85, *Firma Foto-Frost v. Hauptzollamt Lübeck-Ost*, 1987 E.C.R. 4199, 3 C.M.L.R. 57 (1988) (challenge to denial of recovery of duties under Commission regulation).

136. Treaty of Rome, *supra* note 2, art. 173.

137. Case 26/62, *N.V. Algemene Transport En Expeditie Onderneming Van Gend & Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, 1963 C.M.L.R. 105.

138. *Id.* at 13-14.

139. *Id.* at 14.

Similarly, the Court ruled that a German law requiring a minimum alcohol content in alcoholic beverages, which had the effect of completely excluding the French drink "Cassis de Dijon" violated the Treaty's prohibition against quantitative restrictions and measures having an equivalent effect in Article 30.¹⁴⁰ Likewise, the Court held that the Netherlands could not, consistent with Articles 12 and 16, impose inspection fees on products which did not correspond to the actual cost of the inspection fee or which were imposed solely on imported products, unless the state could show that domestic products undergoing a comparable inspection derived no benefit from the inspection.¹⁴¹

Article 95 of the Treaty of Rome prohibits the imposition of higher taxes on imported products than on similar domestic products. This prohibition is essentially the same as the principle in GATT Article III:2 which provides that imports shall not be subjected to higher taxes or other charges than like domestic products. However, internal taxes provide fertile ground for subtle and not-so-subtle discrimination in favor of local products. Such discrimination has led the Court of Justice to find that Article 95 was violated by a French tax on automobiles based on rated horsepower. Coincidentally, no French cars had sufficient horsepower to qualify at the higher tax rate, and the tax was imposed only on imported cars.¹⁴² The Court also found Article 95 to be violated by a French alcohol excise tax. The tax structure resulted in high taxes on grain alcohol products, most of which were produced outside of France, and low taxes on products derived from wine and fruit, which were produced in abundance in France. The Court rejected France's argument that the products were not similar.¹⁴³

140. Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649, 3 C.M.L.R. 494 (1979). The Court rejected Germany's peculiar argument that the restriction was permitted under Article 36 as a public health measure on the theory that the lower alcohol content of products such as Cassis de Dijon may more easily induce a tolerance towards alcohol than more highly alcoholic beverages.

141. Case 111/89, *The State (Netherlands) v. P. Bakker Hillegom BV*, 3 C.M.L.R. 119 (1990).

142. Case 112/84, *Humblot v. Directeur des Services Fiscaux*, 1985 E.C.R. 1367, 2 C.M.L.R. 338 (1986).

143. Case 168/78, *Commission v. French Republic*, 1980 E.C.R. 347, 2 C.M.L.R. 631 (1981).

This kind of Member State protectionism persists throughout the Community. For example, the Court only recently invalidated an Italian alcohol tax scheme under Article 95(2) which discriminated against rum imported from other Member States in favor of Italian spirits.¹⁴⁴ In another case, the Court ruled that Article 30 invalidated a German law which discriminated in favor of local pharmacies.¹⁴⁵ Likewise, proposed state financial assistance to help a private company expand its production facilities has been found incompatible with the prohibitions against certain state aids under Articles 92 and 93.¹⁴⁶ A fairly transparent violation of Article 30's prohibition against restrictions on imports of other Member States was recently struck down by the Court.¹⁴⁷

Finally, a dramatic and extraordinary English case illustrates the passionate national feelings which remain within the Community, particularly in the agricultural sphere. A recent rebellion by some farmers in France against the importation of English sheep led to violence and an effort by animal protection organizations to seek an injunction against further exportation of English sheep to France.¹⁴⁸ French farmers had stopped truckload shipments of English sheep and had slaughtered some of the sheep and set them on fire in local French government offices. Despite these circumstances, the English court ruled that a ban on exports would have violated the rule

144. Case 323/87, *Re Taxation of Rum: Commission v. Italy*, 1989 E.C.R. 2275, 1 C.M.L.R. 67 (1991).

145. Case 215/87, *Schumacher v. Hauptzollamt (Chief Customs Office) Frankfurt am Main*, 1989 E.C.R. 617, 2 C.M.L.R. 465 (1990). In this case German customs officials refused to allow delivery of a non-prescription drug purchased in a French pharmacy and mailed to Germany. The court rejected Germany's contention that its law satisfied the public health exception in Article 30 because the same drug was also available without a prescription in Germany.

146. Case 730/79, *Philip Morris Holland v. Commission*, 1980 E.C.R. 2671, 2 C.M.L.R. 321 (1981).

147. Case 128/89, *Re Imports of Grapefruit: Commission v. Italy*, 3 C.M.L.R. 720 (1991). Over a period of years Italy had reduced the number of allowable ports of entry for fresh grapefruit and required that entries from other Member States be made directly. The practical result of the Italian restrictions was that imports of grapefruit from other Member States diminished dramatically over a short period of time to zero. The Court had no difficulty in concluding that these were quantitative restrictions or measures having equivalent effect prohibited by Article 30.

148. *R. v. Minister of Agriculture, Fisheries and Food, ex parte Peter Roberts and Others*, 1 C.M.L.R. 555 (1991) (Queen's Bench Division, Crown Office List).

of proportionality applicable to restrictions on imports under Article 36 of the Treaty.¹⁴⁹

These decisions demonstrate the Court's determination and critical role in realizing the Treaty's principle of free movement of goods and of ensuring a level playing field in trade within the Community.¹⁵⁰ The dispute resolution and enforcement mechanism available in the European Court of Justice makes it clear that the Treaty of Rome has the force of law by which Member States must comply.

C. Dispute Resolution Under the GATT

While similar problems of national favoritism and discrimination face the contracting parties under the GATT, there are often less precise prohibitions and rules than in the EC. The problems are exacerbated by the lack of powerful governing bodies and a definitive dispute resolution mechanism. Imprecise allocations of power and the lack of an independent adjudicative body with the power to make enforceable rulings when disputes arise have made the GATT less effective, or at least less efficient than the EC, in establishing and policing its common market.

The GATT is clearly not a constitution. The contracting parties have not, in fact, yielded any sovereignty, and there is no court with power to construe the General Agreement or to issue definitive legal rulings when disputes arise. Unlike the Treaty of Rome, the GATT itself is not self-executing. Its effectiveness depends upon enactment of its principles by the lawmaking bodies of the contracting parties and enforcement of those national laws by national courts and agencies. The GATT provisions do not have direct effect. A private party cannot invoke a GATT provision directly to challenge a national law which the party claims is contrary to that nation's obligation under the GATT.¹⁵¹ A private party can only rely

149. *Id.*

150. However, even though other important Community interests, such as environmental protection, are at stake, restrictions which affect trade among Member States must be proportional to the intended goal. Case 302/86. *Commission v Denmark*, 1988 E.C.R. 4607, 1 C.M.L.R. 619 (1989) (limitation on number of approved containers for beer, with exception for limited quantities in non-conforming containers, held disproportionate and a violation of Article 30).

151. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE

upon the GATT principles as enacted in domestic national law.¹⁵²

Disputes under the GATT are settled largely by consultation, negotiation, and consensual compliance with GATT Panel dispute decisions. Article XXII:1, in some of the General Agreement's most diplomatic prose, provides that contracting parties are to "accord sympathetic consideration to, and shall afford adequate opportunity for consulting regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement."¹⁵³

Similarly, under Article XXIII:1, when a contracting party considers that any of its benefits under the GATT are being nullified or impaired, or that the objectives of the General Agreement are being impeded, the party may make written representations or proposals to the other contracting party. The responding party is to give sympathetic consideration to the representations or proposals offered. If the matter is not resolved in this manner, it can be referred to the contracting parties as a whole for an investigation, recommendations, and/or a ruling. The contracting parties may then appoint a panel of experts and refer the dispute to them by "terms of reference"¹⁵⁴ for recommendations or rulings under the GATT provisions at issue. If the circumstances are considered sufficiently serious, a complaining party may be relieved of concessions made or obligations undertaken.¹⁵⁵ Under this process, the GATT Panel Report only has the force of a recommendation, and the ultimate decision is made by the contracting parties as a body, under Article XXIII:2. However, the party charged with the violation can choose to reject the Panel Report.

UNITED STATES, Vol. II, Pt. VIII, Ch. 1, Introductory Note (1986) [hereinafter THIRD RESTATEMENT OF FOREIGN RELATIONS].

152. THIRD RESTATEMENT OF FOREIGN RELATIONS, *supra* note 151. *See, e.g.*, *Avesta AB v. United States*, 914 F.2d 233 (Fed. Cir. 1990), *cert. denied*, 111 S. Ct. 1308 (1991) (refusal of International Trade Commission to initiate review of antidumping order under U.S. law alleged to be contrary to U.S. obligations under Antidumping Code of the GATT negotiated in the Tokyo Round).

153. GATT, *supra* note 1, art. XXII:1.

154. The "term of reference" is the jurisdictional mandate which specifies the issues and the limits of the dispute to be resolved, which is common in arbitral proceedings.

155. GATT, *supra* note 1, art. XXIII:2.

Thus, compliance with and enforcement of the GATT relies, to a very large extent, on political forces and the exertion of or threat of independent economic action. This reality means that contracting parties are less certain that their trading partners will play by the established rules or honor GATT Panel decisions.

Despite its shortcomings and the absence of a true judicial mechanism, the GATT has developed a sophisticated system of dispute resolution through the use of GATT Panels, which often consist of widely respected international jurists, scholars, or practitioners. While these Panel decisions lack the force of law, the Panels are usually judicial in their approach to problems and generally carry considerable weight in resolving the disputes.

Several recent Panel decisions illustrate the dispute resolution process under the GATT and allow a comparison with decisions of the European Court of Justice on agriculture or other trade issues. Two recent GATT panel decisions in *European Economic Community—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins* illustrate the conflicts between the EC's Common Agricultural Policy and the GATT.¹⁵⁶ Both decisions involve a complaint by the United States against various EC regulations implemented in its CAP for certain oilseeds and oilcakes.¹⁵⁷ The regulations provided subsidies to EC oilseed processors when EC oilseed products, rather than imported products, were purchased.

In the first decision, the Panel determined that EC subsidies to oilseed *processors* violated the EC's national treatment obligation under GATT Article III:4 and that EC oilseed *producer* subsidies nullified a duty-free concession made under Article II. This Panel Report was adopted by the contracting parties, and the EC made changes in its subsidy system in an effort to comply with the report. The United States, however,

156. Report of the Panel, BISD 37S/86 (L/6627, adopted on January 25, 1990) [hereinafter *EEC—Oilseeds I*], reproduced in PIERRE PESCATORE, WILLIAM J. DAVEY, AND ANDREAS F. LOWENFELD, HANDBOOK OF GATT DISPUTE SETTLEMENT, Case 77, at 525 [hereinafter *HANDBOOK OF GATT*].

157. Oilseeds and oilcakes include various agricultural products such as soybeans and sunflower seeds.

was dissatisfied and took the matter back to the original Panel. The Panel issued a second report on March 16, 1992, concluding that the changes made by the EC in its subsidies system had not remedied the violations previously found.¹⁵⁸ The EC has voiced its intent to reject this second Panel Report.

The United States, a major exporter of oilseeds, complained that the EC subsidies violated the EC's obligations under the GATT on two grounds.¹⁵⁹ First, the United States argued that EC subsidies to EC oilseed *processors* who purchased *domestic* oilseeds gave the domestic product an advantage over imports, violating the national treatment requirement of Article III:4. Second, the U.S. argued that EC oilseed *producer* subsidies under the CAP's price support system also favored domestic products over imported products. Arguing that this favoritism violated the EC's agreement to allow duty-free entry of oilseed products,¹⁶⁰ the U.S. sought redress under Article XXIII because of this impairment of benefits.¹⁶¹

158. *Follow-Up On the Panel Report "European Economic Community—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins," Report of the Members of the Original Oilseeds Panel, DS28/R (March 16, 1992) [hereinafter EEC—Oilseeds II].*

159. This is, of course, not the first dispute between the United States and the EC on agriculture under the GATT. More than twenty years ago they engaged in a so-called "Chicken War." The United States filed a GATT complaint regarding EC import restraints on chicken under its Common Agricultural Policy which substantially reduced U.S. chicken exports in violation of the EC's Schedule of Concessions. A GATT panel determined the United States was entitled to compensation. European Economic Community—Report on Poultry, BISD 12S/65 (L/2088, Nov. 21, 1963), reproduced in HANDBOOK OF GATT, *supra* note 156, at 35. The U.S. in turn withdrew concessions on major EC exports.

160. In essence, the EC had agreed in 1962 GATT negotiations to impose no duties on oilseeds imported from the United States. However, under its internal CAP, it provided a subsidy to EC processors who bought EC oilseeds rather than imports. Although the EC regulations also provided for the usual EC intervention in the oilseed market to support EC producers *vis-à-vis* the world market, it appears that "the oilseeds market has functioned on the basis of the [subsidy] payment to processors, which has rendered intervention purchases [by the EC] largely superfluous." *EEC—Oilseeds I*, HANDBOOK OF GATT, *supra* note 156, at 526. The EC's purpose in this scheme is apparent from a 1974 EC regulation on the soybean market which "stated that appropriate measures of support should be provided to promote the development of the production of soyabeans which would be subjected to direct competition from soyabeans imported from third countries duty free." *Id.* at 526-27.

161. *EEC—Oilseeds I*, HANDBOOK OF GATT, *supra* note 156, at 527.

The GATT Panel concluded that the EC *processor* subsidies violated Article III:4, which requires that imported goods “shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws . . . affecting their internal . . . purchase.”¹⁶² It rejected the EC’s contention that the subsidies were permitted under Article III:8(b), which does “not prevent the payment of subsidies *exclusively to domestic producers*,”¹⁶³ because the subsidies at issue were paid to *processors*, rather than *producers*.¹⁶⁴ The Panel concluded that the processor subsidies were a violation even though the complex EC pricing and subsidy scheme did not always result in discrimination against imports for every individual purchase. The Panel “noted that the exposure of a particular imported product to a *risk* of discrimination constitutes, by itself, a form of discrimination.”¹⁶⁵

The Panel also concluded that the EC oilseed *producer* subsidies nullified or impaired the duty-free tariff concession the EC had accorded the United States in its Schedule of Concessions under Article II.¹⁶⁶ The Panel accepted the United States’ argument that it had a “reasonable expectation” that the duty-free concessions on oilseeds, as originally agreed to by the EC, would not be compromised or nullified by subsidies or other devices favoring domestic products.¹⁶⁷

In considering the *Oilseeds* report, it is important to keep in mind that production subsidies for agricultural products are not prohibited by the GATT *per se*. Nevertheless, the Panel stated that the principle of negotiated concessions under Article XXIII is such that “the improved competitive opportunities that can legitimately be expected from a tariff conces-

162. GATT, *supra* note 1, art. III:4.

163. *Id.* art. III:8(b) (emphasis added).

164. *EEC—Oilseeds I*, HANDBOOK OF GATT, *supra* note 156, at 529.

165. *Id.*

166. *Id.* at 530.

167. *Id.* at 530-32. The Panel rejected the EC’s argument that the U.S. could only have reasonable expectations as to conditions existing as of 1986, when the most recent EC Schedule of Concessions entered into force and that at that time the EC had already established its production subsidies. The Panel determined that the successive Schedules of Concessions as between the EC and the U.S. were largely the result of the accession of new Member States to the Community and that there had not been a renegotiation of the balance of concessions originally established for oilseeds in the 1962 Schedule of Concessions. *Id.*

sion can be frustrated not only by measures proscribed by the General Agreement *but also by measures consistent with that Agreement.*"¹⁶⁸

The Panel found, as fact, that the EC price subsidies for oilseeds completely insulated the EC oilseeds market from competition with imports and clearly nullified the United States' reasonable expectations under the EC's duty-free concession for oilseeds.¹⁶⁹

[T]he Panel found that benefits accruing to the United States under Article II of the General Agreement in respect of the zero tariff bindings for oilseeds in the Community Schedule of Concessions were impaired as a result of subsidy schemes which operate to protect Community producers of oilseeds completely from the movement of prices of imports and thereby prevent the oilseeds tariff concessions from having *any* impact on the competitive relationship between domestic and imported oilseeds.¹⁷⁰

The Panel rejected a number of other EC arguments. The Panel stated that it was irrelevant that imports of oilseeds into the Community might have increased, since the commitments made in tariff concessions "are *commitments on conditions of competition for trade, not on volumes of trade.*"¹⁷¹ The Panel also rejected the EC's contention that its subsidies were justified to protect its sources of supply and noted that the EC could have pursued appropriate remedies under the GATT.¹⁷²

The final recommendations of the Panel regarding a remedy differed because of the fundamental difference between the two sources of the EC's obligations. The *processor* subsidies were found to violate the most-favored nation principle in Article III:4, and the Panel recommended "that the CONTRACTING PARTIES request the Community to bring [its subsidy regulations] into conformity with the General Agreement."¹⁷³

However, the *producer* subsidies did not violate the GATT itself; rather, they impaired a negotiated Schedule of

168. *Id.* at 531 (emphasis added).

169. *EEC—Oilseeds I*, HANDBOOK OF GATT, *supra* note 156, at 533-36.

170. *Id.* at 536.

171. *Id.* at 536 (emphasis added).

172. *Id.* at 537.

173. *Id.* at 538.

Concessions. As to this determination, the Panel recommended "that the CONTRACTING PARTIES suggest that the Community consider ways and means to eliminate the impairment of its tariff concessions for oilseeds."¹⁷⁴ It is an established GATT principle that contracting parties cannot "request the impairing contracting party to remove a measure not inconsistent with the General Agreement; such a finding merely allows the contracting party frustrated in its expectation to request, in accordance with Article XXIII:2, an authorization to suspend the application of concessions or other obligations under the General Agreement."¹⁷⁵ Because EC modification of its subsidies regulations could remedy both violations, the Panel recommended that the contracting parties withhold taking action on the concession impairment determination until the EC had a reasonable time to conform its regulations to the most favored nation principle of Article III:4.¹⁷⁶

The EC accepted the Panel Report, and it was adopted by the contracting parties on January 25, 1990. Acceptance by the EC meant that the EC would conform its law to the Panel Report.¹⁷⁷ The EC subsequently amended its subsidies rules by providing income support for producers based upon their acreage rather than subsidies based on oilseed production. This change is consistent with the EC's efforts to internally reform its Common Agricultural Policy.¹⁷⁸

The United States, however, contended that the EC's proposal to change the basis of its producer subsidies from quantitative oilseed production to oilseed acreage did not eliminate the violations outlined in the Panel Report. The United States was apparently satisfied that changes made by the EC regarding *processor* subsidies had brought it into compliance with its GATT obligations under Article III:4 and did not contest the EC modifications in this regard.¹⁷⁹ However, as to EC obligations under Article II, the United States submitted that the changes merely altered the form, without al-

174. *EEC—Oilseeds I*, HANDBOOK OF GATT, *supra* note 156, at 538.

175. *Id.* at 534.

176. *Id.* at 538.

177. *Id.* at 525.

178. Council Regulation (EEC) No. 3766/91 (Dec. 12, 1991), attached as Appendix A to *EEC—Oilseeds II*, *supra* note 158.

179. *EEC—Oilseeds II*, *supra* note 158, at 11.

tering the level of subsidies or eliminating the impairment of benefits accruing to the U.S. under the General Agreement.¹⁸⁰ The United States asked the GATT Panel to review the EC changes and determine whether they satisfied the requirements of the original Panel Report.

The second GATT Panel Report in *EEC—Oilseeds II* was issued to the parties on March 16, 1992. It concluded that the changes in the EC's producer subsidy system had failed to bring EC law into compliance with the Panel's earlier Report.¹⁸¹ The Report stated that "what is relevant . . . is not whether the subsidies provided under the new support system are described as income or price support, or in some other manner, but whether they are product-specific production subsidies."¹⁸² The second Panel decision concluded that the new EC subsidies based on acreage continued to impair the EC's 1962 tariff concessions to the U.S.¹⁸³

The reaction of the EC to the second Panel Report was swift and vociferously negative. Press reports indicated that the agriculture ministers of Member States of the EC voted unanimously to reject the new GATT Panel Report.¹⁸⁴ The EC blocked adoption of the new report by the contracting parties, and the United States announced its intention to retaliate.¹⁸⁵

Press reports on the EC's reaction to the second Panel Report are indicative of the important confluence between the EC's efforts to reform its CAP and its obligations under the GATT as well as the crucial role agriculture plays in the efforts to conclude the Uruguay Round. The second Panel Report determined that the EC's new subsidies based on acreage still impaired its 1962 concessions to the U.S. The EC, however, has sought to reform its internal CAP by such changes in an effort to reduce EC commodity surpluses and subsidy

180. *Id.*

181. *Panel Reports EC Oilseed Policy on Subsidies Inconsistent With GATT*, 9 Int'l. Trade Rep. (BNA) 533 (Mar. 25, 1992).

182. *EEC—Oilseeds II*, *supra* note 158, at 25.

183. *Id.* at 28.

184. *EC Agriculture Ministers Decide to Reject GATT Panel Report on Oilseed Subsidies*, 9 Int'l. Trade Rep. (BNA) 589 (April 1, 1992).

185. This statement is based on informal information obtained from the Office of the United States Trade Representative.

costs. Reduction of agricultural subsidies has been at the center of the dispute over efforts to bring the agricultural sector under GATT disciplines.

The EC and the United States went head to head on oilseeds. The U.S. was within days of imposing substantial punitive tariffs on EC imports, which could have affected \$1 billion of EC products, when the parties reached an accord in the Blair House Agreement in November, 1992.¹⁸⁶ The principal provisions of the Blair House Agreement are summarized as follows:

- The EC agreed to limit its oilseed area by establishing a separate base area for oilseeds and by agreeing to set aside a minimum 10 percent (15 percent in 1994/95, no less than 10 percent in subsequent years) of the oilseed base. These limits will be bound in the GATT.
- The EC-10 [countries'] base area for 1994/95 is set at 3.966 million ha [hectares], with separate limits for Spain and Portugal of 1.411 and 0.1222 million ha, respectively. A single base area for the EC-12 [countries] is established for 1995 and beyond.
- The EC agreed to enforce the area limits through a penalty system that will reduce oilseed payments to producers by 1 percent for each 1 percent that planted area exceeds the limit. The payment penalty would be imposed in the sale year of the overshoot, but would serve as the level from which further reductions would be made if plantings exceeded the limit in the following marketing year. Payment reductions would accumulate progressively if planted area continued to exceed the limit.
- Additional controls (beyond those in existing EC law) will be placed on planting of industrial oilseeds on set-aside land.
- Producers of confectionery sunflowerseed will not be eligible for oilseed payments. If the by-products resulting from planting oilseeds for industrial use on set-aside land exceeds 1 million tons of soybean meal equivalent, the EC must take appropriate corrective action within the framework of CAP reform.
- If the United States believes the agreement has been vio-

186. WESTERN EUROPE AGRICULTURE AND TRADE REPORT. *Situation and Outlook Series*, (Dec. 1992), at 65.

lated, the EC agrees to undertake binding arbitration.¹⁸⁷

Under the last provision of the Agreement, the United States agreed to "forego any further compensation claim for impairment of the bindings."¹⁸⁸ In the event a party believes the Agreement has been breached, both are required to submit to "binding arbitration in the GATT on the issues of breach, damage[,] and remedy,"¹⁸⁹ thereby precluding any unilateral retaliation.

It is interesting to compare the EC's subsidy program for oilseeds, and the EC's corresponding arguments that the program does not violate the GATT, with the European Commission's and the European Court of Justice's treatment of such nationalistic behavior under the Treaty of Rome. The Treaty's prohibitions on national discrimination and aids which interfere with the common market are strict. Liberal construction of the prohibitions would not allow the kind of subsidy program used under the EC's CAP which discriminates against oilseeds imported *into* the common market.

Another recent GATT Panel decision involving agricultural trade was rendered after Australia filed a complaint against United States quotas on sugar imports. The Panel ruled that the U.S. quotas violated the prohibition on quantitative import limitations in Article XI:1.¹⁹⁰ The United States had supposedly reserved the right to impose import restrictions on sugar in its Schedule of Concessions under Article II:1. The U.S. argued to the GATT Panel that this reservation validated the import quotas imposed in the Headnote to the Tariff Schedules of the United States. The Panel rejected this contention. It noted that the various GATT provisions regarding negotiations among the contracting parties contemplated further *reductions* in trade barriers, not additional ones. Thus, the Panel concluded that

. . . Article II:1(b) does not permit contracting parties to qualify their obligations under other provisions of the

187. *Id.*

188. Memorandum of Understanding, ¶ 10 (Dec. 3, 1992) [referred to as the Blair House Agreement].

189. *Id.*

190. United States—Restrictions on Imports of Sugar, BISD 36S/331 (L/6514, adopted June 22, 1989), HANDBOOK OF GATT, *supra* note 156, at 469.

General Agreement and that the provision in the United States GATT Schedule of Concessions can consequently not justify the maintenance of quantitative restrictions on the importation of certain sugars inconsistent with the application of Article XI:1.¹⁹¹

The Panel recommended that the United States be requested "either to terminate these restrictions or to bring them into conformity with the General Agreement".¹⁹²

GATT Panel Reports illustrate the powerful impulse to afford national protection against international competition. In a dispute involving an amendment to United States copyright law, this national protectionism is readily apparent.¹⁹³ The amendment, for the first time, allowed foreign nationals to copyright their works in the United States. However, the amendment included the so-called "Manufacturing Clause" which provided that foreigners could obtain copyright protection in the United States *only* if the works were manufactured in the U.S. In short, imported copyrighted works produced abroad had no copyright protection in the United States. The Panel Report explained that this protectionism resulted from the fear "that the then infant United States printing and publishing industries would be overwhelmed by foreign competition."¹⁹⁴

It was undisputed that the Manufacturing Clause import restriction would ordinarily be prohibited by Article XI:1. However, the Manufacturing Clause was part of U.S. law in 1947, when the United States adhered to the General Agreement under the Protocol of Provisional Application.¹⁹⁵ As the Panel Report explained, under the terms of the Protocol, contracting parties were only required to comply with Part II of the GATT, "to the fullest extent not inconsistent with existing legislation" as of October 30, 1947.¹⁹⁶ Therefore, the United States was not previously required to eliminate the Manufacturing Clause in order to comply with its GATT obligations.

191. *Id.* at 472.

192. *Id.*

193. United States—Manufacturing Clause, BISD 31S/74, 76 (L/5609, adopted May 15-16, 1984), HANDBOOK OF GATT, *supra* note 156, at 287.

194. *Id.*

195. BISD, Vol. IV/77.

196. United States—Manufacturing Clause, *supra* note 193, at 288.

In 1976, however, reform of U.S. copyright law resulted in a provision which specified that the Manufacturing Clause would expire on July 1, 1982. Afraid to relinquish this protection, the House and Senate of the United States passed bills on June 30, 1982, to extend the life of the Manufacturing Clause for another four years. The President's veto of the bill was overridden by Congress; the Manufacturing Clause was extended.¹⁹⁷

In response to the EC's complaint, the GATT Panel concluded that the Protocol of Provisional Application was "a one-way street," preserving existing legislation which was inconsistent with GATT but not allowing a nation to resume or increase GATT-inconsistent legislation once it had been eliminated or reduced.¹⁹⁸ This situation occurred with the Manufacturing Clause. Because the United States had enacted a firm expiration date for the Manufacturing Clause in the copyright reform law of 1976, it could not thereafter resurrect the Manufacturing Clause inconsistently with Article XI:1.¹⁹⁹

Of course, national protection in international trade can take procedural as well as substantive form. GATT dispute panels have addressed procedural barriers to trade, as has the European Court of Justice in enforcing the Treaty of Rome. A recent GATT Panel Report determined that Section 337 of the United States Tariff Act of 1930 violated its most-favored-nation principle in Article III:4. It concluded that Section 337 subjected imported goods to less favorable treatment of patent infringement claims in administrative proceedings before the United States International Trade Commission than was accorded domestic products in patent infringement proceedings in federal district courts.²⁰⁰

197. *Id.* at 287-288.

198. *Id.*

199. *Id.* at 290-292. In a similar case, the Panel ruled that Norway could not impose import restrictions on apples and pears which were inconsistent with Article XI:1. The Panel determined that there was no mandatory Norwegian law at the time of its adherence to the GATT in 1947. Thus, Norway was subject to the prohibition against quantitative restrictions in Article XI:1, Norway—Restrictions on Imports of Apples and Pears, BISD 36S/306 (L/6474 adopted June 22, 1989), HANDBOOK OF GATT, *supra* note 156, at 467.

200. United States—Section 337 of the Tariff Act of 1930, BISD 36S/345 (L/6439, adopted November 7, 1989), HANDBOOK OF GATT, *supra* note 156, at 481.

The Panel found six factors which established that Section 337 proceedings for imported products were less favorable than proceedings for domestic products.²⁰¹ The United States accepted this Panel Report, and it was adopted by the contracting parties. Although various proposals have been suggested for changes in Section 337, the United States has not yet taken action to conform its laws to the Report. The United States has asserted that adjustment of U.S. laws to bring Section 337 into compliance with the Panel Report "would be sought only as part of a comprehensive agreement on improved intellectual property protection in the Uruguay Round."²⁰²

Finally, a GATT Panel Report recently ruled that United States user fees imposed on imported merchandise violated the GATT because the fees exceeded the actual cost of the services rendered.²⁰³ The United States accepted this Report, and it was adopted by the contracting parties.

Although the Panel Report method of dispute resolution under the GATT is fairly viable, the *Dunkel Draft* proposes the establishment of a Multilateral Trade Organization to administer the General Agreement and a proposed Integrated Dispute Settlement System.²⁰⁴ With its adoption, the GATT would at last have a more formalized administrative structure. The proposal provides for a Ministerial Conference and Gen-

201. These factors were: (1) complainants challenging imported products had a choice of fora not available where domestic products were involved; (2) Section 337 proceedings had tight time restrictions not present in district court; (3) counterclaims could not be raised in Section 337 proceedings; (4) general exclusion orders were available under Section 337; (5) automatic exclusion orders result in Section 337 proceedings and are enforced by the Customs Service, whereas in district court the prevailing plaintiff must pursue enforcement; and (6) imported products are subject to simultaneous proceedings in both Section 337 proceedings and in district court. United States—Section 337 of the Tariff Act of 1930, BISD 36S/345 (L/6439, adopted November 7, 1989), Slip Op. 58., HANDBOOK OF GATT, *supra* note 156, at 491-94.

The Panel stated that "it found no evidence that these elements had been deliberately introduced so as to discriminate against foreign products." *Id.*, Slip op. 64, HANDBOOK OF GATT, *supra* note 156, at 500.

202. HOUSE COMM. ON WAYS AND MEANS, 102D CONG., 1ST SESS., OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES 82 (Comm. Print 1991).

203. United States—Customs User Fees, BISD 35S/245. 247 (L/6264, adopted February 2, 1988), HANDBOOK OF GATT, *supra* note 156, at 1988. The fees imposed by the United States Custom Services are in addition to any duties owed.

204. DRAFT FINAL ACT, *Agreement Establishing the Multilateral Trade Organization (Annex IV)*, *supra* note 4, at 92.

eral Council of all members and a Secretariat with a Director-General.²⁰⁵

CONCLUSION

The EC's Common Agricultural Policy has had substantial success in meeting its food security needs, but the policy has placed enormous financial pressures on the Community and has largely failed to address the income needs of smaller farmers. Its proposed reforms may ameliorate its internal problems but do not appear to alter its system of subsidies in a manner to sufficiently address the proposals for bringing world-wide agricultural trade fully within the GATT. In light of the strong differences among the EC, the United States, and other major agricultural trading nations, it remains to be seen whether the contracting parties in the GATT can still reach a compromise allowing a successful conclusion of the Uruguay Round.

A comparison of the dispute resolution mechanisms in the EC and in the GATT shows continuing examples of national favoritism and discrimination, despite the prohibitions in both the Treaty of Rome and the GATT. Thus, the urge to protect "our own" and take advantage of "others" appears to be a persistent individual and national theme, which so far has only been policed rather than eliminated.

The absence of fully effective adjudication and enforcement mechanisms under the GATT must also contribute to the reluctance of the contracting parties to fully trust their agricultural fate to their trading partners. Although GATT Panel decisions are generally respected, a contracting party found to be in violation of the General Agreement can simply refuse to accept the Panel's determination. The persistence of national protectionism under the Treaty of Rome, despite a full judicial system, seems to confirm the view that the tendency toward national protectionism will not soon vanish from international trade. Nevertheless, the European Court of Justice and other constitutional bodies provide a more effective means of enforcement of the Treaty's rules and goals

205. *Id.* at 93-95.

for the free movement of goods than is presently possible under the GATT.

The proposed Integrated Dispute Settlement System contained in the *Dunkel Draft*, if adopted, would establish a formal dispute resolution system. Such a system would hopefully give international trading partners more confidence that decisions resolving disputes under the GATT would be fully respected and promptly implemented by GATT trading partners. A formal system of dispute resolution would be more effective than the present system where Panel decisions are merely the first step in a negotiated diplomatic solution.