

International Agricultural Trade
Research Consortium

**DOES THE AGREEMENT ON AGRICULTURE
WORK? AGRICULTURAL DISPUTES
AFTER THE URUGUAY ROUND**

**by
Robert E. Hudec***

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INTRODUCTION

According to conventional wisdom, the original GATT agreement, which lasted from 1947 to the end of 1994, was highly successful in reducing barriers to international trade in industrial goods, but it was a conspicuous failure in reducing barriers and other distortions to trade in agricultural products. In the Uruguay Round, as in many of GATT's earlier rounds of trade negotiations, governments set out to do something to correct this failure on the agricultural side. In contrast to earlier efforts, however, the Uruguay Round actually seems to have accomplished some major changes in the GATT regime for agricultural trade -- enough so that government officials and other observers have dared to express the hope that positive results may follow.

The two most visible changes that were made in the Uruguay Round were two kinds of legal changes. The first was a new and different set of legal obligations — a new set of rules calling for governments to reduce barriers and other distortions to trade in agricultural products in ways that had not been tried before. The other major legal change was the establishment of a “stronger” dispute settlement procedure, one that looked like it would increase the enforcement powers behind all GATT/WTO legal obligations, old and new. This paper examines the likely effects of these two important legal changes on the behavior of GATT/WTO member governments toward trade in agricultural products.

The usual technique for assessing the likely effects of a change in rules or enforcement procedures is to begin by examining the extent to which the GATT's weak performance in the area of agricultural trade was caused by weaknesses in its rules or weaknesses in its enforcement procedure, and then to ask whether the changes made in the Uruguay Round address these weaknesses in an effective manner. The bulk of this paper will be devoted to such an analysis. First, however, in order to put this inquiry into the proper context, it is necessary to emphasize some distinctions between an international legal system like the GATT or the WTO and the domestic legal systems with which most readers are most familiar.

A. Enforcement of International Rules: The Importance of Political Will

In the domestic legal systems of most developed countries the enforcement of rules is backed by the full power of the state, so that one can take for granted that rules will be enforced if they are well designed. There is thus a one-to-one relationship between the design of a rule and its effectiveness. Well designed rules will be effectively enforced, and poorly designed rules will interfere with effective enforcement.

The same one-for-one relationships cannot be assumed in an international legal system like the GATT. An international legal system will not be supported by the coercive power of a national government. It will be able to assemble a variety of normative and economic pressures that will help to induce governments to comply with its rules, but in the end the main source of enforcement pressure is self-interest of its member governments — their desire to make the legal system work. If governments lack the political will to obey the rules, the rules will not work, no matter how well they are crafted.

If one were to ask informed observers to list the causes of the early GATT's failure to

achieve effective liberalization in agricultural trade, the simple answer most would give would be a lack of political will on the part of the relevant governments. However much they may have declared their desire to liberalize agricultural trade, the large developed countries of North America and Europe that wielded ultimate power in GATT did not really want to liberalize agricultural trade. Each of these governments was committed to a program for supporting farm income. One of the keys to the political popularity of these farm programs was that much of their expense was financed indirectly, and to some extent invisibly, by maintaining domestic prices for farm products at levels well above world market prices. And in order to maintain those high prices in domestic markets, it was necessary to employ trade restrictions to isolate domestic markets from world markets. Thus, so as long as governments wanted to maintain farm programs financed in this way, there was never any chance that GATT would assemble the political will to lower restrictions on trade in agricultural products.

The existence of very strong forces resisting legal discipline in this area necessarily affects the kind of conclusions one can draw about the strength or weakness of the GATT rules and enforcement procedures in this area. The fact that a particular rule or procedure has some weakness does not necessarily mean that such weakness is the reason that governments were able to pursue a protectionist policy. If the forces of resistance are strong enough, even the best crafted rules and procedures will fail. And the contrary will sometimes also be true. That is, even the most poorly constructed rules and procedures can sometimes succeed if they are backed by a strong consensus among member governments.

When we speak of the strength or weakness of the GATT's rules and procedures for regulating agricultural trade, therefore, we are speaking of a factor that was not necessarily determinative. Rather, we are speaking of a factor that made it either relatively more difficult, or relatively easier, for a government to resist legal discipline over its policy. Such influences can be of critical importance at the margin, when the decision whether or not to comply is closely contested, but in the face of an extremely powerful will not to conform such structural factors will have little to do with outcomes.

B. How International Rules Affect Government Behavior

It will help to clarify the analysis of GATT rules and enforcement procedures if we pause for a moment to consider just how a GATT legal rule normally affects government behavior. The starting point is recall that international rules have no force in themselves. This means that International rules will affect government behavior only to the extent that they help to bring about a government decision to behave in conformity with the rules. The key point of impact for GATT rules is their impact on the process of internal decision-making in national capitals.

When we examine the internal decision-making process of national governments, we find that international rules never act by themselves. There will almost always be a coalition of forces in favor of the government behavior called for by the international rule -- forces that would be there with or without the international rule, and that will have a variety of independent policy reasons for

wanting that particular outcome. By the same token, there will almost always be a coalition of forces on the other side, opposing the result called for by the international rule, and the forces on this side will also have a variety of their own policy reasons for the position they take. International rules affect the conduct of national governments to the extent they affect the balance of these opposing forces. The objective of writing international rules is to strengthen the hand of the forces that favor the kind of government conduct that the rule requires.

There are two points in the internal decision-making process when the international rule can make an important difference. The first, and most important, is the time when the government reaches its first decision whether or not to engage in the prohibited conduct. This decision usually occurs long before any international rule enforcement proceedings are brought to bear. Consequently, the most important factor at this point is the clarity of the international rule itself -- the ease with which proponents can establish, without a formal legal ruling, that the conduct in question violates the rule. The effectiveness of the rule-enforcement procedure will obviously not affect how the rule is interpreted at this point, but the existence of a credible rule enforcement procedure can have a measurable influence on how seriously the violation is taken, by making it more or less clear that violations can and will be successfully prosecuted in international litigation.

The second point at which international rules are usually brought to bear is the later point in time when at those who support the international rule seek to overturn the rule-violating conduct -- at a time when it has already gone into effect. Such efforts usually occur at the time when international enforcement proceedings have been launched by the government or governments injured by the conduct in question. Obviously, this is the point at which the ability of the international organization to generate a clear and authoritative legal ruling is most important. And, needless to say, it is at this point that the influence of the international rule will be weakened if most seriously if the enforcement procedure is easily blocked, or if the rule itself is so ambiguous that it is difficult to obtain clear legal rulings.

This, then, is the setting in which international rules and enforcement procedures will have to operate if they are to have their desired impact. As we examine the relative strengths and weaknesses of GATT rules and procedures, the question that will always be before us will be how this particular strength or weakness affects the process of internal decision-making in the target government -- essentially, how will it affect the relative power of those participants in that decision-making process who favor the conduct called for by the rule.

We now return to the central question posed by this paper. Section I of this paper will discuss the weaknesses of the former GATT *rules* on agricultural trade, and the extent to which those weaknesses have or have not been cured by the new WTO rules that replaced them. Part II will then discuss the weaknesses of the GATT *dispute settlement procedure*, and the extent to which those weaknesses have or have not been cured by the new WTO dispute settlement procedure that has replaced it.

I. THE RULES

A. The GATT Rules on Agriculture

The strengths and weaknesses of the GATT rules on agricultural trade are covered extremely well, and in much greater depth than I can attempt in this short paper, in a very fine recent book by Josling, Tangerman and Warley, titled *Agriculture in the GATT*.¹ Much of what this paper will have to say about the effectiveness of GATT rules in GATT's relationship with agricultural trade is drawn from their excellent survey of the history of GATT's effort to regulate government measures affecting trade in agriculture. While acknowledging my debt to their work, however, I must also warn that I have added my own perspective to what they have said, and thus that they may not agree with some things that I say.

The new WTO Agreement on Agriculture employs a useful three-part distinction to deal with measures affecting agricultural trade — Market Access, Export Subsidies, and Domestic Support. The term “Market Access” refers to those measures that regulate access that imports will have into the domestic market of the regulating country — border measures such as tariffs, quotas, and other import restraining measures. “Export subsidies” means just what it says — the extent to which the government employs export subsidies to dispose of surplus agricultural production on world markets. The term “Domestic Support” refers to what are usually called “producer subsidies” — payments and other transfers of value given to domestic producers regardless of the destination of their production. This category also includes what are known as “administered price supports” — measures taken by governments, such as purchase commitments, that have the effect of holding domestic prices higher than world market prices. It will facilitate later comparison with the Agreement of Agriculture if we discuss the GATT rules affecting agricultural trade under the same three headings.

At the outset, we need to make clear that the GATT does not have a special body of rules to regulate agricultural trade. There are two important special rules that apply only to agricultural trade -- Article XI:2(c)(i) on quotas and Article XVI:3 on export subsidies -- but the entire GATT agreement also applies to agricultural trade. Unless otherwise provided, every rule in the GATT agreement applies to all “goods,” including agricultural goods. Thus, all the basic cornerstone obligations of the GATT apply to agricultural trade -- the MFN obligations of GATT Articles I and XIII, the National Treatment obligations of Article III, the general rule against the use of quantitative restrictions contained in Article XI:1, and the rule requiring governments to observe tariff bindings stated in Article II. The general exceptions to basic GATT rules likewise apply to agricultural trade. These exceptions include Articles III:8(a) excepting government procurement transactions the National Treatment Obligation, Article III:8(b) excepting domestic production

¹ T.E. Josling, S. Tangerman & T.K. Warley, *AGRICULTURE IN THE GATT* (London, Macmillan, 1996). The best detailed technical description of the applicable GATT rules and their interpretation is W. J. Davey, “The Rules for Agricultural Trade in GATT,” in M. Honma, S. Shimizu & H. Funatsu, eds. *GATT AND TRADE LIBERALIZATION IN AGRICULTURE* (Otaru University of Commerce 1993).

subsidies from the National Treatment obligation, Articles XII and XVIII-B permitting the use of quantitative restrictions for balance of payments purposes, Article XIX permitting governments to suspend tariff concessions and other obligations when imports cause serious injury to a domestic industry, and Articles XX and XXI allowing exceptions from all GATT obligations when necessitated by certain enumerated public policy considerations such as health, safety, conservation and national security.

It would seem to be difficult to make a case that the GATT's problems with agricultural trade are attributable to weaknesses in the general rules of GATT, because these are the same GATT rules that apply to trade in manufactures, where they seem to have been quite successful with regard to liberalizing trade in manufactured goods. Nonetheless, there are some important conceptual holes in the GATT's general rules that governments have been able to take advantage of when they seek to resist demands for liberalization of agricultural trade. Among the most noteworthy holes have been the exception permitting virtually unlimited use of domestic production subsidies, the hole in GATT rules allowing voluntary export restraints, and the large hole permitting certain tariff-type measures, such as the variable levy and tariff quotas, when tariffs are unbound or bound only at very high rates. The fact that these weaknesses have not caused a serious decline in the level of liberalization on the industrial side can be attributed to the general strength of the consensus in favor of liberalization in that sector. The effect has not been so benign when confronting the much different political climate affecting trade in agriculture.

Consequently, although we shall not try to cover all of GATT's basic commercial policy rules and exceptions in this paper, we shall have to consider in addition to the special rules of Articles XI:2(c)(i) and XVI:3, those gaps in the GATT's general rules that had been taken advantage of under the old GATT regime on agriculture.

1. Export Subsidies — Article XVI:3

The one area of agricultural trade policy in which the GATT's rules are generally regarded as defective is the area of export subsidies, and in particular the rule of GATT Article XVI:3. The original GATT text adopted in 1947 said nothing at all about export subsidies, due to the United States' insistence that commitments on export subsidies must await the adoption of the ITO Charter as a whole. In 1955, after it had become clear that the ITO Charter would never be ratified, the GATT Contracting Parties agreed to add three new paragraphs to Article XVI to deal with export subsidies. Article XVI:4 was a rule flatly prohibiting export subsidies of any kind for "*nonprimary*" products. Article XVI:3 was more permissive toward export subsidies on *primary*² products. It allowed them, but only on condition that

² The term "primary products" is defined in Article XVI-B as follows:

" . . . any product of farm, forest or fishery, or any mineral, in its natural form or which had undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade."

The definition has been stretched to include things like wheat flour, and wine. In the revised rules of the 1979 and 1994 Subsidies Codes, minerals were removed from the category of primary products.

such subsidies shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product, account being taken of the shares of the contracting parties in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product.

The “equitable share” rule of Article XVI:3 was applied successfully once in a 1958 dispute settlement proceeding brought by Australia against a French export subsidy on wheat.³ Despite the deficiencies in the rule, the panel appointed to adjudicate Australia’s claim seemed to have had no difficulty concluding that the growth of French exports under the subsidy had taken “more than an equitable share of world export trade.” The other contracting parties seemed prepared to support this ruling, and France, despite having some fairly powerful arguments about the unreliability of postwar data as an indicator of traditional (read “equitable”) share, accepted the decision.

Little enforcement pressure was brought to bear for the next twenty years. During this time the GATT was accommodating itself to highly protective agricultural programs in Europe and elsewhere, without much effort to reestablish GATT legal discipline over market access. By the mid-to-late 1970s, however, export subsidies were beginning to play a greater and greater role as farm programs caused domestic production to expand beyond self-sufficiency to overproduction. The growing use of export subsidies aroused a particularly strong reaction from exporters in other countries, because, unlike restrictions on access to domestic markets, which were in large part just a continuation of past practice, export subsidies took away third-country markets that exporters had often held for many years. Consequently, the political pressure to do something about export subsidies was greater than for agricultural protection generally, and as a result a relatively serious, if belated, effort to enforce GATT legal discipline eventually developed.

The first major effort to enforce Article XVI:3 occurred when Australia and Brazil brought dispute settlement complaints in 1978 against the EC export subsidy on sugar.⁴ By this time the price support programs of the EC’s Common Agricultural Policy were producing large surpluses of several products -- surpluses that were being disposed of in subsidized export sales. The European Community perceived the threat that effective legal discipline over export subsidies would pose to the current CAP program of price supports, and so fought complaints vigorously, contesting every element of every legal claim. Despite what seemed to be an extraordinary increase in export sales of European sugar due to the subsidy, the panel said it was unable to find that the EC had taken more than an equitable share.

³ *France —Assistance to Exports of Wheat and Wheat Flour*, BISD, 7th Supp. 46-57 (1959).

⁴ *European Community, Refunds on Exports of Sugar* BISD 26th Supp. 290-319 (1980) (complaint by Australia). *European Community— Refunds on Exports of Sugar*, BISD, 27th Supp. 69-98 (1981) (complaint by Brazil). See C. Phegan, “GATT Article XVI:3: Export Subsidies and ‘Equitable Share,’” 16 JOURNAL OF WORLD TRADE 251 (1982); I. Smith, “EEC Sugar Policy in an International Context,” 15 JOURNAL OF WORLD TRADE 95-110 (1981); I. Smith, “GATT: EEC Sugar Export Refunds Dispute,” *id.*, at pages 534-43 (1981).

In the Tokyo Round, which was just being concluded at the time of the two sugar complaints, the United States, once the strongest opponent of export subsidy rules but now their strongest proponent, made a concerted effort to beef up the export subsidy rules in the new Subsidies Code. The effort involved adding some precision to the definition of “equitable share” by adding some hopefully more tangible concepts about market displacement, and price-undercutting to the same general provision. The United States tried to enforce its new rule in a 1981 complaint against EC export subsidies on wheat flour.⁵ As before, the EC contested each and every element of the legal claim with intense vigor. And once again, despite another large increase in the volume of EC exports, the panel was unable to find that EC exports had “displaced,” “undercut” or taken “more than an equitable share.” With the defeat of the United States complaint, GATT member governments tended to write off the possibility of ever successfully challenging anyone’s export subsidies. From 1985 on, the United States decided that the only way to resist the EC subsidy program was to engage in subsidy wars, which the U.S. did to the considerable discomfort of non-subsidizing third-country exporters.

At one level, the problem that was causing the failure to enforce Article XVI:3 and its Subsidies Code successor (Article 10) was that there was no intellectual content to the concept of equitable share. The concept suggested by the word “equitable” was something like the share of world trade that a country could have earned under normal market conditions. The concept may never have been definable, but by the late 1970s world markets for products like sugar and wheat flour had been so distorted by subsidies and other “surplus disposal” programs, for so long, than no one had any chance of proving what anyone’s normal share would be. As a result, no position that any government took, whether protesting change or attacking the status quo, could demonstrate any greater claim to “equity” than any other.

Beneath this problem lurked an even larger problem with Article XVI:3 -- a problem that has occupied GATT legal experts from GATT’s earliest days. It is the problem of rules that are defined in terms of market effects. The problem with such rules is that there is almost never a way to prove that any particular trade flows have been caused by any particular government measure, or, conversely, that trade would have flowed differently in the absence of such a measure. In the hands of a clever advocate, there is almost always some alternative explanation for events that have occurred, and even more ways to explain events that haven’t.

In response to this perception, GATT panels have wherever possible interpreted GATT obligations not to require proof of adverse market effects. Rather, they have held that the only adverse effect that needs to be proved is that the government measure in question has adversely

⁵ *European Community — Subsidies on Export of Wheat Flour* SCM/42 (1983) (unadopted). See M. Coccia, “Settlement of Disputes in GATT Under the Subsidies Code: Two Panel Reports on E.E.C. Export Subsidies,” 16 *GEORGIA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW* 1-44 (1986).

affected “competitive conditions.”⁶ By “competitive conditions” GATT law means the objectively verifiable market conditions under which the complaining country’s goods must compete — conditions such as heavier taxation than the taxes imposed on the competing domestic product, or other regulatory measures that impose heavier burdens on foreign products. Adverse changes in competitive conditions can always be proved from the measure itself, and are almost never contested.⁷

The legal rationale for GATT’s “competitive conditions” doctrine has stressed the adverse impact that GATT rules requiring proof of trade effects will have a weaker impact on the internal decision-making process in governments.⁸ Panels have pointed out that such rules give too little guidance to government policy-makers when they have to decide whether a particular measure is permitted by GATT law. If a measure’s legality depends on what market effects it will have, then legality cannot be determined unless one can reach some kind of conclusion about future market effects. In internal government debates about a proposed trade measure, supporters of the measure can usually muddy the legal waters with predictive arguments that this or that special factor will cause market effects to be benign. The ability to inject even this much legal uncertainty into the debate can be an advantage of considerable importance, because the typical government debate often involves a number of officials who are looking for ways to avoid saying no to constituents, and who thus would like to be able to ignore the negative message of the relevant GATT rule. For such officials, any demonstration of uncertainty about whether the measure actually violates the GATT rule will often be enough to justify disregarding it.

The structure of Article XVI:3 exposed it to all these weakening influences. The problem was not just that no one knew what “equitable share” meant. It was that every aspect of the rule required tracing the market effects of the subsidy in question. Over and over again, panels found a correlation between the timing of a new subsidy and a large increase in market share, but time and time again panels were unable to convince themselves that the former was the cause of the latter.

⁶ For more recent expositions of the doctrine, see *United States — Taxes on Petroleum and Certain Imported Substances* (“*Superfund Taxes*”) BISD 34th Supp. 1136-166 (1988); *European Community — Payments and Subsidies on Oilseeds and Animal Feed Proteins* BISD, 37th Supp. 86-132 (1991); BISD, 39th Supp. 91-127 (1993)

⁷ The “competitive conditions” doctrine was not saying that economic harm was irrelevant to proof of legal violations. After all, the normal consequence of an adverse change in competitive conditions is that adverse economic effects will follow. The GATT doctrine was merely saying that complaining governments should not have to prove the last step in the chain of consequences, because the difficulty of proving that last step would have frustrated rule enforcement and thus have eliminated all remedies for the economic harms that were almost certainly there.

⁸ See, e.g., *European Community — Payments and Subsidies on Oilseeds and Animal Feed Proteins*, 37 BISD 86 (1991) at paragraph 151.

The rationale usually also included the points that (1) trade effects are simply too hard to prove, and thus would simply frustrate rule enforcement if required, and (2) a trade damage requirement would delay relief until statistical evidence of trade damage is available, a delay which could require several years or more. *Id.*

There is no guarantee, of course, that a better rule would have produced better enforcement. It would have undoubtedly made it easier for panels to come to a clear legal ruling. But what happened after that would depend on the political will of the relevant parties. Many governments were committed to price support programs that were generating surpluses that had to be disposed of, and unless governments could be persuaded, or forced, to change those programs they were not going to give up the export subsidies that allowed them to solve this problem.

2. Market Access -- Article XI:2(c)(i) and Related Provisions

Throughout the forty-seven year history of the GATT, most developed country governments isolated their domestic markets for agricultural products from the lower prices on world markets by maintaining fairly high protection against imports of agricultural products. Most governments employed quotas for this purpose. The relevant GATT rules for quotas began with the flat prohibition of quotas in GATT Article XI:1, Article XI:2(c)(i) stated a special limited exception for quotas on imports of agricultural products that were necessary to protect domestic agricultural price support programs. The two main conditions of XI:2(c)(i) were, first, that the price support program had to limit domestic production, and second, that imports had to be given the same percentage share of the domestic market that they would have had absent the restriction.

Some governments employed tariffs or tariff-type measures to protect domestic markets from import competition. The relevant GATT rules on tariffs begin with a non-rule: Until governments agree to “bind” tariffs at certain ceiling levels, governments are free to set tariffs as high as they wish, even at levels that prohibit all trade. Where tariffs are unbound, or bound at prohibitive levels, governments may effectively turn tariffs into quotas by establishing a “tariff-rate quota”-- an instrument that sets a low tariff for the just the quantity of goods to be permitted entry, and sets a prohibitory tariff on the rest. Tariff-rate quotas were entirely legal under GATT. Also arguably legal was the “variable levy” employed by the European Community’s Common Agricultural Policy — an instrument under which unbound tariffs would vary according to the price of the import, so that the price of imports would always exceed the support price on domestic markets. The way to preclude prohibitive tariffs, tariff-rate quotas, and variable levies under GATT law was to negotiate bindings on tariffs at non-prohibitive levels.

A third type of measure used to restrict imports of agricultural products was the so-called “voluntary export restraint” — a device under which the exporting government, threatened by even more severe restrictions, undertook to limit its exports to an agreed quantity. Voluntary export restraints (or VERs) were known as “grey area measures” because their GATT legal status was neither black nor white. The government of the importing country that demanded the VER could not be held in violation because it was imposing no restriction, whereas the government of the exporting country, the victim, was technically in violation for restricting its exports — a violation that no one would every complain about. In practice, VER’s were immune from legal attack.

Since the primary instrument for restricting imports of agricultural products was the quota, by all rights the story of GATT’s efforts to discipline import restrictions in its area should be story of efforts to enforce the conditions of the exception for agricultural QR’s stated in GATT Article XI:2(c)(i). That legal rule, however, has not played a very important role in the development of

GATT's policy toward restrictions on agricultural imports. Many of the QRs employed to protect developed country farm programs have failed to meet the conditions of Article XI:2(c)(i), but that has not seemed to matter very much. There were relatively few legal challenges to such trade restrictions before the mid-1980s. The number of legal challenges did increase in the period 1986-89, but the cases usually involved products at the margin of national price support programs and by this time it is doubtful that anyone seriously believed that GATT would be able to restore legal discipline to this area by enforcing the conditions of Article XI:2(c)(i). Although Article XI:2(c)(i) still stands as one of the rules of GATT 1994, it has effectively been rendered a nullity by the Agreement on Agriculture's commitment to remove all non-tariff barriers,⁹ and will probably never be heard from again.

Article XI:2(c)(i) was originally designed in 1947 to grant legal permission for the type of QR's employed by the United States farm program at this time. It was thought that U.S. trade restrictions on agricultural products would be able to comply with the two most important conditions stated in Article XI:2(c)(i) -- the requirement that the price-support program restrict domestic production, and the requirement that imports be given the same share of the domestic market that they would have held in the absence of the restrictions.

The United States quickly fell into noncompliance with a 1951 law imposing QR's on imports of dairy products, without controls on domestic production. The Netherlands filed a legal complaint, and the rest of GATT chimed in with expressions of deep concern about the survival of GATT if its leading citizen were to flout its rules so early. (Little did they know.) At the time, there seemed to be nothing wrong with the GATT rule itself. Everyone, including the United States, was clear about the fact that the U.S. quota was in violation of Article XI: 1 and that it did not qualify for the exception under Article XI:2(c)(i). The United States undertook to introduce legislation correcting the problem, and, when the proposed legislation failed to pass, the United States consented to a GATT decision authorizing the Netherlands to retaliate.¹⁰

None of the GATT legal proceedings seemed to exert any influence on the U.S. Congress. To the contrary, the legal proceedings seemed to persuade the Congress that GATT was an undesirable irritant to the conduct of U.S. agricultural trade policy. A variety of legislative proposals were introduced seeking to force the Executive to ignore GATT, and these proposals eventually forced the Executive to seek a waiver that would remove almost all GATT legal restrictions on the type of trade restrictions used to protect U.S. agricultural support programs. The U.S. persuaded other GATT member countries to grant such waiver in 1955, on the ground that failure to do so would have jeopardized future U.S. participation in GATT.¹¹ To repeat, no weakness in Article XI:2(c)(i) contributed to this result.

⁹ Agreement on Agriculture, Article 4.2.

¹⁰ *United States — Import Restrictions on Dairy Products*, BISD, 1st Supp. 62-64 (1953).

¹¹ BISD, 3rd Supp. 32 (1955).

The next battle fought over agricultural trade restrictions took place in the mid-to-late 1950s, at the time when the governments of Western Europe began to achieve international solvency and so could no longer find legal protection for agricultural QR's as balance-of-payments measures. Once again, there was little dispute over the legal status of these "residual restrictions" under Article XI:2(c)(i). While Germany did devote considerable effort to defending its agricultural restrictions under the Grandfather clause of the original GATT protocol, neither Germany nor any other country offered an Article XI:2(c)(i) defense. In the end, the GATT's efforts were concentrated on looking for a suitably rigorous phase-out program for balance-of-payments restrictions.¹²

Programs aimed at restrictions in European developed countries were quickly overtaken in the late-1950s and early 1960s by the transformation of the major farm programs of Western Europe into the EEC's Common Agricultural Policy (CAP). The CAP quickly developed into a trade regime with little or no effective GATT discipline. The EC started by withdrawing all its tariff bindings on the key agricultural products covered by CAP, paying for that privilege by granting concessions on other non -agricultural products. This allowed it to place tariffs at whatever level it wished. The Community then adopted a regime of variable tariffs that moved up whenever import prices went down, thereby guaranteeing that imports would never undercut the CAP's artificially elevated domestic prices, so that imports were confined to the position of residual supplier. In some ways the variable levy was a more effective protective device than quotas, and this led certain governments to attack the its legality under GATT. But, aided by the rule allowing governments to set unbound tariffs at whatever level they wanted, the Community was able defend the variable levy successfully enough to produce an impasse over the legal issue.¹³

It might be argued that a weakness in the GATT rules pertaining to unbound tariffs contributed to the Community's success in creating a highly restrictive program of trade measures. It is true that the EEC, being a creature of treaty law rather than a political organism, is forced by its legal structure to be more sensitive than most national states about its international legal obligations, and has tended to spend a disproportionate amount of effort trying to prevent clearly adverse legal conclusions emerging from GATT legal proceedings against it. Thus, it is probably true that having a defensible legal theory did make it easier for the Community to reach the internal decision to implement this agriculture policy. That said, however, it must be recognized that the Community had both the will and the power to accomplish this protectionist agriculture policy whatever its GATT legal status. That agricultural policy had been an essential ingredient of the political understanding behind the Treaty of Rome, the Community had proved itself able to adopt

¹² The phase-out program was known as the Hard Core Waiver decision, BISD, 3rd Supp. 38, 191-95 (1955). See generally, R. Hudec, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY*, 2nd ed. (Butterworths, 1990) at pages 265-276.

¹³ The issue was raised by Uruguay in a large dispute settlement proceeding known as *Uruguayan Recourse To Article XXIII*, but the panel declined to rule on the ground that the Contracting Parties had been unable to reach an agreed conclusion when the issue had been discussed in previous meetings. See Hudec, *supra* note 12, at 218.

several other measures in violation of GATT law, and with U.S. support it had been able to defend those other GATT-illegal measures to impasse.¹⁴

The period of the 1960s, when the CAP was developing into final form, was a period of anti-legalism in the GATT when few if any legal claims were brought forward. There is no doubt that the absence of GATT legal challenges provided a more hospitable climate for the protectionist evolution of the CAP. But the cause-and-effect relationship here was not quite what it seemed. The anti-legalism of the 1960's was in large part a policy developed by the EEC to protect itself from legal challenges as it was trying to make GATT members accept some of the GATT-inconsistent measures needed to cement the Community as an institution. The success of that strategy was due primarily to the political power of the EEC, aided by support from the United States, and did not have anything to do with the strength or weakness of particular GATT rules.

The decade of the 1970s witnessed a gradual resumption of legal activity, mainly at the behest of the United States. The United States legal campaign was in large part driven by domestic political imperatives, chiefly the demands of a U.S. Congress that wanted proof that the United States could enforce its legal rights. The Congress enacted Section 301 in 1974 to force the government to pursue GATT legal claims for this purpose. Consequently, much of the U.S. GATT litigation during the 70s and 80s was an effort to satisfy these political imperatives -- more a quest for high-visibility legal victories than an effort to solve larger trade policy problems by enforcing GATT rules.

The first case brought by the United States against trade restrictions supporting an agricultural price support program was a 1975 complaint, brought as a result of a Section 301 proceeding, against Canadian quotas on imports of eggs.¹⁵ The U.S. GATT complaint alleged that Canada had not complied with Article XI:2(c)(i) both because Canada had not restricted domestic production and because it had not given imports a large enough market share. The U.S. approach to the complaint showed a lack of confidence in the willingness of GATT to undertake rigorous enforcement of XI:2(c)(i) at this point in time. The U.S. asked for a working party of governments rather than a panel of GATT experts, and asked the working party to render only an "advisory opinion," suggesting that the United States was looking for a mediation proposal rather than a legal ruling. And that is what the United States got. The working party found that Canada had restricted domestic production, but could not agree on what share of the market imports should be given. Instead, the working party submitted a proposal for a compromise quota amount, which the parties accepted. At this stage, it seemed that even the United States did not think Article XI:2(c)(i) could be enforced.

¹⁴ For example, the Community was able to undertake a series of preferential arrangements with former African colonies, and to defend them as Article XXIV free trade areas — an arrangement that was clearly GATT-illegal and which, almost four decades later, was finally recognized as such by requesting a waiver. See Decision of 9 December 1994 on Fourth ACP-EEC Convention of Lome, GATT Doc. L/7604 (19 December 1994).

¹⁵ *Canada — Import Quota on Eggs*, BISD, 23rd Supp. 91-93 (1977).

The year afterward, the United States brought another GATT complaint, stimulated by another Section 301 proceeding, about certain minimum price restrictions imposed by the EEC on imports of tomato products.¹⁶ The litigation turned out to be a largely academic exercise, since the restrictions had been removed before the panel had ever been appointed. Moreover, since the main elements of the CAP were protected by variable levies that did not require XI:2(c)(i) justification, this case would have been of only marginal relevance to the main EEC program of price supports. Although the panel did rule that the measures did not meet the requirement of XI:2(c)(i) that domestic production be restricted, the doubly marginal nature of the ruling meant that it caused little if any concern.

In 1979, Chile filed a GATT legal complaint challenging some EEC seasonal QR's on apples, another short term measure, involving another marginal product not covered by the CAP variable levy system.¹⁷ Despite the doubly marginal nature of the case, the panel still seemed reluctant to rule the EC measures themselves in violation of Article XI:2(c)(i). It accepted a rather strained argument that the EC was restricting domestic production of apples — a result which indicated to many observers that GATT panels were not prepared to enforce XI:2(c)(i). The panel did rule that Chile's share of the quotas was too small, but even this result looked like a diplomatic effort at compromise. Once again it was a result that would not inspire much confidence in the utility of Article XI:2(c)(i).

In 1986 the United States began what appeared to be a concerted campaign to bring Article XI:2(c)(i) back to life. By this time the GATT had become a considerably more legal institution. The 1979 Tokyo Round agreements had included a codification of GATT dispute settlement practice that had strengthened the procedure substantially. In 1983, the GATT Secretariat had acquired a legal office that was capable of issuing high quality legal opinions in place of the fuzzy diplomatic responses of earlier GATT panels. And with this legalism came a good deal more political courage on the part of GATT panelists, who, once armed with sound legal answers, were willing to follow those answers wherever they led. Presented with this conspicuously more legal institution, governments proceeded to invest more effort into the dispute settlement system, bringing more cases and preparing them more carefully.

The United States started its campaign to revive Article XI:2(c)(i) by bringing what was later admitted to be a test case. The United States decided to complain first against Japanese import restrictions on twelve rather minor agricultural products. The case became known as the *Japan 12* case.¹⁸ The United States prosecuted the case carefully, and Japan defended the case thoroughly.

¹⁶ *European Community — Programme of Minimum Import Prices (MIPS), Licenses, etc. for Certain Processed Fruits and Vegetables*, BISD, 25th Supp. 68-107 (1979)

¹⁷ *European Community — Restrictions on Imports of Apples from Chile*, BISD, 27th Supp. 98-117 (1981).

¹⁸ *Japan — Restrictions on Certain Agricultural Products*, BISD 35th Supp. 163-245 (1989).

The panel, assisted by the GATT Secretariat legal office, prepared a long and thorough legal analysis laying out an interpretation of each and every requirement of Article XI:2(c)(i). It found each of the twelve Japanese restrictions inconsistent with at least one or more of Article XI:2(c)(i)'s requirements. Included was a holding that Japan, as the government invoking an exception from GATT rules, had the burden of proving the correct market share owing to imports. Since for most products trade restrictions had been in effect for over forty years by this time, it was impossible to prove anything about anyone's likely share in the absence of restrictions, which meant that no country would ever be able to use the Article XI:2(c)(i) exception.

The *Japan 12* legal ruling had an air of legal unreality about it. In the first place, the United States would seem to have had no standing to invoke Article XI:2(c)(i) against another country's trade restrictions on agricultural products when it itself had been excused from compliance with those rules since 1955. Second, it seemed totally improbable that GATT countries would agree to submit the trade restrictions protecting their politically important domestic price support programs to a rule that made them all illegal. Oddly enough, however, no less than thirteen cases calling for enforcement of Article XI:2(c)(i) were filed in the years 1988 and 1989, with the United States as complainant in seven of them and four others being "me, too" follow-ups to a U.S. complaint. And, even though the entire collection of cases retained a certain "not for real" quality, twelve of the thirteen complaints were successful in producing at least some changes, and at least seven actually produced some improvement in market access.¹⁹

¹⁹ The thirteen cases were:

1. *Norway -- Restrictions on imports of Apples and Pears*, BISD, 36th Supp. 306-331 (1990) (U.S. complaint; settled by advancing date on which seasonal quota would be lifted)
2. *Sweden -- Restrictions on imports of Apples and Pears*, GATT Doc. L/6300 (28 January 1988) (U.S. complaint; settled before panel decision, by undertaking to eliminate QRs and renegotiate bindings under Article XXVII).
3. *Finland -- Restrictions on Imports of Apples and Pears*, GATT Doc. DS1/2 (18 September 1989) (U.S. complaint; settled by agreement to convert QRs to tariffs)
4. *Korea -- Restrictions on Imports of Beef*, BISD 36th Supp. 268-306 (1990) (U.S. complaint: settled by specific increase in quota for two years and commitment to liberalize thereafter)
5. *Korea -- Restrictions on Imports of Beef*, BISD 36th Supp. 202-234 (1990) (Australia complaint: settled on same terms as U.S. complaint)
6. *Korea -- Restrictions on Imports of Beef*, BISD, 36th Supp. 234-68 (1990) (New Zealand complaint; settled on same terms as U.S. and Australian complaints)
7. *Japan -- Restrictions on Imports of Beef and Citrus Products (US)*, GATT Doc. L/6322 (29 March 1988) (U.S. complaint: settled before panel decision by undertaking to remove quotas in 3-4 years, subject to safeguard tariff increases)
8. *Japan -- Restrictions on Imports of Beef*, GATT Doc. C/M/219 (8 April 1988) (Australia complaint; settled on same terms as U.S. complaint)
9. *Japan -- Restrictions on Imports of Beef*, GATT Doc. L/6340 (2 May 1988) (New Zealand complaint; settled on same terms as U.S. complaint)
10. *European Community -- Restrictions on Imports of Desert Apples*, BISD, 36th Supp. 93-135 (1990) (Chile complaint; restrictions expired before panel decision)
11. *European Community -- Restrictions on Imports of Apples*, GATT Doc. L/6336 (27 April 1988) (New Zealand complaint; restrictions expired before panel decision)

To explain this unreal, even surrealistic, outbreak in enforcement of Article XI:2(c)(i) in the late 1980s, one has to take account of the general political attitudes toward agricultural trade at the time. By the late 1980s, it was generally agreed that all developed country agricultural programs were violating the spirit of GATT whatever their exact legal status. Moreover, even though the United States had led the assault on legal discipline some thirty years before, the United States restrictions were no worse than the others, and in a number of areas much less protective. Indeed, the United States had taken a leadership role in trying to reduce trade barriers for the past twenty years. Thus the United States demands on other countries were not as unthinkable as might have been thought initially. Indeed, most of the defendant governments were probably willing to concede that they owed the United States some of the trade access it was claiming from them. As for the effort to pursue these claims by trying to enforce this rather out of date legal rule, by 1988 it was pretty clear that governments were going to rewrite GATT's rules on agricultural trade in the Uruguay Round, so that nothing that was said about the meaning of Article XI:2(c)(i) was taken as binding for the future. Until the new rules were written, however, governments could not quite figure out a way to put them aside. What one sees, therefore, is a number of governments responding to legal claims they think are hopelessly unreal and out of date, but nonetheless responding to them positively because, after all, the underlying claims for better treatment are valid, and because, the law is the law until it is actually changed, and, finally, because change is just around the corner.

On the whole, this rather odd closing chapter to the story of Article XI:2(c)(i) does not change the general conclusion that GATT's unsuccessful effort to discipline trade restrictions against agricultural imports cannot be traced to inadequate GATT legal rules. Better rules might have occasionally made it more cumbersome for governments to achieve their objectives, but the scant attention paid to clear violations of these rules in the first place makes it clear that better rules would not have changed the results during this time.

Nonetheless, once governments became committed to reform of some kind, it became relevant to ask whether these old rules would serve as the basis of a reformed legal system. Thus it was relevant to look again at these rules to identify their strengths and weaknesses.

Article XI:2(c)(i) itself emerged with several defects. On the one hand, the effort to enforce that provision in the late 1980s had revealed that, as presently interpreted, its key "market share" condition would be impossible to comply with. In addition, a number of its lesser conditions, such as the requirement that goods be perishable," made no economic sense. Indeed, when clarified in litigation the "market share" condition itself turned out to make little or no economic sense, and did

12. *European Community -- Restrictions on Imports of Apples*, BISD, 36th Supp. 135-167 (1990) (U.S. complaint; restriction expired before panel decision)

13. *Canada -- Restrictions on Imports of Ice Cream and Yoghurt*, BISD, 36th Supp. 68-93 (1990) (U.S. complaint; compliance postponed pending results of Uruguay Round; meanwhile, complaining U.S. exporter established plant in Canada)

not seem very equitable either. The element that got overlooked in most explanations of Article XI:2(c)(i) was the fact that, in calculating what the market share for imports would have been without GATT-illegal trade restrictions, the home government was able to employ all GATT-legal measures at its disposal to increase its “normal” share of its market. Thus it could use tariffs up to the bound level to increase its market share, and if the bound rate were high enough (or if there were no bound rate at all) it could also employ tariff quotas, or possibly even variable levies so long as they could be defended as being GATT-legal. Likewise, the home government could use production subsidies without limit (except self-imposed budget limits) for the same purpose. Under these conditions, the share reserved for imports would often be meaningless.

At the same time that the market share rules of XI:2(c)(i) looked too strict, those rules could also be expected to be a source of weakness similar to the weaknesses of the Article XVI:3 “equitable share” rule. The requirement that imports be given a share of the domestic market equal to the share they would have obtained without the restrictions calls for just the kind of predictive judgment about trade effects that paralyzed application of Article XVI:3. Such judgments were open to all the same kind of muddying arguments -- arguments that what happened in the past was not representative of present, or future, conditions. The government official who wanted quotas allowing little or no imports would have found it relatively easy to push aside claims that GATT prohibited what he wanted to do.

The rule of Article XI:2(c)(i) requiring that the price support program restrict domestic production proved to have some of the same difficulties of proof. Governments often tend to enact half-measures that seek to induce reductions in production without requiring them, leading to difficult-to-resolve issues about the likely market effects of such measures. The difficulty of proving, or disproving, the market effects of such half-measures made it difficult to reach clear conclusions about violations of this requirement.

In sum, it would appear that governments contemplating a reform of GATT’s market access rules were well advised to avoid a rule like Article XI:2(c)(i), for the variety of reasons just given. Its rules could have been too strict, many of its rules made little economic or political sense, and its reliance of predictive judgments about trade effects exposed it to the same paralyzing tendencies in administration as were found in Article XVI:3.

But Article XI:2(c)(i) was not the only problem. A better rule for agricultural QRs would do little good if GATT’s tariff rules still allowed variable levies, or tariff quotas for countries like the EC that had essentially unbound tariffs. A reformed legal system would either have to do something about binding tariffs at reasonable levels (the old GATT solution) or else change the rules allowing variable levies and/or tariff quotas. And, if governments wanted a reform that sealed all the legal loopholes, they would also have to do something about VERs, or else VER’s would become the instrument of choice for agricultural policy makers, as they had been for some industrial sectors like textiles. A new set of rules would not cure the weaknesses of the old GATT rules unless it addressed all these collateral gaps in GATT law as well.

3. Domestic Production Subsidies

A third element in most domestic agricultural programs is the domestic production subsidy -- transfers of value from the government to the producers of agricultural products, granted without regard to the destination of the affected product. (Export subsidies, by contrast, are transfers of value conditioned on the export of the affected product.). Domestic subsidies come in a variety of shapes and sizes. Some are direct transfers to producers, either in cash or in kind (such as inputs, transportation, or services such as advice, instruction or research). Others are indirect transfers of value, value transfers to purchasers or other parties that are intended to be transferred back to the producer in the form of higher prices or lower costs. Finally, a third major type of subsidy is price supports — actions or commitments by the government, such as government purchase offers, designed to raise domestic market prices to a certain level.

Subsidies can be viewed as an alternative to tariffs or quota restrictions on imports. The simplest way to increase farm income to the desired level would be to remove all trade restrictions, allow domestic market prices to fall to world price levels, and then grant domestic producers a subsidy equal to the difference between the prices they actually receive and the prices that would be necessary to give them the desired level of income. In theory, that same income goal could be reached without using subsidies, by restricting supply enough to raise domestic market prices to the desired level. Depending on the circumstances, it may be possible to achieve the desired supply restriction simply by restricting imports, but in practice most governments have found it necessary to guarantee the right result by adopting price support programs in which the government guarantees a certain price by offering to buy at or near the desired price.

Most agricultural programs involve a mixture of trade restrictions and subsidies. The subsidy element is usually large enough to be a significant influence on farm income. Most programs use a wide variety of subsidies, some applicable to particular products, others applicable to agricultural production in general. Some subsidies exercise a significant distorting influence on domestic production, some others only an insignificant influence, and some others (frequently referred to as “decoupled”) little or none.

Since about the time of the Kennedy Round negotiations of 1963-1967, trade policy officials have been saying that it was impossible to create effective multilateral discipline over agricultural *trade* measures (tariffs, quotas and export subsidies) unless one also imposed a similar discipline on domestic subsidies (also referred to as “internal support measures”). It was widely asserted that the reason for the failure of the agricultural trade negotiations in the Kennedy Round and Tokyo Round negotiations was that those negotiations had not dealt at all with limiting internal support measures, but had concentrated only on reducing conventional trade barriers.

Although this argument was often made to sound as though it rested on some fundamental principle of economics that made it impossible for conventional trade commitments to work in this

situation, that is not true. If governments had been willing to reduce trade barriers, and export subsidies, increased imports and undisposed of production surpluses would have forced governments to reduce production incentives unless they were willing to appropriate unprecedented amounts of money for direct subsidies. Rather, the argument seems to have been a description of several overlapping political attitudes, and political realities. At a very basic level, it was a way that governments that relied primarily on high domestic prices (i.e., severe trade restrictions and large export subsidies) could defend themselves from being singled out because of their highly visible protectionism, allowing them to point the finger at governments who achieved equally distortive results by programs employing less protectionism and more subsidies. Along the same lines, insisting on reduction of domestic subsidies was also a way of insisting on a “level-playing field” approach to reform -- a requirement that all farm programs undergo the same degree of unpleasant change. Such a level-playing-field approach could have been a political necessity with domestic producers, or, conceivably, it could have been just an effort to throw sand in the gears of unwanted negotiations. Finally, these statements may merely have been expressing the simple political truth that governments would never be willing to reduce external trade barriers and export subsidies until they were ready to accept the consequences to their farm programs — specifically, the need to reduce domestic subsidies that functioned as production incentives.

The GATT law on domestic subsidies does not restrict the use of such subsidies as much as critics on the agriculture side seem to desire, but it does have some restraining effects. In theory, subsidies to domestic producers should be a violation of the National Treatment obligation that requires equal treatment of foreign and domestic goods with respect to all internal regulatory measures. But GATT Article III:8(b) creates a major exception from the National Treatment obligation by allowing governments to grant subsidies directly to domestic producers. The exception is not quite as large as it first seems, however. Four kinds of peripheral legal discipline exist. (1) The primary form of legal discipline is that *indirect* subsidies -- subsidies involving payment to persons other than producers themselves — are not permitted by the III:8(a) exemption.²⁰ A fairly large number of agricultural subsidies could fall within this category. (2) Subsidies granted on products subject to a tariff concession run a substantial risk of being subjected to legal action. A GATT legal doctrine holds that granting of a production subsidy on a product on which a tariff concession had been granted is an act that undercuts the competitive advantage that is expected when one obtains a tariff concession, and that this commercial harm, in turn, constitutes “non-violation nullification and impairment” of the tariff concession under Article XXIII:1(b) — a finding which, though not a legal violation, does authorize the aggrieved party to withdraw substantially equivalent concessions.²¹ The doctrine applies only when the subsidy was not reasonably to be

²⁰ This narrow construction of III:8(a) was first rendered in *Italy — Discrimination Against Imported Agricultural Machinery*, BISD, 7th Supp. 60-68 (1959), then tightened in *European Community — Payments and Subsidies on Oilseeds and Animal Feed Proteins*, BISD, 37th Supp. 86-132 (1991), and recently affirmed by the WTO Appellate Body in *Canada — Certain Measures Concerning Periodicals*, WT/DS31/AB/R (30 June 1997).

²¹ The doctrine was first announced in an early GATT legal decision, *Australia — Subsidy on Ammonium Sulphate*, 2 BISD 188-196 (1952). The doctrine was affirmed by a decision of the Contracting Parties during the 1954-55 Review Session, see BISD, 3rd Supp. 224 (1955).

expected at the time the concession was granted -- in other words, when the subsidy was either in existence at the time of concession, or was reasonably foreseeable at that time. (3) The provisions of GATT Article VI that authorize governments to impose countervailing duties on subsidized imports that cause material injury to a domestic industry do create a somewhat different kind of legal discipline over domestic subsidies. To the extent that a particular agricultural product counts on export markets, the danger that subsidies may trigger countervailing duties in some markets can be a highly effective deterrent to subsidies, even domestic production subsidies. (4) Finally, it should be noted that the 1979 Subsidies Code contained what appeared to be a daring effort to expand upon the “nullification and impairment” remedy by making a similar type of proceeding available for other kinds of domestic subsidy that causes injurious trade distortions.²² The substantive grounds of the new procedure were never well defined, however, and to the author’s knowledge that provision was never used.

Except for the danger of countervailing duties in particular markets, these peripheral forms of legal discipline did not seem to have been used very often against domestic subsidies on agricultural products. Thus, despite widespread use of indirect domestic subsidies in national agricultural programs, there were virtually no GATT legal complaints seeking to enforce the Article III prohibition of such subsidies against agricultural subsidies in particular. To the author’s knowledge, the one and only such complaint was a successful 1988 U.S. complaint against an EC subsidy given to processors of oilseeds.²³ There was not much more use of the “nullification and impairment” doctrine in agricultural cases, due, no doubt, to the relatively small number of tariff bindings on important agricultural products. The only two legal complaints seeking to invoke the nullification and impairment doctrine against domestic agricultural subsidies were a successful 1981 U.S. complaint against EC production subsidies on canned peaches and pears,²⁴ and the above-mentioned 1988 U.S. complaint against EC oilseeds subsidies.²⁵

In sum, although it is true that the GATT rules left governments a good deal of latitude to use domestic subsidies, particularly on those products where tariffs were not bound, the peripheral

²² 1979 Subsidies Code, Articles 8 and 11-14. This remedy was expanded upon substantially in the 1994 Uruguay Round Subsidies Code. It remains to be seen how often it will be used. The substantive scope of this procedure, in relation to existing nullification and impairment doctrine, countervailing duty law, and previous interpretations of the term “serious prejudice” remain to be worked out.

²³ *European Community — Payments and Subsidies on Oilseeds and Animal Feed Proteins*. BISD, 37th Supp. 86-132 (1991); BISD, 39th Supp. 91-127 (1993). The subsidy to processors was eliminated and replaced by payments directly to producers.

²⁴ *European Community — Production Aids on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes*, GATT Doc. L/5778 (20 February 1985) (panel report; unadopted). The case was settled by removing what was arguably the only distortive element of the subsidy.

²⁵ The *Oilseeds* case, note 20 above, also involved a claim that payment of a direct subsidy to producers would nullify and impair benefits from a 1962 tariff concession on oilseeds. The panel ruled that it would, and so ruled a second time when the producer subsidy was actually implemented. The case was settled with a complex agreement limiting the acreage of EC oilseed production.

rules that did exist did not seem to be enforced very well against those agricultural subsidies that were GATT-illegal. It is tempting to conclude that, with domestic agricultural subsidies as with national agriculture programs in general, the relative weakness of the GATT rules was less responsible for the weakness of GATT legal discipline than was the simple lack of political will to enforce any multilateral discipline at all.

One further observation should be noted. The GATT rules for subsidies were the same for both agricultural and industrial subsidies. The relative weakness of the rules on production subsidies did not appear to discourage removal of trade barriers in the field of industrial trade, nor did the lack of a strong subsidies discipline work to undercut the value of the conventional legal commitments that governments exchanged in the industrial sector. One might well ask, therefore, what the difference was between industrial trade and agricultural trade that made the weakness of legal discipline over domestic subsidies seem so important to the latter and not very important to the former.

If it is true, as suggested above, that the concern about domestic subsidies on the agricultural side was primarily a political rather than an economic phenomenon, one can think of a few distinctions that would explain the difference in political perceptions. The simple fact was that production subsidies on the industrial side were not a frequent, nor as important, nor as visible. The fact that most industrial tariffs were bound probably made the nullification and impairment doctrine a greater deterrent to the use of such subsidies in that sector. Moreover, it is probably true that, in most larger developed countries legislators and voters are simply less solicitous of the welfare of industrial producers, and thus that political opposition to subsidies is greater in the industrial sector. Thus, governments negotiating reciprocal trade liberalizations on the industrial side have less reason to worry that the other side will have an unfair advantage because of a more active program of production subsidies. There may be legal freedom to use domestic subsidies, but industrial competitors have not been able to exploit it in the past, and are unlikely to do so in the future. Agricultural competitors, by contrast, have a long track record demonstrating that they do have the power to obtain such subsidies. The need for some degree of legal control is thus more evident.

B. The WTO Rules on Agriculture

1. The Political Meaning of the Legal Reforms

We now turn to the legal reforms agreed to in the Uruguay Round, chiefly the WTO Agreement on Agriculture. In appraising the legal effectiveness of those reforms, we must begin again by recognizing the importance of the question of political will -- the question of whether there is a serious political commitment to trade liberalization behind this legal reform.

It might be thought that legal changes made in the Uruguay Round show that governments are already committed to make the necessary changes in the underlying farm programs. Unfortunately, this is not so. In the first place, the Uruguay Round commitments themselves were fairly shallow, leaving most of the hard decisions for the future. In addition, even those commitments that were made may not have represented the kind of full commitment one makes

when signing an enforceable contract under domestic law. To the contrary, signing an international commitment is usually just one of many steps along the road toward a government decision to adopt the behavior called for by the rule. In the normal case, it often requires a continued debate, and several more decisions, before governments actually deliver the promised behavior. During that continued debate, one usually finds that the forces that opposed the initial legal commitment have by no means been vanquished. To the contrary, one finds that they are both willing and able to do battle again and again — sometimes till Hell freezes over.

To understand this second point, we must return to the points made earlier about the process of internal government decision-making about trade policy. When governments participate in international negotiations about controversial matters, the governments themselves are often badly divided, internally, over what policy they wish to follow. The forces on each side of the internal debate have their own sources of domestic political support, and they will probably already have tried to win the policy debate by employing these forces in the usual channels of government policy making.

Making the issue a matter of international negotiation is normally a tactical move by the side that believes that international considerations will strengthen their side of the debate. Putting the issue into an international forum not only brings international considerations to bear more forcefully on the debate. Importantly, it can also shift the locus of internal government decision-making to a more favorable forum -- to a friendlier ministry, or a friendlier legislative setting. The hope is that by pushing the internal policy debate through a gradual series of decisions in these friendlier forums -- the decision whether to negotiate in the first place, the decision on what negotiating position to take, and the ultimate decision whether to sign an international commitment on the issue — the government's internal policy-making apparatus can gradually be led toward some form of commitment to the point of view represented by international side of the debate.

Looking at the Uruguay Round legal reforms from the perspective of the United States, one can view the process that led up to these legal reforms as exactly this sort of tactical move in the larger debate over whether to change domestic farm programs. One can even identify a critical moment in the U.S. policy debate when this strategy was adopted. The time was 1985. The event was the “dead on arrival” rejection by the U.S. Congress of the Reagan Administrations draft of the 1985 Farm Bill, a draft which proposed radical reform of the U.S. farm program. At this point, many officials of the Reagan Administration concluded that the only way such reforms could ever be adopted was to change the national political dynamics of the reform proposal by making reform a matter of international negotiation.²⁶

If one sees the Uruguay Round legal reforms from this perspective, one can see more clearly

²⁶ Public acknowledgment of such a decision is not to be expected, because public officials will insist that international route is objectively the best forum for reform and was their first choice all along. The author has heard a more candid description of the decision, connected to the demise of the Administration's 1985 farm bill, in an interview with a key policy official involved in the decision, and confirmed by numerous other observers familiar with the events. See, e.g., D. Orden, R. Paarlberg & T. Roe, *THE POLITICS OF AMERICAN FARM POLICY*, Chapter 2 at note 1, citing G. Amstutz, “Letters to the Editor,” *CHOICES* (Fourth Quarter, 1986).

what those legal reforms have or have not accomplished. The decision to adopt the legal reforms obviously represented a victory for the side of the internal policy debate favoring a change toward a more market-oriented farm programs. But those opposed to changing existing farm programs will undoubtedly have the opportunity to fight again as specific policy decisions are made. This is what happens usually happens with all GATT/WTO legal commitments. The government remains divided, the policy debate usually goes on, and those in favor of changes called for by the new legal commitments usually have to fight the same battles over and over again before the ultimate results can be known.

In this setting of more or less perpetual conflict, the success or failure of a legal reform will be determined by anything that affects the relative strength of either side of the debate. The one significant new factor, of course, will be the legal reform itself. If the new legal commitments are clearer and stronger than the old one, that fact should help to increase the influence of those who want the legal reform to succeed. We cannot expect the new legal commitments to be the last word in the debate, however. The issue is merely whether they are well-crafted enough to make a positive contribution to their ultimate enforcement.

2. The WTO Agreement on Agriculture: An Overview²⁷

The WTO Agreement on Agriculture contains three sets of new obligations pertaining to trade in agricultural products. Each of the three sets relates to one of the three types of trade distortion discussed in the first section of this paper -- Market Access, Export Subsidies, and Domestic Support. The structure of the rules is extremely complex. The general rules that define in general terms what each government is expected to do were defined in a document called the

²⁷ The substantive content of the legal documents that constitute the WTO Agreement on Agriculture (even if one includes the guidelines known as the "Modalities") cannot be understood without a detailed roadmap by informed commentators. Fortunately, Professors Tangermann and Josling have written an excellent set of such roadmaps, although only a few have been widely published. The most useful starting point is Josling, Tangermann and Warley, note 1 *supra*, which summarizes the main points of the Agreement on Agriculture against the background of the GATT legal and political history that preceded it. The following sources provide the more detailed roadmaps, including commentary on implementation, that are needed to go further:

Stefan Tangermann, "An Assessment of the Uruguay Round Agreement on Agriculture," a paper prepared for the OECD Directorate for Food, Agriculture and Fisheries, and for the OECD Trade Directorate (1994) (103 pages);

Tim Josling, et. al., "The Uruguay Round Agreement on Agriculture: An Evaluation," Commissioned Paper No. 9, The International Agricultural Trade Research Consortium (1994) (91 pages);

Tim Josling & Stefan Tangermann, "The Significance of Tariffication in the Uruguay Round Agreement on Agriculture," a paper presented to the North American Agricultural Policy Research Consortium Workshop on Canadian Agricultural Policy, Vancouver, Canada (1994) (30 pages);

Stefan Tangermann, "Implementation of the Uruguay Round Agreement on Agriculture by Major Developed Countries," UNCTAD Doc. UNCTAD /IDT/16 (3 October 1995) (52 pages);

Stefan Tangermann, "Implementation of the Uruguay Round Agreement on Agriculture: Issues and Prospects," 47 JOURNAL OF AGRICULTURAL ECONOMICS 315-337 (1996);

Stefan Tangermann, et. al., "Implementation of the Uruguay Round Agreement on Agriculture and Issues for the Next Round of Negotiations," Commissioned Paper No. 12, The International Agricultural Trade research Consortium (1997) (158 pages).

“Agreement on Modalities,” or “Modalities” for short,²⁸ but that document was never converted into a binding obligation. Rather, each government translated the rules of the Modalities into specific commitments defined in numerical terms and listed these in its country “Schedule” to the Agreement on Agriculture. In addition to the detailed schedules of member countries, the Agreement itself contains a number of other general provisions in the nature of refinements, but these by themselves do not give anything like complete picture of the agreement. As a consequence, the only way to give an overview of the Agreement is to describe the general rules of the Modalities, even though the Modalities themselves were never made part of the Agreement.

In addition to the difficulties posed by the curious structure of the Agreement on Agriculture, the text of all its provisions, legally binding or otherwise, is exceedingly complex. Almost every general rule is subject to a number of refinements or exceptions, and most of these cannot be translated without recourse to additional information explaining their purpose and the meaning of special terms. For the purposes of this paper, it will suffice to describe the main structural elements of the rules, concentrating particularly on those that can be compared with their GATT antecedents.

(a) The subject of “Market Access” deals with the border measures that governments may employ to limit the access of imports to their domestic markets. Some of the new Market Access provisions are found in Part III of the WTO Agreement on Agriculture. Part III requires governments to abandon the use of non-tariff border measures, a term which for these purposes includes “variable levies” but not tariff quotas. The Modalities require governments convert these non-tariff border measures into bound tariffs, without regard to their GATT legality or illegality, by a process called “tariffication” -- a process which involves calculating the tariff equivalent of the level of protection provided by existing non-tariff measures by measuring the price difference they created between internal market prices and world market prices during a base period 1986-1988.²⁹

The conversion of trade barriers on the more sensitive products to tariffs produced some extremely high tariffs. The conversion process was accompanied by an obligation to reduce existing tariff levels by at least 15% during the six-year implementation period, but even after this reduction many of the key tariffs will remain quite high. In those cases where the converted rates may be low enough to permit some trade, a “safeguard” provision allows tariff increases if either prices or quantities of imports threaten too large an increase in trade.³⁰

Since high across-the-board tariffs might well shut out the limited amounts of imports previously allowed under quotas, as well as new entrants, the tariffication process was accompanied by additional “current access” and “minimum access” commitments -- commitments that obligate governments to provide opportunities for imports equal to prior quota shares, or, in the absence of

²⁸ *Agreement on Modalities for the Establishment of Specific Binding Commitments Under the Reform Programme*, GATT Doc. MTN.TNC/W/FA (20 December 1991) (“the Dunkel Draft”) at pages L.19 to L.34 [hereinafter cited as *Modalities*].

²⁹ *Modalities*, paragraphs 3-7 and Annex 3.

³⁰ Agreement on Agriculture, Article 5.

such prior imports, at least a minimum amount of imports.³¹ Access was to be accomplished by establishing tariff quotas allowing the minimum amounts to enter at lower or zero tariffs.

All of the major Market Access commitments were turned into specific numerical commitments during the negotiations. Instead of adopting general rules defining what governments were supposed to do, governments applied the general rules to themselves and prepared Schedules containing the specific tariff rates they would adopt and bind, specific tariff reductions to be made during the implementation period, and specific access commitments. These Schedules are the operative legal obligations that define the basic elements of each government's commitments on market access.

(b) The subject of Export Subsidies is dealt with both in Part V of the Agreement on Agriculture and in the Modalities. The new rules abandon the "equitable share" formula of GATT Article XVI:3, and instead substitute twin commitments to (1) bind and reduce the money amounts spent on export subsidies, and (2) bind and reduce the volume of exports aided with export subsidies. The reductions promised are 36 percent for budget outlays and 21 percent for the quantities of exports aided, these reductions being measured from outlays and quantities in a base period from 1986 to 1990.³² Rather than being stated as a general rule, the reduction commitments were applied during the negotiations and converted into specific numerical commitments for each country, recorded in a Schedule to the agreement. As in the case of the Market Access commitments, the operative legal obligations defining the basic commitments on export subsidies are the numerical commitments in the Schedules.

The new rules on Export Subsidies actually supplant the old GATT rule in Article XVI:3. Article 13(c) of the Agreement on Agriculture provides that export subsidies conforming to the Schedules and supplement rules in Part V of the Agreement shall be exempt from rules of GATT Article XVI and the parallel provisions of the WTO Agreement of Subsidies and Countervailing Duties.

(c) The third subject dealt with in the WTO Agreement on Agriculture is called "Domestic Support." The term refers to transfers of value given to domestic producers that, unlike export subsidies, are given without regard to the destination of the product in question. The subject includes those direct and indirect transfers of value that are commonly called "subsidies" or "domestic production subsidies," but also includes various measures designed to elevate domestic market prices, usually known as "administered price supports," such as government purchase commitments. Domestic supports include both product-specific subsidies and transfers of value such as advisory "extension" services that are not related to any products. As noted earlier, the 1947 GATT agreement had explicitly authorized direct production subsidies in Article III:8(b), but had provided some peripheral legal discipline, largely unused, in four other areas: indirect subsidies,

³¹ The minimum amount was to be 3 percent of domestic consumption in the base period, growing to 5 percent at the end of the six year implementation period. *Modalities*, paragraph 5 and Annex 3, Sections B and C.

³² *Modalities*, paragraph 11, and Annexes 7 and 8.

subsidies that nullified or impaired tariff concessions, and subsidies that exposed exports to countervailing duties, and subsidies that fell within a new but ill-defined procedure established by the 1979 Subsidies Code.

The Agreement on Agriculture calls upon governments identify and measure those domestic support instruments that have a distortive effect on production. The total amount of such support measures is called the Aggregate Measure of Support (or AMS). The Agreement then calls upon members to bind AMS levels at their 1986-88 levels, and to reduce the AMS levels by 20% from those levels during the implementation period.³³ As in the case of the Market Access and Export Subsidy commitments, the Agreement on Agriculture does not adopt general rules defining how governments must calculate, bind and reduce AMS. Although Part IV of the Agreement does contain a few general rules elaborating on Schedule commitments, governments converted the Modalities rules pertaining to domestic supports to specific numerical commitments, and these numerical commitments, recorded in their Schedules to the Agreement on Agriculture, became the operative legal obligations.

Given the number and variety of domestic support programs in developed countries, it was clear that the extent of legal discipline achieved in this area would depend on the details of the commitment --- the definition of what must be included and how it would be measured. Most observers have concluded that the domestic support commitments will not have a very significant liberalizing effect, because too many domestic subsidies escaped the AMS commitment through one or another loophole — through a too-generous application of the exception for measures that did not distort trade, through the *de minimis* exception for support that did not exceed 5 percent of the total value of that product's production for the year, and especially through an unprincipled special exception for the very large U.S. "deficiency payments" program and for the very large EC "compensations payments" program. It did not help that the AMS commitment was stated in terms of a single global ceiling on all agricultural support, rather than a series of product-by-product or sector-by-sector ceilings.

A complete picture of WTO legal discipline over domestic support measures requires mention of the four kinds of parallel legal discipline that had been available under other GATT legal provisions. Briefly, nothing was done to alter basic GATT law that provided for the first three forms of parallel discipline -- the Article III prohibition of indirect domestic subsidies, the doctrine of nullification and impairment, and the Article VI right to apply countervailing duties. The provisions of the 1979 Subsidies Code creating a right of action against certain injurious forms of domestic subsidy were substantially enlarged. Part III of the Uruguay Round version of the Subsidies Code, the WTO Agreement on Subsidies and Countervailing Measures, contains a substantially enlarged version of those 1979 provisions. The new provision's drafting is exceedingly complex, with a series of interlocking conditions and counter-conditions containing criteria that would appear to be very difficult to apply in practice. But with diligent application, the new provision could well provide a significant source of further legal discipline parallel over domestic support measures.

³³ *Modalities*, paragraph 8 and Annexes 5 and 6.

The Agreement on Agriculture removes a substantial amount of the parallel GATT discipline over domestic support measures. It says nothing about the Article III prohibition of indirect subsidies, but Article 13 of the Agreement provides a series of exemptions from the other parallel GATT rules for all those domestic support measures that comply with the AMS reduction commitments or are exempted from it. For measures that are excused from the AMS binding because they are not trade-distorting, Article 13 grants an absolute exemption from nullification and impairment remedies, countervailing duties, and the new Subsidies Code right of action -- an exemption that appears intended to encourage governments to convert support measures to this non-distortive form. For trade-distortive measures that comply with the AMS obligation or are excused from it under special exceptions, there is no meaningful exemption from countervailing duties, but exemptions are granted from nullification and impairment actions and Subsidies Code actions on condition that the amount of support not increase beyond a 1992 baseline. The net result is the substitution of a certain amount of new discipline under the Agreement on Agriculture for a certain amount of parallel discipline from the old GATT. Neither old nor new amounted to very much. Whether the new eventually becomes meaningful remains, of course, to be seen.

* * *

How does the structure of these three sets of new WTO obligations compare with their GATT antecedents? Although the current version of these rules has been heavily compromised, and thus are likely to have few if any immediate liberalizing effects, it can be said that the basic design does set the WTO in the right direction. It can be said that both the Market Access and Export Subsidy commitments in the Agreement on Agriculture do avoid the major weaknesses of their antecedent GATT provisions — Article XI:2(c)(i) and XVI:3 respectively. The rules on Domestic Support measures had no antecedent in GATT, but it can be said that their creation should eventually fill what was perceived to be an important gap, politically if not legally, in the overall structure of legal obligations pertaining to agricultural trade.

3. Domestic Support: Border Measures vs. Controls on Domestic Production.

We take the last of the three types of measures first. By the mid-1980s it had become almost a standard opening in GATT discussions of agriculture to criticize the structure of GATT rules in this area by saying that it was politically impossible to liberalize trade in agricultural products by focusing on border measures alone. If this were in fact true (as opposed to being a tactical ploy to make it harder to negotiate commitments to liberalize) one must now ask whether the Domestic Support commitments of the Agreement on Agriculture meet that problem.

One might argue that the existence of the Agreement on Agriculture is proof that the Domestic Support commitments must have worked, because for the first time governments have been willing to make significant new commitments on both Market Access and Export Subsidies. Of course, one might as easily argue that the relatively modest level of liberalization achieved in these two other areas demonstrates that the problem has not yet really been solved — that governments are still not willing to make a meaningful commitment to liberalizing reform.

If a solution requires some measurable increase in the legal discipline over domestic support measures, the only honest answer one can give at the present time is that the Domestic Support

obligations have not yet solved the alleged problem. The consensus of informed commentators seems to be that the Agreement on Agriculture will not achieve significant progress toward market-determined production levels at least until another round of support-reducing commitments have been negotiated. The base period chosen for measuring the AMS starting line sets too high a starting mark, there are too many exceptions for important production-distorting kinds of domestic support, and measuring AMS in global quantities assures that scheduled reductions will be made in areas of no significance.

Looking beyond the present agreement, it can be said that, whether or not lack of legal discipline in this area was a problem for past negotiating efforts, any success that is achieved in the future, in terms of reducing the volume of domestic subsidization, will make a contribution to the overall goal of liberalizing trade. To the extent domestic support commitments have the desired effect of lowering incentives to overproduction, they cannot help but make it easier for governments to comply with obligations to reduce trade barriers and export subsidies.

4. Export Subsidies

The clearest improvement made by the Agreement on Agriculture has been in the rules on export subsidies. To the extent the new rules are expressed in simple numerical commitments in government Schedules to the agreement, they make it quite simple to identify when subsidies are or are not in violation of GATT/WTO obligations. No one needs to wrestle with the normative meaning of “equitable share.” And no one has to establish any cause-and-effect relationship between the subsidy and actual trade flows. Compliance or violation are simply a matter of numbers.

When legal obligations can be reduced to this simple form, the obligations will have their maximum effect in internal government debates. Those urging the government to adopt GATT-violative measures have no place to hide from the charge of violation. Those sitting on the fence cannot cater to both sides by pleading legal uncertainty.

The GATT’s experience with the enforcement of tariff commitments tends to support the proposition that numerical simplicity enhances enforceability. Tariffs, of course, share the same numerical simplicity. There’s not much to argue about when the question is simply whether 20% is higher than 10%. Likewise, once governments have made a deal on the numbers, there is not much room to raise questions about whether a rate of 10% is equitable. In a study of GATT dispute settlement done about five years ago, the author found that legal claims involving breach of tariff obligations had a significantly higher success rate than legal claims about other types of trade barriers.³⁴ Simplicity may not be the only factor that caused the higher success rate,³⁵ but it had to be a factor of major importance. It will make a difference here.

³⁴ R. Hudec *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* (Butterworths, 1993) at page 348.

³⁵ As was noted in the study, tariffs tend to be easier to change than other trade measures. Larger governments no longer rely on them for revenue, and the long history of negotiating reductions in tariff has helped to establish a general attitude that they are bargaining chips, rather than instruments of life-or-death survival. These other factors are not likely to play a similar role in rules on export subsidies.

Having eliminated the major weakness of the old GATT rule on export subsidies, is the new rule of the Agreement on Agriculture also free of other weaknesses? According to two dispute settlement complaints filed in recent months by the United States, both Canada and the European Communities are trying to take advantage of other loopholes in the rules to escape the discipline of their numerical commitments — Canada by using a price pooling arrangement to average high price domestic sales with world price exports, and the EC by charging some export subsidies on processed cheese to the apparently underutilized subsidy amounts Scheduled for component ingredients.³⁶ These cases are no doubt just the beginning of an extended process of testing the new agreement for loopholes.

The complaint against the EC export subsidy on processed cheese points to an issue over which there seems to be more than a little uncertainty at present -- the accounting rules that will determine how and when “bound” money amounts or volumes can be expended. The more flexibility governments have in spending these limited rights, the more export subsidization there will be. The issue is likely to come down to a question of how carefully the relevant legal texts were drafted.

The complaint over the Canadian pooling arrangement could also be just the first in a long string of cases testing the meaning of the concept of “subsidy.” Unfortunately, the legal definition of “subsidy” is a rather artificial construct that does not have a very solid conceptual foundation. From an economic point of view, all government assistance that increases revenue (or decreases costs) can be called a subsidy. By this definition, a tariff or a quota is a subsidy to the domestic industry whose revenues are increased by the increased domestic prices the tariff or quota creates. GATT law on subsidies has always tried to keep the concept narrower than that, but the borderline is anything but clear, and GATT law was never able to supply any coherent rationale for where lines should be drawn. The Uruguay Round Agreement on Subsidies and Countervailing Measures has tried for the first time to define “subsidy,”³⁷ and Article 9 of the Agreement on Agriculture contains a further specification of the term “export subsidy.” It will take some time to tell whether these new definitions make the concept of subsidy legally workable.³⁸

³⁶ *Canada -- Measures Affecting the Import of Milk and the Exportation of Dairy Products*, WT/DS103 (8 October 1997) (Complaint by U.S.); *European Communities — Measures Affecting the Exportation of Processed Cheese*, WT/DS104 (8 October 1997) (Complaint by U.S.).

³⁷ WTO Agreement on Subsidies and Countervailing Measures, Article 1. The 1979 Subsidies Code used the word “subsidies” without defining it.

³⁸ Notwithstanding the new WTO Subsidies Code definition, there already seems to be a disagreement between U.S. countervailing duty law and GATT/WTO countervailing duty law over the issue of whether an export prohibition is a subsidy, the United States holding “yes” on the ground that an export restriction artificially reduces the costs of domestic producers who consume the product (e.g., raw logs) whose export is prohibited. See generally, R. Hudec, “Differences in National Environmental Standards: The Level-Playing-Field Dimension,” 5 MINNESOTA JOURNAL OF GLOBAL TRADE 1, 16-21 (1996).

For a brief discussion of what the early decisions of the WTO Appellate Body tell us about how the Appellate Body is likely to approach these and similar interpretative issues, see Section II-B-3 below.

5. Market Access

Earlier, we noted that The GATT rules on market access involved problems in several areas. The rule on quantitative restrictions, GATT Article XI:2(c)(i), had several structural weaknesses. The rules on tariffs allowed a number of equally effective trade restrictions when tariffs were unbound or bound only at very high levels. The failure of the rules to prohibit voluntary export restraints created yet another gap.

The main *structural* problem with XI:2(c)(i) had been that both of the key rules -- the requirement that domestic production be restricted and the requirement that imports receive a proportionate share of the protected domestic market — were written in terms of market effects that could be very difficult to prove. These difficulties of proof would have introduced all of enforcement difficulties inherent in “trade damage” requirements, or in the “equitable share” rule of Article XVI:3 itself.

The Market Access commitments in the Agreement on Agriculture have met this structural problem by taking same kind of first step that was taken by the Export Subsidy rules -- the substitution of numerical tariff commitments for the more complex and uncertain general rule of Article XI:2(c)(i). Part of the increased certainty created by the new rules is achieved simply by converting non-tariff measures to tariffs, but the gain is cemented by reducing everything to Schedules of numerical commitments, as is usually done with tariffs. As pointed out above, the simplicity of these numerical commitments should make violations easier to identify, and harder to defend.

As for other weaknesses in the GATT rules on market access, it was noted earlier that the GATT’s rules on tariffs opened the door to a number of undesirable measures, such as tariff quotas and variable levies, when tariffs are unbound or bound at very high rates. The agriculture tariffs provided for in the Agreement on Agriculture are all supposed to be bound, but many key tariffs are bound at extremely high rates. Without some further rule changes, these high tariff rates would have opened the door to both tariff quotas or variable levies, each being capable of reproducing the effects of ordinary quotas.

Governments seem to have decided that, until these very high tariffs can be brought down to levels that permit normal trade, it is better to allow tariff quotas, and perhaps even variable levies, as the lesser of two evils — a way to allow some trade to flow under very high tariffs rather than letting the high tariffs shut off trade entirely. The GATT rule permitting tariff quotas was explicitly reaffirmed, and the use of tariff quotas was actually endorsed — indeed, even required — so that governments could meet commitments to maintain “current access” and to allow “minimum access” where there had been no prior trade. Although this arrangement is intended to be a

temporary one until tariff rates can be brought down, the widespread use of tariff quotas will diminish the value of the Market Access commitments as long as they remain necessary. The trade distortions that usually accompany any quota will be present with these tariff quotas to the same extent as with any other quota. A few dispute settlement complaints about the administration of tariff quotas have already begun to appear,³⁹ and more will follow.

The Agreement on Agriculture did include a prohibition of variable levies within its general prohibition of non-tariff measures,⁴⁰ but the first round of tariff bindings seems to have included some backsliding on this issue by the European Community, indicating that governments may also be seeking to use variable levies as a “lesser evil” way to allow some trade under the otherwise very high tariffs produced the “tariffication” process.⁴¹ To the extent this happens, the new commitments on market access will be subject to the same evils that variable levies caused under the prior GATT system -- until, of course, tariff levels can be brought down.

The final gap in the system of GATT rules on market access was the legal uncertainty about voluntary export restraints. The Uruguay Round Agreement of Safeguards contains an explicit prohibition of voluntary export restraints, prohibiting countries from asking for such restraints as well as performing them.⁴² Skeptics have long wondered whether such a prohibition would ever be enforceable, since the typical VER occurs when both sides have concluded that it is the most advantageous arrangement for both sides in the given situation. For the moment, however, the Uruguay Round negotiators have done about as much as can be done. The rest will depend on how the first controversies are handled.

³⁹ See, e.g., *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R (ECU, GTM, HND, MEX, USA) (22 May 1997); WT/DS27/R/AB (9 September 1997) (Complaints by Ecuador, Guatemala, Honduras, Mexico, U.S.); *Philippines — Measures Affecting Pork and Poultry*, WT/DS/74 (1 April 1997) and WT/DS102 (7 October 1997) (complaints by U.S.).

⁴⁰ Agreement on Agriculture, Article 4:2, footnote 1.

⁴¹ During the first round of tariff bindings, the EC agreed to give several supplemental bindings on cereals at reduced rates, apparently requested by the United States, but only in the form of bindings on the total of delivered price and customs duty. To meet this obligation, duties will have to vary downward when the price delivered goes up, and will most likely to vary upward when delivered prices go down. It appears that suppliers accepted this form of variable tariff, as they did tariff quotas, as the lesser of two evils. And far from criticizing this departure from the rule abolishing variable levies, the suppliers actually complained when they found that the EC was not allowing customs duties to vary downward enough. See *European Communities — Duties on Imports of Cereals*, WT/DS9 (10 July 1995) (Complaint by Canada); *European Communities — Duties on Imports of Grain*, WT/DS/13 (19 July 1995) (Complaint by U.S.); *European Communities — Duties on Imports of Rice*, WT/DS17 (3 October 1995) (Complaint by Thailand); *European Communities — Implementation of the Uruguay Round Commitments Concerning Rice*, WT/DS25 (18 December 1995) (Complaint by Uruguay).

⁴² Article 11:2 of the WTO Agreement on Safeguards provides:

Furthermore, a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements, or any other similar measures on the export or the import side.

The Final Tally

There are great number of reasons to doubt whether governments have, or will have, the political will to make the Agreement on Agriculture a meaningful reform of GATT/WTO policy toward agricultural trade. And one must also be cautions about the quality of the new legal rules themselves, until they have been well tested by government lawyers trying to find ways around them. (Colleagues tell me that the that testing effort is already well under way, as midnight oil is already being burnt in agriculture ministries around the world while officials and their lawyers try to figure out ways to defeat the new rules.)

From a lawyer's perspective, however, one can already admire the perceptiveness of the negotiators who wrote the Agreement on Agriculture. They obviously understood the legal inadequacy of the old GATT's rules on agriculture, and they chose well when adopting a new basic design for a new set of rules that could be expressed in specific numerical commitments. Although the benefits of this change will not be realized until tariff rates come down far enough to make it impossible to employ tariff quotas and variable levies, the direction is the right one and should bear fruit if and when the rest of the design is carried out.

II. THE ENFORCEMENT PROCEDURES

A. The GATT Dispute Settlement Procedure

1. The GATT Dispute Settlement Procedure in General

The creation of a new and stronger WTO dispute settlement procedure has tended to shift the focus of inquiries about the GATT dispute settlement procedure that preceded it. Until recently, students of GATT were interested in the very considerable record of accomplishment compiled by the GATT dispute settlement procedure over its forty-five year history. Today, all discussions seem to begin with an explanation of what was wrong with the GATT dispute settlement procedure, as a way of explaining why the new WTO procedure was brought into being.

This new focus on the weaknesses of the GATT dispute settlement procedure distorts the perspective on both institutions. It loses sight of the fact that the GATT disputes procedure was quite successful until very recently, and causes observers to neglect the elements that made the GATT procedure successful. This, in turn, causes most observers to attach too much importance to the differences between the GATT and the WTO versions of the procedure, and to neglect the fact that most of the strength of the new procedure lies in the same elements that made the GATT procedure successful.

The GATT dispute settlement procedure stood on a very minimal legal foundation. The GATT agreement itself contained only the most rudimentary description of a procedure — a provision that listed the kinds of legal claims that governments might raise before the GATT membership, without providing any description of how the GATT membership was to go about ruling on them. The provision had been written as the first part of a larger procedure that was to serve the International Trade Organization (ITO), and then was left standing on its own when the ITO failed to be ratified.

Starting from these extremely modest beginnings, the GATT dispute settlement procedure was built by a very gradual process of cautious experimentation over a period that lasted more than four decades. The present “panel” process — the process in which GATT legal claims are adjudicated by a “panel” of neutral GATT experts acting in their personal capacity — evolved through a series of very primitive ad hoc tribunals that became increasingly more “legal” over time.. The legal expertise of the panel process was of varying quality over the years, but on the whole enough good decisions were rendered to keep the process in good standing. But it took 35 years until, in 1983, the GATT Secretariat was able to persuade governments to accept the creation of an institutional source of legal expertise to advise panels — a Secretariat Office of Legal Affairs.

The formal development of the procedure lagged behind the development of its informal practices. Under the formal rules, the procedure was entirely voluntary from beginning to end. The only body with formal authority to issue authoritative rulings in a dispute settlement proceeding was the full membership of GATT, known as the Contracting Parties. In dispute settlement as in most other matters, the Contracting Parties acted only by consensus. That meant that the defendant government had the power to block the process at any point simply by refusing to join a consensus decision to move forward. Defendant governments could refuse to agree to create a panel; they could refuse to agree to the membership of the panel, or its terms of reference, or its operating procedures. They could refuse to agree to a decision “adopting” the panel’s ruling as a ruling of the Contracting Parties. They could refuse to agree to a decision authorizing the winning party to impose retaliatory trade restrictions in response to their own noncompliance.

The reality was that the membership of GATT expected governments to cooperate with the process. Over the years, these expectations became a kind of unwritten law that governments felt they had to follow. Governments did on occasion use their power to block the process, at each of the points mentioned above, but they did so rarely and usually only temporarily. The system was by no means perfect, but it worked in most cases. It compiled a very impressive 90% success record in the the relatively easier caseload of the first three decades, handling about 90 legal complaints in that period. Then, in the 1980s, when the volume of cases rose substantially to 115 cases and the caseload included a significantly greater number of more contentious cases, the disputes procedure compiled a better than 80% success rate -- still a very impressive record for an institution with virtually no legal foundation.⁴³

One of the least understood aspects of the compliance record achieved by the GATT dispute settlement system was the role of sanctions. One of the seemingly important elements of the skeletal procedure that served as the foundation for this adjudication procedure was the power of the Contracting Parties to authorize the complaining government to withdraw legal obligations owed to the defendant if the defendant did not comply with a legal ruling. Most observers wanted to credit the success of the GATT system to that power to authorize retaliation — the power to impose sanctions, in short. In this, most observers were just wrong.

In all the 207 legal complaints filed from 1948 to the beginning of 1990, only one case

⁴³ The data on the procedure’s success rate is from the author’s study of the 207 GATT legal complaints filed from 1948 to 1990. See, Hudec, *supra* note 34, at pages 273-355, 588-608.

produced authorization to retaliate, and in that case the retaliation was purely symbolic and not enforced. Trade retaliation taken under other legal authority has been employed in a few other legal disputes in GATT's history, but the effect was again primarily symbolic. Threats of retaliation also occur with some frequency, but they are more of the same. Retaliation, either threatened or actual, has proved to be mainly a device to attract the attention of senior decision-makers in the target government. The complaining government is always reluctant to use trade retaliation because it knows that it is likely to reap more pain than benefit from the trade restrictions. Thus complaining governments almost always make every effort to settle the dispute without resorting to such measures.⁴⁴

What was it then that explained the high degree of compliance achieved by this seemingly weak GATT dispute settlement procedure? In the author's view, the incentives for compliance consisted of primarily two things — the normative pressure from other governments, and enlightened self-interest. The normative pressure comes from the fact that most findings of legal violation are findings that a government has welched on a deal. The government has given its word, and has broken it. Other governments interested in maintaining the integrity of legal commitments are willing to go to considerable lengths to expose the defendant government to criticism for not keeping its word. Officials of the defendant government are surprisingly sensitive to such pressures. They simply do not like to be held up to that kind of opprobrium.

The element of enlightened self-interest grows out of the same considerations. The defendant government has made a deal in the first place because it expected to gain something from the counter-performance of the other party or parties. In most public discourse, the gain is usually described in terms of reciprocal trade opportunities promised by other parties. For more sophisticated officials and business interests, the gain is seen in terms of the benefits of a liberal trade order, in which all governments gain from coordinated national policies allowing market forces to determine the allocation of resources. To be caught not performing one's own obligations is to lose the right to enforce the obligations of others, thereby losing specific trade opportunities as well as imperiling the liberal entire trading system. Rarely, if ever, does the gain from a violation of GATT obligations make it worth jeopardizing the benefits of the existing trade order.

For all its success, however, by the early 1990s the GATT dispute settlement procedure had gone about as far as it could with its informal and unwritten procedures and its rather covert decision-making process. The better the dispute settlement process performed during the decade of the 1980s, the bigger the tasks it was assigned. Governments began to bring legal challenges to more and more politically important trade measures, as well as legal complaints opening up more and more complex legal issues. The more important the claim, the greater the resistance of the defendant government. And the greater the resistance, the greater the inclination to resist the unwritten rules of the process and to take advantage of the formal powers of self-protection.

⁴⁴ The one exception to this rule is the case in which a government needs an act of retaliation to demonstrate the vigorousness of its defense of national interests to some political audience, a situation that has been extremely rare until now.

One of the ticking time bombs in the GATT procedure was the role of the Office of Legal Affairs. Panel members were usually chosen from the diplomats who staffed GATT delegations of governments that were neutrals in the dispute in question. The panel members were usually long on GATT experience, political savvy and common sense, but a little short of GATT legal expertise — a skill that was becoming increasingly more difficult to master as GATT law expanded into more and more difficult areas. As a result, the legal decisions were often made, *in camera*, by the Secretariat Office of Legal Affairs that was advising the panel. The Secretariat lawyers were a collection of individuals who had never been appointed as judges and who never took the public responsibility of judges. There was a serious question of how long the GATT dispute settlement system could maintain respect for its decisions in national capitals once opponents of GATT started to press on this aspect of its decision-making process.

In the last few years of the GATT dispute settlement system — the years just before the WTO came into force in 1995 —, the accumulation of pressures on the old system, combined with the knowledge that a new dispute settlement system would soon be adopted, produced a rather strange change in government behavior for a few years. It was as though governments, knowing that a new and stronger dispute settlement system would be adopted in any event, felt free to declare a holiday from compliance with the old system until the new one came into force. Governments began to block adoption of rulings with somewhat greater frequency, and compliance in general declined. It was rather strange behavior for governments that were about to adopt an even stronger and more binding dispute settlement procedure, but perhaps even governments cannot resist the lure of a “holiday” from everyday obligations.

In sum, although the GATT dispute settlement procedure had achieved a remarkable record of achievement, it was becoming a victim of its own success. The greater the burden it was asked to carry, the more the flaws in its formal structure were going to jeopardize its success. It clearly needed to formalize the unwritten law that made the procedure mandatory. It clearly needed to have a more transparent and more legitimate source of legal expertise. It clearly needed to remove the formal power of defendants to block the adoption of binding rulings. And even though retaliation was not the actual incentive behind compliance with legal rulings, the greater public attention to the process also made it necessary to protect the image of strength by eliminating the defendant’s power to block the imposition of retaliatory sanctions for noncompliance.

2. Dispute Settlement in Agriculture Cases

Given the current view that the formal weaknesses of the GATT dispute settlement procedure made it ineffective, it might logically seem to follow that these formal weaknesses contributed to the GATT’s failure to bring about a liberal trade order in agriculture. Once it is seen, however, that the GATT dispute settlement procedure was reasonably successful for most of its life, it is difficult to believe that its formal weaknesses were responsible for the GATT’s failure to discipline protectionist agricultural policies. That failure went much deeper. From all we know about the political forces behind these protectionist policies, even the best rules and enforcement procedures would most likely not have been strong enough to stand up to the political forces supporting those programs.

There is an interesting history of GATT dispute settlement cases involving restrictions on agricultural trade, but it is rather misleading. The author has conducted a statistical analysis of outcomes in agriculture cases as compared with outcomes in nonagricultural cases.⁴⁵ The study was based on an analysis of all 207 legal complaints filed in GATT from 19948 to 1990. The study did show that a surprisingly high percentage of legal complaints concerned agricultural trade issues, 43%, but it also showed that the agricultural complaints were as successful as complaints about nonagricultural trade. The data on outcomes is misleading, of course, because we know that governments were not observing GATT rules on agricultural trade nearly as well as they were observing the rules on nonagricultural trade. The equal rate of success merely means that governments were not bringing legal claims against the more important agricultural trade restrictions. They were bringing the claims they could win — claims involving peripheral products that were subject to tariff bindings or other ordinary GATT rules.

B. The WTO Dispute Settlement Procedure

1. The Uruguay Round Reforms

The Uruguay Round *Understanding on Rules and Procedures for the Settlement of Disputes* began by collecting and codifying all the written and unwritten rules of the GATT dispute settlement procedure. The main effect of codification was to make the procedure operate automatically where, in the past, it had operated with the cooperation of the defendant country. Thus, the new *Understanding* made the road from filing a legal complaint to receiving a legal ruling an automatic process that the defendant could no longer block. To achieve this kind of automaticity, the *Understanding* provided that if bilateral consultations did not resolve the problem in a specified number of days, the complainant could request the appointment of a panel and a panel would be appointed within a specified number of days. If the parties cannot agree on panelists or terms of reference for the panel, the panelists will be appointed by the Secretariat and the panel will be given standard terms of reference. The panel's decision must be rendered in a given number of days, subject to some extensions by rule or by consent.

The next important change was to make legal rulings automatically binding. The panel ruling becomes automatically binding within a certain number of days unless the member governments decide by consensus to reject it. Since consensus requires the consent of the winning party, the practical result is that all rulings become automatically binding unless the parties reach a settlement. Although most GATT legal rulings did become binding, governments did have the right to prevent this from happening, and even though it would be extremely costly to exercise that right, they took some comfort in knowing that the right to block a ruling was there. By removing this ultimate safeguard, this part of the Uruguay Round reforms represented a major change from the previous GATT dispute settlement procedure.

The provision for automatically binding rulings created some quite natural concerns about legal error in the panel ruling. To meet this problem, governments decided to create an appeal

⁴⁵ Hudec, *supra* note 34, at pages 326-336.

process before an appellate tribunal of distinguished senior judges. The Appellate Body, as it was called, also served an important function of giving the WTO dispute settlement procedure an anchor in legal expertise that was both transparent and legitimate, as the Secretariat Office of Legal Affairs had not been. To maintain the speed and automaticity of the procedure, the *Understanding* provided that the Appellate Body decision must be rendered within a specific time, and would become binding within a short time period unless the member governments agreed by consensus to reject it.

A final element of automaticity was provided regarding the power to retaliate. Contrary to the terms of GATT Article XXIII which gives the GATT membership the discretion to approve or disapprove requests for authority to retaliate, the *Understanding* grants the complainant an absolute right to retaliate if compliance is not forthcoming at an appropriate time. To preserve the automaticity of retaliation, the *Understanding* provides a number of expedited procedures to resolve the issues that may arise concerning time of compliance, and the size and nature of the retaliation. It remains to be seen whether complaining governments will actually begin to resort to retaliation now that they have this procedure. Given the many good reasons for not retaliating, it is reasonable to expect that governments will use the many procedures attached to the new retaliation process in order to create decision-making “events” for the defendant government, but it is likely that governments will continue to stop short of actually imposing increased trade barriers.

Most of the automaticity in the new WTO procedure was a response to United States demands for a more effective dispute settlement procedure. The *quid pro quo* for these formal elements promising increased strength was a pledge by the United States to use the WTO dispute settlement process to pursue legal claims against other members, as opposed to pursuing such claims “unilaterally” — i.e., in a process where the United States functioned as judge, jury and sanctioning authority. The quality of this United States commitment is somewhat uncertain.⁴⁶ Although the United States did sign this agreement, its negotiators also assured the Congress that the United States was not committed to give up its Section 301 procedure that provided for unilateral processing of legal claims against other governments. The ultimate nature of the United States commitment on this point will thus have to be tested over time. A failure to achieve something like substantial performance of the *quid pro quo* promise could result in the collapse of this legal reform.

What can one say about the effect these improvements on the WTO’s ability to enforce the new rules of the Agreement on Agriculture? The two kinds of automaticity at the beginning and at the end of the new procedure do not seem like they will make a substantial difference. The automaticity at the beginning of the process which guarantees the right to a prompt legal ruling is not that different from the unwritten rules of the GATT dispute settlement procedure. That is not a major change. The automaticity at the end of the process in terms of absolute and automatic rights

⁴⁶ Article 23 of the *Understanding* provides:

When members seek the redress of a violation of obligations or other nullification or impairment of benefits . . . they shall have recourse to, and abide by, the rules and procedures of this Understanding.

of retaliation is new, but it is doubtful that governments will make much use of it. Retaliation has never been the secret to enforcing GATT legal rulings. The one change to be expected in this area is probably a more frequent reference to the threat of retaliation.

The middle of the process — the automatically binding rulings and the provision for review by an Appellate Body — do remove some of the ultimate protections governments thought they had under the old procedure. Although governments rarely used these ultimate protections, one can expect governments now to be a bit more cautious about what they sign. This may already have happened to some extent in the empty or well-padded commitments made in the Agreement on Agriculture. It would be an unfortunate paradox if a dispute settlement reform designed to strengthen government observance of liberal trade principles should wind up persuading governments to scale back on the initial commitments they make. In reality, however, I suspect the shape of the Agreement on Agriculture would not have been any different even if it had been negotiated under the old GATT dispute settlement procedure.

One more immediate impact that one can expect to see at the outset will be a tendency to steer legal claims away from dispute settlement procedures. Although governments themselves probably do not yet know how they will react to automatically binding legal rulings, they probably know enough to know that they want to avoid the risk of having such a ruling imposed upon them. Consequently, one should see governments proposing that many matters be dealt with in the Committee on Agriculture rather than being brought in dispute settlement proceedings. Also, where dispute settlement proceedings are initiated, one might expect to see defendants urging complainants to consult and negotiate at length before invoking the formal procedures aimed at securing a legal ruling. This is something that one should begin to look for when studying the work of the Agriculture Committee and the nature of responses to the first round of WTO dispute settlement complaints, even though it may still be a bit early to draw conclusions.

The ultimate question posed by the Uruguay Round reforms, of course, is whether the provision for automatically binding legal rulings will somehow make it easier for the WTO to enforce the key obligations of the Agreement on Agriculture. One has to approach this question with a certain degree of skepticism. Any student of GATT's history with agricultural trade restrictions will know the strength of the political forces that resisted compliance with GATT norms. At their strongest, these political forces were strong enough to have carried the United States and the European Community out of GATT before they would have complied. It is hard to believe that adjustments in an adjudication procedure in Geneva are going to make a significant difference in whether such forces prevail, especially since the adjustments do not really change things very much from the way they were under the old GATT procedure. With all due respect to the new legal reforms, it still seems likely that the answers to this question will largely be written in the debates on agriculture policy in national capitals.

If this estimate of the strength of the new WTO dispute settlement procedure is correct, one practical conclusion can be drawn. It is that the new procedure would risk a possibly fatal defeat if it were thrown prematurely into combat with national agricultural policies. Governments seeking reform would be wise not to overplay their hand.

2. The Overall Record to Date

The new WTO Dispute Settlement procedure created by the Uruguay Round *Understanding on Rules and Procedures for the Settlement of Disputes* began to function officially on January 1, 1995. As of October 20, 1997, there had been 104 “requests for consultation,” the first step that a government must take when filing a legal complaint to initiate the dispute settlement procedure. Several of these 104 complaints were duplicates -- complaints against the same trade restriction filed by another government. Treating duplicate complaints as parts of the same basic complaint, the WTO Secretariat calculated that these 104 complaints actually represented 73 separate legal complaints.

It is probably too early to draw any meaningful conclusions from this small sample of early cases, especially since many of them have not yet reached a conclusion. What follows is an attempt to give the flavor of what has happened so far, without trying to draw too many conclusions from it.

Of the first 73 legal complaints to be filed, so far twenty six have been referred to panels. Fourteen were settled without reference to a panel. The remaining thirty-three complaints are currently in the first stage of bilateral consultations.

Of the twenty-six legal complaints referred to panels so far, only seven complaints have been carried through to a final decision — a decision by a “panel” followed by a second appellate decision by the WTO Appellate Body. Two more complaints have reached the stage of a first panel decision, and are currently on appeal to the Appellate Body. In one other case, the panel prepared an “interim report” — a preliminary version of the report that is circulated to the parties for comment before release of a final version--, but at that point the parties settled the case and the decision was withdrawn (and apparently dropped to the bottom of the Lac Lemman encased in cement). Four more complaints that were referred to panels were settled before the panel reached a decision. Finally, twelve complaints are currently before GATT panels, some at a final stage with a decision expected momentarily, others at an early stage where proceedings have not moved very far, if at all. Some of the panel cases that have not yet moved very far will very likely be settled or withdrawn without a panel decision.

The overall volume of complaints under the new WTO procedure has been double the volume of complaints achieved by the GATT dispute settlement procedure at its peak volume in the late 1980s. The 73 WTO complaints over the first 2.8 years amount to an average of 26 complaints per year. The only comparable data for GATT is the author’s count of GATT complaints activity for the five years 1985-1990. Counted according to the same criteria, there were 63 GATT complaints during this five year period, for an average of a bit less than 13 complaints per year.⁴⁷

⁴⁷ Hudec, *supra* note 34, Appendix. The author’s count was 69 cases, but six of these would have been considered duplicates under the current WTO criteria.

It is difficult to compare GATT and WTO data, because under the WTO’s new “unitary” dispute settlement procedure all complaints under all agreements are brought under the same disputes procedure, whereas GATT in its later years had at least six separate “Code” disputes procedures in addition to the central Article XXIII procedure. Most other counts taken by the GATT Secretariat or by other scholars have tended not to include all complaints filed under all agreements.

It is a bit too early to compare the number or percentage of GATT and WTO complaints that proceeded to the appointment of a panel, because 33 of the first 73 WTO complaints are still in the first consultation phase and thus could still be referred to panels. We do know that 26 of the remaining 40 WTO complaints have been referred to panels, a percentage of 65%. This is higher than the percentage of GATT complaints referred to panels during the 1985-1990 period, which was 54% (34/63). The percentage of cases referred to panels is not necessarily indicative of a greater preference for litigation over settlement. Securing the appointment of a panel is often just a further bargaining lever, and the greater use of this step in the procedure may simply be due to the somewhat greater ease in obtaining it under the new procedure.

During the first year or so of the new WTO dispute settlement procedures, observers noted that the first year's sample of legal complaints seemed to be producing a higher-than-normal rate of settlement. This suggested to many observers that defendant governments were taking account of the increased legal rigor of the new procedure, and were choosing to correct their legal violations voluntarily rather than face a painful lawsuit that they were sure to lose. If so, that would have been a significant achievement for the new WTO disputes procedure.

Unfortunately, the current data are still not complete enough to confirm this first impression about the rate of settlement. More than half the first 73 WTO complaints (45/73) are still being processed. Furthermore, before one can consider settlements as evidence of effectiveness, one must carefully examine the substantive results achieved by the settlement. The most one can say at the moment is that the first impressions themselves, rendered by knowledgeable observers, are at least some evidence that the new WTO disputes procedure is having some positive impact. The data on settlements will bear continued attention. If the achievements of the new procedure actually demonstrate the sort of effectiveness that was expected of it, one should see that reputation reflected in a significant increase in positive settlements.

The quality of the legal decisions produced by the new procedure has been good enough to earn provisional acceptance from a broad cross-section of the WTO membership. There has not been much criticism to date, a fact which may be explained in part by the desire of governments and academic critics to protect this fragile new institution from the many critics who oppose all international adjudication on "sovereignty" grounds.

The WTO panels that render the first decision in a case have not been changed much from their GATT predecessors, and so not much change was expected from them. To date, the first ten decisions of WTO panels have contained a few more questionable rulings than knowledgeable observers would have liked, but allowances have been made for the increased difficulty of the legal issues now being raised under the many new Uruguay Round agreements.

In any event, the new procedure's reputation for quality is primarily being determined by the work of the new Appellate Body. The seven Appellate Body decisions to date have exhibited a degree of professionalism that has met the expectations of most governments. Litigants and academic critics may quarrel with the substance of certain rulings, but as long as the Appellate Body

can maintain the appearance of high-quality legal work of an objective character, its ability to sustain its rulings should be maintained.

The Appellate Body has added a considerable degree of legitimacy to WTO dispute settlement at just the time when its work was becoming more difficult. The public selection process of the seven persons appointed to the Appellate Body has strengthened the public perception that the Appellate Body possesses both the required legal expertise and a proper legal charter to apply it. The seven individuals are persons of considerable international standing. They were examined carefully and were explicitly approved by the WTO membership. As befits a distinguished tribunal, they have been given ample compensation, an ample staff, and the necessary degree of independence from governments and from the rest of the WTO Secretariat.

So far, the reception of the Appellate Body's first seven decisions is has been consistent with these expectations. The Appellate Body has managed to sound like an objective international court of composed of distinguished judges. That impression, combined with a broadly shared desire on the part of governments that the Appellate Body succeed, has been enough to produce a successful public reception so far.

3. The Record on Cases Involving Agricultural Products

Of the 73 complaints brought in the nearly three years that the WTO dispute settlement procedure has been operating, 17 have involved problems relating to trade in agricultural products. Of these 17 complaints, seven have involved problems of import access,⁴⁸ seven have involved health and sanitary restrictions,⁴⁹ and three have involved claimed violation of Agriculture

⁴⁸ 1. *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R (ECU, GTM, HND, MEX, USA) (22 May 1997); WT/DS27/R/AB (9 September 1997) (Complaints by Ecuador, Guatemala, Honduras, Mexico, U.S.)

2. *European Communities — Measures Affecting Importation of Certain Poultry Products*, WT/DS69 (24 February 1997) (complaint by Brazil).

3. *Japan — Measures Affecting the Imports of Pork*, WT/DS66 (15 January 1997) (Complaint by EC).

4. *European Communities — Measures Affecting Butter Products*, WT/DS72 (24 March 1997) (Complaint by New Zealand).

5. *Philippines — Measures Affecting Pork and Poultry*, WT/DS/74 (1 April 1997) and WT/DS102 (7 October 1997) (complaints by U.S.).

6. *European Communities — Duties on Imports of Cereals*, WT/DS9 (10 July 1995) (Complaint by Canada).

7. *European Communities — Duties on Imports of Grain*, WT/DS/13 (19 July 1995) (Complaint by U.S.); *European Communities — Duties on Imports of Rice*, WT/DS17 (3 October 1995) (Complaint by Thailand); *European Communities — Implementation of the Uruguay Round Commitments Concerning Rice*, WT/DS25 (18 December 1995) (Complaint by Uruguay).

⁴⁹ 1. *European Communities — Measures Affecting Livestock and Meat (Hormones)*, WT/DS26/R/USA and WT/DS48/R/CAN (17 August 1997). (Complaints by U.S. and Canada).

2. *Australia — Measures Affecting the Importation of Salmon*, WT/DS18 (5 October 1995) (Complaint by Canada).

Agreement's commitments on export subsidies.⁵⁰ Eleven of the seventeen complaints listed the United States as a complainant; Canada had four complaints, and no other country had more than two. Seven of the seventeen complaints were against the European Communities. Japan, Korea and Australia were defendants in two cases.

What have the decided cases told us so far about the enforcement of the core commitments of the Agreement on Agriculture?

Two cases involving agricultural trade measures have gone through the full litigation procedure ending with a decision by the Appellate Body. Neither involved a test of the central commitments of the Agreement on Agriculture. The case known as *Bananas III*⁵¹ did raise a potentially important issue, about the relationship between the Agreement on Agriculture and remaining GATT obligations that still apply to agricultural trade measures.

The issue in *Bananas III* involved the EC's allocation of tariff quotas on bananas, according to an overall regime that had been negotiated in the closing days of the Uruguay Round and incorporated into the EC's Schedule attached to the Agreement on Agriculture. The allocations were found to be in violation of the MFN obligations of GATT Article XIII. The Community argued that the incorporation of this trade regime in the EC Schedule gave it the status of agreed exception to the other rules of the GATT agreement. This could very well have been done during the negotiations on agriculture, because there were many instances in which the new and different legal commitments of the Agreement on Agriculture were viewed as displacing existing GATT rules. For example, Article 13 of the Agreement on Agriculture, discussed in Part I-B-3 and -4 above, provides that several GATT provisions will no longer apply to agricultural measures that are now

3. *Korea — Measures Concerning Testing and Inspection of Agricultural Products*, WT/DS3 (6 April 1995) (Complaint by U.S.); *Korea — Measures Concerning Inspection of Agricultural Products*, WT/DS41 (24 May 1996) (Complaint by U.S.).

4. *Australia — Measures Affecting the Importation of Salmonids*, WT/DS21 (17 November 1995) (Complaint by U.S.).

5. *United States — Measures Affecting Import of Poultry Products*, WT/DS100 (18 August 1997) (Complaint by EC).

6. *Japan — Measures (Quarantine) Affecting Agricultural Products*, WT/DS76 (7 April 1997) (Complaint by U.S.).

7. *Korea — Measures Concerning the Shelf-Life of Products*, WT/DS5 (3 May 1995) (Complaint by U.S.).

⁵⁰ 1. *Hungary — Export Subsidies in Respect of Agricultural Products*, WT/DS35 (27 March 1996) (Complaints by Argentina, Australia, Canada, New Zealand, Thailand, U.S.).

2. *Canada -- Measures Affecting the Import of Milk and the Exportation of Dairy Products*, WT/DS103 (8 October 1997) (Complaint by U.S.).

3. *European Communities — Measures Affecting the Exportation of Processed Cheese*, WT/DS104 (8 October 1997) (Complaint by U.S.).

⁵¹ *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R (ECU, GTM, HND, MEX, USA) (22 May 1997) (panel decision); WT/DS27/R/AB (9 September 1997) (Appellate Body decision).

governed by the AMS commitments on domestic support measures, and the new rules on export subsidies.

The Community's argument was weak, however, because instead of obtaining general approval of an excusing provision like Article 13, the Community had merely put the new regime into its Schedule, where as a practical matter, no agreement by other formal governments could be inferred. The Community's defense was thus rejected, under a well established rule that governments cannot write themselves excuses by putting them in their Schedules. The ultimate result on this issue stood for the proposition that however novel and innovative it may have been, the only way the Agreement on Agriculture will displace any older GATT obligations is by specific legal provisions so providing.

The only other Appellate Body decision on agricultural trade measures was the celebrated *Hormones* decision interpreting the Agreement on Sanitary and Phytosanitary Measures (SPS Code).⁵² While the SPS Code is appended to the Agreement of Agriculture, its quite separate regulatory structure is outside the scope of this paper.

What can be learned from the other Appellate Body decisions that do not involve the Agreement on Agriculture? Although it is still too early to generalize with any confidence about the jurisprudential tendencies of the Appellate Body, the one trend that seems to have been fairly prominent during these early decisions, including *Bananas III* and *Hormones*, has been a tendency to stay quite close to the literal meaning of the legal texts at issue.⁵³ For any new and complex agreement like the Agreement on Agriculture, this tendency will likely mean that gaps, omissions, and imprecise drafting will be translated into gaps, omissions and imprecision in the regulatory structure. The Appellate Body is not likely, at this stage in its development to, clean up the inadequacies of the negotiators. Given, however, that not much is expected of these new commitments until another round of negotiation, this may not be a very serious flaw.

What can be learned from the other cases involving agricultural trade issues that have not yet reached the point of final decision? Two other agriculture cases referred to panels also involved issues under the Agreement on Agriculture, but they were settled. One involved a Canadian complaint against the European Communities use of reference prices, rather than actual transaction prices, to calculate duties under the new EC tariff bindings on cereals.⁵⁴ The other involved the

⁵² *European Communities — Measures Affecting Livestock and Meat (Hormones)*, WT/DS26/R/USA and WT/DS48/R/CAN (17 August 1997) (panel decision); WT/DS26/AB/R and WT/DS48/AB/R (Appellate Body decision).

⁵³ See generally, R. Hudec, "GATT/WTO Constraints on National Regulation: Requiem for an 'Aim and Effects' Test," 32 THE INTERNATIONAL LAWYER (forthcoming, Fall 1998)

⁵⁴ *European Communities — Duties on Imports of Cereals*, WT/DS/9 (10 July 1995). The case was settled by establishing a refund mechanism to repay any net duty overpayments caused by use of the reference price, in conjunction with another settlement reached over compensation for the most recent EC enlargement.

complaint by a large number of countries against Hungary for exceeding the limits on export subsidies in the Agreement on Agriculture.⁵⁵ The settlement in the Hungarian case did vindicate the export subsidy commitments. The settlement in the other case did seem to represent some retreat from the commitment to abolish variable levies, agreed to by both parties.

Two more agriculture cases are currently before panels, neither involving the Agreement on Agriculture.. One involves another SPS complaint by Canada against an Australian health restriction prohibiting importation of Canadian salmon.⁵⁶ The other involves a claim by Brazil that the EC import regime for poultry does not conform to the commitment made by the EC in its Article XXIV:6 settlement on the most recent expansion of the Community.⁵⁷

Looking at the three types of agriculture cases brought so far — access problems, health-and-safety restrictions, and export subsidies — , one sees differing prospects for meaningful adjudication. The health-and-sanitary cases are probably the most active single area — the type of problem that most easily triggers a resort to dispute settlement. The mere existence of the SPS Agreement seems to have made governments more interested in doing something about their problems with health-and-sanitary restrictions, many of which are long-standing. The fact that the *Hormones* decision did produce an affirmed finding of violation has helped to bolster confidence in the SPS Agreement. The *Hormones* case itself was a bit too easy to prove very much about the WTO's ability to deal with cases in which the scientific evidence is not so totally one-sided, but cases testing the viability of the SPS Agreement on that issue should be forthcoming before long.⁵⁸

The cases involving export subsidies could produce the most interesting test of all relating to the viability of the WTO Agreement on Agriculture. Most commentators have suggested that, despite all the loopholes in the rest of the Agreement, the export subsidy commitments did have enough rigor to bring about some meaningful reductions in the volume of subsidies. It was perhaps not surprising, therefore, that governments would start feeling the pinch of these commitments at an early time, and that in response they would start looking for ways to circumvent them. The

⁵⁵ *Hungary — Export Subsidies in Respect of Agricultural Products*, WT/DS35 (27 March 1996). Hungary agreed to seek a waiver allowing it to scale down the excess subsidies over a period of years.

⁵⁶ *Australia -- Measures Affecting the Importation of Salmon*, WT/DS18 (5 October 1995).

⁵⁷ *European Communities — Measures Affecting Importation of Certain Poultry Products*, WT/DS69 (24 February 1997).

⁵⁸ It may be worth noting here that the Panel decision in the *Hormones* case took a somewhat circuitous route to its decision through Article 5 of the SPS Agreement. This mode of analysis may have been chosen in order to introduce some findings as to trade effects required by Article 5.5 -- findings that the European hormones restriction caused more harm to imported beef than domestic beef, and that the restriction may have been intended to achieve that purpose. These findings raised the question whether findings as to trade effects and purposes are a necessary part of adverse decisions under the SPS agreement. If so, however, it is difficult to explain how the Appellate Body could have affirmed the overall finding of violation after having reversed the particular findings made by the Panel under Article 5.5. Further litigation may be needed to clear up the question of whether and to what extent findings of adverse trade effects will be required.

complaints against both the Canadian and the EC export subsidy practices both make the claim that, if allowed, these practices would significantly weaken the Agreement's discipline over export subsidies. The litigation over these two practices may be a good test of how seriously governments intend to reduce export subsidies.

The eight cases involving problems of market access for imports cover a broad mixture of access problems, ranging from EC discrimination in favor of its CAP banana producers, U.S. retaliation against EC sanitary requirements on poultry, and a decision classifying a new kind of New Zealand butter as non-butter for purposes of an advantageous EC tariff provision favoring butter. The one series of access complaints that had potential significance for the new Agreement on Agriculture were complaints against the administration of the EC's rather curious ceiling binding on cereals, a binding which promised that duty-plus-invoice-price would not exceed the reference price by a certain percentage -- 55% for some cereals, 180% for rice. This type of binding had all the elements of the variable levy, which had supposedly been outlawed by the Agreement on Agriculture. As noted earlier, the complaining exporters seemed to view a variable levy as a lesser evil than the high tariff rates achieved by tariffication, and were asking that its variability be observed when that was to their advantage. The cases might have revealed whether governments were claiming the right to make *de facto* exceptions to the prohibition against variable levies, but before these issues could be explored they were settled with a rather complex refund procedure which guaranteed that all exporters would get the benefit of the binding.