International Law and International Relations Cheek to Cheek: An International Law/International Relations Perspective on the U.S./EC Agricultural Export Subsidies Dispute

Miguel Montana-Mora
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Table of Contents

I. INTRODUCTION ........................................... 2
II. COMMON AGRICULTURAL POLICY AND THE INTERNATIONAL TRADE REGIME: SOME IRONIES .................. 5
   A. An International Law/International Relations View of the International Trade Regime ................... 5
   B. The Origin of GATT Rules on Agriculture ............... 11
   C. The Creation of the European Economic Community and the Birth of CAP .............................. 13
   D. The European Community Export Refunds Under the General Agreement .................................. 15
III. THE TOKYO ROUND REFORMS: AGREEMENT WITHOUT CONSENSUS .................................................. 20
   A. Introduction ......................................... 20
   B. The Code on Subsidies and Countervailing Duties of 1979: Unbridged Policy Differences ................ 22
   C. Functioning of the Code on Subsidies in Practice .... 29
IV. NEGOTIATING THE SUBSTANTIVE ISSUES: THE URUGUAY ROUND .................................................. 32
   A. The Ministerial Declaration of 1982 and Its Aftermath ....................................................... 32
   B. The Ministerial Declaration of Punta del Este: The Negotiation Approach .................................. 34
   C. Negotiation Context .................................. 35
      1. The United States ................................ 36
      2. The European Community .......................... 37

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I. Introduction

One of the most salient features of the creation of the European Community (EC or Community) was the establishment of a Common Agricultural Policy (CAP) for all Member States. Over the years, it has proved to be the most integrated and consistent of all the common policies. Although the establishment of a common commercial policy in other areas presents a poor record, with regard to agriculture not only is there a real common commercial policy, but for many years there was also a reasonable degree of cohesion among Member States.

1 According to Article 38(4) of the Treaty Establishing the European Economic Community, Mar. 25, 1957 (Treaty of Rome), "the functioning and development of the Common Market for agriculture products shall be accompanied by the establishment of a common agricultural policy among the Member States." Treaty of Rome, Mar. 25, 1957, art. 38(4), 298 U.N.T.S. 11, 30. The objectives of the Common Agricultural Policy (CAP) are:

(a) to increase agricultural productivity by developing technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour;
(b) to ensure thereby a fair standard of living for the agricultural community, particularly by the increasing of the individual earnings of persons engaged in agriculture;
(c) to stabilise markets;
(d) to guarantee regular supplies; and
(e) to ensure that supplies reach consumers at reasonable prices.

Id. at 30-31.


The importance of agriculture for the EC is readily understood by looking at the Official Journals and the annual budgets: Between two-thirds and three-quarters of the legal acts published deal with agriculture, which accounts for nearly three-quarters of the entire budget.3

The CAP has had dramatic success in increasing agricultural productivity and assuring the availability of supplies. Although in the 1960s Europe was basically a food importer zone, today the EC is the second largest exporter of farm products in the world. The scheme based on the use of variable levies to prevent imports and export refunds to foster exports proved to be very successful for the Community at a time when it was a net importer of farm products. Nonetheless, the effects of this scheme on world markets have given rise to a growing number of disputes between the Community and its trading partners, notably the United States. During the 1980s, the Community became a net exporter of agricultural products4 while a record number of U.S. farmers were filing for bankruptcy. Although the causal relationship between the EC's growing exports and the corresponding decline of U.S. exports is much discussed, the United States has blamed the EC for having stolen its markets. A war of subsidies and other protectionist measures between the EC and the United States has ensued, becoming the most thorny issue of the bilateral relationships between the two blocks and putting into question the credibility of the General Agreement on Tariffs and Trade (GATT or General Agreement)5 as a legal system.

A first step directed at restoring this credibility was the inclusion of agriculture within the agenda of the Uruguay Round multilateral trade negotiations.6 However, the irreconcilable differences between the EC and the United States in connection with the reduction of public support to farmers has stalled the talks, leading the negotiations to

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6 The Uruguay Round is the eighth round of multilateral trade negotiations held within the GATT institutional milieu. It was launched in Punta del Este (Uruguay) in September 1986. See Ministerial Declaration of Punta del Este, 33 Basic Instruments and Selected Documents (GATT) 19 (1987) [hereinafter B.I.S.D.].
a halt. Everyone wonders why a sector that represents a very small part of the Gross Domestic Product of both the EC and the United States could have caused the collapse of the Uruguay Round—and many answers have been offered from a wide array of different perspectives.

This Article tries to contribute to this debate. The Article applies one of the newest methodologies designed to study international cooperation—the integration of international law and international relations theory—to an event of outstanding importance to world commerce: the agricultural export subsidies dispute between the United States and the EC. As made evident in the last meeting of the American Society of International Law, by combining the theoretical diversity of international relations theory with the doctrinal tradition of international law, this methodology provides a rejuvenated insight into the study of world trade regulation. Although “it has been difficult to tell for the last twenty years that the two disciplines were even talking about the same world,” a number of efforts have been launched recently, aimed at reintegrating international law and international relations.

From this perspective, the Article will review the evolution of the rules since the inception of GATT in 1947 until the most recent proposals submitted within the Uruguay Round negotiations. Part II introduces some of the theories provided by both international lawyers and international political scientists to explain the functioning of the international trade regime. It also examines the original rules of the General Agreement and the legality of EC agricultural export subsidies against this theoretical framework. Part III analyzes the Code on Subsidies and Countervailing Duties drafted during the Tokyo Round and its functioning in practice. Part IV examines the role of the Uruguay Round as the first attempt to subject agricultural policies to the GATT regime, and it portrays the factors that have led to the collapse of the Round. Part V concerns the “Agreement on Agriculture” proposed by the GATT Director General in December 1991. It delineates the prospects for the proposed agreement on the basis of the theoretical framework provided in Part II and empirical data available to date. The conclusions, set out in Part VI, argue that the compatibility with GATT of the agricultural export subsidies granted by the EC should not be examined in strict legal terms.

The EC/U.S. agricultural subsidy dispute is best understood by adding insights from international relations theory to existing legal analyses. The nature of the international trade regime installed after World War II is best appreciated in this light. Put in this perspective,
one can argue that the effectiveness of the norms regulating the use of subsidies has depended on the degree to which the legal rules embraced the commercial interests of the most relevant actors. The core conclusion of the Article is that the current round of multilateral trade negotiations will be successfully completed and will have a legitimizing effect on GATT rules on agriculture.

II. Common Agricultural Policy and the International Trade Regime: Some Ironies

A. An International Law/International Relations View of the International Trade Regime

Contemporary international economic interdependence is an immediate consequence of the success of the so-called Bretton Woods System, embodied by the International Monetary Fund (IMF), the World Bank, and GATT. Since its entry into force on January 1, 1948, GATT has become "the centerpiece of a solar system of independent agreements" which have come to regulate international commerce on a worldwide basis. The functioning of GATT within the international trade realm has been studied from different disciplines, which have provided distinct and complementary explanations. A comprehensive understanding of GATT's role as the central institution for the regulation of international trade would require an interdisciplinary approach that could benefit from the insights provided by fields such as law, economics, and political science. With this idea in mind, this Article examines the agricultural export subsidies dispute between the EC and the United States cutting across the domains of international law and international political science. When appropriate, the analysis will be enriched with ideas borrowed from other disciplines in order to contribute to a better understanding of the underpinnings of GATT regulation on agricultural subsidies.

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8 Although strictly speaking the "Bretton Woods System" encompasses only the IMF and the World Bank, Jackson also includes the GATT. Jackson & Davey, supra note 5, at 2, 282.

9 Technically speaking, "the basic treaty comprising the GATT has never come into force, being applied through a 1947 'Protocol of Provisional Application.'" [hereinafter P.P.A.]. Jackson, Restructuring the GATT System, supra note 5, at 1. The Contracting Parties have considered the definitive application of GATT several times, but so far they have never reached an agreement. Generally Marc Hansen & Edwin Vermulst, The GATT Protocol of Provisional Application: A Dying Grandfather?, 27 COLUM. J. TRANSNAT'L L. 263 (1989); Frieder Roessler, The Provisional Application of the GATT, 19 J. WORLD TRADE L. 289 (1985) (discussing the P.P.A.).

The Contracting Parties decided to act under the P.P.A. instead of waiting for GATT to come into force because, among other reasons, the negotiation mandate granted by Congress to the President was to expire in 1948. Jackson, The World Trading System, supra note 5, at 35.

10 R. Michael Gadbow, The Outlook for GATT as an Institution, in Managing Trade Relations in the 1980s 33, 36 (Seymour J. Rubin & Thomas R. Graham eds., 1983).

International political scientists view GATT as an international regime of "networks of rules, norms, and procedures that regularize behavior and control its effects." Whether international regimes affect state behavior and practices has been the subject of extensive debate. Although the Realists hold that state action in the international domain is an exercise of power politics, the Institutionalists and the proponents of the Functional Theory of International Regimes argue that international regimes do have effects on state behavior. Some scholars have studied GATT's salient features as an international trade regime, and have drawn some conclusions as to the causes of the regime's change and its impact on state behavior. In connection with regime change, the most salient model is the theory of hegemonic stability. In short, the two central propositions of this theory are that "the formation of international regimes normally depends on hegemony," and that "the maintenance of order requires continued hegemony." As applied to international trade, the theory "specifies that

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A conference of international relations scholars held in Los Angeles in 1980 accepted the following definition of "regime":

A regime is composed of sets of explicit or implicit principles, norms, rules, and decision-making procedures around which actor expectations converge in a given area of international relations and which may help to coordinate their behavior.
1. Principles are beliefs of fact, causation, and rectitude.
2. Norms are standards of behavior defined in terms of general rights and obligations.
3. Rules are specific prescriptions and proscriptions regarding behavior.
4. Decision-making procedures are the prevailing practices for making and implementing collective choices.


The concept of "international regime" was first applied within the domain of political science by John Ruggie. See John G. Ruggie, International Responses to Technology: Concepts and Trends, 29 Int'l Org. 557 (1975). From then on, it was widely adopted as a theoretical construction which tries to explain cooperative behavior among states in different issue-areas. See generally Helen Milner, International Theories of Cooperation among Nations, 44 World Pol. 466 (1992) (reviewing the most recent theories of cooperation among nations).


15 Keohane, After Hegemony, supra note 14, at 85-109.


18 Keohane, After Hegemony, supra note 14, at 31. The second tenet of the theory has been criticized by Keohane, who argues that "cooperation does not necessarily require the existence of a hegemonic leader after international regimes have been established. Post-hegemonic cooperation is also possible." Id. at 32.
stable, open international economic structures are causally associated with a hegemonic distribution of state power." Hence this model would explain the changes that have occurred in the world trading system by the decline of American hegemony during the last decades. Although the theory has been widely accepted, its validity with regard to the international trade regime has been challenged on different grounds. Some authors have observed an uneven timing between the American decline and the major changes occurring within the international trade regime. Others have denied the causal relationship and have concluded that "the theory is inadequate because of its failure to take into account the role of international institutions, such as international economic regimes, in fostering and shaping patterns of cooperation."

In response to the hegemonic model, Robert Keohane presented the Functional Theory of International Regimes, according to which international regimes perform valuable functions. For example, international regimes provide an important source of information, reduce the costs of legitimate transactions, and facilitate negotiations among governments. They legitimate and delegitimate distinct types of state action and provide incentives for compliance. In addition, "the regime-eroding effects of hegemonic decline are to some extent counterbalanced by the value to governments of rules that limit player's [sic] legitimate strategies and therefore reduce uncertainty in the world political economy." Others have reduced the functions performed by the GATT regime to four interrelated categories: the "facilitative" function, the "constraint" function, the "diffusion of influence" function, and the "promotion of interaction" function. The first function is best illustrated by the seven rounds of multilateral trade negotiations held within GATT's institutional milieu. With regard to the third function, they argue that "the existence of the GATT regulatory-consultative framework has given smaller regime members a greater opportunity to pursue their interests than would have been the case had no regime for this issue come into being." The fourth func-

19 Lipson, supra note 16, at 437.
20 In light of this observation, Lipson has concluded that "the model can be criticized ... on the grounds that its predictions are only roughly accurate and that its causal links are not always compelling." Id.
21 See, e.g., Keohane, After Hegemony, supra note 14, at 215.
22 Keohane, After Hegemony, supra note 14, at 85-109.
23 Id. at 107-108, 244-245.
24 Id. at 195.
25 See Finlayson & Zacher, supra note 12, at 310.
26 Id. at 310-311. As already noted, the Uruguay Round is the eighth round of multilateral trade negotiations. The other rounds were: Geneva (1947), Annecy (1949), Tourquay (1950), Geneva (1956), Dillon (1961), Kennedy (1962-67), and Tokyo (1973-79). See Jackson, Restructuring the GATT System, supra note 5, at 37.
27 Finlayson & Zacher, supra note 12, at 313. This argument, if not stretched too far, seems plausible in light of the numerous measures adopted to the advantage of developing
tion, which is a consequence of the success of the other three functions, is the "promotion of interaction." Since the basic economic objective of the GATT is the expansion of international trade to the benefit of all states, the type of "interaction" that is "promoted" is trade exchanges. To these four functions, one could easily add what could be labeled the "appeasement of domestic pressures" function. Ample evidence suggests that a tough international trade regime is a good instrument to appease domestic pressure groups. In the case of GATT, however, this ability has been inhibited because the courts of most Contracting Parties do not give direct effect to its provisions.

These classifications are obviously as arbitrary as any other classification, and one could find evidence either to support or to challenge some of these functions. Because it is central to the theme of this Article and it has been identified by numerous scholars, it is worth analyzing the second function in some detail: the so-called "constraint" function. The ability of a regime to perform this function will largely depend on the effectiveness of the norms of the agreements on which the regime stands. Thus, an appraisal of the "constraint" function of international regimes necessitates a legal analysis of the elements that ensure the effectiveness of a set of norms.

From a legal perspective, it can be argued that international trade norms, like all kinds of norms, aim at influencing the behavior of the subjects to whom the norms are addressed. In New Haven School terminology, "rules or norms formulate shared or community expectations as to how those to whom a norm is addressed will behave." Regardless of their form or origin, they reflect the desirability of attaining a goal and direct the subjects of the norms to that end. In short, norms determine "what ought to be." As long as they succeed in the realization of "what ought to be," "one speaks of the effectiveness of (the normative force of) the norm."

A primary question is how to measure the effectiveness of any set of norms. It seems that the effectiveness (normative force) of a legal system must be judged by analyzing what would have happened in the absence of such a system. The general observance of the rules is not

countries, such as the formal recognition of a "different and special" treatment in many GATT agreements.

28 Id.
30 See Finlayson & Zacher, supra note 12, at 511-512; Kehane & Nye, supra note 12, at 51.
33 Id.
definitive proof that the rules have been effective because a possibility exists that in the absence of the norms states would have behaved the same. We say that the norms are effective if states adopt a course of action because of the norm. Thus, "we understand by normative force the effect of a norm directed at influencing behaviour."35

The normative force of international trade norms depends in part on the willingness of international subjects to abide by the rules. "This willingness may be prompted by the legitimacy which the norm, and/or the system of norms of which this norm forms a part, enjoys in the eyes of the addressee."36 The more legitimate a country regards a set of norms, the more it will be willing to behave according to those norms. It follows that, to ensure the effectiveness of a legal system, account must be taken of the factors bearing on its legitimacy. The identification of these factors is not an easy task. Following Professor Pieter van Dijk's footprints, some of these factors can be mentioned here.

First, the legitimacy of the norm depends on "the way in which the norm has been created and formulated."37 In the context of GATT, for example, the legitimacy of the norms, which were shaped to serve the commercial goals of a handful of states, may be challenged by those countries that joined the regime at a later stage, claiming that the norms do not take into account their specific commercial interests. As Ernst-Ulrich Petersmann has noted, "the efficiency of international economic regulations is dependent upon the taking into account of the interests of the respective addressees and of their consent to the policy measures (interest realization, consensus principle, maximization of self-interest)."38 In fact, states normally comply with treaties because they are reflective of their interests. In Professor Chayes' words, "the basic principle of classical international law that states cannot be legally bound except with their own consent tends to make the rules they are obligated to carry out reflective of their interests."39

Another factor which has an important bearing on the legitimacy of a set of norms is "the consensus on values underlying the norms."40 When this consensus is incomplete, states may reach an agreement on a principle. "The negotiators [are] able to agree on the desirability of

35 van Dijk, supra note 32, at 16.
36 Id. In Professor van Dijk's words, "legitimacy is the value or authority which the addressee attributes to a norm and/or to the system of norms to which this particular norm belongs." Id.
37 Id.
40 van Dijk, supra note 32, at 16.
attaining a goal but not on the instruments to be used to reach the goal." 41 Principles may turn into rules if a strong consensus exists at a later time. 42 If rules are formulated before such consensus exists, problems are likely to crop up if one tries to enforce them. Additional difficulties may arise if the drafting of a norm is not clear, and its real nature is discussed. "If a provision is taken by some as an agreement on a principle and by others as a prescription of conduct it inevitably widens the gap between expectation and fulfillment, which is the source of all conflict." 43 For a variety of reasons, sometimes international negotiations give rise to rules in spite of the lack of consensus on the values underlying such rules. In these instances, the life of these rules is likely to be very troublesome.

The legitimacy also depends on "the expectation that the compliance with the norm will be enforced by sanctions." 44 Whether institutionalized or unilateral, the availability of sanctions may have a deterrent effect on potential deviators. International political scientists argue that "'tit for tat' is a more effective strategy to induce cooperation than submissiveness." 45 In addition, it is widely acknowledged that the effectiveness of a legal system depends largely on the availability of a mechanism to enforce the rules, and the authority of the body established to perform such a task. This body is typically in charge of supervising whether states behave according to the rules (review function), restoring the harmony between prescribed conduct and behavior (correction function), and "clarifying] and further specifying the] norms to which the interpretation and application of norms lead (creative function)." 46

The purpose of the following sections is to analyze the regulation of the General Agreement against the theoretical framework provided above. The idea is to examine the way in which the norms on subsidies were created, especially the role played by both the United States and the EC; the eventual consensus underlying the rules; and their functioning in practice. This may shed some light as to how the GATT regime performed its functions before the Tokyo Round.

42 See id. The reverse is also true. "[N]orms originally intended to regulate conduct gradually begin to operate like principles." Id. at 58.
43 Id.
44 van Dijk, supra note 32, at 16.
46 van Dijk, supra note 32, at 27; see also PIETER VAN DIJK, SUPERVISORY MECHANISMS IN INTERNATIONAL ECONOMIC ORGANIZATIONS (1984) (discussing the review, correction and creative functions of these bodies in the context of international economic organizations).
B. The Origin of GATT Rules on Agriculture

The most striking irony in connection with U.S. complaints about the ineffectiveness of GATT rules dealing with agriculture is that when these rules were drafted, they were designed to suit the interests of U.S. farmers. "The GATT rules were written to fit the agricultural programs then in existence, especially in the United States." Thus to understand the original GATT rules on agriculture it is necessary to give a short overview of the roots of U.S. agricultural policies.

For a number of reasons, agriculture has traditionally been a sector protected by most governments. In the 1930s, some Western countries, namely the United Kingdom, France, Germany, and Denmark, intervened heavily in agricultural markets to protect their farmers from the crisis of the mid-1920s. The United States also laid the foundations for its agricultural policies in this period, relying heavily on import quotas, production control programs, price supports, export subsidies, and the like. As Goldstein has noted, "by mandating a policy that dictated the use of import quotas and export subsidies instead of one based on reciprocal tariff negotiations without benefit of government supports, the United States established a precedent for excluding agriculture from the worldwide liberalization trend that followed World War II." In the mid-1940s, when discussions for the inclusion of agriculture within the scope of the stillborn International Trade Organization were underway, the U.S. delegation "recognized that the U.S. Senate would not ratify an international agreement that would have forced the United States to dismantle its agricultural program or which would have made its programs inoperable." Thus, in spite of the strong opposition from some countries, namely Australia and a number of developing countries, GATT incorporated special rules for agriculture. As various commentators have noted, "it is

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48 Some of the arguments used to explain agricultural protectionism are the desire to ensure self-sufficiency in agricultural products, environmental concerns, the desire to keep people living in the countryside, the political power of farm lobbies, and the need to protect farmers from price fluctuations and adverse weather conditions. See, e.g., Eduardo Moyano Estrada, Una aproximación sociopolítica al proteccionismo en la agricultura, 666 Información Comercial Española 163 (1989) [hereinafter I.C.E.]; Barcelo Vila, La reducción del proteccionismo agrario: Exigencia del sistema y desabilidad social, 666 I.C.E. 22 (1989).
51 Id. at 48.
52 Hathaway, supra note 47, at 103.
53 See id. at 103-104. As Hathaway points out, "[n]ot only did agriculture receive special treatment in the GATT, but the special treatment also appears to have been tailored to the
ironic that three decades later these special exceptions for agriculture would become the major focus of the U.S. government's efforts to change the rules in the current GATT negotiations.\textsuperscript{54}

As far as the regulation of subsidies is concerned, the original text of the General Agreement, now embodied in Article XVI, included only an obligation of notification, and a duty to hold consultations with other Contracting Parties to discuss the possibility of limiting subsidization.\textsuperscript{55} The soft language of this Article, the lack of an efficient mechanism to control its observance, and the absence of a definition of subsidy limit the usefulness of the provision. When the Contracting Parties met in 1955 to review the General Agreement, they added a new section to Article XVI.\textsuperscript{56} The interests of the United States pre-

\textsuperscript{54} Hathaway, supra note 47, at 105.

\textsuperscript{55} Article XVI(1) states:

If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidization.

GATT, supra note 5, art. XVI(1), reprinted in 1 B.I.S.D. (GATT) 54 (1952).

\textsuperscript{56} Sections B(2)-(5) of Article XVI reads as follows:

2. The contracting parties recognize that the granting by a contracting party of a subsidy on the export of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this Agreement.

3. Accordingly, contracting parties should seek to avoid the use of subsidies on the export of primary products. If, however, a contracting party grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory, such subsidy 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 that product.

4. Further, as from 1 January 1958 or the earliest practicable date thereafter, contracting parties shall cease to grant either directly or indirectly any form of subsidy on the export of any product other than a primary product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market. Until 31 December 1957 no contracting party shall extend the scope of any such subsidization beyond that existing on 1 January 1955 by the introduction of a new, or the extension of existing, subsidies.

5. The CONTRACTING PARTIES shall review the operation of the provisions of this Article from time to time with a view to examining its effectiveness, in the light of actual experience, in promoting the objectives of this Agreement and avoiding subsidization seriously prejudicial to the trade or interests of contracting parties.
vailed again and a distinction was made between the regulation of subsidies on primary and non-primary products. The purpose of the introduction of a different regime for subsidies on primary products was to preserve U.S. agricultural policies. Thus, in a report prepared at the request of Senator Ribicoff in 1973, one can read that “the GATT provisions on export subsidies on primary products reflect the position taken by the United States on this matter when the GATT was reviewed in 1955.”

After the Review Session of 1955, GATT prohibited export subsidies for non-primary products for those Contracting Parties that accepted Article XVI(4). With regard to primary products, the Review Session produced one of the most ambiguous and criticized articles of the General Agreement: Article XVI(3). According to this provision, the Contracting Parties “should seek to avoid the use of subsidies on the export of primary products.” If, however, a Contracting Party does grant subsidies that operate “to increase the export of any primary product from its territory, such subsidy 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.”

C. The Creation of the European Economic Community and the Birth of CAP

Some years after the GATT was opened for signature, Germany, France, Belgium, Luxembourg, Italy, and the Netherlands, all GATT Contracting Parties created the European Economic Community under the Treaty of Rome. The establishment of a common market among these countries gave rise to some concerns as to its compatibility with the General Agreement, which are summarized in the discussion that follows.

GATT, supra note 5, art. XVI(B).


58 On November 19, 1960, Austria, Belgium, Canada, Denmark, France, Germany, Italy, Luxembourg, the Netherlands, Norway, Switzerland, the United Kingdom, and the United States signed a Declaration giving effect to Article XVI(4). See E. Bruce Butler, Countervailing Duties and Export Subsidization: A Re-emerging Issue in International Trade, 9 Va. J. Int'l L. 82, 91 (1968).

59 See GATT, supra note 5, art. XVI(3).

60 Id.

61 Id.

62 Belgium, France, Luxembourg and the Netherlands were GATT original Contracting Parties. Italy joined GATT on May 30, 1950, and Germany on October 1, 1951. GATT, 1 B.I.S.D. (GATT) 127-135 (1952).

GATT permits the creation of Custom Unions or Free Trade Areas if they fulfill the conditions set out in Article XXIV. The foundation of this exception to the most-favored-nation clause lies in the idea that they have trade promoting effects. Thus Custom Unions and Free Trade Areas are considered beneficial if they do not impair trade interests of third countries. Since the Treaty of Rome provides for a common external tariff, the EC falls squarely within the concept of Customs Union. To be entitled to the exception set forth in Article XXIV, a Custom Union must (1) provide for the elimination of duties and other restrictive regulations of commerce with respect to substantially all the trade between the members and (2) not raise the level of protection with regard to third countries.

According to Article XXIV(7), any GATT Contracting Party deciding to enter into a Customs Union shall notify the Contracting Parties and make available to them such information to consider the agreement. In fulfillment of this requirement, the EC treaty was presented to the GATT in March of 1957. Baron Snoy, speaking on behalf of the six European States, stressed the conformity of the Treaty of Rome with the General Agreement and gave the "firm assurance . . . that as long as the Six would remain contracting parties to the General Agreement they would scrupulously observe their obligations under this Agreement." Baron Snoy's optimism was not shared by most GATT members. When the Contracting Parties examined the Treaty of Rome in their XII Session, almost all participants raised objections to the text. They feared that the Treaty of Rome would increase the trade barriers between the newly created organization and non-member states, the main points of contention being the establishment of a common external tariff, quantitative restrictions, the association treaties

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64 According to GATT Article XXIV(8)(a):
A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that
(i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,
(ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union.

GATT, supra note 5, art. XXIV(8)(a).

65 According to GATT Article XXIV(8)(b), "A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories." GATT, supra note 5, art. XXIV(8)(b).

66 GATT, supra note 5, art. XXIV(8).

67 GATT, supra note 5, art. XXIV(5).

with overseas territories, and the managed approach with regard to trade in agricultural products.69 As a consequence, they decided to set up a Committee charged with the analysis of the compatibility of the contested issues with GATT.70 Interestingly, the Committee was unable to come up with a definite conclusion. Legal analysis was clouded by political and economic considerations. It soon became apparent that since all EC Member States were GATT Contracting Parties, it was unrealistic to take a tough stand.71 Thus the creation of the EC was accepted on pragmatic considerations leaving legal analysis to a second level.72 Ironically, the United States was the Contracting Party that most firmly supported the creation of the EC, anticipating that it would be a good market for U.S. products.73 In addition, the establishment of the EC was central to U.S. foreign policy objectives. "If a protectionist Common Agricultural Policy was the price to pay for political stability and economic prosperity in Western Europe, so be it. The long-term advantages for the general U.S. interest were viewed as far outweighing the short-term costs to special interests in agriculture."74

D. The European Community Export Refunds Under the General Agreement

The third irony in connection with GATT regulation of agriculture is that over the years the ambiguities of Article XVI(3), which was introduced at the insistence of the United States, would act as a shield in favor of the export refunds introduced by the EC in the context of its Common Agricultural Policy.75 As a consequence of the success of the CAP, over the years the Community became one of the world's leading exporters of a number of agricultural products. This caused friction with other GATT Contracting Parties, notably the United States and other agricultural exporters. Ironically, the rules that had

71 As De Lacharrière has noted, if the Treaty of Rome had been "condemned," GATT would have exploded. De Lacharrière, supra note 69, at 634.
72 The Contracting Parties never reached a formal and definitive conclusion as to the compatibility of the Treaty of Rome with the GATT. Bourgeois, Le GATT et le Traité CEE, supra note 69, at 35.
74 Michel Petit, The Agricultural Trade Confrontation between the United States and the European Community: A Challenge to Our Profession, 2 Agric. Econ. 185, 188 (1988) [hereinafter The Agricultural Trade Confrontation]. As Nicholas Butler has pointed out, "the true difficulties which the nature of the CAP and the operation of its mechanisms were going to present to the United States only emerged later." Nicholas Butler, The Ploughshares War Between Europe and America, 62 FOREIGN AFF. 105, 108 (1985).
75 See CAP, supra note 1.
been introduced after World War II to allow the maintenance of U.S. farm policies would now prevent the United States and other Contracting Parties from threatening the basic mechanisms of the CAP, namely its export refunds. In order to illustrate this assertion, a brief analysis follows of the two cases in which the compatibility of the export refunds granted by the EC with the General Agreement was put into question.

On September 25, 1978, Australia filed a complaint under GATT against the EC, challenging the compatibility of the latter’s export sugar refunds with Article XVI(3) of the General Agreement. On November 10, 1978, Brazil filed another complaint against the very same practices, using arguments almost identical to those presented by Australia. Although two different panels were set up, the members of the two panels were the same, and the development of the procedures was very similar. Some twenty years before, a GATT panel had ruled against France for using export subsidies on wheat flour similar to those under attack in 1978. The question posed by these cases was

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76 European Communities—Refunds on Exports of Sugar, 26 B.I.S.D. (GATT) 290, 292 (1979) [hereinafter Refunds on Exports of Sugar].

According to GATT Article XXIII, when any GATT Contracting Party considers that any benefit accruing to it directly under the General Agreement is being nullified or impaired, or that the attainment of any objective of the Agreement is being impeded, as a result of non-compliance, the application by another Contracting Party of any measure, regardless of whether it conflicts or not with GATT, or any other situation, it may hold consultations with the other Contracting Party in order to settle the matter. GATT, supra note 5, art. XXXIII.

If consultations fail, “the matter may be referred to the CONTRACTING PARTIES, [which] shall promptly investigate any matter so referred to them, and shall make appropriate recommendations” or rulings, as appropriate. GATT, supra note 5, art. XXIII.

Over the years, the Contracting Parties developed the practice of appointing panels composed of governmental experts, which are expected to investigate the matter in light of the relevant GATT provisions and submit a report to the Contracting Parties. For the report to have legal force, it has to be adopted by the Contracting Parties. Because the decisions are adopted by consensus, the losing party might block or bog down the procedure. In order to prevent this situation, the panels have traditionally tried to accommodate the interests of the contending parties in their reports, sometimes leaving legal considerations to a second plane.

The composition of the panels, their advisory nature, the disputes as to what their function should be, and the fact that the last say belongs to the Contracting Parties has prevented the panels from trying to clarify the meaning of many rules that are unclear or ambiguous. See Miguel Montañá-Mora, A GATT With Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes, 31 COLUM. J. TRANSNAT’L L. 103 (1993) (analyzing GATT dispute settlement from an historical perspective).

77 See European Communities—Refunds on Export of Sugar: Complaint by Brazil, 27 B.I.S.D. (GATT) 69, 97 (1980) [hereinafter Complaint by Brazil].

78 Id.; see also Refunds on Exports of Sugar, supra note 76.

79 In 1958, Australia filed a complaint against France alleging that the latter had stolen its wheat flour markets in Ceylon, Indonesia, and Malaya. According to Australia, as a result of the subsidies on wheat and wheat flour granted by France, Australian exports had been displaced by French wheat flour in those markets. In spite of the ambiguity of GATT Article XVI(3), the panel concluded that the French practices were subsidies within the terms of Article XVI(3). French Assistance to Exports of Wheat and Wheat Flour, 7 B.I.S.D. (GATT) 46 (1959).

To reach this conclusion, the panelists undertook a complex analysis of the evolution of world export markets on wheat flour in the previous years. They pointed out that French
whether the fragile fabric of Article XVI(3) could resist the strain brought by a complaint against one of the two GATT superpowers.

Australia and Brazil alleged that the export refund scheme maintained by the EC (1) had resulted in the Community having more than an equitable share of world export trade in sugar; (2) had caused or threatened to cause serious prejudice to their interests, in that the EC exports had displaced Australian and Brazilian sugar from their traditional markets; and (3) had nullified or impaired benefits accruing to them under the General Agreement.80

The first issue addressed by the panel was whether the export refunds could be considered subsidies in light of Article XVI of the General Agreement.81 The panel found that the export refunds were granted to enable Community sugar to be exported and that the refunds thus granted were financed out of the European Agriculture Guidance and Guarantee Fund (EAGGF).82 According to the panel, this Fund was a government fund of the type mentioned in the Notes and Supplementary Provisions to Article XVI(3).83 As a result, it concluded that the export refunds were subsidies subject to the provisions of Article XVI.

After noting that the EC had disclosed the export refund scheme and held consultations with Australia in compliance with Article

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80 See Complaint by Brazil supra note 77; Refunds on Exports of Sugar, supra note 76.

81 It is to be noted that the EEC had traditionally rejected any assimilation between the notion of subsidy and the notion of export refund. According to the Community, while the former is directed to foster exports, the latter is used to place EEC products in world markets at "world prices," which are artificially low. See Claude Blumann, Les Echanges Agricoles CEE- Etats-Unis et Leur Encadrement Juridique, in Les Relations Communautaire Européenne Etats-Unis 225, 230 (Jacques Bourrinet ed., 1987). In this case, however, the representative of the Community recognized that EEC practices fell within the scope of Article XVI, although he argued that the system "would only be inconsistent with [Article XVI] if it resulted in the community obtaining more than an equitable share of world export trade." Refunds on Exports of Sugar, supra note 76, at 290.

82 Refunds on Exports of Sugar, supra note 76, at 305.

83 According to the last sentence of the Notes to Article XVI(3):

Notwithstanding such determination by the CONTRACTING PARTIES, operations under such a system shall be subject to the provisions of paragraph 3 where they are wholly or partly financed out of government funds in addition to the funds collected from producers in respect of the product concerned.

XVI(1), the panel examined the consistency of the scheme with Article XVI(3). The analysis of the panel revealed the flaws and ambiguities of the section added in 1955. These ambiguities gave rise to disputes between the contending parties as to the meaning of numerous concepts, namely what was meant by "world export trade," "representative period," and "equitable share." On the other hand, the obscurity of the language used in Article XVI forced the panel to construct a workable interpretation of the most debated concepts. When dealing with the concept of "equitable share," which is generally considered the most disputed concept within Article XVI(3), the panel pointed out that "no definition of the concept 'equitable share' had been provided, and neither had it in the past been considered absolutely necessary to agree upon a precise definition of the concept." The panels deemed it appropriate and sufficient to analyze the main reasons for developments in individual market shares, and to analyze market and price developments, and then infer a conclusion on that basis. In so doing, the panel took up the "displacement standard" set out by a previous panel in 1958, according to which "more than an equitable share of world export trade" should include situations in which the effect of an export subsidy granted by a signatory is to displace the exports of another signatory, bearing in mind the developments in world markets." After an examination of sugar exports statistics, the panel noted that there had been a steady increase in Community sugar exports in recent years, coupled with a decline in Australian sales. Nevertheless, the panel found that "there was not sufficient evidence to state that the increased Community exports in recent years had to a considerable extent directly displaced Australian exports from world markets." Taking into account the difficulties in establishing this causal relationship, the panel concluded that "it was not in a position to reach a definite conclusion that the increased share had resulted in the European Community's having more than an equitable share of world export trade in that product, in terms of Article XVI(3)." In practice, this argument, which was repeated in the decision rendered in connection with the complaint brought by Brazil, meant the exoneration of the EC under Article XVI(3) as not having "more than an equitable share" of world export trade in sugar. Nonetheless, the panel considered that the Community system constituted a threat of

84 See Refunds on Exports of Sugar, supra note 76.
85 Id.
86 See Refunds on Exports of Sugar, supra note 76, at 308.
87 See French Assistance to Exports of Wheat and Wheat Flour, supra note 79, at 55.
88 See Refunds on Exports of Sugar, supra note 76, at 308.
89 Id. at 319.
90 See Complaint by Brazil, supra note 77.
serious prejudice in terms of Article XVI(1).  

The basic question raised by these cases is why the very same rules which proved enforceable in 1958 did not work in 1978. One could answer this question by saying that the facts in these cases were very different, but it hardly would be persuasive. A more convincing explanation may lie in the considerations that follow.

During the early years, GATT experienced a tremendous success due to the homogeneity of the initial contracting parties and the strong consensus in support of the GATT rules. When the panel examined the so-called French Wheat Flour Case in 1958, Article XVI(3) proved enforceable because in spite of its ambiguous language, there was still a strong consensus underlying the norms. During the 1960s and the 1970s, with the dramatic increase in membership and the loss of GATT's original coherence, there was an increasing departure from the rules. The degree of adherence that the norms received from major actors declined sharply. When the panel was called to deal with the complaints brought by Australia and Brazil in the EC Sugar Export Refunds Cases, Contracting Parties regarded as general principles what they once had considered crystal-clear rules in the very early years. The erosion of the consensus underlying the norms had hindered their effectiveness.

The report of the panel in these cases should also be read in light of the pragmatic approach towards dispute settlement that prevailed during the 1960s. In the late 1970s, when disputes arose, GATT dispute settlement procedures "had become more an occasion for politics and conciliation than for objective dispute settlement." Though the creation of the panels in 1952 marked a shift to a more legalistic approach towards dispute settlement, during the 1960s the erosion of the consensus underlying basic GATT principles changed the perception of the Contracting Parties towards legal complaints. A belief spread that since some rules were not observed anymore, enforcement

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92 Id.
93 French Assistance to Exports of Wheat and Wheat Flour, supra note 79.
94 See HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY, supra note 5 (describing the causes which contributed to the erosion of the GATT).
96 During the very early years, the Contracting Parties appointed Working Parties composed of state representatives, who would work out a solution to the dispute. In 1952, during the 7th Session of the Contracting Parties, the Chairman—apparently due to the large volume of complaints—suggested the establishment of a Panel to deal with all complaints. From then on, the practice of establishing a Panel instead of Working Parties became the usual. See HUDEC, THE GATT LEGAL SYSTEM, supra note 5, at 67, 74-76. According to Ernst-Ulrich Petersmann, since 1953 only three Working Parties have been established under Article XXIII(2). See Ernst-Ulrich Petersmann, International and European Foreign Trade Law: GATT Dispute Settlement Proceedings against the EEC, 22 COMMON MKT. L. REV. 441, 469 (1985).
of other rules was improper. All these developments led to a relaxation of the GATT regime.

In addition, the Sugar Export Refunds Cases were a direct attack on the export refunds scheme of the EC, which is central to the functioning of CAP. It should be noted that the EC had already become one of GATT’s superpowers. Although the United States had shaped GATT norms on agriculture to serve its commercial goals, the EC neither participated in the preparation of the GATT, nor formally acceded to the General Agreement. In this context, it was not feasible for the fragile dispute settlement machinery to strictly enforce a norm which was not legitimate in the eyes of the EC and to come up with a report that would have undermined the foundations of the CAP, the keystone of EC construction.

III. The Tokyo Round Reforms: Agreement Without Consensus

A. Introduction

When the GATT Contracting Parties launched the Tokyo Round (1973-1979), the patterns of world trade in agricultural products experienced dramatic changes. The period 1973-1980 saw the EC’s share of world imports fall substantially, while its exports were growing steadily. “In 1974, the Community was a major importer of dairy products, sugar and beef. By 1981 it had become the world’s largest dairy exporter, number two in world sugar trade and the exporter of over 60,000 tons of beef.” Some years later it would become one of the world’s largest exporters of wheat flour, poultry, and barley. “In 1979, the Community of Nine crossed an important commercial and political watershed. For the first time, it became a net exporter of temperate foodstuffs.” Furthermore, in 1974 only twenty percent of the EAGGF was devoted to financing export refunds, but by 1980 this percentage had increased to fifty percent.

Although the 1970s was a golden decade for U.S. agriculture, the U.S. Administration was increasingly disturbed by the growing competition of the EC in third markets. The United States “main concern

98 See Montañá-Mora, A GATT With Teeth, supra note 76 (providing an overview of GATT dispute settlement from an historical perspective).
99 The EC is a member de facto of GATT because it has never acceded to the General Agreement. Nonetheless, it has participated in its own name in all the rounds of multilateral trade negotiations since the Dillon Round (1961) and is a Contracting Party to all the codes adopted during the Tokyo Round. See Petersmann, The EC as a GATT Member, supra note 68, at 23 (discussing the position of the EC within GATT).
101 Butler, supra note 74, at 115.
104 See OCDE, supra note 4, at 22.
was the increased resort to subsidies by its trading partners, particularly the Common Agricultural Policy of the EC." United States exporters wanted the U.S. Administration to take some action against the Community's ever-increasing use of export subsidies. "The United States government sought to deflect these pressures for warlike action by promising to negotiate more effective GATT rules, [and] a new Subsidies Code that would provide for effective legal control of export subsidies." During the first three years of the Tokyo Round of negotiations, the United States tried to force the EC to abandon CAP in a process that Robert Strauss, Head of the U.S. Delegation, described as "barking at the moon." Other countries, namely Australia and Canada, also expressed the view that "there should be much better rules to limit export subsidies on agricultural products."

On the other hand, "the Community's mandate did not permit it to accept any new obligations limiting the use of subsidies. Community negotiators were authorized only to affirm and restate those subsidy obligations already contained in existing GATT texts." They feared that a stringent regulation of subsidies could undermine CAP, which in the words of the EC negotiator, was the "glue that held the European Community together." In addition, the EC insisted on stringent regulation of the countervailing duties, to limit U.S. discretion when adopting countervailing measures. The main objective of the EC was to force the United States to incorporate the so-called "injury test" into its countervailing duty legislation. Thus when the negotiations started, there was deep disagreement as to what weight should be given to subsidies on the one hand, and to countervailing duties on the other.

The disputes over the use of subsidies were not limited to the agri-

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110 Rivers & Greenwald, supra note 95, at 1452 (citing Alistair Sutton, one of the two EC negotiators).

111 The U.S. Tariff Act of 1930 did not require "injury" to domestic industry as a condition to impose countervailing duties on subsidized imports. The law did not violate GATT Article VI because it was sheltered by the grandfather clause included in the Protocol of Provisional Application of 1947.

cultural field. United States negotiators were opposed to all kinds of subsidies for ideological reasons. Behind the scenes, there was a deep conflict of philosophies as to what the proper role of a government in a market economy should be. Although the United States does not always refuse government involvement in economy, "it has an attachment to the principles of free market economics greater than that of most other countries." According to the United States, any subsidy introduces a distortion in the economy, which is bad per se. On the contrary, other countries contend that subsidies are a legitimate exercise of domestic sovereignty directed to correct the imperfections of international markets.

There was also deep disagreement in connection with the competence of the "Agriculture Group." While the EC held that all problems relating to trade in agricultural products should be dealt with in this group, the United States maintained that each issue should be addressed within the group to which it was most closely related. For example, the United States wanted the problems raised by the use of export subsidies to agricultural products to be dealt with in the "Subsidies Group." In addition, the United States proposed to establish a new regulation according to the so-called "traffic-light approach." This approach classified subsidies in three categories: prohibited (red), conditionally allowed (amber), and permitted (green). After much discussion, the United States agreed to drop this point and assented to build the new regime upon the norms of the General Agreement.

B. The Code on Subsidies and Countervailing Duties of 1979: Unbridged Policy Differences

In spite of the unfavorable negotiation context described above, the negotiators finally reached an agreement on a new text, referred to as the "Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade," most commonly known as the Code on Subsidies and Countervailing Duties.

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113 Rivers & Greenwald, supra note 95, at 1449.

This ideological conflict is aggravated by the deep disagreement among economists in connection with the effects of subsidies on international trade and the legitimacy of the measures imposed to counteract their effects.

117 Id. at 171.
118 Id.
119 Rivers & Greenwald, supra note 95, at 1466.
of 1979 (Code).\textsuperscript{120} The Code is divided into seven parts, which regulate respectively Countervailing Duties, Subsidies, Developing Countries, Special Situations, the establishment of a Committee to administer the Code, Dispute Settlement, and Final Provisions.\textsuperscript{121} Some of these aspects will be examined in the following pages.

The purpose of the Code, as stated in the preamble, is not to eliminate subsidies as such. Rather, its emphasis is on the effects of subsidies in international trade. This emphasis is also apparent in the “General Provisions” on subsidies embodied in Article 8 of the Code. The compromise reached between the United States and the Community is best illustrated in the language of Article 8(1) of the Code. According to this Article, “signatories recognize that subsidies are used by governments to promote important objectives of social and economic policy,” but they “also recognize that subsidies may cause adverse effects to the interests of other signatories.”\textsuperscript{122} As a consequence, the signatories undertake not to use export subsidies in a way inconsistent with the norms of the Code.\textsuperscript{123} In addition, “they shall seek to avoid causing, through the use of any subsidy: (a) injury to the domestic industry of another signatory, (b) nullification or impairment of the benefits accruing directly or indirectly to another signatory under the General Agreement, or (c) serious prejudice to the interests of another signatory.”\textsuperscript{124} For the purposes of this Article, it is important to highlight that nullification or impairment, or the existence of serious prejudice, may arise through “the effects of the subsidized exports in displacing the exports of like products of another signatory from a third country market.”\textsuperscript{125}

The Code refines the notification and consultation duty included in Article XVI(1) of the General Agreement, which, incidently, is the only section that binds all GATT Contracting Parties. In order to overcome the limitations of the self notification regime, the Code allows signatories to make written requests for information on the subsidies granted by another signatory. According to Article 7 of the Code, any Contracting Party “may make a written request for information on the nature and extent of any subsidy granted or maintained by another signatory . . . which operates directly or indirectly to increase exports of any product from or reduce imports of any product into its terri-

\textsuperscript{120} In force since January 1, 1980. See The Agreement on Interpretation and Application of Articles VI, XVI, XXIII of the General Agreement on Tariffs and Trade, in 26 B.I.S.D. (GATT) 56 (1980) [hereinafter Code].

\textsuperscript{121} Id.

\textsuperscript{122} Code, supra note 120, art. 8(2).

\textsuperscript{123} Id.

\textsuperscript{124} Code, supra note 120, art. 8(3).

\textsuperscript{125} Code, supra note 120, art. 8(4)(c). They may also arise through: “(a) the effects of the subsidized imports in the domestic market of the importing signatory, (b) the effects of the subsidy in displacing or impeding the imports of like products into the market of the subsidizing country.” Code, supra note 120, art. 8(4)(a) & (b).
If that signatory fails to provide the requested information, the Contracting Party concerned may bring the matter to the Committee set up in Article 16 to administer the Code. In addition, if a signatory fails to notify the Contracting Parties of a subsidy, any Contracting Party can bring it to the attention of the Committee.

With regard to export subsidies, the agricultural exporter countries sought to subject both industrial and agricultural subsidies to the same regime, but they did not succeed. Ironically, while in 1955 the interests of U.S. farmers were too powerful to fall under the same discipline as industrial subsidies, it was now the EC who would keep agricultural subsidies out of the general regime. Article 9 of the Code prohibits export subsidies on non-primary products altogether. The problem is that the negotiators were not able to find a definition of "export subsidy" acceptable both to the United States and the Community. Although it may sound perplexing, they tried to subject to stringent norms something they were unable to define. In order to alleviate the absence of a definition, the Code provides an illustrative list of practices constituting export subsidies. The list, which was based on another list drafted by a Working Party in 1955, is important because it provides an important source for interpretation. However, it has failed to resolve many interpretative problems. The absence of a definition of "subsidy" has led to different interpretations. Some scholars contend that the meaning of subsidy used in Articles 7 through 19 (Track II) is the same as the meaning used in Articles 1 through 6 (Track I), which regulate the conditions for imposing

126 Code, supra note 120, art. 7.
127 Code, supra note 120, art. 16(1).
128 Note, however, that the minerals, which were considered primary products falling under Article XVI(3), would now be considered industrial products, thus falling under Article XVI(4).
129 As a consequence of the deep differences between the EC and the United States, the negotiations failed to produce a definition of the very same thing they were trying to regulate. To remedy the lack of a definition, they annexed to the Code an illustrative list of practices that should be considered export subsidies. The fact that they did not adopt a definitive list, but only an illustrative list, has been criticized by some scholars, who consider that "this fact creates uncertainty in the application of the GATT rules." Balassa, Subsidies and Countervailing Measures: Economic Considerations, 23 J. WORLD TRADE L. 63, 64 (1989).

It should be noted that the list can be an important source of interpretation when trying to establish if a practice falls within the concept of subsidy. However, the United States has expressed the view that the list may be used to define a subsidy in the context of Part II of the Code (Regulation of Subsidies), but not in the context of Part I (Regulation of Countervailing Duties). The purpose of this interpretation is to prevent the Code from curtailing the discretion of the U.S. Administration in deciding which practices are subsidies according to U.S. countervailing duty legislation. See Jackson, The World Trading System, supra note 5, at 260.

130 As stated above, the Code is divided into seven parts. See supra note 121 and accompanying text. The first two parts are normally referred to as Track I and Track II. Track I is related to Article VI of GATT and sets forth conditions under which a Contracting Party may levy countervailing duties on subsidized imports. Track II is related to Article XVI of GATT. It regulates the conditions under which the contracting parties may grant domestic and export subsidies. Benyon & Bourgeois, The EC-US Steel Agreement, 21 COMMON MKT. L. REV. 805,
countervailing duties, while others argue that the Code uses a different concept of subsidy in each track.131

The norms dealing with agricultural export subsidies are much more permissive. Article 10(1) of the Code is essentially a reprint of Article XVI(3) of the General Agreement, although the former uses more stringent language than the latter. Although Article 10(1) says that "signatories agree not to grant directly or indirectly any export subsidy on certain primary products . . .,"132 the latter contains merely a hortatory norm: "Contracting Parties should seek to avoid the use of subsidies on the export of primary products."133 In light of this difference, some commentators hold that "le code fait de la simple obligation morale, une obligation expresse."134

In addition, the Code introduces some new guidelines directed to ease the application of some of the concepts used in that article. Taking up the "displacement standard" elaborated on by the panel on French export subsidies on wheat flour in 1958,135 the Code considers that a "'more than equitable share of world export trade' shall include any case in which the effect of an export subsidy granted by a signatory is to displace the exports of another signatory bearing in mind the developments on world markets."136 It remains to be seen whether this standard will prove workable in the future, considering the tremendous difficulties faced by the panels in the Sugar Export Refunds cases in 1979.137 The new norms of the Code provide a further clue to give meaning to the notion of "more than equitable share." According to Article 10(2)(b), "with regard to new markets, traditional patterns of supply of the product concerned to the world market, region or country, in which the new market is situated shall be taken into account in determining 'equitable share of world export trade.'"138

As a response to the problems raised in the Sugar Export Refunds cases to establish a "previous representative period," the Code provides that this period "shall normally be the three most recent calendar years in which normal market conditions existed."139 Unfortunately, the Code does not give any guidelines to determine the meaning of "nor-

327 (1984); Edmond McGovern, International Trade Regulation: GATT, the United States and the European Community 335 (1986).
131 See Beseler & Williams, Antidumping and Antisubsidy Practices 118 (1986). The arguments offered by Horlick et al. in connection with Articles VI and XVI of the General Agreement are also applicable to track I and II of the Code. See Horlick, supra note 105, at 9.  
132 Code, supra note 120, art. 10(1).  
133 GATT, supra note 5, art. XVI(3).  
134 de Bus, supra note 109, at 44.  
135 See discussion supra note 79.  
136 Code, supra note 120, art. 10(2)(a).  
137 See supra notes 76-92 and accompanying text.  
138 Code, supra note 120, art. 10(2)(b).  
139 Code, supra note 120, art. 10(2)(c).
normal market conditions." Finally, the Code tries to prevent a Contracting Party from using export subsidies to dump its products in particular markets. According to Article 10(3), "[s]ignatories further agree not to grant export subsidies on exports of certain primary products to a particular market in a manner which results in prices materially below those of other suppliers to the same market."

In connection with domestic subsidies, Article 11 establishes, for the first time in GATT's history, norms on "subsidies other than export subsidies" with effects on international trade. This Article stresses the declaration embodied in Article 8 according to which these subsidies are used by governments to promote important objectives of social and economic policy. According to Article 11, the Code does not intend to restrict the right of signatories to use such subsidies to achieve important policy objectives that they consider desirable, such as "the elimination of industrial, economic and social disadvantages of specific regions." Following the tone of Article 8, signatories recognize in Article 11(2) that such subsidies "may cause or threaten to cause injury to a domestic industry" of other signatories or "may nullify or impair benefits accruing to another signatory under the General Agreement, in particular where such subsidies would adversely affect the conditions of normal competition." Consequently, signatories "shall therefore seek to avoid causing such effects through the use of subsidies." The article also recommends that signatories take into account possible adverse effects on trade when evaluating the internal objectives to be achieved with these subsidies. In light of the soft language used in Article 11(2), it would be difficult to argue that it encompasses any legal obligation.

The third paragraph of Article 11 gives some guidance as to what practices fall under the concept of "subsidies other than export subsidies." A general requirement is "specificity," that is, that the subsidy is

141 Code, supra note 120, art. 10(3).
142 See JACkSON, THE WORLD TRADING SYSTEM, supra note 5, at 259.
143 Code, supra note 120, art. 11(1)(a). The other objectives listed in Article 11(1) are:
(b) to facilitate the restructuring, under socially acceptable conditions, of certain sectors, especially where this has become necessary by reason of changes in trade and economic policies, including international agreements resulting in lower barriers to trade,
(c) generally to sustain employment and to encourage re-training and change in employment,
(d) to encourage research and development programmes, especially in the field of high technology industries,
(e) the implementation of economic programmes and policies to promote the economic and social development of developing countries,
(f) redeployment of industry in order to avoid congestion and environmental problems.
144 Code, supra note 120, art. 11(2).
145 Id.
agricultural exports subsidies dispute

1. The Article gives some examples of practices that are deemed to be domestic subsidies: government financing of commercial enterprises, including grants, loans or guarantees, government financing of research and development programs, and fiscal incentives, among others.

2. The Code also introduces new norms designed to take into account the specific interests of developing Contracting Parties, although it fails to fulfill their expectations. The Code recognizes that "subsidies are an integral part of economic development programmes of developing countries." An important element of satisfaction for these countries is that they are exempted from the prohibition of export subsidies on non-primary products. In addition, "there shall be no presumption that export subsidies granted by developing country signatories result in adverse effects, as defined in this Agreement, to the trade or production of another signatory." Countries claiming the existence of such effects will have to prove them. The new regulation aims at favoring primarily the competitive position of least developed countries. Thus, advanced developing signatories "should endeavour to enter into a commitment to reduce or eliminate export subsidies when the use of such export subsidies is inconsistent with its competitive and development needs." With regard to export subsidies on primary products, there are no specific rules for developing signatories.

3. Another characteristic of the Code is the creation of a Committee charged with the supervision of the operation of the Agreement and the introduction of a stringent dispute settlement mechanism, which compares with the General Agreement and other codes and is "definitely an improvement." The new procedure includes strict deadlines, an automatic right to have a panel established if conciliation fails, and follow-up procedures. The refinements introduced in these articles are basically a concession by the EC to the United States in return for not putting into question the whole structure of CAP. As Professor Hudec has pointed out, the EC's largest concession in the negotiations was perhaps the establishment of a new and more strin-

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146 Code, supra note 120, art. 11(3).
147 See Seyoum, supra note 140, 525-524.
148 Code, supra note 120, art. 14(1).
149 Code, supra note 120, art. 14(2).
151 Code, supra note 120, art. 14(4).
152 Code, supra note 120, art. 14(5).
153 Code, supra note 120, art. 14(10).
154 Code, supra note 120, art. 16.
155 Code, supra note 120, arts. 12, 13, 17 & 18.
156 Horlick, supra note 105, at 18.
A detailed study of the text reveals that the Code is long on rhetoric but short on substantive reforms. While it was drafted to redress the deficient regulation of subsidies embodied in the General Agreement, the lack of consensus between the United States and the EC produced a text which is basically a confirmation of the former regime. Although it is true that some of the concepts used in Article XVI were refined, and that the Code includes a stringent dispute settlement mechanism, the fundamental issues, namely the concept of subsidy or the notion of "more than equitable share," remain untouched.

In spite of these timid reforms, some member governments of the EC feared that "the new Code could still lead to legal actions seeking to undermine the Common Agricultural Policy. They asked for some assurance that the new Code would not be used in this manner." This last minute crisis could have undermined the whole Tokyo Round of multilateral trade negotiations. To avoid the collapse of the Round, Strauss, Head of the U.S. Delegation, wrote a secret letter to Gundelach, his EC counterpart. According to some sources, in this letter Strauss confirmed to Gundelach that the United States would not use the Code to attack the CAP. As a result, the EC dropped its last-minute objections and accepted the Code. Perplexing as it may sound, in the end, the most important policy difference in the bilateral relations between the United States and the EC was purportedly settled through a "gentlemen's agreement" that, indeed, did not reflect any real consensus between the two blocks. In addition, since these agreements do not give rise to legal obligations, they lack what we have called the "appeasement of domestic pressures" function. The purpose of this agreement was to overcome the difficulties posed by domestic decision making procedures. If the content of this secret agreement had been included in the text of the Code, Congress would not have given its approval to the Tokyo Round accords. In fact, gentlemen's agreements are good techniques to reach agreements in international fora, bypassing domestic decision-making structures. The problem is that "the procedural ease with which de facto agreements

157 Hudec, "Transcending the Ostensible," supra note 106, at 221.
158 Id.
159 Id.
160 See La politique agricole commune et le GATT, 298 LES NOTES BLEUS 2 (1986).
161 Id.
162 In international law, "gentlemen's agreement" means an international accord that is not legally binding, although it creates political or moral obligations. See Schachter, The Twilight Existence of Nonbinding International Agreements, 71 Am. J. Int'l L. 296 (1977) (analyzing the legal nature of these agreements). Some authors call these agreements "de facto agreements" (Roessler) or "extralegal agreements" (Bothe). See Roessler, supra note 41, at 27, 40-56; Bothe, supra note 31, at 68.
can be adopted deprives them of the guarantee of national consensus.\textsuperscript{163}

Although the Code was presented in the United States as a major accomplishment,\textsuperscript{164} the future prospects for the Code remain murky. As Hudec has put it, "when one finds the tendency to create paper obligations coupled with the tendency to write more rigorous litigation rules, one can expect to find dramatic legal failures."\textsuperscript{165}

\section*{C. Functioning of the Code on Subsidies in Practice}

To fairly assess the functioning of any set of legal rules special attention must be given to the context in which those rules are called to operate. The circumstances which surrounded world trade in agricultural products at the beginning of the 1980s were certainly not the most adequate to test the fragile norms drafted during the Tokyo Round to cope with agricultural export subsidies. After two decades of steady increases, world trade in agricultural products had begun to fall. "As export markets stagnated and production increased, the competition for these markets increased, and the food crisis turned into a trade crisis.\textsuperscript{166} The recession of the early 1980s was especially painful for U.S. agriculture, which saw the worst crisis since the Great Depression.\textsuperscript{167} In addition, other factors made things worse, namely the U.S. embargo on wheat exports to the USSR, the emergence of new competitors, and an overvalued dollar. Since many U.S. farmers were not able to return the capital they had borrowed during the golden 1970s, they were thrown into bankruptcy. Meanwhile, EC exports were growing steadily. In fact, the Community had become the world's leading exporter of many agricultural products.\textsuperscript{168} "The Tokyo Round had created expectations of changes in EC policy that had not occurred. The economic harms being caused by the CAP were growing, particularly in U.S. export markets in third countries. The situation had produced strong political pressure for some kind of vigorous response."\textsuperscript{169} The pressures on the U.S. government to "do something" were enormous.\textsuperscript{170} As a response, between December 1981 and July 1982, the United States lodged six complaints under GATT. The six complaints had two things in common: They were related to trade in agricultural

\begin{itemize}
\item \textsuperscript{163} Roessler, supra note 41, at 55.
\item \textsuperscript{164} See Hudec, "Transcending the Ostensible." supra note 106, at 222.
\item \textsuperscript{165} Id. at 223.
\item \textsuperscript{166} HATHAWAY, supra note 47, at 16.
\item \textsuperscript{167} See Doug Bereuter, Farm Trade: A U.S. Viewpoint: Congressman Urges Reforms to Europe's Common Agricultural Policy, 255 EUROPE 12 (1986).
\item \textsuperscript{168} See Subsidies Threaten a Trade War in Food, BUS. WEEK, Feb. 8, 1982, at 37.
\item \textsuperscript{170} Bereuter, supra note 167, at 12-14.
\end{itemize}
products, and they were directed against the EC. A brief examination of the first case brought under the Code follows.

On September 29, 1981, the U.S. Trade Representative accepted a petition of Miller's National Federation, alleging that EC export subsidies on wheat flour had caused the EC share of the world market to increase significantly while forcing the U.S. share down by two-thirds. The United States lodged a complaint with GATT under the new Code. Consultations failed and a panel was set up to examine the case.

The first contention raised in this case was whether wheat flour is a primary or a non-primary product. This is a very important point because as we have seen, the Code contains an outright prohibition of export subsidies on non-primary products. It is to be noted that in its written complaint the United States assumed that wheat flour is a primary product. However, during the hearings the United States assumed that it was a non-primary product. The panel did not discuss the issue because it had not been raised by the United States in its written complaint. This attitude has been criticized by some scholars, who note that neither the Understanding of 1979 nor the Declaration of 1982 preclude contending parties from raising new points during the procedure which were not included in the written complaints.

Another contested point was the determination of the "previous representative period." As we have seen, Article 10(2)(c) of the Code establishes that this period "shall normally be the three most recent calendar years in which normal market conditions existed." The United States contended that the panel should choose the three years prior to the establishment of the CAP, alleging that the CAP had

171 Six of the complaints in the petition were: Export Subsidies on Wheat Flour (Subsidies Code), Export Subsidies on Pasta (Subsidies Code), Export Subsidies on Poultry (Subsidies Code), Production Subsidies on Canned Fruit and Raisins (GATT, art. XXIII), Export Subsidies on Sugar (Subsidies Code), and Preferential Tariff on Citrus Products (GATT, art. XXIII). See Hudec, Legal Issues, supra note 169, at 32. See also How Export Subsidies May Spark a Trade War, Bus. Week, Oct. 5, 1981, 27, 27-28 (noting that complaints were triggered by EC subsidies); The Next Transatlantic War, The Economist, Nov. 20, 1982, at 33; Subsidies Threaten a Trade War in Food, supra note 168, at 138 (discussing complaints in context of general trade disagreements between the EC and the United States).


174 See id.

175 See id.

176 See id.

177 See id. However, the panel, taking into account that there was a precedent on point and that the fact that wheat flour is a primary product is so obvious that even the United States had assumed it in its written complaint, applied a simple principle of procedural economy. See discussion on French export subsidies on wheat flour, supra note 79.

178 Coccia, supra note 173.

179 Code, supra note 120, art. 10(2)(c).
altered "normal market conditions." Nevertheless, the panel held that since trade in wheat flour had been affected by the use of subsidies by different governments in various periods, it was reasonable to take into account the three years prior to the complaint (1977-1980).

The most anticipated issue was how the panel would approach the interpretation of the notion of "more than equitable share." Following the new criteria introduced in the Code the panel examined whether the EC's exports had displaced U.S. exports in particular markets. The analysis revealed that during the representative period (1977-1980), U.S. and EC shares of world trade in wheat flour had been twenty-five percent and fifty-eight percent, respectively. In 1981, the U.S. share fell down to twenty-one percent (minus four percent), while the EC share grew to sixty-six percent (plus eight percent). In addition, twelve out of seventeen markets analyzed revealed a substantial decline of the U.S. share coupled with a steady increase of that of the EC. In addition, nine markets showed a clear proportionality between U.S. decline and EC progress. In spite of these developments, the panel was unable to reach a definite conclusion. In light of the "difficulties inherent in the concept of more than equitable share," it held that notwithstanding the important increase of EC wheat flour exports, it had not been possible to establish a causal relationship between EC growth and U.S. decline. It has been argued that "a panel should try to attenuate those difficulties instead of using them as an excuse for not making a decision." This view ignores the nature and the limitations of GATT dispute settlement machinery, and the fact that in the past, "creative" interpretations have been criticized by the Contracting Parties. In addition, "experience shows that dispute settlement proceedings cannot substitute for an absent consensus on substantive rules."

The EC Export Refunds on Wheat Flour case was just the beginning of a series of cases that undermined GATT dispute settlement machinery. Hilt's comments on the performance of the GATT dispute settlement process in recent years are illustrative: "Recently a few serious deadlocks in the GATT D[ispute] S[ettlement] procedures, all in

180 Coccia, supra note 173.
181 Id.
182 Id.
184 Id.
the field of agriculture and especially under the Subsidies Code were sufficient to discredit the most effective and unique DS system that economic organizations operating on a worldwide basis have ever experienced." These cases revealed the inadequacy of GATT dispute settlement mechanisms to solve the substantive policy issues that the participants in the Tokyo Round were not able to resolve.

From a broader perspective, one could argue that since the EC had been involved deeply in the negotiations, it could no longer contend that the regime was illegitimate in its eyes. The real problem in the Tokyo Round was that with regard to both industrial and agricultural subsidies there was no real consensus either on the rules or on the principles on which the norms were to stand. While the norms on subsidies were regarded in the United States as legally binding "norms of obligation," in the EC they seemed mere guidelines or "norms of aspiration." In light of these considerations, the only option left to restore the "constraint function" of the GATT regime was to put the agricultural policies of all Contracting Parties on the table and to bargain on the policies themselves. The panel itself suggested that any solution to the export subsidies issue should be reached through negotiations within the International Wheat Council or the GATT, and that Article 10 of the Code could not be enforced unless its language was reformed.

IV. Negotiating the Substantive Issues: The Uruguay Round

A. The Ministerial Declaration of 1982 and Its Aftermath

The GATT Contracting Parties met at the Ministerial level for the first time after completion of the Tokyo Round on November 29, 1982. Noting that the multilateral trading system was seriously endangered, they issued a Declaration, which included basically hortatory norms, in which they addressed the most outstanding problems raised since the end of the Tokyo Round.

As far as agriculture is concerned, the Contracting Parties undertook "to bring agriculture more fully into the multilateral trading system by improving the effectiveness of GATT rules, provisions and

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188 In connection with industrial subsidies, Bourgeois has noted that, whatever views one might have about the desirability of an optimal world economic order, international legal rules to implement it are only really enforceable if they correspond to a genuine consensus of the Contracting Parties. Such a consensus does not seem to exist with respect to subsidisation, because there is no consensus on the policies for which subsidisation is an instrument. Bourgeois, *supra* note 186, at 232.
189 *Jackson, World Trade and the Law of GATT, supra* note 5, at 761.
disciplines and through their common interpretation; to seek to improve terms of access to markets; and to bring export competition under greater discipline." Obviously, this was only rhetoric. Behind the scenes, there were bitter discussions between the Community and the United States. While the latter accused the EC of using export refunds to steal U.S. markets in third countries, the EC argued that the problems faced by U.S. farmers were not a consequence of CAP, but a result of the recession, the overvaluation of the dollar, the high interest rates, new world market developments, and the U.S. embargo on the USSR. In any event, "since the violent verbal attack by U.S. representatives in the 1982 GATT Ministerial meeting, it appears that suppressing these restitutions has become the main U.S. objective in agricultural trade negotiations."198

Shortly after the Ministerial Declaration, the United States decided to leave verbal attacks aside and adopt a more expedient course of action. The United States and the EC had decided to undertake a joint study to find solutions to their frictions, but the meetings were fruitless. At the beginning of December 1982, the Department of Agriculture was "preparing a plan and package in response to the European stance on agricultural subsidies—updating its list of U.S. exports which might be subsidized."194 In January of 1983, John Block, the Secretary of Agriculture, "was reported to be pressing President Reagan 'to fight fire with fire.'"195 As a result, by the end of January "the first salvo or 'shot across the bow' from the [United States] came with the announced sale of one million metric tons of wheat flour to Egypt at less than the market price, a sale which completely eliminated the Europeans from the world's largest wheat flour market."196 The United States deliberately attacked a French market, considering the French government to be the main upholder of the CAP.197 Some interpreted this action as a provocation to induce the EC to bring a complaint in GATT against the United States, arguing that if the EC had won the case it would have opened a door for the United States to challenge its own export refund schemes.198 Instead, the Community reacted by selling one million metric tons of wheat to China.199

In the midst of this confrontation, the conclusions of the U.S./EC Wheat Flour Panel report, discussed in Part III, came as an outrage in the United States, which eventually requested a review of the panel's

193 Petit, The Agricultural Trade Confrontation, supra note 74, at 189.
194 Butler, supra note 74, at 117.
195 Id. at 115.
197 Michell Petit, Conflictos entre las estrategias agroalimentarias de los Estados Unidos y de la Comunidad Economica Europea, 235 REVISTA DE ESTUDIOS AGRO-SOCIALES 267, 272 (1986).
198 Boger, supra note 79, at 222 n.279 (citing Julian Heron, Washington trade attorney).
decision.\textsuperscript{200} In light of the inefficacy of the GATT regulation, the United States adopted numerous measures directed to foster agricultural exports.\textsuperscript{201} What ensued was a subsidy war and an escalation of the trade conflicts related to agricultural products, a detailed description of which falls outside the scope of this paper. However, it is worth noting here that as a result of this escalation, in 1984, for example, the United States and the EC were spending approximately $35 billion in agricultural subsidies.\textsuperscript{202}

\textbf{B. The Ministerial Declaration of Punta del Este: The Negotiation Approach}

On September 20, 1986, the Contracting Parties to the GATT launched in Punta del Este (Uruguay) a new round of multilateral trade negotiations. Both the number of participating countries (ninety-two at the beginning of the negotiations) and the issues included in the Declaration revealed that the Uruguay Round would be the most ambitious in GATT’s history. Its basic objectives would be to strengthen and extend the coverage of the GATT system—the agenda included new areas such as Services, Trade Related Investment Measures (TRIMS), Intellectual Property and Agriculture; to reduce non-tariff barriers to trade; to increase the role of developing countries in GATT; and, generally, to restore respect to GATT.\textsuperscript{203}

One of the most important features of the Declaration was the inclusion of agriculture. The world’s crisis in agricultural trade and the escalation of the conflict between the United States and the EC gave agriculture a privileged place in the agenda of negotiations. In April 1986, James Baker had claimed “that the [U.S.-European Community disputes on agricultural trade posed the biggest threat to the world’s free trading system.”\textsuperscript{204} The growing international tension and the high cost of farm policies prompted the Contracting Parties, for the first time in the negotiating history of the GATT, to put all forms of agricultural protection on the table.\textsuperscript{205}

\textsuperscript{200} Boger, supra note 79, at 223.
\textsuperscript{201} For example, the Bonus Incentive Commodity Export Program (BICEP), since the 1985 Farm Bill a part of the Export Enhancement Program, the Export Credit Guarantee Programs (GSM-102 and GSM-103), Marketing Loans, the Targeted Export Assistance (TEA), and an expansion of the PL-480 Program were among the measures. See COMMISSION EEC, REPORT ON UNITED STATES TRADE BARRIERS AND UNFAIR PRACTICES 28-33 (1991); see also JEAN P. CHAVET, LA GUERRE DU BLE 55, 53-56, 157 (1988).
\textsuperscript{202} Barbara Insel, A World Awash in Grain, 63 FOREIGN AFFAIRS 892, 900 (1985).
\textsuperscript{203} See Ministerial Declaration of Punta del Este, supra note 6; THE URUGUAY ROUND: A HANDBOOK OF THE MULTILATERAL TRADE NEGOTIATIONS (J. Michael Finger & Andrzej Olechowski eds., 1987) [hereinafter HANDBOOK].
\textsuperscript{205} Gary P. Sampson, Developing Countries and the Uruguay Round of Trade Negotiations, 1989 PROC. WORLD BANK ANN. CONF. ON DEV. ECON. 21, 50.
According to the Punta del Este Declaration, "negotiations shall aim to achieve greater liberalization of trade in agriculture and bring all measures affecting import access and export competition under strengthened and more operationally effective GATT rules and disciplines." The negotiations would focus on three areas: improving market access, export competition, and minimizing the adverse effects of sanitary and phytosanitary regulations on trade in agriculture. This was a dramatic change of approach with respect to past GATT practice. Although at the inception of GATT the rules were written to fit the agricultural programs then in existence, now the process would be the reverse. The Contracting Parties now would negotiate reforms in their agricultural policies to bring them in line with the basic GATT principles. During the Tokyo Round the Contracting Parties tried to subject their policies to stringent regulation without coping with the roots of the problem; now, the regulation would be coupled with a negotiation of the substantive issues.

As far as agricultural subsidies are concerned, the negotiations would take place within the "Agriculture Group," rather than within the "Subsidies Group." This is a consequence of the approach selected: direct bargaining over the agricultural policies. Thus, the results reached in the "Subsidies Group" would require adjustment according to the reforms made by the "Agriculture Group."

C. Negotiation Context

The United States and the EC have dominated international agricultural trade negotiations since the creation of the latter. In fact, during the Tokyo Round important parts of the negotiations were dealt with among the two giants and later presented to the other Contracting Parties as a fait accompli. To prevent this situation from occurring again, a group encompassing both developed and developing countries representing twenty-two percent of world agricultural exports was created in 1986 under the leadership of Australia. The group is generally known as the Cairns Group, after the Australian city where it held its first meeting. Any final accord in the Uruguay Round would have to accommodate the interests of the United States, the EC,

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206 As Hathaway has noted, "what is omitted from the Declaration is also telling. No reference is made to the uniqueness of agriculture or its special adjustment problems or to food security or the special role of food trade." HATHAWAY, supra note 47, at 123.
207 Ministerial Declaration of Punta del Este, supra note 6.
208 Id.
209 Id. at 24.
and the Cairns Group. Another country to be taken into account is Japan, given the strategic importance of agriculture to its economy.

For a better understanding of the evolution of the negotiations, it is worth outlining here the negotiation interests of each block at the beginning of the Uruguay Round.

1. **The United States**

Everyone wonders why the United States attaches so much importance to a sector that accounts for only two percent of its Gross Domestic Product.\(^\text{212}\) The response to this question lies in a mixture of commercial, ideological, and political factors.

The United States negotiating strategy is conditioned by its supposed comparative advantage in agricultural production. According to this argument, the reduction of agricultural protectionism would produce a decline in EC exports, to the advantage of the United States. As a consequence, the liberalization process would produce an important number of new jobs in the United States.\(^\text{215}\) Although the comparative advantage of the United States is generally admitted, some commentators hold that "those who have concluded that Europe is not a competitive producer need think again."\(^\text{214}\)

From an ideological point of view, the desire to reduce agricultural protectionism may be explained as a consequence of U.S. neoliberal rhetoric. While the EC has consistently proposed international commodity agreements in international trade negotiations on agricultural trade, the United States has always rejected any formal attempt to create cartels on ideological grounds. The creation of cartels "probably opposes an 'anglo-saxon' approach, a priori favoring market mechanisms, to an attitude, quite general on the European continent, seeking a political solution when faced with a major conflict of interests."\(^\text{215}\)

The U.S. position is also explained by political considerations. We have all heard of the legendary power of farm lobbies. In the United States, agribusiness interests are very well organized to influence political decisions. Congressmen receive financial contributions from farm lobbyists, and also receive the support of specialized newspapers dur-

\(^{212}\) In 1988, agriculture accounted for 2% of the Gross Domestic Product in the United States, 2.9% in the EC, 3% in Canada, 4.2% in Australia, and 8.4% in New Zealand. ALBERT MASSOT i MARTI, EL DERECHO AGRARIO, EL DERECHO AGROALIMENTARIO, y EL DERECHO RURAL EN EL ORDENAMIENTO JURIDICO DE LA UNION EUROPEA 727 (1992).


\(^{214}\) Insel, supra note 202, at 895. Likewise, Bergman notes that in some products the EEC is more competitive than the U.S. See Dennis Bergman, Les Relations Commerciales Agricoles entre la CEE et les Etats-Unis, in LES RELATIONS COMMUNAUTE EUROPEENNE ETATS-UNIS 301, 302 (Jacques Bourrinet ed., 1987).

\(^{215}\) Petit, The Agricultural Trade Confrontation, supra note 74, at 190.
The prime target of U.S. negotiators has been export subsidies, in contrast to the EC, which has been seeking a global negotiation of all forms of support to agriculture. The U.S. stand is explained by the fact that unlike the EC, the United States has, during the last decades, based its agricultural policy on deficiency payments and a wide array of indirect subsidies to farmers. Thus its main interest has not been global negotiation, but the export refunds granted by the Community.

2. The European Community

When the Uruguay Round was launched, the EC had already initiated a reform of the CAP. In spite of these reforms, the Community was very reluctant to include agriculture on the agenda for a number of different reasons.

The first factor which comes to mind when trying to explain the Community's stand is the rigidity of its decision-making process. This rigidity has been an obstacle to the reform of the CAP for many years, and has prevented the Commission from voicing its opinion in international fora. In Professor Weiler's words, "the story of the EC in international trade is that of a giant in chains who has not really been able to translate its economic power effectively onto the international arena."

The agricultural trade negotiations have been hindered by the deep differences between the Commission and the Council of Ministers. The weight given to national governments in Community decisions reduces the Commission's leeway. This would partly explain the defensive position of the Community in the U.S./EC agricultural confrontation.

216 See Petit, Conflictos entre las estrategias agroalimentarias, supra note 197, at 274-78 (discussing U.S. policy making in the agricultural sector).
217 See, e.g., Avery, supra note 3 at 481, 482.
218 Although an ambiguous agreement was reached at the Ministerial Meeting of 1982 to study the problems connected with agricultural trade, the Community, under French pressure, insisted that this did not mean that the EC would initiate negotiations on trade liberalization in this sector. Later, the mounting pressure of the United States, the Cairns Group, and the pro-reformists within the EC, coupled with the spillover effects of agricultural disputes, prompted the Community to include agriculture in the Uruguay Round agenda. See ANNA MURPHY, THE EUROPEAN COMMUNITY AND THE INTERNATIONAL TRADING SYSTEM 112 (1990).
221 See Catherine Pivot, Logiques Comparées des Politiques Agricoles Américaine et Européenne, in LES RELATIONS COMMUNAUTÉS EUROPEENNES-ÉTATS-UNIS, at 193, 205-06 (Jacques Bourrinet ed., 1987). In addition, Patterson has stated that "the most serious impact on the trading system growing out of the very nature of the EC and its decision-making structure is that it seems to have built-in, and serious, bias toward protectionism. This is most clearly seen in the area where the EC has gone furthest in establishing a common policy: agriculture." Gardner Patterson, The European Community as a Threat to the System, in TRADE POLICY IN THE 1980's 223, 227 (William R. Cline ed., 1983).
As in the United States, EC pressure groups also have an important bearing on the decision-making process. Since lobbies are not as well organized as in the United States, they operate mainly on national governments. In the past, the establishment of formal consultation mechanisms between the Commission and domestic pressure groups was rejected, because a risk existed that a formal involvement of these groups would harm the already complex decision-making process. The EC Commission, however, has just approved a document which may be the point of departure for the regulation of lobbies within the EC.

Another factor to be taken into account is the structure of European agriculture. It should be noted that in 1980 the land in agricultural use in the United States was 430 million hectares, while in the EC the figure stood at 102 million; however, the EC had 6.5 million farms and 8.7 million farmers, in contrast to the United States, where there were only 2.6 million farms and 3.5 million farmers. The number of farms and the high percentage of jobs directly related to agriculture caused the EC to adopt a cautious stand in the negotiations. As is well known, there are not only agricultural interests lurking behind the CAP, but also rural development, demographic, and environmental concerns.

Finally, the Community knows that it has enormous bargaining power because, in spite of the accusations of being protectionist, the EC is the leading importer of agricultural products in the world. In fact, "most observers link power within GATT to the size of domestic markets to which improved access can be offered in a trade bargaining context."

3. Cairns Group

As noted, the Cairns Group includes fourteen countries, which represent twenty-two percent of world agricultural exports, and which name themselves "fair traders." It is an ambiguous and heterogeneous group that encompasses both developed countries (Australia, New Zealand, Canada) and developing countries (Argentina, Brazil, Chile, Fiji, Hungary, Indonesia, Thailand, Colombia, Malaysia, the Philippines, and Uruguay). The participation of Canada in the group stresses its heterogeneity, taking into account that its agricultural pol-

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222 Murphy, supra note 218, at 126. But see a document recently approved by the EC Commission and published in Un diálogo abierto y estructurado entre la Comisión y los grupos de interés, 1999 O.J. (C 63).
224 See OCDE, supra note 4.
225 Finlayson & Zacher, supra note 12, at 312-313.
icy is quite protectionist.\textsuperscript{227}

The Group was created to carry out concerted action in the negotiations, increasing their bargaining power in front of the EC and the United States. Note that this group was created under the leadership of Australia, a country that has brought several complaints under GATT against agricultural subsidies. The countries within the Cairns Group consider that they are the real victims of the quarrels between the EC and the United States.\textsuperscript{228} They support a dramatic liberalization of world trade in agriculture. In practice, their position is very close to the U.S. stance.\textsuperscript{229}

4. Japan

The Japanese model is close to that of the EC. They maintain the most protectionist agricultural policy in the world, especially in connection with rice.\textsuperscript{230} This is due to food security concerns, but also to the political progress of the agricultural lobby, NOKYO, within the peculiar Japanese electoral system.\textsuperscript{231} NOKYO represents over five million farmers and has an important influence over some political parties.\textsuperscript{232}

D. Evolution of the Negotiations

The first proposal containing specific measures aimed at the liberalization of world trade in agricultural products was submitted by the United States on July 6, 1987. Its obvious focus was agricultural export subsidies. The most salient measures proposed by the United States were as follows: (1) agricultural subsidies: to eliminate within a ten-year period all subsidies which directly or indirectly affect agricultural trade; (2) export subsidies: to freeze and progressively eradicate, within a ten-year period, the quantities exported by using export subsidies; (3) import access: to eliminate, within a ten-year period, all non-tariff barriers to imports; only tariffs would be allowed; and (4) sanitary and phytosanitary regulations: to harmonize national regulations in order to reduce the adverse effects of national legislation on international trade.

This offer was considered in Community circles as a bluff. In fact, if the U.S. proposition had gone through, the GATT norms on agricultural trade would have been much more stringent than those regulating trade in industrial products. In addition, the U.S. Administration would have had serious problems in getting it accepted by Congress.
The proposal should be read in the context of the U.S. negotiating strategy, but it was clearly unrealistic. As one commentator put it, the so-called "double-zero" option "avait au moins le mérite de frapper les esprits."233

The proposal was strongly opposed by other Contracting Parties, namely the EC and Japan. They argued that the negotiations should take into account the special factors affecting agriculture, like food security concerns, the dependence on weather conditions, and the different structure of agriculture in different countries.234

While U.S. attention concentrated on EC export subsidies, the latter made clear from the outset that the negotiations should embrace all measures affecting agricultural trade, not only export subsidies.235 In addition, the Community highlighted that agriculture negotiations cannot be isolated from negotiations in other sectors. In Willy De Clerq’s words, "the concept of globality is essential to the success of the new round."236

On October 26, 1987, the EC submitted its proposal, which contrasted sharply with the U.S. document. The Community presented a two-stage plan, which called for short-term internationally coordinated actions to stabilize the most imbalanced markets, such as dairy products, sugar, and cereals. At a later time, the Contracting Parties would seek to reduce the level of government support to agriculture. The plan to "coordinate actions" was in line with the "cartel-oriented" approach held traditionally by the EC, which has always been opposed by the United States.

In contrast, the proposal presented by the Cairns Group the same day was modeled after the U.S. document. Put briefly, its basic objectives were the elimination of "all import and export restrictions and all domestic subsidies with an impact on trade. Only measures for infrastructure improvement, disaster relief and ... direct income support to farmers and consumers would be allowed."237

Japan presented its proposal in December 1987.238 As already noted, the main concern of the Japanese was the protection of their rice production. Accordingly, Japan’s document included principles similar to those submitted by the EC. It emphasized the non-economic objectives of farm policies, namely rural development, environmental quality, and food security.239

233 Id. at 20.
236 Id.
238 Id.
239 Id. at 146.
During the numerous meetings held by the "Agriculture Group" from December 1987 to December 1988, the four main negotiators stuck to their initial positions, making any progress impossible. While the negotiations were under way, trade disputes related to agriculture were a recurring issue. In addition, the elections scheduled in France and in the United States hindered the negotiation process. It is well known that no government is willing to make concessions in trade talks when elections lie ahead.

The GATT Contracting Parties decided to schedule a meeting at the Ministerial level to evaluate the progress made and to give the negotiations political impulse. The meeting, which has come to be known in GATT jargon as the "Midterm Review," took place in Montreal in December 1988. The discussions on agricultural trade were dominated by the United States and the EC, which were unable to smooth over their differences. While the former insisted on the "elimination" of trade distorting measures, the latter preferred the word "reduction." The efforts to find a word acceptable to both Contracting Parties were futile and ridiculous, taking into account that an agreement on the substance, not on the language, is what was lacking.

The lack of agreement about the reduction of agricultural subsidies was one of the most striking features of the Montreal Meeting. As a response to EC and U.S. intransigence, some developing countries blocked the whole Round. To overcome the stalemate, the Contracting Parties agreed to a new meeting in Geneva in April 1989. In preparation for the gathering, the GATT Director General held various meetings with the Community and the United States, while the former's Commissioners Ray McSharry (Agriculture) and Frans Andriessen (External Relations) gathered with their American counterparts, Clayton Yeutter and Carla Hills. These meetings produced a compromise agreement on the long-term objective of the reforms, which should represent "a 'substantial progressive reduction' in agricultural support."

As a result of these previous meetings, in Geneva the Contracting Parties reached an agreement on a twenty-point document, which

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240 For example, on September 22, 1988, the EC and Australia lodged two complaints in GATT against the sugar import regime of the United States. See GATT, *United States Sugar Trade Policy*, 57 Focus (GATT Information Service, Geneva) 1, 1-2 (1988).
241 See *Murphy*, supra note 218.
242 *Id.* at 119.
243 *Id.*
246 See *Murphy*, supra note 218, at 119.
247 *Id.* at 119-120.
248 The main features of the document may be summarized as follows:

a) Long-term Elements: The long-term goals are to establish a fair and market-oriented agri-
provided a framework for future discussions and brought U.S./EC positions closer to the long-term objective of the negotiations. The Contracting Parties undertook to submit before December 1989 new proposals for negotiations based on the legal framework accorded in Geneva.

The proposals submitted some months later revealed that the agreement reached in April was purely cosmetic. Although the United States abandoned the so-called "double-zero" option, its proposal was considered in Brussels as a direct attack on the CAP. The

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249 The United States document, submitted on October 25, 1989, included the following proposals:
a) Market access: All non-tariff barriers to trade (including EC's variable levies) would be converted into tariffs, which would be reduced down to zero or "a low level"; b) Export Competition: Export subsidies would be eliminated and prohibited within a five-year period. Only "authentic food aid" would escape this prohibition; c) Internal Support: the central idea is to eliminate within a ten-year period all forms of price support and support measures linked to production. In connection with domestic subsidies, the United States proposed a regulation inspired by the so-called traffic light approach. Some policies would be suppressed (red light), notably all support measures linked to prices or production; other policies would be subject to GATT's discipline (yellow light); and some policies would be authorized (green light), namely income support measures delinked from production, environmental programs, and food aid; d) Sanitary and Phytosanitary Measures: New procedures for notification, consultation and dispute settlement would be established; and e) Developing Countries: Although a different and special treatment is envisaged for less developing countries, advanced developing countries will have to comply with the new regulation. U.S. Trade Representative, Internal Proposal to GATT (Apr. 1989) (on file with author).

As expected, the document presented by the Cairns Group on November 27, 1989 was very ambitious. Thus the liberalization process would be applied to all measures, all products, and all Contracting Parties. The main points of the proposal were similar to the U.S. document. It is worth noting here that it proposed the modification of Article XVI of the General Agreement (and its counterparts in the Code) in order to prohibit all export subsidies.

In contrast to the preceding proposals, the first page of the EC’s document, which was submitted on December 20, 1989, emphasized the importance of the specific characteristics of agriculture production, its dependence on weather conditions, price fluctuations, and the like. The EC opposed in principle the "tarification option," arguing that under this approach the U.S. deficiency payments would escape the regulation. In addition, while the United States focused on the elimination of frontier measures (namely variable levies), the EC emphasized that the total internal support should be calculated, and then reduced using the so-called Global Measure of Support. EC, Internal Proposal to GATT (Dec. 20, 1989) (on file with author).

In its proposal, Japan argued that taking into account the non-economic concerns related to agriculture (e.g., food security), it would be difficult to eliminate all support measures. It considered that a reduction of the levels of support would be constructive and realistic, but it did not propose specific measures or deadlines.

250 See Rechazo frontal de la CA al plan de EE.UU, LA VANGUARDIA, Oct. 27, 1989, at 78.
United States and the Cairns Group warned that the negotiations would not go through unless the EC proposal was improved. These new squabbles, coupled with the problems raised in other areas, resulted in a new deadlock of the negotiations that lasted until the fall of 1990. Taking into account that the Uruguay Round was scheduled to come to an end in December of 1990, the prospects for an agreement were very bleak.

In November 1990, in spite of the fierce opposition from agricultural pressure groups, the EC Commission managed to have the Council approve a new proposal, according to which the EC would reduce its agricultural subsidies by thirty percent. Once again, the proposal fell short of the expectations of both the United States and the Cairns Group.

On December 3, 1990, the GATT Contracting Parties launched the Brussels meeting that was supposed to close the Uruguay Round while 30,000 farmers rioted in the streets. The United States and the Cairns Group demanded precise commitments on export subsidies and market access; the EC insisted on a global negotiation. After four days of tense discussions, the negotiations collapsed.

The proposal had been strongly opposed by the Council of Ministers for one month. When it passed, European agricultural lobbies said that the Commission had betrayed them. See Les Douze d’accord pour réduire de 30% les Subventions Agricoles, Supplement D’Agromonde Service (EUROPOLITIQUE), No. 317, at 1 (Nov. 23, 1990).

The central theme of the new proposal was a reduction by 30% of the support and protection for the principal products (this means not all products). This would include: a) A 30% reduction of the support to agriculture, using the Global Measure of Support; b) the “tarification” of some frontier measures (although the proposal included a corrective mechanism which was considered by the United States as a new form of variable levy); and c) a concomitant adjustment of export refunds. EC, Internal Proposal to GATT (Nov. 7, 1990) (on file with author).

Note that the Community avoided any precise commitment on export subsidies. As Mr. Mac Sharry said in the European Parliament, “the Community has made it clear that it is not prepared to single out export refunds for particular treatment.” Mr. Mac Sharry, Member of the Commission with Responsibility for Agriculture, Community Offer on Agriculture in the Uruguay Round, delivered at Nov. Plenary Sess. of the European Parliament, Strasbourg 5 (Nov. 22, 1990).

The Contracting Parties met in Brussels without a basis for negotiating. On December 4, the EC tried to explain its proposal, but the negotiators were unable to reach an agreement on the negotiation method. The EC accused the United States of having transformed the Uruguay Round into a farm conference, while the latter rejected the EC’s global approach. After much heated discussion, the Brussels meeting came to an end without an agreement. Manuel Estepé, Ultimátum de veinticuatro horas para evitar el fracaso de la Ronda Uruguay, LA VANGUARDIA, Dec. 6, 1990, at 56.
V. The Quest for a Compromise: Dunkel's Document of December 1991

A. Introduction

The collapse of the talks in December 1990 was followed by a proliferation of trade disputes involving agricultural products.\(^{255}\) President Bush proposed a $1.2 billion export subsidy program, a gesture that was interpreted as a maneuver to put pressure on the Community.\(^{256}\) In addition, the uncertainty as to the final outcome of the Round was stressed by the fact that the U.S. Executive's negotiating mandate was due to expire in May 1991.

In this uncertain context, in February 1991 the EC Commission presented a document on the reform of the CAP which would be the point of departure for the dramatic reform accorded by the EC Council of Ministers in May 1992.\(^{257}\) The problem was that the compromise struck within the EC Council was so delicately balanced that the leeway left for further negotiations was severely curtailed. In any event, this move eased the tensions with the United States, which welcomed the proposed reforms with surprise.\(^{258}\) In fact, some interpreted this document as a political gesture aimed at helping the United States Exec-


\(^{257}\) See Desarrollo y Futuro de la PAC, COM (91) 258 final (1991). The basic purpose of this text was to provoke a deep reflection within Community circles as to what the future of the CAP should be, in the light of mounting budgetary constraints and increasing trade conflicts with third countries. The first part of the document exposes the main reasons militating against the maintenance of the traditional principles. It explains how the scheme, designed while the EC was running a deficit in most agricultural products, was no longer useful to fulfill the objectives set forth in Article 39 of the EC Treaty. The reforms adopted in the past had failed to improve the situation. Thus, according to the Commission, the only solution lay not in another set of partial reforms, but in a deep revision of the objectives and principles of the CAP.

The document recognizes the importance of farmers for the preservation of the environment and rural development. As a consequence, it calls for instruments designed to support farmers' income, taking into account both production and environmental considerations. The central idea of the document is to substitute price support mechanisms by direct income measures.

In its final remarks, the Commission made clear that the only inviable option was the maintenance of the status quo. If the CAP is not modified, the situation of both the markets and the budget will be unbearable.

tive to have the fast-track extended by Congress,\textsuperscript{259} which eventually renewed fast-track authority in May 1991.\textsuperscript{260} The new climate brought about by the EC internal reforms and the renewal of the fast-track gave the negotiations some stimulus.

In December 1991, the GATT Director-General came up with a document entitled "Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations,"\textsuperscript{261} which was meant to be the basis for a definitive accord. It is worth pausing here to examine the main features of the text on "Agriculture" (Section L).\textsuperscript{262}

\section*{B. The Proposed Uruguay Round Agreement on Agriculture}

The document has four parts: "Uruguay Round Agreement on Agriculture" (Part A), "Agreement on Modalities for the Establishment of Specific Binding Commitments Under the Reform Programme" (Part B), "Decision by Contracting Parties on the Application of Sanitary and Phytosanitary Measures" (Part C), and the "Declaration on Measures Concerning the Possible Negative Effects of the Reform Programme on Net Food-Importing Developing Countries" (Part D). Because they are central to the main theme of this paper, Parts A and B will be analyzed briefly.

An overview of the text reveals four major features. First, unlike past GATT norms on agricultural export subsidies, the document contains more than rhetoric. It includes specific binding commitments in three important areas—market access, domestic support, and export competition. Second, the text adds a new element to GATT's institutional structure—a Committee on Agriculture. Third, the document takes into account the distinctive problems of developing countries, especially the least developed countries. Fourth, the proposed agreement should be understood not as a point of arrival, but as a point of departure in a long reform process.

With regard to the first feature, the document prescribes that the Contracting Parties should submit lists of specific commitments on market access, domestic support, and export competition before March 1, 1992,\textsuperscript{263} which would be annexed to the Uruguay Round Protocol to the General Agreement.\textsuperscript{264} In connection with market access, the document takes up the "tariffication option" proposed by the United States. This means that all non-tariff barriers, such as quantitative import restrictions, variable import levies, minimum import prices,

\textsuperscript{262} \textit{Draft Final Act}, supra note 261, sec. L; see also Massot i Martí, \textit{El Derecho Agrario}, supra note 212, at 706-23.
\textsuperscript{264} \textit{Draft Final Act}, supra note 261, sec. L, pt. A, art. 3.
discretionary import licensing, state trading enterprises, voluntary export restraints, and the like, shall be converted into tariff equivalents. The level of tariff equivalents resulting from this process shall constitute the base level for the implementation of reduction commitments on market access. According to the document, “ordinary customs duties, including those resulting from tariffication, shall be reduced, from the year 1993 to 1999, on a simple average basis by thirty-six percent with a minimum rate of reduction of fifteen percent for each tariff line.” In addition, if there are no significant imports, minimum access opportunities shall be established. It is to be noted that the proposed text includes a Special Safeguard Provision, which would exclude the application in this context of Articles XIX(1)(a) and XIX(3) of the General Agreement.

The domestic support reduction commitments shall be expressed in terms of Aggregate Measurements of Support (AMS). When calculation of the AMS is not practicable, Contracting Parties shall undertake “equivalent commitments.” According to the proposed agreement, all domestic support shall be reduced, from the year 1993 to the year 1999, by twenty percent, taking as the base period the years 1986 to 1988. However, there is a de minimis margin of five percent. In order to take into account the reforms already undertaken by the EC, “credit shall be allowed in respect of actions undertaken since the year 1986.”

It is to be observed that the domestic support reduction commitments do not apply to all domestic support measures. The measures which meet the criteria set out in Annex 2 will be exempted from these commitments. Annex 2 includes two “fundamental requirements” (ab-

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265 Draft Final Act, supra note 261, sec. L, annex 3, sec. A.
267 These minimum access opportunities shall represent in the first year not less than 3% of corresponding consumption in the period 1993-1999 and shall be expanded to reach 5% by the end of the implementation period. Draft Final Act, supra note 261, sec. L, pt. B, para. 5.
269 Draft Final Act, supra note 261, sec. L, pt. A, art. 6. Annex 5 contains a detailed definition of the AMS. According to paragraph 1, the AMS shall be calculated on a product-specific basis for each basic product (defined as the product as close as practicable to the point of first sale) receiving market price support, non-exempt direct payments, or any other subsidy not exempted from the reduction commitment (“other non-exempt policies”). Support which is non-product specific shall be totalled into one non-product-specific AMS in total monetary terms. Draft Final Act, supra note 261, sec. L, annex 5, para. 6-13.
270 Draft Final Act, supra note 261, sec. L, annex 6 (explaining the criteria to determine these commitments).
271 If domestic support subject to reduction does not exceed 5% of the total value of production, the Contracting Parties will not be required to undertake the reduction of that support. For developing countries the margin shall be 10%. Draft Final Act, supra note 261, sec. L, pt. A, art. 6(4) & pt. B, para. 10.
sence of, or at most minimal, trade distortion effects or effects on production) and two "basic criteria": "(i) the support in question shall be provided through a publicly-funded government programme (including government revenue foregone) not involving transfers from consumers;"279 and (ii) the support in question shall not have the effect of providing price support to producers."274 In short, the purpose of these provisions is to exempt from the reduction commitments those measures that are decoupled from prices and production. The importance of these exemptions should not be underestimated. They include a wide array of measures such as research programs, training services, inspection, marketing and infrastructural services, direct provision of Food Aid bought by the donor government at market prices, income support decoupled from prices or volume of production (eligibility shall be determined by clearly-defined criteria such as income, status as a producer or landowner, or factor use or production level in a defined and fixed base period), government financial participation in income insurance and income safety-net programs, payments for relief from natural disasters, producer retirement programs, payments under environmental programs, and payments under regional assistance programs.275 All these measures, if they meet the detailed criteria prescribed in Annex 2, not only will be exempt from the reduction commitments, but also shall be considered as non-actionable for the purposes of countervailing measures.276

As far as export competition is concerned, Article 9 provides a list of export subsidies which shall be subject to reduction commitments.277 Export subsidies included in the list shall be subject to budg-

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273 Note that for GATT purposes, aid which does not come from a government fund is not a subsidy. See Agreement on Subsidies and Countervailing Measures, Draft Final Act, supra note 261, sec. I.

274 Draft Final Act, supra note 261, sec. L, annex 2, para. 1.


277 The following subsidies are subject to reduction commitments:

(a) The provision by governments or their agencies of direct subsidies, including payments-in-kind, to a firm, to an industry, to producers of an agricultural product, to a cooperative or other association of such producers, or to a marketing board, contingent on export performance.

(b) The sale or disposal for export by governments or their agencies of non-commercial stocks of agricultural products at a price lower than the comparable price charged for the like product to buyers in the domestic market.

(c) Payments on the export of an agricultural product that are financed by virtue of governmental action, whether or not a charge on the public account is involved, including payments that are financed from the proceeds of a levy imposed on the agricultural product concerned or on an agricultural product from which the exported product is derived.

(d) The provision of subsidies to reduce the costs of marketing exports of agricultural products (other than widely available export promotion and advisory services) including handling, upgrading and other processing costs, and the costs of international transport and freight.
etary outlay and quantity commitments. Over the implementation period (1993-1999) and taking as a base period the years 1986-1990, budgetary outlays shall be reduced by thirty-six percent, and quantities by twenty-four percent. The Contracting Parties also undertake not to introduce or reintroduce subsidies on the export of agricultural products if such subsidies were not granted during the base period. In addition, they may negotiate commitments to limit the scope of export subsidies granted on agricultural products in individual or regional markets. Note that this last provision has a strong “market share” approach.

Annex 8 sets out the criteria according to which export competition commitments shall be determined. In connection with the product coverage of the commitments, the document states that “outlay and quantity commitment levels shall be established for all products or groups of products in any case where exports of such products are subsidized through practices listed in Annex 7 paragraphs (1) (a) through (1) (e).” It gives an illustrative list of such products, which include *inter alia*, wheat and wheat flour, coarse grains, rice, oilseeds, vegetable oils, oilcakes, sugar, butter and butter oil, skim milk powder, cheese, other milk products, bovine meat, pigmeat, poultry meat, sheepmeat, live animals, eggs, wine, fruit, vegetables, tobacco, and cotton. Not surprisingly, some of these products have been the source of much GATT litigation in the past.

Because the document provides that commitments shall be established for those products that are subsidized through practices listed in Annex 7, a question arises: What if the products are subsidized through practices other than those listed in Annex 7? The answer to this question depends on the nature of the practice at hand. If it can be considered a domestic subsidy, the practice will fall under the regulation of “Domestic Support.” If it is an export subsidy, other than those listed in Annex 7, the answer must be found in Article 10 of the proposed agreement: These subsidies “shall not be applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments; nor shall non-commercial transactions be used to circumvent such commitments.” In addition, “participants undertake not to provide export credits, export credit guarantees or in-

Draft Final Act, supra note 261, sec. L, art. 9 & annex 7.


280 Draft Final Act, supra note 261, sec. L, annex 8, para. 7.

281 Draft Final Act, supra note 261, sec. L, annex 8, para. 7.

Another question posed by the proposed agreement is what happens if a Contracting Party is exporting a quantity in excess of its reduction commitment level and it claims that such quantity is not subsidized. In this case, it is up to that Contracting Party to prove that no export subsidy (listed in Annex 7 or not) has been granted in respect of such quantity. Note that under Article XVI(3) of the General Agreement (and Article 10 of the Code), if a Contracting Party complains that another Contracting Party has acquired "more than an equitable share of world export trade" in a product by granting export subsidies, the burden of proof is on the claimant. According to the proposed agreement, the burden of proof in this context now will be born by the defendant.

Finally, the document prescribes that Contracting Parties' donors of international food aid shall ensure that this aid is not tied directly or indirectly to commercial exports of agricultural products to recipient countries. The regulation of food aid has to be welcome, bearing in mind that a good deal of U.S. exports have taken place under the mask of food aid. The loose language used in Article 10(4) casts some doubts, however, as to whether it will be effective in preventing the circumvention of export commitments.

Another major feature of the proposed text is the establishment of a Committee on Agriculture, charged with the supervision of the operation of the Agreement (review function). The review process will take place on the basis of the notifications submitted by the Contracting Parties and documents prepared by the Secretariat. Consultations and Dispute Settlement will be governed by Articles XXII and XXIII of

Draft Final Act, supra note 261, sec. L, pt. A, art. 10(2). In this context, it is worth mentioning the Organization for Economic Cooperation and Development (OECD) Agreement on Export Credits. See Agreement on Export Credit Terms, 113 OECD Observer 14 (1981); Andrew M. Moravcsik, Disciplining Trade Finance: The OECD Export Credit Arrangement, 43 Int'l Org. 175 (1989); John E. Ray, The OECD Consensus on Export Credits, 9 World Econ. 295 (1986).


Draft Final Act, supra note 261, sec. L, pt. A, art. 10(4)(a). In addition, these transactions shall be carried out according to the FAO "Principles of Surplus Disposal and Consultative Obligations." Draft Final Act, supra note 261, sec. L, pt. A, art. 10(4)(b). When possible, this aid shall be provided in full grant form or on terms no less concessional than those included in Article IV of the Food Aid Convention of 1986. Draft Final Act, supra note 261, sec. L, pt. A, art. 10(4)(c).


the General Agreement and by the new Understanding on Dispute Settlement.\footnote{Draft Final Act, supra note 261, sec. L, pt. A, art. 18(1). See also Understanding on Rules and Procedures Governing the Settlement of Disputes under Articles XXII and XXIII of the General Agreement on Tariffs and Trade, Draft Final Act, supra note 261, sec. S, 1-2 & sec. T, 1-6; Montañá-Mora, A GATT With Teeth, supra note 76 (commenting on the new GATT dispute settlement procedures).}

In this context, it is to be noted that the reforms have strengthened dramatically the judicial features of the procedure. This can be seen, for example, in the creation of a Standing Appellate Body composed of persons "with demonstrated expertise in law,"\footnote{Draft Final Act, supra note 261, sec. S, para. 15(5).} which shall hear appeals "limited to issues of law covered in the panel report and legal interpretation developed by the panel."\footnote{Draft Final Act, supra note 261, sec. S, para. 15(6).} If the proposal to create an Integrated Dispute Settlement System goes through, some of the traditional functions of the Code Committees in connection with dispute settlement (establishment of panels, adoption of panel reports) will be taken up by a Dispute Settlement Body.\footnote{Draft Final Act, supra note 261, sec. L, pt. D.}

A third feature of the document is that it takes into account the special problems of developing countries. Part D, for example, which is based on Article 15 of the Agreement, encompasses a Declaration on measures concerning the negative effects of the reform on food-importing developing countries.\footnote{Draft Final Act, supra note 261, sec. L, pt. A, art. 15(2), & pt. B, para. 16.} Article 14(1) provides for special and differential treatment in respect of commitments. "Least developed countries shall not be required to undertake reduction commitments."\footnote{Draft Final Act, supra note 261, sec. L, pt. B, para. 13-20.} In addition, numerous provisions scattered throughout the text of the Agreement provide for special and differential treatment of these countries.\footnote{Draft Final Act, supra note 261, sec. L, pt. B, para. 17.} With respect to market access, developed countries will take into account fully the particular needs of these countries, for example, by providing for greater improvement of the terms of access for agricultural products of particular interest to these countries.\footnote{Draft Final Act, supra note 261, sec. L, pt. B, para. 18-19. In addition, according to Article 6(3) if domestic support subject to reduction does not exceed 10% of the total value of production, there shall be no requirement to undertake the reduction of that support.} With respect to domestic support, investment subsidies and agricultural input subsidies generally available shall be exempt from domestic support reduction commitments. This is also the case for domestic support to producers to encourage diversification from growing illicit narcotic crops.\footnote{Draft Final Act, supra note 261, sec. L, pt. A, art. 6(2) & pt. B, para. 18-19. In addition, according to Article 6(3) if domestic support subject to reduction does not exceed 10% of the total value of production, there shall be no requirement to undertake the reduction of that support.} In connection with export competition, developing countries shall not be required to undertake commitments in respect of some of the subsidies listed in Annex 7.\footnote{Draft Final Act, supra note 261, sec. L, pt. A, art. 9(4) & pt. B, para. 20.} With respect to specific commitments in the areas of market access, domestic support and ex-
port competition, developing countries shall have the flexibility to apply lower rates of reduction, provided that the rate of reduction in each case is no less than two-thirds of that specified for developed countries. In addition, they have an implementation period of ten years.\textsuperscript{298} As already noted, least developed countries are exempt from the reduction commitments altogether.

Finally, the proposed Agreement on Agriculture should be regarded not as a point of arrival, but as the beginning of a very long process. This is already apparent in the preamble ("Having decided to establish a basis for initiating a process of reform..."),\textsuperscript{299} but is most clearly seen in the legal *pactum de negotiando* included in Part XI, entitled "Continuation of the Reform Process." According to the only article of this part (Article 19), "[r]ecognizing that the long-term objective of substantial progressive reductions in support and protection resulting in fundamental reform is an ongoing process, the participants agree that negotiations for continuing the process will be initiated one year before the end of the implementation period."\textsuperscript{300} In so doing, they shall take into account "the experience to that date in implementing the reduction commitments; the effects of the reduction commitments on world trade in agriculture; and what further commitments are necessary to achieve the above mentioned long-term objectives."\textsuperscript{301}

C. The Agreement, United States/EC: The Single Most Important Trade Deal the World Has Ever Seen?

According to Dunkel’s document, lists of specific commitments were due on March 1, 1992.\textsuperscript{302} However, in January it was already apparent that this deadline could not be met because 3 out of the 108 participants in the Uruguay Round found the proposed agreement on Agriculture unacceptable: the EC, the United States and Japan.\textsuperscript{303} The main problem for the EC is that the Agreement on Agriculture would undermine the foundations of the projected “new CAP.” According to the document, the farmer income support programs envisaged by the reform would be subject to domestic support reduction commitments. The United States, although closer to the principles of the document, refused to turn its import quotas on dairy products, sugar, peanuts, and tobacco into tariffs.\textsuperscript{304} The Japanese feared that the agreement, if approved, would undermine many of the measures designed to protect its rice production. The disagreements resulted in a new stalemate of the negotiations.

\textsuperscript{298} Draft Final Act, supra note 261, sec. L, pt. B, para. 15.
\textsuperscript{299} Draft Final Act, supra note 261, sec. L, pt. A, pmbl.
\textsuperscript{300} Draft Final Act, supra note 261, sec. L, pt. A, art. 19.
\textsuperscript{301} Draft Final Act, supra note 261, sec. L, pt. A, art. 19.
\textsuperscript{303} See Massot i Martí, El Derecho Agrario, supra note 212, at 722.
\textsuperscript{304} Id.
In the fall of 1992, the United States and the EC resumed bilateral talks in order to unlock the Round. While the United States sought a twenty-four percent reduction in the Community's quantity of subsidized exports, the latter called for no more than an eighteen percent reduction.\footnote{Keith Bradsher, \textit{U.S. Hope Dashed On Global Trade}, \textit{N.Y. Times}, Oct. 22, 1992, at A1, D10.} In addition, the United States pursued a dramatic reduction of Community's subsidies on oilseeds, and threatened to impose $1 billion trade sanctions on Community products unless an accord was reached.\footnote{Id.} On the other hand, the EC wanted some assurance that the direct payments to farmers introduced under the new CAP would not be challenged.\footnote{See id.; El contencioso agrícola vuelve a bloquear las negociaciones de EE.UU. y la CEE en el GATT, \textit{La Vanguardia}, Oct. 29, 1992, at 60.}

Once again, the talks revealed the deep divergences within the Community. While most EC Member States called for a prompt accord,\footnote{See Londres presiona a sus socios europeos para cerrar un acuerdo en el GATT, \textit{La Vanguardia}, Oct. 25, 1992, at 78.} France launched diplomatic efforts to prevent the Community from closing a deal with the United States.\footnote{See Francia intensifica las presiones para frenar un acuerdo del GATT, \textit{La Vanguardia}, Oct. 26, 1992, at 49.} In spite of French opposition, after six years of negotiations a deal was struck on November 19, 1992. In John Major's words, it was "the single most important trade deal the world has ever seen."\footnote{See George Brock & Martin Fletcher, \textit{Farm Deal Lifts Trade War}, \textit{The Times} (London), Nov. 21, 1992, at 1.} The tentative pact would call for a twenty-one percent reduction in the volume of farm products exported through export subsidies, and a thirty percent spending cut in export subsidies during the period 1994-2000, taking as a basis the years 1986-1990.\footnote{Id.} In addition, the Community would undertake a reform program to settle the long U.S./EC dispute on soybeans, which would include a limitation on oilseeds planting of 5.128 million hectares, and a mandatory set-aside of fifteen percent of the acreage the first year, and at least ten percent in subsequent years.\footnote{Id.} That would leave EC production in future years between 8.5 million and 9.7 million tons.\footnote{Id.} The accord also envisaged a twenty percent cut in domestic support during the same period, taking as a basis the years 1986-1988. With regard to market access, the deal includes the "tariffication" of non-tariff barriers. The resulting level of tariff equivalents would be reduced by thirty-six percent, using the same basis. Where there are no significant imports, minimum access opportunities would be established. Most importantly, the accord accepted the basic instruments of
the new CAP.\textsuperscript{314}

Although it made the front page of newspapers worldwide,\textsuperscript{315} the enthusiasm evoked by the U.S./EC accord on agriculture was soon overshadowed by France’s charge that the EC Commission had exceeded its Mandate, and by its announcement that it would prevent the Council of Ministers from approving the agreement.\textsuperscript{316} Because according to the Treaty of Rome (Article 114) trade policy decisions are adopted by qualified majority, from a legal point of view the EC could reach an agreement with the United States in spite of French opposition. This move, however, would be politically unfeasible. This episode illustrates the extent to which the capacity of the EC to speak in international arena is curtailed by the difficulties posed by its decision-making procedures.

At the time of this writing, the 108 participants of the Uruguay Round were still negotiating in order to complete the round that was expected to end in December 1990. It is not surprising that the GATT has been labeled as the “General Agreement on Talk and Talk.”\textsuperscript{317} In light of the fundamental difficulties faced by the negotiators, two questions leap to mind: (1) Why have the negotiations lasted so long? (2) Will there be a final deal at all?

The answer to the first question may lie in a dense web of political, economic, ideological, strategic, and legal factors, the identification and exposition of which fall beyond the scope of this paper. Nevertheless, a few considerations can be advanced here, not to answer the question, but to provide some elements for debate. The first reason for the delay is apparent when one looks at the agenda of the Uruguay Round. The participants are seeking to extend the coverage of the GATT system by including new areas such as Services, Intellectual Property, and Trade Measures Related to Investment.\textsuperscript{318} In addition, they are trying to include agriculture as an economic sector for the first time under GATT coverage. These additions raise not only political and economic issues, but also difficult technical issues. In fact, a number of developing Contracting Parties do not have any idea about what impact an agreement on Services would have on their economy. In any event, if one compares the aims of the Uruguay Round and the complexity of the issues involved with previous rounds, the delay in the


\textsuperscript{316} See Francia rechaza el acuerdo comercial entre EE.UU. y la CE, \textit{La Vanguardia}, Nov. 21, 1992, at 1 & 49-51.

\textsuperscript{317} \textit{Building Blocks or Stumbling Blocks?}, \textit{The Economist}, Oct. 31, 1992, at 69.

\textsuperscript{318} See \textit{HANDBOOK}, supra note 203.
projected agenda is hardly surprising. This complexity demanded significant involvement of networks of knowledge-based experts, whose ideas usually evolve independently, rather than under the direction of domestic governments.\textsuperscript{319} The growing influence of groups of experts in international cooperation has caught the attention of political scientists, who have started to study the role of epistemic communities in international policy coordination.\textsuperscript{320}

Second, from a legal perspective it has been argued that the projected introduction of a "tough" dispute settlement mechanism has brought additional strain upon the negotiations.\textsuperscript{321} Participants in the Uruguay Round are negotiating not only new rules, but also effective rules. It is to be noted that one of the objectives explicitly stated in the Declaration of Punta del Este was to "strengthen the role of GATT, improve the multilateral trading system based on the principles and rules of the GATT and bring about a wider coverage of world trade under agreed, effective and enforceable multilateral disciplines."\textsuperscript{322} With this idea in mind, participants have introduced dramatic reforms in the GATT dispute settlement procedure, which after the Uruguay Round will look much like an international court.

A third factor usually overlooked by both international lawyers and international political scientists is the importance of domestic politics.\textsuperscript{323} International norms do not operate in a vacuum. The process by which they are created, adopted, implemented, and enforced depends deeply on domestic factors such as the organization of domestic pressure groups and the domestic decision-making structures within each individual contracting party. The problems raised in connection with the negotiations on agricultural subsidies illustrate this point. The position of the United States is heavily conditioned by the power of farm lobbies, but mostly by the fast-track procedure. When negotiating in the international trade arena, the U.S. Executive must always keep an eye on Washington to make sure that the agreement reached will be approved and implemented by Congress.

With respect to the EC, the main domestic problem when negotiating international trade norms is the decision-making structure. Ac-


\textsuperscript{320} See Peter M. Haas, Knowledge, Power and International Policy Coordination, 46 Int’l Org. (1992) (discussing the role of epistemic communities in international policy coordination in different issue areas).

\textsuperscript{321} "One of the main reasons for the tremendous difficulties in completing the Uruguay Round is related to the introduction of a ‘tough’ dispute settlement mechanism. Contracting Parties take more seriously the negotiation of rules that will be judicially enforced after the Round." Montañán-Mora, A GATT With Teeth, supra note 76, at 178-179.

\textsuperscript{322} See Ministerial Declaration of Punta del Este, supra note 6.

\textsuperscript{323} See Milner, supra note 12, at 481. See also John H. Jackson et al., Implementing the Tokyo Round: National Constitutions and International Economic Rules (1984) (discussing the influence of domestic decision-making structures on international economic norms).
According to Article 113 of the Treaty of Rome, the negotiation of international trade treaties is the responsibility of the EC Commission. However, the Commission must follow the directions of the EC Council of Ministers. In addition, the negotiated agreement requires the latter's approval. As a consequence, trade policy decisions have to accommodate the different views and interests of all member states. In view of the evolution of the negotiations within the GATT "Agriculture Group," it can be argued that the struggles within the Community have been one of the most prominent causes for the delay of the round. Most recently, the disputes between different member states as a consequence of the farm deal with the United States, and its coincidence in time with the efforts to ratify the Maastricht treaty, have slowed the pace of the negotiations.

In the light of the foregoing considerations, many observers wonder whether there will be a final deal at all. Although any attempt to answer this question is a venture into the realm of speculation, it can be argued that an agreement finally will be reached.

First, the argument usually espoused to predict a satisfactory completion of the round comes from economics. Although it has become fashionable to argue the contrary, most economists contend that the liberalization of world trade fostered by the eventual completion of the Uruguay Round will result in a dramatic expansion of world trade to the benefit of all countries. In the context of the current sluggish economic scenario, an agreement seems a *conditio sine qua non* for economic recovery. In a recent interview, the Chairman of the IMF argued that the failure of the Uruguay Round would be the worst event for the World since World War II.324

The numerous advantages that the GATT legal system has brought to the international community makes the success of the Uruguay Round desirable from the perspective of international law also. Although criticized in recent years, GATT dispute settlement procedures have proved to be the most effective dispute settlement system available among all economic organizations operating on a worldwide basis.325 By subjecting national governments to some agreed international standards, GATT norms have created stable conditions under which economic operators can function with certainty. "In fact, several analysts have suggested that uncertainty may well be the single most important trade barrier and thus its lessening, the major achievement of the GATT."326

Other arguments to predict a successful outcome for the round come from international political scientists. Several models developed

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324 See El FMI condiciona la reactivación económica mundial al éxito de la Ronda Uruguay, El Pals (Madrid), April 24, 1992, at 61.
325 Hilf, supra note 187, at 63.
326 Finlayson & Zacher, supra note 12, at 314.
within this discipline suggest that in a GATT-type situation, cooperation is likely to emerge. According to the Absolute Gains hypotheses, states cooperate because they aim at realizing absolute gains. "Following economic reasoning states act rationally to increase the net benefits they receive." This is more likely to occur in an iterated scenario such as the GATT regime. A similar hypothesis is presented by the theory of relative gains. The problem with these models is that in international trade negotiations the actors are not states but politicians or public servants, who are constrained by various domestic factors. "This shifts the focus from economics to politics."

The International Relations discipline also argues that international regimes are easier to maintain than to create. That is why they are valued by governments. In the case of GATT, the value of the international trade regime to governments is illustrated by the growing number of Contracting Parties (108 at the time of writing). Notwithstanding the problems confronted in the Uruguay Round, very few would advocate the demise of the current regime. Were this to occur, it would be impossible to create another international trade regime under current conditions. As the proponents of the theory of hegemonic stability have suggested, regimes might be maintained in the absence of a hegemon, but they cannot be created ex-novo.

It is one thing to forecast the round will be successfully completed, and another to predict when it will come to an end. As already noted, the round is largely overdue. The delays are not only attributable to the problems inherent to the negotiations, but also to other factors. In this sense, U.S. elections and the problems raised in connection with the ratification of the Maastricht accords have played a relevant role. With regard to the problems raised by the negotiations, although there have been stalemates in other sectors such as services or textiles, agriculture topped the list. Nevertheless, one should not be overly pessimistic. In fact, the dramatic reform of the CAP initiated by the EC, although partially prompted by domestic financial and political constraints, has to be read as the first success of the agricultural trade negotiations within the Uruguay Round. France's opposition to the deal between the United States and the

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328 Milner, supra note 12, at 470.
331 See KEOHANE, AFTER HEGEMONY, supra note 14, at 50, 85-109.
332 The classical theory of hegemonic stability requires the presence of a hegemony both for creating and for maintaining a regime. However, Keohane argues that "cooperation does not necessarily require the existence of a hegemonic leader after international regimes have been established." Id. at 82.
Community does not seem insurmountable. Regimes create situations in which issues are linked to one another. French resistance may be overcome if the EC strikes good deals in other sectors, such as services. In any event, whatever agreement the negotiators reach within the "Agriculture Group," it will be just the point of departure of a very long process.

VI. Conclusions

This Article has examined the compatibility of GATT with the CAP agricultural export subsidies traditionally granted by the EC. It has analyzed the evolution of GATT regulation of agricultural subsidies from a historical perspective, with special emphasis on the role of the United States and the EC in the process of development, applying one of the newest methodologies for the study of international cooperation: the combination of international relations theory with the doctrinal tradition of international law.

The role GATT has played in the international regulation of agricultural export subsidies has varied over the years. Thus an appraisal of the strength of the regime and the functions performed by GATT as a regulatory framework has required an historical analysis. "Recognition of the fact that the relative importance of regime norms varies over time it is critical for an adequate understanding of regime evolution."333

The analysis has revealed that the agricultural export subsidies dispute between the EC and the United States lends itself unfavorably to strict legal scrutiny. A comprehensive understanding of the role of GATT as a regulatory regime should take advantage of the broader landscape provided by international political scientists. From this perspective, GATT is regarded as one of the international regimes established after World War II characterized by formal agreements and institutional structures.334 Since the United States was in a position of hegemony after Western Europe’s decay, it modeled the basic principles of the regime after its own commercial interests. This is clearly seen in the original regulation of the General Agreement, which left agriculture outside the GATT to serve U.S. interests. It is also apparent in the waiver granted to the United States in 1955 to legalize its import restrictions and in the norms introduced in the Review Session of the same year. In spite of the ambiguous language of the rules dealing with agricultural export subsidies, they proved to be enforceable, as demonstrated by the 1958 French Wheat Flour case. The outcome of this case should be analyzed in the light of the effectiveness of GATT as a regulatory regime during the 1950s. International political scientists have attributed this success to the presence of a hegemony, while inter-

333 Finlayson & Zacher, supra note 12, at 305.
334 KEOHANE, AFTER HEGEMONY, supra note 14, at 139.
national lawyers point to the strong consensus underlying the norms, and the development of original and effective dispute settlement machinery. The interpretations are complementary.

The creation of the EC was an important challenge to the GATT system. Firmly supported by the United States on economic and strategic grounds, the Treaty of Rome itself raised some questions as to its compatibility with the norms of the General Agreement. In any event, the Community became a de facto member of GATT. It had to take up the positions of its member states, this meaning that it could not shape the regime to suit its specific interests. Over the years, the common agricultural policy developed by the EC, especially its export refunds, gave rise to disputes with other Contracting Parties. At the same time, numerous developments such as the growing heterogeneity of GATT membership and a mounting protectionism resulted in an erosion of the system. The uneven timing between these developments and U.S. economic decline seems to belie some of the assumptions of the theory of hegemonic stability. The deterioration of GATT as a legal system, coupled with the loss of credibility provoked by the 1955 U.S. agricultural waiver, led to a decline in the adherence to the rules. In this context, a strict legal analysis, as demonstrated by the EC Sugar Cases, was unwarranted. In the late 1970s, EC practices should not have been analyzed in terms of legality, but in terms of legitimacy.

The inability of the GATT regime to cope with the disputes raised by agricultural subsidies skyrocketed after the Tokyo Round. During the negotiations, and in spite of the lack of consensus, the United States and the EC, constrained by domestic pressures, drafted new legal rules and adopted a stringent dispute settlement mechanism. The unresolved policy differences between the two blocks, coupled with an historical coincidence—the greatest crisis in world agricultural trade since the 1930s—resulted in the demise of the new dispute settlement procedures, undermining the credibility of the whole GATT legal system. The failure of the Code, as illustrated by the EC Wheat Flour Case and what ensued, demonstrated that the solution of the policy differences between the EC and the United States called for a direct negotiation of their agricultural policies. In short, the key was not only stringent regulation, but above all, negotiation. With this idea in mind, the negotiators at the Uruguay Round, for the first time in history, put all agricultural support measures on the negotiating table. Although the EC, at French insistence, was very reluctant to include agriculture within the agenda, the issue finally topped the list. In light of the bitter disputes between the two blocks after the Ministerial Declaration of 1982, and the threat of a global trade war, the final inclusion of agriculture within the Uruguay negotiations may be explained as a relative success of the tit for tat strategy. It also can be explained
from other perspectives, such as the pressure from domestic liberal
groups within the Community to have agriculture on the table.

The deep involvement of the United States, the EC, Japan, and
the Cairns Group will legitimate GATT rules on agriculture, in the
sense that the new rules will be the result of a more balanced outcome.
An analysis of the proposed agreement reveals a triumph of economic
rationality over politics. In this sense, the growing complexity of the
issues addressed in international trade negotiations are likely to in-
crease the influence of the so-called epistemic communities in the pro-
cess of international policy coordination. In the long run, one might
envision a future in which trade relations will be less influenced by
politics and more influenced by technical expertise. At this moment,
though, if an agreement is to be reached, economic logic will have to
take into account practical political realities in some sectors. In con-
nection with agriculture, the reform of the CAP, although also fostered
by other factors, is in itself a major accomplishment of the Uruguay
Round.

The scope of the agenda, the complexity of the negotiations, and
domestic factors bearing on the negotiating ability of the most impor-
tant participants have resulted in several stalemates and a two-year de-
lay. The question now posed is whether there will be a final deal at all. Relying on generally accepted assumptions from different disciplines,
a number of arguments have been presented to predict the successful
completion of the round. First, there is widespread agreement among
economists that the liberalization brought by the round would result in
a dramatic expansion of world trade to the benefit of all countries. Ap-
lication of several models developed by political scientists, such as
the Absolute Gains or Relative Gains hypothesis makes this argument
even more compelling. The problem with these models is that they
usually overlook domestic politics.

From a legal perspective, it has been argued that GATT norms
have contributed to the peaceful settlement of trade disputes among
states, and have provided stable conditions for world commerce. As
Petersmann has noted, "international rules increase predictability and
calculability by indicating to the international economic actors what
they can rightfully expect from others and by sanctioning non-adher-
ence to the rules."

Conceived either as a "prototype of a legalistic
type system of international
regulation," or as a mere forum where
"trade problems are negotiated and compromised within a general
framework of rules," most scholars recognize the tremendous bene-


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336 *Jackson & Davey, supra note 5*, at 252.
fits that the GATT legal system has brought into the international community.

Other arguments to predict the final outcome of the round have come from the theory of international regimes. According to its proponents, regimes are much easier to maintain than to create. A failure of the Uruguay Round would seriously damage the international trade regime instituted after World War II. The regime has facilitated the celebration of eight rounds of negotiations, has placed the concerns of the developing countries in a better setting than would be the case without the regime, and most importantly, it has ensured adherence to its rules.