

# The Institutional Framework for Food Regulation and Trade

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The past twenty years has seen a remarkable change in the international environment in which farms and food firms operate. In a Conference devoted to the changes in the nature of food regulation and trade, it may be useful to review the new set of institutions and market structures that make up the international environment.<sup>1</sup> This international environment has been called a “transnational policy space” with actors, agendas, procedures and rules.<sup>2</sup> Many of the pieces of this policy space were put into place in the Uruguay Round, in 1995. Others have been the response to increasingly interdependent systems (globalization) in the marketing and processing of foods. All countries are impacted by these changes. Understanding the nature of these rules is therefore an important part of recognizing the drivers of the international environment in which food firms and farms exist.

## ***The Ancient Regime***

Twenty years ago, in May 1986, the Uruguay Round had not yet started. Trade in agricultural products was included somewhat imperfectly in the General Agreement on Tariffs and Trade (GATT), as a result of a number of exceptions built into the Articles and the special treatment demanded by the dominant countries reluctant to cede any control over agricultural policy.<sup>3</sup> Food policy was also largely autonomous. National authorities communicated on common health problems, but each was essentially responsible for their own set of rules. The real if somewhat diffuse forces of globalization had not yet hit agricultural and food markets, which still seemed to be largely based on internal trade for the meeting of food needs; the sales of surplus temperate zone products from those countries with adequate land resources to those with the greater population

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<sup>1</sup> In order to keep focused, I will avoid discussing important but more remote aspects of the institutional environment, such as commercial and financial regulations.

<sup>2</sup> See Coleman, Grant and Josling, 2004.

<sup>3</sup> The special treatment included the provision in Article XI that allowed quantitative import restrictions to support domestic supply control, and the clause in Article XVI that allowed export subsidies for primary products, subject to constraints that proved impossible to impose. In addition, Article XX gave the green light to trade barriers needed to enforce regulations to protect the health of plants animals and people. This also proved a wide loophole, as no test was introduced to sort the legitimate regulation from the protection of inefficient producers. See Josling, Tangermann and Warley, 1996.

density; and the traditional flows of tropical products based on past colonial ties. Much of this trade was therefore in primary products designed for processing, not highly differentiated, with prices largely influenced by the domestic agricultural policies of the OECD countries. Many saw such “world markets” as being an inadequate basis for domestic farm policy.<sup>4</sup> Domestic price policies were supported by border measures that insulated producers from foreign competition. And many considered the food regulations that govern the processing, distribution and retailing of agricultural products also to be sacrosanct.

In the first half of the 1980s, a few countries had experimented with a reform of their domestic policies, and hence were able to change their trade policies in agricultural products.<sup>5</sup> But it was not until the cost of US farm programs rose sharply, as world cereal prices dipped in the middle of the decade and demand stagnated, that the notion of a broad reform of domestic and trade policies began to take hold. The EU’s Common Agricultural Policy (CAP) was also becoming very expensive, even for the ten members, and the imminent addition of Spain and Portugal threatened more intense competition for southern EU producers. So European politicians became somewhat more receptive to the multilateral discussion of what had previously been off limits.

Partly as a result of lax disciplines, and partly in the absence of effective ways of enforcing those disciplines, the impact of international rules on domestic food policy was minimal. One decision from that era illustrates this lack of regard for international rules. The ban on the use of hormones in beef production within the EU, to curb the misuse of growth-enhancing drugs, was extended in 1985 to include imports of beef, with little apparent concern for whether that action was consistent with international obligations.<sup>6</sup> Indeed, the motivation of some in Europe was clearly to favor domestic producers and protect them from imports. The so-called “fourth criterion” that was being discussed for health and safety regulations was the social and economic position of the industry. Though the issue later revolved around the health implications of the use of six hormones in cattle raising, initially the issue drew its political salience from the impact that using economic criteria in food regulations would have on trade.

But the beef-hormone case in many ways proved to be a watershed. First, it involved groups in farm policy that had not been interested in such matters before. It helped to create the food-safety constituency that now plays a major role in regulation. Second, it alerted policy administrators to the importance of consumer confidence in maintaining demand for a particular product. Third, the issue helped to convince skeptics in the US Congress that a dispute settlement process with the power to impose decisions on reluctant countries might be a sound investment in the future of the trade system. And fourth, it exposed the weaknesses of the fragmented system of health and safety rules in an increasingly interdependent world.

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<sup>4</sup> US sugar producers still refer to the world price as the “dumped price”.

<sup>5</sup> One such country was Chile, which tried trade reform, including liberalizing agricultural trade, in the 1970s. But that reform faltered and had to be revived in the early 1980s.

<sup>6</sup> The action would probably have been contrary to the GATT Standards Code, but the EU maintained that a “process standard” such as the way in which beef are raised was not covered by the Standards Code.

## ***The New Epoch Dawns***

In food trade regulation, the start of the new era can plausibly be traced to 1985, the year that the EU extended its hormone ban to imported beef. In that same year the US passed a Farm Bill that began a process of reform in domestic price support policy. The decision in the 1985 US Farm Bill to tie direct payments to historical yields and acres became the basis of the “decoupling” of farm support that dominated the next decade of US farm policy. Even more dramatic was the abrupt decision of the New Zealand government to abandon its support of the livestock sector. Many Latin American countries began to reform their agricultural trade policies about this time, along with their macroeconomic reforms.<sup>7</sup> The landscape was beginning to change.

In 1986 the Uruguay Round was launched with an explicit goal to liberalize trade in agricultural products and remove the anomalies in the GATT. Food policy reform was a natural part of that goal. The decision to include discussions on domestic food regulations as well as farm support policies was critical to the changes that followed. But though the final agreement reached six years later resulted in only modest gains in market access, the Uruguay Round marked a breakthrough in the decades-long attempts to develop a framework of rules for food and agricultural trade as well as for domestic farm policies.

At the same time as the process of developing a multilateral framework for agricultural and food trade was being negotiated in the GATT, bilateral and regional processes were also responding to the demands of globalization and more open economies. The 1985 White Paper on the “completion” of the EU internal market marked the start of a major, and largely successful attempt to reduce transactions costs within the EU by the end of 1992. Food regulations figured prominently in the debate on how the objective was to be achieved. The tension between harmonization of rules to reduce the cost of selling into many national markets and allowing member states to retain idiosyncratic rules to reflect local conditions threatened to halt the process. The legal ruling in the Cassis de Dijon case gave rise to the convenient doctrine of “mutual recognition” which at least in political terms provided a resolution to the problem.

In North America, similar issues were facing negotiators crafting the US-Canada Free Trade Agreement, the first major (post-war) deviation by the US from its historical support for multilateral agreements. The agreement with Canada, later recast as NAFTA when Mexico achieved comparable access into the US market, contained rules that attempted to address the inconsistencies between the US and the Canadian food regulations. Though not as ambitious as the European single market program, the Canada-US FTA did experiment with institutional reform in this area, particularly in the area of animal health and safety regulations.

## ***The Emerging Multilateral Rules Framework***

So what is the rules framework that emerged from the Uruguay Round within which food regulation policies and procedures must fit? There are four legs to the table, each

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<sup>7</sup> Chile had in fact undergone substantial reform in the 1970s, though some of these steps had been subsequently reversed.

mutually supportive.<sup>8</sup> Each leg contains a mix of negative inducements (“sticks”) and positive incentives (“carrots”), designed to encourage countries to stay within the rules even if to do so constrains formerly autonomous policy choices and to impose disciplines if they stray too far. These major agreements include the Sanitary and Phytosanitary (SPS) Agreement and the Technical Barriers to Trade (TBT) Agreements, the Trade Related Intellectual Property (TRIPS) Agreement, the Agreement on Agriculture (URAA) and the Dispute Settlement Understanding (DSU).<sup>9</sup> A discussion of the provisions of each of these components is necessary before exploring the totality of the framework that they support.

### **The SPS and TBT Agreements**

The central element of the multilateral rule system for food trade is the SPS Agreement, that deals with trade restrictions used in support of measures designed to ensure human, animal and plant health. An accompanying agreement, the TBT Agreement, relates to technical regulations not designed to deal with health issues. The primary function of the SPS Agreement was to clarify the meaning of Article XX of the GATT. That article established the right of countries to use trade measures to protect animal, plant and human health. The SPS Agreement reaffirms that right but elaborates on the procedures that countries should follow to be sure that they are not unduly restricting market access for other countries. As such, it sets up a framework for national SPS measures so that countries may be sure that they are operating such policies in a way that does not infringe on the rights of trade partners; and it offers a “notification and review” process that allows countries to challenge those measures that appear to infringe on the rights of themselves and others.

The increase in transparency is a major aspect of the reduction of transactions costs for the food industry, and constitutes a significant improvement in the multilateral food system. As Josling, Roberts and Orden put it:

“The WTO’s notification requirements constitute the cornerstone of the transparency provisions that are intended to facilitate decentralized policing by trading partners to ensure compliance with the SPS and TBT Agreements’ substantive provisions. All of the major agricultural exporting and importing countries now routinely notify proposed measures. Each notification indicates, among other things, what the proposed measure is, which product or products it is applied to, if it is based on an international standard, and when it is expected to come into force. This increased transparency contributes to the smooth functioning of the world trading system by facilitating both compliance and complaints by trading partners. Compliance is aided when advance notice of new or modified measures provides an opportunity for firms to change production methods to meet new import requirements, thereby minimizing disruptions that such changes can cause to trade flows.” (Josling, Roberts and Orden, 2004).

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<sup>8</sup> Other aspects of the Uruguay Round Agreement also have an influence on food trade. These include the General Agreement on Trade in Services (GATS) and the Trade-related Investment Measures (TRIMS) Agreement.

<sup>9</sup> For the details of these agreements see WTO (1994).

The negative inducements in the case of food safety regulations were designed to dissuade countries from using SPS measures to protect the incomes of domestic farmers. The most significant of these “sticks” are:

- Prohibition on SPS measures that are not developed by the use of Risk Assessment and are not part of a consistent program to maintain an “acceptable level of risk.”
- Prohibition on SPS measures that are more restrictive than the multilateral standards agreed in the standard setting bodies, where such standards exist, unless the country concerned can show with scientific evidence that such a deviation is necessary.

The combination of these two strictures implies a regime for health and safety standards based on risk management principles widely accepted and understood in the scientific community, rather than reacting to the pressures put on regulatory agencies by interested parties.

The “carrots” in this case are designed to give national standards bodies the confidence that the new regime involves credible commitments. They include:

- Setting up of the SPS Committee and the obligation to notify changes in regulations to the Committee before they come into operation.
- The opportunity to challenge the regulations of other countries in the Committee as a way of defusing conflicts.
- Establishing a source of information for exporters on importer SPS regulations.

Moreover, the SPS Agreement attempts to guide countries in their use of harmonized or mutually agreed standards. In particular, it endorses the use of the standards developed by Codex Alimentarius (CODEX) and the procedures followed by the International Plant Protection Convention (IPPC) for the tracking and control of plant diseases and the International Office of Epizootics (OIE) for similar monitoring of animal diseases.<sup>10</sup> While not requiring countries to use such multilateral standards, the SPS Agreement has had the effect of raising the profile of the three standards bodies, in effect by making the use of their standards and procedures *de facto* consistent with the provisions of the Agreement. The SPS Agreement also promotes the use of “equivalence” of regulations negotiated between importers and exporters and “regionalization” of SPS measures, whereby parts of countries can be declared free of particular diseases and be granted access to importing country markets.

The TBT Agreement is not quite as strict in some respects as the SPS Agreement. It does not require a risk assessment and does not insist on scientific evidence as the main criterion for justification of a measure. But it is not by any means without constraints. It provides that technical regulations should be applied in a non-discriminatory way, should be used only in pursuit of legitimate objectives, and should be least trade disruptive, taking into account the risks of not fulfilling the objective of the regulation. Risks should

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<sup>10</sup> See Josling, Roberts and Orden (2004) for a fuller discussion of the SPS Agreement and the role of these three institutions (sometimes known as the “three sisters”).

therefore be assessed, but in the broader context of a set of objectives that is not limited to health and safety issues. These legitimate objectives could include national security considerations and prevention of deceptive practices, as well as environmental protection.

### **The TRIPS Agreement**

The second leg of the table is the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). The TRIPS Agreement imposes on all WTO members the obligation to protect the fruits of intellectual labor, both artistic and industrial. Much of the pressure to include such a regime came from the software, pharmaceutical and entertainment industries. The TRIPS in effect introduced a new multilateral regime of particular interest to producers of knowledge goods and those goods where a reputation had been built up by producers. Though it does not specify what instruments countries should use to protect intellectual property, it does give holders of patents and copyrights as well as producers in particular regions some assurance against piracy.<sup>11</sup> The TRIPS Agreement was a part of the “single undertaking” of the WTO and thus applied to all members. The supervision of the TRIPS agreement was entrusted to a new TRIPS Council, and left an existing institution, the World Intellectual Property Organization, with a smaller role in overseeing IP issues.

Some important aspects of agricultural and food production and marketing were included in the TRIPS. The “sticks” in this case were the obligation to set up protective regulations to apply within each country’s borders. For agriculture these include:

- Protection of patents for biotechnology, specifically new plant material created by gene transfer.
- Establishment of Plant Breeders Rights, but with some flexibility for countries as to how to grant that protection.
- Protection of Geographical Indications (GIs), though again allowing countries a wide range of instruments to effect that protection.

The inclusion of the protection of GIs in the negotiations in the Uruguay Round on trade-related intellectual property issues has essentially transformed GI issues from national, bilateral or plurilateral matters to the multilateral stage.<sup>12</sup>

The TRIPS Agreement incorporates GIs by requiring member states to “provide the legal means for interested parties to prevent” the use of any means “in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner that misleads the public

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<sup>11</sup> There has been considerable debate over the merits of including in the Uruguay Round an agreement that protects mainly patent holders in the developed world. On the other hand, the conclusion of the TRIPS needs to be taken in conjunction with the other aspects of the Round, many of which were designed to assist developing countries. See Barton, *et.al.* for a fuller discussion of this issue.

<sup>12</sup> The definition of GIs is given in Article 22:1 of the TRIPS, as follows:

“Geographical Indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.”

as to the geographical origin of the good,” as well as any use “which constitutes an act of unfair competition.” (Article 22:2) The same article continues by enjoining Members to refuse or invalidate a trademark which contains or consists of a geographical indication with respect to goods not originating in the territory indicated, if the use of the indication in the trade mark for such goods in that Member is of such a nature as to mislead the public as to the true place of origin.”<sup>13</sup>

Wines and spirits are singled out for a more comprehensive level of protection. This additional protection was at the request of the EU, and is generally considered to have been a concession by exporters who were unconvinced by the need for such measures in return for restraints on EU subsidies. Article 23 stipulates that each Member shall provide legal protection for geographical indications “even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as ‘kind’, ‘type’, ‘style’, ‘imitation’ or the like.” (Article 23:1) No mention is made of misleading the public or unfairly competing within Article 23: as the Article is headed “additional” protection, the presumption is that no such conditions are required for GI protection for wines and spirits. Moreover, the scope for allowing “generic” exceptions, where a geographical name has become widely used for a type of product regardless of origin, is much narrower for wines and spirits.

The intention of the TRIPS, in the area of GIs, was to increase the level of protection given to such property rights within the global trade system. The Agreement itself gives two avenues to pursue this aim. Article 23:4 mandates countries to push ahead with a multilateral register of wines and spirits and Article 24:1 commits Members to “enter into negotiations aimed at increasing the protection of individual geographical indications under Article 23.” Thus the wines and spirits sector is assured of further extension of protection regardless of the economic merits.<sup>14</sup> The more significant issue in the longer run is whether to extend the additional benefits given to wines and spirits to other agricultural and food products. Certain countries have been anxious to provide that extra protection in order to be able to develop market reputations that would increase producer income. As with wines, this would shift the emphasis away from the prevention of deception towards the control of competition from other producers.

The “carrots” in the case of intellectual property are mainly in the form of the potential to develop further the scope of GIs, and thus are of less interest to those countries that feel that they are typically importers of such goods.

- The possible establishment of a Multilateral Register of Wines and Spirits
- The possible extension of “additional” protection to goods other than wines and spirits.

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<sup>13</sup> Section 4 of Article 22 guards against a GI that is literally true but falsely represents to the public that the goods originate in another country.

<sup>14</sup> One could argue that most developing countries do not export wines and spirits that would benefit from such protection in developed countries (though instances exist). But one can also argue that the marketing of developed country wines and spirits in developing countries is often controlled by state agencies and that the cost of setting up a GI protection system may not pose too much of a problem nor impact too heavily on poor consumers.

The wines and spirits register is the source of some controversy, and countries have not been able to agree on its status. The extension of protections given to wines and spirits to other foods and beverages is still further off.

## **The URAA**

The third of the table legs is the Uruguay Round Agreement on Agriculture (URAA). The URAA corrected many of the “exceptions” for agriculture that had been included in the original GATT Articles or negotiated as waivers. Non-tariff barriers were replaced by bound tariffs, and the exception to this rule for supply-control schemes has now ceased to be applicable. Export subsidies have been limited and domestic support (i.e. not given at the border) has been disciplined. Thus the URAA established new rules that radically improved the agro-food trade system by tying the hands of national governments.

The significance of the URAA to food trade cannot be over-emphasized. It provided a set of trade rules for agricultural products that contributed to the establishment of a new international distribution system for farm and food products. By taking away the ability of countries to apply quantitative controls to goods at the border, except for health and safety reasons, it established an environment in which sourcing foods or ingredients from abroad was commercially possible. Put another way, the SPS barriers that had hidden behind quantitative import restrictions now became exposed as the “front line” in any conflict over market access.

The URAA contains a number of “sticks” designed to prevent behavior by governments deemed collectively to be deleterious to the trade system. The most important of these constraints are:

- Prohibition of export subsidies, other than those specified in the countries schedule.
- Prohibition on Trade-distorting domestic subsidies, above the levels indicated in the country schedules.
- Prohibition on Quantitative Restrictions, other than the Tariff-rate Quotas (TRQs) which were set up under the process of converting non-tariff trade barriers to tariffs.

So to be consistent with these constraints, countries have to move toward protection by tariffs and support for farm incomes through non-trade-distorting payments systems. This has indeed begun to happen, but the rate of further reductions in tariffs and subsidies is still under negotiation in the current round.

The “carrots” in the URAA included a number of provisions designed to encourage countries to accept these prohibitions. These include:

- Temporary shelter in the Peace Clause of agricultural subsidies from the provisions of the Subsidies and Countervailing Measures Agreement (SCM) also negotiated in the Uruguay Round (now expired).
- A separate category of domestic subsidies (the Blue Box) that could be maintained (but not increased) to satisfy domestic concerns that the US and the EU direct payments programs linked to supply control would be cut.

- Continuation of the process of reform, to satisfy those wanting to see more rapid liberalization, with a proviso that non-trade concerns would be taken into account.
- The establishment of a WTO Agriculture Committee that would have the task of monitoring the compliance of countries with the new rules.

The combination of these rule changes has been to allow the continued integration of global markets in food and farm products. Though the tariffs still remain high, and export subsidies have not been eliminated, the root causes of trade conflicts and distortions are more apparent and the solutions more attainable.

### **The Dispute Settlement Understanding**

The fourth leg of the framework for agricultural policy is the Dispute Settlement Understanding, as also established in the Uruguay Round. This Agreement replaces the GATT dispute settlement process that had become ineffective. Countries could block the establishment of a panel or delay the work by objecting to panel members. When the panel reported, any country (presumably the disappointed party) could block the adoption of the panel report.<sup>15</sup>

The “sticks” in the case of the DSU are the sanctions that can be imposed on countries that are found to violate WTO rules or cause harm to other countries even if not in violation. Specifically, the DSU provides the following restraints on countries found to be contravening the WTO:

- Remove an instrument or cease from an action that violates the WTO Agreements.
- Modify actions that “nullify or impair” the benefits that other member had reasonable assumed to get from the WTO agreements.
- Face sanctions (“withdrawal of concessions”) usually in the form of high tariffs on an equivalent value of trade, or grant concessions of an equal value.

This legal process is in distinction to the political act of negotiating mutual concessions. Panels are supposed to interpret the treaties and not find mutually-beneficial solutions to trade conflicts or propose remedies that satisfy political actors in the countries in conflict. So the introduction of “hard law” into agricultural trade disputes is a significant development.

The “carrots” in this case are the fact that all countries can find remedy through a process that has a set timetable and cannot be blocked by powerful WTO members. More precisely, it gives all members the right to:

- Initiate consultations and make use of conciliation procedures.
- Request a panel and appeal the findings on legal grounds to the Appellate Body of the WTO.

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<sup>15</sup> It is, in retrospect, surprising that so many cases were in fact sent to panels and most of the recommendations were adopted. However, several prominent agricultural cases failed to reach this final stage.

- Receive permission to apply sanctions if the losing defendant does not bring actions into line with WTO obligations.

The significance of this is being increasingly realized by countries who until recently would not have considered challenging the larger developed countries or even their neighbors for fear of retribution or at best of prevarication. Thus the policy environment has teeth. The other aspects, subsidy constraints, SPS restrictions and GI protection, are made more significant by the fact that violations can and have been declared.

### ***Has the multilateralization of food rules worked?***

The main actors in the setting, implementation and modification of food policies are still the national governments. They are increasingly entwined in the multilateral system that they created, but national governments are still the ultimate source of authority and the enforcer of any agreement. So one test for the new framework is whether governments are in general agreement that it is proving useful. So far the food-rules framework described above has passed the test: no-one wishes to go back to the ancient regime.

### **The SPS and TBT Agreements**

The assessment of the SPS Agreement has generally been favorable, despite the continuing saga of the beef-hormone dispute. Josling, Roberts and Orden (2004) sum up their conclusions as follows:

“The SPS Agreement obligation to base regulations on scientific risk assessment clearly has reduced the degrees of freedom for disingenuous use of regulatory interventions and promoted convergence among countries. The obligation to base measures on science has led to the resolution of many trade issues through the WTO. But the impact of the risk management requirements of the SPS Agreement has extended far beyond WTO dispute settlement results and complaints. The Agreement has generated broad-based regulatory review by many WTO members, both major agricultural exporters and importers, as they determine whether they and their trading partners are complying with the obligation to base their risk management decisions on scientific assessments. Evidence suggests that regulatory authorities are either unilaterally modifying regulations, or voluntarily modifying regulations after technical exchanges. Enacting regulatory changes that allow greater market access has become easier now that the SPS Agreement assures policymakers that their trading partners must conform to the same science-based principles.” (Josling, Roberts and Orden, 2004)

### **The TRIPS Agreement**

Conclusion of the TRIPS Agreement has had important legal and political implications. As a legal matter, it has taken the GATT/WTO system into uncharted territory, covering not merely border measures, but also mandating threshold national regulatory standards and means of enforcing those standards. Politically, it has placed WTO rules and negotiations into the center of domestic political battles over the appropriate scope of IP protection, and has been more responsible than any other issue area for exacerbating North-South acrimony in Geneva. Particularly severe have been the disputes over the effects of TRIPS and patents generally on access to medicines in the developing world.

The TRIPS Agreement is perhaps best seen, from the perspective of the rules of the trade system, as a part of an emerging global infrastructure for commerce. Those who argue for its legitimacy in the WTO see the universal adoption of IP protection as necessary to allow businesses to invest in research, establish cross-national production networks, and sell into foreign markets without fear of being undercut by competitors that have not had the same product development costs. It is part of the projection of national regulations onto the global market. It is not aimed primarily at government action against imports. One could argue that a decision not to protect a particular form of intellectual property is an indirect subsidy to domestic firms. In any event, it moves the trade system away from the notion that trade rules do not dictate to countries what they should do at home but merely encourage them to pursue their objectives in ways that least distort trade. The principle of mutual benefits from trade by exploiting comparative advantage is not applicable. To the extent there is a parallel principle, it is that the costs to the consumer of developing such goods as pharmaceuticals and movies should be allocated across the entire world in order to ensure the development of an adequate quantity of such goods and (more problematically) the equitable division of their cost of development.<sup>16</sup>

### **The URAA**

By general agreement, the URAA has had significant impacts on domestic policies. The reform of the CAP in 1992 owes much to the need to fit in with the URAA being negotiated at that time. The subsequent CAP reforms have continued along the same path, each one making it easier to live within the constraints embedded in the WTO schedules of subsidies. US policy has also reacted to the WTO constraints, in particular the changes in the 1996 Farm Bill that gave the US apparent flexibility to pursue the long term goal of reducing EU and Japanese domestic support levels. But when emergency payments were paid in the three years after 1998, the shoe was on the other foot. US policymakers had to be creative to avoid violating support limits. And the 2002 Farm Bill was crafted to take advantage of the “unused” support as well as the (temporary) budget surplus in the US.

One clear, if limited, measure of the successes in agricultural trade reform following the Uruguay Round is the way in which countries have implemented their obligations. Tariff ceilings have not been breached, tariff-rate quotas have been made available, if not always filled, export subsidies have come down on schedule despite very weak world markets, and domestic support in most countries is well below allowable limits. The process of notification and monitoring worked well for a time, and the information made available on agricultural trade policies and practices represents a significant increase in transparency. However, notifications have broadly dried up since 2001, as one might have predicted given the onset of negotiations in the Doha Round.

Discussions within the WTO Committee on Agriculture, as in the SPS and TBT Committees, have created a basis for understanding among governments that is already smoothing the way for further cooperation. The adoption of the Agreement on Agriculture has also, until recently, restrained trade conflicts over the external effects of farm support policies. Instead, trade conflicts have festered over food safety and

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<sup>16</sup> For more information see Maskus (2000) and Watal (2004).

environmental issues peripheral to agricultural protection, such as regulations on genetically-modified organisms.

Failures in the agricultural area have come from the inherent conflicts between those countries that see open markets as a solution to problems facing domestic agriculture and those that see such markets as a threat to the desired development of the sector. Trade policy will always entail a compromise between those that seek overseas outlets and those that wish to protect their markets from others. Progress toward trade liberalization is slow in agriculture for the obvious reason that many groups oppose such progress. All the WTO can do is to set rules that restrain this conflict and attempt to move countries over time toward a trade system that satisfies the needs of its member countries.

## **The DSU**

The Dispute Settlement Understanding has become the lynch-pin of the WTO system. Though not universally popular, it has survived the inevitable conflicts with domestic politicians quite well. The process, though measured, at least has a timetable for the various steps.<sup>17</sup>

As for food regulation disputes, the DSU has been influential in elucidating the rules as laid down in the SPS and TBT Agreements. As Josling, Roberts and Orden report:

“Countries have made 32 formal requests for consultations related to food regulation trade barriers under the DSU between 1995 and 2002. They account for 11 percent of the total number of formal DSU complaints for all products under all agreements since the WTO agreements came into effect.<sup>18</sup> Formal complaints related to food regulations exhibit the same the pattern observed for cross notifications—developed countries are both the petitioner and respondent in the majority of cases, but not in every case. Most recently, over the four years 1999-2002, developing countries have initiated more complaints (6) than developed countries (5).

Six complaints related to food system regulation have reached a WTO panel ruling and the Appellate Body. Four complaints involved SPS measures and each of these cases concerned regulations that were found to have no rationale in terms of risk reduction. In the first complaint (DS 18) Canada challenged Australia’s ban on salmon imports imposed ostensibly to prevent the spread of diseases in recreational and commercial fish stocks. The United States and Canada challenged the scientific basis for the EU ban on growth hormones in beef production in separate complaints (DS 26 and DS 48) that were heard by the same WTO panel. In the fourth complaint (DS 76) the United States challenged Japan’s testing requirements regarding treatment effectiveness for all new varieties of selected horticultural products. The measures at issue in each of these cases were imposed by developed countries. In each case, the panel and Appellate Body ruled for the complainants (exporters) on at least some grounds, so these disputed cases have

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<sup>17</sup> However, this timetable has slipped in the case of the GMO complaint against the EU. The report has still not been released several months after it was first expected.

<sup>18</sup> It is also notable that 70 percent of the total number of complaints that have cited violations of the TBT Agreement over this same period are related to food regulations. Only eight complaints referenced other sectors, including textiles, petrochemicals, and pharmaceuticals.

shown that the measures of countries with advanced scientific establishments are not immune to challenge.” (Josling, Roberts and Orden, 2004).

The toughest test of the disciplines of the SPS Agreement has been the US and Canada challenge of the scientific basis for the EU’s ban on growth hormones in beef production, mentioned above. The EU’s defense of its measure rested on its claims that the international standards for these hormones did not meet its public health goals and that the ban represented as a precautionary approach to managing uncertain risks. The WTO panel concluded, and the Appellate Body upheld the decision, that the EU’s ban violated the provisions of the SPS Agreement. Both the panel and the Appellate Body affirmed the right of WTO members to establish a level of consumer protection higher than the level set by international health standards. The ban was nonetheless judged to be in violation of the SPS Agreement as it was not backed by an objective risk assessment. Although the Appellate Body was willing to acknowledge that the ban was originally motivated by “consumer concerns” rather than by protectionism, the overall outcome of the case suggests that the WTO will rule against measures based on popular misconceptions of risks as well as more overtly discriminatory measures (ibid.).

Some of the aspects of the TRIPS provisions on GIs have been the subject of a trade dispute that led to the setting up of a Dispute Settlement Panel. This has given the opportunity to clarify some key issues. The challenge was initiated by the US in June 1999, when the US requested consultations with the EU on the alleged lack of protection for US trademarks and GIs in the EU. Specifically, the US contended that the EU did not accord as much protection to US GIs or similar trademarks as it did to EU producers. Such a situation would be a violation of the basic WTO principle of “national treatment,” that holds that foreign and domestic products should be subject to the same rules. It would also violate several provisions of the TRIPS Agreement, which reasserts the right of national treatment in the case of intellectual property protection.

Initially, the US objected to the Regulation 2081/92 governing GIs (except in the wine sector), as amended. This led to inconclusive talks but neither a resolution nor the selection of a panel. But the revision of the legislation in the EU in April 2003 raised more concerns in the US, and this time the US was joined by Australia in the complaint. A panel was requested by the US and Australia in August 2003, and agreed in October of that year. The panel ruled in April 2005 that the EU has indeed failed to give the US trademark holders adequate protection, as required.

The outcome of the WTO case managed to give comfort to both sides to the dispute. The EU was able to claim that its GI protection program was not WTO-incompatible as such and the US could point to the fact that the EU was found to have violated WTO articles in the way in which it implemented that policy. The EU will have to change its policy regarding the registration of foreign products in the EU market considerably. Its own GI regime will in essence have to be open to all countries selling GI goods into the EU market. This could over time undermine the strategy of encouraging quality improvements through regional product protection. Having other countries protect EU GIs in their markets, as they are requesting in the current WTO negotiations, would restore some measure of balance in this respect (Josling, 2006).

The regulations at issue in the WTO case did not apply to wines and spirits. But some aspects of the ruling do relate to this area of trade. The panel report clarified one aspect of the complications of having GI and trademark systems intersect, by considering the issue of the rights to the names Bud and Budweiser. This contentious issue, involving one of the world's largest food-and-drink firms, had been simmering for a century, ever since Adolphus Busch emigrated from Germany to the US and choose a German-sounding name (actually the German translation of a Czech town name) to the dismay of the brewers in that town who had several centuries of experience. When the Czech Republic emerged from the blanket of central planning and tried out the competitive marketplace they persuaded four countries to grant GI status to Budweiser as well as its Czech language equivalent. The EU took over this protection when the Czech Republic joined the EU, and hence had to defend its actions when the US challenged the EU Regulation.<sup>19</sup>

Besides being the subject of negotiation in the Doha round, the domestic support policies of the developed countries are giving rise to legal questions within the WTO. Until recently there had been few attempts to litigate the issue of whether developed countries are violating the terms of the Agreement on Agriculture as they notify their domestic policies to the WTO and classify subsidies into amber, blue and green boxes. And there have been almost no challenges to the subsidies themselves, mainly due to the shelter of the Peace Clause, which granted immunity for domestic (and export) subsidies from the full rigors of the non-agricultural subsidy regime as defined in the Agreement on Subsidies and Countervailing Measures (Steinberg and Josling, 2003). But the Peace Clause expired at the end of 2003 and will not be renewed unless introduced again in the final stages of the agricultural talks.

As a result of the expiry of the Peace Clause, litigation has offered another avenue for addressing the trade distortions alleged to be a result of developed country policy. As if to serve notice of the increased use of the trade dispute resolution pathway, Brazil challenged the US cotton subsidy program and Australia, Brazil and Thailand requested a WTO panel to examine EU sugar policy. The Cotton Panel report, together with the Appellate Body modifications, have been adopted by the Dispute Settlement Board, and the US is discussing the timetable for bringing its cotton policies into line with the WTO ruling. The sugar case is somewhat behind, and the Appellate Body has yet to report in this case. But preliminary indications are that the EU will also have to modify certain aspects of its sugar policy.

Both the cotton and sugar complaints will prove landmark cases for defining the agricultural subsidy landscape. The cotton panel found evidence of "serious prejudice" to Brazil's interest through the depression of world prices. In addition, several elements of the US cotton program were found to have violated other provisions of the WTO. Some of these elements apply to other commodities besides cotton. Thus the extent to which the cotton ruling will have impacts on other products is still unfolding. The sugar panel will show that export subsidies can exist even when there is no export program as such. If domestic prices are kept high, the panels may find that export products are being sold at

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<sup>19</sup> Under the TRIPS Agreement, trademarks that overlap with GIs are granted protection. The EU was thus, in the view of the US, delinquent in not protecting the Bud and Budweiser names. They could register the Czech name as a GI but not its German translation.

less than their cost of production. Such occurrences are likely to be common. These cases are unlikely to fully resolve the question as to what constitutes a subsidy and how these subsidies fare when compared with the general rules in the WTO. But the answer will be important in shaping the options for further domestic policy reform in the EU and elsewhere.

### ***The continued development of the rule system***

The multilateral policy framework for food trade is, of course, in its infancy. It is difficult to know how far countries may wish to travel down the road to science-based SPS regimes, low tariffs for food and agricultural products, and trade-neutral farm support. A collapse of agricultural markets could cause some backsliding in the area of liberalization. But an indication of the general willingness to go further can be seen in the current trade talks in the WTO. After a desultory start, the political pressure has been building for a revision of the URAA that would continue the path to reform and tighten further the constraints on domestic policy. At present, the precise form of that continuation is eluding negotiators.

Whether or not the Doha Round reaches a conclusion, there is likely to be development on two fronts. One is the continued process of testing the agreements embedded in the Uruguay Round with the aid of the DSU. The resort to the legal process of the WTO to challenge aspects of food regulations and farm programs places new burdens on domestic policy-makers. Though such a strategy has attractions, particularly for farm commodity exporters who feel frustrated by the ability of importers to stall and resist trade reform, it also carries with it dangers, as it pits the legal remedies in the WTO against the political process of regulating domestic food markets and negotiating domestic farm policy. This could seriously compromise the political acceptance of the multilateral trade rules and the institutions that are currently in place.

As long as national food and farm policies move towards compliance with the SPS and TBT Agreements, the TRIPS and the URAA, pushed by the legal remedies available through the DSU, and the scope for deviant behavior becomes more restricted by negotiation, domestic policies will begin to work more smoothly together. This process is likely to continue so long as the external impacts of policies are of interest to other countries and the domestic political process goes along with (or does not notice) the lack of autonomy. Thus the new institutional regime at the multilateral level will produce a new set of food policies in countries concerned to escape challenge and retribution from trading partners.

In addition, the process of regionalism stands ready to pick up any slack in the multilateral trade rules. As Coleman, Grant and Josling put it:

“Regional integration is closely linked with multilateral integration (globalisation) rather than being unrelated or opposed to it. But the relationship is as complex as the agreements themselves. Some regional agreements are extensions of national economic and foreign policies with motivations ranging from the construction of new political units to the need to consolidate political and economic reforms. Other agreements try to preserve market access when larger political units break up. Some countries join

agreements to gain preferred access to regional markets; others see these pacts as a 'safe haven' against the aggressive use of trade policies by others.

“There is an emerging systemic role for regional trade pacts that arises from their number and ubiquity. Regional trade agreements in effect have come to share with the multilateral pacts such as the WTO (and plurilateral bodies such as the OECD) responsibility for the ‘management of globalisation.’ This task involves the regulation (or re-regulation) of markets in a global economy to make sure that those markets fulfill the function of allocating resources and distributing products and services without the negative social impacts (market failures) to which an unregulated market is prone. It thus includes improvements in market access as well as constraints on national policies such as subsidies other than those agreed to be acceptable. It also allows for agreed measures of consumer and environmental safety and the protection of basic human rights, though many of these measures will be subject to controversy for years to come. Regionalism can contribute to these aims. At a time when critics of the trade system are calling into question the desirability of the continued opening up of markets it would be counterproductive if regional and multilateral institutions dissipated their energies in conflict.” (Coleman, Grant and Josling, 2003).

## ***Conclusion***

For food firms the rules of international trade are becoming clear. National food regulations, though ostensibly autonomous, are now essentially subject to multilateral rules and any deviations are increasingly costly to policy-makers. Moreover, the market provides its own disciplines, and the costs of ignoring these are also costly. Both these developments are probably positive and complementary. The multilateral framework for food regulations that has emerged in the past twenty years is in fact a reasonable basis for future policy, moving along lines that individual countries could well have chosen for themselves. In agricultural policy this path involves minimal involvement of government in commodity markets (since there will be no outlet for surpluses on the world market by way of subsidies) but targeted payments linked to social objectives (to encourage cross-compliance with environmental standards). A key consideration will be whether US farm policy returns to this path in the 2007 Farm Bill after a diversion in 2002. At present the EU is out ahead in the reform of its agricultural policies, but needs the discipline of the URAA to maintain the momentum.

Such a farm and food system also requires a focus on quality and food safety, and this will come to dominate policy discussions. Local and regional foodstuffs will be promoted as a way of differentiating the product. This will require traceability and identity preservation throughout the supply chain, as well as a labeling system understandable by consumers. Thus in this scenario, farmers and processors join forces with retailers to provide foods that are attractive and healthy for consumers. Under these conditions, the policy environment for farmers will rely increasingly on the impact that the supply chain “captains” can exert on the traditional farm politics. Once again, Europe is exploring this path. But dangers lurk around every corner: the dividing line between sensible provision of public goods and pandering to populist pressures is narrow.

But, all told, the institutional developments in the food industry of the past twenty years have been remarkable. Josling, Roberts and Orden conclude:

“The framework for integrating trade and domestic regulations in the area of human, plant and animal health and safety is in place...The task for the international community is to build on this framework to encourage trade, improve biosafety and avoid discrimination against developing countries. The role of international institutions is to absorb some of the costs and help to minimize the risks faced by developing countries in their continued integration into the global food economy.” (Josling, Roberts and Orden, 2004).

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