— DISCUSSION —
AGRICULTURAL POLICIES, TRADE AGREEMENTS AND DISPUTE SETTLEMENT

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Mike Gifford has done a good job of outlining how the Uruguay Round multilateral trade agreement has changed the rules governing the ways in which national governments are allowed to interfere with and engage in international commerce (IATRC, 1994; Josling, Tangermann and Warley, 1996; Meilke, McClatchy and de Gorter, 1996). While the rules governing trade in primary agricultural products continue to differ from those governing trade in manufactured products, most observers would agree that progress was made in "normalizing" trading relations for agricultural products by: 1) eliminating all non-tariff barriers to trade; 2) banning the use of export subsidies on commodities which are not explicitly identified in a countries World Trade Organization (WTO) schedule; 3) reducing export subsidies on all commodities; 4) reducing all tariffs and the binding of most agrifood tariffs; and 5) developing an improved dispute settlement mechanism that applies to all products.

ANTI-DUMPING (AD) AND COUNTERVAILING DUTY (CVD) DISPUTES

There are two types of disputes which will be taken to the WTO. First, disputes alleging that countries are not abiding by the obligations they assumed with the signing of the Uruguay Round agreement (nullification, impairment, circumvention). Second, disputes governed by the Agreement on Subsidies and Countervailing Measures, the Agreement on Implementation of Article VI of GATT 1994 (anti-dumping) and the Agreement on Agriculture. My comments are focused on the second type of dispute which deals primarily with anti-dumping and countervailing duty actions.

Anti-dumping actions are brought by domestic producers against foreign firms. The original intent was to combat predatory pricing (Boltuck and Litan, 1991; USITC, 1995). Predatory pricing is the practice of a firm selling products below cost to drive out rival firms thereby creating a market power for itself. Its market power position then allows it to subsequently raise prices above those that prevailed before the predatory pricing began. The

description of predatory pricing should be sufficient to suggest that it will never be successful for agrifood products and uncommon outside of the agricultural sector (Shin, 1994). Instead, anti-dumping provisions are generally used to combat international price discrimination. Interestingly, price discrimination is perfectly legal if practiced by domestic firms, and applauded internally when used by the Canadian Wheat Board (CWB) to benefit Canadian grain producers. Schott (1994, p. 85) has described the Uruguay Round agreement on anti-dumping as "a bandage to a festering sore of trade policy."

The economic basis for a CVD complaint is different than for an AD action. A countervailing duty case is brought by domestic firms against foreign governments. As Horlick (1991, p. 137) notes, "there is a grain of truth, which is the distortion caused by subsidies" lying behind the rationale for a CVD, while AD actions are "90 percent pure protectionist." Essentially, domestic firms should not be expected to compete against the treasuries of foreign governments.

Significant changes were made in AD/CVD laws as a result of the Uruguay Round of trade negotiations. For CVD investigations the changes include: 1) specific time schedules for decisions; 2) a higher *de minimis* level; 3) a five year sunset provision; 4) the opportunity for consumers of the foreign product to make representations; 5) different rules for developing nations; and 6) an appeals process (Schott 1994, Jackson 1996). Most importantly, WTO panel reports cannot be blocked from adoption, except by consensus. The WTO rules governing AD and CVD actions are not self-executing, hence these procedures must be incorporated into domestic legislation.

ADMINISTERIAL PROTECTION RULES

Before proceeding, it is useful to ask what desirable features countries would like to see embodied in administered protection rules. Of course, countries can be schizophrenic depending on whether they are protecting domestic industries or challenging other nations "unfair" trading practices. However, there are at least four desirable features, of the administered protection rules, on which there would be general agreement:

- The proceedings should be "rules based". The criteria for determining if a subsidy or practice is illegal should be stable, well defined and straightforward. While there will always be "grey areas" these should be kept to the minimum by using language that is as clear as possible. The "creative ambiguity" mentioned by Gifford (1997) should be avoided. Clear rules should also limit the number of frivolous cases brought before panels.

- Rulings should be predictable. Predictability is enhanced when the number of potential "courts" in which a case can be heard is limited. An industry should be protected from double jeopardy and endless litigation.
- There should be a time schedule for panel findings that insures the resolution of disputes in a timely fashion.
- For AD/CVD cases the arguments, evidence and findings should be consistent with basic economic theory (van Duren, 1991; Meilke and Sarker, 1996).

THE AGRI-FOOD INDUSTRY

As Gifford (1997) has mentioned, progress was made on most of the issues raised above, in the Uruguay Round. However, based on these common-sense criteria there is reason for concern with the current arrangements for administered protection. The issues are important for agri-food producers because they are heavy users of this form of protection. About one-half of the cases brought to the WTO since its inception have involved agri-food products and two of the three extraordinary challenges under the CUSTA have involved agri-food (pork, live swine, softwood lumber) (Endsley 1995, Dixit 1996).

Historically, the United States, Canada, the European Union and Australia have been the principle users of contingency protection legislation. However, more than forty countries now have domestic administered protection rules. As developing nations increase their use of administered protection, domestically and through the WTO, the proportion of agri-food disputes is likely to increase.

The WTO embodies new rules which classifies subsidies into three groups: 1) prohibited; 2) actionable; and 3) non-actionable. However, the list of subsidies differs greatly among manufactured goods and agri-food products (Table 1 and Table 2).

The rules governing Canada's external trading relations are further complicated by its membership in the NAFTA. Consider a case brought against Canada by the United States and Mexico. Mexico and the United States would have to decide whether to bring the case under NAFTA or the WTO, but not both (Endsley, 1995). If they chose to pursue the case under NAFTA, two panels would be formed. One governing the Canada-Mexico case and one governing the Canada-United States case. Alternatively, if both Mexico and the United States brought separate cases under domestic legislation, they could also simultaneously file a case with the WTO (Cadsby and Woodside, 1996). To an economist, but perhaps not to a lawyer, this is an exceedingly complex arrangement with a high likelihood of generating conflicting decisions. If NAFTA is eventually expanded to include more countries, as seems undeniable, the process will get even more cumbersome without fundamental institutional changes.

Table 1. WTO Rules as they Apply to Subsidies and Countervailing Measures: Manufactured Products

Prohibited Subsidies:
• Government Transfers of Funds, Revenue Foregone or Provision of Services other than General Infrastructure to a Specific Industry
• Income or Price Support
• Export Subsidies
• Domestic Use Regulations
Actionable Subsidies:
• Ad Valorem Subsidization Exceeds 5 percent[a]
• Subsidies to Cover an Industries Operating Losses[a]
• Forgiveness of Government Held Debt[a]
Non-Actionable Subsidies:
• Generally Available Subsidies
• Specific Subsidies Which Met the Following Conditions:
* ad valorem subsidization less than 1 percent
* assistance for research activities if the assistance covers not more than 75 percent of the costs of industrial research or 50 percent of the costs of pre-competitive development activity[b]
* assistance to disadvantaged regions, based on specified development criteria[b]
* assistance to promote adoption of existing facilities to new environmental requirements, provided the assistance is limited to 20 percent of the cost of adaption[b]

[a] These subsidies must be shown to have trade effects as described in the Agreement on Subsidies and Countervailing Measures.

[b] Other conditions apply.

Table 2. WTO Rules as they Apply to Subsidies and Countervailing Measures: Agriculture

Prohibited Subsidies: • Export Subsidies on Products not Identified in the Countries Schedule of Commitments
Actionable Subsidies: • Ad Valorem Product Specific Support Exceeds 5 percent • Ad Valorem Product Specific Support 1 percent - 5 percent[a] • Ad Valorem Non-Specific[b] Support Exceeds 1 percent[a] • Direct Payments under Production Limiting Programs[a] • Export Subsidies on Products Specified in the Countries Schedule of Commitments[a]
Non-Actionable Subsidies: • Generally Available Subsidies • Ad Valorem Subsidization Less than 1% • General Services: * research * pest and disease control * training services * extension and advisory services * inspection services * marketing and promotion services * infrastructure • Public Stockholding for Food Security Purposes • Domestic Food Aid • Direct Payments to Producers through Decoupled Income Support • Government Financial Participation in income insurance and income safety-net programs * Payments for Relief from Natural Disasters * Structural Adjustment Assistance Provided through: - producer retirement programs - resource retirement programs - investment aids • Payments Under Environmental Programs • Payments Under Regional Assistance Programs • Specific Subsidies which Meet the Following Conditions: * assistance for research activities if the assistance covers not more than 75 percent of the costs of industrial research or 50 percent of the costs of pre-competitive development activity * assistance to disadvantaged regions, based on specified development criteria * assistance to promote adoption of existing facilities to new environmental requirements, provided the assistance is limited to 20 percent of the cost of adaption.

[a] With a determination of "injury" and "due restraint" must be shown in bringing a case.

[b] The term non-specific is used in the context of Article 6 of the Agreement on Agriculture.

There are many forces of change pushing the dispute settlement system in various directions. National governments, and experts such as Mike Gifford who have a deep understanding of the institutional issues involved, need to think about how to create the most fair, liberal and efficient mechanism as possible — and how to stick-handle the political sovereignty issues involved. A list of "forces" includes the following:

- The rules governing trade in agri-food products will become increasingly like those governing trade in manufactured products. The Uruguay Round agreement sets this process in motion and there will be no turning back. In the meantime, mechanisms are needed to insure countries live up to their commitments and to define the grey areas in the agreements.
- Regional Integration Agreements (RIA) will be enlarged in North America, Europe (and in Asia, but more slowly) creating trading blocks which are subject to more liberal trading rules than those governing trade between non-block countries. In North America, there will be increasing pressure to form a common market instead of a free trade area; agri-food is likely to be one of the major stumbling blocks towards progress.
- The growth and deepening of regional integration agreements will increasingly blur the distinction among domestic and foreign firms.

These forces will push the evolution of an efficient dispute settlement mechanism in two directions. First, disputes occurring between countries, which are not in the same RIA, should be heard and settled in the WTO. Second, disputes among members of the same RIA, where trade is subject to more liberal trading rules than in the WTO, should be heard and settled by RIA panels. National administered protection agencies should become "transparency" agents along the lines suggested by Meilke and Sarker (1996) and Spriggs (1994). Their role would be to "filter" cases before they proceeded to either the RIA or WTO dispute settlement bodies. National administered protection agencies, given a new mandate, could play an important "informal" role in examining and negotiating trade irritants. However, this suggests the elimination of purely domestic contingency protection legislation, and no matter the arguments on efficiency grounds, this will be a difficult concept to sell in many countries.

REFERENCES

Boltuck, R. and E. R. E. Litan. 1991. *Down in the Dumps*. Brookings Institution: Washington, D.C.

Cadsby, B. And K. Woodside. 1996. "Canada and the New Subsidies Code." *Commentary*. C. D. Howe Institute 75(February).

Endsley, H. B. 1995. "Dispute Settlement Under the CFTA and NAFTA: From Eleventh-Hour Innovation to Accepted Institution." *Hastings International and Comparative Law Review* 18(4):659-711.

Dixit, P. M. 1996. *WTO Disputes: Review of Procedures and Cases.* Discussion paper presented at the Agricultural Trade Policy Workshop, Taipei, Taiwan, June 3-4, 1996.

Gifford, M. 1997. *Agricultural Policies, Trade Agreements and Dispute Settlement.* Invited paper presented at the Canada-United States-Mexico Policy Workshop, March 6-8, 1997, Tucson, Arizona.

Horlick, G. 1991. "Comment." R. Bultock and R. E. Litan, eds. *Down in the Dumps.* Brookings Institution: Washington, D. C.

International Agricultural Trade Research Consortium. 1994. *The Uruguay Round Agreement on Agriculture: An Evaluation.* Commissioned Paper 9. July.

Jackson, J. H. 1996. "The WTO Dispute Settlement Procedures: A Preliminary Appraisal." J. J. Schott, ed. *The World Trading System: Challenges Ahead.* Institute for International Economic: Washington DC.

Josling, T., S. Tangermann and T. K. Warley 1996. *Agriculture in The GATT.* Macmillian: London.

Meilke, K. D., D. McClatchy and H. de Gorter 1996. "Challenges in Quantitative Economic Analysis in Support of Multilateral Trade Negotiations." *Agricultural Economics* 14(3):185-200.

Meilke, K. D. And R. Sarker 1997. "National Administered Protection Agencies: Their Role in the Post-Uruguay Round World." D. Orden and D. Roberts, eds. *Understanding Technical Barriers to Agricultural Trade.* Proceedings of a Conference of the International Trade Research Consortium, Dept. Of Applied Economics, University of Minnesota, St. Paul, MN.

Schott, J. J. 1994. *The Uruguay Round: An Assessment.* Institute for International Economics, Washington D.C.

Shin, H.J. 1994. *Antidumping Law and Foreign Firm Behavior: An Empirical Analysis.* Ph.D. thesis, Yale University.

Spriggs, J. 1991. "Towards an International Transparency Institution." *The World Economy* 14(3):165-180.

United States International Trade Commission. 1995. *The Economic Effects of Antidumping and Countervailing Duty Orders and Suspension Agreements.* Publication 2900, June.

Van Duren, E. 1991. "An Economic Analysis of Alternative Countervailing Duties." *J. World Trade* 25(1):91-105.