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## ARTICLES

### ELIMINATING PHYTOSANITARY TRADE BARRIERS: THE EFFECTS OF THE URUGUAY ROUND AGREEMENTS ON CALIFORNIA AGRICULTURAL EXPORTS

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#### INTRODUCTION

Trade liberalization during recent years has opened new markets for many of California's high value agricultural commodi-

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ties.<sup>1</sup> However, while lower tariffs, disappearing quotas, and in some cases reduced subsidies have created new opportunities for United States exports, some foreign markets remain closed behind the protection of scientifically questionable sanitary and phytosanitary standards (SPS).<sup>2</sup> For this reason, United States agricultural exporters insisted that new international rules over SPS measures be included in the most recently concluded multilateral round of trade negotiations, the Uruguay Round.<sup>3</sup> This article describes how the World Trade Organization's Agreement on the Application of Sanitary and Phytosanitary Measures<sup>4</sup> and its Un-

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The opinions expressed herein are exclusively those of the authors and not those of any elected official, officer, or agency of the United States government.

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<sup>1</sup> California's agricultural exports reached a record level of \$11.8 billion in 1994, an increase from \$10.7 billion in 1993. Letter from Secretary Ann M. Veneman, Cal. Dep't of Food & Agric., in CAL. DEP'T OF FOOD & AGRIC., CALIFORNIA AGRICULTURAL EXPORTS ANNUAL BULLETIN AND STATISTICAL APPENDIX - 1994 (1995).

<sup>2</sup> SPS standards are measures designed to protect human, animal, or plant health in the areas of agriculture and food safety. The risks they regulate include pests, diseases, and toxins. Sanitary measures concern human and animal health while phytosanitary measures apply to plants. This article concentrates on phytosanitary standards.

Specific definitions of sanitary and phytosanitary measures are provided in Annex A of the Agreement on the Application of Sanitary and Phytosanitary Measures, GATT Doc. No. MTN/FA [hereinafter SPS Agreement]; GATT Secretariat, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* 78 (1994) [hereinafter Legal Texts].

<sup>3</sup> The Uruguay Round, the eighth round of General Agreement on Tariffs and Trade (GATT) negotiations, was initiated at a meeting of GATT trade ministers in Punta del Este, Uruguay, in September, 1986. The Uruguay Round created a new international trade structure, the World Trade Organization (WTO), which replaced the GATT on January 1, 1995. While the WTO replaces the GATT as an organization, the WTO will administer the General Agreement on Tariffs and Trade (now often referred to as GATT 1947) and the Uruguay Round Agreements. As of February 2, 1996, the WTO had 119 member countries.

<sup>4</sup> SPS Agreement, *supra* note 2, reprinted in J. DENNIN, LAW AND PRACTICE OF THE WORLD TRADE ORGANIZATION, booklet 1, at 59 (1995), & in Legal Texts at 69.

derstanding on Rules and Procedures Governing the Settlement of Disputes,<sup>5</sup> working together, have the potential of eliminating phytosanitary barriers still obstructing the export of California agricultural commodities. It examines how phytosanitary trade disputes were resolved in the past, and how they might now be settled under the Uruguay Round Agreements as administered by the World Trade Organization (WTO).

### I. PHYTOSANITARY IMPEDIMENTS TO TRADE

California exporters are familiar with phytosanitary regulations, which include inspecting for diseases and pests, administering fumigation treatments, and requiring that products come from disease free areas. Most phytosanitary regulations are based upon legitimate science. However, when such regulations are scientifically questionable, they can function as disguised barriers to imports. California exporters have been subjected to numerous unfounded phytosanitary barriers. Examples include Mexico's previous insistence that California cherries be fumigated for pests which are not found in California's cherry production areas<sup>6</sup> and China's former ban on imports of California wheat due to *Tilletia Controversa* Kuhn (TCK), a fungus which does not exist in the state.<sup>7</sup>

Before the Uruguay Round, Article XX(b) of the General Agreement on Tariffs and Trade (GATT) permitted a general exception to GATT obligations if the measure was "necessary to protect human, animal, or plant life or health," but little guidance was provided on what was considered a legitimate SPS

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<sup>5</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes [hereinafter *Dispute Settlement Understanding*], 33 I.L.M. 114 (1994), reprinted in J. DENNIN, *LAW AND PRACTICE OF THE WORLD TRADE ORGANIZATION*, booklet 2, at 1 (1995).

<sup>6</sup> Report of the Expert Working Group transmitted from Dr. D.G. McNamara, Chairman, Expert Working Group, European Plant Protection Organization, Paris, to NAFTA country representatives, including U.S. Representative Lyle Sebranek, Food Safety and Technical Services, USDA, Washington, D.C. (June 23, 1995) (on file with author).

<sup>7</sup> China lifted its ban on California wheat in April, 1995. China imposed its quarantine in 1981 citing fears about TCK infecting Chinese wheat. However, California's climate is not conducive to TCK, which requires six to eight weeks of continuous snow cover. Memorandum from Anne Chadwick, Executive Director of the Cal. Ass'n of Wheat Growers, to U.S. Representative George Radanovich (April 25, 1996) (on file with author).

measure.<sup>8</sup> The Agreement on Technical Barriers to Trade (Standards Code), negotiated as part of the Tokyo Round in 1979, was one of the first attempts to instill some discipline over protectionist manipulation of technical standards.<sup>9</sup> However, while the Agreement covered both manufactured and agricultural goods, it was written primarily for manufactured items, and its language applied imperfectly to quarantine issues.

At the outset of the Uruguay Round, the need for scientific discipline on phytosanitary measures was widely recognized by GATT contracting parties and was listed as one of the objectives of the Round.<sup>10</sup> Consequently, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) now obligates WTO members to base standards on sound science, to apply an even level of acceptable risk, to recognize the equivalency of different procedures, and to maintain transparent and available regulations. The Agreement also makes phytosanitary disputes subject to WTO dispute settlement procedures.

The SPS Agreement does not create specific SPS standards. Instead, it provides general rules for countries to follow when establishing SPS measures. The effectiveness of the Agreement will be judged by how effectively the new practices prevent the erection of new barriers by requiring more legitimate standards, and by how well the WTO arbitrates existing disputes.

### A. Provisions of the Sanitary and Phytosanitary Agreement

#### 1. Basic Rights and Obligations

Article 2 of the SPS Agreement states that the use of phytosanitary measures necessary to protect the health of humans, animals, and plants is permitted.<sup>11</sup> Such standards, which include guidelines and protocols, can be enacted and maintained only if they are based upon scientific evidence. They cannot be used as disguised restrictions to trade.<sup>12</sup> Therefore, the SPS Agreement does

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<sup>8</sup> GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 518 (6th ed. 1994) [hereinafter Analytical Index].

<sup>9</sup> See 1186 U.N.T.S. 276, 26 B.I.S.D. 8 (1980); 18 I.L.M. 1079; 31 U.S.T. 405, T.I.A.S. No. 9616.

<sup>10</sup> See Ministerial Declaration of the Uruguay Round, GATT Doc. No. MIN.DEC (reprinted at 33S/19), reprinted in 3 T. STEWART, THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY 1 (1993).

<sup>11</sup> SPS Agreement, *supra* note 2, art. 2, ¶ 1 (Legal Texts at 70).

<sup>12</sup> SPS Agreement, *supra* note 2, art. 2, ¶¶ 2,3 (Legal Texts at 70).

not prohibit countries from excluding foreign agricultural products for legitimate health or safety reasons. It simply obligates WTO members to base their regulations on sound science and to apply these regulations in a generally non-discriminatory and non-protectionist manner.

## 2. Harmonization

The world has a broad array of quarantine standards regulating the trade of agricultural commodities, and a key goal of the WTO is to create, as much as possible, a system of compatible SPS standards. Article 3 calls for WTO members to harmonize SPS measures by relying on international standards.<sup>13</sup> This does not mean that they must accept international standards. WTO members can maintain SPS rules that are stricter than the international norm if there is scientific justification or if the measure is a consequence of the level of SPS protection a member deems is appropriate.<sup>14</sup> Thus, if an SPS measure varies from international standards, that alone does not create a presumption that the measure violates the SPS Agreement. However, a deviation from internationally accepted norms may be subject to review by parties questioning the scientific legitimacy of the standard. To promote harmonization, members of the WTO are to work with relevant international organizations such as the International Plant Protection Convention, the International Office of Epizootics, and the Codex Alimentarius Commission.<sup>15</sup>

## 3. Equivalency

The SPS Agreement encourages WTO members to “accept the phytosanitary measures of other WTO countries as equivalent.”<sup>16</sup> If it is objectively shown that the measures of an exporting country provide the same level of plant or animal health protection as do the measures of the importing country, then even if the measures employed by the two countries are different, the importing country should accept the other’s products. In other words, as not all international SPS standards can be expected to be harmo-

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<sup>13</sup> SPS Agreement, *supra* note 2, art. 3, ¶ 1 (Legal Texts at 71).

<sup>14</sup> SPS Agreement, *supra* note 2, art. 3, ¶ 3 (Legal Texts at 71).

<sup>15</sup> SPS Agreement, *supra* note 2, art. 3, ¶ 4 (Legal Texts at 71).

<sup>16</sup> SPS Agreement, *supra* note 2, art. 4, ¶ 1 (Legal Texts at 72).

nized, equivalency will permit WTO members to maintain different means by which to ensure the same level of protection.

Ultimately, the principle of equivalency may help eliminate many unjustifiable barriers and reduce the financial burden of many onerous, but justifiable, regulations. However, WTO members must first determine what methods, albeit different methods, achieve equivalent levels of quarantine security. When comparing two different types of SPS measures, such as an inspection procedure and a fumigation treatment, answers as to the effectiveness of the measures should be found objectively in the scientific data. But when comparing the inspection systems of two countries or the professional caliber of their respective personnel, the analysis is more subjective. In practice, the definition of equivalency and criteria for recognizing equivalent practices is likely to emerge from bilateral consultations, regional agreements, and the exchange of views encouraged by the Sanitary and Phytosanitary Committee, which is created by Article 12 of the SPS Agreement.<sup>17</sup>

#### 4. Risk Assessment

Article 5 requires that phytosanitary measures implemented and administered by the members of the WTO be based upon risk assessment.<sup>18</sup> Risk assessment calls for balancing the need for human, plant, and animal health with the objective of establishing standards that do not unnecessarily restrict trade.<sup>19</sup> Rather than prohibiting outright the entry of a product simply because it was grown in a country where a certain pest is present, phytosanitary measures should take into consideration control and inspection methods as well as the probability that the pest could be transmitted via commercially packed products.<sup>20</sup> Phytosanitary measures must not be more trade restrictive than necessary to ac-

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<sup>17</sup> Under Article 12 of the SPS Agreement (Legal Texts at 76), a Committee on Sanitary and Phytosanitary Measures will serve as a forum for discussions on SPS issues. The Committee will facilitate discussions on SPS matters among WTO members, monitor harmonization, and encourage the development of international standards in the setting of phytosanitary measures. It is intended that the multilateral discussions that take place within this committee will lead to the establishment of definitions for certain terms.

<sup>18</sup> SPS Agreement, *supra* note 2, art. 5, ¶ 1 (Legal Texts at 72).

<sup>19</sup> SPS Agreement, *supra* note 2, art. 4, ¶¶ 1,4 (Legal Texts at 72).

<sup>20</sup> SPS Agreement, *supra* note 2, art. 4, ¶ 2 (Legal Texts at 72).

compish a desired level of protection.<sup>21</sup> Importantly, countries must avoid “arbitrary or unjustifiable distinctions” in establishing acceptable levels of risk.<sup>22</sup> That is, members may not accept a high amount of risk for products they want to import and impose a zero risk level on products that might compete with domestic production.

##### 5. Recognition of Differing Regional Conditions

Article 6 acknowledges that countries have different growing regions, and certain pests and diseases may not be found in all of them.<sup>23</sup> Members of the WTO must recognize the concepts of disease-free and pest-free areas.<sup>24</sup> Unnecessarily broad exclusions of exports from an entire country or region, when prohibiting exports from a more confined area would suffice, have been common means of blocking the exports of American agricultural products. For example, following the detection of a small number of oriental fruit flies outside of growing areas in Southern California, Ecuador prohibited the importation of all host products, primarily fruit, from the United States on November 15, 1995.<sup>25</sup> Under Article 6 of the SPS Agreement, if a pest is found in a specific and limited area, it is likely that prohibiting imports from the entire country would contravene a member’s obligations. In this case, after consultations between the Ecuadoran Ministry of Agriculture and Livestock and United States officials, Ecuador revised its position and agreed to accept non-California commodities and to permit the importation of California fresh fruit if fumigated with methyl bromide before leaving customs.<sup>26</sup> Given that a methyl bromide fumigation is expensive and reduces the quality of some products, unnecessarily requiring such a fumigation was interpreted by some as a trade barrier. Ecuador’s reaction to the limited detections might have been more consistent

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<sup>21</sup> SPS Agreement, *supra* note 2, art. 4, ¶ 6 (Legal Texts at 73).

<sup>22</sup> SPS Agreement, *supra* note 2, art. 5, ¶ 5 (Legal Texts at 72-73).

<sup>23</sup> SPS Agreement, *supra* note 2, art. 6, ¶ 1 (Legal Texts at 73-74).

<sup>24</sup> SPS Agreement, *supra* note 2, art. 6, ¶ 2 (Legal Texts at 74).

<sup>25</sup> *USDA Panel Takes On Technical Barriers*, J. COM., Feb. 13, 1996, at 1A, col. 3, and 12A, col. 4.

<sup>26</sup> Letter from Engineer Ignacio Perez Artera, Technical Administrative Under Secretary, Ecuadoran Ministry of Agriculture and Livestock, to Mr. Charles Havens, Assistant Deputy Administrator for Plant Protection and Quarantine, USDA (Dec. 7, 1995) (on file with author).

with its WTO obligations had it simply prohibited the importation of oriental fruit fly host products originating in or transiting through the detection area until data could be provided documenting the exotic nature of the detection.

A potentially even more important example for California exporters is China's former prohibition of imports of all citrus, apples, table grapes, and cherries from the United States because of detections of the Mediterranean fruit fly in the Los Angeles area. China is seeking to become a member of the WTO, and in March 1994, in order to bring its quarantine regulations into conformity with WTO standards, China agreed that some host products could be imported from areas of the United States outside California.<sup>27</sup> In March 1995, China agreed to evaluate the pest risk of individual commodities, regardless of origin.<sup>28</sup> In theory, this will allow regions outside the Mediterranean fruit fly quarantine area in California to export to China. This evolution in China's policy is due substantially to China's efforts to join the WTO and to bring its measures into conformity with the new WTO standards.

Before recognition of pest free zones may lead to the opening of markets, a clear definition of what constitutes a pest free zone is required. The WTO needs to encourage members and regional quarantine organizations to continue developing criteria for determining when an area is qualified to be considered free of a pest or disease and should encourage, where feasible, the harmonization of these standards among regional bodies.<sup>29</sup> Without WTO guidelines, new barriers could be erected.

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<sup>27</sup> Final Operational Guidelines for Exporting Apples from Washington State of the United States to the People's Republic of China (June 29, 1994); Phytosanitary Requirements for the Export of Sweet Cherries from Washington State of the United States to the People's Republic of China (April 20, 1995); & Operational Guidelines for Exporting Apples from Washington, Oregon and Idaho States of the United States to the People's Republic of China (April 20, 1995) (on file with author).

<sup>28</sup> Letter of Intent signed in Beijing, the People's Republic of China, by Ms. Patricia Sheikh, Foreign Agricultural Service Director for Asia, Africa, and Eastern Europe, International Trade Policy Division, USDA, and Mr. Yao Wenguo, Deputy Director General of Animal and Plant Quarantine, Ministry of Agriculture, the People's Republic of China (March 11, 1995) (on file with author).

<sup>29</sup> The North American Plant Protection Organization (NAPPO) has begun this process. On April 21, 1994, the United States, Canada, and Mexico signed *NAPPO Standards for Pest Free Areas*. NAPPO 934-006.



## 6. Transparency

Article 7 and Annex B of the SPS Agreement require that all SPS regulations be easily identifiable and clear, or transparent. WTO members must freely provide information on their phytosanitary measures and are required to have a central enquiry point at which questions on SPS regulations will be answered.<sup>30</sup> If an international standard does not exist and a member is promulgating a new SPS regulation, a member must publish it at an "early stage," thus permitting the WTO's members to become familiar with it and to comment on it.<sup>31</sup> Except in urgent circumstances, a member country shall provide an interval between the time a new standard is published and when it is enacted; this will permit other countries to adapt to the measure.<sup>32</sup>

These transparency rules have already proven useful for California exporters. In March 1995, Brazil changed importation requirements for twenty-five commodities, including California table grapes.<sup>33</sup> Brazil failed to inform the WTO that it had enacted these SPS regulations.<sup>34</sup> Brazilian importers learned four months after the promulgation of the rules that their government had revised its phytosanitary regulations in such a way that, had they been enforced, would have unintentionally closed the Brazilian market to California's table grape exports.<sup>35</sup> Importers were told the regulations would be implemented immediately, possibly stranding shipments en route and prematurely ending the season for California table grape exports to Brazil. However, when the United States argued Brazil had not fulfilled its notification requirements under the SPS Agreement, Brazil provided the United States with a bilateral derogation until December 31, 1995.<sup>36</sup> Following bilateral consultations with the United States, Brazil in February 1996 agreed to permit the importation of Cali-

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<sup>30</sup> SPS Agreement, *supra* note 2, art. 7, & Annex B, ¶ 3 (Legal Texts at 74, 80).

<sup>31</sup> SPS Agreement, *supra* note 2, art. 7, & Annex B, ¶ 5 (Legal Texts at 81).

<sup>32</sup> SPS Agreement, *supra* note 2, art. 7, & Annex B, ¶ 2 (Legal Texts at 80).

<sup>33</sup> INSIDE APHIS, Nov.-Dec. 1995, at 16, col. 2.

<sup>34</sup> *Id.*

<sup>35</sup> EXPORT CERTIFICATION UNIT, ANIMAL & PLANT HEALTH INSPECTION SERVICE (APHIS), USDA, PHYTOSANITARY NOTE 813 (issued to USDA-authorized inspectors Aug. 10, 1995) (on file with author).

<sup>36</sup> Unclassified cable #2420, Aug. 24, 1995, from USDA, Brasilia, to Foreign Agricultural Service (FAS) and APHIS, Washington, D.C., FAS WASHDC 15615 (on file with author).

fornia table grapes subject to inspection.<sup>37</sup>

### B. *The Future of Phytosanitary Disputes*

Over the next several years, one can expect a growing number of phytosanitary conflicts. The lower tariff bindings negotiated in the Uruguay Round could cause some countries to view the implementation of SPS measures as one of the few remaining means by which to protect domestic growers. Some American officials contend that this is already happening.<sup>38</sup> Differing interpretations on what the SPS Agreement requires may, at least initially, lead to disputes. It is precisely these disputes that may further define obligations and establish clearer guidelines for what constitutes justifiable standards. Until a few precedent setting cases are successfully arbitrated, questions will remain about the eventual impact of the SPS Agreement. However, its potential to ensure that phytosanitary standards will be based on scientific and not protectionist considerations, if realized, will benefit California agricultural exporters.

## II. DISPUTE SETTLEMENT

The SPS Agreement would be of limited use if it could not be enforced. The Understanding on Rules and Procedures Governing the Settlement of Disputes, or Dispute Settlement Understanding (DSU), of the Uruguay Round, provides a means by which to resolve disputes. Before examining the DSU, however, it is helpful to understand the GATT's dispute settlement mechanism, which was the DSU's precursor.<sup>39</sup>

### A. *Dispute Settlement under the GATT*

Under the GATT, a contracting party could utilize the dispute settlement process if it believed another member had violated

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<sup>37</sup> APHIS, USDA, PHYTOSANITARY INSTRUCTIONS (Feb. 7-8, 1996).

<sup>38</sup> "When I hear that there is a new barrier to a U.S. product, nine times out of 10 it is a phytosanitary or sanitary issue, and that might be conservative." Paul Drazek, Chair of the Sanitary and Phytosanitary Working Group, USDA. This group, which was established by the USDA in 1995 to help remove SPS trade barriers, is currently working on more than 190 cases. *USDA Panel Takes on Technical Barriers*, J. COM., Feb. 13, 1996, at 1A, col. 3.

<sup>39</sup> For a more detailed description of the GATT's dispute settlement process, see Plank, *An Unofficial Description of How a GATT Panel Works and Does Not*, 4 J. INT'L ARB. 53 (1987).

GATT rules.<sup>40</sup> However, contracting parties avoided formal dispute resolution whenever possible. Rather than serving as a judicial forum for objectively resolving disputes, the filing of a case was sometimes perceived as a failure of diplomacy. Contracting parties were obligated to exhaust bilateral discussions and then undergo more consultations under GATT auspices in Geneva before a panel could be formed.<sup>41</sup>

Sometimes consultations led to resolution. For example, the United States apple and pear industry in 1987 challenged the Swedish and Norwegian opening date systems (import windows dependent on domestic production).<sup>42</sup> The United States requested that a panel be formed to review its dispute with Sweden, but consultations produced a mutually acceptable, GATT-consistent settlement between the two countries, so a panel was never created.<sup>43</sup> However, consultations failed to yield an agreement with Norway, and a panel was established to arbitrate the dispute.<sup>44</sup>

When panels were formed, three or five experts from countries disinterested in the outcome of the dispute would read submissions of the disputing parties, listen to oral arguments, and then make a judgment based upon the facts and the GATT rules.<sup>45</sup> Even though panels were to make decisions and release reports "without undue delay," decisions, especially in agricultural cases, were slowed by lengthy consultations and the threat of blocked panel reports.<sup>46</sup>

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<sup>40</sup> GATT, THE TEXT OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 39 (July 1986) [hereinafter General Agreement]; GATT, THE TEXT OF THE TOKYO ROUND AGREEMENTS, UNDERSTANDINGS REGARDING NOTIFICATION, CONSULTATION, DISPUTE SETTLEMENT AND SURVEILLANCE 201-02 (Nov. 28, 1979) [hereinafter Tokyo Round]; GATT Doc. L/4907, ¶¶ 8-10.

<sup>41</sup> GATT Doc. L/4907, ¶¶ 8,16; Tokyo Round, *supra* note 40, at 201, 203.

<sup>42</sup> R. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT SYSTEM 241-242, 553-554 (1993) [hereinafter Enforcing International Trade Law]; GATT Doc. L/6300.

<sup>43</sup> Enforcing International Trade Law, *supra* note 42, at 554; GATT Doc. L/6330.

<sup>44</sup> Enforcing International Trade Law, *supra* note 42, at 242, 553; GATT Doc. C/M/218.

<sup>45</sup> GATT Doc. L/4907, Annex: Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement, at *ii-vii* [hereinafter Agreed Description].

<sup>46</sup> Analytical Index, *supra* note 8, at 588; GATT Doc. L/4907, Agreed Description, *supra* note 45, at *ix*.

The panel's written report would first be submitted to the disputing parties who were provided with yet another opportunity to resolve their differences.<sup>47</sup> If the parties could not settle, the panel issued its report.<sup>48</sup> Unless the GATT Council adopted the report by consensus, the report had no effect.<sup>49</sup> If the report was adopted, the losing party was obligated to comply with the panel's recommendations within "a reasonable period of time."<sup>50</sup> Contracting parties could be authorized to suspend concessions or retaliate against another party if circumstances "were serious enough to justify such action," such as in the case of non-compliance.<sup>51</sup> However, with few exceptions, retaliation or compensation were not invoked.<sup>52</sup>

### B. Complaints about the GATT Dispute Settlement Process

In the opinions of American negotiators at the Uruguay Round and many exporters who had tried to use the system, the GATT dispute settlement mechanism was seriously flawed.<sup>53</sup> The process

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Although the Contracting Parties have never established precise deadlines for the different phases of the procedure, probably because the matters submitted to panels differ as to their complexity and their urgency, in most cases the proceedings of the panels have been completed within a reasonable period of time, extending from three to nine months.

In reality, however, the process took much longer. See *infra* note 55, at 15-17, and U.S. Docket No. 301-326.

<sup>47</sup> GATT Doc. L/4907, ¶ 18; Tokyo Round, *supra* note 40, at 203.

<sup>48</sup> GATT Doc. L/4907, ¶ 17; Tokyo Round, *supra* note 40, at 203.

<sup>49</sup> GATT Doc. L/4907, ¶ 10; Tokyo Round, *supra* note 40, at 202. See also J. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 50 (1989):

[T]he voting consensus question has posed great problems for the GATT dispute settlement procedure, rendering it difficult if not impossible to obtain Council approval of a panel report in a dispute, when the national dissatisfied with the outcome expressed in such a report refuses to go along with the "consensus" for Council approval.

<sup>50</sup> GATT Doc. L/4907, ¶¶ 21, 22; Tokyo Round, *supra* note 40, at 204; & Analytical Index, *supra* note 8, at 588.

<sup>51</sup> GATT art. 23, ¶ 2; General Agreement, *supra* note 40, at 40.

<sup>52</sup> See A. OXLEY, THE CHALLENGE OF FREE TRADE 149 (1990); J. JACKSON, THE WORLD TRADING SYSTEM, LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 96 (1989): "Although the contracting parties are authorized to suspend concessions . . . they have actually done so in only one case (up to mid-1988)."

<sup>53</sup> For a thorough description of the problems with the GATT's dispute settle-

lacked deadlines and could drag on for years.<sup>54</sup> Under the GATT's policy of consensus voting, the ability of a single contracting party, often the defending party, to block a decision after a lengthy period of documented submissions and oral arguments weakened the legitimacy of the GATT as an effective arbiter. The process did not provide for appeals of panel reports. If the GATT Council did adopt a report, its recommendations were not always implemented, so even after prevailing the party that requested the panel report might not secure more access if the defending party failed to implement fully the panel report.

The dispute between the United States and the European Community (E.C.) over canned fruit subsidies, which was of concern to California peach and pear processors, illustrated some of the defects of the GATT's dispute settlement mechanism.<sup>55</sup> In the 1960's, the E.C. reduced its tariffs on canned fruit.<sup>56</sup> In 1978-79, the E.C. extended subsidies to fruit processors that, according to the United States canned fruit industry, negated the tariff reductions. After consultations between the United States and the E.C. failed, a GATT panel was formed in March 1982.<sup>57</sup> Nearly three years after the panel's formation, the panel's report was distributed to all contracting parties in February 1985.<sup>58</sup> The panel concluded, among other points, that the subsidies neutralized the cost advantages of foreign suppliers.<sup>59</sup> Although the United States

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ment mechanism compiled for the Congress when it was considering implementing legislation for the Tokyo Round, refer to J. JACKSON, *MTN AND THE LEGAL INSTITUTIONS OF INTERNATIONAL TRADE*, (a report prepared at the request of the Subcomm. on Int'l Trade, Senate Comm. on Finance), 96th Cong., 1st Sess., 6 MTN Studies, pt. 4, at 12-22 (Comm. Print 1979).

<sup>54</sup> Between March 1988 and January 1992, the median period of time from the date a panel was requested to initiate the dispute settlement process to the date the panel issued its report was 395 days. Once issued, the median time until the report was adopted (if the GATT Council did adopt it) was 249 days. Horlick & DeBusk, *Dispute Resolution under NAFTA: Building on the U.S.-Canada FTA, GATT and ICSID*, 27 J. WORLD TRADE L. 36-37 (Feb. 1993).

<sup>55</sup> U.S.T.R. § 301, *E.C. Canned Fruit Production Subsidies*, Docket No. 301-26 (1981), and Docket No. 301-71 (1989).

<sup>56</sup> Enforcing International Trade Law, *supra* note 42, at 496; GATT Doc. L/5306.

<sup>57</sup> Enforcing International Trade Law, *supra* note 42, at 496; GATT Doc. C/M/156.

<sup>58</sup> Enforcing International Trade Law, *supra* note 42, at 156, 496; GATT Doc. L/5778.

<sup>59</sup> Enforcing International Trade Law, *supra* note 42, at 156, 496-497; GATT Doc. L/5778.

was successful in convincing the panel, the E.C. blocked the adoption of the panel's ruling by the GATT Council.<sup>60</sup>

In February, 1986, a bilateral agreement was negotiated.<sup>61</sup> The E.C. agreed to reductions in assistance payments and some subsidies in exchange for the United States withdrawing the case. However, in May, 1989, the E.C.'s failure to implement the agreement prompted a section 301 dispute.<sup>62</sup> Finally, in October of that same year, over seven years after the panel's formation, a lasting bilateral agreement was reached.<sup>63</sup> The length of this dispute and the ability of the E.C., the defending party, to block Council adoption demonstrated some of the flaws of the GATT's dispute settlement procedures.

As the most frequent user of the dispute settlement mechanism, the United States had much to gain from an improved dispute settlement process. Frustrated both by the weaknesses of the GATT system and the massive American trade deficits that first arose in the mid-1980's, Presidents Reagan, Bush, and Clinton advocated changes in international rules that would create a stronger dispute settlement mechanism. In the Omnibus Trade and Competitiveness Act of 1988, Congress stated that a primary objective of United States negotiators at the Uruguay Round should be "to provide for more effective and expeditious dispute settlement mechanisms and procedures" and "to ensure that such mechanisms within the GATT . . . enable better enforcement of U.S. rights."<sup>64</sup> Arguably, American negotiators were successful in fulfilling Congress' mandate.

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<sup>60</sup> Enforcing International Trade Law, *supra* note 42, at 498.

<sup>61</sup> Enforcing International Trade Law, *supra* note 42, at 498; GATT Doc. C/M/195 (meeting of Feb. 12, 1986).

<sup>62</sup> 6 Int'l Trade Rep. 867 (BNA)(1989); U.S.T.R. Docket No. 301-71; Enforcing International Trade Law, *supra* note 42, at 498.

Section 301 of the Trade Act of 1974 is the principal United States law for addressing unfair trade practices that damage United States interests. Under section 301, the United States may unilaterally raise tariffs or impose quantitative restrictions on imports of the violating country if the country is found to be violating a trade obligation owed to the United States. Section 301 must be used in connection with the WTO process if a WTO agreement is involved. The United States maintains that it may use Section 301 consistently with its WTO obligations.

<sup>63</sup> 6 Int'l Trade Rep. 867 (BNA)(1989); GAIT Focus No. 38, at 1 (1986).

<sup>64</sup> Omnibus Trade and Competitiveness Act of 1988, § 1101(b)(1), 19 U.S.C. § 2901(b)(1) (1988).

### C. *The Dispute Settlement Understanding of the Uruguay Round*

The Dispute Settlement Understanding (DSU) of the Uruguay Round is designed to create a more expeditious system by which unfair trade barriers may be removed. It is based upon, yet significantly changes, the GATT's dispute settlement mechanism. The DSU sets forth in great detail the rules and deadlines of the new system. It establishes a Dispute Settlement Body composed of all the contracting parties, which administers the dispute settlement rules.<sup>65</sup> Improving upon the GATT system, the DSU establishes a procedure for appealing panel reports. It contains provisions for compensation and retaliation if a party does not abide by a report's recommendations. It reverses the GATT's requirement of consensus when making certain decisions, thus preventing a disputing party from blocking decisions contrary to its interests. In short, under the new rules, the establishment of dispute panels, the adoption of their reports, the adoption of appellate reports, and the granting of requests for retaliation will be virtually automatic. And perhaps most important, in marked contrast with the GATT's dispute resolution process, the DSU contains strict deadlines.

#### 1. Consultations

The DSU maintains the preference for mutual resolution of disputes over arbitration.<sup>66</sup> Under Article 4, a complainant is required to consult with a party it believes is infringing upon its trading rights before asking for the establishment of a panel.<sup>67</sup> However, if consultations do not resolve the dispute within 60 days, the complaining party may request the formation of a panel.<sup>68</sup> If the dispute involves perishable goods, a likely situation for California agricultural exporters, a panel may be requested after only 20 days of consultations.<sup>69</sup>

#### 2. Panels

If consultations are not constructive, a panel will be established to review a dispute unless the Dispute Settlement Body decides by

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<sup>65</sup> Dispute Settlement Understanding, art. 2, ¶ 1 (33 I.L.M. 114).

<sup>66</sup> *Id.* art. 3, ¶ 7 (33 I.L.M. 115).

<sup>67</sup> *Id.* art. 4, ¶¶ 3, 7-8 (33 I.L.M. 116-17).

<sup>68</sup> *Id.* ¶ 7 (33 I.L.M. 117).

<sup>69</sup> *Id.* ¶ 8.

consensus not to do so.<sup>70</sup> As was the case with the GATT, each panel will consist of either three or five persons disinterested in the outcome of the dispute.<sup>71</sup> The disputing parties are to present written submissions describing the dispute and explaining their respective views of it to the panel.<sup>72</sup> Given that not all jurists will have the technical expertise to rule on entomological or plant pathological issues, the Agreement encourages panels to solicit the impartial advice of technical experts and even to form expert review groups to provide scientific information.<sup>73</sup> The panel will then evaluate the arguments, and perhaps with the assistance of internationally recognized experts, examine the applicability of the Uruguay Round Agreements to the dispute.<sup>74</sup>

Diplomatic and bilateral initiatives are still encouraged. Throughout the process, the panel is to consult regularly with the disputing parties and provide them with opportunities to reach a mutually satisfactory solution.<sup>75</sup> If the parties do not arrive at a settlement, the panel shall submit a written report to the Dispute Settlement Body that lists the relevant facts, the applicability of the rules, and the rationale for the panel's recommendations.<sup>76</sup> The panel also must recommend in its report that the defending government amend or repeal the measure if the disputed measure is found to have violated one of the Uruguay Round Agreements.<sup>77</sup>

A deadline of six months is set for the panel to submit its report unless the matter is particularly urgent, as with perishable products, in which case the panel should attempt to release the report within three months.<sup>78</sup> While the six month deadline may be extended if necessary, in no case shall the period between the establishment of the panel and the issuance of the report exceed nine months.<sup>79</sup> The Dispute Settlement Body shall adopt the re-

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<sup>70</sup> *Id.* art. 6, ¶ 1 (33 I.L.M. 118).

<sup>71</sup> *Id.* art. 8, ¶¶ 3, 5 (33 I.L.M. 119).

<sup>72</sup> *Id.* art. 12, ¶ 6 (33 I.L.M. 121).

<sup>73</sup> *Id.* art. 13, ¶ 2 (33 I.L.M. 122). Likewise, the SPS Agreement, *supra* note 2, art. 11, ¶ 2 (Legal Texts at 75) states a panel "may . . . establish an advisory technical experts group" from which to obtain advice on scientific matters.

<sup>74</sup> Dispute Settlement Understanding, art. 11 (33 I.L.M. 120).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* art. 12, ¶ 7 (33 I.L.M. 121).

<sup>77</sup> *Id.* art. 19, ¶ 1 (33 I.L.M. 124).

<sup>78</sup> *Id.* art. 12, ¶ 8 (33 I.L.M. 121).

<sup>79</sup> *Id.* art. 12, ¶ 9.



port within 60 days following the release of the report unless the body decides unanimously to reject it or one of the disputing parties states its intent to appeal.<sup>80</sup>

### 3. Appeals

Under the new Agreement, panel reports can be appealed. An appeals process was devised in part to address concerns about the power that the nearly automatic adoption of panel reports would give to panels. The WTO's standing Appellate Body may uphold, modify, or reverse a panel's legal conclusions.<sup>81</sup> Generally, the Appellate Body shall issue its finding within 60 days from the date the appeal was requested.<sup>82</sup> Once the Appellate Body circulates its report, the report is to be adopted within 30 days unless by consensus the Dispute Settlement Body rejects it.<sup>83</sup> The disputing parties must unconditionally accept the Appellate Body's report.<sup>84</sup>

### 4. Implementation and Surveillance of Panel Reports

In contrast to the GATT, the DSU contains a specific time frame for the implementation of decisions. Within thirty days after the adoption of a report, the defending party must notify the Dispute Settlement Body of its intent regarding the report.<sup>85</sup> If the report's recommendations cannot be implemented immediately, the DSU states that the party shall have a "reasonable period of time" in which to comply.<sup>86</sup> This reasonable period is established in one of three ways. The defending party may set a date by which it will implement the decision; this date must be approved by the Dispute Settlement Body.<sup>87</sup> If it is not approved, within 45 days after a report is adopted by the Dispute Settlement Body, the disputants may mutually agree to a compliance schedule.<sup>88</sup> If such an agreement cannot be reached, a compliance date may be established by binding arbitration. This must be

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<sup>80</sup> *Id.* art. 16, ¶ 4 (33 I.L.M. 123).

<sup>81</sup> *Id.* art. 17, ¶ 13 (33 I.L.M. 124).

<sup>82</sup> *Id.* ¶ 5 (33 I.L.M. 123).

<sup>83</sup> *Id.* ¶ 14 (33 I.L.M. 124).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* art. 21, ¶ 3 (33 I.L.M. 125).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* art. 21, ¶ 3, § a (33 I.L.M. 125).

<sup>88</sup> *Id.* § b.

done within 90 days after the adoption of the panel report.<sup>89</sup>

Unless the panel or the Appellate Body has extended the period for issuing its report, the length of time from the establishment of a panel until the date that the reasonable period of time for implementation is set may not exceed 15 months unless the disputing parties agree otherwise.<sup>90</sup> The total time, except under exceptional circumstances, may not exceed eighteen months.<sup>91</sup>

The Dispute Settlement Body is obligated to see that its recommendations are implemented. It will keep under surveillance the rulings it adopts, and any of its members may raise questions about the implementation of adopted decisions.<sup>92</sup> Questions concerning the implementation of decisions may not be removed from the agenda of the Dispute Settlement Body until they are resolved.<sup>93</sup> Within ten days prior to a Dispute Settlement Body meeting to discuss the implementation of recommendations in a certain dispute, the defending party must present the Dispute Settlement Body with a written report describing the steps toward implementation it has taken.<sup>94</sup>

## 5. Compensation and Retaliation

If a defending party does not bring the disputed measure into conformity with the Uruguay Round Agreement within a reasonable period (as established under the procedures of Article 21), that party will be obliged to enter into negotiations for compensation if the other party so requests.<sup>95</sup> If a mutually acceptable compensation scheme cannot be agreed upon within 20 days after the end of the implementation period, the complaining party may request that the Dispute Settlement Body permit it to suspend concessions, or retaliate.<sup>96</sup> This may be done only as a last resort, and the retaliation must be authorized by the Dispute Settlement Body.<sup>97</sup> Unless it decides by consensus to reject the request, the Dispute Settlement Body shall permit retaliation within

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<sup>89</sup> *Id.* § c.

<sup>90</sup> *Id.* ¶ 4.

<sup>91</sup> *Id.* (33 I.L.M. 125-126).

<sup>92</sup> *Id.* ¶ 6 (33 I.L.M. 126).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* art. 22, ¶ 2.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* art. 3, ¶ 7 (33 I.L.M. 115).

30 days after the end of the implementation period.<sup>98</sup> The level of retaliation may not exceed the impairment caused by the violating measure's non-conformity with the Uruguay Round Agreement.<sup>99</sup> The defending party may seek arbitration if it believes that the level of retaliation is excessive.<sup>100</sup> The arbitration should be completed within 60 days after the expiration of the implementation period, and the parties shall accept the arbitration decision as final.<sup>101</sup>

### III. CASE STUDIES

#### A. *Washington and Oregon Apples to Japan*

The effort to secure access for Washington and Oregon apples into Japan demonstrates how long pre-Uruguay Round bilateral negotiations could languish without result. Talks to eliminate scientifically unjustified standards dragged on for more than a decade. Although this example involves products grown in Washington and Oregon, the lessons drawn from it are directly applicable to California commodities, including California apples, which Japan continues to ban.

Prior to 1995, Japan prohibited the importation of Washington and Oregon apples for phytosanitary reasons.<sup>102</sup> Japan's primary quarantine concern was the presence of codling moths. However, the possibility that the fireblight bacteria or the lesser appleworm and a few other pests might be introduced, via apples, into Japan were also issues.<sup>103</sup> The Northwest apple industry began addressing Japan's concerns in the 1970's and intensified its efforts in the early 1980's.<sup>104</sup> In an effort to allay Japanese anxieties over the codling moth, United States industry worked with USDA to

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<sup>98</sup> *Id.* art. 22, ¶ 6 (33 I.L.M. 127-128).

<sup>99</sup> *Id.* ¶ 4 (33 I.L.M. 127).

<sup>100</sup> *Id.* ¶ 6 (33 I.L.M. 127-128).

<sup>101</sup> *Id.* ¶¶ 6, 7.

<sup>102</sup> Message transmitted from Earl Ozaki, APHIS Area Director, USDA, in Tokyo, to G. Greg Rohwer, APHIS Assistant Deputy Administrator, USDA, in Washington, D.C., June 7, 1983; message transmitted from Earl Ozaki, APHIS Area Director, USDA, in Tokyo, to William Helms, APHIS Deputy Administrator (June 23, 1987) (APHIS/PPQ reference 62-3212).

<sup>103</sup> Ozaki to Helms, *supra* note 102.

<sup>104</sup> Letter to the editor, from Christian Schlect, President of the Northwest Horticultural Council, to the editor of the SEATTLE POST INTELLIGENCER (Sept. 1, 1993), stating: "Washington's apple growers have tried in vain since 1971 to gain access to the Japanese market."

develop and present to Japan a "systems approach" involving multiple intense inspections of apples to be exported. According to the USDA, this approach would have provided the same or greater level of quarantine security as the requested fumigation treatment. However, Japan rejected even a trial shipment of apples under the systems approach procedure claiming that its law required a fumigation.<sup>105</sup>

In November 1985, Deputy Administrator Ford of the Animal and Plant Health Inspection Service (APHIS) of USDA claimed that his agency had done all it could do given that Japan was insisting on a 100 percent guaranteed security system. It was debated whether the issue should be raised to a political level. The Reagan Administration then requested that the USDA and the industry try to develop a fumigation treatment for the codling moth as requested by Japan. By March 1987, the USDA and the industry had developed a treatment that combined fifty-five days in cold storage with a methyl bromide fumigation. The Japanese Ministry of Agriculture, Forestry, and Fisheries (MAFF) responded that this fumigation would be acceptable if confirmed by large scale tests. It was at this time that MAFF also outlined extensive measures for fireblight and requested data on five additional pests.<sup>106</sup>

The large scale tests for codling moth were commenced and the results were accepted by Japan in November 1988. In addition, in 1989, USDA sent Japan research documenting that mature symptomless commercially packed apples were safe and that quarantine measures were not necessary since fireblight could not be recovered from the surface of mature apples taken from blighted trees.<sup>107</sup> In December 1989, Japan rejected this research and insisted upon field and treatment measures for fireblight. MAFF also requested additional information on the lesser appleworm.<sup>108</sup>

In February 1992, MAFF responded to United States data submissions with requests for additional information on codling

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<sup>105</sup> Ozaki to Helms, *supra* note 102.

<sup>106</sup> Ozaki to Helms, *supra* note 102.

<sup>107</sup> R.G. Roberts, Evaluation of Mature Apple Fruit for the Presence of *Erwinia Amylovora* (1989)(unpublished article, on file with author).

<sup>108</sup> Message transmitted from R.R. Hashimoto, APHIS, USDA, in Tokyo, to Richard Backus APHIS, USDA, in Washington, D.C. (Jan. 4, 1990)(message EGJA-2916-7197).

moth treatment procedures and with requests for further safeguards for fireblight, including a requirement that field inspections be conducted after rain or hail storms.<sup>109</sup> By June 1992, USDA had sent the Ministry all it had requested. In mid-December 1992, in a meeting with industry representatives, MAFF agreed to provide before Christmas a timetable for when it would send inspectors to confirm laboratory tests and field procedures. In January 1993, that timetable still had not been provided, and USDA requested that a technical team from both sides be formed to reach a final agreement. Japan delayed, suggesting that all technical issues be resolved prior to a meeting between scientists.<sup>110</sup> In March 1993, Michael Armacost, United States Ambassador to Japan, sent an unclassified cable to Washington, D.C., stating that "continuation of a technical dialogue with the Ministry of Agriculture has proven to be feckless when what we are dealing with in reality is a politically driven non-tariff trade barrier."<sup>111</sup>

Over the following months, extensive political pressure to resolve this dispute was put on Japan. United States industry launched a public affairs campaign in Japan and also investigated the possibility of taking section 301 action. Senator Slade Gorton of Washington traveled to Tokyo for two days of meetings on this issue with Japanese leaders. The Clinton Administration undertook subcabinet and cabinet level involvement. These efforts were successful. Japan ultimately recognized all technical issues as resolved.<sup>112</sup> A year was spent implementing pre-harvest procedures, and the first Washington and Oregon apples arrived in Japan in January 1995.<sup>113</sup>

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<sup>109</sup> Message transmitted from APHIS International Services in Japan, to APHIS International Services in Hyattsville, MD (Feb. 10, 1992)(message LGJC-3252-8058).

<sup>110</sup> Message transmitted from James Parker, U.S. Minister-Counselor for Agriculture in Tokyo, to Mr. Glen Lee, Deputy Administrator, APHIS (Jan. 27, 1993)(on file with author).

<sup>111</sup> State Dep't unclassified cable 5105, March 22, 1993 (on file with author).

<sup>112</sup> Press release, former U.S. Representative Jay Inslee (WA-4), Sept. 24, 1993 (on file with author).

<sup>113</sup> While Japan has opened its market to Washington apples, growers are not entirely pleased. Due to stringent rules on inspecting, packing, and storage, the amount of apples being sent to this large market is relatively small. In addition, Japan has approved only a limited number of growing acres for its imports. *Export Growth Fruitful for U.S. Apple, Pear Growers*, J. COM., Jan. 18, 1996, at 8A, col. 2.

If the Uruguay Round's SPS Agreement had been in place when the apple agreement was being negotiated, this dispute most likely would have evolved differently. One of the major irritants for United States negotiators was the perception that Japan's "goal posts" kept moving. Japan did not have, up front, a transparent description of how it intended for its quarantine concerns to be addressed. It appeared to some United States negotiators that once a problem was solved, Japan determined that it had not been solved the right way, or yet another problem was found to replace it. For example, when nearly all issues surrounding the fireblight problem had finally been resolved in the spring of 1993 after the apple blossom, Japan insisted that a fireblight inspection be conducted during the blossom season, in effect delaying market access for another year.<sup>114</sup> If transparency language had been part of the international standards when negotiations began, the United States could have insisted upon a more comprehensive understanding of what would be required to address all concerns and could have dealt with those issues simultaneously, rather than sequentially. The transparency required under the SPS Agreement fixes the "goal posts" so that exporters know what must be accomplished in order to comply with foreign regulations. The SPS Agreement language on equivalency might have shortened the negotiations. If this text had been in place when Japan rejected the systems inspection approach because it was not a treatment, the United States could have requested consultations and possibly international review based upon the principles of sound science and equivalency. Under the equivalency language, WTO members are obligated to accept different methods that have been objectively demonstrated to secure the same level of quarantine security.<sup>115</sup> If the SPS Agreement had been in effect, Japan could not have rejected the systems approach simply because its national legislation required a treatment. Under the new system, national laws that require scientifically unfounded policies may contravene a member's WTO obligations and be subject to international review. The apple dispute was settled by bilateral negotiations, which were not conducted under the auspices of the GATT. If Washington and Oregon apple growers had sought to

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<sup>114</sup> Letter from Secretary of Agriculture Mike Espy and U.S. Trade Representative Mickey Kantor to the Japanese Ministry of Agriculture, Forestry and Fisheries (May 19, 1993) (on file with author).

<sup>115</sup> SPS Agreement, *supra* note 2, art. 4, ¶ 1 (Legal Texts at 72).

resolve their dispute through the GATT's dispute resolution mechanism, the process likely would have been lengthy as well, and despite having compelling arguments for removing Japan's barriers, the dispute's outcome would not necessarily have been conclusive. However, it is probable that a more scientific resolution would have been reached sooner if the DSU of the Uruguay Round had been available.

While it is possible that the WTO may evolve into a small claims court where issues such as the dispute over Washington and Oregon apples are submitted, reviewed, and decided upon, the SPS text will be a greater success if it simply prevents episodes such as the one presented above. The new SPS language has the potential of instilling discipline into the setting of international standards and into the conduct of bilateral negotiations. That in itself may provide the means for reducing the number of issues that need to avail themselves of the WTO dispute settlement process.

#### B. *California Tomatoes to Japan*

The case of California tomatoes and Japan presents an example of how the SPS standards are possibly already instilling some discipline into bilateral negotiations and, as a result, might be shaping the standards being set by importing countries. While California tomato growers consider Japan a potentially significant market, tomato imports from the United States are prohibited due to Japan's contention that fresh tomatoes from the United States could carry tobacco blue mold.<sup>116</sup> On numerous occasions, California growers have provided evidence to Japan that United States tomatoes are not hosts for the fungus and thus pose no threat to Japanese agriculture.<sup>117</sup>

The Japanese Ministry of Agriculture, Forestry, and Fisheries (MAFF) scheduled a hearing for February 1996 at which a panel

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<sup>116</sup> *A Slice of the Market*, J. COM., Jan. 15, 1996, at 1A, col. 3.

<sup>117</sup> Memorandum by Jim Westbrook, FAS/ITP/AAEED, Foreign Agricultural Service, USDA (Nov. 9, 1995).

Ed Beckman, President of the California Tomato Board, states: "There has never been any incident of blue mold on tomatoes, nor are (tomatoes) listed as a host of blue mold in the State of California, and we have provided extensive documentation to that effect." *Japan's Market Remains Closed to U.S. Tomatoes*, J. COM., Feb. 13, 1996, at 12A, col. 5.

would evaluate the risks that imported tomatoes pose to Japan.<sup>118</sup> California exporters were optimistic that Japan would accept their data, which would mean that the quarantine would be removed. However, the panel refused to lift the ban.<sup>119</sup> In addition, Japanese officials placed new stipulations upon Americans providing data on tobacco blue mold.<sup>120</sup> Once again, as had happened with Washington and Oregon apples, data submissions concerning United States tomatoes were accepted and returned by Japan with requests for still more data.

However, it appears the SPS Agreement might affect the outcome of this case. Equipped with new international rules that did not exist when the apple dispute was being negotiated, United States technical negotiators in February 1996 informed MAFF that sufficient information had been provided to make a scientifically based decision, and if the Japanese did not do so, USDA would consider pursuing WTO review under the DSU.<sup>121</sup> Japan agreed to reconsider some previous positions and tentatively accepted United States research and testing data.<sup>122</sup> In this case, the threat of WTO action might be enough to convince Japan to bring its measures on tomatoes into conformity with the WTO Agreements. While market access still has not been secured, the new WTO rules might save the California tomato industry years of frustrating bilateral negotiations. Also, the SPS Agreement might prevent Japan from requiring costly and sometimes scientifically questionable procedures in exchange for market access as it did with Washington and Oregon apple growers.

#### CONCLUSION

The SPS Agreement and Dispute Settlement Understanding of the Uruguay Round have the potential of greatly benefitting California agricultural exporters. The SPS Agreement will establish discipline on the enactment of phytosanitary standards. The Dispute Settlement Understanding will make it possible to enforce

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<sup>118</sup> *A Slice of the Market*, J. COM., Jan. 15, 1996, at 1A, col. 3.

<sup>119</sup> *Japan's Market Remains Closed to U.S. Tomatoes*, J. COM., Feb. 13, 1996, at 12A, col. 5.

<sup>120</sup> Letter from U.S. Secretary of Agriculture Dan Glickman to U.S. Representative George Radanovich (March 15, 1996) (on file with author).

<sup>121</sup> Pers. Comm. between the author, William L. Bryant, and U.S. negotiators.

<sup>122</sup> Letter from Secretary of Agriculture Dan Glickman to U.S. Representative George Radanovich (March 15, 1996) (on file with author).



these rules in a much more effective and rapid manner than was possible under the GATT.

By the end of the Uruguay Round in 1994, the need for international governance on SPS measures was even more apparent than it had been at the beginning of negotiations in 1986. High value horticultural trade increased dramatically during the eight years it took to negotiate the SPS Agreement.<sup>123</sup> The extended efforts of the Northwest apple industry and the ongoing efforts of the California tomato industry to secure access to Japan emphasized the importance of establishing a system based upon internationally accepted scientific principles.

It appears that the new system is beginning to work.<sup>124</sup> Countries for the most part are notifying the WTO prior to changing standards, and WTO members are being given the opportunity to comment prior to the standards being implemented.<sup>125</sup> It is possible that this process will prevent future disputes. And, as was the case with Brazil's rules on importing California table grapes, when no advance notification is given it is hoped regulatory implementation may be delayed and extensions providing for consultations may be secured. In addition to increased cooperation as a result of more transparency, some countries, such as Japan, are bringing, if only reluctantly, their regulations into conformity with the rules of the Uruguay Round Agreements.

While to some extent the Uruguay Round Agreements are already working to prevent future barriers from being erected, to be successful they must also resolve existing disputes. The WTO must be prepared to arbitrate where non-scientifically based regulations are impeding trade. This will require international consensus on the concept of acceptable risk, on approved methodology

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<sup>123</sup> "The total value of U.S. horticultural exports climbed to \$9.1 billion in 1995, up 12 percent from 1994 and more than triple the export value of 1985." APHIS TRADE SUPPORT TEAM, USDA, TECHNICAL TRADE REPORT (Mar. 1996).

<sup>124</sup> In a demonstration of confidence in the new system, 26 disputes were brought before the WTO between January, 1995 and January, 1996. *Disputes Before the WTO*, J. COM., Jan. 30, 1996, at 7A, col. 1.

<sup>125</sup> *Count of SPS WTO Notifications in 1995 by Country*, compiled from information provided by the USDA Office of Food Safety and Technical Services (Feb. 12, 1996) (on file with author). In 1995, WTO members provided 190 notifications of SPS regulatory changes to the WTO. Mexico notified the WTO of such changes most frequently (87 notifications) with the European Union (23), the Republic of Korea (21), and the U.S. (18) also submitting frequent notifications. Japan submitted seven notifications of SPS regulatory changes. Notifications were received by 19 different countries.

for approving pest free zones, on criteria for evaluating the equivalency of different methods, and on certain definitions. This consensus and the framework it supports will to some extent evolve from the precedents established in panel reports. To this extent, the streamlined dispute settlement procedures established in the Dispute Settlement Understanding, with fixed time lines and more binding decisions, provide reasonable hope that the WTO will be the arbiter and enforcer that California's agricultural exporters need.

Perhaps more than those in any other state, California's growers have much to gain from the successful implementation of the Uruguay Round's SPS Agreement and Dispute Settlement Understanding. The sheer number of crops that California exports means that, as it has in the past, California will be vulnerable to SPS barriers inhibiting its exports. The WTO opens a multilateral umbrella under which such barriers can be eliminated and, hopefully, prevented. Even with the SPS Agreement, however, most international quarantine disputes will still be resolved through bilateral negotiations. And those disputes that do advance to the WTO most likely will be settled, as was the case with the United States and Sweden concerning apples and pears, during consultations.

Importantly, the new Agreements provide tools that did not previously exist. If WTO members employ the SPS principles of the Uruguay Round when drafting new standards, that in itself should prevent the creation of new barriers. The streamlined dispute settlement procedure and the emphasis on scientific justification should provide the leverage needed to eliminate, even bilaterally, many of the existing phytosanitary barriers inhibiting California's exports. Both the principles and the leverage provided by the new SPS rules and the Dispute Settlement Understanding are likely to benefit substantially California's farmers and agricultural exporters.