

Curbing Agricultural Exceptionalism: The EU's Response to External Challenge

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1. INTRODUCTION

FROM the launch of GATT in 1948, through to the Uruguay Round of GATT negotiations, the niceties of international trade rules had little impact on the design and implementation of EU farm policies. GATT was built on consensus, but powerful economic actors (such as the EU) were to a large extent able to implement farm policies that best suited their perceived needs. This agricultural exceptionalism had been promoted by the US in the 1940s and 1950s, but was cultivated by the EU (and others) in the 1960s and 1970s. However, since the Punta del Este declaration of 1986, which launched the Uruguay Round, agricultural exceptionalism has been under pressure and the Uruguay Round Agreement on Agriculture of 1994 (the URAA) did, to some extent, curb agricultural exceptionalism and continues so doing through the WTO dispute settlement body.

In this article we analyse the extent to which agricultural exceptionalism has been curbed, explore why it was curbed and finally explore the implication of this for EU policy making. We argue that in particular two major changes in GATT institutions enabled actors, dissatisfied with the agricultural exceptionalism institutionalised in GATT 1947, to curb it. The Uruguay Round represented a significant break with the past. First, it was a 'single undertaking' in which progress on other dossiers was contingent upon an outcome on agriculture deemed satisfactory to other GATT signatories. Having signed up to a single

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undertaking, the EU was 'forced' to make concessions on agriculture if the Uruguay Round was to be concluded. Thus we subscribe to the view that the MacSharry reform of 1992, which ushered in a major change in EU farm policy, was in large part prompted by the need to assuage its partners in the Uruguay Round negotiations. This is in contrast to a number of authors who conclude that the MacSharry reforms were driven by internal factors, particularly budgetary constraints (see Swinbank and Daugbjerg, 2006, for a review of this debate).

Second, in implementing the agreements, the GATT system was based on consensus (tempered by power diplomacy), whereas the WTO ushered in a rules-based system of international trade. The determination of new WTO rules (for example in the Doha Round) is still based upon consensus, but once the rules are in place, a quasi-judicial system applies (the dispute settlement process). 'Soft' law has been replaced by 'hard', or harder, law. Under the new quasi-judicial dispute settlement procedure, countries are expected to bring their policies into conformity with WTO rules (or face retaliatory trade sanctions). At the outset of the new regime it was far from certain that powerful entities, such as the EU, would be willing to abide by WTO disciplines, but during 2005 two seminal rulings were confirmed: one condemning many aspects of the US support regime for upland cotton (and by analogy other US farm support regimes), and another condemning the EU's export subsidy provisions for sugar. In November 2005, the EU's Council of Ministers reached a political agreement on a reform of the sugar regime, allowing the EU, more or less, to meet the deadline of 22 May 2006 of bringing its policies into conformity with WTO commitments.

The article now proceeds as follows. In Section 2 we introduce the concept of agricultural exceptionalism in the GATT/WTO legal system. In Section 3 we outline the EU's commitment to the Uruguay Round as a *single undertaking* and show how this led to the MacSharry reforms of 1992. In Section 4 we explain why the WTO's dispute settlement mechanisms impose new restraints on EU farm policy; and we conclude in Section 5.

2. CURBING AGRICULTURAL EXCEPTIONALISM?

There have been multilateral rules to regulate trade in agricultural products since 1948. The General Agreement on Tariffs and Trade (GATT) of 1947 concerned trade in all goods, *including* agriculture. The fundamental idea underpinning GATT 1947 is that of market liberalism and free (or, at least, freer) trade. The overall aim was to abolish various trade barriers, and allow producers with a comparative advantage to expand their market share, giving consumers access to a wider range of more competitively priced products. However, agriculture was given exceptional treatment in GATT 1947.

The concept of agricultural exceptionalism is often used to describe the special treatment of agriculture at the national and EU level (Grant, 1995; Halpin, 2005; and Skogstad, 1998) but it can also be applied at a global level. Agricultural exceptionalism holds that the farming industry is different from most economic sectors in modern societies. First, farming is subject to unstable weather and market conditions, which are beyond the control of the individual farmer. Climatic factors, and plant and animal diseases and pests can have a marked impact on farm production, resulting in sharp fluctuations in market prices (because of the low price elasticity of demand for farm products) and potentially unstable farm incomes. Furthermore, farmers may collectively over-react to market price movements, with high prices following a harvest failure inducing farmers to increase their plantings for the next season, when prices collapse because of over-supply, etc. Second, it has often been argued that farm incomes could be chronically low ('the farm income problem') in a growing economy. Because of the low-income elasticity of demand, there will be little increase in the demand for farm products as the economy grows. Consequently, farms have to get larger, and farmers and farm workers have to quit the land if income levels in the farm sector are to match those in the rest of the economy. However, if farm labour and other farming assets are 'locked in' to the sector, unable to exit and earn higher returns elsewhere in the economy, their income earning capacity may be depressed. Moreover, given that farming is characterised by many small farmers, each of whom is a price taker, there is a 'treadmill' of competition as each farmer seeks to reduce costs by adopting new technologies thereby fuelling over-supply which drives down market prices. Thus 'the first rationale for treating agriculture as an exceptional sector is tied to the *specific interests and needs of farmers*' (Skogstad, 1998).

The second defining feature of agricultural exceptionalism is that the farming sector 'contributes to broader national interests and goals' (Skogstad, 1998). A secure and safe food supply and stable and reasonable food prices are highly valued. In the agricultural exceptionalist view, unregulated markets will fail to deliver these valued objectives in food supply. However, the importance of food security in the world's high-income developed economies has decreased during recent decades as a result of increased production and reductions in relative food prices. Accordingly, newer versions of agricultural exceptionalism emerged that emphasised the public goods provided by the agricultural sector. These include care of farmed landscapes, maintenance of biodiversity, flood control, and the viability of rural communities that preserve the country's cultural heritage. By the late 1990s, policy makers and analysts were referring to the multifunctionality of agriculture (Hodge, 2000).

The idea of agricultural exceptionalism was institutionally embedded in GATT 1947. Articles XI and XVI meant that agriculture was shielded from rules regarding the use of quantitative import restrictions and export subsidies. Thus, the

farming industry has had exceptional treatment in the international trade rules in force since 1948. This mirrored the domestic agricultural policy situation in many of the GATT member states, including the US and the European countries, which a decade later formed the European Economic Community (now the EU). Agricultural exceptionalism in the GATT implied that the GATT played only a minor role in shaping the CAP. The waiver granted to the US in 1956 allowing it to place further restrictions on imports of agricultural goods, led to the EU's unchallenged use of variable import levies on agricultural products. As the EU had entered into very few tariff bindings on agricultural products, it was able to use its variable import levy mechanism with impunity. Although GATT Article XVI:3 stipulated that export subsidies on agricultural goods should 'not be applied in a manner which results in . . . [*the exporter*] . . . having more than an equitable share of world export trade in that product', it proved impossible to police this rule; and so the EU was able to expand its share of world markets by spending more on export subsidies. Additionally, the reluctance of the EU to adopt GATT panel rulings further underlined that agriculture was considered a special industry in international trade, whilst not excluding it entirely from GATT rules.¹

The Uruguay Round, launched in Punta del Este, Uruguay, in September 1986, and concluded in Marrakesh, Morocco, in April 1994, became a turning point in global agricultural trade regulation, not so much because of the constraints it put on WTO member states, but rather because it set a new direction for global agricultural trade rules. The new *Agreement on Agriculture* (URAA) was both a remarkable shift in the perception of agriculture, and a big disappointment for those hoping for a rapid elimination of agricultural support and protection. Thus it narrowed the extent to which agricultural exceptionalism applied in international trade rules, but certainly did not eliminate the differences in treatment. The specific commitments allowed plenty of room for maintaining domestic agricultural policies based on an agricultural exceptionalist ideology.

Non-tariff barriers (such as variable import levies) were to be converted into tariffs and bound tariffs cut by 36 per cent. Domestic support was reduced by 20 per cent and the expenditure on export subsidies by 36 per cent. However, real impacts were limited. First, the base from which to cut was an average of the years 1986–88 (1986–90 for export subsidies) in which world market prices were exceptionally low and import protection and export subsidies correspondingly high. Second, the introduction of the blue box as a category of domestic support exempted the US deficiency payments, and the EU's area and headage payments, from domestic subsidy reduction commitments.

¹ This was a systemic problem. Busch and Reinhardt (2002, p. 473) point out that, between 1948 and 1994, in nearly a third of cases examined 'defendants fail[ed] to comply at all, effectively spurning panel rulings'.

Further, special safeguard provision enabled importing states to offset the effect of comparative advantage for a number of imported commodities in which they were not competitive. GATT Article VI, augmented by the *UR Agreement on Subsidies and Countervailing Measures*, deals with anti-dumping measures and allows WTO members to apply countervailing duties. But the Special Safeguard Provisions for agriculture go beyond this. They allow importers to charge an additional duty on imports without the need to show either that the product was dumped or that the domestic industry suffered damage. There are two instances in which the special agricultural safeguard can be invoked. First, if countries experience an import surge (according to a complex formula), then all imports of that product from that source can be subject to an additional duty for the remainder of the year. Second, and alternatively, a price trigger can be set. Again the arrangements are complex, but if on a consignment basis the import price is found to be below an historic trigger price, then an additional duty is charged (see Swinbank and Tanner, 1996). The trigger price is equal to the country's average import price in the base period.

It was evident right from the beginning of the implementation of the URAA that its real impact on subsequent levels of agricultural support and protection would be limited. As Tangermann (2004) remarks:

[T]he point has often been made that most of the quantitative commitments established in the Uruguay Round were so generous that they did not yield much in the way of trade liberalization. As a matter of fact, levels of support provided to agricultural producers in OECD countries, as measured within the OECD's framework of PSE analysis, have not, on average, declined significantly after the Uruguay Round, though they decreased somewhat while the Uruguay Round negotiations were still going on.²

Thus, one can hardly claim that there was much change in terms of the restrictions the agreement put on WTO members. Within the restrictions of the URAA, WTO members could continue supporting and protecting their farmers to much the same extent as they had been doing at the conclusion of the Round.

However, this interpretation of the URAA overlooks important changes to the international trade rules on food. The URAA did indeed curb agricultural exceptionalism in global agricultural trade regulation. In the preface to the Agreement, it is explicitly emphasised that the 'long-term objective . . . is to establish a fair and market-oriented agricultural trading system . . .' and that 'substantial progressive reductions in agricultural support and protection . . .' is to result in 'correcting and preventing restrictions and distortions in world agricultural markets'. However, it also says that 'commitments under the reform

² The Paris-based Organisation for Economic Co-operation and Development (OECD) has, since the early 1980s, calculated PSEs for its member countries on an annual basis. The Producer Support Estimate (PSE) is an estimate of the extent to which farmers' revenues have been increased by domestic farm policies.

programme should be made in an equitable way among all Members, having regard to *non-trade* concerns, including food security and the need to protect the environment' (emphasis added). The EU subsequently claimed that multifunctionality was one of its non-trade concerns. However, during the Doha Round negotiations, the EU failed to table any drafting proposals that would have given multifunctionality an operational significance in the agriculture agreement (Swinbank, 2005).

Most importantly, Articles XI and XVI of GATT 1947, which had been the legal defence of agricultural exceptionalism, are overridden by the URAA. Article 21 of the URAA states that, 'The provisions of GATT 1994 and other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement'. So, the URAA is composed of more than a set of commitments to reduce agricultural support and protection. It also consists of a new vision of agriculture as an industry which does not require special treatment, although some degree of exceptionalism will remain for as long as agriculture has its own agreement within the WTO. Agricultural exceptionalism, to a significant extent, has been curbed in the WTO. The URAA also envisaged that 'normalising' agricultural trade was a gradual and ongoing process, *and* ensured that such a process would take place. In Article 20 of the URAA, WTO members agreed that 'negotiations for continuing the process will be initiated one year before the end of the implementation period'.

The change of the underlying perception of agriculture was the most important impact of the URAA since it significantly altered the debate about the future of agricultural policies. As Tangermann (2004) puts it: 'The Uruguay Round has not only resulted in new legal rules and quantitative reduction commitments in the areas of market access, domestic support and export competition. It has also affected the nature of the policy debate in agriculture. The WTO has become a relevant factor in agricultural policy making'. National policy makers had to consider how URAA commitments impacted on existing farm policies, and envisage how future rounds of trade negotiations (for example that foreshadowed in Article 20) might reshape the URAA and therefore set a framework for various farm policy reform options that WTO members might consider.

3. A SINGLE UNDERTAKING AND CAP REFORM

Some authors argue that the GATT talks were of only minor importance in the 1992 reform of the CAP: instead domestic concerns, primarily budgetary, triggered the reform. For example, Rieger (2000) claims that

it was neither the state of international agricultural markets nor the pressure applied by the US government that convinced European policymakers to take the inclusion of agriculture in the Uruguay Round more seriously. Much more important were the mounting budget costs of the

CAP, and, even more so, the way that market support mechanisms had perversely redistributed incomes to farmers.

A crucial contention of this article is that important institutional changes were brought about by the launch of the Uruguay Round in 1986 and that these had a decisive impact on the EU's decision to embark on CAP reform. First, and of pivotal importance, was the decision to treat the Uruguay Round as a 'single undertaking'. Earlier GATT Rounds had been characterised by a separation of issues into discrete negotiating groups, because some GATT members wished to avoid cross-linkages in the negotiations, and the *ad hoc* acceptance of the codes negotiated. Thus the implementation of the Tokyo Round has been characterised as 'GATT à la carte', with participants allowed to choose whether they would, or would not, sign up to the various codes negotiated (Jackson, 1998; and Paemen and Bensch, 1995).

By contrast, the Punta del Este declaration proclaimed: 'The launching, the conduct and the implementation of the outcome of the negotiations shall be treated as parts of a single undertaking'.³ Strictly speaking this related to the launch of negotiations on trade in goods, and not to the parallel negotiations on trade in services, but trade in goods did embrace agriculture (including 'the adverse effects that sanitary and phytosanitary regulations and barriers can have on trade in agriculture'), GATT's dispute settlement provisions, and trade-related aspects of intellectual property rights. Croome (1999) comments that the single undertaking was a rule on which the EU had 'laid particular stress', and led to the oft-repeated assertion throughout the Round that 'nothing is agreed until everything is agreed'. France, in particular, had been very reluctant to include agriculture in the negotiations unless there was the potential for offsetting gains in other sectors: to 'rebalance' trade with Japan, and to ensure that the newly industrialising countries, in Asia in particular, met 'in full their obligations under the GATT', for example (Paemen and Bensch, 1995). Despite the creation of a single undertaking, the Punta del Este declaration went on to say: 'Balanced concessions should be sought within broad trading areas and subjects to be negotiated in order to avoid unwarranted cross-sectoral demands'. But, in the words of Paemen and Bensch (1995), the 'history of international trade was about to enter a new chapter', and the US had achieved its ambition of including both agriculture and services in the new Round.

Launching the Round as a single undertaking did not, however, guarantee that it would be *closed* in the same fashion. As Croome (1999) notes, as the negotiations proceeded 'crucial questions' arose as to how the new agreements were to be applied:

³ The Punta del Este declaration is reprinted in Croome's semi-official 'history' of the Uruguay Round (Croome, 1999) and in Paemen and Bensch (1995). See Chapters 1 and 2 of Croome for his account of the preparations for, and launch of, the Uruguay Round.

Should the post-Round institutional structure include . . . a new multilateral trade organization to administer all or some of the agreements? What was to be the relationship between the GATT agreements and the agreements reached on the 'new subjects'? Could governments pick and choose among the agreements, or must the whole outcome of the Round be accepted as a single undertaking?

These issues were being discussed by mid-1989, 'and in early 1990, Canada put forward the first official government-tabled proposal for a new institution, which it called the "World Trade Organization"' (Jackson, 1998). Croome (1999) reports that in February 1990 the EU began to voice the idea that a new organisational treaty – termed the 'Multilateral Trade Organisation' (MTO) – would be needed to oversee the Uruguay Round agreements, but claims that the US was hostile. It was not until December 1991, on the eve of the presentation of Arthur Dunkel's *Draft Final Act*, that the negotiators accepted that there would be an MTO, and – by implication – that the agreements would be implemented as a single undertaking (Croome, 1999).

In particular, these procedural arrangements meant that GATT 1947 did not have to be amended, which would have meant that the revised agreement could only come into force when a minimum number of countries had ratified the revisions (Jackson, 1998), but instead those countries that definitely wanted the new world trading order, as a single undertaking, to replace the old, could withdraw from the old arrangements and (once ratified) immediately apply the new. This, 'exit tactic', according to Steinberg (2002), was the plan hatched by the US and the EU in 1990.

As the Round had progressed, the US and the EU had become concerned that a large number of developing countries were reluctant to sign the emerging agreements on trade-related aspects of intellectual property rights (TRIPs) and investment measures (TRIMs) (Steinberg, 2002) despite their acceptance of the single undertaking in the Punta del Este declaration, or of GATS. Furthermore, if these were to be adopted on an *ad hoc* basis (as had been the Tokyo Round codes), the concessions would have to be granted on a most favoured nation (MFN) basis to *all* GATT contracting parties, and not just those that had accepted the new disciplines (Steinberg, 2002). Based on a series of unpublished US documents, Steinberg (2002) traces the evolution of the US initiative from December 1989, through EU acceptance of the plan in October 1990, and its incorporation into the *Draft Final Act* of December 1991. This 'single undertaking to closing the round' created a new collection of 'agreements and associated legal instruments' that would be 'integral parts' of the *Marrakesh Agreement Establishing the World Trade Organization* and 'binding on all Members' (Article II.2). GATT 1947 was re-enacted as GATT 1994, one of the *Multilateral Agreements on Trade in Goods* listed in Annex 1 of the WTO agreement (Jackson, 1998). With the WTO in place, both the US and EU 'withdrew from the GATT 1947 and thereby terminated their GATT 1947 obligations (including its MFN

guarantee) to countries that did not accept the Final Act and join the WTO' (Steinberg, 2002).

The ploy paid off, and the GATT membership switched *en bloc* to the WTO. GATT, as an institutional agency, was terminated on 30 August 1995 (Jackson, 1998). But, by its acceptance of this strategy in October 1990, the EU had signalled its willingness to concede concessions on agriculture: a single undertaking without an agreement on agriculture was inconceivable.

a. GATT, the Heysel D eb acle and the MacSharry Reforms

The first phase of the agriculture negotiations, leading up to and including the mid-term review in Montreal in December 1988, did not go well. The Americans' so-called 'zero-option' proposal of July 1987 had 'astonished' the other negotiators, with the EU claiming it was a bluff. The EU's counter-offer had 'no substance at all', and over a year later there was no sign of an agreement on agriculture as ministers gathered for the mid-term review in Montreal (Paeman and Bensch, 1995; see also GATT, 1987). In all of this there was little indication that the EU yet recognised that a meaningful deal on agriculture had to be a component part of a single undertaking.

From January 1989 there were new teams in place in both Brussels and Washington. President Reagan gave way to President Bush (senior), and Clayton K. Yeutter replaced Richard E. Lyng as Secretary of State for Agriculture. Yeutter's previous role – that of US Trade Representative – was filled by Carla Hills (Paeman and Bensch, 1995). Jacques Delors was reappointed President of the European Commission, and a newcomer to the college of commissioners, Ray MacSharry, took over as farm commissioner. The previous incumbent in this post, Frans Andriessen, became trade commissioner. MacSharry and Yeutter led the agriculture negotiations.

One immediate task for MacSharry was to revive the GATT agriculture negotiations following the failure in Montreal. Under Arthur Dunkel's guidance, and with a good deal of flexibility on the part of the US, the mid-term review (which had been the business for Montreal) was signed off in Geneva in April 1989, and the Uruguay Round was back on track (Paeman and Bensch, 1995). The text on agriculture talked of the objective of establishing 'a fair and market-oriented agricultural trading system' and of 'substantial and progressive reductions in agricultural support' (as quoted in Swinbank and Tanner, 1996).

Meanwhile, in Brussels, in the course of the 1989–90 farm price review, it became all too evident that farm ministers did not have the stomach to inflict the price cuts that they had been mandated to do by the over-hyped CAP 'reforms' of 1988 (Swinbank and Tanner, 1996). As Manegold (1989) remarked: 'Thus, the much-touted CAP reform has perhaps ended before it really got to the core'.

As late as July 1990, less than five months before the Uruguay Round was to be concluded, EU farm commissioner MacSharry showed little (public) faith in

trade liberalisation in a spirited defence of the CAP, saying: 'there can be no question of setting aside the achievements of the CAP or to put them at risk in the pursuit of dubious textbook economic theories of comparative advantage and international specialisation. . . . The CAP exists because of the importance given to agriculture and to the rural society of Europe' (as quoted in *Agra Europe*, 20 July 1990); but, as we shall see below, MacSharry and his colleagues were already planning for a CAP reform. Furthermore, only a couple of weeks later, at Dromoland Castle in Ireland, while hosting an informal meeting of farm ministers from Australia, Canada, Japan and the US, MacSharry surprised his guests, EU farm ministers ('who had received no prior notice of MacSharry's plans') and his fellow commissioners ('No such plan had been discussed by the Commission executive') by proposing to reduce 'global subsidies to agriculture by 30 per cent over a ten year period between 1986 and 1996' (*Agra Europe*, 3 August 1990).

Although this fell far short of the US position, it did eventually form the basis of the EU's offer that was tabled on 7 November 1990. However, in the meantime, the autumn was taken up with rather public and very stormy meetings in first the Commission, and then the Council, before MacSharry's proposal became the basis of the EU's negotiating position (Swinbank and Tanner, 1996; and Daugbjerg, 1998). The EU's offer comprised: (i) a 30 per cent reduction in an Aggregate Measure of Support, as first suggested by MacSharry before the summer recess, for certain products, from a 1986 base (the US were asking for 75 per cent),⁴ (ii) a limited form of tariffication *with* rebalancing (the US wanted to cut tariffs by 75 per cent, and was opposed to rebalancing), and (iii) 'a concomitant adjustment of export restitutions' (the US wanted a 90 per cent reduction) (Swinbank and Tanner, 1996). This was too little, too late, and was not sufficient to salvage the ministerial talks scheduled for the Heysel conference centre in Brussels in December (Paeman and Bensch, 1995). It was not the way to achieve a balanced outcome as part of a single undertaking.

A small group of Commission officials had been preparing for a CAP reform for some time. Kay (1998) dates this from early 1989 when Commission President Jacques Delors, concerned that the 1988 reforms 'would be only a medium-term measure to control the rate of increase of the CAP's budget costs', became convinced of the need for further CAP reform, and that MacSharry would be 'a

⁴ But, in an attempt to appease Germany, facing elections in December, EU farm ministers had been promised that farmers would receive compensation 'in the form of direct income supports that do not stimulate production' ('EC Deal on Farm Aid Could Save Uruguay Round', *Financial Times*, 24 October 1990): a precursor of the CAP reform proposals to be tabled early in 1991. The Council Press Release, following the unanimous approval of the EU's GATT 'offer', notes that 'the Commission undertook to submit in the very near future measures designed to soften the effect on Community agriculture of the reductions in support which will ensue from the Community offer' (Council of the European Communities, 1990).

suitable proponent of such reforms'. Ross (1995) suggests the process began 'in early 1990', gives Delors a more central role in the deliberations than does Kay (who emphasises more MacSharry's role) and suggests that the ongoing trade tensions were important motivating factors. To him, the failure of the Heysel meeting was a 'blessing in disguise' for it gave 'Delors and his team . . . precious time to get CAP reform through the Commission and then win Council approval'. In an endnote he comments: 'One interesting detail of the entire plan was that there developed an agreed taboo to refrain from acknowledging that CAP reform was in any way connected to the Uruguay Round'.

GATT's Director General, Arthur Dunkel, tabled a *Draft Final Act* in December 1991 (Swinbank and Tanner, 1996); the MacSharry reforms were agreed in May 1992 (Daugbjerg, 1998; and Swinbank and Tanner, 1996); but it was only after the Blair House Accord had been agreed and then 'renegotiated', and the EU and the US had come to a final compromise in early December 1993, that reluctant EU farm ministers (particular the French) could be convinced that the GATT deal posed no immediate threat to EU farm policy, and the Round could be concluded (Swinbank and Tanner, 1996).

The CAP had been 'reformed', in that in some sectors support had been switched from consumers to taxpayers, but the overall level of CAP support had not decreased; and there was no immediate need to make further changes to the new CAP to make it fit the enhanced GATT/WTO disciplines (Swinbank, 1996). The 'reform' had been driven by the need to agree a deal on agriculture if the Uruguay Round was to be closed as a single undertaking.

4. DISPUTE SETTLEMENT AND THE CONSENSUS TO REJECT RULE

The other institutional innovation of the Uruguay Round accords, which put pressure on agricultural exceptionalism, was the new dispute settlement system. In particular, consensus was replaced by automaticity. Although the establishment of a panel can be delayed, it cannot be blocked; and rather than allowing one member to block adoption of a panel report, reports would be automatically accepted (after scrutiny by the Appellate Body if required) unless the membership collectively decided to reject a panel's report, which is implausible. While there are concerns about the dispute settlement proceedings, and, in particular, the implementation of its rulings, the change has ushered in a quasi-judicial system that has displaced the pre-1995 consensual approach. In the WTO, negotiations to *change* the rules still proceed on the basis of consensus (as in the Doha Round), whereas *implementation* of rules is increasingly subject to judicial review. Policies have been challenged and changed.

But it was not immediately apparent that a change had occurred. Hudec (1998), writing soon after the inauguration of the new WTO system, was by no

means convinced that WTO members would adhere to the new commitments, even when challenged in the dispute settlement process. As he reflected:

Any student of GATT's history with agricultural trade restrictions will know that the strength of the political forces that resisted compliance were strong enough to have carried the United States and the European Community out of GATT before they would have complied. It is hard to believe that adjustments to an adjudication procedure in Geneva are going to make a significant difference in whether such forces prevail, especially since the adjustments do not really change things very much from the way they were under the old GATT procedure.

More recently, Davis (2007) has been particularly critical of the EU in its defence of the CAP, saying it was 'notorious for delaying tactics', that it 'established a pattern of non-cooperation', and claiming that this 'recalcitrance in adjudication of agricultural policies has continued under the new rules of the WTO'. Given this level of scepticism, it is relevant to enquire how well the EU has coped with this new situation. Table 1, compiled from information on the WTO website in July 2006, summarises the cases in which the EU's agricultural policies had been questioned, or challenged, through the dispute settlement process.⁵ A couple of cases concerning coffee, and those on fish and wood, are excluded, and some aggregation has been undertaken. In a number of instances consultations were requested, but no further action resulted. In other instances, mutually agreed solutions were subsequently notified to the WTO, in one instance after the panel had been convened (rice, in case DS210). In a number of instances, EU policy was amended: to allow imports of salted chicken pieces at lower tariff rates (DS269 and DS286), and to allow imported products the same registration rights for geographical indications of origin as those originating within the EU, for example (DS174 and DS290), although both these disputes are probably not yet fully resolved.⁶ But three 'big' cases stand out: bananas, (beef) hormones, and export subsidies on sugar. Furthermore, the dispute over 'biotech' products is likely only the first skirmish in a long-drawn-out transatlantic trade war over genetically modified organisms (GMOs).

Based on the period 1970–99, Davis (2003, p. 106) claimed that: 'On the controversial cases, the EU has entirely disregarded both the reputational harm and international obligation arising from violation rulings'. Doubtless she had beef hormones and bananas in mind: the sugar case falls outside her period. We would argue that, *in the context of CAP decision-making*, beef hormones and bananas were unrepresentative cases and that sugar (although special in its own ways) was more indicative of how the EU responds to WTO constraints (or how it did respond while the Doha Round was in progress).

⁵ Busch and Reinhardt (2002) discuss the difficulties inherent in a study of this sort.

⁶ The EU negotiated tariff rate quotas (TRQs) with Thailand and Brazil to limit the quantities of salted and cooked chicken that could be imported at the lower tariff rates (*Agra Europe*, 1 December 2006).

TABLE 1
WTO Challenges to the CAP

<i>Title</i>	<i>Complainants and DS Number</i>	<i>Comments</i>
Approval and marketing of biotech products	Argentina (293), Canada (292), US (291)	Dates from May 2003. In September 2006 the panel found that the EU had delayed the approval process, but by then the EU had changed its approval process, and most of the products cited in the dispute had been removed from the market (<i>Agra Europe</i> , 6 October 2006).
Bananas III	Ecuador, Guatemala, Honduras, Mexico, US (27) (see also DS16, 105 and 158)	A continuation of old GATT squabbles. Process started February 1996. Panel reported May 1997 (Appellate Body September 1997). Found that the EU's import regime contravened WTO provisions. The Lomé waiver did cover tariff preferences, but not import quota mechanisms. Because of delays in changing the EU regime, an arbitration report allowed the complainants to retaliate against EU economic interests. Despite lodging the details of a mutually agreed solution with Ecuador and the US in 2001, Honduras, Nicaragua and Panama are still unhappy about the level of tariffs applied from 1 January 2006. DS16, 105 and 158 were requests for consultations that did not lead to the establishment of panels.
Butter	New Zealand (72)	Consultations requested March 1997. Mutually agreed solution notified in November 1999, days before the panel reported. The issue was whether or not spreadable butter could be included in the tariff rate quota (TRQ) granted for New Zealand butter.
Cereals (9); and Duties on imports of grains (13)	Canada (9) and US (13)	June/July 1995, Canada and US unhappy at the way import taxes on cereals were to be applied in the new regime. US complaint had potentially broader product coverage. Settled.
Chicken cuts	Brazil (269), Thailand (286)	Dates from October 2002. Panel report May 2005, Appellate Body September 2005. Issue was the EU's tariff classification of salted chicken pieces. EU found at fault, and Arbitrator set 27 June 2006 as the final date for implementing the ruling.

TABLE 1 *Continued*

<i>Title</i>	<i>Complainants and DS Number</i>	<i>Comments</i>
Export subsidies on sugar	Australia (265), Brazil (266), Thailand (283)	Dates from 2002. Panel report October 2004, supported by Appellate Body April 2005. Found that the EU's C sugar exports, and its 're-export' of ACP sugar, did infringe its export subsidy constraints. Arbitration panel set date of 22 May 2006 to bring EU exports into conformity with the ruling. EU sugar reform (agreed November 2005) more or less did this.
Hormones (and EU's counterclaim against continued suspension)	Canada (48), US (26); and counterclaims against Canada (321) and the US (320)	The beef hormones case formally dates back to January 1996, but it had been an issue in the old GATT. The panel (August 1997) and Appellate Body (January 1998) found the EU's measures infringed the SPS Agreement. The EU was unable/unwilling to make its rules WTO compliant, and so trade sanctions against the EU were authorised from July 1999. The EU claims that Directive 2003/74/EC does make the EU compliant, and so it has launched counterclaims against Canada and the US, challenging the continued suspension of concessions. The panel report was still pending in June 2007.
Measures affecting the export of processed cheese	US (104)	In October 1997 the US requested consultations on the EU's grant of export subsidies on processed cheese. No action.
Measures affecting imports of wine	Argentina (263)	In September 2002 Argentina requested consultations on various mandatory measures concerning oenological practices affecting imports of wine. No further action is recorded.
Poultry	Brazil (69)	In February 1997 Brazil requested consultations on the EU's implementation of a TRQ on poultry cuts. The Panel report of March 1998 did not substantiate Brazil's claim. Brazil went to the Appellate Body, which reversed some of the findings. In October 1998 the parties announced they had reached a mutual agreement on the implementation of the Appellate Body's findings.

TABLE 1 *Continued*

<i>Title</i>	<i>Complainants and DS Number</i>	<i>Comments</i>
Rice: (I) Duties on imports of rice (17) and Implementation of the Uruguay Rounds Commitments concerning rice (25); (II) Restrictions on certain import duties on rice (134); and (III) Rice (against Belgium: 210)	Thailand (17); Uruguay (25); India (134); US (210)	17 and 25 were 1995 requests for consultations on the implementation of the Uruguay Round agreements, which led nowhere. The issues were similar to those raised by Canada (9) and the US (13) on the import of other cereals. The Indian complaint (134) of May 1998 concerned a 'so-called cumulative recovery system (CRS), for determining certain import duties on rice, with effect from 1 July 1997. India contended that the measures introduced through this new regulation will restrict the number of importers of rice from India. Again, no further action is recorded. In Case DS210 the US (in October 2000) requested consultations with Belgium over the latter's administration of import duties. A panel was established in June 2001, but the US almost immediately requested a suspension of its activities, and in December 2001 the parties announced a mutually agreeable solution.
Tariff-rate quota on corn gluten feed from the US	US (223)	January 2001 request for consultations on the EU's imposition of a TRQ. No action.
Trademarks and geographical indicators	Australia (290), US (174)	US complaint dates back to 1999 (Australia 2003). Panel reported March 2005. Found the EU's registration procedures infringed the WTO's national treatment provisions. EU amended its procedures from 31 March 2006; but both Australia and US claimed that the EU had not met their concerns, and invited the EU to make further revisions.

Extracted from:

http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm, accessed 27 July 2006 (see text for further details)

Both the beef and the banana disputes were of long standing: there had been skirmishes in the old GATT, and it was perhaps inevitable (but unfortunate) that they should re-emerge as early cases in the WTO. Table 2 summarises some of the salient features of the political economy background to these three disputes.

Bananas involved a heady mixture: commitments to African, Caribbean and Pacific (ACP) states through the Lomé convention, derived from old colonial ties; commercial interests of trans-national corporations; and conflicting views in

TABLE 2
Political Economy Characteristics of Three WTO Disputes

	<i>Bananas</i>	<i>Beef Hormones</i>	<i>Sugar</i>
EU farm interest	Limited to specific islands and the French overseas departments	Beef production widespread	Important crop in some arable areas
EU processor/trade interest	Trans-national corporations involved in shipping and ripening, but sources of supply are fungible	Abattoirs (and to a lesser extent meat-packing plants) reliant on local livestock	Capital intensive, location specific, beet sugar processing industry
EU consumer interests	German consumers said to be very concerned about an increase in banana prices	Consumers said to be very concerned about beef hormones	Dietary concerns, but no specific link to EU farm policy
African, Caribbean and Pacific states (complicated by the extension of preferences to the least developed countries through Everything but Arms)	A number of Caribbean economies were very dependent on the banana trade, and benefited from ACP preferences	Selected African states benefit from the beef protocol	Selected ACP states, often highly dependent on sugar, benefit from the sugar protocol. Also an EU-based industry processing raw cane sugar
Decision making	Qualified majority vote; but strong development interests in the European Parliament also took an interest	Joint decision of the European Parliament and the Council	Qualified majority vote in the Council

the Council of Ministers, reflecting in part their historical perspective (Tangermann, 2003). Alter and Meunier (2006) assert:

The banana dispute was a specific dispute about a specific policy, but it was not an 'old-style' trade dispute about protecting the domestic losers from international competition. . . . Rather the European protection of the Lomé guarantees was about development aid through off-budget measures.

Alter and Meunier (2006) also say: 'The creation of the WTO led to an immediate change in EU behavior. . . . Anticipating a challenge to the banana regime under the new WTO system, the EU offered a deal to the Latin American countries that were party to the GATT case . . .'. Thus the EU did make changes to its banana policy, although the new import regimes were also challenged, and the EU remained in breach of WTO rulings for some time. Knock-on effects were the realisation that its Lomé Convention was incompatible with its WTO commitments, leading to the decision to negotiate a series of WTO-compatible free trade area agreements (known as 'Economic Partnership Agreements') with its Lomé partners, which have still to be achieved; and, as part of its diplomatic offensive in the WTO, the decision to offer duty- and quota-free access to virtually all goods produced in least-developed countries (a policy later known as 'Everything but Arms') (Pilegaard, 2006). The latter, to be fully applied to sugar from 2009, was then a further pressure leading to the 2005 sugar 'reform'.

The longstanding and still ongoing dispute over beef hormones is complex and politically charged (for an overview, see Davis, 2003; and Kerr and Hobbs, 2005). The dispute pre-dates the negotiation of the Agreement on the Application of Sanitary and Phytosanitary (SPS) Measures. Davis (2003), on the evidence of an interview with a USDA official, suggests that the EU was 'not a major player in these negotiations', and was 'never able to articulate a coherent position'. Referring specifically to the EU's wish to see 'consumer concerns' incorporated into the SPS Agreement, Skogstad (2001) suggests that the EU played a much more active role, but, recognising it had few allies, decided to abandon this line of action. She suggests the EU believed 'that the risk posed to the hormone ban could be managed', that it saw 'that the EC's interest in restricting SPS barriers to trade went beyond winning the hormone dispute with the US', and that it responded to 'pressure not to hold up the protracted negotiations on agriculture'.

However, if the EU did believe it could 'manage' the hormone dispute, it miscalculated. A WTO panel (and the Appellate Body) ruled against the import ban, and the EU then failed to negotiate compensation in the form of increased tariff rate quotas for Canadian and US hormone-free beef: Kerr and Hobbs (2005) claim that, as 'the EU had no intention of complying with its obligations', compensation 'was not acceptable and retaliation by Canada and the United States became the only option'.

The EU, however, has changed its policy, in particular in the form of Directive 2003/74/EC of the European Parliament and of the Council, which entered into force on 14 October 2003. The EU claims this is in 'conformity with the

recommendations and rulings' of the Dispute Settlement Body, and, in particular, that it 'is based on a comprehensive risk assessment'. Canada and the US disagree, and continue to apply trade sanctions. As a result, a WTO panel is currently examining the EU's claim that these sanctions are not WTO compliant (WTO, 2004).

It may well be that the EU will lose this attempt to legitimise its policy on beef hormones within the WTO, which for North American observers will be further evidence of the EU's recalcitrance and foot-dragging within the WTO (Ames, 2001). Why then was the EU willing to change its policy on sugar, one of the last bastions of the old CAP?

The EU's support regime for sugar was basically unchanged from 1968. The EU price was kept well above world market prices (often three times higher) by prohibitive import duties, export refunds (subsidies) and the possibility of intervention buying. However, the quantity of sugar that could (directly) benefit from price support was limited by quota. Any sugar produced in excess of this (known as C sugar) had to be exported from the EU without an export refund. Despite a structural surplus of sugar within the EU (in addition to the C sugar exports), the EU had a commitment to import 1.3 million tonnes of white sugar equivalent from selected ACP states, and India, stemming from its old colonial ties, and the 1986 and 1995 enlargements of the EU had added to the preferential import arrangements.

When establishing its export subsidy commitments in the Uruguay Round, the EU chose to notify its commitments on sugar by *excluding* C sugar exports (on the grounds they were not subsidised) and after netting out its preferential imports from the ACP states and India.⁷ As a consequence, after the scheduled reductions through to 2000, the maximum quantity of sugar that the EU was entitled to export annually with the aid of export subsidies was 1,273,500 tonnes (McNelis, 2005).

Under the old GATT, challenges to export subsidy regimes had been largely unsuccessful. After 1995, with the new dispute settlement procedures, several have been successful, including the Australia–Brazil–Thailand challenge to the EU's sugar regime. The panel found that the EU's subsidised exports were well in excess of its bound commitments: this was because C sugar was effectively cross-subsidised, and the footnote excluding a quantity equivalent to the import of ACP sugar had no legal binding. And this despite the fact that, had the EU known this in 1994, it could have included both C and ACP sugar in its schedule of commitments, giving it a much bigger basic entitlement. From the EU's perspective, the rules had been changed by the Dispute Settlement Body, and yet it chose to comply. After an appeal, and arbitration, the EU was obliged to curb its

⁷ In a rather badly drafted footnote to its schedule of commitments, the EU said: 'Does not include exports of sugar of ACP and Indian origin on which the Community is not making any reduction commitments. The average of export in the period 1986 to 1990 amounted to 1.6 mio t'.

subsidised exports by 22 May 2006, which it more or less did.⁸ It had changed its policy.

The change was not easy, and the process was long and drawn out. In November 2005, the Council of Agricultural Ministers reached political agreement on the complex regime that was to apply from July 2006 (Noble, 2006). Support prices are being cut by 36 per cent in four unequal instalments, with compensation payable to farmers (through the Single Payment Scheme), a restructuring scheme for processors, and some limited help for ACP states. This is expected in time to result in a substantial contraction in sugar production in the EU, and in some ACP states. Indeed the sole Irish sugar-beet refiner (*Irish Sugar*, owned by *Greencore*) immediately announced it was ceasing production (*Agra Europe*, 24 March 2006). C sugar can no longer be exported. But the quota buy-out failed – at least initially – to control production, and so the EU was forced to impose quota cuts of more than 2 million tonnes (about 12 per cent of total quota) for both 2006/07 and 2007/08 (*Agra Europe*, 23 February 2007).

Why sugar and not beef hormones? The commercial impact on the sugar sector of the sugar reforms was likely more severe than any relaxation of the ban on growth hormones would have been to the beef sector; and industrial concentration in sugar-beet processing is more marked than it is for abattoirs. The ACP beneficiaries of the sugar protocol lobbied extensively against the reforms, as they did with bananas but with less success. We would suggest there were two differences between beef hormones and sugar.

First, the timing was different. If the EU was to be seen as a committed negotiator in the Doha Round, intent upon a single undertaking, it had to abide by the WTO ruling. It did not want to be locked in to the defence of the indefensible, as appeared to have been the case with bananas and beef.

Second, and most importantly, the institutional contexts within which the rulings are processed within the EU are different. Despite the interests of the ACP sugar suppliers, and the least developed countries through Everything but Arms, this was a *farm* policy issue to be decided by the Council of Agricultural Ministers, without the direct involvement of the European Parliament, since the latter has only a consultative role in decisions on the CAP.⁹ In contrast, the beef hormones case was a *food safety* policy issue with legislation jointly determined by the European Parliament and the Council under the co-decision procedure. Involving the European Parliament meant that policy making became more susceptible to public sentiment, because of the intense public interest in food safety and Parliament's quest for an important policy-making role.

⁸ Somewhat controversially, it continued to issue export licences until 22 May 2006 (*Agra Europe*, 26 May 2006).

⁹ Following the political decision in the Council in November 2005 to accept the package, there was a delay in formal adoption as the Council had to wait on Parliament to proffer its advice. Although not obliged to heed Parliament's views, some minor amendments were accepted (Noble, 2006).

This suggests that, contrary to the negotiating phase, when the EU's negotiators argue that the EU member states are unwilling to accept externally imposed disciplines, during the implementation phase the EU is able to conform when the dispute relates to decisions on *farm* policy (as epitomised by the classic CAP price and income support mechanisms) that can be decided by the Council of Ministers; whereas those involving *food safety* policy (e.g. beef hormones, GMOs), which involve the European Parliament, are less acceptable of WTO-imposed policy changes. In June 2007 the EU decided to embark on an Inter-governmental Conference to draft a new Treaty revising existing provisions (European Council, 2007). If, as expected, this takes up most of the provisions of the rejected European Constitution, this would give the European Parliament co-decision powers on EU *farm* policy. However, it is beyond the scope of this article to speculate on how that might impact future CAP decision making.

5. CONCLUDING REMARKS

In this article we have argued that the launch of the Uruguay Round in 1986, and its closure in 1994, as a *single undertaking*, marked a seminal change in the treatment of agriculture in the GATT/WTO legal system, and in the formation of farm policy in the EU. The agricultural exceptionalism that had prevailed in GATT 1947 was curbed (but by no means eliminated as evidenced by the existence of the URAA). The Doha Round promised a continuation of that trend, but whether or not a new agreement on agriculture is finally agreed, bringing the agricultural sector closer to the rules that prevail for trade in other goods, remains an open question.

By embarking upon a single undertaking, the EU (perhaps unwittingly) accepted the need for some change to its farm policies to appease its trading partners. We show how these pressures led to the MacSharry reforms of 1992. Space precludes a discussion of the subsequent interactions between CAP reform and the WTO process, but elsewhere we have argued that the constraints of the URAA, and the prospect of tightening those constraints in the Doha Round, were important drivers of the Fischler Reforms of 2003/04 (Swinbank and Daugbjerg, 2006).

The package of Uruguay Round agreements included a revised dispute settlement procedure. While consensual decision making had prevailed in GATT 1947, in both the negotiation and implementation of trade agreements, that is no longer the case in the WTO. The negotiation of new (or revised) agreements, as in the Doha Round, remains consensual; but the interpretation (and hence implementation) of existing agreements has become quasi-judicial in the dispute settlement process.

The evidence suggests that, post-1995, for *farm* policy issues, for which the EU's Council of Agricultural Ministers has prime responsibility, the EU has a reasonable record in complying with WTO rulings, although admittedly this

conclusion rests heavily upon a single case: that of sugar.¹⁰ For *food safety* policy issues, however, for which the Council and the European Parliament share legislative authority, the EU has had difficulty complying with WTO rulings, and this is likely to remain the case.

Future WTO pressures to EU *farm* policy will stem from two sources: an outcome to the Doha Round negotiations, and/or dispute settlement challenges to existing policies. Our analysis suggests that the EU will be unwilling to unilaterally reduce its tariffs, or commit itself to the abolition of export subsidies, except in the context of an overall negotiated Doha settlement, but we would not rule out further evolutionary reform of the CAP as it responds to changing domestic priorities. A successful dispute settlement challenge to an important part of the CAP would test the EU's commitment to the WTO rules-based trading system. While it remains committed, we believe it would endeavour to comply. If its commitment to the WTO waivers, agricultural exceptionalism could again prevail.

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¹⁰ However, sugar can be viewed as a 'least likely case': it had been one of the CAP market regimes most resistant to change despite the fact that sugar reform had often been debated, and repeated opportunities to propose reform had arisen as a result of the periodic need to renew the legislation relating to sugar quotas.

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