

**Developing New Rules for Agricultural Trade: A U.S. Perspective**  
**Doha Round Failure, U.S.-EU Free Trade Agreement,**  
**and the Need for Multilateral Negotiations**

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## **Section I: The Current Rules for Agricultural Trade**

The Uruguay Round provided the only multilateral agreement on agriculture ever concluded, and has been unquestionably the single most important event in the evolution of agricultural trade policy worldwide. Most of the concepts that formed the structure of the Agreement on Agriculture were proposed by the export-oriented members of the (at that time) GATT, especially the United States.

The U.S. approach to the Uruguay Round negotiations on agriculture was in large part motivated by its belief that the Common Agricultural Policy (CAP) of the European Union was causing serious economic damage to U.S. interests. This concern focused on both EU agricultural export subsidies as well as domestic production subsidies. Beyond the concern about EU subsidies, there was a belief that U.S. farm exports had the potential to expand substantially if multilateral disciplines on tariff and non-tariff barriers to market access could be developed. On market access, Japan was probably the country most often thought of by American agriculture as needing market opening, although at that time Japan was already by far the largest market for U.S. farm exports.

This U.S. perspective was a major factor in the development of the first-ever rules for agriculture on categorizing and limiting domestic and export subsidies as well as introducing the first comprehensive multilateral framework for reducing tariffs and eliminating quotas on agricultural imports. As part of this approach, the U.S. and the agricultural exporting countries known as the Cairns Group led the efforts to develop a separate WTO agreement on sanitary and phytosanitary (SPS) import measures.

From the perspective of export-oriented agricultural trade policy, the Uruguay Round results could be viewed as a success. They brought the first-ever multilateral disciplines on domestic and export subsidies. In addition, the agricultural tariffs of all WTO members would be gradually reduced and (with a few important exceptions) all import quotas and bans were converted to tariff-rate quotas. In addition, the new WTO Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement) was expected to be very effective in discouraging the use of unjustified health-related trade barriers.

There have been only two attempts at a multilateral agreement on agriculture, i.e., the GATT Uruguay Round and the WTO Doha Round. It is interesting to note that the Uruguay Round negotiations on agriculture were conceptually and technically difficult because there was absolutely no precedent for creating such an agreement. The substantive portion of the Uruguay Round agriculture negotiations was completed in about six years (1988-1994), including a full review of complete implementation schedules.

The interval between the Uruguay Round and Doha Round was only about seven years, but there were intangible changes during this period that proved to be important for the multilateral trade negotiations. The WTO grew larger and the voice of its developing countries became stronger. The belief of the developing countries that they had not been treated equitably during the Uruguay Round appeared to intensify. More broadly, around

the world there seemed to be a growing concern that globalization, with international trade as an important part of it, had negative as well as positive consequences.

## **Section II: The Doha Round**

It is appropriate to look at the fundamental underlying factors that have in effect completely stalemated the Doha Round agriculture negotiations for many years. It is universally understood that the round will not be completed without an agreement on agriculture, and therefore a closer look at how the present deadlock has evolved is especially important.

It is clear in retrospect that the problems in agriculture were there from the very beginning, i.e., the launch of the round in Doha in November 2001. (This next round of agriculture negotiations had already been mandated by Article 20 of the Uruguay Round Agreement on Agriculture.) The agriculture portion of the Doha Round Declaration was, as should be expected, quite general, but it contained certain key provisions that were meant to provide real guidance for the ensuing negotiations. And indeed it would have been difficult for any WTO Member to argue against objectives such as “substantial improvements in market access” and “substantial reductions in trade-distorting domestic support”. Only later did it become clear in the course of the negotiations that the various WTO members were bringing very different interpretations of what it would mean to implement the Doha Declaration objectives for agriculture.

This absence of agreement on basic objectives extended even to the most fundamental element of the negotiations, i.e., the name. The word “Development” in Doha Development Agenda, it later became clear, had (and still has) different meanings for developing and developed countries. Developing countries see the inclusion of “Development” as a clear commitment that this Round should have as its major thrust the improvement of trading conditions for developing countries. Developed countries, on the other hand, at least in agriculture, have viewed the Doha Round as a more or less traditional negotiation with virtually all provisions being the result of a negotiated balance of concessions.

Because the United States was the single most important participant in proposing the modalities for the Doha Round, it is instructive to examine the U.S. objectives for this negotiation. To understand the original U.S. positions on agriculture it is useful to know that U.S. agriculture had traditionally been very aware of the EU policies of support and protection for its farmers. The U.S. positions were driven largely by this concern with EU policies, but also with substantial economic justification, especially in the case of EU export subsidies. Regarding market access, U.S. agricultural tariffs were on average much lower than those of other countries, so it was thought that the U.S. had much to gain and little to lose in this area.

The U.S. objectives for agriculture in the Doha Round can be described as:

- 1) A drastic formula approach to tariff reductions that would substantially open the markets of most WTO members;
- 2) The elimination of export subsidies;

- 3) A “harmonizing” approach to domestic subsidy reduction that would result in deeper percentage cuts for EU farm subsidies than for U.S. agricultural support.

The U.S. objective for domestic support was uniquely its own, i.e., leveling the playing field vis-à-vis EU domestic farm subsidies. And it had a surprisingly positive outcome for the U.S. The EU, finding itself in a greatly strengthened position as a result of the 2003 reform of its Common Agricultural Policy, agreed in conjunction with the July 2004 WTO Framework Agreement to reduce its WTO domestic subsidy ceiling by a greater percentage than would be required for the U.S.

Regarding the issue of export subsidies, the EU, after about six years of being hit with worldwide criticism on this issue, agreed at the Hong Kong Ministerial Meeting in December 2005 to the principle of completely eliminating export subsidies in agriculture. Although two of its three key objectives had now basically been achieved, the U.S. was left with the difficult challenge of showing that a substantial market access result would also be part of the Doha Round package.

In the early years of the agriculture talks the leadership of the WTO process in Geneva made a sustained effort to bring developing countries into the process, and in doing so incorporated certain concepts that greatly complicated the negotiating process, in particular the ideas of Special Products (SP) and the Special Safeguard Mechanism (SSM). These new concepts had the purpose of limiting access to developing country markets for farm products, and they are now viewed by these countries as indispensable parts of a final agreement. However, they also immediately made it much more difficult for the export-oriented countries, including the U.S., to achieve their market access objectives.

The dynamic set up for its domestic politics by the original U.S. negotiating position was that all three of its key objectives would be the tradeoff for a substantial reduction in U.S. domestic support. In fact, with by now weaker support from the agricultural sector, in October 2005 the U.S. administration went further than ever before in proposing a lowering of the WTO ceiling for U.S. farm subsidies.

The October 2005 proposal got mixed reviews around the world, with many negotiating partners asserting that the U.S. proposal would not necessarily result in meaningful reductions or reform for U.S. farm programs. By this point in the negotiations it had become clear that the WTO members were demanding a further move on the part of the U.S. in terms of reducing domestic support, but the U.S. did not make that further move.

As background to the specific developments discussed above it can be added that important systemic factors have contributed to the morass of the Doha agriculture negotiations. Not long into the negotiations it became clear that the negotiating process itself was dysfunctional. A negotiating culture emerged in which a premium was placed on the rigid defense of established positions. Expressing interest in creative problem solving was viewed as a possible sign of weakness to be avoided. Furthermore, the negotiators themselves were generally not empowered to deviate from their own proposals, with this being done only at the ministerial level. From the perspective of the

export-oriented countries, this situation was exacerbated by the fact that many, perhaps most, of the countries active in the agriculture negotiations appeared to have as a primary objective the minimizing of additional access to their markets.

These developments led to the dilemma that confronted the U.S. and probably constituted the single biggest obstacle to agreement on the new WTO modalities for agriculture. Because of its domestic political situation the U.S. needed other countries, both developing and developed, to show greater flexibility on market access before it could offer deeper cuts in domestic support. However, the other countries maintained that the U.S. had not offered enough in terms of reducing what were perceived to be unacceptably high levels of farm subsidies, and they refused to concede better market opening opportunities until the U.S. moved further on domestic support. This stalemate on agriculture was one of the most important factors contributing to the stagnation and eventual cessation of the Doha Round negotiations.

#### Doha Round Lessons to be Learned

In retrospect one could say that all of the major participants made misreadings and missteps that contributed to the failure of the Doha Round negotiations on agriculture. Those that most impacted the negotiations include the following:

- Developed countries, at least initially, did not recognize that the negotiating environment for the Doha Round would be so different from that of the Uruguay Round, primarily because of the greater number and assertiveness of developing countries.
- The leading participants never insisted, either at the Doha launch or thereafter, that developed and developing countries come to a common understanding of what it meant to pursue a “development agenda” through WTO negotiations.
- The U.S. and other exporting countries overestimated the willingness of developing countries to further open their markets to imports of agricultural products.
- The expectations of developing countries that the U.S. would be willing to meaningfully reduce its domestic agricultural support for the advancement of the Doha Round turned out to be unfounded.

### **Section III: The U.S. Turns to the Trans-Pacific Partnership**

In the post-WWII era multilateral negotiations had been by far the highest priority for the U.S. trade policy agenda. However, by 2009 and 2010 the United States was undergoing a fundamental shift in the focus of its trade policy objectives. The primary factors in this transformation were the reluctant recognition that the Doha Round negotiations had failed, in combination with the appearance of the opportunities to become a partner in two trade agreements having enormous potential, one with a large group of Pacific nations, and the other with the European Union.

The first significant decision by the Obama administration on trade policy, announced in November 2009, was the commitment to negotiate for U.S. membership in an expanded Trans-Pacific Strategic Economic Partnership Agreement, usually known as the Trans-Pacific Partnership or TPP. This was in effect the real entrance of the United States into the TPP negotiations, although in September 2008 President George W. Bush had notified the Congress of his intention to negotiate with the original four TPP members (New Zealand, Singapore, Chile, and Brunei).

Engaging in negotiations on the TPP appeared to offer the Obama administration opportunities to respond to pressure coming from several different directions. First, in response to some domestic criticism but also to urgings from other heads of state, the TPP finally allowed President Obama to point to active engagement in a trade negotiation. However, engaging in any trade initiative ran the risk of alienating those factions of his Democratic Party most skeptical about trade agreements. But the White House probably saw the TPP as the trade negotiation most likely to avoid such criticism. U.S. officials repeatedly asserted that the TPP would be a “high-quality and high-standards” trade agreement that “would reflect U.S. priorities and values.”

Moreover, the TPP negotiation allowed the United States to address a strategic and geopolitical objective that was much more fundamental than worries about how the Obama trade agenda was being perceived. In the U.S. there were serious concerns about the rapid evolution of Asian economic regionalism, and in particular the interest of some Asian powers to develop or enhance regional agreements that exclude the U.S. There was a belief that the complete lack of a trade strategy would leave the U.S. without any tools to counter the growth of exclusive regional economic arrangements within Asia.

There has been a continuing debate in Washington regarding whether the United States joined the TPP negotiations primarily with the objective of “containing China.” U.S. officials have never stated publicly that “China containment” is an objective of the United States, but it is clear that the TPP presents an enormous opportunity for the U.S. to strengthen its economic presence in East Asia. And by early 2015, in an effort to gain support for TPP in the United States, President Obama and its other proponents in Washington were asserting that if TPP does not provide the rules framework for trade in East Asia then China will set the trade rules for that region<sup>1</sup>. On the other hand, U.S. officials have always been careful not to exclude the possibility that China could enter the TPP at some later date.

The U.S. objectives for the agriculture portion of the TPP can be described as belonging to two major categories: 1) market access and 2) rules on SPS measures. The U.S. approach to agricultural market access in the TPP has had two major phases. During the first phase, which lasted from the launch of the negotiations until early in 2013, there was limited enthusiasm for the market access portion of the talks. At that time the U.S. had ten other countries to deal with in the TPP, but it already had Free Trade Agreements in effect with six of them. And the U.S. position was that the agricultural market access provisions of its existing FTAs should not be reopened for further negotiation as part of

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<sup>1</sup> State of the Union Address, January 20, 2015, [whitehouse.gov](http://whitehouse.gov).

the TPP process. Of the remaining four countries (Vietnam, Malaysia, New Zealand, and Brunei), there was limited U.S. interest in attempting to gain improved access to these markets for agricultural products.

However, this situation changed dramatically with the entry of Japan into the TPP negotiations. Because of the intense interest from the U.S. private sector, as of about mid-2013 the bilateral market access negotiations with Japan became the highest U.S. priority in the agricultural portion of the TPP talks.

Beyond market access, the other major priority for the U.S. in agriculture was the TPP chapter on SPS measures. In this area the central focus for the TPP countries (including the U.S.) was the concept of “SPS plus,” which generally means going beyond the WTO’s SPS Agreement. (“SPS plus” is discussed further in Section VII.) In the SPS chapter the most contentious question involved the concept of the “enforceability” of SPS measures developed specifically for the TTIP. The issue was the extent to which the agreement would have its own dispute settlement mechanism for enforcing the new “SPS plus” obligations. (The WTO dispute settlement process will not be available because these new SPS rules would apply only to the countries within the regional agreement.)

#### **Section IV: The TTIP: Overall Structure and Goals**

Although the concept of a U.S.-EU free trade agreement had been discussed in the think tank circles of Washington for many years, it was probably the onset of the Great Recession, triggered by the crash of financial markets in 2008, that provided the decisive impetus for the launch of the Transatlantic Trade and Investment Partnership (TTIP). National leaders on both sides of the ocean generally made it clear that economic stimulus and job creation were the most important and immediate priorities for negotiating the TTIP.

Another major objective for the TTIP was the concept of “regulatory convergence.” The goal in this area was to find ways of increasing the trade-related compatibility of all (not just for food and agriculture) of the wide-ranging and sophisticated regulatory regimes of the EU and the U.S. Agreeing on whether to focus on certain key sectors, or to take a more “horizontal” approach across all sectors, or both, has been one of the major challenges for this aspect of the TTIP negotiations.

In the early stages leaders on both sides also frequently expressed the opinion that the TTIP would provide the opportunity to develop trade rules that could later be adopted globally. Publicly it was usually not expressed so explicitly, but the EU and U.S. appeared to share the view that the failure of the Doha Round had left a void in the sustaining of an effective rules-based trading system. And they shared the belief that a trade agreement between the EU and U.S. would be the best alternative for providing rules and standards that would be worthy of global adoption.

At the U.S.-EU summit meeting in March 2014 the leaders of the two sides issued a joint declaration in which they described their TTIP objectives in the following manner:

“(Our TTIP) goals include expanding access to each other’s markets for goods, services, investment, and procurement; increasing regulatory compatibility while maintaining the high levels of health, safety, labour and environmental protection our citizens expect of us; and formulating joint approaches to rules that address global trade challenges of common concern. A high-standard TTIP agreement will make us more competitive globally, and boost economic and jobs growth, including for small and medium-sized enterprises.”<sup>2</sup>

The agriculture and food sector of the TTIP negotiations has two major components: 1) the trade-related aspects of SPS regulatory policy and 2) mutual improvements in market access. Of these two areas, the SPS negotiation is clearly the more difficult.

### **Section V: SPS Measures - The EU-U.S. Relationship**

The U.S. and the EU have a long and very difficult history of SPS-related disputes. This has occurred despite the fact that they both of course committed to the principles and obligations of the SPS Agreement when they accepted the Uruguay Round results.

However, diverging approaches to regulation and even cultural differences between the EU and U.S. have led to conflicting interpretations and application of the SPS Agreement. To understand the daunting challenge that the SPS area presents in the TTIP negotiations, it is essential to have some grasp of the differing perspectives of the two sides in their approach to managing the risks within their own agriculture and food systems.

The most important factor underlying many of the U.S.-EU bilateral problems is the divergence of views regarding the “precautionary principle” approach to risk management. There is not a universally accepted definition of the precautionary principle, but the EU application of it could be described in the following manner. The precautionary principle indicates that where the possibility of a harmful effect exists, but where scientific uncertainty regarding the risk persists, governments may adopt provisional, non-scientific risk management strategies.

The EU has made the precautionary principle the cornerstone of its approach to risk management in the SPS area. On the other hand, in the U.S. the precautionary principle is often viewed as inconsistent with the basic tenets of the WTO SPS Agreement and as the pretext for scientifically unjustified barriers to trade.

For many years the U.S. and the EU have been the chief protagonists in what may be described as a global battle of diverging approaches to SPS issues, especially pertaining to risk management. The “pure science versus precautionary principle” debate has extended from confrontations at the Codex Alimentarius Commission (Codex) to biotech

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<sup>2</sup> EU-U.S. Summit Joint Statement, Brussels, March 26, 2014, Council of the European Union.

policy in the developing countries of Africa. The result is a certain constant tension in the U.S.-EU relationship.

Regarding the precautionary principle, two important trade disputes between the EU and U.S. can be best understood through the lens of this approach to risk management. One of these is the beef hormones conflict, which probably is the most important SPS issue to go all the way through the WTO dispute settlement process. Essentially this dispute centers around the U.S. practice of applying hormone growth promoters in the feeding of beef cattle to accelerate growth and improve feeding efficiency.

The U.S. believes that there has never been any internationally accepted evidence that this practice poses a demonstrable risk to the health of consumers. On the other hand, the EU can argue that the application of growth promoters is not necessary for the production of beef, and therefore that if it even very marginally increases the health risk (through higher hormone levels), then it should be prohibited.

The beef hormones case was one of the first SPS issues to reach WTO dispute settlement. Eventually the WTO found that the EU had not performed an adequate risk assessment and therefore ruled in favor of the U.S. In one of the relatively few recent successes in addressing EU-U.S. agricultural trade disputes, the U.S. has dropped its WTO-authorized retaliation in the beef hormones case in exchange for access to the EU market for beef not produced with hormones. However, in the U.S. view, this is not the final resolution of the issue because the EU has not changed its decades-long policy of prohibiting the use of hormone growth promoters for beef.

Another issue of major and more urgent importance is the EU prohibition on the use of the beta-agonist feed additive ractopamine, which is used in the U.S. and other major meat-exporting countries to improve leanness in beef and pork production. This issue became especially difficult when in 2012 ractopamine was approved as safe (within the indicated maximum residue levels) by the Codex, which gave it an international standard as defined by the WTO. Here again an understanding of the precautionary principle can help one comprehend the differences. The EU does not accept the Codex approval of ractopamine, citing persistent scientific uncertainty, and it makes reference to the EU's broader, precautionary opposition to the use of veterinary drugs as growth promoters.

Beyond the more general policy differences, the U.S. and the EU have an approximately 50-year history of specific SPS-related trade disputes. The current list of bilateral problems goes far beyond the beef hormones and ractopamine issues described above, including antimicrobial rinses used in poultry production and an array of biotech-related regulatory disputes. Making this even more problematic is that three of these issues (beef hormones, biotech measures, and poultry rinses) are currently still at some stage of the WTO dispute settlement process.

Although almost all of the major U.S.-EU SPS disputes have consisted of U.S. challenges of EU import measures, the EU brings its own set of SPS grievances to the TTIP negotiations. The EU believes that the U.S. decision making process for SPS issues is often non-transparent and very slow. For example, the EU claims that there are unduly long delays in obtaining import approvals for certain fruits and vegetables as well as

receiving the Grade A certification for dairy products. The EU also asserts that the U.S. should be determining the equivalence of meat processing based on the EU as a single entity and market, rather than country-by-country.

## **Section VI: The TTIP - Negotiating Improvements in Agricultural Market Access**

The U.S.-EU negotiations on market access for agricultural and food products are much less complex and technically demanding than the SPS work, since they are essentially dealing with tariffs and tariff-rate quotas. However, the market access talks are nevertheless politically difficult. A large part of the difficulty derives from the fact that the EU and U.S. have shown substantial differences in their treatment of agriculture in their separate previous negotiations for FTAs.

The U.S. has been ambitious and comprehensive in its approach to FTAs, and has generally pursued a consistent strategy of including virtually all agricultural products in the elimination of tariffs and tariff-rate quotas. (Among the rare exceptions were sugar in the Australia FTA, due to U.S. political considerations, and rice in the Korea FTA, due to Korean sensitivities.) U.S. agriculture believes that continuing the U.S. approach of comprehensive liberalization in FTAs is essential for the TTIP.

The EU, on the other hand, has been much more selective in its inclusion of agricultural products while negotiating its FTAs. For example, the EU has generally excluded beef, dairy products and some fruits and vegetables. In the TTIP it appears that the EU is taking an approach consistent with what it offered in the EU-Canada agreement, i.e., eliminating tariffs over the near- or medium-term for the vast majority of agriculture and food products, but maintaining permanent protection for its most sensitive sectors.

For U.S. agriculture and EU agriculture the difference between comprehensive liberalization (the U.S. position) and permanent protection of certain sensitive sectors (the EU view) is a crucial one, and a difference that will be resolved for the TTIP only at the highest political levels. However, a very positive factor in the pursuit of a U.S.-EU agreement on agricultural market access could be the outcome of the U.S.-Japan negotiation under TPP. As of this writing it appears that TPP will result in substantial improvements in access to the Japanese market for U.S. agricultural products, but definitely not the “comprehensive liberalization” that was provided by other U.S. FTAs. As such, the TPP result may become a useful precedent that brings more realistic U.S. expectations regarding what will be possible in the TTIP negotiations on agriculture.

## **Section VII: Major TTIP Objectives of the U.S. Private Sector**

The overarching concern expressed by the private sector of U.S. agriculture has been that any FTA with the EU must be comprehensive in its coverage, meaning that not only must agriculture as a sector be included in the TTIP, but all agricultural products must be fully

included as well. The primary negotiating objective is that SPS and other non-tariff barriers be adequately addressed in the negotiations<sup>3</sup>.

Negotiations to reduce and eliminate EU tariffs and tariff-rate quotas are certainly also important to U.S. agriculture, and the EU duties on dairy and meat products are particularly high. However, many export-oriented sectors of U.S. agriculture believe that unless there are changes in the SPS and other non-tariff barriers of the EU, even the elimination of tariffs and tariff-rate quotas would be of little or no value to them.

Therefore, many of the TTIP objectives expressed by the U.S. private sector involve the removal of what are perceived to be SPS import barriers imposed by the EU without scientific justification. These include, among many others, the EU bans on the use of the beta-agonist growth promoters for beef and pork and antimicrobial rinses for poultry, as mentioned above.

The U.S. private sector is also very supportive of the decision by the U.S. and EU to develop an ambitious “SPS plus” chapter in the TTIP<sup>4</sup>. Very similar to its incorporation in the TPP negotiations, the “SPS plus” concept in the TTIP generally means building on and going beyond the rights and obligations undertaken by all WTO members through the WTO’s SPS Agreement. In the TTIP it could mean, for example, that the EU and U.S. would provide each other with greater transparency and more timely SPS notifications than required by the WTO. This should not be especially problematic.

However, much more challenging would be negotiating an agreement stronger than the existing one for accepting each other’s SPS measures as equivalent, or developing some type of “rapid response mechanism” for resolving stoppages of agricultural products at the border. Additionally, there have been calls for SPS provisions in the TTIP to be enforceable, meaning subject to a bilateral dispute settlement process. U.S. agriculture can be expected to be strongly pushing all of the above initiatives.

Another important objective for a number of U.S. agricultural sectors is a focus on the EU approach to approving and labeling the products of biotechnology. Many in U.S. agriculture and the food industry assert that the EU system for regulating biotech products is not science-based, and is inefficient and nonresponsive as well. Moreover, the U.S. private sector has been skeptical about the effectiveness of the EU-U.S. government dialogue on GMO regulation begun after the suspension of the WTO case involving the EU biotech approval process. However, in defining its TTIP objectives, the U.S. biotech industry primarily has asked for much better adherence by the EU to the EU’s own legal framework for regulating the commodities of agricultural biotechnology, especially regarding the approval process<sup>5</sup>.

Many of the specific objectives put forward by U.S. agricultural and food interests can be categorized as coming under the heading of “regulatory compatibility.” Examples of this

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<sup>3</sup> Agriculture Coalition letter to Michael Froman, May 20, 2013, nopa.org.

<sup>4</sup> U.S. Ag Coalition Letter to USTR on EU FTA, March 4, 2013, naega.org

<sup>5</sup> “BIO Comments on TTIP Negotiations,” Comments to USTR from the Biotechnology Industry Organization, bio.org, June 19, 2013, pages 13-17.

include calling for harmonizing pesticide and food additive registrations, and also establishing a regular dialogue between the EU and U.S. risk assessment agencies.

Another frequently cited goal for U.S. agriculture is the modification of the EU's Renewable Energy Directive (Directive 2009/28/EC, known as the RED). Article 17 of this directive contains very specific eligibility criteria for a biofuel to be classified as "sustainable." Biomass not defined as sustainably produced can be imported into the EU, but biofuels made from such biomass are not eligible for EU financial supports, including tax exemptions, that accrue to "sustainable" biofuels. As described by one international study, "... if a biofuel cannot fulfil the sustainability criteria (of the RED), this has a significant restrictive impact on its marketability within the EU."<sup>6</sup>

The U.S. groups most impacted, such as in the soybean sector, assert that the RED represents a de facto trade barrier that inappropriately imposes EU sustainability requirements on farmers in the U.S. and other countries. More specifically, the EU greenhouse gas emissions reduction requirements and the criteria for sustainable land use are considered problematic<sup>7</sup>. The issue has significant importance in terms of potential trade flows and also more generally for the trade policy precedents involved.

### **Section VIII: Further EU Perspectives on the TTIP**

The EU agricultural and food sector does have some offensive interests in the TTIP. The most important of these could be considered attempting to gain U.S. acceptance of the EU approach to geographical indications (GIs). (GIs are discussed in detail in Section IX.) In addition, EU agriculture seeks better access to the U.S. market for its dairy products, particularly cheese, as well as resuming access for beef and veal. There is also some interest in further exports to the U.S. of specialty sugars and certain sugar-containing products that are currently limited<sup>8</sup>.

On the issue of agricultural biotechnology, EU farmers understand the significant benefits that genetically modified organisms (GMOs) can offer to producers. However, non-governmental organizations and other groups outside of agriculture have had the predominant voice among EU constituencies, and have traditionally been very skeptical regarding the use of GMOs in food production. Underlying the policy debate to a certain extent is a European cultural aversion to "genetically engineering" food and a belief that consumers have the right to know if their food has been produced in this manner. The political result of all of this is that on the GMO issue the EU is engaging in the TTIP

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<sup>6</sup> "Sustainability Criteria in the EU Renewable Energy Directive: Consistent with WTO Rules?" International Centre for Trade and Sustainable Development, Information Note No. 2, September 2010.

<sup>7</sup> American Soybean Association letter to Daniel Mullaney/USTR on "U.S.-EU High Level Working Group on Jobs and Growth," February 3, 2012, agri-pulse.com.

<sup>8</sup> "Achieving a Successful Outcome for Agriculture in the EU-U.S. Transatlantic Trade and Investment Partnership Agreement," James Grueff and Stefan Tangermann, Discussion Paper of the International Food and Agricultural Trade Policy Council, February 2013, pages 19-20.

negotiations with a defensive posture and a resistance to significant changes in its regulatory approach to biotechnology<sup>9</sup>.

### **Section IX: Geographical Indications**

An important part of the TTIP negotiations on agriculture and food will be the issue generally known as “geographical indications,” which is often referred to as simply “GIs.” These are food or beverage designations that derive originally from production in a specific geographical location. One of the best-known examples is the cheese known as parmigiano reggiano, whose name is actually taken from the two towns in Italy where this cheese is produced.

The key question is whether such designations should be legally protected for the original producers or should be considered generic and available for general use. The GI issue can have major trade implications and, for example, in the TTIP could even result in U.S. dairy producers losing the ability to market certain products with traditional names in their own domestic market.

The EU perspective is that the names used by the original European producers should be legally protected, both within the European Union and in EU export markets. The GI issue has been an EU priority in agricultural trade negotiations for many years, and the EU has been able to successfully incorporate its approach to GIs in the course of negotiating many of its FTAs with other countries. The most recent and probably most important examples have been the EU-Korea and the EU-Canada bilateral trade agreements.

Some sectors of U.S. agriculture are very concerned and adamantly opposed to U.S. acceptance of the EU position on GIs in the TTIP negotiations. The U.S. private sector has developed the position that “common” or “generic” names that have a history of being widely used in commerce should not be legally protected or limited in use. According to this approach, GIs would be differentiated by type. Compound names (meaning more than one word) that specifically indicate the original location of production could be protected. An example would be the cheese known as parmigiano reggiano, which was mentioned above. However, common or generic names with a history of commercial use would not be protected. An example of this would be the name “parmesan,” which is the common name that has evolved for the cheese originally known as parmigiano reggiano<sup>10</sup>.

The U.S. dairy industry, which is very concerned about protecting the common names of many cheeses, has been particularly vocal on the GI issue. In 2012 it led the formation of an international alliance known as the Consortium for Common Food Names, which is essentially an advocate for the U.S. approach to GIs as described above<sup>11</sup>.

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<sup>9</sup> Ibid.

<sup>10</sup> Consortium for Common Food Names, [commonfoodnames.com](http://commonfoodnames.com), “The Issue.”

<sup>11</sup> Ibid.

A recent case before the U.S. Patent and Trademark Office (USPTO) was an interesting illustration of the GI issue. In 2012 the Swiss applied for a U.S. trademark for the term “gruyere” cheese, based on the fact that the cheese was originally (and is still) produced in the town of Gruyeres, Switzerland. USPTO rejected the application, saying that the term had lost its geographical significance, and cited as evidence the existence of U.S. manufacturers of gruyere as well as U.S. consumer views that gruyere can be made anywhere and not just in Switzerland<sup>12</sup>.

## **Section X: Multilateral Challenges: Status and Limitations of the SPS Agreement**

Although the SPS Agreement has performed well so far, WTO members who want to use the agreement in good faith and for its intended purposes are facing many challenges today. One of these challenges is the politicization of the designated standards-setting organizations, especially at the Codex. The clearest example of this was the eventually successful effort of the U.S. Government to establish a Maximum Residue Level (MRL) for the beta-agonist ractopamine. Far from the original idea of Codex as a forum where decisions are made by unanimous consent and purely on the basis of scientific evidence, the U.S.-led initiative to approve ractopamine became a battle of lobbying for votes against the EU and others. After many years the ractopamine MRL was approved at Codex in 2012, but only by a very close and contentious vote.

Another challenge for the SPS Agreement appears to be systematic non-compliance on the part of some of the most important WTO members, including Russia and China. Many Russian SPS measures have been questioned, such as near-zero tolerances for tetracycline antibiotics that are inconsistent with international standards, and the allegedly arbitrary de-listing of foreign meat plants as suppliers of the Russian market. In 2014 the EU claimed that Russian measures blocking the importation of pork and live pigs are inconsistent with most of the fundamental principles of the SPS Agreement, and initiated a dispute settlement case at the WTO. Among many complaints involving China, various WTO members have claimed that import bans on products such as beef and apples have ignored the existing science and international standards.

Looking beyond the experience to date with the SPS Agreement, the desire for the agreement itself or SPS-like agreements to cover other issue areas has been apparent. One of these is trade-related environmental issues. Although, for example, the WTO panel in the U.S.-EU biotech case ruled that the SPS Agreement can apply to the protection of the environment, it certainly is not primarily an environmental agreement. Moreover, the relationship between the SPS Agreement and the Biosafety Protocol is not well-defined, and in the event of a trade dispute it would not be at all clear which agreement would have precedence over the other.

In other issue areas, some might like to see trade rules used as a means to achieve important animal welfare or sustainability objectives. Although these are legitimate goals,

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<sup>12</sup> “Consortium for Common Food Names Applauds Rejection of Gruyere Trademarks,” commonfoodnames.com, May 9, 2012.

it would be difficult to conceive of a meaningful role for the SPS Agreement in achieving them. In addressing issues that go beyond the scope of the SPS Agreement some different thinking may be needed.

Specifically on animal welfare, for example, a recent landmark WTO dispute settlement case, “EC – Seal Products,” may provide a new avenue for moving forward. In ruling on this case in 2014, the WTO found that restricting trade to protect animal welfare can be justified under the “necessary to protect public morals” provision of GATT Article XX(a). (The WTO also ruled, however, that the current EU Seal Regime discriminates against imported seal products and must be modified.)

Beyond the WTO dispute settlement process, however, WTO members would be well-advised to consider developing new and separate agreements to achieve non-trade objectives, rather than to revise the SPS Agreement. Any revisions taking the SPS Agreement away from its core disciplines of science-based decision making for health-related import measures would risk completely undermining the effectiveness of the agreement.

### **Section XI: New Multilateral Negotiations Will Be Essential**

The current WTO rules for agriculture were developed in the early 1990s. Now more than 20 years later, they provide no or very little guidance for many of the most important issues in agricultural policy today. It would be useful to acknowledge that the WTO, as it is currently constituted and presently functions, is not a dynamic organization whose members are capable of developing or adapting trade rules to address constantly evolving problems and objectives. (Although this might be possible for plurilateral subgroups of WTO members on certain issues.) As examples, the following is only a partial list of issues that call for new multilateral rules and disciplines, but that are almost certainly beyond the capability of the WTO to address effectively.

Energy policy: In the United States, as one example, a certain aspect of energy policy has been one of the most important features of the U.S. agricultural economy within the last ten years. There is a U.S. law requiring that the fuel additive known as ethanol, which is made primarily from corn, must be blended into gasoline produced in the U.S. This has had a significant effect on the price of corn, which is the single most important commodity produced by U.S. agriculture. Yet the WTO Agreement on Agriculture provides no specific guidance as to whether this government support (through the gas-blending mandate) is trade-distorting and therefore should be limited.

Safety net programs: There should be a thoughtful multilateral negotiation to develop new rules for the use of domestic safety net programs, such as revenue assurance (or insurance) systems. For example, in its 2014 agricultural legislation (“the Farm Bill”), the United States for the first time included a revenue assurance program as a central part of its government support for farmers. However, the program does not correspond in any manner to the few specific requirements in the Annex 2 (Green Box) provision on income safety net programs. Developments such as these can contribute to a loss of credibility for the 20-year-old Annex 2 rules on domestic support.

Environmental programs: Such programs for agricultural production have evolved substantially over the last 20 years, and multilateral trade rules to provide guidance should extend far beyond the simplistic statement in Annex 2 that government payments for environmental programs shall be limited to the cost of complying with the program.

Peace Clause: Whenever the multilateral process resumes the status of the two forms of WTO discipline on agricultural support may become an issue for discussion and possible negotiation. Since 2004 agricultural support has been subject to the distinctly different disciplines of the Agreement on Agriculture and the Agreement on Subsidies and Countervailing Measures (SCM). (From 1995 through 2003 such support was for the most part exempt from challenges using the SCM Agreement because of the Article 13 “Peace Clause” contained in the Agreement on Agriculture.)

The essential difference between the two forms of discipline is the following. The Agriculture Agreement categorizes support programs based on their characteristics, and limits the total cost (in monetary terms) of programs deemed to be trade-distorting (Amber Box). The SCM Agreement, on the other hand, for the most part looks at whether a support program causes adverse effects, and is not concerned with the characteristics of the program itself.

In the most significant WTO dispute settlement case to date on agricultural subsidies, Brazil won its challenge against the U.S. support program for cotton. Brazil successfully used both the SCM Agreement and the Agriculture Agreement in this case, but the most important results were the findings of “serious prejudice” based on the SCM Agreement.

It is plausible that when serious WTO negotiations on agriculture resume, some important participants will argue for a new version of the Peace Clause to protect themselves from challenge under the SCM Agreement. One of these participants could be the United States, which has done very little to make its agricultural support programs more WTO-consistent. However, there is also evidence that some of the major emerging developing countries may be providing agricultural support in a manner that is inconsistent with WTO rules and disciplines, and these countries might also be interested in some form of protection from SCM challenges<sup>13</sup>.

Sustainability: Promoting the sustainability of agricultural production is now universally supported as a policy goal among the member countries of the WTO. On the other hand, sustainability is not even mentioned in the Agreement on Agriculture. One of the most difficult agricultural issues for the WTO to address in the future will be the application of domestic sustainability requirements to imported products. The TTIP may provide an important development for this issue if the EU and U.S. can reach agreement regarding the sustainability requirements of the EU’s Renewable Energy Directive.

Export Restrictions: Food security is an issue that is becoming increasingly more important to all countries, especially due to the food price shocks that have occurred in

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<sup>13</sup> Michael Rue, USA Rice Federation, Testimony before Senate Finance Committee Subcommittee on Trade, June 29, 2014, pages 2-4.

recent years. Export restrictions can significantly undermine global food security, with a particularly strong impact on the food security concerns of import-dependent developing countries that are especially susceptible to sharp price increases for basic commodities.

The language on export prohibitions and restrictions in the Agreement on Agriculture (Article 12) is weak and generally considered to be ineffective. Many WTO members believe that there is a need to develop meaningful disciplines on the use of export restrictions. Although new multilateral rules would be the best response to such concerns, in the meantime some encouragement can be taken from the outcome of the WTO dispute settlement case known as “China/Raw Materials,” which interprets GATT Article XI:2(a) as providing meaningful discipline on export restrictions. This is the same GATT provision included in Article 12 of the Agreement on Agriculture.

Geographical indications: As described above, the GI issue is an extremely difficult one within the TTIP negotiations, in large part because this negotiation involves the world’s two major protagonists in the GI debate. However, because of this very fact, any compromise solution that the EU and U.S. can develop through the TTIP negotiations could also bring the possibility of providing the basis for a global approach to the GI issue, but only if adopted by a multilateral negotiating process.

## **Section XII: The Case for Concluding the Doha Round**

Despite the fact that many important issues regarding agricultural support, as illustrated above, are beyond the present negotiating capabilities of the WTO, a strong argument can be made that the most recent draft Doha Round text on agriculture (from 2008) has substantial value, and would be worth serious efforts to complete.

One very positive aspect of the Doha Round negotiation on agriculture is almost completely overlooked. When compared with the only multilateral accord ever completed on agriculture, i.e., the Uruguay Round Agreement, it can be argued that the Doha package on agriculture already offers much more in terms of market liberalization and policy reform. For example, the Doha tiered formula that applies the deepest cuts to the highest tariffs should be much more effective at market opening than the Uruguay Round approach of an overall average reduction with a minimum reduction per tariff line, and with the importing country choosing which cut to apply to which tariff.

Similarly, an agreement based on the current Doha Round text would have much deeper reductions than the Uruguay Round in the allowed limits for the Amber Box trade-distorting domestic support, and the countries with the highest ceilings would reduce the most. Furthermore, while the Uruguay Round mandated moderate reductions in agricultural export subsidies, any Doha Round outcome must include the complete elimination of export subsidies. While these positive features can be compelling, the greatest weakness of the current text is probably the persisting lack of definition for certain market protection provisions, especially the concepts of Special Products and the Special Safeguard Mechanism for developing countries.

It is also not widely understood that the Doha Round negotiation on agriculture would be technically very manageable to complete. However, doing so would mean overcoming the dysfunctional negotiating culture that emerged and evolved at the WTO during the process. More importantly, this negotiation has stagnated because in the key WTO countries an assessment has repeatedly been made that the political cost of making the compromises needed to complete the negotiation would be greater than the political benefit of having a new WTO agreement on agriculture.

Some small cause for optimism emerged from the WTO's Ninth Ministerial Conference in Bali, Indonesia in December 2013. After many months of contentious discussions, primarily between the U.S. and India, the WTO members reached agreement on the issue of programs of public stockholding for food security purposes. The agreement states essentially that developing countries, on a temporary basis, may exclude price-support expenditures on existing public stockholding programs from their Amber Box calculations. Although this is a relatively minor issue in the context of the Doha Round negotiations on agriculture, the Bali outcome did provide some encouragement for those who would like to see these negotiations resume and reach a successful conclusion.

More generally, the WTO leadership was reenergized by the success of the Bali ministerial meeting. After some delays during 2014 related to interpretations of the public stockholding agreement, the WTO members committed themselves to developing by mid-2015 a work plan for concluding the Doha Round negotiations.