

# INTERNATIONAL TRADE—POSSIBLE UNDERMINING OF U.S. PESTICIDE AND FOOD SAFETY LAWS BY THE DRAFT TEXT OF THE URUGUAY ROUND OF GATT NEGOTIATIONS

## I. FACTS

Uruguay Round negotiations for the General Agreement on Tariffs and Trade (GATT) began in 1986. A major item on the agenda for these negotiations was solving the agricultural trade problems which had developed during the 1970s and early 1980s.<sup>1</sup> The Uruguay Round negotiations failed to meet the anticipated completion deadline of December 15, 1990 because of the European Community's refusal to concede on agricultural subsidy issues.<sup>2</sup> On December 20, 1991, a proposed draft text of the negotiations for the GATT (Dunkel Draft) was published by GATT Director General Arthur Dunkel in an attempt to resolve these and other troubling issues of the Uruguay Round.<sup>3</sup>

A major focus of the Dunkel Draft is sanitary and phytosanitary standards,<sup>4</sup> pesticide standards, and other food safety issues.<sup>5</sup> The draft includes plans for harmonization of standards concerning contamination, processing, inspections, packaging, labeling, and other standards for food, food products, and beverages, as well as pesticides and plant and animal diseases.<sup>6</sup> According to consumer groups such

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<sup>1</sup> Lyn MacNabb & Robert Weaver, Comment, *The General Agreement on Tariffs and Trade (GATT): Has Agriculture Doomed the Uruguay Round?*, 26 LAND & WATER L. REV. 761, 767 (1991). See *infra* notes 37 & 39.

<sup>2</sup> *Id.* at 762-63.

<sup>3</sup> *GATT Language Would Undermine FIFRA, Other Environmental Laws, Groups Say*, 9 Int'l Trade Rep. (BNA) No. 2, at 62 (Jan. 8, 1992) [hereinafter *GATT Language*].

<sup>4</sup> Sanitary or phytosanitary measures are defined in *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, GATT Doc. MTN.TNC/W/FA, *Text on Agriculture*, Annex A, at L.45 (Dec. 20, 1991) (available upon request from the Office of the United States Trade Representative) [hereinafter *Dunkel Draft*]. In general, they are measures which protect animal or plant life or health from risks of disease and pests.

<sup>5</sup> *GATT Language*, *supra* note 3, at 62.

<sup>6</sup> *GATT Language Would Undermine FIFRA, Other Environmental Laws, Groups Say*, Int'l Trade Daily (BNA) (Jan. 10, 1992) [hereinafter *GATT Language Would Undermine FIFRA*].

as the Community Nutrition Institute and Public Citizen, the draft agreement restricts assertions of sovereignty by individual nations wishing to establish their own regulatory systems. The draft advocates adherence to international standards unless individual nations meet a narrow exception for demonstrated impending national injury.<sup>7</sup> Public Citizen contends that the draft's emphasis on harmonization of standards will promote less stringent national standards, as nations will only be required to meet the GATT standards.<sup>8</sup> The draft also requires that nations defending their sanitary laws must show that their standards are the least trade restrictive alternative.<sup>9</sup> The United States' agreement to this section of the Dunkel Draft may undermine the high standards of United States food safety laws such as the Delaney Clause of the Federal Food, Drug, and Cosmetic Act (FFDCA)<sup>10</sup> and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).<sup>11</sup>

According to U.S. Trade Representative Carla A. Hills, the United States does not plan to attempt to delay concluding the Uruguay Round, despite the United States' failure to issue an official response to the Dunkel Draft by the January 13, 1992 deadline.<sup>12</sup> Hills says that the agreement will not be presented to Congress until the draft is revised to facilitate U.S. objectives of greater exports and more jobs.<sup>13</sup> A spokesman for Ms. Hills stated that the United States will not allow federal food safety standards to be undermined by the GATT.<sup>14</sup> On November 21, representative Henry Waxman<sup>15</sup> introduced a concurrent resolution which would require Congress to deny approval to implementing legislation for any trade agreement that jeopardizes health, safety, or environmental laws.<sup>16</sup>

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<sup>7</sup> *Id.* The Draft provides: "However, where urgent problems of health protection arise or threaten to arise for a contracting party, that contracting party may omit such of the steps enumerated . . . as it finds necessary . . ." *Dunkel Draft, supra* note 4, at L.49, para. 3.2.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> 21 U.S.C. § 348(c)(3)(A) (1988). For text, see *infra* note 17 [hereinafter FFDCA].

<sup>11</sup> 7 U.S.C. § 136 (1988) [hereinafter FIFRA]; *GATT Language Would Undermine FIFRA, supra* note 6.

<sup>12</sup> *USTR Hills Calls Uruguay Round 'Right on Track' but Sees No End*, Int'l Trade Rep. (BNA) 138 (Jan. 22, 1992).

<sup>13</sup> *Id.*

<sup>14</sup> *GATT Language Would Undermine FIFRA, supra* note 6.

<sup>15</sup> Representative Waxman is a Democrat from California.

<sup>16</sup> H.R. Con. Res. 246, 102d Cong., 1st Sess. (1991); *GATT Language, supra* note 3, at 62. FIFRA and FFDCA are among the laws protected by the resolution.

## II. LAW

A. *FFDCA Delaney Clause and FIFRA*

One domestic statute that environmental groups fear will be adversely effected by acceptance of the Dunkel Draft is the Delaney Clause of the Federal Food, Drug, and Cosmetic Act.<sup>17</sup> The clause was originally enacted in 1958 in response to public fears of carcinogenic substances in processed foods. The Food and Drug Administration (FDA) has generally interpreted the clause as requiring strict intolerance of any additive found to be cancer-causing by valid scientific tests, regardless of the amount of the additive contained in the final food product. The clause represents a public policy which places protection of public health above economic benefit considerations.<sup>18</sup>

Agency officials and the judiciary disagree as to how strictly the Delaney Clause should be construed. For example, in 1986 the FDA gave its approval to list two colors as acceptable for use in cosmetics, even though they had been found to be cancer-causing.<sup>19</sup> In doing so the FDA recognized a *de minimis* exception to the Delaney Clause. The FDA concluded that it had the "inherent authority" to disregard the "literal terms of the statute" when the matter was trivial.<sup>20</sup> In *Public Citizen v. Young*,<sup>21</sup> the D.C. Circuit Court of Appeals overturned the FDA's approval of the color additives, reasoning that the *de minimis* exception conflicted with "the natural, almost inescapable" wording of the clause in the statute.<sup>22</sup> The court relied on the legislative history of the FFDCA which showed that Congress adopted

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<sup>17</sup> Congress' original intent was to preclude approval of any additive which caused cancer. The clause reads "no additive shall be deemed to be safe if it is found to induce cancer when ingested by man or animal, or if it is found, after tests which are appropriate for the evaluation of the safety of food additives, to induce cancer in man or animal . . ." 21 U.S.C. § 348(c)(3)(A). See also Margaret Gilhooley, *Plain Meaning, Absurd Results and the Legislative Purpose: The Interpretation of the Delaney Clause*, 40 ADMIN. L. REV. 267, 270 (1988).

<sup>18</sup> Gilhooley, *supra* note 17, at 273.

<sup>19</sup> 21 U.S.C. § 376(b)(5)(B) (1988), dealing with color additives, and 21 U.S.C. § 360b(d)(1)(H) (1988), dealing with drugs for food-producing animals, include comparable language to that in § 348(c)(3)(A). All three clauses are referred to as Delaney Clauses because of their similar wording. Gilhooley, *supra* note 17, at n.1.

<sup>20</sup> Gilhooley, *supra* note 17, at 274 (quoting Listing of D&C Orange No. 17 and Red No. 19, 51 Fed. Reg. 28, 331, 346 (1986)).

<sup>21</sup> 831 F.2d 1108 (D.C. Cir. 1987).

<sup>22</sup> *Id.* at 1112.

the clause as worded despite objections from the food industry that it was too rigid.<sup>23</sup> Although the FDA argued that statutes may be read as having implicit exceptions, the court rejected the applicability of this *de minimis* theory to the clause because of the absence of a textual basis for it.<sup>24</sup>

The FDA continues to urge that it is unreasonable to regulate trivial risks of contamination in light of the purpose of the legislation. With improvements in detection methods, it becomes increasingly more probable that many food additives will be found to be carcinogenic if fully tested. If the clause is strictly construed, trace amounts of these additives will cause products to be banned even though they pose a negligible risk of cancer for the individual who ingests them—a risk which most consumers would be willing to take. In response to this problem, Professor Gilhooley suggests that a consistent choice be made between giving the Delaney Clause an absolute meaning and interpreting it so as to overlook minute risks that are insignificant to safety considerations.<sup>25</sup> The FDA's *de minimis* theory would satisfactorily comply with the intent of Congress if such intent was interpreted as being to guard against significant rather than negligible risks.

In February of 1991, the Environmental Protection Agency (EPA), acting on objections to its response to a petition for the revocation of fourteen food additive regulations, issued an Order concerning pesticides and commodities.<sup>26</sup> The petition had claimed that these food additives violated the Delaney Clause. The Order confirmed the EPA's commitment to the *de minimis* exception despite *Public Citizen v. Young*.<sup>27</sup>

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<sup>23</sup> *Id.* at 1113-15.

<sup>24</sup> *Id.* at 1113.

<sup>25</sup> Gilhooley, *supra* note 17, at 297.

<sup>26</sup> 56 Fed. Reg. 7750 (1991).

<sup>27</sup> The Order provided:

On the questions involving congressional rigidity and legislative design, EPA undertook an exhaustive review of the FFCDA and pertinent legislative histories. EPA discovered fewer signs of congressional rigidity in the FFDCA and its legislative history concerning the food additives Delaney Clause than were noted by the Public Citizen court regarding the color additives Delaney Clause. [See *supra* note 21]. In fact, the legislative history of section 409 and other provisions involving pesticides actually suggest that a rigid interpretation of the food additives Delaney Clause would be inconsistent with congressional intent. This determination is confirmed by Congress' legislative design for regulating pesticides. Hence, EPA concludes that the food additives Delaney Clause is subject to an exception for pesticide uses

In addition to undermining the Delaney Clause, the Dunkel Draft's sanitary and phytosanitary provisions pose a potential threat to the high standards of FIFRA. FIFRA was enacted in 1947 to provide for the registration, inspection, and control of pesticides which might be harmful either to the environment, humans, or animals.<sup>28</sup> FIFRA, unlike the Delaney Clause, is not a zero-risk statute. Under section 136(l) of FIFRA, a pesticide presents an imminent hazard if it is "likely to result in *unreasonable* adverse effects on the environment or . . . to the survival of a species declared endangered."<sup>29</sup> According to the language of the statute, a pesticide which has been scientifically proven to be dangerous in some way will not automatically be banned, but will be allowed to remain in use unless it presents some "imminent hazard."<sup>30</sup> FIFRA also provides for classification of pesticides according to whether or not the product "may generally cause, without additional regulatory restrictions, unreasonable adverse effects on the environment . . . ."<sup>31</sup>

Unlike debate over the Delaney Clause, current debate over FIFRA does not center around its textual interpretation. The issue here is whether FIFRA and its implementation by the EPA pre-empt state laws and municipal ordinances which enforce stricter standards than those imposed by FIFRA. State supreme court and federal circuit court cases were divided on the issue,<sup>32</sup> but the U.S. Supreme Court resolved the conflict in *Wisconsin Public Intervenor v. Mortier*.<sup>33</sup> The

which pose trivial risks.

*Id.* at 7755.

<sup>28</sup> Under FIFRA, 7 U.S.C. § 136(c), a pesticide is "adulterated" if "its strength or purity falls below the professed standard of quality as expressed on its labeling under which it is sold . . . ."

<sup>29</sup> 7 U.S.C. § 136(l)(1988) (emphasis added).

<sup>30</sup> 7 U.S.C. § 136a(d)(1). There is some debate as to what standard will be used for re-registration of pesticides, which is required under § 136a. The "unreasonable adverse effects" standard is considered by many to be too vague, as is the "imminent hazard" standard. The major complaint is that discretionary risk and benefit standards such as these are subject to being manipulated and might result in delay in removing dangerous pesticides from the market. For a full discussion of this issue, see Marina M. Lolley, *Carcinogen Roulette: The Game Played Under FIFRA*, 49 MD. L. REV. 975 (1990).

<sup>31</sup> 7 U.S.C. § 136a(d)(1)(B)(1988) (emphasis added).

<sup>32</sup> The principal cases in favor of preemption were *Professional Lawn Care Ass'n v. Milford*, 909 F.2d 929 (6th Cir. 1990) and *Maryland Pest Control Ass'n v. Montgomery County*, 822 F.2d 55 (4th Cir. 1987). Major decisions against preemption came from two state supreme courts: *Central Maine Power Co. v. Lebanon*, 571 A.2d 1189 (Me. 1990) and *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal.3d 476, 683 P.2d 1150, 204 Cal. Rptr. 897 (1984).

<sup>33</sup> 111 S. Ct. 2476 (1991).

Court held that no actual conflict exists between the local and federal laws and that FIFRA does not pre-empt local governmental regulation of pesticide use since it does not supersede local action either explicitly or implicitly.<sup>34</sup> The Court emphasized that local governments are often better equipped to regulate pesticides to meet specific local needs.<sup>35</sup>

### *B. Current GATT Standards Code*

The GATT is a multilateral agreement designed to facilitate international trade and is negotiated through a series of "rounds," during which representatives discuss rules. The substance of their discussion, however, is bargaining for trade restrictions, concessions, and harmonization.<sup>36</sup> The bargaining results in a contract which will function as a code of conduct between member nations who are referred to as "contracting parties." The GATT's objective is to conduct trade and other economic endeavors "with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods . . . ."<sup>37</sup> The resulting GATT system performs two major functions: it serves as higher authority when there is internal pressure for protectionist measures and as an international forum for dispute resolution.<sup>38</sup>

The original GATT did not include provisions on technical barriers to trade. The Tokyo Round of negotiations took place between 1973 and 1979 and resulted in the Agreement on Technical Barriers to Trade, often referred to as the Standards Code. The Standards Code prohibits signatories from adopting technical regulations or standards, for the purpose of protecting consumer or environmental health or safety, that create undue impediments to trade.<sup>39</sup> Although the Standards Code does not provide specific regulations, its objective is to

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<sup>34</sup> *Id.* at 2482.

<sup>35</sup> *Id.* at 2484 (quoting S. REP. No. 970, 92d Cong., 2d Sess. 27 (1972), reprinted in 1972 U.S.C.C.A.N. 3983, 4111).

<sup>36</sup> See J. Michael Finger, *That Old GATT Magic No More Casts Its Spell (How the Uruguay Round Failed)*, 25 J. WORLD TRADE 19, 21 (1991).

<sup>37</sup> General Agreement on Tariffs and Trade, opened for signature October 30, 1947, 61 Stat. A3, A11, 55 U.N.T.S. 187, 194 [hereinafter GATT].

<sup>38</sup> MacNabb & Weaver, *supra* note 1, at 761.

<sup>39</sup> GATT: Technical Barriers to Trade, opened for signature April 12, 1979, Preface, 31 U.S.T. 405, 1186 U.N.T.S. 276, reprinted in THE TEXTS OF THE TOKYO ROUND AGREEMENTS (Geneva, 1986) [hereinafter Standards Code].

ensure that newly imposed technical standards do not create unnecessary obstacles to trade.<sup>40</sup>

Though most provisions of the GATT have been effective with similar permissive, vague language, the Standards Code faces several problems because of its openness. When arguments among contracting parties arise as to whether one party's health regulations are necessary or create obstacles to trade, the Code provides for dispute resolution panels composed of technical experts.<sup>41</sup> There are no effective sanctions, however, if the panel determines that the regulations are unnecessary or create obstacles to trade. The most severe punishment available is to authorize one party to suspend its GATT obligations to another.<sup>42</sup> Another problem posed by the Standards Code is that it does not cover requirements for processing and production methods (PPMs), which include the use of pesticides. Parties need only draft domestic PPM requirements in order to circumvent the Code altogether and create as many obstacles to trade as they wish.<sup>43</sup>

### *C. U.S.-EC Hormone Beef Dispute and the Need for the Uruguay Round*

The GATT and the Standards Code address three types of governmental intervention which are barriers to imports: tariffs, quotas, and subsidies.<sup>44</sup> While some farm tariffs are tolerated by the GATT, those which are severely trade distorting are discouraged.<sup>45</sup> Although quotas may also distort competitive trade even more subtly than tariffs, current GATT rules as applied to agriculture do not effectively address these internal measures.<sup>46</sup> Article XVI of the GATT defines subsidies broadly so that almost any governmental action which results in direct benefits may be considered a subsidy.<sup>47</sup> World market prices are then distorted, and producers in importing countries are hurt when subsidies allow exporters to lower prices so that they do not reflect the natural forces of supply and demand.<sup>48</sup>

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<sup>40</sup> *Id.* at Preface, para. 5.

<sup>41</sup> *Id.* at arts. 14.9, 14.14.

<sup>42</sup> *Id.* at art. 14.21.

<sup>43</sup> Adrian Rafael Halpern, *The U.S.-EC Hormone Beef Controversy and the Standards Code: Implications for the Application of Health Regulations to Agricultural Trade*, 14 N.C. J. INT'L L. & COMM. REG. 135, 147-48 (1989).

<sup>44</sup> MacNabb & Weaver, *supra* note 1, at 769. See also, *id.* at 761-62 n.7.

<sup>45</sup> *Id.* at 769.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 770.

<sup>48</sup> *Id.*

When these purposeful governmental barriers were effectively banned by the Standards Code, contracting parties began to use health standards and regulations in the form of requirements for PPMs as covers for protectionist measures. This enabled them to create effective subsidies for their struggling independent farmers while avoiding conflict with the explicit terms of the GATT.<sup>49</sup> One such purported health regulation was the European Community's ban on all trade of beef treated with growth hormones.<sup>50</sup> Although the EC asserts the ban's necessity to protect against possible health risks, the United States contends that the ban is not based on scientific evidence and is therefore an unjustified trade barrier.<sup>51</sup>

The Standards Code provides the following relevant obligations: technical regulations and standards may not be prepared, adopted, or applied "with a view to creating obstacles to international trade,"<sup>52</sup> and certification systems must not discriminate against or among imports.<sup>53</sup> Although the Code does not cover standards drafted in terms of PPMs, it does provide that a dispute settlement case may be brought where a contracting party has used PPMs in order to circumvent the Code's obligations.<sup>54</sup> The U.S.-EC dispute illustrates the failure of the GATT and the Code to resolve disagreement over how such standards and policies are to be coordinated in order to facilitate trade.<sup>55</sup>

It also illustrates the inadequacy of the Code's dispute resolution mechanism in giving the non-regulating party the burden of proving a negative.<sup>56</sup> When the regulating party claims that its standards are necessary to protect human health, the non-regulating party must conclusively show that the restricted product is absolutely safe.<sup>57</sup> But an exporting country can rarely, if ever, prove absolute safety,<sup>58</sup> as

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<sup>49</sup> See, e.g., Halpern, *supra* note 43, at 144 (explaining the EC directive against beef treated with growth hormone).

<sup>50</sup> Council Directive 85/649, arts. 5, 6(1), 1985 O.J. (L 382) 228, 229-30.

<sup>51</sup> Halpern, *supra* note 43, at 135.

<sup>52</sup> Standards Code, *supra* note 39, at art. 2.1.

<sup>53</sup> *Id.* at art. 7.2.

<sup>54</sup> *Id.* at art. 14.25.

<sup>55</sup> Michael B. Froman, Recent Development, 30 HARV. INT'L L.J. 549 (1989).

<sup>56</sup> See Steven J. Rothberg, Note, *From Beer to BST: Circumventing the GATT Standards Code's Prohibition on Unnecessary Obstacles to Trade*, 75 MINN. L. REV. 505, 531 (1990).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*



exemplified by the U.S. domestic problems concerning the Delaney Clause and FIFRA.<sup>59</sup>

### III. ANALYSIS

#### A. *Sanitary and Phytosanitary (SPS) Measures in the Dunkel Draft*

The Uruguay Round negotiations attempted to respond to the problems resulting from the omissions of the Tokyo Round by adding a Decision on Sanitary and Phytosanitary Measures (Decision).<sup>60</sup> The purpose of the Decision is to reaffirm that the GATT allows contracting parties to adopt or enforce valid measures designed to protect human, animal, or plant life or health, but continues to prohibit such measures which are merely a means of discrimination or restriction on international trade.<sup>61</sup> Contracting parties thus have the right to take SPS measures, but also have the obligation to ensure that they are applied only to the extent necessary to provide protection based on scientific evidence.<sup>62</sup> The Decision is drafted very differently from the previous GATT texts in that it attempts to set up standardized rules and regulations towards the goal of harmonization and transparency.<sup>63</sup> The *Administration* section of the Decision promises that a Committee on SPS Measures will be established to provide a forum for consultations, facilitate negotiations, encourage the use of international standards, and monitor the process of international harmonization.<sup>64</sup>

Parties may have higher standards than those of the international organizations if they are scientifically justified or if a need exists for provision of an appropriate level of SPS protection, provided they are not inconsistent with any other GATT provisions and obligations.<sup>65</sup>

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<sup>59</sup> See *supra* part II.A.

<sup>60</sup> *Dunkel Draft*, *supra* note 4, at L.35, pt. C.

<sup>61</sup> *Id.* at L.35.

<sup>62</sup> *Id.* at L.36, paras. 6, 7.

<sup>63</sup> "To harmonize sanitary and phytosanitary measures on as wide a basis as possible, contracting parties shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this decision." *Id.* at L.37, para. 9. "Contracting parties shall notify changes in their sanitary or phytosanitary measures and shall provide information on their sanitary or phytosanitary measures. . . ." *Id.* at L.40, para. 27.

<sup>64</sup> *Id.* at L.42, paras. 38-41.

<sup>65</sup> *Id.* at L.37, para. 11.

In assessing the appropriate level of protection against SPS risks, parties must consider scientific evidence, PPMs, and relevant ecological and environmental conditions, while also taking into account the ultimate objective of minimizing negative trade effects.<sup>66</sup>

The Dunkel Draft makes few improvements in the dispute settlement techniques of the GATT. The provisions of Articles XXII and XXIII of the GATT apply to the SPS decision with the addition that the dispute panel may, when appropriate, seek advice from experts or establish an advisory technical experts group.<sup>67</sup> Contracting parties are responsible for implementing the obligations set out in an SPS decision, including taking "such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the relevant provisions of this decision."<sup>68</sup>

*B. Interaction Between FIFRA, FFDC A, and the Uruguay Round Draft, and Implications for U.S. Acceptance*

In formulating its response to the SPS measures of the draft, the United States must consider not only how rejection would impact U.S. participation in world trade, but also how acceptance would affect domestic health, safety, and environmental laws. Consumer and public interest groups have expressed opposition to this portion of the draft agreement, contending that adherence to the international standards proposed in the draft would require the United States to lower its standards. In order to compete and trade freely in the world market, they say, the United States would have to allow imports or exports which fail to meet United States standards, thus possibly increasing danger to human, animal, and environmental health. This perception is premised upon a misunderstanding of both the current status of FIFRA and the Delaney Clause of the FFDC A and reflects a restrictive reading of the Dunkel Draft.

Contrary to consumer opinion and that of groups such as the Community Nutrition Institute which oppose the Dunkel Draft,<sup>69</sup> the Delaney Clause does not create a zero-risk standard in most circum-

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<sup>66</sup> *Id.* at L.38, paras. 17, 19.

<sup>67</sup> *Id.* at L.41, paras. 35, 36.

<sup>68</sup> *Id.* at L.43, para. 45.

<sup>69</sup> *GATT Language, supra* note 3, at 62.

stances.<sup>70</sup> Likewise, FIFRA only prohibits pesticides which are likely to result in unreasonable adverse effects,<sup>71</sup> implying that minimal adverse effects would be allowed. Both rules, therefore, are based upon scientific standards, yet are flexible enough to account for *de minimis* amounts of carcinogenic substances or negligibly adulterated products.

Although the Dunkel Draft was designed to establish international SPS standards, the rules set forth in the document itself are not firmly entrenched. The draft is a working document to be used as a means of facilitating further negotiations which had been stalled.<sup>72</sup> Contracting parties must work together along with the proposed Committee on SPS Measures to harmonize standards in order to ensure protection of human and environmental health as well as to facilitate trade. The draft specifically gives contracting parties the right to introduce measures which result in a higher level of protection, so long as they do not interfere with other provisions of the GATT.

Evaluation of the impact the Dunkel Draft's acceptance might have on domestic law requires an understanding of the position of the GATT in U.S. domestic law. The GATT has never been ratified by Congress as a treaty, so it lacks treaty authority for purposes of domestic litigation.<sup>73</sup> GATT is generally considered to be an executive agreement which has legal status equivalent to treaties and may supersede inconsistent state law.<sup>74</sup> However unlikely, full acceptance

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<sup>70</sup> See *supra* part II.A. (discussing the domestic application of the FFDCA Delaney Clause and FIFRA).

<sup>71</sup> 7 U.S.C. § 136(J)(1988).

<sup>72</sup> The Dunkel Draft provides:

This document is being tabled by the Chairman of the Trade Negotiations Committee at Official Level with the following understanding: . . . (c) Final agreement on the attached Draft Final Act will depend on substantial and meaningful results for all parties being achieved in the ongoing market access negotiations, including those related to tariffs and non-tariff measures: this applies to areas such as natural resource-based products, tropical products, agriculture and textiles and clothing.

*Dunkel Draft, supra* note 4, at Preface.

<sup>73</sup> Ronald A. Brand, *The Status of the General Agreement on Tariffs and Trade in United States Domestic Law*, 26 STAN. J. INT'L L. 479, 490 (1990) (citing *Sneaker Circus, Inc. v. Carter*, 457 F. Supp. 771 (E.D.N.Y. 1978), *aff'd mem.*, 614 F.2d 1290 (2d Cir. 1979)).

<sup>74</sup> *Id.* at 501-02. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), Justice Jackson's concurring opinion introduced a three part analysis of the ways in which executive authority comports with congressional authority. 343 U.S. at 635-38. GATT agreements seem to fall in the "zone of twilight" where the Executive is not acting with the authorization of Congress, but is acting with its

of the current Dunkel Draft by the U.S. Trade Representative acting for the Executive Branch would incorporate the draft into the GATT once the other GATT members accept it. Upon incorporation, the draft would be elevated to executive agreement status, effectively superseding inconsistent state law. This would mean that state laws which comply with or supplement FIFRA and FFDCFA might be superseded by inconsistent standards and procedures mandated by the Dunkel Draft's SPS measures.

The Dunkel Draft does, however, allow for the introduction of measures which would result in a higher level of SPS protection if they are scientifically justified, consistent with other provisions of the GATT, and not disguised protectionist measures.<sup>75</sup> FIFRA and Delaney Clause decisions are not always based strictly on scientific considerations, especially when agencies use a *de minimis* standard for product regulation.<sup>76</sup> Factors such as consumer perception and environmental health are also often taken into account. In this case, the United States and its internal regulatory bodies might not be able to scientifically explain domestic SPS regulations.<sup>77</sup> Finally, although the draft seems to introduce strict measures for immediate harmonization of SPS standards, problems such as the hormone beef dispute might still arise without any means of resolution. The draft merely proposes that the standards of international organizations such as the International Office of Epizootics would be adopted as standards for international trade, leaving room for negotiation among contracting parties and gradual harmonization of standards.<sup>78</sup>

The draft fails to provide much improvement, however, in the area of dispute resolution. If the proposals of the draft are accepted, contracting parties might continue to get caught in patterns (such as

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implied acquiescence. More than forty years of active participation in the GATT has led to a continuing practice which has been silently allowed by Congress. The Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. §2903(a)(1) (1988), however, contains language implying full legal status for the GATT, which would allow it to supersede domestic law. For a detailed discussion, see Brand, *supra* note 73, at 501.

<sup>75</sup> *Dunkel Draft*, *supra* note 4, at L.37, para. 11.

<sup>76</sup> See *supra* notes 29-31 and accompanying text.

<sup>77</sup> Ironically, this situation is the reverse of the United States' position in the hormone beef dispute, in which the United States insisted that there was no scientific reason to doubt the safety of the hormone, while the EC argued that public perception was an important consideration, as was the welfare of its small, independent farmers. See, Halpern, *supra* note 43, at 151.

<sup>78</sup> *Dunkel Draft*, *supra* note 4, at L.42, paras. 40-41.

the United States-EC dispute) which look to the GATT for guidance, but find only a means for further disagreement.<sup>79</sup> The draft proposes appointing a permanent committee to settle such disputes. But if a party, relying on Article XX of the GATT, argues that its regulations are unsuitable for scientific examinations, such a committee has no useful function.<sup>80</sup> The need for continuing negotiation remains even after acceptance of the draft agreement, during which the United States will not be required to lower its standards, but rather to advocate those standards as ones which should become international.

#### IV. CONCLUSION

With respect to sanitary and phytosanitary measures, the goal of the Uruguay Round negotiations was to develop international standards for health regulations in order to facilitate open trade without the protectionist use of domestic health standards as technical barriers to trade. The major problem with such a goal is that it requires agreement as to what constitutes an acceptable risk for harmful effects of pesticides, hormones, and other chemicals which come into contact with food, other processed products for human consumption, and the environment.

Attempting to reach such an agreement forced the delegates at the Uruguay Round to deal with some difficult issues.<sup>81</sup> First, who should determine the appropriate levels of safety for different nations? Few nations will be willing to accept standards which are lower than their own and to subject their own legislation to the concerns of their trading partners. Second, does the "escape clause" of Article XX(b)

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<sup>79</sup> In the hormone beef dispute, the United States argued that a panel of experts be allowed to determine the scientific basis of the health risk posed and thus resolve the dispute as recommended by the terms of the Standards Code. The EC rejected that proposal, contending that the issue was less scientific than social, perhaps relying on Article XX(b). See discussion *infra* note 80.

<sup>80</sup> Article XX provides general exceptions to the GATT as a whole (an "escape clause") and reads:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . . (b) necessary to protect human, animal or plant life or health.

*GATT*, *supra* note 37, at art. XX(b). The Dunkel Draft SPS Decision specifically includes as one of its goals the expansion of Article XX(b). *Dunkel Draft*, *supra* note 4, at L.36.

<sup>81</sup> Halpern, *supra* note 43, at 150-51.

extend to popular concern and the psychological health of consumers? While the negotiations appeared to focus on scientific support for regulating health risks, this escape clause focuses on subjective determinations which are more responsive to the needs of a particular area or state.

Another problem with the Uruguay Round and its resulting draft agreement is that they fail to recognize the importance of health and safety matters to individual nations. Health and safety concerns tend to be given the same degree of state interest as national security. The Uruguay Round has underestimated the effect this could have on reaching a final agreement by neglecting to devote much energy to minimizing the disadvantages to free trade caused by differing standards.<sup>82</sup> Another complicating factor is that different countries have widely varying positions on health and safety, which result in unique priorities. Lesser developed countries, for example, have a different perspective from the United States, which in turn has a different perspective from the European Community. To disregard one interest in the hopes of bolstering another would only result in impediments to trade which appear to be protectionist, but which would in the end harm the interested country. Many dangerous pesticides, for example, are banned in the United States because there is no food supply problem and the agricultural industry can afford to regulate on the basis of health. In Third World countries, however, these same pesticides are widely used because of the economic importance of their agricultural industries.<sup>83</sup> When Third World countries then export these products, the pesticides banned in the United States end up in products consumed in the United States despite stringent domestic regulation.<sup>84</sup>

The question finally becomes one of choosing between facilitating international trade and enforcing strict guidelines for the protection of human, animal, and environmental health. The goal of the Uruguay Round negotiations seems doomed to failure because it attempts to choose both at the same time, in fact trying to improve international trade *by* enforcing strict health regulations. A more realistic and

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<sup>82</sup> Eliza Patterson, *International Efforts to Minimize the Adverse Trade Effects of National Sanitary and Phytosanitary Regulations*, 24 J. WORLD TRADE 91, 95 (1990).

<sup>83</sup> In fact, they are often imported from the United States under FIFRA, 7 U.S.C. §136(o)(1988), which authorizes the export of pesticides that do not meet U.S. standards.

<sup>84</sup> Halpern, *supra* note 43, at 153.

responsive approach would be to work towards balancing the two objectives. Contracting parties should be allowed to advance their own health interests through domestic regulation such as FIFRA and the Delaney Clause, but not so that international trade is completely unrestricted. The goal should be to allow for regulation which is narrowly constructed so as to impede the free flow of trade as little as possible.

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