

THE UNIQUE ROLE OF STATE TRADING ENTERPRISES IN WORLD AGRICULTURAL TRADE: SIFTING THROUGH RHETORIC

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I. INTRODUCTION

The role of state trading enterprises ("STEs") in world agricultural trade has become one of the most fiercely contested battlegrounds in World Trade Organization ("WTO") negotiations. Leading the charge, the United States has demanded substantive reform or even an end to STEs. In the words of the United States Under-

Secretary for Agriculture,”[t]he era of government trading boards acting as a ‘nanny’ for farmers is as dead as the era of export subsidies The stage is now set for further reforms of state trading enterprises to allow the private sector to operate more openly.”¹

The United States and other opponents of STEs² claim that STEs have an unfair advantage, distort world agricultural trade, and that efforts to regulate STEs by the General Agreement on Tariffs and Trade (“GATT”) have been futile.³ Defenders of STEs argue that claims of trade distortion by STEs are exaggerated, that STEs occupy an integral and important role in sustaining agricultural policies in several countries, and that STEs serve as an essential countervailing force to multinational corporations engaged in private trade.⁴

While some reform is necessary and perhaps inevitable, STEs serve a distinct and important role in world agricultural trade, especially for developing countries.⁵ Understanding this role and appreciating the complexities underlying the debate requires sifting through the rhetoric and politics. Then and only then can a determination be made as to the proper role of STEs in world agricultural trade.

This article addresses the escalating controversy surrounding contemporary agricultural STEs. Section II examines the development of agricultural STEs and the complexities associated with the diverse roles and types of agricultural STEs, especially in setting agricultural policy in developing countries. Section III outlines the criticisms against and justifications for STEs, emphasizing that perspectives on the role of STEs in agricultural trade depend largely on one’s view of the appropriate role of STEs in setting and executing a government’s agricultural policy. Sections IV and

1. *STE Row Set to Ignite in New WTO Talks*, AGRA EUROPE WEEKLY, June 16, 2000, at EP/4.

2. The strongest ally of the United States in opposing STEs is Europe. See The Honorable Sir Leon Brittan, Address at the Institute of International Economics, Washington, D.C. (Nov. 20, 1997) transcript available at <http://www.eurunion.org/news/speeches/1997/971121lb.htm> (last visited Sept. 5, 2001). Sir Brittan, the Vice-President of the European Commission, addressing STEs opined: “[I]f we are going to look at international competition rules seriously, the time is ripe to consider whether this antiquated form of monopoly trading can be phased out altogether.” *Id.*

3. See *id.* available at <http://www.eurunion.org/news/speeches/1997/971121lb.htm> (last visited Sept. 5, 2001).

4. See THE CAIRNS GROUP: AN INTRODUCTION (2001), at <http://www.cairnsgroup.org/introduction.html> (last visited Sept. 5, 2001) (discussing that the defenders of STEs include members of the Cairns Group and lesser developing countries). The Cairns Group is a coalition of eighteen agricultural countries who account for one-third of the agricultural exports. *Id.* The Cairns Group exerted a strong influence on the negotiations that resulted in the Uruguay Round Agreement on Agriculture (“URAA”). *Id.* Members of the Cairns Group include Argentina, Australia, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Fiji, Guatemala, Indonesia, Malaysia, New Zealand, Paraguay, the Philippines, South Africa, Thailand and Uruguay. *Id.*

5. See Paul Barbour, WTO Reform to State Trading Enterprises and the Implications for National Food Security of Developing Countries, Paper Presented for Institute for Agriculture & Trade Policy (March 1999), available at http://www.wtowatch.org/library/admin/uploadedfiles/WTO_Reform_of_State_Trading_Enterprises_and_th.htm (last visited Sept. 5, 2001).

V explain and scrutinize the efforts by GATT to establish rules to define and regulate STEs. Section VI recommends certain principles that should be followed in the crafting of a role for STEs in a contemporary and dynamic global agriculture.

II. DEVELOPMENT OF AGRICULTURAL STEs

The first step in chronicling the development of STEs is to define what is an STE. This is no easy task because STEs vary in structure, operation, power, and function.⁶ As a result, there has been a lack of consensus in defining such a diverse entity.⁷ Loosely defined, STEs are enterprises authorized to engage in trade and owned, sanctioned, or otherwise supported by the government.⁸ Special or exclusive privileges granted by their governments allow STEs to influence through their purchases or sales the level or direction of trade in their commodities.⁹ Defined as such, these STEs have played a unique and historic role in world agricultural trade and in the policies of developed and developing countries.¹⁰

6. See P.J. Lloyd, *State Trading and the Theory of International Trade*, in STATE TRADING IN INTERNATIONAL MARKETS, 117, 118 (M. M. Kostecki ed., 1982).

7. See Michelle Veeman et al., *International Trade in Agriculture and Food Products: The Role of State Trading Enterprises*, RESEARCH AND ANALYSIS DIRECTORATE AGRICULTURE AND AGRI-FOOD CANADA 4-6 (Apr. 1999), available at <http://www.agr.ca/policy/epad> (last visited Nov. 11, 2001). The history of constructing a definition of STE illustrates the difficulties in reaching a consensus definition of such a diverse and complex entity. Early definitions of STEs focused on state conduct of foreign trade, government monopolization, and government ownership of an enterprise. See John N. Hazard, *State Trading in History and Theory*, 24 LAW & CONTEMP. PROBS. 243 (1959). These concepts eventually gave way to a functional definition, which argues that state trading occurs when a government or a government-backed agency determines the essential terms (including price or quantities) on which exports and imports have to take place. See M. M. Kostecki, *State Trading in Agriculture by the Advanced Countries*, in STATE TRADING IN INTERNATIONAL MARKETS 22 (M. M. Kostecki ed., 1982). This definition focuses on the government control of foreign trade, rather than on the ownership or management of the entities actually engaged in the trade. See Lloyd, *supra* note 7, at 119. Picking up on this theme, more recent definitions assert that both market control and the impact that governments exercise over individual transactions are relevant. The argument is that state trading exists when a government, an agency of government, or an institution granted exclusive rights by the government, controls trade or materially affects the conditions of trade on a transaction-by-transaction basis. This definition suggests that use of tariffs, quotas, and other traditional trade instruments do not constitute state trading, while trade by government-chartered marketing boards with monopolies does. See PRAVEEN M. DIXIT & TIM JOSLING, STATE TRADING IN AGRICULTURE: AN ANALYTICAL FRAMEWORK 6 (Int'l Agric. Trade Research Consortium, Working Paper No. 97-4, 1997), available at <http://www.umn.edu/iatrc> (last visited Apr. 22, 2001).

8. See U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-96-94, CANADA, AUSTRALIA AND NEW ZEALAND: POTENTIAL ABILITY OF AGRICULTURAL STATE TRADING ENTERPRISES TO DISTORT TRADE 14 n.2 (1996). [hereinafter GAO].

9. See Karen Z. Ackerman & Praveen M. Dixit, *An Introduction to State Trading in Agriculture*, USDA AGRIC. ECON. REP. NO. 783, 2 (Oct. 1999).

10. See *id.* at 11-12.

A. *Emergence of Modern Agricultural STEs*

1. *Developed Countries*

The modern form of state trading emerged after World War I, primarily in Europe and the former British Dominions.¹¹ Overproduction led to low prices, creating havoc for agriculture in developed countries.¹² Laissez-faire gave way, and during the mid-1920s marketing boards¹³ emerged in Australia, Canada, New Zealand, Rhodesia, South Africa, and Great Britain.¹⁴ This new form of state trading in agriculture represented a new rationale: farm producers needed government assistance to ease their economic plight.¹⁵ This has been the pattern for modern state trading.¹⁶ When times are bad and emergency regulations are necessary, state trading is initiated.¹⁷

It should be no surprise then that in the 1930s depressed economic conditions in agriculture prompted protectionism, and STEs in these developed countries became more widespread.¹⁸ It was expected that these measures were intended only to help farmers through a difficult period.¹⁹ When the depression lifted, however, the sentiment to continue government intervention in agricultural marketing steadily gained ground.²⁰ Agricultural prices failed to recover compared to industrial products, and world market prices for agricultural products fluctuated sharply.²¹ Developed

11. See Kostecki, *supra* note 8, at 26-27.

12. See *id.* at 27-28.

13. These governmental marketing boards were principally producer-controlled legalized monopolies, endowed with exclusive power to conduct foreign trade and to control output." See *id.*

14. See *id.* at 28.

15. See *id.* at 27.

16. See *id.*

17. See *id.*

18. The success or failure of self-help producer organizations apparently was at least partly responsible for the development or lack of development of STEs in the 1930s. In countries such as Denmark, Sweden and Ireland, where there was and still is an absence of STEs, cooperative movements and commodity cartels combined with rigid foreign-trade control to protect successfully the farm sector in these countries from the frustrations of the 1930s, precluding any need to develop STEs. In contrast, in the former British Dominions the cooperative movement was unsuccessful in maintaining centralized export marketing, which necessitated the creation of statutory marketing boards. In addition, the National Socialist governments of Germany and Italy in the 1930s conducted their foreign-trade operations through STEs for important agricultural products. State trading in agriculture was also conducted in France and several countries in Central Europe. See *id.* at 27-29.

19. See J.C. ABBOTT & H.C. CREUPELANDT, *AGRICULTURAL MARKETING BOARDS THEIR ESTABLISHMENT AND OPERATION* 3 (1966).

20. See *id.*

21. See *id.*

countries sought to preserve their agricultural economy.²² As a result, STEs were continued and even extended.²³

The position of the United States towards state trading has been inconsistent. Adhering to laissez-faire principles, Congress in the 1920s rejected legislation (the so-called McNarry-Haugen bills) that would have established a government export corporation.²⁴ However, during the post-depression era, while still promoting the virtues of free trade, the United States through its use of the Commodity Credit Corporation ("CCC") became the largest state trader in the world, outside the Sino-Soviet bloc.²⁵ Due to the Federal Agriculture Improvement and Reform Act ("FAIR") of 1996,²⁶ the CCC no longer plays a role in state trade.²⁷ Today the United States adamantly opposes STEs and considers reigning in the alleged trade distorting effects of state trading as a "key objective" of its trade policy.²⁸

2. *Developing Countries*

STEs were introduced in developing countries during World War II in response to the disruption of normal marketing channels caused by the war.²⁹ Following World War II, STEs became even more established in developing countries. Viewed as appropriate government tools, STEs were initiated during the 1950s and 1960s with the assistance of the World Bank.³⁰ Agriculture was seen as a

22. *See id.*

23. *See id.*

24. *See* Kostecki, *supra* note 8, at 28.

25. Authorized in 1933, the Commodity Credit Corporation, regulated the wheat exports of the United States and was organized and operated within the Department of Agriculture. The CCC had been propelled into the mainstream of international trade with the passage of the Agricultural Trade Development and Assistance Act of 1954. The United States reported the CCC as an STE to the WTO Council for Trade in Goods in 1995 and 1996. *See* Bernard Fensterwald, Jr., *United States Policies Toward State Trading*, 24 *LAW & CONTEMP. PROBS.* 369, 372-73 (1959); *see* Dan Sumner & Tim Josling, *The Role of the State in Agricultural Trade in North America: The U.S. Commodity Credit Corporation as a Government Actor in the North American Market for Grains*, 3-5 (Nov. 18, 1998), at <http://www.agecon.ucdavis.edu/Faculty/DanS/papers/stec.pdf> (last modified Apr. 13, 2001).

26. *See* Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888 (1996) (codified at 7 U.S.C. §§ 7201-7334 (1999)).

27. *See* Ackerman & Dixit, *supra* note 10, at 19. FAIR "eliminated commodity-specific price and income support programs and replaced most of the programs with fixed farm payments to be phased out in 2002." *Id.* As a result, the CCC does not acquire "commodities as it did in earlier years." *Id.* "The CCC's major export price subsidy program, the EEP, has not assisted export sales of wheat or other major commodities since July 1995." *Id.*

28. Dan Glickman, *Address at the Canadian Agricultural Trade Conference* (April 19, 1999) (transcript available at <http://www.usda.gov/news/releases/1999/04/0173>) (last visited Apr. 22, 2001)).

29. *See generally* J. N. Behrman, *State Trading By Underdeveloped Countries*, 24 *LAW & CONTEMP. PROBS.* 454 (1959).

30. *See* Barbour, *supra* note 6, available at http://www.wtowatch.org/library/admin/uploadedfiles/WTO_Reform_of_State_Trading_Enterprises_and

sector to be exploited in order to boost the industrial sector.³¹ When free trade became emphasized in the 1980s, however, STEs in developing countries became the target for reform, ironically by the World Bank.³²

3. *Countries Seeking Succession to the WTO*

International dealings with STEs are about to become more complex with countries like China with centrally planned economies now entering the international scene. Despite some limited economic reform, China uses STEs in controlling their agricultural trade.³³ Other applicants to the WTO, including Algeria, Saudi Arabia, and Vietnam, also conduct their trade of grains and other agricultural products through STEs.³⁴ STEs in the former Soviet Union have been eliminated, but regional and national governments continue to procure commodities from farmers and restrict commerce between regions.³⁵ Foreign trade companies in these countries continue to be directly or indirectly controlled by the government.³⁶

B. *Prevalence of State Trading in Agricultural Trade*

STEs are far more prevalent in agriculture than in other industries.³⁷ At least one hundred agricultural enterprises or organizations in over thirty countries could be defined as STEs.³⁸ Some of the largest STEs are in Australia, Canada, Indonesia, Japan, Korea and New Zealand.³⁹

STEs are extensively involved in both the export and import of agricultural trade. While export STEs are more prevalent in least developed countries, the largest export STEs are in the former British Dominions of Canada, Australia, and New Zealand, each with STEs with an annual export value greater than one billion dollars.

_th.htm (last visited Sept. 5, 2001).

31. See *id.* available at http://www.wtwatch.org/library/admin/uploadedfiles/WTO_Reform_of_State_Trading_Enterprises_and_th.htm (last visited Sept. 5, 2001).

32. See *id.* available at http://www.wtwatch.org/library/admin/uploadedfiles/WTO_Reform_of_State_Trading_Enterprises_and_th.htm (last visited Sept. 5, 2001).

33. See Ackerman & Dixit, *supra* note 10, at 9.

34. See *id.*

35. See *id.*

36. See *id.*

37. See U.S. GAO, *supra* note 9, at 18.

38. Based on notifications by member countries to the WTO, the total number of STEs is 159, of which 101 are agricultural STEs. The next largest category is petrochemicals with 13 STEs. See *Summary of Country Notifications Submitted to the World Trade Organization Under Title XVII 4(a) of GATT*, at <http://www.dairytrade.com/stetable.htm> (last visited Nov. 7, 2001).

39. Ackerman & Dixit, *supra* note 10, at 7-8.

Turkey and Israel also have substantial agricultural exports through STEs.⁴⁰ Asian countries house the most numerous and largest net importing STEs, including the Japan Food Agency and Indonesia's Badan Urusan Logistik ("BULOG").⁴¹ Other large agricultural STE importers are Egypt, Korea, Pakistan, Mexico, Tunisia, Morocco, and Malaysia.⁴² STEs provide China with enormous power to manage the level and direction of import trade flows of several major agricultural commodities, including wheat, rice and corn.⁴³

The list of agricultural products traded by STEs is long. It includes: "alcoholic beverages, cotton, dairy products, edible oils, ethyl alcohol, fresh and chilled vegetables, fruits and dried fruits, garlic, grains, honey, hops, meat and livestock, oilseeds, opium, potatoes, poultry and eggs, raw silk, soybeans, sugar, tea, tobacco and tobacco products, and wool."⁴⁴ Of these products, the most traded commodities by STEs are "wheat,⁴⁵ feed grains,⁴⁶ rice,⁴⁷ dairy products⁴⁸ and sugar."⁴⁹

The types of agricultural STEs vary considerably. General categories of STEs include statutory marketing boards, export marketing boards, regulatory marketing boards, fiscal monopolies, canalizing agencies, and foreign trade enterprises.⁵⁰ These

40. South Africa, who had major export STEs, terminated the authorities and operations of its marketing boards in 1997. See South Africa Notification to WTO Working Party on State Enterprises, G/STR/N/4/ZAF (Nov. 10, 2000). For a summary of member countries' notifications to the WTO of the largest export-oriented agricultural STEs, refer to Table 2. See *id.* at 7 (summarizing important notifications from 1992 through 1995).

41. See Karen Ackerman, *State Trading Enterprises: Their Role As Importers*, AGRIC. OUTLOOK, Nov. 1997, at 31-35 (discussing foreign STE importers).

42. See *id.* at 32-37.

43. See *id.* at 36 (discussing China's import STEs); Frederick W. Crook et al., *State Trading and Management of Grain Marketing in China*, AGRIC. OUTLOOK, June/July 1999, at 27-30 (discussing China's grain imports).

44. GATT Secretariat, *Operations of State Trading Enterprises As They Relate to International Trade*, G/STR/2, at 15 (Oct. 26, 1995) [hereinafter GATT Secretariat].

45. Ackerman & Dixit, *supra* note 10, at 4. STEs account for approximately forty percent of world wheat exports, of which the Australian and Canadian Wheat Boards handle thirty-two percent. Other STEs exporting wheat include the governments of Poland, Kazakhstan, and other Central European countries. See *id.* STE imports account for between one-third and one-half of wheat exports. Twelve countries account for just over one-half of wheat imports. See *id.* at 5.

46. See *id.* "The Canadian Wheat Board and Australia's state-level STEs handled thirty-eight percent of world barley exports." *Id.* "Other smaller exporters (the Eastern European countries, Russia, Syria, and Turkey) exercise some degree of state control over their barley exports." *Id.*

47. *Id.* at 4. "STEs account for about half of world rice exports and nearly a third of rice imports." *Id.* at 6. Thailand (twenty-five percent) and Vietnam (fourteen percent) are the largest rice exporters. *Id.*

48. *Id.* "[T]he New Zealand Dairy Board handles about thirty percent of world dairy product exports." *Id.* Smaller dairy export STEs are in Australia, Canada, and Poland. *Id.*

49. *Id.* at 4-12. The Queensland Sugar Corporation in Australia accounts for eleven percent of all sugar world exports. *Id.* at 6.

50. See *id.*

categories differ from each other in function, government control, products traded, and authority.⁵¹

C. Unique Policy Roles of Agricultural STEs

The prevalence of state trading in agriculture should not be a surprise because most countries develop from an agricultural base, giving agricultural policy objectives elevated status.⁵² STEs have been viewed as traditionally viable means by which governments can meet their agriculture-related policy objectives.⁵³ These policy objectives are generally domestic oriented, numerous, and differ from country to country.⁵⁴ These differences render it difficult to draw general assumptions or make sweeping conclusions concerning the appropriate role of the modern STE.⁵⁵

1. Policy Tool for Developed Countries

A major role for STEs among developed countries is to support the domestic policy objective of price or income support to producers.⁵⁶ On the export side, STEs may exercise control over supplies, prices and exports.⁵⁷ Exporter STEs, such as the Canadian Wheat Board, boost domestic producer prices by managing domestic production.⁵⁸ On the import side, STEs may exercise control over imports and domestic sales through managing purchase, sales and stocks.⁵⁹ Importer STEs, such as the Japan Food Agency, increase production returns by restricting imports.⁶⁰

51. See Ackerman & Dixit, *supra* note 10, at 4-12.

52. See William M. Miner, *State Trading and Agricultural Trade: New Rules and Policy Options*, Paper presented at the Conference on Agriculture and The New Trade Agenda in the WTO 2000 Negotiations, sponsored by the World Bank in Cooperation With The World Trade Organization 1 (October 1-2, 1999), available at <http://wbln0018.worldbank.org/trade/decagridoc.nsf> (last visited April 22, 2001).

53. See GATT Secretariat, *supra* note 45, at 2-3.

54. See Alex F. McCalla & Andrew Schmitz, *State Trading in Grain*, in STATE TRADING IN INTERNATIONAL MARKETS 118-19 (M.M. Kostecki ed., 1982) (asserting that state trading by a country in agricultural products is an element of domestic policy rather than international policy).

55. Implicit in all the policy reasons or justifications for STEs is the assumption that markets, when left to themselves, will not reach a solution that meets society's goals. See Dixit & Josling, *supra* note 8, at 6, available at <http://www.umn.edu/iatrc> (last visited Apr. 22, 2001).

56. See *id.* available at <http://www.umn.edu/iatrc> (last visited Apr. 22, 2001).

57. See *id.* available at <http://www.umn.edu/iatrc> (last visited Apr. 22, 2001).

58. See *id.* at 6-9, available at <http://www.umn.edu/iatrc> (last visited Apr. 22, 2001).

59. See Ackerman & Dixit, *supra* note 10, at 11.

60. See *id.*; MERLINDA INGCO & FRANCIS NG, DISTORTIONARY EFFECTS OF STATE TRADING IN AGRICULTURE: ISSUES FOR THE NEXT ROUND OF MULTILATERAL TRADE NEGOTIATIONS 10-12 (Development Research Group, The World Bank) (Apr. 1998); BRIAN PADDOCK, STATE TRADING AND INTERNATIONAL TRADE NEGOTIATIONS 10-11 (Agriculture and Agri-Food Canada 1998).

2. Policy Tool for Developing Countries

Among developing countries, the assurance of reasonably priced food in developing countries is more of an objective than is support for domestic producers.⁶¹ STEs are used to further macroeconomic policies such as national food security (cheap food policy), consumer subsidies, and tax revenue, as well as export and import activities.⁶² STEs further domestic food policies by holding retail prices below producer or world price levels.⁶³ “The STE controls the procurement, distribution, marketing, and processing of the covered commodities either by procuring, processing, and distributing the products itself or, more frequently, by contracting with or licensing traders and processors.”⁶⁴ The Food Corporation of India and BULOG of Indonesia, both of which have (or had in the case of BULOG) sole authority for domestic purchases of grains and exclusive rights on imports, are examples of STEs that have pursued macroeconomic policies of food security.⁶⁵

Developing countries “prefer STEs because STEs allow them flexibility to carry out political mandates expeditiously.”⁶⁶ State trading is preferable “to taxes [and] subsidies for redistributing incomes among different groups because it is more convenient” and leads to less of a risk of political protests.⁶⁷ “It is the nontransparent nature of STE activities that makes them preferable over other policy instruments.”⁶⁸

An increasingly significant policy rationale for developing countries is that STEs balance out competition in a world trade environment of imperfect competition.⁶⁹ Given the fact that there are a relatively small number of players in international agricultural commerce and the significant barriers to entry, STEs provide an important countervailing force against what would otherwise be an oligopolistic market controlled by a small number of transactional companies.⁷⁰ In recent years, these transactional companies or multinationals have increased their investment activity in global agricultural markets.⁷¹ This policy rationale is particularly

61. See DIXIT & JOSLING, *supra* note 8, at 6.

62. See Ackerman & Dixit, *supra* note 10, at 11.

63. See *id.*

64. *Id.*

65. See Dixit & Josling, *supra* note 8, at 6, available at <http://www.umn.edu/iatrc> (last visited Apr. 22, 2001).

66. Ackerman & Dixit, *supra* note 10, at 11.

67. *Id.*

68. *Id.*

69. See Veeman et al., *supra* note 8, at 4-6, available at <http://www.agr.ca/policy/epad> (last visited Nov. 11, 2001).

70. SOPHIA MURPHY, MARKET POWER IN AGRICULTURAL MARKETS: SOME ISSUES FOR DEVELOPING COUNTRIES 4 (South Centre, Working Paper No. 6, Nov. 1999), available at <http://www.southcentre.org/publications/agric/toc.htm> (last visited Apr. 22, 2001).

71. See Daryll E. Ray, *Globalization of World Markets Increases Reach of Multinational Ag Suppliers*, at <http://www.wtowatch.org> (listing several recent examples of multinational agribusiness' investments and allegiances, including John Deere in China and India, Cargill in China and Argentina,

applicable with respect to the world grain trade.⁷² Given that the global grain trade is dominated by a few privately owned large multinationals,⁷³ agricultural STEs are arguably the only effective control that less developed countries have over their grain imports, and therefore an important component of their food security policy.

3. Centrally Planned Economies

STEs as a form of economic organization may be the only compatible form of international interface for agricultural trade for China and, until recently, Russia. In other words, a centrally planned economy with public ownership and distribution systems may find private international trade incompatible with those domestic organizations. These countries have little choice in pursuing state trading.⁷⁴

III. ASSESSMENT OF STEs

The diversity in the types and functions of STEs renders it difficult to objectively assess the performance of agricultural STEs. Opponents and proponents of STEs both have strong opinions.⁷⁵ When the dust finally settles, however, the most

and AGCO in Russia).

72. See Veeman et al., *supra* note 8, at 34-5, available at <http://www.agr.ca/policy/epad> (last visited Nov. 11, 2001).

73. Private traders, including Cargill, Continental Grain, Louis Dreyfus, Bunge and Born, Mitsui/Cook, and Andre Garnac together control seventy-five percent of the world's grain trade, and in effect hold an oligopoly position capable of controlling price and supply. See *id.* These multinationals are privately owned and are thus not required to publish financial data on their operations. One reason for private ownership is that corporate success in the grain trade depends heavily on market intelligence. See *id.*

74. See Alex F. McCalla & Andrew Schmitz, *State Trading in Grain*, in STATE TRADING IN INTERNATIONAL MARKETS 55, 66 (M. M. Kostecki ed., 1982).

75. See generally Initiation of Section 302 Investigation and Request for Public Comment: Wheat Trading Practices of the Canadian Wheat Board, 65 Fed. Reg. 69,362 (Nov. 16, 2000) (illustrating the especially poignant rhetoric in the showdown between the United States and Canada over the Canadian Wheat Board. In response to a petition filed by the North Dakota Wheat Commission, The United States Trade Representative announced in October 2000 an eighteen-month investigation into anti-competitive trading practices allegedly employed by the Canadian Wheat Board). This announcement comes on the heels of repeated calls to reform or even terminate the Canadian Wheat Board. See Stuart Laidlaw, *European Trade Official Wants Give and Take With Canada on Farm Subsidies*, CANADIAN PRESS NEWSWIRE, Oct. 11, 2000, available at 2000 WL 28211955. See John Greenwood, *Banff Meeting Aims to Keep up Pressure on EU: Ending Farm Subsidies*, THE NATIONAL POST, Oct. 10, 2000, at C03; Peter Morton, *U.S. Wants to Cut Down Canadian Wheat Board*, THE NATIONAL POST, Sept. 29, 2000, at C03. Canadian officials skeptically dismiss the investigation as "opportunistic politics," and adamantly deny any evidence to support the trade distorting allegations against the Canadian Wheat Board. *Fischler Warns Cairns Group Against Hard Line*, AGRA EUROPE, Oct. 13, 2000, at EP/3; *STE Row Set to Ignite in New WTO Talks*, AGRA EUROPE, June 16, 2000, at EP/4; *WTO Talks Focus on STEs and Subsidies*, AGRA EUROPE, Sept. 29, 2000, at EP/4. Employing a pot-and-

rational conclusion to be drawn is that there is simply insufficient data to assess the performance of the various types of STEs in world agricultural trade.

A. *Criticism of STEs*

Critics complain that agricultural STEs distort trade and enjoy unfair advantages over private commercial firms that compete against STEs in the international agricultural market.⁷⁶

1. *Distortion of Trade*

STE activities affect trade by influencing domestic and international prices. The trade effects from STEs have traditionally been equated to those effects caused by tariffs.⁷⁷ An STE that restricts imports into a country affects domestic prices similar to that of an import tariff.⁷⁸ An STE that expands exports affects domestic prices similar to that of an export subsidy.⁷⁹ Several factors influence the tariff or subsidy equivalents associated with a STE, including its degree of control over the domestic market, its policy objectives, the extent of its international market power, and the range of its authority and government support.⁸⁰ Critics charge that regardless of the factors involved, the affect STEs have on domestic and international prices amounts to trade distortion that is unjustified in a free trade economy.⁸¹

2. *Unfair Trade Advantage*

There are basically five powers or benefits that give STEs, arguably, an unfair trade advantage over private traders.⁸² First, the economic rent stemming from STEs statutory powers is typically not available to private traders that compete against STEs

kettle defense, Canadian officials assert that market-distorting state support for wheat producers reaches a higher level in the United States than in Canada, and that the European Union's position against STEs is merely designed to give the European Union negotiating leverage in its efforts to defend its own continuing use of export subsidies in WTO negotiations. *See CWB Practices are on Barshefsky's Agenda*, AGRA EUROPE, Oct. 27, 2000, at M/10; *NZDB Rejects EU "State Trading" Accusations*, AGRA EUROPE, Sept. 29, 2000, at EP/5.

76. Ingco & Ng, *supra* note 61, at 10-12.

77. *See* Lloyd, *supra* note 7, at 126.

78. *See* Ackerman & Dixit, *supra* note 10, at 13.

79. *See id.*

80. *See* Ingco & Ng, *supra* note 61, at 16-25.

81. *See* Hugh Maginnis, *State-Trading Enterprises: Existence of Monopolies is No Longer Justified*, USIA/IEC. J. 1, 2 (May 1999), at <http://usinfo.state.gov/journals/ites/0599/ijee/ag-hugh.htm> (last visited Sept. 18, 2001).

82. *See* DIXIT & JOSLING, *supra* note 8, at 7, available at <http://agecon.lib.umn.edu/iatrc/wp9704.pdf> (last visited Apr. 22, 2001).

in the international market.⁸³ An STE may use its statutory power to offer producer prices lower than world market prices and to sell to consumers at prices higher than world levels.⁸⁴ STEs use the revenues and profits derived from these transactions to subsidize exports of selected commodities in which it has monopoly or monopsony rights.⁸⁵

Second, the lack of transparency, together with the control that STEs have over domestic and export markets, gives STEs greater pricing flexibility relative to private traders.⁸⁶ STEs are able to charge different prices in different markets for the same commodity. For example, grain prices in the domestic market may be high due to protective tariffs, while the STE exports grain at lower prices to compete with other exporters selling at a lower price. Many private companies also use discriminatory pricing, but critics argue that STEs do not face the same risks as private companies in procuring commodities for export.⁸⁷ The lack of competition for obtaining the commodities precludes the possibility of "price discovery" through an open bidding process.⁸⁸

Third, price pooling gives STEs flexibility in discretionary pricing in the international market, an arrangement not available to private exporters who have to compete with other domestic sellers in acquiring exportable products.⁸⁹ Price pooling is where the final price paid to producers is a blended price based on net revenue of all sales in foreign and domestic markets.⁹⁰ It is designed to stabilize price and income risks to producers by allowing STEs to pay producers the same return regardless of the time of delivery during the marketing year.⁹¹

Fourth, underwriting the costs of STEs by governments, gives STEs a resource advantage over private traders.⁹² Many STEs benefit from the financial backing of the central government, either through direct subsidies or from government guarantees.⁹³

83. See *id.* at 8, available at <http://agecon.lib.umn.edu/iatrc/wp9704.pdf> (last visited Apr. 22, 2001).

84. See *id.* at 7-8, available at <http://agecon.lib.umn.edu/iatrc/wp9704.pdf> (last visited Apr. 22, 2001).

85. See *id.* available at <http://agecon.lib.umn.edu/iatrc/wp9704.pdf> (last visited Apr. 22, 2001).

86. See *id.* at 8, available at <http://agecon.lib.umn.edu/iatrc/wp9704.pdf> (last visited Apr. 22, 2001).

87. See *id.* available at <http://agecon.lib.umn.edu/iatrc/wp9704.pdf> (last visited Apr. 22, 2001).

88. See INGCO & NG, *supra* note 61, at 10-12.

89. See DIXIT & JOSLING, *supra* note 8, at 8, available at <http://www.umn.edu/iatrc/wp.pdf> (last visited Apr. 22, 2001).

90. See *id.* available at <http://www.umn.edu/iatrc/wp.pdf> (last visited Apr. 22, 2001).

91. See *id.* available at <http://www.umn.edu/iatrc/wp.pdf> (last visited Apr. 22, 2001).

92. See *id.* available at <http://www.umn.edu/iatrc/wp.pdf> (last visited Apr. 22, 2001).

93. See *id.* at 9, available at <http://www.umn.edu/iatrc/wp.pdf> (last visited Apr. 22, 2001).

STEs are also known to enjoy tax benefits, transport subsidies, preferential foreign exchange, public utility rates, and capital expansion funds.⁹⁴ Underwriting gives STEs the liberty to take more risks than a company without such financial protection.⁹⁵

Fifth, having the security of controlling the supply on the market or exports give STEs an advantage over private traders in securing long-term contracts with buyers or sellers.⁹⁶ Private operators cannot be sure that a competitor will not outbid them, whereas the STE knows they will have all the domestic production at their disposal for resale.⁹⁷ “This allows them greater freedom than private firms in making export sales commitments and permits STEs to make long-term agreements with importing governments.”⁹⁸

B. *Defense of STEs*

Defenders of STEs respond that the criticisms lack an evidentiary basis and ignore other important factors that contextually make the harms from STEs less egregious.⁹⁹ Defenders of STEs also argue that STEs provide an important countervailing force against multinationals.¹⁰⁰

1. *STEs Threat to Competition Is Overstated*

Defenders of STEs point to the U.S. General Accounting Office (“GAO”) as admitting that STEs threat to competition may be overstated.¹⁰¹ The GAO concludes that definitive statements regarding STEs’ trade-distorting activities cannot be easily reached.¹⁰² Defenders argue that until sufficient evidence is established, assertions of trade distortion are merely speculative.¹⁰³

94. See *id.* available at <http://www.umn.edu/iatrc/wp.pdf> (last visited Apr. 22, 2001).

96. See *id.* available at <http://www.umn.edu/iatrc/wp.pdf> (last visited Apr. 22, 2001).

96. See *id.* available at <http://www.umn.edu/iatrc/wp.pdf> (last visited Apr. 22, 2001).

97. See *id.* available at <http://www.umn.edu/iatrc/wp.pdf> (last visited Apr. 22, 2001).

98. *Id.* available at <http://www.umn.edu/iatrc/wp.pdf> (last visited Apr. 22, 2001). Note, however, that multinationals such as Cargill can source from various countries to fulfill their sales commitments, a benefit that is normally unavailable to STEs. See *id.* available at <http://www.umn.edu/iatrc/wp.pdf> (last visited Apr. 22, 2001). Exceptions would “include the New Zealand Dairy Board and Australian Wheat Board, both of which can source from other countries.” *Id.* available at <http://www.umn.edu/iatrc/wp.pdf> (last visited Apr. 22, 2001).

99. See MURPHY, *supra* note 71, at 5, available at <http://www.southcentre.org/publications/agric/toc.htm> (last visited Apr. 22, 2001).

100. See *id.* at 9-10, available at <http://www.southcentre.org/publications/agric/toc.htm> (last visited Apr. 22, 2001).

101. See *id.* at 6, available at <http://www.southcentre.org/publications/agric/toc.htm> (last visited Apr. 22, 2001).

102. See GAO, *supra* note 9, at 5.

103. See MURPHY, *supra* note 71, at 3, available at

2. *STEs Play a Pivotal Policy Role in Developing Countries*

Defenders assert that the legitimate domestic concerns that STEs help address outweigh any trade-distorting effects caused by STEs.¹⁰⁴ Developing countries especially have particular needs that are satisfied by STEs.¹⁰⁵ Absent the use of STEs, developing countries are handicapped in world agricultural trade.¹⁰⁶

3. *STEs Provide an Important Countervailing Force Against Multinationals*

World agricultural markets are far from perfect and eliminating STEs would allow transnational companies to expand their operations to absorb the market thus created.¹⁰⁷ Less developing countries would be particularly vulnerable.¹⁰⁸ Abolishing STEs would hand the control of world grain over to a few multinationals.¹⁰⁹ “Countries and [multinationals] might engage in strategic alliances to turn terms of trade in their favor, and use monopoly margins as a substitute for tariffs.”¹¹⁰

Defenders also assert that the criticisms of STEs are arguably more germane to multinationals.¹¹¹ The argument is that the “[l]ack of price and operational transparency,” the “[r]apid consolidation in the industry,” “[a]ccess to secure financing and protected prices,” and “[g]uaranteed supplies,” make multinational grain companies more prone to criticism than STEs.¹¹² World agricultural trade absent

<http://www.southcentre.org/publications/agric/toc.htm> (last visited Apr. 22, 2001).

104. See Veeman et al., *supra* note 8, at ___, available at <http://www.agr.ca/policy/epad> (last visited Nov. 11, 2001).

105. *Id.* available at <http://www.agr.ca/policy/epad> (last visited Nov. 11, 2001).

106. See *id.* available at <http://www.agr.ca/policy/epad> (last visited Nov. 11, 2001).

107. See MURPHY, *supra* note 71, at 8-9, available at <http://www.southcentre.org/publications/agric/wto6.pdf> (last visited Oct. 18, 2001).

108. See Barbour, *supra* note 6, available at http://www.wtwatch.org/library/admin/uploadedfiles/WTO_Reform_of_State_Trading_Enterprises_and_th.htm (last visited Sept. 5, 2001).

109. See *id.* available at http://www.wtwatch.org/library/admin/uploadedfiles/WTO_Reform_of_State_Trading_Enterprises_and_th.htm (last visited Sept. 5, 2001).

110. See *id.* available at http://www.wtwatch.org/library/admin/uploadedfiles/WTO_Reform_of_State_Trading_Enterprises_and_th.htm (last visited Sept. 5, 2001) (quoting Michiel Keyzer, *World Trade: Free and Fair*, COURRIER DE LA PLANETE, European Commission Directorate General for Development, Special Issue Jan.-Feb. (1998)).

111. See MURPHY, *supra* note 71, at 9, available at <http://www.southcentre.org/publications/agric/wto6.pdf> (last visited Oct. 18, 2001).

112. *Id.* at 9-10, available at <http://www.southcentre.org/publications/agric/wto6.pdf> (last visited Oct. 18, 2001).

STEs would still be marked by imperfect competition. The only difference is that developing countries would lose import leverage against the multinationals.¹¹³

C. *Lack of Information Obscures Objective Assessment of STEs*

The reality is that no one really knows the effect of STEs on world trade. This fact is particularly frustrating to opponents of STEs.¹¹⁴ Three fundamental problems impede an accurate analysis of how STEs influence markets.¹¹⁵

One problem is that the variety of state trading practices and the differences in operations of STEs, including the size of operations and the level of government control or intervention, make it difficult to determine the distortionary effects of STEs and their effects on world agricultural trade.¹¹⁶ To date, there has been no cross-country study of STEs in both developed and developing countries.¹¹⁷

Secondly, the information that is currently gathered concerning STEs is insufficient. Attempts to quantify the impacts of STEs and their activities on international agricultural trade have just commenced.¹¹⁸ Until there is a comprehensive inventory of STEs, including those, which have never been reported to the WTO, assessing the impacts of STEs on international agricultural trade will remain unresolved.¹¹⁹

Thirdly, STEs are just one component of a web of agricultural policies designed to achieve a multitude of objectives.¹²⁰ Therefore, it is difficult to isolate the distortionary forces in existence.¹²¹ It has been suggested then, that it would be helpful to classify STEs in terms of their ability to distort trade rather than lumping them all together.¹²²

113. See *id.* at 9, available at <http://www.southcentre.org/publications/agric/wto6.pdf> (last visited Oct. 18, 2001).

114. The problem of proof actually is exasperating to both critics and supporters of STEs. An official with the U.S. National Association of Wheat Growers complained that "[t]he Canadian Wheat Board uses unfair pricing mechanisms abroad to steal our markets, [b]ut we can never get anyone's attention because we can't prove it." Peter Morton, *U.S. Wants to Cut Down Canadian Wheat Board*, NAT'L POST, Sept. 29, 2000, at C3. Australia's ambassador to the WTO stated that "[w]e're perfectly happy to address trade distorting aspects of such enterprises if they are proven, but the EU [European Union] has never been able to say how they create problems to private traders." *WTO Talks Focus on STEs and Subsidies*, AGRIC EUROPE, Sept. 29, 2000, at EP/4.

115. See INGCO & NG, *supra* note 61, at 9, 25 (supporting one fundamental problem of the difficulty in determining distortionary effects); see Ackerman & Dixit, *supra* note 10, at 29 (supporting the fundamental problems of insufficient information gathered on STEs and STEs are just one part of a web of agricultural policies).

116. See INGCO & NG, *supra* note 61, at 9.

117. See *id.* at 25.

118. See Ackerman & Dixit, *supra* note 10, at iii.

119. See *id.* at 29.

120. See *id.*

121. See *id.*

122. See *id.*

IV. GATT AND THE REGULATION OF STEs

GATT regulates STEs maintained by WTO members.¹²³ While STE regulations have been in effect since the beginning of GATT in 1947, compliance has been poor.¹²⁴ Part of the problem is the shortcomings in the rules themselves.¹²⁵

A. *The Development of GATT Regulation of STEs*

GATT recognized STEs as legitimate participants in international trade in 1947 when state trading was widespread in agriculture.¹²⁶ The Havana Conference on Trade and Employment in 1948 was aimed to establish the International Trade Organization ("ITO").¹²⁷ At that time state trading had blossomed due to the war and considerable attention was given at the Conference to STEs.¹²⁸ The United States wanted to curtail STEs. Europe on the other hand had a more interventionist view and was not as anxious as the United States towards STEs. The prospects of ITO died in 1950 when President Truman withdrew the Havana Charter from congressional consideration and the ITO never came into existence.¹²⁹

Despite the failings of the Havana Charter,¹³⁰ the GATT, which had been adopted as a temporary interim agreement in 1947, survived.¹³¹ Most of the provisions on state trading survived as Article XVII and Article II, paragraph 4 of the GATT.¹³² In 1957, Article XVII was amended to introduce requirements for reporting specified activities and a provision that the contracting parties recognize the importance of negotiation aimed toward lessening the level of protection provided by state trading.¹³³

Article XVII did not provide a definition of what constituted an STE. As a result, what constituted an STE was subject to different interpretations by members. Subsequently, notifications required by GATT have been marked by different

123. In 1994, the WTO became the successor organization to GATT. See RALPH H. FOLSOM, ET. AL., *INTERNATIONAL TRADE AND INVESTMENT IN A NUTSHELL* 70 (1996).

124. See *id.* at 67-70 (1996) (noting that dispute settlement under GATT is dependent upon acquiescence of individual member states, and discussing member states' problems with GATT).

125. See *generally id.* (discussing several holes in the general powers afforded the WTO and this affect on its members).

126. Ackerman & Dixit, *supra* note 10, at 1.

127. See CLAIR WILCOX, *A CHARTER FOR WORLD TRADE* 53 (1949).

128. See *id.* at 94-102.

129. See HENKIN ET AL., *INTERNATIONAL LAW* 1396-1397 (1993).

130. The Havana Charter failed largely due to cold war inspired suspicion of international institutions, the revival of protectionism in the United States, and the disinterest of the business community. See *id.* at 1397.

131. See *id.*

132. See *generally* Ivan Bernier, *State Trading and the GATT*, in *STATE TRADING IN INTERNATIONAL MARKETS* 245, 246-256 (M. M. Kosteci ed., 1982) (discussing state trading enterprises and Articles XVII and II (4) of the GATT).

133. See *id.*

interpretations of what constitutes an STE.¹³⁴ Although the Uruguay Round Agreement did not directly change any of the provisions in Article XVII, it includes a Memorandum (Understanding on Interpretation of Article XVII) to clarify the definition and scope of trading activities, to improve notification requirements, and to facilitate the formation of a Working Party on State Trading.¹³⁵

B. *GATT Rules Governing STEs*

The main GATT Article on STEs remains Article XVII. There are, however, three other GATT sources of laws governing STEs. First, there are other Articles relating either directly or indirectly to STEs, including Articles II, XX, and XXXVII.¹³⁶ Second, an Interpretative Note to Articles XI, XII, XIII, XIV and XVIII specifies that throughout these Articles, the terms "import restrictions" or "export restrictions" include restrictions made effective through State trading operations.¹³⁷ Third, as a result of the Uruguay Round, the Understanding on the Interpretation of Article XVII was made legally part of GATT 1994.¹³⁸ From these sources, we derive the GATT rules on state trading.

1. *Definition*

The Understanding on Interpretation of Article XVII of the Uruguay Round defines STEs as

[g]overnmental and nongovernmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through purchases or sales the level or direction of imports or exports.¹³⁹

This definition emphasizes the institutional nature of STEs, and identifies three fundamental elements: first, a governmental or non-governmental entity, including marketing boards; second, the granting to the enterprise of exclusive or special rights or privileges; and third, a resulting influence, through the enterprise's purchases or sales, on the level or direction of reports or exports. The phrase "in the exercise of

134. See *INGCO & NG*, *supra* note 61, at 3.

135. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125, 1157-1158 (1994) [hereinafter Final Act].

136. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, reproduced in KENNETH W. DANN, *THE GATT—LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 393-95, 427-28, 445-46 (1970) [hereinafter GATT].

137. See *id.* at Annex 1, ¶1, Interpretative Note.

138. See Final Act, *supra* note 136.

139. *Id.*

which they influence through their purchases or sales the level or direction of imports or exports” seems to be aimed at the core of STE regulation: the potentially distorting effects of the operations of STEs on trade.¹⁴⁰

Thus, under the definitions, the enterprise need not be state owned. Public ownership is not an issue. The focus rather is on the behavior of entities formally granted exclusive rights, special privileges or monopolies.¹⁴¹ Also, the entity need not be given a monopoly position in order to be subject to Article XVII. The important criteria are that it enjoys exclusive or special rights or privileges, and that in the exercise of these rights and privileges it influences imports or exports by its buying and selling activities.¹⁴²

2. *Non-Discrimination*

Paragraph 1 of Article XVII sets forth the concept of non-discriminatory treatment. Members undertake any enterprise”covered by XVII:1(a) shall, in its purchases or sales involving imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment set out in the General Agreement for governmental measures affecting imports or exports by private traders.”¹⁴³ This standard of conduct is further explained in paragraph 1(b):

Such enterprises shall, having due regard to the other provisions of this Agreement, make . . . purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.¹⁴⁴

The requirement for non-discriminatory treatment in Article XVII:1 is tempered by an interpretative note to Article XVII:1 which allows an STE to charge different prices for sales in different markets provided this practice is done for commercial reasons and to meet the market conditions in the export market.¹⁴⁵ Also, as stated in paragraph 1 of the Interpretative Note to XVII, a country’s receipt of a”tiered loan” (where Country A receives a loan from Country B in order to buy goods from Country B) falls in the category of”commercial considerations.”¹⁴⁶

140. *Id.*

141. *See* Dixit, *supra* note 7, at 7-8, available at <http://www.umn.edu/iatrc> (last visited April 22, 2001).

142. *See id.*

143. *See* GATT, *supra* note 137, 393, art. XVII:1(a).

144. *Id.* at 393, art. XVII:1(b).

145. *See id.* at Interpretative Note to art. XVII, Annex 1 ¶1.

146. *Id.*

3. Notification and Transparency

The requirement to notify STEs and their operations is in paragraph 4(a) of Article XVII. "Members shall notify . . . the products which are imported into or exported from their territories by enterprises of the kind described in paragraph 1(a) of this Article."¹⁴⁷ The notification rule is to make it possible for members to judge the extent to which STEs serve as a substitute for other measures covered by the General Agreement, such as quantitative restrictions, tariffs and subsidies. It is also to allow members to assess the possible trade distortions resulting from the operations of notified STEs.¹⁴⁸

The format for such notifications is a standard questionnaire. The first questionnaire was distributed in 1960.¹⁴⁹ A revised questionnaire was adopted in April 1998.¹⁵⁰ A complete set of answers to the questionnaire must be made every three years, with updates made in each of the two intervening years.¹⁵¹ A member who has reason to believe that another member has not adequately met its notification obligation may also make counter-notifications.¹⁵²

Paragraph 5 of the WTO Understanding on Article XVII created a working party, open to all member states, under the Council for Trade in Goods to review the notifications and counter-notifications on State trading.¹⁵³ This Working Party on STEs meets as necessary, but at least once a year, and reports to the Council for Trade in Goods. As required by the WTO Understanding, the Working Party conducts reviews of all of the notifications made on State trading.¹⁵⁴ The Working Party recently completed two tasks mandated in the Uruguay Round: review of the 1960 notification questionnaire and development of an illustrative list of state trading relationships and activities.¹⁵⁵

147. *Id.* at 393, art. XVII:4.

148. See *STR: The rules, available at* http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto05/wto5_12.htm (last visited Sept. 6, 2001).

149. See *id. available at* http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto05/wto5_12.htm (last visited Sept. 6, 2001).

150. See *id. available at* http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto05/wto5_12.htm (last visited Sept. 6, 2001).

151. See *id. available at* http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto05/wto5_12.htm (last visited Sept. 6, 2001).

152. See *id. available at* http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto05/wto5_12.htm (last visited Sept. 6, 2001).

The questionnaire asked Member States to report on the activities of their STEs. The response was to include: 1) a complete list of their STEs; 2) The justification for creating or maintaining each STE; 3) A description of what the STE does (import, export, marketing, etc.) and how it does what it does; and 4) Data on total production, imports and exports in the sector concerned and how much of that is handled by the STE.

153. See GATT, *supra* note 137, art. XVII:5.

154. See *STR, supra* note 150, *available at* http://wto.org/english/thewto_e/whatis_e/eol/e/wto05/wto5_13.htm (last visited Sept. 6, 2001).

155. See United States Trade Representative, 1999 USTB Annual Report: Working Party on

4. *No Quantitative Restrictions*

“The Interpretative Note to Articles XI, XII, XIII, XIV, and XVIII, all of which deal in whole or in part with quantitative trading restrictions, states that [t]hroughout [these] Articles, the terms ‘import restrictions’ or ‘export restrictions’ include restrictions made effective through State trading operations.”¹⁵⁶ “Thus, a law which granted a state trading enterprise exclusive import rights in a certain product, and a decision by that enterprise to refuse to import at all, would appear to be in violation of Article XI (General Elimination of Quantitative Restrictions).”¹⁵⁷

5. *Preservation of Tariff Concessions*

“GATT 1994 deals with GATT schedules of concessions and sets out (in paragraph 4) that any monopoly of the importation of any product covered in a GATT Schedule shall not result in protection which is on the average in excess of the amount of protection provided for in that Schedule.”¹⁵⁸ An Interpretative Note clarifies that the provisions of paragraph 4 of Article II are to be applied in light of Article 31 of the Havana Charter (which contains the obligation to negotiate the level of protection afforded by monopolies) and explains that “the term ‘import mark-up’ shall represent the margin by which the price charged by the import monopoly for the imported product . . . exceeds the landed costs.”¹⁵⁹ By its terms, paragraph 4 applies to import monopolies whether or not they are STEs.¹⁶⁰

6. *Additional Articles*

“Two additional Articles of GATT 1994 deal with State trading.”¹⁶¹ “Article XX covers ‘General Exceptions’ and its paragraph (d) states that nothing in the Agreement shall prevent the adoption or enforcement by any member of measures necessary to ensure compliance with laws or regulations relating to the enforcement of

State Trading (Mar. 2000), available at www.ustr.gov/wto/99ustrrrpt/ustr99ste.pdf.

156. *STR*, *supra* note 150, available at http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto05/wto5_12.htm (last visited Sept. 6, 2001).

157. *Id.* available at http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto05/wto5_12.htm (last visited Sept. 6, 2001).

158. *Id.* available at http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto05/wto5_12.htm (last visited Sept. 6, 2001).

159. *Id.* available at http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto05/wto5_12.htm (last visited Sept. 6, 2001).

160. *See id.* available at http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto05/wto5_12.htm (last visited Sept. 6, 2001).

161. *Id.* available at http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto05/wto5_12.htm (last visited Sept. 6, 2001).

monopolies operated under Article II:4 and XVII.¹⁶² Article XXXVII, which is part of Part IV of the General Agreement and deals with "Commitments," states in paragraph 3(a) that developed country members shall make every effort, in cases where a government determines the resale price of products wholly or mainly produced in the territories of developing country members, to maintain trade margins at equitable levels.¹⁶³

In summary, GATT deals with STEs in five principle ways. First, identifying the enterprises considered as State trading. Second, by extending to such enterprises the nondiscriminatory treatment of Article I. Third, by imposing upon them a duty to act according to commercial considerations only, barring in particular the use of quantitative restrictions. Fourth, by providing for regular reports by the contracting parties on their STEs including, if required by other contracting parties, the import mark-up in the case of state-trading monopolies. Fifth, by excluding nullification of tariff concessions through import mark-ups in the case of import monopolies.

IV. FAILURE OF GATT RULES

For those who advocate restrictions on STEs, the GATT rules have been an exercise in futility. This should not be surprising for four reasons. The first three reasons are readily apparent. First, there are the logistical problems with devising regulations suitable to so many different types and sizes of STEs. Second, there is the natural resistance of governments long dependent on STEs to sustain their agricultural policy. Third, there is the growing concern of States with small economies with the ever-increasing influence of multi-national private traders. Any of these reasons alone create serious obstacles to devising rules to the satisfaction of WTO member countries.

The fourth reason may not be as obvious, but is nevertheless probably the most significant problem in creating GATT rules that effectively restrict STEs. It is that the GATT restrictions on STEs are undermined by an inherent contradiction. One of the fundamental premises of GATT is free trade—which is, trade should be conducted by private actors in free markets. Yet many parts of the world do not have economies based upon free-market principles.¹⁶⁴ And even in market economies, STEs play a unique role in the agricultural sector.¹⁶⁵ The primary obligation imposed by GATT on STEs is to act as if they were private enterprises. However, STEs are created precisely to fulfill roles not normally assumed by private enterprises.¹⁶⁶

162. *Id.* available at http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto05/wto5_12.htm (last visited Sept. 6, 2001).

163. *See id.* available at http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto05/wto5_12.htm (last visited Sept. 6, 2001).

164. *See* Bernier, *supra* note 133, at 247-48.

165. *See* Ackerman & Dixit, *supra* note 10, at 4.

166. *See* Bernier, *supra* note 133, at 247-48.

The failure of the GATT restrictions is manifested in two ways. First, the rules fail to accommodate state trading in market situations.¹⁶⁷ Second, the rules fail to manage acceptance into WTO of major non-market economies.¹⁶⁸ A closer examination of these two failures demonstrates the fragility that the inherent contradiction imposes upon the workings of the GATT rules.¹⁶⁹

A. *The GATT Rules Fail to Accommodate State Trading Companies in Market Situations*

The failure to accommodate state trading companies in market situations is due largely to the broad definition in Article XVII. The notification procedures in paragraph 4 of article XVII were intended to allow GATT contracting parties to report the extent of their involvement in State trading as defined in paragraph 1(a).¹⁷⁰ When the reporting was a failure in 1960, the GATT Panel on State Trading decided to circulate a more comprehensive questionnaire and require more frequent reports.¹⁷¹ The responses to the revised questionnaire were unsatisfactory.¹⁷² The scope of the inquiry was extremely broad and each contracting party knew that an affirmative answer to any questions would be an admission that the country was engaged in state trading within the meaning of Article XVII.¹⁷³ Such an admission would require the state to comply with the standards set forth in paragraph 1(b).¹⁷⁴

It should be expected that contracting parties to the WTO fail to be more forthcoming in their responses. Most states pursue policies that have the "effect" of providing beneficial privileges to private enterprises, which technically amounts to state trading, as it is currently defined in paragraph 1(a).¹⁷⁵ It is unrealistic to expect STEs to comply with the requirement in paragraph 1(b) that they operate "solely in accordance with commercial considerations."¹⁷⁶

167. *See id.*

168. *See id.*

169. *See id.* at 256-58.

170. *See STR, supra* note 150, *available at* http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto05/wto5_12.htm (last visited Sept. 6, 2001).

171. *See id.* *available at* http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto05/wto5_12.htm (last visited Sept. 6, 2001).

172. *See* Veeman et al., *supra* note 8, at ___, *available at* <http://www.agr.ca/policy/epad> (last visited Nov. 11, 2001).

173. *See id.* at 8-9, *available at* <http://www.agr.ca/policy/epad> (last visited Nov. 11, 2001).

174. *See id.* at 32, *available at* <http://www.agr.ca/policy/epad> (last visited Nov. 11, 2001).

175. *See* Tim Josling, *State Trading and the WTO: Agricultural Trade Policy Aspects*, paper presented for discussion in the Workshop on State Trading in North America (Institute of International Studies) 10 (Nov. 18, 1998), *available at* <http://www.agecon.ucdavis.edu/faculty/dan.s/papers/papers.htm> (last visited Apr. 22, 2001).

176. *Id.* *available at* <http://www.agecon.ucdavis.edu/faculty/dan.s/papers/papers.htm> (last visited Apr. 22, 2001).

As a result of the lack of precision in the definition combined with the reliance on self-notification, countries have free reign to interpret the definition to suit their own purposes.¹⁷⁷ Not surprisingly, the record of compliance with the notification rules has not been good.¹⁷⁸ There are a number of noteworthy omissions from the list of STEs that are notified. For example, the Ontario Wheat Producers' Marketing Board has been left out, apparently on the grounds that their export activities are undertaken under licenses issued by the Canadian Wheat Board.¹⁷⁹ The United States has excluded activities of various marketing orders of horticulture and dairy products.¹⁸⁰ The European Union has not notified the activities of the commodity management committees of the European Commission or the activities of the member state intervention agencies.¹⁸¹

B. *The GATT Rules Fail to Manage Acceptance Into WTO of Major Non-Market Economies*

A major problem with the WTO is how to manage the acceptance into the WTO system of major non-market economies, which are especially dependent on managed agricultural policies. The GATT has always had a few non-market economies as contracting parties. In some cases, these were nations that were contracting parties to GATT before they shifted to a non-market economy structure (such as Czechoslovakia or Cuba). In other cases, the GATT explicitly accepted into membership certain non-market economies, which are relatively small in terms of their impact on trade (such as Poland, Hungary, Romania and Yugoslavia), under special provisions or protocols. The succession of these former socialist economies has not been successful.¹⁸²

There is no reason to believe that the succession of China will be anymore successful. China presents unique problems because of its non-market economy. Despite a movement towards trade liberalization, there are still some products, the import of which can be controlled by STEs.¹⁸³ These STEs have exclusive rights to import most grains, vegetable oils, tobacco, sugar, fertilizer, cotton and petroleum.¹⁸⁴

177. See *id.* available at <http://www.agecon.ucdavis.edu/faculty/dan.s/papers/papers.htm> (last visited Apr. 22, 2001).

178. See Brian Paddock, *State Trading and International Trade Negotiations*, Research and Analysis Directorate, AGRIC. AND AGRI-FOOD CANADA 9 (Dec. 1998).

179. See *id.*

180. See *id.*

181. See *id.*

182. See Ackerman & Dixit, *supra* note 10, at 9-10; Feng YU-SHU, *China's Membership of GATT: A Practical Proposal*, 53 J. WORLD TRADE 60-62 (1988).

183. See Ackerman & Dixit, *supra* note 10, at 9.

184. See *id.*

The size of China's state trading activities creates especially unique management issues for the WTO.¹⁸⁵

VI. POLICY GUIDEPOSTS

A. *Rational For the Role of Agricultural STEs*

Given the complexities involved, determining the appropriate role of STEs in global agricultural trade is no easy task. This paper suggests that policy makers when deliberating the role of agricultural STEs adhere to seven principles or policy guideposts listed below. With a few exceptions, these policy guideposts are not specific recommendations, rather, the intent is to provide a framework for which specific rules or policy decisions are to be weighed, balanced and considered. These guideposts are interrelated as concepts with each other, but hopefully supply a logical seam to be employed when developing a rational for the role of agricultural STEs.

1 *Banning STEs is Not a Viable Policy Option*

Banning STEs is not a viable policy option for at least four reasons. First, it would not be acceptable to many governments to prohibit STEs, especially when, despite the many allegations that state trading distorts markets, it has not been established that these activities adversely affect trade.¹⁸⁶ Second, until developing countries have established adequate domestic markets they will be reluctant to accept a ban, especially in such a sensitive policy area as agriculture.¹⁸⁷ Third, STEs are too widespread for a ban to even be considered.¹⁸⁸ Their prevalence in countries seeking accession even makes a ban seem far less likely. Fourth, sovereignty concerns would prevent attempts to impose a ban.¹⁸⁹

2. *There May Not Be One "Ideal" Solution*

There may not be just one ideal solution, there may be various combinations of rules, accommodations and policy options to address the role of STEs. It would be

185. *See id.*

186. *See* Miner, *supra* note 53, *available at* <http://wbln0018.worldbank.org/Trade/DECagridoc.nsf> (last visited Apr. 22, 2001).

187. *See id. available at* <http://wbln0018.worldbank.org/Trade/Decagridoc.nsf> (last visited Apr. 22, 2001).

188. *See id. available at* <http://wbln0018.worldbank.org/Trade/Decagridoc.nsf> (last visited Apr. 22, 2001).

189. *See id. available at* <http://wbln0018.worldbank.org/Trade/Decagridoc.nsf> (last visited Apr. 22, 2001).

useful for policy makers not to be wedded to one single approach, especially in a dynamic global agricultural culture, where technologies and advances are continuously changing.

3. *Political Rhetoric Must Give Way to Logical Analysis*

Far too much energy and time is spent in posturing and politicizing the supposed distorting effects of STEs on agricultural trade.¹⁹⁰ Rhetoric must give way to logical analysis, grounded on sufficient and accurate data.

4. *Additional Data is Required to Understand Effect of STEs on Agricultural Trade*

Additional data will enable policy makers to better understand the economics of State trading and to determine the extent, if any, of the ability of STEs to distort trade. Recognizing this need, the delegate of New Zealand, some time ago during the second session of the Preparatory Committee of the United Nations Conference on Trade and Employment, declared:

We should be aware of attempting to legislate too precisely to meet the case of state enterprises, not out of any feeling that State enterprises should be put in a privileged position, but rather from the feeling that the first essential of sound legislation is that we should be thoroughly familiar with what we are legislating about.¹⁹¹

This advice is still good counsel today. A comprehensive inventory of STEs, including those, which have not been reported to the WTO, needs to be built.¹⁹² This will help provide empirical measurements on the quantitative impacts of STEs on international trade. The proprietary nature of the information sought has impeded progress.¹⁹³ In addition, once sufficient data is collected and organized, STEs should be classified in terms of their ability to distort trade.¹⁹⁴ These efforts will help avoid applying misleading assumptions and making inappropriate policy conclusions.¹⁹⁵

5. *The General Concern Over the Competitive Impacts of STEs Should Be Considered in Connection with an Overall Policy of International Competition*

All potential threats to competitive markets could be addressed. Such an approach is in keeping with the original intentions behind the Havana Declaration to have international trade agreements address the activities of private firms as well as

190. See GAO, *supra* note 9, at 14.

191. GATT, document E/PC/T/A/PV/14, 152 (Oct. 30, 1947) [hereinafter "GATT Document"].

192. See Ackerman & Dixit, *supra* note 10, at 7-10.

193. See *id.* at 17.

194. See *id.*

195. See generally *id.* (discussing STEs capacity to distort trade).

those of government.¹⁹⁶ The problem with full disclosure requirements is that this could place the STEs at a serious disadvantage in relation to multinationals.¹⁹⁷ A global competition policy must ensure that multinationals do not abuse their market power. Since the greatest concern is the potential abuse of monopoly power, governments could agree to force STEs to compete, at least for a portion of trade. Domestic competition laws could be used for this purpose, but not all governments have competition and anti-trust laws, and some may not be prepared to open their STEs to direct competition.¹⁹⁸ These issues could be addressed through developing multilateral rules on competition policies and trade to apply to both private and STEs. These discussions, however, are at an early stage, and an international agreement will be both complex and will take considerable time.¹⁹⁹

6. *The Needs of Less Developing Countries Should Be Accommodated*

Less developing countries as a general rule rely more on STEs to enable their agricultural policies. STEs are the only control many African nations have on food trade to offset powerful multinationals.²⁰⁰ Some level of accommodation should be made to these nations as well as to other developing countries. The provisions of the Agreement on Agriculture provide for special treatment of developing countries to help achieve food security objectives and similar flexibility may be negotiable for relevant STE activities.²⁰¹

7. *The current reform agenda should be tailored so as to recognize the realities of the diverse, complex and significant roles STEs play*

Even though there is not evidence that STEs harm trade, the momentum is growing for some type of reform, especially with the urging of the United States.²⁰²

196. *See id.*

197. *See* Barbour, *supra* note 6, *available at* http://www.wtwatch.org/library/admin/uploadedfiles/WTO_Reform_of_State_Trading_Enterprises_and_th.htm (last visited Sept. 5).

198. *See id.* *available at* http://www.wtwatch.org/library/admin/uploadedfiles/WTO_Reform_of_State_Trading_Enterprises_and_th.htm (last visited Sept. 5, 2001).

199. *See* Paddock, *supra* note 180, at 9.

200. *See* Barbour, *supra* note 6, *available at* http://www.wtwatch.org/library/admin/uploadedfiles/WTO_Reform_of_State_Trading_Enterprises_and_th.htm (last visited Sept. 5, 2001).

201. *See id.* *available at* http://www.wtwatch.org/library/admin/uploadedfiles/WTO_Reform_of_State_Trading_Enterprises_and_th.htm (last visited Sept. 5, 2001).

202. *See id.* *available at* http://www.wtwatch.org/library/admin/uploadedfiles/WTO_Reform_of_State_Trading_Enterprises_and_th.htm (last visited Sept. 5, 2001).

One option is more effective multilateral rules and disciplines to apply to those STEs that obstruct or distort trade, or have the potential to do so.²⁰³ This will require Article XVII to be clarified and strengthened to prevent trade abuse. It will be necessary to ensure that STE operations are sufficiently transparent to demonstrate that all WTO rules and commitments are being respected. Provided full transparency of STE activities were achieved through the openness of their operations and international monitoring activities there may be no need for new disciplines on STEs which are already bound to respect the trade rules.²⁰⁴ This approach would require elaboration and clarification of Article XVII to ensure that it effectively disciplines those activities of government entities that are not explicitly covered by other trade rules. Negotiations would need to address the definition of what constitutes an STE, what measures would represent the granting of exclusive or special privileges, the activities of a STE that would be inconsistent with the general principles of non-discrimination, what constitutes "commercial considerations," the relationship between Article XVII to other Articles in the Agreement, and the requirements for adequate notification.²⁰⁵

The problem with transparency rules, however, as noted above, is that it could place the STEs at a considerable disadvantage in relation to multinationals.²⁰⁶ Blindly imposing stricter transparency rules may severely damage developing countries and undermine the very reason for the GATT rules -- to establish free and fair trade. This sense of balance should extend to all GATT rules under consideration in addition to the transparency rules, including additional disciplines relating to the export and import activities of STEs.²⁰⁷

VII. CONCLUSION

Despite the increasing demand to ban or reform agricultural STEs, it is well to remember the complex, unique and important roles STEs play in world agricultural trade. These roles reflect the unique position of agricultural policy in both developing and developed countries, and countries like China, seeking accession to the WTO.

203. See *id.* available at http://www.wtowatch.org/library/admin/uploadedfiles/WTO_Reform_of_State_Trading_Enterprises_and_th.htm (last visited Sept. 5, 2001).

204. See *id.* available at http://www.wtowatch.org/library/admin/uploadedfiles/WTO_Reform_of_State_Trading_Enterprises_and_th.htm (last visited Sept. 5, 2001).

205. See *id.* available at http://www.wtowatch.org/library/admin/uploadedfiles/WTO_Reform_of_State_Trading_Enterprises_and_th.htm (last visited Sept. 5, 2001).

206. See *id.* available at http://www.wtowatch.org/library/admin/uploadedfiles/WTO_Reform_of_State_Trading_Enterprises_and_th.htm (last visited Sept. 5, 2001).

207. These include STE involvement in the administration of TRQs, in minimum access arrangements, domestic marketing and price support activities, and in exports including price behavior, export credits and other competitive practices. See Paddock, *supra* note 180, at 10.

Attempts to reform should be tempered with the realization that no evidence exists substantiating that all categories of STEs distort trade. Additional information is needed, which may justify stricter reporting and transparency rules. Even this type of reform, however, may disadvantage developing countries in competing against multinational private traders.

Indeed, assessment of STEs should be rendered only in the overall context of international competition. This requires patience and deliberation, which will likely translate into slower reform, at least in the short run, than what is presently being advocated by reform advocates. Wholesale reform without any thought to international competition, however, will benefit only multinational private traders at the expense of countries who lack the resources to compete on a level playing field.

In the words of the New Zealand delegate, we should be "thoroughly aware with what we are legislating about!"²⁰⁸

208. Bernier, *supra* note 133, at 245.