World Agricultural Trade in Purgatory: The Uruguay Round Agriculture Agreement and Its Implications for the DOHA Round

Part II

by

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expressions, set forth in the chart below.[187] In both expressions, the figure on the left hand side is the actual import volume. A Member compares it to the trigger volume, which is the result yielded by the right-hand side of each expression.[188] Only if actual imports exceed the trigger volume is there a surge, and only then may the Member resort to the special safeguard.[189]

Chart:
Formula for Determining Imposition of a Special Safeguard Remedy
(derived from *Agreement on Agriculture*, Article 5:4)

If: Actual Import Volume in 1 Year >	[(Base Trigger Level) x (Average Volume of Imports in last 3 years)] + (Change in Volume of Domestic Consumption in Recent Year)

Then: Member may impose special safeguard remedy.

But if: Actual Import < Volume in 1 Year	[(Base Trigger Level) x (Average Volume of Imports in last 3 years)] + (Change in Volume of Domestic Consumption in Recent Year)

Then: Member may not impose special safeguard remedy.

From the expressions in the chart, it is evident the trigger volume depends on the applicable base trigger level multiplied by the average quantity of imports. Once again, the base trigger level is a percentage. This percentage depends on market access opportunities for the product.[190] If the share of

compared to the preceding year, provided that the trigger level shall not be less than 105 per cent of the average quantity of imports in (x) above.

Agreement on Agriculture, Art. 5:4 (footnote omitted).

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

imports in the domestic market (measured by imports as a percent of domestic consumption) is large, then the trigger level will be low. The average quantity of imports of the product is an absolute number, that is, a volume based on data available for the most recent three-year period.

It also is evident from the formula that changes in domestic consumption (measured by volume) can influence, even determine, the outcome. Why do these changes play a role in the calculation? Consider a case in which domestic consumption of an agricultural product has risen. Would it be fair to leave the rise unaccounted for and compare only actual imports with the trigger volume?

Arguably, the answer is "no." If imports exceed the trigger but domestic consumption has risen and yet is omitted from the calculus, then the perfectly reasonable response of foreign farmers facing a special safeguard remedy would be that imports rose to meet domestic consumption demand. They would say the domestic market of the importing country is growing, and they, along with farmers from that country, are helping to accommodate this growth. Adding the rise in domestic consumption to the trigger level raises that threshold and thereby takes into account the interests of foreign farmers.

Conversely, consider a case in which actual imports exceed the trigger volume and domestic consumption has declined. Would it be fair to exclude this decline when determining whether to impose a special safeguard? Again, arguably, the answer would be "no." The twin facts of imports exceeding the trigger and domestic consumption declining suggest foreign farmers are taking market share from domestic farmers at a time of worsening domestic demand. In other words, domestic farmers would say they face a real threat of actual injury or already have been injured by foreign competition in a contracting domestic market. Subtracting the diminution in domestic consumption from the trigger volume lowers that trigger and thus accounts for the interests of domestic farmers. In sum, accounting for the recent domestic consumption pattern in an "up" market sensibly increases the difficulty of qualifying for a special safeguard while accounting for it in a "down" market sensibly lowers the qualification.

It is worth highlighting the inverse relationship between market access opportunities and the applicable base trigger level. The greater the existing market access opportunity (*i.e.*, the higher the import penetration), the lower the percentage figure used as the base trigger level and thus the more likely the actual import volume will exceed the trigger volume. Put succinctly, the link in Article 5 between the concept of "import surge" and import penetration, embedded in this inverse relationship, is a protectionist bias in the special safeguard remedy. The link ensures an ever-greater chance of meeting the requirements for imposing the remedy with ever-increasing degrees of import penetration.

Is this result normatively "good" or bad"? The answer is it depends on the perspective taken to the question and the paradigm for analysis.[191] In brief, from a free-trade perspective, this result is "bad." Imported agricultural products may be both cheaper and of better quality than domestic competitors, leading to the argument that comparative advantage lies with the foreign farmers. From a protectionist perspective, the domestic farmers may deserve a limited remedy to "get into shape" for international competition or to "recuperate" from vicissitudes beyond their control.

It also is worth illustrating the operation of the trigger volume rules through an hypothetical example. Consider the market for apples in New Zealand. Suppose New Zealand's apple farmers lobby for imposition of a special safeguard remedy against foreign apple imports. Officials at the Ministry of Foreign Affairs and Trade ("MFAT") in Wellington gather the following data:

Volume of imports in 2005:	
	20 million tons
Volume of imports in previous 3 years:	
	2004 – 17 million tons
	2003 – 12 million tons
	2002 – 15 million tons
Average import volume in previous 3 years:	
	14.67 million tons
Total domestic consumption in previous 3 years:	
	2004 – 22 million tons
	2003 – 16 million tons
	2002 – 19 million tons
Change in domestic consumption in last 2 years:	
	6 million ton increase

Given these data, MFAT officials calculate the existing access opportunity for foreign-produced apples to the New Zealand market as follows:

191. BHALA, *supra* note 30, at 1117-23 (discussing the purpose of safeguard law).

Market Access Opportunity = $\frac{\text{Imports of a product into a Member}}{\text{Total domestic consumption of the product in the Member}} \times 100$

$= \frac{17 + 12 + 15}{22 + 16 + 19} \times 100$

$= \frac{44}{57} \times 100$

= 77.19 percent.

Because import penetration, measured by this market access opportunity statistic, clearly exceeds thirty percent, the base trigger level is 105 percent. To determine whether New Zealand may proceed with a special safeguard against imported apples, MFAT officials make the following calculation:

Actual Import Volume in 1 Year	> or <	[(Base Trigger Level) x (Average Volume of Imports in last 3 years)] + (Change in Volume of Domestic Consumption in Recent Year)
20	> or <	[(105 percent) x (14.67)] + (6)
20	> or <	[15.40] + (6)
20	<	21.4

The result is New Zealand would not be able to impose a special safeguard under the rules of the trigger volume in Articles 5:1(b) and 5:4 of the *Agriculture Agreement*. Imports for the year total twenty million tons, but the trigger volume is higher, 21.4 million tons. That result is interesting, particularly given the high import penetration into the New Zealand market. But, it is the correspondingly low base trigger level (105 percent) that operates to make a special safeguard remedy unjustifiable.

Of course, the result could change with different import volume and domestic consumption data. For instance, suppose in 2004 New Zealanders consume twenty (instead of twenty-two) million tons of apples. Then, the year-on-year increase would be four (instead of six) million tons, and the trigger volume from the right-hand side of the above formula would be 19.4 (instead of 21.4) million tons. In this scenario, New Zealand could proceed with the remedy, because the actual import volume of twenty million exceeds the new trigger volume of 19.4 million. The result also could change if New Zealand sets a trigger level higher than the base of 105 percent. Suppose, for example, New Zealand establishes a 110 percent level. Using the revised import data (an increase in domestic consumption of four million tons), the trigger volume from the right-hand side of the formula becomes 20.14 million tons. Actual imports of twenty million fall just short of this trigger volume, so New Zealand could not resort to the remedy.[192]

Suppose MFAT officials determine New Zealand cannot impose a special safeguard remedy under the trigger volume rules in Articles 5:1(a) and 5:4 of the *Agreement on Agriculture.* Are the apple farmers in New Zealand out of luck? The answer is "not necessarily." There are two ways to trigger the remedy—volume or price—and the trigger price rules are set forth in Articles 5:1(b) and 5:4 of the *Agreement.*[193] Akin to a trigger volume, a trigger price is a legal threshold for imposition of a special safeguard against imports of an agricultural product entering into a WTO Member. Again, as an impediment to open markets, it is a reason world agricultural trade is in Purgatory. But, whereas the actual import volume of an agricultural product must exceed a trigger volume to justify the remedy, the actual import price of a product must be less than the trigger price to justify it. Might a WTO Member invoke a special safeguard remedy if the volume of imports is declining, even though

192. To complicate this example a bit, suppose some apple imports were *en route* to New Zealand, shipped pursuant to a contract concluded before New Zealand began imposing the special safeguard remedy. May New Zealand apply the remedy to the imports in transit? The answer is "no." The contract was settled before the remedy took effect. *See Agreement on Agriculture*, Art. 5:3 (stating that "[a]ny supplies of the product in question which were *en route* on the basis of a contract settled before the additional duty is imposed . . . shall be exempted from any such additional duty, provided that they may be counted in the volume of imports of the product in question during the following year for the purposes of triggering the [special safeguard] provisions").

However, New Zealand may count the imports *en route* in the subsequent year for purposes of determining whether the volume of imports exceeds the trigger level. To complicate matters still further, suppose some apple imports (*e.g.*, red delicious apples) are subject to a market access commitment under the *Agriculture Agreement*, whereas others (*e.g.*, dessert apples) are not. (The example begs the question of whether the two kinds of apples are "like" products, but Article 5 does not contain a "like product" criterion.) Could New Zealand include both types of apples when counting the volume of imports? Could New Zealand impose a special safeguard measure against both types of apples?

The answers, respectively, are "yes" and "no." *See Agreement on Agriculture*, Art. 5:2 (stating that "[i]mports under current and minimum access commitments established as part of a concession" under Article 5:1 "shall be counted for the purpose of determining the volume of imports required for invoking the provisions of" the special safeguard based on a trigger volume, "but imports under such commitments shall not be affected by any additional duty imposed under" either the trigger volume or trigger price criteria.). Whether or not imports of an agricultural product are subject to a current or market access commitment, the imports may be included in the calculation of imports. But, imports subject to such a commitment cannot be "hit" with a special safeguard, as that would undermine the commitment.

193. *Agreement on Agriculture*, Art. 5:1(b), 5:4.

the trigger price level is breached? The *Agreement on Agriculture* does not forbid this use of the remedy, but it strongly discourages it.[194]

Under the *Agreement on Agriculture*, the trigger price is denominated in the local currency of a WTO Member seeking to invoke the safeguard, and is expressed in c.i.f. (cost, insurance, and freight) terms.[195] The trigger price for a specific agricultural product and Member equals "the average 1986 to 1988 reference price" for that product.[196] For perishable and seasonable products, different reference prices and periods are permissible.[197] In turn, the "reference price" generally is an average c.i.f. price, and is publicly available to all WTO Members so that they may anticipate the tariff consequences of breaching the trigger, in terms of an additional safeguard remedy that may ensue.[198] Once the trigger price is set, it is compared to the c.i.f. price of an individual shipment, *i.e.*, the comparison is between an average of prices used to calculate the trigger price, and an individual transaction price. Thus, a synopsis of the trigger price rule is that it permits a safeguard action "if the c.i.f. price of imports of a tariffied product falls below a reference price based on average import prices in 1986-88."[199] The action is taken on a shipment-by-shipment basis.[200]

Sensibly, the individual transaction price is the "import price." It is the actual price (determined according to applicable customs valuation rules) at which a shipment of agricultural products enters the customs territory of a WTO Member seeking to impose a special safeguard. Like the trigger price, the individual transaction price is a c.i.f. price, denominated in the domestic currency of the importing WTO Member.[201] As the following formula indicates, the comparison is expressed in percent terms, namely, the difference

194. *See id.* Art. 5:7 (stating, "Members undertake, as far as practicable, not to take recourse to the provisions of sub-paragraph 1(b) where the volume of imports of the products concerned are [*sic*] declining.").

195. *See id.* Art. 5:1(b) (stating that "the price at which imports of that product may enter the customs territory of the Member granting the concession, as determined on the basis of the c.i.f. import price of the shipment concerned expressed in terms of its domestic currency, falls below a trigger price").

196. *Id.*

197. *See id.* Art. 5:6 (stating, "For perishable and seasonable products, the conditions set out above shall be applied in such a manner as to take account of the specific characteristics of such products" and "different reference prices for different periods may be used under sub-paragraph 1(b) [the trigger price rules, which set forth a trigger price equal to the average 1986-88 reference price]."). Note, however, no more details are set forth, suggesting case-by-case determinations as to "different" reference prices and periods are to be made.

198. *See id.* Art. 5:1(b) n.2 (defining "reference price").

199. CROOME, *supra* note 10, at 55.

200. *See Statement of Administrative Action*, *supra* note 12, at 715 (clarifying this point).

201. *See Agreement on Agriculture*, Art. 5:5(a) (defining "import price" as "the c.i.f. . . . import price of the shipment expressed in terms of the domestic currency").

between the actual import price and the trigger price as a percentage of the trigger price.[202]

$$\text{Difference} = \frac{\text{Import Price} - \text{Trigger Price}}{\text{Trigger Price}} \times 100$$

Focusing on the percentage difference is logical, as it would be unwieldy to define triggers in terms of absolute price differences, given the diversity of currencies of the WTO Membership.

Ominously, from a free trade perspective, no time limit is prescribed for a special safeguard applied as a result of the trigger price.[203] However, as in a trigger volume case, there is a limit on the size of the remedy in a trigger price case.[204] Article 5:5 of the *Agriculture Agreement* creates a five-point sliding scale to gauge whether a WTO Member taking action does not impose an excessive remedy. The Table summarizes this scale. Essentially, the scale is an inverse relationship between the amount of additional tariff imposed, on the one hand, and the gap between the actual import price and trigger price, on the other hand (not unlike calibrating the fine for speeding on a motorway).

202. *See id.* Art. 5:5(a)-(e) (defining "difference" in sub-paragraph (b) as the gap "between the import price and the trigger price," and expressing in writing in sub-paragraphs (a)-(e) the above formula).

203. The Clinton Administration indicated "Article 5 permits importing countries to apply a 'special safeguard' *during at least the six-year implementation period* to products they have subjected to 'tariffication' in order to protect domestic producers from increased imports or price declines, measured against historical levels [footnote omitted, emphasis added].") *Statement of Administrative Action*, *supra* note 12, at 711. The *Statement* apparently contains a footnote (numbered "1") after the word "period," which was not reprinted in HOUSE DOCUMENT 103-316 cited *supra* note 12. Article 5:9 of the *Agriculture Agreement* further states that the special safeguard remedy remains in effect "for the duration of the reform as determined under Article 20."

204. *Agreement on Agriculture*, Art. 5.

Table 4: Trigger Prices in Relation to Additional Duty That May Be Imposed

(as set forth in *Agreement on Agriculture*, Article 5:5)

Difference between Import Price and Trigger Price (i.e., amount by which c.i.f. import price, denominated in local currency, is below the trigger price, expressed as a percentage of the trigger price)	***Additional Duty Permitted***
Less than 10 percent (i.e., the import price is less than 10 percent below the trigger price)	No additional duty permitted.
Between 10 – 40 percent (i.e., the import price is more than 10 percent below the trigger price, and up to 40 percent below the trigger price)	Additional duty is equal to 30 percent of the amount by which the difference exceeds 10 percent of the trigger price.
Between 40 – 60 percent (i.e., the import price is more than 40 percent below the trigger price, and up to 60 percent below the trigger price)	Additional duty is equal to 50 percent of the amount by which the difference exceeds 40 percent of the trigger price, plus the previous additional duty.
Between 60 – 75 percent (i.e., the import price is more than 60 percent below the trigger price, and up to 75 percent below the trigger price)	Additional duty is equal to 70 percent of the amount by which the difference exceeds 60 percent of the trigger price, plus the previous additional duties.
More than 75 percent (i.e., the import price is more than 75 percent below the trigger price)	Additional duty is equal to 90 percent of the amount by which the difference exceeds 75 percent of the trigger price, **plus** the previous additional duties.

A few points are worth noting about the scale. First, under Article 5:5(a) of the *Agreement on Agriculture*, which defines the start of the scale, a difference between the actual import and trigger prices of ten percent or less is immaterial.[205] No special safeguard action may be taken in that case.[206] Given the many factors that can cause changes in the price of agricultural products, a ten percent *de minimis* threshold appears reasonable (though, arguably from the perspective of agricultural exporters, too low).

205. *Agreement on Agriculture*, Art. 5.5(a)
206. *Id.*

Second, under Article 5:5, any additional duty is imposed on the basis of the extent to which the actual import price falls below the trigger price.[207] That is, the amount of additional duty depends on the difference between the two prices, not on the import price itself.[208] Of course, the normal MFN (or other appropriate) tariff would be calculated on the import price, according to applicable customs valuation rules. To continue the example of apple farmers in New Zealand lobbying for protection, suppose the price of imported apples is 19 percent less than the trigger price. Article 5:5(b) explains "the additional duty shall equal 30 per cent of the amount by which the difference exceeds ten per cent."[209] Applying the rule in this case, the amount of excess over ten percent is, of course, nine percent (19 – 10 percent). Thirty percent of nine percent is 2.7 percent, hence a duty of 2.7 percent would be authorized (in addition to the normal MFN tariff, which in New Zealand is zero[210]).

This example suggests the additional duty may be rather small. But, like fines calibrated with the degree of speeding on a motorway, the charges can add up. Consider the end of the sliding scale, defined by Article 5:5(e) of the *Agriculture Agreement*. Cases at this end involve a difference of more than seventy-five percent between actual import and trigger prices. The remedy is an additional duty of ninety percent; obviously, a high charge in itself. However, that is not the only charge. The last clause of sub-paragraph (e) of this article states that "plus the additional duties allowed under (b), (c) and (d)." Sub-paragraphs (c), and (d) contain a similar final clause: sub-paragraph (d) mandates the inclusion of "the additional duties allowed under (b) and (c); and sub-paragraph (c) calls for including "the additional duty allowed under (b)." These clauses mean the added charges are cumulative.

For example, consider the worst-case scenario in which Article 5:5(e) of the *Agreement* is applicable. Assume the price for apples imported into New Zealand is 100 percent below the trigger price. What special safeguard remedy could New Zealand impose? Article 5:5(e) authorizes an additional duty of ninety percent of the amount by which the difference between import and trigger prices exceeds seventy-five percent. That difference is twenty-five percent (100 – 75 percent), and ninety percent of twenty-five percent is 22.5 percent. Hence, the additional duty would be 22.5 percent. But, the

207. *Id.* Art. 5.5(b)-(e).

208. *Id.*

209. *Id.* at 5.5(b).

210. New Zealand offers duty free treatment on all agricultural and industrial products, except for textiles, clothing, and footwear ("TCF" articles). It also offers duty-free treatment on TCF articles from least-developed countries, and on items covered by its free trade agreement with Singapore. (Author's discussion with New Zealand trade officials, University of Auckland, March 2003.)

calculation would not end here. Applying the rule of the last clause of Article 5:5(e), three further charges must be calculated and included in the remedy:

_ Under sub-paragraph (b), an additional duty is charged equal to 30 percent of the amount by which the difference between import and trigger prices exceeds 10 percent. In this scenario, the additional duty would be 30 percent of the amount by which the 100 percent difference between import and trigger prices is over 10 percent. That is, it would be 30 percent of 90 percent (90 percent being the gap between the 100 percent difference and the 10 percent threshold). The result is an additional duty of 27 percent.

_ Under sub-paragraph (c), an additional duty is charged equal to 50 percent of the amount by which the difference between import and trigger prices exceeds 40 percent. In this scenario, the additional duty would be 50 percent of the amount by which the 100 percent difference between import and trigger prices is over 40 percent. That is, it would be 50 percent of 60 percent (60 percent being the gap between the 100 percent difference and the 40 percent threshold). The result is an additional duty of 30 percent.

_ Under sub-paragraph (d), an additional duty is charged equal to 70 percent of the amount by which the difference between import and trigger prices exceeds 60 percent. In this scenario, the additional duty would be 70 percent of the amount by which the 100 percent difference between import and trigger prices is over 60 percent. That is, it would be 70 percent of 40 percent (40 percent being the gap between the 100 percent difference and the 60 percent threshold). The result is an additional duty of 28 percent.

What, then, in this scenario, which is dreadful for apple exporters to New Zealand, would the special safeguard remedy be?

The answer is a duty of 107.5 percent. This whopping figure is 22.5 percent (from the first part of Article 5:5(e)) "plus the additional duties allowed under (b), (c) and (d)" (the last clause of Article 5:5(e)), namely, twenty-seven percent (from Article 5:5(b)), thirty percent (from Article 5:5(c)), and twenty-eight percent (from Article 5:5(d)). This remedy would be in addition to the MFN or other applicable rate, which in the case of New Zealand, is zero. In all probability, a special safeguard of 107.5 percent effectively shuts apple imports out of New Zealand, giving domestic farmers the ultimate in protection.

F. LOWERING LEGAL STANDARDS?

In addition to the fundamental point that actions against import surges represent departures from free trade, hence the "*A*" in the six sin acronym *BARBER*, there are three troubling aspects about the special safeguard remedy. First, consider the fact the WTO *Antidumping Agreement* generally forbids comparisons between average and individual prices when calculating dumping margins.[211] Indeed, the strong preference for average-to-average comparisons was an important innovation in multilateral antidumping law designed, at least, to reduce the likelihood of finding a positive dumping margin in a case in which the dumping remedy was not merited. The point is that greater thought might have been given during the Uruguay Round to consistency in price data comparison in different remedy contexts. As indicated earlier, the special safeguard remedy in Article 5 of the *Agriculture Agreement* does not mandate average-to-average comparisons.[212] The trigger price is calculated from an average reference price, which in turn is an average c.i.f. price.[213] But, it is compared with an individual import transaction price.[214]

Second, neither a trigger volume nor price is associated with the general safeguard remedy of GATT Article XIX and the WTO *Agreement on Safeguards*.[215] Under the general remedy, a Member invoking the remedy must show an increase in imports (in absolute terms or relative to domestic production).[216] But, no trigger volume as such is defined.[217] While price depression or price suppression may be evidence of material injury or threat thereof, there is no analogy to a trigger price.[218]

Third, depending on the threshold levels set, it may be easier to invoke a special safeguard remedy under the *Agriculture Agreement* than turn to the general safeguard available under GATT–WTO law. For instance, for some agricultural products, there may have been a slump in prices during the 1986-88 period. For them, the trigger price would be low. In turn, it may be relatively easy to invoke a special safeguard—relative, that is, to trying to satisfy the general safeguard remedy criteria.

The second and third concerns lead to a basic challenge to Article 5 of the *Agriculture Agreement*: is this provision necessary at all? That is, why not

211. *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping), *reprinted in* BHALA, *supra* note 10, at 392-418. Article 2:4:2 of the *Antidumping Agreement* defines as one indicia of a "fair" comparison between normal value and export price the juxtaposition of a weighted average normal value with a weighted average export price, or a juxtaposition of normal value and export price on a transaction-by-transaction basis. *Id.* at Art. 2.42. Only if the pattern of export prices differs significantly among purchasers, across regions, or over time, and this difference cannot be taken into account by an average-to-average (or transaction-to-transaction) comparison, is it permissible to compare a weighted average normal value with an individual export price. For a critique of Article 2:4:2, see Raj Bhala, *Rethinking Antidumping Law*, 29 GEO. WASH. J. INT'L L. & ECON. 1, 67-69 (1995).

212. *Agreement on Agriculture*, Art. 5.

213. *Id.*

214. *Id.*

215. *See* BHALA, *supra* note 30, at ch. 17 (discussing the criteria set forth in these rules); *see also* Agreement on Safeguards, Apr. 15, 1994, WTO Agreement, Annex 1A, *reprinted in* BHALA, *supra* note 10, at 521-30.

216. *Agreement on Safeguards*, Art. 2.

217. *Id.*

218. *Id.*

rely on the general safeguard remedy, and make use of the emerging jurisprudence on it created by the Appellate Body? Surely, expunging Article 5 would help world agricultural trade emerge from Purgatory. That the general and special safeguard rules are mutually exclusive is clear from Article 5:8 of the *Agreement*, which says if a Member proceeds with a special safeguard remedy in a case, then it cannot have recourse in the same case to GATT Article XIX and the related provisions of the WTO *Agreement on Safeguards*.[219]

The answer may be the Uruguay Round negotiators needed the special safeguard as an inducement to commit to irreversible tarrification. They could wrap themselves in the text of Article 5 when questioned by domestic farming constituents about hardships caused by tarrification. Article 5:9 of the *Agreement* lends modest support to this answer. It indicates the special safeguard rules remain in effect during the on-going negotiations to reduce barriers to agricultural trade (*i.e.*, the so-called built-in agenda established by Article 20), but will lapse without an agreement to continue the reform process.[220] Evidently, the negotiators wanted to be explicit that the "escape valve" is omnipresent. A bit more support for this answer comes from the fact the Article 5 remedy has been used infrequently.[221]

Yet, if that is the answer, then it is not altogether persuasive. From a legal perspective, the general remedy has been deployed against agriculture products (albeit not always successfully for the importing WTO Member, in terms of winning an Appellate Body case).[222] Worse yet, from a systemic

219. *See Agreement on Agriculture*, Art. 5:8 (stating that "[w]here measures are taken in conformity with paragraphs 1 through 7 above, Members *undertake not to have recourse*, in respect of such measures, to . . . paragraphs 1(a) and 3 of Article XIX of GATT 1994 or paragraph 2 of Article 8 of the *Agreement on Safeguards*") (emphasis added).

220. *See Id.* Art. 20. This provision is entitled "Continuation of the Reform Process." *Id.* It states "substantial progressive reductions in support and protection resulting in fundamental reform" is both a "long-term objective" and "an ongoing process." *Id.* Accordingly, built into the text of Article 20 is the date by which WTO Members agreed to initiate new agricultural trade negotiations, namely, 1 January 1999, one year before the end of the implementation period defined in Article 1(h) as the six years following 1 January 1995. *Id.* These "built-in agenda" negotiations essentially have been subsumed into the Doha Round. *Id.* Article 20 further states the talks must take into account (1) the experience of WTO Members, and the effects on world trade in agriculture, of implementing reduction commitments, (2) non-trade matters, (3) special and differential treatment, (4) the need for a "fair" agricultural trading system, (5) other concerns mentioned in the Preamble to the *Agriculture Agreement*, and (6) the possibility of further commitments to achieve the stated objectives. *Id.*

221. *See* October 2002 *Briefing Document*, *supra* note 25, at 19 (stating that "[i]n practice, the special agricultural safeguard has been used in relatively few cases").

222. *See, e.g.*, *United States – Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, Report of the Appellate Body, WT/DS177/AB/R (complaint by New Zealand), WT/DS178/AB/R (complaint by Australia) (adopted 16 May 2001) (ruling against the United States in its safeguard action, essentially because the United States International Trade Commission did not make a determination about unforeseen developments,

perspective, why create a remedy that is partly redundant with an existing remedy, and thereby create uncertainty about how the two remedies relate to one another, and about the nuances of each remedy?

An answer to this question requires a doctrinal comparison of safeguards laws, and only an outline of that is possible here. Any safeguard rule affords the possibility of a protective measure against fair foreign competition. There is no allegation of an unfair trading practice, *i.e.*, a WTO Member contemplating the action is not alleging dumping, illegal subsidization, or infringement of an intellectual property right. Rather, the Member is alleging a surge of fairly-traded imports of a particular product into its customs territory. The very nature of the allegation means a safeguard remedy is theoretically more protectionist than actions against unfair trading practices—dumping, subsidization, or intellectual property infringement. Thus, the critical theoretical questions any safeguard rule must answer are:

(1) What qualifies as a "surge" (*i.e.*, an actionable "increase") in imports?

(2) What proof of injury, or threat of injury, to domestic producers of a good that is "like" the imports, must be shown (which begs the question of whether the domestic product and imports are "like" products)?

(3) What causal connection must be proven between the import surge and the injury or threat to the domestic producers, and in particular to what extent must different possible causes be identified and injury or threat thereof be attributed specifically to each separate cause?

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i.e., the Commission did not examine whether it was an "unforeseen development" that lamb meat imports into the United States increased and caused or threatened serious injury, and also faulting the Commission for not properly separating the injurious effects of other factors from the injurious effects of increased imports); *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, Report of the Appellate Body, WT/DS166/AB/R (adopted 19 Jan. 2001) (ruling against the United States in its safeguard measure on wheat gluten from the European Communities, essentially because the United States International Trade Commission failed to show low capacity utilization was due to increased imports rather than increased production capacity, and did not provide a sufficient basis for excluding Canadian imports from the remedy, despite rules in the North American Free Trade Agreement against the application of a global safeguards remedy to a NAFTA Party, and also criticizing the United States for not offering adequate opportunity, before imposing the remedy, for consultations to resolve the dispute); *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, Report of the Appellate Body, WT/DS98/AB/R (adopted 12 Jan. 2000) (ruling against Korea in its safeguard measure on skimmed milk powder from the European Community, largely because of Korea's failure to meet applicable notification and burden of proof requirements, and also noting the importance of conforming, before imposing a safeguard, with the requirement in GATT Article XIX of showing that increased imports and injury or threat were a result, in part, of unforeseen circumstances). *See also* Raj Bhala & David Gantz, *WTO Case Review 2001*, 19 ARIZ. J. INT'L & COMP. L. 466, 613-14, 616-17, 625-29 (2002) (reviewing key Appellate Body holdings in the *Lamb Meat* and *Wheat Gluten* cases); Raj Bhala & David Gantz, *WTO Case Review 2000*, 18 ARIZ. J. INT'L & COMP. L. 1, 91-92 (2001) (reviewing key Appellate Body holdings in the *Korea – Dairy Products* case).

The general safeguard provision in GATT Article XIX, coupled with emerging Appellate Body jurisprudence, offer answers to all three questions.[223] In brief, this corpus indicates that imports must increase in absolute terms or relative to domestic production, and it further indicates that this increase resulted from unforeseen circumstances and the effect of GATT–WTO obligations, such as tariff concessions.[224] It calls for proof of "material" injury or threat thereof. And, this body of law demands proof the surge indeed has caused injury or threat, though the actual standard for causation remains frustratingly ambiguous.

Even this brief summation of GATT Article XIX and the growing Appellate Body case law suggests an answer to the question of why Article 5 of the *Agriculture Agreement* is necessary, at least from the perspective of protectionist farming interests. The requirements of Article 5 are not redundant with the general GATT–WTO safeguard rules. To the contrary, Article 5 offers a more permissive basis on which to strike against an import surge than do the general safeguard rules.

The proof is in the comparison. First, Article 5 does not require an injury or threat determination. Second, Article 5 does not require an assessment of causation. Third, while Article 5 does have a more precise definition of an import surge than does GATT Article XIX, in that Article 5:1(b) and 5:4 contain numerical criteria relating to base trigger levels, Article 5 does not require any showing a surge was unforeseen.

Another way to compare the doctrines of special and general safeguards is from the perspective of free traders. For them, the special safeguard remedy in the *Agriculture Agreement* is both good and bad news. The "good" news is that imposition of this remedy adversely affects only one of the three measures

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223. GATT Article XIX:1(a) states:

> If, as a result of *unforeseen developments* and of the *effect of the obligations* incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such *increased quantities* and under such conditions as to *cause or threaten serious injury* to domestic producers in that territory of *like or directly competitive products*, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

reprinted in BHALA, *supra* note 10, at 226 (emphasis added).

224. *See* cases cited *supra* note 222 (showing the importance of "unforeseen developments"); *see also Argentina – Safeguard Measures on Imports of Footwear*, Report of the Appellate Body, WT/DS121/AB/R (adopted 12 Jan. 2000) (holding that though the "unforeseen developments" language is not in the WTO *Agreement on Safeguards*, it remains a prerequisite to taking a safeguard action, because it is in GATT Article XIX, hence an importing WTO Member must show that increased imports that caused or threatened serious injury were "unexpected," though ruling against Argentina's safeguard measures on independent grounds); Bhala & Gantz, *supra* note 222, at 80-83.

associated with the market access methodology, namely tarrification, and then only with respect to an individual product and for a limited time. Tariff cuts made in accordance with the targets, and the minimum access tariff quotas, remain unaffected by a special safeguard remedy. The "bad" news is the requirements to impose a special safeguard remedy (at least according to the tentative analysis just sketched out) are considerably less rigorous than to make use of a general safeguard. In the agricultural sector, the special safeguard remedy potentially could undermine the integrity of the doctrine on safeguards as it has developed under GATT Article XIX.

To be sure, there is more to the answer than a thorough doctrinal comparison of requirements for taking action. It would be necessary to compare the precise nature and size of the remedies under the two types of safeguard relief. GATT Article XIX does not limit a safeguard remedy, in a precise arithmetic sense, or in the sense demanding an additional duty and ruling out a quantitative restriction. But, it does call for consultation with exporting Members that have a substantial exporting interest in the product in question, with a view to a compensatory adjustment. Failing that consultation, it calls for a suspension of substantially equivalent concessions.[225] In contrast (as discussed at length above), a special safeguard remedy must take the form of an additional duty. In a trigger volume case, this duty is capped at one-third of the level of the normal tariff, and in a trigger price case it is set by a sliding scale.

Comparing the duration of the remedy also would matter. For example, the WTO *Agreement on Safeguards* permits a remedy for four years, with renewal for a possible second four-year period.[226] It also would be worthwhile to examine the transparency rules associated with the different safeguard rules. Article 5:7 of the *Agreement on Agriculture* calls for giving notice in writing to the WTO Committee on Agriculture, and for affording interested Members the opportunity to consult with the country seeking to take action.[227]

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225. *See* GATT Article XIX:2-3 (concerning written notice, the opportunity for prior consultation, agreement on the action, and suspension of concessions), *Agreement on Safeguards*, Art. 8:1-2 (concerning appropriate compensatory settlements). *See* BHALA & KENNEDY, *supra* note 12, § 9-1(e)(3) at 931-33 (explaining that, notwithstanding the rule barring retaliation for the first three years of a safeguard action, which is contained in Article 8:3 of the *Safeguards Agreement*, retaliation will not occur if a deal on compensation is struck between the WTO Member taking action and the Members with an export interest in the target product).

226. *See Agreement on Safeguards*, Art. 7:1-3 (limiting a safeguard measure to four years, allowing for extension if necessary to prevent or remedy serious injury, if there is evidence of adjustment by the domestic industry producing a like product, and limiting the total remedial period to eight years).

227. *See id.* at Art. 17 (establishing this Committee). Article 18 of the *Agreement* charges the Committee with reviewing progress on the implementation of commitments negotiated in the Uruguay Round, and obligates Members to notify the Committee of various matters, including their progress in implementing commitments, and new domestic support measures. *Id.* at Art. 18.

Would most importing countries find these procedures less, or more, onerous than the process called for by GATT Article XIX and the *Agreement on Safeguards*? Careful consideration of these questions would go a long way to stating resolutely what now is a suspicion: that the Uruguay Round negotiators knew what they were creating in Article 5 of the *Agriculture Agreement*, namely, a remedy that could be used with, on important points of proof, less ardour than the extant one.

III. DOMESTIC SUBSIDIES

"Rich countries squander more than $300 [billion] a year—six times their combined foreign aid—on their shrinking farm populations."[228]

A. THE CONCEPT OF "TOTAL AMS"

The second of the three methodologies in the *Agreement on Agriculture* to liberalize world agricultural trade concerns domestic support.[229] Articles 6 and 7, which constitute Part IV of the *Agreement*, embody the first serious multilateral effort to discipline agricultural subsidies: "The central thrust of the domestic support provisions of the *Agreement on Agriculture* is to encourage a further shift, over time, towards measures and policies that *distort production and trade as little as possible*."[230] Yet, a cursory reading of these two Articles casts doubt on the efficacy, if not sincerity, of the effort in the Uruguay Round. As with the market access methodology, no specific numerical reduction targets exist in Articles 6 and 7, or anywhere else in the *Agreement*. Moreover, these Article speak of exceptions to commitments to reduce domestic subsidies as eagerly as they set forth the commitments.

From a free trade, as well as a development, perspective, this eagerness is misplaced. Rich countries spend $314 billion annually in domestic support

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Article 16:2 of the *Agreement* further charges the Committee to monitor the *Decision on Measures Concerning the Possible Negative Effects of the Reform Program on Least-Developed and Net Food-Importing Developing Countries*. *Id.* at Art. 16:2.

228. *WTO's Yard a Mess*, *supra* note 1, at 10.

229. I use the word "support" and "subsidy" synonymously. A technical distinction between the two terms is possible. "Support" can be used in the broad sense to cover not only budgetary outlays, but also revenue foregone, whereas "subsidy" can refer only to budgetary outlays. Applying this distinction, a price support measure not involving an actual expenditure would be "support," but not a "subsidy." *See* CROOME, *supra* note 10, at 58 (suggesting this distinction, but using the terms essentially interchangeably).

See Australian Bureau of Agricultural and Resource Economics (ABARE), *Reforming Domestic Agricultural Support Policies through the World Trade Organization* (ABARE Research Report 01.2, February 2001) (discussing domestic support measures and the obligations created by the *Agriculture Agreement*, and a cogent explanation of why implementation of those obligations fails to eliminate distortions in world agricultural trade).

230. CROOME, *supra* note 10, at 56 (emphasis added).

programs for their farmers, an amount exceeding the Gross National Product of all of Sub-Saharan Africa.[231] This support (along with export subsidies) costs farmers in poor countries $24 billion annually in lost income, and eliminating trade distorting subsidies could lead to a tripling of agricultural exports from developing countries, to $60 billion a year.[232] For the countries of the Organization for Economic Co-operation and Development (OECD), more than thirty percent of farm revenue comes from a domestic support program.[233] Thus, one *Financial Times* columnist observes:

> [T]he critics are correct in one thing. The developed nations are indeed the world's piggiest protectionists. Farms are no longer mere farms. They are monuments to the political power of a tiny group that holds the rest of us hostage. The average European cow is allotted a subsidy of more than $2 a day, more than many citizens of the world have to live on.
>
> . . .
>
> Data from the Organization for Economic Co-operation and Development show that full-time farmers in its member countries get the equivalent of $11,000 a year in cash or price support. New Zealand subsidizes to the tune of $1,000 per farmer. The European Union by contrast hands to each of its farmers the equivalent of $17,000 a year. In the U.S., the rate is $16,000. Few can beat Norway, which pays about $45,000.[234]

However, these telling statistics beg an important question: what is "support"? After all, if cutting domestic support is part of the cleansing process to help world agricultural trade emerge from Purgatory, then the necessary starting point is to define what is to be cut.

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231. *See* Becker, *supra* note 32, at A1 (noting this incongruity).

232. *See* Frances Williams, *Drugs Accord Fails to Heal Rifts in WTO*, FIN. TIMES, Aug. 29, 2003, at 4 (mentioning these statistics, some of which are drawn from an August 2003 report by the International Food Policy Research Institute in Washington, D.C.). *See* Arlyn Miller, *Analyzing the "Farm and Rural Investment Act" – The 2002 Farm Bill* (unpublished manuscript on file with author) (discussing reforms to domestic support programs in the United States).

233. Stefan Tangermann, *Cutting Support Can Help Farmers to Prosper*, FIN. TIMES, Aug. 22, 2003, at 11.

234. Amity Shlaes, *Send Farmers Off to the Markets*, FIN. TIMES, Sept. 1, 2003, at 13 (advocating domestic support reductions and formal farmer buy-outs using Tangermann bonds, which are named after Professor Stefan Tangermann, the Director for Food, Agriculture, and Fisheries at the OECD, who in the 1980s called for the securitization and trading of farmer bonds).); *see also* Watkins, *supra* note 16, at 13 (stating that "each year rich countries spend more than $1 bn a day supporting their agricultural producers . . . [and] [t]he European Union and the U.S. account for almost two-thirds of total spending).

Defining "support" is no easy task, because of the diversity and complexity of such programs in the nearly 150 WTO Members. Suggestive of their trade-liberalizing ambitions, the Uruguay Round negotiators developed the concept of "Total Aggregate Measurement of Support," or "Total AMS" for short.[235] They meant for this concept to be a single figure measuring all government support provided by a Member to its agricultural sector, whether on a product-specific or non-product specific basis, as long as the subsidy does not qualify for an exemption stated elsewhere in the *Agreement*.[236] Those exemptions, namely, "Green Box" subsidies, "Blue Box" subsidies, and *de minimis* "Amber Box" subsidies, are discussed below.[237] Suffice it for now to say the Green Box consists of government-funded subsidies that do not distort international trade in agriculture; the Blue Box contains subsidies linked to production (or non-production); the Amber Box has all subsidies not in the first two Boxes, and a low level of Amber Box payments are permitted.[238]

The very term "Total AMS" connotes a summation of itemized monetary values. Article 1(h) of the *Agreement on Agriculture* articulates these items:

> "Total AMS" mean[s] the sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, all non-product-specific aggregate measurements of support and all equivalent measurements of support for agricultural products, and which is:
>
> (i) with respect to support provided during the base period (i.e., the "Base Total AMS") and the maximum support permitted to be provided during any year of the implementation period or thereafter (i.e., the "Annual and Final Bound Commitment Levels"), as specified in Part IV of a Member's Schedule; and

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235. *See Agreement on Agriculture*, Art. 1(h) (defining "Total AMS").

236. *See* World Trade Organization, *Domestic Support in Agriculture – The Boxes* (1 October 2002) (stating that Total AMS "includes all supports for specified products together with supports that are not for specific products, in one single figure."); CROOME, *supra* note 10, at 58 (identifying Total AMS as the "combined annual value" of measures subject to reduction commitments).

Several of the rules on domestic support were imported into the *Agreement* (specifically, into Annexes 2, 3, and 4) from the December 1993 *Modalities Document* (from Annexes 4, 5, and 6 thereto). *Id.* at 53 n.170.

237. As in the *Agreement on Subsidies and Countervailing Measures*, wherein the traffic light terms ("Red Light," "Dark Amber," "Yellow Light," and "Green Light" subsidies) are not used expressly, in the *Agreement on Agriculture*, the terms "Green Box," "Blue Box," and "Amber Box" are not used. However, they are widely accepted and part of the commonplace lingo of an international trade lawyer.

238. *See* CROOME, *supra* note 10, at 56 (explaining that Green Box measures have "little or no distorting effect on trade," whereas Amber Box measures "distort trade," hence the first type of domestic support is preferable to the second type).

(ii) with respect to the level of support actually provided during any year of the implementation period and thereafter (i.e., the "Current Total AMS"), calculated in accordance with the provisions of this Agreement, including Article 6, and with the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule [of Concessions] . . . .[239]

Two points about the initial clause of the *chapeau* in this definition of "Total AMS" suggest an ambitious beginning, and raise hope the definition is free of sin from a free-trade perspective.

First, nothing in Article 1(h), nor elsewhere in the *Agriculture Agreement*, defines "support." That omission contrasts with the clarity of Article 1:1 of the *Agreement on Subsidies and Countervailing Measures* (*SCM Agreement*"), which also emerged from the Uruguay Round. This provision defines "subsidy" as a "financial contribution by a government that confers a "benefit." Article 2:1 of the *SCM Agreement* is similarly clear, as it lays out the "specificity test" (*i.e.*, to be actionable, a "subsidy" must be "specific to an enterprise or industry or group of enterprises or industries"). Presumably, "support", as the term is used in the *Agriculture Agreement*, could be a "subsidy" in the sense of the *SCM Agreement*—a financial contribution conferring a benefit to a specific group. Also, "support" could entail non-financial contributions (*e.g.*, free water for irrigation, as distinct from cash payments, though no doubt the "free" water would have a monetary value) or contributions (financial or otherwise) not conferring a benefit. The word "all" reinforces the sense "Total AMS" is a sincere measurement of every domestic agricultural support program.

Second, neither the definition nor other provisions in the *Agreement on Agriculture* define "agricultural producers." Potentially, they could include individuals and businesses a few steps removed from the core farming activities of preparing land, planting seeds, caring for the growing crops, and harvesting mature crops. Might processing be included? If so, then how far downstream from the core farming activities would processors still be deemed "producers"? For example, might buyers of peanuts, which then roast or salt the peanuts, or make peanut butter, peanut brittle, or chocolate peanut butter cups, be included?

The answer should be "yes" (especially for peanut lovers), insofar as the aim of domestic support obligations is to cut agriculture subsidies as broadly, as well as deeply, as possible. The answer also should be "yes," to the extent

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239. *Agreement on Agriculture*, Art. 1(h) (emphasis added).

that helping agricultural sectors in poor countries develop is important. Ghana, for instance, likely would benefit from being able to diversify into refined chocolates, rather than continue to be dependent on cocoa exports and leave the high value-added process of making chocolates to Belgian and Swiss processors. In other words, would-be and nascent Third World processors could benefit from enhanced access to markets in rich countries, and from lessened competition with subsidized processors in rich countries.

B. ELEMENTS OF TOTAL AMS

The second clause in the *chapeau* for the definition of "Total AMS" in Article 1(h) of the *Agreement on Agriculture* does not appear sinful from a free-trade perspective.[240] On its face, this clause in the *chapeau* presents in writing what can be expressed in a simple arithmetic formula:

Total AMS = Aggregate Measurement of Support for basic agricultural products
\+
Non-product-specific support provided to agricultural producers
\+
Equivalent Measurement of Support

Intuitively, the formula makes sense.[241] The first right-hand side variable, the "Aggregate Measure of Support," or "AMS," is a summation of payments by a WTO Member to support so-called "basic" agricultural goods, added up on a product-by-product basis. Technically, each good has a "specific AMS;"[242] hence the first variable includes the sum of all the specific AMS figures, each one of which corresponds to a different commodity.

For example, assume Malaysia subsidizes three commodities, palm oil (a type of vegetable oil), rubber, and pineapples. It would calculate AMS by summing the subsidies it pays for each of these products. The term "basic agricultural product" refers to commodities "as close as practicable to the

240. *See supra* note 239 and accompanying text (quoting this definition).

241. *See* CROOME, *supra* note 10, at 58 (stating that "[t]he Total AMS figure is arrived at by adding together the support for individual products and the support which is not product-specific").

242. *See Agreement on Agriculture*, Annex 3, ¶ 6 (calling for the calculation of a "specific AMS" for each basic agricultural product); *Statement of Administrative Action*, *supra* note 12, at 718 (stating that "[t]he AMS for a single basic agricultural product is a composite of the value, expressed in national currency, of market price support, direct payments to producers falling outside the green box, and other internal measures that are subject to a reduction commitment, minus any producer assessments").

point of first sale," *i.e.*, as unprocessed as possible, because the first point of sale typically would be from a farm to a processing facility.[243] For instance, pineapples would be the "basic agricultural product" in the chain of production leading to pineapple juice from concentrate. In its Schedule, each WTO Member identifies such basic agricultural products.

The second variable is a summation of support for farmers regardless of the crop they grow or product they process. For instance, assume a government pays every farmer a stipend to purchase domestically-made fertilizer, regardless of the crop a farmer grows, and that is the only such non-product-specific support. Then, this variable would be the sum of the stipends.

The third variable on the right side of the formula for Total AMS refers to what could be dubbed a "default scenario." That occurrence is when calculation of AMS is not feasible.[244] Article 1(d) of the *Agreement on Agriculture* defines the term "Equivalent Measurement of Support," or "EMS," as a monetary value for the annual level of subsidies for producers of a basic agricultural product "through the application of one or more measures."[245] This provision explains EMS is used when "the calculation . . . in accordance with the AMS methodology is *impracticable*."[246]

As any international commercial lawyer knows, "impracticability" and "impossibility" are conceptually different (the latter being more stringent than the former), and the *Agreement* does not insist on "impossibility" before resorting to EMS. Consequently, a WTO Member appears to have considerable latitude in applying its own calculation measure as an alternative to the standard AMS methodology, and indeed to deciding the standard methodology is not practicable. Put differently, perhaps herein lies an occasion (or opportunity) for sin, in the sense of understating AMS, and thus reducing the extent of subsidy cuts.

How is EMS calculated? Annex 4 to the *Agreement on Agriculture* answers this question. Annex 4 contains five general rules for the calculation. First, the EMS must cover support to all basic agricultural products provided by central and sub-central governments.[247] Second, the same base period (discussed later) applies in both AMS and EMS situations. That is, 1986-1988 is the relevant period from which to draw data to calculate the base level AMS

243. *Id.* at Art. 1(b).

244. The United States does not have any EMS items. *See Statement of Administrative Action*, *supra* note 12, at 718.

245. *Agreement on Agriculture*, Art. 1(d).

246. *Id.* (emphasis added).

247. *Id.* at Annex 4, ¶ 1 (stating that "[s]upport at both national and sub-national level shall be included.").

and for the base level EMS.[248] Third, an EMS must be calculated according to the subsidy as received as closely as practicable to the point of first sale.[249] In other words, the focus of the calculation is on payments to producers (*i.e.*, farmers), not downstream subsidies. However, fourth, payments to processors must be included in an EMS calculation, if those payments benefit farmers.[250] At least insofar as purchases by a processor of a farmer's output qualify as a "benefit," this caveat ought not to pose a difficulty. Fifth, any agricultural levies or fees paid by farmers are deducted from EMS; otherwise EMS would over-state the amount of the subsidy.[251]

These rules are generic in that they apply to any domestic agricultural subsidy subject to reduction commitments, regardless of the particular type of subsidy whose amount is being ascertained. In reality, WTO Members subsidize farmers in different ways, and a particular Member may sponsor a variety of payment programs. To accommodate this diversity in domestic subsidy schemes, Annex 4 to the *Agriculture Agreement* delineates among three wide categories of domestic subsidies. It does so, first, by repeating the formulation that EMS is used only when calculating "this component of the AMS is not practicable."[252] Initially, the words "this component of the AMS," appear puzzling. Would not "Total AMS" be technically correct? The answer is "no."

It is important to appreciate Annex 4 closely tracks Annex 3, which concerns the calculation of AMS (and which is discussed more fully below).

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248. *See Id.* at Art. 1(d)(i) (discussing "support provided during the base period"), Annex 3 ¶¶ 9, 11 (establishing 1986-88 as the base period for calculating the fixed external reference price), and Annex 4 ¶ 3 (applying the rules of Annex 3, paragraphs 10-13, to EMS calculations of non-exempt direct payments and other non-exempt support).
It is rather tricky to lay out the textual basis for reaching this conclusion with respect to an EMS calculation for a market price subsidy. Neither the text of the *Agriculture Agreement*, nor its Annexes, spells out 1986-88 as the relevant base period. The key provision is paragraph 2 of Annex 4, which ought to contain an unequivocal statement about the base period, but does not. Fortunately, paragraph 2 refers to paragraph 1 of the same Annex, and the first sentence of paragraph 1 refers to Annex 3 (where the base period is defined). Even so, the textual basis seems weaker for this conclusion than it should be.

249. *See id.* at Annex 4, ¶ 2 (requiring calculation "on a product-specific basis for all basic agricultural products as close as practicable to the point of first sale receiving market price support and for which the calculation of the market price support component of the AMS is not practicable."). *Id.* ¶ 4 (setting forth the rule in the first sentence).

250. *See id.* ¶ 4 (setting forth the rule in the second sentence).

251. *See id.* (setting forth this deduction in the third sentence).

252. *Id.* ¶ 1. Article 1(d) of the *Agreement on Agriculture* expressly refers to Annex 4, in the context of calculating EMS for any year of the period in which the *Agreement* is implemented, or thereafter, *i.e.*, in effect, any year after the base period. As with the Article 1(a) and 1(h) definitions of "AMS" and "Total AMS," respectively, Article 1(d) acknowledges the level of support will be specified in Part IV of the Schedule of each Member (typically in tables prepared by a Member and incorporated by reference in Part IV). That specification is the public proclamation of a Member of its bound level of support for its agricultural sector, from which it pledges (or may pledge) reductions.

Annex 3 identifies three types of domestic support programs, or, in the language of Annex 4, "components of AMS." Annex 4 makes use of this classification. In brief, the three types are:

(1) market price support (also called producer price support), *i.e.*, government maintenance of an applied administered price, as measured by the gap between the administered and a fixed external reference price;

(2) non-exempt direct payments, *i.e.*, non-*de minimis* Amber Box subsidies paid directly to producers; and

(3) other non-exempt support, *i.e.*, indirect payments such as input subsidies and marketing-reduction costs.

Essentially, Annex 4 counsels WTO Members to follow, as closely as possible, the Annex 3 calculation rules for each component of AMS, whenever strict adherence to those rules is not practicable.

What are the relevant Annex 3 rules for calculating the EMS provided by price support, direct payments, and other types of subsidies? First, with respect to market price support, a WTO Member is to use the applied administered price and the volume of production eligible to receive that price.[253] In other words, it is to apply the familiar "price times quantity" formula (the price maintained by the government, multiplied by the quantity of output entitled to receive that price) to gauge the amount of price support. Only if it is not practicable to use this formula may a WTO Member use its budgetary expenditures as the EMS of its producer price maintenance scheme.[254]

Second, with respect to non-exempt direct payments and other product-specific subsidies, Annex 4 instructs a WTO Member to calculate the EMS by looking to Annex 3. Assuming such payments depend on a price gap (*e.g.*, between a reference and administered price), then the Member has a choice in how to value the payments. It may elect to calculate the EMS for them using the gap between the relevant fixed reference price and the applied administered price, multiplied by the quantity of eligible production.[255] Or, it

253. *See id.* ¶ 2 (stating that "equivalent measurements of market price support shall be made using the *applied administered price and the quantity of production eligible to receive that price*" (emphasis added)); *see also Statement of Administrative Action*, *supra* note 12, at 718 (explaining that market price support is the gap between the domestic administered and world market price, multiplied by the quantity of output eligible for support).

254. *See id.* ¶ 2 (stating that "where this [calculating the product of the administered price and eligible quantity] is not practicable, on *budgetary outlays used to maintain the producer price*" (emphasis added)).

255. *See id.* ¶ 3 (stating that "the basis for equivalent measurements of support concerning these measures [*i.e.*, non-exempt direct payments and other product-specific subsidies not exempt from reduction commitments] shall be calculations as for the corresponding AMS components (*specified in paragraphs 10 through 13 of Annex 3*)" (emphasis added)), and Annex 3 ¶ 10 (stating that "non-exempt direct payments which are dependent on a price gap shall be calculated using *either the gap between the fixed reference price and the applied administered price multiplied by the quantity of production eligible to receive the administered price, or using budgetary outlays*").

may look to its budgetary outlays.[256] If the amount of the subsidy made by the Member to producers is independent of commodity prices, then the Member calculates the EMS using actual budget expenditures.[257]

The above discussion is a testament to the complexity of calculating EMS, and thus AMS and Total AMS. Yet, even this discussion is simplified. Complexity (like idleness) may well be the playmate of the devil. That is to say, complexity may afford WTO Members the opportunity to behave opportunistically, and thus be the playmate of protectionism. It may give them choices in the calculations that lead to higher or lower amounts of domestic agricultural support. The goal is, or ought to be, a "true" accounting of the level domestic agricultural support and thereby confidence each Member is applying reduction commitments to support levels that are not over-stated. To the extent a Member aims to show a higher level for a particular agricultural commodity, in the hope of softening the blow of reduction commitments on producers whose subsidies are being cut, the Member has worked the rules to the benefit of those farmers. It has done so at the expense of farmers of the same commodity in other countries, who must compete against higher-than-true subsidy levels and, consequently, less-dramatic-than-should-be subsidy cuts.

In sum, at least some steps in the calculation of AMS potentially afford room for opportunism. With respect to the EMS, the *Agreement on Agriculture* seems to give Members considerable discretion in whether to make an EMS calculation for one or more components of AMS. Neither the *Agreement* nor its Annexes explain what circumstances might make it "not practicable" to compute AMS. Depending on the facts, a Member may be able to make both a normal AMS and an EMS calculation, uncover which is lower, and then offer a *post hoc* rationale for choosing the higher figure. To the extent the rules permit Members to do so, they provide yet one more reason why world trade in agriculture is in Purgatory.

C. THE "AMS" ELEMENT

The first two clauses of the *chapeau* to the definition of "Total AMS" in Article 1(h) of the *Agreement on Agriculture* suggest all that is needed is to compute the terms on the right-hand side of the formula, and deal with the final two clauses in the definition (clauses (i) and (ii)), concerning base and

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256. *See id.* at Annex 3 ¶ 10 (*quoted supra* note 255); *Statement of Administrative Action, supra* note 12, at 718 (explaining non-exempt direct support payments can be measured using the price-gap methodology, or by actual government budget outlays).

257. *See id.* ¶ 12 (setting forth this rule).

post-base periods. However, that suggestion is misleading.[258] At least from a free-trade perspective, the definition of "Total AMS" is neither so easy nor without sin.

The phrase italicized in clause (ii), which refers to Article 6 of the *Agriculture Agreement*, is critical. This phrase is the technical legal basis for exempting Blue Box subsidies and *de minimis* Amber Box subsidies from the calculation of Total AMS. Blue Box subsidies are the subject of Article 6:5, and *de minimis* Amber Box subsidies are the topic of Article 6:4. The reference to them in the definition of "Total AMS" ensures their exclusion from the computation.[259]

Further, the first element in the formula for "Total AMS" is "Aggregate Measurement of Support," without the prefix "Total," and it is itself a term defined in Article 1 of the *Agriculture Agreement*. In that definition is yet more protectionism, namely, words that exempt another category of support programs from being counted in AMS and thus in Total AMS. Article 1(a) of the *Agreement on Agriculture* defines "AMS" as the following:

> The annual level of support, expressed in monetary terms, provided for an agricultural product in favor of the producers of the basic agricultural product or non-product-specific support provide in favor of agricultural producers in general, *other than support provided under programmes that qualify as exempt from reduction under Annex 2* to this *Agreement*, which is:
>
> (i) with respect to support provided during the *base period*, specified in the relevant tables of supporting material incorporated by reference in Part IV of a Member's Schedule; and
>
> (ii) with respect to support provided during *any year of the implementation period and thereafter*, calculated in accordance with the provisions of Annex 3 of this *Agreement* and taking into account the constituent data and methodology used in the tables of

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258. *See supra* note 239 and accompanying text (defining "Total AMS").

259. To be technically precise, Article 6:4 excludes Blue Box subsidies from the calculation of "Current Total AMS," which is defined in Article 1(h)(ii) of the *Agriculture Agreement* as "the level of support actually provided during any year of the implementation period and thereafter." Article 6:5 performs the same function with respect to Green Box subsidies.
Article 1(h)(i) and common sense indicate "Current Total AMS" is distinct from two other measurements. "Base Total AMS" is Total AMS during the base period for calculating agriculture subsidies and reduction commitments. "Annual and Final Bound Commitment Levels" are commitments made by a WTO Member, and memorialized in Part IV of its Schedule, to cut subsidies.

supporting material incorporated by reference in Part IV of the Member's Schedule.[260]

Plainly, "AMS" is a single number, a monetary figure, for each WTO Member pertaining to a "product" or "non-product specific support provided in favour of agricultural producers in general;" while "Total AMS" is a value incorporating all support for "producers."[261] Conceptually, the sum of all product-specific and non-product specific support captured by the term "AMS" yields "Total" support to producers envisioned by the term "Total AMS."[262]

How, exactly, does the calculation occur? But for Annexes 3 and 4 to the *Agreement on Agriculture*, WTO Members would be entirely free to answer as they please. Fortunately, these Annexes impose discipline on the calculation.[263] There are four essential rules. First, AMS equals the sum of all product-specific support for each basic agricultural product for which a Member provides price support, or other non-exempt direct payments. Accordingly, the Member establishes a "specific AMS" for each basic agricultural product to which it provides product-specific support.[264] Next, the Member adds all non-product specific support payments, thereby obtaining one monetary figure.[265] Third, it adds this figure to its product-specific support payments.[266] The resulting sum is the Member's AMS.[267] In this sum, the Member must include not only actual government expenditures, but also revenue forgone (*e.g.*, through a tax credit or deduction), whether at the central or sub-central level[268] Finally, the Member deducts any fees paid by farmers in connection with obtaining the support.[269] Thus, in arithmetic terms:

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260. *Id.* at Art. 1(a) (emphasis added).

261. *Agreement on Agriculture*, Art. 1(a), (h).

262. *Id.*

263. *Id.* at Annex 3-4.

264. *See id.* at Annex 3, ¶ 6 (stating that "[f]or each basic agricultural product, a specific AMS shall be established, expressed in total monetary value terms").

265. *Id.* ¶ 1.

266. *Id.*

267. *See id.* (explaining how to calculate "AMS").

268. *See id.* ¶¶ 2-3 (mandating, respectively, the inclusion of "both budgetary outlays and revenue foregone" and "national and sub-national level" payments).

269. *See id.* ¶ 4 (setting forth the deduction from AMS for "[s]pecific agricultural levies or fees paid by producers"). Neither the *Agreement* nor Annex elaborates on what might qualify as a "specific agricultural levy or fee." *Id.*

AMS = Sum of Specific AMS (that is, of all product-specific support to basic agricultural products)
+
Sum of all non-product specific support
-
Fees paid by producers

For instance, suppose the United States subsidizes four products, cotton, milk, peanuts, and rice, in the amounts of $ 1, 2, 3, and 4 billion respectively.[270] To register producers with these subsidy programs, and

270. In fact, the example of cotton is not a supposition, as recent media coverage highlights. *See* Shlaes, *supra* note 234, at 13; *The Long Reach of King Cotton*, N. Y. TIMES, Aug. 5, 2003, at A18; *Stitched Up*, THE ECONOMIST, July 26, 2003, at 71; Watkins, *supra* note 16, at 13. As these articles reveal, the world's largest cotton producers, in terms of market share, are China (twenty-five percent), United States (twenty-one percent), and India (twelve percent). *Stiched Up*, *supra* at 71. China provides its cotton farmers with $1.2 billion annually. *Id.* The United States spends over $3 billion, with each acre (equal to 0.4 hectares) of American cotton production getting $230 annually in domestic support (through guarantees of high prices). *Id.* In its June 2003 CAP reforms, the EU left untouched the $700 million of support it provides to cotton farmers in Greece and Spain. *Id.* These facts should not imply the United States has a comparative advantage in cotton. To the contrary, it is a relatively inefficient producer. It costs 50 percent more to grow cotton in the United States than in Africa. *Id.* Notably, there are 25,000 cotton farmers in the United States, and they have an average net worth of almost $1 million. *Long Reach of Cotton*, *supra* at A18. In contrast, there are 10-11 million of them in West and Central Africa, and most are poor by any measure. Watkins, *supra* note 16, at 13. In Burkino Faso, 2 million people work in the cotton industry. Shlaes, *supra* note 234, at 13. Yet, the amount the United States spends on its cotton farmers exceeds the entire Gross Domestic Product of sub-Saharan African countries like Burkino Faso and Mali. Watkins, *supra* note 16, at 13.

As these articles also reveal, sub-Saharan African countries are trying to gain world market share, which stands at 5 percent, and they account for one-eighth of all cotton exports in the world. *Stitched Up*, *supra* at 13. For Burkina Faso and Mali, cotton provides one-third of export earnings, and for Chad, it provides one-quarter. *Id.* By at least one estimate, the subsidy schemes of developed countries lead them to dump cotton on the world market, lowering world cotton prices by about 25 United States cents and costing African cotton exporters $250 million in export earnings. *Id.* Dumping has caused cotton prices to fall so steeply that cotton from the otherwise competitive farmers in Burkino Faso now is ten cents higher than American cotton. *Long Reach of Cotton*, *supra* at A18. If the ripple effects of the tumble in cotton prices on African economies are tallied, the cost to them of cotton subsidies in developed countries is $1 billion. *Stitched Up*, *supra* at 13. Were the United States and other developed countries to cease subsidizing cotton, presumably the world market price of cotton would rise, yielding more profits to African farmers and increasing the export revenues of their countries. *Long Reach of Cotton*, *supra* at A18. The positive knock-on effects could be more investment in inputs and technologies by the farmers.

Several sub-Saharan African cotton-producing countries (*e.g.*, Burkino Faso) are predominantly Muslim. *Id.* There might be yet more positive effects of taking steps to benefit sub-Saharan African farmers, not the least of which could be assisting in poverty alleviation and thereby (at least indirectly) enhancing America's national security (assuming poverty is a breeding ground for extremism). Doubtless, however, powerful political interests in cotton-growing areas of the United States, which include Arizona, California, and various Southern states, would lobby against terminating the subsidies. *See* Neil King, Jr. & Scott Miller, *Post-Iraq Influence of U.S. Faces Test At New Trade Talks*, WALL ST. J., Sept. 9, 2003, at A1, A10 (also opining the current administer the payments, the Department of Agriculture imposes a processing charge of $100 per producer, thereby collecting a total of $500 million. Suppose, further, that three states, Kansas, Missouri, and Nebraska, provide support to all farmers, regardless of crop type, for soil conservation.[271] Support from these states totals $5 billion. This support does not qualify for the Green Box or the Blue Box, and it exceeds the *de minimis* threshold for the Amber Box. Applying the above formula to these data, the AMS for the United States would be $14.5 billion.

As in the definition of "Total AMS" and in the definition of "AMS," the focus is on subsidization of "basic agricultural products." Does that focus entirely exclude payments to processors? The answer is "no." Again, some subsidies paid by a WTO Member to agricultural processors may be included in AMS, namely, those processor payments that benefit producers of basic agricultural products.[272] As a theoretical matter, it is unclear whether an actual benefit must exist, or the potential for one is enough. As a practical matter, depending on the particular scheme, there may be considerable room for arguing the effect is to benefit farmers growing the basic product that subsequently is processed.

D. *B – B*OXES FOR DOMESTIC SUPPORT

One "B" in the acronym *BARBER* stands for boxes in which domestic agricultural subsidies are classified. Yet, the sin associated with the boxes is not evident from the first clause of the *chapeau* of the definition of "AMS" in Article 1(a) of the *Agreement on Agriculture*. Likewise, it is not obvious from the disciplines on the calculation of "AMS" imposed by Annexes 3 and 4. Rather, the seeds of protection are in the last clause of the *chapeau*. There, hopes dim that the monetary figure captured in "AMS," and thereby in "Total AMS," is a truly "aggregate" one. The language italicized in the *chapeau* is critical.[273] It is the exemption for a major category of support called "Green Box" subsidies. The words "other than" in the definition of "AMS," which are disappointing from a trade-liberalizing vantage, signal that domestic support programs fitting within the Green Box are exempt from reduction.

Chairman of the House Ways and Means Committee, Bill Thomas, from California, would be alienated by an effort to reduce cotton subsidies).

271. *See* DONALD WORSTER, DUST BOWL (1979) (discussing the highly engaging history of soil conservation problems in the Southern Plains during the 1930s).

272. *See Agreement on Agriculture*, Annex 3, ¶ 7 (stating that "[m]easures directed at agricultural processors shall be included to the extent that such measures benefit the producers of the basic agricultural products.").

273. *See supra* note 260 and accompanying text (the definition of "AMS").

The point is Uruguay Round negotiators were nothing less than devilishly clever in defining "Total AMS" and its key element, "AMS." They exempted Blue Box and *de minimis* Amber Box subsidies by referring in the definition of "Total AMS" in clause (ii) of Article 1(h) to Article 6, which discusses these two Boxes. In the definition of "AMS" in Article 1(a), they exempted Green Box subsidies through the reference to Annex 2. These exemptions ensure "Total AMS" is not "total," nor is "Aggregate Measurement of Support" really "aggregate." Because the single monetary sum for domestic support does not include subsidy programs in these Boxes, the commitments made by WTO Members to reduce domestic support, which Total AMS gauges, are not comprehensive. To stretch the metaphor of Purgatory, it is as if WTO Members went to confession during the Uruguay Round, but were not thorough in accounting for their agricultural programs nor in their pledge to avoid them going forward. The consequence is cross-border agricultural trade that is not free from government support. That consequence is enduring because the exemptions are permanent, unless during the Doha Round WTO Members agree to alter or scrap them.[274]

As intimated, the occasion for this sin is the existence in the *Agriculture Agreement*, and its Annexes, of three broad categories, or "boxes," of domestic agricultural support programs.[275] Green and Blue Box programs are entirely exempt from reduction commitments. Reduction commitments apply only to non-*de minimis* Amber Box programs, and any Amber Box subsidy in excess of a commitment is prohibited.[276] The existence of these Boxes (particularly the Blue Box) is yet another reason for characterizing the state of global agricultural trade as "Purgatorial."

A fourth box, the "Special and Differential Treatment," or "Development," Box exists for developing country WTO Members.[277] Three kinds of government-funded programs in these Members qualify for this Box: (1) an investment subsidy generally available to farmers (*i.e.*, not specifically targeted at producers of certain crops), (2) an input subsidy (*e.g.*, for fertilizers) generally available to low-income or resource-poor farmers, and (3) a subsidy to encourage diversification from growing narcotics (whether or not

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274. *See* October 2002 *Briefing Document*, *supra* note 25, at 20 (discussing the Boxes and proposals to change or eliminate them).

275. *See Domestic Support in Agriculture*, *supra* note 236 (discussing one-page reference to the boxes).

276. *See* October 2002 *Briefing Document*, *supra* note 25, at 19 (stating that "[t]he Agriculture Agreement has no red box, although domestic support exceeding the reduction commitment levels in the amber box is prohibited ").

277. *Id.* at 19-20.

generally available).[278] Subsidies in the Special and Differential Treatment Box share a common purpose, namely, to encourage Third World agricultural and rural development. However, this Box is not to be confused with more ambitious proposals by many developing countries, in the context of the Doha Round talks, to create a "Development Box." In that proposed Box would be, for instance, measures to support agriculture and food security, and by virtue of being in the Box, they would be exempt from discipline.[279]

Underlying the Box classification system is a *de minimis* level of subsidy support—five percent for developed country WTO Members and ten percent for developing countries. No *de minimis* level applies to least developed countries, because their subsidy programs are exempt from reduction commitments. That is, product-specific domestic support up to five or ten percent of the total value of a Member's production of a basic agricultural product in a year is considered *de minimis*.[280] Similarly, non-product-specific support that does not exceed five (or ten) percent of the value of a Member's total agricultural production is *de minimis*.[281] These thresholds apply regardless of the box in which the subsidy would be classified. The legal repercussion of finding a subsidy program to be *de minimis* is its exclusion from both the Current AMS calculation, and hence from the reduction commitments. Conversely, Article 7:2(b) of the *Agriculture Agreement* explains the legal repercussion of a Member not making a commitment on domestic support reduction in its Schedule of Concessions. It is that the Member must not provide support to its agricultural producers beyond the relevant *de minimis* level.[282] That ought to be incentive enough for most Members to make a commitment.

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278. *See Agreement on Agriculture*, Art. 6:2 (setting forth the criteria for the Special and Differential Treatment box).

279. *See* MICHALOPOULOS, *supra* note 17, at 210 (discussing the Development Box).

280. *See Agreement on Agriculture*, Art. 6:4(a)(i) (the 5 percent level for product-specific subsidies in developed countries), and 6:4(b) (the 10 percent level for developing countries); CROOME, *supra* note 10, at 58-59 (identifying these thresholds).

281. *Id.* at Art. 6:4(a)(ii) (the 5 percent level for non-product-specific subsidies in developed countries) and 6:4(b) (the 10 percent level for developing countries).
In contrast to Article 6:4(a)(i) of the *Agriculture Agreement*, Article 6:4(a)(ii) does not contain the phrase "during the relevant year," or other words indicating the relevant period for calculating the total value of a Member's agricultural production is a year. Surely, though, a year must be the relevant period in both instances.

282. *See id.* at Art. 7:2(b) (stating that "[w]here no Total AMS commitment exists in Part IV of a Member's Schedule, the Member *shall not provide support to agricultural producers in excess of the relevant de minimis level* set out in paragraph 4 of Article 6" (emphasis added)).

1. The Green Box

It is only right, given the urgent need for rural development in the Third World, that Special and Differential Treatment Box subsidies are exempt from the "Current Total AMS" calculation and reduction commitments.[283] "Current Total AMS" is the actual support level in a Member in a year, and is compared against that Member's commitments.[284] Likewise, there is good reason for excusing Green Box support, though the reason is not universally persuasive.[285] To be sure, the rubric "Green Box" is somewhat misleading. It does not refer only to agricultural subsidies designed to promote environmental purposes. The better metaphorical link is to a traffic light than to Green party causes.[286]

A domestic agricultural subsidy is classified in the "Green" Box if it has a minimal impact on trade. As such, it is permissible. A WTO Member has a "green light," as it were, to provide non-trade distorting support.

> In order to qualify for the "green box," a subsidy *must not distort trade*, or at most cause *minimal* distortion. These subsidies have to be *government-funded* (not by charging consumers higher prices) and *must not involve price support.* They tend to be programmes that are *not directed at particular products*, and include *direct income supports* for farmers that are not related to (are "*decoupled*" from) current production levels or prices.

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283. *See id.* at Art. 6:2 (containing the exemption), *see also* October 2002 *Briefing Document*, *supra* note 25, at 19-20 (explaining the exemption).

284. *See id.* at Art. 1(h)(ii) (defining "Current Total AMS" as "the level of support actually provided during any year of the implementation period and thereafter"); *see also Statement of Administrative Action*, *supra* note 12, at 718 (providing the same definition).

285. As the WTO Secretariat observes,

> Most countries accept that agriculture is not only about producing food and fibre, but also has other functions, including . . . non-trade objectives. *The question debated in the WTO is whether "trade-distorting" subsidies, or subsidies outside the "green box," are needed in order to help agriculture perform its many roles.*
>
> Some countries say all the [non-trade] objectives can and should be achieved more efficiently through "green box" subsidies which are targeted directly at these objectives and by definition do not distort trade. . . .
>
> Other countries say the non-trade concerns are closely linked to production. They believe subsidies based on or related to production are needed for these purposes. For example, rice fields have to be promoted in order to prevent soil erosion, they say.
>
> Many exporting developing countries say proposals to deal with non-trade concerns outside the "green box" of non-distorting domestic supports amount to a form of special and differential treatment for rich countries.

October 2002 *Briefing Document*, *supra* note 25, at 24 (emphasis added).

286. The WTO itself uses the metaphor of a traffic light for agricultural subsidies boxes. *See, e.g.*, *Domestic Support in Agriculture*, *supra* note 236 (stating that "[i]n WTO terminology, subsidies in general are identified by 'boxes' which are given the colors of traffic lights"); October 2002 *Briefing Document*, *supra* note 25, at 19 (using the metaphor).

"Green box" subsidies are therefore *allowed without limits*, provide they comply with relevant criteria. They also include *environmental protection* and *regional development* programmes . . . .[287]

A pithy way to summarize Green Box programs is to dub them "social" subsidies, because their aim transcends the economics of any particular commodity.

For example, Green Box programs in the United States include crop disaster assistance, the Conservation Reserve Program, the Women, Infants and Children Food Assistance Program, agricultural research, and extension, inspection, and marketing services.[288] Indeed, Green Box support tends not to be product-specific, nor is it linked to output or prices. Accordingly, a domestic support measure to help the agricultural sector (*e.g.*, farmers in general) would be excluded from the calculation of AMS, and thereby from the AMS reduction commitments, as long as, it has no or a minimal impact on trade. Indeed, a Member can increase Green Box support funding, or devise and implement new Green Box measures.[289]

Consequently, by using the Green Box, WTO Members "retain a high degree of flexibility for achieving the aims of their agricultural policies."[290] Fortunately, to ensure they do not abuse the Green Box, using it to cover trade-distorting domestic support, the Uruguay Round negotiators gave considerable guidance as whether a measure qualifies for the Green Box and exclusion from the AMS calculation. They articulated one criterion applicable to all subsidy schemes that are candidates for the Green Box, plus policy-specific criteria linked to the type of subsidy at issue. They also put in Article 7 of the *Agreement* the mandate that WTO Members conform these candidates to the general and policy-specific criteria; otherwise the Member must include the offending scheme in Current Total AMS and must apply reduction commitments to it.[291] The first paragraph of Annex 2 to the *Agreement on*

287. October 2002 *Briefing Document*, *supra* note 25, at 20 (emphasis added). Annex 2 of the *Agreement on Agriculture* sets for the specific requirements for fitting in the Green Box.

288. *See Statement of Administrative Action*, *supra* note 12, at 717 (listing these programs as qualifying for the Green Box).

289. *See* CROOME, *supra* note 10, at 56-57 (stating that "public spending on Green Box measures can be maintained, or even increased," and that Members "may at any time introduce new Green Box measures").

290. *Id.* at 57.

291. *See Agreement on Agriculture*, Art. 7:1 (stating that "[e]ach Member shall ensure that any domestic support measures in favor of agricultural producers which are not subject to reduction commitments because they qualify under the criteria set out in Annex 2 . . . are maintained in conformity therewith"). Conversely, a Member could alter a domestic support measure that does not qualify for the Green Box in such a way as to satisfy the Green Box criteria.

Agriculture articulates the basic criterion, namely, "no trade distortion" (in the *chapeau*), which two subsequent sub-paragraphs further define as the following:

> Domestic support measures for which exemption from the reduction commitments is claimed shall meet the fundamental requirement that they have *no, or at most minimal, trade-distorting effects or effects on production.* Accordingly, all measures for which exemption is claimed shall conform to the following *basic criteria*:
>
> (a) the support in question shall be provided through a *publicly-funded government programme* (including government revenue foregone) not involving transfers from consumers; and,
>
> (b) the support in question *shall not have the effect of providing price support* to producers;
>
> *plus policy-specific criteria* and conditions set out below.[292]

In other words, there is said to be no or minimal trade distortion if there is public funding but no price support. To say a subsidy must be "publicly funded" means it must not be financed by charging higher prices to consumers of raw or processed agricultural goods.[293] To say a subsidy must not "have the effect of providing price support" means it does not operate in a way to keep prices of a good at or above a certain level, or within a certain band.

Is it, in fact, true in every instance of a publicly funded agricultural subsidy de-coupled from prices that there is no trade distortion? Certainly not. Consider the quintessential example of Green Box support, namely, income support.[294] A farmer in Virginia receiving income support of, say $250 per month can decide to keep bees and make honey (or more of it, if he already is in that business). Would his honey output, along with that of all other farmers, distort trade by displacing honey imports from China? Quite possibly, yes. The distortion will be magnified if there is an anti-dumping action brought

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Then, the Member must notify the WTO Committee on Agriculture. *See Agreement on Agriculture*, Art. 18:3; *see also Statement of Administrative Action*, *supra* note 12, at 719.

292. *Agreement on Agriculture*, Annex 2 ¶ 1 (emphasis added) and 7:2(a) (stating that "[a]ny domestic support measure . . . that cannot be shown to satisfy the criteria in Annex 2 . . . or to be exempt from reduction by reason of any other provision of this *Agreement* shall be included in the Member's calculation of its Current Total AMS").

293. *See Domestic Support in Agriculture*, *supra* note 236 (discussing the Green Box), *see also* October 2002 *Briefing Document*, *supra* note 25, at 20 (discussing the Green Box).

294. *See Domestic Support in Agriculture*, *supra* note 236 (highlighting, as an example of a Green Box subsidy, direct income support for farmers that are decoupled from production levels and prices), *see also* October 2002 *Briefing Document*, *supra* note 25, at 20 (discussing direct income support).

against Chinese honey imports (as, indeed, has occurred). The point is that the Green Box is an ostensibly noble effort to discipline subsidies with rules that are easier to articulate and justify in theory than sometimes in practice.

Along with the basic criterion, Annex 2 to the *Agreement* contains policy-specific criteria, plus a non-exclusive list of Green Box subsidies. Logically, the Annex presents this list of examples in the context of the policy-specific criteria. The Table below summarizes these illustrations and attendant criteria. As just indicated, direct payments to producers and decoupled income support may qualify for the Green Box, if they meet Annex 2 elaborates. Like all other subsidy programs, direct payments to producers must meet the basic criterion for the Green Box. They also must meet essentially the same criteria as decoupled income support. The amount of payments must not be tied to production type or volume, domestic or international prices, or the factors of production employed.[295] In brief, direct payments to producers and decoupled income

*Table 5: Illustrative List of Green Box Subsidies and Policy-Specific Criteria**

Type of Green Box Subsidy and Paragraph Reference in Annex 2 of the Agreement on Agriculture	***Summary of Policy-Specific Criteria to Qualify for the Green Box***
General Services ***(Paragraph 2)*** Government services such as research and development, pest and disease control, training, extension and advisory services, inspection, marketing and promotion, and infrastructure (such as electricity reticulation, roads and other transportation facilities, ports, water supply, dams and drainage).	1) Service is to agricultural or rural community. 2) No direct payments are made to farmers or processors. 3) Regarding infrastructure, payments are only for capital construction costs, and not for on-farm facilities (except reticulation of generally available public utilities).
Public Stockholding for Food Security ***(Paragraph 3)*** Expenditures for accumulating and holding food.	1) The product is an integral part of the food supply, as identified in national legislation. 2) The volume and accumulation of stocks corresponds to pre-determined targets. 3) The targets relate solely to food security. 4) Stock accumulation and disposal are transparent. 5) Food purchases for the stock by the government are at current market prices. 6) Food sales from the stock by the government are at no less than the current domestic market prices.
Domestic Food Aid ***(Paragraph 4)*** Government food assistance.	1) Aid is to sections of population in need. 2) There are clear criteria for eligibility. 3) Eligibility criteria relate to nutrituional objectives. 4) Aid is in the form of providing food directly, or the

295. *See Agreement on Agriculture*, Annex 2 ¶ 6.

	means for buying food (at either market or subsidized prices.) 5) Financing and administration are transparent. 6) Food purchases for aid by the government are at current market prices.
Direct Payments to Producers and Decoupled Income Support (Paragraphs 5-6) Income subsidies.	1) There are clear criteria for eligibility. 2) Eligibility criteria include income, status as producer or landowner, factor use, or output. 3) Payments must not relate to type or volume of output, and recipients cannot be required to produce in order to obtain payment. 4) Payments must not relate to prices, nor to employing factors of production.
Income Insurance and Income Safety-Net Programs (Paragraph 7) Government financial participation in a program to provide income insurance or a safety-net for income.	1) Eligibility must be based on loss of income derived from agriculture. 2) The income loss must exceed 30 percent of average income in prior 3-year period. 3) Payments must compensate for less than 70 percent of the producer's income loss. 4) Payments must relate solely to income. 5) Payments must not relate to type or volume of output, prices, or employing factors of production. 6) If natural disaster relief also is collected, then the sum of payments must be less than 100 percent of total loss.
Natural Disaster Relief (Paragraph 8) Government assistance to provide relief in the event of a natural disaster, or a like disaster (including disease, pests, nuclear accident, or war).	1) There is formal recognition by the government of a natural or like disaster. 2) Payments must be only for the loss of income, livestock, land, or other production factor due to the natural disaster. 3) Payments must compensate for no more then the replacement cost of losses. 4) Payments must not be conditional upon a type or quantity of future output. 5) Payments made during a disaster must not exceed the amount necessary to prevent or alleviate further loss. 6) If payments also are collected under an income insurance or income-safety program, then sum of the payments must be less than 100 percent of total loss.
Producer Retirement (Paragraph 9) Structural adjustment designed to retire farmers.	1) There are clear criteria for eligibility. 2) Eligibility criteria facilitate retirement of producers, or help them obtain non-farm jobs. 3) Payments must be conditional on the total and permanent retirement of the recipient from agricultural.
Resource Retirement (Paragraph 10) Structural adjustment programs designed to retire resources from the agricultural sector.	1) There are clear criteria for eligibility 2) Eligibility criteria remove land, livestock, and other resources from marketable agricultural output. 3) Payments must be conditional on retirement of land from production for at least 3 years, and on the permanent disposal of livestock. 4) Payments must not be conditional on an alternative

	use of land or other resources. 5) Payments must not be related to the type or quantity of output, nor to prices of the output from the land or other resources remaining in production.
Investment ***(Paragraph 11)*** Structural adjustment to aid investment in agriculture.	1) There are clear criteria for eligibility. 2) Eligibility criteria assist financial or physical restructuring of a producer's operations in response to structural disadvantages that are demonstrated by objective means. 3) Payments must not be related to the type or quantity of output, or to prices. 4) Payments must last only until the investment has been realized. 5) Payments must not be conditional on producing certain crops (but may bar production of a certain crop). 6) Payments must be limited to amount necessary to compensate for structural disadvantage.
Environmental Programs ***(Paragraph 12)*** Government programs for the environment or conservation.	1) There are clear criteria for eligibility. 2) Eligibility criteria contain specific conditions to be fulfilled, including production methods or inputs. 3) Payments must be limited to covering extra costs or loss of income associated with complying with the program.
Regional Assistance ***(Paragraph 13)*** Government programs to help farmers in disadvantaged regions.	1) Eligibility must be limited to farmers in a disadvantaged region, but must be generally available to all farmers in that region. 2) The disadvantaged region must be a clearly designated, contiguous geographical area with a definable economic and administrative identity. 3) The region must be considered "disadvantaged" on the basis of neutral and objective criteria set forth by law or regulation. 4) Difficulties faced by the region must not be temporary. 5) Payments must not be related to the type or quantity of output, nor to prices. 6) Payment must be limited to the extra cost or income loss associated with farming in the disadvantaged region. 7) If payments are related to factors of production, then the amounts must decrease above a specified level of the factor in question.

*Note: The policy-specific criteria are in addition to the basic criterion that must be satisfied to qualify for the Green Box, namely, no or minimal trade distortion. This criterion, stated in Annex 2, paragraph 1, mandates that the subsidy not distort trade, be publicly funded, and not have the effect of supporting agricultural prices.

Likewise, income insurance and income safety-net programs also may qualify for the Green Box, if they meet the policy-specific criteria of Annex 2.[296] Essentially, these programs help protect a farmer against the loss of agriculture-sourced income, but only if the loss is over thirty percent of his income in a preceding three-year period.[297] In the first year of assistance, there is a cap on payments, in that they must compensate the farmer for less than seventy percent of his income loss. Not surprisingly, the payments must be free of any link to output, prices, or factors employed.[298]

In a similar vein, various types of structural adjustment assistance may qualify for the Green Box. Annex 2 of the *Agriculture Agreement* delineates and sets policy-specific criteria for three types of this assistance—for the retirement of producers or resources and new investment. Structural adjustment assistance for the retirement of farmers qualifies for the Green Box if designed to facilitate their permanent retirement, or to help them gain employment in a non-agricultural sector.[299] Structural adjustment directed toward retirement of resources (*e.g.*, removing land from cultivation or livestock from production) may qualify too. Its aim must be long-term retirement (*e.g.*, taking land out of marketable agricultural production for at least three years, or slaughtering livestock), not require any alternative agricultural use for the resources and be unrelated to production and prices. For structural adjustment assistance in the form of investment aid (including aid for re-privatization) to qualify for the Green Box, it must be for restructuring operations of farmers "in response to objectively demonstrated structural disadvantages."[300]

The amount and duration of payments are capped. However, these caps are phrased in loose terms, namely: "[Payments] shall be limited to the amount required to compensate for the structural disadvantage [and] only for the period of time necessary for the realization of the investment. . . ."[301] Consistent with the nature of the Green Box, payments must not be related to the type or volume of production, nor to domestic or international agricultural prices, and must not obligate farmers to grow

296. *Id.* ¶ 7(a)-(c).

297. The highest and lowest previous income levels are excluded when calculating the average. *See id.* ¶ 7(a).

298. If in the same year a farmer receives payments from an income insurance or safety-net program, and from a program for relief from natural disasters, then his total payments must not exceed 100 percent of his loss. *See id.* ¶ ¶ 7(d), 8(e).

299. *Id.* ¶ 8.

300. *Id.* ¶ 11(a).

301. *Id.* ¶ 11(d), (f).

certain crops.[302] Sensibly, given the purpose of the assistance, the payments can be conditional on eschewing a product.

Another candidate for the Green Box is a program to relieve farmers from natural disasters.[303] While there is no explicit causation requirement, implicitly the disaster must have resulted in a decline in production of over thirty percent of average output in a prior three-year period.[304] Disaster relief payments may come directly from the government, or via a government-sponsored crop insurance scheme. But, they must be for covering loss of income, livestock, land, or other production factors and must be limited to the replacement cost of the loss.[305] In the spirit of a true Green Box subsidy, a qualifying disaster relief program cannot mandate that beneficiaries grow or process a certain type or quantity of output in the future.[306] To qualify for the Green Box, relief payments must follow "a formal recognition by government authorities that a natural or like disaster" has taken place or is occurring.[307]

In most events, the term "natural disaster" is not controversial; cyclones, tornadoes, floods, droughts, and other weather-related phenomena would qualify. What might be a "like" disaster? Interestingly, not only diseases and pests, but also "nuclear accidents" and "war on the territory of the Member concerned" are "like" natural disasters. There is no requirement of a formal declaration of war (only a formal "recognition" of one, whatever that may mean), and nothing in Annex 2 of the *Agreement on Agriculture* limits the term "war" to an outside invasion. Presumably, civil wars and even insurgency and guerrilla movements would count as "like." If so, then to take two of many sad situations: Colombia could provide Green Box support to its farmers (assuming it has the budget to do so), citing the war on narco-terrorism as the "like" natural disaster, and Israel could do so on the basis of the second *intafada*. The point is the word "like" blurs the line between truly natural phenomenon and chaos or misery for which humans alone are to blame.

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302. *Id.* ¶ 8(b)-(c), (e).

303. *Id.* ¶ 8.

304. *Id.* ¶ 8(a) (stating that "[e]ligibility for such payments . . . shall be determined by a production loss which exceeds 30 percent of the average of production in the preceding three-year period or a three-year average based on the preceding five-year period, excluding the highest and lowest entry").

305. *Id.* ¶ 8(b)-(c). A limit akin to "mitigation of losses" also exists. If payment is made while a disaster is occurring, then it must be limited to the amount required to prevent or alleviate further loss. *Id.* ¶ 8(d).

306. *Id.* ¶ 8(c).

307. *Id.* ¶ 8(a).

Clearly defined environmental or conservation programs qualify for the Green Box if eligibility for payments depends on meeting specific targets (*e.g.*, relating to production methods or inputs) and if the amount of the subsidy is limited to the extra cost of or loss of income from compliance.[308] Here, then is a direct analogy with non-agricultural subsidies for environmental retro-fitting, which the *SCM Agreement* classifies as "Green Light."[309] This analogy continues with the other two types of Green Light subsidies, and the Table draws out the analogy. The policy-specific criteria for Green Box and Green Light subsidies understandably differ in detail, particularly as to the existence and nature of limitations on payments to qualify as non-actionable. However, as the Table indicates, these two categories of agricultural and non-agricultural subsidies, respectively, resemble one another in their underlying policy aims and in the reason why they are exempted from the disciplines imposed on other schemes.

308. *See id.* ¶ 12 (containing criteria for environmental programs).

309. *See SCM Agreement*, Art. 8:2(c) (concerning assistance to promote the adaptation of existing facilities to new – not existing – environmental regulations); BHALA & KENNEDY, *supra* note 12, § 7-3(d)(4) at 831-37 (explaining the criteria for environmental adaptation subsidies).

Table 6: Green Box Agricultural Subsidies and Green Light Non-Agricultural Subsidies

(derived from Annex 2 of the *Agriculture Agreement* and Article 8 of the *SCM Agreement*)

Green Box Agricultural Subsidies	***Green Light Non-Agricultural Subsidies***	***Underlying Purpose***	***Policy-Specific Criteria for Green Box Subsidies***	***Policy-Specific Criteria for Green Light Subsidies***
Environmental Programs	Environmental Adaptation Programs	Help defray the cost of compliance with environmental regulations.	See Table above, and Agriculture Agreement, Annex 2, ¶ 12.	See SCM Agreement, Art. 8:2(c).
Programs for Regional Assistance	Programs for Disadvantaged Regions	Help a comparatively poor region.	See Table above, and Agriculture Agreement, Annex 2, 13.	See SCM Agreement, Art. 8:2(b).
Research Programs	Research and Development	Assist research and development.	See Table above, and Agriculture Agreement, Annex 2, 2(a).	See SCM Agreement, Art. 8:2(a).

Programs aimed at assisting a disadvantaged region within a WTO Member also fit in the Green Box. However, payments must be restricted to farmers in that region (though generally available to all farmers in the region)[310] and to the extra costs (or loss of income) associated with farming

310. *See Agreement on Agriculture*, Annex 2 ¶ 13(a), (d) (stating that "[e]ligibility for such payments shall be limited to producers in disadvantaged regions," and "[p]ayments shall be available only to producers in eligible regions, but generally available to all producers within such regions").

in the region.[311] Payments must not be linked to crop type, production volume, except to reduce output, and then only if they decline after a threshold level,[312] nor to prices.[313] The region itself must be "a clearly designated contiguous geographical area" and considered "disadvantaged" in a long-term sense according to "neutral and objective criteria clearly spelt out in law or regulation."[314] Here, then, is a second analogy between Green Box subsidies in the *Agriculture Agreement* and Green Light subsidies in the *SCM Agreement.* In both instances, the aim is to excuse subsidies aimed at helping relatively poor areas.[315]

There are still more illustrations Annex 2 of the *Agriculture Agreement* helpfully provides in conjunction with articulating policy-specific criteria for Green Box eligibility. For instance, subsidies that are not direct payments to producers or processors, but which provide services or benefits to the agricultural sector, qualify. Examples would be government programs for research, pest and disease control, training, extension and advice, inspection, marketing and promotion, electricity reticulation, and capital costs of infrastructure projects (*i.e.*, subsidies for construction expenses, but not for inputs, operating costs, or preferential user charges) for roads, ports, water supply, dams, or drainage.[316] With respect to research, there is an analogy between the Green Box and the Green Light category for research and development subsidies. Both appear designed to allow government support for pre-commercial development activity.[317]

Food security programs are obvious candidates for the Green Box. Subsidies for public stock holding aimed at food security thus qualify. An illustration would be expenditures for accumulating and holding food stocks, even if held by private entities, as long as the subsidizing government buys the food at current market prices, sells it from stocks at no

311. *See id.* ¶ 13(f) (stating that "[t]he payments shall be limited to the extra costs or loss of income involved in undertaking agricultural production in the prescribed area").

312. *See id.* ¶ 13(b), (e) (stating that "[t]he amount of such payments . . . shall not be related to, or based on, the type or volume of production . . . other than to reduce that production," and "[w]here related to production factors, payments shall be made at a degressive rate above a threshold level of the factor concerned").

313. *See id.* ¶ 13(c) (stating that "[t]he amount of such payments . . . shall not be related to, or based on, the prices, domestic or international, applying to any production").

314. *Id.* ¶ 13(a) (stating that its difficulties must "arise out of more than temporary circumstances."

315. *See SCM Agreement*, Art. 8:2(b) (concerning assistance to disadvantaged regions); BHALA & KENNEDY, *supra* note 12, § 7-3(d)(3) at 827-31 (explaining the criteria for regional development subsidies).

316. *See Agreement on Agriculture*, Annex 2 ¶ 2 (containing an itemized list of examples).

317. *See SCM Agreement*, Art. 8:2(a) (concerning assistance to disadvantaged regions); BHALA & KENNEDY, *supra* note 12, § 7-3(d)(2) at 822-27 (explaining the criteria for research and development subsidies).

less than the prevailing market price for the product, and is financially transparent in doing so.[318] Similarly, programs for domestic food aid—the direct provision of food or assistance to buy food at market or subsidized prices—qualify for the Green Box, assuming they are for needy people whose eligibility is adjudged through clear criteria relating to nutritional objectives and the government operates in a financially transparent manner.[319]

Why are the illustrations of Green Box subsidies, and the attendant policy-specific criteria, in Annex 2 to the *Agriculture Agreement* important? One answer pertains to size. The Green Box is large. It may be huge, depending on how shrewd a WTO Member is in drafting legislation for, and implementing, agricultural programs. Might the dimensions be so large as to be able to place the very concept of "Total AMS" in it, thereby circumscribing the utility of the concept as an "aggregate" measure and restricting the meaningfulness of subsidy reductions? It is hard to say "no" with resoluteness, hence a reason for urging some cleansing in the Box scheme, lest world agricultural trade remain in Purgatory.

Indeed, in the Doha Round, some WTO Members argue the amount of subsidies paid is so large, and the very nature of the subsidies so dubious, that Green Box programs are (contrary to the general criteria for them) trade distorting, and that the distortion is not minimal. There is pressure from these Members to revise the criteria for various Green Box subsidies, if not eliminate the Box. That pressure comes particularly from the Cairns Group. It looks askance at paragraphs 5-7 in Annex 2 of the *Agriculture Agreement*, concerning direct payments to farmers, decoupled income support, and income insurance and income safety-net programs.[320] Pure as this freed trade view is and as helpful as it would be in cleansing the *Agriculture Agreement* of a protectionist sin, it is dubious whether it will gain widespread support in the Doha Round.

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318. *See Agreement on Agriculture*, Annex 2 ¶ 3 (containing criteria for food security subsidies to fit into the green box). Footnote 5 to paragraph 3 offers developing country WTO Members limited special and differential treatment. *Id.* at n.5. A developing country WTO Member that maintains its governmental stockholding program for food security automatically meets the requirements of paragraph 3 as long as it operates in a transparent manner under "officially published objective criteria." *Id.*

319. *See id.* ¶ 4 (containing criteria for domestic food aid subsidies to fit into the Green Box). A developing country WTO providing food at subsidized prices is deemed in conformity with Green Box requirements, if its "objective . . . [is] meeting food requirements of urban and rural poor . . . on a regular basis at reasonable prices."). *Id.* at nn.5-6.

320. *See Domestic Support in Agriculture*, *supra* note 236 (discussing Doha Round talks on the Green Box); October 2002 *Briefing Document*, *supra* note 25, at 20 (describing the positions on the Green Box of some WTO Members that "in certain circumstances, [these subsidies] could have an influence on production or prices.").

2. *The Blue Box*

The Purgatorial situation of world trade in agriculture is evident from a second major exemption from subsidy reduction commitments and the calculation of Total AMS. Not only are programs in the Green Box exempt, but so, too, are Blue Box subsidies. The social purpose of most or all Green Box programs cloaks them with a non-trade rationale. With Blue Box subsidies, however, a socially appealing justification is harder to make. WTO Members using the Blue Box tend to defend it on economic grounds, arguing subsidies in this Box are less trade-distorting than Amber Box subsidies and are helpful in reforming agriculture, though they also urge it is a useful tool for achieving certain non-trade objectives.[321] They would approve of the characterization of the Blue Box" as "the Amber Box with conditions."[322]

True, those conditions are supposed to reduce trade distortion. Yet, by constructing the Blue Box, Uruguay Round negotiators helped ensure world trade in agriculture would be kept from Heaven as free traders would picture it. Blue Box subsidies are a significant impediment to emerging from Purgatory, at least in theory, and in practice for a few WTO Members. As the WTO itself admits, "The blue box is an exemption from the general rule that all subsidies linked to production must be reduced or kept within defined minimal ('*de minimis*') levels."[323]

What an exemption it is. Any payments tied to agricultural output, acreage under cultivation, or to animal numbers, which also require limiting output through (for instance) a production quota or a requirement that a farmer set aside part of his land, would be put in the Blue Box.[324] As Article 6:5(a) of the *Agriculture Agreement* explains:

> Direct payments under production-limiting programmes shall not be subject to the commitment to reduce domestic support if:
>
> (i) such payments are based on fixed area and yields; or
>
> (ii) such payments are made on 85 per cent or less of the base level of production; or

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321. *See* October 2002 *Briefing Document*, *supra* note 25, at 20 (mentioning these justifications).

322. *See Domestic Support in Agriculture*, *supra* note 236 (applying this characterization).

323. October 2002 *Briefing Document*, *supra* note 25, at 20.

324. *See id.* (elaborating on the meaning of "Blue Box"); *Domestic Support in Agriculture*, *supra* note 236 (explaining that "[a]ny support that would normally be in the amber box, is placed in the blue box if the support also requires farmers to limit production").

(iii) livestock payments are made on a fixed number of head.[325]

Article 6:5(b) continues with a mandatory exclusion of Blue Box payments from calculation of Current Total AMS.[326] In brief, these payments are entirely outside of the AMS calculation and reduction commitments.

Thus, a scheme to pay a farmer $10 for every bushel of wheat not harvested or one to pay a farmer $250 per acre left fallow would be classic Blue Box subsidies. These examples are payments based on yields and fixed area, respectively, and they suggest the potentially commodious size of this Box. Put differently, world trade in agriculture could be in Purgatory for a long time indeed if many WTO Members sponsor Blue Box subsidy programs.

Fortunately, that is not the case. Only a handful of WTO Members actually make Blue Box payments to their farmers, such as small countries like Iceland, Norway, the Slovak Republic, Slovenia, and Switzerland. The problem is this handful includes two commercially significant countries, the EU and Japan. The United States (like these other Members) properly notified the WTO of its use of Blue Box subsidies, but it no longer actually makes such payments.[327] However, the small number of Members with Blue Box programs must be considered alongside one fact: there is no limit in the *Agriculture Agreement* on spending in the Blue Box.[328]

Put starkly, only domestic resource limits (especially government budgets) or political realities constrain a WTO Member in its Blue Box subsidy programs. Smaller or developing country Members would be hard-pressed to compete with the EU's CAP budget or Japan's funds for agricultural subsidies (though analysts wonder how long the EU, especially after enlargement, and Japan, in its chronic state of economic woe, can afford their programs). Not surprisingly, advocates of the Blue Box hope to avoid imposition of a limit on spending in this Box, and similarly to prevent re-classification of programs in this Box to the Amber Box.

Their advocacy has an economic justification, namely, adjustment costs. Why not, they ask, move away from Amber Box programs in a way that does not cause too much hardship to domestic farmers?[329] The candid

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325. *Agreement on Agriculture*, Art. 5(a) (emphasis added).

326. *See id.* at 5(b) (setting forth the exemption).

327. The Clinton Administration referred to "U.S. deficiency payments under the Food, Agriculture, Conservation, and Trade Act of 1990" as being direct support meeting production-limiting requirements, and thereby as exempt from reduction commitments. *See Statement of Administrative Action*, *supra* note 12, at 719.

328. *See Domestic Support in Agriculture*, *supra* note 236 (discussing the lack of Blue Box spending limits).

329. *See id.* (discussing the Doha Round talks on the Blue Box).

answer is all they are doing is shifting the costs of adjustment to poor farmers in the Third World. For as much and as long as developed countries maintain Blue Box programs, developing and least developed countries will suffer because of them. Until the sin of helping some farmers while hurting others is cleansed, world agricultural trade will remain in Purgatory.

Finally, it is worth considering is whether there is a persuasive analogy between the subsidies in the Blue Box, on the one hand, and non-agricultural subsidies classified in the traffic light system of the *SCM Agreement*, on the other hand? The answer is "no." The *SCM Agreement* defines Yellow Light and Dark Amber subsidies as potentially actionable, not unlike non-*de minimis* Amber Box agricultural subsidies, which are subject to reduction commitments.[330] While Green Box and Green Light support look broadly similar (as discussed earlier), and while Export and Red Light subsidies are cousins (as discussed below), the *SCM Agreement* does not delineate a category akin to the Blue Box. Nor should it do so. Were there to be a "Blue Light" for non-agricultural subsidies, exempting them from the countervailing duty remedy or lowering the legal criteria for applying this remedy, then the *SCM Agreement* would be bedevilled with a sin like that of the *Agriculture Agreement*. The metaphor of the traffic light would be broken.

3. *The Amber Box*

The Amber Box is the default category in the system of classifying domestic support created by the *Agreement on Agriculture*. The *Agreement* provides no definition as such, just as it does not expressly use the terms "Green Box," "Blue Box," and "Amber Box." Rather, the *Agreement* identifies exemptions from commitments to reduce expenditures for domestic support; the exemptions being the Green and Blue Boxes and *de minimis* levels. The Amber Box contains whatever support measures are left over, *i.e.*, any subsidy that does not fit within the Green or Blue Boxes automatically is dropped into the Amber Box.[331]

To phrase the definition affirmatively, the Amber Box consists of support payments to farmers or processors that distort trade, production, or prices. For instance, "government buying-in at a guaranteed price ('market

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330. On Yellow Light and Dark Amber subsidies, see *SCM Agreement*, Arts. 5-7; *see also* BHALA & KENNEDY, *supra* note 12, § 7-3(b)-(c) at 805-17.

331. *See Domestic Support in Agriculture*, *supra* note 236 (describing the Amber Box); CROOME, *supra* note 10, at 57 (stating that "[a]ll domestic support measures in favor of agricultural producers that cannot be shown to meet the Annex 2 criteria [for the Green Box] are considered to be trade-distorting (Amber Box) measures" (emphasis omitted)).

price support')" would be an Amber Box measure.[332] Indeed, price support is the quintessential Amber Box subsidy. Among OECD countries, two-thirds of all domestic subsidies take the form of price support.[333] To be sure, price support is not alone in the Amber box. Irrigation subsidies and certain government credit subsidies, also would fall into this Box.[334]

From a free trade perspective, distortions caused by Amber Box subsidies are sinful. Price supports are a case in point.[335] Farmers in OECD countries receive prices for their output that, on average, are thirty-one percent above the equivalent international trade prices.[336] For some commodities, the distortion is far greater: OECD milk producers get prices eighty percent above the world market, and sugar producers get prices almost 100 percent above world market prices.[337] For rice farmers fortunate enough to have their paddies in the OECD, the differential is 360 percent.[338] Ironically, however, none of the OECD farmers is lucky enough to receive the full benefit of these sorts of price support schemes. They receive as profit no more than twenty-five cents per dollar worth of price support.[339] The remaining seventy-five of price support funds is used to cover additional production costs, is capitalized into the value of land, or is captured by landlords.[340]

Is the existence of the Amber Box another reason why global agricultural trade is in Purgatory? On the one hand, non-*de minimis* support payments in this Box are subject to reduction commitments. The commitments to reduce Amber Box subsidies, above *de minimis* amounts, are laudable. On the other hand, only these payments are subject to commitments, and these reductions are not all aimed at zero (notwithstanding the separate question of the degree to which commitments remain unfulfilled). In other words, at least the cleansing of the Amber Box is underway. But, new, dramatic, and comprehensive pledges are needed to shrink this Box to a tiny one.

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332. CROOME, *supra* note 10, at 56.

333. *See* Tangermann, *supra* note 233, at 11 (mentioning this statistic).

334. *See Statement of Administrative Action*, *supra* note 12, at 718 (mentioning these programs in the context of calculating Total AMS).

335. *See* Tangermann, *supra* note 233, at 11 (noting statistics on price differentials).

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *See id.* (discussing the inefficiency of price support as a tool to boost the incomes of farmers).

E. "REFORM" OF THE COMMON AGRICULTURAL POLICY

The CAP was established in 1958.[341] The last time significant changes were made to it was the early 1990s, when the "MacSharry reforms" cut intervention prices (*i.e.*, the guaranteed minimum price at which a Common Market Organization, or "CMO," will purchase a commodity).[342] Those reforms aimed to shrink the "infamous wine lakes and butter mountains" caused by the incentive to over-produce created by inflated intervention prices.[343] In June 2003, the EU heralded the most significant reform to the CAP in a decade, with the EU Agriculture Commissioner, Franz Fischler, calling the changes "the beginning of a new era."[344]

To what extent are these changes, which focus on Blue Box payments, helpful in cleansing, and, therefore, in catalyzing the Doha Round talks?[345] The question demands an objective answer based on a thorough review, because as *The Economist* rightly observed, "As always with the CAP, the devil is in the details." That kind of review is for another time and place.

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341. *See* Tobias Buck et al., *Fischler's Surprise for Europe's Farmers: Now the Argument Over Agriculture Moves to the WTO*, FIN. TIMES, June 27, 2003, at 17.

342. *Id.*

343. *Id.*

344. *Id.*

345. *See More Fudge than Breakthrough*, THE ECONOMIST, June 28, 2003, at 51; *Cutting the CAP*, FIN. TIMES, June 9, 2003, at 14; Buck, *supra* note 341, at 6. The CAP reform follows steadfast campaigning by the Commissioner Fischler in favor of ending production-linked payments. The reform is a diluted version of the Commissioner's original proposal. Under his proposal, the link between payments and output was to be severed almost entirely, thus nearly ending CAP Blue Box subsidies and eliminating an incentive to produce surpluses the EU either stockpiled at great expense, or dumped overseas to the detriment of developing countries. The proposal called for direct payments to farmers, thereby converting Blue Box to Green Box subsidies. About 80 percent of domestic support would have been switched to non- or less-trade distorting schemes. By severing the link to output, the proposal would have removed an important force depressing world market prices of some commodities (though EU consumers might face the same high prices due to import and internal barriers, and the EU budget for subsidy payments might not be affected). That would have helped some farmers in developing countries, insofar as their incomes would have risen. It also would have discourage intensive farming in the EU, which can be damaging to the environment, as farmers would focus on efficiency and quality rather than sheer output. France objected to de-coupling support from output, asserting an end to the Blue Box would jeopardize the social fabric of Europe, particularly its rural communities and culture. France's self-interest is indisputable: it is the largest net beneficiary of CAP subsidies. France was not alone in resisting de-coupling. Joining it were the other top recipients of CAP funds: Ireland, Portugal, and Spain.

Interestingly, Germany (the largest contributor to the CAP budget, and traditionally a proponent of CAP reform) may have agreed to dilution of Commissioner Fischler's initial proposal in exchange for France agreeing to oppose an EU corporate takeover code (which Germany disfavors). Germany and France both denied any nexus between CAP reform and a takeover code. Buck, *supra* note 341, at 7.

For now, suffice it to say that "reform" is the most positive label that reasonably could apply to the CAP alterations.[346]

The general reform is to pay farmers directly a flat rate based on historical records, that is, a fixed amount calculated using 2000-2002 as the reference period.[347] This single farm payment will be conditional on farmers adhering to clearly-defined standards for animal and plant health, animal welfare, the environment, food safety, and on cross-compliance (*i.e.*, farmers keeping their land in good agricultural and environmental condition).[348] The idea is to de-couple the single farm payment from production, and thereby ensure farmers will adjust output to market demand signals rather than blithely overproduce. However, it is not evident how historical records and current output might correlate, and thereby influence payment rates. Further, the overall CAP budget will remain the same—about $58 billion annually, which accounts for about half of the EU's entire budget.

The general reform is accompanied by several exceptions. The EU did not eliminate all of its Blue Box programs, nor did it touch either its export subsidies or its barriers to market access. Rather, the EU agreed to phase out some production-linked support, provoking *Le Monde* to characterize aptly what happened as "decoupling *à la carte*."[349] For example, Blue Box support for beef will be partially decoupled (by seventy percent). De-coupling is incomplete for cereals (*e.g.*, maize, rye, and wheat), with twenty-five percent of payments still linked to output. De-coupling also is incomplete in the sheep and goat sector, for up to fifty percent of payments can be linked to output (*e.g.*, of mutton). Support for cotton and sugar is

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346. *See CAP Reform – A Long-Term Perspective for Sustainable Agriculture* (June 26, 2003); *EU Fundamentally Reforms Its Farm Policy to Accomplish Sustainable Farming in Europe*, IP/03/898 (Lux., June 26, 2003); Speech of Dr. Franz Fischler, Member of the European Commission responsible for Agriculture, Rural Development, and Fisheries, *The New, Reformed Agricultural Policy* (Luxembourg, June 26, 2003); *The Reformed CAP: Accomplishing a Sustainable Agricultural Model for Europe* (undated). *See also*, *Update on EU Farm Reforms: Implications for Cancún* (July 7, 2003) (summarizing the reforms by the Head of South Africa's WTO Delegation, Faizel Ismail) *available at* www.tralac.org. *See also* Matthew Newman, *Divided Farmers Criticize EU Subsidy Changes*, WALL ST. J., Sept. 9, 2003, at A17; Tobias Buck, *Reform Turns to "Mediterranean" Farms*, FIN. TIMES, June 28-29, 2003, at 4; Cathy Bolt, *Farmers Cool on EU Deal*, THE WEEKEND AUSTRALIAN FIN. REV., June 28-29, 2003, at 6; *EU's Cows Can Safely Graze*, THE SYDNEY MORNING HERALD (Australia), June 28-29, 2003, at 24; *CAP it All*, THE ECONOMIST, June 28, 2003, at 16; Tobias Buck, *EU Deal on Farm Reforms to Boost World Trade Talks*, FIN. TIMES, June 27, 2003, at 1. I have drawn from all of these sources, as well as the articles cited *supra* note 342, in the discussion of the CAP reforms.

347. An additional component of the general reform is the reduction of support to large farmers, and the re-deployment of the funds for rural development.

348. Becker, *supra* note 32, at A8. Of the EU's annual subsidy budget, about 15 percent of expenditures are said to support environmental programs. *Id.*

349. *More Fudge than Breakthrough*, *supra* note 345, at 51.

left undisturbed.[350] For durum wheat, forty percent of the single farm payment, which is set at fixed per hectare rates of 313, 291, and 285 Euros in 2004, 2005, and 2006, respectively, may be tied to production. For starch potatoes, for which the rate is 110.54 Euros per ton, sixty percent of the single farm payment may be linked to production. The EU made no proposals on "Mediterranean products" (*e.g.*, olive oil and tobacco, as well as cotton), pledging to do so in autumn, 2003. It said dairy payments will not be covered by the reform until 2008, and the dairy quota system will remain in place until 2014-15. Ominously, even the phase out periods are not harmonized across the EU. The generally applicable phase out year is 2005, but for countries that find this date too ambitious (notably, France) it is 2007.

Finally, on another important area of CAP reform, reductions in the intervention price for key commodities, reform was far short of grand. While the EU agreed to reduce that price for butter, it maintained the same intervention prices for cereals, which absorb more CAP funds than any other agricultural sector. The EU also reaffirmed that CMOs will continue to regulate product markets whenever necessary. The EU announced a fifty percent cut in the intervention price for rice (to 150 Euros per ton, limited to 75,000 tons per year), but simultaneously increased direct aid from fifty-two to 177 Euros per ton. Of that direct aid, 102 Euros per ton is part of the single farm payment; while the remaining seventy-five Euros per ton is linked to output.

Allan Burgess, President of the Australian Dairy Farmers, summarized well the changes to the CAP: "[T]hey [the reforms] are still *very limited*; they keep export subsidies, and the decoupling of subsidies from production varies between industries."[351] Until the EU heeds the call of Mr. Burgess (and others), the risk of over-production remains. So, too, does the concomitant risk the EU will dump surpluses in the Third World, a risk to which small farmers in that World (*e.g.*, wheat farmers in Namibia) are particularly vulnerable because even sporadic dumping (*e.g.*, 50,000 tons in a few weeks) is enough to cause them severe hardship. Not surprisingly, free-trade oriented observers around the world have been under-whelmed by the "reform" effort. Representative of many comments are those of Brendan Stewart, Chairman of the Australian Wheat Board: "It's a step in the right direction, but *it's about time they got off their backsides and*

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350. Cutting support for sugar may be especially difficult. The *Financial Times* comments that high internal guarantee prices and barriers to sugar imports "have turned Europe's sugar market into arguably the most protected system within the CAP." *See* Buck, *supra* note 344, at 4.

351. Bolt, *supra* note 346, at 6 (emphasis added).

actually did something."[352] With respect to the Doha Round, indeed, the future of the multilateral trading system, Mr. Stewart's concluding note was ominous: "If the world trade negotiation system and the World Trade Organization is [*sic*] going to work, *it's got to start to deliver some real gains.*"[353]

F. *R* – *R*EDUCING DOMESTIC SUPPORT

One of the two "Rs" in the acronym *BARBER* refers to reduction commitments for domestic agricultural subsidies. As Article 1(h) of the *Agreement on Agriculture*[354] indicates, these commitments are memorialized in Part IV, section I, of the Schedule of Concessions of each WTO Member country. What are the total AMS reduction commitments? That is, by what amount did Uruguay Round negotiators obligate their countries to reduce Total AMS? The short answer, if only the *Agreement on Agriculture* is examined, is "zero." There is no specific numerical obligation therein.

Of course, that answer (without elaboration) is inaccurate. Based on commitments countries made during the Uruguay Round, as set forth in their Schedules, developed country WTO Members agreed to reduce total AMS by twenty percent, and developing country Members agreed to do so by 13.3 percent.[355] No AMS reduction commitment exists for least developed countries. By at least one estimate, domestic support commitments amount to an eighteen percent reduction of Total AMS from $197 billion to $162 billion.[356] Just how impressive is this reduction?

A glib answer, premised on the hidden intent of the WTO Members, is "not very." Many developed WTO Members are eager to find ways to trim their yawning budget deficits. The mounting costs associated with support programs—not only the subsidy payments themselves, but also the costs of storing and disposing of surpluses created by subsidies—are a target for the axe of the budget cutter.[357] While intent (at least in a moral sense) matters, a more serious answer is that whether the reduction commitments are impressive depends on the criteria used to evaluate them.

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352. *Id.* (emphasis added).

353. *Id.* (emphasis added).

354. *See supra* note 239 and accompanying text.

355. *See* CROOME, *supra* note 10, at 58 (stating these commitments).

356. *See* GALLAGHER, *supra* note 5, at 44 (explaining the reduction is "by the end of the transition period").

357. *See* RAGHAVAN, *supra* note 15, at 161 (discussing the rising budgetary costs of domestic agricultural support as a motive for reduction commitments).

Abstracting from one such criterion, the base period (which is discussed later), consider the location of the commitments. Where do countries present these commitments, if not in the *Agriculture Agreement* itself? Like pledges to cut tariffs (discussed in section two) and to cut export subsidies (discussed in section four), the commitments to reduce domestic support are in the December 1993 *Modalities Document*.[358]

Arguably, therefore, commitments to decrease domestic support for farmers and processors are not "hard" law. That is, possibly it is appropriate to view them as "soft" law, like cuts to tariffs and export subsidies. These promises become "hard" if a WTO Member makes and binds them in its Schedule of Concessions. Only then do they become enforceable. At least, that is one criterion on which to fashion an argument.

Put differently, this criterion—location—suggests the argument that the sin associated with reduction commitments is a sin of irresolution. The WTO Members did not articulate forcefully commitments to which they could be held as a matter of international trade law. Moreover, the argument would go, because of the way in which the *Agreement* defines "AMS," the reduction commitments apply only to Amber Box subsidies.[359] In brief, it is the total value of non-*de minimis* Amber Box payments that developed and developing countries must reduce by twenty and 13.3 percent, respectively – not Green or Blue Box payments.[360] The sin of exemptions from the commitments for two Boxes compounds the sin of irresolute reduction commitments. Indeed, while "[m]ost WTO Members have readily met their AMS reduction commitments," the "World Bank and other analysts have expressed doubts . . . that the total of AMS reductions will make major inroads into support programs in the industrialized countries."[361] The principal reason given is the wide range of measures permissible in the Green and Blue Boxes.[362]

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358. *See* CROOME, *supra* note 10, at 58 (discussing paragraphs 8 and 15-16 of the December 1993 *Modalities Document* and stating that "[t]he commitments to reduce domestic support . . . result from the provisions of the same document on 'modalities' that set out the timetable and percentage reductions for liberalization of market access").

359. *See Agreement on Agriculture*, Art. 6:1 (stating that "domestic support reduction commitments of each Member . . . shall apply to all of its domestic support measures in favor of agricultural producers with the exception of domestic measures which are not subject to reduction in terms of the criteria set out in this Article [namely, the Blue Box and *de minimis* levels] and Annex 2 [namely, the Green Box]").

360. *See* October 2002 *Briefing Document*, *supra* note 25, at 20 (stating that "[t]he total value of these [Amber Box] measures must be reduced"); *Domestic Support in Agriculture*, *supra* note 236 (discussing the exemption for *de minimis* Amber Box subsidies); CROOME, *supra* note 10, at 58 (listing the exemptions from reduction commitments).

361. GALLAGHER, *supra* note 5, at 45.

362. *See id.* (also mentioning a study by the Global Trade Analysis Project ("GTAP") at Purdue University, which indicates (1) overall agricultural protection in advanced and newly

Related to this argument is concern about an occasion for sin, *i.e.*, about the opportunity for anti-free trade behavior from the concept of "AMS." The reduction commitments are aggregate, not specific to particular products. Nothing at law compels a Member to cut a specific product by a certain amount. Phrased in the affirmative, inherent in the concept of "AMS" is the ability to support specific products; this aggregation device "has allowed Members to moderate the impact of reductions on the most sensitive sectors by making larger proportionate cuts elsewhere."[363] Consider a hypothetical, two-crop developed country WTO Member. In accordance with its agreed-upon cuts reflected in its Schedule, the Member could cut support to oranges by forty percent, but leave rice support alone, and thereby satisfy the twenty percent reduction commitment.

Unfortunately, there is evidence some developed country Members have succumbed to the occasion by not, for example, reducing AMS on exports of interest to developing country Members, such as dairy products and sugar.[364] Indeed, following conclusion of the Uruguay Round negotiations, the Clinton Administration rather triumphantly declared:

> The reductions need not be made on a commodity-by-commodity basis, or evenly across commodities. Each WTO Member is free to decide which support programs to reduce in order to achieve the required reductions.
>
> . . .
>
> As a result of reductions in support for many commodities in the Food Security Act of 1985, the Food, Agriculture, Conservation, and Trade Act of 1990, and various budget acts, *the United States will not need to make additional reductions in support to meet its Uruguay Round obligations*. In addition, some elements of U.S. farm programs will be excepted from reduction commitments [for example, as Green Box or *de minimis* support].[365]

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industrialized countries will fall by 20 percent, and (2) protection of the agricultural sector will remain high relative to the manufacturing sector).

363. *Id.*

364. *See* MICHALOPOULOS, *supra* note 17, at 111 (discussing this point).

365. *Statement of Administrative Action*, *supra* note 12, at 719 (emphasis added). *See also id.* at 732 (stating that "[n]o change in U.S. domestic law will be required to bring the United States into conformity with domestic support commitments made in the *Agreement on Agriculture*," and "[t]he United States will be able fully to meet its Total AMS reduction commitments within the current framework of the law").

In other words, the United States successfully negotiated at the international level its self-imposed domestic legislation, thereby committing to cut no more than what it already had.

It is important not to extend this argument too far. The occasion of sin is not sin itself, though both are to be avoided. Not every WTO Member has crossed the line. How can the world trading community learn whether a particular WTO Member is complying with its subsidy reduction commitments? Articles 6:1 and 6:3 of the *Agriculture Agreement*, read in tandem, provide the answer. Article 6:1 essentially says a Member voluntary agrees to reductions in domestic support, and binds them in Part IV of its Schedule as "Annual and Final Bound Commitment Levels." A bound commitment is an enforceable promise made to the rest of the Membership to cut Total AMS. Article 6:3 explains how to test a Member on its promises on a yearly basis. It says a Member fulfils its promise as long as its current Total AMS does not exceed the Annual or Final Bound Commitment Level specified by the Member in its Schedule.

G. *B* – *B*ASE PERIOD SELECTION

One "B" in the *BARBER* acronym stands for the choice of a base period. The above discussion abstracts from the issue of a "base period" and subsequent periods for implementing reduction commitments. Yet, selection of a base period is one criterion needed to address the question "How impressive are the reduction commitments?"

For developed WTO Member countries, Article 1(f) of the *Agreement on Agriculture* defines the "implementation period" as the six-year period starting January 1, 1995, when the *Agreement* entered into force (*i.e.*, January 1, 1995 to December 31, 2000).[366] For developing countries, this provision says the implementation period extends to nine years (*i.e.*, until December 31, 2004).[367] In contrast, the *Agreement* does not define up front the "base period," even though the definitions of "Total AMS," "AMS," and "Equivalent Measurement of Support" reference base and subsequent implementation periods. That failure is an inconvenience to the lawyer reading the *Agreement* for the first time. It hardly could be characterized as "sinful." Rather, the sin, if there is one, must lie in a protectionist-motivated choice of a base period.

Indubitably, there must be some starting point for gauging AMS, Total AMS, and some initial Total AMS to which reduction commitments

366. *See Agreement on Agriculture*, Art. 1(f) (defining the period).
367. *Id.*

apply.[368] After all, any reduction presumes a point from which to make a cut. In the context of domestic support programs, it is critical to identify an initial level of support. Accordingly, the starting point is the "base period," and the AMS therein is the "base level AMS." Likewise, the "Base Total AMS" is the "Total AMS" corresponding to the base period and, therefore, to "the maximum support permitted a WTO Member during the implementation period."[369]

Embedded in these terms lies the choice of historical dates for the base period, and that choice is a battle between free trade and protectionist forces. For any given percentage reduction commitment, from a trade-liberalizing perspective, the lower the initial level, the better, whereas from a protectionist perspective, choosing a high initial level is desired. Obviously, a twenty percent cut in Total AMS is more significant in absolute terms when starting with a higher base. But, cutting from a lower starting point evinces determination to bring Total AMS to a truly low level. Not surprisingly, then, aggressive trade liberalization requires selection of a base period in which agricultural subsidies are low, while protectionism demands the opposite choice. As just observed, Uruguay Round negotiators put their choice of the base period not in the highly visible front part of the text of the *Agreement on Agriculture*, but rather in Annex 3 to the *Agreement*. That placement, itself, is enough to suggest the protectionist forces prevailed.

Well, so they did. The base period is 1986-1988. To be specific, the Uruguay Round negotiators selected these years in which to measure the extent of domestic agricultural support. There is a evidence of a variety of sorts to indicate the years 1986, 1987, and 1988 were ones during which agricultural subsidies in major trading nations were at, or near, record high levels on an array of products (some in which developing or least developed countries have a keen exporting interest).[370] The "sin," as it were, is the intentional choice of a base period that undermined the significance of the

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368. *See* CROOME, *supra* note 10, at 58 (explaining "[t]he initial AMS or EMS calculations for each country formed the starting point for their reduction commitments included in schedules . . . [and] [t]he commitments themselves were expressed in terms of annual and final bound commitment levels, setting out the maximum AMS that could be provided during the implementation period and thereafter").

369. *Statement of Administrative Action*, *supra* note 12, at 718.

370. *See, e.g.*, GALLAGHER, *supra* note 5, at 40-43 (summarizing World Bank research to the effect that "measures to reduce domestic support for agriculture may be ineffective for several reasons," one of which is AMS is "calculated from a base period (1986-88) during which world agricultural prices were comparatively low and domestic support to producers in developed countries was very high").

reduction commitments.[371] It is one thing to cut subsidies from a low base, but quite another to do so from a high base and then proclaim to the world they are being slashed.

Given the choice, by what methodology are WTO Members to calculate their support levels in 1986-1988 with a view to implementing their reduction commitments? Annex 3 to the *Agreement on Agriculture* provides at least a partial answer. It distinguishes among three types of non-*de minimis* Amber Box subsidies: "market price support," "non-exempt direct payments," and "other non-exempt measures." That is, Annex 3 differentiates among price subsidies, non-price subsidies paid straight to producers, and non-price subsidies that are indirect (such as input subsidies, marketing-cost reduction measures).[372] For every Member the calculation is retrospective, because Members are to use data from 1986-88 on all three kinds of support.

"Market price support" is the difference between a "fixed external reference price," on the one hand, and "the applied administered price," on the other hand, multiplied by the quantity of production eligible to receive the applied administered price.[373] The simple arithmetic formula is:

Market Price Support = [Fixed External Reference Price – Applied Administered Price]
x
[Quantity of Production Eligible for Market Price Support]

As its name connotes, the "applied administered price" is a price level established by a government and maintained by subsidization. Paragraph 9

371. This sin appears to be compounded by the fact that during the base period, developing countries (including many countries that recently acceded to the WTO) tended to penalize agriculture. Rather, they encouraged industrialization, providing support of one sort or another to the manufacturing sector. Thus, the reduction commitments allow greater support levels in developed than developing countries (because developing countries did not provide substantial support to their agricultural sectors during the base period). Moreover, the commitments may be inappropriate for some developing countries, especially transition-economy countries, in which there are serious statistical problems. *See* MICHALOPOULOS, *supra* note 17, at 61, 189. On dual-sector, labor surplus models of economic growth, and the encouragement of industrialization. BHALA, *supra* note 3, at ch. 6.

372. These terms are found in paragraphs 8, 10, 11, and 13 of Annex 3. *Agreement on Agriculture*, Annex 3, ¶¶ 8, 10, 11, 13. The adjective "non-exempt" simply refers to subsidies not exempt from reduction commitments, *e.g.*, because they qualify for the Green or Blue Boxes, or are *de minimis* Amber Box payments.

373. *Id.* ¶ 8. Interestingly, this paragraph excludes from AMS any "[b]udgetary payments" expended to maintain the gap between the reference and administered prices, and gives as examples "buying-in or storage costs."

of Annex 3 explains the "fixed external reference price" is calculated from market price data, namely, both the "average f.o.b. [free on board] unit value for the basic agricultural product concerned in a net exporting country and the average c.i.f. [cost, insurance and freight] unit value for the basic agricultural product concerned in a net importing country."[374] That is, the reference price is a benchmark based on the price of a commodity as exported by one WTO Member and imported by another Member.

However, neither the *Agreement* nor its Annex reveals many details about how a WTO Members are to calculate a fixed external reference price. That omission leaves room for opportunistic behaviour, at least with respect to choosing "a net exporting country" and "a net importing country." Suppose a Member aims to compute a high level of support for a commodity (and thereby apply its reduction commitments to a higher base level), such as cotton. Suppose, further, contrary to the assumptions of a perfectly neo-classical market, there is not one world price for cotton, but rather some variance in the price data during 1986-1988. For instance, suppose f.o.b. and c.i.f. prices from the Member's cotton trade with African and Asian countries are lower than the rest of the world, and that a considerable percentage of the Member's cotton trade during the base period is with Africa and Asia.

The language of Annex 3, Paragraph 9 (just quoted) refers to "a" net exporting and "a" net importing country. The lack of the plural in the text could be read as permission for a WTO Member to pick price data from any one of its trading partners, or possibly any two countries. To be sure, the Member may be constrained by a different provision of Annex 3, namely, Paragraph 11. It states that "[t]he fixed reference price shall be based on the years 1986 to 1988 and *shall generally be the actual price used for determining payment rates*."[375] Is the italicized language a strong preference for use of actual f.o.b. and ci.f. prices at which the Member exported and imported cotton, respectively, to all countries with which it traded cotton? Alternatively, given the use of "shall generally be" in both Paragraphs 9 and 11, could they be read in tandem as expressing two ways to determine the external reference price, namely, the actual price a Member used in its subsidy scheme in 1986-1988, or an average of f.o.b. and c.i.f. prices in two countries, however the Member chooses them?

No doubt at least some WTO Members have had to compute external reference prices. For now, the point is not to delve into how each Member

374. *Id.* ¶ 9. This paragraph also explains the reference price "may be adjusted for quality differences as necessary."

375. *Id.* ¶ 11 (emphasis added).

has gone about the calculation. Rather, it is simply to highlight the potential to maneuver, because of the textual ambiguity. Further, it is to illustrate the repercussions of the ambiguity for calculating non-exempt direct payment levels. If these payments depend on a price gap between a fixed reference price and an applied administered price, then a Member is to calculate the amount of them using the same arithmetic formula (presented above) for market price support (or, in its discretion, using actual budgetary outlays).[376] If the payments do not depend on a price gap, then the Member measures them based on budgetary outlays during the base period.[377] In other words, the opportunity to be opportunistic may exist when a Member checks its 1986-88 market price and non-exempt direct support, because the fixed external reference price is relevant to both types of subsidies.

Does this opportunity exist when gauging the base period level of other non-exempt measures? The answer is "not quite" or at least not in the same way as regards market price and direct payment subsidies. Annex 3 to the *Agriculture Agreement* indicates a WTO Member must use actual budgetary outlays. Assuming a Member's budget is transparent and its system of governmental accounting is sound, both questionable assumptions for some Members, his method is not controversial. However, if the Member's budget expenditure on a non-exempt measure does not reflect the full amount of the subsidy, then it might have room to maneuver. That is because paragraph 13 of Annex 13 instructs the Member to measure the level of non-exempt subsidies as "the gap between the price of the subsidized good or service and a *representative market price for a similar good or service*, multiplied by the quantity of the good or service."[378] The italicized language creates the possibility of a spirited debate about whether a price is "representative," and whether it is a "market" price. Any competent trade lawyer is capable of constructing an argument that a good or service is, or is not, "similar" to the subsidized good or service in question.

Of course, even competent trade lawyers are to be forgiven for confusion about the rules on calculating base period support levels. The point is this calculation is tainted by the sin of base period selection, at least to the extent there is room for a WTO Member to advantage itself by choosing prices that lead to high (or higher) support levels. Put

376. *See id.* ¶ 10 (stating that "non-exempt direct payments which are dependent on a price gap shall be calculated either using the gap between the fixed reference price and the applied administered price multiplied by the quantity of production eligible to receive the administered price, or using budgetary outlays").

377. *See id.* ¶ 12 (stating that "[n]on-exempt direct payments which are based on factors other than price shall be measured using budgetary outlays").

378. *Id.* ¶ 13.

colloquially, selecting 1986-88 was "bad enough." Matters are all the worse if Members can manipulate the representative price to ensure they maximize their calculated support levels. In brief, one sin can lead to another.

IV. EXPORT SUBSIDIES

"Reformers have so far turned their fire primarily on subsidies, particularly for exports. These are the most pernicious because they harm other countries' farmers by depressing world prices."[379]

A. THE GENERAL RULE

It should come as no surprise, given the sins associated with the first two methodologies for liberalizing agricultural trade, increasing market access and constraining domestic support, that the third methodology, disciplines on export subsidies, is impure from a free-trade perspective. The pure way to impose discipline on them would have been to get rid of them entirely, perhaps as far back as 1947, when the original contracting parties signed GATT. However, GATT Article XVI:4 and the accompanying Interpretative Note 2, along with the 1979 Tokyo Round *Subsidies Code*, expressly permit countries to subsidize agricultural exports.[380] For the Uruguay Round negotiators to mandate their elimination would have been dramatic. They rose to the occasion with respect to non-agricultural export subsidies, requiring their removal in nearly all instances.[381] They failed with respect to agricultural export subsidies.

In other words, the general rule is not a prophylactic ban on agricultural export subsidies, much less the embodiment of a grand, trade-liberalizing principle.[382] The clue to this disappointment is the convoluted language of what could be considered the "general rule" on these subsidies, namely, Article 3:3 of the *Agreement on Agriculture*:

379. *WTO's Yard a Mess*, *supra* note 1, at 10.

380. *See* CROOME, *supra* note 10, at 59 (discussing early efforts to impose discipline on agricultural export subsidies).

381. *See SCM Agreement*, Art. 3 (containing the prohibition on export subsidies); BHALA & KENNEDY, *supra* note 12, § 7-3(a) at 800-05 (discussing Red Light subsidies and their phase out).

382. Still, at least one commentator characterizes their achievement as a "ban," but then highlights exceptions to the ban. *See* CROOME, *supra* note 10, at 59 (stating that "[t]he agreement [on Agriculture] breaks with the past by *banning* their [*i.e.*, export subsidies] use unless they qualify under one of four exceptions . . ." (emphasis added), the exceptions being export subsidies (1) subject to reduction commitments, (2) eligible for special and differential treatment, (3) excused by downstream flexibility, or (4) not covered by a reduction commitments but subject to anti-circumvention rules].)

> Subject to the provisions of paragraphs 2(b) and 4 of Article 9, a Member shall not provide export subsidies listed in paragraph 1 of Article 9 in respect of the agricultural products or groups of products specified in Section II of Part IV of its Schedule in excess of the budgetary outlay and quantity commitment levels specified therein and shall not provide such subsidies in respect of any agricultural product not specified in that Section of its Schedule.[383]

Article 3:3 is about commitments voluntarily negotiated by a WTO Member. The commitments apply only to programs listed in Article 9:1 of the *Agreement*. There are exceptions to these commitments permitted by Article 9:2(b) and 9:4. The references to paragraphs 1, 2(b), and 4 are enough to raise suspicion, if not cynicism, about the Article.

These references also suffice to justify putting forward another candidate for the general export subsidy rule. It is the "general rule" of gradual reduction. Uruguay Round negotiators agreed developed country WTO Members had to cut the value of direct export subsidies by thirty-six percent below the base period level (1986-90) over the implementation period (1995-2000).[384] These Members had to reduce the quantity of subsidized exports by twenty-one percent (in comparison with the same base period, over the same implementation period).[385] They applied the familiar formula of imposing on developing countries two-thirds as much of an obligation, over a dilated period, as on developed countries. Hence, developing country Members need to decrease the value and quantity of subsidies by twenty-four and fourteen percent, respectively, using the same base period, by the end of their implementation period (2004).[386] The negotiators agreed to exempt least developed countries from these obligations.[387] This generous-sounding special and differential treatment for the poorest of the poor countries has little practical significance, given the lack of a budget in most such countries for export subsidy schemes.

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383. *Agreement on Agriculture*, Art. 3:3.

384. *See* CROOME, *supra* note 10, at 60 (stating that "[f]or developed countries, the reduction commitments are based on requirements that . . . the subsidies concerned be reduced by 36% in value, normally by comparison with outlays in 1986-90, over a six-year implementation period" (emphasis omitted)).

385. *Id.* (stating that "[o]ver the same [implementation] period, the quantity of products benefiting from such subsidies (except for subsidies for products incorporated into exported products) had to be reduced by 21%").

386. *See id.* (stating that "[d]eveloping countries are subject to lower reduction requirements (cuts of 24% in value and 14% in quantity), and have the benefit of a 10-year implementation period" (emphasis omitted)).

387. *Id.* (stating that "[l]east-developed countries are not required to make reduction commitments").

Nevertheless, the general rule is impressive, or is it? Imposing discipline on both budgetary outlays and the quantity of subsidized exports "ensures that governments will control the use of subsidies in a variety of market conditions."[388] But, that is hardly the end of the answer. Consider, first, that the answer depends in part on the starting point. During the base period, the extent to which developed countries subsidized their agricultural exports hardly was insignificant. To the contrary, their annual average subsidized exports during 1986-90 included 48.2 million tons of wheat, 19.5 million tons of coarse grains, 1.8 million tons of sugar, and 1.2 million tons of beef.[389] Accordingly, one observer explains:

> [D]espite the commitment to reduce export subsidies, these have been maintained at such high levels as to undermine the incentives provided to developing-country producers. Examples abound of the adverse effects of export subsidies on developing-country producers: subsidies in [*sic*] dairy products have damaged production in a large range of countries, including Brazil, Jamaica and Tanzania; subsidies on tomato concentrate have especially affected West African countries such as Burkina Faso, Mali and Senegal; support for beef has undermined efforts to increase livestock production in some of the same countries; and EU beef has come to dominate the markets of Benin and Côte d'Ivoire, for which Burkina Faso and Mail were once important suppliers. In effect, there has been far less "real" improvement in the agricultural sector than was anticipated.[390]

To be sure, as with reductions in tariffs and domestic support (discussed in sections two an three), base period selection is one way to evaluate an effort to cut export subsidies. Location of the effort, in the sense of the place in which it is articulated, may be relevant.

Consider, then, where, exactly, is this "general rule"? It is nowhere in the text of the *Agreement on Agriculture*.[391] Rather, the December 1993

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388. *Statement of Administrative Action*, *supra* note 12, at 722. As the *Statement* suggests, if an export subsidy depends on an internal price (as do some EU schemes), and the subsidizing Member reduces that price, then the subsidy would increase. The quantity restriction, however, would be an effective constraint on this increase. Conversely, if an export subsidy depends on a world market price and that price falls, then the limit on expenditures would be the effective limit on an increase in the subsidy. *Id.*

389. *See* GALLAGHER, *supra* note 5, at 44 (containing these statistics).

390. MICHALOPOULOS, *supra* note 17, at 111.

391. *See Agreement on Agriculture*, Art. 8. Article 8 of the *Agriculture Agreement* tells WTO Members not to provide export subsidies that are inconsistent with the *Agreement* or the commitments they specified in their Schedules of Concessions. *Id.* at Art. 9:1 contains the six-item list of export subsidy programs to which reduction commitments apply. *Id.* Article 9:2 identifies the two forms of reduction commitments:

Modalities Document sets forth reduction commitments for agricultural export subsidies.[392] The April 1994 *Press Summary* summarizes these commitments, and the October 2002 *Briefing Document* repeats them. In other words, the pattern of irresolution is the same as for market access and domestic support. The general rule looks more to be "soft" than "hard" law, judging from its location. What matters, in the sense of a legal obligation enforceable under the *DSU*, is whether a WTO Member has placed in its Schedule of Concessions (specifically, in Part IV, sections II and III of its Schedule) a commitment to reduce an export subsidy on a particular primary or processed agricultural good. Only if it has, and only if it has not fulfilled the commitment, is there a potential legal action available to an aggrieved Member exporting that good.

Consider, next, the allowance for deviations within a product category, or from one year to another. The *Agreement on Agriculture* does not hold WTO Members to the rigid requirement of achieving the cuts to which they commit in each implementation year. The reduction commitments apply to product groups, such as coarse grains or cheese.[393] Thus, deviations are possible within a group. For example, a Member could cut export subsidies on pecorino cheese by twenty-six percent, but on mozzarella cheese by 36 percent. Moreover, the *Agreement* gives Members "downstream flexibility."[394] That means a Member is allowed to exceed the limits on export subsidies, in terms of spending (value) or coverage (volume), it previously set in its Schedule. The logic of downstream flexibility is that as long as the deviation from an annual limit is not too great, it is permissible. Article 9:2(b) delineates permissible deviations, for the second through fifth years of the implementation period (1996-2000), with respect to an export subsidy program on which a Member has made a reduction commitment. These technically complex rules are about permitted annual swings above the levels of export subsidies to which a Member committed in its

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_ budgetary outlays (*i.e.*, the value of a subsidy, measured in terms of expenditures on a program in a given year), and

_ export quantity (*i.e.*, the volume of a subsidy, measured in terms of the maximum quantity of an agricultural product that can be subsidized in a given year). *Id.* at Art. 9:2. However, Article 9 does not specify numerical reduction targets. Article 9:3 directs Members to specify in their Schedules any commitment about limiting an extension of the scope of an export subsidy program. *Id.* at Art. 9:3. But, it does not articulate targets or a formula for such limits.

392. *See* CROOME, *supra* note 10, at 59-60 (discussing paragraphs 11 and 15 of, and Annex 8 to, the December 1993 *Modalities Document*).

393. *See id.* at 60 (using these examples).

394. *See id.* at 59-60 (explaining this jargon).

Schedule.[395] The plausible theory on which they are based is that what ought to matter is the reduction of export subsidies across the entire implementation period (1995-2000 for developed countries, and 1995-2004 for developing countries).[396]

Still another evaluation criterion to consider is how much developed countries actually gave up in committing to reductions in export subsidies. As with domestic support (discussed in section two), export subsidy programs represent taxpayer expenditures (aside from a non-outlay scheme operating in a manner to increase food prices). The Uruguay Round commitments are attractive to a developed WTO Member keen to cut expenditures. Moreover, depending on the specific agricultural product and period in question, the world price to which an export subsidy may be linked could decline. The result might be a concomitant fall in budgetary outlays, and satisfaction of the commitment, without having to reduce the quantity of the product receiving the subsidy.[397]

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395. *See Agreement on Agriculture*, Art. 9:2(b). Article 9:2(b) contains four rules, which I have captioned in italics below and summarized. *Id.* All of them must be satisfied if a Member is to qualify for downstream flexibility:

(1) *Three Percent Spending Rule* – A Member's cumulative budgetary outlays, from the beginning of the period (1995) to the year in question, cannot exceed by more than three percent of base-period (1986-90) outlays the cumulative amounts that would have resulted if the Member had complied fully with the annual outlay limits to which it committed in its Schedule. *Id.*at Art. 9:2(b)(i). Accordingly, five statistics are needed: (1) base-period outlays; (2) three percent of base-period outlays; (3) actual cumulative outlays; (4) permitted cumulative outlays, *i.e.*, maximum expenditures permitted by the commitment levels in the Member's Schedule; and (5) the excess of actual outlays over permitted outlays. If the excess is greater than three percent of the base period, *i.e.*, if (5) is greater than (2), then the Member has breached this rule.

(2) *1.75 Percent Volume Rule* – The cumulative quantity of agricultural goods exported from a Member with the benefit of an export subsidy, from the beginning of the period (1995) to the year in question, cannot exceed by more than 1.75 percent of base-period (1986-90) quantities the cumulative quantity that would have resulted if the Member had complied fully with its annual commitment levels. Here, again, five statistics are needed: (1) quantities of exports benefiting from the subsidy during the base period; (2) 1.75 percent of base-period quantities; (3) the actual cumulative quantity of exports benefiting from the subsidy; (4) the permitted cumulative quantity of exports, *i.e.*, the maximum quantity of exports that could benefit from the export subsidy; and (5) the excess of actual over permitted quantities. If the excess is greater than 5 percent of the base period, *i.e.*, if (5) is greater than (2), then the Member has breached this rule. *Id.* at Art. 9:2(b)(ii).

(3) *Total Spending and Volume Rule* – A Member's total cumulative amounts of budgetary outlays for export subsidies, and the quantities of its agricultural exports benefiting from subsidies, over the entire implementation period, must not exceed the totals that would have resulted if the Member had complied fully with its limits on an annual basis. *Id.* at Art. 9:2(b)(iii).

(4) *Comparison with Base Period Rule* – For a developed Member, at the conclusion of the implementation period (2000), its budgetary outlays for export subsidies must not be greater than 64 percent of base-period levels, and the quantities of its agricultural exports benefiting from subsidies must not exceed 79 percent of base-period levels. For a developing country Member, the figures are 76 and 86 percent respectively. *Id.* at Art. 9:2(b)(iv).

396. *See* CROOME, *supra* note 10, at 60 (explaining the rationale for downstream flexibility).

397. *See Statement of Administrative Action*, *supra* note 12, at 722 (suggesting this scenario).

Nevertheless, to conclude the general rule of gradual reduction is positively unimpressive, even sinful, requires more than just locating its place in or out of a text, or discussing the possibility of item-to-item or year-to-year deviations. It demands an inquiry into the details of the rule. The inquiry, pursued below, reveals yet another sin committed in the Uruguay Round, namely, excepting various schemes from cuts on export subsidies.

B. *E* – *E*XCEPTIONS TO EXPORT SUBSIDY CUTS

The "E" in the *BARBER* acronym refers to exceptions to the cuts on export subsidies. Here, the sin is the failure to limit severely – or better yet, expurgate – export subsidies. As discussed at the outset of this section, in contrast to Article 3 of the *SCM Agreement*, which bans export subsidies on non-agricultural products in all but least-developed WTO Members, the *Agreement on Agriculture* essentially permits all Members to continue their export subsidies on agricultural products. What it requires is partial reduction, not complete elimination.

It is important to keep in mind that from the perspective of free trade, an export subsidy is the most evil of all government payments to agriculture. That is because the very nature of an export subsidy, *i.e.*, its aims and effects, is to distort trade. It favors the output of the subsidizing country in world markets over all other like or substitutable products lacking equivalent or similar government support.[398] From this perspective, the general rule needs cleansing. This is evident from more than just the niggardly gestures of developed country WTO Members, *i.e.*, their thirty-six percent value/twenty-four percent volume reduction commitments. It is stark from two exceptions to this rule: definitional exceptions; and export credits. Because they are commodious, they call into question the seriousness with which some Members take export subsidy elimination.

To understand these exceptions, it is necessary to emphasize the *Agreement on Agriculture* eschews a generic, comprehensive definition of "export subsidy," relying instead on a list of governmental schemes to boost agricultural exports. The decision taken during the Uruguay Round by the negotiators of this *Agreement* of the Uruguay Round negotiators aggravates (or, perhaps the better word is "compliments") their decision not to root out export subsidies. Put metaphorically, it helps justify the characterization of world agricultural trade in Purgatory. In a comparative legal sense, their decision stands in unfavorable contrast to choices made by negotiators of the

398. *See id.* at 720 (stating that "[e]xport subsidies are among the most trade-distorting of government policies, *because they allow subsidizing countries to displace naturally efficient producers in world markets*" (emphasis added)).

SCM Agreement. Those Uruguay Round negotiators defined (in Article 1:1) the word "subsidy" in a comprehensive manner, delineated (in Article 3:1) the Red Light category of non-agricultural subsidies to include both export and import substitution subsidies, and provided (in Annex I, the *Illustrative List of Export Subsidies*) a non-exclusive list of what they meant by an "export subsidy."[399] Most tellingly, they banned all Red Light subsidies, except as provided by least developed WTO Members.[400] The Uruguay Round negotiators, while creating the analogous category of agricultural export subsidies, were nowhere near as forceful.

What, then, are the listed programs? Article 9:1 of the *Agriculture Agreement* contains the following:

(a) the provision by governments or their agencies of *direct subsidies*, including payments-in-kind, to a firm, to an industry, to producers of an agricultural product, to a cooperative or other association of such producers, or to a marketing board, *contingent on export performance*;

(b) the sale or disposal for export by governments or their agencies of *non-commercial stocks of agricultural products* at a *price lower* than the comparable price charged for the like product to buyers in the domestic market;

(c) *payments on the export of an agricultural product* that are *financed by virtue of governmental action*, whether or not a charge on the public account is involved, including payments that are financed from the proceeds of a levy imposed on the agricultural product concerned or on an agricultural product from which the exported product is derived;

(d) the provision of *subsidies to reduce the costs of marketing exports of agricultural products (other than widely available export promotion and advisory services)* including handling, upgrading and other processing costs, and the costs of international transport and freight;

(e) *internal transport and freight charges* on export shipments, provided or mandated by governments, on *terms more favorable* than for domestic shipments;

399. *See SCM Agreement*, Art. 3:1(a) (defining and prohibiting export subsidies, namely, "subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I. . .), *see id.* at n.4 (explaining a subsidy is *de facto* contingent on export performance if it "is in fact tied to actual or anticipated exportation or export earnings," even though it is not "legally contingent upon export performance"), *see id.* at Annex I (containing a non-exclusive 12-item list).

400. *See id.* at Art. 3:1 (containing the ban in the *chapeau*), *see id.* at Art. 27:2(a) (containing the exemption from Article 3:1(a)), *see id.* at Annex VII, ¶ (a) (referencing least-developed countries). The *SCM Agreement* grants developing countries an extended period in which to phase out export subsidies. *See SCM Agreement*, Art. 27:2(b), 27:4, and Annex VII, ¶ (b); BHALA & KENNEDY, *supra* note 12, § 7-5 at 841-44.

(f) subsidies on agricultural products *contingent on their incorporation in exported products*.[401]

Only these six types of programs qualify as an "export subsidy."[402] Because this list is exclusive, only these programs are subject to the general rule, *i.e.*, to reduction commitments.[403] What, then, does the rule not cover?

In other words, what ought to be on the list, if world agricultural trade is to emerge from Purgatory? One answer is that reduction commitments apply only to a program a Member puts in its Schedule of Concessions. That answer is a cynical, indeed erroneous, overstatement.[404] The six sub-paragraphs of Article 9:1, quoted above, are not listless categories. The italicized language in each of them indicates the Uruguay Round negotiators were serious about disciplining export subsidies to some degree. For example: the first sub-paragraph covers many export programs sponsored by the United States and EU, the second sub-paragraph includes direct sales by the United States Commodity Credit Corporation out of dairy stocks and sales by the EU out of intervention stocks, the third sub-paragraph captures the EU's sugar program and Canada's dairy program, the fifth category sub-paragraph encompasses Canada's "Crow's Nest" subsidized freight rates for items exported from western Canadian ports, and the sixth sub-paragraph has payments by the EU to exporters of cookies and confectionary made from domestic grain or sugar.[405] Clearly, then, a more technically precise answer is needed. That answer is there are two exceptions with large (or potentially large) dimensions—definitional exceptions and export credits.[406]

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401. *Agreement on Agriculture*, Art. 9:1 (emphasis added).

402. *Id.*

403. *Id.*

404. Interestingly, the Clinton Administration reported "[n]o volume reduction commitments have been made with respect to exports of processed products, but budgetary outlays are subject to reduction commitments." *Statement of Administrative Action*, *supra* note 12, at 723. It is not clear from the context (a discussion of Article 11 of the *Agriculture Agreement*) whether this reference is to the United States, a subset of WTO Members, or the entire Membership.

405. *See id.* at 721 (setting forth these examples).

406. Technically speaking, special and differential treatment afforded to developing country WTO Members also is an exception. *See* CROOME, *supra* note 10, at 59 (specifying "export subsidies by developing countries consistent with the agreement's provision for special and differential treatment in their favor" as one exception). As indicated above, developing country Members are to reduce (by 2004) their export subsidies by 24 percent in value, and 14 percent in volume, and least-developed countries have no such obligation. However, this exception is entirely understandable.

Further, during the implementation period, developing countries are exempt from reduction commitments on export subsidies to defray the cost of marketing and transporting (overseas or domestically) agricultural products. *See Agreement on Agriculture*, Art. 9:4 (containing exemptions for Article 9:1(d) and (e) programs). Article 9:4 conditions this special and differential treatment on a developing country "not appl[ying] [the subsidy] in a manner that would circumvent reduction commitments." That condition cannot mean what it literally says, because the special and differential treatment circumvents reduction commitments on marketing and transportation costs. Presumably, the

The same italicized language in Article 9:1 of the *Agriculture Agreement* reveals the definitional exceptions. To the extent a WTO Member can devise a program that does not fall within the boundaries created by this language, the Member has succeeded in getting around the definition. The omission from the *Agriculture Agreement*, in contrast to the *SCM Agreement*, of language encompassing *de facto* and *de jure* subsidies, may assist a Member inclined to plot in this manner. It might have an argument under the *Agriculture Agreement*, which it does not under the *SCM Agreement*, namely, "as a matter of law, there is no subsidy, and the Article 9:1 does not cover *de facto* benefits."[407]

To be sure, whether this, or any other, plot succeeds may depend on the views of the Appellate Body. At least judging from some case law on the *SCM Agreement*, the Appellate Body is likely to draw those boundaries as expansively as possible.[408] That is, the Appellate Body tends to find a program is an export subsidy subject to discipline.[409] Whether the Appellate Body will apply its jurisprudence on export subsidies under the *SCM Agreement* to cases involving Article 9:1 of the *Agriculture Agreement* remains to be seen. Arguably, it should at least consider doing so, at least in instances where there are similarities in language or purpose. For example, Article 9:1(a), like item (a) in Annex I to the *SCM Agreement*, speaks of "direct subsidies . . . contingent on export performance." Another example concerns transportation and freight, as the language of Article 9(e) and item (c) of Annex I is identical.

Even if the Appellate Body were to act aggressively against efforts by WTO Members to skirt definitional boundaries, it could not prevent exceptions from arising, nor cure all of them in existence. The Appellate Body can deal only with a program brought to it under the *DSU*.[410] What, then, might be some of the definitional exceptions a WTO Member could try to carve out for itself, through shrewd use of the italicized language in Article 9:1? Consider each sub-paragraph in turn.

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condition refers to the circumvention of other reduction commitments, *i.e.*, those in sub-paragraphs (a)-(c) and (f).

407. *See SCM Agreement* Article 3:1(a) (forbidding export subsidies "contingent, in law *or in fact*" (emphasis added)); *see also id.* at n.4 (defining "in fact").

408. *See* BHALA, *supra* note 10, ch. 15 (discussing some of the cases).

409. *Id.*

410. To be sure, I have argued elsewhere the decisions of the Appellate Body have *de facto* precedential effect, and ought to be given a *de jure* one. *See* Raj Bhala, *The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)*, 33 GEO. WASH. INT'L L. REV. 873-978 (2001); Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 FLA. STATE UNIV. J. TRANSNAT'L L. & POL'Y 1-151 (Fall 1999); *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. UNIV. INT'L L. REV. 845-956 (1999).

First, as regards direct export subsidies under Article 9:1(a), a WTO Member could devise an indirect subsidy scheme, or one not conditional on export performance. To make the program indirect, perhaps it could make payments through an intermediary, through a state-owned or managed entity, or through some kind of export-licensing regime that creates quota rents for the licensees. To make the payments non-contingent, perhaps it could make payments available to beneficiaries that export any portion of their output, but not tie the payments to the portion exported or make the payments to a broad class of beneficiaries that includes exporters. Second, with respect to stock sales under Article 9:1(b), a Member could argue it disposes of "commercial" stocks, that it does so mostly at a prices "comparable" to the domestic like product (*i.e.*, only some of the sales were dumped), or that the stocks are not "like" a product in the domestic market. Third, on government financing under Article 9:1(c), a Member could urge no benefits resulted "by virtue of" official action. Perhaps it might characterize a financial benefit to an agricultural exporter as accruing because of market forces. Fourth, on marketing and overseas shipping costs under Article 9:1(d), a Member could claim the subsidies it offers are "widely available" as part of its "export promotion and advisory services." Perhaps it might point out the services are offered to all businesses, whether or not they actually export or are engaged in agricultural activities. Fifth, on internal transport costs under Article 9:1(e), a Member could try satisfying the words "more favourable" through non-discriminatory treatment. It might subsidize the internal transportation of, say, cotton, from the farm to domestic textile factories and to ports for overseas shipment. Sixth, concerning inputs under Article 9:1(e), like Article 9:1(a), a Member might focus on the word "contingent." It could devise a scheme for paying businesses to use domestic agricultural products in finished products and define the class of beneficiaries to include, but not be limited to, exporters.

The point of these illustrations is not that any of them will "work," much less pass muster under Appellate Body scrutiny. The point is to indicate the flexible, even porous, nature of the boundaries created by Article 9:1 of the *Agreement on Agriculture*. The WTO Members did not define the boundaries using words that would hem themselves in when they design and implement an agricultural export subsidy program. Put metaphorically, the protectionist sin here is in less-than-full renunciation of a sinful behavior, namely, subsidizing exports.

One danger in expressing this point metaphorically is overstatement. The Uruguay Round negotiators knew of the possibility of definitional exceptions created or tested by a shrewd WTO Member. Accordingly, they wrote into the *Agreement on Agriculture*, in Article 10:1, an anti-circumvention rule: "*Export subsidies not listed in paragraph 1 of Article 9* shall not be applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments; nor shall non-commercial transactions be used to circumvent such commitments."[411] The scope of the rule, indicated by the italicized text, squarely addresses instances when a Member is seeking to implement an export subsidy program in a way that keeps it outside of the six programs listed in Article 9:1. What the rules seems to say, in conversational terms, is the following: "Even if Article 9:1 does not specifically list an export subsidy scheme a WTO Member has constructed, that Member had better be sure its scheme does not undermine (or threaten to do so) the promises it made to cut its subsidies." In brief, Article 10:1 protects Article 9:1.

Is the protection effective? Unfortunately, it is difficult to answer in the affirmative. Consider paragraph 2 of Article 10 of the *Agriculture Agreement*, which immediately follows the anti-circumvention quoted above: "Members undertake *to work toward* the development of internationally agreed disciplines to govern the provision of *export credits*, *export credit guarantees* or *insurance programs* and, after agreement on such disciplines, to provide export credits, export credit guarantees or insurance programs only in conformity therewith."[412] What Article 10:2 means is that a glaring type of export subsidy is not considered, for purposes of the *Agreement*, an export subsidy at all—export credits. If that were not the meaning, then why would WTO Members pledge to work toward an accord on disciplining export credits, and adhere to the agreement once they reach it?[413] These credits and related export credit guarantee and insurance schemes are not subject to the discipline of reduction commitments. It is a "glaring" type of subsidy because its aim and effect is to boost exports. At bottom, export credits, guarantees, and insurance schemes facilitate the purchase of agricultural products by one country from another country. They do so by giving the importing country the financial ability to make the purchases, so long as it uses the help to buy agricultural products from the country providing the assistance.

Is it intellectually defensible to except export credits from commitments to cut export subsidies? Insofar as a First World WTO Member sponsors an export credit scheme for Third World Member, the sponsoring Member can

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411. *Agreement on Agriculture*, Art. 10:1 (emphasis added). A corollary to this rule, in Article 10:3, requires a Member claiming it does not subsidize a quantity of exports in excess of its reduction commitments to prove that the exported product has not receive an export subsidy. This corollary covers both programs listed in Article 9:1 and embraced by the anti-circumvention rule of Article 10:1. *Id.* at Art. 10:3.

412. *Id.* at Art. 10:2 (emphasis added).

413. *See* CROOME, *supra* note 10, at 60 (describing the Article 10 provision on export credits as a "pledge"); *Statement of Administrative Action*, *supra* note 12 (stating that "[t]hese [export credit or credit guarantee] programs *will not be subject to reduction commitments* until agreement is reached on such disciplines" (emphasis added)).

characterize the scheme as development aid. But, that kind of aid helps the donor, too, specifically, the farmers in the donor. The help is not unconditional nor necessarily very generous.[414] Moreover, this characterization would conflict with Article 10:4(a) of the *Agreement on Agriculture*, which obligates Members to ensure their food aid programs are "*not tied directly or indirectly* to commercial exports of agricultural products to recipient countries."[415] Arguably, then, the omission of export credits from the disciplines, such as they are, of Article 9:1, is not defensible at all.

Consider the sharp contrast between Article 10:2 and the *SCM Agreement*. That *Agreement* expressly lists, and thereby bans, these programs. It defines them as the following:

> The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programs, of insurance or guarantee programs against increases in the cost of exported products or of exchange risk programs, at premium rates which are inadequate to cover the long-term operating costs and losses of the programs.[416]

It is hypocritical to contend these programs are export subsidies with respect to non-agricultural products (covered by the *SCM Agreement*), but not if they are directed at agricultural exports (dealt with by the *Agriculture Agreement*). That hypocrisy may well be explained, and explained well, by the simple political fact rich WTO Members, notably the United States, historically have relied heavily on agricultural export credit schemes.[417] Indeed, the United States provides $7 billion in official export credits[418] and ties eighty percent of its overseas aid to the purchase of American goods and services.[419]

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414. *See* MICHALOPOULOS, *supra* note 17, at 123-24 (observing "food aid . . . is frequently tied to procurement from a particular donor and determined by food stock availability in the donor country rather than by the needs of the recipient").

415. *Agreement on Agriculture*, Art. 10:4(a) (emphasis added).

416. *SCM Agreement*, Annex 1, *Illustrative List of Export Subsidies*, ¶ (j).

417. The Clinton Administration admitted as much in the *Statement of Administrative Action*, when it characterized the Export Credit Guarantee Program as "one of U.S. agriculture's most effective tools," and assured this Program "is among the programs exempt from reduction commitments ." *Statement of Administrative Action*, *supra* note 12, at 734. The defense that "current use of this program is well below both historic and authorized levels," even if still true, seems beside the point. *Id.*

418. *See* Watkins, *supra* note 16, at 13 (mentioning this statistic). As for the EU, export subsidies of all forms account for 9 percent of the CAP budget, down from the 30 percent figure in recent years. *See* King Jr. & Miller, *supra* note 270, at A10.

419. *See* Alan Beattie, *Japan, U.S. "Least Helpful to Poor Nations,"* FIN. TIMES, Apr. 29, 2003, at 6 (mentioning this statistic). Consequently, the Center for Global Development (a Washington, D.C. research organization) ranked the United States and Japan as the second least, and the least, respectively, helpful countries to poor nations. That ranking is based on an index called

C. MORE "REVERSE" SPECIAL AND DIFFERENTIAL TREATMENT?

A final point about export subsidies and the Third World ought to be highlighted. Quite obviously, developing countries have less financial wherewithal to subsidize agricultural exports than developed countries. Conversely, export subsidies by rich countries slant the playing field, as it were, even more in favor of their farmers than it otherwise would be. Thus, as general propositions, the more generous the exceptions to disciplines on agricultural export subsidies are, the greater the benefit to First World. Conversely, the more severe the disciplines are, the greater the benefit to the Third World. Here, as with several aspects of the *Agriculture Agreement*, there is a devil in the details.

Consider a provision of the *Agreement on Agriculture* that seems to have received little attention – Article 11. It states that "[i]n no case may the per-unit subsidy paid on an incorporated agricultural primary product exceed the per-unit export subsidy that would be payable on exports of the primary product as such."[420]

This restriction is, in essence, one on import substitution.[421] Suppose the subsidy to a domestic processor for using a local agricultural input exceeds the subsidy paid to a farmer who exports that input directly. The incentive structure created by the differential subsidy payments is to incorporate the input in the domestic production of a processed agricultural good, rather then export the input. (The processor effectively could pass on to the farmer on some of the subsidy it receives by paying a higher price for the input, one just above the price the farmer would receive by exporting it.) That is, the idea is to encourage the use of domestically-grown primary products in the production of processed goods, and favor those primary products over like imported items that the processor could incorporate.

From a free-trade perspective, that kind of distortion is noxious. Processors ought to be free to source inputs based on market price and quality signals. From a development perspective, however, the distortion could be justified. A Third World country might seek to assist its primary product

"commitment to development," which measures (1) generosity, (2) openness to exports from developing countries, (3) participation in global peacekeeping, (4) immigration policies, (5) environmental protection, and (6) the usefulness of foreign assistance. *Id.* Of the twenty-one rich countries surveyed, the Netherlands and Denmark topped the list, while Japan ranked last because of restrictive immigration policies and poor use of aid. *Id.*

420. *Agreement on Agriculture*, Art. 11.

421. One observer describes the rule thusly: "If subsidies are paid on processed agricultural products, they must not be more than proportionate to the subsidy that would be paid for the primary products that would have been included in the final processed product." CROOME, *supra* note 10, at 60-61; *see also* BHALA & KENNEDY, *supra* note 12, § 12-2(e)(5)(B)(i) at 1204 (discussing Article 11).

farmers, ensuring there is a reasonably lucrative domestic market for their crops. For example, a Latin American country might want to encourage the production and export of blueberry jam, and thus move beyond its present state of harvesting blueberries and shipping them to a developed country for processing into jam. A country in South or South East Asia might want to move beyond heavy reliance on exports of a basic commodity like rice and build domestic capacity to make and ship rice pudding. Moreover, the Third World country might seek to help agricultural processing businesses, *i.e.*, to add value to the agricultural products made in the country and thereby to earn more revenues from exportation. The country might even be trying to stimulate the vertical integration of a particular agricultural sector, which could lead to improved efficiencies.

These sorts of policies probably are consistent with the long-term national security interests of rich nations. After all, these policies compliment efforts to discourage farmers in the poor country from harvesting illicit products, namely narcotics. They help stimulate income levels, and reduce income volatility, in rural areas, which in turn might make farmers less desperate, and hence less susceptible to extremist ideologies. Yet, Article 11 constricts WTO Members, in their use of subsidies on incorporated products, to pursue these policies. The *Agriculture Agreement* does not afford (expressly, anyway) developing country Members—the very Members in which, from the perspective of First World national security, rural prosperity is most important—any special and differential treatment on these subsidies. Even if they did not run into the constraint of Article 11, they might well encounter its cousins: tariff escalation and tariff peaks on processed agricultural goods, *i.e.*, the phenomena whereby duty rates on primary commodities are lower than the rates on processed items, and the rates on processed items are abnormally high. Cocoa versus chocolate is just one example:

> The US and EU charged zero per cent tariffs on imports of raw cocoa beans, but as much as 14 percent on processed items such as paste and chocolate. As a result, developing countries produced more than 90 percent of all cocoa beans, but less than 5 percent of world chocolate output.[422]

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422. Guy de Jonquières, *U.S. and EU Tariffs Higher for Third World*, FIN. TIMES, Sept. 2, 2003, at 7 (summarizing the findings in a September 2003 report by Oxfam, which include the following stark facts: (1) American tariffs are twenty times higher on goods from developing countries than on goods from developed countries, largely because of tariff escalation and higher duty rates on key developing country exports such as textiles and clothing; (2) American tariffs are four to five times higher on Indian imports than British imports, with an average 19 percent tariff on garments, India's second largest export; (3) in 2002, the average American tariff on imports from Bangladesh was fourteen percent, and Bangladesh paid $301 million in duties to the United States, though Bangladesh accounted for 0.1 percent of all imports into the United States;

Other instances abound. In addition to confectionery, fruit juice, peanut butter, and tinned meat, attract duty rates in many developed countries that exceed thirty percent.[423] The EU imposes a 230 percent tariff on grape juice.[424] Canada's tariffs on fully processed foodstuffs are twelve times higher than its duty rates on products in the first stage of processing.[425]

Still, it is important not to exaggerate the point. The *Agreement on Agriculture* does not make it impossible to advance these kinds of policies. For instance, a WTO Member can channel funds for them into Green Box measures. That presumes the Member not only has the funding available, but also has the legal capacity to understand and interpret how it can implement its goals for rural development within the Box system. The point is simply that some provisions in the *Agreement*, from some perspectives, appear to be "reverse" special and differential treatment. Indeed, when juxtaposing Article 11 with the exception for export credits and tariff rates on some processed agricultural products, it may seem the treatment is a full-throttle reverse.

V. CLEANSING IN THE DOHA ROUND?

"The economics of trade, like freedom, are invisible: there is not one set of rules for the rich and another for the poor."[426]

A. THE UNHELPFUL PEACE CLAUSE

Plainly, it is for the WTO community to hold its Members to their promises and to induce meaningful promises in the first place. In this respect, the "Peace Clause" in Article 13 of the *Agriculture Agreement* was not helpful.[427] It temporarily constrained severely litigation of claims on agricultural subsidies after the *Agreement* entered into force on January 1, 1995.

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(4) also in 2002, Bangladesh's tariff bill to the United States was just below the bill paid by France, which accounted for 2.4 percent of all imports into the United States, and whose goods attracted an average American tariff of only one percent; (5) the average EU tariff is four times higher on imports from India than on imports from the United States; (6) the average EU tariff on imports from Sri Lanka and Uruguay is over eight times higher than on imports from the United States).

423. *See* MICHALOPOULOS, *supra* note 17, at 107 (mentioning these rates) and 211 (encouraging developing countries, because of tariff escalation, "to push for a formula that will lead to a greater reduction in the tariffs on processed food products").

424. *See id.* (mentioning this rate).

425. de Jonquières, *supra* note 422, at 7 (citing the September 2003 Oxfam report).

426. *WTO's Yard a Mess*, *supra* note 1, at 10.

427. *See Statement of Administrative Action*, *supra* note 12, at 723-25 (examining the Peace Clause in detail).

Specifically, the Peace Clause barred imposition of duty to countervail a Green Box subsidy.[428] For an Amber Box subsidy, whether or not it was *de minimis*, (*i.e.*, a subsidy subject to a reduction commitment, or a support that was legally insignificant), and for a Blue Box subsidy, the Peace Clause barred a countervailing duty action, except if the subsidy resulted in injury (or threat) under GATT Article VI and the *SCM Agreement*.[429] Likewise, for an export subsidy satisfying the criteria of the *Agreement*, the Peace Clause disallowed a countervailing duty action unless that subsidy caused injury (or threat of injury) on the basis of volume, effect on prices, or consequent impact in accordance with the standards of GATT Article VI and the *SCM Agreement*.[430] WTO Members had to exercise "due restraint" in initiating countervailing duty actions against an allegedly injurious (or threatening) Amber Box, Blue Box, or export subsidy.[431] In sum, the Peace Clause deferred the moment of accountability on certain key kinds of support, or to put it metaphorically, extended the period of Purgatory for world agricultural trade.

Thankfully, from a free trade perspective, the Peace Clause expired as of January 1, 2004. Assuming it is not extended during the Doha Round, WTO Members will not enjoy legal security simply by complying with their commitments under the *Agriculture Agreement* on domestic support and export subsidies.[432] Their programs will be subject to scrutiny, and cleansing

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428. *See Agreement on Agriculture*, Art. 13(a) (declaring "domestic support measures that conform fully to the provisions of Annex 2 [concerning the Green Box])" to be "non-actionable for purposes of countervailing duties"); CROOME, *supra* note 10, at 61 (stating that "no countervailing action may be taken against permitted (Green Box) measures").

429. *See Agreement on Agriculture*, Art. 13(b) (declaring domestic support measures conforming to Article 6, *i.e.*, Amber Box payments, and direct payments conforming to Article 6:5, *i.e.*, Blue Box payments, exempt from countervailing duties, unless injury (or threat) is proven); CROOME, *supra* note 10, at 61 (summarizing this rule).
Similarly, subsidies in the Special and Differential Treatment Box benefit from the Peace Clause, with the "implementation period" being nine years commencing on 1 January 1995, *i.e.*, the immunity expires on 1 January 2003. *See Agreement on Agriculture*, Arts. 1(f) (definition of "implementation period") and 13(b)(2) (mentioning domestic support conforming to Article 6:2, *i.e.*, the Special and Differential Treatment Box).

430. *See id.* at Art. 13(c)(i) (declaring "export subsidies that conform fully to the provisions of . . . this *Agreement* . . . shall be . . . subject to countervailing duties only upon a determination of injury or threat thereof based on volume, effect on prices, or consequent impact in accordance with Article VI of GATT 1994 and . . . the *Subsidies Agreement*. . . .); CROOME, *supra* note 10, at 61 (summarizing this rule).

431. *See Agreement on Agriculture*, Art. 13(b)(i), (c)(i) (mandating "due restraint"); CROOME, *supra* note 10, at 61 (explaining "'due restraint' shall be shown in initiating countervailing duty investigations" against domestic subsidies subject to reduction commitments and against export subsidies conforming to the *Agreement*).

432. *See* October 2002 *Briefing Document*, *supra* note 25, at 25 (stating that "[w]ithout this 'peace clause,' countries would have greater freedom to take action against each other's subsidies, under the Subsidies and Countervailing Measures Agreement and related provisions").

via WTO litigation, under the *SCM Agreement*.[433] In other words, the possibility of greater parallelism in disciplining agricultural and non-agricultural subsidies exists.

Because the Peace Clause did not entirely forbid a countervailing duty action against an Amber Box, Blue Box, or export subsidy, it would be an overstatement to call it an "unconditional immunity." But, the overstatement would not be gross. The requirement of an injury (or threat) determination weighs (or weighed) heavily on any such action. Furthermore, the requirement in an export subsidy case of basing injury (or threat) on volume, price, or impact narrowed the usable data from which to make a determination; whereas GATT Article VI and the *SCM Agreement* admit a broad range of data, which includes, for example, serious prejudice. The portion of the Peace Clause for Amber and Blue Box subsidies, namely Article 13(b)(i) of the *Agriculture Agreement*, does not contain this limit. Thus, at least in theory, when the Peace Clause operated it was easier to find injury (or threat) and impose a countervailing duty in an Amber or Blue Box subsidy case than in an export subsidy case. Finally, and perhaps tellingly, there is a contrast in standards with the *SCM Agreement*. No injury (or threat) determination is needed to countervail an export subsidy of a non-agricultural product.[434] Evidently, Uruguay Round negotiators took more seriously (or were more successful in dealing with) the problem of rooting out non-agricultural export subsidies via remedial action.

B. TO CANCUN AND BEYOND

To review and analyze properly all of the agricultural proposals made in the Doha Round would be to write another extended article. That may be for another time. Still, a few comments can lay the foundation for such an effort, and at least provide some guidance now.

First, there were three principal proposals on the table for Doha Round negotiators. They were made by the United States, the EU, and Stuart Harbinson (Chair of the WTO agriculture talks, and an able, seasoned trade diplomat from Hong Kong). Overall, the American proposal called for the most significant cuts in tariffs, domestic subsidies, and export subsidies.[435]

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433. *See Agreement on Agriculture*, Art. 1(f) (defining the "implementation period" for purposes of Article 13, the Peace Clause, as "the nine-year period commencing in 1995," which ended on December 31, 2003).

434. *See SCM Agreement*, Arts. 3-4 (on prohibited subsidies); BHALA & KENNEDY, *supra* note 12, § 7-3(a)(2) at 801-03 (explaining the irrebuttable presumption an adverse trade effect is caused by an export subsidy).

435. *See* Daneswar Poonyth & Ramesh Sharma, *The Impact of the WTO Negotiating Modalities in the Areas of Domestic Support, Market Access and Export Competition on Developing Countries: Results from ATPSM* (May 2003). This paper was presented at the

The EU offer was the least ambitious in these respects. The Harbinson proposal was a compromise between the American and European offers. Accordingly, the Food and Agriculture Organization (FAO) estimates the greatest positive pro-free trade effects from the American proposal, the least from the EU proposal, and an intermediate amount from the Harbinson effort. Unfortunately, but perhaps not surprisingly in retrospect, the Harbinson draft was rejected in early March 2003 as insufficient by one side, and too much for the other (and, of course, the Americans and Europeans each nixed the other's proposal).[436]

Following the rejection of the Harbinson draft and as the September 2003 Ministerial Conference in Cancun approached, the United States and EU reached a framework accord on agricultural trade liberalization.[437] Their August 2003 *Joint Text* reportedly contained six key points:

Amalgamated Methodology for Reducing Agricultural Tariffs –

As the United States sought, the deepest tariff cuts would be imposed on products that currently have the highest duty rates. As the EU sought, there would be broadly equal reductions in duty rates across the board, with a minimum tariff cut. There would be a maximum permissible tariff on an agricultural product.

Limitation on Domestic Support –

International Conference on *Agricultural Policy Reform and the WTO: Where Are We Heading?*, held in Capri, Italy, on 23-26 June 2003. The authors are economists with the FAO.

436. *See, e.g.*, Frances Williams, *Trade Diplomats Optimistic Over WTO Talks*, FIN. TIMES, Aug. 20, 2003, at 8 (stating that "[t]he EU and other countries with protectionist farm policies criticized Mr. Harbinson's earlier draft in March as too detailed and ambitious").

Interestingly, while some of the opposition in the United States was based on the Harbinson proposal not going far enough to require high-tariff countries (like Japan) to reduce their barriers, other opposition came because the proposal threatened domestic support. *See* Tobias Buck et al., *U.S. Farmers on the Defensive*, FIN. TIMES, June 27, 2003, at 17 (explaining (1) the 2002 Farm Bill enacted in the United States calls for $19.1 billion of domestic support, linked in part to prices, (2) the Harbinson proposal would have required cutting the $19.1 figure by 60 percent over 5 years, and also would have required the EU to cut by 60 percent its $67 billion cap over the same period, (3) "the main American commodity producers, particularly growers of wheat, soy beans, cotton, corn and rice," would have been heavily impacted by that cut, and thus opposed the Harbinson proposal).

437. *Text of Agreement Between Negotiators From the United States and the European Commission Concerning the Modalities for World Trade Organization Talks on Agriculture, Released Aug. 13, 2003, in Geneva*, 20 Int'l Trade Rep. (BNA) 1403-04 (Aug. 21, 2003) [hereinafter *EC–U.S. Joint Text*]. I use the short title, and for this discussion draw on the *EC–U.S. Joint Text*, plus the following sources: Ambassador Allen Johnson, Chief Agricultural Negotiator, *Conference Call to Discuss Agriculture Trade Negotiations at the WTO*, Aug. 13, 2003, *available at* www.ustr.gov; Frances Williams, *Rifts Over Farm Trade Add to Delays on Cancún Plans*, FIN. TIMES, Aug. 22, 2003, at 8; *WTO's Yard a Mess*, *supra* note 1, at 10; Williams, *supra* note 436, at 8; Guy de Jonquières, *U.S.–EU Farm Proposals Leave WTO Members in a Dilemma*, FIN. TIMES, Aug. 15, 2003, at 7; Guy de Jonquières, *U.S. and EU Unveil Plan to Cut Farm Trade Subsidies*, FIN. TIMES, Aug. 14, 2003, at 8.

The EU agreed less trade-distorting domestic support, *i.e.*, Blue Box subsidies, would be limited to FIVE percent of total farm output.

No Disciplines on *De Minimis* Subsidies –

The United States agreed not to press for disciplines on *de minimis* agricultural subsidies.

Export Subsidies –

The EU would not eliminate all of its export subsidies. Rather, it would eliminate export subsidies on some products of special interest to Third World WTO Members, and reduce these subsidies on other products.

Export Credits –

The United States would reduce, but not eliminate, some of its export credits and food aid programs.

Special and Differential Treatment –

Duty-free treatment would be granted to some agricultural products from some Third World WTO Members.

Whether these points can or ought to be the basis for a Doha Round agreement is very much in doubt. As Professor Jim Rollo of the University of Sussex observed, "It [the August 2003 accord] simply bolts together both sides' views and leaves all the important decisions for later. It may be a big step for the United States and EU, but it's a small step for mankind."[438]

This observation is astute. To be fair to the American and European negotiators, they did not intend the *Joint Text* to be a final negotiating position, and drew it up after just two weeks of talks. In mid-August 2003, Mr. Pérez del Castillo of Uruguay, the Chairman of the WTO General Council, suggested a draft text for the September Cancun Ministerial Conference with modifications to the *Joint Text* to make it more ambitious. As often happens, the ambition of some creates contention among others, and the *Joint Proposal* (plus Mr. del Castillo's draft) did just that. Critics point to flaws, yet the flaws they identify depend on their ambitions.

For WTO Members with protectionist ambitions, the *Joint Text* is entirely too radical. Japan objects to any ceiling on agricultural tariffs, which is not surprising because it imposes duties on rice imports of almost 1,000 percent.[439] The EU protests the cuts to domestic subsidies too severe.[440] South Korea, Switzerland, and others have reservations reflecting their aim to keep certain markets closed.

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438. de Jonquières, *U.S.-EU Farm Proposals Leave WTO Members in a* Dilemma, *supra* note 437, at 7.

439. *See* Guy de Jonquières, *WTO Battles Over Framework for Cancún Trade Talks*, FIN. TIMES, Aug. 26, 2003, at 7 (discussing Japan's objection to the August 2003 *Joint Text* and the modification offered by Mr. del Castillo).

440. *See id.* (discussing the EU's reaction to Mr. Del Castillo's modification).

From a development perspective, the special and differential treatment in the *Joint Text* is disappointing. WTO Members with development ambitions are offended by the lack of respect given to the non-reciprocity expectation in GATT Article XXXVI:8. Under the *Joint Text*, most developing countries would have to reduce their barriers to agricultural trade, including on sensitive farm products, by larger absolute amounts than most developed countries. That is, the *Joint Text* implies disproportionate tariff reductions, because most developing countries have relatively higher levels of protection. It also would exempt significant net food exporting countries from any special and differential treatment, a point to which Brazil strongly objects.[441] True, disproportionate (indeed, unilateral) reductions are justified by standard Ricardian economic logic (not to mention dynamic models of the benefits of trade liberalization). Nonetheless, many Third World Members see callousness and hypocrisy in the American and European argument that the main future market opportunities for poor countries lie in trade with other poor countries. There are some promising developing country markets, such as India, which boasts a large and expanding massive domestic market. There also are some distinctly unpromising markets, which are small in size and income. Developing country agricultural exporters know well that they should heed the adage "go where the money is." To them, the prize markets boast large numbers of well off consumers—the United States, EU, and Japan.

For WTO Members in agreement that free trade ought to be the ambition during the Doha Round, the *Joint Text* suffers from at least four flaws. First, it lacks particular numerical reduction targets or target dates with respect to all of its points. Paragraph 1:1 contains bracketed text; it calls for reducing "the most trade-distorting domestic support measures in the range of []% – []%." Paragraph 2:1, which deals with the formula for tariff reduction, is replete with bracketed text.[442] It also does not explain how to treat individual agricultural goods. Consequently, the United States and EU might be able to retain high barriers against imports of dairy and sugar products. These ambiguities may

441. *See* Williams, *supra* note 437, at 8 (discussing the proposed special and differential treatment exemption). Brazil also estimates it would export $10 billion worth of agricultural products, in addition to the $27 billion it expects to estimate in 2003, if developed WTO Members lowered their market access barriers and cut subsidies. Newman, *supra* note 346, at A17.

442. This Paragraph states:

The formula applicable for tariff reduction shall be a blended formula under which each element will contribute to substantial improvement in market access. The formula shall be as follows:

(i) []% of tariff lines subject to a []% average tariff cut and a minimum of []%; for these import sensitive tariff lines market access increase will result from a combination of tariff cuts and TRQs.

(ii) []% of tariff lines subject to a Swiss formula coefficient [].

(iii) []% of tariff lines shall be duty-free.

EC–U.S. Joint Text, *supra* note 437, at 1403. For an explanation of the Swiss and other tariff-reduction methodologies, see *supra* note 87 and accompanying text.

be a political necessity. The major agricultural trading nations may be unwilling to reveal their "bottom line" negotiating positions (assuming they have identified those lines) so far in advance of the proverbial "eleventh hour" of the Doha Round. Smaller and developing countries may be unwilling to offer specific concessions in payment for increased market access until they know exactly how much additional market access they will get from the major importing countries. Nevertheless, the ambiguities are maddening, given the considerable cutting that has yet to be done. Consider the fact that in developed countries, tariffs on agricultural goods, despite implementation of market access commitments under the *Agreement on Agriculture*, are roughly ten times higher than on industrial products.[443]

Second, the Cairns Group, along with other WTO Members, criticize the domestic support ceiling in the *Joint Text* as too convenient for the EU. Under Paragraph 1:2 of the *Joint Text*, direct payments to farmers linked to output (in effect, Blue Box payments) would be limited to five percent of the total value of agricultural production. However, this five percent limit, to which the EU would agree, embodies reforms to the CAP the EU already has made (or at least contemplates), not dramatic new cuts. Such reforms are dubious and possibly ought not to be accommodated. That may be all the more true with respect to commodities of keen export interest to developing countries, such as beef, cotton, sugar, and wheat. Until true discipline is brought to domestic support, farmers in poor countries remain at risk from dumping of cheap farm products by rich countries with generous subsidies.

Third, perhaps there ought to be disciplines on *de minimis* subsidies. Here again, there is bracketed text. Paragraph 1:3 calls for cutting *de minimis* support "by []%." This kind of support affects only a small percentage of total farm output in the United States. But, they cost about $7 billion each year. That price tag suggests reducing *de minimis* subsidies might well help certain exporters in the Third World, who specialize in the "small" product.

Fourth, as for export subsidies, the *Joint Text* does not go far enough. It does not call for a complete phase out of export subsidies. Bracketed text in Paragraph 3:1 masks the period during which some export subsidies would be phased out, and which products of interest to poor countries would benefit.[444] Hence, fifteen developing country WTO Members, including large farm exporting countries, argue it violates the Doha Round

443. Tangermann, *supra* note 233, at 11.

444. Paragraph 3:1 states with respect to export subsidies, "Members shall commit to eliminate over a [] year period export subsidies for the following products of particular interest to developing countries . . . ." *EC–U.S. Joint Text*, *supra* note 434, at 1403.

Declaration (in spirit, if not in letter). These critics are led by Brazil, China, and India, account for sixty percent of the farmers in the world, and can prevent the United States and EU from dictating a deal on farm trade.[445] Significantly, these farmers are joined by the powerful American Farm Bureau Federation, which articulated its disappointment at a pledge merely to reduce export subsidies.[446] As a corollary, all of these critics argue the *Joint Text* is vague. It fails to identify the agricultural products from which export subsidies would be removed.

So, where does the flawed August 2003 *Joint Text* leave world agricultural trade? Put in terms of the metaphor of Purgatory and its underlying presumption that free trade is Heavenly, it probably would be only a partial cleansing of protectionist sins. Uncertainty about it is uncertainty about Doha Round negotiations on agriculture and thus about how much longer world trade in primary and processed agricultural goods will remain in Purgatory. If Heaven is free trade, with equal opportunity for First and Third World farmers and processors, then let us pray for a full expiation in the Doha Round for the *BARBER* sins of the Uruguay Round. Or, to mix metaphors, let us hope for a short haircut.

445. *See* Williams, *supra* note 437, at 8 (discussing opposition from developing countries); *India, Japan, Mercosur Nations Reject U.S.–EU Joint Proposal on WTO Farm Trade*, 20 Int'l Trade Rep. (BNA) 1401 (Aug. 21, 2003) (reporting opposition from various developing countries).

446. *See* Gary G. Yerkey, *U.S. Farmers Disappointed U.S.–EU Ag Plan Fails to Urge Elimination of Export Subsidies*, 20 Int'l Trade Rep. (BNA) 1400-01 (comments of Bob Stallman, President, American Farm Bureau Federation).