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

Part I

by

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WORLD AGRICULTURAL TRADE IN PURGATORY: THE URUGUAY ROUND AGRICULTURE AGREEMENT AND ITS IMPLICATIONS FOR THE DOHA ROUND

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I dedicate this article to my mother, Barbara Mallory Bhala (22 April 1937–28 April 2003). *We needed one more summer.*

I. INTRODUCTION

"[F]reeing farm trade is the Doha Round's toughest challenge. It is also its biggest opportunity."[1]

A. THE METAPHOR OF PURGATORY

Agricultural trade among Members of the World Trade Organization (WTO) is in Purgatory.[2] No, I do not mean to suggest the souls of deceased citizens of those Members, or the Members individually or collectively are in an intermediate state between Heaven and Hell. That is hardly for me to say.[3] Besides, Purgatory is a process, not a place.[4] Rather, I mean to argue, with

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1. *WTO's Yard a Mess – Developing Countries Need to Embrace Tort Reforms Too*, FINANCIAL TIMES, Aug. 18, 2003, at 10.

2. The definition of "Purgatory" in Catholic theology is:

> A state of final purification after death and before entrance into heaven for those who died in God's friendship, but were only imperfectly purified; a final cleansing of human imperfection before one is able to enter the joy of heaven.

CATECHISM OF THE CATHOLIC CHURCH, *Glossary* at 896 (2nd ed. 2000). For theological treatments of Purgatory, RICHARD P. MCBRIEN, CATHOLICISM 1166-69 (New ed. 1994); John A. Hardon, S.J., THE CATHOLIC CATECHISM 273-80 (1981); MONIKA K. HELLWIG, UNDERSTANDING CATHOLICISM 180-81 (1981). For brief discussions of Catholicism, by the Chaplain to Cambridge University and a Professor of Philosophy at Boston College, respectively, see ALBAN MCCOY, AN INTELLIGENT PERSON'S GUIDE TO CATHOLICISM (1997), PETER KREEFT, FUNDAMENTALS OF THE FAITH (1988).

Throughout, I adhere to the convention of capitalizing "m" with respect to Members of the WTO.

3. In *Trade, Development, and Social Justice*, I make use of the Catholic concepts of Homily, Mortification, Mercy, and Almsgiving, and analogous Islamic concepts (*Khutba*, *Ramadan*, *Rahmah*, and *Zakat*), to classify special and differential treatment rules in international trade law. *See generally* RAJ BHALA, TRADE, DEVELOPMENT, AND SOCIAL JUSTICE (2003). I also endeavour to explain the rudiments of Catholic social justice theory, and consider whether these rules are "just" toward the Third World by using that theory as a standard for justice. *Id.* My efforts to apply theological concepts are less ambitious in the present article than in the book. Here, I seek only to use the concept of Purgatory as a metaphor that, like any good metaphor, can be insightful (and entertaining).

Understandably, some readers may question a discussion of international trade law containing explicit religious language. May I suggest this discourse takes place, and has so for some time (*e.g.*, in the debate about granting China permanent normal trade relations in connection with its accession to the WTO)? Also, may I suggest the treatment in the Preface and Introduction to *Trade, Development, and Social Justice*? Finally, it may be useful to recall the words of John Paul II, in his January 13, 2001 Address to the Diplomatic Corps accredited to the Holy See:

> Even if some are reluctant to refer to the religious dimension of human beings and human history, even if others want to consign religion to the private sphere, even if believing communities are persecuted, Christians will still proclaim that *religious experience is part of human experience. It is a vital element in shaping the person and the society to which people belong.* (emphasis added.)

John Paul II, Address of the Holy Father to the New Ambassador of Iraq to the Holy See, (April 28, 2001), *available at* www.vatican.va.

4. *See* REV. PETER KLEIN, THE CATHOLIC SOURCE BOOK 120 (2000) (explaining "Purgatory is the suffering of the faithful which causes a 'purging' of temporal punishment due to sin. It is explained in the *Catechism* (#1054), *supra* note 1, *as a process (not a place)* a purification after

respect to international trade in primary and processed agricultural products, there is neither autarky nor free trade—neither the Hell of closed borders nor the Heaven of open ones. The WTO Members generally have rejected protectionism. But, they have failed to embrace fully its opposite. This intermediate situation for their agricultural trade is Purgatory.

One way to interpret this argument is as an empirical proposition. Following this line, I would trot out data showing that many countries have yet to implement completely the commitments they made to one another during the 1986-93 Uruguay Round of multilateral trade negotiations. In fact, there is a body of evidence showing that many agreed-upon trade liberalization initiatives remain on paper.[5] However, for purposes of this work, I do not interpret my argument this way. Rather, I mean to focus on the substantive legal obligations to which WTO Members have committed themselves and to urge their "half-measures" on agricultural trade liberalization and keep this trade in Purgatory.

To be sure, the metaphor is not perfect. Few metaphors ever are. The imperfections naturally provoke the question whether the metaphor is more of an aesthetic distraction than a heuristic device to enlighten the analysis. Purgatory is for the souls of some dead individuals, namely, those in need of expiation for sins committed while alive. Once purified through Purgatory, the soul ascends to Heaven. Agricultural trade among WTO Members hardly is dead. It is well above zero, both in value and volume. Depending on the period and commodity being studied, that trade is growing.

Purgatory also is a concept relevant to a person, not a community, society, or country, much less business transactions among countries. Purgatory stands for a way station between different planes of existence, a necessary but not preferred stop, made necessary because of past choices freely made. Purgatory is by no means Hell, but Heaven remains closed until the imperfections of the soul are cleaned away. "Purgatory is best understood as a process by which we are purged of our residual selfishness so that we can really become

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death for those who are saved, so that they may achieve the holiness necessary to enter heaven." (Emphasis added.)); HARDON, *supra* note 2, at 274 (stating that "[i]n spite of some popular notions to the contrary, the Church has never passed judgment as to whether purgatory is a place or in a determined space where the souls are cleansed. It simply understands the expression to mean the state or condition under which the faithful departed undergo purification.")

5. *See, e.g.*, PETER GALLAGHER, GUIDE TO THE WTO AND DEVELOPING COUNTRIES 41-42 (2000) (stating that "[r]ecent assessments suggest that there have been only small changes in prices for the most traded agricultural products as a direct result of access improvements and cuts in subsidies," citing a 1997 World Bank study showing "the implementation of individual country commitments appeared to focus on managing trade rather than liberalizing trade," explaining "[t]here has been limited progress in trade liberalization, based on estimates of pre- and post-Uruguay Round trade distortions and the implementation of market access commitments in 1995-96, and observing "that by early 1997, only a small part of the agreed liberalization had been undertaken").

one with the God who is totally oriented to others, *i.e.*, the self-giving God."[6] My argument is that WTO Members have yet to complete they're accounting (indeed, atoning) for protecting domestic agricultural interests.

I am not deluded into thinking every WTO Member will maintain a wholly selfless policy toward agricultural trade.[7] That may be a fool's dream. Thus, I mean to press the metaphor of Purgatory only so far as appropriate to make the point that rules governing agricultural trade need considerable reform—"cleansing"—before that trade can be characterized accurately as "free". Put bluntly, "sins" have been committed in devising and implementing the rules. Only removal of their stains will allow that trade to emerge from Purgatory.

Does that mean free trade in agriculture is desirable, as is Heaven? Well, let me beg the indulgence of the reader on this issue and proceed on the assumption the answer is "yes." This assumption is quite reasonable, though, of course, not accepted by all WTO Members for all commodities in all contexts. For the present, let me take notice of the existence of a considerable corpus of economic research (theoretical and empirical) indicating as much.

B. SIX SINS FROM THE URUGUAY ROUND: *BARBER*

Who committed the "sins" that put world agriculture trade in Purgatory and when? The WTO Members did so, of their own free will, in 1986-93 during the Uruguay Round of multilateral trade negotiations.[8] Whether their trade in agriculture will be cleansed of prior bad deeds during the present Doha Round, launched in November 2001 and scheduled for conclusion in 2005, remains to be seen.

What sinful behaviour of WTO Members consigned cross-border agricultural trade to Purgatory and keeps it out of a free trade paradise? A broad explanation is the WTO Members sinned against the free market. They do not live according to market-driven policies, nor do they respond solely to market price signals in making decisions about what and how much to grow and process. Speaking about agriculture and Third World development in an address to the United States Coast Guard Academy in May 2003, President

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6. MCBRIEN, *supra* note 2, at 1168-69 (emphasis original).

7. However, in *Trade, Development, and Social Justice*, I argue for greater charity in special and differential treatment, on the basis of Catholic social justice theory. *See generally* BHALA, *supra* note 3.

Because the Members are responsible for their behaviour, a strict analogy with Purgatory would mean they (not their agricultural trade) is in Purgatory, and they (not their rules on agricultural trade) need cleansing. I do not mean to carry the metaphor so far.

8. The Uruguay Round was completed on 15 December 1993, the various documents from that Round were signed on 15 April 1994, and the Agreements from the Round entered into force on 1 January 1995.

Bush intoned: "The lesson of our time is clear: when nations embrace free markets, the rule of law and open trade, they prosper and millions of lives are lifted out of poverty and despair.[9]

Until the Members follow the "lesson," their trade in farm products will not emerge from Purgatory.

A synopsis of a legally precise reply is that the "sins" are certain provisions the Members inserted in the Uruguay Round *Agreement on Agriculture* and certain positions they have taken in the Doha Round negotiations.[10] Some provisions in the *Agreement* allow them to re-impose protectionist measures, while others are sufficiently ambiguous to allow them to eschew embracing free trade measures. These provisions concern:

R – *R*eduction commitments with respect to tariffs.
A – *A*ction against import surges.
B – *B*oxes for classifying domestic subsidies.
R – *R*eduction commitments with respect to domestic support.
B – *B*ase period selection for measuring subsidies and reduction commitments.
E – *E*xceptions to disciplines on export subsidies.

These sins can be remembered by an acronym. A modest rearrangement of the key letters above is *BARBER*.

One virtue of this acronym is its irony. The purported purpose of the *Agriculture Agreement* is to liberalize world agricultural trade by cutting various forms of government intrusion in that trade. The job of a barber is, of course, to cut hair. An underlying question in any analysis of the *Agreement* is the extent to which its provisions actually cut tariffs, non-tariff barriers, or subsidies and whether those cuts "look good" in the sense of have salubrious economic effects. Much of what I am saying in this work suggests the cuts are, at best, a trim, and their effects, especially on poor countries, are not necessarily positive. I might add the acronym has a second virtue—it is ecumenical. Virtually all people, of whatever faith, get haircuts. The outstanding

9. Press Release, White House, Office of the Press Secretary, and President Delivers Commencement Address at Coast Guard (May 21, 2003) (on file with the North Dakota Law Review).

10. This *Agreement*, also known as the *WTO Agreement on Agriculture*, and its five Annexes, are reprinted in *International Trade Law Handbook*. RAJ BHALA, INTERNATIONAL TRADE LAW HANDBOOK 305-32 (2d ed. 2002). All references herein to the *Agreement* and its Annexes are to the version in the *Handbook*. The official WTO published summary of the *Agreement* and a former senior Director in the GATT Secretariat wrote the rest of the texts from the Uruguay Round. *See* JOHN CROOME, GUIDE TO THE URUGUAY ROUND AGREEMENTS 52-62 (1999). Throughout, I use the labels "*Agreement on Agriculture*" and "*Agriculture Agreement*" interchangeably.

exception is Sikh men. Given the strong interest of Sikh farmers in the Indian Punjab in freer agricultural trade, I suspect, from personal experience, they would have no objection to the acronym! Still, however ironic or ecumenical the acronym is, I do not mean to imply it is the only, much less the best, possible memory device.

More seriously, I do not claim to have uncovered all sins or to have exposed them in the only possible manner.[11] After all, I am hardly the first to discuss the *Agriculture Agreement*.[12] It is entirely possible to view world agricultural trade rules in terms of their effects on Third World WTO Members and to differentiate these effects as to developing and least developed countries. The provocative study by Oxfam, *Rigged Rules and Double Standards* (2002), takes such an approach. The title of the report bespeaks the argument. That argument—rich countries have not opened their markets sufficiently to the farm products of poor countries—could be adjudged the greatest sin perpetrated in the Uruguay Round and continued thereafter. After all, it is a lack of charity for one's poorer neighbor.

Consider one provision, Article 4:2 of the *Agreement on Agriculture*. Tariffication called for by this Article may amount to "reverse" special and differential treatment—it may create a benefit greater for the First World than for the Third World. That possibility arises because, in general, non-tariff barriers (the subject of tariffication) are more pronounced in the Third than in the First World. Hence, tariffication arguably does more to enhance market

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11. Indeed, identifying a seventh sin that put and keeps world agricultural trade in Purgatory would give rise to an analogy with the "Seven Deadly Sins." The acronym "PLACES + G" helps recall the Seven Deadly Sins (*P*ride, *L*ust, *A*nger, *C*ovetousness, *E*nvy, *S*loth, and *G*reed), and surely one could be devised for agriculture?

12. For instance, in July 2003, Professor Joseph A. McMahon of the Queen's University of Belfast kindly shared with me his study, entitled *The Agreement on Agriculture*, which includes treatment of the CAP and early multilateral trade law history with respect to agriculture. This study will be published by Kluwer in a forthcoming collection of articles on the WTO. *See also* MELAKU GEBOYE DESTA, THE LAW OF INTERNATIONAL TRADE IN AGRICULTURAL PRODUCTS (2002) (chronicling and explaining trade rules concerning market access, domestic support, and export subsidies); RAJ BHALA & KEVIN KENNEDY, WORLD TRADE LAW § 12-2 at 1178-1209 (1998) (containing Professor Kennedy's discussion of trade liberalization in agriculture); Paul C. Rosenthal & Lynn E. Duffy, *Reforming Global Trade in Agriculture*, *in* THE WORLD TRADE ORGANIZATION: THE MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION 147-50 (Terence P. Stewart ed. 1996) (discussing American negotiating objectives); Kevin J. Brosch, *The Uruguay Round Agreement on Agriculture*, *in* THE GATT, THE WTO AND THE URUGUAY ROUND AGREEMENTS ACT: UNDERSTANDING THE FUNDAMENTAL CHANGES 865 (Harvey M. Applebaum & Lyn M. Schlitt eds. 1995) (discussing the *Agreement*); Joseph A. McMahon, *The Uruguay Round and Agriculture: Charting A New Direction?*, 29 INT'L LAW. 411 (1995) (discussing the *Agreement*); Miguel Antonio Figueroa, *The GATT and Agriculture: Past, Present, and Future*, 5 KANS. J.L. & PUB. POL'Y 93 (1995). For the official American interpretation of the *Agreement on Agriculture*, see the Clinton Administration's *Statement of Administrative Action, Agreement on Agriculture*, *in* URUGUAY ROUND TRADE AGREEMENTS, TEXTS OF AGREEMENTS, IMPLEMENTING BILL, STATEMENTS OF ADMINISTRATIVE ACTION, AND REQUIRED SUPPORTING STATEMENTS, H.R. DOC. NO. 316, at 709-41 (1994).

access for First World farmers and processors than for their Third World brothers and sisters producing like products.

Consider, further, Article 6 of the *Agriculture Agreement*, which deals with domestic subsidies, and Article 9, which deals with export subsidies. These provisions discipline, to some extent, certain types of agricultural subsidies. Yet, to the extent world food prices are adversely affected by subsidies, the incentive to invest in domestic agricultural production declines. That is particularly likely in Third World countries unable to afford price support measures or other devices to encourage investment. In other words, food price suppression or depression caused by First World subsidies diminishes the profitability of an investment in food production. In turn, efforts by countries that are net importers of food but which seek to develop their own food production capacity and adopt new agricultural technologies may be undermined. That is because foreign and domestic investors responding to price signals channel resources into other sectors.[13]

My point, though, is while I discuss the inequities, even wickedness, in agricultural trade rules, I do not dwell on them from a Third World vantage. As a matter of social justice, persons from Kansas to Karnataka toiling in the agricultural sector have equal human dignity.[14] As a matter of economic reality, developed countries are major players in some world agricultural markets. They account for two-thirds of world imports of agricultural products.[15] Of the roughly 5 billion people living in the Third World, 75 percent of them survive on less than one United States dollar per day, and about 900 million of them are farmers or otherwise working in rural areas.[16] Still, I do not wish to be an apologist for the Third World, which suffers in part because of its own heinous medley of protectionism, ineptitude, corruption, and violence.[17] As the *Financial Times* rightly observed:

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13. *See* GALLAGHER, *supra* note 5, at 46 (suggesting this line of reasoning).

14. *See* BHALA, *supra* note 3, at ch. 19 (discussing human dignity as a principle of Catholic social justice theory).

15. *See* GALLAGHER, *supra* note 5, at 42 (mentioning this fact). *See* CHAKRAVARTHI RAGHAVAN, RECOLONIZATION – GATT, THE URUGUAY ROUND & THE THIRD WORLD 162-69 (1990) (citing statistics (through the 1980s) on the dominance of developed countries in most agricultural markets).

16. *See* Kevin Watkins, *Reducing Poverty Starts with Fairer Farm Trade*, FIN. TIMES, June 2, 2003, at 13 (mentioning these statistics).

17. *See* Melaku Gboye Desta, *Agriculture and the Doha Development Agenda: Any Hopes for Improvement?*, *in* ESSAYS ON THE FUTURE OF THE WTO: FINDING A NEW BALANCE (Kim Van der Borght ed. 2003) (critically assessing the treatment of agriculture in the WTO from the perspective of developing countries). GALLAGHER, *supra* note 5, at 41-46, 137-46 (summarizing the provisions of the *Agriculture Agreement* affecting the Third World, which also points out agricultural markets in many Third World countries remain largely insulated from world market price signals). *See* RAGHAVAN, *supra* note 15, at 160-77, 275-77 (discussing a pro-Third World commentary during the Uruguay Round). *See* CONSTANTINE MICHALOPOULOS, DEVELOPING

> *Critics who claim that WTO rules are intrinsically unfair to poor countries protest too much.* The rules are far from perfect. But the fact that not all countries gain equally from trade is not, in itself, evidence of unequal opportunity: *it is at least as much because opportunities are not always fully exploited.*
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> Sometimes, that is because of a lack of economic capacity and resources. Failed states with few productive industries cannot expect miracles from export-led growth. Too often, however, *developing countries handicap themselves by shutting out each other's exports.* India, a fervent critic of western protection, erects higher barriers against many other poor countries than do most industrialized economies. They need to fall.[18]

Still, neither the practical importance of rich countries nor the self-inflicted wounds of poor countries is my focus. Rather, my argument is world agricultural trade is in Purgatory, put there because of the *BARBER* sins. As a matter of faith, "Heaven" is free trade in agriculture, which by definition means an equality of opportunity for farmers in the First and Third Worlds. Insofar as a lack of charity to poor farmers in impoverished WTO Members is made possible by agricultural trade rules, the rules certainly need to be cleansed on account of that sin too.

These difficult topics, the weighty metaphor of Purgatory, and the word "sin" suggest there is every reason to be pessimistic about the present Doha Round negotiations on trade in agriculture. However, that inference would be erroneous. It would overlook the whole point of being in Purgatory, namely, cleansing "[a]ll who die in God's grace and friendship, but still imperfectly purified... so as to achieve the holiness necessary to enter the joy of heaven."[19] Put succinctly, a soul does not "slip" in Purgatory to Hell; hence

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COUNTRIES IN THE WTO (2001) (synthesizing economic evidence concerning the effects on the Third World of the Uruguay Round agreements).

18. *The Challenge for Trade in Cancun*, FIN. TIMES, Aug. 14, 2003, at 12 (emphasis added).

19. CATECHISM, *supra* note 2, ¶ 1031 at 268. *See also* LEO J. TRESE, THE FAITH EXPLAINED 152-53 (1991) (stating that "the soul in purgatory suffers joyfully.... The great difference between the suffering of hell and the suffering of purgatory is the hopelessness of hell's eternal separation against the certainty of purgatory's release."). Professor McBrien goes so far as to say "[t]he kind of suffering associated with purgatory... is not suffering inflicted upon us from the outside as a punishment for sin, as the late medieval theology of the West understood it, but the *intrinsic pain that we all feel when we are asked to surrender our ego-centered self so that the God-centered loving self may take its place.*" MCBRIEN, *supra* note 2, at 1169.

There may be differences in the account of Professor McBrien and those of other writers. For example, *The Essential Catholic Handbook* explains "stains of sin... are cleansed away in a purifying process called purgatory," and "[t]hese stains of sin are *primarily the temporal punishment due to venial or mortal sins* already forgiven but for which sufficient penance was not done during your lifetime" (emphasis added). THE ESSENTIAL CATHOLIC HANDBOOK 42 (1997). Without getting into deep theological waters (in which I surely would need a life line), I ask the

souls in Purgatory are not damned.[20] Rather, they are "indeed *assured* of their eternal salvation."[21] Might it be so with world trade in agriculture?

That is, if this trade is not condemned to the Hell of protectionism, a Hell in which WTO Members punish themselves by punishing each other with tariff and non-tariff barriers to primary and processed agricultural products.[22] The text of the Doha *Ministerial Declaration* concerning negotiations on agriculture gives reason for optimism:

> We recall the long-term objective referred to in the *Agreement [on Agriculture]* to establish a fair and market-oriented trading system through a programme of fundamental reform encompassing strengthened rules and specific commitments on support and protection in order to correct and prevent restrictions and distortions in world agricultural markets. We reconfirm our commitment to this programme. Building on the work carried out to date and *without prejudging the outcome of the negotiations* we commit ourselves to comprehensive negotiations aimed at: *substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support.* We agree that special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall be embodied in the Schedules of concessions and commitments and as appropriate in the rules and disciplines to be negotiated, so as to be operationally effective and to enable developing countries to effectively [*sic*] take account of their development needs, including food security and rural development. We take note of the non-trade concerns reflected in the negotiating proposals submitted by Members and confirm that *non-trade concerns will be taken into account in the negotiations as provided for in the Agreement on Agriculture.*[23]

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indulgence of the reader when I say these differences do not materially affect the present metaphorical use of Purgatory. All these accounts agree a soul in Purgatory is not condemned, and that is all I am trying to say in the text above—world trade in agriculture is not doomed to protectionism.

20. *See* HARDON, *supra* note 2, at 279 (explaining "there is no comparison between this suffering [in Purgatory] and the pains of hell. It is temporary and therefore includes the assured hope of one day seeing the face of God. . . .").

21. CATECHISM, *supra* note 2, ¶ 1031 at 268 (emphasis added).

22. *Id.* (differentiating the "final purification of the elect" from "the punishment of the damned").

23. WORLD TRADE ORGANIZATION, DOHA DECLARATIONS, *Ministerial Declaration* ¶ 13 at 6 (adopted 14 November 2001) (emphasis added). Of course, many of these issues affect countries that have not (yet) acceded to the WTO. For example, Eritrea faces a monstrous

Some of the italicized text suggests the Doha Round could be the final cleansing of protectionist measures left over from the Uruguay Round.[24] After all, world agricultural trade would be in, or very close to, a free trade Heaven if there were "substantial" improvements in market access, if "all forms" of export subsidies were phased out, and if there were "substantial" reductions in domestic support.

Of course, this suggestion may be assuring, but it is not assurance. Observe, for instance, the reference to "non-trade concerns." These "concerns" appear reasonable enough—environmental protection, food security, poverty alleviation, rural development, and structural adjustment.[25] But, to a free trader, the term is a euphemism for protectionism on the dubious ground that agriculture plays multiple functions in a society, and that farmers and farm output must be treated differently from factory workers and widgets.[26] Consider another textual matter. At the insistence of the EU, spurred by the French, Doha Round negotiators inserted into the text of paragraph 13 the phrase "without prejudging the outcome of the negotiations." The European logic was a negotiation whose outcome was known in advance as not a negotiation; rather, it is a process of compulsion. The obvious response was "wrong." A negotiation can be substantively meaningful when all parties have agreed to the goal but have yet to agree on how to reach it. Peace negotiations are an obvious example. Warring parties that desire peace typically need to negotiate on how to achieve this agreed-upon end.

The point is the WTO Members may need yet more Rounds for deliverance from the *BARBER* sins.[27] The process in Purgatory can take a

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drought, two-thirds of its 3.5 million people need food, one third of its livestock are short of water, livestock prices have fallen by 30 percent, and grain prices have doubled in the early 2003. *See* Chris Hellier, *Hunger and Hope in Eritrea*, CNEWA WORLD 25 (July-August 2003).

24. It would be another lengthy article in itself to analyze all of the proposals for agricultural trade reform submitted thus far in the Doha Round. The WTO web site, www.wto.org, posts many of those proposals. I confine the present work to credible news accounts of agricultural talks in the Round.

25. *See* Information and Media Relations Division, World Trade Organization Secretariat, *WTO Agriculture Negotiations: The Issues, and Where We Are Now* 23 (21 Oct. 2002), *available at* www.wto.org/english/tratop_e/agric_e/negs_bkgrnd10_access_e.htm [hereinafter October 2002 *Briefing Document*] (defining, by way of a non-exclusive list, the term). *See also* Larry A. DiMatteo, *The Doha Declaration and Beyond: Giving a Voice to Non-Trade Concerns Within the WTO Trade Regime*, 36 VAND. J. TRANSNAT'L L. 95-160 (arguing the binding provisions of WTO agreements ignore the non-trade concerns of consumer and labor rights, environmental protection, and state sovereignty).

26. *See infra* notes 42-49 and accompanying next (discussing this argument, known as "multifunctionality").

27. The Clinton Administration explained the *Agreement on Agriculture*, "While representing significant progress in reducing trade-distorting measures . . ., represents *only the beginning* of a reform process for world-wide trade in agriculture" (emphasis added). *See Statement of Administrative Action*, *supra* note 12, at 709.

long time. No one knows how long an individual soul remains in Purgatory, though intercession of various sorts (*e.g.*, of saints and from prayer) may expedite matters.[28] Likewise, no one can say how long global agricultural trade will be where it is now. Intercession by free trade interests may help bring about a successful negotiating outcome to the Doha Round. While there is always in earthly international economic relations the possibility WTO Members could regress to a 1930s-style protectionist inferno, I think the odds look to be remote, however difficult the going in the Doha Round.

Having identified "sins" that put world agricultural trade into Purgatory and which need to be cleansed for it to emerge from there, I hasten to add a qualification about my use of the word "sin." Whereas Purgatory is associated with Catholic theology, "sin" is a concept to all Christian denominations and, among other faiths, to Islam.[29] In employing the term, I mean to distinguish the presumed ideal of free trade. I do not mean to condemn the entire *Agreement on Agriculture* nor all of the negotiating positions taken in the Doha Round. There are sound arguments for several of the provisions I discuss and compelling rationales for some negotiating positions. Certainly, I do not mean to cast judgment on any WTO Member, which is not for me to do.

I would like to convey with the word "sin" a poignant deviation from unfettered cross-border trade in farm products—protectionism of one form or another—but not connote that the deviation is entirely irrational. Sin is evil, but it is not inexplicable. For the present, I eschew an effort at explanation, take the deviations as they are, and view them as why world agricultural trade is in Purgatory. I concede my use of the word is somewhat less full or forceful than a Christian, Islamic, or other religious scholar would understand. Of

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28. *See* CATECHISM, *supra* note 2, ¶ 1032 at 269 (stating that "[f]rom the beginning the Church has honored the memory of the dead and offered prayers in suffrage for them, above all the Eucharistic sacrifice, so that, thus purified, they may attain the beatific vision of God"); TRESE, *supra* note 19, at 153 (stating that "no one can know 'how long' purgatory lasts for any individual soul . . . . [W]hile there is *duration* beyond the grave, there is no 'time' as we know it; no nights and days, no hours and minutes. . . . But we the living can help that soul, by the mercy of God; and the frequency of our remembrance, and the endurance of our remembrance").
The Second Council of Lyons in 1274, and the Councils of Florence and Trent, in 1439 and 1563, respectively, were instrumental in developing Catholic teaching on Purgatory. *See* CATECHISM, *supra* note 2, ¶ 1031 at 268-69; HARDON, *supra* note 2, at 277-78. The Second Council of Lyons focused on the existence of purgatory and the utility of prayer for the dead. *See* HARDON, *supra* note 2, at 277. In *Decree for the Greeks*, the Council of Florence balanced the emphasis on satisfaction and expiation, in the Western Church, with the emphasis on purification, in the Eastern Church. *See* MCBRIEN, *supra* note 2, at 1168. The Council of Trent, in response to the Reformation-era doctrine that salvation occurs only by grace (hence, praying for the dead is inappropriate), affirmed the existence of Purgatory, "insisted that the souls detained there are helped by acts of intercession of the faithful, and especially the sacrifice of the Mass." MCBRIEN, *supra* note 2, at 1168.

29. *See* JOSEPH PIEPER, THE CONCEPT OF SIN (1977) (Edward T. Oakes, S.J. trans., St. Augustine's Press ed., 2001) (discussing a brief, readable, Catholic theological treatment).

course, I also recognize the reader inclined to favor the free market may associate irrationality and moral opprobrium with deviations permitted by the *Agreement* and advocated in the Doha Round. However, I would add a moral case can be made that protectionism is evil; it offends individual property rights and freedom of contract (not to mention ITS effects on the poor). Indeed, Robert McGee makes that case forcefully in works on which I have drawn elsewhere.[30]

A final, personal note is worth making about the metaphor of Purgatory and the word "sin." The discussion below can be read without dwelling on the metaphor or word; it can be studied as a neutral primer on the Uruguay Round rules and Doha Round negotiations. At the same time, without revealing confidences, let me indicate I am blessed to have spoken extensively about a variety of international trade law matters with two Director-Generals of the WTO. These honorable men do not shy away from the moral dimensions of WTO matters nor even from theological concepts and terminology. Phrases like "it breaks your heart," "doing the Lord's work," or "I see that way of thinking" have peppered our chats. To my mind, that inspiration is justification enough for my language here.

Evidently, the metaphor has suffused no less than the minds of the editors of the *Financial Times*. In a lead op-ed piece on the Doha Round, they characterized "policies that penalize poor [countries] . . ., such as trade-distorting farm subsidies and tariff structures that discriminate heavily against imports of processed products," as "the *sins* of the wealth."[31] That characterization appears to have caught on inside the secular Washington, D.C. establishment. Several weeks after the *Financial Times* story, the head of a prominent economics think-tank was quoted in the *New York Times* as saying that "[o]ur American subsidy system is a crime, *it's a sin*."[32]

C. WHY BOTHER?

Aside from taking free trade in agriculture as a perfect outcome, the discussion below rests on the assumption that this trade merits increased attention among legal scholars and students. Is that assumption reasonable? After all, Purgatory, like agriculture, is not a topic most of us bother about much. Heaven and Hell, like new free trade agreements or new antidumping cases are more likely to draw attention. While theologians understand and

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30. *See* RAJ BHALA, INTERNATIONAL TRADE LAW: THEORY AND PRACTICE 38-41 (2nd ed. 2001) (containing excerpts on morality, rights, and fairness).

31. *The Challenge for Trade in Cancún*, *supra* note 18 (emphasis added).

32. Elizabeth Becker, *Western Farmers Fear Third-World Challenge to Subsidies*, N.Y. TIMES, Sept. 9, 2003, at A1, A8 (quoting C. Fred Bergsten, Director, Institute for International Economics) (emphasis added).

discuss Purgatory and development economists deal with agriculture,[33] neither Purgatory nor agriculture is in the mainstream of writing in the legal academy. As one example, the trade–agriculture intersection went virtually unnoticed among panels at the April 2003 American Society of International Law meeting in Washington, D.C. As another example, the World Bank's new book, *Agriculture, Trade, and the WTO*, consists of far more chapters written by economists and diplomats than lawyers.[34] These patterns are not atypical in conferences or books.

My purpose here is not to attempt to redress single-handedly the imbalance; that would be not only be impossible in one article, but also vain for one author. Yet, disrespect of agriculture is a mistake when studying international trade law. For roughly half a century, contracting parties to the General Agreement on Tariffs and Trade (GATT) did not devise an accord specifically to govern agriculture; though primary agricultural commodities and processed agricultural products always have been subject to the legal disciplines of GATT.[35] Following attention in the late 1950s (in, for example, the Haberler Report), agriculture gained a prominent place in the early 1960s, particularly with the amendment to GATT known as "Part IV," which deals with trade and development. In some parts of the legal academy, the very word "agriculture" triggers yawns or sneers (as if food magically appears from abroad on a dining table). Why bother with the intersection of farming and

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33. *See, e.g.*, GLOBALIZATION AND AGRICULTURAL TRADE POLICY (Hans J. Michelmann et al., eds., 2001) (a stimulating collection of papers from a conference sponsored by the University of Saskatchewan (Canada) Department of Agricultural Economics on various agricultural trade issues, held in the aftermath of the failure of the WTO Ministerial Conference in Seattle); INTERNATIONAL AGRICULTURAL DEVELOPMENT (Carl K. Eicher & John M. Staatz eds., 1998) (treating the theoretical and empirical aspects of the role of agriculture in development, acceleration of the agrarian transformation, and the reduction of rural poverty); DANIEL A. SUMNER, AGRICULTURAL TRADE POLICY – LETTING MARKETS WORK (1995) (explaining the economic aspects of agricultural provisions in multilateral and regional trade agreements), LUTHER TWEETEN, AGRICULTURAL TRADE – PRINCIPLES AND POLICIES (1992) (a text on agricultural trade policy).

34. *See* AGRICULTURE, TRADE, AND THE WTO (Merlinda D. Ingco ed., 2003) (containing one of fifteen chapters by a private legal practitioner in Washington, D.C., on safeguards, by Gary Horlick)

35. That theoretical subjection did not translate into comprehensive coverage. First, "[b]efore the Uruguay Round, many GATT countries had few bound rates of duty for agricultural products." *See Statement of Administrative Action, supra* note 12, at 713. Second, several provisions of GATT (*e.g.*, on quantitative restrictions and export subsidies) have exemptions of one sort or another for agricultural products, resulting in incomplete or loose coverage. *See* RAGHAVAN, *supra* note 15, at 160. Third, GATT contracting parties obtained waivers from GATT obligations for key agricultural programs, as the United States did in 1955 (obtaining a permanent waiver for its Agricultural Adjustment Act), and as Japan and Switzerland did in their protocols of accession (for certain agricultural measures). *See id.* Fourth, the GATT contracting parties never approved the Treaty of Rome. Accordingly, the European Community "functioned on the basis" that its CAP had not been disapproved. *Id.*

trade when reform of the WTO dispute settlement system,[36] major safeguards disputes over steel, access to patented pharmaceuticals to treat infectious diseases,[37] or the possible inclusion of foreign direct investment in the WTO legal regime[38] are pressing? Surely, they are the "big picture" issues.[39]

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36. *See, e.g.*, Raj Bhala & Lucienne Attard, *Austin's Ghost and DSU Reform*, INT'L LAW. (forthcoming 2003) (manuscript on file with author) (discussing various proposals for changing dispute settlement procedures); Joel P. Trachtman & Philip M. Moremen, *Costs and Benefits of Private Participation in WTO Dispute Settlement: Whose Right Is It Anyway?*, 44 HARV. INT'L L.J. 221-50 (2003) (concluding the scope and character of private party participation, in domestic courts and at the WTO, ought to vary depending on the field of WTO law, based on normative considerations associated with each field).

37. *See, e.g.*, *Pill Paupers*, ECONOMIST, Dec. 21, 2002, at 10 ((1) reporting on the continuing dispute "over how far to extend compulsory licensing, a tool that confers that right to manufacture patented drugs without the patent-holder's consent," (2) explaining the controversial American position in the Doha Round, namely, any extension be limited to critical diseases like AIDS, malaria, and tuberculosis, (3) observing "[f]ew of the world's poorest countries are in any position to use compulsory licensing . . . [b]ecause they lack not only the administrative and legal capacity but also any domestic drug industry to exploit it, [hence] they instead import generic drugs from countries such as India. . . .", (4) arguing against differential pricing in favor of poor countries, because of the problem of arbitrage (*i.e.*, some cheaply-priced medicines may flow back to high-priced markets), and because governments may use the fact of differential pricing to pressure drug companies to reduce their prices in high-priced markets, and (5) concluding the best solution would be for wealthy countries to use aid budgets to help poor countries import medicine at market prices).

In August 2003, just before the WTO Ministerial Conference in Cancun, WTO Members reached agreement on methods to improve access for Third World countries to cheap medicines. Frances Williams, *Cheap Drugs Deal Agreed as U.S. Lifts Veto*, FIN. TIMES, Sept. 1, 2003, at 5. Along with the United States, Brazil, India, Kenya, and South Africa were instrumental in the negotiations, which led to the resurrection of a December 2002 proposal to which the United States had objected. *Id.* That proposal was a limited waiver of compulsory licensing rules in the WTO *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("*TRIPs*"), which allow a Member to invoke compulsory licensing only in favor of a domestic generic producer. *Cheap Drugs are Better than Nothing*, FIN. TIMES, Aug. 29, 2003, at 10. That right is of no help to most poor countries, because they lack the domestic capacity to manufacture pharmaceuticals, hence the waiver authorized them to import cheap generic medicines. The United States dropped its objection to the waiver, in exchange for adoption by the WTO General Council of a letter from the Chairman of the General Council interpreting the December 2002 waiver proposal. Frances Williams, *Cheap Drugs Deal Agreed as U.S. Lifts Veto*, FIN. TIMES, Sept. 1, 2003, at 5. Essentially, this letter assures poor countries lacking manufacturing capacity the right to import inexpensive generic drugs (from countries that produce them, such as Brazil and India) to combat serious diseases, such as AIDS, malaria, and tuberculosis. Frances Williams, *WTO Deal on Cheap Drugs Ends Months of Wrangling*, FIN. TIMES, Aug. 28, 2003, at 3. The letter also explains this right may be exercised only in good faith, to protect public health, and not for commercial policy objectives that would undermine the rights of patent holders (such as pharmaceutical companies in the United States) or lead to diversion of cheap drugs to markets in developed countries. *Id.* Industrialized WTO Members have agreed not to import generic medicines, and eleven newly industrialized and advanced developing countries, including Mexico and Korea, have agreed to do so only in an emergency. Frances Williams, *Cheap Drugs Deal Agreed as U.S. Lifts Veto*, FIN. TIMES, Sept. 1, 2003, at 5.

38. *See, e.g.*, Kevin C. Kennedy, *A WTO Agreement on Investment: A Solution in Search of a Problem?*, 24 U. PA. J. INT'L ECON. L. 77-188 (2003) (reviewing and evaluating arguments for and against a WTO agreement that would address domestic legal restrictions on foreign capital investment); Edward Luce et al., *India Opposes World Trade talks on Investment Rules*, FIN. TIMES, Aug. 28, 2003, at 3 (reporting India's disagreement with the EU, Japan, South Korea, and

The question of "why bother?" can be a veiled excuse if posed in the context of the EU's Common Agricultural Policy (CAP). Few if any international trade law scholars or students enthusiastically seek to delve into the nuances—no, the horrors—of the CAP to understand the intersection between trade and agriculture. But, even this understandable excuse no longer ought to be permitted. Today, there are at least three strong justifications for "bothering" about agricultural trade: intellectual challenge, practical importance, and national security.

Farming is not just about planting, harvesting, and selling crops anymore (if it ever was). It is about, for example, the development of rural poor in impoverished countries.[40] Farming also is about whether the same respect accorded to the geographical indication of French cognac and Greek feta cheese ought to extend to Hungarian yoghurt, Darjeeling tea, Florida orange juice and Idaho potatoes.[41] It is about whether the EU ought to allow into its market wine produced in Australia and stored with oak chips.[42] In brief, farming is

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Switzerland over whether to begin negotiations at the September 2003 WTO Ministerial Conference in Cancun on a WTO accord on FDI).

39. Still another candidate for a "big picture" issue might be efforts to curb trade in illicit products. *See, e.g.*, Chantal Thomas, *Disciplining Globalization: International Law, Illegal Trade, and the Case of Narcotics*, 24 MICH. J. INT'L L. 549-75 (2003).

40. *See, e.g.*, FOOD AND AGRICULTURE ORGANIZATION, FARMING SYSTEMS AND POVERTY (2001) (stating that roughly 500 million small farmers produce most of the food in developing countries, yet the rates of hunger and poverty among these families are higher than those for the urban poor and their access to social services is less than that of the urban poor. The authors also argue for greater attention to farming systems, with emphasis on economic, cultural, and ecological factors, as a strategy for helping the rural poor); IVAN ROBERTS ET AL., REFORMING WORLD AGRICULTURAL TRADE POLICIES, Australian Bureau of Agricultural and Resource Economics Research Paper No. 99.12 (1999), *reprinted in* BHALA, *supra* note 30, at 729-33 (arguing if developed countries reduced support for their agricultural sectors, then developing countries would have greater market access and receive higher prices for their agricultural exports, but conceding the welfare effects on food-importing developing countries would be less clear).

41. *See* Bernard O'Connor & Irina Kireeva, *What's in a Name? The "Feta" Cheese Saga*, 9 INT'L TRADE L. & REG. July 2003, at 110-2 (discussing the registration of "feta" as a protected designation of origin under the geographical indications law of the European Community): Edward Alden & Tobias Buck, *U.S. Steps Up Pressure on EU Trademarks*, FIN. TIMES, April 8, 2003, at 9 (reporting the United States is reviving a 1999 WTO case against the EU charging the EU does not grant broad trademark protection to branded products, even though in the Doha Round talks the EU seeks broader protection for geographically-indicated products).

In August 2003, the EU approved a list of forty-one well-known food and drink names, including Parma ham, Roquefort cheese, and sherry. *See* Frances Williams, *Flurry of Litigation Ahead of Cancún*, FIN. TIMES, Aug. 30-31, 2003, at 3. At the September 2003 WTO Ministerial Conference in Cancun, the EU plans to advocates creation of a global register for these geographical indications that would confer world-wide protection. *Id.* There is stiff resistance to this proposal. *Labels of Origin*, FIN. TIMES, July 28, 2003, at 12. Many WTO Members view it as a thinly veiled attempt to protect inefficient, subsidized EU farmers from competition, and to placate some EU farm constituencies angered by reforms to the CAP. *Id.* Moreover, the goal of informing consumers about the geographic origin of a product can be achieved by appropriate country of origin labeling (*e.g.*, words to the effect "Feta Cheese Made in Greece"). *Id.*

42. *See* Tobias Buck, *Woody Wine Talks Foment EU Rebellion*, FIN. TIMES, March 31, 2003, at 6 (explaining the Australian practice gives wine a flavor that otherwise occurs through long-

rich in the breadth and depth of the topics it entails, and intellectual challenge, practical importance, and national security are at play in many, if not most, supposedly narrow agricultural issues.

Purgatory is an intellectually difficult concept to grasp, and so, too, is agriculture. Perhaps the best illustration of the intellectual challenge is the controversial justification for protecting and subsidizing farmers known as "multifunctionality."[43] Advocates for the CAP or for restrictive agricultural trade practices and generous support programs point to externalities, specifically, un-priced external benefits of protection and subsidization of domestic farmers (*e.g.*, promoting the environment and rural and indigenous cultures, bolstering food security, and providing employment). "Nonsense" is the free trade reply from the United States and seventeen-member Cairns Group.[44] If the CAP is, as Henri Gaymard, the French Minister of Agriculture says, a central feature of the EU's "social model," then why does over half of EU support go to just seven percent of EU farmers, typically the largest ones?[45] Surely the EU, bullied by France, is unwilling to endure the adjustment costs of ending subsidies.[46] In any event, the WTO *Agreement on Agriculture* provides an exemption from subsidy reduction commitments for

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term storage in wooden barrels, which is the method used in the EU, and thus questioning whether the EU ban on oak chip storage is a protectionist measure to benefit wine producers in France, Italy, Portugal, and Spain, who are concerned about losing market share, especially given that in the United Kingdom, Australian wines outsell all others, and in the United States, they outsell all others save for Italian wines).

43. *See* IVAN ROBERTS ET AL., REFORMING WORLD AGRICULTURAL TRADE POLICIES, Australian Bureau of Agricultural and Resource Economics Research Paper No. 99.12 (1999), *reprinted in* BHALA, *supra* note 30, at 713, 721-25 (defining and evaluating the multifunctionality justification). *See also* Tomás Garcia Azcárate & Marina Mastrostefano, *Agriculture an the WTO: True Love or Shot-Gun Wedding*, *in* ESSAYS ON THE FUTURE OF THE WTO: FINDING A NEW BALANCE (Kim Van der Borght ed., 2003) (discussing negotiations on agriculture from a European perspective, and emphasizing the trans-Atlantic relationship between the United States and EU).

44. The Group members are Argentina, Australia, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Paraguay, Philippines, South Africa, Thailand, and Uruguay. *See* October 2002 *Briefing Document*, *supra* note 25, at 21; *see also* BHALA, *supra* note 30, at 35 (discussing the background on the Cairns Group).

45. Watkins, *supra* note 16, at 13 (reporting over half of American domestic subsidies go to seven percent of the biggest farmers).

46. *See* Guy de Jonquières, *Disputes Over Trade Set to Strain Unity*, FIN. TIMES, May 30, 2003, at 6 (stating that "[t]he U.S. says the biggest obstacle in the [Doha Round] talks is the reluctance of the EU – and of France, in particular – to reform the Common Agriculture Policy"). France's advocacy of a temporary suspension of subsidies on food exports to Africa seems a cynical ploy to forestall discussion of real reform. It smacks of neo-colonialist "divide-and-conquer" policies, because it covers only Africa and only food exports, thus dividing developing countries and sectors within them against each other. The United States is quite right to support the proposal only if it includes all developing countries. However, the French position that the proposal covers agricultural export credits for food aid may be worthy of study. As explained later, the United States makes the most use of such credits. *See id.* (discussing the proposal); *see also* discussion *infra* Section Four.

socially useful, non-trade distorting subsidies (the so-called "Green Box," described below). Moreover, say CAP critics, the EU's selfishness injures Third World farmers and processors through reduced market access to the EU, competition with subsidized and even dumped EU farm products, and consequent price suppression or depression.[47]

To be fair to the EU, multifunctionality has its advocates in the United States. Between 1993-2003 (*i.e.*, since the conclusion of the Uruguay Round), the top twenty-five percent of farmers in the United States captured ninety percent of subsidies (the figure in the EU was lower – seventy percent).[48] This trend is increasingly skewed. In 1995, the top ten percent of American farmers got fifty-five percent of the subsidies, but by 2002, they managed to increase their taking to sixty-five percent. What explains this increasingly skewed trend? One answer is that most payments go to large-scale farms, and these industrial-scale producers have cleverly tailored their political campaign contributions. In 1992, agribusinesses contributed $37 million to campaigns, and in 2002 they gave $53 million.[49] They not only increased their giving level, but also shifted the pattern, donating to the Republican Party fifty-six percent in 1992 and seventy-two percent in 2002.[50] Yet, a typical justification for the American domestic support system, which was strengthened through legislation enacted in 2002, is an instance of multifunctionality—the need to preserve the small family farm, an institution integral to American history and the American character from global competitive threats.

The reality probably is agribusiness is big business. As the United States Trade Representative (USTR), Ambassador Robert B. Zoellick, enjoys touting, one out of every three acres of farmland in the United States is planted with crops for export.[51] Nevertheless, regardless of the substantive merits, the point to appreciate is multifunctionality ineluctably requires inter- and intra-disciplinary analysis. That is because agriculture plays, is believed to play, or said to play non-agricultural functions.

The need for cross-disciplinary thinking also is true of other agricultural issues. How else could the moratorium imposed by the EU in 1998 on approval of products containing genetically modified organisms (GMOs) be

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47. *See* Alan Swinbank et al., *Implications for Developing Countries of Likely Reforms of the Common Agricultural Policy of the European Union*, Commonwealth Secretariat Economic Paper #38, (December 1999) (discussing possible CAP reforms and effects on the Third World).

48. Becker, *supra* note 32, at A8.

49. *Id.*

50. *Id.*

51. *See Id.* (mentioning Ambassador Zoellick's "boast[]"). I do not mean to suggest the family farm is free from siege (which obviously would be factually untrue), but rather mean to indicate the mismatch between who receives support payments and who is said to benefit from them.

studied?[52] Is the European measure protectionism justified by the precautionary principle, "which holds that as long as the evidence about a product, technology or activity is in any way incomplete, it should be prohibited or, at the least, heavily regulated"?[53] From an American perspective, the answer is "no." It is a *de facto* ban on imports of GMO products, based on unsound science, and a wrongful denial of $300 million worth of exports of agricultural products.[54] It also is a measure with an *in terrorem*

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52. *See* Gary G. Yerkey, *Agriculture: USDA's Veneman Wants "Strong Action" Against EU Over Ban on Imports of GMOs*, 20 Int'l Trade Rep. (BNA) 384, (February 27, 2003) (discussing the desire of the United States Secretary of Agriculture, Ann M. Veneman, to file a WTO action against the EU over the ban). *See generally* AGRICULTURE, TRADE & THE ENVIRONMENT: DISCOVERING & MEASURING THE CRITICAL LINKAGES (Maury E. Bredahl, et al. eds., 1996) (discussing, from economic and environmental perspectives, links among trade, agriculture, politics, and the environment).

The United States (along with Argentina and Canada) has challenged the EU ban, and alleges (*inter alia*) that over 30 biotechnology products have been affected by it. *See* Frances Williams, *U.S. Fires First Shot at EU Biotech Food Curbs*, FIN. TIMES, Aug. 19, 2003, at 3. The United States delayed bringing the case in the fall 2002 and early spring 2003, concerned in part about a possible boycott throughout the EU of American products, which would exacerbate the strain on trans-Atlantic ties created by the Iraq War. The United States also may have hoped it would not need to bring a case to persuade the EU to lift the moratorium on approvals of new GMO products, if the EU pursues its business interests. The biotechnology industry in Europe is far behind that of the United States, it is losing thousands of jobs it might otherwise generate, and applications for biotechnology research—specifically, field trials of GMOs—have fallen 76 percent since the EU implemented the moratorium on approvals in 1998. Moreover, since 1998, two thirds of all European companies seeking to develop GM crops have terminated major projects. *See* Henry Miller & Gregory Conko, *Brussels' Bad Science Will Cost the World Dear*, FIN. TIMES, Aug. 14, 2003, at 13 (discussing the declining competitiveness of Europe's agricultural biotechnology businesses); Joe Kirwin, *EC Cites 76 Percent Drop in Applications for GMO Trials, Urges End of De Facto Ban*, 20 Int'l Trade Rep. (BNA) 554 (Mar. 27, 2003) (mentioning the effects of the ban on European agricultural biotechnology businesses); Gary G. Yerkey, *U.S. Still Plans to Launch WTO Case Against EU Over GMO Import Dispute*, 20 Int'l Trade Rep. (BNA) 467 (March 13, 2003) (discussing the implications of the Iraq War for the GMO case); Gary G. Yerkey, *U.S. Appears to be Increasingly Hesitant to Bring WTO Case Against EU Over GMOs*, 20 Int'l Trade Rep. (BNA) 427 (March 6, 2003) (treating the politics involved in bringing the GM case).

Whether the EU will lift the ban, and rely on regulations approved by the European Parliament in July 2003 on the traceability and labeling of GMOs (which call for food to be marked "GM" if it contains more than 0.9 percent DNA or protein arising from genetic modification) remains to be seen. Likewise, it remains to be seen whether the United States will acquiesce to these labeling rules. *See More Trouble Ahead*, THE ECONOMIST, July 5, 2003, at 74; Christopher S. Rugaber, *Grassley, Baucus Pressure USTR Zoellick on WTO Case Against EU*, 20 Int'l Trade Rep. (BNA) 468 (March 13, 2003) (quoting the European Commissioner for Health and Consumer Protection, David Byrne, as saying even if new regulations are promulgated, the moratorium on approvals would not be removed until "October at the earliest").

53. Miller & Conko, *supra* note 52, at 13.

54. *See* Rugaber, *supra* note 51, at 468 (mentioning the estimate by American officials of $300 million in lost exports); Gary G. Yerkey, *Agriculture: Rep. Goodlatte Urges EU to Lift Ban on Imports of GMOs in Meeting with Lamy*, 20 Int'l Trade Rep. (BNA) 385 (February 27, 2003) (quoting Rep. Bob Goodlatte as saying "[t]he politicizing of agricultural biotechnology must end, so that we can return to providing food aid to the hungry as soon as possible. The EU's policy is not based on sound science, and it is harmful not only to American agriculture but [also] to those people throughout the world who are in the grip of starvation").

effect on poor countries, with a devilish consequence; these countries, says the United States, fear their food exports will be barred from EU markets if they contain GMOs, so they are reluctant to invest in food biotechnologies that might alleviate the problem of hunger.[55] From the perspective of "Old" Europe and, to be fair, some in "New" Europe,[56] the answer is "yes." The moratorium is a legitimate sanitary and phytosanitary (SPS) measure.[57] The EU attests its revised measures concerning labeling of GM products and traceability of GMOs reflect internationally accepted standards (namely, those adopted for risk-testing by *Codex Alimentarius*, the food safety body of the United Nations), and those standards allow for stricter procedures than adopted in the United States. From both perspectives, the ban also is about Third World development;[58] though the two sides operate from rather different development paradigms. The American side highlights the use by poor farmers of high-yield GM seeds and the contribution of GM products to fighting starvation.[59] The European side decries dependence created by GM seeds and

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55. *See* de Jonquières, *supra* note 46, at 6 (calling the GMO dispute "[t]he biggest potential flashpoint," and discussing President Bush's view of the *de facto* moratorium).
The American argument presumes the precautionary principle "exaggerates the potential drawbacks of new products and underestimates their benefits," *i.e.*, it presumes the principle itself falsely assumes "little harm comes from delaying the introduction of new products and technologies," because the principle "forces us to ignore proven benefits in a costly effort to eliminate hypothetical risks that are small or easily manageable." Miller & Conko, *supra* note 52, at 13. Perhaps, in another case at another time, the roles will reverse, and the United States will invoke the principle and extol its cost-benefit ratio.

56. Like it or not, the distinction between "Old" and "New" Europe is marvelously insightful. The literature on SPS standards and GMOs is increasingly large. For one account of the 13 March preliminary opinion by the Advocate General of the European Court of Justice that Italy has the legal right to ban GM corn (which it has done with respect to GM corn used in oils, flour, and other products on the ground the corn poses a health risk) as long as there are detailed reasons to believe there is danger to human health or the environment. *See* Kirwin, *supra* note 52, at 554.

57. *See* Tobias Buck, *Brussels Tells EU to End Delays on Modified Crops*, FIN. TIMES, Feb. 4, 2003, at 6 (explaining that "European governments say their stance reflects the deeply felt concerns of a population made anxious by a string of recent food scares").

58. *See* Rossella Brevetti, *Argentina and United States Share Concerns on GMO Ban, Officials Say*, 20 Int'l Trade Rep. (BNA) 527 (Mar. 20, 2003) (noting that Argentina exports GM soy and cotton, and quoting the Argentine Vice Minister for Foreign Relations, Martin Redrado, as saying "[t]his is not an issue of one country; its an issue for all developing countries").

59. In his speech on 21 May 2003 at the United States Coast Guard Academy, President Bush all but called the EU position on GM crops irrational and selfish:

> [European governments] have blocked all new bio-crops because of *unfounded, unscientific* fears. This has caused many African nations to avoid investing in biotechnologies, for fear their products will be shut out of European markets. European governments should join, *not hinder*, the great cause of ending hunger in Africa.

President Delivers Commencement Address at Coast Guard, *supra* note 9 (emphasis added). *See also* DAVID G. VICTOR, SUSTAINING A REVOLUTION: A POLICY STRATEGY FOR CROP ENGINEERING (2002) (arguing, *inter alia*, the United States should join with other countries, such as China, to promote crop engineering, and eschew a formal trade litigation with the EU over GMOs).

products on foreign (read, American) agribusiness corporations and looks to an interventionist regulatory model of government behavior.[60]

My point is obviously not to opine on the merits of the opposing positions in the GM case. Rather, it is to show that this legal drama is yet another example of what ought to be an axiom: farming is not just about farming anymore, anymore than Purgatory is just about Purgatory. That axiom ought to make world agricultural trade intellectually appealing, at least to some non-farmer teachers and students of law.[61]

Closely linked to this first justification is a second one: pragmatism. It is impossible to appreciate the breadth of contemporary international trade law and its linkages to many areas without having some idea of what is going on with agriculture. That is also true with Heaven and Hell. Comprehending a bit about Purgatory enriches the understanding of these two realms. To disrespect agriculture is to ignore the single most important topic left over from the Uruguay Round. Each foregoing illustration of intellectual challenge also serves as evidence of practical importance. It is hardly an overstatement to say completion of the Doha Round hinges critically on the resolution of complex and competing demands about agricultural trade. A successful outcome is not yet at hand.[62] In brief, to be well-rounded and up to date in international trade law is to know something of the farm.

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60. *See* Guy de Jonquières, *Battles Among Regulators Could Damage Trade*, FIN. TIMES, May 26, 2003, at 11 (reporting that while "[t]he National Foreign Trade Council, a leading U.S. business association, recently published a 120-page paper attacking EU regulations as disguised trade barriers," it also is true that attitudes to regulating risk, as in the GM foods dispute, "reflect deeper differences in culture, values and concepts of the role of government").

61. Still another example is trade in farm products with Cuba. Despite the continued American trade embargo and travel ban, eased somewhat in 2000, Cuba imports $250 million worth of agricultural products from the United States (and $1 billion world-wide), contracts with American companies from 45 different states, and is now one of America's top 50 agricultural trading partners. Possibly 60 percent of Cuba's agricultural products could come from the United States, were the embargo and ban lifted. But, their removal would be politically controversial, because of the linked array of historical, human rights, and other non-agricultural issues. *See* Christopher S. Rugaber, *American Farm Group Visits Cuba, Urges Loosening of U.S. Trade Embargo*, 19 Int'l Trade Rep. (BNA) 2051 (November 28, 2002).

62. *See The Challenge for Trade in Cancún*, *supra* note 18, at 16 (stating that "[p]rogress in the talks has been desultory and limited mainly to technical matters. Deep divisions remain on issues of substance and every deadline for an important decision has been missed"). Negotiators were unable to meet the date of 31 March 2003, by which they were to have reached an agreement on "modalities" for further commitments on agricultural trade liberalization. Paragraph 14 of the Doha *Ministerial Declaration* set this date.

"Modalities" is trade law jargon for identifying issues to be discussed in negotiations, and setting targets, including numerical targets, to achieve the objectives of the negotiations. *See* WTO Press Release (Press/336), *Agriculture Negotiations – Farm Talks Miss Deadline; But "Work Must Go On," Says Supachai* (31 March 2003). As the word suggests, "modalities" are not a final agreement, but rather a road map to reaching one. For example, whether a particular rule needs to be created, or an existing one interpreted, how deeply import tariffs and subsidy programs should be cut, and over what period, all would be "modalities." At the end of successful negotiations, agreement would have been reached on a new rule (or on the lack of need for one), interpreting an

Neither the intellectual nor the pragmatic justification is isolated from global political and military (referred to inside the beltway of Washington, D.C. as "pol–mil") developments, any more than Purgatory is a process unrelated to Heaven. The alignment in the United Nations of WTO Members on the subject of military action against Iraq continues to impinge (unfortunately and wrongly) on official thinking about trade. On agricultural trade issues, the United States often sides with the Cairns Group, and indeed American officials typically attend the Group's meetings. The Group includes a military ally, Australia, and a willful nonparticipant, New Zealand.[63] Small wonder why "Aussie" but not "Kiwi" products are the subjects of a possible free trade agreement with the United States. The EU counts in its ranks two vocal opponents of the use of force by the United States, namely, France and Germany, as well as the most steadfast American ally, Great Britain. Personal relationships among senior officials involved in pol-mil and economic decisions are strained, and mutual contempt, expressed privately and sometimes in sarcastic public remarks, lingers. Small wonder, then, why the WTO failed to achieve a compromise on modalities by the deadline of March 31, 2003, and the United States proceeded with the GMO case.[64]

Perhaps the more pressing context in which agricultural trade and national security are linked is not disputes among First World partners, but relations between the First and Third Worlds. To the extent Third World farmers re - main poor, are they not fertile soil in which to plant seeds of extremist ideologies or at least of lucrative cash crops used in narcotics?[65] To the extent poverty can be reduced by reforming world trade rules for agriculture, is it not in the national security interest of rich countries to spearhead those reforms?[66]

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existing rule (or on the lack of need for an interpretation), the exact amount of reductions in tariffs and subsidies for each product category, and the precise period for these reductions.
The WTO Director-General, Dr. Supachai Panitchpakdi, called the failure to meet the deadline "a great disappointment for us all," and the Chairman of the talks, Stuart Harbinson, called it "certainly a setback." Press Release (Press/336), *supra*.

63. *See* October 2002 *Briefing Document*, *supra* note 25 (identifying the Cairns Group members).

64. *See* Frances Williams, *Doha Talks in Crisis as Farm Reform Deadline Set to be Missed*, FIN. TIMES, March 31, 2003, at 1 (reporting on the impasse on agriculture, because of WTO Members unwilling to move from their opposing positions on trade barriers and subsidies in agriculture, and explaining the line-up of countries on the two sides). *See also*, *supra* notes 51-60 and accompanying text (discussing the GMO case).

65. Putting the problem in this context is not new. A 1989 study by the Congressional Budget Office spoke of political stability in the Third World through improving agricultural conditions. *See* CONGRESSIONAL BUDGET OFFICE, AGRICULTURAL PROGRESS IN THE THIRD WORLD AND ITS EFFECT ON U.S. FARM EXPORTS preface, xvi (May 1989).

66. On the topic of the link between agricultural trade reforms and poverty alleviation in rural sectors of the Third World, *see, e.g.*, Jon Hellin & Sophie Higman, *Feeding the Market* (2003) (discussing the impact of globalization on small land-holding farmers in Latin America of bananas, coffee, potatoes, cocoa, wine, sheep, forestry, and quinoa (an Andean grain), and

Farming also is about the food security within particular Third World countries.[67] Perceptions in the Third World of dependence on First World food, seeds, or fertilizer (whether true or not) hardly help win hearts and minds abroad. To what extent are deviations from free trade principles, which economists teach serve the net interests of all, appropriate to accommodate this security issue? To pose the question is to reveal the link between agricultural trade with the Third World, on the one hand, and national security in the First World, on the other hand.

D. THREE METHODOLOGIES

The standard characterization of the methodologies contained in the Uruguay Round *Agreement on Agriculture* for reducing trade barriers and

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highlighting practical obstacles impeding the access of their output to developed countries, such as the problem of satisfying demand on a continuous basis in high volumes at high quality levels); Merlinda Ingco & L. Alan Winters, *Agricultural Trade Liberalization in a New Trade Round* (World Bank Discussion Paper No. 418, 2000) (offering perspectives from developing countries, and countries whose economies are in transition, on how to reduce market distortions in agriculture in a way that would benefit them); Australian Bureau of Agricultural and Resource Economics (ABARE), *Reforming World Agricultural Trade Policies* (ABARE Research Paper 99.12, Sept. 1999) (identifying the areas in which actual reductions in market-distorting support are needed to achieve fundamental reform of world trade in agriculture).

67. India is just one example of a country greatly concerned about food security, and proud to boast its status as a net exporter of food.

Article 12 of the *Agreement on Agriculture* deals with food security matters in the context of restrictions on exports of foodstuffs. Any WTO Member implementing a quantitative restriction, namely, an export prohibition or restriction, under GATT Article XI:2(a) (which concerns temporary measures to prevent or relieve critical shortages of foodstuffs) must "give due consideration to the effects" of the restriction on the "food security" of other members. The Member implementing the export constraint must give written notice, as far in advance as possible, to the WTO Committee on Agriculture, explaining its nature and duration, and consult upon request with any other Member having a substantial importing interest in the foodstuff. *See Agreement on Agriculture*, Art. 12:1. However, there is special and differential treatment for developing country Members. *See Agreement on Agriculture*, Art. 12:1. They are exempt from these obligations, unless they are net exporters of the foodstuff in question.

Furthermore, Article 16:1 of the *Agreement* obligates developed countries to take action called for in the *Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries, published in* OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, URUGUAY ROUND – FINAL TEXTS OF THE GATT URUGUAY ROUND AGREEMENTS INCLUDING THE AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION AS SIGNED ON APRIL 15, 1994, MARRAKECH, MOROCCO, at 395 [hereinafter *Decision*]. Essentially, the *Decision* focuses on "negative effects [from agricultural trade liberalization] . . . in terms of the availability of adequate supplies of basic foodstuffs from external sources on reasonable terms and conditions, including short-term difficulties in financing normal levels of commercial imports of basic foodstuffs." *Id.* ¶ 2. To deal with this eventuality, the *Decision* allows for the establishment of "appropriate mechanisms," including reviewing the level of food aid, initiating negotiations on food aid commitments, adopting guidelines to ensure an increasing proportion of basic foodstuffs is provided to least-developed and net-food importing countries, and to consider technical and financial assistance to these countries to improve agricultural productivity and infrastructure. *See Id.* ¶ 3. Responding to the *Decision*, the International Grains Council in July 1999 re-negotiated and completed the Food Aid Convention. *See* October 2002 *Briefing Document*, *supra* note 25, at 23.

subsidies is to divide them into three categories: (1) market access, (2) domestic support, and (3) export subsidies.[68] This characterization follows logically from negotiating objectives set forth in the document that launched the Round, the September 1986 Punta del Este *Ministerial Declaration*. It stated the following:

> Contracting parties [to the GATT] agree that there is an urgent need to bring more discipline and predictability to world agricultural trade by correcting and preventing restrictions and distortions including those related to structural surpluses so as to reduce the uncertainty, imbalances and instability in world agri - cultural markets. Negotiations shall aim to achieve greater liber - alization of trade in agriculture and bring all measures affecting import access and export competition under strengthened and more operationally effective GATT rules and disciplines . . . by:
>
> (i) improving *market access* through, *inter alia*, the reduction of import barriers;
>
> (ii) improving the competitive environment by increasing *discipline on the use of all direct and indirect subsidies* and other measures affecting directly or indirectly agricultural trade, in - cluding the phased reduction of their negative effects and dealing with their causes. . . .[69]
>
> Plainly, the first category, market access,) follows from item (i), and the second and third categories, domestic support and export subsidies, follow from the objectives in item (ii).[70]

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68. *See, e.g.*, CROOME, *supra* note 10, at 52 (identifying the "provisions on market access, domestic support, and export subsidies" as the "main elements of the agreement"); STEFAN TANGERMANN, A DEVELOPED COUNTRY PERSPECTIVE OF THE AGENDA FOR THE NEXT WTO ROUND OF AGRICULTURAL NEGOTIATIONS (Program for the Study of International Organizations, The Graduate Institute of International Studies, Geneva, PSIO Occasional Paper, WTO Series Number 5, 1996) (containing an economic discussion of the three methodologies, and the need to achieve further reductions in tariffs, domestic support, and export subsidies); *Statement of Administrative Action*, *supra* note 12, at 709 (identifying the "three principal areas" of "market access," "domestic support measures," and "export subsidies").

69. *Ministerial Declaration on the Uruguay Round of Multilateral Trade Negotiations*, Punta del Este, Uruguay, 20 September 1986, *reprinted in* BHALA, *supra* note 10, at 261, 266 (emphasis added).

70. Item (iii) in the list, not quoted above, concerns minimization of the adverse effects on trade in agriculture of sanitary and phytosanitary ("SPS") regulations. SPS measures are governed by the WTO *Agreement on Sanitary and Phytosanitary Standards*. To keep the length and breadth of the present article manageable, SPS measures are not covered. *See* BHALA, *supra* note 30, at ch. 24 (discussing SPS measures); *see also SPS Agreement*, *reprinted in* BHALA, *supra* note 10, at 333-47 (discussing SPS measures).

As a legal matter, the three-pronged categorization is a perfectly accurate rendition of a large part of the structure of the *Agreement on Agriculture* drafted by the Uruguay Round negotiators. In the *Agreement*, Part III (consisting of Articles 4-5) is about market access, Part IV (consisting of Articles 6-7) is about domestic support commitments, and Part V (consisting of Articles 9-10) is about export subsidies. These methodologies apply to all agriculture products; the only exceptions are fish and fish products.[71]

As to the first method, market access, the obligations for all WTO Members are to be implemented within specified periods. To account for varying stages of economic development, different time periods apply to different categories of WTO Members— "developed" and "less developed" with "less developed" further divided in some instances into "developing" and "least developed." For all categories of Members, the period commenced on January 1, 1995, which is the date when the *Agreement Establishing the World Trade Organization* (*WTO Agreement*") and its Annexes entered into force and thus when the *Agriculture Agreement* took effect.[72]

Exactly what were the Members to have done? They were to have implemented three kinds of measures: (1) reduced tariffs; (2) converted non-tariff barriers to tariffs, a process known as "tarrification;" and (3) created minimum access tariff-rate quotas. These measures are related to one another in that they operate jointly to increase market access for agriculture exporters. Tariffication ensures tariff reductions are not undermined by increases in non-tariff barriers. Tariff reductions ensure tariffication leads to lower duty rates. Minimum access tariff rate quotas ensure a degree of market access while tariff reductions are phased in and tariffication occurs.

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71. *See Agreement on Agriculture*, Article 2 (explaining the scope of coverage as the products listed in Annex 1, and defining them as "agricultural products") and Annex 1, ¶ 1(i) (stating that the *Agreement* covers Chapters 1-24 of the Harmonized System "less fish and fish products"). There are 13 additional headings or sub-headings in other Chapters of the Harmonized System, classifying agricultural products covered by the *Agreement* (*e.g.*, cotton, fur skins, hides, and wool). *See Agreement on Agriculture*, Annex 1, ¶ 1(ii); *Statement of Administrative Action*, *supra* note 12, at 710. The scope of coverage was imported into the *Agreement* from the December 1993 *Modalities Document*, cited *infra* note 100. *See* CROOME, *supra* note 10, at 53 n.170 (explaining the elements of the *Modalities Document* that were incorporated into the *Agreement*).

72. For a country joining the WTO after 1 January 1995, a different commencement date for calculating the period in which to implement *Agriculture Agreement* obligations would apply. Presumably, it would be the effective date of accession.

The *Agriculture Agreement* contains five Annexes, not to be confused with the four Annexes to the *WTO Agreement*. All five Annexes to the *Agriculture Agreement* are an integral part of the *Agreement*. *See Agreement on Agriculture*, Art. 21:2. The first three Annexes to the *WTO Agreement* (but not Annex 4, which contains plurilateral agreements on government procurement and civil aircraft) are integral parts thereof. *See WTO Agreement*, Art. II:2. The various agreements in Annex 1A to the *WTO Agreement*, where the *Agriculture Agreement* is located, including GATT and the *Agreement on Sanitary and Phytosanitary Standards* ("*SPS Agreement*"), apply to agricultural products. *See Agreement on Agriculture*, Arts. 14, 21:1.

Accordingly, in sections two, three, and four below, I review the obligations created by the *Agreement on Agriculture*. My focus in these sections, respectively, is on market access, domestic subsidies, and export subsidies. In each section, I try to explain not only what the *Agreement* achieves, but equally or more importantly what it fails to do. Those failures—sins—are why I characterize the *Agreement* as keeping world trade in agriculture in "Purgatory." They must be addressed—cleansed—before agricultural traders can reach the realm of pure free trade.

The Doha Round is the current forum in which they are being addressed, in part through the intercession of representatives of the WTO Secretariat working tirelessly to cleanse some trading nations of their impure ways. Section Five discusses problems faced by negotiators in the Doha Round. It is about their efforts to "cleanse" world trade in agriculture of protectionist sins of the past.

Taken together, I hope the five sections might serve as a primer on contemporary issues at the intersection of agriculture and international trade law. If that purpose is achieved, then the present work might help enhance the respect for agriculture topics in the legal academy. Better yet, perhaps the piece might help nudge agricultural trade out of Purgatory.

E. A WORD ABOUT LABELS

In evaluating the Uruguay Round *Agreement on Agriculture* and proposals made during the Doha Round, it is sometimes worthwhile to move beyond simplistic distinctions among WTO Members. In this respect, the most obvious fallacy is to view the agricultural interests of all rich countries as aligned, aligned against the interest of an opposing monolith, the Third World. Cutting across rich and poor is the Cairns Group, with developed and developing countries in it.[73]

Within the First World, there is division that testifies to diversity. The GMO issue, pitting the United States against the EU, is one among several sources of that division. Similarly, within the Third World, there are assorted sub-groups. For instance, consider these facts from the WTO: between 1993 and 1998, global agricultural trade (not counting trade within the EU) rose by $100 billion, and exports from developing countries grew by $47 billion (from $120 to $167 billion).[74] Consequently, developing countries as a group captured a larger share of world agricultural exports—from 40.1 percent to

73. *See supra* note 43 (identifying the Cairns Group members).

74. *See* October 2002 *Briefing Document*, *supra* note 25, at 22 (containing these and the other facts and figures mentioned above).

42.4 percent. Yet, some developing countries experienced deteriorating agricultural trade balances—import growth outstripped export growth.

One step to appreciating the complexity of distinctions among WTO Members is to inquire about the pattern of agricultural trade, how a Member fits into the pattern, and what difficulties it faces. For instance, there are net agricultural exporters and net agricultural importers, some of which are net food importers.[75] In search of enhanced market access, the net exporters, some of which are members of the Cairns Group, push for more cuts in tariffs, domestic support, and export subsidies. Concerned about food security, the net food importers worry about the effect of cuts in subsidies on food prices; if the result is higher prices, then they literally face not just worsened terms of trade, but the evils of malnutrition and hunger. At the same time, higher prices may be just what these countries need if they are to see investment of productive resources in their agricultural sectors, which could lead to long-term increases in food output and even food security. Also within the Third World is a group of countries with small, non-diversified, uncompetitive agricultural sectors. They have little arable land or are located in unfriendly climatic environments. They staunchly protect what little domestic farming they have and are likely to continue to seek to do so until they are able to generate alternative efficient businesses.

In brief, the labels "First World" and "Third World" continue to be useful generic, short hand references. They continue to suggest episodic, issue-dependent solidarity on each side. That is how I use them here, and I intend nothing pejorative. I acknowledge an increasing number of trade controversies blur these traditional categories. Indeed, even the relatively newer categories—"developed," "developing," and "least developed"—are not always helpful in ascertaining or anticipating the agricultural interests of a particular WTO Member.

II. MARKET ACCESS

> World agriculture is riddled with barriers and distortions unknown in other types of trade since the heyday of protectionism in the 1930s. . . . Tariffs in many countries are several times those on industrial goods and, on some products, as much as 350 per cent in the U.S., 75 percent in the EU and 900 percent in South Korea. On top of that, quotas curb many imports.[76]

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75. *See* MICHALOPOULOS, *supra* note 17, at 123, 209 (delineating these categories and the interests of countries in each category with respect to multilateral agricultural trade negotiations).

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

A. *R* – REDUCING TARIFFS

One "*R*" in the six *BARBER* sins represents reduction commitments on agricultural tariffs. The obligation to reduce agriculture tariffs is contained in Article 4:1 of the *Agriculture Agreement*. It simply states: Market access concessions contained in Schedules [of Tariff Concessions of each WTO Member] relate to bindings and reductions of tariffs, and to other market access commitments as specified therein.[77] At first glance, this language seems innocuous. However, the substantive obligations to which it relates are numerical targets for cutting customs duties.

To account for variations in economic development, different targets, as well as different implementation periods, are set for different classes of WTO Members. Developed countries committed to reduce their agriculture tariffs by an average of thirty-six percent in value by January 1, 2001 in equal annual installments.[78] Developing countries agreed to reduce their duty rates by an average of twenty-four percent in value and fourteen percent in quantity over a decade—by December 31, 2004.[79] Least developed countries are not obliged to make any tariff cuts.[80] The table below summarizes these targets, as well as the minimum per product cuts, discussed later.[81] In brief, developing countries are expected to cut their average tariffs on agricultural imports by

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77. *Agreement on Agriculture*, Art. 4:1. The term "market access concessions" refers to all market access commitments made on agriculture products during the Uruguay Round. *See Agreement on Agriculture*, Art.1(g). As the *Statement of Administrative Action* explains,

[i]n GATT practice, a party commits or 'binds' itself not to apply a rate of duty to a particular good that is higher than the rate specified in its schedule. This maximum specified rate is referred to as the 'bound' rate of duty.

Statement of Administrative Action, *supra* note 12, at 713.

78. *See Agreement on Agriculture*, Art. 1(f) (defining "implementation period" as "the six-year period commencing in the year 1995"). CROOME, *supra* note 10, at 54 (discussing the phase-in period for cuts).

79. *See* CROOME, *supra* note 10, at 54 (stating that developing countries "could apply the reductions over a 10-year period").

This conclusion is based on Article 15:2 of the *Agreement on Agriculture*, which specifically explains that "[d]eveloping country Members shall *have the flexibility* to implement reduction commitments over a period of *up to* 10 years." *Agreement on Agriculture*, Art. 15:2 (emphasis added). Two points are noteworthy about Article 15:2. First, the italicized language indicates Article 15:2 does not require developing countries to take the full decade to cut agricultural tariffs. Second, the general definition of "implementation period," in Article 1(f), is rather misleading, unless it is read in tandem with Article 15:2. Article 1(f) says "implementation period" is "the six-year period commencing in the year 1995, *except that, for the purposes of Article 13*, it means the nine-year period commencing in 1995." The italicized language creating the exception is too narrow, because Article 13 is not the only exception; Article 15:2 is another exception. Article 13 covers domestic support and export subsidies, but does not cover market access. Article 15:2 covers reduction commitments without limitation.

80. *See* CROOME, *supra* note 10, at 54 (explaining "[l]east-developed countries were not required to make reductions."). This conclusion is based on the second sentence of Article 15:2 of the *Agriculture Agreement*, and tracks its language.

81. This Table is drawn in part from October 2002 *Briefing Document*, *supra* note 25, at 11.

two-thirds that of developed countries and are given double the amount of time to do so.

Table 1: Agricultural Tariff Reduction Commitments Made During the Uruguay Round

Tariff Reduction Commitments	***Developed Countries***	***Developing Countries***	***Least Developed Countries***
Average Cut for All Agricultural Products	*36 percent*	*24 percent*	*Zero*
Minimum Cut Per Agricultural Product	*15 percent*	*10 percent*	*Zero*
Period for Phasing in the Cuts	*6 years, from 1995-2000*	*10 years, from 1995-2004*	*Not applicable*

Is it striking that any target is set for developing countries? To adherents of Ricardo's theory of comparative advantage, the answer is "no."[82] For them, even unilateral tariff reductions yield a net welfare gain to a society. That gain may be all the greater for a poor country maintaining high barriers and may boost trade among such countries that slash their barriers.[83] Possibly, for Third World countries characterized by labor surplus, reducing barriers to agricultural trade may hasten the process of industrialization by making the agriculture sectors more competitive and encouraging a shift of farm workers with zero or low marginal productivity to the industrial sector.[84] In brief, from an economic perspective, it is beneficial for all countries, regardless of their income, to drop their barriers.

However, what the law requires is a different matter. Any obligation imposed on less developed countries to cut tariffs, demanded (however politely) in return for a cut by developed countries, offends the fundamental principle of special and differential treatment embodied in GATT Article XXXVI:8: The developed contracting parties *do not expect reciprocity* for

82. *See* BHALA, *supra* note 30, at chs. 1-2 (discussing this theory and criticisms of it).

83. This point is pressed by (among others) Jagdish Bhagwati in a variety of economic works.

84. *See* BHALA, *supra* note 3, at pt. 2 (discussing Labor surplus models and the industrialization process).

commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.[85]

This principle of non-reciprocity means that rich countries cut tariffs without asking, expecting, cajoling, or imposing any condition on poor countries. Lest there be any doubt about this meaning, the Interpretative Note to Article XXXVI:8 explains that "do not expect reciprocity" means poor countries "*should not be expected*, in the course of trade negotiations, *to make contributions* which are *inconsistent with their individual development, financial and trade needs*, taking into consideration past trade developments."[86] Evidently, some Uruguay Round negotiators forgot, ignored, or altered this meaning, at least with respect to those poor countries for which targeted "contributions" are "inconsistent" with their "needs." It is important not to overstate the accusation. The fact negotiators imposed no tariff cut targets on least-developed countries accords fully with the non-reciprocity principle. The argument about incongruity must focus on developing countries and appraise each country's "needs" in relation to a twenty-four percent average cut over ten years. In the final analysis, the argument likely will be valid for some, but not all, developing countries.

This argument necessarily implicates a fundamental question about tariff reduction: what methodology is and ought to be used to cut duty rates? The answer is there is a menu, and the choice of methodology depends on the ultimate goal.[87] In turn, WTO Members advocate a methodology that best advances its goal. Not surprisingly, the method agreed to in the Uruguay Round is known as the "Uruguay Round approach." Its hallmarks are (1) an average percentage reduction in tariffs over a number of years, (2) a minimum tariff cut on each good, and (3) the flexibility for smaller reductions on individual goods. A political consensus coalesced around this approach; the approach commends itself as a compromise. However, it is complex to negotiate, understand, and in some instances implement and monitor.

A far simpler approach than the Uruguay Round one, the simplest of all, is called the "Single Rate." Tariffs are cut to the same rate for all goods. That method is used in regional trade agreement (RTA) negotiations because the aim typically is to achieve a low or zero tariff for goods originating within the RTA. Obviously, not all WTO Members share the goal of a global free trade

85. GATT Article XXXVI:8 (emphasis added), *reprinted in* BHALA, *supra* note 10, at 245.

86. GATT Ad Article XXXVI, Paragraph 8 (emphasis added), *reprinted in* BHALA, *supra* note 10, at 246.

87. *See* Information and Media Relations Division, WTO Secretariat, *Tariff Negotiations in Agriculture – Reduction Methods* (Background Fact Sheet, August 2003) *available at* www.wto.org. As this source observes, there are still more possible methodologies, which can be grouped under the rubric "Hybrid." A "Hybrid" methodology combines one or more of the approaches described above. *Id.*

area. Another straightforward method is called "Flat Rate Percentage Reductions." The same percent cut is applied to all goods, regardless of the starting duty rates. This approach appears fair. But, it leaves in place large disparities in tariff levels across Members and insists that even poor Members make cuts.

To deal with disparities, a third method, which is more complicated than the Single or Flat Rate approaches, may be used. Called "Harmonizing Reductions," the goal of this method is to make larger cuts on higher tariffs, smaller cuts on lower tariffs, and harmonize or at least converge tariffs on each good. There are several mathematical formulas for reaching this goal. One formula is to apply different percentages for different tariff rate bands. For instance, for the zero to ten percent band, no reduction is required; though sometimes countries agree to eliminate rates at or below five percent because they are seen as a nuisance, with little revenue-generating implications. For the eleven to fifty percent band, a cut of twenty-five percent in the rates might be required, and for the fifty-one to one hundred percent band, a cut of fifty percent might be the obligation. A second formula, the "Swiss Formula," calls for a significant narrowing of the gap between high and low tariffs, typically phased in through equal annual installments, plus a cap on the maximum tariff permissible. The name originates from the 1973-79 Tokyo Round, during which Switzerland proposed the strategy. Many Third World WTO Members find harmonizing reductions offends the non-reciprocity expectation in GATT Article XXXVI:8. Indeed, this approach imposes greater obligations to cut tariffs on poor than on rich countries, for most poor countries start out with higher tariffs than rich countries (reflecting, typically, their dependence on tariffs for government revenue). Interestingly, however, in the Doha Round Switzerland opposes the Swiss approach, preferring the Uruguay Round approach; while Uruguay advocates the Swiss Formula.

Whatever the choice of methodology, another fundamental question about tariff reduction is how ambitious it is. Just how impressive are the thirty-six and twenty-four percent targets in the Uruguay Round approach? Double-digit tariff rate cuts of this magnitude sound ambitious. But, the substantive impact of any tariff cut is impossible to gauge without knowing the initial rates subject to reduction. The levels to which rates fall depend on the levels from which they fell. To take two extreme examples, suppose one WTO Member's agricultural tariff rates average fifty percent, and the average duties in a second Member are five percent. A thirty-six percent cut in the first Member's average rates translates into an eighteen percent cut, which sounds impressive, but it still leaves a high average rate of thirty-two percent. If the Member is a developing country, then the cut is twelve percent, resulting in a

formidable thirty-eight percent average rate. As for the second Member, a thirty-six percent cut of a five percent average duty rate yields a very low average, just 3.2 percent. What was the starting point—the "base rate"—for measuring the target cuts?

The answer is the tariff rate in effect on either January 1, 1995 or September 1986, depending on the nature of the rate on the agricultural product in question.[88] If the duty associated with an individual agricultural product was bound, the base rate is the bound duty as of January 1, 1995, the date the *Agriculture Agreement* entered into force. If the duty was not bound, the base rate is the actual duty charged in September 1986, when the Uruguay Round commenced.[89] This distinction affords developing countries the option of binding previously unbound duties, and the Uruguay Round negotiators agreed that these countries could set a bound rate that would not be subject to further tariff cuts.[90]

Here is an opportunity for a disingenuous binding. When converting unbound tariffs on agricultural imports into bound rates during the Uruguay Round, some developing countries decided to set bound tariff ceilings, called "ceiling bindings."[91] Yet, many of them set ceiling bindings on various agricultural imports at rates considerably above previous unbound rates, and they did not commit to declines in these rates over time.[92] To illustrate the problem, suppose Nicaragua's pre-Uruguay Round unbound tariff on corn is fifty percent, and it sets a bound rate of sixty percent. Corn exporters in, for instance, Nebraska has little to cheer about (assuming Nicaragua applies the bound rate and not some rate below fifty percent).[93]

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88. *See* October 2002 *Briefing Document*, *supra* note 25, at 11 (setting forth these dates in the notes to the table on Numerical Targets for Cutting Subsidies and Protection); CROOME, *supra* note 10, at 54 (discussing base rates).

89. *See supra* notes 68-70 and accompanying text (discussing the Punta del Este *Ministerial Declaration*).

90. *See* CROOME, *supra* note 10, at 54 (discussing "ceiling bindings," *i.e.*, maximum tariffs on agricultural products for which no bound duty rate had been set by a developing country, and which need not be reduced further).

In addition to the two scenarios mentioned above—an individual agricultural product with a bound rate and one without a bound rate—there is a third scenario, namely, a product protected by a non-tariff barrier. As discussed below, this barrier was subject to tariffication, and the conversion of the barrier to a tariff resulted in a new base rate by which to begin tariff cuts (unless that rate was ceiling binding of a developing country). *Id.*

91. *See* GALLAGHER, *supra* note 5, at 42 (using this term).

92. *See* October 2002 *Briefing Document*, *supra* note 25, at 11 (stating, in the Notes to the table on "Numerical Targets for Cutting Subsidies and Protection," that "as a result of those [Uruguay Round] negotiations, several developing countries chose to set fixed bound tariff ceilings that do not decline over the years"); CROOME, *supra* note 10, at 42 (discussing this behavior).

93. In many developing countries, there is a significant difference between applied and bound agricultural tariff rates. For example, one study observes that for 31 developing countries (excluding members of the Cairns Group), the simple (*i.e.*, unweighted) applied agricultural duty

Critics of the *Agreement on Agriculture* charge that, overall, the initial pre-Uruguay Round rates are high, hence post-cut rates still are high.[94] While this criticism is fair, an "unbiased" evaluation is impossible. Once again, the end depends in part on the beginning. That is, a proper evaluation hinges on two key factors: (1) selection of a date or period "better" than January 1, 1995 and September 1986, in the sense of lower base rates being in effect; and (2) a standard to determine whether the thirty-six and twenty-four percent targeted cuts are ambitious. On the first criterion, no doubt unsatisfied trade liberalizers could point to a date on which agriculture tariffs were low and thus urge adoption of cuts from a low base. On the second criterion, no doubt they could call for targets more aggressive than thirty-six or twenty-four percent. In other words, arguments about the base date and cuts there from rely on criteria, whether made explicit or left as an implicit assumption.

However, there is at least one point critics have in their favor: transparency. As with the targets themselves, the base rates used to calculate tariff cuts are not set forth in the *Agreement.* The failure of the negotiators to write the starting points into the text only exacerbates suspicions that the tariff cuts would be, in terms of substantive importance, less grand than the negotiators proclaimed in enthusiastic official documents like the December 1993 *Press Release.*

The selection of a base rate to commence tariff cuts is not the only way in which to manipulate the ambitiousness of the cuts. A second clever device would be to restrict cuts to certain agricultural products. In fact, WTO Members have made use of this device. For instance, on shelled groundnuts, the United States and Japan retain tariffs of 132 and 550 percent, respectively.[95] Overall, WTO Members cut tariffs by above-average amounts on flowers, oilseeds, and plants, by below-average amounts on dairy products and sugar, and by roughly average amounts on all other products.[96] As for tropical products, which account for about one-half of all agricultural exports from developing country WTO Members, developed Members agreed to a forty-

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is 25 percent, compared with a bound rate of 66 percent. *See* MICHALOPOULOS, *supra* note 17, at 85, 210.

94. *See* GALLAGHER, *supra* note 5, at 42 (citing a 1997 World Bank study to support the conclusion that "limited progress [has been made] in real agricultural trade liberalization largely as a result of . . . the choice of the base period (1986-88)," and because of dirty tariffication and the use by developing countries of very high ceiling bindings).

95. *See* MICHALOPOULOS, *supra* note 17, at 107 (mentioning these facts).

96. *See* GALLAGHER, *supra* note 5, at 43 (discussing these bands). The principal types of oilseeds traded across international borders are cottonseed, groundnuts, palm, rapeseed, soybeans, and sunflower. RAGHAVAN, *supra* note 15, at 163. International trade in dairy products occurs principally in butter, cheese, and non-fat dry milk, because fresh milk cannot be stored. *Id.* at 163, 168. Sugar derived from cane is a tropical product, whereas sugar from beet is produced in temperate climates. *Id.* at 168.

three percent tariff cut, slightly above the thirty-six percent average.[97] In other words, WTO Members have taken advantage of the freedom any reduction commitment cast in terms of an "average" inherently allows, namely, the protection of sensitive domestic sectors with below-average reductions.

Fortunately, from a free trade perspective, the room for maneuver on per-product cuts is limited. With respect to both developed and developing country WTO Members, Uruguay Round negotiators established minimum tariff cuts for each agricultural product. They did so to ensure a Member did not make all or most cuts on a limited range of products but leave certain primary commodities or processed items protected with high duty rates, thereby denying market access to foreign exporters of those goods. Thus, developed countries had to reduce the tariff on each agricultural product by a minimum of fifteen percent, while the minimum cut on individual products developing countries have to make is two-thirds of the minimum cut required of developed countries, *i.e.*, ten percent.[98] The same phase-in periods apply for the minimum per product reductions as are generally applicable, namely, equal installments of cuts over six years (1995-2000) for developed countries and over a decade (1995-2005) for developing countries.[99]

Significantly, for least developed countries, no minimum product-specific tariff reduction targets exist. The *Agriculture Agreement* allows them to maintain their duty rates and even increase their actual duty rates within their previously agreed bindings for as long as they remain least developed. At the same time, the obligation imposed on developing countries to make any minimum reduction hardly amounts to non-reciprocal treatment. Here, as with the thirty-six and twenty-four percent tariff cuts, the comment can be made that developed countries are less than charitable in adhering to the mandate in GATT Article XXXVI:8.

The targets of thirty-six and twenty-four percent tariff would seem to be of sufficient importance to merit express mention in the *Agreement on Agriculture*, perhaps in Article 4 itself. After all, if market access is the first of three methodologies for liberalizing world agricultural trade and if tariff reduction is the first of three measures associated with this methodology, then surely Uruguay Round negotiators would want to proclaim to the world, in the text of the *Agreement* themselves, the ambitious cuts to which they have committed. Would that incentive be greater for negotiators representing

97. *See* GALLAGHER, *supra* note 5, at 43 (discussing this fact, and containing a table on tariff reduction commitments of developed countries, in which the highest percentage reduction commitment is on flowers, plants, and spices (fifty-two percent) and the lowest is on dairy products (twenty-six percent)).

98. *See* CROOME, *supra* note 10, at 54 (discussing the minimum tariff reductions).

99. *See Id.* (discussing the phase-in periods for minimum tariff reductions)

developed countries, at least those eager to show their concern for developed and least developed countries?

Yet, these figures are nowhere to be found in the *Agreement.* They are set forth in a major "*Press Summary*" issued by the GATT Secretariat at the conclusion of the Uruguay Round negotiations, in April 1994 a few days before the signing of the Marrakesh Protocol.[100] They are repeated in a "*Briefing Document*" on trade and agriculture issued by the WTO in October 2002, the month before the Doha Ministerial Conference.[101] But, again, the thirty-six and twenty-four percent figures are not in the place to which common sense would lead a trade lawyer.

Of course, a press release is not the document by which WTO Members commit themselves to trade obligations. Rather, to find the tariff reduction targets, it is necessary to go to a side document, dated December 20, 1993, called *Modalities for the Establishment of Specific Binding Commitments Under the Reform Programme.*[102] This "*Modalities Document*" sets out the ways in which the Uruguay Round negotiators agreed to fulfill their obligations. Annex 3 of the *Modalities Document* deals with market access. Yet, even it does not mandate every developed country WTO Member cut its agriculture tariffs by thirty-six percent and every developing country Member do so by twenty-four percent. These numbers are targets. By definition, rarely will all who aim at a target hit it, *i.e.*, the average cut of an individual Member might be less or more than the target. In practice, deviations have occurred. Several East Asian and Latin American developing countries agreed to relatively low bound rates on agricultural imports of less than thirty percent; whereas many South Asian and African developing countries set high bound rates on these imports of 100 to 200 percent.[103]

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100. *See* GATT *Press Summary, News of the Uruguay Round* 8-11 (April 5, 1994), *reprinted in* BHALA, *supra* note 30, at 685, 686 (stating that "[t]ariffs resulting from this 'tariffication' process, as well as other tariffs on agricultural products, are to be reduced by an average 36 percent in the case of developed countries and 24 percent in the case of developing countries, with minimum reductions for each tariff line being required.").

101. *See* October 2002 *Briefing Document*, *supra* note 25, at 11 (stating, in the notes to the table on "Numerical Targets for Cutting Subsidies and Protection" that "[o]nly the figures for cutting export subsidies appear in the agreement [on Agriculture]. The other figures were targets used to calculate countries' legally binding 'schedules' of commitments."). However, even this statement is inaccurate. As explained in Section Four below, the export subsidy reduction commitments are not set forth in the *Agriculture Agreement.*

102. *See* CROOME, *supra* note 10, at 53-54 (discussing the 36 and 24 percent figures, and locating them in Annex 3 ¶¶ 3-7, 14-17 of the *Modalities Document*). The *Modalities Document* is MTN.GNG/MA/W/24 and is referred to herein as the "December 1993 *Modalities Document.*"

103. *See* GALLAGHER, *supra* note 5, at 42 (discussing these Uruguay Round bindings).

How are deviations from the target to be explained? Simply put, by the negotiating process during the Uruguay Round.[104] Also, by definition, a target for some or most members might not be a target for all Members, *i.e.*, some developed or developing country Members might take aim elsewhere. To take an hypothetical example, based on many give-and-take sessions with trading partners, New Zealand might agree to cut its agriculture tariffs by an average of forty percent (more than the thirty-six percent target applicable to it), while Nicaragua might agree to cut by twenty percent (less than the twenty-four percent target applicable to it).[105] The fact the thirty-six and twenty-four percent figures are targets, not legal obligations in the text of the *Agreement*, create the suspicion the figures are "soft." That suspicion matters, particularly to farmers and processors, wherever located, looking for signs the multilateral trade negotiation process provides them with meaningful new market access opportunities.

Where, then, does each WTO Member set out its specific commitments to cut agriculture tariffs? The answer is the Schedule of Concessions of the Member.[106] The Schedule is a legal document, namely, the one in which a Member binds its duty rates on imported goods pursuant to Article II of GATT. Put bluntly, what was said in the December 1993 *Modalities Document* and the April 1994 *Press Summary* have little or no legal relevance.[107] What matters, in terms of what one Member can be held liable for in WTO litigation conducted according to the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the *Dispute Settlement Understanding*, or *DSU*), is what the Member commits to do in its

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104. *See* October 2002 *Briefing Document*, *supra* note 25, at 11 (stating, in the motes to the table on "Numerical Targets for Cutting Subsidies and Protection," that "[e]ach country's specific commitments vary according to the outcome of negotiations").

105. In fact, as I learned in March 2003 at the University of Auckland, New Zealand offers duty-free treatment to all countries on agriculture products.

106. *See* CROOME, *supra* note 10, at 53 (stating that "tariff reductions are set out in the national schedules of commitments that are attached to the Marrakesh Protocol, and governed by the protocol itself"). *Id.* at 53 n.170 (calling Schedules "the definitive statement of each country's commitments"); *see also Statement of Administrative Action*, *supra* note 12, at 709 (explaining that "[i]n many cases, the operation of these rules [on market access, domestic support measures, and export subsidies] is linked to particular commitments by each WTO Member, contained in that WTO Member's schedule annexed to the Marrakesh Protocol to the GATT 1994," and that "[e]ach WTO Member's schedule sets forth the WTO Member's commitments regarding the access it will provide to its market for imports of agricultural products and the maximum amount of domestic support and export subsidies it will provide to agricultural products").

107. *See* CROOME, *supra* note 10, at 54-55 (opining the commitments in the *Modalities Document* "no longer have force, except to the extent that they may also have been reproduced in the Agreement on Agriculture," and that "[t]he obligations that count, and that could give rise to dispute settlement procedures if individual WTO members fail to live up to them, are the detailed commitments in each national schedule, or in the market access provisions of the *Agreement on Agriculture*.").

Schedule.[108] Each Member's Schedule is accessible, in (for example) the library of the WTO Secretariat or from the trade ministry of the Member in question. In other words, the agriculture tariff cuts to which a Member commits are available if one knows where to look. It might be said the situation is one of "transparency for those in the loop."

B. TARIFFICATION

Market access created by tariff reduction can be destroyed by an increase in a non-tariff barrier. In GATT language, benefits from cutting or abolishing a duty could be nullified or impaired by imposing a quota, licensing regime, or other quantitative or regulatory requirement. To mitigate the risk of replacing one kind of protection with another, the *Agreement on Agriculture* speaks about "tariffication." This term is trade jargon for the creation of a tariff-only regime of protection.[109] The "creation" results from conversion of all non-

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108. The *DSU* is *reprinted in* BHALA, *supra* note 10, at 602-29; *see also* PETER GALLAGHER, GUIDE TO DISPUTE SETTLEMENT (2002) (explaining the DSU).

109. *See* CROOME, *supra* note 10, at 52 (equating "tariff-only regime" with "tariffication"). Apparently, the Clinton Administration did not see tariffication in exactly this way. It expressly condoned the replacement of a non-tariff barrier with a tariff-rate quota:

> The schedules reflect commitments by WTO Members to convert the border measures other than ordinary customs duties (such as quotas and variable levies) they had in place during the 1986-1988 base period to tariff equivalents. That means they will replace their non-tariff barriers with tariffs set at rates that will provide trade protection equivalent to the protection provided during the base period by the non-tariff barriers. A WTO Member will generally only apply the tariff equivalent to imports in excess of the minimum or current access commitment it has made for a particular product. *Thus tariffication typically means that WTO Members will replace a non-tariff barrier with a tariff-rate quota.* [Footnote omitted.]
>
> To illustrate how "tariffication" will work, assume that during 1986-1988 a WTO Member limited imports of butter to 10,000 tons (subject to a tariff of four percent *ad valorem*) with the result that the WTO Member's domestic market price for butter was 75 percent above the world market price. *Under tariffication, that WTO Member might establish a tariff-rate quota* for butter with an in-quota quantity of 10,000 tons and an in-quota tariff-rate of four percent *ad valorem* and apply an over-quota tariff-rate of 75 percent *ad valorem.*

Statement of Administrative Action, *supra* note 12, at 711 (emphasis added). I would suggest the Administration erred in this meaning of "tariffication," insofar as its interpretation conflicts with Article 4:2, footnote 1, of the *Agreement on Agriculture*. The expansive language of that footnote, interpreted as such by the Appellate Body in the Chile – Price Band case, calls for conversion of tariff-rate quotas to tariffs. Unfortunately, HOUSE DOCUMENT 103-316 in which the *Statement* is reprinted, does not contain the footnote at the end of the first paragraph quoted above. *See Statement of Administrative Action*, *supra* note 12. The Clinton Administration's interpretation accords with its conversion of all quantitative restrictions maintained under Section 22 of the Agriculture Adjustment Act (7 U.S.C. § 624), as well as conversions of quotas under the Meat Import Act of 1979. In its favor, the Administration also cites examples from other countries of conversions of non-tariff barriers to tariff-rate quotas, with specific guaranteed access levels: the EU's variable levy on poultry (access of 29,000 tons); Korea's restrictive licensing of corn (access of 6,102,100 tons); the Philippines' import ban on pork (access of 54,000 tons); and Poland's state trade enterprise limitations on prunes (access of 1,000 tons). *See Statement of Administrative Action*, *supra* note 12, at 712.

tariff barriers to tariffs. The new tariffs may be calibrated to provide substantially the same level of protection (or less, if mandated by applicable tariff reduction commitments) to domestic farmers as did the non-tariff barriers they supplant.

Tariffication accords with two important GATT principles. First, if domestic producers are to receive protection, then it ought to be in the form of a tariff.[110] This principle is manifest in, for example, GATT Article XI:1, the general proscription against quantitative restrictions.[111] Second, any protective measure ought to be transparent.[112] Tariffication yields a more transparent regime of protection than before. Despite legal obligations to the contrary, particularly GATT Articles X (concerning transparency) and XIII (concerning the non-discriminatory administration of quantitative restrictions) and despite precedents set by the Appellate Body in cases like *Bananas*,[113] some WTO Members sponsor non-tariff barriers the opaqueness of which exacerbates discrimination against foreign-sourced agricultural products.

Thus, tariffication operates in tandem with tariff reduction to foster market access. In fact, the thirty-six and twenty-four percent targets for cutting tariffs apply to the duty rates created by tariffication.[114] Article 4:2 contains the following tariffication obligation:

> Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties, except as otherwise provided for in Article 5 [concerning special safeguards, discussed below] and Annex 5

Significantly, there are independent obligations in the North American Free Trade Agreement ("NAFTA"), incumbent on the United States, Canada, and Mexico, on agricultural products of North American origin. In particular, NAFTA establishes maximum tariff rates for these products, and mandates the elimination of all such tariffs over time. *See Statement of Administrative Action*, *supra* note 12, at 712. I discuss these obligations in a forthcoming publication associated with a conference on "NAFTA At Ten: The Future of Free Trade in North America," held in October 2003 at Michigan State University.

110. *See* CROOME, *supra* note 10, at 53 (describing the "GATT principle that protection should as far as possible be given only by import duties").

111. From an economic perspective, tariffs may cause less distortion to a market than quotas, and provide the government imposing them with revenue, whereas rents from quotas or other quantitative limits may benefit favored private-sector interests (and corrupt politicians assisting these interests). *See, e.g.*, MELVYN KRAUSS, THE NEW PROTECTIONISM 13-17 (1978), *reprinted in* BHALA, *supra* note 30, at 515-17 (discussing the economics of tariffs versus quotas).

112. *See Note on the Meaning of "Transparency" and the Facts of the EC–Poultry Products Case*, *in* BHALA, *supra* note 30, at 504-08 (discussing GATT Article X).

113. *See* Report of the Appellate Body, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (adopted 25 Sept. 1997); *see also* Raj Bhala, *The Bananas War*, 31 MCGEORGE L. REV. 839, 852-58, 877-90 (2001) (discussing the EU's import licensing regime and GATT Article XIII).

114. *See* CROOME, *supra* note 10, at 54 (explaining the scope of tariff reductions).

> [concerning special treatment for certain products, also discussed later].[115]

This statement is resolute. It makes "tarrification" an irreversible process and thus promises a world free of non-tariff barriers in agricultural trade.[116]

What, exactly, does "tariffication" cover? The footnote to Article 4:2 of the *Agriculture Agreement* provides part of the answer. It identifies the kinds of non-tariff barriers subject to tariffication.

> These measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947, but not measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement.[117]

In other words, the footnote instructs, by means of a non-exclusive list, that all non-tariff barriers, except balance of payments safeguards and measures not specific to agricultural imports, are to be converted to tariffs. However, as explained below, exemptions for "special treatment" in Annex 5 to the *Agreement* qualifies this grand-sounding commitment.

It is at least an indicator of the seriousness of the tariffication obligation that country-specific derogations are not "grand fathered" by the footnote to Article 4:2. Before the Uruguay Round, just forty GATT contracting parties had converted their protective measures on agricultural products from non-tariff to tariff barriers.[118] Yet, even their conversion was incomplete. These contracting parties maintained (on average) non-tariff measures against

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115. *Agreement on Agriculture*, Art. 4:2 (footnote omitted, emphasis added).

116. *See* CROOME, *supra* note 10, at 55 (interpreting Article 4:2 as an "irreversible" tariffication obligation).

One observer says "[t]he most significant result" of the *Agreement on Agriculture* is "the change in the form of protection of food markets," namely, using "only tariff protection" and binding "tariffs against future increase." GALLAGHER, *supra note* 5, at 41. He justifies this characterization on the ground "the security of trade in agricultural products will be greater than in industrial products, since 100% of agricultural product tariff lines will be bound." That justification is correct, though it presumes all agricultural items given special treatment as a "designated product" or "staple food," and thereby exempted temporarily from tariffication, have been tarrified. This exemption is discussed below.

117. *Agreement on Agriculture*, Art. 4:2 fn. 1 (emphasis added).

118. *See* CROOME, *supra* note 10, at 53 (providing this statistic).

twenty-two percent of the agriculture product lines listed in the harmonized schedules, and some of these measures were quite restrictive.[119] Thus, suppose a contracting party had maintained a non-tariff measure by virtue of its terms of accession to GATT or perhaps by a waiver granted under GATT Article XXV. Could it continue to do so after January 1, 1995, when the *Agreement on Agriculture* entered into force?

The footnote answers the question "no."[120] The answer does not mean a WTO Member had to drop its barrier entirely. Rather, a Member had to change it to a tariff. Moreover, depending on the Member's tariff reduction commitments, a restrictive non-tariff barrier could translate into a substantially equivalent high duty rate, but the rate would decline over time. At the least, because of the tariffication obligation, the Member would be maintaining existing market access opportunities.[121]

Unfortunately, the footnote to Article 4:2 of the *Agriculture Agreement* hardly has quelled controversy about the kinds of measures subject to tariffication. Argentina successfully sued Chile in the *Price Band* case, arguing (*inter alia*) Chile's protective regime for imported wheat, wheat flour, and edible vegetable oils did not comport with Article 4:2.[122] Argentina drew an analogy between Chile's price band system, on the one hand, and a variable import levy and minimum import price, on the other hand. The Appellate Body liked Argentina's analogy, ruling Chile's system was subject to tariffication. Almost assuredly, this topic is ripe for further judicial interpretation. In the meantime, the WTO Secretariat concedes less than twenty percent of all agricultural products, as defined by tariff lines, have been subject to tariffication.[123]

C. THE THIRD WORLD AND EXEMPTIONS FROM TARIFFICATION

Annex 5 to the *Agriculture Agreement* deals with the scope of the tariffication obligation of Article 4:2 of the *Agreement.* However, as intimated earlier, it is euphemistic to characterize Annex 5 as "guidance" rather than

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119. *See id.* (discussing pre-Uruguay Round tariffication in agriculture).

120. *See id.* (stating that "[t]his requirement [of tariffication] applied even if the country maintaining a border measure had previously been specifically authorized to do so, for instance under the terms of its original accession to the GATT").

121. *See id.* (stating that "the tariffication package also required countries to maintain current access opportunities at least equivalent to those 'existing.'").

122. *See* Report of the Appellate Body, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products* (WT/DS207/AB/R) (adopted 23 Oct. 2002), and the discussion of the case in Raj Bhala & David A. Gantz, *WTO Case Review 2002*, 20 ARIZ. J. INT'L & COMP. L. 143, 221-58 (2003) (discussing the case); *Id.* at 237-51 (discussing analogical arguments)

123. *See* October 2002 *Briefing Document, supra* note 25, at 18 (mentioning this statistic).

"exemptions." Annex 5 affords "special treatment," in the form of two exemptions from the tariffication obligation. These exemptions are for designated products and staple items in traditional diets, as set forth in sections A and B of Annex 5, respectively. The "designated product" exemption is available for all WTO Members and is potentially available for any primary agricultural product or prepared product.[124] In contrast, the "staple food" exemption is available only to developing country WTO Members and only for primary agricultural products.[125] Significantly, the exemptions had to be invoked during the Uruguay Round negotiations, *i.e.*, "[t]hese options could only be exercised in the course of drawing up schedules of commitments, and therefore now govern access opportunities solely for the few products and markets concerned."[126] At least four WTO Members invoked an exception, and the most common product for which an exemption was claimed was rice.[127]

An obvious question is whether either exemption helps Third World farmers. One way to approach it is to appreciate the technical details of the exemptions and their repercussions. There are four substantive tests applicable to both the "designated product" and "staple food" exemption from tariffication.[128] If an imported agricultural item does not satisfy all three tests, then a WTO Member cannot protect domestic farmers or processors by maintaining a non-tariff barrier on the item. First, imports of the item must comprise less than three percent of domestic consumption during the base period of 1986-1988.[129] Second, starting with the base period, the importing WTO Member must not have given any export subsidy to the item.[130] Third, if the item is a primary product, then the Member must have effective measures in place to restrict production of that product.[131] These tests may

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124. *See Agreement on Agriculture*, Annex 5, Section A, ¶ 1 (referring to "any primary agricultural product and its worked and/or prepared products," using the term "designated products," and not circumscribing the exemption to any particular group of WTO Members).

125. *See id.* at Section B, ¶ 7 (referring to "a primary agricultural product that is the predominant staple in the traditional diet of a developing country Member").

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

127. *See id.* at 56 (discussing the invocations).

128. *See Agreement on Agriculture*, Annex 5, Section A ¶ 1(a)-(c) (concerning the designated product exemption), Section B, ¶ 7 (specifying conditions for the staple food exemption "*in addition to those specified in paragraph 1(a) through 1(d)*" (emphasis added)). In other words, the four tests for the designated product exemption are made applicable by the *chapeau* of paragraph 7 of Section B to the staple food exemption.

129. *See id.* ¶ 1(a) (stating that Article 4:2 shall not apply if "imports of the designated products comprised less than 3 percent of corresponding domestic consumption in the base period 1986-1988").

130. *See id.* ¶ 1(b) (stating Article 4:2 shall not apply if "no export subsidies have been provided since the beginning of the base period for the designated products").

131. *See id.* ¶ 1(c) (stating Article 4:2 shall not apply if "effective production-restricting measures are applied to the primary agricultural product").

appear to have little to do with one another. In fact, they have a common thrust.

Exemption from tariffication is permission to continue a disreputable form of trade barrier, like a quota, licensing scheme, or other quantitative restriction. The permitted non-tariff barrier is disreputable because it is less transparent than a tariff and less susceptible to straightforward negotiations on reduction, and because it is less economically sensible than a tariff, it has no or less revenue accrues to the importing WTO Member. How are other WTO Members to know whether a particular Member exempts an item from tariffication to protect its farmers growing a competitor commodity or its producers processing a competitor good? How is the community to know whether the Member aims to boost the market share of its commodity or good in relation to the share held by foreign farmers or processors?

The three tests answer these questions. The second test ensures the importing WTO Member is not paying its farmers or processors to export their output, which would be a telltale sign the Member is attempting to advantage its domestic interests. The third test ensures the Member is not trying to increase output of a particular primary product and thus is not seeking to advantage its farmers growing that commodity. The first test ensures the scope of the exemption from tariffication, in terms of permission to continue with a non-tariff barrier, is limited to imports with only a small market share in the importing Member. Obviously, if imports account for twenty-five percent of domestic consumption, then the impact of the exemption, in terms of distorting trade, is greater than if they account for a *de minimis* level. That impact would be magnified if the Member also subsidizes its exports and does not strive to restrict production.

As for the fourth test, at first glance it appears to be more of a procedural than substantive requirement. A WTO Member seeking to invoke the designated product or staple food exemption from tariffication must designate in its Schedule of Concessions that the item is subject to special treatment. It must do so using the symbol "ST-Annex 5." However, the substantive nature of this requirement is evident from what this designation must reflect, namely, special treatment to accommodate "non-trade concerns, such as food security and environmental protection."[132] Embedded in this language is an intent requirement. The designation must serve a non-trade purpose. Presumably, the Member must articulate this purpose.

Even if all four tests are met, a WTO Member is not free to exempt an agricultural item from tariffication. There remain requirements particular to each exemption. With respect to the designated product exemption, a Member

132. *Id.* ¶ 1(d).

must provide exporting Members with minimum market access opportunities and specify them in its Schedule.[133] That ensures exporters of the designated product do not lose opportunities owing to the lack of tariffication by the importing Member. Indeed, during the first year of implementation of the *Agriculture Agreement* (January 1, 1995-December 31, 1995), an importing Member had to offer market access equal to four percent of domestic consumption during the base period.[134] During each subsequent year of the implementation period (January 1, 1996-December 31, 2000), the Member had to increase this opportunity by 0.8 percent of base-period domestic consumption.[135]

Once a WTO Member no longer makes use of the designated product exemption, it must provide minimum market access for the product at the level of eight percent of domestic consumption in the base period.[136] Then, the Member must convert to ordinary tariffs the protective border measures other than its ordinary tariffs that apply to the product; it must satisfy the tariffication obligation of Article 4:2 of the *Agriculture Agreement* with respect to the product. At that point, the product no longer is a designated one and is subject to ordinary customs duties bound in the Member's Schedule of Concessions. What duty rate must the Member apply to the formerly designated product? The answer is based on a "tariff equivalent," which essentially is the rate the Member would have had to apply if the Member had not exempted the product from tariffication and had cut the tariff on the product by fifteen percent in equal annual installments during the implementation

133. *See id.* ¶ 1(e) (setting forth the obligation to provide minimum access opportunities).

134. *See id.* (containing this benchmark).

135. *Id.*

136. *See id.* ¶ 5 (stating that "[w]here the special treatment is not to be continued at the end of the implementation period, the Member concerned shall implement the provisions of paragraph 6. In such a case, after the end of the implementation period *the minimum access opportunities for the designated products shall be maintained at the level of 8 percent of corresponding domestic consumption in the base period* in the Schedule of the Member." (emphasis added)).

A sunset rule is built into the designated product exemption. Paragraph 3 of Annex 5, Section A, speaks of "[a]ny negotiation on the question of whether there can be a continuation of the special treatment as set out in paragraph 1 after the end of the implementation period," *i.e.*, after 31 December 2000 (the six years following 1 January 1995, which are defined in Article 1(f) as the "implementation period"). Paragraph 3 further indicates this negotiation must be completed before the end of the implementation period, and conducted in conjunction with the built-in agenda talks under Article 20. Paragraph 4 clarifies the scope of the sunset rule, by speaking of "a Member" continuing to apply the special treatment. In other words, the sunset rule concerns the use of the designated product exemption by individual WTO Members. Each Member seeking to extend the designated product exemption beyond 31 December 2000 is supposed to have negotiated for an extension before that date. Moreover, paragraph 4 obligates a Member seeking an extension to "confer additional and acceptable concessions as determined in that negotiation." Put colloquially, an extension is not "free." Of course, if no Member applied for an extension by 31 December 2000, then the exemption thereby would end.

period of January 1, 1995 to December 31, 2000.[137] In sum, the exemption from tariffication as a designated product cannot go on forever. On the day of reckoning—when the exemption ends and tariffication occurs—the level of protection through the new bound duty is supposed to be what would have prevailed had there been no exemption. Put simply, the exemption does not rescue a product from this reckoning.

The "staple food" exemption from tariffication, which is restricted to developing country WTO Members and contingent on passage of the first four tests, also has its peculiar additional requirements.[138] First, the agricultural item in question must be a "primary agricultural product." Second, this product must be a "predominant staple in the traditional diet" in the Member. The first circumstance is itself controversial. Why should developing countries be entitled to keep non-tariff barriers only on primary agricultural products. Many might be—indeed, are likely to be—keen on "moving up the value added chain" by producing and exporting processed agricultural products. Yet, to develop internationally competitive processing businesses, some might seek to rely on temporary non-tariff measures. They cannot do so because of the restricted scope of the exemption.

The second requirement can lead to disputes because of the ambiguity of the quoted terms. How "dominant" is "predominant?" Would the answer be fifty-one percent, as measured by caloric intake? What is a "staple" in a diet? What diet ought to qualify as "traditional"? There is little doubt the goal of section B is to help a developing country achieve food security in one or a few key items. The ambiguities indicate developing countries have considerable discretion in deciding which items to pick. To be sure, they face the discipline of litigation brought by an exporting country under the *DSU*. But, what exporting country, particularly a rich, powerful WTO Member, would relish

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137. *See id.* ¶ 6 (second sentence). The term "tariff equivalent" is used in Annex 5, Section A, ¶ 6 to convey the idea of an ordinary customs duty that would have been applied to the designated product, had it not been exempted from tariffication as a designated product. *Id.* *Guidelines for the Calculation of Tariff Equivalents for the Specific Purpose Specified in Paragraphs 6 and 10 of this Annex* are referenced in paragraph 6 (third sentence) *reprinted in* BHALA, *supra* note 10, at 332. In brief, the *Guidelines* explain the tariff equivalent is the difference between the internal and external price for the product, expressed as an *ad valorem* or specific duty. *See Guidelines*, ¶ 1. The external price is the average c.i.f. price for the product (or, if c.i.f. prices are unavailable, then f.o.b. prices from an appropriate major exporter, adjusted by adding an estimate of insurance and freight charges). *Id.* ¶ 2. The internal price is the representative wholesale price of the product in the importing WTO Member. *Id.* ¶ 4. Annual average market exchange rate data, drawn from the same period as the data for external prices, are used to convert external prices into the domestic currency of the importing WTO Member. *Id.* ¶ 3. The initial tariff equivalent calculated can be adjusted to take account of differences in quality or variety, but the Member must afford full opportunity, upon request, for consultations about the adjustment. *Id.* ¶ 7. If a tariff equivalent is lower than the current bound duty rate, the equivalent can be set at the bound rate. *Id.* ¶ 6.

138. *Agreement on Agriculture*, Annex 5, Section B, ¶ 7.

the publicity of pressing a case against a small, poor Member over food security?

Setting aside these matters and assuming all tests are met, can a developing country WTO Member invoke the staple food exemption? The answer is a "conditional yes." That is, it can invoke the exemption only if it offers minimum market access opportunities and specify them in its Schedule to foreign farmers growing the exempted primary agricultural product.[139] As is true for the designated product exemption, the purpose of this requirement is to ensure exporters do not lose opportunities owing to the maintenance of a non-tariff barrier on a staple food.

What minimum access must the developing country Member provide? During the first year of implementation of the *Agriculture Agreement* (January 1, 1995–December 31, 1995), an importing developing country Member had to offer market access equal to one percent of domestic consumption during the base period.[140] The same base period, 1986-88, is used for the staple food and designated product exemptions.[141] By the beginning of the fifth year of the implementation period (*i.e.*, by January 1, 1999), the Member had to increase this access, in equal annual installments, to two percent of base-period domestic consumption.[142] During the fifth year, the Member could maintain this two percent market access level, but at the beginning of the sixth year (*i.e.*, January 1, 2000), the Member had to go beyond this level.[143] The increases, in equal annual installments, had to result in a figure of four percent of base-period domestic consumption by January 1, 2004 (the start of the tenth

139. *See id.* ¶ 7(a) (setting forth the obligation to provide minimum access opportunities).

140. *See id.* ¶¶ 1(a) (defining the "base period"), 7 (referencing paragraph 1(a))).

141. See *id.* ¶ 7(a) (containing this benchmark).

142. *Id.*

143. The ability of the Member to maintain the two percent level from the beginning of the fifth to the beginning of the sixth implementation years, *i.e.*, from 1 January 1999 to 31 December 2000, is not obvious from the relevant language of Annex 5:

> minimum access opportunities in respect of the products concerned, as specified in . . . the Schedule of the developing country Member concerned, correspond to 1 percent of base period domestic consumption of the products concerned from the beginning of the first year of the implementation period and are *increased in equal annual installments to 2 percent* of corresponding domestic consumption in the base period *at the beginning of the fifth year of the implementation period. From the beginning of the sixth year of the implementation period*, minimum access opportunities in respect of the products concerned *correspond to 2 percent* of corresponding domestic consumption in the base period and are increased in equal annual installments to 4 percent of corresponding domestic consumption in the base period until the beginning of the 10th year.

Id. ¶ 7(a) (emphasis added). The italicized language contemplates a 2 percent level in the fifth year, and increases starting again in the sixth year.

implementation year), and the Member must at least maintain this level every year thereafter in its Schedule.[144]

The details of the market access conditions to qualify for an exemption restricted to primary commodities and poor countries are mind-numbingly technical. Yet, it is critical to unearth a large policy point buried by the details, namely, the generosity or lack thereof of special and differential treatment for developing countries. For the designated product exemption, which is not limited to primary commodities or poor countries, the initial market access figure is 4 percent, and the annual incremental amounts for the entire implementation period (January 1, 1996–December 31, 2000) are 0.8 percent of base-period domestic consumption.[145] By the end of the implementation period (*i.e.*, by January 1, 2001), the minimum market access, in terms of base-period domestic consumption, was eight percent. In other words, a developed or developing country WTO Member exempting from tariffication a designated product had to provide greater market access than a developing country Member exempting a staple food—four versus one percent in the first year and increments of 0.8 percent in 1996-2000, resulting in eight percent at the end of implementation versus increments resulting in two percent by 2000 and four percent by 2004. The Table below summarizes these differences.

144. *See id.* (setting forth these benchmarks).

145. *See id.* Section A, ¶ 1(e) (containing this benchmark).

Table 2: Minimum Market Access An Importing WTO Member Must Provide To Exempt An Agricultural Item from Tariffication

Implementation Period* *(Agreement on Agriculture, Articles 1(f) and 15:2)*	**Designated Product Exemption From Tariffication**** *(Agreement on Agriculture, Annex 5, Section A, ¶ 1(e))* Market access the Member must provide for imports of the designated product, measured as a percent of domestic consumption in the Member during the base period (1986-88):	**Staple Food Exemption From Tariffication***** *(Agreement on Agriculture, Annex 5, Section B, ¶ 7(a))* Market access the Member must provide for imports of the staple food, measured as a percent of domestic consumption in the Member during the base period (1986-88):
1995	4	1
1996	4.8	1.25
1997	5.6	1.5
1998	6.4	1.75
1999	7.2	2
2000	8	2
2001		2.5
2002		3
2003		3.5
2004		4

Notes to Table 2:

* 1st of January of each year, ended in 2000 for developed countries and 2004 for developing countries.

** Available to all WTO Members.

*** Available only to developing country WTO Members, and only for primary agricultural products.

Essentially, the obligation incumbent on developing countries to provide market access to foreign farmers of primary agricultural products is half that put on developed countries. That lesser obligation is as it should be. But, is it enough of a difference to matter, *i.e.*, is this special and differential treatment modest at best? Assuredly, the answer is "yes." Here lies the policy point. Differences in low, single digit percentages are unlikely to give many primary agricultural product farmers in poor countries relief they need from foreign competition to become domestically and internationally competitive. Buried in the detail is another instance of less-than-generous treatment for the Third World.

Lest there be any doubt about this conclusion, consider what also is demanded of a developing country should it seek to exempt a staple food from

tariffication. It must have provided "appropriate market access opportunities" to "other products" covered by the *Agriculture Agreement*.[146] Not surprisingly, the word "appropriate" is undefined. Consequently, a developed WTO Member with an exporting interest in a primary agricultural product could argue against invocation by a developing country Member of the staple food exemption because that Member has not offered it "appropriate" market access on other primary agricultural items. That smacks of reciprocity, *i.e.*, of special and differential treatment given only if conditions are fulfilled, which are precisely what rich Members are not to expect under the famous rule of GATT Article XXXVI:8.[147] To be sure, there is an economic logic to requiring poor Members to fulfill carefully constructed criteria before derogating from a trade-liberalizing norm like tariffication. The policy debate embedded in the criteria is whether they are constructed to stimulate rural development in the Third World or to safeguard and even expand markets for farmers and processors in the First World.

In most instances, a developing country WTO Member is not to make use of the staple food exemption beyond the implementation period—beyond December 31, 2004.[148] Then, the Member must convert to ordinary tariffs the protective border measures other than its ordinary tariffs that apply to the primary agricultural product; it must satisfy the tariffication obligation of Article 4:2 of the *Agriculture Agreement* with respect to the product. At that point, the product no longer is a designated one and is subject to ordinary customs duties bound in the Member's Schedule of Concessions.

What duty rate must the developing country Member apply to the formerly exempt primary commodity? Here, as with the designated product exemption, the answer depends on the "tariff equivalent," which essentially is the rate the Member would have applied if it had not exempted the commodity

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146. *Id.* Section B, ¶ 7(b).

147. *See supra* note 86 and accompanying text (discussing the non-reciprocity expectation).

148. *See Agreement on Agriculture*, Annex 5, Section B, ¶¶ 8-10 (containing rules about whether an exemption can be maintained beyond the end of the 10th year of implementation).
A sunset rule is built into the staple food exemption. Paragraph 8 of Annex 5, Section B, speaks of "[a]ny negotiation on the question of whether there can be a continuation of the special treatment as set out in paragraph 7 after the end of the 10th year following the beginning of the implementation period," *i.e.*, after 31 December 2004 (the six years following 1 January 1995, which are defined in Article 1(f) as the "implementation period," plus the additional time contemplated in Annex 5, Section B, as well as in Article 15:2 as special and differential treatment). Paragraph 8 further indicates this negotiation must be finished before the end of the implementation period, *i.e.*, before 31 December 2004, hence a developing Member seeking to extend the exemption beyond 31 December 2004 is supposed to have negotiated for an extension before that date. Moreover, paragraph 9 obligates the developing Member seeking an extension to "confer additional and acceptable concessions as determined in that negotiation." Put colloquially, reciprocity, contrary to GATT Article XXXVI:8, is expected of the Member in exchange for an extension. Of course, if no Member applied for an extension by 31 December 2004, then the exemption thereby would end.

from tariffication.[149] It is not clear whether the fifteen percent reduction rule applies in both contexts. As explained earlier, for a designated product, a converted tariff rate is calculated using a hypothetical tariff cut of fifteen percent in equal annual installments from 1995-2000.[150] Does this same fifteen percent reduction rule apply to a developing country Member tariffying a staple food? The answer seems to depend on whether the Member negotiated for that, or some other, reduction rule in its Schedule of Concessions. The relevant language in Annex 5, Section B, refers both to this rule and to the possibility of special and differential treatment.[151] Put differently, the answer depends on savvy negotiation by the developing country. But, regardless of the percent reduction, there will be a day of reckoning when tariffication occurs. The staple food exemption does not rescue Third World farmers of this primary commodity from this reckoning.

Annex 5 to the *Agreement on Agriculture*, along with the Appellate Body holding in the *Price Band* case, delineate what agricultural goods are subject to tariffication. However, neither source of law explains how tariffication is to occur. The text of the *Agreement* itself does not spell out how conversion of non-tariff to tariff barriers must occur. There is an Attachment to Annex 5,

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149. *See Agreement on Agriculture*, Annex 5, Section B, ¶ 10 (second sentence). The term "tariff equivalent" is used in this paragraph, as well as in Annex 5, Section A, ¶ 6 to convey the idea of an ordinary customs duty that would have been applied to the designated product, had it not been exempted from tariffication.

Guidelines for the Calculation of Tariff Equivalents for the Specific Purpose Specified in Paragraphs 6 and 10 of this Annex are referenced in paragraph 6 (third sentence) and attached to Annex 5 *reprinted in* BHALA, *supra* note 10, at 332. In brief, the *Guidelines* explain the tariff equivalent is the difference between the internal and external price for the product, expressed as an *ad valorem* or specific duty. *Guidelines*, ¶ 1. The external price is the average c.i.f. price for the product (or, if c.i.f. prices are unavailable, then f.o.b. prices from an appropriate major exporter, adjusted by adding an estimate of insurance and freight charges). *Id.* ¶ 2. The internal price is the representative wholesale price of the product in the importing WTO Member. *Id.* ¶ 4. Annual average market exchange rate data, drawn from the same period as the data for external prices, are used to convert external prices into the domestic currency of the importing WTO Member. *Id.* ¶ 3. The initial tariff equivalent calculated can be adjusted to take account of differences in quality or variety, but the Member must afford full opportunity, upon request, for consultations about the adjustment. *Id.* ¶ 7. If a tariff equivalent is lower than the current bound duty rate, the equivalent can be set at the bound rate. *Id.* ¶ 6.

150. *See supra* notes 136-137 and accompanying text.

151. The second sentence of paragraph 10 of Annex 5, Section B, states: "In other respects, the provisions of *paragraph 6 shall apply as modified by the relevant special and differential treatment accorded to developing country Members* under this *Agreement*" (emphasis added). Paragraph 6 sets forth the 15 percent reduction rule in the context of the designated product exemption. Article 15 of the *Agriculture Agreement*, which concerns special and differential treatment, is worded in general terms. It does not discuss tariffication, nor does it explain how to calculate a tariff equivalent for a staple food on which a developing Member imposed a non-tariff barrier. But, Article 15:1 mandates "special and differential treatment in respect of commitments . . . as set out in the relevant provisions of this *Agreement* and *embodied in the Schedules of concessions* and commitments" (emphasis added). The italicized language would seem to permit a developing country to negotiate a tariff rate reduction plan, as it were, in connection with ending an exemption from tariffication for a staple food.

entitled *Guidelines for the Calculation of Tariff Equivalents for the Specific Purpose Specified in Paragraphs 6 and 10 of this Annex.*[152] However, as their title suggests, they are not broadly applicable to all tariffication efforts, but rather only those covered by paragraphs 6 and 10 of Annex 5. Those paragraphs concern the designated product and staple food exemption; they refer to agricultural products whose exemption is being eliminated and which need to be tarrified. Consequently, at least from Annex 5, the title of the *Guidelines*, and Article 4:2, there seems to be no textual basis for applying the *Guidelines* to the tariffication of non-exempt products. Still, that has not prevented at least one authority from presuming that the *Guidelines* are applicable.[153]

Assuming the *Guidelines* are not strictly applicable to Article 4:2 tariffication other than to designated products or staple foods, what help is available? The question is not merely academic. If a WTO Member, intentionally or not, converts a non-tariff barrier to an ordinary customs duty that is higher than the protection afforded by the non-tariff barrier, trade in the product has not been liberalized. Rather, "dirty tariffication" occurs.[154] Indeed, there is evidence of dirty tariffication.

> [D]eveloped (and developing) countries chose to bind their tariffs at higher rates than the actual tariff equivalents during the years just before the conclusion of the Uruguay Round agreements (1989-93). For example, *the final bindings for the EU were almost two thirds higher than the tariff equivalents for 1989-93 . . .*, and *for the U.S. they were more than three quarters higher.* Binding the tariffs at such high levels allowed countries to vary their actual tariff rates *according to the results they wished to achieve in protecting their domestic markets* – much as the EU used to do with variable levies, which have been prohibited [under Article 4:2, footnote 1, of the *Agriculture Agreement*] since the Uruguay Round. The result of this so-called "dirty tariffication" *has not been improved market access, merely that protection has become more transparent.*[155]

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152. *See supra* note 149 (citing and discussing the *Guidelines*).

153. *See* BHALA & KENNEDY, *supra* note 12, § 12-2(e)(3)(B) at 1193 n.60 (referring to the *Guidelines* in the general context of tariffication).

154. *See, e.g.*, Dale E. Hathaway & Melinda D. Ingco, *Agricultural Liberalization and the Uruguay Round*, *in* THE URUGUAY ROUND AND THE DEVELOPING ECONOMIES, 1, 158 (Will Martin & L. Alan Winters eds. 1995); Jeffrey J. Steinle, *The Problem Child of World Trade: Reform School for Agriculture*, 4 MINN. J. GLOBAL TRADE 333, 348-49 (1995) (discussing the inexact science of tariffication).

155. MICHALOPOULOS, *supra* note 17, at 105 (emphasis added).

In brief, post-Uruguay Round tariffs resulting from tariffication are "very high" on many agricultural products because of the "excessively high tariff equivalents" used by many countries.[156] Such products include staple items like cereals, dairy products, meat, milk, and sugar, where tariffication of quantitative restrictions has resulted in duty rates above 100 percent.[157] Rice is another example—the Japanese rate on it, in the several hundreds, is prohibitive.[158]

To return to the metaphor, emerging from Purgatory presupposes cleansing, not its opposite. On this matter, as with tariff reduction targets, common sense would lead a trade lawyer in search of information about tariffication to the wrong place. Once again, the lawyer might need to look at the December 1993 *Modalities Document*, particularly Annex 3 thereto, if he needs specific information about the process of conversion.[159] One general point about the end of the process is clear. The resulting tariff may be an *ad valorem* duty (*i.e.*, a duty rate expressed as a percentage of the customs value of imported merchandise, such as twenty-five percent) or a specific duty (*i.e.*, an amount expressed in terms of the number of units of imported merchandise, such as $2.50 per bushel). If a quota is converted to a tariff rate quota (TRQ), that is, to a measure calling for the application of a low duty rate or duty free treatment up to a certain threshold plus a higher rate on imported volumes in excess of the threshold, then conversion is only partial.[160]

D. DO MINIMUM ACCESS TARIFF RATE QUOTAS HELP?

Tariffication alone does not necessarily increase market access opportunities for agricultural exporters. Duty rates may be high because the non-tariff measures from which they were converted were restrictive or because of dirty tariffication. Even the additional obligation that conversion be to a substantially equivalent level of protection and current market access

156. *See* GALLAGHER, *supra* note 5, at 42 (citing evidence from a 1997 World Bank study).

157. *See* MICHALOPOULOS, *supra* note 17, at 107 (mentioning this fact).

158. *See id.* (reporting a tariff of 550 percent). Still another illustration is tobacco, on which the United States imposes duties as high as 350 percent. *See id.* However, there is an obvious health justification for a prohibitive duty on tobacco. Not surprisingly, this source concludes the cuts in non-tariff measures "in agriculture after the conclusion of the Uruguay Round does not seem to have resulted in significant improvements in market access for developing countries." *Id.* at 111.

159. *See* CROOME, *supra* note 10, at 53 (stating that "[t]he tariffication process was based on application of negotiated methods, or 'modalities' that are not included in the published Uruguay Round texts"). "The tariffication methods are set out in the Uruguay Round document MTN.GNG/MA/W/24, Modalities for the establishment of specific binding commitments under the reform programme, of 20 December 1993, and are largely in Annex 3 of that document." *Id.* at 53 n.170.

160. *See* UNITED STATES CUSTOMS SERVICE, IMPORTING INTO THE UNITED STATES 79-80 (November 1998), *reprinted in* BHALA, *supra* note 30, at 512-14 (discussing TRQs).

opportunities be maintained may be of little help to exporters. Suppose imports in a particular agricultural sector account for only ten percent of consumption in an importing WTO Member. Mere tariffication is unlikely to increase by much that share.

In an effort to address this unhappy prospect, during the Uruguay Round a system of tariff quotas (TRQs) was established "to *maintain existing import access levels*, and to *provide minimum access opportunities*."[161] The TRQ device appeared to be sensible because the lower duty rate applicable to in-quota shipments ensured a modicum of access. So, in addition to tariff reduction and tariffication, the Uruguay Round negotiators agreed upon a third market access obligation—the provision of minimum access TRQs. What is the nature of this obligation?

Setting aside for the moment the selection of a base period, consider the instances in which imports of a particular agricultural product account for less than 3 percent of total domestic consumption in a WTO Member. For that product, the *Agreement on Agriculture* calls upon the Member to establish a minimum access TRQ. In practice, the Member must define a volume of imports of that product at which it will provide access to its market at a reduced or zero tariff.[162] Any amount in excess of the quota threshold enters at the normal most-favored nation (MFN) tariff. This obligation compliments the "designated product" exemption from tariffication. As explained earlier, the key requirement associated with this exemption is that imports account for less than three percent of domestic consumption in an importing WTO Member. Providing minimum access through a TRQ for such a product ensures a modicum of market access, despite maintenance of a non-tariff barrier to imports of the product.

Is three percent an ambitious market share figure to use? The answer is "no." Under the *Agriculture Agreement*, this amount expanded to five percent of domestic consumption by 2000 for developed countries and expands to five percent by 2004 for developing countries.[163] Consequently, more agricultural product categories will benefit from a minimum access TRQ. Yet, requiring minimum market access when imports account for less than five percent of total domestic consumption is not particularly ambitious either, imports at that level still have only a small share of the market. Moreover, as with tariff reduction obligations, the selection of a base period is important. The five

161. October 2002 *Briefing Document*, *supra* note 25, at 17 (emphasis added).

162. *See* CROOME, *supra* note 10, at 53-54 (explaining the requirement of providing a low duty rate on an MFN basis if imports of an agricultural product account for less than 5 percent of total domestic consumption during the base period).

163. These requirements were set forth in the December 1993 *Modalities Document*. *See* CROOME, *supra* note 10, at 54 (discussing the three and five percent thresholds).

percent figure not only reflects domestic consumption of imported products during the base period, but also sets the standard for the minimum opportunity to be given to overseas farmers and processors.

In other words, a WTO Member is supposed to set a TRQ so as to provide access of up to five percent of its market for the product in question, but the Member need not be more generous than that. Suppose the base period is one in which domestic consumption of imports of the product in question, measured in terms of absolute volume and value, is low. Then, the minimum TRQ will afford an existing market access opportunity that, in terms of volume and value, is low. What base period does the *Agriculture Agreement* use for setting minimum access TRQs? None other than the same period used for tariff reduction commitments.

What, then, is the basic concern regarding TRQs? Simply put, it is whether they serve more as barriers to trade than their ostensible purpose of providing minimum access. Aside from the base period used to set a TRQ, some tariff quotas entail fairly high in-quota duty rates, which impede market access. Other TRQs have extremely high out-of-quota rates, effectively prohibiting above-quota shipments. Not surprisingly, then, in the Doha Round, some WTO Members advocate the elimination of TRQs; while others call for slashing the duty rates and/or expanding the quota thresholds. Equally important, they point out, is addressing the non-transparent administration of TRQs, which makes it difficult for an exporter to obtain an in-quota allotment at the low duty rate.[164]

The concern about TRQs is not inconsequential. There are forty-three WTO Members using TRQs on agricultural imports, with a combined total of 1,425 TRQs in their commitments.[165] Among the Members with the highest number of TRQs on agricultural imports are Norway (232), Poland (109), Iceland (90), EU (87), Bulgaria (73), Hungary (70), Colombia (67), Korea

164. On this point, the WTO Secretariat observes:

> Methods used for giving exporters access to quotas include first-come, first-served allocations, import licensing according to historical shares and other criteria, administering through [a] state trading enterprise, bilateral agreements, and auctioning. The terms can also specify time periods for using the quotas, for example, periods of time for applying for licenses, or for delivering the products to the importing countries. Exporters are sometimes concerned that their ability to take advantage of tariff quotas can be handicapped because of the way the quotas are administered. Sometimes they also complain that the licensing timetables put them at a disadvantage when production is seasonal and the products have to be transported over long distances.
>
> Each method has advantages and disadvantages, and many WTO members acknowledge that it can be difficult to say conclusively whether one method is better than another.

October 2002 *Briefing Document*, *supra* note 25, at 6-7.

165. *Id.* at 7.

(67), Venezuela (61), United States (54), and South Africa (53).[166] In contrast, Chile has one, Australia and Brazil each have two, and New Zealand has three.[167]

E. *A* – ACTION AGAINST IMPORT SURGES

The "*A*" in the six *BARBER* sins refers to action against surges of imported agricultural products. These safeguard actions are one of the most significant potential limitations on exporting agricultural products. In contrast to some features of the market access commitments, such as tariff cut targets and base dates, this potential is written into the text of the *Agreement on Agriculture*. All countries that agreed to tarrification did so knowing they could back out, at least temporarily, by imposing a "special safeguard" under Article 5 of the *Agreement*. This Article establishes a right to impose a safeguard—a duty on an importing primary or processed agricultural good—.in addition to the MFN rate. This right is another reason world agricultural trade is in Purgatory.

To be sure, invoking the special safeguard remedy is permissible only for a WTO Member that reserved the right to do so.[168] There are thirty-nine WTO Members that reserved this right, and their reservations cover a combined total of 6,156 agricultural products.[169] The Members reserving this right on the largest number of products are: Switzerland (961), Norway (581), EU (539), Iceland (462), Morocco (374), Mexico (293), Czech Republic (236), United States (189), Romania (175), Namibia (166), South Africa (166), Swaziland (166), Botswana (161), and Canada (150).[170] In contrast, Australia reserved the right with respect to ten products, New Zealand on four products, and Ecuador, Panama, and Uruguay did so on seven, six, and two products, respectively.[171]

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166. *Id.* (inset entitled "Who has tariff quotas?").

167. *Id.* (inset entitled "Who has tariff quotas?").

168. Article 5:1 of the *Agreement on Agriculture* requires a WTO Member to reserve the right in its Schedule. It states the right can be invoked only on a product "which is designated in its Schedule with the symbol 'SSG' as being the subject of a concession in respect of which the provisions of this Article may be invoked." From the text of Article 5:1, it is unclear whether a Member had to designate individual agricultural products with the "SSG" symbol by the date on which the *Agriculture Agreement* entered into force for the Member, or whether the Member retains an ongoing ability to put this designation in its Schedule. Arguably, to designate a product with "SSG" after the *Agreement* has taken effect would be to modify a Member's Schedule, and hence ought to be subject to negotiation and the possibility of compensatory adjustments.

169. October 2002 *Briefing Document*, *supra* note 25, at 1 (containing these and the other statistics mentioned, and cautioning "the definition of what is a single product varies" from Member to Member).

170. *Id.* at 1-2.

171. *Id.*

Moreover, a WTO Member can invoke the remedy only against an agricultural product subject to tariffication.[172] Thus, if the Member did not protect a particular agricultural product with a non-tariff barrier before the *Agriculture Agreement* took effect, but rather only with a tariff, then the Member cannot apply Article 5 of the *Agreement* to the product. The Member also cannot use the remedy against imports that do not exceed the Member's market access commitment.[173] That is, imports within a TRQ cannot be the target of a special safeguard action.[174] After all, the point of the Article is to serve as an "escape clause" for WTO Members, that is, as a device to assist domestic farmers and processors who had benefited from quotas, licenses, or other quantitative restrictions on an imported product but who have lost these types of protection to tarrification. To put it concisely, a special safeguard remedy can undermine only one of the three measures associated with the market access methodology, namely, the tarrification process. It can do so only with respect to an individual product. It can do so only for as long as the remedy is in place. But, the remedy cannot permanently undermine tariff reductions made in accordance with the targets nor the minimum access tariff quotas.

Aside from limiting the scope of agricultural products to which a special safeguard may be applied, Article 5 of the *Agreement on Agriculture* lays down rules for proper invocation of the remedy. The same rules apply to all WTO Members. Hence, in theory, the remedy is available to assist farmers and processors, whether they toil in a rich or poor Member. But, no special and differential treatment is afforded to developing or least developed country Members in determining whether they can deploy or be the target of an action. In practice, that means a Member with effective legal capacity will be more effective in staving off actions against it and more effective in prosecuting

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172. *See Agreement on Agriculture*, Art. 5:1 (stating that a WTO Member can impose a special safeguard, and not run afoul of the tariff binding obligation in GATT Article II:1(b), but only on an agricultural product "in respect of which measures referred to in paragraph 2 of Article 4 of this Agreement have been converted into an ordinary customs duty"); CROOME, *supra* note 10, at 54-55 (discussing the scope of application of Article 5).

173. *See Agreement on Agriculture*, Art. 5:2 (stating that "[i]mports under current and minimum access commitments established as part of a concession . . . shall not be affected by any additional duty"); *Statement of Administrative Action*, *supra* note 12, at 714 (explaining "a WTO Member may only impose the special safeguard on imports that exceed the current or minimum access commitments set forth in the WTO Member's schedule for that product," thus "if a WTO Member has replaced a quota with a tariff-rate quota, the bound, in-quota quantity would generally represent a current or minimum access commitment and the WTO member must exempt from the special safeguard any imports within the in-quota quantity"). However, a Member must count imports within the access commitment in determining whether the trigger volume threshold (explained below) has been breached. *See Agreement on Agriculture*, Art. 5:1; *Statement of Administrative Action*, *supra* note 12, at 714.

174. *See* October 2002 *Briefing Document*, *supra* note 25, at 1 (clarifying this restriction on the use of Article 5).

claims on behalf of its domestic agricultural interests than a Member with a dearth of trained trade lawyers. Where else is there a dearth of such lawyers but in least developed and some developing country Members? Interestingly, then, in the Doha Round some Third World Members propose to restrict use of Article 5 to poor countries.[175]

The fundamental rule for taking a special safeguard action is that either one of two thresholds must be breached—a "trigger volume," or a "trigger price"—by imports of an agricultural product. Only upon a breach may a Member lawfully impose the remedy. This rule is conceptually simple. Yet, the complex operational details of the rule underscore the need for effective legal capacity to bring and defend special safeguard actions. These details differ depending on whether the trigger volume or trigger price is the basis for taking action against imports. Accordingly, in studying the details it is important to keep in mind what they amount to; namely, authorization under certain circumstances to back away from a previous trade-liberalizing commitment pertaining to an agricultural product.

As for the first threshold, the volume of imports into a WTO Member seeking to invoke the remedy must exceed a "trigger level."[176] The period for measuring whether the volume threshold is breached is "any year," which presumably means any 12-month period, and is not confined to January through December. The specific characteristics of a perishable or seasonable product may be considered, thereby resulting in a shorter period than one year.[177] Might a WTO Member impose a special safeguard if the volume of imports is declining, even though the trigger level is breached? The *Agreement on Agriculture* does not forbid this use of the remedy, but it strongly discourages it.[178]

When a special safeguard is imposed on the basis of a breached trigger volume, there is a time limit on the remedy, namely, the end of the year in which it is imposed, which in effect means the remedy must be removed

175. *See id.* at 19 (mentioning this proposal).

176. *See Agreement on Agriculture*, Art. 5:1(a) (stating that "the volume of imports of that product entering the customs territory of the Member granting the concession during any year exceeds a trigger level").

177. *See id.* Art. 5:6 (stating that "[f]or 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 "shorter time periods under sub-paragraph 1(a) and 4 [the trigger volume rules] may be used in reference to the corresponding periods in the base period"). Exactly how short a period may be used is not defined, suggesting case-by-case determinations are to be made.

178. *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" (emphasis added)).

within one year.[179] There also is a limit on the size of the remedy in a trigger volume case. The additional duty cannot exceed one-third of the level of the ordinary tariff on the imported product.[180] Thus, if the MFN rate on an agricultural product is ten percent, then the WTO Member applying that rate cannot impose a special safeguard remedy in excess of an additional 3.33 percent, for a total duty of 13.33 percent.

WTO Members do not have free reign to set whatever trigger volume they like. They must follow the requirements of Article 5:4 of the *Agreement on Agriculture*. That rather complicated provision embodies the idea that the trigger level ought to depend on the individual agricultural product and Member in question. Put in general terms, the trigger level depends on the "existing market access opportunity" in a specific Member for an individual agricultural product.[181] For a particular product, that "opportunity" is based in part on that Member's market access commitments under Article 4 of the *Agreement*, as well as domestic consumption patterns in that Member. Accordingly, a synopsis of the trigger volume rule is that it permits a safeguard action against import surges depending "on the proportion of the domestic market already taken by imports: the higher the proportion, the less the surge required to trigger the safeguard action."[182]

In practice, the "opportunity" is a type of import-penetration statistic, namely, imports as a percentage of total domestic consumption. Put in arithmetic terms, the definition is:

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179. *See id.* Art. 5:4 (stating that "[a]ny additional duty imposed under sub-paragraph 1(a) [concerning the trigger volume] shall only be maintained *until the end of the year* in which it has been imposed" (emphasis added)).

180. *See id.* (stating that "[a]ny additional duty imposed under sub-paragraph 1(a) [concerning the trigger volume] . . . may only be levied at a level which *shall not exceed one third* of the level of the ordinary customs duty in effect in the year in which the action is taken" (emphasis added)).

181. *See id.* Art. 5:1(a) (identifying "existing market access opportunity as set out in paragraph 4") and 5:4 (stating that the "trigger level shall be set . . . based on market access opportunities defined as imports as a percentage of the corresponding domestic consumption during the three preceding years for which data are available" (emphasis added)). The footnote to Article 5:4 explains that if domestic consumption is not taken into account, then a base trigger level of 125 percent is used.

Article 5:1(a) prefaces the phrase "market access opportunity" with the word "existing;" whereas Article 5:4 does not use the word "existing." While the inconsistency may be sloppy drafting, it is clear the meaning is the same in both contexts—imports as a percentage of domestic consumption during the most recent three-year period for which data are available. In other words, the three-year data yields the "existing" or currently available and anticipated market access for imports.

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

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

The numerator and denominator are absolute import volumes in the most recent three-year period during which data are available. Absent a prolonged problem in the markets for the product in question or a dramatic short-term disruption, a period of this length may well be representative of import and domestic consumption patterns.[183] Thus, for example, suppose Egypt imported one million tons of lamb meat from all sources and Egyptians ate five million tons of lamb meat in that year. The "existing market access opportunity" would be twenty percent (one million tons divided by five million tons, multiplied by 100 to put the figure as a percentage). By definition, the opportunity for any product in any country cannot be less than zero (a scenario of no imports of the product in question) nor more than 100 percent (a scenario of complete dependence on imports). Also by definition, the higher the percentage figure, the greater the extent to which imports have penetrated the marketplace of the WTO Member seeking to impose a special safeguard.

Knowing the market access opportunity is a major step in determining whether a WTO Member can impose a special safeguard. But, more steps are necessary to build a successful case for the safeguard. Article 5:4 of the *Agriculture Agreement* sets up an inverse relationship between the market access opportunity for a product in a Member, on the one hand, and the trigger volume level, formally called the "base trigger level," on the other hand.

Specifically, Article 5:4 identifies three bands for determining the base trigger level applicable to a particular case. These scenarios are a "sliding scale," and the Table summarizes this scale. As the Table indicates, the greater the market access opportunity (*i.e.*, the greater the import penetration), the lower the base trigger level. That inverse relationship makes sense, at least

183. GATT Article XIII:2(d), concerning the non-discriminatory administration of quantitative restrictions, uses the language "previous representative period." There is no set length for this period in GATT or WTO jurisprudence. *See* WORLD TRADE ORGANIZATION, WTO ANALYTICAL INDEX – GUIDE TO WTO LAW AND PRACTICE, vol. 1, ¶¶ 378-381 at 290-92 (2003) (discussing the *EC – Bananas* and *EC – Poultry* cases); JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT § 13.5 at 324-27 (1969) (discussing early GATT efforts to refine the phrase). Sensibly, there are case-to-case considerations in determining whether a previous period is "representative."

from the perspective of domestic farming interests in a WTO Member seeking to impose a special safeguard. To that lobby, a higher import penetration ratio would be a greater cause for concern and potentially necessitate a special safeguard.

What the Table does not reveal and what is difficult to discern from the text of Article 5:4 of the *Agriculture Agreement*, is the importance of the word "base." The *chapeau* to Article 5:4 uses the term "trigger level," as does Article 5:1(b).[184] However, in the language of Article 5:4 describing the three bands, the prefatory word "base" is used. That contrast suggests a WTO Member is free to set a higher percentage as its base trigger level, the "base" level is just what it means, a minimum percentage not to be breached, but above which a level can be set. This interpretation is reinforced by the final clause of the last sentence of this Article, which states, "provided that the trigger level shall not be less than 105 percent of the average quantity of imports." This clause would be redundant with the language of the third band, Article 5:4(c), which states "the *base* trigger level shall equal 105 percent" if the market access opportunities are greater than thirty percent.[185]

Interpreting the text in a way that affords flexibility to WTO Members to set a trigger level above the stated bases also gives effect to the common sense behind the inverse relationship between market access opportunity and base trigger levels. If a WTO Member sets a trigger level higher than the base, then it will become more difficult to qualify for special safeguard relief, which, of course, domestic farmers seeking protection will not like. For example, with a market access opportunity of thirty-five percent, it would be easier to impose a special safeguard with a base trigger level of 105 percent than 110 percent. The actual volume of imports would have to be greater, in order to exceed the higher threshold created by a 110 percent level than the 105 percent base. Conversely, if the Member could set a trigger level below the base, then it would become too easy to impose the remedy, in the sense of undermining the very purpose of a "base" level.

184. *Agreement on Agriculture*, Art. 5:4, 5:1(b); *see also infra* note 195 (quoting Art. 5:1(b)).
185. *Agreement on Agriculture*, Art. 5:4(c) (emphasis added).

Table 3: Base Trigger Levels (Volume) in Relation to Market Access Opportunities

(as set forth in *Agreement on Agriculture*, Article 5:4)

Market Access Opportunity (imports as a percentage of total domestic consumption in the 3 preceding years for which data are available) ⇩	***Base Trigger Level*** (percentage to be applied to average volume of imports during the 3 preceding years for which data are available) ⇨		
Up to 10 Percent (imports are less than 10 percent of domestic consumption)	125 percent		
Between 10–30 percent (imports are between 10 and 30 percent of domestic consumption)		110 percent	
Over 30 Percent (imports exceed 30 percent of domestic consumption)			105 percent

Once a WTO Member determines the market access opportunity and base trigger level for a particular agricultural import, it must gather three more pieces of data. For most products and for most Members this necessity ought not to be a burden. First, the Member must have at hand the volume of the product in question it has imported during any one-year period. This statistic ought to be readily available. In calculating market access opportunity, the Member uses three-year import volume data, so it will have figures for a one-year period. Second, the Member must obtain the average volume of imports of the product during the most recent three-year period for which data are

available. This statistic will be readily available, for the Member uses it in the numerator for computing market access opportunity. Third, the Member must compute the change in the volume of domestic consumption of the product in the most recent year for which data are available. This computation demands consumption data for two years because the change is across two years—the most recent year for which data exist and the year preceding it. Nevertheless, this statistic, too, will be easy to come by because the Member will have used consumption data for three years in the denominator of the formula for market access opportunity.

All three statistics are needed to calculate whether a WTO Member has experienced a surge of imports and, therefore, whether it can impose a special safeguard. Essentially, the Member takes them and, along with the applicable base trigger level, plugs them into a formula. This formula produces a "trigger volume," which is a threshold import quantity, plus any increases (or minus any decreases) in the volume of domestic consumption. The Member compares the result from the formula with the actual volume of imports of the product and year in question. If actual import volume exceeds the trigger volume, the Member can impose a special safeguard. The excess is the import surge, hence the condition for taking action exists. Conversely, if actual volume is below the trigger volume, the Member cannot impose a special safeguard because no measurable surge exists.

This "decision rule" every WTO Member contemplating a special safeguard action must use is set forth in Article 5:4 of the *Agreement on Agriculture*.[186] The words of the rule may be translated into two formulaic

186. This provision states:

> Any additional duty imposed under sub-paragraph 1(a) [concerning the volume of imports to trigger special safeguard relief] shall only be maintained until the end of the year in which it has been imposed, and may only be levied at a level which shall not exceed one third of the level of the ordinary customs duty in effect in the year in which the action is taken. The trigger level shall be set according to the following schedule based on market access opportunities defined as imports as a percentage of the corresponding domestic consumption during the three preceding years for which data are available:
>
> (a) where such market access opportunities . . . are less than or equal to 10 per cent, the base trigger level shall equal 125 per cent;
>
> (b) where such market access opportunities for a product are greater than 10 per cent but less than or equal to 30 per cent, the base trigger level shall equal 110 per cent;
>
> (c) where such market access opportunities for a product are greater than 30 per cent, the base trigger level shall equal 105 percent.
>
> In all cases the additional duty may be imposed in any year where the absolute volume of imports of the product concerned entering the customs territory of the Member granting the concession exceeds the sum of (x) the base trigger level set out above multiplied by the average quantity of imports during the three preceding years for which data are available and (y) the absolute volume change in domestic consumption of the product concerned in the most recent year for which data are available