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**The Bumpy Ride Towards the Establishment
of “A Fair and Market-Oriented Agricultural
Trading System” At the WTO: Reflections
Following the Cancun Setback**

by

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*By Melaku Geboye Desta**

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I. INTRODUCTION

The World Trade Organization (“WTO”) Agreement on Agriculture (“AoA”) declares in its preamble that the long-term objective of WTO members is “to establish a fair and market-oriented agricultural trading system.”¹ The current agricultural negotiations at the WTO are part of the endeavor to bring this objective one step closer to reality.² According to the negotiation schedule agreed at Doha in November 2001, the fifth session of the WTO Ministerial Conference held at Cancun, Mexico, from September 10-14, 2003, was to be the occasion on which members would submit comprehensive draft schedules of concessions on agricultural trade which were to be based on modalities that should have been agreed by March 31, 2003.³ However, agricultural issues in the Doha negotiations proved so difficult that the elusive subject of a modalities agreement was not even included in the agenda for the Cancun Ministerial session.⁴ Indeed, the draft modalities text prepared by the WTO Committee on Agriculture Chairman Stuart Harbinson was not accepted as a working document for the ministerial conference.⁵ Instead, in a last minute effort to ensure agriculture would not be a stumbling block for the ministerial, the Cancun agenda on agriculture was limited to reaching agreement on a so-called “Framework for Establishing Modalities in Agriculture”—a document setting out vague and general directions without any specific figures as to the extent of liberalization commitments to be undertaken by the members.⁶ What is worse however, is that Ministers failed to reach an agreement even on such a framework document⁷—a failure which, together with the deadlock over the so-called Singapore issues, led to the collapse of the whole Cancun Ministerial session.⁸ The impact of this failure on the Doha agenda in the short term, and on the WTO itself as an institution in the long term, is not yet clear. What is fairly clear is that the already ambitious deadline to con-

1. AoA, Apr. 15, 1994, pmbll., Marrakesh Agreement Establishing the World Trade Organization, at http://www.wto.org/english/docs_e/legal_e/14-ag.pdf (the AoA was in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations).

2. See THE INT’L CTR. FOR TRADE AND SUSTAINABLE DEV. (“ICTSD”) AND THE INT’L INST. FOR SUSTAINABLE DEV. (“IISD”), DOHA ROUND BRIEFING SERIES: CUNCUN UPDATE 1 (Aug. 2003), available at http://www.ictsd.org/pubs/dohabriefings/cancun_updates/V2_02_ag.pdf.

3. *Id.* at 2.

4. *See id.*

5. *Id.*

6. *See id.* at 1.

7. *See id.*

8. *See id.* at 2.

clude the round by January 1, 2005, set by the Doha Declaration, will be missed by a wide margin largely because of agriculture.⁹

The purpose of this article is to provide an overview of the winding and often slippery path agriculture has had to follow towards liberalization and where it is stuck today, that is, right after the Fifth Ministerial Conference at Cancun. The article commences with a highlight of the agricultural negotiations on the road to Cancun. The main part of the article, which follows from here, will then be divided into three major sections—market access, export subsidies, and domestic support—a structure taken from the Uruguay Round Agreement on Agriculture as well as the agricultural section of the Doha Ministerial Declaration. The two sub issues of special and differential treatment and non-trade concerns will be discussed where they play a role in the negotiation process. Indeed, the approach usually is to give place to these two special concerns within the framework of the three pillars—such as by way of allowing better terms of access to developing countries or exempting payments for environmental purposes from domestic support reduction commitments.

Each of these three sections will in turn be structured as follows: first, the key concepts in every section will be introduced; second, the currently applicable legal regimes in these areas will be briefly described; and third, the current sticking points in each section will be identified. Finally, the prospects of settlement in each area will be assessed on the basis of the following official documents: the Harbinson modalities draft papers,¹⁰ later submissions by the major players in particular the EU-US joint proposal of August 13, 2003,¹¹ and the proposed Framework Agreement of August 20, 2003, initially submitted by sixteen leading developing countries (which later grew to about twenty-two and became known as the G22 countries),¹² the draft Ministerial Declaration issued on August 24, 2003, by General Council Chairman Carlos Perez del Castillo,¹³ and the final

9. *See id.* at 2.

10. *See generally* WTO, Negotiations on Agriculture: First Draft of Modalities for the Further Commitments (Revision), WTO doc. TN/AG/W/1/Rev. 1 (Mar. 18, 2003), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple; WTO, Negotiations on Agriculture: First Draft of Modalities for the Further Commitments, WTO doc. TN/AG/W/1 (Feb. 17, 2003), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple. Courts refer to the modalities text in general when both original and revised versions provide for the same proposed rules.

11. *EU-US Joint Text on Agriculture* (Aug. 13, 2003), available at http://www.ictsd.org/issarea/attd/Resourcs/docs/EC-US_joint_text_13_Aug_2003.pdf.

12. *Id.*

13. WTO, Preparations for the Fifth Session of the Ministerial Conference: Draft Cancun Ministerial Text (Revision), JOB(03)/150/Rev. 1 (Aug. 24, 2003), available at

draft that emerged on September 13, 2003, during the Cancun negotiations.¹⁴ A brief conclusion summarizes the issues and provides some perspectives into the future of the agriculture negotiations.

1.1 Agriculture on the Road to Cancun: Highlights

The share of agricultural exports in global trade has fallen 47 percent of total merchandise exports in 1970 to just 9.1 percent in 2001.¹⁵ However, despite this decline in its share of world trade, agriculture remains the most sensitive subject for international trade negotiators and the multilateral trading system. Just like at the Punta del Este conference in 1986, which launched the Uruguay Round, agriculture was the deal-maker or breaker during the Doha WTO Ministerial conference which launched the Doha Development Agenda.¹⁶ Likewise, in the more than seven years of Uruguay Round negotiations, agriculture is still the most contentious and also the most important issue in the ongoing Doha trade negotiations.¹⁷ Many deadlines came and went during the Uruguay Round negotiations as well as missed deadlines in the Doha process. The resultant blame fell upon agriculture, and the collapse of the Cancun Ministerial Conference was also blamed on agriculture.¹⁸

<http://www.ictsd.org/ministerial/cancun/docs/Job.03.150.Rev.1.pdf>.

14. See generally WTO, Preparations for the Fifth Session of the Ministerial Conference: Draft Cancun Ministerial Text (Second Revision), JOB(03)/150/Rev. 2 (Sept. 13, 2003), available at http://www.ictsd.org/ministerial/cancun/docs/draft_cancun_minist_text_rev2.pdf.

15. See WTO, Trade Statistics (2003), available at http://www.wto.org/english/res_e/statis_e/statis_e.htm. This is, of course, an average and masks very wide variations among countries. See *id.* Extreme examples would be Japan with agricultural exports counting for a mere 1.3% of its merchandised exports and Ethiopia with 84.2% of its merchandise exports accounted for by agricultural products. *Id.*

16. See WTO, Implementation of Paragraph 6 on the Doha Declaration of the TRIPS Agreement and Public Health, Decision of the General Counsel for Trade-Related Aspects of Intellectual Property Rights, WTO doc. WT/L/540 (Sept. 1, 2003), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple.

17. See WORLD BANK, GLOBAL ECONOMIC PROSPECTS REALIZING THE DEVELOPMENTS PROMISE OF THE DOHA AGENDA XVI (2004), available at <http://www.worldbank.org/prospects/gep2004/full.pdf>. (stating "reducing protection in agriculture alone would produce roughly two-thirds of the gains from full global liberalization of all merchandise trade.").

18. See, e.g., *Industrial Market Access Modalities Approval Awaits Agriculture*, BRIDGES WEEKLY TRADE NEWS DIGEST, May 28, 2003, at <http://www.ictsd.org/weekly/03-05-28/story1.htm>.

It is impossible to explain why this is so. Several reasons—real as well as imagined—have been propounded: food security and safety (and thus national security), foreign exchange earnings (and hence economic survival, a concern mainly of developing countries), domestic politics in the face of one of the most tightly organized and conservative political forces mustering disproportionate voting power (a concern mainly of developed countries), environmental protection, sustainable development and/or animal welfare to name a few.¹⁹

Whatever the validity or weight of these or any other explanations, agriculture has been treated as an exception to important rules and principles of international trade from the establishment of the multilateral trading system over five decades ago.²⁰ The Uruguay Round is credited with taking the most important step forward in the process of integrating agriculture into the mainstream rules of the trading system.²¹ To that end, an AoA has been concluded for the first time in the history of the multilateral trading system.²² This Agreement has had very modest ambitions. As reiterated in its preamble, it was intended merely to initiate a reform process in agricultural trade, that is the establishment of a "fair and market-oriented agricultural trading system" is its only long-term objective.²³ But, with its entry into force, the foundation for that reform process has been put firmly into place. A system of rules governing agricultural trade, backed by detailed Schedules of Concessions and Commitments, has now been introduced, and with it the enduring defiance of agriculture to multilateral regulation has been tempered.²⁴

The developments thus far have, however, been largely limited to a reshaping of the rules of agricultural trade in the direction of the overall discipline applying to the trade of non-agricultural products. The treatment of agricultural products as a distinct category continues to play an important role in the WTO architecture.²⁵ The Agriculture Agreement provides for a system of rules significantly different from mainstream General Agreement on Tariffs and Trade ("GATT") provisions for most other products, and its provisions have been made

19. See generally Fabian Delcros, *The Legal Status of Agriculture in the World Trade Organization: State of Play at the Start of Negotiations*, 36 J. OF WORLD TRADE 219 (2002).

20. See JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS* 397-98 (4th ed. 2002).

21. *Id.* at 397.

22. AoA, *supra* note 1, at art. 2.

23. *Id.* pmb1.

24. See *id.* art. 15 ¶ 1.

25. *Id.* pmb1.

to prevail over inconsistent GATT/WTO rules.²⁶ Moreover, the conclusion of this Agreement has not been accompanied by immediate, meaningful, actual liberalization in agricultural trade. As such, agriculture is still a class in itself. Agriculture still stands alone as the sector where export subsidies are expressly and generously—albeit selectively—permitted under WTO law. Three-digit tariffs are rather common; significant additional duties can be introduced in the name of “safeguard measures” regardless of injury considerations and in the most unpredictable of ways; or a proven trade-distortive and injurious domestic support program may escape any challenge.²⁷ In short, agricultural trade still has a long way to go on the road to liberalization. Seen from this perspective, although the Agreement certainly represents a significant breakthrough in the history of international trade regulation, it is also possible to say that the same Agreement is a standing symbol of continued failure to integrate agricultural trade into the mainstream system. To this extent, it represents as much of the moves in the right direction as the perpetuation of the artificial distinction between agricultural and non-agricultural products. Therefore, although it may seem paradoxical, the Agreement could also be seen as an embodiment of both success and failure in agricultural trade negotiations at the same time.

One virtue of the Agriculture Agreement has been that it had a built-in agenda for a continuation of the liberalization process, so as to more readily ensure its long-term objective of bringing fundamental change in the level of protective and distortive devices at work in many countries.²⁸ At the same time, many members had long argued that agriculture should be brought within the fold of a broader round so as to allow trade-offs to take place—a strategy successfully applied more than a decade ago by developed countries to bring in in-

26. *See id.* art. 21.1.

27. *See generally id.*

28. *Id.* art. 20. Article 20 provides:

Continuation of the Reform Process: Recognizing that the long-term objective of substantial progressive reductions in support and protection resulting in fundamental reform is an ongoing process, Members agree that negotiations for continuing the process will be initiated one year before the end of the implementation period, taking into account: (a) the experience to that date from implementing the reduction commitments; (b) the effects of the reduction commitments on world trade in agriculture; (c) non-trade concerns, special and differential treatment to developing country Members, and the objective to establish a fair and market-oriented agricultural trading system, and the other objectives and concerns mentioned in the preamble to this Agreement; and (d) what further commitments are necessary to achieve the above mentioned long-term objectives.

Id.

tellectual property and services in exchange for a promise to re-integrate agriculture and textiles into the system.²⁹ Putting agriculture as part of a broader negotiation round was also one of the primary objectives of the third WTO Ministerial Conference at Seattle.³⁰

Seattle proved to be a disappointing failure, and the widely-expected Millennium Round of trade negotiations was not launched. However, because agriculture was one of a few areas on which a negotiation had already been mandated by the results of the Uruguay Round, the WTO General Council was able to announce a sector-specific negotiation process on February 7, 2000.³¹ In accordance with a program agreed upon during that occasion, the WTO agriculture negotiators held their first meeting on March 23, 2000.³² In the first phase of the process (which covered the period between March 2000 and March 2001), several meetings were held and dozens of proposals submitted by about eighty-nine percent of the WTO's members.³³ These submissions were further developed with more technical details during the largely informal meetings of the second phase of the negotiations (from March 2001 to March 2002).³⁴ An important development during this second phase of the sectoral negotiations in agriculture came from the Doha ministerial conference (November 2001), which launched a comprehensive trade negotiation round and brought the already proceeding agricultural negotiations within its fold.³⁵ Indeed, the pre-Doha phase of the agriculture negotiations was sending the clear message that progress in agriculture would be possible only if a broader round was launched at Doha.

On agriculture, the Doha Declaration provided as follows:

We recall the long-term objective referred to in the Agreement 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 car-

29. WTO, The Third WTO Ministerial Conference (Nov. 30, 1999), *available at* http://www.wto.org/english/thewto_e/minist_e/min99_e/min99_e.htm.

30. *Id.*

31. Press Release, WTO, WTO Services and Agriculture Negotiations: Meetings Set for February and March (Feb. 7, 2000), *available at* http://www.wto.org/english/news_e/pres00_e/pr167_e.htm.

32. *See id.*

33. *See* WTO, Agriculture Negotiations: Backgrounder: In a Nutshell (Mar. 1, 2004), *available at* http://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd01_nutshell_e.htm.

34. *See id.*

35. *See id.*

ried 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 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.³⁶

Five broad negotiation issues have been identified in this paragraph: (1) market access, (2) export subsidies, (3) domestic support, (4) special and differential treatment, and (5) non-trade concerns.³⁷ While this is clear from the text, countries have subsequently argued over the degree of importance that should be attached to each of these issues—some want to give equal weight to all five of them while others contend that there is a hierarchy built into the order.³⁸ Clearly, the order and tone of presentation of these five items shows a hierarchy which puts the three pillars of the AoA (market access, export subsidies, and domestic support) on top, followed in second place by special and differential treatment (note the use of such strong terms as “shall be an integral part of all elements of the negotiations”), and lastly, the so-called non-trade concerns (indicated by the weaker wording of the commitment to “take note of the non-trade concerns”).³⁹ Among the three pillars, too, there is a difference in the immediate negotiation

36. WTO, Ministerial Declaration, WTO doc. WT/MIN(01)/DEC/1, at ¶ 13 (Nov. 20, 2001), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple.

37. *See id.*

38. WTO, Agriculture Negotiations: Background: Introduction, (Mar. 1, 2004), available at http://www.wto.org/english/tratop_e/agric_e/negs_bkgnd05_intro_e.htm (A useful summary of the negotiation process prepared by the *Information and Media Relations Division* of the WTO noted the following on 21 October 2002:

Some countries have described the mandate given by Article 20 as a ‘tripod’ whose three legs are export subsidies, domestic support, and market access. Non-trade concerns and special and differential treatment for developing countries would be taken into account as appropriate. Others say it is a ‘pentangle’ whose five sides also include non-trade concerns and special and differential treatment for developing countries as separate issues in their own right.).

39. WTO, Agriculture Negotiations: Background: The ‘Modalities’ Phase: March 2002 – The Mandate, at n. 13 (Aug. 15, 2003), available at http://www.wto.org/english/tratop_e/agric_e/negs_bkgnd07_modalities_e.htm.

objectives.⁴⁰ The commitments in the areas of market access and domestic support are similar in that they discuss introducing “substantial improvements in market access,” and “substantial reductions in trade-distorting domestic support.”⁴¹ On the other hand, the commitments on export subsidies calling for “reductions of, with a view to phasing out, all forms of export subsidies” sound stronger.⁴² This was one of the most contentious subjects during the Doha ministerial talks; indeed, success and failure in the talks were hanging on the wording of the clause “with a view to phasing out” export subsidies in this paragraph.⁴³

The third phase in the agriculture negotiations, known as the modalities phase, began in March 2002.⁴⁴ This phase was supposed to be concluded on March 31, 2003, with the adoption of a modalities agreement.⁴⁵ Despite the lack of progress in many areas, Agriculture Committee Chairman Stuart Harbinson managed to put together a first modalities draft paper which he circulated on February 17, 2003.⁴⁶ The reaction was typical of agriculture negotiations—some condemning it for going too far, others for not going far enough.⁴⁷ A month later, on March 18, 2003, Harbinson circulated a revised version of his draft, but only to elicit the same reactions.⁴⁸ Indeed, as Harbinson himself noted, several participants did not even “accept the revised First Draft as a basis for the negotiations.”⁴⁹ Over time, a tacit agreement appears to have been reached to pursue the goal in two stages: first agree on some kind of a “framework modalities agreement” and then proceed to the full modalities.⁵⁰ On that basis, and in an effort to break the deadlock, the United States and the European Union got together and

40. *See id.*

41. *Id.*

42. *Id.*

43. Guy De Jonquieres & Francis Williams, *Trade Talks Falter Over Farm Subsidy Deal*, FINANCIAL TIMES, Nov. 13, 2001, at 2 (noting France objected to “wording in the draft WTO agenda that calls for negotiations with a ‘view to phasing out’ all farm export subsidies”).

44. Stuart Harbinson, *Negotiations on Agriculture*, WTO doc. TN/AG/10, available at http://docsonline.wto.org/gen_search.asp?searchmode=simple.

45. *See id.*

46. *See* WTO, *Negotiations on Agriculture, First Draft of Modalities for the Further Commitments*, *supra* note 10, at 1.

47. *See generally* WTO, *Summary Report on the Seventeenth Meeting of the Committee on Agriculture Special Session*, WTO doc. TN/AG/R/7 (Mar. 24, 2003), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple.

48. WTO, *Negotiations on Agriculture, First Draft of Modalities for the Further Commitments (Revision)*, *supra* note 10, at 1.

49. Harbinson, *supra* note 44.

50. *See* WTO, *Agriculture Negotiations: Background: The ‘Modalities’ Phase: March 2002 – The Mandate*, *supra* note 39.

came up with what was called the “EU-US joint proposal.”⁵¹ The immediate impact of this bilateral submission on the negotiations was such that, in the words of WTO spokesperson Keith Rockwell, it “galvanized the process in a way that we have not seen in three-and-a-half years of agriculture negotiations.”⁵² However, later developments suggest that the joint proposal could probably have backfired in the sense that “[i]nstead of encouraging consensus, the proposals prompted Brazil, India, China and about [twenty] other developing countries to group together to demand radical cuts in wealthy nations’ farm subsidies and trade barriers.”⁵³ This demand from the so-called G22 countries came in the form of an “agriculture framework proposal.”⁵⁴ The effect of these and other developments was that the Cancun ministerial could only talk about a framework for modalities, further delaying the already overdue agreement on modalities.⁵⁵ In preparation for Cancun, WTO General Council Chairman Carlos Pérez del Castillo prepared a framework proposal for agricultural modalities, hoping to translate the resulting document into detailed and full modalities in the post-Cancun phase.⁵⁶ Cancun’s failure to agree on this framework agreement effectively means that the negotiations currently stand at a pre-modalities phase.

II. AGRICULTURAL MARKET ACCESS

Agricultural market access refers to the terms and conditions under which agricultural products could be imported into WTO member countries. Countries often set up different forms of barriers against the importation of goods and services for any of numerous reasons. These barriers are generally of two

51. See *EU-US Joint Text on Agriculture*, *supra* note 11.

52. *Agriculture: Real Negotiations Start as EC, US Table Joint Modalities Text*, BRIDGES WEEKLY TRADE NEWS DIGEST, Aug. 21, 2003, available at <http://www.ictsd.org/weekly/03-08-21/story2.htm>.

53. Guy de Jonquieres, *Crushed at Cancun*, FINANCIAL TIMES, Sept. 15, 2003, available at <http://www.investmentwatch.org/articles/ft16sep.html>.

54. WTO, *Agriculture-Framework Proposal: Joint Proposal by Bolivia, Brazil, Chile, China, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, India, Mexico, Pakistan, Paraguay, Peru, Philippines, Thailand, South Africa, Thailand, and Venezuela*, WTO doc. WT/MIN(03)/W/6 (Sept. 4, 2003), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple [hereinafter WTO, *Agriculture-Framework Proposal*].

55. See EUROPEAN PUBLIC HEALTH ALLIANCE, *THE CANCUN MINISTERIAL CONFERENCE OF THE WTO: WHAT WENT WRONG?*, Sept. 23, 2003, at <http://www.epha.org/a/747>.

56. WTO, *Preparations for the Fifth Session of the Ministerial Conference: Draft Cancun Ministerial Text (Second Revision)*, *supra* note 14, at A-1.

types: tariffs and non-tariff barriers ("NTBs").⁵⁷ From its very beginning, GATT has had a preference for tariffs over NTBs,⁵⁸ and Article XI prohibits NTBs with only a few general⁵⁹ and one agriculture-specific exception.⁶⁰ The agriculture-specific exception contained in Article XI:2(c) is a tightly-defined exception with a history of narrow interpretations by GATT panels.⁶¹ Although the exception

57. See WTO, Agriculture Negotiations: Background: Market Access: Tariffs and Tariff Quotas (Mar. 1, 2004), available at http://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd10_access_e.htm (reasoning that barriers are used for protection of competing domestic producers, enforcement of health and safety standards, and various other regulations).

58. See generally GATT, Oct. 30, 1947, available at <http://www.sunsonline.org/trade/docof/01gatt47.htm>.

59. *Id.* art. XI (the general exceptions include the balance-of-payments restrictions allowed under Article XII, the development provisions of Article XVIII, and those covered under Article XX.).

60. *Id.* art. XI ¶ 2(c). Article XI provides the only agriculture-specific exception in the GATT as follows: the prohibition of quantitative restrictions under paragraph 1 does not extend to: import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate: (i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or (ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or (iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible. Any contracting party applying restrictions on the importation of any product pursuant to subparagraph (c) of this paragraph shall give public notice of the total quantity or value of the product permitted to be imported during a specified future period and of any change in such quantity or value. Moreover, any restrictions applied under (i) above shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In determining this proportion, the contracting party shall pay due regard to the proportion prevailing during a previous representative period and to any special factors which may have affected or may be affecting the trade in the product concerned.

Id.

61. *Id.*; see generally, MELAKU GEBOYE DESTA, THE LAW OF INTERNATIONAL TRADE IN AGRICULTURAL PRODUCTS: FROM GATT 1947 TO THE WTO AGREEMENT ON AGRICULTURE Part I (Kluwer 2002).

has been invoked by defendants in several GATT cases to justify their agricultural import restrictions, not a single country has been successful throughout the history of GATT.⁶²

However, the tight conditions attached to this exception, as well as the strict construction it enjoyed in the hands of GATT panels, has not deterred countries from resorting to quantitative restrictions.⁶³ Indeed, the major obstacles to international agricultural trade were non-tariff barriers of the sort prohibited under Article XI and not justified by either the agriculture-specific or general exceptions of GATT.⁶⁴ An important challenge in the area of agricultural trade was to bring some discipline into this widespread use of non-tariff barriers, often in violation of the rules.⁶⁵ Given that they were often maintained in violation of GATT rules, the logical outcome should be their elimination. This was, however, impossible. The most that the Uruguay Round could do was to convert all pre-existing NTBs into their tariff equivalents via the innovative approach of tariffication, regardless of whether such measures were maintained consistently with GATT rules.⁶⁶ This tariffication exercise applied to a range of measures including not only the traditional NTBs, such as quotas and quantitative restrictions, but also such other measures as “variable import levies [often associated with EC agricultural protectionism], 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.”⁶⁷ According to the Appellate Body, these different forms of border measures have one thing in common, “they restrict the volume or distort the price of imports of agricultural products.”⁶⁸ The resulting tariffs were also bound against any future increase and then subjected to a thirty-six percent minimum reduction

62. *See generally id.*

63. *See generally id.*

64. *See* Bernard O'Connor, Book Review, 6 J. INT'L ECON. L. 535, 537-38 (2003) (reviewing DESTA, *supra* note 61) (discussing the important question as to why GATT contracting parties allowed this to happen and did not challenge more of these measures under Article XI and providing explanations as to why).

65. *See generally* GATT, *supra* note 58.

66. DESTA, *supra* note 61.

67. AoA, *supra* note 1, at art. 4 ¶ 2 n.1.

68. *See* WTO, Chile-Price Band System and Safeguard Measures Relating to Certain Agricultural Products, WTO doc. WT/DS207/AB/R, at 63 (Sept. 23, 2002), *available at* http://docsonline.wto.org/gen_search.asp?searchmode=simple. One may of course question whether ordinary customs duties as well are not doing exactly that: restricting the volume or distorting the price of imports of agricultural products. But, as the Appellate Body itself emphasized throughout the report, transparency and predictability are the reasons behind the preference for ordinary customs duties.

commitment on the average tariff levels (and a fifteen percent minimum per tariff line) over a six year implementation period (for developing countries, the reduction rate is two-thirds of the above percentages over a ten-year implementation period).⁶⁹ At the same time, because the actual conversion of non-tariff barriers into their tariff equivalents was left to the member countries themselves, the resulting tariffs were often much higher than their genuine equivalents (due to what has been coined the problem of "dirty tariffication").⁷⁰

This whole process gave rise to two contradictory, but more or less well-founded concerns: some feared that the final outcome of the tariffication exercise could be more restrictive—or at least no less restrictive—than the pre-tariffication period; some others feared that tariffication would lead to excessive and/or low-priced imports thereby injuring their domestic producers.⁷¹ Several supplementary arrangements were made to accommodate these concerns.⁷²

To protect against the unintended but likely result of a more restrictive regime after tariffication, countries undertook what are called "current access commitments" that attempted to guarantee that historic levels of imports would remain not adversely affected by the tariffication process.⁷³ This commitment applied in situations where imports of a product during the base period (1986-88) already represented at least five percent of corresponding domestic consumption, which was far from common in agriculture.⁷⁴ In cases where imports during the base period were less than five percent, members undertook a commitment to create what are called "minimum access opportunities" representing three percent of domestic consumption of the product for the base period for the first year of the implementation period, 1995, reaching five percent by the end of the implementation period, 2000.⁷⁵ In theory, therefore, a minimum of five percent of the domestic consumption of every product in every member country today must be

69. See ERS, USDA, EUROPEAN UNION: ISSUES AND ANALYSIS: MARKET ACCESS COMMITMENTS (Nov. 28, 2001), available at <http://www.ers.usda.gov/briefing/EuropeanUnion/IssuesMarketaccess.htm>.

70. See Carmen G. Gonzales, *Institutionalizing Inequality: the WTO Agreement on Agriculture, Food Security and Developing Countries*, 27 COLUM. J. ENVTL. L. 433, 460-461 (2002).

71. See Dale E. McNeil, *The NAFTA Panel Decision on Canadian Tariff-Rate Quotas; Imagining a Tarrifying Bargain*, 22 YALE J. INT'L L. 345, 354-360 (1997); Lyn MacNabb & Robert Weaver, Comment, *The General Agreement on Tariffs and Trade (GATT): Has Agriculture Doomed the Uruguay Round?*, 26 LAND & WATER L. REV. 761, 773 (1991).

72. See, ERS, USDA, EUROPEAN UNION: ISSUES AND ANALYSIS, *supra* note 69.

73. See *id.*

74. See *id.*

75. *Id.*

accounted for by imports, or at least the business opportunities to do so must be in place.⁷⁶ To give effect to the minimum/current access commitments, countries were obliged to establish tariff quotas at “low or minimal” duty rates; however, administering these tariff quotas has proved to be much more difficult than anticipated during the Uruguay Round negotiations.⁷⁷

On the other hand, to accommodate fears of excessive or low-priced imports into the newly-opened markets, a special arrangement was made to allow the introduction of special safeguard (“SSG”) measures on tariffed products under less stringent conditions than those set by GATT Article XIX and the Safeguards Agreement, the most important being the absence of an injury requirement under Article 5 of the AoA.⁷⁸ The fate of these arrangements and their practical administration, together with the traditional question of how to further reduce the existing agricultural tariffs, constitute the core of the market access aspect of the ongoing negotiations.⁷⁹ These will be discussed in turn.

2.1 Tariff Reductions in the Current Negotiations

Now that tariffs are the only means of protection at the border,⁸⁰ the most important market access issue in the current negotiations relates to the depth of tariff reductions and the method by which to achieve desired reduction targets. While several options have been proposed so far, those from the United States and the Cairns Group on the one hand and from the European Union on the other, appear to represent the two extreme positions and most others fall somewhere in between. At the most conservative end, the European Communities proposed to stick to the Uruguay Round tradition both in terms of style as well as numerical targets, and suggested a formula for “an overall average tariff reduction of 36% and a minimum reduction per tariff line of 15% as was the case in the Uruguay Round.”⁸¹ At the most liberal end stood the United States proposal—also sup-

76. *See id.*

77. *Id.*

78. AoA, *supra* note 1, at art. 5 ¶ 1(a)-(b).

79. *See generally* ERS, USDA, EUROPEAN UNION: ISSUES AND ANALYSIS, *supra* note 69.

80. *See* OECD, THE URUGUAY ROUND AGREEMENT ON AGRICULTURE: AN EVALUATION OF IT'S IMPLEMENTATION IN OECD COUNTRIES 23 (2001); *see also* WTO, Agriculture Negotiations: Backgrounder: Market Access: Tariffs & Tariff Quotas, *supra* note 57 (nothing that there are a few temporary exceptions, maintained under special treatment provisions, currently in use by China, Taipei, Korea, and the Phillippines on rice).

81. EUROPA, WTO AND AGRICULTURE: THE EUROPEAN UNION TAKES STEPS TO MOVE THE NEGOTIATIONS forward (Jan. 27, 2003), at http://europa.eu.int/comm/trade/goods/agri/pr270103_en.htm.

ported by the Cairns Group—which ambitiously called for the adoption of what it called the “Swiss 25” formula⁸² of tariff harmonization, higher cuts on higher tariffs, so as to reduce all higher tariffs to a maximum of twenty-five percent (keeping in-quota tariffs still lower) to be implemented in equal annual installments over a five-year period.⁸³ Curiously, the United States went further and asked members to set a date for the eventual elimination of agricultural tariffs⁸⁴—a move that, if successful, could have given agriculture a further lead over manufactures.⁸⁵ Knowing the sensitivity of agricultural issues in many WTO members, it was not difficult to dismiss this latter point as too ambitious for the Doha negotiations.⁸⁶ Indeed, given that several agricultural tariffs in several member countries are bound at three digit levels,⁸⁷ even the tariff harmonization formula that would set twenty-five percent as the maximum for any tariff line⁸⁸ was already an ambitious one. It is notable, however, that from quite early on there was a growing consensus to use some tariff harmonization mechanism – such as the

82. The Swiss formula is a term used to describe a tariff harmonization formula originally suggested by Switzerland during the Tokyo round of negotiations for tariff reductions in manufactured products; it is not supported by the Swiss in the current agricultural negotiations. See *Statement of Robert B. Zoellick: U.S. Trade Representative Before the House Comm. on Agric., 108th Cong. 5-6 (2003)*, available at <http://www.ustr.gov/speech-test/zoellick/2003-05-21-agriculture.pdf> (stating that, because the U.S. proposed to reduce all higher tariffs to a maximum 25%, Robert Zoellick called it the “Swiss 25” formula).

83. FOREIGN AGRICULTURAL SERVICE (“FAS”), USDA, U.S. PROPOSAL FOR GLOBAL AGRICULTURAL TRADE REFORM: THE U.S. WTO AGRICULTURAL TRADE REFORM (Nov. 7, 2003), available at <http://www.fas.usda.gov/itp/wto/proposal.htm>; see also *Statement of Robert B. Zoellick: U.S. Trade Representative Before the House Comm. On Agric., supra* note 82, at 4.

84. See Debra Henke, *WTO Negotiations Offer the Best Chance for Agricultural Trade Reform*, AG EXPORTER, at 12 (Nov. 2001), available at <http://www.fas.usda.gov/info/agexporter/2001/nov/page12-15.pdf> (stating that US agriculture is “more than twice as dependent on exports as the U.S. general economy [and] . . . [a]bout 25 percent of gross cash receipts from agricultural sales are for export, compared with 10 percent on average for manufactured goods”); see also FAS, USDA, U.S. PROPOSAL FOR GLOBAL AGRICULTURAL TRADE REFORM, *supra* note 83 (outlining the latest United States agricultural trade positions).

85. See ICTSD AND IISD, DOHA ROUND BRIEFING SERIES: MARKET ACCESS FOR NON-AGRICULTURAL PRODUCTS 2 (Feb. 2003), available at <http://www.ictsd.org/pubs/dohabriefings/doha4-marketaccess.pdf> (noting that the United States has made a similarly ambitious proposal to eliminate all tariffs on all non-agricultural products by 2015 and further that agriculture is already ahead of manufacturers in terms of the proportion of tariff lines with bound rates).

86. See *id.*

87. *Statement of Robert B. Zoellick: U.S. Trade Representative Before the House Comm. On Agric., supra* note 82, at 10.

88. See *id.*

Swiss formula—that would help to overcome the extreme tariff dispersion between different agricultural tariff lines.

Agriculture committee chairman Stuart Harbinson's first draft of the modalities proposed a three-tier distinction among agricultural products on the basis of their bound tariff levels, thus suggesting higher reduction rates for higher tariffs and lower reduction rates for lower tariffs.⁸⁹ The draft (both original and revised versions) suggested that agricultural tariffs in excess of 90% *ad valorem* be reduced by an average of 60% and a per-tariff-line minimum of 45%; for those products with tariffs between 15-90% *ad valorem*, the average would be 50% and the per-tariff-line minimum 35%; and for those products with tariffs of 15% *ad valorem* or lower, the average reduction requirement would be 40% and the per-tariff-line minimum 25%.⁹⁰ The modalities draft also proposed methods by which this tariff reduction formula would be applied in cases where members are applying non-*ad valorem* tariffs.⁹¹ If successful, this approach would have significantly reduced the current high level of tariff dispersion; it would not, however, have created anything like a maximum permissible tariff level.⁹²

The Harbinson draft also contained provisions intended to address the problem of tariff escalation—a situation where tariff rates rise with the degree of processing (i.e. higher tariff rates on more processed products than on primary or less processed forms of the same product).⁹³ The original version of the modalities draft simply stated “where the tariff on a processed product is higher than the tariff for the product in its primary form, the tariff reduction for the processed product shall be higher than that for the product in its primary form.”⁹⁴ The re-

89. See generally WTO, Negotiations on Agriculture: First Draft of Modalities for the Further Commitments, *supra* note 10.

90. WTO, Negotiations on Agriculture: First Draft of Modalities for the Further Commitments (Revision), *supra* note 10, at 3-4; WTO, Negotiations on Agriculture: First Draft of Modalities for the Further Commitments, *supra* note 10, at 3.

91. See WTO, Negotiations on Agriculture: First Draft of Modalities for the Further Commitments, *supra* note 10, at 4 (stating that

[w]here participants apply non-*ad valorem* tariffs, the allocation of any tariff item in categories (ii) and (iii) above shall be based on tariff equivalents to be calculated by the participant concerned in a transparent manner, using representative average [1999-2000] external reference prices or data [and] . . . [f]ull details of the method and data used for these calculations shall be included in the tables of supporting material for the draft schedules and shall be subject to multilateral review).

92. See Statement of Robert B. Zoellick: U.S. Trade Representative Before the House Comm. On Agric., *supra* note 82, at 10.

93. See *id.*

94. WTO, Negotiations on Agriculture: First Draft of Modalities for the Further Com-

vised version further refined this higher-tariff-reduction requirement for the processed product to mean that "the rate of tariff reduction for the processed product shall be equivalent to that for the product in its primary form multiplied, at a minimum, by a factor of [1.3]."⁹⁵

The structure proposed for reductions by developing countries was even more complicated. First, in recognition of the food security and rural development concerns of these countries, the proposal allowed them the right to declare an unspecified number of products, presumably those that might be called food staples and/or export products, as "special products and designate them with the symbol 'SP' in their schedules."⁹⁶ These products would then be subject to a uniform requirement of ten percent average and five percent per-tariff-line minimum reduction regardless of existing tariff levels.⁹⁷ For all other non-SP products, the approach would be generally similar to that proposed for developed countries.⁹⁸ But in this case, the thresholds were higher, the rates of reduction lower, the number of categories larger, and the implementation period longer.⁹⁹

Accordingly, there are four categories of products:¹⁰⁰ those with *ad valorem* tariffs higher than 120% would be reduced by 40% average and 30% per-tariff-line minimum; those with tariffs between 60-120% by an average of 35% and a per-tariff-line minimum of 25%; those with tariffs between 20-60% by an average of 30% and a per-tariff-line minimum of 20%; and those with tariffs 20% or lower *ad valorem* to be reduced by a 25% average and a 15% per-tariff-line minimum.¹⁰¹ These reduction commitments would also benefit from a longer implementation period, ten years as opposed to five years.¹⁰²

While tariff reductions would naturally be a welcome development to international agricultural trade, many developing countries—and particularly LDCs—have been worried about the potential loss of competitive advantage due

mitments, *supra* note 10, at 4.

95. WTO, Negotiations on Agriculture: First Draft of Modalities for the Further Commitments (Revision), *supra* note 10, at 3.

96. *Id.* at 4.

97. *See id.*

98. *See id.*

99. *See id.*

100. *See id.*; *see also* WTO, Negotiations on Agriculture: First Draft of Modalities for the Further Commitments, *supra* note 10, at 3-4 (noting that the original first draft modalities had three categories just like that for developed countries; a fourth category was introduced by the revised first draft modalities).

101. WTO, Negotiations on Agriculture: First Draft of Modalities for the Further Commitments (Revision), *supra* note 10, at 4.

102. *See id.*

to erosion of the preferential margin that would necessarily result from reduction of MFN tariffs.¹⁰³ In recognition of this, the modalities draft proposed to impose a soft-law, best-efforts, obligation on developed countries “to maintain, to the maximum extent technically feasible, the nominal margins of tariff preferences and other terms and conditions of preferential arrangements they accord to their developing trading partners.”¹⁰⁴ The modalities draft further proposed to allow developed countries to delay their tariff reductions on products of vital export interest to preference beneficiaries (defined to mean a product constituting at least twenty percent of their total merchandise exports) by two years and then to implement the reductions over another six year period.¹⁰⁵ In-quota duties for such products would be eliminated.¹⁰⁶ Finally, the modalities draft also contained the usual loose undertaking by developed countries to provide “targeted technical assistance programmes and other measures, as appropriate, to support preference-receiving countries in efforts to diversify their economies and exports.”¹⁰⁷ But, this one is a hollow promise with little, if any, practical significance.

Annex A to the pre-Cancun draft contained a proposed “Framework for Establishing Modalities in Agriculture,”¹⁰⁸ which was based largely on the EU-US joint proposal¹⁰⁹ and the G22 proposal.¹¹⁰ All three documents are unanimous in their approach to tariff reductions—they all advocate what is called a “blended formula,” first suggested by the EU-US joint text proposing to divide all agricul-

103. See Franz Fischler & Pascal Lamy, *Free Farm Trade Means an Unfair Advantage*, FIN. TIMES, Apr. 1, 2003, available at 2003 WL 16398285 (stating that the European Commission Commissioners of Agriculture and Trade indicate their concern for developing countries:

There cannot be a Doha deal unless developing countries are able to conclude that they have been treated fairly. But on market access, most of the proposals put by others in Geneva risked undermining developing countries that rely on preferential market access to European Markets. Further market access must not become a blunt instrument for already powerful agricultural exporters to use against the developing world.);

see also Stefan Tangermann, *The Future of Preferential Trade Arrangements for Developing Countries and the Current Round of WTO Negotiations on Agriculture*, FAO/ESCP (Apr. 2001), available at http://www.fao.org/trade/docs/TradePref_en.htm.

104. WTO, Negotiations on Agriculture: First Draft of Modalities for the Further Commitments (Revision), *supra* note 10, at 4.

105. See *id.* at 4-5.

106. See *id.* at 5.

107. *Id.*

108. See WTO, Preparations for the Fifth Session of the Ministerial Conference: Draft Cancun Ministerial Text (Revision), *supra* note 13, at A-1.

109. ICTSD & IISD, DOHA ROUND BRIEFING SERIES: CUNCUN UPDATE, *supra* note 2, at 1.

110. WTO, Agriculture-Framework Proposal, *supra* note 54.

tural tariff lines into three groups.¹¹¹ The first group would be subject to a Uruguay Round-style average tariff cut with a mandatory per-tariff-line minimum; the second category would be subject to a "Swiss formula" with a coefficient; and a third one would be subject to the famous zero-for-zero approach on which all tariffs would be eliminated.¹¹² The specific percentage of tariff lines that would be subject to each category, the average and per-tariff-line minimum reductions in the first category, as well as the coefficient in the second category were all to be left for the post-Cancun phase.¹¹³

However, the similarities between the three documents on market access do not extend much beyond this point. The G22 proposal to put a cap on the maximum permissible tariff level was replaced in the Cancun draft by an alternative between tariff capping and the introduction of an effective additional market access in those or other areas through a request-offer process, a position taken from the EU-US joint proposal.¹¹⁴ At Cancun, ministers spent most of their time on agriculture and the revised draft ministerial declaration (the Cancun draft) circulated on September 13, 2003, (one day before the conclusion of the session) closely followed the pre-Cancun draft in most cases.¹¹⁵ On the issue of tariff reductions, the Cancun draft reaffirmed the blended formula of the pre-Cancun draft without much change.¹¹⁶ The only important modifications to this part of

111. WTO, Preparations for the Fifth Session of the Ministerial Conference: Draft Cancun Ministerial Text (Revision), *supra* note 13; WTO, Agriculture-Framework Proposal, *supra* note 54; ICTSD & IISD, DOHA ROUND BRIEFING SERIES: CUNCUN UPDATE, *supra* note 2, at 1, 3.

112. WTO, Preparations for the Fifth Session of the Ministerial Conference: Draft Cancun Ministerial Text (Revision), *supra* note 13, at B-2; WTO, Agricultural-Framework Proposal, *supra* note 54; ICTSD & IISD, DOHA ROUND BRIEFING SERIES: CUNCUN UPDATE, *supra* note 2, at 1, 3.

113. *See* WTO, Preparations for the Fifth Session of the Ministerial Conference: Draft Cancun Ministerial Text (Revision), *supra* note 13, at 4; WTO, Agriculture-Framework Proposal, *supra* note 54; ICTSD & IISD, DOHA ROUND BRIEFING SERIES: CUNCUN UPDATE, *supra* note 2, at 1, 3.

114. *See* WTO, Preparations for the Fifth Session of the Ministerial Conference: Draft Cancun Ministerial Text (Revision), *supra* note 13, at A-2; WTO, Agriculture-Framework Proposal, *supra* note 54; ICTSD & IISD, DOHA ROUND BRIEFING SERIES: CUNCUN UPDATE, *supra* note 2, at 1, 3.

115. *See generally* WTO, Preparations for the Fifth Session of the Ministerial Conference: Draft Cancun Ministerial Text (Second Revision), *supra* note 14; WTO, Preparations for the Fifth Session of the Ministerial Conference: Draft Cancun Ministerial Text (Revision), *supra* note 13.

116. *See generally* WTO, Preparations for the Fifth Session of the Ministerial Conference: Draft Cancun Ministerial Text (Second Revision), *supra* note 14; WTO, Preparations for the Fifth Session of the Ministerial Conference: Draft Cancun Ministerial Text (Revision), *supra* note 13.

the pre-Cancun draft relate to non-trade concerns and tariff escalation on which the Cancun draft echoed the Harbinson revised first modalities draft.¹¹⁷

2.2 Tariff Rate Quotas ("TRQ") and Their Administration

TRQs were introduced mainly to implement the minimum and/or current access commitments of the Agreement on Agriculture.¹¹⁸ In order to satisfy these requirements, countries had to introduce a two-tier tariff structure made up of the normal bound rate resulting from the tariffication process (the out-of-quota rate) and a lower rate (the in-quota rate) designed to enable the importation of an amount equal to the minimum/current access commitment levels for a particular product in a particular country.¹¹⁹ Three interrelated issues have been raised during the negotiations: first, there is concern that the required in-quota quantity is too small in many cases and therefore needs expansion;¹²⁰ second, most of these already small in-quota quantities themselves have often remained unfilled;¹²¹ and third, trade-restrictive methods of TRQ administration, some of which smacked of the pre-Uruguay Round NTBs, have contributed to the under-fill.¹²²

In response to the concern that in-quota volumes have been too small, the Harbinson first modalities draft suggested that tariff quota volumes be set at a minimum level of 10% of domestic consumption in every such product, with the flexibility that members could set an 8% commitment on as much as 25% of these products provided they undertake a 12% commitment on another 25% of products.¹²³ Importantly, for most developing countries, the modalities draft proposes to abolish tariffs on in-quota volumes for tropical products, raw as well as processed, and for what are called products of particular importance to the diver-

117. See generally WTO, Preparations for the Fifth Session of the Ministerial Conference: Draft Cancun Ministerial Text (Second Revision), *supra* note 14; WTO, Preparations for the Fifth Session of the Ministerial Conference: Draft Cancun Ministerial Text (Revision), *supra* note 13; WTO, Negotiations on Agriculture: First Draft of Modalities for the Further Commitments (Revision), *supra* note 10.

118. See Agriculture Negotiations: Backgrounder: Market Access: Tariffs and Tariff Quotas, *supra* note 57.

119. See *id.*

120. See *id.*

121. See *id.*

122. See *id.*

123. See, WTO, Negotiations on Agriculture: First Draft of Modalities for the Further Commitments (Revision), *supra* note 10, at 5.

sification of production away from narcotic and other illicit products. The implementation period for this commitment will be five years as well.¹²⁴

Again, in pursuance of the special and differential treatment principle, the modalities draft made two proposals. First, developing countries would be exempted from the requirement to expand in-quota volumes for their "special products;" and second, they would be entitled to lower levels of in-quota volume expansion on other products (an average of 6.6% of domestic consumption with the flexibility to undertake a 5% commitment on 25% of their products provided they also undertake an 8% commitment on another 25% of products).¹²⁵ Developing countries would also benefit from an implementation period of ten years.

Finally, the revised first modalities draft attempted to further strengthen the discipline governing in-quota trade by requiring reduction of in-quota tariffs in all cases where the average tariff rate quota fill rate was below sixty-five percent.¹²⁶ This would potentially mean virtually all tariff quotas since the fill rate over the implementation period for Uruguay Round commitments stood below sixty-five percent, the only exception being 1995, the first year of the implementation period for which the fill rate was sixty-six percent.¹²⁷

While all the above market access issues have played a part in the Doha negotiations,¹²⁸ a lot of attention has been rightly focused on the problem of TRQ administration.¹²⁹ Members have used a variety of means in administering their TRQs.¹³⁰ The most important ones are the following: applied tariffs;¹³¹ first-come, first-served;¹³² licenses on demand;¹³³ auctioning;¹³⁴ historical importers;¹³⁵

124. *See id.*

125. *See id.*

126. *Id.*

127. *See* WTO, Agriculture Negotiations: Background: Market Access: Tariffs and Tariff Quotas, *supra* note 57.

128. *See* ICTSD & IISD, DOHA ROUND BRIEFING SERIES, CUNCUN UPDATE, *supra* note 2, at 2.

129. *See* WTO, Agriculture Negotiations: Background: Market Access: Tariffs and Tariff Quotas, *supra* note 57.

130. *See id.*

131. *See id.* (occurring when the in-quota tariff rate is applied as though it were an ordinary tariff without any tariff rate quota and imports are allowed in unlimited quantities at that rate).

132. WTO Secretariat, Changes in Tariff Quota Administration and Fill Rates, Background Paper, WTO doc. TN/AG/S/6, at 8 (Apr. 11, 2002), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple (occurring when "imports are permitted entry at the in-quota tariff rates until such a time as the tariff quota is filled; then the higher tariff automatically applies [and] [t]he physical importation of the good determines the order and hence the applicable tariff").

133. *Id.* (occurring when "importers' shares are generally allocated, or licences issued, in

imports undertaken by state trading entities;¹³⁶ and, producer groups or associations.¹³⁷ These “principal” methods have sometimes been supplemented by “additional” conditions, which included “domestic purchase requirements,” “limits on tariff quota shares per allocation,” “export certificates,” and “past trading performance.”¹³⁸ While some of these TRQ administration methods (such as the use of applied tariffs) facilitate realization of the AoA’s long-term objective of establishing a fair and market-oriented agricultural trading system, some others (such as auctioning and the domestic purchase requirements) could, arguably, even be challenged for their WTO-compatibility. The lack of transparency and predictability surrounding their application in many member countries has further exacerbated the problem.¹³⁹ The Doha negotiations have thus rightly spent a lot of time and energy on the issue. The first Harbinson draft of the modalities proposed a long provision on TRQ administration containing a mixture of three approaches: restatement of the basic principles (of transparency and predictability), a positive list of “do’s” (such as requiring all in-quota imports to be from MFN suppliers), and a negative list of “don’ts” (such as domestic purchasing requirements).¹⁴⁰ Indeed, this first draft shows a tendency to outlaw such prevalent practices as the allocation of import licenses only to domestic producer groups/associations, the setting of exportation or re-exportation requirements as conditions for import permits, and even auctioning.¹⁴¹ The parts of the Harbinson draft dealing with TRQ administration were also among the areas of which relatively less displeasure was expressed by the negotiators in the run-up to Cancun, and in addition the Cancun draft barely mentions TRQ administration.¹⁴²

relation to quantities demanded and often prior to the commencement of the period during which the physical importation is to take place”).

134. *Id.* (occurring when “importers’ shares are allocated, or licenses issued, largely on the basis of an auctioning or competitive bid system”).

135. *Id.* (occurring when “importers’ shares are allocated or licenses issued, principally in relation to past imports of the product concerned”).

136. *Id.* (occurring when “[i]mport shares are allocated entirely or mainly to a state trading entity which imports (or has direct control of imports undertaken by the relevant Member) the product concerned”).

137. *See id.*

138. *Id.*

139. *See* WTO, Negotiations on Agriculture: First Draft of Modalities for the Further Commitments, *supra* note 10, at 2.

140. *Id.* at 12-14.

141. *Id.* at 12 (noting that “[n]o charges, deposits or other financial requirements shall be imposed, directly or indirectly, on or in connection with the administration of tariff quota commitments or with importation of tariff quota products other than as permitted under the GATT 1994”).

142. *See generally id.*

2.3 Special Agricultural Safeguard (“SSG”)

A special safeguard provision was introduced to enable members to impose additional duties on the importation of products subject to tariffication in the event of unexpected import surges or price slumps—without the need to prove injury—as would otherwise be required under general safeguards rules.¹⁴³ This right would exist only in respect of products for which countries expressly reserved the right to do so by putting the SSG symbol in their schedules of commitments.¹⁴⁴ According to the most recent WTO Secretariat survey, thirty-nine Members have reserved the right to use the special safeguard option on hundreds of products; but, so far, only ten Members have used it “in one or several of the years 1995 to 2001.”¹⁴⁵ This situation, coupled with its obvious trade-distortive impacts, has prompted many entities, including the United States, the Cairns Group¹⁴⁶ and several developing countries, to propose its elimination. Others, including the European Community¹⁴⁷ and Japan,¹⁴⁸ have proposed to keep it, stressing the fact that the AoA foresees its duration throughout the reform process.

The original version of the first modalities draft suggested eliminating the special safeguard option for developed countries over an agreed transition period while maintaining a modified version of it for so-called “strategic products” of developing countries.¹⁴⁹ The revised version of the same draft dropped the reference to “strategic products” for developing countries and envisaged the application of a special safeguard mechanism (“SSM”) by these countries on a wider range of products and under defined circumstances.¹⁵⁰ Both the pre-

143. AoA, *supra* note 1, at art. 5.

144. *Id.* art. 5 ¶ 1.

145. See WTO, Special Agricultural Safeguard, WTO doc. G/NG/S/9/Rev.1, at 1 (Feb. 19, 2002), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple.

146. See WTO, Negotiations on Agriculture: Cairns Group Negotiating Proposal: Domestic Support, WTO doc. G/AG/NG/W/35, at 2 (Sept. 22, 2000), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple.

147. See WTO, EC Comprehensive Negotiating Proposal, WTO doc. G/AG/NG/W/90, at 1 (Dec. 14, 2000), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple.

148. See WTO, Negotiating Proposal by Japan on WTO Agricultural Negotiations, WTO doc. G/AG/NG/W/91, at 8 (Dec. 21, 2000), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple (noting that Japan goes even further and proposes the introduction of a new safeguard mechanism to apply with respect to seasonal and perishable agricultural products).

149. WTO, Negotiations on Agriculture: First Draft of Modalities for Further Commitments, *supra* note 10, at 4.

150. ICTSD & IISD, DOHA ROUND BRIEFING SERIES: CUNCUN UPDATE, *supra* note 2, at 2.

Cancun draft agricultural framework as well as its Cancun counterpart simply noted that the SSG was still under negotiation.¹⁵¹ Both confirmed, however, that an SSM would be established for use by developing countries subject to conditions and for products to be determined.¹⁵² This was also the position suggested by the EU-US joint proposal¹⁵³ and the G22 proposal a few weeks prior to Cancun.¹⁵⁴

In sum, the agricultural market access issues in the current negotiations present some of the most complex issues of international trade. Despite these complexities, however, the market access part of the agricultural negotiations appears to be progressing relatively well. In short, there is some reason to be optimistic and expect significant reductions in tariffs, some expansion in TRQs, and a more rigorous discipline governing TRQ administration. Most importantly for developing countries, market access is the only area in which the principle of special and differential treatment is being pursued with a promise of a meaningful outcome.

III. AGRICULTURAL EXPORT SUBSIDIES

3.1 *Export Subsidies "Proper"*

Export subsidies are "subsidies contingent upon export performance."¹⁵⁵ This formulation however raises the more basic question of what a "subsidy" is—a concept defined only by the Agreement on Subsidies and Countervailing Measures.¹⁵⁶ A subsidy is a financial contribution made by a government or any public body conferring a benefit on the recipient.¹⁵⁷ Under the original text of

151. *Id.* at 3.

152. *See id.*; *see also* WTO, Negotiations on Agriculture: First Draft of Modalities for the Further Commitments (Revision), *supra* note 10, at 6.

153. *See* ICTSD & IISD, DOHA ROUND BRIEFING SERIES: CUNCUN UPDATE, *supra* note 2, at 3.

154. *See generally* DUNCAN GREEN, CATHOLIC AGENCY FOR OVERSEAS DEV., THE CUNCUN WTO MINISTERIAL MEETING, SEPTEMBER 2003: WHAT HAPPENED? WHAT DOES IT MEAN FOR DEVELOPMENT? (Sept. 19, 2003), *available at* http://www.investmentwatch.org/files/CAFOD_Cuncun_Analysis.doc.

155. AoA, *supra* note 1, at art. 1 ¶ e.

156. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, art. 1.1, Marrakesh Agreement Establishing the World Trade Organization, *at* http://www.wto.org/english/docs_e/legal_e/24-scm.pdf [hereinafter SCM Agreement].

157. *Id.*

GATT, subsidies, whether export or domestic, were not subject to any strict discipline.¹⁵⁸ The only thing countries had to do was notify their subsidies and, if they were found to have any serious adverse impact on the trade interests of other countries, to discuss the possibility of limiting the subsidization.¹⁵⁹ During the 1954-55 GATT review session, Article XVI was modified and a two-tiered distinction was introduced between domestic and export subsidies, on the one hand, and between export subsidies on primary and non-primary products on the other.¹⁶⁰ The resulting regime kept domestic subsidies as legitimate instruments of support, subject only to the old obligations of notification and consultation, while it put export subsidies under a stronger discipline.¹⁶¹ More specifically, export subsidies on non-primary products were prohibited if they resulted in the sale of export items at a price lower than their domestic market (often called the "dual pricing" requirement).¹⁶² But, the same export subsidies were permitted on primary products, subject only to the vague and impracticable condition that they did not use them to acquire a "more than equitable share of world export trade" in that product.¹⁶³ Attempts were made during subsequent rounds of trade negotiations to bring export subsidies on primary products under the same rules as those applying to non-primary products.¹⁶⁴ But, this was all in vain. For example, during the Tokyo Round (1973-1979), a separate agreement was concluded addressing the issue of subsidies and countervailing duties, often known as the subsidies code.¹⁶⁵ This code strengthened the export subsidies discipline of non-primary products by abolishing the "dual pricing" requirement and introducing a flat prohibition of them, but its provisions on export subsidies on "certain primary products" were nothing more than the use of new words repeating old stories.¹⁶⁶ As a result, agricultural export subsidies were freely and extensively used,

158. GATT, *supra* note 58, at art. XVI.

159. *See id.*

160. *See* Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, arts. 8-11 (Apr. 12, 1979), available at <http://www.worldtradelaw.net/tokyoround/subsidiescode.pdf>.

161. *See id.*

162. *See* SCM Agreement, *supra* note 156, at arts. 5(a), 11.2(iv).

163. Agreement on Interpretation and Application of Articles, VI, XVI and XXIII of the General Agreement on Tariffs and Trade, *supra* note 160, at art. 10 ¶ 1.

164. *Id.* arts. 9-10.

165. *See id.*

166. *See id.*

especially by developed countries, until the Uruguay Round was concluded in 1994.¹⁶⁷

The Uruguay Round brought an important change to this situation, not just through the conclusion of the Agriculture Agreement, but also the generic Agreement on Subsidies and Countervailing Measures (“SCM Agreement”).¹⁶⁸ The SCM Agreement itself has introduced substantial changes to the law of subsidies in general. The SCM Agreement classifies all subsidies into one of three types, or “boxes” as they are commonly referred to: “red” or prohibited, “amber” or actionable, and “green” or non-actionable.¹⁶⁹ Falling in the “red” box are export subsidies and import substitution subsidies (i.e., subsidies contingent upon the use of domestic over imported products).¹⁷⁰ The “green” box covers all non-specific subsidies as well as three types of specific subsidies: research and development subsidies, regional development subsidies targeting disadvantaged regions, and environmental subsidies to promote adaptation to new legal requirements.¹⁷¹ The “amber” box covers a residual category of subsidies (all non-red and non-green) against which action may be taken if they cause adverse trade effects to the interests of others.¹⁷² The discipline contained in the SCM Agreement is generic, as it applies to all sectors, but it often expressly excludes agricultural subsidies from its coverage.¹⁷³ Yet provisions of the SCM Agreement could still affect agricultural trade in at least two ways: filling any loopholes that may, and do, exist within the subsidies provisions of the AoA, and serving as a principal contextual guide for the interpretation of relevant AoA provisions.¹⁷⁴ However, as the *Canada Dairy* saga has shown, the relationship between the AoA and the SCM Agreement can be more complicated than this.¹⁷⁵

Export subsidies flatly prohibited by the SCM Agreement are expressly permitted by the AoA in the agricultural sector.¹⁷⁶ Indeed, agriculture is the only sector where export subsidies are legal. The AoA has created two categories of

167. *See id.*

168. *See generally* SCM Agreement, *supra* note 156.

169. *Id.* arts. 3, 5-8.

170. SCM Agreement, *supra* note 156, at art. 8.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *See generally* WTO, Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products Report of the Appellate Body, WTO docs. WT/DS103/AB/R & WT/DS113/ABR (Oct. 13, 1999), *available at* http://docsonline.wto.org/gen_search.asp?searchmode=simple.

176. *Compare* SCM Agreement, *supra* note 156, *with* AoA, *supra* note 1.

export subsidies—listed and non-listed—each subject to distinct disciplines.¹⁷⁷ Listed agricultural export subsidies (as under AoA Article 9.1) have generally been subject to reduction commitments of a dual nature—quantitative (by twenty-one percent) and budgetary (by thirty-six percent)—on a 1986-1990 base period and over a six-year implementation period.¹⁷⁸ Developing countries were required to undertake only two-thirds of these obligations to be implemented over a period of ten years.¹⁷⁹ This means that those countries that were providing export subsidies during the base period would be allowed to continue to do so on condition that they undertook, and remained within, specific reduction commitments. Those countries that had not been providing such export subsidies during the base period—almost by definition developing countries—have been prohibited from providing any export subsidies. Following this process, twenty-five WTO members have scheduled export subsidy reduction commitments in respect of different products.¹⁸⁰ This also means that only these twenty-five countries are allowed to use the export subsidies listed in Article 9.1 of the AoA and on the products they have scheduled in their commitments.¹⁸¹ As regards non-listed export subsidies, the only limitation is that they may not be used in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments.¹⁸² Article 10.2 goes a step further and picks up three forms of non-listed export support practices, including export credit schemes, and declares that Members shall undertake to work toward the development of internationally agreed disciplines governing their use.¹⁸³ To the disappointment of many Members, including the European Communities, no such agreement was reached due largely to opposition by the United States.

Agricultural export subsidies are the most contentious, and especially from the perspective of developing countries, the most destructive trade policy instruments. However, they are still seen, particularly by the European Commu-

177. *Id.* arts. 1, 9.

178. *Id.* art. 9 ¶ 1.

179. *Id.*

180. WTO, Agriculture Negotiations: Background: Phase 1: Export Subsidies, Competition and Restrictions, (Oct. 10, 2002), *available at* http://www.wto.org/english/tratop_e/agric_e/negs_bkgnd06_export_e.htm (stating that the members are Australia, Brazil, Bulgaria, Canada, Colombia, Cyprus, Czech Republic, European Communities, Hungary, Iceland, Indonesia, Israel, Mexico, New Zealand, Norway, Panama, Poland, Romania, Slovak Republic, South Africa, Switzerland-Liechtenstein, Turkey, United States, Uruguay, and Venezuela).

181. AoA, *supra* note 1, at art. 9 ¶ 1.

182. *See id.* art. 10 ¶ 1.

183. *Id.* art. 10 ¶ 2.

nities, as the king in a chess game for whose protection all available resources and weapons have to be deployed. The Doha Declaration provides, in relevant part, that “[b]uilding on the work carried out to date and without prejudging the outcome of the negotiations we commit ourselves to comprehensive negotiations aimed at . . . reductions of, *with a view to phasing out*, all forms of export subsidies.”¹⁸⁴ Success or failure for the entire Doha ministerial conference was hanging in the balance until the very last minute on the inclusion or otherwise of this emphasized language in this declaration.¹⁸⁵

Needless to say, agricultural export subsidies continue to be the most contentious topic throughout the Doha negotiations. Although there is a wide range of proposals on this issue, one can generally say that the vast majority demand the phasing out of export subsidies while a small minority, led by the European Communities, is prepared to consider only reductions.¹⁸⁶ Reflecting this overwhelming demand for the phasing out of export subsidies, the Harbinson first draft of modalities proposed a formula by which fifty percent of export subsidies (in budgetary as well as quantitative terms) would be phased out over a five-year period, while the other half would be phased out over nine years, in both cases at equal annual installments.¹⁸⁷ For developing countries, this same approach was proposed to be implemented over a period of ten and twelve years, respectively, while keeping the exemptions of AoA Article 9.4 intact.¹⁸⁸ The export subsidies section is the most contentious. Curiously enough, the Revised First Modalities Draft made almost no change to this section of the original

184. WTO, Doha WTO Ministerial Declaration, WTO doc. WT/MIN(01)/DEC/1, at 3 (Nov. 20, 2001), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple (emphasis added).

185. See De Jonquires & Williams, *supra* note 43.

186. See ICTSD AND IISD, DOHA ROUND BRIEFING SERIES, DEVELOPMENTS SINCE THE FOURTH WTO MINISTERIAL CONFERENCE 3 (Feb. 2003), available at <http://www.ictsd.org/pubs/dohabriefings/doha2-agric.pdf> (noting that the U.S., the Cairns Group, the Africa Group, ASEAN, and WAEMU are in the group demanding the phase out of export subsidies, but some developing countries, such as India, which call for the abolition of export subsidies, also propose that developing countries be allowed to keep the preferential treatment they currently enjoy under Article 9.4 of the AoA and other benefits); see also WTO, Negotiations on Agriculture: First Draft Modalities for the Further Commitment (Revision), *supra* note 10, at 2.

187. WTO, Negotiations on Agriculture: First Draft of Modalities for the Further Commitments, *supra* note 10, at 8.

188. See *id.*; see also AoA, *supra* note 1, at art. 9 ¶ 4 (relating to the provision of subsidies to reduce the costs of marketing and international transport and freight of exports of agricultural products, and internal transport and freight charges on export shipments on terms more favourable than for domestic shipments).

draft.¹⁸⁹ This proposal, if it had somehow won the acceptance of the European Union, would have given some hope that, in about a decade from today, agricultural export subsidies could be prohibited just like in non-agricultural products and thereby usher in an era of greater fairness in international trade relations.

However, the disagreement over export subsidies continued until the last minute in preparation for Cancun.¹⁹⁰ The EU-US joint proposal suggested eliminating export subsidies only on products of particular export interest to developing countries over an agreed period.¹⁹¹ The proposed framework from the G22 countries suggested eliminating all export subsidies with some hint that export subsidies on products of particular export interest to developing countries would be eliminated within a shorter time frame than other products.¹⁹² The pre-Cancun draft framework prepared by General Council Chairman del Castillo took refuge in other vague language, proposing to eliminate export subsidies on products of particular export interest for developing countries over an agreed period while, on other products, proposing that members "shall commit to reduce, with a view to phasing out, budgetary and quantity allowances for export subsidies."¹⁹³ In the words of the pre-Cancun draft framework, "the question of the end date for phasing out of all forms of export subsidies remains under negotiation."¹⁹⁴ The Cancun ministerial conference put agricultural export subsidies at the heart of the negotiations.¹⁹⁵ However, the Cancun draft ministerial declaration of September 13, 2003, only paraphrased the proposal contained in the pre-Cancun draft with no substantive modifications.¹⁹⁶ Coupled with the sensitive issues raised in the cotton sector by four west and central African countries, the stalemate over ex-

189. Compare WTO, Negotiations on Agriculture: First Draft of Modalities for the Further Commitments (Revision), *supra* note 10, at 7, with WTO, Negotiations on Agriculture: First Draft of Modalities for the Further Commitments, *supra* note 10, at 8.

190. See generally WTO, Framework for Establishing Modalities in Agriculture, Annex A (Sept. 14, 2003), available at http://www.ictsd.org/ministerial/cancun/docs/G21_ag_text.pdf.

191. EU-US Joint Text on Agriculture, *supra* note 11, at ¶ 3.1.

192. See RACHEL THOMPSON, ACPO, WORLDWIDE SUMMARY OF CUNCUN WTO SUMMIT (Sept. 14, 2003), available at http://www.apcoworldwide.com/content/newsroom/staff_insight/cancun_wto.cfm.

193. WTO, Preparations for the Fifth Session of the Ministerial Conference: Draft Cancun Ministerial Text (Revision), *supra* note 13, at A-3.

194. *Id.*

195. See generally WTO, Preparations for the Fifth Session of the Ministerial Conference, Draft Cancun Ministerial Text (Second Revision), *supra* note 14.

196. Compare *id.*, with WTO, Preparations for the Fifth Ministerial Conference: Draft Cancun Ministerial Text (Revision), *supra* note 13.

port subsidies once again played its traditional role in facilitating the collapse of the ministerial conference.¹⁹⁷

3.2 Other Measures of Export Support

Another important issue of export competition, particularly in the eyes of the European Communities and several other countries, is the “discriminatory” nature of the current agricultural export subsidies regime, in the sense of not applying the same discipline to similar measures of export support, particularly export credit schemes, state-trading export enterprises and abuse of international food aid.¹⁹⁸ After years of reluctance, the United States now appears to have accepted the need for an internationally-agreed discipline, particularly in the case of export credits, credit guarantees and insurance mechanisms.¹⁹⁹ Reflecting this encouraging progress, the Harbinson first modalities draft included a lengthy four-page-text providing the forms of export support to be covered by such an agreement, the terms and conditions under which they should be granted, and rules on transparency and special and differential treatment.²⁰⁰ The pre-Cancun draft framework reflected this emerging consensus by proposing to apply to export credits the same discipline that would apply to other agricultural export subsidies.²⁰¹ This position was also repeated by the Cancun draft with no change.²⁰²

197. See *The Cotton Case: In the Upcoming WTO Ministerial in Cancun* (Sept. 1, 2003), available at http://www.ictsd.org/ministerial/cancun/docs/Cotton_before_Cancun.pdf; see also WTO, Draft Decision Concerning Specific Measures in Favour of Cotton with a View to Poverty Alleviation, WTO doc. WT/GC/W/511, at 2 (Aug. 22, 2003), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple.

198. EUR. COMM., FREQUENTLY ASKED QUESTIONS: THE WTO AND EU AGRICULTURE (Sept. 4, 2003), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/03/169&format=HTML&aged=0&language=en&guiLanguage=en>.

199. *Statement of Robert B. Zoellick: U.S. Trade Representative Before the House Comm. on Agric.*, *supra* note 82, at 4. (describing the U.S. position on export credit schemes and food aid as a proposal “to guard against market disruption while maintaining the viability of these programs”).

200. See WTO, Negotiations on Agriculture: First Draft of Modalities for the Further Commitments (Revision), *supra* note 10, at 17; WTO, Negotiations on Agriculture: First Draft of Modalities for the Further Commitments, *supra* note 10, at 18.

201. See WTO, Preparations for the Fifth Session of the Ministerial Conference: Draft Cancun Ministerial Text (Second Revision), *supra* note 14, at A-4.

202. See WTO, Preparations for the Fifth Session of the Ministerial Conference: Draft Cancun Ministerial Text, (Revision), *supra* note 13, at A-4.

The differences between the European Union and the United States on the issue of food aid continued as wide as ever until quite late in the negotiation process.²⁰³ The European Communities has always believed that the United States uses food aid as a means of circumventing its export subsidy commitments.²⁰⁴ On that basis, the European Communities proposed to revise the food aid provisions in the AoA so as to establish a genuine food aid system that responds to the real food aid needs of countries rather than the presence or absence of surplus production in the donor countries.²⁰⁵ The United States, on the other hand, saw no problems with the rules and only wanted more transparency in their administration.²⁰⁶ The Harbinson first modalities draft went in line with the European Union position and proposed rules that would require food aid to be provided in fully grant form, and to give preference to financial grants for purchase by the recipient country from whatever source it may wish rather than actual food exports, unless it is necessitated by humanitarian emergency situations declared by appropriate United Nations food aid agencies.²⁰⁷ The pre-Cancun draft framework is open on this point, saying "disciplines shall be agreed in order to prevent commercial displacement through food aid operations."²⁰⁸ Once again, the Cancun draft also left this part of the pre-Cancun draft unchanged.²⁰⁹

203. See WTO, Agriculture Negotiations: Backgrounder: The 'Modalities' Phase, *supra* note 39.

204. See *id.*

205. Melaku Geboye Desta, *Food Security and International Trade Law: An Appraisal of the World Trade Organization Approach*, 35(3) J. OF WORLD TRADE 449, 449-68 (2001).

206. See *id.*

207. See WTO, Negotiations on Agriculture: First Draft of Modalities for the Further Commitments, *supra* note 10, at 23; see also WTO, Negotiations on Agriculture: First Draft of Modalities for the Further Commitments (Revision), *supra* note 10, at 21 (revising the first draft and thereby strengthening the proposal by introducing the important statement that

Members recognize that international food aid and the commitments undertaken in this regard under the Food Aid Convention play a critically important role in alleviating hunger and in contributing to world food security, particularly in responding to emergency food situations and to other food and nutrition needs of developing countries. The following provisions are accordingly intended not to limit the role of bona fide international food aid, but to ensure that such aid is not used as a method of surplus disposal, nor as a means of achieving commercial advantages in world export markets.)

208. WTO, Preparations for the Fifth Session of the Ministerial Conference, Draft Cancun Ministerial Text (Revision), *supra* note 13, at A-1.

209. Preparations for the Fifth Session of the Ministerial Conference, Draft Cancun Ministerial Text (Second Revision), *supra* note 14, at A-1.

The use of State-Trading Enterprises (“STE”) as export monopolies is also another issue subject to the Doha negotiations.²¹⁰ Interestingly, this is one issue on which the United States and the European Communities have generally agreed.²¹¹ The *Canada Dairy* dispute has given a substantial majority of WTO members enough reason to stand united against the practice.²¹² Both the European Communities and the United States, just like many others, want to write further disciplines into the AoA so that price pooling, cross-subsidization, and similar practices carried out through state trading export enterprises would be expressly prohibited.²¹³ Reflecting this growing consensus, the first Harbinson modalities draft proposed a fairly stringent set of rules on state trading export enterprises, which sought to introduce not just market forces in their operation but even attempt to introduce competition by requiring governments to scrap their export monopoly powers.²¹⁴ Both the pre-Cancun as well as the Cancun draft frameworks proposed to introduce the same stringent disciplines to export state trading enterprises as those applying to export credits and other forms of export subsidies.²¹⁵

In sum, the Harbinson modalities draft was a fairly ambitious text on export subsidies. Although it may be difficult to think in terms of export subsidies continuing as legitimate instruments for over a decade to come, even such a result, if achieved, would have been an enormous accomplishment for the Doha negotiations. Moreover, apart from the ultimate phasing out of listed export subsidies, it appears that the long-promised discipline on export credits and other forms of export support is also probably within reach. Unfortunately, seeing how contentious this subject has been throughout the negotiations, it was already possible to predict further watering down of the modest proposals contained in the

210. *EU-US Joint Text on Agriculture*, *supra* note 11.

211. *See id.*

212. *See generally* WTO, Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products, Report of the Appellate Body, *supra* note 175; WTO, Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products, Second Recourse to Article 21.5 of the DSU by New Zealand and the United States, WTO docs. WT/DS103/AB/RW2, WT/DS113/AB/RW2 (Dec. 20, 2002), *available at* http://docsonline.wto.org/gen_search.asp?searchmode=simple.

213. *See* EUR. COMM., THE EC’S PROPOSAL FOR MODALITIES IN THE WTO AGRICULTURE NEGOTIATIONS, Ref.625/02, at 13 (Dec. 16, 2002), *available at* http://trade-info.cec.eu.int/doclib/docs/2003/april/tradoc_111447.pdf.

214. *See* WTO, Negotiations on Agriculture: First Draft of Modalities for the Further Commitments (Revision), *supra* note 10, at 15.

215. *See generally* WTO, Preparations for the Fifth Session of the Ministerial Conference, Draft Cancun Ministerial Text (Second Revision), *supra* note 14.

Harbinson draft. The Pre-Cancun draft framework from General Council Chairman del Castillo as well as the Cancun draft itself are already much weaker than the Harbinson modalities draft.²¹⁶ With export subsidies being the most destructive and the most reviled instruments of trade distortion in use today, any attempts at further weakening this part of the proposed rules could endanger the entire negotiations with total collapse.

IV. AGRICULTURAL DOMESTIC SUPPORT

Agricultural domestic support refers to subsidies provided to agricultural producers regardless of whether their products are exported. Although domestic support as a concept is used only in the AoA, it means essentially the same as the more familiar concept of "domestic subsidies."²¹⁷ Governments provide support to their agricultural producers in different ways, ranging from direct budgetary transfers to highly disguised forms of market price support.²¹⁸ Although the forms of support are diverse, they have certain features in common. First, they are intended to guarantee certain levels of income for agricultural producers. Second, they are implemented mainly by way of either setting minimum artificial prices on the market (which are necessarily higher than world market prices) or through direct budgetary transfers to agricultural producers.²¹⁹

If the effect of such agricultural domestic support measures was limited to making recipient farmers better off, all would be well. The problem with several forms of domestic support is that, in trying to make the recipients better off, they distort the patterns of agricultural production and trade at the international level and leave non-supported farmers elsewhere worse off.²²⁰ Indeed, domestic support measures may nullify benefits accruing from trade liberalization.²²¹ For instance, the effects of the reduction and binding of tariffs in multilateral trade negotiations may be circumvented by domestic support measures taken in favor of competing domestic products or producers.²²² An international agreement to discipline the use of border measures without a concomitant agreement addressing important domestic policy issues will therefore not achieve its goals.²²³

216. See *id.* at A-1.

217. See generally AoA, *supra* note 1.

218. See de Jonquieres, *supra* note 53.

219. See *id.*

220. See *id.*

221. See *id.*

222. See *id.*

223. See MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF

Moreover, domestic support measures also affect international trade indirectly because they stimulate domestic production and often result in excess supply.²²⁴ Because world market prices are invariably lower than in the domestic market of the subsidizing countries, the excess can be exported only with the aid of subsidies or given in the form of food aid to other countries.²²⁵ Further, the artificially higher domestic market prices naturally attract imports; as a result, domestic support measures almost always need to be supplemented by some form of import restrictions so as to prevent importation of competing foreign products or re-importation of the subsidized exports themselves.²²⁶ Domestic support measures thus play a dual role in distorting agricultural markets, directly by giving artificial incentives for excess production, and indirectly by making the use of import barriers and export subsidies unavoidable.²²⁷

GATT never imposed any meaningful discipline on the use of domestic support, whether agricultural or otherwise,²²⁸ and the only constraint in this respect came from the doctrine of reasonable expectations introduced by the *Australia Ammonium Sulphate* case which implied that countries would not be allowed to introduce subsidies on goods that are already subject to tariff commitments.²²⁹ This quasi-judicial development led to the 1955 Understanding, which provided that

a contracting party which has negotiated a concession under Article II may be assumed, for the purpose of Article XXIII, to have a *reasonable expectation* failing evidence to the contrary that the value of the concession will not be nullified or impaired by the contracting party which granted the concession by the subsequent introduction or increase of a domestic subsidy on the product concerned.²³⁰

The Tokyo Round attempted to introduce a more effective discipline on the use of domestic subsidies,²³¹ but the final version of the 1979 Subsidies Code

INTERNATIONAL TRADE 5-7 (2d ed. 1999).

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

225. *See id.* at 250.

226. *See id.* at 252-53.

227. *See id.*

228. *See GATT, supra* note 58, at art. XVI ¶ 1.

229. *The Australian Subsidy on Ammonium Sulphate*, GATT/CP. 4/39 (Apr. 3, 1950), available at <http://ielaw.info/gatt/8.pdf>.

230. European Economic Community – Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes, L/5778, at 5 (Feb. 20, 1985), available at <http://www.worldtradelaw.net/reports/gattpanels/eccannedfruit.pdf> (emphasis added).

231. *See Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, supra* note 160, at pmbl.

merely required signatories to *seek to avoid* causing adverse effects to others' interests through the use of domestic subsidies.²³² It was the Uruguay Round SCM Agreement which introduced a more meaningful discipline on domestic subsidies for the first time.²³³ In its "traffic light approach," the SCM Agreement put domestic subsidies largely in the "amber" category of actionable subsidies,²³⁴ which are subject to challenge on proof of injury,²³⁵ but, this Agreement left agricultural domestic support measures largely to the AoA.²³⁶

The AoA appreciated the causal role of domestic support measures behind market access restrictions and export subsidies, and its approach has been to promote decoupling of farm support from production decisions.²³⁷ The ubiquitous nature of domestic support measures, particularly in the developed countries, and the resolve of many to defend them meant that the long-term objective of the AoA "to establish a fair and market-oriented agricultural trading system" had to be compromised to enable those countries to continue to intervene in the market on the side of their farmers.²³⁸ The result is a complex mix of rules and exceptions whose trade-liberalization impact was minimal at least in the short-term.²³⁹

The AoA follows a positive list approach in the sense that trade-distorting domestic support measures are in principle prohibited unless specifically permitted.²⁴⁰ Measures so permitted may be put under three broad categories: some are available to all WTO members; some others are available exclusively to developing countries; and a third category is available almost exclusively to developed or high-income developing countries.²⁴¹ Two measures fall under the first category: all members are free to use the so-called "green box" measures under Annex 2 to the AoA; and all are free to provide *de minimis* levels

232. *Id.* at art. 8 ¶ 3 (stating that "[s]ignatories further agree that they shall *seek to avoid* causing, through the use of any subsidy (a) injury to the domestic industry of another signatory, (b) nullification or impairment of the benefits accruing directly or indirectly to another signatory under the General Agreement, or (c) serious prejudice to the interests of another signatory) (emphasis added).

233. SCM Agreement, *supra* note 156, at arts. 1-2.

234. *See id.* arts. 5, 6.1-9 (inferring that the only types of domestic subsidy in the red box are the so-called import-substitution subsidies and three others have been put in the category of non-actionable subsidies); *see also* ICTSD & IISD, DOHA ROUND BRIEFING SERIES: CUNCUN UPDATE, *supra* note 2, at 3 (stating that the latter category was eliminated on January 1, 2000).

235. SCM Agreement, *supra* note 156, at arts. 7.1-10.

236. *See generally id.*

237. AoA, *supra* note 1, at pmbl.

238. *Id.*

239. *See* TREBILCOCK & HOWSE, *supra* note 223, at 263-64, 268-69.

240. *See id.* at 263.

241. *See* AoA, *supra*, note 1, at art. 6.

of non-green support (five percent for developed countries and ten percent for developing countries of the total value of production of a basic agricultural product in the case of product-specific support or of total value of agricultural production in the case of non-product specific support).²⁴² Secondly, in pursuit of the principle of special and differential treatment, three forms of support are available exclusively to developing country members: (i) investment subsidies that are generally available to agriculture; (ii) agricultural input subsidies that are generally available to low-income or resource-poor producers; and (iii) measures of producer support to encourage diversification from growing illicit narcotic crops.²⁴³ Finally come those measures available almost exclusively to developed and high-income developing countries: (i) direct payments provided under production-limiting programmes—called “blue box” measures—which are *de jure* available to every member but *de facto* limited to developed countries; and (ii) the residual category of all other forms of support that are not covered by any of the exemptions, generally called the “amber box” measures, which are *de jure* limited to a group of thirty-four countries, largely OECD.²⁴⁴ Each category will be further discussed in the following section.

4.1 Amber Box Measures

These are domestic support measures that are deemed to have significant (or more than minimal) trade-distorting impact. Market price support measures are the classic example. These measures are prohibited to all but thirty-four members.²⁴⁵ These thirty-four members are the ones that are reported to have used such trade- and production-distorting measures during the 1986-88 base period²⁴⁶ and on which they have undertaken Aggregate Measurement of Support (“AMS”) reduction commitments in their schedules.²⁴⁷ The AMS is defined as “the annual level of support, expressed in monetary terms, provided for an agricultural product . . . or non-product specific support provided in favour of agricultural producers in general.”²⁴⁸ The calculation of the AMS takes into account

242. *Id.* at art. 6 ¶ 4(a)-(b).

243. *Id.* art. 6 ¶ 2.

244. *Id.* art. 6.

245. WTO, Agriculture Negotiations: Backgrounder: Domestic Support: Amber, Blue and Green Boxes (Apr. 20, 2004), available at http://www.wto.org/english/tratop_e/agric_e/negs_bkgnd13_boxes_e.htm.

246. *See id.*

247. *See id.*

248. AoA, *supra* note 1, at art. 1 ¶ a.

both product-specific as well as sector-wide support, and the final commitments are expressed in aggregate terms in the form of *Total AMS*.²⁴⁹ The reduction commitments are then applied from the Total AMS, determined by each country for the 1986-88 base period, called the *Base Total AMS*.²⁵⁰ It was from this benchmark that countries undertook twenty percent reduction commitments over a six-year implementation period in equal annual installments (developing countries undertook only a 13.3% reduction commitment over a ten year implementation period).²⁵¹ A WTO member complied with its obligations in any given year of the implementation period if the actual amount of support provided during that year—called the *Current Total AMS*—did not exceed the corresponding annual or final bound commitment level specified in its Schedule.²⁵² It is worth noting that this commitment applies on a sector-wide level, rather than a product-specific level.²⁵³ The effect is that countries could legally increase product-specific amber-box support to any level, provided the aggregate limit was respected.²⁵⁴

The thirty-four members that had undertaken domestic support reduction commitments were allowed to provide amber box support within the limits of their commitments, while those members that had not undertaken such commitments—exclusively the poorest developing countries—were prohibited from providing amber box measures whatsoever.²⁵⁵ The only exceptions to this rule are the right to provide *de minimis* levels of support and the special and differential treatment options available to developing countries.²⁵⁶ Although presented in the AoA more as an exception rather than a rule, it is this prohibition on the use of amber box support that applies to over two-thirds of the WTO membership.²⁵⁷ It is no wonder, therefore, to see that the countries for whom the use of amber box domestic support is already illegal are pursuing the goal of extending the ban to all members.²⁵⁸ But, the argument for the elimination of amber box measures

249. See *id.* art. 1 ¶ h.

250. See *id.* art. 1 ¶ h(i)-(ii).

251. See WTO, Modalities for the Establishment of Specific Binding Commitments Under the Reform Programme, WTO doc. MTN.GNG/MA/W/24 (Dec. 20, 1993), at http://docsonline.wto.org/gen_search.asp?searchmode=simple.

252. See AoA, *supra* note 1, at arts. 6-7.

253. See *id.*

254. See *id.*

255. See *id.*

256. See *id.*

257. See *id.*

258. See WTO, Agriculture Negotiations: Backgrounder: Update Phase 2: Domestic Supports-Amber, Blue, and Green Boxes (Oct. 2, 2001), available at

is also increasingly being made by countries that are entitled to use them today.²⁵⁹ The major sticking points for the ongoing negotiations regarding amber box domestic support include the following: (1) should it be eliminated or just reduced; (2) if reduced, by how much; and (3) should the aggregate commitments be replaced by product-specific commitments?²⁶⁰

To start with the latter issue, several countries have argued that the aggregate nature of the commitments have allowed countries to provide unlimited amounts of support to particularly sensitive sectors and that the only way domestic support commitments could improve free trade is if those commitments are product-specific.²⁶¹ According to the Cairns Group, the current negotiations should “result in commitments on a disaggregated basis to ensure that trade and production-distorting support will be reduced for all agricultural products.”²⁶² A submission by the Association of South-East Asian Nations (“ASEAN”) uses similar language on disaggregation, but to be applied for developed countries only.²⁶³ On the opposite side stands, among others, Norway, proposing that “the non-product specificity of the AMS support should be maintained in order to allow for flexibility to reallocate support among productions.”²⁶⁴

On the more fundamental question, concerning the fate of amber box measures in general, the United States and the Cairns Group have been leading

http://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd14_ph2domest_e.htm.

259. See WTO, Agriculture Negotiations: Background: Update Phase 1: Domestic Support-Amber, Blue, and Green Boxes, (Oct. 10, 2002), *available at* http://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd08_domestic_e.htm; *see also* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, THE URUGUAY ROUND AGREEMENT ON AGRICULTURE: AN EVALUATION OF ITS IMPLEMENTATION ON OECD COUNTRIES 53 (2001), *available at* <http://www1.oecd.org/publications/e-book/5101051E.pdf> (stating that the “European Union, Japan and the United States are by far the largest providers of amber support in absolute terms, accounting for around 80% of the base period total amber box for the OECD countries”).

260. See WTO, Agriculture Negotiations: Background: Update Phase 2: Domestic Supports – Amber, Blue and Green Boxes, *supra* note 258; WTO, Agriculture Negotiations: Modalities Phase: Chairperson’s Overview Paper (Dec. 18, 2002), *available at* http://www.wto.org/english/tratop_e/agric_e/negoti_modoverview_e.htm.

261. See WTO, Agriculture Negotiations: Modalities Phase: Chairperson’s Overview Paper, *supra* note 260.

262. WTO, Negotiations on Agriculture: Cairns Group Negotiating Proposal: Domestic Support, *supra* note 146, at 2.

263. See WTO, Special and Differential Treatment for Developing Countries in World Agricultural Trade, WTO doc. G/AG/NG/W/55 (Nov. 10, 2000), *available at* http://docsonline.wto.org/gen_search.asp?searchmode=simple.

264. WTO, Agriculture Negotiations: Proposal by Norway, WTO doc. G/AG/NG/W/101, at 4 (Jan. 16, 2001), *available at* http://docsonline.wto.org/gen_search.asp?searchmode=simple.

the camp that seeks to set a date by which all trade-distorting domestic support would be eliminated.²⁶⁵ The United States' stance on this subject has seemingly hardened over time. When the United States presented its first comprehensive proposal on agriculture in June 2000, its primary objective was to introduce some form of "support harmonization" in which disparities in trade-distorting support among countries would be reduced.²⁶⁶ In a later proposal, the United States argued for a formula to limit all trade-distorting support to the *de minimis* level and for a date to be agreed for their eventual elimination.²⁶⁷ The Cairns Group has consistently argued for the elimination of trade-distorting support since 2000.²⁶⁸

The opposing camp has been led by, *inter alia*, the European Union, Japan and Switzerland. According to the European Union, the existing regime is "globally the right framework for addressing domestic support issues," and the only thing to talk about during the negotiations should be about the reduction of amber box support while maintaining the overall structure.²⁶⁹ In its proposal for the modalities, the EU maintained its approach and suggested a fifty-five percent reduction on amber box support while maintaining the other boxes intact.²⁷⁰

Amid all this, the first modalities proposal from Stuart Harbinson suggested a sixty percent reduction in the final bound Total AMS in equal annual installments over a five year implementation period.²⁷¹ Interestingly, Harbinson also made a half-hearted move towards disaggregation and suggested that "Article 6.3 of the Agreement on Agriculture shall be amended so as to ensure that the

265. See WTO, Agricultural Negotiations: Backgrounder: Update Phase 2: Domestic Supports – Amber, Blue and Green Boxes, *supra* note 258.

266. See WTO, Proposal for Comprehensive Long-Term Agricultural Trade Reform: Submission from the United States, WTO doc. G/AG/NG/W/15, at 2 (June 23, 2000), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple; see also WTO, Note on Domestic Support Reform: Negotiations on Agriculture: Submission from the United States, WTO doc. G/AG/NG/W/16 (June 23, 2000), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple.

267. See FAS, USDA, THE U.S. WTO AGRICULTURE PROPOSAL: U.S. PROPOSAL FOR GLOBAL AGRICULTURAL TRADE REFORM (Nov. 7, 2003), available at <http://www.fas.usda.gov/itp/wto/proposal.htm> (discussing later U.S. positions).

268. See WTO, Negotiations on Agriculture: Cairns Group Negotiating Proposal: Domestic Support, *supra* note 146, at 2.

269. WTO, EC Comprehensive Negotiating Proposal, WTO doc. G/AG/NG/W/90, at 3 (Dec. 14, 2000), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple.

270. EUR. COMM., THE EC'S PROPOSAL FOR MODALITIES IN THE WTO AGRICULTURE NEGOTIATIONS 4 (Jan. 29, 2003) available at <http://europa.eu.int/comm/agriculture/external/wto/officdoc/mod.pdf>.

271. See WTO, Negotiations on Agriculture: First Draft of Modalities for the Further Commitments, *supra* note 10, at 8.

AMS for individual products shall not exceed the respective levels of such support provided on average of the years [1999-2001].²⁷² This would mean that while the reduction commitment remains an aggregate one, product-specific benefits would be capped at a level equal to the average benefit they had received during the 1999-2001 period.²⁷³ Needless to say, while this modest reform could easily be condemned as too little, it might be enough to attract strong opposition from influential interest groups representing such sensitive sectors as sugar, dairy and beef which are more likely to be affected than others.²⁷⁴ Just as in the AoA, the Harbinson draft also proposed that developing countries undertake only two-thirds of the suggested reduction commitments to be implemented over ten years.²⁷⁵

The EU-US joint proposal of August 13, 2003 suggested reductions in a range, setting the minimum and maximum percentage points by which all amber box domestic support measures would be reduced.²⁷⁶ The joint text left the specific numbers for future negotiations.²⁷⁷ The framework proposed by the G22 Countries also accepted the overall approach of the EU-US joint proposal, introducing reductions in a range, but added several more stringent requirements.²⁷⁸ First, the reduction commitments would be on a product-specific basis.²⁷⁹ Secondly, specific products benefiting from an above-average level of support over a certain base period would be subject to the maximum reduction rate within the range leading to some degree of support harmonization.²⁸⁰ Third, a “down-payment” would be made in the form of a first reduction by an amount that would be negotiated across the board for all products within the first year of implementation period and higher reductions, with a view to phasing out, of domestic support for products benefiting from such measures if those products are also exported and account for a certain percentage of world exports of that product.²⁸¹

272. *Id.* at 10.

273. *See id.*

274. *See* Parr Rosson, *Agriculture and the World Trade Organization 2*, available at <http://cnas.tamu.edu/publications/introduction.pdf>.

275. *See* WTO, *Negotiations on Agriculture: First Draft of Modalities for the Further Commitments*, *supra* note 10, at 7.

276. *See EU-US Joint Text on Agriculture*, *supra* note 12, at 1.1, 1.3, 2.1, 2.2, 2.5, 3.1, 3.2.

277. *Id.* at 1, 1.2.

278. *See* WTO, *Agriculture-Framework Proposal*, *supra* note 54.

279. *See id.* at 2.

280. *See id.*

281. *See id.*

The pre-Cancun framework for agricultural modalities prepared by General Council Chairman del Castillo was more in line with the EU-US joint proposal described earlier: adopting the approach of reductions in a range at an aggregate, sector-wide level with no reference to the support harmonization or down payment elements in the G22 proposal.²⁸² Thanks to the tenacity of the G22 countries during the ministerial conference, the Cancun draft framework proposed to cap product-specific support at their average levels for a representative period which would be agreed at a later stage.²⁸³

4.2 Green Box Measures

Annex 2 to the AoA provides for a detailed but non-exhaustive list of practices for which governments may claim exemptions from reduction/elimination requirements—the so-called “green” box measures.²⁸⁴ Most of them are measures generally considered trade-neutral, and the following is a brief summary of the measures falling under this box and the requirements they have to satisfy as provided in Annex 2 to the AoA. The basic requirement is that such measures must have no, or at most minimal, trade distortion effects or effects on production.²⁸⁵ This basic requirement is supplemented by a detailed and virtually exhaustive list of measures, along with general and policy-specific criteria that have to be satisfied before being exempted from reduction commitments.²⁸⁶ The exemptions do not apply to market price support nor other forms of support involving transfers from consumers.²⁸⁷ Although governments are allowed to take precautionary food security measures and provide general services (such as research, pest control, training, and infrastructural development) to producers and domestic food aid to the needy, they are required to carry out these tasks as much as possible within the framework of market forces.²⁸⁸ Members may give an unlimited amount of direct income support to their farmers, so long as the payments are made in a manner that is decoupled from production decisions and trade.²⁸⁹ Furthermore, Members are allowed to provide income insurance and

282. See WTO, Preparations for the Fifth Session of Ministerial Conference: Draft Cancun Ministerial Text (Revision), *supra* note 13, at B-2.

283. See *id.*

284. AoA, *supra* note 1, at annex 2.

285. See *id.*

286. See *id.*

287. See *id.* annex 3.

288. See *id.* annex 2.

289. See *id.* annex 2 ¶ 6.

disaster relief services on condition that farmers are not thereby made to profit from such occurrences.²⁹⁰ Finally, Members can also provide assistance for structural adjustment, and environmental and regional development purposes.²⁹¹ In general, while decoupled payments may be made for whatever reason and in unlimited amounts, those payments that take the form of income insurance, disaster relief, structural adjustment assistance, environmental or regional development programs have to comply with the requirement that they not be given in excess of the actual losses suffered or extra costs incurred to implement the government program.²⁹²

Although economists seem to agree that no domestic support could be trade-neutral, green box measures have been relatively the least-contentious area of domestic support in the negotiations. Proposals were, of course, submitted from different quarters. Some wanted to abolish the box altogether and put its contents under the amber box category that is subject to reduction commitments. Some wanted to put a cap on the amount of money that could be spent on them, while others wanted to narrow the scope of measures falling under that box.²⁹³ Still others wanted to enlarge the box so as to include additional measures.²⁹⁴ On balance, however, it is more likely that this box will survive the current negotiations without much modification. The only important issue here is whether the criteria for green box exemptions should be tightened.²⁹⁵

The first Harbinson modalities draft suggested that the provisions of Annex 2 be maintained subject to minor modifications.²⁹⁶ Important among the suggested modifications were the following: (1) in response mainly to European Union insistence, the modalities draft suggested inclusion of animal welfare payments under paragraph 12 of Annex 2 along with payments under environ-

290. See *id.* annex 2 ¶ 8.

291. See *id.* annex 2 ¶¶ 11-13.

292. See *id.* annex 2.

293. See generally WTO, Agreement on Agriculture: Special and Differential Treatment and a Development Box; Proposal to the June 2000 Special Session of the Committee on Agriculture by Cuba, Dominican Republic, Honduras, Pakistan, Haiti, Nicaragua, Kenya, Uganda, Zimbabwe, Sri Lanka and El Salvador, WTO doc. G/AG/NG/W/13 (June 23, 2000), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple.

294. See WTO, Agriculture Negotiations: Backgrounder: Domestic Support: Amber, Blue and Green Boxes, *supra* note 245.

295. See generally WTO, Negotiations on WTO Agreement on Agriculture: Proposals by India in the Areas of (i) Food Security, (ii) Market Access, (iii) Domestic Support, and (iv) Export Competition: Proposal on Food Security, WTO doc. G/AG/NG/W/102 (Jan. 15, 2001), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple.

296. See *id.* at 27.

mental programmes; and (2) in response to the concerns of developing countries, a long list of special and differential treatment provisions were proposed to exempt measures designed for maintaining domestic production capacity for staple crops, and payments to small-scale or family farms for reasons of rural viability and cultural heritage.²⁹⁷ Attachment 10 to the revised first modalities draft also introduced a catalogue of measures that would be included in a revised version of AoA Article 6.2 on special and differential treatment for developing countries, which could significantly increase the number of domestic support measures that would be exempted from reduction commitments.²⁹⁸ The pre-Cancun draft framework for agricultural modalities, as well as its Cancun revision, left "green box" domestic support measures intact, while noting that the criteria for a measure to be classified as such remained under negotiation.²⁹⁹

4.3 Blue Box Measures

Under the AoA, direct payments made to farmers under production-limiting programs, often known as the "blue box" measures, are excluded from the calculation of the Current Total AMS, and thus, from the reduction requirements on condition that certain important conditions are satisfied.³⁰⁰ First of all, the payments need to be "direct" payments in the sense that they should not be transferred to farmers through market manipulation devices.³⁰¹ Second, payments should be conditional upon some form of production-limiting measures being taken by the recipient, including on a fixed acreage and yields, or on eighty-five percent or less of the base level production, or, in the case of livestock payments, on a fixed number of head.³⁰² This option is *de jure* available to every WTO member but, only the European Union, Iceland, Norway, Japan, Slovenia, the United States, and Slovakia—all OECD countries—are reported to have used blue box measures.³⁰³ It is thus only natural that, while almost all other countries have proposed to delete this box from the AoA and move its contents into the amber box and deal with them accordingly, those that have made use of the blue

297. *See id.*

298. *See id.* at 28.

299. WTO, Preparations for the Fifth Session of Ministerial Conference: Draft Cancun Ministerial Text (Revision), *supra* note 13, at A-1.

300. AoA, *supra* note 1, at art. 6.

301. *See id.*

302. *See id.*

303. *See* WTO, Agriculture Negotiations: Backgrounder: Update Phase 2: Domestic Supports – Amber, Blue, and Green Boxes, *supra* note 258.

box—except the United States, which no longer maintains such measures—are its staunch defenders.³⁰⁴ Switzerland and Korea are examples of countries that have not used the blue box so far, but are defending it no less passionately.³⁰⁵ Indeed, Switzerland joined the European Union in declaring that progress in the negotiations would be possible only if the blue and green boxes were to be maintained.³⁰⁶ The United States and the Cairns Group led the camp that advocated scrapping this box altogether.³⁰⁷ The most important issue involving blue box in the Doha negotiations has thus been whether to retain or scrap it. The first Harbinson modalities proposal on this issue, perhaps more than on many others, was cluttered with parentheses, which indicates the high degree of contention involved.³⁰⁸ When looked at closely, however, both parenthetical options would effectively eliminate the blue box and either put its contents in the amber category, subject to reduction commitments, or keep it as a separate category but subject it to discipline similar to that applying to the amber box.³⁰⁹

The EU-US joint proposal suggested capping the total value of blue box support at five percent of total value of national agricultural production in each member country.³¹⁰ The proposal from the G22 countries, on the other hand, called for the elimination of blue box support altogether.³¹¹ The pre-Cancun draft framework for agricultural modalities, as well as its Cancun revision, proposed only a reduction approach based on the EU-US joint proposal.³¹²

304. WTO, Agriculture Negotiations: Background Fact Sheet, Domestic Support in Agriculture: The Boxes (Oct. 1, 2002), available at http://www.wto.org/english/tratop_e/agric_e/agboxes_e.htm.

305. See WTO, Agriculture Negotiations: Backgrounder: Phase 2: Domestic Supports—Amber, Blue, and Green Boxes, *supra* note 258.

306. See WTO, Seventh Special Session of the Committee on Agriculture, Statement by Switzerland, WTO doc. G/AG/NG/W/155 (Apr. 5, 2001), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple.

307. See generally FAS, USDA, U.S. PROPOSAL FOR GLOBAL AGRICULTURAL TRADE REFORM, *supra* note 83; see also WTO, Negotiations on Agriculture: Cairns Group Negotiating Proposal: Domestic Support, *supra* note 146.

308. WTO, Negotiations on Agriculture: First Draft of Modalities for the Further Commitments, *supra* note 10, at 9.

309. See *id.*

310. See *EU-US Joint Text on Agriculture*, *supra* note 11, at 1.2(ii).

311. WTO, Proposal of a Framework Document ¶ 1.1(iii) (Aug. 20, 2003), available at http://www.ictsd.org/issarea/ag/resources/index_WTO.htm.

312. See WTO, Preparations for the Fifth Session of the Ministerial Conference: Draft Cancun Ministerial Text (Second Revision), *supra* note 14, at A-1; *EU-US Joint Text on Agriculture*, *supra* note 11, at 1.2(iii); WTO, Negotiations on Agriculture: First Draft of Modalities for the Further Commitments, *supra* note 10, at 18.

4.4 The Peace Clause

The "peace clause" refers to the last-minute compromise of the Blair House Accord, by which the European Communities and the United States agreed to provide protection to agricultural subsidies against challenge under certain conditions.³¹³ According to Article 13 of the AoA, green box domestic support measures that are provided in compliance with the AoA are fully protected against unilateral countervailing action as well as multilateral challenge under the SCM Agreement and GATT 1994, including challenge under the non-violation nullification and impairment provisions of GATT Article XXIII:1(b), for the duration of nine years.³¹⁴ This immunity applies to blue box and *de minimis* domestic support as well, but with important modifications.³¹⁵ First, these two forms of support are countervailable, just like all other subsidies, the only difference being that members have to show due restraint in initiating investigations.³¹⁶ Secondly, their exemption from the SCM Agreement and the non-violation nullification and impairment provisions of GATT Article XXIII:1(b) is qualified by the requirement that such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year.³¹⁷

The peace clause is set to expire at the end of 2003, and, while a large majority of members do not have any problems with that, many desire to keep it.³¹⁸ This clause has thus become one of the most contentious issues in the current negotiations.³¹⁹ The European Communities leads the camp that wants to keep it;³²⁰ the Cairns Group and the United States lead the opposition which wants to abolish it.³²¹ In the eyes of the European Union, the peace clause is only "the logical corollary of the specific nature of the Agreement on Agriculture;"³²²

313. See WTO, Agriculture Negotiations: Backgrounder: Phase 1: The Peace Clause (Oct. 10, 2002), available at

http://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd13_peace_e.htm.

314. AoA, *supra* note 1, at art. 13.

315. See *id.*

316. See *id.*

317. *Id.*

318. See Richard H. Steinberg & Timothy E. Josling, *When the Peace Ends: The Vulnerability of EC and US Agricultural Subsidiaries to WTO Legal Challenge*, 6 J. INT'L ECON. L. 369, 371 (June 2003).

319. See *id.* at 372.

320. See AG TRADE NEWS, Oct. 25, 2002, at http://www.agricoop.org/weekly_report/October%2025.doc.

321. See *id.*

322. WTO, Summary Report on the Sixth Meeting of the Special Session Held on 22-23 March 2001, WTO doc. G/AG/NG/R/6, at 5 (Aug. 2, 2001), available at

for India, such a position is only indicative of a desire to “perpetuate the trade distortions which exist in global agricultural trade.”³²³

It is notable that the argument over the peace clause is looking more like an extension of the argument over the blue box. To the extent some countries want to maintain the blue box, they also want to keep the peace clause.³²⁴ The fact that the one was intended to be temporary, and the other not so, doesn’t seem to matter in the current negotiations. Indeed, although the peace clause applies to other forms of agricultural domestic support, and even export subsidies as well, the fact that blue box measures are used by only a few members indicates that these measures will be vulnerable to legal challenge more than others after the peace clause expires.

The modalities first draft did not mention the peace clause at all.³²⁵ Because the peace clause was designed from the outset as a temporary safety mechanism, this silence would lead to its termination by the end of 2003.³²⁶ The pre-Cancun draft agricultural framework put the peace clause as one of the many issues on which no agreement had been reached.³²⁷ Ominously, however, the Cancun draft stated that the peace clause “will be extended by . . . months.”³²⁸ Given the Cancun failure, this means that the peace clause will legally expire unless a decision is reached before the end of 2003. The brief final statement issued by the Cancun ministerial session scheduled a General Council meeting at the level of senior officials for December 15, 2003,³²⁹ which gave them only two weeks to “save the peace.” Whether the possible expiration of the peace clause will open the floodgates for agricultural disputes before the Dispute Settlement Body is yet to be seen.

http://docsonline.wto.org/gen_search.asp?searchmode=simple.

323. WTO, Statements by India, Sixth Special Session of the Committee on Agriculture 22-23 March 2001, WTO doc. G/AG/NG/W/176, at 2 (Apr. 11, 2001), *available at* http://docsonline.wto.org/gen_search.asp?searchmode=simple.

324. WTO, Summary Report on the Sixth Meeting of the Special Session Held on 22-23 March 2001, *supra* note 322, at 5.

325. *See generally* WTO, Negotiations on Agriculture: First Draft of Modalities for the Further Commitments, *supra* note 10.

326. *See* STEINBERG & JOSLING, *supra* note 318, at 370-71.

327. *See* WTO, Preparations for the Fifth Session of the Ministerial Conference: Draft Cancun Ministerial Text (Revision), *supra* note 13, at A-1.

328. *Id.* at A-4.

329. WTO, Draft Ministerial Statement, WTO doc. WT/MIN(03)/W/24 (Sept. 14, 2003), *available at* http://docsonline.wto.org/gen_search.asp?searchmode=simple.

V. CONCLUSION

The foregoing discussion has shown that agriculture is once again dictating the pace of progress in trade negotiations at the WTO. Interestingly, the sticking points of today are largely the same issues that immobilized the whole Uruguay Round process of negotiations over a decade ago. Nor is there any major change in the positions of the leading Uruguay Round players. Apart from the fact that developing countries are gaining strength in making their voices heard, the traditional alignment of forces which we had during the Uruguay Round is still more or less intact—the old protectionists and conservatives are still trying their best to conserve their protectionist policies, while the old liberalizers are still working hard for further and quicker liberalization. The latter group has boosted their positions by injecting into their argument the enduring cause of developing countries and their special interest in this sector. To this end, the old truths are being retold vehemently. The unfairness of OECD countries' export subsidies on the competitive position of developing countries, the exclusion of developing country agricultural products from developed country markets, the use of food aid as a morally-minded term to sugar-coat surplus disposal and "dumping" in developing countries regardless of its impact on domestic production are all being rehashed afresh. The emergence of the high-profile issue of cotton subsidies late in the negotiations has further boosted this aspect of the argument.

However, whatever governments may say in this respect, the issue about agriculture is one of principle. If the multilateral trading system claims to be based on any principle, it is fairness, transparency and equal opportunities for all on the basis of the economic law of comparative advantage. The current rules of agricultural trade are only an embodiment of sheer hypocrisy in global economic relations. The solution proposed under the Cancun draft ministerial declaration on cotton is the latest and most blatant expression of this hypocrisy.³³⁰ As one observer rightly put it, this is a situation in which "[t]he US uses subsidies to deprive poor countries of comparative advantage. Then it tells them they have to find other kinds of business."³³¹ This cannot continue in an institution that prides itself for being almost the only international economic organization in which the one-country, one-vote principle of democratic decision-making still rules.

330. WTO, Preparations for the Fifth Session of the Ministerial Conference, Draft Cancun Ministerial Text (Second Revision), *supra* note 14, at 6.

331. See de Jonquieres, *supra* note 53.

Indeed, in the face of an increasingly rights-conscious group of developing countries who are becoming more and more united to protect their interests, agriculture once again seems to be testing the very survival of the multilateral trading system. Soon after the Cancun setback, while African countries are questioning the credibility of the WTO,³³² the representatives of both the United States and the European Union were blaming the organization's decision-making process for most of the problems.³³³ United States trade representative Robert Zoellick compares the Cancun ministerial session to a United Nations General Assembly type of forum which is good enough only for making inflammatory rhetoric with no substantive result.³³⁴ He also underlines his country's commitment to pursue its liberalization agenda via bilateral and regional avenues, potentially undermining the WTO system.³³⁵ European Union trade commissioner Pascal Lamy, on his part, has made it clear that he is preparing proposals to "revamp" the WTO's "medieval" decision making procedures³³⁶—a suggestion that could imply the scrapping of its tradition of consensus and potentially even the fundamental one-country, one-vote principle enshrined in its "constitution."³³⁷ Either way, the WTO finds itself once more at the crossroads. Bilateralism and regionalism could be used as strategic tools to promote what the United States likes to call "competition in liberalization;"³³⁸ changing the WTO Constitution might make it easier to reach quick decisions. However, the essence of multilateralism will be lost in both cases.

332. See Gary G. Yerkey, *Support for WTO in Congress, Private Sector Wanes After Collapse of Cancun Trade Talks*, INT'L TRADE DAILY, Sept. 16, 2003, available at <http://www.investmentwatch.org/articles/itd16sep.html>.

333. See Press Release, USDA, Transcript of Final Press Conference, WTO Fifth Ministerial Meeting (Sept. 14, 2003), available at <http://www.usda.gov/news/releases/2003/09/0318.htm>.

334. See *id.*

335. See *Statement of Robert B. Zoellick: U.S. Trade Representative Before the House Comm. on Agric.*, *supra* note 82, at 2.

336. Nicola Smith, *Lamy: European Convention Must Not Forget Trade* (Feb. 10, 2003), at <http://www.euobserver.com/index.phtml?aid=9319>.

337. Pascal Lamy has been quoted as saying that "the principle of the permanent sit-in of 146 trade ministers in order to take a number of very detailed decisions ... is a theory that visibly does not work." Tobias Buck, *EU May Rethink Multilateral Trade Role*, FIN. TIMES, Sept. 16, 2003, available at 2003 WL 60578090. Peter Sutherland, former Director General of GATT and the WTO and current chairman of a WTO consultative board, agrees that "the time has clearly arrived for a serious look at the way the WTO functions." Peter Sutherland, *Cancun Was A Setback But Not a Tragedy*, FIN. TIMES, Sept. 18, 2003, available at 2003 WL 60578187.

338. *Statement of Robert B. Zoellick: U.S. Trade Representative Before the House Comm. on Agric.*, *supra* note 82, at 2.

Amid all this, the only sound approach, once again, seems to be a return to principle. The time taken in the negotiations, however long, is less important than the substantive content of resulting agreements. As far as agriculture is concerned, there can be only one standard by which to measure any such agreement—the extent to which its rules will be more fair to developing countries. Fortunately for the multilateral trading system, in agriculture, fair trade is synonymous with free trade. That is why agriculture is an issue of principle.