

International trade rules and the agriculture sector

Selected implementation issues



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by
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for the
Development Law Service
FAO Legal Office

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FOREWORD

The conclusion of the Uruguay Round of multilateral trade negotiations marked a turning point in the history of global trade relations. It ushered in the WTO, whose members agreed to fourteen substantive agreements, many of which specify the coverage and application of the more general provisions in the GATT. It also gave momentum to the process of further economic liberalization that is still underway. Whereas the GATT only covered trade in goods and excluded agricultural and textile products, the WTO covers trade in services and intellectual property rights, as well as trade in all goods, including agricultural and textile products. In addition, there has been effort to extend the WTO's reach into other trade-related areas such as investment, government procurement and trade facilitation.

Since the establishment of the WTO, there have been significant changes in the legal and institutional landscape of many developing countries. Some of these changes are a direct consequence of WTO obligations while others may have been merely inspired by those obligations or were part of ordinary legal reform processes in the respective countries. By and large however, whatever the motivation for trade-related legal reform, our experience in the FAO Legal Office has been that besides the substantial costs involved, there are many challenges to successful and meaningful legal and institutional reforms. Mere changes of legal texts are unlikely to automatically induce respective changes in administrative practice. Legal drafters must therefore be well aware of the existing legal and administrative culture and get a realistic appreciation of the resource constraints in the country - for inadequate resources certainly restrict the ability of implementing bodies to put new rules into practice.

This study is about the nature and extent of these trade-related legal and institutional reforms with a particular focus on those of direct relevance to the agricultural sector. In addition to the sectoral focus on agriculture, the study places distinct emphasis on the challenges of developing countries in the implementation of trade-related international obligations in the agricultural sector. No doubt, evidence has and continues to be gathered to show that trade does indeed have the capacity to increase the pace of economic development in the developing world. What is lacking, however, is a sustained analysis of the legal effects of those agreements at the domestic level. This would in turn be useful, in determining the requisite legal infrastructure, the necessary technical assistance package and the long-term

sustainability of the entire body of trade rules at the domestic level. Most importantly however, it will be useful for countries that are in the process of accession, first of all, to gain an appreciation of the extent of legal reforms they would be required to undertake and, secondly, to request and sequence technical assistance and other resources in the most efficient manner. This study seeks to fill that knowledge gap.

I would like to take this opportunity thank the various contributors to this legislative study. Melaku Desta contributed Part I, Chapter 2, Victor Mosoti Part I, Chapters 4, 5 and 6, Emmanuelle Bourgois Part I, Chapter 5, Ida Ngueng-Feze, Part I, Chapter 3, Ramesh Sharma and Lorenzo Cotula, Part I, Chapter 6, Jan Ceyskens, Part II, Chapter 1, Ambra Gobena, Part II, Chapter 2, and Charlotta Jull, Part II, Chapter 3. I wish to extend special thanks to Victor Mosoti and Ambra Gobena who compiled and edited the study. In addition, Victor initiated the study and guided the process of its preparation to fruition.

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ABBREVIATIONS

ACP	African, Caribbean and Pacific states
ADP	Anti-Dumping Agreement
AGOA	African Growth and Opportunity Act
AMS	Aggregate Measure of Support
AoA	Agreement on Agriculture
ARIPO	African Regional Industrial Property Organization
ASEAN	Association of South-East Asian Nations
CAC	Codex Alimentarius Commission
CARICOM	Caribbean Community and Common Market
CBD	Convention on Biological Diversity
CET	Common External Tariff
COMESA	Common Market for East and Southern Africa
CSD	Customs Services Department
CU	Customs Unions
EAC	East African Community
EIA	Economic Integration Agreements
EPA	Economic Partnership Agreements
EPC	Export Promotion Council
EPZ	Export Processing Zone
ETI	Ethical Trading Initiative
Eurep-GAP	European Retailers Protocol for Good Agricultural Practice
FTA	Free Trade Areas
GAP	Good Agricultural Practice
GATT	General Agreement on Tariffs and Trade
HACCP	Hazard Analysis & Critical Control Points
HCDA	Horticultural Crop Development Authority
HS	Harmonized Commodity Description and Coding System
IGAD	Intergovernmental Authority on Drought and Desertification
IPPC	International Plant Protection Convention
ISTA	International Seed Testing Association
ITC	International Tin Commission
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
LDC	Least Developed Countries
MFN	Most Favoured Nation
MRL	Maximum Residue Levels
MUB	Manufacturing-Under-Bond
NFIDCs	Net Food Importing Developing Countries

NT	National Treatment
OECD	Organization for Economic Cooperation and Development
OIE	Office International des Epizooties
RTA	Regional Trade Arrangements
SAARC	South Asian Association for regional Co-operation
SAP	Structural Adjustment Programs
SAPTA	South Asian Preferential Trade Agreement
SCM	Agreement on Subsidies and Countervailing Measures
SME	Small and Medium Enterprises
SPS	Agreement on the Application of Sanitary and Phytosanitary Measures
SSG	Special Agricultural Safeguard
STE	State Trading Enterprises
TBT	Agreement on Technical Barriers to Trade
TDCA	Trade, Development and Cooperation Agreement
TRIM	Agreement on Trade-Related Investment Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TRQ	Tariff Rate Quotas
UPOV	Union for the Protection of New Plant Varieties Conventions 1979, 1991
USAID	United States Agency for International Development
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

INTRODUCTION

There are divergent views on the role of law in economic development. What is clear however is that unambiguous laws together with well functioning institutions contribute to the requisite certainty and security to realise particular policy objectives. In promoting the agricultural sector, the law should not only reflect policy proposals geared towards greater productivity, but more concretely, it should support the creation of an enabling environment in order to realize these objectives. In this regard, it should provide the institutional basis for organized agriculture, including spelling out the formation of agricultural cooperatives, marketing boards and farmers associations. A sound legal framework is also important regarding land tenure and property rights, rural financing and collateral, bankruptcy, consumer protection and anti-competitive practices, all of which help to create an economic climate that is conducive to productive enterprise.

Membership of the WTO has generally prompted a number of economic, legal and institutional reforms at national level. When implemented, these internationally agreed disciplines designed to liberalise and facilitate trade between countries, can ultimately stimulate economic development. In the decade since the WTO came into existence, developing country WTO members and countries considering membership have often grappled with questions including the real costs of implementation of such WTO commitments, and on the "legal capital" and extent of the overall package of domestic reforms necessary for effective compliance.

Many important changes have taken place in the agricultural sector throughout the developing world over the past two decades, but particularly in the last ten years or so since the WTO came into existence. Many governments have implemented market reforms such as commodity and input price de-controls and extensively liberalized the domestic economic environment by dismantling existing trade restrictions and transferring to private players many of the functions previously undertaken by governments. It should be noted however, that by the early 1990s, many developing countries that had been beneficiaries of the World Bank's Structural Adjustment Programmes (SAP) had only minimal trade restrictions in place because a liberalized trade regime was one of the conditions that came with the SAP assistance. Alongside policy reforms have been institutional changes, often resulting in the divestiture of government-owned stakes in public enterprises and a reduced oversight role for governments generally. The motivation was and remains to increase

efficiency gains and minimise government expenditure in sectors or roles in which it has little added value, or in which such a role ends up being a hindrance to the flourishing of private enterprise.

Agriculture has always been a paradox in GATT-WTO history. On average, protectionism has increased in the agricultural sector while it has been significantly reduced or completely eliminated in most other sectors that have been the subject of multilateral negotiations, especially industrial goods. While the agricultural sector is taxed, sometimes quite heavily in many developing countries, and forms an important source of government revenue, in the developed world it remains the coveted beneficiary of large amounts of government expenditure in the form of subsidies and other support programmes. These payments, offered in support of a wide range of agricultural produce distort both trade and production. Underlining the need to do away with such distortions is the assertion that eliminating barriers to merchandise trade could result, according to the WTO Annual Report (2003), in "welfare gains ranging from US\$250 billion to US\$260 billion annually of which one third to one half will accrue to developing countries. The more rapid growth associated with global reduction in protection could reduce the number of people living in poverty by as much as 13 percent by 2015."

Beyond the Agreement on Agriculture (AoA) and the General Agreement on Tariffs and Trade (GATT), international agricultural trade involves other instruments that control the imposition of border measures, including the Agreements on Subsidies and Countervailing Measures (SCM), Customs Valuation, the Application of Sanitary and Phytosanitary Measures (SPS) and on Technical Barriers to Trade (TBT). Broader sectoral issues touching on agricultural productivity include the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), the Agreement on Trade-Related Investment Measures (TRIMs) as well as the Marrakesh Decision. Whereas this list entails a vast panoply of commitments for member states, this study aims to highlight the major aspects of some of the key ones with a detailed focus on the AoA and TRIPs.

The basic premise of this study rests on FAO's determination "to contribute towards an expanding world economy and ensuring humanity's freedom from hunger", espoused in its Constitution. As was recognised in the Rome Declaration on World Food Security of 1996, in today's globalized world, "trade is a key element in achieving world food security." In paragraph 12 of the Declaration of the World Food Summit: Five Years Later, FAO

members urged "all members of the WTO to implement the outcome of the Doha conference, especially the commitments regarding the reform of the international agricultural trading system ... given that international agricultural trade has a role to play, consistent with Commitment 4 of the World Food Summit Plan of Action, in promoting economic development, alleviating poverty and achieving the objectives of the World Food Summit, in particular in developing countries."

This study focuses on WTO rules in the area of agriculture, and the legal and institutional implications of these rules for members. In identifying the commitments to which WTO members are bound, it is clear that the ability of countries to comply with requirements varies widely. The nature and extent of legal and institutional reforms has not to date been extensively documented, particularly in the agricultural sector; yet it is an important quantification of the welfare gains from trade liberalization and an assessment of the practical operation of trade facilitation measures. If the assessment is carried out in the context of giving domestic effect to an international treaty to which a state is party, the legal obligations contained therein are the standards by which the law will be held to account. This study is an exercise in such an assessment - it analyses the principal obligations set out in select WTO Agreements relevant to agricultural trade and offers examples of how these standards are applied in various national legislations.

The study is structured so that the first part discusses the basic legal obligations contained in the WTO instruments, and a second part which provides a contextual analysis in the form of three case studies. The latter give a country blow-up of the issues and processes involved in amending legislation and offers an assessment of the degree of compliance to the commitments they have signed up to. After this introduction, the first chapter gives a targeted overview of the multilateral commitments relevant to the agricultural sector, with an emphasis on what the WTO Agreements mean for national laws and the domestic legal environment. It reflects the dominant theme and purpose of this legislative study, which is what membership means for the domestic legal frameworks of member states. Starting with a brief overview of the general role of the WTO in the agricultural trade context, the chapter sets the stage for the study introducing the key elements of the AoA, TRIPS and SPS Agreements which entail obligations for members. While giving an idea of the reform processes involved, it is by reference to the standards discussed briefly here that an assessment of national legislation and institutions can begin. Identifying what

exactly the terms of an international agreement demands for domestic application is half the battle. At this level, there is a lot of literature which analyses the scope of the agreements, specifically the more ambiguous provisions and that generate significant academic discussion.

The second chapter discusses the evolution of the AoA, being the primary international legal instrument for interstate trade relations in the agricultural sector. It traces its development from the Uruguay Round and concludes with a synopsis of the current provisions and possible trends following the Hong Kong Ministerial Conference. As the only sector-specific agreement, chapter three provides an understanding of why insufficient attention was seemingly paid to agriculture in the GATT, and how it was pushed to centre-stage at the Uruguay Round. It provides information on the origins, nature, structure, scope and obligations contained in the AoA, including a behind-the-scenes look at the drafting and negotiation process. Set against this context, it also includes the legislative implications of these rules for WTO members. For each of the three central pillars of the agreement the key concepts are laid out and problematic areas highlighted.

Seventy-five percent of all State Trading Enterprises (STEs) are found in the agricultural sector. For this reason alone, any discussion of the state of liberalization in the agricultural sector should of necessity include STEs. Chapter 4 discusses the controversies surrounding STEs and provides background on the legal problems and economic benefits associated with the different types of agricultural-sector STEs.

The chapters on "Interpretative Issues in Article 27(3)(b) of TRIPS" and on "Geographical Indications and Agricultural Trade" in the first segment of the study attempt an explanation of the precise nature of obligations created by the relevant WTO agreement. Chapter 4 uses decisions of WTO panels and the Appellate Body to enrich the explanation of the interpretive issues in TRIPS, article 27(3)(b), a much discussed but little understood aspect of the TRIPs Agreement for many developing countries. Following a brief look at the negotiation history and how it made its way onto the GATT agenda, chapter 5 presents the nuances in the language of the provision, particularly on the scope and form of *sui generis* protection.

Chapter 5, on geographical indications (GI) discusses the relevant international legal framework through the prism of the relevance of GIs to the marketability

of agricultural products. It highlights the different approaches to GIs protection in the EU and the US, as well as other countries.

Import surges can damage agricultural productivity, particularly fledgling businesses in developing country economies. Safeguard measures that are imposed on imports and provide temporary assistance to domestic industries are discussed in chapter seven. This chapter offers a conceptual analysis of import-surge related terms and phrases within the WTO framework that are economically and legally noteworthy, exploring in detail the relevant GATT provisions, and the Antidumping and Safeguards Agreements. This analysis is placed in context through illustrations of safeguard mechanisms as found in the national legislations of select CARICOM countries, the US and EU.

The three case studies in the second part of the study discuss trade-related legal and institutional reforms in three selected countries. They review the legislation in place, assessing compliance against international standards and describing the network of institutions that support the legal and policy trade framework. The similar structure of the case studies also facilitates comparison. All the three countries examined underwent market-based reforms for different reasons in the nineties.

The Kazakhstan case study adopts more of a legalistic approach while the Nepal chapter has an institutional focus; the Kenya case study falls between these two. The Kazakhstan case study expounds upon the process of modifying the domestic legal framework in line with WTO commitments necessary in order to accede to the organization - it notes the related steps and procedures, specific commitments and points for negotiation.

The Kenya case study sheds light on the domestic legal and institutional framework of a developing country with original membership and paints a picture of a country with more than ten years implementing experience. Agriculture's important role in the Kenyan economy is reflected in the priority given to this sector in its trade policy, and shows how developing countries similarly reliant on the contribution of agriculture are constrained by budgetary considerations in their implementation of measures and standards mandated by the WTO. The Nepal case study examined in chapter 3 looks at a recently acceded WTO member and highlights the trade relationships with its principal trade partner India, highlighting its vulnerability to shocks as a result of its heavy reliance on this partner and its dependence on few exports.

At its core therefore, this study is about developing countries, and the legal effects of agricultural trade rules on their economies. Broadly, the study seeks to build on the compelling argument for the full integration of developing countries into the multilateral trading system, and *a fortiori*, to make a case for meeting the development challenges of these countries.

PART I

BASIC LEGAL OBLIGATIONS

1.

WTO AGREEMENTS AND NATIONAL LEGISLATION

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I. INTRODUCTION

The conclusion of the Uruguay Round of multilateral trade negotiations was a turning point in the history of global economic relations. Besides ushering in the WTO (whose members agreed to fourteen substantive agreements, many of which specify the coverage and application of the more general provisions in the initial General Agreement on Tariffs and Trade (GATT)), it brought about a certain momentum to the process of further economic liberalization that continues to date.¹ Whereas the GATT only covered trade in goods and for the most part excluded agricultural and textile products, the WTO covers trade in services and intellectual property rights, as well as trade in all goods, including agricultural and textile products. In addition, there have been intense efforts to extend the WTO's reach into other areas such as investment, government procurement and trade facilitation. With the exception of trade facilitation over which WTO members have already agreed to negotiate, proposals for negotiations in the other areas have been met with stiff resistance from developing countries.²

The WTO, established in 1995 as a successor to the GATT, is easily one of the most studied and commented upon amongst the many inter-governmental institutions that in some way have an impact on economic development in recent times. It is charged with implementing a set of agreements, adopted by all its members in a "single undertaking", which create legally binding rights and obligations as between the members.

Over the past decade, there is evidence that international trade relations have indeed become much more legalized under the WTO, pursuant to the adoption of the Uruguay Round agreements and, in particular, the Dispute Settlement Understanding (DSU). The DSU ushered in a variety of reforms to the old GATT system, including greater clarity of rules, binding decisions,

¹ See *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments-Results of the Uruguay Round* 6, 6–18; 33 I.L.M. 1140, 1144–1153 (1994).

² See generally, Simon Evenett (ed). 2003. *The Singapore issues and the world trading system*. World Trade Institute and Swiss State Secretariat for Economic Affairs; Mosoti, V. 2003. Non-Discrimination and its dimensions in a possible WTO framework agreement on investment: reflections on the scope and policy space for the development of poor economies. *Journal of World Investment and Trade*, 4(6).

and a standing Appellate Body.³ This highly legalized WTO system applies to a much broader membership and subject coverage. Article 1(1) of the DSU spells out the reach of the dispute settlement system stating that the DSU "shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the 'covered agreements')." The Appellate Body in *Brazil-Desiccated Coconut*, defined "covered agreements" to "include the WTO Agreement, the Agreements in Annexes 1 and 2, as well as any Plurilateral Trade Agreement in Annex 4 where its committee of signatories has taken a decision to apply the DSU." It went on to state that "in a dispute brought to the DSB, a panel may deal with all the relevant provisions of the covered agreements cited by the parties to the dispute in one proceeding."⁴

From the 23 original members under the GATT, which had expanded to 99 members by 1979, the WTO now has 151 members. Soon, others like Russia, Saudi Arabia and a host of other countries from Sudan to Kazakhstan that are negotiating their accession might also be able to join. To a certain extent, the increase in numbers has been advantageous to developing countries despite the unique decision-making process of the WTO. It has been advantageous in the sense that they are becoming more assertive and in command of the issues under negotiation, and their demands cannot easily be wished away.⁵

Serious questions have been posed about trade liberalization, the WTO's *leit motif*, and its effects on poor economies. No doubt, enough evidence could be gathered to show that trade does indeed have the capacity to increase the pace of economic development in the poor world. Yet, trade should be about more than simply GDP and other esoteric economic

³ For a detailed discussion on the mechanics of dispute settlement in the WTO, see for example, Vermulst, E. and Driessen, B. 1995. An overview of the WTO dispute settlement process and its relationship with the Uruguay Round Agreements. *Journal of World Trade*, 29:136.

⁴ See *Brazil-Measures Affecting Desiccated Coconut*, (WT/DS22/AB/R)(1997) p. 13. Recent scholarship pegged on the premise that WTO law is only part of the *corpus* of wider public international law, suggests that a complainant can lodge or argue a dispute based on non-WTO law. See Pauwelyn, J. 2003. How to win a WTO dispute based on non-WTO law: questions of jurisdiction and merits. *Journal of World Trade*, 6: 997-1030, and Pauwelyn, J. 2005. The Transformation of World Trade. *Michigan Law Review*, 104.

⁵ See for example, Mangeni, F. 2002. *African influence at the WTO*. Study Commissioned by the Secretariat of the Common Market for Eastern and Southern Africa (COMESA). Lusaka.

calculations. It should be about the broader concerns of global welfare; it comes down to food security, and general wellbeing.

1.1 The WTO and domestic legal reforms

Legal commitments made by countries at the multilateral level typically have to be implemented through reforms to domestic law and national institutional or administrative structures. Sometimes such multilateral commitments constrain countries to effect particular changes to the existing national legal framework or to come up with laws where none exist.

Good examples of specific multilateral commitments of this nature in the agricultural sector would be article 27(3)(b) of the TRIPS Agreement, which makes it mandatory for WTO members to provide for a system of plant variety protection; the export subsidy reduction commitments in article 9 of the Agreement on Agriculture; or the requirement that agricultural marketing boards, generally falling under the definition of "state trading enterprises" in the context of article XVII of the General Agreement on Tariffs and Trade 1994, carry out their purchases (for example of farm inputs), in a non-discriminatory manner.

The implementation of WTO commitments has both legal and institutional dimensions, which means that a body of effective laws has to be developed and implemented. Both of these are heavily involving and expensive. The drafting of new laws or the revision of existing ones, usually quite extensive, can often be undertaken with the expert assistance of competent international organizations or through bilateral arrangements with trading partners.

Yet, laws are not enough. Implementation structures have to be erected. To take one example, it was estimated eight years ago by UNCTAD that it would cost US\$1.5 million to draft the necessary laws and develop the enforcement capability for the TRIPS Agreement in Tanzania.⁶ Other examples cited in the UNCTAD study include: the cost for Egypt of US\$1.8 million to train staff administering the IPR laws; the cost for India US\$5.9 million to modernize its patent office; and the cost for Bangladesh US\$250 000 one-off in addition to the US\$1.1 million required annually to

⁶ UNCTAD. 1996. *The TRIPS Agreement and developing countries*, p. 21. UNCTAD/ITE/1.

draft the IPR laws and develop the enforcement capability.⁷ There are other agreements with similarly onerous requirements.

II. RELEVANT MULTILATERAL TRADE COMMITMENTS

2.1 The Agreement on Agriculture

Leading commentators agree that agriculture was not in fact exempt from the GATT, (noting that the view that agriculture was exempt from the GATT is not correct, and that it however reflects the "unfortunate reality that agriculture has been the most difficult part of international trade to bring under the international treaty rule discipline of the GATT" ⁸) and that it posed the most difficult "problems for the architects of the international trading system from the earliest days of planning for the post-war era."⁹ It was therefore treated as an exceptional case. According to Melaku Desta:

"... when governments got together to negotiate for multilateral liberalization of international trade, agricultural products were considered a special case befitting the status of an exception rather than the rule. This was reflected in the content of the first drafts as well as the final versions of both the Havana Charter as well as the General Agreement. Two particularly important trade restrictive and protective measures generally outlawed by the General Agreement were explicitly, albeit conditionally, permitted for agricultural products. They concern the use of quantitative restriction and export subsidies – the two traditional weapons used by governments to protect domestic producers from foreign competition in the domestic market and to artificially enhance the competitive advantage of their producers in foreign markets, respectively. What is more, even in areas where no such express exceptions were provided, countries often ignored the rules more in the area of agriculture than elsewhere."¹⁰

The Agreement on Agriculture (AoA) is one of the less auspicious results of the Uruguay Round - measured against initial aspirations of what it should

⁷ Id.

⁸ Jackson, J. 2000. *The world trading system* p. 313. MIT Press.

⁹ Josling T., Tangermann, S. and Warley, T.K. 1996. *Agriculture in the GATT*, p. 11. Macmillan Press.

¹⁰ See Desta, M.G. (2002), p. 6.

have achieved, simply because it did not go far enough. This agreement is extensively examined in chapter 2. In brief terms however, the agreement deals with international trade in agricultural products along four main themes: First, as provided for in article 4(2) of the AoA, members agreed to phase out non-tariff barriers, including quotas, by converting them into their tariff equivalents. This process, known as "tariffication" is a central feature of the market access pillar of the agreement, though there have always been complaints that tariffication for some countries was done in a manner to yield overly exaggerated tariffs. In their schedules, countries also negotiated minimum concessions for specific products, proposed tariff reductions some products, and tariff bindings for all agricultural products. To emphasize the linkages between the GATT and the AoA, a WTO panel has interpreted a violation of article 4(2) of the AoA as a violation of GATT, article XI. In *Korea – Various Measures on Beef*, the panel held, with respect to a certain practice of the Korean state trading agency for beef imports, as follows: "when dealing with measures relating to agricultural products which should have been converted into tariffs or tariff-quotas, a violation of article XI of GATT and its Ad Note relating to state-trading operations would necessarily constitute a violation of article 4(2) of the Agreement on Agriculture and its footnote which refers to non-tariff measures maintained through state-trading enterprises."¹¹

Secondly, the agreement contains commitments on four broad categories of domestic support, with the general requirement being that, unless exempted, such domestic support measures should be reduced over time. These reduction commitments are included in the members' schedules and form an integral part of the binding commitments under the AoA. A "Green Box" of measures exempt from these commitments such as domestic food aid, decoupled income support, and social support programmes, is included in Annex 2 to the AoA. These measures are described as those that "... have no, or at most minimal, trade distorting effects or effects on production."¹² Members also agreed on the rather complex concept of "Aggregate Measure of Support" (AMS) for calculating the total extent of the domestic support programmes and their reductions over a period of time.

Thirdly, the agreement focuses on export subsidies with a series of basic obligations on the lowering of export subsidies over a period of time. Article 9(1) specifies the export subsidies that are subject to reduction

¹¹ WTO Doc. WT/DS161/R, Panel Report on *Korea – Various Measures on Beef*, para. 762.

¹² See paragraph 1 of Annex 2 to the AoA.

commitments, and states that they include "... the provision by governments or their agencies of direct subsidies, including payments-in-kind, to a firm, to an industry, to producers of an agricultural product, to a cooperative or other association of such producers, or to a marketing board, contingent on export performance." Various parts of this provision have been the subject of interpretation by WTO panels and the Appellate Body. In its ruling in the *Canada - Dairy* case, the panel erroneously determined that "payments-in-kind" were *per se*, direct subsidies. In an appeal, the Appellate Body clarified that "where the recipient gives full consideration in return for a 'payment-in-kind' there can be no 'subsidy', for the recipient is paying market-rates for what it receives." Stating what it understood by 'payment-in-kind' and laying the interpretive rule, the Appellate Body went on to say:

"In our view, the term 'payments-in-kind' describes one of the forms in which 'direct subsidies' may be granted. Thus, article 9(1)(a) applies to 'direct subsidies', including 'direct subsidies' granted in the form of 'payments-in-kind'. We believe that, in its ordinary meaning, the word 'payments', in the term 'payments-in-kind', denotes a transfer of economic resources, in a form other than money, from the grantor of the payment to the recipient. However, the fact that a 'payment-in-kind' has been made provides no indication as to the economic value of the transfer effected, either from the perspective of the grantor of the payment or from that of the recipient. A 'payment-in-kind' may be made in exchange for full or partial consideration or it may be made gratuitously. Correspondingly, a 'subsidy' involves a transfer of economic resources from the grantor to the recipient for less than full consideration ... The panel erred in finding that 'a determination in the instant matter that 'payments-in-kind' exist would also be a determination of the existence of a direct subsidy.' The panel should have considered whether the particular 'payment-in-kind' that it found existed was a 'direct subsidy'. Instead, because the panel assumed that a 'payment-in-kind' is necessarily a 'direct subsidy', it did not address specifically either the meaning of the term 'direct subsidies' or the question whether the provision of milk to processors for export under Special Classes 5(d) and 5(e) constitutes 'direct subsidies'."¹³

¹³ WTO Doc. WT/DS103/AB/R, Appellate Body Report in *Canada - Dairy*, paras. 87 and 88.

In *Canada - Dairy*, the meaning of "governments or their agencies" was also interpreted:

"According to Black's Law Dictionary, 'government' means, *inter alia*, '[t]he regulation, restraint, supervision, or control which is exercised upon the individual members of an organized jural society by those invested with authority'. This is similar to meanings given in other dictionaries. The essence of 'government' is, therefore, that it enjoys the effective power to 'regulate', 'control' or 'supervise' individuals, or otherwise 'restrain' their conduct, through the exercise of lawful authority. This meaning is derived, in part, from the functions performed by a government and, in part, from the government having the powers and authority to perform those functions. A 'government agency' is, in our view, an entity which exercises powers vested in it by a 'government' for the purpose of performing functions of a 'governmental' character, that is, to 'regulate', 'restrain', 'supervise' or 'control' the conduct of private citizens. As with any agency relationship, a 'government agency' may enjoy a degree of discretion in the exercise of its functions."¹⁴

Fourthly, the AoA contains the famous peace clause at article 13, which requires that governments exercise due restraint for the first nine years of the agreement from taking domestic countervailing duty proceedings or initiating WTO dispute settlement proceedings, regarding any measures they may consider challengeable. Lastly, the AoA provides linkages at article 14 to the SPS Agreement which addresses health standards and safety conditions regarding health risks from plant or animal-borne pests or diseases, additives or other disease-causing organisms in foods, beverages, or feed.

2.2 The TRIPs Agreement

The primary objective of the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) is the removal of any trade-restrictive domestic intellectual property measures. Such measures could be laws, regulations, policy positions or their manifest implementation through administrative action. (It is interesting to note in this context, article 6(2) of the Dispute Settlement Understanding which states that any complaining

¹⁴ WTO Doc. WT/DS103/AB/R, Appellate Body Report on *Canada – Dairy*, para. 97.

party should "identify the specific *measures* at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." In WTO law, a "measure" usually refers to some type of governmental action, although the Appellate Body has held that certain private actions could be attributable to governments. In the *Japan - Agricultural Products II* case, the Appellate Body interpreted the term "measure" (in relation to Annex B of the *SPS Agreement*) by listing examples of "measures" to include "laws, decrees and ordinances". Further, the Appellate Body stated that the term could refer to all "other instruments which are applicable generally and are similar in character to the instruments explicitly referred to".¹⁵ The *Japan - Film* case dealt with the issue of private actions that qualify as "measures" within the meaning of article 6(2) of the DSU. The panel held: "As the WTO Agreement is an international agreement, in respect of which only national governments and separate customs territories are directly subject to obligations, it follows by implication that the term *measure* in article XXIII:1(b) and article 26(1) of the DSU, as elsewhere in the WTO Agreement, refers only to policies or actions of governments, not those of private parties. But while this 'truth' may not be open to question, there have been a number of trade disputes in relation to which panels have been faced with making sometimes difficult judgments as to the extent to which what appear on their face to be private actions may nonetheless be attributable to a government because of some governmental connection to or endorsement of those actions."¹⁶

In its preambular language, the TRIPS Agreement calls on all WTO members to provide "effective and adequate" intellectual property rights (IPRs),¹⁷ and to ensure that these IPRs do not amount to trade restrictions in themselves. In the *India - Patents* case, the panel observed the "effective and adequate" IPRs protection objective of TRIPS in relation to article 70(8)(a) thus: "The panel's interpretation...is consistent also with the object and purpose of the TRIPS Agreement. The Agreement takes into account, *inter alia*, "the need to promote effective and adequate protection of intellectual

¹⁵ See *Japan - Measures Affecting Agricultural Products*, WT/DS76/AB/R (1999), paras. 126–129.

¹⁶ See *Japan - Measures Affecting Consumer Photographic Film* (WT/DS44/R) (1998), paras. 10–52.

¹⁷ See Trachtman, J.P. 2002. The boundaries of the WTO: institutional linkage: transcending "trade and ..." 96 *American Journal of International Law*, 77:78 (observing that one of the primary reasons why the United States supported the negotiations on the TRIPS Agreement was to ensure that countries would enhance the protection they gave to intellectual property rights within their domestic laws).

property rights."¹⁸ Article 27(1) in particular compels WTO members to create domestic legal frameworks that allow for patent protection of inventions from all fields of technology as long as they meet the basic substantive conditions for patentability: that is, the inventions must be novel, involve an inventive step and be capable of industrial application.¹⁹ These three criteria are not defined in the TRIPS Agreement. Hence, their precise meaning is left to each WTO member. According to Watal, no effort was even made to arrive at a definition or harmonization during the Uruguay Round negotiations. For a comprehensive discussion of the approach of the European and American approaches see chapter 6.

Articles 3 and 4 of the TRIPS Agreement require WTO members not to employ discriminatory measures against IPRs-holders based on their country of origin, on the field of technology of the invention or on whether the resulting products are local or foreign.²⁰ Non-discrimination, that is, national treatment and most-favoured-nation (MFN) treatment, is not unique to the TRIPS Agreement, but rather is one of the very central pillars of the international trading system. The interpretation of when a measure flouts the non-discrimination rule in WTO law is anything but easy. It is an issue that panels and the Appellate Body have struggled with despite the long history of the provision and its importance particularly in the area of trade in goods. Regarding IPRs, it has also been the subject of panel decisions. In the *Canada–Pharmaceutical Patents* case,²¹ the panel was emphatic that "discrimination" in article 27(1) is a negative term whose meaning goes beyond simple "differentiation" between national and foreign IPRs protection or their beneficiaries. The message that the panel was putting across was therefore that a WTO member that wishes to use a discriminatory or IPRs "differentiation" measure, can do so as long as there is a legitimate regulatory reason. Put simply, the panel wanted to be clear that regulatory policy space is not constrained by the requirement for non-discriminatory policies. The impact of WTO agreements on domestic regulatory policy space has long been a concern for developing countries. Recently however, it

¹⁸ See *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products* (WTO Doc. WT/DS50/R) (September 1997), para 57.

¹⁹ See Watal, J. 2001. *Intellectual property in developing countries* p. 90. Kluwer Law International.

²⁰ See articles 3 and 4 of the TRIPS Agreement.

²¹ See *Canada – Patent Protection of Pharmaceutical Products*, Complaint by the European Communities (WTO Doc. WT/DS/114).

has been raised more emphatically, and is increasingly linked to the concept of special and differential treatment.²²

Beyond the bold call for patent protection in article 27(1) of the TRIPS Agreement, some exceptions exercisable at the option of WTO members are provided. Article 27(2) excludes "inventions the commercial exploitation of which might be contrary to *ordre public* or morality."²³ Article 27(3)(a) excludes "diagnostic, therapeutic and surgical methods for the treatment of humans or animals"²⁴ while article 27(3)(b) excludes plants and animals, but with many significant qualifications and exclusions, which we discuss later. It leaves it up to the individual WTO members to decide which of the options to exercise. Should they choose, they may exclude all or some of the identified materials from protection. This 'option flexibility' was included in the TRIPS Agreement in recognition of the differences in domestic legal systems regarding what is or is not excluded from protection. United States patent law for example grants protection to "whoever invents or discovers any new and useful process, machine, manufacture, or composition of nature, or any new and useful improvement thereof."²⁵ This broad potential scope may be contrasted with the European approach.²⁶ Articles 52 and 53 of the *European Patent Convention* expressly exclude from protection any "discoveries, methods of human treatment, inventions the exploitation of which would be contrary to morality, and plant and animal varieties."

By dint of article 27(3)(b), most developing countries committed themselves to an entirely novel set of IPR obligations because the vast majority of them did not provide for a system of plant varieties protection prior to the coming into force of the WTO Agreement. Llewelyn notes, that in contrast, for developed countries the TRIPS provision was simply "a restatement of

²² See Werner, Corrales-Leal *et al.* 2003. *Spaces for development policies: re-visiting special and differential treatment*. ICTSD (available at www.ictsd.org).

²³ The TRIPS Agreement does not define the term "*ordre public*." See Arckermann, T.G. 1997. Disorderly loopholes: TRIPs patent protection, GATT and the ECJ. *Texas International Law Journal*, 32: 489, 495 (stating that *ordre public* originated in French law and is related to the concept of public policy).

²⁴ For a discussion on the patenting of medical procedures such as surgery techniques see, Judge, L.R. 1997. Issues surrounding the patenting of medical procedures. *Santa Clara Computer and High Technology Law Journal*, 13:181, 203.

²⁵ See 35 USC § 101.

²⁶ See Van Overwalle, G. 1999. Patent protection for plants: a comparison of American and European approaches. *Journal of Law and Technology*, 39:143–194.

existing intellectual property practice."²⁷ Citing evidence of deliberations on what took place in Europe for example in the 1950s on how to protect the results of plant breeding activity, and those that took place later on about the *European Union Directive on the Legal Protection of Biotechnological Inventions*, Llewelyn concludes that Europe has had a long history of robust debate and enforcement of plant variety protection. This is in stark contrast to the situation in much of the developing world where there was "no history of protecting plant material", and which had had "no equivalent opportunity to decide whether plant varieties should indeed be protected."²⁸ As evident from the incorporation of a review sub-clause in article 27(3)(b), the framers of the agreement anticipated the challenges ahead, particularly because of the absolute "shall" requirement in the provision and the relatively short implementation periods required. It was foreseeable first, that in their haste to comply, on the pain of trade sanctions, developing-country WTO members that did not have such an IPRs system may have been compelled to adopt systems of protection that were against their prospects and priorities in enhancing agricultural productivity, food security and other national policy interests.²⁹ Secondly, given the key players that had been involved in the negotiations and the underlying business interests, it was not difficult to imagine a situation where developing countries in particular would be under pressure to borrow or be compelled to follow legislative models from their more developed trading partners, or ratchet up the level of protection afforded beyond that required in the TRIPS Agreement. Now, with the wisdom of a decade's experience in implementing TRIPs, all of these concerns have indeed come to pass.

Article 27(3)(b) of the TRIPS Agreement makes it mandatory for WTO members to provide for the protection of plant varieties through patents, an effective *sui generis* system, or a combination thereof. This *sui generis* option provides valuable policy space for developing countries to draft national legislation that accords with their national agricultural development priorities

²⁷ See Llewelyn, M. 2003. *Which rules in world trade law – patents or plant variety protection?* p. 306. Cottier, T. and Mavroidis, P. *Intellectual property: trade competition and sustainable development*. The World Trade Forum Vol. III University of Michigan Press.

²⁸ Id.

²⁹ See United Nations Conference on Trade and Development (UNCTAD). 1996. *The TRIPS Agreement and developing countries*. No. 25, U.N. Doc. UNCTAD/ITE/1 (stating that developed countries were the main beneficiaries of the disciplines in the TRIPs Agreement); cf. Hamilton, M. 1996. The TRIPS Agreement: Imperialistic, Outdated, and Overprotective. *Vanderbilt Journal of Transnational Law*, 29: 613, 614–20 (in which developing countries liken the TRIPs Agreement to imperialism).

and that at the same time meets their WTO commitments. The coming into force of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) will inspire countries to prepare laws to protect plant varieties and farmers rights. This inspiration should come from the fact that under patents, farmers would be prohibited from using seeds from patented varieties without the consent of the patent holder. As seeds saved by farmers and exchanged among them can account for up to 80/90 percent of the total seed requirements in developing countries, a patent system would indeed constrain subsistence farming and imperil the realization of food security. Workable *sui generis* systems are therefore a priority.

How do countries go about implementing their obligations in article 27(3)(b)? This is a question that may appear obvious but often one that many under-resourced developing countries grapple with. A number of considerations need to be borne in mind before a decision on what to do is actually made. First, at the policy level, an evaluation of the nature and size of the domestic seed industry, meaning seed production, certification, supply, trade and marketing, and the value and potential of the plant breeding programs will need to be made. The seed industry, the resource poor farmers who save seed from season to season, and the plant breeders are usually most affected by legislative changes in the manner of protection of plant varieties.

Second, again at the policy level, a clear determination of the national development goals, including prospects for the development of plant breeding programs, the biotechnology sector, the need for foreign direct investment and other related concerns. Third, the policy makers will need to consider the diplomatic implications of aligning national legislation with certain international agreements. In multilateral trade negotiations at the WTO, the issue of alliances is important. It is the only way to command clout and influence the evolution of trade policy for poor economies. Hence, the country will need to consider the kinds of diplomatic links and alliances it may need in the long-run, and therefore make an effort not to undermine them through ill-advised legislation. Fourth and most importantly, an evaluation of what options there are and their implementation costs, will be necessary. This should be done in a comprehensive and accurate manner. Often, such costing would include setting up an entirely new institutional mechanism, with skilled legal and technical personnel, infrastructure and

laws to back it up. Given the heavy costs of implementing IPR laws,³⁰ some commentators have often advised poor countries to set up regional institutions, or to use existing national institutions such as Attorney Generals' offices.

Once the preliminary policy decisions are made, the next step is to consider the method of implementation. In accordance with article 1(1) of TRIPS, WTO members are "free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice." To a large extent, this depends on the legal system of the country at issue. In this regard, there are two main legislative options. The first is a relatively short statute that incorporates the TRIPS Agreement into the laws of the country, giving it the force of domestic law. Regardless of the legal system, this is never a good option to take because the TRIPS Agreement is a framework set of minimum standards that involves options, and presupposes further action.

With particular regard to article 27(3)(b), such a statute would inevitably need to be accompanied by legislation that indicates the choices that the country made in terms of the method of plant variety protection, and it will also have to deal with the administrative issues. A second approach is a comprehensive statute that sets out a series of clear objectives on the protection of IPRs. It would also spell out what IPRs and obligations are protected, the scope and exceptions of protection, and the procedure for enforcement, and remedies available in the event of infringement.

Related to this overall process of implementation, countries have to specifically avail themselves to the issue of how they will deal with the requirement of non-discrimination, meaning the national treatment and Most-Favoured-Nation requirements obligations. The straightforward way is simply by a rigorously neutral drafting and practical application of IPR legislation. For the legal draftsman, compliance legislation would need to be drafted in such a way that first, it does not predicate the granting of protection on nationality, or indeed refer to the nationality of a potential right-holder, and second, that it does not grant any favours, privileges or immunities to the nationals that it does not give to other applicants or right-holders.

³⁰ See UNCTAD. 1996. *The TRIPs Agreement and Developing Countries*, UNCTAD/ITE/1.

National treatment in the TRIPS Agreement, unlike its equivalent provisions in agreements on trade in goods where it applies to like products, refers to the treatment that individual nationals receive in the country in which they are applying for IPR protection.

As explained earlier, MFN yields a multilateralizing effect for rights accorded to a WTO member's nationals, in the sense that it extends those rights to others. There are a few exceptions to the MFN requirement in the TRIPS Agreement. For example, it does not apply to benefits accorded nationals of other countries under agreements for general judicial assistance or law enforcement, and international agreements on IPR protection that predate the TRIPS Agreement, meaning those that entered into force prior to 1 January 1995. Such IPR agreements should be notified to the TRIPS Council and they must "not constitute arbitrary or unjustifiable discrimination against nationals of other members."³¹

There has been a tremendous amount of legal drafting and institutional changes in keeping with the commitments made under the TRIPS Agreement. For instance, Zambia is currently amending its legislation on intellectual property in this regard for example by increasing the lifespan of a patent from 16 to 20 years. In addition, a new Plant Varieties Protection Act in compliance with article 27(3)(b) is under consideration by the Seed Control and Certification Institute. All the necessary changes are expected to be completed by January 2006.

In terms of the implementing institutional structure, the Patents and Companies Registration Office, which is part of the Ministry of Commerce, Trade and Industry, executes most of the Zambian industrial property laws. India, the world's largest grower of tea, enacted the Geographical Indications Act in September 2003. The new law protects, among other GIs, the popular "Darjeeling Tea". To protect this mark of quality, the Indian Tea Board has spent approximately US\$200 000 in the last four years on legal and registration expenses – hiring an international watch agency and fighting infringements in overseas jurisdictions. This does not account for administrative expenses including manpower working on the job in the Tea Board, the cost of setting up monitoring mechanisms, software development and other implementation related costs.

³¹ Article 4(d), TRIPs Agreement.

2.3 The SPS Agreement

The marketability of agricultural products depends on the producer's ability to meet the expectations of the consumer. This applies both for the domestic and export markets. Productivity, product standards and export competitiveness in general are subject to various hazards, be they human-induced such as deliberate food contamination and wars, or naturally occurring ones such as bad weather, diseases or pests. Sanitary and phytosanitary measures are applied in order to lower or eliminate the risk posed to human, animal or plant life or health by pests, diseases, various food additives or contaminants. These measures are hence closely related to agricultural productivity and profitability.

The commencement of negotiations on an agreement to discipline the application of sanitary and phytosanitary measures during the Uruguay Round was directly linked to the expected outcome in agriculture negotiations. As the negotiations on agriculture progressed, and negotiators became confident that non-tariff measures would be dealt away with and replaced by bound tariffs, certain GATT Contracting Parties were fearful that sanitary and phytosanitary measures would be used as disguised barriers to their agricultural exports. This was the major impetus behind the negotiations for the SPS Agreement. Hence, the SPS Agreement and the Agreement on Agriculture are complementary.

Prior to the coming into force of the SPS Agreement, the "Standards Code" negotiated during the Tokyo Round as the Agreement on Technical Barriers to Trade, covered all SPS and related measures. This Agreement was revised and strengthened during the Uruguay Round, and now covers all measures except for those specifically covered under the TBT Agreement. Both agreements seek to define and expand the scope of protective measures under GATT, article XX(b). GATT, article XX(b), provided that border measures to protect the health and safety of people, animals and plants which inhibit trade could be deemed GATT-consistent as long as they were not applied in a discriminatory and trade restrictive way. This provision is still part of GATT-WTO law although it has long been considered too wide and imprecise, hence the SPS Agreement. Effectively, and in the light of the General Interpretive Note,³² the more stringent SPS Agreement provisions now trump the health exception in GATT, article XX(b).

³² See *Agreement Establishing the World Trade Organization*. Annex IA, General Interpretive Note.

2.3.1 The scope of the SPS Agreement

The intent of the SPS Agreement is to guide WTO members in the setting of health standards in a way that is least trade-restrictive. In the event of doubt as to the legality or proportionality of an imposed measure, the agreement provides guidance on how to determine whether a measure is primarily a barrier to trade or primarily for health protection. The agreement disciplines what are popularly known as "quarantine measures", meaning all those border control measures necessary to protect human life or health and animal or plant life or health. Sanitary measures relate to human or animal health and phytosanitary measures relate to plant health. The agreement recognizes the sovereign right for WTO members to take measures that may be trade restrictive for the sake of protecting the life or health of people, animals and plants. It clarifies which factors should be taken into account when imposing any such protective measures.

The SPS Agreement aims at ensuring food safety and animal and plant health protection. Within this scope, it covers products, processes and production methods. Consequently, the agreement makes it mandatory that certain sanitary standards be adhered to in the food production process. These sanitary standards apply both to in-country food products and those that have been imported. The key trade law principle of non-discrimination as between foreign suppliers applies, and any derogation thereof must be justified on the basis of prevailing animal and plant health conditions in that country. In brief therefore, the SPS Agreement applies to any measure, which directly or indirectly may affect international trade and which has the following objectives: the protection of human or animal life or health from risks arising from additives, contaminants, toxins or disease-causing organisms in the food; the protection of human life from plant-borne or animal-borne diseases; the protection of animal or plant life from the introduction of pests, diseases or disease-causing organisms; the protection of a country from damage caused by entry, establishment or spread of pests, commonly called "invasive species".

The most trade distortive SPS measures are usually imposed on agricultural products. Such measures could be, for instance, certification procedures, quarantine regulations, labelling, setting guidelines on minimum pesticide residues, requiring certain product or process criteria or the use of only certain prescribed food additives.

In general, WTO members are allowed to impose SPS measures as long as they are backed by scientific evidence. However, there is a caveat to the effect that such trade measures must not be any more trade restrictive than is necessary to protect health and that they should not arbitrarily or unjustifiably discriminate between members where identical or similar conditions prevail. Further, such SPS measures should not amount to a disguised trade restriction. As much as possible, WTO members are encouraged to base their SPS Measures on international standards, guidelines and recommendations.

2.3.2 Country obligations under the SPS Agreement

Quite unlike the Agreement on Agriculture, the SPS Agreement does not require countries to formulate any quantitative and legally binding schedules of concessions. The agreement is simply a set of legally binding rules, principles and minimum standards for WTO members to ensure that any SPS measures they impose are justified and backed by sound science, and that they do not constitute a barrier to international trade. The SPS capability of a country comprises of institutional, regulatory and technical aspects. Hence, complying with the SPS Agreement requires an enforceable legislative framework, adherence to standards, inspection and certification systems, monitoring and surveillance systems, effective management frameworks, trained and competent staff, well equipped laboratories, and well-defined and effective communication channels between the various players. For acceding countries, the WTO has prepared a document, Checklist of Illustrative SPS and TBT Issues for Consideration in Accessions (WT/ACC/8) (annexed to the paper), which points out the particular areas in respect of which information is required for purposes of discussions in the Working Parties.

2.3.3 The main features of the SPS Agreement

(a) Harmonization

WTO members are at liberty to set whatever human, plant and animal health and safety standards they may consider appropriate. The SPS Agreement however encourages harmonized standards through the "establishment, recognition and application of common sanitary and phytosanitary measures by different Members." The agreement specifically refers to three international standards-setting bodies; the FAO/WHO Codex Alimentarius

Commission, the Office International des Epizooties (OIE), and the International Plant Protection Convention (IPPC).

These three have observer status in the WTO SPS Committee. In general, developing countries are taking an increasingly active role in the work of the three bodies. Efforts are being made to support this. In particular, the FAO/WHO Codex Alimentarius Commission launched, in February this year, a trust fund to assist developing countries to participate in its work. The fund's objectives include strengthening "the capacity of developing countries and countries with economies in transition to build strong and compatible food control systems through collegial exchanges, knowledge transfer and professional development through the Codex Alimentarius Commission and its committees and task forces." The fund will also reinforce collaborative national Codex structures and stakeholder participation in all recipient countries, and support the identification of new national delegates to Codex committees, task forces and governance meetings, and reinforce their participation over a 12-year period.

The IPPC, housed within FAO, develops international plant import health standards, mainly on quarantine pests, basic principles governing phytosanitary laws and regulations, and harmonized plant quarantine procedures. The IPPC guidelines for pest risk assessment provide a scientific basis for governments to evaluate risks from imports. The OIE, based in Paris offers international animal health standards and procedures. Its manuals and guides are updated regularly taking into account advancements in scientific research. The OIE has also developed methodologies for animal disease risk assessment.

Guidelines, standards or principles developed by these organizations are voluntary. Hence, they are not legally binding in and of themselves. However, the legal effect of their being referred to in the SPS Agreement is that any WTO member that adopts these standards is presumed to be in full compliance with the relevant SPS Agreement commitments.³³ Members remain free to formulate their own standards of protection, perhaps even

³³ The legal status of the standards issued by the Codex Commission was directly addressed in a WTO decision not too long ago. In *European communities - trade description of sardines*, (WT/DS231/R, delivered on 29 May 2002, WT/DS231/R/Corr.1.) both the panel and the Appellate Body held that Codex Stan 94 was a "relevant international standard" within the meaning of Article 2.4 of the TBT Agreement. No one would doubt that a similar holding would have been the result in relation to the SPS Agreement.

more stringent than the internationally accepted standards. In this case, scientific justification will be necessary. Article 5 of the SPS Agreement regulates the situation when a member decides to adopt standards of protection that deviate from international standards.

(b) Equivalence

Members can usually negotiate at a bilateral or regional level, the mutual recognition of standards if they are deemed to be "equivalent". In these circumstances, the burden to demonstrate "equivalence" lies with the exporting country. For members, equivalent standards have to be notified to the WTO Secretariat.

(c) Risk assessment

The SPS Agreement requires that members should impose SPS measures only after an evaluation of the actual risks involved. Countries are at liberty to either use international standards to justify SPS measures or to conduct their own risk assessment in order to evaluate the risks and their possible consequences. Similar levels of risk should attract similar levels of protective measures. The agreement allows members to take precautionary measures in the case of an emergency and when sufficient scientific evidence does not exist to support definitive measures. However, effort should be made within a reasonable period to seek any additional information necessary for a more objective risk assessment.

(d) Transparency

This is a major obligation under the SPS Agreement. Each WTO member must establish or designate a national central government authority as responsible for the implementation of the notification procedures. Any new sanitary or phytosanitary law or regulation, or revision thereof, that may restrict trade and that differs from international standards has to be notified to the WTO Secretariat. These should be sent, in standard format, prior to the date of entry into force, so that other WTO members can react to them. Every WTO member is also required to set up a "national enquiry point", an office that will provide information to trading partners in the national laws and regulations on food safety and animal and plant health. This office will also have information on any equivalence agreements, risk assessment procedures and decisions. In effect, the office should be staffed by officers

who can answer any reasonable question on the SPS Agreement and its implementation in the country, and also provide copies of national legislation or revisions and any other relevant documentation.

In general therefore, the SPS Agreement has onerous implementation challenges. Each WTO member must establish or designate a national central government authority as responsible for the implementation of the notification procedures. Any new sanitary or phytosanitary law or regulation, or revision thereof, that may restrict trade and that differs from international standards has to be notified to the WTO Secretariat.

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2.

THE EVOLUTION OF THE WTO AGREEMENT ON AGRICULTURE

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I. INTRODUCTION

The AoA¹ came into existence over ten years ago as one of the instruments annexed to the Marrakesh Agreement establishing the WTO. The AoA declares in its preamble that the long-term objective of WTO members is "to establish a fair and market-oriented agricultural trading system." The current agricultural negotiations at the WTO are part of the endeavour to bring this objective one step closer to reality. The short-term mission of the AoA, on the other hand, was to launch the reform process and to take the first steps towards that long-term goal. The AoA disciplines on, *inter alia*, the three pillars of agricultural market access, domestic support and export subsidies, constituted that first step on the path of reform. The in-built agenda contained in article 20 of the AoA, was designed to ensure that these AoA disciplines would be only the first step in a reform process culminating in the establishment of a fair and market-oriented agricultural trading system.

This chapter provides a background on the origins, nature, structure, scope and obligations of the AoA. To that end, the chapter is structured in three parts: market access, domestic support, and export subsidies. Each of these three sections is examined in the same format. First, the key concepts in every section are introduced. Thereafter, the currently applicable legal regimes in these areas are described. Next, the contentious issues in each section are identified. And finally, the prospects in each area are assessed on the basis mainly of the following official documents: the Harbinson modalities draft papers,² subsequent negotiation submissions by the major players, the draft Ministerial Declaration issued on 24 August 2003 by General Council Chairman Carlos Perez del Castillo,³ the final draft that emerged on 13 September 2003 during the Cancun negotiations⁴, the

¹ Agreement on Agriculture (hereafter the AoA) in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, 15 April 1994.

² WTO. *Negotiations on Agriculture: First Draft of Modalities for the Further Commitments*. (WTO doc. TN/AG/W/1), 17 February 2003 (hereafter first draft modalities or first modalities draft); WTO. *Negotiations on Agriculture: First Draft of Modalities for the Further Commitments: Revision* (WTO doc. TN/AG/W/1/Rev.1), 18 March 2003 (hereafter revised first draft modalities). Reference is made to the modalities text in general in cases where both original and revised versions provide for the same proposed rules.

³ WTO. *Preparations for the Fifth Session of the Ministerial Conference: Draft Cancun Ministerial Text – Revision* (WTO doc. JOB(03)/150/Rev.1), 24 August 2003 (hereafter the pre-Cancun Draft).

⁴ WTO. *Preparations for the Fifth Session of the Ministerial Conference: Draft Cancun Ministerial Text – Second Revision* (WTO doc. JOB(03)/150/Rev.2), 13 September 2003 (hereafter the Cancun Draft).

July 2004 Framework Agreement⁵, and the Hong Kong Ministerial Declaration.⁶ A brief conclusion summarizes the issues and provides some perspectives into the future of the agriculture negotiations. The issues of special and differential treatment and non-trade concerns⁷ are discussed as appropriate in each section. The final section provides a brief summary of the legislative implications of the AoA rules and commitments for WTO member countries.

1.1 Origins of the AoA

The roots of the AoA are to be found in the text of GATT itself. The special status of agriculture, whether real or imagined, got its legal expression in the body of GATT rules which left some important loopholes in respect of agricultural trade from the very beginning. The loopholes had been there since early negotiations for the ITO Charter and the 1947 version of the GATT, particularly in market access. It is notable that the size of the agricultural loophole in GATT continued to grow over time, particularly in the first two decades of its life, thereby further alienating agricultural trade from other sectors. This widening gap between agriculture and other sectors could be seen in the 1955 waiver granted to the United States from its obligations under the key GATT provisions of articles II and XI;⁸ the exclusion of agricultural products from the new GATT prohibition of export subsidies in 1955⁹; the creation of the European Common Agricultural Policy in the 1960s¹⁰, which was later subjected to a series of re-negotiations of commitments every time the Community expanded as envisaged under

⁵ See WTO, *Doha Work Programme: Decision Adopted by the General Council on 1 August 2004* (WT/L/579, 2 August 2004) (hereafter the "July 2004 Package" or simply the "July Package").

⁶ See WTO, Sixth WTO Ministerial Conference, Hong Kong (13–18 December 2005), *Doha Work Programme Ministerial Declaration* (WT/MIN(05)/DEC), adopted on 18 December 2005, 22 December 2005 (hereafter the Hong Kong Declaration).

⁷ On the place of non-trade concerns in the current agriculture negotiations, see WTO Committee on Trade and Environment, *Environmental Issues Raised in the Agriculture Negotiations: Statement by Mr. Frank Wolter*, WT/CTE/GEN/8/Suppl.1, 5 October 2005.

⁸ See *Waiver Granted To The United States in Connection with Import Restrictions Imposed under Section 22 of the United States Agricultural Adjustment Act of 1933, as Amended* Decision of 5 March 1955 BISD § 03S/32, 41 June 1955.

⁹ See GATT, article XVI:3 in particular.

¹⁰ See Meester, G. 2005. European Union, Common Agricultural Policy, and World Trade. *Kansas Journal of Law & Public Policy*, 14: 389.

GATT, articles XXIV:6 and XXVIII¹¹; the use of a "grandfather clause" by newly-joining countries in their protocols of accession to protect their agricultural sectors¹²; the use of grey-area measures, such as EC variable import levies, whose legality was always questionable but no clear-cut decision was ever taken; and a habitual disregard of such disciplines by other contracting parties more readily in agriculture than in other sectors.¹³ A steadily increasing number of agricultural cases were brought before the GATT dispute settlement system; but they could not address the real problem areas simply because the rules were not designed to bring discipline in agricultural trade, the more so with respect to the most important trading powers. Hudec found that between 1960 and 1989 exactly one-half of GATT cases involved agricultural products (based on a working definition of agricultural products that was narrower than the definition given to agricultural products under Annex I of the AoA).¹⁴ Even the most creative panels could not create law; they could only interpret and apply existing law. There was simply a consensus that the GATT legal system "has not yet been able to engage agricultural trade policy in a significant way."

The frustration with this reverse development in GATT's disciplining power over national agricultural trade policy finally resulted in growing calls, and later an emerging consensus (particularly from the early 1980s), that GATT had to do something about agriculture. In the words of the 1982 GATT Ministerial Declaration, "there is widespread dissatisfaction with the application of GATT rules and the degree of liberalization in relation to agricultural trade", and "there is an urgent need to find lasting solutions to the problems of trade in agricultural products".¹⁵ The only solution to the

¹¹ For more on renegotiations and their legal consequences, see *European Economic Community—payments and subsidies paid to processors and producers of oilseeds and related animal-feed proteins*, report of the panel (L/6627 BISD 37S/86) adopted on 25 January 1990.

¹² See *Protocol for the Accession of Switzerland*, BISD 14S/6-11 (July 1966) paragraph 6. See also, Haberli, C. 2005. The July 2004 Agriculture Framework Agreement. In O'Connor, B. (ed.) *Agriculture in WTO Law* p. 404. Cameron May. London (hereafter O'Connor (2005)).

¹³ Writing about the pre-Uruguay Round situation of agriculture within the GATT, Trebilcock and Howse observed: "a number of the major exporting states had come close to ignoring GATT requirements altogether, even to the point of refusing to implement GATT panel decisions." Trebilcock, M. and Howse, R. 1999. *The regulation of international trade*, p. 247. Routledge. London and New York. Second edition.

¹⁴ Excluding disputes involving cigarettes (which in fact fall under HS Chapter 24 of the AoA). See Hudec, R. 1993. *Enforcing international trade law: The evolution of the modern GATT legal system*, p. 327. Butterworth Legal Publishers.

¹⁵ See, e.g. the 1982 GATT Ministerial Declaration.

problem of agricultural trade could thus come only from the "political organ" of the GATT – and it took the form of the 1986 Punta del Este Ministerial Declaration which launched the Uruguay Round. This Declaration put agriculture at the heart of the negotiations and declared: "there is an urgent need to bring more discipline and predictability to world agricultural trade by correcting and preventing restrictions and distortions including those related to structural surpluses so as to reduce the uncertainty, imbalances and instability in world agricultural markets."¹⁶ The Uruguay Round negotiations aimed "to achieve greater liberalization of trade in agriculture and bring all measures affecting import access and export competition under strengthened and more operationally effective GATT rules and disciplines"¹⁷ Translating these political commitments into legally enforceable rights and obligations proved much tougher than anticipated in 1986. About eight years of testing negotiations finally came to a successful end with overall achievements that transcended the expectations of even the most optimist observers at the launch of the round in 1986. Agriculture played a key role in the success or failure of the whole negotiation process.

1.2 Nature and structure of the AoA

The AoA stands on three pillars – market access, domestic support, and export subsidies. This structure was not chosen arbitrarily by the negotiators; it was in a sense dictated by the very nature of the GATT loopholes that the AoA was designed to plug. As will be developed further later on, GATT had explicit agriculture-specific exceptions in the areas of subsidies and market access, which were essentially loopholes in the body of the GATT text. As argued earlier, these loopholes expanded rather than becoming smaller over the years and one of the most important objectives of the Uruguay Round was to find a lasting solution to the problems of agricultural trade. The AoA's three pillars could thus be described as a three-pronged plug that went into the agriculture-specific loopholes in the body of the GATT. It shall be seen later in the chapter, however that GATT had only two agriculture-specific holes – market access and export subsidies – and the three prongs of the AoA were somehow designed to fill those two holes. The third prong, domestic support, was found necessary in order to properly address the issues on the two other subjects.

¹⁶ See GATT. Ministerial Declaration on the Uruguay Round (MIN.DEC) adopted in Punta del Este, Uruguay, on 20 September 1986, *BISD* 33S/19–28.

¹⁷ See *Id.*

The AoA has been a subject of controversy since its birth in 1995. Some look at it as an instrument with the potential to redress the imbalance in trade relations between developing and developed countries. Others look at it as an instrument that "systematically favours agricultural producers in industrialized countries at the expense of farmers in developing countries", thereby institutionalizing inequality.¹⁸ Gonzalez goes further and argues that the AoA "increases food insecurity by exacerbating rural poverty and inequality" in developing countries and hampers their ability to adopt appropriate measures to address the problem.¹⁹ For some the AoA is an embodiment of "the recognition that agriculture has always been different and that difference needs to be recognized in something more than limited exceptions."²⁰ Still others accuse it of having overly neo-liberal leanings, ignoring such facts as the lack of power for millions of people to purchase their daily food on the market; their dietary preferences, and even of ignoring the importance of agriculture in providing livelihoods for an estimated seventy percent of the world's population.²¹ It is further argued that the AoA ignores important ecological considerations and undermines genetic diversity.²²

Related to the perception of AoA, is the more academic question of why agriculture is so different as to make it effectively the only sector governed by a sector-specific agreement within the WTO. The explanations offered by different people range from what Ragosta calls the "farmers' unique role in maintaining an independent republic"²³ to the U.S. Senate's tendency "to represent land more than people"²⁴, to agriculture's role as the source of our food, to its unique relevance to biodiversity and the environment at large, to the cultural issue of ensuring the survival of a rural way of life. O'Connor provides strategic and economic explanations and concludes that "agriculture

¹⁸ See Gonzalez, C.G. 2002. Institutionalizing inequality: the WTO Agreement on Agriculture, food security, and developing countries. *Columbia Journal of Environmental Law* 27:438.

¹⁹ *Id.*, p. 476.

²⁰ O'Connor (2005), p. 418.

²¹ See, e.g. Murphy, S. 2002. Structural distortions in world agricultural markets: do WTO rules support sustainable agriculture? *Columbia Journal of Environmental Law* 27: 609–610.

²² See *Id.*, p. 610.

²³ See Ragosta, J.A. 2005. Trade and agriculture, and lumber: why agriculture and lumber matter. *Kansas Journal of Law & Public Policy* 14: 414-15.

²⁴ See *Id.* Dam also observed in 1970 that "no treaty that impinged upon the U.S. Farm program could receive the constitutionally required senatorial approval" Dam, K. 1970. *The GATT: law and the international economic organization*, p. 260. University of Chicago Press.

is different from any other sector and is rightly treated according to the rules of a separate WTO Agreement."²⁵

Amid all this diversity of opinion, almost everyone agrees that the AoA has taken the single most important step to bring agriculture more firmly within a system of multilaterally agreed rules – rules that led to the adoption by WTO member countries of new national legislation in order to bring their pre-Uruguay Round practices into line with AoA requirements.²⁶ An excellent example of national legislative changes that followed adoption of the AoA is the amendment of the Swiss Federal Constitution in 1996, which had to go through a national referendum and the complete revision of the 1951 Federal Law on Agriculture in 1998. What is also clear is that, in as long as the AoA remains in place, agricultural products will remain a special category in themselves subject to special treatment within the WTO framework. An understanding of those areas of GATT that provided special rules for agriculture is essential for a proper appreciation of the meaning and effect of the AoA that came out of the Uruguay Round as well as the direction it is taking in the current negotiations.

II. THE DOHA NEGOTIATIONS: GENERAL

2.1 Background

The share of agricultural exports in global trade has fallen from 47 percent of total merchandise exports in 1970 to just 9.1 percent in 2001.²⁷ This is, of course, an average and masks very wide variations among countries; extreme examples would be Japan with agricultural exports accounting for a mere 1.3 percent of its merchandise exports and Ethiopia with 84.2 percent of its merchandise exports accounted for by agricultural products. 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 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.²⁸ Just like in the more than seven years of Uruguay Round negotiations, agriculture is still the most contentious and also the

²⁵ O'Connor, (2005), p. 419.

²⁶ For the details on this, see Haberli in O'Connor (2005), pp. 403 and 404.

²⁷ See WTO. 2003. *International trade statistics 2002*, pp. 105–112.

²⁸ See Decision of the Council for TRIPS, IP/C/W/405, 30 August 2003.

most important issue in the ongoing Doha trade negotiations. As a World Bank study put it, "Reducing protection in agriculture alone would produce roughly two-thirds of the gains from full global liberalization of all merchandise trade".²⁹ Just as the many deadlines that came and went during the Uruguay Round negotiations were largely blamed on agriculture, so also are the many negotiating deadlines already missed so far in the Doha process³⁰ and the collapse of the Cancun Ministerial Conference blamed largely on agriculture.³¹ For example, the failure of WTO negotiators to meet the 31 March 2003 deadline for agreement on agricultural trade liberalization modalities was taken as a setback not just for the agriculture negotiations, but for the entire Doha process. Indeed, the subsequent failure to meet the 31 May 2003 deadlines for a Modalities Agreement on market access for non-agricultural products was blamed on that previous failure to meet the agricultural modalities deadline.

As noted earlier, although the Uruguay Round took the first most important step in the process of liberalizing agricultural trade, the developments thus far have been limited to a reshaping of the rules with little immediate actual liberalization. The treatment of agricultural products as a distinct category still forms part of the WTO architecture. The Agriculture Agreement provides for a system of rules significantly different from mainstream GATT provisions for most other products, and its provisions have been made to prevail over inconsistent GATT/WTO rules. 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; where three-digit tariffs are rather common; where significant additional duties can be introduced in the name of "safeguard measures" regardless of injury considerations and in the most unpredictable of ways; where a proven trade-distortive and injurious domestic support programme may escape any challenge; etc. In short, agricultural trade still has a long way to go on the road to liberalization. Seen from this perspective, therefore, 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.

²⁹ World Bank. 2003. *Global economic prospects realizing the development promise of the Doha Agenda: 2004*, p. xvi. Washington D.C.

³⁰ See, for example www.ictsd.org/weekly/03-05-28/story1.htm.

³¹ The so-called Singapore issues – investment, competition, transparency in government procurement, and trade facilitation – were also partly responsible for the Cancun collapse.

2.1.1. Agriculture on the road to Hong Kong: highlights

One virtue of the Agriculture Agreement has been that it had an in-built agenda for a continuation of the liberalization process so as to realize its long-term objective of bringing fundamental change in the level of protective and distortive devices at work in many countries. Article 20 of the Agreement on Agriculture provided as follows:

"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."

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 intellectual property and services in exchange for a promise to re-integrate agriculture and textiles into the system. Launching the already mandated negotiations in agriculture as part of a broader negotiation round was also one of the primary objectives of the third WTO Ministerial Conference at Seattle.³²

Seattle proved to be a disappointing failure, and the widely expected Millennium Round of trade negotiations was not launched. But, since agriculture was one of the few areas on which a negotiation had already been mandated by the results of the Uruguay Round, the WTO General Council was

³² Held at Seattle, United States, from 30 November to 3 December 1999. For details on this Conference, see www.wto.org/wto/seattle/english/about_e/07ag_e.htm.

able to launch a sector-specific negotiation process on 7 February 2000.³³ In accordance with a programme agreed on that occasion, the WTO agriculture negotiators held their first meeting on 23–24 March 2000. 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 89 percent of the WTO's membership. 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). 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. 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 carried out to date and without prejudging the outcome of the negotiations we commit ourselves to comprehensive negotiations aimed at: substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support. We agree that special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall be embodied in the Schedules of concessions and commitments and as appropriate in the rules and disciplines to be negotiated, so as to be operationally effective and to enable developing countries to effectively take account of their development needs, including food security and rural development. We take note of the non-trade concerns

³³ See WTO. *Services and Agriculture negotiations: meetings set for February and March*. (WTO Press Release (Press/167)), 7 February 2000.

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."³⁴

Five broad negotiation issues have been identified in this paragraph: market access, export subsidies, domestic support, special and differential treatment, and non-trade concerns. 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 wanted to give equal weight to all five of them while others contended that there was a hierarchy built into them. 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."³⁵

But of course, the order and tone of presentation of these five items clearly 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"). Also among the three pillars, there is a difference in the immediate negotiation objectives. The commitments in the areas of market access and domestic support are similar in that they talk about introducing "substantial improvements in market access", and "substantial reductions in trade-distorting domestic support". On the other hand, the commitments on export subsidies sound stronger: "reductions of, with a view to phasing out, all forms of export subsidies." This was one of the most contentious subjects during the Doha ministerial talks; indeed, success and

³⁴ WTO. *Doha Ministerial Declaration*. (WT/MIN(01)/DEC/1) adopted on 14 November 2001, para. 13.

³⁵ WTO. *Agriculture negotiations: where we are now* p. 12 (available at www.wto.org).

failure in the talks were hanging on the wording of the clause "with a view to phasing out" export subsidies in this paragraph.³⁶

The third phase in the agriculture negotiations, known as the modalities phase, began in March 2002. The hope was to conclude this phase on 31 March 2003 with the adoption of a Modalities Agreement.³⁷ As per the Doha negotiation schedule, the fifth session of the WTO Ministerial Conference (held in Cancun Mexico, 10–14 September 2003) was the time for members to submit comprehensive draft tables of concessions in agriculture based on these modalities. However, as so often in trade negotiations, reality once again fell short of ambition; progress was lacking in many areas. Agriculture Committee Chairman Stuart Harbinson nonetheless managed to put together a first modalities draft paper which he circulated on 17 February 2003.³⁸ The reaction was typical of agriculture negotiations – some condemning it for going too far, others for not going far enough. A month later, on 18 March 2003, Harbinson circulated a revised version of his draft,³⁹ but only to elicit the same reactions. Indeed, as Harbinson himself noted, several participants did not even "accept the revised First Draft as a basis for the negotiations".⁴⁰ Over time, a tacit agreement was 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. On that basis, and in an effort to break the deadlock, the US and the EU got together and came up with what was called the "US-EU joint proposal".⁴¹ The immediate impact of this bilateral submission on the negotiations was such that, in the words of WTO spokesperson Keith Rockwell, it "galvanised the process in a way that we have not seen in three-and-a-half years of agriculture negotiations".⁴² However, later developments suggested that the

³⁶ Financial Times, 14 November 2001, p. 14. The date scheduled for the conclusion of the Doha ministerial talks – noted that France objected to "wording in the draft WTO agenda that calls for negotiations 'with a view to phasing out' all farm export subsidies." The following day, the Financial Times reported that an all-night haggling in Doha ended in agreement and pointed out: "France was bought off with an assurance that the ministers' declaration did not 'pre-judge' the outcome of future farm trade talks", p. 15.

³⁷ Paragraph 14 of the Doha Declaration provided: "Modalities for the further commitments ... shall be established not later than 31 March 2003."

³⁸ See first modalities draft.

³⁹ See revised first modalities draft.

⁴⁰ See *Negotiations on agriculture: report* by the Chairman ... to the TNC TN/AG/10, 7 July 2003, para. 8.

⁴¹ See *EU-US Joint Text on Agriculture* (13 August 2003), (available at www.ictsd.org).

⁴² See ICTSD, (www.ictsd.org); see also 2003, US-EU agriculture framework sees partial elimination of export subsidies. *Inside US Trade*.

joint proposal might have backfired in the sense that "instead of encouraging consensus, the proposals prompted Brazil, India, China and about 20 other developing countries to group together to demand radical cuts in wealthy nations' farm subsidies and trade barriers."⁴³ This demand from the so-called G20 countries came in the form of a "proposal for a framework document."⁴⁴ 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. In the 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. What is worse, ministers failed to reach an agreement even on such a framework document – a failure which, together with the deadlock over the so-called Singapore issues, led to the collapse of the whole Cancun ministerial session. With the Cancun failure, the agriculture agenda and the future of the WTO itself came under question.

The feeling of disappointment that followed the Cancun setback was later tempered by the July 2004 Package, and the Framework Agreement reached for the establishment of the agricultural Modalities.⁴⁵ Although the July Package was full of broad and vague declarations without any specific commitments, it nonetheless managed to give a sense of direction to the entire exercise. Among the main achievements of the July Package are its adoption of a single but tiered formula for the reduction of agricultural tariffs (the higher the tariff levels the steeper the cuts); and its use of a similarly tiered formula to reduce trade-distorting domestic support (the higher a member's support levels, the higher the cuts) both at the specific level of amber box measures subject to AMS commitments and the overall level of trade distortive domestic support measures in general (i.e. amber box, *de minimis*, and blue box combined) with a 20 percent downpayment at the beginning of the implementation period. Also noteworthy of the July Package is the agreement to eliminate export subsidies as listed in members' schedules, as well as other forms of export support, such as export credits, export credit guarantees or insurance programmes, exporting state trading

⁴³ See de Jonquieres, G. Comment and Analysis, p. 21. *Financial Times*. 16 September 2003.

⁴⁴ See WTO, *Agriculture - Framework Proposal, Joint Proposal by Argentina, Bolivia, Brazil, Chile, China, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, India, Mexico, Pakistan, Paraguay, Peru, Philippines, South Africa, Thailand and Venezuela*, WT/Min(03)/W/6, 4 September 2003 (hereafter the pre-Cancun G20 proposal).

⁴⁵ See the July Package.

enterprises and food aid practices that market access has the same effect as the listed export subsidies. However, the developments between July 2004 and December 2005 had been so disappointing that the WTO had to lower its expectations from the sixth WTO Ministerial in Hong Kong (13–17 December 2005), lest the Cancun experience be repeated.⁴⁶ The Hong Kong Ministerial Declaration has added some specifics to the otherwise broad commitments of the July Package, such as the decision to have three bands for reductions in trade-distorting domestic support, to complete the elimination of all forms of export subsidies by 2013, and to adopt four bands for structuring tariff cuts. Members also committed to complete the agriculture modalities by 30 April 2006 and to submit comprehensive schedules based thereon by 31 July 2006, which would then lead to the conclusion of the Doha Round by the end of 2006. Whether such an ambitious agenda will be met is yet to be seen. Most observers are naturally pessimistic about it. Compared to Cancun, Hong Kong was of course a success. However, it was also taken by many as a missed opportunity and a disappointment.⁴⁷ Indeed, EU trade commissioner Peter Mandelson himself was quoted to have said: "If we didn't make the conference a success, we certainly saved it from failure."⁴⁸

III. 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 several reasons.⁴⁹ These barriers are generally of two types: tariffs and non-tariff barriers (NTBs). From its very beginning, GATT has had a preference for tariffs over NTBs, and article XI prohibits NTBs with only a few general⁵⁰ and one agriculture-specific exceptions. Article XI:2(c) provides for the only agriculture-specific exception in the

⁴⁶ See Williams, F. WTO chief meets ministers in bid to salvage talks p. 10. *Financial Times* 9 November 2005, quoting EU trade commissioner Peter Mandelson as saying: "There is a clear preference by the great majority to adjust expectations for Hong Kong."

⁴⁷ See *inter alia*, Hard truths: The Doha trade round is still alive, but hardly healthy. *The Economist*, 20 December 2005.

⁴⁸ See Bradsher K. Trade officials agree to end subsidies for agricultural exports. *New York Times*, December 2005.

⁴⁹ These include protection of competing domestic producers, generation of governmental revenue, enforcement of internal health, technical, and other regulations, etc.

⁵⁰ 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.

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 sub-paragraph (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."

The agriculture-specific exception contained in article XI:2(c) is a tightly-defined exception with a history of narrow interpretations by GATT panels. Although it was invoked by defendants in several GATT cases to justify their

agricultural import restrictions, not a single country was successful throughout the history of GATT.⁵¹

However, the tight conditions attached to this exception as well as the strict construction it enjoyed in the hands of GATT panels did not deter countries from resorting to quantitative restrictions. 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. An essential question here is as to why GATT contracting parties allowed this to happen and did not challenge more of these measures under article XI. The explanations suggested by Bernard O'Connor include: the fact that many countries with comparative advantage in agricultural production were not GATT contracting parties; that many countries had their own programmes in place and did not want to promote jurisprudence that could come back to haunt them; and that governments did not take international action because they agreed on the need to manage domestic production and supply.⁵² An important challenge in the area of agricultural trade was to bring some discipline to the widespread use of non-tariff barriers, often in violation of the rules. Given that they were often maintained in violation of GATT rules, the logical outcome should be their elimination. This was however practically unachievable. The most that the Uruguay Round could do was convert all pre-existing "non-tariff" barriers (NTBs) into their tariff equivalents via the innovative approach of tariffication regardless of whether those measures were maintained consistently with GATT rules. This tariffication exercise applied to a range of measures including not just 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".⁵³ 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

⁵¹ For more on this, see Desta, MG. 2002. *The law of international trade in agricultural products: from GATT 1947 to the WTO Agreement on Agriculture*. Kluwer Law International.

⁵² O'Connor B. 2003. Book Review: the law of international trade in agricultural products: From GATT 1947 to the WTO Agreement on Agriculture. *Journal of International Economic Law* 6(2): 537 and 538.

⁵³ See footnote 1 to article 4:2 of the Agreement on Agriculture.

agricultural products."⁵⁴ One may of course question whether ordinary customs duties also do exactly that: restrict the volume or distort the price of imports of agricultural products. But, as the Appellate Body itself emphasised throughout the report, transparency and predictability are the reasons behind the preference for ordinary customs duties. The resulting tariffs were also bound against any future increase and then subjected to a 36 percent minimum reduction commitment on the average tariff levels (and a 15 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). 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 was called the problem of "dirty tariffication").

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. Several supplementary arrangements were made to accommodate these concerns.

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. This commitment applied in situations where imports of a product during the base period (1986–1988) already represented at least 5 percent of corresponding domestic consumption, which was far from common in agriculture. In cases where imports during the base period were less than 5 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 5 percent by the end of the implementation period (2000). In theory, therefore, a minimum of 5 percent of the domestic consumption of every product in every member country today must be accounted for by

⁵⁴ See *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, report of the Appellate Body, (WT/DS207/AB/R, issued on 23 September 2002), para. 200.

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

On the other hand, in order to assuage 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). 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.⁵⁵ These will be discussed in turn.

3.1 Tariff reductions in the current negotiations

3.1.1 Negotiations on tariff reductions

Now that tariffs are the only means of protection at the border⁵⁶, 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 US and the Cairns Group on the one hand and from the EU on the other appear to represent the two extreme positions and most others fall somewhere in between. At the most conservative end, the EC 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 reduction of 36 percent and a minimum reduction per tariff line of 15 percent as was

⁵⁵ There are also a few new market access issues, such as protection of geographical indications, that are currently being pushed by some members.

⁵⁶ Note that there are a few temporary exceptions, maintained under special treatment provisions, currently in use by Chinese Taipei, Korea and the Philippines on rice. See WTO. 2002. *WTO Agriculture Negotiations: The Issues, and Where We are Now* (available at www.wto.org). The OECD has also noted that Hungary and Poland tariffed only 91 percent and 96 percent respectively of their agricultural NTBs. See OECD. 2001. *The Uruguay Round Agreement on Agriculture: an Evaluation of Its Implementation in OECD Countries*, p. 23. Paris.

the case in the Uruguay Round."⁵⁷ At the most liberal end stood the US proposal – also supported by the Cairns Group – which ambitiously called for the adoption of what it called the "Swiss 25" formula (see below) of tariff harmonization (higher cuts on higher tariffs) so as to reduce all higher tariffs to a maximum of 25 percent (keeping in-quota tariffs still lower) to be implemented in equal annual instalments over a five-year period. Curiously, the US went further and asked members to set a date for the eventual elimination of agricultural tariffs⁵⁸ – a move that, if successful, could have given agriculture a further lead over manufactures.⁵⁹ Knowing the sensitivity of WTO members to agricultural issues, it was not difficult to dismiss this latter point as too ambitious for the Doha negotiations. Indeed, given that several agricultural tariffs in several member countries are bound at three digit levels, even the tariff harmonization formula that would set 25 percent as the maximum for any tariff line 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 Swiss formula – that would help to overcome the extreme tariff dispersion between different agricultural tariff lines.⁶⁰ 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. Because the US proposed to reduce all higher tariffs to a maximum of 25 percent, Robert Zoellick called it the Swiss 25" formula.⁶¹

Former Agriculture Committee Chairman Harbinson's first draft of the modalities proposed a three-tier distinction among agricultural products on

⁵⁷ *The EC'S Proposal for Modalities in the WTO Agriculture Negotiations* (29 January 2003), available at europa.eu.int.

⁵⁸ For the latest US positions, see www.fas.usda.gov/itp/wto/proposal.htm. This is not accidental; the US argues that its agriculture is "more than twice as dependent on exports as the US general economy. About 25 percent of gross cash receipts from agricultural sales are for export, compared with 10 percent on average for manufactured goods." Henke, H. 2001. WTO negotiations offer the best chance for agricultural trade reform. *AgExporter*.

⁵⁹ Note, however, that the US has also made a similarly ambitious proposal to eliminate all tariffs on all non-agricultural products by 2015. See WTO. *Market access for non-agricultural products: communication from the United States* (TN/MA/W/18) (5 December 2002). Agriculture is already ahead of manufactures in terms of the proportion of tariff lines with bound rates.

⁶⁰ For more on the different formulae used in the trade negotiations, see WTO. *Negotiating Group on market access: formula approaches to tariff negotiations – note by the Secretariat* (TN/MA/S/3/Rev.2, 11 April 2003).

⁶¹ See *Statement of Robert B. Zoellick U.S. Trade Representative before the Committee on Agriculture of the U.S. House of Representatives*, 21 May 2003 (available at www.ustr.gov) (hereafter Zoellick (2003)).

the basis of their bound tariff levels, thus suggesting higher reduction rates for higher tariffs and lower reduction rates for lower tariffs.⁶² The draft (both original and revised versions) suggested that agricultural tariffs in excess of 90 percent *ad valorem* be reduced by an average of 60 percent and a per-tariff-line minimum of 45 percent; for those products with tariffs between 15 and 90 percent *ad valorem*, the average would be 50 percent and the per-tariff-line minimum 35 percent; and for those products with tariffs of 15 percent *ad valorem* or lower, the average reduction requirement would be 40 percent and the per-tariff-line minimum 25 percent.⁶³ 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.⁶⁴ 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.⁶⁵

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). 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."⁶⁶ The revised 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]."⁶⁷

The structure proposed for reductions by developing countries was even more complicated. Firstly, 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" – the original first draft modalities used the term "strategic products" – and

⁶² See first draft modalities, paras. 7 and 10; revised first draft modalities, paras. 8 and 12.

⁶³ See first draft modalities, para. 7; revised first draft modalities, para. 8.

⁶⁴ Revised first draft modalities, para. 9.

⁶⁵ According to Robert Zoellick, the Harbinson proposal on market access would result in an average agricultural tariff of 36 percent (down from the current 62 percent) while the US proposal would have cut them down to an average of 15 percent. See Zoellick (2003).

⁶⁶ See first draft modalities, para. 7.

⁶⁷ See revised first draft modalities, para. 8.

designated them the symbol "SP" in their schedules. These products would then be subject to a uniform requirement of 10 percent average and 5 percent per-tariff-line minimum reduction regardless of existing tariff levels. For all other non-SP products, the approach would be generally similar to that proposed for developed countries. But, in this case, the thresholds were higher, the rates of reduction lower, the number of categories bigger, and the implementation period longer.

Accordingly, there are four categories of products here⁶⁸: those with *ad valorem* tariffs higher than 120 percent would be reduced by 40 percent average and 30 percent per-tariff-line minimum; those with tariffs between 60 and 120 percent by an average of 35 and a per-tariff-line minimum of 25 percent; those with tariffs between 20 and 60 percent by an average of 30 and a per-tariff-line minimum of 20 percent; and those with tariffs 20 percent or lower *ad valorem* to be reduced by a 25 percent average and a 15 percent per-tariff-line minimum.⁶⁹ These reduction commitments would also benefit from a longer implementation period – ten years as opposed to five years.

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 to erosion of the preferential margin that would necessarily result from reduction of MFN tariffs.⁷⁰ 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."⁷¹ 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 20 percent of their total

⁶⁸ Note 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.

⁶⁹ See revised first draft modalities, para. 12.

⁷⁰ Interestingly, this is a point that has been championed as much by the preference-providing countries as by the preference beneficiaries. See Fischler, F. and Lamy, P. *Financial Times*, p. 19. 1 April 2003. For an in-depth analysis of the impact of further reductions in MFN agricultural tariffs on the interest of preference-beneficiary developing countries, see Tangermann, S. 2001. *The future of Preferential Trade Agreements for developing countries and the current round of WTO negotiations on agriculture*. FAO/ESCP.

⁷¹ See revised first draft modalities, para. 16.

merchandise exports) by two years and then to implement the reductions over another six year period. In-quota duties for such products would also be eliminated. 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."⁷² But, of course, this 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", which was based largely on the 'US-EU joint proposal'⁷³ and the "pre-Cancun G20 proposal".⁷⁴ All these three documents are unanimous in their approach to tariff reductions – they all advocate what is called a "blended formula", first suggested by the US-EU joint text proposing to divide all agricultural tariff lines into three groups. 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. 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.

However, the similarities between the three documents on market access do not extend much beyond this point. The pre-Cancun G20 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 'US-EU joint proposal'. At Cancun, ministers spent most of their time on agriculture and the revised draft ministerial declaration (the Cancun draft) circulated on 13 September 2003 (i.e. one day before the conclusion of the session) closely followed the pre-Cancun Draft in most cases. On the issue of tariff reductions, the Cancun Draft reaffirmed the blended formula of the pre-Cancun Draft without much change. The only important modifications to this part of the pre-

⁷² See revised first draft modalities, para. 16.

⁷³ See pre-Cancun Draft.

⁷⁴ See Cancun Draft.

Cancun Draft relate to non-trade concerns and tariff escalation on which the Cancun Draft echoed the Harbinson revised first modalities draft.⁷⁵

3.1.2 Negotiations on tariff reductions: from Cancun to Hong Kong

Cancun was a failure, and any proposals on the table until that time are only part of the negotiating history of whatever comes out of this whole process. The first real breakthrough came in the form of the July Package.

The July 2004 Package adopted a "tiered" approach to the reduction of tariffs, which is just one form of what is traditionally known as the Swiss Formula that aims to cut higher tariffs more deeply than lower tariffs – thereby resulting in a higher degree of tariff harmonization. The July Package calls it "progressivity in tariff reductions".⁷⁶ All members, except LDCs, are required to reduce their tariffs according to this approach. The size of the cuts is however still under negotiation, and needs to be resolved in order for those elusive modalities to be achieved. The July Package already provides that tariff cuts, whatever their size, will apply from bound levels as opposed to applied ones. The high levels of agricultural tariff waters (i.e. the differences between bound and applied rates) particularly in developing countries will thus mean that the effect of such a reduction will be minimal in the short term.

Progressivity in tariff reductions would be possible only if tariffs across products are comparable in some objective form. The agriculture schedules of many WTO members are however made up of different forms of tariffs – such as *ad valorem*, specific, mixed and compound.⁷⁷ Comparison of tariff levels across different products is most straightforward in cases where tariff levels are expressed in *ad valorem* terms. However, unlike for non-agricultural products,⁷⁸ the July Package does not expressly require conversion of non-*ad valorem* agricultural tariffs into their *ad valorem* equivalents (AVEs). The conversion of the many non-*ad valorem* agricultural tariffs to their AVEs was nonetheless found to be a necessary precondition for the achievement of

⁷⁵ See pre-Cancun Draft and accompanying text.

⁷⁶ See July Package, para. 29.

⁷⁷ For comprehensive information on this see WTO Committee on Agriculture, Special Session: *Calculation of Ad Valorem Equivalents (AVEs): Data Requirements and Availability*, Note by the Secretariat (TN/AG/S/11, 15 November 2004).

⁷⁸ Paragraph 5 of Annex B of the July Package on the Framework for Establishing Modalities in Market Access for Non-Agricultural Products provides: "all non-*ad valorem* duties shall be converted to *ad valorem* equivalents on the basis of a methodology to be determined and bound in *ad valorem* terms."

progressivity in agricultural tariff reductions, as it would otherwise be difficult, if not impossible, to allocate specific tariff lines in the different tiers that will be subject to different levels of cuts. It is not clear whether members will use the AVEs only during the negotiation process for the allocation of particular tariff lines in the appropriate tiers while retaining their existing non-*ad valorem* tariffs in their final schedules. A couple of considerations suggest that this is a possibility: (1) the inclusion of a specific commitment prohibiting such possibility for non-agricultural products and its absence for agricultural products; and (2) the attempt by agricultural exporters to push for an AVE conversion methodology that would lead to higher AVEs and be subject to steeper tariff reductions and the importers' preferences for the opposite scenario.

The AVE calculation proved much more difficult than initially thought. Technical issues relating to methods of calculation, choice of data and data sources for the purpose and questions of verification procedures all combined to slow down progress in the negotiations. The problems in calculation methodology centred around two alternative methods, the "unit price method" and the "revenue method". In a unit price method, the AVE would be derived from a given specific duty (e.g. in US\$) as a percentage of a given reference price (e.g. also in US\$). In other words, the AVE is calculated as the specific duty expressed as a percentage of the unit value of a product. Using a revenue method, on the other hand, the AVE would be derived from the total tariff revenue of a member from the importation of a particular product over a given period as a percentage of total value of imports of the same product over the same period. The AVEs in this case are thus calculated directly from data on customs revenue collected for a particular product divided by the value of imports of the same product and expressed in percentage terms.⁷⁹ The value of products in either case would have to be set based on the world market prices of products.

In a manner reminiscent of the issues surrounding the agricultural tariffication exercise of the Uruguay Round, the root cause of the problem now lies with the interest of members with high protection levels to ensure that the effect of the AVE conversion exercise would still leave as wide a room as possible to protect their markets after the Doha reductions have been completed. As summarised by the ICTSD, "AVE conversion has

⁷⁹ See Id, paras. 7 and 8; WTO Committee on Agriculture, Special Session. *Calculation of ad valorem equivalents (AVEs): data requirements and availability*, Note by the Secretariat (TN/AG/S/11), 15 November 2004.

pitted the EU and G-10 countries against the US, the Cairns group of agricultural exporters and the G-20. The former groups make use of a large number of specific tariffs. Agricultural exporters would like to see the conversion based more closely on the lower world prices, which would lead to higher AVEs, and eventually, steeper tariff cuts.⁸⁰ The presence of sometimes widely diverging data on world market prices and volumes for some agricultural products (e.g. between the WTO's Integrated Database (IDB) and the United Nations Statistical Division Commodity Trade Statistics database (Comtrade)) meant that the level of protection available for a country after Doha would partly depend on the choice of databases to determine the relevant world market prices. This technical hurdle was overcome at a Paris "mini-ministerial" meeting in May 2005 in which a group of leading WTO members agreed to use IDB and Comtrade data with a complex formula on their weighting and sequencing.⁸¹

The July Package left the number of bands, the thresholds for defining the bands and the level of tariff reduction in each band for subsequent negotiations.⁸² Several proposals have been submitted between the July Package and the Hong Kong Ministerial Declaration. To give just a few examples, the EC proposed to have four bands, with the highest tier subject to a 60 percent reduction, and a 100 percent tariff cap. Developing countries would be subject to less onerous commitments in the form of higher thresholds for each of the four tiers and lower reduction requirements within each; the cap for developing countries would be set at 150 percent.⁸³ The US on its part also proposed a four-tier system of cutting tariffs, but the thresholds for each tier are lower, the reduction rates higher (the highest being subject to a 90 percent cut), and a tariff cap of 75 percent for developed countries.⁸⁴ Likewise, the G20 also proposed a four-tier structure, but with reduction ambitions falling somewhere between those of the EC and the US.⁸⁵ This growing consensus on the structure of the tiers for agricultural tariff reductions and the divergence on the thresholds were reflected in the text of the Hong Kong Ministerial Declaration which stated

⁸⁰ ICTSD. 2005. *Agriculture: key trade ministers strike AVE deal in Paris* (available at www.ictsd.org).

⁸¹ For more on this, Id; see also FAO. 2004. *Tariff reduction formulae: methodological issues in assessing their effects*. In *FAO trade policy technical notes No. 2*. Rome.

⁸² See July Package, para. 30.

⁸³ See EC Commission, *Making Hong Kong a success: Europe's contribution*, 28 October 2005 (available at europa.eu.int).

⁸⁴ See *U.S. Proposal for Bold Reform in Global Agriculture Trade* December 2005 (available at www.ustr.gov).

⁸⁵ See *G20 Proposal on market Access*, 12 October 2005 (available at www.ictsd.org).

that "We adopt four bands for structuring tariff cuts, recognizing that we need now to agree on the relevant thresholds – including those applicable for developing country members."⁸⁶ The search for a Modalities Agreement in respect of the tariff reduction formula is therefore a search for acceptable thresholds within these four bands and, possibly, fixing a cap for the maximum permissible tariff levels for both developed and developing countries.

However, the July Package also introduced the concept of "sensitive products", which are different from the "special products" introduced earlier. Under the July Package, the commitment to progressivity in tariff reductions is subject to "flexibilities for sensitive products". Accordingly, members are entitled to "designate an appropriate number, to be negotiated, of tariff lines to be treated as sensitive, taking account of existing commitments for these products."⁸⁷ The extent to which any flexibilities in favour of sensitive products will shield their tariffs from the reduction formulae that will be agreed in the future is still far from clear. The July Package hints that there will be "deviations from the tariff formula",⁸⁸ but the degree of this deviation and the conditions under which it could be allowed have yet to be negotiated. Apart from that, the July Package adopts a negative approach in the sense that it tells us only what the special treatment of sensitive products will not be rather than what it will be.⁸⁹ Thanks to the vagueness of the language of the market access commitment in the July Package, it still declares that designating a product as sensitive will not mean less-than-substantial improvement in market access in that product. Moreover, the July Package also left for future negotiations, such issues as the number of tariff lines that could be designated as sensitive products and the manner and criteria of their selection. Post-July Package proposals on the number of products, for example, range from one percent to 15 percent of tariff lines⁹⁰ and Hong Kong was not able to bridge this gap. The Ministerial Declaration simply recognized "the need to agree on treatment of sensitive products, taking into account all the elements involved". The importance of the decision awaiting negotiators in this respect is a crucial one which could have implications for the overall direction of agricultural trade rules *vis-à-vis* rules applying to trade in other products.

⁸⁶ See Hong Kong Ministerial Declaration, para. 7.

⁸⁷ See July Package, para. 31.

⁸⁸ See *Id.*, para. 34.

⁸⁹ See *Id.*, paras. 32–34.

⁹⁰ See Annex A to the Hong Kong Declaration, p. A-5.

Finally, the July Package also allowed developing countries the flexibility "to designate an appropriate number of products as Special Products, based on the criteria of food security, livelihood security and rural development needs."⁹¹ Once again, however, the details as to the number of products to be so designated, their manner of selection and the degree of flexibility they would enjoy were left for subsequent negotiations. All the Hong Kong Declaration did in this respect was to clarify that developing countries would be entitled to self-designate their special products provided they are "an appropriate number" and guided by indicators based on the criteria of food security, livelihood security and rural development.⁹² It is notable that developing countries have this right to self-designate special products in addition to their right to designate another category of sensitive products which will have to be negotiated just like the developed countries. The right to designate products as sensitive or special is not applicable to LDCs as they are already exempted from any tariff reduction commitments.⁹³

The issues of sensitive and special products have been among the most controversial in the later phase of the negotiations. The lesson one could derive from the Uruguay Round is also limited, the only relevant point being the special treatment option that was invented primarily to address the sensitivities of rice in Japan and Korea who were allowed conditional exemption from the tariffication requirement in return for higher minimum access commitments. Given that all agricultural products are currently subject only to tariffs, the only way a special treatment could apply to a selected group of sensitive or special products is in the form of tariff cuts less than the otherwise applicable rate for the tier in which such products would fall.

3.2 Tariff rate quotas (TRQs) and their administration

As noted earlier TRQs were introduced mainly to implement the minimum and/or current access commitments of the Agreement on Agriculture.⁹⁴ 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

⁹¹ See July Package, para. 41.

⁹² See Hong Kong Ministerial Declaration, para. 7.

⁹³ See July Package, para. 45.

⁹⁴ According to the WTO Secretariat, as of 8 March 2002, 43 members have tariff quota commitments for a total of 1425 individual tariff lines. See WTO. 2002. *Tariff and other quotas: background paper by the Secretariat* at para. 6 (TN/AG/S/5).

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. Some three interrelated issues have been raised during the negotiations in this respect: firstly, there is concern that the required in-quota quantity is too small in many cases and therefore needs expansion; secondly, most of these already small in-quota quantities themselves have often remained unfilled⁹⁵; and thirdly, trade-restrictive methods of TRQ administration, some of which was reminiscent of the pre-Uruguay Round NTBs, have contributed to the under-fill.

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 percent of domestic consumption in every such product, with the flexibility that members could set an 8 percent commitment on as much as 25 percent of these products, provided they undertake a 12 percent commitment on another 25 percent of products. Importantly for most developing countries, the modalities draft proposed 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 diversification of production away from narcotic and other illicit products. The implementation period for this commitment was to be five years.

Again in pursuance of the special and differential treatment principle, the modalities draft proposed two things here: firstly, developing countries would be exempted from the requirement to expand in-quota volumes for their "special products"; and secondly, they would be entitled to lower levels of in-quota volume expansion on other products: an average of 6.6 percent of domestic consumption with the flexibility to undertake a 5 percent commitment on 25 percent of their products provided they also undertake an 8 percent commitment on another 25 percent of products.⁹⁶ 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

⁹⁵ According to the WTO Secretariat, the average TRQ fill rate for the six-year implementation period varied between 66 percent for 1995 and 60 percent for 2000. See WTO Secretariat. 2002. *Tariff quota administration methods and tariff quota fill: background paper by the Secretariat* (WTO Document TN/AG/S/6), 22 March 2002, para. 17, Table 5.

⁹⁶ See revised first modalities draft, para. 20.

in all cases where the average TRQ fill rate was below 65 percent.⁹⁷ This would potentially mean almost all tariff quotas, because the fill rate over the implementation period for Uruguay Round commitments almost always stood below 65 percent – the only exception being 1995, the first year of the implementation period for which the fill rate was 66 percent.⁹⁸

While all the above market access issues have played a part in the Doha negotiations, much attention has been – rightly – focused on the problem of TRQ administration. Many agree that TRQs should be expanded but often do not mention by how much; the US has proposed a 20 percent increase together with elimination of in-quota tariffs. Members have so far used a variety of means in administering their TRQs. The most important ones are the following:

- *applied tariffs*. This is a situation where 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.

- *first-come, first-served*. This is a situation where "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. The physical importation of the good determines the order and hence the applicable tariff."⁹⁹

- *licences on demand*. This is a situation where "importers' shares are generally allocated, or licences issued, in relation to quantities demanded and often prior to the commencement of the period during which the physical importation is to take place"¹⁰⁰;

- *auctioning*. Here "importers' shares are allocated, or licences issued, largely on the basis of an auctioning or competitive bid system."¹⁰¹

- *historical importers*. In this case "importers' shares are allocated, or licences issued, principally in relation to past imports of the product concerned."¹⁰²

- *imports undertaken by state trading entities*. Here "import shares are allocated either entirely or predominantly to a state trading entity which imports (or has

⁹⁷ See Id, para. 22.

⁹⁸ See WTO Document TN/AG/S/5, para. 51, Table 4.

⁹⁹ See WTO Document TN/AG/S/6, para. 5, Table 1.

¹⁰⁰ Id.

¹⁰¹ Id.

¹⁰² Id.

direct control of imports undertaken by intermediaries) the product concerned."¹⁰³

- *producer groups or associations*. In this case "import shares are allocated entirely or mainly to a producer group or association which imports (or has direct control of imports undertaken by the relevant member) the product concerned."¹⁰⁴

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.¹⁰⁵ 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. The Doha negotiations have thus rightly spent a significant amount 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). Indeed this first draft shows a tendency to outlaw such prevalent practices as the allocation of import licences only to domestic producer groups/associations, the setting of exportation or re-exportation requirements as conditions for import permits, and even auctioning. A relevant part of the first modalities draft provided as follows: "No 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."¹⁰⁶ The parts of the Harbinson draft dealing with TRQ administration were also among the areas on which relatively less displeasure was expressed by the negotiators in the run-up to Cancun - and the Cancun Draft hardly said anything about TRQ administration.

¹⁰³ Id.

¹⁰⁴ Id.

¹⁰⁵ Id. Table 2.

¹⁰⁶ Attachment 1 to the first draft modalities, para. 2(i).

The July Package did not say much on TRQs and their administration. It simply envisaged the possibility of "reduction or elimination of in-quota tariff rates, and operationally effective improvements in tariff quota administration".¹⁰⁷ The Hong Kong Declaration does not even mention the issue of TRQs. However, the amount of detailed work done prior to the Cancun ministerial, coupled with the growing consensus that prevailed at the time about the need to resolve the problem of TRQs and their administration, could suggest that the Harbinson modalities proposals may still play a role in future negotiations.

3.3 Special Agricultural Safeguard (SSG)

As noted earlier, the 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. 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. According to WTO data, 39 members have reserved the right to use the special safeguard option on hundreds of products; but so far only 10 members have used it "in one or several of the years 1995 to 2001".¹⁰⁸ This situation, coupled with its obvious trade-distortive impacts, has prompted many countries, including the US, the Cairns Group¹⁰⁹ and several developing countries, to demand its elimination. Others, including the EC¹¹⁰ and Japan¹¹¹ have proposed to keep it, stressing the fact that the AoA foresees its duration throughout the reform process.

The original version of the Harbinson 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

¹⁰⁷ July Package, para. 35.

¹⁰⁸ WTO. *Special agricultural safeguard: background paper by the Secretariat: Revision* (WTO Document G/AG/NG/S/9/Rev.1), 19 February 2002, para. 3.

¹⁰⁹ WTO. *Negotiations on agriculture: Cairns Group negotiating proposal: market access*. (WTO Document G/AG/NG/W/54), 10 November 2000.

¹¹⁰ *EC Comprehensive Negotiating Proposal* (WTO Document G/AG/NG/W/90), 15 December 2000, para. 4.

¹¹¹ See *Negotiating proposal by Japan on WTO agricultural negotiations* (WTO Document G/AG/NG/W/91) 21 December 2000, para. 15. Indeed, Japan goes even further and proposes the introduction of a new safeguard mechanism to apply with respect to seasonal and perishable agricultural products (para. 14).

"strategic products" of developing countries.¹¹² 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.¹¹³ Both the pre-Cancun Draft agricultural framework as well as its Cancun counterpart simply noted that the SSG was still under negotiation. Both confirmed, however, that "a special agricultural safeguard (SSM) shall be established for use by developing countries subject to conditions and for products to be determined." This was also the position suggested by the "US-EU joint proposal"¹¹⁴ and the "pre-Cancun G20 proposal" few weeks prior to Cancun.¹¹⁵

The July Package and the Hong Kong Declaration also leave the fate of the SSG open while reaffirming the commitment to establish the SSM for developing countries. The Hong Kong Declaration went further and provided that the SSM will be triggered by import quantity surges and price falls just like the SSG, but leaves the detailed arrangements for future negotiations. Now that the introduction of a developing countries-version of the SSG is already certain, two questions might be asked: first, how beneficial will the SSM be for developing countries, and second, what are the political implications of such a development particularly in terms of the fate of the SSG.

The first question, that is, the practical utility of the SSM, is relevant in that most developing countries have more than enough "water" between their bound and applied tariffs, and it is legal to use this water in response to any future unduly low-priced imports or surges in import quantities. As the Appellate Body observed in *Chile Price Band*, "A member may, fully in accordance with article II of the GATT 1994, exact a duty upon importation and periodically change the rate at which it applies that duty (provided the changed rates remain *below* the tariff rates bound in the Member's Schedule). This change in the *applied* rate of duty could be made, for example, through an act of a member's legislature or executive at any time."¹¹⁶ The agreement in the July Package to make tariff reductions from bound rates rather than applied rates was considered a victory for developing countries largely because it is mainly in developing countries that we find significant

¹¹² See first draft modalities, paras. 23 and 24.

¹¹³ See revised first draft modalities, para. 26.

¹¹⁴ See Cancun Draft.

¹¹⁵ See Cancun Draft.

¹¹⁶ See *Chile Price Band*, Appellate Body Report, para. 232.

differences between these two tariff rates. Here also comes the second concern – that an SSM for developing countries will legitimize the case for the SSG. In other words, negotiations are always about give and take; there is always a price to be paid for any interest pursued by any country or grouping, and the fear is that the right for an SSM secured by the developing countries may be purchased at the price of accepting the continued existence of the SSG whose beneficiaries are the developed countries. At least from the perspective of most developing countries, an SSM that may not be of any use in practice is not a price worth paying for. Moreover, in both cases, it is the long-term objective of achieving a fair and market-oriented agricultural trading system that will suffer the most.

3.4 Conclusion on market access

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 and there is some room 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. It is also notable that developed and willing developing countries have already committed themselves in the Hong Kong Declaration to implement duty-free and quota-free market access for a minimum of 97 percent of products originating from LDCs by 2008.¹¹⁷

IV. AGRICULTURAL EXPORT SUBSIDIES AND OTHER FORMS OF EXPORT SUPPORT

4.1 Background

The AoA defines export subsidies as "subsidies contingent upon export performance".¹¹⁸ This formulation however raises the more basic question of what a "subsidy" is – a concept defined only by the Agreement on Subsidies

¹¹⁷ See Hong Kong Declaration, para. 47, together with Annex F thereof.

¹¹⁸ See article 1(e) of the AoA.

and Countervailing Measures¹¹⁹ (the SCM Agreement). According to article 1 of the SCM Agreement, a subsidy is a financial contribution made by a government or any public body conferring a benefit on the recipient. Under the original text of GATT, subsidies (whether export or domestic), were not subject to any strict discipline. 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.¹²⁰ During the 1954–55 GATT review session, article XVI was modified and a two-tier 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. 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. 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). But, the same export subsidies were permitted on non-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".

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. But this was all in vain. For example, during the Tokyo Round (1973–1979), a separate ("plurilateral-type") agreement was concluded addressing the issue of subsidies and countervailing duties, often referred to as the Subsidies Code.¹²¹ 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" (redefined to exclude minerals from the old concept) were nothing more than the use of new words repeating old stories. As a result, agricultural export subsidies were freely and extensively used especially by developed countries until the Uruguay Round was concluded in 1994.

¹¹⁹ Agreement on Subsidies and Countervailing Measures (hereafter the SCM Agreement) in *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, Marrakesh, 15 April 1994.

¹²⁰ See article XVI, section A. For a more extensive survey of this subject, see Desta, MG (2002).

¹²¹ Agreement on Interpretation and Application of articles VI, XVI and XXIII of the General Agreement, *BISD* 26S/56 (1980).

The Uruguay Round brought an important change to this situation not just through the conclusion of the AoA but also the generic SCM Agreement. The SCM Agreement itself has introduced substantial changes to the law of subsidies in general. Employing a "traffic light approach", this Agreement puts all subsidies into either of three boxes: "red" or prohibited, "amber" or actionable, and "green" or non-actionable. Falling in the "red" box are export subsidies and what are often called import substitution subsidies (i.e. subsidies contingent upon the use of domestic over imported products). The "green" box covered 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. 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. 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. 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. However, as the *Canada Dairy* saga has shown, the relationship between the AoA and the SCM Agreement can be more complicated than this.¹²²

Export subsidies flatly prohibited by the SCM Agreement are expressly permitted by the AoA in the agricultural sector. Indeed agriculture is the only sector where export subsidies are legal. The AoA has created two categories of export subsidies – listed and non-listed – each subject to distinct disciplines. Listed agricultural export subsidies (as under AoA, article 9.1) have generally been subject to reduction commitments of a dual nature - quantitative (by 21 percent) and budgetary (by 36 percent) - on a 1986–1990 base period and over a six-year implementation period. Developing countries were required to undertake only two-thirds of these obligations to be implemented over a period of ten years. 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

¹²² See *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Reports of both the Panel and the Appellate Body, WT/DS113 and WT/DS103 (hereafter *Canada Dairy*).

developing countries - have been prohibited from providing any export subsidies. Following this process, 25 WTO members have scheduled export subsidy reduction commitments in respect of different products.¹²³ This also means that only these 25 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. 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.¹²⁴ 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. To the disappointment of many members including the EC, however, no such agreement was reached due largely to US opposition.

Agricultural export subsidies have long been perceived as the most contentious, and especially from the perspective of developing countries, the most destructive trade policy instruments. However, the users of these subsidies, particularly the EC, have been strongly opposed to any moves to eliminate agricultural export subsidies and bring the rules of agricultural trade in line with those applying to non-agricultural products. The Doha Declaration was thus considered a breakthrough when it provided, in relevant part, that "building 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."¹²⁵ Success or failure for the entire Doha Ministerial Conference were hanging until the very last minute, on the inclusion or otherwise of the italicised phrase in this declaration.¹²⁶

¹²³ The countries 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. See *Export subsidies: background paper by the Secretariat* (TN/AG/S/8), 9 April 2002, para. 4.

¹²⁴ See article 10.1 of the AoA.

¹²⁵ *Doha Ministerial Declaration*, para. 13 (emphasis added).

¹²⁶ De Jonquiers, G. and Williams, F. *Trade talks falter over farm subsidy deal*. Financial Times, 13 November 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").

4.2 Export subsidies: negotiations on the road to Cancun

Agricultural export subsidies continue to be one of the most contentious throughout the Doha negotiations. Although there have been a wide range of proposals on this issue, one can generally say that the vast majority¹²⁷ demanded the phasing out of export subsidies while a small minority led by the EC, was initially prepared to consider only reductions and not total abolition. Reflecting this overwhelming demand for the phasing out of export subsidies, the Harbinson first draft of the modalities proposed a formula by which 50 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 instalments.¹²⁸ For developing countries, this same approach was proposed to be implemented over a period of 10 and 12 years respectively, while keeping the exemptions of AoA article 9.4 intact. The exemptions under article 9.4 relate 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.¹²⁹ Curiously enough, the revised first modalities draft made almost no change to this section of the original draft.

However, the disagreement over export subsidies continued until the last minute in the preparation for Cancun. The 'US-EU joint proposal' suggested eliminating export subsidies only on products of particular export interest to developing countries over an agreed period. The proposed framework from the "G20 countries" suggested the elimination of 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. The pre-Cancun Draft framework prepared by General Council Chairman del Castillo took refuge in more 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

¹²⁷ The US, the Cairns Group, the Africa Group, ASEAN, WAEMU, etc. are all in this group. 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.

¹²⁸ See the first draft modalities, paras. 28–31.

¹²⁹ See the first draft modalities, paras. 32–34.

phasing out, budgetary and quantity allowances for export subsidies". 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."

The Cancun Ministerial Conference put agricultural export subsidies at the heart of the negotiations. However, the Cancun Draft ministerial declaration of 13 September 2003 only paraphrased the proposal contained in the pre-Cancun Draft with no substantive modifications. Coupled with the sensitive issues raised in the cotton sector by four West and Central African countries (known generally as the Cotton Initiative)¹³⁰ the stalemate over export subsidies once again played its traditional role in facilitating the collapse of the Ministerial Conference.

4.3 Other forms of export support: negotiations on the road to Cancun

Another important issue of export competition particularly in the eyes of the EC, but also 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. After years of reluctance, the US now appears to have accepted the need for an internationally agreed discipline particularly in the case of export credits, credit guarantees and insurance mechanisms.¹³¹ 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.¹³² 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. (It is interesting to note that both the "US-EU joint proposal" as well as the "pre-Cancun G20 proposal" were at one on

¹³⁰ This is one of the rare success stories so far in the Doha agriculture negotiations. For an excellent background on the Cotton Initiative, see Kennedy KC. 2005. The incoherence of agricultural, trade, and development policy for sub-Saharan Africa: sowing the seeds of false hope for sub-Saharan Africa's cotton farmers? *Kansas Journal of Law & Public Policy* 14:307–356.

¹³¹ Robert Zoellick described the US position on export credit schemes and food aid as a proposal "to guard against market disruption while maintaining the viability of these programs."

¹³² See attachment 4 to the first modalities draft or attachment 5 to the revised version.

this point; and in fact the pre-Cancun Draft was taken directly from them). This position was also repeated by the Cancun Draft with no change.

The differences between the EU and the US on the issue of food aid continued as wide as ever until quite late in the negotiation process. The EC has always believed that the US uses food aid as a means of circumventing its export subsidy commitments. On that basis, the EC proposed to revise the food aid provisions in the AoA so as to establish a genuine food aid system which responds to the real food aid needs of countries rather than the presence or absence of surplus production in the donor countries.¹³³ The US, on the other hand, saw no problems with the rules and only wanted more transparency in their administration. The Harbinson first modalities draft went in line with the EU position and proposed rules that would require food aid to be provided in full 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.¹³⁴ 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." Once again, the Cancun Draft also left this part of the pre-Cancun Draft unchanged.

The use of State-Trading Enterprises (STEs) as export monopolies is also another issue subject to the Doha negotiations. Interestingly, this is one issue on which the US and the EC have been speaking with the same language from quite early on. The *Canada Dairy* dispute has given a substantial majority of WTO members enough reason to stand united against the practice.¹³⁵ Both the EC as well as the US, just like many others, want to write further disciplines into the Agreement on Agriculture so that price pooling, cross-subsidization, and similar practices carried out through state trading export enterprises would be expressly prohibited. Reflecting this growing consensus, the first Harbinson modalities draft proposed a fairly stringent set of rules on state trading export enterprises which sought to

¹³³ For more on this subject, see Desta, MG. 2001. *Food security and international trade law: an appraisal of the World Trade Organization approach*. Journal of World Trade 35(3):449–468.

¹³⁴ See attachment 5 to the first modalities draft or attachment 6 to the Revised Version.

¹³⁵ See *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products* Reports of the panel (WTO Documents WT/DS103/R, WT/DS113/R) and the Appellate Body (WTO Documents WT/DS103/AB/R, WT/DS113/AB/R) adopted on 27 October 1999.

introduce not just market forces in their operation but even attempt to introduce competition by requiring governments to scrap their export monopoly powers.¹³⁶ Both the pre-Cancun as well as the Cancun Draft frameworks also proposed to introduce the same stringent disciplines to export state trading enterprises as those applying to export credits and other forms of export subsidies.

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 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. As export subsidies are the most destructive and most reviled instruments of trade distortion in use today, any attempts at further weakening this part of the proposed rules would endanger the entire negotiations with total collapse.

4.4 Export competition: from Cancun to Hong Kong

The July Package saw an important breakthrough in the area of export competition. Members agreed "to establish detailed modalities ensuring the parallel elimination of all forms of export subsidies and disciplines on all export measures with equivalent effect by a credible end date."¹³⁷ The commitment to eliminate applied to export subsidies as listed in members' schedules; export credits, export credit guarantees or insurance programmes with repayment periods beyond 180 days and those with a repayment period of under 180 days which fail to conform with disciplines that are to be negotiated; trade-distorting practices of state trading export enterprises that are considered to be subsidized; and food aid that does not conform with various disciplines, which will also be negotiated.¹³⁸ The July Package

¹³⁶ See attachment 6 to the first modalities draft, or attachment 7 to the revised version.

¹³⁷ See July Package, para. 17.

¹³⁸ See July Package, para. 18.

however left the issue of end date unresolved, on which negotiations continued up until the final minutes in the preparation for Hong Kong.

It was reported that a four-hour "Green Room" meeting on the second day of the Hong Kong session "saw every country in attendance except the EU and Switzerland endorse a 2010 end-date for agricultural export subsidies."¹³⁹ The final declaration set this date for the end of 2013, which is subject to confirmation upon the completion of the Modalities Agreement that was set for 30 April 2006.¹⁴⁰ Despite this condition and the long life that agricultural export subsidies have been allowed, this is perhaps what the Hong Kong Ministerial Declaration will be remembered for in the long term. The date set for modalities is also the date that the Hong Kong Declaration has set for the conclusion of new disciplines on export credits, export credit guarantees or insurance programmes (with a repayment period of less than 180 days), exporting state trading enterprises and food aid. Finally, the Hong Kong Declaration also provides that developing country members will continue to benefit from the provisions of article 9.4 of the AoA only for five years after the end-date for elimination of all forms of export subsidies.

V. 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".¹⁴¹ Governments provide support to their agricultural producers in different ways – ranging from direct budgetary transfers to highly disguised forms of market price support. Although the forms of support are diverse, they have certain features in common: they are intended to guarantee certain levels of income for agricultural producers; and 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.

If the effect of such agricultural domestic support measures were 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

¹³⁹ See ICTSD. 2005. Will members reveal their cards in time? *Bridges Hong Kong Daily Update* 3(15).

¹⁴⁰ See Hong Kong Declaration, para. 6.

¹⁴¹ For more on this, see Desta (2002), p. 306.

better off, they distort the patterns of agricultural production and trade at the international level and leave non-supported farmers elsewhere worse off. Indeed, domestic support measures may nullify benefits accruing from trade liberalization. For instance, the effects of the reduction and binding of tariffs in multilateral trade negotiations may be circumvented by domestic support measures taken in favour of competing domestic products or producers. 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. Moreover, domestic support measures also affect international trade indirectly because they stimulate domestic production and often result in excess supply. As a result of world market prices being invariably lower than 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. 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 subsidised exports themselves. 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.

GATT never imposed any meaningful discipline on the use of domestic support, whether agricultural or otherwise,¹⁴² 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.¹⁴³ This quasi-judicial development was soon followed by 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."¹⁴⁴ The Tokyo Round attempted to introduce a more effective discipline on the

¹⁴² See GATT, article XVI:1, which imposed only notification and consultation obligations. For more on this, see Desta (2002), chapter 9.

¹⁴³ *Chile v. Australia: subsidy on ammonium sulphate*, Working Party Report (GATT/CP.4/39) adopted on 3 April 1950, *BISD*, Vol. II.

¹⁴⁴ GATT, *BISD* 3S/224.

use of domestic subsidies; but the final version of the 1979 Subsidies Code merely required signatories to *seek to avoid* causing adverse effects to others' interests through the use of domestic subsidies. Under article 8(3), "Signatories 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." It was the Uruguay Round SCM Agreement which introduced a more meaningful discipline on domestic subsidies for the first time. In its 'traffic light approach', the SCM Agreement put domestic subsidies largely in the "amber" category of actionable subsidies, which are subject to challenge on proof of injury; but, this Agreement left agricultural domestic support measures largely to the AoA. The only types of domestic subsidy put under the red box are the so-called import-substitution subsidies; three others have been put in the category of non-actionable subsidies. But, this latter category has been terminated on 1 January 2000.

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. The ubiquitous nature of domestic support measures particularly in 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. The result is a complex mix of rules and exceptions whose trade-liberalization impact was minimal at least in the short-term.

The AoA follows a positive list approach in the sense that trade-distorting domestic support measures are in principle prohibited unless specifically permitted. Measures so permitted may be put under three broad categories: some are available to all WTO members; others are available exclusively to developing countries; and a third category is available almost exclusively to developed or high-income developing countries. 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 of non-green support (5 percent for developed countries and 10 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). 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. 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 35, largely OECD, countries counting EC(15) as one.¹⁴⁵ These categories will be discussed further in this section.

5.1 Amber box measures

5.1.1 Approach and structure in the AoA

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 in all but 35 members.¹⁴⁶ These 35 members are the ones that had reported to have used such trade- and production-distorting measures during the 1986–88 base period¹⁴⁷ and on which they have undertaken Aggregate Measurement of Support (AMS) reduction commitments in their schedules. 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".¹⁴⁸ The calculation of the AMS takes into account both product-specific as well as sector-wide support, and the final commitments are expressed in aggregate terms in the

¹⁴⁵ For a list of these countries, see Committee on Agriculture, Special Session, *Total aggregate measurement of support, Note by the Secretariat*, TN/AG/S/13, 27 January 2005.

¹⁴⁶ These are: Argentina, Australia, Brazil, Bulgaria, Canada, Chinese Taipei, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, EC, Hungary, Iceland, Israel, Japan, Jordan, Korea, Lithuania, Mexico, Moldova, Morocco, New Zealand, Norway, Papua New Guinea, Poland, Slovak Republic, Slovenia, South Africa, Switzerland-Liechtenstein, Thailand, Tunisia, United States, Venezuela.

¹⁴⁷ This does not of course apply to countries that joined the WTO after the Uruguay Round.

¹⁴⁸ Article 1(a) of the Agriculture Agreement.

form of *Total AMS*.¹⁴⁹ 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*. It was from this benchmark that countries undertook 20 percent reduction commitments over a six-year implementation period in equal annual instalments (developing countries undertook only a 13.3 percent reduction commitment over a ten year implementation period).¹⁵⁰ A WTO member has 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.¹⁵¹ It is worth noting that this commitment applies on a sector-wide rather than a product-specific level. The effect is that countries could legally increase product-specific amber-box support to any level provided the aggregate limit was respected.

As noted earlier, the 35 members that had undertaken domestic support reduction commitments are 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 – are prohibited from providing amber box measures at all. 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. 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. It is no wonder therefore, to see that the countries for which the use of amber box domestic support is already illegal are pursuing the goal of extending the ban to all members. But the argument for the elimination of amber box measures has also been made increasingly by countries that are entitled to use them today.¹⁵²

¹⁴⁹ Article 1(h) of the Agriculture Agreement.

¹⁵⁰ See paragraph 8 of the *Uruguay Round modalities for the establishment of specific binding commitments under the reform programme*. GATT Document MTN.GNG/MA/W/24, 20 December 1993 (hereafter the Modalities Agreement).

¹⁵¹ Article 6:3 of the Agriculture Agreement.

¹⁵² See for example the positions of the US and the Cairns Group. In fact, the EU, Japan and the US alone "account for 90 percent of total domestic support (i.e. AMS, blue box, green box, *de minimis*, and special and differential treatment) for the OECD area as a whole." OECD (2001), p. 14.

5.1.2 Major issues in Amber box support

The main controversial issues in the ongoing negotiations regarding amber box domestic support include the following: (1) Should it be eliminated or just reduced? If it is the latter, by how much? and (2) Should the aggregate commitments be replaced by product-specific commitments?

To start with the second question, several countries argued that the aggregate nature of the commitments allowed countries to provide unlimited amounts of support to particularly sensitive sectors and that the only way domestic support commitments could help towards freer trade was if those commitments were product-specific. 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."¹⁵³ A submission by the Association of South-East Asian Nations (ASEAN) used a similar language on disaggregation, but to be applied for developed countries only.¹⁵⁴ On the opposite side stood, 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."¹⁵⁵

On the more fundamental question concerning the fate of amber box measures in general, the US and the Cairns Group have been leading the camp that seeks to set a date by which all trade-distorting domestic support would be eliminated. The US stance on this subject has hardened over time. When the US 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.¹⁵⁶ In a later proposal, the US 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.¹⁵⁷ The Cairns Group has consistently argued for the elimination of trade-distorting support

¹⁵³ Cairns Group Negotiating Proposal: Domestic Support G/AG/NG/W/35, 22 September 2000.

¹⁵⁴ See *Special and differential treatment for developing countries in World Agricultural Trade: submission by ASEAN* (WTO Document G/AG/NG/W/55), 10 November 2000.

¹⁵⁵ Proposal by Norway, G/AG/NG/W/101, 16 January 2001.

¹⁵⁶ See *Proposal for comprehensive long-term agricultural trade reform: submission from the United States*, (G/AG/NG/W/15), 23 June 2000; see also *Note on domestic support reform: submission from the United States*, (G/AG/NG/W/16), 23 June 2000.

¹⁵⁷ For later US positions, see www.fas.usda.gov/itp/wto/proposal.htm.

since 2000.¹⁵⁸ The opposite camp has been led by, *inter alia*, the EU, Japan and Switzerland. According to the EU, 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.¹⁵⁹ In its proposal for the modalities, the EU maintained its approach and suggested a 55 percent reduction on amber box support while maintaining the other boxes intact.¹⁶⁰

Amid all this, the first modalities proposal from Stuart Harbinson suggested a 60 percent reduction in the final bound Total AMS in equal annual instalments over a five year implementation period. 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 AMS for individual products shall not exceed the respective levels of such support provided on average of the years [1999–2001]." 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. 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. 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.

The "US-EU joint proposal" of August 13 2003 suggested reductions in a range – i.e. setting the minimum and maximum percentage points by which all amber box domestic support measures would be reduced. The joint text left the specific numbers for future negotiations. The framework proposed by the "G20 Countries" also accepted the overall approach of the "US-EU joint proposal" introducing reductions in a range, but added several more stringent requirements. Firstly, the reduction commitments would be on a product-specific basis. 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 (thus leading to some degree of support harmonization). Thirdly, a "down payment" would be made in the form of a first reduction (by an amount that would be negotiated) across the

¹⁵⁸ See Cairns Group proposal on domestic support.

¹⁵⁹ See EC comprehensive proposal.

¹⁶⁰ See EC proposal for the Modalities Agreement.

board for all products within the first year of the implementation period; and higher reductions, with a view to the 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.

The pre-Cancun framework for agricultural modalities prepared by General Council Chairman del Castillo was more in line with the "US-EU joint proposal" described earlier: adopting the approach of reductions in a range at an aggregate sector-wide level, and with no reference to the support harmonization or down payment elements in the "pre-Cancun G20 proposal". Thanks to the tenacity of the G20 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.

5.2 Blue box measures

5.2.1 Approach and structure in the AoA

Under the AoA, direct payments made to farmers under production-limiting programmes, often known as the "blue" box measures, are excluded from the calculation of the Current Total AMS, and hence from the reduction requirements, on condition that certain important conditions are met. 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. Secondly, payment should be conditional upon some form of production-limiting measures being taken by the recipient, including on a fixed acreage and yields, or on 85 percent or less of the base level production, or, in the case of livestock payments, on a fixed number of head.¹⁶¹ This option is *de jure* available to every WTO member; but a total of only nine members, counting EC (15) as one, notified blue box support in at least one of the years 1995 to 2003.¹⁶² These are Czech Republic, Estonia, EC (15), Iceland, Japan Norway, Slovenia, Slovakia and the US – all OECD countries.

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 box – except the US which no longer maintains such measures – are its staunch

¹⁶¹ See article 6:5 of the Agriculture Agreement.

¹⁶² See Committee on Agriculture Special Session, *Blue Box Support: Note by the Secretariat* (TN/AG/S/14), 28 January 2005.

defenders. Switzerland and Korea are examples of countries that have not used the Blue box so far but that are defending it no less passionately. Indeed, Switzerland joined the EU in declaring that progress in the negotiations would be possible only if the blue and green boxes were to be maintained.¹⁶³ The US and the Cairns Group led the camp which advocated scrapping this box altogether.

5.2.2 Major issues in blue box support

The most important issue involving blue box support 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. When looked at closely however, both parenthetical options would effectively eliminate the blue box and either put its contents in the amber category (and hence subject to reduction commitments as such), or keep it as a separate category but subject it to discipline similar to that applying to amber box.¹⁶⁴ The relevant proposal reads as follows:

"Direct payments under production-limiting programmes provided in accordance with the provisions of article 6.5 of the Agreement on Agriculture (blue box payments) [shall be capped at the average level notified for the implementation years [1999–2001] and bound at that level in Members' Schedules. These payments shall be reduced by [50] percent. The reductions shall be implemented in equal annual instalments over a period of [five] years.] [shall be included in a member's calculation of the Current Total Aggregate Measurement of Support (AMS)]."

The "US-EU 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. The proposal from the 'G20 countries', on the other hand, called for the elimination of blue box support altogether. The pre-Cancun Draft framework for agricultural modalities as well as its Cancun revision proposed only a reduction approach based on the "US-EU joint proposal".

¹⁶³ For the Swiss position see its Statement to the Seventh Special Session of the Committee on Agriculture, 26–28 March 2001, (G/AG/NG/W/155).

¹⁶⁴ First modalities draft, para. 43.

5.3 Green box measures

5.3.1 Approach and structure in the AoA

Annex 2 to the Agreement on Agriculture provides for a detailed but non-exhaustive list of practices for which governments may claim exemptions from reduction/elimination requirements – so-called "green" box measures. 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. This basic requirement is supplemented by a detailed and virtually exhaustive (although explicitly described otherwise) list of measures along with general and policy-specific criteria they have to satisfy before being exempted from reduction commitments. The exemptions do not apply to market price support and all other forms of support involving transfers from consumers. Besides, while governments are allowed to take precautionary food security measures, provide general services (such as research, pest control, training, infrastructural development, etc.) 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. 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. Furthermore, members are allowed to provide income insurance and disaster relief services on condition that farmers are not thereby made to profit from such occurrences. Finally, members can also provide assistance for structural adjustment, and environmental and regional development purposes. In general, while decoupled payments may be made for whatever reason and to unlimited amounts, those payments that take the form of income insurance, disaster relief, structural adjustment assistance, environmental or regional development programmes 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 programme. According to WTO data, a total of 83 members (counting the EC-15 as one) had made notifications by 2004 concerning their domestic support measures since the 1995 implementation year, and 68 of these had provided green box notifications.¹⁶⁵

¹⁶⁵ For comprehensive information about green box measures reported by WTO members, see Committee on Agriculture Special Session, *Green Box Measures: Note by the Secretariat*, (TN/AG/S/10), 8 November 2004.

5.3.2 Major issues in green box support

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 current 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 commitments¹⁶⁶; some wanted to put a cap on the amount of money that could be spent on them; some others wanted to narrow the scope of measures falling under that box; still others wanted to enlarge the box so as to include additional measures.¹⁶⁷ On balance, however, it is more likely that this box will survive the current negotiations without much modification. The only important issue here has been whether the criteria for 'green box' exemptions should be tightened.¹⁶⁸

The first Harbinson modalities draft suggested that the provisions of Annex 2 be maintained subject to minor modifications. Important among the suggested modifications were the following: (1) in response mainly to an EU insistence, the modalities draft suggested inclusion of animal welfare payments under paragraph 12 of Annex 2 along with payments under environmental 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 *inter alia*, maintaining domestic production capacity for staple crops, and payments to small-scale or family farms for reasons of rural viability and cultural heritage.¹⁶⁹ 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. The pre-Cancun Draft framework for agricultural modalities (as well as its Cancun revision) left "green box" domestic support measures

¹⁶⁶ See, e.g. a proposal by a group of 11 developing countries in (WTO Document G/AG/NG/W/13), 23 June 2000.

¹⁶⁷ See WTO. *Services and agriculture negotiations: meetings set for February and March*. (WTO Press Release (Press/167)), 7 February 2000.

¹⁶⁸ For other proposals such as to take green box support into the amber box and subject it to reduction commitments, see, e.g. proposal by India, G/AG/NG/W/102, 15 January 2001.

¹⁶⁹ See revised first modalities draft, attachment 8, para. 6.

intact while noting that the criteria for a measure to be classified as such remained under negotiation.

5.3.3 The direction of negotiations on domestic support

An interesting feature of the July 2004 package is the support-harmonization approach it introduced for trade-distorting domestic support. Harmonization in domestic support is however different from harmonization in agricultural market access. In the latter case, harmonization refers to the process and objective of narrowing the gap between the tariff levels that apply to different products in different countries; it is in effect a means of minimising the level of tariff dispersion contained in the tariff schedules of a member country. In the context of domestic support however, harmonization refers to the process and objective of narrowing the gap between the levels of trade-distorting domestic support that could be provided by different countries; this is thus inter-country rather than inter-product harmonization. Indeed there is no room for inter-product harmonization for domestic support because the commitments in this area, unlike in market access or even export subsidies, are sector-wide.

The July Package injected harmonization as an objective in addition to the Doha objective to bring about "substantial reductions in trade-distorting domestic support". Two levels of commitments are clearly provided in the July Package with respect to trade-distorting domestic support, which is here understood to mean all non-green box measures of support (i.e. amber box measures, permitted *de minimis* levels, and the blue box) – overall and specific. The overall commitment would apply to a base level figure that would be made up of the Final Total AMS (for amber box), permitted *de minimis* levels and the higher of existing blue box payments during a recent representative period to be agreed.¹⁷⁰ In order to achieve its object of harmonization, the July Package provided that the overall base level thus constituted would be reduced according to a tiered formula under which "members having higher levels of trade-distorting domestic support will make greater overall reductions in order to achieve a harmonizing result."¹⁷¹ The July Package further agreed on a 20 percent reduction as a down payment at the beginning of the implementation period. This overall reduction commitment is supplemented by commitments specific to each trade-distorting domestic support – i.e. amber box, blue box

¹⁷⁰ See July Package, paras. 7 and 8.

¹⁷¹ See *Id.*, at para. 7.

and *de minimis* support. The tiered formula was once again agreed to apply to the reduction of the amber box measures so that members with higher AMS levels would make steeper cuts. However, the number of support bands and the rate that would apply to each were left for future negotiations. The July Package also contained a commitment to cap product-specific AMS at their respective average levels according to a methodology to be agreed so as "to prevent circumvention of the objective of the Agreement through transfers of unchanged domestic support between different support categories".¹⁷² Reductions on *de minimis* levels were left for future negotiations; however there is already an agreement to exempt developing countries from any such reduction requirement provided they "allocate almost all *de minimis* support for subsistence and resource-poor farmers."¹⁷³

The Hong Kong Declaration made some notable progress in this respect. It was agreed that there will be three bands for reductions in Final Bound Total AMS and in the overall cut in trade-distorting domestic support, with higher linear cuts in higher bands. Moreover, the gap in the amount of Final Bound Total AMS within the 35 members that undertook commitments in the area is so big that the Hong Kong Declaration was able to be more specific about the allocation of countries to each of the three tiers. Accordingly, "the member with the highest level of permitted support will be in the top band, the two members with the second and third highest levels of support will be in the middle band and all other members, including all developing country members, will be in the bottom band."¹⁷⁴ On the basis of the latest WTO data, the one member that has the highest level of permitted support and that is going to be put in the top band is the EC(15) – which may do so as EC(25) following its latest expansion; the two members with the second and third highest levels of support that will be put in the middle band will be Japan and the US respectively; while the remaining 32 members with domestic support commitments will be put in the third band.¹⁷⁵ The rights of developing countries with no domestic support commitments to provide *de minimis* levels of support remain unaffected. The rate that will apply to each of the three bands is a matter left for the Modalities Agreement.

The blue box also saw important developments in the July Package. On top of the overall commitments that will apply to all trade-distorting domestic

¹⁷² See Id, at para. 9.

¹⁷³ See Id, at para. 11.

¹⁷⁴ See Hong Kong Declaration, para. 5.

¹⁷⁵ For the latest data on this, see TN/AG/S/13.

support, including the blue box, a specific agreement was reached to cap the blue box at no more than 5 percent of the value of a country's agricultural production over a period to be negotiated. The Hong Kong Declaration did not say much on the blue box.

In relation to the green box measures, the July Package simply commits members to review and clarify the criteria for measures to be put in this box so as to ensure that they have no, or at most minimal, trade-distorting effects or effects on production.¹⁷⁶ The Hong Kong Declaration merely refers back to the July Package to review the green box criteria and extend their coverage to "programmes of developing country members that cause not more than minimal trade-distortion".¹⁷⁷

VI. 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 very similar to the 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 with increased force and momentum, 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 liberalisers are still working hard for further and quicker liberalisation. The latter group have boosted their positions by injecting into their argument the enduring cause of developing countries and their special interest in this sector. The emergence of the high-profile issue of cotton subsidies later in the negotiations has further boosted this aspect of the argument.

However, whatever governments may say in this respect, the issue of 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 paragraph 27 of

¹⁷⁶ See July Package, para. 16.

¹⁷⁷ See Hong Kong Declaration, para. 5.

the Cancun Draft ministerial declaration on cotton was considered as one of the most blatant expressions of this hypocrisy. The negotiations since Cancun have changed many things, often in favour of developing countries. The commitment to eliminate developed countries' export subsidies on cotton by 2006 and the agreement to extend duty- and quota-free market access for most goods originating in LDCs are worthy outcomes of the Hong Kong Ministerial Declaration.

Despite the slow progress, the agriculture negotiations still promise important developments in each of the three pillars. The elimination of all forms of agricultural export subsidies by 2013 is an historic achievement that should be protected from any last-minute diplomatic second-thoughts and compromises. Although the changes in this regard will require legislative and institutional modifications in only the 25 or so WTO members that have export subsidy commitments, the parallel disciplines that are expected to be completed as part of the Modalities Agreement by 30 April 2006 on such issues as export credits, food aid and state trading export enterprises may have more direct implications for other members as well.

The picture will look broadly similar in the other two pillars as well. With respect to domestic support, the dual commitments to apply a tiered formula at the level of overall trade-distorting measures and specifically the amber box would not create any obligations for countries with no trade-distorting domestic support measures in place – and most developing countries fall into this category. Indeed, to the extent their financial status permits, most of these countries may be able to introduce new support measures within their *de minimis* levels (for trade-distorting ones) and the green box. The agreement in the Hong Kong Declaration to review the green box criteria so as "to ensure that programmes of developing country members that cause not more than minimal trade-distortion are effectively covered" appears to indicate that the review of green box criteria may even introduce further flexibilities for the benefit of developing countries.

Likewise, the agreement to apply the tariff reduction commitments from bound rates rather than applied ones also has the effect of allowing most developing countries to retain their existing applied rates while reducing their bound rates to levels which should in many cases still remain far higher than what most of these countries may want to apply. In most developed countries, on the other hand, the gap between bound and applied tariffs is either small or non-existent, and the implications of the commitments will be

more immediate in many cases. The introduction of the categories of sensitive and special products as well as the SSM will also require a revision of the national schedules of particularly the developing countries both to designate the beneficiary products as well as apply the permitted deviations from whatever tariff reduction formulae are going to be agreed.

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