

**LEGAL ISSUES IN
INTERNATIONAL
AGRICULTURAL TRADE:
THE EVOLUTION OF THE WTO
AGREEMENT ON AGRICULTURE FROM
ITS URUGUAY ROUND ORIGINS TO ITS
POST-HONG KONG DIRECTIONS**

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LEGAL ISSUES IN INTERNATIONAL AGRICULTURAL TRADE: THE EVOLUTION OF THE WTO AGREEMENT ON AGRICULTURE FROM ITS URUGUAY ROUND ORIGINS TO ITS POST-HONG KONG DIRECTIONS

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I. INTRODUCTION

The WTO Agreement on Agriculture¹ (AoA) came into existence over ten years ago as one of the agreements annexed to the Marrakesh Agreement establishing the World Trade Organization (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 that should culminate in the establishment of a fair and market-oriented agricultural trading system.

This short study aims to provide condensed background information on the *origins, nature, structure and scope* of, and *obligations* contained in, the AoA focusing on the three pillars. To that end, the paper is structured in three parts: market access, domestic support, and export subsidies. Each of these three sections will in turn be structured as follows: Firstly, the key concepts in every section will be introduced. Secondly, the currently applicable legal regimes in these areas will be briefly described. Thirdly, the current sticking points in each section will be identified. And finally, the prospects in each area will be assessed on the basis mainly of the following official documents: the Harbinson modalities draft papers,² later 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 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 will be 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. Before that, however, some reflections on the origins, nature and structure of the AoA would be in order.

A. 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 the 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

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 referred to as 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 referred to as the Cancun draft).

⁵ See WTO, *Doha Work Programme: Decision Adopted by the General Council on 1 August 2004* (WT/L/579, 2 August 2004), hereafter referred to as 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.

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), and 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

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 renegotiations of commitments every time the Community expanded as envisaged under 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 in respect of some of the most important trading powers.¹⁴

The frustration with this reverse development in GATT’s disciplining power over national agricultural trade policy finally resulted in growing calls, and later 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 problem of agricultural trade could thus come only from the “political organ”

⁸ The Contracting Parties decided “pursuant to paragraph 5 (a) of Article XXV of the General Agreement ... that subject to the conditions and procedures set out hereunder the obligations of the United States under the provisions of Articles II and XI of the General Agreement are waived to the extent necessary to prevent a conflict with such provisions of the General Agreement in the case of action required to be taken by the Government of the United States under Section 22.” 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 The reasons behind the creation of the CAP at the EEC level in the 1960s, which was based on the agriculture chapter of the 1957 Treaty of Rome, are both instructive in themselves and partly contributed to the direction taken by the multilateral trade rules on agricultural products. For more on this, see Gerrit Meester, “European Union, Common Agricultural Policy, and World Trade”, 14 *Kansas Journal of Law & Public Policy* (Winter, 2005) p. 389 ff. According to Meester, the “low-level consolidation of the import tariffs on oilseeds, protein crops and products ... cereals substitutes” was done at the GATT Dillon Round as a price paid for the introduction of the CAP at the time. See *Id.*

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 Paragraph 6 of the 1966 Protocol for the Accession of Switzerland provided, in relevant part, that “Switzerland reserves its position with regard to the application of the provisions of Article XI of the General Agreement to the extent necessary to permit it to apply import restrictions ...” See *Protocol for the Accession of Switzerland*, BISD 14S/6-11 (July 1966). In the words of Christian Haberli, head of the International Affairs at the Swiss Federal Office for Agriculture, upon

its accession to the GATT, Switzerland obtained “a virtual *carte blanche agricole*” and was “free to regulate imports just about as it wanted to.” See Christian Haberli, “The July 2004 Agriculture Framework Agreement” in Bernard O’Connor (ed.) *Agriculture in WTO Law* (Cameron May, London, 2005), p. 404.

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.” Michael Trebilcock and Robert Howse, *The Regulation of International Trade* (Routledge, London and New York, 2nd ed. 1999), p. 247.

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.” See Robert Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Butterworth Legal Publishers 1993), p. 327, finding that between 1960 and 1989 exactly one-half of GATT cases involved agricultural products. Hudec found this on a working definition of agricultural products that was narrower than the definition given to agricultural products under Annex I of the AoA. See, e.g., Hudec’s exclusion of disputes involving cigarettes from agricultural disputes; cigarettes in fact fall under HS Chapter 24, which are agricultural products for purposes of the AoA.

¹⁵ See, e.g. the 1982 GATT Ministerial declaration at

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 optimistic observers at the launch of round in 1986. Agriculture played a key role in the success or failure of the whole negotiation process.

B. NATURE AND STRUCTURE OF THE AOA

A look at the structure of the AoA shows that this is an agreement that 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 loop-holes on the body of the GATT text. As argued earlier, these loop-holes 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 loop-holes on the body of the GATT.¹⁸

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.*

¹⁸ We shall see later on 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

The AoA has always been a subject of controversy since its birth in 1995. Some look at it as an instrument with a potential to redress the imbalance in the trade relations between developing and developed countries. Others look at it as an instrument that “systematically favors agricultural producers in industrialized countries at the expense of farmers in developing countries” and thereby institutionalizes inequality.¹⁹ For some the AoA is an embodiment of “the recognition that agriculture has always been different and that difference needs to be recognised in something more than limited exceptions.”²⁰ Still others accuse it of having too 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

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”²² to the U.S. Senate’s tendency “to represent land more than people”²³ to agriculture’s role as the

holes. We shall see that the third prong, domestic support, was found necessary in order to properly address the issues on the two other subjects.

¹⁹ See Carmen G. Gonzalez, “Institutionalizing Inequality: the WTO Agreement on Agriculture, Food Security, and Developing Countries” 27 *Columbia Journal of Environmental Law* (2002), p. 438. 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. *Id.* p. 476.

²⁰ See Bernard O’Connor, “Should there be an Agreement on Agriculture”, in Bernard O’Connor (ed.) *supra* n. 12, p. 418.

²¹ See, e.g. Sophia Murphy, “Structural Distortions in World Agricultural Markets: Do WTO Rules Support Sustainable Agriculture?”, 27 *Columbia Journal of Environmental Law* (2002), pp. 609-610. Murphy further argues that the AoA ignores important ecological considerations and undermines genetic diversity. See *Id.*, p. 610.

²² See John A. Ragosta, “Trade and Agriculture, and Lumber: Why Agriculture and Lumber Matter” 14 *Kansas Journal of Law & Public Policy*, Winter, 2005, 414-15.

²³ 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” K. Dam, *The GATT; Law and 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. A leading authority and practitioner on agricultural trade law, Bernard O'Connor, provides strategic and economic explanations and concludes that "agriculture is different from any other sector and is rightly treated according to the rules of a separate WTO Agreement."²⁴

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.²⁵ 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

A. BACKGROUND

The share of agricultural exports in global trade has fallen from 47 per cent of total merchandise exports in 1970 to just 9.1 per cent in 2001.²⁶ 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.²⁷ Just like in the more than seven years of Uruguay Round negotiations, agriculture is still the most contentious and also the most important issue in the ongoing Doha trade negotiations.²⁸ 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 process²⁹ and the collapse of the Cancun Ministerial Conference blamed largely on agriculture.³⁰

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

International Economic Organization (University of Chicago Press, 1970), p. 260.

²⁴ O'Connor, *supra* n. 12, at 419.

²⁵ 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. For the details on this, see Haberli, *supra* n. 12, pp. 403-404.

²⁶ 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 per cent of its merchandise exports and Ethiopia with 84.2 per cent of its merchandise exports accounted for by agricultural products. See WTO, *International Trade Statistics 2002* (Geneva, 2003), pp. 105 - 112.

²⁷ It appears that agriculture was being rivalled in this only by the row surrounding drug patents for the pharmaceutical industry which received a boost from an unexpected source, the anthrax scare in North America and the resulting brawl between Bayer (the patent holder for Cipro – the anthrax treatment drug) on the one hand and Canada and the USA, on the other. A deal on pharmaceutical products was finally reached at the last minutes in the preparation for Cancun. See Decision of the Council for TRIPS, IP/C/W/405, 30 August 2003.

²⁸ 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." World Bank, *Global Economic Prospects Realizing the Development Promise of the Doha Agenda: 2004*, (Washington D.C. 2003), p. xvi.

²⁹ For example, the failure of WTO negotiators to meet the 31st 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 31st 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. See, e.g. <http://www.ictsd.org/weekly/03-05-28/story1.htm>

³⁰ The so-called Singapore issues – investment, competition, transparency in government procurement, and trade facilitation – were also partly responsible for the Cancun collapse.

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.

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.³¹ 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 a few areas on which a negotiation had already been mandated by the results of the Uruguay Round, the WTO General Council was able to 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

³¹ See Article 20 of the Agreement on Agriculture which provides 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."

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

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

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 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.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”). Among the three pillars, too, 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 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 the 31st of 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 at Cancun, Mexico, from 10 to 14 September 2003) was to be 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.

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

³⁵ 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.” WTO Secretariat, *Agriculture Negotiations: Where We are Now* http://www.wto.org/english/tratop_e/agric_e/negs_bkqrnd00_contents_e.htm, p. 12.

³⁶ A *Financial Times* report on 14 November 2001 – i.e. 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.” P. 14. 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 no later than 31 March 2003.”

³⁸ See first modalities draft, *supra* n. 2.

³⁹ See revised first modalities draft, *supra* n. 2.

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 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); 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 per cent down payment at the beginning of the implementation period; and 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 enterprises and food aid practices that market access have 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 would 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 end of 2006. Whether such an ambitious agenda will be met is yet to be seen. Most

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* (Aug. 13, 2003), available at, http://www.ictsd.org/issarea/attd/Resourcs/docs/EC-US_joint_text_13_Aug_2003.pdf.

⁴² See ICTSD, <http://www.ictsd.org/weekly/03-08-21/story2.htm>; see also “U.S., EU Agriculture Framework Sees Partial Elimination of Export Subsidies”, *Inside US Trade*, 13 August 2003.

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

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 July package, *supra* n. 5.

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

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

By agricultural market access, we mean 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.⁵¹ 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.⁵²

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.⁵³ An important challenge in the area of agricultural trade was to bring some discipline into this widespread use of non-tariff barriers, often in violation of the rules. 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

⁴⁷ See, inter alia, "Hard truths: The Doha trade round is still alive, but hardly healthy", *The Economist* (Dec. 20th 2005).

⁴⁸ See Keith Bradsher, "Trade Officials Agree to End Subsidies for Agricultural Exports", *New York Times*, Dec. 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.

⁵¹ Article XI:2(c) provides for the only agriculture-specific exception in the GATT as follows: the prohibition of quantitative restrictions under paragraph 1 does not extend to:

"import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate: (i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or (ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or (iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible. Any contracting

party applying restrictions on the importation of any product pursuant to 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."

⁵² For more on this, see Melaku Geboye Desta, *The Law of International Trade in Agricultural Products: from GATT 1947 to the WTO Agreement on Agriculture* (Kluwer, 2002), Part I.

⁵³ An important 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 in the need to manage domestic production and supply. Bernard O'Connor, "Book Review: The Law of International Trade in Agricultural Products: From GATT 1947 to the WTO Agreement on Agriculture", *Journal of International Economic Law* (Volume 6, Issue 2, July 2003), pp. 537-538.

(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”.⁵⁴ According to the Appellate Body, these different forms of border measures have one thing in common: “they restrict the volume or distort the price of imports of agricultural products.”⁵⁵ The resulting tariffs were also bound against any future increase and then subjected to a 36% minimum reduction commitment on the average tariff levels (and a 15% 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 (1986-88) already represented at least five per cent of corresponding domestic consumption, which was far from common in agriculture. In cases where imports during the base period were less than five percent, members undertook a commitment to create what are called “minimum access opportunities” representing three percent of domestic consumption of the product for the base period for the first year of the implementation period (1995), reaching five per cent by the end of the implementation period (2000). In theory, therefore, a minimum of five per cent of the domestic consumption of every product in every member country today must be accounted for by 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, to accommodate fears of excessive or low-priced imports into the newly-opened markets, a special arrangement was made to allow the introduction of special safeguard (SSG) measures on tariffied 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.⁵⁶ These will be discussed in turn.

⁵⁴ See footnote 1 to Article 4:2 of the Agreement on Agriculture.

⁵⁵ 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. One may of course question whether ordinary customs duties as well are not doing 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.

⁵⁶ There are also a few new market access issues, such as protection of geographical indications, that are currently being pushed by some members.

A. TARIFF REDUCTIONS IN THE CURRENT NEGOTIATIONS

1. Negotiations on Tariff Reductions on the Road to Cancun

Now that tariffs are the only means of protection at the border⁵⁷, 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 fell 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 % and a minimum reduction per tariff line of 15% as was the case in the Uruguay Round.”⁵⁸ 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” formula⁵⁹ 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 tariffs⁶⁰ – a move that, if successful, could have given agriculture a further lead over manufactures.⁶¹ Knowing the sensitivity of agricultural issues in many WTO members, it was not difficult to dismiss this latter point as too ambitious for the Doha negotiations. 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.⁶²

Former Agriculture Committee chairman Stuart Harbinson’s first draft of the modalities proposed a three-tier distinction among agricultural products on the basis of their bound tariff levels, thus suggesting higher reduction rates for higher tariffs and lower reduction rates for lower tariffs.⁶³ The draft (both original and revised versions) suggested that agricultural tariffs in excess of 90 per cent ad valorem be reduced by an average of 60 per cent and a per-tariff-line minimum of 45 per cent; for those products with tariffs between 15 and 90 per cent ad valorem, the average would be 50 per cent and the per-tariff-line minimum 35 per cent; and for those products with tariffs

⁵⁷ 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 Secretariat, *WTO Agriculture Negotiations: The Issues, and Where We are Now* 10 October 2002, available at http://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd00_contents_e.htm The OECD has also noted that Hungary and Poland tariffed only 91% and 96% respectively of their agricultural NTBs. See OECD, *The Uruguay Round Agreement on Agriculture: an Evaluation of Its Implementation in OECD Countries* (Paris, 2001) p. 23.

⁵⁸ *The EC’S Proposal for Modalities in the WTO Agriculture Negotiations* (29 January 2003), available at <http://europa.eu.int/comm/agriculture/external/wto/officdoc/mod.pdf>.

⁵⁹ 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%, Robert Zoellick called it the “Swiss 25” formula. See *Statement of Robert B. Zoellick U.S. Trade Representative before the Committee on Agriculture of the U.S. House of Representatives*, May 21, 2003, available at <http://www.ustr.gov/speech-test/zoellick/2003-05-21-agriculture.pdf>.

⁶⁰ For the latest US positions, see <http://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 U.S. general economy. About 25 percent of gross cash receipts from agricultural sales are for export, compared with 10 percent on average for manufactured goods.” Debra Henke, “WTO Negotiations Offer the Best Chance for Agricultural Trade Reform”, *AgExporter*, November 2001.

⁶¹ Note, however, that the US has also made a similarly ambitious proposal to eliminate all tariffs on all non-agricultural products by 2015. See *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.

⁶² 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).

⁶³ See first draft modalities, *supra* n. 2, paras. 7 and 10; see also revised first draft modalities, *supra* n. 2, paras. 8 and 12.

of 15 per cent ad valorem or lower, the average reduction requirement would be 40 per cent and the per-tariff-line minimum 25 per cent.⁶⁴ 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.⁶⁵ 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.⁶⁶

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.”⁶⁷ 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]”⁶⁸

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 designate them with the symbol “SP” in their schedules. These products would then be subject to a uniform requirement of 10 per cent average and 5 per cent 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 here⁶⁹: those with ad valorem tariffs higher than 120 per cent would be reduced by 40 per cent average and 30 per cent per-tariff-line minimum; those with tariffs between 60 and 120 per cent by an average of 35 and a per-tariff-line minimum of 25 per cent; those with tariffs between 20 and 60 per cent by an average of 30 and a per-tariff-line minimum of 20 per cent; and those with tariffs 20 per cent or lower ad valorem to be reduced by a 25 per cent average and a 15 per cent per-tariff-line minimum.⁷⁰ 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.⁷¹ In recognition of this,

⁶⁴ See first draft modalities, *supra* n. 2, para. 7, and revised first draft modalities, *supra* n. 2, para. 8.

⁶⁵ Paragraph 9 of the revised first draft modalities provides as follows: “Where participants apply non-ad valorem tariffs, the allocation of any tariff item in categories (ii) and (iii) above shall be based on tariff equivalents to be calculated by the participant concerned in a transparent manner, using three-year average external reference prices or data, based on a recent representative five-year period, excluding the highest and the lowest entry. Full details of the method and data used for these calculations shall be included in the tables of supporting material for the draft Schedules and shall be subject to multilateral review.”

⁶⁶ According to Robert Zoellick, the Harbinson proposal on market access would result in an average agricultural tariff of 36 per cent (down from the current 62 per cent) while the US proposal would have cut them down to an average of 15 per cent. See Zoellick, *supra* n. 59.

⁶⁷ See first draft modalities, *supra* n. 2, para. 7, last indent.

⁶⁸ See revised first draft modalities, *supra* n. 2, para. 8, last indent.

⁶⁹ 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.

⁷⁰ See revised first draft modalities, *supra* n. 2, para. 12.

⁷¹ Interestingly, this is a point that has been championed as much by the preference-providing countries as by the preference beneficiaries. In a comment entitled “Free farm trade means an unfair advantage” on the *Financial Times*, EU Agriculture and Trade Commissioners argued that “There cannot be a Doha deal unless developing countries are able to conclude that they have been treated fairly. But on market access, most of the proposals put by others in Geneva risked undermining developing countries that rely on preferential market access to European markets. Further market access must not become a blunt instrument for already powerful agricultural exporters to use against the developing world.”

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."⁷² 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 per cent of their total 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."⁷³ But, of course, this one is a hollow promise with little, if any, practical significance. Annex A to the pre-Cancun draft contained a proposed "Framework for Establishing Modalities in Agriculture", which was based largely on the 'US-EU joint proposal'⁷⁴ and the 'pre-Cancun G20 proposal'.⁷⁵ 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-Cancun draft relate to non-trade concerns and tariff escalation on which the Cancun draft echoed the Harbinson revised first modalities draft.⁷⁶

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 higher level of tariff harmonisation. The July package calls it "progressivity in tariff reductions".⁷⁷ 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.

See Franz Fischler and Pascal Lamy, *Financial Times*, 1st April 2003, p. 19. For an in-depth analysis of the impact of further reductions in MFN agricultural tariffs on the interest of preference-beneficiary developing countries, see Stephan Tangermann, "The Future of Preferential Trade Agreements for Developing Countries and the Current Round of WTO Negotiations on Agriculture" (Paper prepared for FAO/ESCP, April 2001).

⁷² See revised first draft modalities, *supra* n. 2, para. 16.

⁷³ See revised first draft modalities, *supra* n. 2, para. 16.

⁷⁴ See *supra* n. 3.

⁷⁵ See *supra* n. 4. The proposal from this group was severely criticised by the EU. EU agriculture commissioner Franz Fischler has been quoted as saying: "Do not reach for the stars in order to get the moon." Likewise, EU trade commissioner Pascal Lamy said: "When I see the extreme proposal co-sponsored by Brazil, India and some others, I cannot help (but get) the impression that they are circling on a different orbit." *AFP News*, September 4, 2003.

⁷⁶ See *supra* n. 3 and accompanying text.

⁷⁷ See July Package, *supra* n. 5, para. 29.

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.⁷⁸

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.⁷⁹ 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,⁸⁰ 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 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.⁸¹

⁷⁸ That is probably why EU trade commissioner Peter Mandelson said he could not envisage a Doha Round that would be concluded on the basis of “real cuts by Europe, paper cuts by others.” Quoted in *Bridges Weekly Trade News digest*, Vol. 10, No. 2, 25 January 2006, available at <http://www.ictsd.org/weekly/06-01-25/story1.htm>.

⁷⁹ 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). According to this survey, the WTO Consolidated Tariff Schedules Database contains 7,977 agricultural tariff lines that are bound in non-ad valorem terms by a total of 35 Members, counting the EC(15) and Switzerland-Liechtenstein, respectively, as one. See para. 5. Among the 35 members with non-ad valorem agricultural tariffs are Australia, Canada, the EC, India, Japan, Norway, Switzerland, and the US.

⁸⁰ 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.”

⁸¹ 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 to be a possibility: (1) the inclusion of a specific commitment prohibiting such possibility for non-agricultural products and its absence for agricultural products;

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 USD) as a percentage of a given reference price (e.g. also in USD). In other words, the AVE is calculated as the specific duty expressed as a percentage of the unit value of a product. In 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.⁸² 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.⁸³ The presence of sometimes widely diverging data on world market prices and volumes for some

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.

⁸² See *Id.* Para. 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)]

⁸³ As summarised by the ICTSD, “AVE conversion has 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.” ICTSD, “Agriculture: Key Trade Ministers Strike AVE Deal in Paris”, 11 May 2005, available at <http://www.ictsd.org/weekly/05-05-11/BRIDGESWeekly9-16.pdf>.

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.⁸⁴

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.⁸⁵ Several proposals have been submitted between the July package and the Hong Kong ministerial. 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.⁸⁶ 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.⁸⁷ Likewise, the G20 also proposed a four-tier structure, but with reduction ambitions falling somewhere between the EC and the US's.⁸⁸ 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 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."⁸⁹ 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."⁹⁰ 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",⁹¹ 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.⁹² 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 lines⁹³ 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

⁸⁴ For more on this, see *Id.* [ICTSD, "Agriculture: Key Trade Ministers Strike AVE Deal in Paris", 11 May 2005, available at <http://www.ictsd.org/weekly/05-05-11/BRIDGESWeekly9-16.pdf>.] See also FAO, "Tariff Reduction Formulae: Methodological Issues in Assessing their Effects" in *FAO Trade Policy Technical Notes No. 2* (Rome 2004).

⁸⁵ See July Package, *supra* n. 5, para. 30.

⁸⁶ See EC Commission, *Making Hong Kong a Success: Europe's Contribution*, 28 October 2005, available at http://europa.eu.int/comm/trade/issues/newround/doha_da/pr281005_en.htm

⁸⁷ See *U.S. Proposal for Bold Reform in Global Agriculture Trade* (Dec. 2005) available at http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2005/asset_upload_file281_8526.pdf

⁸⁸ See *G20 Proposal on Market Access*, 12 October 2005, available at <http://www.ictsd.org/ministerial/hongkong/docs/G20proposal.pdf>.

⁸⁹ See Hong Kong Ministerial Declaration, *supra* n. 6, para. 7.

⁹⁰ See July Package, *supra* n. 5, para. 31.

⁹¹ See *Id.*, para. 34.

⁹² See *Id.*, paras. 32-34.

⁹³ See Annex A to the Hong Kong Declaration, *supra* n. 6, p. A-5.

one which could have implications for the overall direction of agricultural trade rules vis-à-vis rules applying to trade in other products.

Finally, the July package also allowed developing countries the flexibility “to designate an appropriate number of products as Special Products, based on criteria of food security, livelihood security and rural development needs.”⁹⁴ 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.⁹⁵ 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.⁹⁶

The issues of sensitive and special products have been among the most controversial in the later phase of the negotiations. The lesson one could get from the Uruguay Round is also limited, the only relevant one 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.

B. 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

⁹⁴ See July Package, *supra* n. 5, para. 41.

⁹⁵ See Hong Kong Ministerial Declaration, *supra* n. 6, para. 7.

⁹⁶ See July package, *supra* n. 5, para. 45.

Agriculture.⁹⁷ In order to satisfy these requirements, countries had to introduce a two-tier tariff structure made up of the normal bound rate resulting from the tariffication process (the out-of-quota rate) and a lower rate (the in-quota rate) designed to enable the importation of an amount equal to the minimum/current access commitment levels for a particular product in a particular country. 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 unfilled⁹⁸; and thirdly, trade-restrictive methods of TRQ administration, some of which smacked 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 per cent of domestic consumption in every such product, with the flexibility that members could set an 8 per cent commitment on as much as 25 per cent of these products provided they undertake a 12 per cent commitment on another 25 per cent 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

⁹⁷ 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 *Tariff and Other Quotas: Background Paper by the Secretariat*, WTO doc. TN/AG/S/5, 21 March 2002, para. 6.

⁹⁸ According to the WTO Secretariat, the average TRQ fill rate for the six-year implementation period varied between 66% for 1995 and 60% for 2000. See WTO Secretariat, *Tariff Quota Administration Methods and Tariff Quota Fill: Background Paper by the Secretariat* (WTO doc. TN/AG/S/6) 22 March 2002, para. 17, Table 5.

average of 6.6 per cent of domestic consumption with the flexibility to undertake a 5 per cent commitment on 25 per cent of their products provided they also undertake an 8 per cent commitment on another 25 per cent of products.⁹⁹ Developing countries would also benefit from an implementation period of ten years.

Finally, the revised first modalities draft attempted to further strengthen the discipline governing in-quota trade by requiring reduction of in-quota tariffs in all cases where the average tariff rate quota fill rate was below 65 per cent.¹⁰⁰ This would potentially mean virtually all tariff quotas since the fill rate over the implementation period for Uruguay Round commitments almost always stood below 65 per cent – the only exception being 1995, the first year of the implementation period for which the fill rate was 66 per cent.¹⁰¹

While all the above market access issues have played a part in the Doha negotiations¹⁰², a lot of attention has been – rightly – focused on the problem of TRQ administration. Members have so far used a variety of means in administering their TRQs. The most important ones are the following: applied tariffs¹⁰³; first-come, first-served¹⁰⁴; licences on demand¹⁰⁵; auctioning¹⁰⁶; historical importers¹⁰⁷; imports undertaken by state trading entities¹⁰⁸; and

producer groups or associations.¹⁰⁹ 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.¹¹⁰ 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 lot of time and energy on the issue. The first Harbinson draft of the modalities proposed a long provision on TRQ administration containing a mixture of three approaches: restatement of the basic principles (of transparency and predictability), a positive list of do’s (such as requiring all in-quota imports to be from MFN suppliers) and a negative list of don’ts (such as domestic purchasing requirements). 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.¹¹¹ 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.

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

has direct control of imports undertaken by intermediaries) the product concerned.” See *Id.*

⁹⁹ See revised first modalities draft, *supra* n. 2, para. 20.

¹⁰⁰ See *Id.*, para. 22.

¹⁰¹ See WTO doc. TN/AG/S/5, *supra* n. 97, para. 51, Table 4.

¹⁰² 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.

¹⁰³ 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.

¹⁰⁴ 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.” See WTO doc. TN/AG/S/6, *supra* n. 98, para. 5, Table 1.

¹⁰⁵ 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.” See *Id.*

¹⁰⁶ Here “importers’ shares are allocated, or licences issued, largely on the basis of an auctioning or competitive bid system.” See *Id.*

¹⁰⁷ In this case “importers’ shares are allocated, or licences issued, principally in relation to past imports of the product concerned.” See *Id.*

¹⁰⁸ Here “import shares are allocated entirely or mainly to a state trading entity which imports (or

¹⁰⁹ 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.” See *Id.*

¹¹⁰ See *Id.* Table 2.

¹¹¹ 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.” Attachment 1 to the first draft modalities, *supra* n. 2, para. 2(i).

improvements in tariff quota administration".¹¹² 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.

C. 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".¹¹³ This situation, coupled with its obvious trade-distortive impacts, has prompted many countries, including the US, the Cairns Group¹¹⁴ and several developing countries, to demand its elimination. Others, including the EC¹¹⁵ and Japan¹¹⁶, 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 "strategic products" of developing

countries.¹¹⁷ 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.¹¹⁸ 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'¹¹⁹ and the 'pre-Cancun G20 proposal' few weeks prior to Cancun.¹²⁰

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: firstly, how beneficial will the SSM be for developing countries, and what are the political implications of such a development particularly in terms of the fate of the SSG. The first question, i.e. the practical usefulness 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."¹²¹ The agreement in the July package to make tariff reductions from bound rates rather than applied rates was considered

¹¹² See July package, *supra* n. 5, para. 35.

¹¹³ WTO, Special Agricultural Safeguard: Background Paper by the Secretariat: Revision, WTO doc: G/AG/NG/S/9/Rev.1, 19 February 2002, para. 3.

¹¹⁴ WTO Negotiations on Agriculture: Cairns Group Negotiating Proposal: Market Access, WTO doc. G/AG/NG/W/54, 10 November 2000.

¹¹⁵ *EC Comprehensive Negotiating Proposal*, WTO doc. G/AG/NG/W/90, 15 December 2000, para. 4.

¹¹⁶ See *Negotiating Proposal by Japan on WTO Agricultural Negotiations* (WTO doc. 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. See para. 14.

¹¹⁷ See first draft modalities, *supra* n. 2, paras. 23 and 24.

¹¹⁸ See revised first draft modalities, *supra* n. 2, para. 26.

¹¹⁹ See *supra* n. 4.

¹²⁰ See *supra* n. 4.

¹²¹ See *Chile Price Band*, AB report, *supra* n. 55, para. 232.

a victor for developing countries mainly because it is mainly in the developing countries that we find significant 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, this is not a price worth paying for an SSM that may not be of any use in practice. 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.

D. 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 2008.¹²²

¹²² See Hong Kong declaration, *supra* n. 6, para. 47 together with Annex F thereof.

IV. AGRICULTURAL EXPORT SUBSIDIES AND OTHER FORMS OF EXPORT SUPPORT

A. BACKGROUND

The AoA defines export subsidies as “subsidies contingent upon export performance”.¹²³ This formulation however raises the more basic question of what a “subsidy” is – a concept defined only by the Agreement on Subsidies and Countervailing Measures¹²⁴ (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 about the possibility of limiting the subsidization.¹²⁵ 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”.

¹²³ See Article 1(e) of the AoA.

¹²⁴ 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.

¹²⁵ See Article XVI, Section A. For a more extensive survey of this subject, see Desta (2002), *supra* n. 52, Chapter 4.

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 known as the Subsidies Code.¹²⁶ 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.

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

¹²⁶ Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement, *BISD* 26S/56 (1980).

relationship between the AoA and the SCM Agreement can be more complicated than this.¹²⁷

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%) and budgetary (by 36%) — 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 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.¹²⁸ 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.¹²⁹ 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

¹²⁷ 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*).

¹²⁸ 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.

¹²⁹ See Article 10.1 of the AoA.

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.”¹³⁰ Success and failure for the entire Doha ministerial conference were hanging until the very last minute on the inclusion or otherwise of the underlined phrase in this declaration.¹³¹

B. 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 majority¹³² 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 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.¹³³ 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.¹³⁴ 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 minutes 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 to eliminate 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 another vague language, proposing to eliminate export subsidies on products of particular export interest for developing countries over an agreed period while, on other products, proposing that members “shall commit to reduce, with a view to phasing out, budgetary and quantity allowances for export subsidies”. 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,¹³⁵ the stalemate

¹³⁰ *Doha Ministerial Declaration*, *supra* n. 34, para. 13 (emphasis added).

¹³¹ Guy De Jonquiers & Francis Williams, *Trade Talks Falter Over Farm Subsidy Deal*, FINANCIAL TIMES, Nov. 13, 2001, at 2 (noting France objected to “wording in the draft WTO agenda that calls for negotiations with a ‘view to phasing out’ all farm export subsidies”).

¹³² 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.

¹³³ See the first draft of modalities, *supra* n. 2, paras. 28-31.

¹³⁴ See the first draft of modalities, *supra* n. 2, paras. 32-34. 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.

¹³⁵ Known generally as the Cotton Initiative, this is one of the rare success stories so far in the Doha

over export subsidies once again played its traditional role in facilitating the collapse of the ministerial conference.

C. 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.¹³⁶ 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.¹³⁷ 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.¹³⁸ 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

agriculture negotiations. For an excellent background on the Cotton Initiative, see Kevin C. Kennedy, "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?" 14 *Kansas Journal of Law & Public Policy* (Winter, 2005), pp. 307-356.

¹³⁶ 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." See *supra* n. 59.

¹³⁷ See Attachment 4 to the first modalities draft or attachment 5 to the revised version, *supra* n. 2.

¹³⁸ It is interesting to note that both the 'US-EU joint proposal' as well as the 'pre-Cancun G20 proposal' were also at one on this point and the pre-Cancun draft was taken directly from them.

system which responds to the real food aid needs of countries rather than the presence or absence of surplus production in the donor countries.¹³⁹ 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 fully grant form, and to give preference to financial grants for purchase by the recipient country from whatever source it may wish rather than actual food exports unless it is necessitated by humanitarian emergency situations declared by appropriate United Nations food aid agencies.¹⁴⁰ 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 reasons to stand united against the practice.¹⁴¹ 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-

¹³⁹ For more on this subject, see Melaku Geboye Desta, 'Food Security and International Trade Law: An Appraisal of the World Trade Organization Approach' (2001) 35 *Journal of World Trade*, No. 3, pp. 449-468.

¹⁴⁰ See Attachment 5 to the first modalities draft or attachment 6 to the revised version, *supra* n. 2. The revised first modalities draft has strengthened the proposal by introducing an important statement of principle as follows: "Members recognize that international food aid and the commitments undertaken in this regard under the Food Aid Convention play a critically important role in alleviating hunger and in contributing to world food security, particularly in responding to emergency food situations and to other food and nutrition needs of developing countries. The following provisions are accordingly intended not to limit the role of bona fide international food aid, but to ensure that such aid is not used as a method of surplus disposal, nor as a means of achieving commercial advantages in world export markets." See Attachment 6 to the revised first modalities draft, *supra* n. 2.

¹⁴¹ See *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, reports of the panel (WTO docs. WT/DS103/R, WT/DS113/R) and the Appellate Body (WTO docs. WT/DS103/AB/R, WT/DS113/AB/R) adopted on 27 October 1999.

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 introduce not just market forces in their operation but even attempt to introduce competition by requiring governments to scrap their export monopoly powers.¹⁴² 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. Export subsidies being the most destructive and the most reviled instruments of trade distortion in use today, any attempts at further weakening this part of the proposed rules could endanger the entire negotiations with total collapse.

D. 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.”¹⁴³ The commitment to eliminate applied to export subsidies as listed in members’ schedules; export credits, export credit guarantees or insurance programmes

¹⁴² See Attachment 6 to the first modalities draft, or attachment 7 to the revised version, *supra* n. 2.

¹⁴³ See July package, *supra* n. 5, para. 17.

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.¹⁴⁴ The July package however left the issue of end date unresolved, on which negotiations continued up until the last 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.”¹⁴⁵ The final declaration set this date for the end of 2013, which is subject to confirmation upon the completion of the modalities agreement that set for 30 April 2006.¹⁴⁶ Despite this condition and the long life that agricultural export subsidies have been allowed, this is perhaps what the Hong Kong ministerial will be remembered for over 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”.¹⁴⁷ Governments provide support to their agricultural producers in different ways – ranging from direct budgetary transfers to

¹⁴⁴ See July package, *supra* n. 5, para. 18.

¹⁴⁵ See ICTSD, “Will Members Reveal Their Cards In Time?”, *Bridges Hong Kong Daily Update*, Issue 3, 15 December 2005.

¹⁴⁶ See Hong Kong declaration, *supra* n. 6, para. 6.

¹⁴⁷ For more on this, see Desta (2002), *supra* n. 52, p. 306.

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 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. Since world market prices are invariably lower than in the domestic market of the subsidizing countries, the excess can be exported only with the aid of subsidies or given in the form of food aid to other countries. 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,¹⁴⁸ and the

¹⁴⁸ See GATT Article XVI:1 which imposed only notification and consultation obligations. For more on this, see Desta (2002), *supra* n. 52, Chapter 9.

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.¹⁴⁹ 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.”¹⁵⁰ The Tokyo Round attempted to introduce a more effective discipline on the 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.¹⁵¹ 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,¹⁵² which are subject to challenge on proof of injury; but, this Agreement left agricultural domestic support measures largely to the AoA.

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 the developed countries and the resolve of many to defend them meant that the long-term objective of the AoA “to establish a fair and market-oriented

¹⁴⁹ *Chile v. Australia: Subsidy on Ammonium Sulphate*, Working Party Report (GATT/CP.4/39) adopted on 3 April 1950), *BISD*, Vol. II.

¹⁵⁰ GATT, *BISD* 3S/224.

¹⁵¹ 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.”

¹⁵² 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.

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; some others are available exclusively to developing countries; and a third category are 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% for developed countries and 10% 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.¹⁵³ These categories will be discussed further in this section.

¹⁵³ 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.

A. AMBER BOX MEASURES:

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.¹⁵⁴ These 35 members are the ones that had reported to have used such trade- and production-distorting measures during the 1986-88 base period¹⁵⁵ 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”.¹⁵⁶ 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 form of *Total AMS*.¹⁵⁷ 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 % reduction commitment over a ten year implementation period).¹⁵⁸ A WTO member complied with its obligations in any given year of the implementation period if the actual amount of support provided during that year – called the *Current Total AMS* – did not exceed the corresponding annual or final bound commitment level specified in its Schedule.¹⁵⁹ 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

¹⁵⁴ 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.

¹⁵⁵ This does not of course apply to countries that joined the WTO after the Uruguay Round.

¹⁵⁶ Article 1(a) of the Agriculture Agreement.

¹⁵⁷ Article 1(h) of the Agriculture Agreement.

¹⁵⁸ See paragraph 8 of the Uruguay Round *Modalities for the Establishment of Specific Binding Commitments Under the Reform Programme*, GATT doc. MTN.GNG/MA/W/24, 20 December 1993 (hereafter the *Modalities Agreement*).

¹⁵⁹ Article 6:3 of the Agriculture Agreement.

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.¹⁶⁰

2. Major Issues of Amber Box Support in the Doha Negotiations: the Road to Cancun

The major sticking points for the ongoing negotiations regarding amber box domestic support include the following: (1) should it be eliminated or just reduced? if the latter, by how much? and (2) should the aggregate commitments be replaced by product-specific commitments?

To start with the latter issue, 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 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.”¹⁶¹ 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.¹⁶² 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.”¹⁶³ 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’s 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.¹⁶⁴ 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.¹⁶⁵ The Cairns Group has consistently argued for the elimination of trade-distorting support since 2000.¹⁶⁶

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.¹⁶⁷ In its proposal for the modalities, the EU maintained its approach and suggested a 55 % reduction on amber box

¹⁶⁰ See for example the positions of the US and the Cairns Group. In fact, the EU, Japan and the US alone “account for 90% 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), *supra* n. 57, p. 14.

¹⁶¹ Cairns Group Negotiating Proposal: Domestic Support G/AG/NG/W/35, 22 September 2000.

¹⁶² See Special and Differential Treatment for Developing Countries in World Agricultural Trade: Submission by ASEAN, WTO doc. G/AG/NG/W/55, 10 November 2000.

¹⁶³ Proposal by Norway, G/AG/NG/W/101, 16 January 2001.

¹⁶⁴ 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.

¹⁶⁵ For later US positions, see <http://www.fas.usda.gov/itp/wto/proposal.htm>.

¹⁶⁶ See Cairns Group proposal on domestic support, *supra* n. 161.

¹⁶⁷ See EC comprehensive proposal, *supra* n. 115, para.10.

support while maintaining the other boxes intact.¹⁶⁸

Amid all this, the first modalities proposal from Stuart Harbinson suggested a 60 % reduction in the final bound Total AMS in equal annual installments 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 more 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 13 August 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). And, thirdly, a ‘down payment’ would be made in the form of a first reduction (by an amount that would be negotiated) across the board for all products within the first year of implementation period; and higher reductions, with a view to phasing out, of domestic support for products benefiting from such measures if those products are also

exported and account for a certain percentage of world exports of that product.

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.

B. BLUE BOX MEASURES

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 per cent or less of the base level production, or, in the case of livestock payments, on a fixed number of head.¹⁶⁹ 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 2003.¹⁷⁰ 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 defenders. Switzerland and Korea are examples of countries that have not used the blue box so far but that are defending it no less

¹⁶⁸ See EC proposal for the modalities agreement, *supra* n. 58, pp. 4-5.

¹⁶⁹ See Article 6:5 of the Agriculture Agreement.
¹⁷⁰ See Committee on Agriculture Special Session, *Blue Box Support: Note by the Secretariat*, TN/AG/S/14, 28 January 2005.

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.¹⁷¹ The US and the Cairns Group led the camp which advocated scrapping this box altogether.

2. Major Issues of Blue Box Support in the Doha Negotiations: the Road to Cancun

The most important issue involving blue box in the Doha negotiations has thus been whether to retain or scrap it. The first Harbinson modalities proposal on this issue, perhaps more than on many others, was cluttered with parentheses, which indicates the high degree of contention involved. 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.¹⁷²

The 'US-EU joint proposal' suggested to cap 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'.

C. GREEN BOX MEASURES:

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 provided 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 be not 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.¹⁷³

¹⁷¹ 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. See also WTO Secretariat, *supra* n. 57.

¹⁷² 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] per cent. 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)].” First modalities draft, *supra* n. 2, para. 43.

¹⁷³ 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.

2. Major Issues of Green Box Support in the Doha Negotiations: the Road to Cancun

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 commitments¹⁷⁴; 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.¹⁷⁵ 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.¹⁷⁶

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.¹⁷⁷ 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 intact while noting that the criteria for a measure to be classified as such remained under negotiation.

3. The Direction of Negotiations on Domestic Support from Cancun to Hong Kong

An interesting feature of the July 2004 package is the support-harmonisation approach it introduced for trade-distorting domestic support. Harmonisation in domestic support is however different from harmonisation in agricultural market access. In the latter case, harmonisation 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, harmonisation 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 harmonisation. Indeed there is no room for inter-product harmonisation for domestic support because the commitments in this area, unlike in market access or even export subsidies, are sector-wide.

The July package injected harmonisation 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 in respect of 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.¹⁷⁸ In order to achieve its object of harmonisation, 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."¹⁷⁹ The July package further agreed on a 20 percent

¹⁷⁴ See, e.g. a proposal by a group of 11 developing countries in WTO doc. G/AG/NG/W/13, 23 June 2000.

¹⁷⁵ See WTO Secretariat, *supra* n. 57.

¹⁷⁶ 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.

¹⁷⁷ See revised first modalities draft, *supra* n. 2, attachment 8, para. 6.

¹⁷⁸ See July package, *supra* n. 5, paras. 7 & 8.

¹⁷⁹ See *Id.*, para. 7.

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 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”.¹⁸⁰ 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.”¹⁸¹

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.”¹⁸² 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.¹⁸³ 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 support, including the Blue Box, a specific agreement was reached to cap the Blue Box at no more than 5% 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.¹⁸⁴ 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.¹⁸⁵

VI. CONCLUSION

The foregoing discussion has shown that agriculture is once again dictating the pace of progress in trading 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 in 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 about agriculture is one

¹⁸⁰ See *Id.*, para. 9.

¹⁸¹ See *Id.*, para. 11.

¹⁸² See Hong Kong declaration, *supra* n. 6, para. 5.

¹⁸³ For the latest data on this, see TN/AG/S/13, *supra* n. 153.

¹⁸⁴ See July package, *supra* n. 5, para. 16.

¹⁸⁵ See Hong Kong declaration, *supra* n. 6, para. 5.

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 the Cancun draft ministerial declaration on cotton was considered as one of the most blatant expressions of this hypocrisy. As one observer rightly put it, this is a situation in which “the US uses subsidies to deprive poor countries of comparative advantage. Then it tells them they have to find other kinds of business.”¹⁸⁶ 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.

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 a 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.

¹⁸⁶ Quoted anonymously in Guy de Jonquieres, *supra* n. 43, p. 21.

