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

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

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

A. THE METAPHOR OF PURGATORY

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

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

² The definition of “Purgatory” in Catholic theology is:

A state of final purification after death and before entrance into heaven for those who died in God’s friendship, but were only imperfectly purified; a final cleansing of human imperfection before one is able to enter the joy of heaven. CATECHISM OF THE CATHOLIC CHURCH, Glossary at 896 (2nd ed. 2000). For theological treatments of Purgatory, RICHARD P. McBRIEN, CATHOLICISM 1166-69 (New ed. 1994); John A. Hardon, S.J., THE CATHOLIC CATECHISM 273-80 (1981); MONIKA K. HELLWIG, UNDERSTANDING CATHOLICISM 180-81 (1981). For brief discussions of Catholicism, by the Chaplain to Cambridge University and a Professor of Philosophy at Boston College, respectively, see ALBAN MCCOY, AN INTELLIGENT PERSON’S GUIDE TO CATHOLICISM (1997), PETER KREEFT, FUNDAMENTALS OF THE FAITH (1988).

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

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

Here, I seek only to use the concept of Purgatory as a metaphor that, like any good metaphor, can be insightful (and entertaining).

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

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


⁴ See REV. PETER KLEIN, THE CATHOLIC SOURCE BOOK 120 (2000) (explaining “Purgatory is the suffering of the faithful which causes a ‘purging’ of temporal punishment due to sin. It is explained in the Catechism (#1054), supra note 1, as a process (not a place) a purification after
respect to international trade in primary and processed agricultural products, there is neither autarky nor free trade—neither the Hell of closed borders nor the Heaven of open ones. The WTO Members generally have rejected protectionism. But, they have failed to embrace fully its opposite. This intermediate situation for their agricultural trade is Purgatory.

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

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

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

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\(^5\) See, e.g., Peter Gallagher, Guide to the WTO and Developing Countries 41-42 (2000) (stating that “[r]ecent assessments suggest that there have been only small changes in prices for the most traded agricultural products as a direct result of access improvements and cuts in subsidies,” citing a 1997 World Bank study showing “the implementation of individual country commitments appeared to focus on managing trade rather than liberalizing trade,” explaining “[t]here has been limited progress in trade liberalization, based on estimates of pre- and post-Uruguay Round trade distortions and the implementation of market access commitments in 1995-96, and observing “that by early 1997, only a small part of the agreed liberalization had been undertaken”).
one with the God who is totally oriented to others, *i.e.*, the self-giving God.”\(^6\) My argument is that WTO Members have yet to complete they’re accounting (indeed, atoning) for protecting domestic agricultural interests.

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

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

B. SIX SINS FROM THE URUGUAY ROUND: BARBER

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

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

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7. However, in *Trade, Development, and Social Justice*, I argue for greater charity in special and differential treatment, on the basis of Catholic social justice theory. See generally BHALA, *supra* note 3.
8. The Uruguay Round was completed on 15 December 1993, the various documents from that Round were signed on 15 April 1994, and the Agreements from the Round entered into force on 1 January 1995.
Bush intoned: “The lesson of our time is clear: when nations embrace free markets, the rule of law and open trade, they prosper and millions of lives are lifted out of poverty and despair.\textsuperscript{9}

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

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

\begin{itemize}
  \item \textit{R} – Reduction commitments with respect to tariffs.
  \item \textit{A} – Action against import surges.
  \item \textit{B} – Boxes for classifying domestic subsidies.
  \item \textit{R} – Reduction commitments with respect to domestic support.
  \item \textit{B} – Base period selection for measuring subsidies and reduction commitments.
  \item \textit{E} – Exceptions to disciplines on export subsidies.
\end{itemize}

These sins can be remembered by an acronym. A modest rearrangement of the key letters above is \textit{BARBER}.

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

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

\textsuperscript{10} This \textit{Agreement}, also known as the \textit{WTO Agreement on Agriculture}, and its five Annexes, are reprinted in \textit{International Trade Law Handbook}. Raj Bhala, \textit{International Trade Law Handbook} 305-32 (2d ed. 2002). All references herein to the \textit{Agreement} and its Annexes are to the version in the \textit{Handbook}. The official WTO published summary of the \textit{Agreement} and a former senior Director in the GATT Secretariat wrote the rest of the texts from the Uruguay Round. See John Croome, \textit{Guide to the Uruguay Round Agreements} 52-62 (1999). Throughout, I use the labels “\textit{Agreement on Agriculture}” and “\textit{Agriculture Agreement}” interchangeably.
exception is Sikh men. Given the strong interest of Sikh farmers in the Indian Punjab in freer agricultural trade, I suspect, from personal experience, they would have no objection to the acronym! Still, however ironic or ecumenical the acronym is, I do not mean to imply it is the only, much less the best, possible memory device.

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

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

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11. Indeed, identifying a seventh sin that put and keeps world agricultural trade in Purgatory would give rise to an analogy with the “Seven Deadly Sins.” The acronym “PLACES + G” helps recall the Seven Deadly Sins (Pride, Lust, Anger, Covetousness, Envy, Sloth, and Greed), and surely one could be devised for agriculture?

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

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

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

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13. See Gallagher, *supra* note 5, at 46 (suggesting this line of reasoning).
Critics who claim that WTO rules are intrinsically unfair to poor countries protest too much. The rules are far from perfect. But the fact that not all countries gain equally from trade is not, in itself, evidence of unequal opportunity: it is at least as much because opportunities are not always fully exploited.

Sometimes, that is because of a lack of economic capacity and resources. Failed states with few productive industries cannot expect miracles from export-led growth. Too often, however, developing countries handicap themselves by shutting out each other’s exports. India, a fervent critic of western protection, erects higher barriers against many other poor countries than do most industrialized economies. They need to fall.18

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

These difficult topics, the weighty metaphor of Purgatory, and the word “sin” suggest there is every reason to be pessimistic about the present Doha Round negotiations on trade in agriculture. However, that inference would be erroneous. It would overlook the whole point of being in Purgatory, namely, cleansing “[a]ll who die in God’s grace and friendship, but still imperfectly purified . . . so as to achieve the holiness necessary to enter the joy of heaven.”19 Put succinctly, a soul does not “slip” in Purgatory to Hell; hence
souls in Purgatory are not damned. Rather, they are "indeed assured of their eternal salvation." Might it be so with world trade in agriculture?

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

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

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

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

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

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

23. WORLD TRADE ORGANIZATION, DOHA DECLARATIONS, Ministerial Declaration ¶ 13 at 6 (adopted 14 November 2001) (emphasis added). Of course, many of these issues affect countries that have not (yet) acceded to the WTO. For example, Eritrea faces a monstrous
Some of the italicized text suggests the Doha Round could be the final cleansing of protectionist measures left over from the Uruguay Round. After all, world agricultural trade would be in, or very close to, a free trade Heaven if there were “substantial” improvements in market access, if “all forms” of export subsidies were phased out, and if there were “substantial” reductions in domestic support.

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

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

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

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


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

27. The Clinton Administration explained the Agreement on Agriculture, “While representing significant progress in reducing trade-distorting measures ... represents only the beginning of a reform process for world-wide trade in agriculture” (emphasis added). See Statement of Administrative Action, supra note 12, at 709.
long time. No one knows how long an individual soul remains in Purgatory, though intercession of various sorts (e.g., of saints and from prayer) may expedite matters. 28 Likewise, no one can say how long global agricultural trade will be where it is now. Intercession by free trade interests may help bring about a successful negotiating outcome to the Doha Round. While there is always in earthly international economic relations the possibility WTO Members could regress to a 1930s-style protectionist inferno, I think the odds look to be remote, however difficult the going in the Doha Round.

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

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

28. See CATECHISM, supra note 2, ¶ 1032 at 269 (stating that "[f]rom the beginning the Church has honored the memory of the dead and offered prayers in suffrage for them, above all the Eucharistic sacrifice, so that, thus purified, they may attain the beatific vision of God"); TRESE, supra note 19, at 153 (stating that "no one can know 'how long' purgatory lasts for any individual soul .... [W]hile there is duration beyond the grave, there is no 'time' as we know it; no nights and days, no hours and minutes .... But we the living can help that soul, by the mercy of God; and the frequency of our remembrance, and the endurance of our remembrance").

The Second Council of Lyons in 1274, and the Councils of Florence and Trent, in 1439 and 1563, respectively, were instrumental in developing Catholic teaching on Purgatory. See CATECHISM, supra note 2, ¶ 1031 at 268-69; HARDON, supra note 2, at 277-78. The Second Council of Lyons focused on the existence of purgatory and the utility of prayer for the dead. See HARDON, supra note 2, at 277. In Decree for the Greeks, the Council of Florence balanced the emphasis on satisfaction and expiation, in the Western Church, with the emphasis on purification, in the Eastern Church. See McBRIEN, supra note 2, at 1168. The Council of Trent, in response to the Reformation-era doctrine that salvation occurs only by grace (hence, praying for the dead is inappropriate), affirmed the existence of Purgatory, "insisted that the souls detained there are helped by acts of intercession of the faithful, and especially the sacrifice of the Mass." McBRIEN, supra note 2, at 1168.

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

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

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

C. WHY BOTHER?

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

31. The Challenge for Trade in Cancún, supra note 18 (emphasis added).
discuss Purgatory and development economists deal with agriculture, neither Purgatory nor agriculture is in the mainstream of writing in the legal academy. As one example, the trade–agriculture intersection went virtually unnoticed among panels at the April 2003 American Society of International Law meeting in Washington, D.C. As another example, the World Bank’s new book, Agriculture, Trade, and the WTO, consists of far more chapters written by economists and diplomats than lawyers. These patterns are not atypical in conferences or books.

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

33. See, e.g., GLOBALIZATION AND AGRICULTURAL TRADE POLICY (Hans J. Michelmann et al., eds., 2001) (a stimulating collection of papers from a conference sponsored by the University of Saskatchewan (Canada) Department of Agricultural Economics on various agricultural trade issues, held in the aftermath of the failure of the WTO Ministerial Conference in Seattle); INTERNATIONAL AGRICULTURAL DEVELOPMENT (Carl K. Eicher & John M. Staatz eds., 1998) (treating the theoretical and empirical aspects of the role of agriculture in development, acceleration of the agrarian transformation, and the reduction of rural poverty); DANIEL A. SUMNER, AGRICULTURAL TRADE POLICY – LETTING MARKETS WORK (1993) (explaining the economic aspects of agricultural provisions in multilateral and regional trade agreements); LUTHER TWEETEN, AGRICULTURAL TRADE – PRINCIPLES AND POLICIES (1992) (a text on agricultural trade policy).

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

35. That theoretical subjecting did not translate into comprehensive coverage. First, “[b]efore the Uruguay Round, many GATT countries had few bound rates of duty for agricultural products.” See Statement of Administrative Action, supra note 12, at 713. Second, several provisions of GATT (e.g., on quantitative restrictions and export subsidies) have exemptions of one sort or another for agricultural products, resulting in incomplete or loose coverage. See RAGHAVAN, supra note 15, at 160. Third, GATT contracting parties obtained waivers from GATT obligations for key agricultural programs, as the United States did in 1955 (obtaining a permanent waiver for its Agricultural Adjustment Act), and as Japan and Switzerland did in their protocols of accession (for certain agricultural measures). See id. Fourth, the GATT contracting parties never approved the Treaty of Rome. Accordingly, the European Community “functioned on the basis” that its CAP had not been disapproved. Id.
trade when reform of the WTO dispute settlement system,\textsuperscript{36} major safeguards disputes over steel, access to patented pharmaceuticals to treat infectious diseases,\textsuperscript{37} or the possible inclusion of foreign direct investment in the WTO legal regime\textsuperscript{38} are pressing? Surely, they are the "big picture" issues.\textsuperscript{39}


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

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

\textsuperscript{38} See, e.g., Kevin C. Kennedy, \textit{A WTO Agreement on Investment: A Solution in Search of a Problem?}, 24 U. PA. J. INT'L.\ ECON. L. 77-188 (2003) (reviewing and evaluating arguments for and against a WTO agreement that would address domestic legal restrictions on foreign capital investment); Edward Luce et al., \textit{India Opposes World Trade talks on Investment Rules}, \textit{FIN. TIMES}, Aug. 28, 2003, at 3 (reporting India's disagreement with the EU, Japan, South Korea, and
The question of “why bother?” can be a veiled excuse if posed in the context of the EU’s Common Agricultural Policy (CAP). Few if any international trade law scholars or students enthusiastically seek to delve into the nuances—no, the horrors—of the CAP to understand the intersection between trade and agriculture. But, even this understandable excuse no longer ought to be permitted. Today, there are at least three strong justifications for “bothering” about agricultural trade: intellectual challenge, practical importance, and national security.

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

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


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

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

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

42. See Tobias Buck, Woody Wine Talks Foment EU Rebellion, Fin. Times, March 31, 2003, at 6 (explaining the Australian practice gives wine a flavor that otherwise occurs through long-
rich in the breadth and depth of the topics it entails, and intellectual challenge, practical importance, and national security are at play in many, if not most, supposedly narrow agricultural issues.

Purgatory is an intellectually difficult concept to grasp, and so, too, is agriculture. Perhaps the best illustration of the intellectual challenge is the controversial justification for protecting and subsidizing farmers known as "multifunctionality."\textsuperscript{43} Advocates for the CAP or for restrictive agricultural trade practices and generous support programs point to externalities, specifically, un-priced external benefits of protection and subsidization of domestic farmers (e.g., promoting the environment and rural and indigenous cultures, bolstering food security, and providing employment). “Nonsense” is the free trade reply from the United States and seventeen-member Cairns Group.\textsuperscript{44} If the CAP is, as Henri Gaymard, the French Minister of Agriculture says, a central feature of the EU’s “social model,” then why does over half of EU support go to just seven percent of EU farmers, typically the largest ones?\textsuperscript{45} Surely the EU, bullied by France, is unwilling to endure the adjustment costs of ending subsidies.\textsuperscript{46} In any event, the WTO Agreement on Agriculture provides an exemption from subsidy reduction commitments for term storage in wooden barrels, which is the method used in the EU, and thus questioning whether the EU ban on oak chip storage is a protectionist measure to benefit wine producers in France, Italy, Portugal, and Spain, who are concerned about losing market share, especially given that in the United Kingdom, Australian wines outsell all others, and in the United States, they outsell all others save for Italian wines.\textsuperscript{47}


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

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

\textsuperscript{46} See Guy de Jonquières, Disputes Over Trade Set to Strain Unity, FIN. TIMES, May 30, 2003, at 6 (stating that “[t]he U.S. says the biggest obstacle in the [Doha Round] talks is the reluctance of the EU – and of France, in particular – to reform the Common Agriculture Policy”). France’s advocacy of a temporary suspension of subsidies on food exports to Africa seems a cynical ploy to forestall discussion of real reform. It smacks of neo-colonialist “divide-and-conquer” policies, because it covers only Africa and only food exports, thus dividing developing countries and sectors within them against each other. The United States is quite right to support the proposal only if it includes all developing countries. However, the French position that the proposal covers agricultural export credits for food aid may be worthy of study. As explained later, the United States makes the most use of such credits. See id. (discussing the proposal); see also discussion infra Section Four.
socially useful, non-trade distorting subsidies (the so-called “Green Box,” described below). Moreover, say CAP critics, the EU’s selfishness injures Third World farmers and processors through reduced market access to the EU, competition with subsidized and even dumped EU farm products, and consequent price suppression or depression.47

To be fair to the EU, multifunctionality has its advocates in the United States. Between 1993-2002 (i.e., since the conclusion of the Uruguay Round), the top twenty-five percent of farmers in the United States captured ninety percent of subsidies (the figure in the EU was lower—seventy percent).48 This trend is increasingly skewed. In 1995, the top ten percent of American farmers got fifty-five percent of the subsidies, but by 2002, they managed to increase their taking to sixty-five percent. What explains this increasingly skewed trend? One answer is that most payments go to large-scale farms, and these industrial-scale producers have cleverly tailored their political campaign contributions. In 1992, agribusinesses contributed $37 million to campaigns, and in 2002 they gave $53 million.49 They not only increased their giving level, but also shifted the pattern, donating to the Republican Party fifty-six percent in 1992 and seventy-two percent in 2002.50 Yet, a typical justification for the American domestic support system, which was strengthened through legislation enacted in 2002, is an instance of multifunctionality—the need to preserve the small family farm, an institution integral to American history and the American character from global competitive threats.

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

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

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47. See Alan Swinbank et al., Implications for Developing Countries of Likely Reforms of the Common Agricultural Policy of the European Union, Commonwealth Secretariat Economic Paper #38, (December 1999) (discussing possible CAP reforms and effects on the Third World).
49. Id.
50. Id.
51. See Id. (mentioning Ambassador Zoellick’s “boast[!]”). I do not mean to suggest the family farm is free from siege (which obviously would be factually untrue), but rather mean to indicate the mismatch between who receives support payments and who is said to benefit from them.
studied. Is the European measure protectionism justified by the precautionary principle, "which holds that as long as the evidence about a product, technology or activity is in any way incomplete, it should be prohibited or, at the least, heavily regulated"? From an American perspective, the answer is "no." It is a de facto ban on imports of GMO products, based on unsound science, and a wrongful denial of $300 million worth of exports of agricultural products. It also is a measure with an in terrorem


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

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

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

54. See Rugaber, supra note 51, at 468 (mentioning the estimate by American officials of $300 million in lost exports); Gary G. Yerkey, Agriculture: Rep. Goodlatte Urges EU to Lift Ban on Imports of GMOs in Meeting with Lammy, 20 Int'l Trade Rep. (BNA) 385 (February 27, 2003) (quoting Rep. Bob Goodlatte as saying "[t]he politicizing of agricultural biotechnology must end, so that we can return to providing food aid to the hungry as soon as possible. The EU's policy is not based on sound science, and it is harmful not only to American agriculture but [also] to those people throughout the world who are in the grip of starvation").
effect on poor countries, with a devilish consequence; these countries, says the
United States, fear their food exports will be barred from EU markets if they
contain GMOs, so they are reluctant to invest in food biotechnologies that
might alleviate the problem of hunger.\textsuperscript{55} From the perspective of “Old”
Europe and, to be fair, some in “New” Europe,\textsuperscript{56} the answer is “yes.” The
moratorium is a legitimate sanitary and phytosanitary (SPS) measure.\textsuperscript{57} The
EU attests its revised measures concerning labeling of GM products and
traceability of GMOs reflect internationally accepted standards (namely, those
adopted for risk-testing by \textit{Codex Alimentarius}, the food safety body of the
United Nations), and those standards allow for stricter procedures than
adopted in the United States. From both perspectives, the ban also is about
Third World development;\textsuperscript{58} though the two sides operate from rather different
development paradigms. The American side highlights the use by poor
farmers of high-yield GM seeds and the contribution of GM products to fighting
starvation.\textsuperscript{59} The European side decries dependence created by GM seeds and

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

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

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

\textsuperscript{58} See Rossella Brevetti, \textit{Argentina and United States Share Concerns on GMO Ban,
soy and cotton, and quoting the Argentine Vice Minister for Foreign Relations, Martin Redrado,
as saying “[t]his is not an issue of one country; its an issue for all developing countries”).

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

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

\textit{President Delivers Commencement Address at Coast Guard}, \textit{supra} note 9 (emphasis added). \textit{See also} DAVID G. VICTOR, \textit{SUSTAINING A REVOLUTION: A POLICY STRATEGY FOR CROP
ENGINEERING} (2002) (arguing, \textit{inter alia}, the United States should join with other countries, such
as China, to promote crop engineering, and eschew a formal trade litigation with the EU over
GMOs).
products on foreign (read, American) agribusiness corporations and looks to an interventionist regulatory model of government behavior.60

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

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

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

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

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

“Modalities” is trade law jargon for identifying issues to be discussed in negotiations, and setting targets, including numerical targets, to achieve the objectives of the negotiations. See WTO Press Release (Press/336), Agriculture Negotiations – Farm Talks Miss Deadline; But “Work Must Go On,” Says Supachai (31 March 2003). As the word suggests, “modalities” are not a final agreement, but rather a road map to reaching one. For example, whether a particular rule needs to be created, or an existing one interpreted, how deeply import tariffs and subsidy programs should be cut, and over what period, all would be “modalities.” At the end of successful negotiations, agreement would have been reached on a new rule (or on the lack of need for one), interpreting an
Neither the intellectual nor the pragmatic justification is isolated from global political and military (referred to inside the beltway of Washington, D.C. as "pol–mil") developments, any more than Purgatory is a process unrelated to Heaven. The alignment in the United Nations of WTO Members on the subject of military action against Iraq continues to impinge (unfortunately and wrongly) on official thinking about trade. On agricultural trade issues, the United States often sides with the Cairns Group, and indeed American officials typically attend the Group’s meetings. The Group includes a military ally, Australia, and a willful nonparticipant, New Zealand. Small wonder why "Aussie" but not "Kiwi" products are the subjects of a possible free trade agreement with the United States. The EU counts in its ranks two vocal opponents of the use of force by the United States, namely, France and Germany, as well as the most steadfast American ally, Great Britain. Personal relationships among senior officials involved in pol-mil and economic decisions are strained, and mutual contempt, expressed privately and sometimes in sarcastic public remarks, lingers. Small wonder, then, why the WTO failed to achieve a compromise on modalities by the deadline of March 31, 2003, and the United States proceeded with the GMO case.

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

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

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

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

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

66. On the topic of the link between agricultural trade reforms and poverty alleviation in rural sectors of the Third World, see, e.g., Jon Hellin & Sophie Higman, Feeding the Market (2003) (discussing the impact of globalization on small land-holding farmers in Latin America of bananas, coffee, potatoes, cocoa, wine, sheep, forestry, and quinoa (an Andean grain), and...
Farming also is about the food security within particular Third World countries. Perceptions in the Third World of dependence on First World food, seeds, or fertilizer (whether true or not) hardly help win hearts and minds abroad. To what extent are deviations from free trade principles, which economists teach serve the net interests of all, appropriate to accommodate this security issue? To pose the question is to reveal the link between agricultural trade with the Third World, on the one hand, and national security in the First World, on the other hand.

D. THREE METHODOLOGIES

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

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

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

Furthermore, Article 16:1 of the Agreement obligates developed countries to take action called for in the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries, published in OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, URUGUAY ROUND – FINAL TEXTS OF THE GATT URUGUAY ROUND AGREEMENTS INCLUDING THE AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION AS SIGNED ON APRIL 15, 1994, MARRAKECH, MOROCCO, at 395 [hereinafter Decision]. Essentially, the Decision focuses on "negative effects [from agricultural trade liberalization]... in terms of the availability of adequate supplies of basic foodstuffs from external sources on reasonable terms and conditions, including short-term difficulties in financing normal levels of commercial imports of basic foodstuffs." Id. ¶ 2. To deal with this eventuality, the Decision allows for the establishment of "appropriate mechanisms," including reviewing the level of food aid, initiating negotiations on food aid commitments, adopting guidelines to ensure an increasing proportion of basic foodstuffs is provided to least-developed and net-food importing countries, and to consider technical and financial assistance to these countries to improve agricultural productivity and infrastructure. See Id. ¶ 3. Responding to the Decision, the International Grains Council in July 1999 re-negotiated and completed the Food Aid Convention. See October 2002 Briefing Document, supra note 25, at 23.
subsidies is to divide them into three categories: (1) market access, (2) domestic support, and (3) export subsidies. This characterization follows logically from negotiating objectives set forth in the document that launched the Round, the September 1986 Punta del Este Ministerial Declaration. It stated the following:

Contracting parties [to the GATT] agree that there is an urgent need to bring more discipline and predictability to world agricultural trade by correcting and preventing restrictions and distortions including those related to structural surpluses so as to reduce the uncertainty, imbalances and instability in world agricultural markets. Negotiations shall aim 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 . . . by:

(i) improving market access through, inter alia, the reduction of import barriers;

(ii) improving the competitive environment by increasing discipline on the use of all direct and indirect subsidies and other measures affecting directly or indirectly agricultural trade, including the phased reduction of their negative effects and dealing with their causes. . . .

Plainly, the first category, market access,) follows from item (i), and the second and third categories, domestic support and export subsidies, follow from the objectives in item (ii).

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


70. Item (iii) in the list, not quoted above, concerns minimization of the adverse effects on trade in agriculture of sanitary and phytosanitary (“SPS”) regulations. SPS measures are governed by the WTO Agreement on Sanitary and Phytosanitary Standards. To keep the length and breadth of the present article manageable, SPS measures are not covered. See BHALA, supra note 30, at ch. 24 (discussing SPS measures); see also SPS Agreement, reprinted in BHALA, supra note 10, at 333-47 (discussing SPS measures).
As a legal matter, the three-pronged categorization is a perfectly accurate rendition of a large part of the structure of the Agreement on Agriculture drafted by the Uruguay Round negotiators. In the Agreement, Part III (consisting of Articles 4-5) is about market access, Part IV (consisting of Articles 6-7) is about domestic support commitments, and Part V (consisting of Articles 9-10) is about export subsidies. These methodologies apply to all agriculture products; the only exceptions are fish and fish products.\footnote{71. See Agreement on Agriculture, Article 2 (explaining the scope of coverage as the products listed in Annex 1, and defining them as “agricultural products”) and Annex 1, ¶ 1(i) (stating that the Agreement covers Chapters 1-24 of the Harmonized System “less fish and fish products”). There are 13 additional headings or sub-headings in other Chapters of the Harmonized System, classifying agricultural products covered by the Agreement (e.g., cotton, fur skins, hides, and wool). See Agreement on Agriculture, Annex 1, ¶ 1(ii); Statement of Administrative Action, supra note 12, at 710. The scope of coverage was imported into the Agreement from the December 1993 Modalities Document, cited infra note 100. See CROOME, supra note 10, at 53 n.170 (explaining the elements of the Modalities Document that were incorporated into the Agreement).}

As to the first method, market access, the obligations for all WTO Members are to be implemented within specified periods. To account for varying stages of economic development, different time periods apply to different categories of WTO Members—“developed” and “less developed” with “less developed” further divided in some instances into “developing” and “least developed.” For all categories of Members, the period commenced on January 1, 1995, which is the date when the Agreement Establishing the World Trade Organization (WTO Agreement’) and its Annexes entered into force and thus when the Agriculture Agreement took effect.\footnote{72. For a country joining the WTO after 1 January 1995, a different commencement date for calculating the period in which to implement Agriculture Agreement obligations would apply. Presumably, it would be the effective date of accession. The Agriculture Agreement contains five Annexes, not to be confused with the four Annexes to the WTO Agreement. All five Annexes to the Agriculture Agreement are an integral part of the Agreement. See Agreement on Agriculture, Art. 21:2. The first three Annexes to the WTO Agreement (but not Annex 4, which contains plurilateral agreements on government procurement and civil aircraft) are integral parts thereof. See WTO Agreement, Art. II:2. The various agreements in Annex 1A to the WTO Agreement, where the Agriculture Agreement is located, including GATT and the Agreement on Sanitary and Phytosanitary Standards (“SPS Agreement”), apply to agricultural products. See Agreement on Agriculture, Arts. 14, 21:1.}

Exactly what were the Members to have done? They were to have implemented three kinds of measures: (1) reduced tariffs; (2) converted nontariff barriers to tariffs, a process known as “tarification,” and (3) created minimum access tariff-rate quotas. These measures are related to one another in that they operate jointly to increase market access for agriculture exporters. Tarification ensures tariff reductions are not undermined by increases in nontariff barriers. Tariff reductions ensure tarification leads to lower duty rates. Minimum access tariff rate quotas ensure a degree of market access while tariff reductions are phased in and tarification occurs.
Accordingly, in sections two, three, and four below, I review the obligations created by the Agreement on Agriculture. My focus in these sections, respectively, is on market access, domestic subsidies, and export subsidies. In each section, I try to explain not only what the Agreement achieves, but equally or more importantly what it fails to do. Those failures—sins—are why I characterize the Agreement as keeping world trade in agriculture in "Purgatory." They must be addressed—cleansed—before agricultural traders can reach the realm of pure free trade.

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

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

E. A WORD ABOUT LABELS

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

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

73. See supra note 43 (identifying the Cairns Group members).
74. See October 2002 Briefing Document, supra note 25, at 22 (containing these and the other facts and figures mentioned above).
42.4 percent. Yet, some developing countries experienced deteriorating agricultural trade balances—import growth outstripped export growth.

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

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

II. MARKET ACCESS

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

75. See MICHALOPOULOS, supra note 17, at 123, 209 (delineating these categories and the interests of countries in each category with respect to multilateral agricultural trade negotiations).
76. WTO’s Yard a Mess, supra note 1 at 10.
A. R—REDUCING TARIFFS

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

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

77. Agreement on Agriculture, Art. 4:1. The term “market access concessions” refers to all market access commitments made on agriculture products during the Uruguay Round. See Agreement on Agriculture, Art.1(f). As the Statement of Administrative Action explains, in GATT practice, a party commits or 'binds' itself not to apply a rate of duty to a particular good that is higher than the rate specified in its schedule. This maximum specified rate is referred to as the 'bound’ rate of duty. Statement of Administrative Action, supra note 12, at 713.

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

79. See CROOME, supra note 10, at 54 (stating that developing countries “could apply the reductions over a 10-year period”). This conclusion is based on Article 15:2 of the Agreement on Agriculture, which specifically explains that “[d]eveloping country Members shall have the flexibility to implement reduction commitments over a period of up to 10 years.” Agreement on Agriculture, Art. 15:2 (emphasis added). Two points are noteworthy about Article 15:2. First, the italicized language indicates Article 15:2 does not require developing countries to take the full decade to cut agricultural tariffs. Second, the general definition of “implementation period,” in Article 1(f), is rather misleading, unless it is read in tandem with Article 15:2. Article 1(f) says “implementation period” is “the six-year period commencing in the year 1995, except that, for the purposes of Article 13, it means the nine-year period commencing in 1995.” The italicized language creating the exception is too narrow, because Article 13 is not the only exception; Article 15:2 is another exception. Article 13 covers domestic support and export subsidies, but does not cover market access. Article 15:2 covers reduction commitments without limitation.

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

81. This Table is drawn in part from October 2002 Briefing Document, supra note 25, at 11.
two-thirds that of developed countries and are given double the amount of
time to do so.

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

<table>
<thead>
<tr>
<th>Tariff Reduction Commitments</th>
<th>Developed Countries</th>
<th>Developing Countries</th>
<th>Least Developed Countries</th>
</tr>
</thead>
<tbody>
<tr>
<td>Average Cut for All Agricultural Products</td>
<td>36 percent</td>
<td>24 percent</td>
<td>Zero</td>
</tr>
<tr>
<td>Minimum Cut Per Agricultural Product</td>
<td>15 percent</td>
<td>10 percent</td>
<td>Zero</td>
</tr>
<tr>
<td>Period for Phasing in the Cuts</td>
<td>6 years, from 1995-2000</td>
<td>10 years, from 1995-2004</td>
<td>Not applicable</td>
</tr>
</tbody>
</table>

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

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

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82. See BHALA, *supra* note 30, at chs. 1-2 (discussing this theory and criticisms of it).
83. This point is pressed by (among others) Jagdish Bhagwati in a variety of economic works.
84. See BHALA, *supra* note 3, at pt. 2 (discussing Labor surplus models and the industrialization process).
commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.\textsuperscript{85}

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

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

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

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

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

\textsuperscript{87} See Information and Media Relations Division, WTO Secretariat, Tariff Negotiations in Agriculture - Reduction Methods (Background Fact Sheet, August 2003) available at www.wto.org. As this source observes, there are still more possible methodologies, which can be grouped under the rubric "Hybrid." A "Hybrid" methodology combines one or more of the approaches described above. Id.
Another straightforward method is called "Flat Rate Percentage Reductions." The same percent cut is applied to all goods, regardless of the starting duty rates. This approach appears fair. But, it leaves in place large disparities in tariff levels across Members and insists that even poor Members make cuts.

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

Whatever the choice of methodology, another fundamental question about tariff reduction is how ambitious it is. Just how impressive are the thirty-six and twenty-four percent targets in the Uruguay Round approach? Double-digit tariff rate cuts of this magnitude sound ambitious. But, the substantive impact of any tariff cut is impossible to gauge without knowing the initial rates subject to reduction. The levels to which rates fall depend on the levels from which they fell. To take two extreme examples, suppose one WTO Member’s agricultural tariff rates average fifty percent, and the average duties in a second Member are five percent. A thirty-six percent cut in the first Member’s average rates translates into an eighteen percent cut, which sounds impressive, but it still leaves a high average rate of thirty-two percent. If the Member is a developing country, then the cut is twelve percent, resulting in a
formidable thirty-eight percent average rate. As for the second Member, a thirty-six percent cut of a five percent average duty rate yields a very low average, just 3.2 percent. What was the starting point—the “base rate”—for measuring the target cuts?

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

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

88. See October 2002 Briefing Document, supra note 25, at 11 (setting forth these dates in the notes to the table on Numerical Targets for Cutting Subsidies and Protection); CROOME, supra note 10, at 54 (discussing base rates).
89. See supra notes 68-70 and accompanying text (discussing the Punta del Este Ministerial Declaration).
90. See CROOME, supra note 10, at 54 (discussing “ceiling bindings,” i.e., maximum tariffs on agricultural products for which no bound duty rate had been set by a developing country, and which need not be reduced further).
91. In addition to the two scenarios mentioned above—an individual agricultural product with a bound rate and one without a bound rate—there is a third scenario, namely, a product protected by a non-tariff barrier. As discussed below, this barrier was subject to tariffication, and the conversion of the barrier to a tariff resulted in a new base rate by which to begin tariff cuts (unless that rate was ceiling binding of a developing country). Id.
92. See GALLAGHER, supra note 5, at 42 (using this term).
93. In many developing countries, there is a significant difference between applied and bound agricultural tariff rates. For example, one study observes that for 31 developing countries (excluding members of the Cairns Group), the simple (i.e., unweighted) applied agricultural duty
Critics of the Agreement on Agriculture charge that, overall, the initial pre-Uruguay Round rates are high, hence post-cut rates still are high.94 While this criticism is fair, an “unbiased” evaluation is impossible. Once again, the end depends in part on the beginning. That is, a proper evaluation hinges on two key factors: (1) selection of a date or period “better” than January 1, 1995 and September 1986, in the sense of lower base rates being in effect; and (2) a standard to determine whether the thirty-six and twenty-four percent targeted cuts are ambitious. On the first criterion, no doubt unsatisfied trade liberalizers could point to a date on which agriculture tariffs were low and thus urge adoption of cuts from a low base. On the second criterion, no doubt they could call for targets more aggressive than thirty-six or twenty-four percent. In other words, arguments about the base date and cuts there from rely on criteria, whether made explicit or left as an implicit assumption.

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

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

94. See GALLAGHER, supra note 5, at 42 (citing a 1997 World Bank study to support the conclusion that “limited progress [has been made] in real agricultural trade liberalization largely as a result of . . . the choice of the base period (1986-88),” and because of dirty tariffication and the use by developing countries of very high ceiling bindings).
95. See MICHALOPOULOS, supra note 17, at 107 (mentioning these facts).
96. See GALLAGHER, supra note 5, at 43 (discussing these bands). The principal types of oilseeds traded across international borders are cottonseed, groundnuts, palm, rapeseed, soybeans, and sunflower. RAGHAVAN, supra note 15, at 163. International trade in dairy products occurs principally in butter, cheese, and non-fat dry milk, because fresh milk cannot be stored. Id. at 163, 168. Sugar derived from cane is a tropical product, whereas sugar from beet is produced in temperate climates. Id. at 168.
three percent tariff cut, slightly above the thirty-six percent average.\textsuperscript{97} In other words, WTO Members have taken advantage of the freedom any reduction commitment cast in terms of an "average" inherently allows, namely, the protection of sensitive domestic sectors with below-average reductions.

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

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

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

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

\textsuperscript{98} See CROOME, supra note 10, at 54 (discussing the minimum tariff reductions).

\textsuperscript{99} See \textit{id.} (discussing the phase-in periods for minimum tariff reductions)
developed countries, at least those eager to show their concern for developed and least developed countries?

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

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

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

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

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

103. See GALLAGHER, supra note 5, at 42 (discussing these Uruguay Round bindings).
How are deviations from the target to be explained? Simply put, by the negotiating process during the Uruguay Round.\textsuperscript{104} Also, by definition, a target for some or most members might not be a target for all Members, \textit{i.e.}, some developed or developing country Members might take aim elsewhere. To take an hypothetical example, based on many give-and-take sessions with trading partners, New Zealand might agree to cut its agriculture tariffs by an average of forty percent (more than the thirty-six percent target applicable to it), while Nicaragua might agree to cut by twenty percent (less than the twenty-four percent target applicable to it).\textsuperscript{105} The fact the thirty-six and twenty-four percent figures are targets, not legal obligations in the text of the \textit{Agreement}, create the suspicion the figures are “soft.” That suspicion matters, particularly to farmers and processors, wherever located, looking for signs the multilateral trade negotiation process provides them with meaningful new market access opportunities.

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

\textsuperscript{104} See October 2002 Briefing Document, \textit{supra} note 25, at 11 (stating, in the motes to the table on “Numerical Targets for Cutting Subsidies and Protection,” that “[e]ach country’s specific commitments vary according to the outcome of negotiations”).

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

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

\textsuperscript{107} See \textit{CROOME}, \textit{supra} note 10, at 54-55 (opining the commitments in the \textit{Modalities Document} “no longer have force, except to the extent that they may also have been reproduced in the Agreement on Agriculture,” and that “[t]he obligations that count, and that could give rise to dispute settlement procedures if individual WTO members fail to live up to them, are the detailed commitments in each national schedule, or in the market access provisions of the \textit{Agreement on Agriculture}.”).
Schedule. Each Member’s Schedule is accessible, in (for example) the library of the WTO Secretariat or from the trade ministry of the Member in question. In other words, the agriculture tariff cuts to which a Member commits are available if one knows where to look. It might be said the situation is one of “transparency for those in the loop.”

B. TARIFFICATION

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

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

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

The schedules reflect commitments by WTO Members to convert the border measures other than ordinary customs duties (such as quotas and variable levies) they had in place during the 1986-1988 base period to tariff equivalents. That means they will replace their non-tariff barriers with tariffs set at rates that will provide trade protection equivalent to the protection provided during the base period by the non-tariff barriers. A WTO Member will generally only apply the tariff equivalent to imports in excess of the minimum or current access commitment it has made for a particular product. Thus tariffication typically means that WTO Members will replace a non-tariff barrier with a tariff-rate quota. [Footnote omitted.]

To illustrate how “tariffication” will work, assume that during 1986-1988 a WTO Member limited imports of butter to 10,000 tons (subject to a tariff of four percent ad valorem) with the result that the WTO Member’s domestic market price for butter was 75 percent above the world market price. Under tariffication, that WTO Member might establish a tariff-rate quota for butter with an in-quota quantity of 10,000 tons and an in-quota tariff-rate of four percent ad valorem and apply an over-quota tariff-rate of 75 percent ad valorem.

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

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

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

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

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

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

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

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


114. See CROOME, supra note 10, at 54 (explaining the scope of tariff reductions).
[concerning special treatment for certain products, also discussed later].\textsuperscript{115}

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

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

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

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

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

\textsuperscript{115} Agreement on Agriculture, Art. 4:2 (footnote omitted, emphasis added).

\textsuperscript{116} See CROOME, supra note 10, at 55 (interpreting Article 4:2 as an "irreversible" tarrification obligation).

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

\textsuperscript{117} Agreement on Agriculture, Art. 4:2 fn. 1 (emphasis added).

\textsuperscript{118} See CROOME, supra note 10, at 53 (providing this statistic).
twenty-two percent of the agriculture product lines listed in the harmonized schedules, and some of these measures were quite restrictive.\textsuperscript{119} Thus, suppose a contracting party had maintained a non-tariff measure by virtue of its terms of accession to GATT or perhaps by a waiver granted under GATT Article XXV. Could it continue to do so after January 1, 1995, when the Agreement on Agriculture entered into force?

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

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

\textbf{C. THE THIRD WORLD AND EXEMPTIONS FROM TARIFFICATION}

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

\textsuperscript{119} See \textit{id.} (discussing pre-Uruguay Round tariffication in agriculture).

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

\textsuperscript{121} See \textit{id.} (stating that “the tariffication package also required countries to maintain current access opportunities at least equivalent to those ‘existing.’”).


\textsuperscript{123} See October 2002 \textit{Briefing Document, supra} note 25, at 18 (mentioning this statistic).
"exemptions." Annex 5 affords "special treatment," in the form of two exemptions from the tariffication obligation. These exemptions are for designated products and staple items in traditional diets, as set forth in sections A and B of Annex 5, respectively. The "designated product" exemption is available for all WTO Members and is potentially available for any primary agricultural product or prepared product. In contrast, the "staple food" exemption is available only to developing country WTO Members and only for primary agricultural products. Significantly, the exemptions had to be invoked during the Uruguay Round negotiations, i.e., "[t]hese options could only be exercised in the course of drawing up schedules of commitments, and therefore now govern access opportunities solely for the few products and markets concerned." At least four WTO Members invoked an exception, and the most common product for which an exemption was claimed was rice.

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

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

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

126. CROOME, supra note 10, at 55.

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

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

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

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

131. See id. ¶ 1(c) (stating Article 4:2 shall not apply if "effective production-restricting measures are applied to the primary agricultural product").
appear to have little to do with one another. In fact, they have a common thrust.

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

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

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

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

132. Id. ¶ 1(d).
must provide exporting Members with minimum market access opportunities and specify them in its Schedule.\footnote{\textit{See id.} § 1(e) (setting forth the obligation to provide minimum access opportunities).} That ensures exporters of the designated product do not lose opportunities owing to the lack of tariffification by the importing Member. Indeed, during the first year of implementation of the \textit{Agriculture Agreement} (January 1, 1995-December 31, 1995), an importing Member had to offer market access equal to four percent of domestic consumption during the base period.\footnote{\textit{See id.} (containing this benchmark).} During each subsequent year of the implementation period (January 1, 1996-December 31, 2000), the Member had to increase this opportunity by 0.8 percent of base-period domestic consumption.\footnote{\textit{Id.}}

Once a WTO Member no longer makes use of the designated product exemption, it must provide minimum market access for the product at the level of eight percent of domestic consumption in the base period.\footnote{\textit{See id.} § 5 (stating that “[w]here the special treatment is not to be continued at the end of the implementation period, the Member concerned shall implement the provisions of paragraph 6. In such a case, after the end of the implementation period \textit{the minimum access opportunities for the designated products shall be maintained at the level of 8 percent of corresponding domestic consumption in the base period in the Schedule of the Member.”} (emphasis added)).} Then, the Member must convert to ordinary tariffs the protective border measures other than its ordinary tariffs that apply to the product; it must satisfy the tariffification obligation of Article 4:2 of the \textit{Agriculture Agreement} with respect to the product. At that point, the product no longer is a designated one and is subject to ordinary customs duties bound in the Member’s Schedule of Concessions. What duty rate must the Member apply to the formerly designated product? The answer is based on a “tariff equivalent,” which essentially is the rate the Member would have had to apply if the Member had not exempted the product from tariffification and had cut the tariff on the product by fifteen percent in equal annual installments during the implementation period.

A sunset rule is built into the designated product exemption. Paragraph 3 of Annex 5, Section A, speaks of “[a]ny negotiation on the question of whether there can be a continuation of the special treatment as set out in paragraph 1 after the end of the implementation period,” \textit{i.e.}, after 31 December 2000 (the six years following 1 January 1995, which are defined in Article 1(1) as the “implementation period”). Paragraph 3 further indicates this negotiation must be completed before the end of the implementation period, and conducted in conjunction with the built-in agenda talks under Article 20. Paragraph 4 clarifies the scope of the sunset rule, by speaking of “a Member” continuing to apply the special treatment. In other words, the sunset rule concerns the use of the designated product exemption by individual WTO Members. Each Member seeking to extend the designated product exemption beyond 31 December 2000 is supposed to have negotiated for an extension before that date. Moreover, paragraph 4 obligates a Member seeking an extension to “confer additional and acceptable concessions as determined in that negotiation.” Put colloquially, an extension is not “free.” Of course, if no Member applied for an extension by 31 December 2000, then the exemption thereby would end.
period of January 1, 1995 to December 31, 2000.\textsuperscript{137} In sum, the exemption from tariffication as a designated product cannot go on forever. On the day of reckoning—when the exemption ends and tariffication occurs—the level of protection through the new bound duty is supposed to be what would have prevailed had there been no exemption. Put simply, the exemption does not rescue a product from this reckoning.

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

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

\textsuperscript{137} See id. ¶ 6 (second sentence). The term “tariff equivalent” is used in Annex 5, Section A, ¶ 6 to convey the idea of an ordinary customs duty that would have been applied to the designated product, had it not been exempted from tariffication as a designated product. \textit{Id.}

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

\textsuperscript{138} \textit{Agreement on Agriculture}, Annex 5, Section B, ¶ 7.
the publicity of pressing a case against a small, poor Member over food security?

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

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

139. See id. § 7(a) (setting forth the obligation to provide minimum access opportunities).
140. See id. §§ 1(a) (defining the "base period"), 7 (referencing paragraph 1(a)).
141. See id. § 7(a) (containing this benchmark).
142. Id.
143. Id.

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

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

Id. § 7(a) (emphasis added). The italicized language contemplates a 2 percent level in the fifth year, and increases starting again in the sixth year.
implementation year), and the Member must at least maintain this level every year thereafter in its Schedule.\footnote{144}

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

\footnote{144. \textit{See id.} (setting forth these benchmarks).}
\footnote{145. \textit{See id.} Section A, ¶ 1(e) (containing this benchmark).}
Table 2: Minimum Market Access An Importing WTO Member Must Provide To Exempt An Agricultural Item from Tarification

<table>
<thead>
<tr>
<th>Implementation Period* (Agreement on Agriculture, Articles 1(f) and 15:2)</th>
<th>Designated Product Exemption From Tarification** (Agreement on Agriculture, Annex 5, Section A, ¶ 1(e))</th>
<th>Staple Food Exemption From Tarification*** (Agreement on Agriculture, Annex 5, Section B, ¶ 7(a))</th>
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<tr>
<td>2004</td>
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</tbody>
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Notes to Table 2:

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

** Available to all WTO Members.

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

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

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

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

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

146. *Id.* Section B, ¶ 7(b).

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

148. *See Agreement on Agriculture*, Annex 5, Section B, ¶¶ 8-10 (containing rules about whether an exemption can be maintained beyond the end of the 10th year of implementation).

A sunset rule is built into the staple food exemption. Paragraph 8 of Annex 5, Section B, speaks of "[a]ny negotiation on the question of whether there can be a continuation of the special treatment as set out in paragraph 7 after the end of the 10th year following the beginning of the implementation period," i.e., after 31 December 2004 (the six years following 1 January 1995, which are defined in Article 1(f) as the "implementation period," plus the additional time contemplated in Annex 5, Section B, as well as in Article 15:2 as special and differential treatment). Paragraph 8 further indicates this negotiation must be finished before the end of the implementation period, i.e., before 31 December 2004, hence a developing Member seeking to extend the exemption beyond 31 December 2004 is supposed to have negotiated for an extension before that date. Moreover, paragraph 9 obligates the developing Member seeking an extension to "confer additional and acceptable concessions as determined in that negotiation." Put colloquially, reciprocity, contrary to GATT Article XXXVI:8, is expected of the Member in exchange for an extension. Of course, if no Member applied for an extension by 31 December 2004, then the exemption thereby would end.
from tariffication.\textsuperscript{149} It is not clear whether the fifteen percent reduction rule applies in both contexts. As explained earlier, for a designated product, a converted tariff rate is calculated using a hypothetical tariff cut of fifteen percent in equal annual installments from 1995-2000.\textsuperscript{150} Does this same fifteen percent reduction rule apply to a developing country Member tariffying a staple food? The answer seems to depend on whether the Member negotiated for that, or some other, reduction rule in its Schedule of Concessions. The relevant language in Annex 5, Section B, refers both to this rule and to the possibility of special and differential treatment.\textsuperscript{151} Put differently, the answer depends on savvy negotiation by the developing country. But, regardless of the percent reduction, there will be a day of reckoning when tariffication occurs. The staple food exemption does not rescue Third World farmers of this primary commodity from this reckoning.

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

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

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

\textsuperscript{150} See supra notes 136-137 and accompanying text.

\textsuperscript{151} The second sentence of paragraph 10 of Annex 5, Section B, states: "In other respects, the provisions of paragraph 6 shall apply as modified by the relevant special and differential treatment accorded to developing country Members under this Agreement" (emphasis added). Paragraph 6 sets forth the 15 percent reduction rule in the context of the designated product exemption. Article 15 of the Agriculture Agreement, which concerns special and differential treatment, is worded in general terms. It does not discuss tariffication, nor does it explain how to calculate a tariff equivalent for a staple food on which a developing Member imposed a non-tariff barrier. But, Article 15:1 mandates "special and differential treatment in respect of commitments... as set out in the relevant provisions of this Agreement and embodied in the Schedules of concessions and commitments" (emphasis added). The italicized language would seem to permit a developing country to negotiate a tariff rate reduction plan, as it were, in connection with ending an exemption from tariffication for a staple food.
entitled *Guidelines for the Calculation of Tariff Equivalents for the Specific Purpose Specified in Paragraphs 6 and 10 of this Annex*.\(^{152}\) However, as their title suggests, they are not broadly applicable to all tariffification efforts, but rather only those covered by paragraphs 6 and 10 of Annex 5. Those paragraphs concern the designated product and staple food exemption; they refer to agricultural products whose exemption is being eliminated and which need to be tariffed. Consequently, at least from Annex 5, the title of the *Guidelines*, and Article 4:2, there seems to be no textual basis for applying the *Guidelines* to the tariffification of non-exempt products. Still, that has not prevented at least one authority from presuming that the *Guidelines* are applicable.\(^{153}\)

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

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

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

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


\(155\) MICHALOPOULOS, supra note 17, at 105 (emphasis added).
In brief, post-Uruguay Round tariffs resulting from tariffication are “very high” on many agricultural products because of the “excessively high tariff equivalents” used by many countries. 156 Such products include staple items like cereals, dairy products, meat, milk, and sugar, where tariffication of quantitative restrictions has resulted in duty rates above 100 percent. 157 Rice is another example—the Japanese rate on it, in the several hundreds, is prohibitive. 158

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

D. DO MINIMUM ACCESS TARIFF RATE QUOTAS HELP?

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

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156. See GALLAGHER, supra note 5, at 42 (citing evidence from a 1997 World Bank study).
157. See MICHALOPOULOS, supra note 17, at 107 (mentioning this fact).
158. See id. (reporting a tariff of 550 percent). Still another illustration is tobacco, on which the United States imposes duties as high as 350 percent. See id. However, there is an obvious health justification for a prohibitive duty on tobacco. Not surprisingly, this source concludes the cuts in non-tariff measures “in agriculture after the conclusion of the Uruguay Round does not seem to have resulted in significant improvements in market access for developing countries.” Id. at 111.
159. See CROOME, supra note 10, at 53 (stating that “[t]he tariffication process was based on application of negotiated methods, or ‘modalities’ that are not included in the published Uruguay Round texts”). “The tariffication methods are set out in the Uruguay Round document MTN.GNG/MA/W/24, Modalities for the establishment of specific binding commitments under the reform programme, of 20 December 1993, and are largely in Annex 3 of that document.” Id. at 53 n.170.
160. See UNITED STATES CUSTOMS SERVICE, IMPORTING INTO THE UNITED STATES 79-80 (November 1998), reprinted in BHALA, supra note 30, at 512-14 (discussing TRQs).
opportunities be maintained may be of little help to exporters. Suppose imports in a particular agricultural sector account for only ten percent of consumption in an importing WTO Member. Mere tariffication is unlikely to increase by much that share.

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

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

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

162. See CROOME, supra note 10, at 53-54 (explaining the requirement of providing a low duty rate on an MFN basis if imports of an agricultural product account for less than 5 percent of total domestic consumption during the base period).
163. These requirements were set forth in the December 1993 Modalities Document. See CROOME, supra note 10, at 54 (discussing the three and five percent thresholds).
percent figure not only reflects domestic consumption of imported products during the base period, but also sets the standard for the minimum opportunity to be given to overseas farmers and processors.

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

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

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

164. On this point, the WTO Secretariat observes:
Methods used for giving exporters access to quotas include first-come, first-served allocations, import licensing according to historical shares and other criteria, administering through [a] state trading enterprise, bilateral agreements, and auctioning. The terms can also specify time periods for using the quotas, for example, periods of time for applying for licenses, or for delivering the products to the importing countries. Exporters are sometimes concerned that their ability to take advantage of tariff quotas can be handicapped because of the way the quotas are administered. Sometimes they also complain that the licensing timetables put them at a disadvantage when production is seasonal and the products have to be transported over long distances.
Each method has advantages and disadvantages, and many WTO members acknowledge that it can be difficult to say conclusively whether one method is better than another.
165. Id. at 7.
In contrast, Chile has one, Australia and Brazil each have two, and New Zealand has three.  

E. A - ACTION AGAINST IMPORT SURGES

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

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

166. Id. (inset entitled "Who has tariff quotas?").
167. Id. (inset entitled "Who has tariff quotas?").
168. Article 5:1 of the Agreement on Agriculture requires a WTO Member to reserve the right in its Schedule. It states the right can be invoked only on a product "which is designated in its Schedule with the symbol "SSG" as being the subject of a concession in respect of which the provisions of this Article may be invoked." From the text of Article 5:1, it is unclear whether a Member had to designate individual agricultural products with the "SSG" symbol by the date on which the Agriculture Agreement entered into force for the Member, or whether the Member retains an ongoing ability to put this designation in its Schedule. Arguably, to designate a product with "SSG" after the Agreement has taken effect would be to modify a Member's Schedule, and hence ought to be subject to negotiation and the possibility of compensatory adjustments.
169. October 2002 Briefing Document, supra note 25, at 1 (containing these and the other statistics mentioned, and cautioning "the definition of what is a single product varies" from Member to Member).
170. Id. at 1-2.
171. Id.
Moreover, a WTO Member can invoke the remedy only against an agricultural product subject to tariffication.\textsuperscript{172} Thus, if the Member did not protect a particular agricultural product with a non-tariff barrier before the Agriculture Agreement took effect, but rather only with a tariff, then the Member cannot apply Article 5 of the Agreement to the product. The Member also cannot use the remedy against imports that do not exceed the Member’s market access commitment.\textsuperscript{173} That is, imports within a TRQ cannot be the target of a special safeguard action.\textsuperscript{174} After all, the point of the Article is to serve as an “escape clause” for WTO Members, that is, as a device to assist domestic farmers and processors who had benefited from quotas, licenses, or other quantitative restrictions on an imported product but who have lost these types of protection to tariffication. To put it concisely, a special safeguard remedy can undermine only one of the three measures associated with the market access methodology, namely, the tariffication process. It can do so only with respect to an individual product. It can do so only for as long as the remedy is in place. But, the remedy cannot permanently undermine tariff reductions made in accordance with the targets nor the minimum access tariff quotas.

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

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

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

\textsuperscript{174} See October 2002 Briefing Document, supra note 25, at 1 (clarifying this restriction on the use of Article 5).
claims on behalf of its domestic agricultural interests than a Member with a dearth of trained trade lawyers. Where else is there a dearth of such lawyers but in least developed and some developing country Members? Interestingly, then, in the Doha Round some Third World Members propose to restrict use of Article 5 to poor countries. 175

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

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

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

175. See id. at 19 (mentioning this proposal).
176. See Agreement on Agriculture, Art. 5:1(a) (stating that “the volume of imports of that product entering the customs territory of the Member granting the concession during any year exceeds a trigger level”).
177. See id. Art. 5:6 (stating that “[f]or perishable and seasonable products, the conditions set out above shall be applied in such a manner as to take account of the specific characteristics of such products” and “shorter time periods under sub-paragraph 1(a) and 4 [the trigger volume rules] may be used in reference to the corresponding periods in the base period”). Exactly how short a period may be used is not defined, suggesting case-by-case determinations are to be made.
178. See id. Art. 5:7 (stating, “Members undertake, as far as practicable, not to take recourse to the provisions of sub-paragraph 1(b) where the volume of imports of the products concerned are [sic] declining” (emphasis added)).
within one year. There also is a limit on the size of the remedy in a trigger volume case. The additional duty cannot exceed one-third of the level of the ordinary tariff on the imported product. Thus, if the MFN rate on an agricultural product is ten percent, then the WTO Member applying that rate cannot impose a special safeguard remedy in excess of an additional 3.33 percent, for a total duty of 13.33 percent.

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

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

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

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

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

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

182. CROOME, supra note 10, at 55.
Imports of a product

\[
\text{Market access} = \text{into a Member} \times 100
\]

opportunity Total domestic consumption of the product in the Member

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

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

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

\textsuperscript{183} GATT Article XIII:2(d), concerning the non-discriminatory administration of quantitative restrictions, uses the language “previous representative period.” There is no set length for this period in GATT or WTO jurisprudence. See \textit{WORLD TRADE ORGANIZATION, WTO ANALYTICAL INDEX – GUIDE TO WTO LAW AND PRACTICE}, vol. 1, §§ 378-381 at 290-92 (2003) (discussing the \textit{EC – Bananas} and \textit{EC – Poultry} cases); \textit{JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT § 13.5} at 324-27 (1969) (discussing early GATT efforts to refine the phrase). Sensibly, there are case-to-case considerations in determining whether a previous period is “representative.”
from the perspective of domestic farming interests in a WTO Member seeking to impose a special safeguard. To that lobby, a higher import penetration ratio would be a greater cause for concern and potentially necessitate a special safeguard.

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

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

\textsuperscript{184} Agreement on Agriculture, Art. 5:4, 5:1(b); see also infra note 195 (quoting Art. 5:1(b)).
\textsuperscript{185} Agreement on Agriculture, Art. 5:4(c) (emphasis added).
Table 3: Base Trigger Levels (Volume) in Relation to Market Access Opportunities

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

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

Once a WTO Member determines the market access opportunity and base trigger level for a particular agricultural import, it must gather three more pieces of data. For most products and for most Members this necessity ought not to be a burden. First, the Member must have at hand the volume of the product in question it has imported during any one-year period. This statistic ought to be readily available. In calculating market access opportunity, the Member uses three-year import volume data, so it will have figures for a one-year period. Second, the Member must obtain the average volume of imports of the product during the most recent three-year period for which data are
available. This statistic will be readily available, for the Member uses it in the numerator for computing market access opportunity. Third, the Member must compute the change in the volume of domestic consumption of the product in the most recent year for which data are available. This computation demands consumption data for two years because the change is across two years—the most recent year for which data exist and the year preceding it. Nevertheless, this statistic, too, will be easy to come by because the Member will have used consumption data for three years in the denominator of the formula for market access opportunity.

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

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

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186. This provision states:
Any additional duty imposed under sub-paragraph 1(a) [concerning the volume of imports to trigger special safeguard relief] shall only be maintained until the end of the year in which it has been imposed, and may only be levied at a level which shall not exceed one third of the level of the ordinary customs duty in effect in the year in which the action is taken. The trigger level shall be set according to the following schedule based on market access opportunities defined as imports as a percentage of the corresponding domestic consumption during the three preceding years for which data are available:
(a) where such market access opportunities . . . are less than or equal to 10 per cent, the base trigger level shall equal 125 per cent;
(b) where such market access opportunities for a product are greater than 10 per cent but less than or equal to 30 per cent, the base trigger level shall equal 110 per cent;
(c) where such market access opportunities for a product are greater than 30 per cent, the base trigger level shall equal 105 percent.
In all cases the additional duty may be imposed in any year where the absolute volume of imports of the product concerned entering the customs territory of the Member granting the concession exceeds the sum of (x) the base trigger level set out above multiplied by the average quantity of imports during the three preceding years for which data are available and (y) the absolute volume change in domestic consumption of the product concerned in the most recent year for which data are available.
expressions, set forth in the chart below.\textsuperscript{187} In both expressions, the figure on the left hand side is the actual import volume. A Member compares it to the trigger volume, which is the result yielded by the right-hand side of each expression.\textsuperscript{188} Only if actual imports exceed the trigger volume is there a surge, and only then may the Member resort to the special safeguard.\textsuperscript{189}

\textbf{Chart:}

\textbf{Formula for Determining Imposition of a Special Safeguard Remedy}
(derived from \textit{Agreement on Agriculture}, Article 5:4)

\begin{align*}
\text{If: Actual Import Volume in 1 Year} & \quad > \quad [ \text{(Base Trigger Level)} \times \\
& \quad \text{(Average Volume of Imports in last 3 years)} ] \\
& \quad + \\
& \quad \text{(Change in Volume of Domestic Consumption in Recent Year)}
\end{align*}

Then: Member may impose special safeguard remedy.

\begin{align*}
\text{But if: Actual Import} & \quad < \quad \text{Volume in 1 Year} \\
& \quad [ \text{(Base Trigger Level)} \times \\
& \quad \text{(Average Volume of Imports in last 3 years)} ] \\
& \quad + \\
& \quad \text{(Change in Volume of Domestic Consumption in Recent Year)}
\end{align*}

Then: Member may not impose special safeguard remedy.

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

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\textsuperscript{187} \textit{Id.}
\textsuperscript{188} \textit{Id.}
\textsuperscript{189} \textit{Id.}
\textsuperscript{190} \textit{Id.}
imports in the domestic market (measured by imports as a percent of domestic consumption) is large, then the trigger level will be low. The average quantity of imports of the product is an absolute number, that is, a volume based on data available for the most recent three-year period.

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

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

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

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

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

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

Volume of imports in 2005: 20 million tons

Volume of imports in previous 3 years:

2004 – 17 million tons
2003 – 12 million tons
2002 – 15 million tons

Average import volume in previous 3 years: 14.67 million tons

Total domestic consumption in previous 3 years:

2004 – 22 million tons
2003 – 16 million tons
2002 – 19 million tons

Change in domestic consumption in last 2 years: 6 million ton increase

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

191. BHALA, supra note 30, at 1117-23 (discussing the purpose of safeguard law).
Market Access Opportunity = \[ \frac{\text{Imports of a product into a Member}}{\text{Total domestic consumption of the product in the Member}} \times 100 \]

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

= \[ \frac{44}{57} \times 100 \]

= 77.19 percent.

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

Actual Import Volume in 1 Year > [ (Base Trigger Level) \times \text{Average Volume of Imports in last 3 years} ]

or < (Change in Volume of Domestic Consumption in Recent Year)

20 > or < \[ \left[ \frac{105 \text{ percent}}{14.67} \right] + (6) \]

20 > or < \[ 15.40 + (6) \]

20 < 21.4

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

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

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

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

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

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

the trigger price level is breached? The *Agreement on Agriculture* does not forbid this use of the remedy, but it strongly discourages it.\(^{194}\)

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

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

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

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

\[^{196}\text{Id.}\]

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

\[^{198}\text{See id. Art. 5:1(b) n.2 (defining “reference price”).}\]

\[^{199}\text{CROOME, supra note 10, at 55.}\]

\[^{200}\text{See Statement of Administrative Action, supra note 12, at 715 (clarifying this point).}\]

\[^{201}\text{See Agreement on Agriculture, Art. 5:5(a) (defining “import price” as “the c.i.f. . . . import price of the shipment expressed in terms of the domestic currency”).}\]
between the actual import price and the trigger price as a percentage of the trigger price.\(^\text{202}\)

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

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

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

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

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

\(^{204}\) Agreement on Agriculture, Art. 5.
Table 4: Trigger Prices in Relation to Additional Duty That May Be Imposed

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

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

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

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205. Agreement on Agriculture, Art. 5.5(a)
206. Id.
Second, under Article 5:5, any additional duty is imposed on the basis of
the extent to which the actual import price falls below the trigger price. That is, the amount of additional duty depends on the difference between the
two prices, not on the import price itself. Of course, the normal MFN (or
other appropriate) tariff would be calculated on the import price, according to
applicable customs valuation rules. To continue the example of apple farmers
in New Zealand lobbying for protection, suppose the price of imported apples
is 19 percent less than the trigger price. Article 5:5(b) explains “the additional
duty shall equal 30 per cent of the amount by which the difference exceeds ten
per cent.” Applying the rule in this case, the amount of excess over ten
percent is, of course, nine percent (19 – 10 percent). Thirty percent of nine
percent is 2.7 percent, hence a duty of 2.7 percent would be authorized (in
addition to the normal MFN tariff, which in New Zealand is zero).

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

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

207. Id. Art. 5:5(b)-(e).
208. Id.
209. Id. at 5:5(b).
210. New Zealand offers duty free treatment on all agricultural and industrial products,
except for textiles, clothing, and footwear (“TCF” articles). It also offers duty-free treatment on
TCF articles from least-developed countries, and on items covered by its free trade agreement
with Singapore. (Author’s discussion with New Zealand trade officials, University of Auckland,
March 2003.)
calculation would not end here. Applying the rule of the last clause of Article 5:5(e), three further charges must be calculated and included in the remedy:

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

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

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

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

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

F. LOWERING LEGAL STANDARDS?

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

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

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

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

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

212. Agreement on Agriculture, Art. 5.
213. Id.
214. Id.
215. See BHALA, supra note 30, at ch. 17 (discussing the criteria set forth in these rules); see also Agreement on Safeguards, Apr. 15, 1994, WTO Agreement, Annex 1A, reprinted in BHALA, supra note 10, at 521-30.
216. Agreement on Safeguards, Art. 2.
217. Id.
218. Id.
rely on the general safeguard remedy, and make use of the emerging jurisprudence on it created by the Appellate Body? Surely, expunging Article 5 would help world agricultural trade emerge from Purgatory. That the general and special safeguard rules are mutually exclusive is clear from Article 5:8 of the Agreement, which says if a Member proceeds with a special safeguard remedy in a case, then it cannot have recourse in the same case to GATT Article XIX and the related provisions of the WTO Agreement on Safeguards.

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

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

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

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

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

222. See, e.g., United States – Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, Report of the Appellate Body, WT/DS177/AB/R (complaint by New Zealand), WT/DS178/AB/R (complaint by Australia) (adopted 16 May 2001) (ruling against the United States in its safeguard action, essentially because the United States International Trade Commission did not make a determination about unforeseen developments,
perspective, why create a remedy that is partly redundant with an existing remedy, and thereby create uncertainty about how the two remedies relate to one another, and about the nuances of each remedy?

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

(1) What qualifies as a “surge” (i.e., an actionable “increase”) in imports?
(2) What proof of injury, or threat of injury, to domestic producers of a good that is “like” the imports, must be shown (which begs the question of whether the domestic product and imports are “like” products)?
(3) What causal connection must be proven between the import surge and the injury or threat to the domestic producers, and in particular to what extent must different possible causes be identified and injury or threat thereof be attributed specifically to each separate cause?

* i.e., the Commission did not examine whether it was an “unforeseen development” that lamb meat imports into the United States increased and caused or threatened serious injury, and also faulting the Commission for not properly separating the injurious effects of other factors from the injurious effects of increased imports); *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, Report of the Appellate Body, WT/DS166/AB/R (adopted 19 Jan. 2001) (ruling against the United States in its safeguard measure on wheat gluten from the European Communities, essentially because the United States International Trade Commission failed to show low capacity utilization was due to increased imports rather than increased production capacity, and did not provide a sufficient basis for excluding Canadian imports from the remedy, despite rules in the North American Free Trade Agreement against the application of a global safeguards remedy to a NAFTA Party, and also criticizing the United States for not offering adequate opportunity, before imposing the remedy, for consultations to resolve the dispute); *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, Report of the Appellate Body, WT/DS98/AB/R (adopted 12 Jan. 2000) (ruling against Korea in its safeguard measure on skimmed milk powder from the European Community, largely because of Korea’s failure to meet applicable notification and burden of proof requirements, and also noting the importance of conforming, before imposing a safeguard, with the requirement in GATT Article XIX of showing that increased imports and injury or threat were a result, in part, of unforeseen circumstances). *See also* Raj Bhala & David Gantz, *WTO Case Review 2001*, 19 ARIZ. J. INT’L & COMP. L. 466, 613-14, 616-17, 625-29 (2002) (reviewing key Appellate Body holdings in the *Lamb Meat* and *Wheat Gluten* cases); Raj Bhala & David Gantz, *WTO Case Review 2000*, 18 ARIZ. J. INT’L & COMP. L. 1, 91-92 (2001) (reviewing key Appellate Body holdings in the *Korea – Dairy Products* case).
The general safeguard provision in GATT Article XIX, coupled with emerging Appellate Body jurisprudence, offer answers to all three questions. In brief, this corpus indicates that imports must increase in absolute terms or relative to domestic production, and it further indicates that this increase resulted from unforeseen circumstances and the effect of GATT–WTO obligations, such as tariff concessions. It calls for proof of “material” injury or threat thereof. And, this body of law demands proof the surge indeed has caused injury or threat, though the actual standard for causation remains frustratingly ambiguous.

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

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

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

223. GATT Article XIX:1(a) states:
If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

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

224. See cases cited supra note 222 (showing the importance of “unforeseen developments”); see also Argentina – Safeguard Measures on Imports of Footwear, Report of the Appellate Body, WT/DS121/AB/R (adopted 12 Jan. 2000) (holding that though the “unforeseen developments” language is not in the WTO Agreement on Safeguards, it remains a prerequisite to taking a safeguard action, because it is in GATT Article XIX, hence an importing WTO Member must show that increased imports that caused or threatened serious injury were “unexpected,” though ruling against Argentina’s safeguard measures on independent grounds); Bhala & Gantz, supra note 222, at 80-83.
associated with the market access methodology, namely tariffs, and then only with respect to an individual product and for a limited time. Tariff cuts made in accordance with the targets, and the minimum access tariff quotas, remain unaffected by a special safeguard remedy. The "bad" news is the requirements to impose a special safeguard remedy (at least according to the tentative analysis just sketched out) are considerably less rigorous than to make use of a general safeguard. In the agricultural sector, the special safeguard remedy potentially could undermine the integrity of the doctrine on safeguards as it has developed under GATT Article XIX.

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

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

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

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

227. See id. at Art. 17 (establishing this Committee). Article 18 of the Agreement charges the Committee with reviewing progress on the implementation of commitments negotiated in the Uruguay Round, and obligates Members to notify the Committee of various matters, including their progress in implementing commitments, and new domestic support measures. Id. at Art. 18.
Would most importing countries find these procedures less, or more, onerous than the process called for by GATT Article XIX and the Agreement on Safeguards? Careful consideration of these questions would go a long way to stating resolutely what now is a suspicion: that the Uruguay Round negotiators knew what they were creating in Article 5 of the Agriculture Agreement, namely, a remedy that could be used with, on important points of proof, less ardour than the extant one.

III. DOMESTIC SUBSIDIES

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

A. THE CONCEPT OF "TOTAL AMS"

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

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

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

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

230. CROOME, supra note 10, at 56 (emphasis added).
programs for their farmers, an amount exceeding the Gross National Product of all of Sub-Saharan Africa.231 This support (along with export subsidies) costs farmers in poor countries $24 billion annually in lost income, and eliminating trade distorting subsidies could lead to a tripling of agricultural exports from developing countries, to $60 billion a year.232 For the countries of the Organization for Economic Co-operation and Development (OECD), more than thirty percent of farm revenue comes from a domestic support program.233 Thus, one Financial Times columnist observes:

[T]he critics are correct in one thing. The developed nations are indeed the world’s piggiest protectionists. Farms are no longer mere farms. They are monuments to the political power of a tiny group that holds the rest of us hostage. The average European cow is allotted a subsidy of more than $2 a day, more than many citizens of the world have to live on.

... 

Data from the Organization for Economic Co-operation and Development show that full-time farmers in its member countries get the equivalent of $11,000 a year in cash or price support. New Zealand subsidizes to the tune of $1,000 per farmer. The European Union by contrast hands to each of its farmers the equivalent of $17,000 a year. In the U.S., the rate is $16,000. Few can beat Norway, which pays about $45,000.234

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

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


234. Amity Shlaes, Send Farmers Off to the Markets, FIN. TIMES, Sept. 1, 2003, at 13 (advocating domestic support reductions and formal farmer buy-outs using Tangermann bonds, which are named after Professor Stefan Tangermann, the Director for Food, Agriculture, and Fisheries at the OECD, who in the 1980s called for the securitization and trading of farmer bonds); see also Watkins, supra note 16, at 13 (stating that "each year rich countries spend more than $1 bn a day supporting their agricultural producers...[and] [t]he European Union and the U.S. account for almost two-thirds of total spending).
Defining “support” is no easy task, because of the diversity and complexity of such programs in the nearly 150 WTO Members. Suggestive of their trade-liberalizing ambitions, the Uruguay Round negotiators developed the concept of “Total Aggregate Measurement of Support,” or “Total AMS” for short. They meant for this concept to be a single figure measuring all government support provided by a Member to its agricultural sector, whether on a product-specific or non-product specific basis, as long as the subsidy does not qualify for an exemption stated elsewhere in the Agreement. Those exemptions, namely, “Green Box” subsidies, “Blue Box” subsidies, and de minimis “Amber Box” subsidies, are discussed below. Suffice it for now to say the Green Box consists of government-funded subsidies that do not distort international trade in agriculture; the Blue Box contains subsidies linked to production (or non-production); the Amber Box has all subsidies not in the first two Boxes, and a low level of Amber Box payments are permitted.

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

“Total AMS” mean[s] the sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, all non-product-specific aggregate measurements of support and all equivalent measurements of support for agricultural products, and which is:

(i) with respect to support provided during the base period (i.e., the “Base Total AMS”) and the maximum support permitted to be provided during any year of the implementation period or thereafter (i.e., the “Annual and Final Bound Commitment Levels”), as specified in Part IV of a Member’s Schedule; and

235. See Agreement on Agriculture, Art. 1(h) (defining “Total AMS”).

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

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

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

238. See CROOME, supra note 10, at 56 (explaining that Green Box measures have “little or no distorting effect on trade,” whereas Amber Box measures “distort trade,” hence the first type of domestic support is preferable to the second type).
(ii) with respect to the level of support actually provided during any year of the implementation period and thereafter (i.e., the "Current Total AMS"), calculated in accordance with the provisions of this Agreement, including Article 6, and with the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member’s Schedule [of Concessions] . . . .

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

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

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

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

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239. *Agreement on Agriculture*, Art. 1(h) (emphasis added).
that helping agricultural sectors in poor countries develop is important. Ghana, for instance, likely would benefit from being able to diversify into refined chocolates, rather than continue to be dependent on cocoa exports and leave the high value-added process of making chocolates to Belgian and Swiss processors. In other words, would-be and nascent Third World processors could benefit from enhanced access to markets in rich countries, and from lessened competition with subsidized processors in rich countries.

B. ELEMENTS OF TOTAL AMS

The second clause in the chapeau for the definition of "Total AMS" in Article 1(h) of the Agreement on Agriculture does not appear sinful from a free-trade perspective.\footnote{See supra note 239 and accompanying text (quoting this definition).} On its face, this clause in the chapeau presents in writing what can be expressed in a simple arithmetic formula:

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

Intuitively, the formula makes sense.\footnote{See CROOME, supra note 10, at 58 (stating that "[t]he Total AMS figure is arrived at by adding together the support for individual products and the support which is not product-specific").} The first right-hand side variable, the "Aggregate Measure of Support," or "AMS," is a summation of payments by a WTO Member to support so-called "basic" agricultural goods, added up on a product-by-product basis. Technically, each good has a "specific AMS;"\footnote{See Agreement on Agriculture, Annex 3, ¶ 6 (calling for the calculation of a "specific AMS" for each basic agricultural product); Statement of Administrative Action, supra note 12, at 718 (stating that "[t]he AMS for a single basic agricultural product is a composite of the value, expressed in national currency, of market price support, direct payments to producers falling outside the green box, and other internal measures that are subject to a reduction commitment, minus any producer assessments").} hence the first variable includes the sum of all the specific AMS figures, each one of which corresponds to a different commodity.

For example, assume Malaysia subsidizes three commodities, palm oil (a type of vegetable oil), rubber, and pineapples. It would calculate AMS by summing the subsidies it pays for each of these products. The term "basic agricultural product" refers to commodities "as close as practicable to the
point of first sale,” *i.e.*, as unprocessed as possible, because the first point of sale typically would be from a farm to a processing facility. For instance, pineapples would be the “basic agricultural product” in the chain of production leading to pineapple juice from concentrate. In its Schedule, each WTO Member identifies such basic agricultural products.

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

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

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

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

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

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

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

246. *Id.* (emphasis added).

247. *Id.* at Annex 4, ¶ 1 (stating that “[s]upport at both national and sub-national level shall be included.”).
and for the base level EMS.\textsuperscript{248} Third, an EMS must be calculated according to the subsidy as received as closely as practicable to the point of first sale.\textsuperscript{249} In other words, the focus of the calculation is on payments to producers (\textit{i.e.}, farmers), not downstream subsidies. However, fourth, payments to processors must be included in an EMS calculation, if those payments benefit farmers.\textsuperscript{250} At least insofar as purchases by a processor of a farmer's output qualify as a "benefit," this caveat ought not to pose a difficulty. Fifth, any agricultural levies or fees paid by farmers are deducted from EMS; otherwise EMS would over-state the amount of the subsidy.\textsuperscript{251}

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

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

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

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

\textsuperscript{250} \textit{See id.} ?? 4 (setting forth the rule in the second sentence).

\textsuperscript{251} \textit{See id.} (setting forth this deduction in the third sentence).

\textsuperscript{252} \textit{Id.} ?? 1. Article 1(d) of the \textit{Agreement on Agriculture} expressly refers to Annex 4, in the context of calculating EMS for any year of the period in which the \textit{Agreement} is implemented, or thereafter, \textit{i.e.}, in effect, any year after the base period. As with the Article 1(a) and 1(h) definitions of "AMS" and "Total AMS," respectively, Article 1(d) acknowledges the level of support will be specified in Part IV of the Schedule of each Member (typically in tables prepared by a Member and incorporated by reference in Part IV). That specification is the public proclamation of a Member of its bound level of support for its agricultural sector, from which it pledges (or may pledge) reductions.
Annex 3 identifies three types of domestic support programs, or, in the language of Annex 4, “components of AMS.” Annex 4 makes use of this classification. In brief, the three types are:

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

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

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

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

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

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

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

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

255. See id. § 3 (stating that “the basis for equivalent measurements of support concerning these measures [i.e., non-exempt direct payments and other product-specific subsidies not exempt from reduction commitments] shall be calculations as for the corresponding AMS components (specified in paragraphs 10 through 13 of Annex 3)” (emphasis added)), and Annex 3 § 10 (stating that “non-exempt direct payments which are dependent on a price gap shall be calculated using either the gap between the fixed reference price and the applied administered price multiplied by the quantity of production eligible to receive the administered price, or using budgetary outlays”).
may look to its budgetary outlays. If the amount of the subsidy made by the Member to producers is independent of commodity prices, then the Member calculates the EMS using actual budget expenditures.

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

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

C. THE “AMS” ELEMENT

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

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

257. See id. ¶ 12 (setting forth this rule).
post-base periods. However, that suggestion is misleading.\footnote{See supra note 239 and accompanying text (defining “Total AMS”).} At least from a free-trade perspective, the definition of “Total AMS” is neither so easy nor without sin.

The phrase italicized in clause (ii), which refers to Article 6 of the \textit{Agriculture Agreement}, is critical. This phrase is the technical legal basis for exempting Blue Box subsidies and \textit{de minimis} Amber Box subsidies from the calculation of Total AMS. Blue Box subsidies are the subject of Article 6:5, and \textit{de minimis} Amber Box subsidies are the topic of Article 6:4. The reference to them in the definition of “Total AMS” ensures their exclusion from the computation.\footnote{To be technically precise, Article 6:4 excludes Blue Box subsidies from the calculation of “Current Total AMS,” which is defined in Article 1(h)(ii) of the \textit{Agriculture Agreement} as “the level of support actually provided during any year of the implementation period and thereafter.” Article 6:5 performs the same function with respect to Green Box subsidies. Article 1(h)(i) and common sense indicate “Current Total AMS” is distinct from two other measurements. “Base Total AMS” is Total AMS during the base period for calculating agriculture subsidies and reduction commitments. “Annual and Final Bound Commitment Levels” are commitments made by a WTO Member, and memorialized in Part IV of its Schedule, to cut subsidies.}

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

The annual level of support, expressed in monetary terms, provided for an agricultural product in favor of the producers of the basic agricultural product or non-product-specific support provide in favor of agricultural producers in general, other than support provided under programmes that qualify as exempt from reduction under Annex 2 to this Agreement, which is:

(i) with respect to support provided during the base period, specified in the relevant tables of supporting material incorporated by reference in Part IV of a Member’s Schedule; and

(ii) with respect to support provided during any year of the implementation period and thereafter, calculated in accordance with the provisions of Annex 3 of this \textit{Agreement} and taking into account the constituent data and methodology used in the tables of
supporting material incorporated by reference in Part IV of the Member’s Schedule.260

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

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

260. Id. at Art. 1(a) (emphasis added).
261. Agreement on Agriculture, Art. 1(a), (h).
262. Id.
263. Id. at Annex 3-4.
264. See id. at Annex 3, ¶ 6 (stating that “[f]or each basic agricultural product, a specific AMS shall be established, expressed in total monetary value terms”).
265. Id. ¶ 1.
266. Id.
267. See id. (explaining how to calculate “AMS”).
268. See id. ¶¶ 2-3 (mandating, respectively, the inclusion of “both budgetary outlays and revenue foregone” and “national and sub-national level” payments).
269. See id. ¶ 4 (setting forth the deduction from AMS for “[s]pecific agricultural levies or fees paid by producers”). Neither the Agreement nor Annex elaborates on what might qualify as a “specific agricultural levy or fee.” Id.
AMS = Sum of Specific AMS (that is, of all product-specific support to basic agricultural products) + Sum of all non-product specific support - Fees paid by producers

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

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

As these articles also reveal, sub-Saharan African countries are trying to gain world market share, which stands at 5 percent, and they account for one-eighth of all cotton exports in the world. Stitched Up, supra at 13. For Burkino Faso and Mali, cotton provides one-third of export earnings, and for Chad, it provides one-quarter. Id. By at least one estimate, the subsidy schemes of developed countries lead them to dump cotton on the world market, lowering world cotton prices by about 25 United States cents and costing African cotton exporters $250 million in export earnings. Id. Dumping has caused cotton prices to fall so steeply that cotton from the otherwise competitive farmers in Burkino Faso now is ten cents higher than American cotton. Long Reach of Cotton, supra at A18. If the ripple effects of the tumble in cotton prices on African economies are tallied, the cost to them of cotton subsidies in developed countries is $1 billion. Stitched Up, supra at 13. Were the United States and other developed countries to cease subsidizing cotton, presumably the world market price of cotton would rise, yielding more profits to African farmers and increasing the export revenues of their countries. Long Reach of Cotton, supra at A18. The positive knock-on effects could be more investment in inputs and technologies by the farmers. Several sub-Saharan African cotton-producing countries (e.g., Burkino Faso) are predominantly Muslim. Id. There might be yet more positive effects of taking steps to benefit sub-Saharan African farmers, not the least of which could be assisting in poverty alleviation and thereby (at least indirectly) enhancing America's national security (assuming poverty is a breeding ground for extremism). Doubtless, however, powerful political interests in cotton-growing areas of the United States, which include Arizona, California, and various Southern states, would lobby against terminating the subsidies. See Neil King, Jr. & Scott Miller, Post-Iraq Influence of U.S. Faces Test At New Trade Talks, WALL ST. J., Sept. 9, 2003, at A1, A10 (also opining the current
administer the payments, the Department of Agriculture imposes a processing charge of $100 per producer, thereby collecting a total of $500 million. Suppose, further, that three states, Kansas, Missouri, and Nebraska, provide support to all farmers, regardless of crop type, for soil conservation. Support from these states totals $5 billion. This support does not qualify for the Green Box or the Blue Box, and it exceeds the de minimis threshold for the Amber Box. Applying the above formula to these data, the AMS for the United States would be $14.5 billion.

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

D. B - BOXES FOR DOMESTIC SUPPORT

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

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

271. See Donald Worster, Dust Bowl (1979) (discussing the highly engaging history of soil conservation problems in the Southern Plains during the 1930s).

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

273. See supra note 260 and accompanying text (the definition of “AMS”).
The point is Uruguay Round negotiators were nothing less than devilishly clever in defining “Total AMS” and its key element, “AMS.” They exempted Blue Box and de minimis Amber Box subsidies by referring in the definition of “Total AMS” in clause (ii) of Article 1(h) to Article 6, which discusses these two Boxes. In the definition of “AMS” in Article 1(a), they exempted Green Box subsidies through the reference to Annex 2. These exemptions ensure “Total AMS” is not “total,” nor is “Aggregate Measurement of Support” really “aggregate.” Because the single monetary sum for domestic support does not include subsidy programs in these Boxes, the commitments made by WTO Members to reduce domestic support, which Total AMS gauges, are not comprehensive. To stretch the metaphor of Purgatory, it is as if WTO Members went to confession during the Uruguay Round, but were not thorough in accounting for their agricultural programs nor in their pledge to avoid them going forward. The consequence is cross-border agricultural trade that is not free from government support. That consequence is enduring because the exemptions are permanent, unless during the Doha Round WTO Members agree to alter or scrap them.274

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

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

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

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

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

277. Id. at 19-20.
Subsidies in the Special and Differential Treatment Box share a common purpose, namely, to encourage Third World agricultural and rural development. However, this Box is not to be confused with more ambitious proposals by many developing countries, in the context of the Doha Round talks, to create a “Development Box.” In that proposed Box would be, for instance, measures to support agriculture and food security, and by virtue of being in the Box, they would be exempt from discipline.

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

278. See Agreement on Agriculture, Art. 6:2 (setting forth the criteria for the Special and Differential Treatment box).
279. See MICHALOPOULOS, supra note 17, at 210 (discussing the Development Box).
280. See Agreement on Agriculture, Art. 6:4(a)(i) (the 5 percent level for product-specific subsidies in developed countries), and 6:4(b) (the 10 percent level for developing countries); CROOME, supra note 10, at 58-59 (identifying these thresholds).
281. Id. at Art. 6:4(a)(ii) (the 5 percent level for non-product-specific subsidies in developed countries) and 6:4(b) (the 10 percent level for developing countries).
In contrast to Article 6:4(a)(i) of the Agriculture Agreement, Article 6:4(a)(ii) does not contain the phrase “during the relevant year,” or other words indicating the relevant period for calculating the total value of a Member’s agricultural production is a year. Surely, though, a year must be the relevant period in both instances.
282. See id. at Art. 7:2(b) (stating that “[w]here no Total AMS commitment exists in Part IV of a Member’s Schedule, the Member shall not provide support to agricultural producers in excess of the relevant de minimis level set out in paragraph 4 of Article 6” (emphasis added)).
I. The Green Box

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

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

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

283. See id. at Art. 6:2 (containing the exemption), see also October 2002 Briefing Document, supra note 25, at 19-20 (explaining the exemption).
284. See id. at Art. 1(h)(i) (defining “Current Total AMS” as “the level of support actually provided during any year of the implementation period and thereafter”); see also Statement of Administrative Action, supra note 12, at 718 (providing the same definition).
285. As the WTO Secretariat observes,

Most countries accept that agriculture is not only about producing food and fibre, but also has other functions, including ... non-trade objectives. The question debated in the WTO is whether “trade-distorting” subsidies, or subsidies outside the “green box,” are needed in order to help agriculture perform its many roles.

Some countries say all the [non-trade] objectives can and should be achieved more efficiently through “green box” subsidies which are targeted directly at these objectives and by definition do not distort trade. ... Other countries say the non-trade concerns are closely linked to production. They believe subsidies based on or related to production are needed for these purposes. For example, rice fields have to be promoted in order to prevent soil erosion, they say.

Many exporting developing countries say proposals to deal with non-trade concerns outside the “green box” of non-distorting domestic supports amount to a form of special and differential treatment for rich countries.

286. The WTO itself uses the metaphor of a traffic light for agricultural subsidies boxes. See, e.g., Domestic Support in Agriculture, supra note 236 (stating that “[i]n WTO terminology, subsidies in general are identified by ‘boxes’ which are given the colors of traffic lights”); October 2002 Briefing Document, supra note 25, at 19 (using the metaphor).
“Green box” subsidies are therefore allowed without limits, provide they comply with relevant criteria. They also include environmental protection and regional development programmes.\textsuperscript{287}

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

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

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

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

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

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

\textsuperscript{290} Id. at 57.

\textsuperscript{291} See Agreement on Agriculture, Art. 7:1 (stating that “[e]ach Member shall ensure that any domestic support measures in favor of agricultural producers which are not subject to reduction commitments because they qualify under the criteria set out in Annex 2... are maintained in conformity therewith”). Conversely, a Member could alter a domestic support measure that does not qualify for the Green Box in such a way as to satisfy the Green Box criteria.
Agriculture articulates the basic criterion, namely, "no trade distortion" (in the chapeau), which two subsequent sub-paragraphs further define as the following:

Domestic support measures for which exemption from the reduction commitments is claimed shall meet the fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production. Accordingly, all measures for which exemption is claimed shall conform to the following basic criteria:

(a) the support in question shall be provided through a publicly-funded government programme (including government revenue foregone) not involving transfers from consumers; and,

(b) the support in question shall not have the effect of providing price support to producers;

plus policy-specific criteria and conditions set out below. 292

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

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

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

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

294. See Domestic Support in Agriculture, supra note 236 (highlighting, as an example of a Green Box subsidy, direct income support for farmers that are decoupled from production levels and prices), see also October 2002 Briefing Document, supra note 25, at 20 (discussing direct income support).
against Chinese honey imports (as, indeed, has occurred). The point is that the Green Box is an ostensibly noble effort to discipline subsidies with rules that are easier to articulate and justify in theory than sometimes in practice.

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

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

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

\textsuperscript{295} See Agreement on Agriculture, Annex 2 § 6.
<table>
<thead>
<tr>
<th>Direct Payments to Producers and Decoupled Income Support (Paragraphs 5-6)</th>
<th>Income subsidies.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) There are clear criteria for eligibility.</td>
<td></td>
</tr>
<tr>
<td>2) Eligibility criteria include income, status as producer or landowner, factor use, or output.</td>
<td></td>
</tr>
<tr>
<td>3) Payments must not relate to type or volume of output, and recipients cannot be required to produce in order to obtain payment.</td>
<td></td>
</tr>
<tr>
<td>4) Payments must not relate to prices, nor to employing factors of production.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Income Insurance and Income Safety-Net Programs (Paragraph 7)</th>
<th>Government financial participation in a program to provide income insurance or a safety-net for income.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) Eligibility must be based on loss of income derived from agriculture.</td>
<td></td>
</tr>
<tr>
<td>2) The income loss must exceed 30 percent of average income in prior 3-year period.</td>
<td></td>
</tr>
<tr>
<td>3) Payments must compensate for less than 70 percent of the producer’s income loss.</td>
<td></td>
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<tr>
<td>4) Payments must relate solely to income.</td>
<td></td>
</tr>
<tr>
<td>5) Payments must not relate to type or volume of output, prices, or employing factors of production.</td>
<td></td>
</tr>
<tr>
<td>6) If natural disaster relief also is collected, then the sum of payments must be less than 100 percent of total loss.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Natural Disaster Relief (Paragraph 8)</th>
<th>Government assistance to provide relief in the event of a natural disaster, or a like disaster (including disease, pests, nuclear accident, or war).</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) There is formal recognition by the government of a natural or like disaster.</td>
<td></td>
</tr>
<tr>
<td>2) Payments must be only for the loss of income, livestock, land, or other production factor due to the natural disaster.</td>
<td></td>
</tr>
<tr>
<td>3) Payments must compensate for no more then the replacement cost of losses.</td>
<td></td>
</tr>
<tr>
<td>4) Payments must not be conditional upon a type or quantity of future output.</td>
<td></td>
</tr>
<tr>
<td>5) Payments made during a disaster must not exceed the amount necessary to prevent or alleviate further loss.</td>
<td></td>
</tr>
<tr>
<td>6) If payments also are collected under an income insurance or income-safety program, then sum of the payments must be less than 100 percent of total loss.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Producer Retirement (Paragraph 9)</th>
<th>Structural adjustment designed to retire farmers.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) There are clear criteria for eligibility.</td>
<td></td>
</tr>
<tr>
<td>2) Eligibility criteria facilitate retirement of producers, or help them obtain non-farm jobs.</td>
<td></td>
</tr>
<tr>
<td>3) Payments must be conditional on the total and permanent retirement of the recipient from agricultural.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Resource Retirement (Paragraph 10)</th>
<th>Structural adjustment programs designed to retire resources from the agricultural sector.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) There are clear criteria for eligibility</td>
<td></td>
</tr>
<tr>
<td>2) Eligibility criteria remove land, livestock, and other resources from marketable agricultural output.</td>
<td></td>
</tr>
<tr>
<td>3) Payments must be conditional on retirement of land from production for at least 3 years, and on the permanent disposal of livestock.</td>
<td></td>
</tr>
<tr>
<td>4) Payments must not be conditional on an alternative</td>
<td></td>
</tr>
<tr>
<td>Investment (Paragraph 11)</td>
<td>Structure adjustment to aid investment in agriculture.</td>
</tr>
<tr>
<td>--------------------------</td>
<td>--------------------------------------------------------</td>
</tr>
<tr>
<td></td>
<td>1) There are clear criteria for eligibility.</td>
</tr>
<tr>
<td></td>
<td>2) Eligibility criteria contain specific conditions to be fulfilled, including production methods or inputs.</td>
</tr>
<tr>
<td></td>
<td>3) Payments must be limited to covering extra costs or loss of income associated with complying with the program.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Environmental Programs (Paragraph 12)</th>
<th>Government programs for the environment or conservation.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1) There are clear criteria for eligibility.</td>
</tr>
<tr>
<td></td>
<td>2) Eligibility criteria must be structurally advantageous.</td>
</tr>
<tr>
<td></td>
<td>3) Payments must be limited to covering extra costs or loss of income associated with complying with the program.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Regional Assistance (Paragraph 13)</th>
<th>Government programs to help farmers in disadvantaged regions.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1) Eligibility must be limited to farmers in a disadvantaged region, but must be generally available to all farmers in that region.</td>
</tr>
<tr>
<td></td>
<td>2) The disadvantaged region must be a clearly designated, contiguous geographical area with a definable economic and administrative identity.</td>
</tr>
<tr>
<td></td>
<td>3) The region must be considered “disadvantaged” on the basis of neutral and objective criteria set forth by law or regulation.</td>
</tr>
<tr>
<td></td>
<td>4) Difficulties faced by the region must be temporary.</td>
</tr>
<tr>
<td></td>
<td>5) Payments must not be related to the type or quantity of output, nor to prices.</td>
</tr>
<tr>
<td></td>
<td>6) Payment must be limited to the extra cost or income loss associated with farming in the disadvantaged region.</td>
</tr>
<tr>
<td></td>
<td>7) If payments are related to factors of production, then the amounts must decrease above a specified level of the factor in question.</td>
</tr>
</tbody>
</table>

*Note: The policy-specific criteria are in addition to the basic criterion that must be satisfied to qualify for the Green Box, namely, no or minimal trade distortion. This criterion, stated in Annex 2, paragraph 1, mandates that the subsidy not distort trade, be publicly funded, and not have the effect of supporting agricultural prices.
Likewise, income insurance and income safety-net programs also may qualify for the Green Box, if they meet the policy-specific criteria of Annex 2.296 Essentially, these programs help protect a farmer against the loss of agriculture-sourced income, but only if the loss is over thirty percent of his income in a preceding three-year period.297 In the first year of assistance, there is a cap on payments, in that they must compensate the farmer for less than seventy percent of his income loss. Not surprisingly, the payments must be free of any link to output, prices, or factors employed.298

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

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

296. Id. ¶ 7(a)-(c).
297. The highest and lowest previous income levels are excluded when calculating the average. See id. ¶ 7(a).
298. If in the same year a farmer receives payments from an income insurance or safety-net program, and from a program for relief from natural disasters, then his total payments must not exceed 100 percent of his loss. See id. ¶¶ 7(d), 8(e).
299. Id. ¶ 8.
300. Id. ¶ 11(a).
301. Id. ¶ 11(d), (f).
certain crops. Sensibly, given the purpose of the assistance, the payments can be conditional on eschewing a product.

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

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

302. Id. § 8(b)-(c), (e).
303. Id. § 8.
304. Id. § 8(a) (stating that "[e]ligibility for such payments . . . shall be determined by a production loss which exceeds 30 percent of the average of production in the preceding three-year period or a three-year average based on the preceding five-year period, excluding the highest and lowest entry").
305. Id. § 8(b)-(c). A limit akin to "mitigation of losses" also exists. If payment is made while a disaster is occurring, then it must be limited to the amount required to prevent or alleviate further loss. Id. § 8(d).
306. Id. § 8(c).
307. Id. § 8(a).
Clearly defined environmental or conservation programs qualify for the Green Box if eligibility for payments depends on meeting specific targets (e.g., relating to production methods or inputs) and if the amount of the subsidy is limited to the extra cost of or loss of income from compliance.\textsuperscript{308} Here, then is a direct analogy with non-agricultural subsidies for environmental retro-fitting, which the SCM Agreement classifies as "Green Light."\textsuperscript{309} This analogy continues with the other two types of Green Light subsidies, and the Table draws out the analogy. The policy-specific criteria for Green Box and Green Light subsidies understandably differ in detail, particularly as to the existence and nature of limitations on payments to qualify as non-actionable. However, as the Table indicates, these two categories of agricultural and non-agricultural subsidies, respectively, resemble one another in their underlying policy aims and in the reason why they are exempted from the disciplines imposed on other schemes.

\textsuperscript{308} See id. ¶ 12 (containing criteria for environmental programs).

\textsuperscript{309} See SCM Agreement, Art. 8:2(c) (concerning assistance to promote the adaptation of existing facilities to new – not existing – environmental regulations); BHALA & KENNEDY, supra note 12, ¶ 7-3(d)(4) at 831-37 (explaining the criteria for environmental adaptation subsidies).
Table 6: Green Box Agricultural Subsidies and Green Light Non-Agricultural Subsidies

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

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

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

\(^{310}\) See Agreement on Agriculture, Annex 2 ¶ 13(a), (d) (stating that "[e]ligibility for such payments shall be limited to producers in disadvantaged regions," and "[p]ayments shall be available only to producers in eligible regions, but generally available to all producers within such regions").
in the region. Payments must not be linked to crop type, production volume, except to reduce output, and then only if they decline after a threshold level, nor to prices. The region itself must be "a clearly designated contiguous geographical area" and considered "disadvantaged" in a long-term sense according to "neutral and objective criteria clearly spelt out in law or regulation." Here, then, is a second analogy between Green Box subsidies in the Agriculture Agreement and Green Light subsidies in the SCM Agreement. In both instances, the aim is to excuse subsidies aimed at helping relatively poor areas.

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

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

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

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

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

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

315. See SCM Agreement, Art. 82(b) (concerning assistance to disadvantaged regions); BHALA & KENNEDY, supra note 12, § 7-3(d)(3) at 827-31 (explaining the criteria for regional development subsidies).

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

317. See SCM Agreement, Art. 82(a) (concerning assistance to disadvantaged regions); BHALA & KENNEDY, supra note 12, § 7-3(d)(2) at 822-27 (explaining the criteria for research and development subsidies).
less than the prevailing market price for the product, and is financially 
transparent in doing so. 318 Similarly, programs for domestic food aid—the 
direct provision of food or assistance to buy food at market or subsidized 
prices—qualify for the Green Box, assuming they are for needy people 
whose eligibility is adjudged through clear criteria relating to nutritional 
objectives and the government operates in a financially transparent 
manner. 319

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

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

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

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

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

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

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

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

Direct payments under production-limiting programmes shall not be subject to the commitment to reduce domestic support if:

(i) such payments are based on fixed area and yields; or

(ii) such payments are made on 85 per cent or less of the base level of production; or

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


324. See id. (elaborating on the meaning of “Blue Box”); *Domestic Support in Agriculture*, supra note 236 (explaining that “[a]ny support that would normally be in the amber box, is placed in the blue box if the support also requires farmers to limit production”).
(iii) livestock payments are made on a fixed number of head.\textsuperscript{325}

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

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

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

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

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

\textsuperscript{325} Agreement on Agriculture, Art. 5(a) (emphasis added).
\textsuperscript{326} See id. at 5(b) (setting forth the exemption).
\textsuperscript{327} The Clinton Administration referred to “U.S. deficiency payments under the Food, Agriculture, Conservation, and Trade Act of 1990” as being direct support meeting production-limiting requirements, and thereby as exempt from reduction commitments. See Statement of Administrative Action, supra note 12, at 719.
\textsuperscript{328} See Domestic Support in Agriculture, supra note 236 (discussing the lack of Blue Box spending limits).
\textsuperscript{329} See id. (discussing the Doha Round talks on the Blue Box).
answer is all they are doing is shifting the costs of adjustment to poor farmers in the Third World. For as much and as long as developed countries maintain Blue Box programs, developing and least developed countries will suffer because of them. Until the sin of helping some farmers while hurting others is cleansed, world agricultural trade will remain in Purgatory.

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

3. The Amber Box

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

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

330. On Yellow Light and Dark Amber subsidies, see SCM Agreement, Arts. 5-7; see also BHALA & KENNEDY, supra note 12, § 7-3(b)-(c) at 805-17.
331. See Domestic Support in Agriculture, supra note 236 (describing the Amber Box); CROOME, supra note 10, at 57 (stating that “[a]ll domestic support measures in favor of agricultural producers that cannot be shown to meet the Annex 2 criteria [for the Green Box] are considered to be trade-distorting (Amber Box) measures” (emphasis omitted)).
price support") would be an Amber Box measure. Indeed, price support is the quintessential Amber Box subsidy. Among OECD countries, two-thirds of all domestic subsidies take the form of price support. To be sure, price support is not alone in the Amber box. Irrigation subsidies and certain government credit subsidies, also would fall into this Box.

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

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

332. CROOME, supra note 10, at 56.
333. See Tangermann, supra note 233, at 11 (mentioning this statistic).
334. See Statement of Administrative Action, supra note 12, at 718 (mentioning these programs in the context of calculating Total AMS).
335. See Tangermann, supra note 233, at 11 (noting statistics on price differentials).
336. Id.
337. Id.
338. Id.
339. Id.
340. See id. (discussing the inefficiency of price support as a tool to boost the incomes of farmers).
E. "Reform" of the Common Agricultural Policy

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

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

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341. See Tobias Buck et al., Fischler’s Surprise for Europe’s Farmers: Now the Argument Over Agriculture Moves to the WTO, FIN. TIMES, June 27, 2003, at 17.
342. Id.
343. Id.
344. Id.
345. See More Fudge than Breakthrough, THE ECONOMIST, June 28, 2003, at 51; Cutting the CAP, FIN. TIMES, June 9, 2003, at 14; Buck, supra note 341, at 6. The CAP reform follows steadfast campaigning by the Commissioner Fischler in favor of ending production-linked payments. The reform is a diluted version of the Commissioner’s original proposal. Under his proposal, the link between payments and output was to be severed almost entirely, thus nearly ending CAP Blue Box subsidies and eliminating an incentive to produce surpluses the EU either stockpiled at great expense, or dumped overseas to the detriment of developing countries. The proposal called for direct payments to farmers, thereby converting Blue Box to Green Box subsidies. About 80 percent of domestic support would have been switched to non- or less-trade distorting schemes. By severing the link to output, the proposal would have removed an important force depressing world market prices of some commodities (though EU consumers might face the same high prices due to import and internal barriers, and the EU budget for subsidy payments might not be affected). That would have helped some farmers in developing countries, insofar as their incomes would have risen. It also would have discouraged intensive farming in the EU, which can be damaging to the environment, as farmers would focus on efficiency and quality rather than sheer output. France objected to de-coupling support from output, asserting an end to the Blue Box would jeopardize the social fabric of Europe, particularly its rural communities and culture. France’s self-interest is indisputable: it is the largest net beneficiary of CAP subsidies. France was not alone in resisting de-coupling. Joining it were the other top recipients of CAP funds: Ireland, Portugal, and Spain.
Interestingly, Germany (the largest contributor to the CAP budget, and traditionally a proponent of CAP reform) may have agreed to dilution of Commissioner Fischler’s initial proposal in exchange for France agreeing to oppose an EU corporate takeover code (which Germany disfavors). Germany and France both denied any nexus between CAP reform and a takeover code. Buck, supra note 341, at 7.
For now, suffice it to say that “reform” is the most positive label that reasonably could apply to the CAP alterations.  

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

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

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

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

349. More Fudge than Breakthrough, supra note 345, at 51.
left undisturbed.\textsuperscript{350} For durum wheat, forty percent of the single farm payment, which is set at fixed per hectare rates of 313, 291, and 285 Euros in 2004, 2005, and 2006, respectively, may be tied to production. For starch potatoes, for which the rate is 110.54 Euros per ton, sixty percent of the single farm payment may be linked to production. The EU made no proposals on "Mediterranean products" (e.g., olive oil and tobacco, as well as cotton), pledging to do so in autumn, 2003. It said dairy payments will not be covered by the reform until 2008, and the dairy quota system will remain in place until 2014-15. Ominously, even the phase out periods are not harmonized across the EU. The generally applicable phase out year is 2005, but for countries that find this date too ambitious (notably, France) it is 2007.

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

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

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

\textsuperscript{351} Bolt, \textit{supra} note 346, at 6 (emphasis added).
actually did something.”\textsuperscript{352} With respect to the Doha Round, indeed, the future of the multilateral trading system, Mr. Stewart’s concluding note was ominous: “If the world trade negotiation system and the World Trade Organization is [sic] going to work, it’s got to start to deliver some real gains.”\textsuperscript{353}

F. R – REDUCING DOMESTIC SUPPORT

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

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

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

\textsuperscript{352} \textit{Id.} (emphasis added).
\textsuperscript{353} \textit{Id.} (emphasis added).
\textsuperscript{354} \textit{See supra} note 239 and accompanying text.
\textsuperscript{355} \textit{See CROOME, supra} note 10, at 58 (stating these commitments).
\textsuperscript{356} \textit{See GALLAGHER, supra} note 5, at 44 (explaining the reduction is “by the end of the transition period”).
\textsuperscript{357} \textit{See RAGHAVAN, supra} note 15, at 161 (discussing the rising budgetary costs of domestic agricultural support as a motive for reduction commitments).
Abstracting from one such criterion, the base period (which is discussed later), consider the location of the commitments. Where do countries present these commitments, if not in the Agriculture Agreement itself? Like pledges to cut tariffs (discussed in section two) and to cut export subsidies (discussed in section four), the commitments to reduce domestic support are in the December 1993 Modalities Document. 358

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

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

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

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

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

361. GALLAGHER, supra note 5, at 45.

362. See id. (also mentioning a study by the Global Trade Analysis Project (“GTAP”) at Purdue University, which indicates (1) overall agricultural protection in advanced and newly
Related to this argument is concern about an occasion for sin, *i.e.*, about the opportunity for anti-free trade behavior from the concept of “AMS.” The reduction commitments are aggregate, not specific to particular products. Nothing at law compels a Member to cut a specific product by a certain amount. Phrased in the affirmative, inherent in the concept of “AMS” is the ability to support specific products; this aggregation device “has allowed Members to moderate the impact of reductions on the most sensitive sectors by making larger proportionate cuts elsewhere.”

Consider a hypothetical, two-crop developed country WTO Member. In accordance with its agreed-upon cuts reflected in its Schedule, the Member could cut support to oranges by forty percent, but leave rice support alone, and thereby satisfy the twenty percent reduction commitment.

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

The reductions need not be made on a commodity-by-commodity basis, or evenly across commodities. Each WTO Member is free to decide which support programs to reduce in order to achieve the required reductions.

... As a result of reductions in support for many commodities in the Food Security Act of 1985, the Food, Agriculture, Conservation, and Trade Act of 1990, and various budget acts, the United States will not need to make additional reductions in support to meet its Uruguay Round obligations. In addition, some elements of U.S. farm programs will be excepted from reduction commitments [for example, as Green Box or *de minimis* support].

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

363. *Id.*

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

365. *Statement of Administrative Action, supra* note 12, at 719 (emphasis added). *See also id.* at 732 (stating that “[n]o change in U.S. domestic law will be required to bring the United States into conformity with domestic support commitments made in the Agreement on Agriculture,” and “[t]he United States will be able fully to meet its Total AMS reduction commitments within the current framework of the law”).
In other words, the United States successfully negotiated at the international level its self-imposed domestic legislation, thereby committing to cut no more than what it already had.

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

G. **BASE PERIOD SELECTION**

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

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

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

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366. See Agreement on Agriculture, Art. 1(f) (defining the period).
367. Id.
apply.\footnote{See CROOME, supra note 10, at 58 (explaining “[t]he initial AMS or EMS calculations for each country formed the starting point for their reduction commitments included in schedules . . . [and] [t]he commitments themselves were expressed in terms of annual and final bound commitment levels, setting out the maximum AMS that could be provided during the implementation period and thereafter”).} After all, any reduction presumes a point from which to make a cut. In the context of domestic support programs, it is critical to identify an initial level of support. Accordingly, the starting point is the “base period,” and the AMS therein is the “base level AMS.” Likewise, the “Base Total AMS” is the “Total AMS” corresponding to the base period and, therefore, to “the maximum support permitted a WTO Member during the implementation period.”\footnote{Statement of Administrative Action, supra note 12, at 718.}

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

Well, so they did. The base period is 1986-1988. To be specific, the Uruguay Round negotiators selected these years in which to measure the extent of domestic agricultural support. There is a evidence of a variety of sorts to indicate the years 1986, 1987, and 1988 were ones during which agricultural subsidies in major trading nations were at, or near, record high levels on an array of products (some in which developing or least developed countries have a keen exporting interest).\footnote{See, e.g., GALLAGHER, supra note 5, at 40-43 (summarizing World Bank research to the effect that “measures to reduce domestic support for agriculture may be ineffective for several reasons,” one of which is AMS is “calculated from a base period (1986-88) during which world agricultural prices were comparatively low and domestic support to producers in developed countries was very high”).} The “sin,” as it were, is the intentional choice of a base period that undermined the significance of the
reduction commitments.\textsuperscript{371} It is one thing to cut subsidies from a low base, but quite another to do so from a high base and then proclaim to the world they are being slashed.

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

“Market price support” is the difference between a “fixed external reference price,” on the one hand, and “the applied administered price,” on the other hand, multiplied by the quantity of production eligible to receive the applied administered price.\textsuperscript{373} The simple arithmetic formula is:

\[
\text{Market Price Support} = \frac{\text{Fixed External Reference Price} - \text{Applied Administered Price}}{\text{Quantity of Production Eligible for Market Price Support}}
\]

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

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

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

\textsuperscript{373} Id. \textit{\textschools}. Interestingly, this paragraph excludes from AMS any “[b]udgetary payments” expended to maintain the gap between the reference and administered prices, and gives as examples “buying-in or storage costs.”
of Annex 3 explains the "fixed external reference price" is calculated from market price data, namely, both the "average f.o.b. [free on board] unit value for the basic agricultural product concerned in a net exporting country and the average c.i.f. [cost, insurance and freight] unit value for the basic agricultural product concerned in a net importing country."\footnote{Id. ¶ 9. This paragraph also explains the reference price "may be adjusted for quality differences as necessary."} That is, the reference price is a benchmark based on the price of a commodity as exported by one WTO Member and imported by another Member.

However, neither the 

*Agreement* nor its Annex reveals many details about how a WTO Members are to calculate a fixed external reference price. That omission leaves room for opportunistic behaviour, at least with respect to choosing "a net exporting country" and "a net importing country." Suppose a Member aims to compute a high level of support for a commodity (and thereby apply its reduction commitments to a higher base level), such as cotton. Suppose, further, contrary to the assumptions of a perfectly neo-classical market, there is not one world price for cotton, but rather some variance in the price data during 1986-1988. For instance, suppose f.o.b. and c.i.f. prices from the Member’s cotton trade with African and Asian countries are lower than the rest of the world, and that a considerable percentage of the Member’s cotton trade during the base period is with Africa and Asia.

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

No doubt at least some WTO Members have had to compute external reference prices. For now, the point is not to delve into how each Member
has gone about the calculation. Rather, it is simply to highlight the potential to maneuver, because of the textual ambiguity. Further, it is to illustrate the repercussions of the ambiguity for calculating non-exempt direct payment levels. If these payments depend on a price gap between a fixed reference price and an applied administered price, then a Member is to calculate the amount of them using the same arithmetic formula (presented above) for market price support (or, in its discretion, using actual budgetary outlays). If the payments do not depend on a price gap, then the Member measures them based on budgetary outlays during the base period. In other words, the opportunity to be opportunistic may exist when a Member checks its 1986-88 market price and non-exempt direct support, because the fixed external reference price is relevant to both types of subsidies.

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

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

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

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

378. Id. ¶ 13.
colloquially, selecting 1986-88 was “bad enough.” Matters are all the worse if Members can manipulate the representative price to ensure they maximize their calculated support levels. In brief, one sin can lead to another.

IV. EXPORT SUBSIDIES

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

A. THE GENERAL RULE

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

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

379. *WTO's Yard a Mess, supra* note 1, at 10.
380. *See CROOME, supra* note 10, at 59 (discussing early efforts to impose discipline on agricultural export subsidies).
381. *See SCM Agreement, Art. 3* (containing the prohibition on export subsidies); *BHALA & KENNEDY, supra* note 12, § 7-3(a) at 800-05 (discussing Red Light subsidies and their phase out).
382. Still, at least one commentator characterizes their achievement as a “ban,” but then highlights exceptions to the ban. *See CROOME, supra* note 10, at 59 (stating that “[t]he agreement [on Agriculture] breaks with the past by banning their [i.e., export subsidies] use unless they qualify under one of four exceptions . . .” (emphasis added), the exceptions being export subsidies (1) subject to reduction commitments, (2) eligible for special and differential treatment, (3) excused by downstream flexibility, or (4) not covered by a reduction commitments but subject to anti-circumvention rules.)
Subject to the provisions of paragraphs 2(b) and 4 of Article 9, a Member shall not provide export subsidies listed in paragraph 1 of Article 9 in respect of the agricultural products or groups of products specified in Section II of Part IV of its Schedule in excess of the budgetary outlay and quantity commitment levels specified therein and shall not provide such subsidies in respect of any agricultural product not specified in that Section of its Schedule.383

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

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

383. Agreement on Agriculture, Art. 3:3.
384. See CROOME, supra note 10, at 60 (stating that “[f]or developed countries, the reduction commitments are based on requirements that . . . the subsidies concerned be reduced by 36% in value, normally by comparison with outlays in 1986-90, over a six-year implementation period” (emphasis omitted)).
385. Id. (stating that “[o]ver the same [implementation] period, the quantity of products benefiting from such subsidies (except for subsidies for products incorporated into exported products) had to be reduced by 21%”).
386. See id. (stating that “[d]eveloping countries are subject to lower reduction requirements (cuts of 24% in value and 14% in quantity), and have the benefit of a 10-year implementation period” (emphasis omitted)).
387. Id. (stating that “[l]east-developed countries are not required to make reduction commitments”).
Nevertheless, the general rule is impressive, or is it? Imposing discipline on both budgetary outlays and the quantity of subsidized exports “ensures that governments will control the use of subsidies in a variety of market conditions.”388 But, that is hardly the end of the answer. Consider, first, that the answer depends in part on the starting point. During the base period, the extent to which developed countries subsidized their agricultural exports hardly was insignificant. To the contrary, their annual average subsidized exports during 1986-90 included 48.2 million tons of wheat, 19.5 million tons of coarse grains, 1.8 million tons of sugar, and 1.2 million tons of beef.389 Accordingly, one observer explains:

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

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

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

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

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

390. MICHALOPOULOS, supra note 17, at 111.

391. See Agreement on Agriculture, Art. 8. Article 8 of the Agriculture Agreement tells WTO Members not to provide export subsidies that are inconsistent with the Agreement or the commitments they specified in their Schedules of Concessions. Id. at Art. 9.1 contains the six-item list of export subsidy programs to which reduction commitments apply. Id. Article 9.2 identifies the two forms of reduction commitments:
*Modalities Document* sets forth reduction commitments for agricultural export subsidies.\(^{392}\) The April 1994 *Press Summary* summarizes these commitments, and the October 2002 *Briefing Document* repeats them. In other words, the pattern of irresolution is the same as for market access and domestic support. The general rule looks more to be "soft" than "hard" law, judging from its location. What matters, in the sense of a legal obligation enforceable under the *DSU*, is whether a WTO Member has placed in its Schedule of Concessions (specifically, in Part IV, sections II and III of its Schedule) a commitment to reduce an export subsidy on a particular primary or processed agricultural good. Only if it has, and only if it has not fulfilled the commitment, is there a potential legal action available to an aggrieved Member exporting that good.

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

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

\(^{393}\) See *id.* at 60 (using these examples).

\(^{394}\) See *id.* at 59-60 (explaining this jargon).
Schedule. 395 The plausible theory on which they are based is that what ought to matter is the reduction of export subsidies across the entire implementation period (1995-2000 for developed countries, and 1995-2004 for developing countries). 396

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

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

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

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

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

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

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

397. See Statement of Administrative Action, supra note 12, at 722 (suggesting this scenario).
Nevertheless, to conclude the general rule of gradual reduction is positively unimpressive, even sinful, requires more than just locating its place in or out of a text, or discussing the possibility of item-to-item or year-to-year deviations. It demands an inquiry into the details of the rule. The inquiry, pursued below, reveals yet another sin committed in the Uruguay Round, namely, excepting various schemes from cuts on export subsidies.

B. E – EXCEPTIONS TO EXPORT SUBSIDY CUTS

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

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

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

398 See id. at 720 (stating that “[e]xport subsidies are among the most trade-distorting of government policies, because they allow subsidizing countries to displace naturally efficient producers in world markets” (emphasis added)).
SCM Agreement. Those Uruguay Round negotiators defined (in Article 1:1) the word "subsidy" in a comprehensive manner, delineated (in Article 3:1) the Red Light category of non-agricultural subsidies to include both export and import substitution subsidies, and provided (in Annex I, the Illustrative List of Export Subsidies) a non-exclusive list of what they meant by an "export subsidy." Most tellingly, they banned all Red Light subsidies, except as provided by least developed WTO Members. The Uruguay Round negotiators, while creating the analogous category of agricultural export subsidies, were nowhere near as forceful.

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

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

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

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

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

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

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

400. See id. at Art. 3:1 (containing the ban in the chapeau); see id. at Art. 27:2(a) (containing the exemption from Article 3:1(a)); see id. at Annex VII, ¶ (a) (referencing least-developed countries). The SCM Agreement grants developing countries an extended period in which to phase out export subsidies. See SCM Agreement, Art. 27:2(b), 27:4, and Annex VII, ¶ (b); BHALA & KENNEDY, supra note 12, § 7-5 at 841-44.
(f) subsidies on agricultural products contingent on their incorporation in exported products.\textsuperscript{401}

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

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

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\textsuperscript{401} Agreement on Agriculture, Art. 9:1 (emphasis added).
\textsuperscript{402} Id.
\textsuperscript{403} Id.
\textsuperscript{404} Interestingly, the Clinton Administration reported "[n]o volume reduction commitments have been made with respect to exports of processed products, but budgetary outlays are subject to reduction commitments." Statement of Administrative Action, supra note 12, at 723. It is not clear from the context (a discussion of Article 11 of the Agriculture Agreement) whether this reference is to the United States, a subset of WTO Members, or the entire Membership.
\textsuperscript{405} See id. at 721 (setting forth these examples).
\textsuperscript{406} Technically speaking, special and differential treatment afforded to developing country WTO Members also is an exception. See Croome, supra note 10, at 59 (specifying "export subsidies by developing countries consistent with the agreement's provision for special and differential treatment in their favor" as one exception). As indicated above, developing country Members are to reduce (by 2004) their export subsidies by 24 percent in value, and 14 percent in volume, and least-developed countries have no such obligation. However, this exception is entirely understandable. Further, during the implementation period, developing countries are exempt from reduction commitments on export subsidies to defray the cost of marketing and transporting (overseas or domestically) agricultural products. See Agreement on Agriculture, Art. 9:4 (containing exemptions for Article 9:1(d) and (e) programs). Article 9:4 conditions this special and differential treatment on a developing country "not applying [the subsidy] in a manner that would circumvent reduction commitments." That condition cannot mean what it literally says, because the special and differential treatment circumvents reduction commitments on marketing and transportation costs. Presumably, the
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The same italicized language in Article 9:1 of the Agriculture Agreement reveals the definitional exceptions. To the extent a WTO Member can devise a program that does not fall within the boundaries created by this language, the Member has succeeded in getting around the definition. The omission from the Agriculture Agreement, in contrast to the SCM Agreement, of language encompassing de facto and de jure subsidies, may assist a Member inclined to plot in this manner. It might have an argument under the Agriculture Agreement, which it does not under the SCM Agreement, namely, “as a matter of law, there is no subsidy, and the Article 9:1 does not cover de facto benefits.”

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

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

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

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

409. Id.

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

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

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

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

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

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

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

413. See CROOME, supra note 10, at 60 (describing the Article 10 provision on export credits as a “pledge”); Statement of Administrative Action, supra note 12 (stating that “[t]hese [export credit or credit guarantee] programs will not be subject to reduction commitments until agreement is reached on such disciplines” (emphasis added)).
characterize the scheme as development aid. But, that kind of aid helps the
donor, too, specifically, the farmers in the donor. The help is not un-
conditional nor necessarily very generous. Moreover, this characterization
would conflict with Article 10:4(a) of the Agreement on Agriculture, which
obligates Members to ensure their food aid programs are “not tied directly or
indirectly to commercial exports of agricultural products to recipient
countries.” Arguably, then, the omission of export credits from the disci-
plines, such as they are, of Article 9:1, is not defensible at all.

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

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

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

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414. See Michalopoulos, supra note 17, at 123-24 (observing “food aid . . . is frequently
tied to procurement from a particular donor and determined by food stock availability in the donor
country rather than by the needs of the recipient”).
415. Agreement on Agriculture, Art. 10:4(a) (emphasis added).
416. SCM Agreement, Annex 1, Illustrative List of Export Subsidies, ¶ (j).
417. The Clinton Administration admitted as much in the Statement of Administrative Action,
when it characterized the Export Credit Guarantee Program as “one of U.S. agriculture’s most
effective tools,” and assured this Program “is among the programs exempt from reduction
commitments.” Statement of Administrative Action, supra note 12, at 734. The defense that
“current use of this program is well below both historic and authorized levels,” even if still true,
seems beside the point. Id.
418. See Watkins, supra note 16, at 13 (mentioning this statistic). As for the EU, export
subsidies of all forms account for 9 percent of the CAP budget, down from the 30 percent figure in
recent years. See King Jr. & Miller, supra note 270, at A10.
419. See Alan Beattie, Japan, U.S. “Least Helpful to Poor Nations,” FIN. TIMES, Apr. 29,
2003, at 6 (mentioning this statistic). Consequently, the Center for Global Development (a
Washington, D.C. research organization) ranked the United States and Japan as the second least, and
the least, respectively, helpful countries to poor nations. That ranking is based on an index called
C. More "Reverse" Special and Differential Treatment?

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

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

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

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

420. Agreement on Agriculture, Art. 11.

421. One observer describes the rule thusly: "If subsidies are paid on processed agricultural products, they must not be more than proportionate to the subsidy that would be paid for the primary products that would have been included in the final processed product." Croome, supra note 10, at 60-61; see also Bhala & Kennedy, supra note 12, § 12-2(e)(5)(B)(i) at 1204 (discussing Article 11).
farmers, ensuring there is a reasonably lucrative domestic market for their crops. For example, a Latin American country might want to encourage the production and export of blueberry jam, and thus move beyond its present state of harvesting blueberries and shipping them to a developed country for processing into jam. A country in South or South East Asia might want to move beyond heavy reliance on exports of a basic commodity like rice and build domestic capacity to make and ship rice pudding. Moreover, the Third World country might seek to help agricultural processing businesses, i.e., to add value to the agricultural products made in the country and thereby to earn more revenues from exportation. The country might even be trying to stimulate the vertical integration of a particular agricultural sector, which could lead to improved efficiencies.

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

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

422. Guy de Jonquières, U.S. and EU Tariffs Higher for Third World, FIN. TIMES, Sept. 2, 2003, at 7 (summarizing the findings in a September 2003 report by Oxfam, which include the following stark facts: (1) American tariffs are twenty times higher on goods from developing countries than on goods from developed countries, largely because of tariff escalation and higher duty rates on key developing country exports such as textiles and clothing; (2) American tariffs are four to five times higher on Indian imports than British imports, with an average 19 percent tariff on garments, India’s second largest export; (3) in 2002, the average American tariff on imports from Bangladesh was fourteen percent, and Bangladesh paid $301 million in duties to the United States, though Bangladesh accounted for 0.1 percent of all imports into the United States;
Other instances abound. In addition to confectionery, fruit juice, peanut butter, and tinned meat, attract duty rates in many developed countries that exceed thirty percent. The EU imposes a 230 percent tariff on grape juice. Canada's tariffs on fully processed foodstuffs are twelve times higher than its duty rates on products in the first stage of processing.

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

V. CLEANSING IN THE DOHA ROUND?

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

A. THE UNHELPFUL PEACE CLAUSE

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

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

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

424. See id. (mentioning this rate).

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

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

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

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

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

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

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

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

432. See October 2002 Briefing Document, supra note 25, at 25 (stating that “[w]ithout this ‘peace clause,’ countries would have greater freedom to take action against each other’s subsidies, under the Subsidies and Countervailing Measures Agreement and related provisions”).
via WTO litigation, under the *SCM Agreement*.\footnote{See Agreement on Agriculture, Art. 1(f) (defining the "implementation period" for purposes of Article 13, the Peace Clause, as "the nine-year period commencing in 1995," which ended on December 31, 2003).} In other words, the possibility of greater parallelism in disciplining agricultural and non-agricultural subsidies exists.

Because the Peace Clause did not entirely forbid a countervailing duty action against an Amber Box, Blue Box, or export subsidy, it would be an overstatement to call it an "unconditional immunity." But, the overstatement would not be gross. The requirement of an injury (or threat) determination weighs (or weighed) heavily on any such action. Furthermore, the requirement in an export subsidy case of basing injury (or threat) on volume, price, or impact narrowed the usable data from which to make a determination; whereas GATT Article VI and the *SCM Agreement* admit a broad range of data, which includes, for example, serious prejudice. The portion of the Peace Clause for Amber and Blue Box subsidies, namely Article 13(b)(i) of the *Agriculture Agreement*, does not contain this limit. Thus, at least in theory, when the Peace Clause operated it was easier to find injury (or threat) and impose a countervailing duty in an Amber or Blue Box subsidy case than in an export subsidy case. Finally, and perhaps tellingly, there is a contrast in standards with the *SCM Agreement*. No injury (or threat) determination is needed to countervail an export subsidy of a non-agricultural product.\footnote{See SCM Agreement, Arts. 3-4 (on prohibited subsidies); BHALA & KENNEDY, supra note 12, § 7-3(a)(2) at 801-03 (explaining the irrebuttable presumption an adverse trade effect is caused by an export subsidy).} Evidently, Uruguay Round negotiators took more seriously (or were more successful in dealing with) the problem of rooting out non-agricultural export subsidies via remedial action.

**B. To Cancun and Beyond**

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

First, there were three principal proposals on the table for Doha Round negotiators. They were made by the United States, the EU, and Stuart Harbinson (Chair of the WTO agriculture talks, and an able, seasoned trade diplomat from Hong Kong). Overall, the American proposal called for the most significant cuts in tariffs, domestic subsidies, and export subsidies.\footnote{See Daneswar Poonyth & Ramesh Sharma, The Impact of the WTO Negotiating Modalities in the Areas of Domestic Support, Market Access and Export Competition on Developing Countries: Results from ATPSM (May 2003). This paper was presented at the}
The EU offer was the least ambitious in these respects. The Harbinson proposal was a compromise between the American and European offers. Accordingly, the Food and Agriculture Organization (FAO) estimates the greatest positive pro-free trade effects from the American proposal, the least from the EU proposal, and an intermediate amount from the Harbinson effort. Unfortunately, but perhaps not surprisingly in retrospect, the Harbinson draft was rejected in early March 2003 as insufficient by one side, and too much for the other (and, of course, the Americans and Europeans each nixed the other's proposal).436

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

Amalgamated Methodology for Reducing Agricultural Tariffs –

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

Limitation on Domestic Support –

436. See, e.g., Frances Williams, Trade Diplomats Optimistic Over WTO Talks, FIN. TIMES, Aug. 20, 2003, at 8 (stating that “[t]he EU and other countries with protectionist farm policies criticized Mr. Harbinson’s earlier draft in March as too detailed and ambitious”). Interestingly, some of the opposition in the United States was based on the Harbinson proposal not going far enough to require high-tariff countries (like Japan) to reduce their barriers, other opposition came because the proposal threatened domestic support. See Tobias Buck et al., U.S. Farmers on the Defensive, FIN. TIMES, June 27, 2003, at 17 (explaining (1) the 2002 Farm Bill enacted in the United States calls for $19.1 billion of domestic support, linked in part to prices, (2) the Harbinson proposal would have required cutting the $19.1 figure by 60 percent over 5 years, and also would have required the EU to cut by 60 percent its $67 billion cap over the same period, (3) “the main American commodity producers, particularly growers of wheat, soy beans, cotton, corn and rice,” would have been heavily impacted by that cut, and thus opposed the Harbinson proposal).

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

No Disciplines on De Minimis Subsidies –

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

Export Subsidies –

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

Export Credits –

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

Special and Differential Treatment –

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

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

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

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


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

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

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

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

\(^{442}\) This Paragraph states:
The formula applicable for tariff reduction shall be a blended formula under which each element will contribute to substantial improvement in market access. The formula shall be as follows:
(i) \([\%]\) of tariff lines subject to a \([\%]\) average tariff cut and a minimum of \([\%]\); for these import sensitive tariff lines market access increase will result from a combination of tariff cuts and TRQs.
(ii) \([\%]\) of tariff lines subject to a Swiss formula coefficient \([\%]\).
(iii) \([\%]\) of tariff lines shall be duty-free.
EC-U.S. Joint Text, supra note 437, at 1403. For an explanation of the Swiss and other tariff-reduction methodologies, see supra note 87 and accompanying text.
be a political necessity. The major agricultural trading nations may be unwilling to reveal their "bottom line" negotiating positions (assuming they have identified those lines) so far in advance of the proverbial "eleventh hour" of the Doha Round. Smaller and developing countries may be unwilling to offer specific concessions in payment for increased market access until they know exactly how much additional market access they will get from the major importing countries. Nevertheless, the ambiguities are maddening, given the considerable cutting that has yet to be done. Consider the fact that in developed countries, tariffs on agricultural goods, despite implementation of market access commitments under the Agreement on Agriculture, are roughly ten times higher than on industrial products.443

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

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

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

443. Tangermann, supra note 233, at 11.
444. Paragraph 3:1 states with respect to export subsidies, "Members shall commit to eliminate over a \( \) year period export subsidies for the following products of particular interest to developing countries . . . ." EC–U.S. Joint Text, supra note 434, at 1403.
Declaration (in spirit, if not in letter). These critics are led by Brazil, China, and India, account for sixty percent of the farmers in the world, and can prevent the United States and EU from dictating a deal on farm trade.\footnote{445} Significantly, these farmers are joined by the powerful American Farm Bureau Federation, which articulated its disappointment at a pledge merely to reduce export subsidies.\footnote{446} As a corollary, all of these critics argue the Joint Text is vague. It fails to identify the agricultural products from which export subsidies would be removed.

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

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

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