

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

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

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I. INTRODUCTION

The WTO Agreement on Agriculture¹ (AoA) came into existence over ten years ago as one of the agreements annexed to the Marrakesh Agreement establishing the World Trade Organization (WTO). The AoA declares in its preamble that the long-term objective of WTO members is “to establish a fair and market-oriented agricultural trading system.” The current agricultural negotiations at the WTO are part of the endeavour to bring this objective one step closer to reality. The short-term mission of the AoA, on the other hand, was to launch the reform process and to take the first steps towards that long-term goal. The AoA disciplines on, *inter alia*, the three pillars of agricultural market access, domestic support and export subsidies constituted that first step on the path of reform. The in-built agenda contained in Article 20 of the AoA was designed to ensure that these AoA disciplines would be only the first step in a reform process that should culminate in the establishment of a fair and market-oriented agricultural trading system.

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

players, the draft Ministerial Declaration issued on 24 August 2003 by General Council Chairman Carlos Perez del Castillo,³ the final draft that emerged on 13 September 2003 during the Cancun negotiations⁴, the July 2004 Framework Agreement⁵, and the Hong Kong Ministerial Declaration.⁶ A brief conclusion summarizes the issues and provides some perspectives into the future of the agriculture negotiations. The issues of special and differential treatment and non-trade concerns⁷ will be discussed as appropriate in each section. The final section provides a brief summary of the legislative implications of the AoA rules and commitments for WTO member countries. Before that, however, some reflections on the origins, nature and structure of the AoA would be in order.

A. ORIGINS OF THE AOA

The roots of the AoA are to be found in the text of GATT itself. The special status of agriculture, whether real or imagined, got its legal expression in the body of GATT rules which left some important loopholes in respect of agricultural trade from the very beginning. The loopholes had been there since the early negotiations for the ITO charter and the 1947 version of the GATT, particularly in market access. It is notable that the size of the agricultural loophole in GATT continued to

both original and revised versions provide for the same proposed rules.

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

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

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

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

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

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

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

grow over time, particularly in the first two decades of its life, thereby further alienating agricultural trade from other sectors. This widening gap between agriculture and other sectors could be seen in the 1955 waiver granted to the United States from its obligations under the key GATT provisions of Articles II and XI;⁸ the exclusion of agricultural products from the new GATT prohibition of export subsidies in 1955⁹; the creation of the European Common Agricultural Policy in the 1960s¹⁰, which was later subjected to a series of renegotiations of commitments every time the Community expanded as envisaged under GATT Articles XXIV:6 and XXVIII¹¹; the use of a “grandfather clause” by newly-joining countries in their protocols of accession to protect their agricultural sectors¹²; the use of

grey-area measures, such as EC variable import levies, whose legality was always questionable but no clear-cut decision was ever taken; and a habitual disregard of such disciplines by other contracting parties more readily in agriculture than in other sectors.¹³ A steadily increasing number of agricultural cases were brought before the GATT dispute settlement system; but they could not address the real problem areas simply because the rules were not designed to bring discipline in agricultural trade, the more so in respect of some of the most important trading powers.¹⁴

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

⁸ The Contracting Parties decided “pursuant to paragraph 5 (a) of Article XXV of the General Agreement ... that subject to the conditions and procedures set out hereunder the obligations of the United States under the provisions of Articles II and XI of the General Agreement are waived to the extent necessary to prevent a conflict with such provisions of the General Agreement in the case of action required to be taken by the Government of the United States under Section 22.” See “Waiver Granted To The United States in Connection with Import Restrictions Imposed under Section 22 of the United States Agricultural Adjustment Act of 1933, as Amended” Decision of 5 March 1955 BISD § 03S/32-41 June 1955.

⁹ See GATT Article XVI:3 in particular.

¹⁰ The reasons behind the creation of the CAP at the EEC level in the 1960s, which was based on the agriculture chapter of the 1957 Treaty of Rome, are both instructive in themselves and partly contributed to the direction taken by the multilateral trade rules on agricultural products. For more on this, see Gerrit Meester, “European Union, Common Agricultural Policy, and World Trade”, 14 *Kansas Journal of Law & Public Policy* (Winter, 2005) p. 389 ff. According to Meester, the “low-level consolidation of the import tariffs on oilseeds, protein crops and products ... cereals substitutes” was done at the GATT Dillon Round as a price paid for the introduction of the CAP at the time. See *Id.*

¹¹ For more on renegotiations and their legal consequences, see *European Economic Community—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, report of the panel (L/6627 BISD 37S/86) adopted on 25 January 1990.

¹² Paragraph 6 of the 1966 Protocol for the Accession of Switzerland provided, in relevant part, that “Switzerland reserves its position with regard to the application of the provisions of Article XI of the General Agreement to the extent necessary to permit it to apply import restrictions ...” See *Protocol for the Accession of Switzerland*, BISD 14S/6-11 (July 1966). In the words of Christian Haberli, head of the International Affairs at the Swiss Federal Office for Agriculture, upon

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

¹³ Writing about the pre-Uruguay Round situation of agriculture within the GATT, Trebilcock and Howse observed: “a number of the major exporting states had come close to ignoring GATT requirements altogether, even to the point of refusing to implement GATT panel decisions.” Michael Trebilcock and Robert Howse, *The Regulation of International Trade* (Routledge, London and New York, 2nd ed. 1999), p. 247.

¹⁴ Even the most creative panels could not create law; they could only interpret and apply existing law. There was simply a consensus that the GATT legal system “has not yet been able to engage agricultural trade policy in a significant way.” See Robert Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Butterworth Legal Publishers 1993), p. 327, finding that between 1960 and 1989 exactly one-half of GATT cases involved agricultural products. Hudec found this on a working definition of agricultural products that was narrower than the definition given to agricultural products under Annex I of the AoA. See, e.g., Hudec’s exclusion of disputes involving cigarettes from agricultural disputes; cigarettes in fact fall under HS Chapter 24, which are agricultural products for purposes of the AoA.

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

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

B. NATURE AND STRUCTURE OF THE AOA

A look at the structure of the AoA shows that this is an agreement that stands on three pillars – market access, domestic support, and export subsidies. This structure was not chosen arbitrarily by the negotiators; it was in a sense dictated by the very nature of the GATT loopholes that the AoA was designed to plug. As will be developed further later on, GATT had explicit agriculture-specific exceptions in the areas of subsidies and market access, which were essentially loop-holes on the body of the GATT text. As argued earlier, these loop-holes expanded rather than becoming smaller over the years and one of the most important objectives of the Uruguay Round was to find a lasting solution to the problems of agricultural trade. The AoA’s three pillars could thus be described as a three-pronged plug that went into the agriculture-specific loop-holes on the body of the GATT.¹⁸

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

¹⁷ See *Id.*

¹⁸ We shall see later on however that GATT had only two agriculture-specific holes – market access and export subsidies – and the three prongs of the AoA were somehow designed to fill those two

The AoA has always been a subject of controversy since its birth in 1995. Some look at it as an instrument with a potential to redress the imbalance in the trade relations between developing and developed countries. Others look at it as an instrument that “systematically favors agricultural producers in industrialized countries at the expense of farmers in developing countries” and thereby institutionalizes inequality.¹⁹ For some the AoA is an embodiment of “the recognition that agriculture has always been different and that difference needs to be recognised in something more than limited exceptions.”²⁰ Still others accuse it of having too neo-liberal leanings, ignoring such facts as the lack of power for millions of people to purchase their daily food on the market; their dietary preferences, and even of ignoring the importance of agriculture in providing livelihoods for an estimated seventy percent of the world’s population.²¹

Related to the perception of AoA is the more academic question of why agriculture is so different as to make it effectively the only sector governed by a sector-specific agreement within the WTO. The explanations offered by different people range from what Ragosta calls the “farmers’ unique role in maintaining an independent republic”²² to the U.S. Senate’s tendency “to represent land more than people”²³ to agriculture’s role as the

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

¹⁹ See Carmen G. Gonzalez, “Institutionalizing Inequality: the WTO Agreement on Agriculture, Food Security, and Developing Countries” 27 *Columbia Journal of Environmental Law* (2002), p. 438. Gonzalez goes further and argues that the AoA “increases food insecurity by exacerbating rural poverty and inequality” in developing countries and hampers their ability to adopt appropriate measures to address the problem. *Id.* p. 476.

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

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

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

²³ See *Id.* Dam also observed in 1970 that “no treaty that impinged upon the U.S. Farm program could receive the constitutionally required senatorial approval” K. Dam, *The GATT; Law and the*

source of our food, to its unique relevance to biodiversity and the environment at large, to the cultural issue of ensuring the survival of a rural way of life. A leading authority and practitioner on agricultural trade law, Bernard O'Connor, provides strategic and economic explanations and concludes that "agriculture is different from any other sector and is rightly treated according to the rules of a separate WTO Agreement."²⁴

Amid all this diversity of opinion, almost everyone agrees that the AoA has taken the single most important step to bring agriculture more firmly within a system of multilaterally agreed rules, rules that led to the adoption by WTO member countries of new national legislation in order to bring their pre-Uruguay Round practices into line with AoA requirements.²⁵ What is also clear is that, in as long as the AoA remains in place, agricultural products will remain a special category in themselves subject to special treatment within the WTO framework. An understanding of those areas of GATT that provided special rules for agriculture is essential for a proper appreciation of the meaning and effect of the AoA that came out of the Uruguay Round as well as the direction it is taking in the current negotiations.

II. THE DOHA NEGOTIATIONS: GENERAL

A. BACKGROUND

The share of agricultural exports in global trade has fallen from 47 per cent of total merchandise exports in 1970 to just 9.1 per cent in 2001.²⁶ However, despite this decline in

its share of world trade, agriculture remains the most sensitive subject for international trade negotiators and the multilateral trading system. Just like the Punta del Este conference in 1986 which launched the Uruguay Round, agriculture was the deal-maker or -breaker during the Doha WTO Ministerial conference which launched the Doha Development Agenda.²⁷ Just like in the more than seven years of Uruguay Round negotiations, agriculture is still the most contentious and also the most important issue in the ongoing Doha trade negotiations.²⁸ Just as the many deadlines that came and went during the Uruguay Round negotiations were largely blamed on agriculture, so also are the many negotiating deadlines already missed so far in the Doha process²⁹ and the collapse of the Cancun Ministerial Conference blamed largely on agriculture.³⁰

As noted earlier, although the Uruguay Round took the first most important step in the process of liberalizing agricultural trade, the developments thus far have been limited to a reshaping of the rules with little immediate actual liberalization. The treatment of agricultural products as a distinct category still forms part of the WTO architecture. The Agriculture Agreement provides for a system of rules significantly different from mainstream

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

²⁴ O'Connor, *supra* n. 12, at 419.

²⁵ An excellent example of national legislative changes that followed adoption of the AoA is the amendment of the Swiss Federal Constitution in 1996, which had to go through a national referendum and the complete revision of the 1951 Federal Law on Agriculture in 1998. For the details on this, see Haberli, *supra* n. 12, pp. 403-404.

²⁶ This is, of course, an average and masks very wide variations among countries. Extreme examples would be Japan with agricultural exports accounting for a mere 1.3 per cent of its merchandise exports and Ethiopia with 84.2 per cent of its merchandise exports accounted for by agricultural products. See WTO, *International Trade Statistics 2002* (Geneva, 2003), pp. 105 - 112.

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

²⁸ As a World Bank study put it, "Reducing protection in agriculture alone would produce roughly two-thirds of the gains from full global liberalization of all merchandise trade." World Bank, *Global Economic Prospects Realizing the Development Promise of the Doha Agenda: 2004*, (Washington D.C. 2003), p. xvi.

²⁹ For example, the failure of WTO negotiators to meet the 31st March 2003 deadline for agreement on agricultural trade liberalization modalities was taken as a setback not just for the agriculture negotiations, but for the entire Doha process. Indeed, the subsequent failure to meet the 31st May 2003 deadlines for a modalities agreement on market access for non-agricultural products was blamed on that previous failure to meet the agricultural modalities deadline. See, e.g. <http://www.ictsd.org/weekly/03-05-28/story1.htm>

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

GATT provisions for most other products, and its provisions have been made to prevail over inconsistent GATT/WTO rules. As such, agriculture is still a class in itself. Agriculture still stands alone as the sector where export subsidies are expressly and generously – albeit selectively – permitted under WTO law; where three-digit tariffs are rather common; where significant additional duties can be introduced in the name of ‘safeguard measures’ regardless of injury considerations and in the most unpredictable of ways; where a proven trade-distortive and injurious domestic support programme may escape any challenge; etc. In short, agricultural trade still has a long way to go on the road to liberalization. Seen from this perspective, therefore, although the Agreement certainly represents a significant breakthrough in the history of international trade regulation, it is also possible to say that the same Agreement is a standing symbol of continued failure to integrate agricultural trade into the mainstream system.

1. Agriculture on the Road to Hong Kong: Highlights

One virtue of the Agriculture Agreement has been that it had an in-built agenda for a continuation of the liberalization process so as to realize its long-term objective of bringing fundamental change in the level of protective and distortive devices at work in many countries.³¹ At the same time, many members had long argued that agriculture should be brought within the fold of a broader round so as to allow trade-offs to take place – a strategy successfully applied more than a decade ago by developed countries to bring in intellectual property and services in exchange for a

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

Seattle proved to be a disappointing failure, and the widely-expected Millennium Round of trade negotiations was not launched. But, since agriculture was one of a few areas on which a negotiation had already been mandated by the results of the Uruguay Round, the WTO General Council was able to launch a sector-specific negotiation process on 7 February 2000.³³ In accordance with a programme agreed on that occasion, the WTO agriculture negotiators held their first meeting on 23–24 March 2000. In the first phase of the process (which covered the period between March 2000 and March 2001), several meetings were held and dozens of proposals submitted by about 89 percent of the WTO’s membership. These submissions were further developed with more technical details during the largely informal meetings of the second phase of the negotiations (from March 2001 to March 2002). An important development during this second phase of the sectoral negotiations in agriculture came from the Doha ministerial conference (November 2001) which launched a comprehensive trade negotiation round and brought the already proceeding agricultural negotiations within its fold. Indeed, the pre-Doha phase of the agriculture negotiations was sending the clear message that progress in agriculture would be possible only if a broader round was launched at Doha.

On agriculture, the Doha Declaration provided as follows:

“... We recall the long-term objective referred to in the Agreement to establish a fair and market-oriented trading system through a programme of fundamental reform encompassing strengthened rules and specific commitments on support and protection in order to correct and prevent restrictions and distortions in world agricultural markets. We reconfirm our commitment to this programme. Building

³¹ See Article 20 of the Agreement on Agriculture which provides as follows: "Continuation of the Reform Process: Recognizing that the long-term objective of substantial progressive reductions in support and protection resulting in fundamental reform is an ongoing process, Members agree that negotiations for continuing the process will be initiated one year before the end of the implementation period, taking into account: (a) the experience to that date from implementing the reduction commitments; (b) the effects of the reduction commitments on world trade in agriculture; (c) non-trade concerns, special and differential treatment to developing country Members, and the objective to establish a fair and market-oriented agricultural trading system, and the other objectives and concerns mentioned in the preamble to this Agreement; and (d) what further commitments are necessary to achieve the above mentioned long-term objectives."

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

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

on the work carried out to date and without prejudging the outcome of the negotiations we commit ourselves to comprehensive negotiations aimed at: substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support. We agree that special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall be embodied in the Schedules of concessions and commitments and as appropriate in the rules and disciplines to be negotiated, so as to be operationally effective and to enable developing countries to effectively take account of their development needs, including food security and rural development. We take note of the non-trade concerns reflected in the negotiating proposals submitted by Members and confirm that non-trade concerns will be taken into account in the negotiations as provided for in the Agreement on Agriculture.”³⁴

Five broad negotiation issues have been identified in this paragraph: market access, export subsidies, domestic support, special and differential treatment, and non-trade concerns. While this is clear from the text, countries have subsequently argued over the degree of importance that should be attached to each of these issues – some wanted to give equal weight to all five of them while others contended that there was a hierarchy built into them.³⁵ But, of course, the order and tone of presentation of these five items clearly shows a hierarchy which puts the three pillars of the AoA (market access, export subsidies, and domestic support) on top, followed in second

place by special and differential treatment (note the use of such strong terms as “shall be an integral part of all elements of the negotiations”) and lastly, the so-called non-trade concerns (indicated by the weaker wording of the commitment to “take note of the non-trade concerns”). Among the three pillars, too, there is a difference in the immediate negotiation objectives. The commitments in the areas of market access and domestic support are similar in that they talk about introducing “substantial improvements in market access”, and “substantial reductions in trade-distorting domestic support”. On the other hand, the commitments on export subsidies sound stronger: “reductions of, with a view to phasing out, all forms of export subsidies.” This was one of the most contentious subjects during the Doha ministerial talks; indeed, success and failure in the talks were hanging on the wording of the clause “with a view to phasing out” export subsidies in this paragraph.³⁶

The third phase in the agriculture negotiations, known as the modalities phase, began in March 2002. The hope was to conclude this phase on the 31st of March 2003 with the adoption of a modalities agreement.³⁷ As per the Doha negotiation schedule, the fifth session of the WTO Ministerial Conference (held at Cancun, Mexico, from 10 to 14 September 2003) was to be the time for Members to submit comprehensive draft tables of concessions in agriculture based on these modalities. However, as so often in trade negotiations, reality once again fell short of ambition; progress was lacking in many areas. Agriculture Committee Chairman Stuart Harbinson nonetheless managed to put together a first modalities draft paper which he circulated on 17 February 2003.³⁸ The reaction was typical of agriculture negotiations – some condemning it for going too far, others for not going far enough. A month later, on 18 March 2003, Harbinson circulated a revised version of his draft,³⁹ but only to elicit the same reactions.

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

³⁵ A useful summary of the negotiation process prepared by the *Information and Media Relations Division* of the WTO noted the following on 21 October 2002: “Some countries have described the mandate given by Article 20 as a ‘tripod’ whose three legs are export subsidies, domestic support, and market access. Non-trade concerns and special and differential treatment for developing countries would be taken into account as appropriate. Others say it is a ‘pentangle’ whose five sides also include non-trade concerns and special and differential treatment for developing countries as separate issues in their own right.” WTO Secretariat, *Agriculture Negotiations: Where We are Now* http://www.wto.org/english/tratop_e/agric_e/negs_bkqrnd00_contents_e.htm, p. 12.

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

³⁷ Paragraph 14 of the Doha Declaration provided: “Modalities for the further commitments ... shall be established no later than 31 March 2003.”

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

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

Indeed, as Harbinson himself noted, several participants did not even “accept the revised First Draft as a basis for the negotiations”.⁴⁰ Over time, a tacit agreement was reached to pursue the goal in two stages: first agree on some kind of a ‘framework modalities agreement’ and then proceed to the full modalities. On that basis, and in an effort to break the deadlock, the US and the EU got together and came up with what was called the ‘US-EU joint proposal’.⁴¹ The immediate impact of this bilateral submission on the negotiations was such that, in the words of WTO spokesperson Keith Rockwell, it “galvanised the process in a way that we have not seen in three-and-a-half years of agriculture negotiations”.⁴² However, later developments suggested that the joint proposal might have backfired in the sense that “instead of encouraging consensus, the proposals prompted Brazil, India, China and about 20 other developing countries to group together to demand radical cuts in wealthy nations’ farm subsidies and trade barriers.”⁴³ This demand from the so-called G20 countries came in the form of a “proposal for a framework document.”⁴⁴ The effect of these and other developments was that the Cancun ministerial could only talk about a framework for modalities, further delaying the already overdue agreement on modalities. In the preparation for Cancun, WTO General Council Chairman Carlos Pérez del Castillo prepared a framework proposal for agricultural modalities hoping to translate the resulting document into detailed and full modalities in the post-Cancun phase. What is worse, Ministers failed to reach an agreement even on such a framework document – a failure which, together with the deadlock over the so-called Singapore issues, led to the collapse of the whole Cancun

Ministerial session. With the Cancun failure, the agriculture agenda and the future of the WTO itself came under question. The feeling of disappointment that followed the Cancun setback was later tempered by the July 2004 Package and the Framework Agreement reached for the establishment of the agricultural Modalities.⁴⁵ Although the July package was full of broad and vague declarations without any specific commitments, it nonetheless managed to give a sense of direction to the entire exercise. Among the main achievements of the July package are its adoption of a single but tiered formula for the reduction of agricultural tariffs (the higher the tariff levels the steeper the cuts); its use of a similarly tiered formula to reduce trade-distorting domestic support (the higher a member’s support levels, the higher the cuts) both at the specific level of amber box measures subject to AMS commitments and the overall level of trade distortive domestic support measures in general (i.e. Amber Box, de minimis, and Blue Box combined) with a 20 per cent down payment at the beginning of the implementation period; and the agreement to eliminate export subsidies as listed in members’ schedules as well as other forms of export support, such as export credits, export credit guarantees or insurance programmes, exporting state trading enterprises and food aid practices that market access have the same effect as the listed export subsidies. However, the developments between July 2004 and December 2005 had been so disappointing that the WTO had to lower its expectations from the sixth WTO Ministerial in Hong Kong (13-17 December 2005), lest the Cancun experience would be repeated.⁴⁶ The Hong Kong Ministerial Declaration has added some specifics to the otherwise broad commitments of the July package, such as the decision to have three bands for reductions in trade-distorting domestic support, to complete the elimination of all forms of export subsidies by 2013, and to adopt four bands for structuring tariff cuts. Members also committed to complete the agriculture modalities by 30 April 2006 and to submit comprehensive schedules based thereon by 31 July 2006, which would then lead to the conclusion of the Doha Round by end of 2006. Whether such an ambitious agenda will be met is yet to be seen. Most

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

⁴¹ See *EU-US Joint Text on Agriculture* (Aug. 13, 2003), available at, http://www.ictsd.org/issarea/attd/Resourcs/docs/EC-US_joint_text_13_Aug_2003.pdf.

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

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

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

⁴⁵ See July package, *supra* n. 5.

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

observers are naturally pessimistic about it. Compared to Cancun, Hong Kong was of course a success. However, it was also taken by many as a missed opportunity and a disappointment.⁴⁷ Indeed, EU trade commissioner Peter Mandelson himself was quoted to have said: "If we didn't make the conference a success, we certainly saved it from failure."⁴⁸

III. AGRICULTURAL MARKET ACCESS

By agricultural market access, we mean the terms and conditions under which agricultural products could be imported into WTO member countries. Countries often set up different forms of barriers against the importation of goods and services for several reasons.⁴⁹ These barriers are generally of two types: tariffs and non-tariff barriers (NTBs). From its very beginning, GATT has had a preference for tariffs over NTBs, and Article XI prohibits NTBs with only a few general⁵⁰ and one agriculture-specific exceptions.⁵¹ The agriculture-specific

exception contained in Article XI:2(c) is a tightly-defined exception with a history of narrow interpretations by GATT panels. Although it was invoked by defendants in several GATT cases to justify their agricultural import restrictions, not a single country was successful throughout the history of GATT.⁵²

However, the tight conditions attached to this exception as well as the strict construction it enjoyed in the hands of GATT panels did not deter countries from resorting to quantitative restrictions. Indeed the major obstacles to international agricultural trade were non-tariff barriers of the sort prohibited under Article XI and not justified by either the agriculture-specific or general exceptions of GATT.⁵³ An important challenge in the area of agricultural trade was to bring some discipline into this widespread use of non-tariff barriers, often in violation of the rules. Given that they were often maintained in violation of GATT rules, the logical outcome should be their elimination. This was however practically unachievable. The most that the Uruguay Round could do was convert all pre-existing 'non-tariff' barriers

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

⁴⁸ See Keith Bradsher, "Trade Officials Agree to End Subsidies for Agricultural Exports", *New York Times*, Dec. 2005.

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

⁵⁰ The general exceptions include the balance-of-payments restrictions allowed under Article XII, the development provisions of Article XVIII, and those covered under Article XX.

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

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

party applying restrictions on the importation of any product pursuant to sub-paragraph (c) of this paragraph shall give public notice of the total quantity or value of the product permitted to be imported during a specified future period and of any change in such quantity or value. Moreover, any restrictions applied under (i) above shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In determining this proportion, the contracting party shall pay due regard to the proportion prevailing during a previous representative period and to any special factors which may have affected or may be affecting the trade in the product concerned."

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

⁵³ An important question here is as to why GATT contracting parties allowed this to happen and did not challenge more of these measures under Article XI. The explanations suggested by Bernard O'Connor include: the fact that many countries with comparative advantage in agricultural production were not GATT contracting parties; that many countries had their own programmes in place and did not want to promote jurisprudence that could come back to haunt them; and that Governments did not take international action because they agreed in the need to manage domestic production and supply. Bernard O'Connor, "Book Review: The Law of International Trade in Agricultural Products: From GATT 1947 to the WTO Agreement on Agriculture", *Journal of International Economic Law* (Volume 6, Issue 2, July 2003), pp. 537-538.

(NTBs) into their tariff equivalents via the innovative approach of tariffication regardless of whether those measures were maintained consistently with GATT rules. This tariffication exercise applied to a range of measures including not just the traditional NTBs, such as quotas and quantitative restrictions, but also such other measures as “variable import levies [often associated with EC agricultural protectionism], minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties”.⁵⁴ According to the Appellate Body, these different forms of border measures have one thing in common: “they restrict the volume or distort the price of imports of agricultural products.”⁵⁵ The resulting tariffs were also bound against any future increase and then subjected to a 36% minimum reduction commitment on the average tariff levels (and a 15% minimum per tariff line) over a six year implementation period (for developing countries, the reduction rate is two-thirds of the above percentages over a ten-year implementation period). At the same time, because the actual conversion of non-tariff barriers into their tariff equivalents was left to the member countries themselves, the resulting tariffs were often much higher than their genuine equivalents (due to what was called the problem of “dirty tariffication”).

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

To protect against the unintended but likely result of a more restrictive regime after tariffication, countries undertook what are called “current access commitments” that attempted to guarantee that historic levels of imports would remain not adversely affected by the tariffication process. This commitment applied in situations where imports of a product during the base period (1986-88) already represented at least five per cent of corresponding domestic consumption, which was far from common in agriculture. In cases where imports during the base period were less than five percent, members undertook a commitment to create what are called “minimum access opportunities” representing three percent of domestic consumption of the product for the base period for the first year of the implementation period (1995), reaching five per cent by the end of the implementation period (2000). In theory, therefore, a minimum of five per cent of the domestic consumption of every product in every member country today must be accounted for by imports; or at least the business opportunities to do so must be in place. To give effect to the minimum/current access commitments, countries were obliged to establish tariff quotas at “low or minimal” duty rates. Administering these tariff quotas has proved to be much more difficult than anticipated during the Uruguay Round negotiations.

On the other hand, to accommodate fears of excessive or low-priced imports into the newly-opened markets, a special arrangement was made to allow the introduction of special safeguard (SSG) measures on tariffied products under less stringent conditions than those set by GATT Article XIX and the Safeguards Agreement (the most important being the absence of an injury requirement under Article 5 of the AoA). The fate of these arrangements and their practical administration, together with the traditional question of how to further reduce the existing agricultural tariffs, constitute the core of the market access aspect of the ongoing negotiations.⁵⁶ These will be discussed in turn.

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

⁵⁵ See *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, report of the Appellate Body, (WT/DS207/AB/R, issued on 23 September 2002), para. 200. One may of course question whether ordinary customs duties as well are not doing exactly that: restrict the volume or distort the price of imports of agricultural products. But, as the Appellate Body itself emphasised throughout the report, transparency and predictability are the reasons behind the preference for ordinary customs duties.

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

A. TARIFF REDUCTIONS IN THE CURRENT NEGOTIATIONS

1. Negotiations on Tariff Reductions on the Road to Cancun

Now that tariffs are the only means of protection at the border⁵⁷, the most important market access issue in the current negotiations relates to the depth of tariff reductions and the method by which to achieve desired reduction targets. While several options have been proposed so far, those from the US and the Cairns Group on the one hand and from the EU on the other appear to represent the two extreme positions and most others fell somewhere in between. At the most conservative end, the EC proposed to stick to the Uruguay Round tradition both in terms of style as well as numerical targets, and suggested a formula for “an overall average reduction of 36 % and a minimum reduction per tariff line of 15% as was the case in the Uruguay Round.”⁵⁸ At the most liberal end stood the US proposal – also supported by the Cairns Group – which ambitiously called for the adoption of what it called the “Swiss 25” formula⁵⁹ of tariff harmonization (higher cuts on higher tariffs) so as to reduce all higher tariffs to a maximum of 25 percent (keeping in-quota tariffs still lower) to be implemented in equal

annual instalments over a five-year period. Curiously, the US went further and asked members to set a date for the eventual elimination of agricultural tariffs⁶⁰ – a move that, if successful, could have given agriculture a further lead over manufactures.⁶¹ Knowing the sensitivity of agricultural issues in many WTO members, it was not difficult to dismiss this latter point as too ambitious for the Doha negotiations. Indeed, given that several agricultural tariffs in several member countries are bound at three digit levels, even the tariff harmonization formula that would set 25 percent as the maximum for any tariff line was already an ambitious one. It is notable, however, that from quite early on there was a growing consensus to use some tariff harmonization mechanism – such as the Swiss formula – that would help to overcome the extreme tariff dispersion between different agricultural tariff lines.⁶²

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

⁵⁷ Note that there are a few temporary exceptions, maintained under special treatment provisions, currently in use by Chinese Taipei, Korea and the Philippines on rice. See WTO Secretariat, *WTO Agriculture Negotiations: The Issues, and Where We are Now* 10 October 2002, available at http://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd00_contents_e.htm The OECD has also noted that Hungary and Poland tariffed only 91% and 96% respectively of their agricultural NTBs. See OECD, *The Uruguay Round Agreement on Agriculture: an Evaluation of Its Implementation in OECD Countries* (Paris, 2001) p. 23.

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

⁵⁹ The “Swiss formula” is a term used to describe a tariff harmonization formula originally suggested by Switzerland during the Tokyo round of negotiations for tariff reductions in manufactured products; it is not supported by the Swiss in the current agricultural negotiations. Because the US proposed to reduce all higher tariffs to a maximum of 25%, Robert Zoellick called it the “Swiss 25” formula. See *Statement of Robert B. Zoellick U.S. Trade Representative before the Committee on Agriculture of the U.S. House of Representatives*, May 21, 2003, available at <http://www.ustr.gov/speech-test/zoellick/2003-05-21-agriculture.pdf>.

⁶⁰ For the latest US positions, see <http://www.fas.usda.gov/itp/wto/proposal.htm> This is not accidental; the US argues that its agriculture is “more than twice as dependent on exports as the U.S. general economy. About 25 percent of gross cash receipts from agricultural sales are for export, compared with 10 percent on average for manufactured goods.” Debra Henke, “WTO Negotiations Offer the Best Chance for Agricultural Trade Reform”, *AgExporter*, November 2001.

⁶¹ Note, however, that the US has also made a similarly ambitious proposal to eliminate all tariffs on all non-agricultural products by 2015. See *Market Access for Non-Agricultural Products: Communication from the United States*, TN/MA/W/18 (5 December 2002). Agriculture is already ahead of manufactures in terms of the proportion of tariff lines with bound rates.

⁶² For more on the different formulae used in the trade negotiations, see WTO, *Negotiating Group on Market Access: Formula Approaches To Tariff Negotiations – Note By The Secretariat* (TN/MA/S/3/Rev.2, 11 April 2003).

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

of 15 per cent ad valorem or lower, the average reduction requirement would be 40 per cent and the per-tariff-line minimum 25 per cent.⁶⁴ The modalities draft also proposed methods by which this tariff reduction formula would be applied in cases where members are applying non-ad valorem tariffs.⁶⁵ If successful, this approach would have significantly reduced the current high level of tariff dispersion; it would not however have created anything like a maximum permissible tariff level.⁶⁶

The Harbinson draft also contained provisions intended to address the problem of tariff escalation – a situation where tariff rates rise with the degree of processing (i.e. higher tariff rates on more processed products than on primary or less processed forms of the same product). The original version of the modalities draft simply stated “where the tariff on a processed product is higher than the tariff for the product in its primary form, the tariff reduction for the processed product shall be higher than that for the product in its primary form.”⁶⁷ The revised version further refined this higher-tariff-reduction requirement for the processed product to mean that “the rate of tariff reduction for the processed product shall be equivalent to that for the product in its primary form multiplied, at a minimum, by a factor of [1.3]”⁶⁸

The structure proposed for reductions by developing countries was even more complicated. Firstly, in recognition of the food security and rural development concerns of these countries, the proposal allowed them the right to declare an unspecified number of

products (presumably those that might be called food staples and/or export products) as “special products” – the original first draft modalities used the term “strategic products” – and designate them with the symbol “SP” in their schedules. These products would then be subject to a uniform requirement of 10 per cent average and 5 per cent per-tariff-line minimum reduction regardless of existing tariff levels. For all other – non-SP – products, the approach would be generally similar to that proposed for developed countries. But, in this case, the thresholds were higher, the rates of reduction lower, the number of categories bigger, and the implementation period longer.

Accordingly, there are four categories of products here⁶⁹: those with ad valorem tariffs higher than 120 per cent would be reduced by 40 per cent average and 30 per cent per-tariff-line minimum; those with tariffs between 60 and 120 per cent by an average of 35 and a per-tariff-line minimum of 25 per cent; those with tariffs between 20 and 60 per cent by an average of 30 and a per-tariff-line minimum of 20 per cent; and those with tariffs 20 per cent or lower ad valorem to be reduced by a 25 per cent average and a 15 per cent per-tariff-line minimum.⁷⁰ These reduction commitments would also benefit from a longer implementation period – ten years as opposed to five years.

While tariff reductions would naturally be a welcome development to international agricultural trade, many developing countries – and particularly LDCs – have been worried about the potential loss of competitive advantage due to erosion of the preferential margin that would necessarily result from reduction of MFN tariffs.⁷¹ In recognition of this,

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

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

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

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

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

⁶⁹ Note that the original first draft modalities had three categories just like that for developed countries; a fourth category was introduced by the revised first draft modalities.

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

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

the modalities draft proposed to impose a soft-law, best-efforts, obligation on developed countries "to maintain, to the maximum extent technically feasible, the nominal margins of tariff preferences and other terms and conditions of preferential arrangements they accord to their developing trading partners."⁷² The modalities draft further proposed to allow developed countries to delay their tariff reductions on products of vital export interest to preference beneficiaries (defined to mean a product constituting at least 20 per cent of their total merchandise exports) by two years and then to implement the reductions over another six year period. In-quota duties for such products would also be eliminated. Finally, the modalities draft also contained the usual loose undertaking by developed countries to provide "targeted technical assistance programmes and other measures, as appropriate, to support preference-receiving countries in efforts to diversify their economies and exports."⁷³ But, of course, this one is a hollow promise with little, if any, practical significance. Annex A to the pre-Cancun draft contained a proposed "Framework for Establishing Modalities in Agriculture", which was based largely on the 'US-EU joint proposal'⁷⁴ and the 'pre-Cancun G20 proposal'.⁷⁵ All these three documents are unanimous in their approach to tariff reductions – they all advocate what is called a "blended formula", first suggested by the US-EU joint text proposing to divide all agricultural tariff lines into three groups. The first group would be subject to a Uruguay Round style average tariff cut with a mandatory per-tariff-line minimum; the second category would be subject to a Swiss formula with a

coefficient; and a third one would be subject to the famous zero-for-zero approach on which all tariffs would be eliminated. The specific percentage of tariff lines that would be subject to each category, the average and per-tariff-line minimum reductions in the first category, as well as the coefficient in the second category were all to be left for the post Cancun phase.

However, the similarities between the three documents on market access do not extend much beyond this point. The pre-Cancun G20 proposal to put a cap on the maximum permissible tariff level was replaced in the Cancun draft by an alternative between tariff capping and the introduction of an effective additional market access in those or other areas through a request-offer process, a position taken from the 'US-EU joint proposal'. At Cancun, ministers spent most of their time on agriculture and the revised draft ministerial declaration (the Cancun draft) circulated on 13 September 2003 (i.e. one day before the conclusion of the session) closely followed the pre-Cancun draft in most cases. On the issue of tariff reductions, the Cancun draft reaffirmed the blended formula of the pre-Cancun draft without much change. The only important modifications to this part of the pre-Cancun draft relate to non-trade concerns and tariff escalation on which the Cancun draft echoed the Harbinson revised first modalities draft.⁷⁶

2. Negotiations on Tariff Reductions: from Cancun to Hong Kong

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

The July 2004 package adopted a 'tiered' approach to the reduction of tariffs, which is just one form of what is traditionally known as the Swiss Formula that aims to cut higher tariffs more deeply than lower tariffs – thereby resulting in higher level of tariff harmonisation. The July package calls it "progressivity in tariff reductions".⁷⁷ All members, except LDCs, are required to reduce their tariffs according to this approach. The size of the cuts is however still under negotiation, and needs to be resolved in order for those elusive modalities to be achieved. The July package already provides that tariff cuts, whatever their size, will apply from bound levels as opposed to applied ones.

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

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

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

⁷⁴ See *supra* n. 3.

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

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

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

The high levels of agricultural tariff waters (i.e. the differences between bound and applied rates) particularly in developing countries will thus mean that the effect of such a reduction will be minimal in the short term.⁷⁸

Progressivity in tariff reductions would be possible only if tariffs across products are comparable in some objective form. The agriculture schedules of many WTO members are however made up of different forms of tariffs – such as ad valorem, specific, mixed and compound.⁷⁹ Comparison of tariff levels across different products is most straightforward in cases where tariff levels are expressed in ad valorem terms. However, unlike for non-agricultural products,⁸⁰ the July package does not expressly require conversion of non-ad valorem agricultural tariffs into their ad valorem equivalents (AVEs). The conversion of the many non-ad valorem agricultural tariffs to their AVEs was nonetheless found to be a necessary precondition for the achievement of progressivity in agricultural tariff reductions, as it would otherwise be difficult, if not impossible, to allocate specific tariff lines in the different tiers that will be subject to different levels of cuts.⁸¹

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

⁷⁹ For comprehensive information on this see WTO Committee on Agriculture, Special Session: *Calculation of Ad Valorem Equivalents (AVEs): Data Requirements and Availability*, Note by the Secretariat (TN/AG/S/11, 15 November 2004). According to this survey, the WTO Consolidated Tariff Schedules Database contains 7,977 agricultural tariff lines that are bound in non-ad valorem terms by a total of 35 Members, counting the EC(15) and Switzerland-Liechtenstein, respectively, as one. See para. 5. Among the 35 members with non-ad valorem agricultural tariffs are Australia, Canada, the EC, India, Japan, Norway, Switzerland, and the US.

⁸⁰ Paragraph 5 of Annex B of the July Package on the Framework for Establishing Modalities in Market Access for Non-Agricultural Products provides: “all non-ad valorem duties shall be converted to ad valorem equivalents on the basis of a methodology to be determined and bound in ad valorem terms.”

⁸¹ It is not clear whether members will use the AVEs only during the negotiation process for the allocation of particular tariff lines in the appropriate tiers while retaining their existing non-ad valorem tariffs in their final schedules. A couple of considerations suggest that this to be a possibility: (1) the inclusion of a specific commitment prohibiting such possibility for non-agricultural products and its absence for agricultural products;

The AVE calculation proved much more difficult than initially thought. Technical issues relating to methods of calculation, choice of data and data sources for the purpose and questions of verification procedures all combined to slow down progress in the negotiations. The problems in calculation methodology centred around two alternative methods, the “unit price method” and the “revenue method”. In a unit price method, the AVE would be derived from a given specific duty (e.g. in USD) as a percentage of a given reference price (e.g. also in USD). In other words, the AVE is calculated as the specific duty expressed as a percentage of the unit value of a product. In a revenue method, on the other hand, the AVE would be derived from the total tariff revenue of a member from the importation of a particular product over a given period as a percentage of total value of imports of the same product over the same period. The AVEs in this case are thus calculated directly from data on customs revenue collected for a particular product divided by the value of imports of the same product and expressed in percentage terms.⁸² The value of products in either case would have to be set based on the world market prices of products.

In a manner reminiscent of the issues surrounding the agricultural tariffication exercise of the Uruguay Round, the root cause of the problem now lies with the interest of members with high protection levels to ensure that the effect of the AVE conversion exercise would still leave as wide a room as possible to protect their markets after the Doha reductions have been completed.⁸³ The presence of sometimes widely diverging data on world market prices and volumes for some

and (2) the attempt by agricultural exporters to push for an AVE conversion methodology that would lead to higher AVEs and be subject to steeper tariff reductions and the importers’ preferences for the opposite scenario.

⁸² See *Id.* Para. 7 and 8. [WTO Committee on Agriculture, Special Session: *Calculation of Ad Valorem Equivalents (AVEs): Data Requirements and Availability*, Note by the Secretariat (TN/AG/S/11, 15 November 2004)]

⁸³ As summarised by the ICTSD, “AVE conversion has pitted the EU and G-10 countries against the US, the Cairns group of agricultural exporters and the G-20. The former groups make use of a large number of specific tariffs. Agricultural exporters would like to see the conversion based more closely on the lower world prices, which would lead to higher AVEs, and eventually, steeper tariff cuts.” ICTSD, “Agriculture: Key Trade Ministers Strike AVE Deal in Paris”, 11 May 2005, available at <http://www.ictsd.org/weekly/05-05-11/BRIDGESWeekly9-16.pdf>.

agricultural products (e.g. between the WTO's Integrated Database (IDB) and the United Nations Statistical Division Commodity Trade Statistics database (Comtrade)) meant that the level of protection available for a country after Doha would partly depend on the choice of databases to determine the relevant world market prices. This technical hurdle was overcome at a Paris "mini-ministerial" meeting in May 2005 in which a group of leading WTO members agreed to use IDB and Comtrade data with a complex formula on their weighting and sequencing.⁸⁴

The July package left the number of bands, the thresholds for defining the bands and the level of tariff reduction in each band for subsequent negotiations.⁸⁵ Several proposals have been submitted between the July package and the Hong Kong ministerial. To give just a few examples, the EC proposed to have four bands, with the highest tier subject to a 60 percent reduction, and a 100 percent tariff cap. Developing countries would be subject to less onerous commitments in the form of higher thresholds for each of the four tiers and lower reduction requirements within each; the cap for developing countries would be set at 150 percent.⁸⁶ The US on its part also proposed a four-tier system of cutting tariffs, but the thresholds for each tier are lower, the reduction rates higher (the highest being subject to a 90 percent cut), and a tariff cap of 75 percent for developed countries.⁸⁷ Likewise, the G20 also proposed a four-tier structure, but with reduction ambitions falling somewhere between the EC and the US's.⁸⁸ This growing consensus on the structure of the tiers for agricultural tariff reductions and the divergence on the thresholds were reflected in the text of the Hong Kong Ministerial Declaration which

stated that "We adopt four bands for structuring tariff cuts, recognizing that we need now to agree on the relevant thresholds – including those applicable for developing country Members."⁸⁹ The search for a modalities agreement in respect of the tariff reduction formula is therefore a search for acceptable thresholds within these four bands and, possibly, fixing a cap for the maximum permissible tariff levels for both developed and developing countries.

However, the July package also introduced the concept of "sensitive products", which are different from the "special products" introduced earlier. Under the July package, the commitment to progressivity in tariff reductions is subject to "flexibilities for sensitive products". Accordingly, members are entitled to "designate an appropriate number, to be negotiated, of tariff lines to be treated as sensitive, taking account of existing commitments for these products."⁹⁰ The extent to which any flexibilities in favour of sensitive products will shield their tariffs from the reduction formulae that will be agreed in the future is still far from clear. The July package hints that there will be "deviations from the tariff formula",⁹¹ but the degree of this deviation and the conditions under which it could be allowed have yet to be negotiated. Apart from that, the July package adopts a negative approach in the sense that it tells us only what the special treatment of sensitive products will not be rather than what it will be.⁹² Thanks to the vagueness of the language of the market access commitment in the July package, it still declares that designating a product as sensitive will not mean less-than-substantial improvement in market access in that product. Moreover, the July package also left for future negotiations such issues as the number of tariff lines that could be designated as sensitive products and the manner and criteria of their selection. Post-July package proposals on the number of products, for example, range from one percent to 15 percent of tariff lines⁹³ and Hong Kong was not able to bridge this gap. The Ministerial Declaration simply recognized "the need to agree on treatment of sensitive products, taking into account all the elements involved". The importance of the decision awaiting negotiators in this respect is a crucial

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

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

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

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

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

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

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

⁹¹ See *Id.*, para. 34.

⁹² See *Id.*, paras. 32-34.

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

