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An Agricultural Law Research Article

**Agricultural Trade Liberalization in the Doha  
Round: The Search for a Modalities Draft**

by

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AGRICULTURAL TRADE LIBERALIZATION IN THE DOHA ROUND:  
THE SEARCH FOR A MODALITIES DRAFT

Cody A. Thacker\*

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Interferences with international trade appear innocuous; they can get the support of people who are otherwise apprehensive of interference by government into economic affairs; . . . yet there are few interferences which are capable of spreading so far and ultimately being so destructive of free enterprise.<sup>1</sup>

## I. INTRODUCTION

World Trade Organization (WTO) talks in Cancun, Mexico, collapsed on September 14, 2003.<sup>2</sup> Part of a global round of trade talks launched in 2001 at Doha, Qatar, the Cancun Ministerial Conference was an opportunity to expand trade and economic growth by further opening world markets.<sup>3</sup> The goal of the meeting was to liberalize international trade by establishing a fair and market-oriented trading system aimed at improving market access, eliminating export subsidies, and reducing domestic support.<sup>4</sup> Unfortunately, the meeting ended without trade ministers agreeing on key issues. At the heart of the failure was an inability to develop modalities<sup>5</sup> for agricultural trade liberalization.<sup>6</sup>

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<sup>1</sup> MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 57 (1962).

<sup>2</sup> Elizabeth Becker, *Poorer Countries Pull Out of Talks Over World Trade*, N.Y. TIMES, Sept. 15, 2003, at A1.

<sup>3</sup> *Id.*

<sup>4</sup> *Ministerial Declaration*, WTO Ministerial Conference, 4th Sess. (Doha), WTO Doc. WT/MIN(01)/DEC/1 (2001) [hereinafter *Doha Ministerial Declaration*], [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.pdf](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.pdf).

<sup>5</sup> The Doha Declaration refers to “modalities” without defining the term. *See, e.g., id.* para. 14. The Permanent Delegation of the European Communities (EC) proposed elements of “modalities” in a February 24, 2003, communication to the Chairman of the General Council of the WTO. *Singapore Issues – The Question of Modalities*, WTO General Council, paras. 1, 4, WTO Doc. WT/GC/W/491 (2003). A group of twelve countries responded to the EC communication, reiterating that the Doha Declaration does not define the term “modalities,” and criticizing the EC paper’s approach to consideration of modalities as “superficial.” *Comments on the EC Communication (WT/GC/W/491) on the Modalities for the Singapore Issues*, WTO General Council, paras. 6, 7, WT/GC/W/501 (2003). The group recommended defining “modalities” from current WTO practice and stated that “[i]t is clear that the ‘modalities’ on negotiations on an issue contains the aspects of the issue that are agreed on and the nature and direction of obligations to be undertaken.” *Id.* para. 6 (emphasis removed).

<sup>6</sup> *See* Becker, *supra* note 2 (describing agriculture as the pivotal issue at the Cancun conference). While agricultural issues were crucial, the collapse is more immediately attributable to the contentious Singapore issues (so called because of their emergence at the Singapore Ministerial Conference): trade and investment, trade and competition, transparency in government procurement, and trade facilitation. *See* Robert B. Zoellick, *America Will Not Wait*

Agriculture has long been the most protected sector of international trade. In the United States, for instance, tariffs on agricultural goods have been an element of federal policy since the country's inception.<sup>7</sup> The policy today is no different. The United States continues to impose a bound agricultural tariff of twelve percent, while the global average remains at sixty-two percent.<sup>8</sup> These numbers are significant because lower barriers to trade—particularly trade in agricultural goods—allow for economic gains, poverty alleviation, and a higher standard of living in developed and developing countries alike.<sup>9</sup> Even a forty percent tariff reduction would result in the world economy gaining \$70 billion per year.<sup>10</sup> A more extensive agreement reducing or eliminating all trade-distorting support, like the one proposed at Cancun, could increase global incomes by as much as \$520 billion and lift 144 million people out of poverty.<sup>11</sup>

The negotiations in Cancun illustrate the distance nations are willing to put between themselves and protectionism. No member argued for more barriers to trade; rather, each argued for some framework to facilitate trade.<sup>12</sup> The existence of various perspectives, however, caused disagreement on how best to achieve this single aim. The United States and the European Union (EU) formed one alliance, coming together one month before the Cancun conference

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*for the Won't-do Countries*, FIN. TIMES (London), Sept. 22, 2003, at 23. For an explanation of the difficulty in resolving the Singapore issues, see INT'L DEV. COMM., U.K. HOUSE OF COMMONS, TRADE AND DEVELOPMENT AT THE WTO: ISSUES FOR CUNCUN, HC 400-I, at 45 (Sess. 2002-2003), <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmintdev/400/400.pdf> (last visited Dec. 20, 2004).

<sup>7</sup> See, e.g., Act of July 4, 1789, ch. 2, 1 Stat. 24 (1789) (imposing duties on a broad range of goods including molasses, wine, malt, sugars, coffee, cocoa, salt, tobacco, indigo, fish, and teas).

<sup>8</sup> THE INT'L AGRIC. TRADE RESEARCH CONSORTIUM, THE CURRENT WTO AGRICULTURAL NEGOTIATIONS: OPTIONS FOR PROGRESS 10 (2001) [hereinafter OPTIONS FOR PROGRESS], [http://agecon.lib.umn.edu/cgi-bin/pdf\\_view.pl?paperid=3818](http://agecon.lib.umn.edu/cgi-bin/pdf_view.pl?paperid=3818).

<sup>9</sup> See Clare Short, *Foreword by the Secretary of State for International Development to U.K. Dep't for Int'l Dev., Eliminating World Poverty: Making Globalisation Work for the Poor* 7 (2000) (discussing the international trading system's role in reducing poverty), <http://www.dfid.gov.uk/pubs/files/whitepaper2000.pdf>. See generally JOHAN NORBERG, IN DEFENSE OF GLOBAL CAPITALISM (2003) (discussing significant connections between free trade, economic growth, and poverty reduction).

<sup>10</sup> Thomas W. Hertel & Will Martin, *Would Developing Countries Gain from Inclusion of Manufactures in the WTO Negotiations?*, Presentation at the Conference on WTO and the Millennium Round (Sept. 11, 1999), at <http://www.gtap.agecon.purdue.edu/resources/download/42.pdf>.

<sup>11</sup> Becker, *supra* note 2 (citing World Bank estimations).

<sup>12</sup> See *infra* Part III.A.1-3.

by drafting a joint framework for negotiation of agricultural issues.<sup>13</sup> They hoped the proposal could provide impetus for constructive negotiations on modalities and, more generally, invigorate the entire Cancun meeting.<sup>14</sup> A diverse group of developing nations formed another camp, which came to be known as the Group of 21 (G21).<sup>15</sup> These nations coalesced to present their own framework for agricultural negotiations in an effort to assert influence within the WTO.<sup>16</sup> In this context, the freshly coupled United States and EU on the one hand, and the surprisingly commanding G21 on the other, became polarized in Cancun. The immediate result was merely a lack of consensus, but the ultimate effect was to put an already delayed Doha Round<sup>17</sup> in serious peril of not achieving the development goals aspired to in the Doha Declaration.<sup>18</sup>

This Note will discuss agricultural negotiations in the Doha Round and the efforts that various entities, namely the United States, the EU, and the G21, have put forth to liberalize trade and further encourage negotiations. More specifically, this Note will analyze the modalities presented at the Cancun Conference to derive a text that maximizes the economic development and poverty reduction generated by a multilateral trading system. Part II provides a backdrop for current negotiations, briefly recounting the history of multilateral agricultural negotiations, paying particular attention to the Uruguay Round

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<sup>13</sup> U.S. Dep't of State, Joint EC-U.S. Paper (Aug. 13, 2003), at <http://usinfo.state.gov/ei/Archive/2003/Dec/31-143080.html> [hereinafter Joint Paper].

<sup>14</sup> See Bruce Odessey, *U.S.-EU Framework on Agriculture Seen as Way Out of WTO Impasse* (Aug. 13, 2003), at <http://usinfo.state.gov/topical/econ/wto/03081301.htm>.

<sup>15</sup> When the G21 submitted their agricultural framework to the WTO, the countries comprising the G21 were Argentina, Bolivia, Brazil, Chile, China, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, India, Mexico, Pakistan, Paraguay, Peru, the Philippines, South Africa, Thailand, and Venezuela. *Agriculture – Framework Proposal*, WTO Ministerial Conference, 5th Sess. (Cancún), WTO Doc. WT/MIN(03)/W/6 (2003) [hereinafter G21 Communiqué].

<sup>16</sup> Elizabeth Becker & Ginger Thompson, *Poorer Nations Plead Farmers' Case at Trade Talks*, N.Y. TIMES, Sept. 11, 2003, at A3.

<sup>17</sup> The Doha Round has failed to make all deadlines, including the March 31, 2003, deadline for establishing modalities. See Press Release, WTO Agriculture Negotiations, Farm Talks Miss Deadline; But 'Work Must Go On,' Says Supachai (Mar. 31, 2003), [http://www.wto.org/english/news\\_e/pres03\\_e/pr336\\_e.htm](http://www.wto.org/english/news_e/pres03_e/pr336_e.htm).

<sup>18</sup> Specifically, the Doha Declaration committed the WTO "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." Doha Ministerial Declaration, *supra* note 4, para. 13.

Agreement on Agriculture (URAA). The URAA will be assessed in terms of domestic support, market access, and export competition.

Part III focuses on the various modalities drafts presented in preparation for Cancun, juxtaposing bilateral and regional trade agreements with comprehensive multilateral trade negotiations under the auspices of the WTO to identify the best method to further facilitate agricultural trade liberalization. Part III also argues that an agreement within the WTO is preferable to regional agreements and suggests that the draft modalities text presented in Cancun can surpass the progress of the Uruguay Round while reconciling members' differences. It then suggests methods that a final modalities agreement may incorporate to expedite the demise of protectionism, such as ending certain forms of domestic support and ceasing the developing world's drive for special and differential treatment. Finally, the Note concludes that an agricultural modalities agreement capable of liberalizing agricultural trade is at hand and suggests eliminating Blue Box support and foregoing special and differential treatment as methods to further engender trade within the existing framework.

## II. BACKGROUND

### A. *General Agreement on Tariffs and Trade*

The International Trade Organization (ITO), which was to be an organ of the United Nations, was the first post-war effort to establish an international body focused on trade.<sup>19</sup> Though the ITO never entered into force, the General Agreement on Tariffs and Trade (GATT), a provisional body designed to put into effect provisions of the ITO, assumed the role of regulating and liberalizing world trade.<sup>20</sup>

From the beginning, GATT performed poorly as an agricultural liberalizer.<sup>21</sup> First, rules were drafted in careful regard to domestic policies rather than reforming domestic policies to meet a broader, more liberal international trade standard.<sup>22</sup> Article XI, for instance, provided for a general

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<sup>19</sup> See generally KARIN KOCK, *INTERNATIONAL TRADE POLICY AND THE GATT 1947-1967*, at 35-61 (1969) (outlining the formation and history of ITO).

<sup>20</sup> *Id.* at 62-94 (outlining the formation and history of GATT).

<sup>21</sup> See Dale E. McNiel, *Furthering the Reforms of Agricultural Policies in the Millennium Round*, 9 MINN. J. GLOBAL TRADE 41, 44 (2000) (explaining that "the rules of the GATT have always contained exceptions that permitted governments to pursue protectionist and mercantilist policies in the agricultural sector").

<sup>22</sup> MELAKU GEBOYE DESTA, *THE LAW OF INTERNATIONAL TRADE IN AGRICULTURAL*

prohibition on quantitative and other non-tariff border barriers, but contained many exemptions for agriculture.<sup>23</sup> Thus, contracting parties were allowed to maintain export restrictions or prohibitions to relieve critical shortages and to maintain import restrictions that were “necessary to the enforcement of governmental measures.”<sup>24</sup> Restrictions on domestic support were also minimal: Article XVI only required a member utilizing subsidies to notify GATT.<sup>25</sup> Second, parties were routinely issued waivers that effectively relieved them of GATT obligations.<sup>26</sup> For example, the U.S. agricultural waiver of 1955 effectively placed U.S. agriculture wholly outside GATT regulation.<sup>27</sup> Lastly, where GATT rules did not conform to state policy, many states flagrantly disregarded the international trade regime in favor of protectionism.<sup>28</sup>

### *B. Uruguay Round Agreement on Agriculture*

Trade ministers launched the Uruguay Round in 1986 with a strong mandate to overcome the shortfalls of GATT and develop an effective international trade regime.<sup>29</sup> They declared that “[n]egotiations 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.”<sup>30</sup> Actually achieving such goals proved arduous, however. “The objectives of the main participants often seemed diametrically opposed.”<sup>31</sup> The domestic policies they sought to uphold embodied little concern for strengthening international trade and working within an international framework.

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PRODUCTS 7 (2002).

<sup>23</sup> *Id.* at 35-59.

<sup>24</sup> General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XI, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, 224-28 [hereinafter GATT].

<sup>25</sup> *Id.* art. XVI, 55 U.N.T.S. at 250.

<sup>26</sup> GEBOYE DESTA, *supra* note 22, at 7, 283.

<sup>27</sup> *See* KOCK, *supra* note 19, at 164.

<sup>28</sup> GEBOYE DESTA, *supra* note 22, at 7; *see* KOCK, *supra* note 19, at 170-76 (discussing an expert groups examination of the “widespread resort to agricultural protection” and GATT’s ineffectiveness as an instrument for the promotion of trade).

<sup>29</sup> *See* McNiel, *supra* note 21, at 52 (discussing the contracting parties’ agreement that there was an “urgent need to bring more discipline and predictability to world agricultural trade”).

<sup>30</sup> GATT Ministerial Declaration on the Uruguay Round of Multilateral Trade Negotiations, Sept. 20, 1986, 25 I.L.M. 1623, 1626 (1986).

<sup>31</sup> JOHN CROOME, *RESHAPING THE WORLD TRADING SYSTEM* 92 (2d ed. 1999).

The two negotiating groups most at odds were the United States and the EU, two giants on the world agriculture market. The United States, joined by the Cairns Group of agricultural exporting countries,<sup>32</sup> advocated the boldest reforms.<sup>33</sup> Most controversial, particularly to the EU, was the U.S. “zero option” that “call[ed] for the complete abolition of all trade-distorting support and protection within ten years.”<sup>34</sup> This was troublesome to the EU because its Common Agricultural Policy (CAP), successful in transforming the EU into a net food exporter, used extensive subsidy payments to make domestically grown products competitive in the world market and employed import duties to keep prices artificially high.<sup>35</sup> Thus the EU was content to maintain the status quo and “regard[ ] the Uruguay Round agricultural negotiations as a damage limitation exercise,”<sup>36</sup> which entailed pulling the United States away from the “zero option.”<sup>37</sup>

Because attention was focused on the substantial crevasse separating the United States and the EU, developing nations were largely ignored in the Uruguay Round’s agricultural negotiations.<sup>38</sup> In general, the agricultural policy of most developing nations before the Uruguay Round was to transfer income from rural farmers to urban dwellers.<sup>39</sup> This was achieved through taxing agricultural exports and subsidizing agricultural imports, and through state agency purchasing at less than world market prices.<sup>40</sup> In this context, developing nations negotiated with a view toward raising depressed income levels in the farm sector by lessening tariffs in the developed world, thus

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<sup>32</sup> The Cairns Group is comprised of seventeen countries: Argentina, Australia, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Paraguay, the Philippines, South Africa, Thailand, and Uruguay. The Cairns Group, An Introduction, <http://www.cairnsgroup.org/introduction.html> (last visited May 11, 2005).

<sup>33</sup> CROOME, *supra* note 31, at 93.

<sup>34</sup> K.A. Ingersent et al., *The EC Perspective*, in *AGRICULTURE IN THE URUGUAY ROUND*, 55, 83 (K.A. Ingersent et al eds., 1994).

<sup>35</sup> CROOME, *supra* note 31, at 94.

<sup>36</sup> Ingersent et al., *supra* note 34, at 82.

<sup>37</sup> *Id.* at 82-83.

<sup>38</sup> L. Alan Winters, *The LDC Perspective*, in *AGRICULTURE IN THE URUGUAY ROUND*, *supra* note 34, at 157, 157-81 (“suggest[ing] that developing countries are generally unable to influence the critical political decisions affecting their trade” particularly regarding agriculture, referring to developing countries’ “political weakness,” and stating that “[t]he developing countries are not major players in the Uruguay Round agriculture negotiations”).

<sup>39</sup> Carmen G. Gonzalez, *Institutionalizing Inequality: The WTO Agreement on Agriculture, Food, Security, and Developing Countries*, 27 *COLUM. J. ENVTL. L.* 433, 446 (2002).

<sup>40</sup> *Id.*

opening unexploited markets, and incorporating special and differential treatment to maintain sheltered domestic markets.<sup>41</sup>

Despite the widely divergent concerns of the United States, the EU, and developing nations, trade ministers reached an agreement in Marrakesh, Morocco, on April 15, 1994, to overcome GATT shortfalls and further liberalize international trade.<sup>42</sup> The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations not only established the WTO, a body to regulate international trade,<sup>43</sup> but crafted a number of separate agreements to reduce protectionism.<sup>44</sup> One of these agreements, the Uruguay Round Agreement on Agriculture (URAA), specifically targeted agriculture through improvements in market access, domestic support, and export competition.<sup>45</sup> The scope of the URAA surpassed that of agricultural agreements in previous trade rounds and removed agriculture's long-protected status, or "exceptionalism," from international disciplines.<sup>46</sup>

### *I. Domestic Support*

The URAA established a protocol, the Aggregate Measure of Support (AMS), to provide a standard gauge for domestic subsidies.<sup>47</sup> The AMS is "the annual level of support, expressed in monetary terms, provided for an agricultural product in favour of the producers of the basic agricultural product or non-product-specific support provided in favour of agricultural producers in general."<sup>48</sup> Not included in the AMS is "Green Box" support, support that

<sup>41</sup> *Id.* at 451. *But see* Winters, *supra* note 38, at 178 (arguing that special and differential treatment, despite being demanded by developing country negotiators, poorly serves their economic interests and undermines bargaining leverage).

<sup>42</sup> *See* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 1867 U.N.T.S. 14, 33 I.L.M. 1143, available at [http://www.wto.org/english/docs\\_e/legal\\_e/03-fa.pdf](http://www.wto.org/english/docs_e/legal_e/03-fa.pdf).

<sup>43</sup> *Id.* (referring to the Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], opened for signature Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144, available at [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto.pdf](http://www.wto.org/english/docs_e/legal_e/04-wto.pdf)).

<sup>44</sup> *See, e.g.*, WTO Agreement, *supra* note 43, List of Annexes.

<sup>45</sup> Agreement on Agriculture, Apr. 15, 1994, WTO Agreement, Annex 1A, 1867 U.N.T.S. 410, available at [http://www.wto.org/english/docs\\_e/legal\\_e/14-ag.pdf](http://www.wto.org/english/docs_e/legal_e/14-ag.pdf).

<sup>46</sup> Randy Green, *Agreement on Agriculture: The Uruguay Round Agreement on Agriculture*, 31 LAW & POL'Y INT'L BUS. 819, 820 (2000).

<sup>47</sup> Agreement on Agriculture, *supra* note 45, art. 1(a), 1867 U.N.T.S. at 410-11.

<sup>48</sup> *Id.* Total Aggregate Measure of Support is "the sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measures of support for basic agricultural products, all non-product-specific aggregate measurements of support and all

has “no, or at most minimal, trade-distorting effects or effects on production.”<sup>49</sup> Rather, AMS measures the most trade-distorting payments, or “Amber Box” support.<sup>50</sup> The URAA obliged developed countries to reduce Total AMS for the 1986-1988 base period by twenty percent over six years.<sup>51</sup> Less developed countries are obliged to reduce their AMS by twenty percent over ten years, and least developed countries have no reduction commitments.<sup>52</sup>

## 2. Market Access

Article 4 of the URAA provides for “tariffication,” which is conversion of “non-tariff import barriers into . . . their tariff equivalents.”<sup>53</sup> Tariffication alone does not improve market access, however, because allowable tariff levels, based on the 1986-1988 base period, are high enough to continue the protection afforded by non-tariff barriers.<sup>54</sup> As a result, the URAA additionally calls for tariffs on agricultural products to be reduced by a minimum and average amount:

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equivalent measurements of support for agricultural products.” *Id.* art. 1(h), 1867 U.N.T.S. at 411-12.

<sup>49</sup> *Id.* Annex 2, para. 1, 1867 U.N.T.S. at 425. Non-trade distorting support, allowed without limitation, is also called “Green Box” support. *WTO and OECD Support Indicators*, OECD IN WASHINGTON, Aug-Sept. 2003, at 3, 3, available at <http://www.oecdwash.org/NEWS/LOCAL/oecdwash-aug-sept2003.pdf>. Green Box support includes research, pest and disease control, training services, extension and advisory services, inspection services, marketing and promotion services, and infrastructural services. Agreement on Agriculture, *supra* note 45, Annex 2, para. 2, 1867 U.N.T.S. at 425-26. In contrast, “Blue Box” support is support designed to limit production, but with less trade distorting effects than “Amber Box” support. *WTO and OECD Support Indicators*, *supra*. Members are not supposed to increase “Blue Box” spending, but have not agreed to reductions. *Id.*

<sup>50</sup> “Amber Box” support, which is measured by AMS, consists of direct payments to farmers and generally serves to support prices. *WTO and OECD Support Indicators*, *supra* note 49, at 3.

<sup>51</sup> AN ANATOMY OF THE WORLD TRADE ORGANIZATION 9 (Konstantinos Adamantopoulos ed., 1997); ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, THE URUGUAY ROUND 17 (1995).

<sup>52</sup> AN ANATOMY OF THE WORLD TRADE ORGANIZATION, *supra* note 51, at 9.

<sup>53</sup> GEBOYE DESTA, *supra* note 22, at 67. “[N]on-tariff barriers [are converted] to tariffs based on the difference between average 1986-88 internal prices and world market prices.” ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 51, at 15.

<sup>54</sup> See GEBOYE DESTA, *supra* note 22, at 67. “Dirty tariffication” refers to the manipulation of internal prices or world market prices in the base period so the allowable tariff conversion is extraordinarily high and poses no actual restriction. *Id.* at 75.

Each tariff line was required to be reduced by a minimum of 15 per cent while the average minimum was 36 per cent. The corresponding figures for developing countries are two-thirds of those relating to developed countries (i.e. 24 per cent average and 10 per cent per tariff line) to be implemented over a period of up to 10 years. Least-Developed countries are required only to tariffify and bind their tariffs; they are not obliged to undertake reduction commitments.<sup>55</sup>

Where few imports took place in the base period due to restrictive regimes, tariffication is rendered ineffective because of the high tariff conversion (i.e., a complete ban on the import of a product would yield an infinite tariff equivalent). Thus the URAA established minimum access opportunity requirements that require members to implement minimal tariffs on a given import until that import represents three percent of domestic consumption for the base year (and five percent of the base figure by 2000).<sup>56</sup>

Notably, Article 5 (the special safeguard clause) still allows for protectionist measures in extreme circumstances to compensate for the vulnerabilities a country may experience after binding its tariffs.<sup>57</sup> A member may invoke the special safeguard clause if the volume of an entering import exceeds a predetermined trigger level that varies by country and is based on existing import levels for that country.<sup>58</sup> Alternatively, if the price of a given import falls below a predetermined trigger price, then a member may also invoke the special safeguard clause.<sup>59</sup>

### 3. *Export Competition*

Lastly, the URAA made modest progress in reducing export subsidies.<sup>60</sup> Members are prohibited from utilizing export subsidies on all non-scheduled items while they may continue to use the export subsidies enumerated in Article 9.1, subject to reduction commitments.<sup>61</sup> The reduction commitments

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<sup>55</sup> *Id.* at 73-74.

<sup>56</sup> *Id.* at 77; AN ANATOMY OF THE WORLD TRADE ORGANIZATION, *supra* note 51, at 8-9.

<sup>57</sup> Agreement on Agriculture, *supra* note 45, art. 5, 1867 U.N.T.S. at 413-15.

<sup>58</sup> *Id.* art. 5, para. 1(a), 1867 U.N.T.S. at 413.

<sup>59</sup> *Id.* art. 5, para. 1(b), 1867 U.N.T.S. at 413.

<sup>60</sup> Export subsidies are defined as "subsidies contingent upon export performance." *Id.* art. 1(e), 1867 U.N.T.S. at 411.

<sup>61</sup> GEBOYE DESTA, *supra* note 22, at 241.

pertain to budget expenditures and quantities exported: budget expenditures for export subsidies in developed countries must be reduced by thirty-six percent over a six-year period from the 1986-1990 base period, while developing countries must make a twenty-four percent reduction over a ten-year period. No reduction is required for the least developed countries.<sup>62</sup> Also, “quantities exported with subsidies [must] be reduced by 21 per cent over six years” in developed countries and fourteen percent over ten years in developing countries.<sup>63</sup>

In sum, the Uruguay Round was an important first step towards the formation of a legitimate global trade regime capable of removing barriers to trade. Unlike the GATT, the URAA calls for specific and substantial commitments from members and removes agriculture’s exceptionalism, making it instead a focal point of negotiations. Among the major accomplishments were improvements in market access and transparency from tariffication, classification and reduction measures for the domestic supports that mostly distort trade, and restrictions on the use of export subsidies.<sup>64</sup>

Despite considerable progress, the URAA leaves much to be desired. Domestic support commitments, anchored in the 1986-1988 base period when domestic support was extraordinarily high, “generally did not require countries to do anything they had not already done.”<sup>65</sup> Two hundred thirty-five billion dollars was still transferred to agricultural producers in 2002,<sup>66</sup> much of which was originally classified as “Amber Box” and shifted into the “Blue Box” or “Green Box” categories to reduce “Total AMS” to meet URAA commitments.<sup>67</sup>

In the area of market access, post-Uruguay Round, bound agricultural tariffs still average sixty-two percent, the highest tariffs coming from the developing world.<sup>68</sup> Similarly, export subsidies, which remain legal on scheduled items, now total over \$27 billion for members, ninety percent of

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<sup>62</sup> ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 51, at 17.

<sup>63</sup> *Id.*

<sup>64</sup> See OPTIONS FOR PROGRESS, *supra* note 8, at 1-9.

<sup>65</sup> Green, *supra* note 46, at 822.

<sup>66</sup> *Subsidies to Agriculture: Why?*, OECD IN WASHINGTON, Aug.-Sept. 2003, at 3, 3, available at <http://www.oecdwash.org/NEWS/LOCAL/oecdwash-aug-sept2003.pdf>.

<sup>67</sup> OPTIONS FOR PROGRESS, *supra* note 8, at 19 (noting that “[o]ver [sixty] percent of the domestic support in OECD countries is now excluded from reduction commitments”).

<sup>68</sup> *Id.* at 10 (indicating that developing countries in Africa, the Caribbean, and South Asia have average bound tariffs ranging from 71-113%, while the EU and United States have bound agricultural tariffs of 30% and 12%, respectively).

which are paid by the EU alone.<sup>69</sup> There has also been a proliferation in the use of export credits,<sup>70</sup> possibly in an effort to circumvent export subsidy restrictions.<sup>71</sup>

Lastly, developing countries argue that developed countries such as the United States, which produces twice as much wheat as its population needs, use food aid as a form of export subsidy, paying farmers for excess supply to be shipped overseas, rather than buying locally-sourced products.<sup>72</sup>

### C. Doha Declaration

In the face of protectionism left intact by the URAA, trade ministers seized authority under Article 20 of the URAA and, in the Doha Declaration, reaffirmed “the long-term objective . . . 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.”<sup>73</sup> They then committed the WTO 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.”<sup>74</sup>

The Declaration was applauded from all quarters for its potential, if not for its substance. James Wolfensohn, president of the World Bank, stated that “[a] ‘good’ pro-poor Doha agreement that lowered tariff peaks and averages in both rich and developing countries could produce up to \$520bn in income gains, benefiting rich and poor alike. Such an agreement would increase growth in developing countries and would lift an additional 140m people out of poverty

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<sup>69</sup> *Id.* at 15.

<sup>70</sup> Export credit can take the form of government loans with terms more favorable than those available on the private market, interest rate subsidies, government assumption of default on private loans, or government-supported or-subsidized insurance offered to private lenders. *Id.* at 17.

<sup>71</sup> *Id.* (citing an Organization for Economic Cooperation Development report that indicates a rise in export credits from \$5.5 billion in 1995 to \$7.9 billion in 1998).

<sup>72</sup> Roger Thurow & Scott Kilman, *Seed of Discord: As U.S. Food Aid Enriches Farmers, Poor Nations Cry Foul*, WALL ST. J., Sept. 11, 2003, at A1.

<sup>73</sup> Doha Ministerial Declaration, *supra* note 4, para. 13.

<sup>74</sup> *Id.* Paragraph 14 of the Doha Ministerial Declaration states that “[m]odalities for the further commitments, including provisions for special and differential treatment, shall be established no later than 31 March 2003,” a goal that was not achieved. *Id.* para. 14.

by 2015.”<sup>75</sup> The Secretary-General of the Organization for Economic Cooperation and Development (OECD) agreed, concluding “that it is in the interest of the people of OECD countries to reduce, and even eliminate, tariffs and export subsidies in agriculture.”<sup>76</sup> Thus, amid wide recognition of agricultural liberalization’s enormous benefits and the potential of the Doha Round to deliver those benefits, various modalities texts were introduced in preparation for the Cancun Ministerial Conference.

### III. ANALYSIS

The first step in realizing the objectives of the Doha Declaration is to establish modalities. This section will first conduct a detailed examination of the modalities drafts proposed before the Cancun meeting. Each will be analyzed according to domestic support, market access, and export competition. Then, trade liberalization by means of bilateral and regional agreements will be explored before returning to the multilateral context and the search for a modalities draft in the WTO. Finally, this section will elucidate mechanisms by which a consensus can be obtained and expanded.

The United States and EU made the first attempt at constructing a modalities draft. With Cancun looming on the horizon, neither party could come to terms with the other’s demands. The U.S. WTO Agriculture Proposal, presented mid-summer 2002, went far in reforming agricultural trade, calling for the total elimination of export subsidies, aggressive cuts in agricultural tariffs through the use of a harmonizing formula,<sup>77</sup> and restriction of trade-distorting domestic support to five percent of the total value of agricultural production.<sup>78</sup>

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<sup>75</sup> James Wolfensohn, *A Good ‘Pro-Poor’ Cancun Could Help Rich as Well*, FIN. TIMES (London), Sept. 8, 2003, at 19.

<sup>76</sup> Honorable Donald J. Johnston, Speech at the Cancun Ministerial Meeting (Sept. 11, 2003), <http://www.oecd.org/dataoecd/21/3/12970704.pdf>.

<sup>77</sup> “Harmonizing reductions . . . make steeper cuts on higher tariffs, bringing the final tariffs closer together (to ‘harmonize’ the rates).” WTO, Reduction Methods, at [http://www.wto.org/english/tratop\\_e/agric\\_e/agnegs\\_swissformula\\_e.htm](http://www.wto.org/english/tratop_e/agric_e/agnegs_swissformula_e.htm) (last visited Apr. 29, 2005). One method of harmonizing reductions employs “[m]athematical formulas designed to make steeper cuts (i.e., higher percentage cuts) on higher tariffs.” *Id.* The United States’ proposal calls for the use of the Swiss 25 formula, which can be expressed as  $T_1 = (T_0 * a) / (T_0 + a)$ , where  $T_1$  is the new tariff,  $T_0$  is the current tariff, and  $a$  is the tariff ceiling (twenty-five percent). Foreign Agricultural Serv., U.S. Dep’t of Agric., Market Access: The Swiss 25 Formula in Action, at <http://www.fas.usda.gov/itp/wto/marketaccess.htm> (last modified Mar. 24, 2004).

<sup>78</sup> Foreign Agricultural Serv., U.S. Dep’t of Agric., The U.S. WTO Agriculture Proposal, at

The EU presented its own proposal, albeit less sweeping, that suggested a thirty-six percent average tariff reduction instead of a harmonizing formula and maintenance of URAA domestic support disciplines.<sup>79</sup> U.S. agricultural interests responded harshly, accusing the EU of working to undermine trade liberalization and introducing new barriers to trade.<sup>80</sup> These criticisms were echoed in Congress and led the United States to exert continued pressure on the EU to liberalize agricultural trade.<sup>81</sup> Thus, unable to reconcile their differences, the United States and EU appeared ready to maintain separate positions in Cancun.

### A. Modalities Texts

On March 18, 2003, amidst the U.S.-EU struggle, Ambassador Stewart Harbinson of Hong Kong—active in his capacity as chairman of the WTO Committee on Agricultural Negotiations—produced the first modalities draft (Harbinson Proposal) to bridge gaps in the negotiating positions of the various members.

#### 1. Harbinson Proposal

Chairman Harbinson drafted a modalities paper that incorporated elements of both the U.S. and EU proposals.<sup>82</sup> Market access provisions fell closer to the U.S. position by calling for graduated tariff cuts over a five-year period, though a simple average reduction was used instead of the U.S.-favored

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<http://www.fas.usda.gov/itp/wto/proposal.htm> (last modified Mar. 24, 2004) [hereinafter U.S. WTO Agriculture Proposal].

<sup>79</sup> Press Release, European Union, WTO & Agriculture: EU Takes Steps to Move Negotiations Forward (Jan. 27, 2003), <http://www.eurunion.org/news/press/2003/2003004.htm>.

<sup>80</sup> Letter from AgTrade to the Honorable Robert B. Zoellick, United States Trade Representative (Jan. 22, 2003), <http://www.affi.com/policy-letters-euletter.pdf>.

<sup>81</sup> See Memorandum from Chuck Grassley, U.S. Senator, to Reporters and Editors (Jan. 29, 2003) (describing the EU proposal as leaving much to be desired), <http://grassley.senate.gov/releases/2003/p03r01-29a.htm>.

<sup>82</sup> Although referred to as one document in this section, the Harbinson Proposal consists of two documents. The first is *Negotiations on Agriculture: First Draft of Modalities for Further Commitments*, WTO Comm. on Agriculture, Special Sess., WTO Doc. TN/AG/W/1 (2003), and the second, the basis of the analysis in this Note, is the revised draft of that document, *Negotiations on Agriculture: First Draft of Modalities for Further Commitments: Revision*, WTO Comm. on Agriculture, Special Sess., WTO Doc. TN/AG/W/1/Rev. 1 (2003) [hereinafter Harbinson Proposal].

harmonizing formula.<sup>83</sup> Also in line with the U.S. proposal, the Proposal provided for more rigorous rules for state trading enterprises.<sup>84</sup> Conversely, the Proposal's domestic support provisions reflected the EU's position. Paragraph 41 maintained the URAA domestic support framework and declined to pursue the EU-maligned five percent domestic support cap.<sup>85</sup> Further, the Proposal emulated the EU's position on export credits and food aid.<sup>86</sup> Notably, there were also provisions in the Proposal directed to the interests of developing nations. In the area of market access, for instance, a negative-list approach was created whereby developing nations could exempt "special products" from general tariff reduction commitments.<sup>87</sup>

Despite making substantial progress, the Harbinson Proposal failed to find enough common ground.<sup>88</sup> The United States voiced several objections. First, it viewed the Proposal's tariff reduction commitments as ineffective because they allowed high tariffs on sensitive products to remain in place.<sup>89</sup> Also in the market access arena, the United States was displeased with the use of a simple average tariff reduction instead of a harmonizing formula because the EU's tariff levels could remain extremely high compared to those in the United States.<sup>90</sup> Second, the United States expected deep cuts in Amber and Blue Box payments, but the Harbinson Proposal only preserved the status quo as set out in the URAA.<sup>91</sup>

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<sup>83</sup> Harbinson Proposal, *supra* note 82, para. 8.

<sup>84</sup> *Id.* para. 27.

<sup>85</sup> *Id.* para. 41.

<sup>86</sup> *Id.* paras. 36-37.

<sup>87</sup> *Id.* para. 11.

<sup>88</sup> The Harbinson Proposal was formally rejected at the WTO Tokyo "mini-ministerial," which was designed to sample the status of trade negotiations prior to the Cancun meeting. Ken Belson, *World Trade Talks in Japan Falter After Three Days*, N.Y. TIMES, Feb. 16, 2003, at A3.

<sup>89</sup> Japan, for instance, only has an average tariff of 51%, but exacts a 490% tariff on rice imports. Press Release, U.S. Dep't of State, U.S. Agriculture Official Says WTO Proposal Too Limited (Feb. 21, 2003) [hereinafter Hegwood], <http://usinfo.state.gov/topical/econ/wto/03022101.htm>. The Harbinson Proposal calls for a 45% reduction in tariffs over 90%, thereby leaving Japan's rice tariffs at a remarkably high 270%. *Id.* By contrast, the Swiss Formula would lower the tariff to 24%.

<sup>90</sup> See Christopher S. Rugaber, *Senate Panel Criticizes Harbinson WTO Proposal on Agriculture Trade*, 20 INT'L TRADE REP. (BNA) No. 10, at 415 (Mar. 6, 2003).

<sup>91</sup> In 2000, EU domestic support payments totaled \$68 billion while the United States spent \$24 billion. Hegwood, *supra* note 89. The Harbinson Proposal would reduce EU spending to \$42 billion and U.S. spending to \$12 billion, a result deemed inequitable and unacceptable by the United States. See *id.*; Harbinson Proposal, *supra* note 82, para. 41.

The EU also expressed dissatisfaction. Agricultural Commissioner Franz Fischler stated that “we find few elements which offer the possibility of bridging the differences between WTO members.”<sup>92</sup> With regard to export subsidization, the EU viewed the Proposal as unbalanced because they were being asked to completely phase out such subsidies over a five-year period.<sup>93</sup> At the same time, alternative forms of export subsidization more heavily used by the United States, like export credits and farm aid, were kept intact.<sup>94</sup> The EU also criticized measures to reduce domestic support, their chief complaint being that the Proposal reduced non-trade distorting Blue Box support,<sup>95</sup> but did not restrict U.S. de minimis spending<sup>96</sup> that is trade-distorting by definition.<sup>97</sup>

Developing nations joined in the chorus of complaints. Although paragraph 11 exempts “special products” from reduction commitments, developing nations were nervous about the lack of specificity in the Proposal regarding the number of products to be included in the “special products” category.<sup>98</sup> Also, the Proposal did not incorporate a countervailing mechanism to enable developing nations to raise tariffs in an amount proportionate to the level of subsidization in other countries.<sup>99</sup>

## 2. *Joint EC-U.S. Paper*

As the summer of 2003 concluded, agricultural negotiations appeared dead in the water. Members decisively rebuked the Harbinson Proposal. Further, the two parties best able to restart negotiations, the United States and EU, appeared unwilling to reconcile their differences. But surprisingly, the two reached a common negotiating position a mere six months after abandoning the

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<sup>92</sup> Press Release, European Union, EU’s Fischler Says, “Harbinson Draft Won’t Bridge Gaps” in WTO Agriculture Talks (Feb. 13, 2003) [hereinafter Fischler], <http://www.eurunion.org/News/press/2003/2003010.htm>.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* paras. 36-37.

<sup>95</sup> Fischler, *supra* note 92; Harbinson Proposal, *supra* note 82, para. 44.

<sup>96</sup> De minimis spending is support not required to be included in a Member’s AMS. See Agreement on Agriculture, *supra* note 45, art. 6, para. 4, 1867 U.N.T.S. at 415-16.

<sup>97</sup> Harbinson Proposal, *supra* note 82, para. 44; see Daniel Pruzin, *EU’s Fischler Lobbies Harbinson to Change Treatment of EU, U.S. Ag Subsidies in Text*, INT’L TRADE REP., Mar. 13, 2003, at 456.

<sup>98</sup> See Walden Bello, *The AoA: Institutionalizing Monopolistic Competition*, INQ7.net, at [http://www.inq7.net/opi/2003/sep/01/opi\\_wbello-1.htm](http://www.inq7.net/opi/2003/sep/01/opi_wbello-1.htm) (last visited Apr. 29, 2005).

<sup>99</sup> *Id.*

Harbinson Proposal and less than one month before negotiations were to begin in Cancun. The Joint Paper they produced can be faulted for vagueness and failing to address several important issues, but it is nonetheless remarkable for finding common ground between the United States and EU and for serving as a starting point for Cancun.<sup>100</sup> Behind the Joint EC-U.S. Paper was a recognition that agriculture lay at the heart of all WTO negotiations. If negotiations regarding agriculture did not move forward, then nothing in the WTO was to move forward.<sup>101</sup>

The Joint Paper begins by harkening back to the objectives of the Doha Declaration, which includes “the objective to establish a fair and market-oriented system through fundamental reform in agriculture,” and also recognizes that “special and differential treatment for developing countries will be an integral part of the negotiations, and that non-trade concerns should be taken into account.”<sup>102</sup> These statements alone were a major step for both parties, perhaps signaling a serious willingness on behalf of the EU to reform its enormous CAP and openness by the United States and EU to negotiate non-trade concerns.

In the area of domestic support, the Joint Paper demonstrates a level of respect for both parties’ interests. For example, Amber and Blue Box support are not equated like the United States proposed earlier. Instead, Amber Box support is reduced by an unspecified range,<sup>103</sup> while less trade-distorting domestic support is permitted but capped at five percent of the total value of agricultural production.<sup>104</sup> The Joint Paper also addresses the EU’s complaints concerning the Harbinson Proposal’s one-sided approach to domestic support by reducing *de minimis* spending.<sup>105</sup>

The Joint Paper found further consensus by introducing truly hybrid market access provisions. Some tariffs are reduced by a simple average (the approach used in the URAA and preferred by the EU).<sup>106</sup> Other tariffs are reduced using

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<sup>100</sup> *An Agreement to Deal*, ECONOMIST, Aug. 16, 2003, at 65.

<sup>101</sup> Conference Call to Discuss Agriculture Trade Negotiations at the WTO with Allen Johnson, Ambassador, Chief Agricultural Negotiator (Aug. 13, 2003) (quoting chief U.S. agricultural trade negotiator Allen Johnson as saying, “If agriculture doesn’t move forward, nothing is going to move forward”), at <http://usinfo.state.gov/topical/econ/wto/agtranscript/030813.htm>.

<sup>102</sup> Joint Paper, *supra* note 13.

<sup>103</sup> *Id.* para. 1.1.

<sup>104</sup> *Id.* para. 1.2(ii).

<sup>105</sup> *Id.* para. 1.3.

<sup>106</sup> The tariffs in this category would be subject to an average and minimum tariff cut, thus improving market access for even sensitive products. Market access could also be improved

the Swiss harmonizing formula (the United States' preferred method),<sup>107</sup> and all tariffs are essentially capped.<sup>108</sup> For developing nations, the Joint Paper includes a special agricultural safeguard along with special and differential treatment that includes lower tariff reductions and a broader time horizon for implementation.<sup>109</sup> Unfortunately, the Joint Paper does not elaborate on the details of developing nation treatment.

Lastly, the Joint Paper's treatment of export competition is in line with EU demands, reducing export subsidies with a view toward phasing them out "on a schedule that is parallel in its equivalence of effect on export subsidies and export credits."<sup>110</sup> Thus, the Joint Paper eliminates the unbalanced approach of the Harbinson Proposal whereby EU-utilized export subsidies were restricted but U.S.-utilized export credits went untouched. Instead, export subsidies and credits are linked together and reduced in tandem. Accordingly, reductions in export subsidies are reflected by equal reductions in export credits.<sup>111</sup> Specifically regarding export credits, the Joint Paper reduces export credits by restricting repayment terms to those available in commercial practice.<sup>112</sup> Also, the Joint Paper suggests both regulating food aid to avoid displacement on the commercial market and protocols for disciplining state trading enterprises, but the details of such guidelines are sparse.<sup>113</sup>

With the above provisions, the Joint Paper assumed the form of an agreement in principle; an agreement in practice was seemingly achievable via more extensive negotiations. Ultimately, the real challenge remains in arriving at a more precise agreement by filling in acceptable numbers.<sup>114</sup> While it is easy for the United States to agree to reduce de minimis spending, for instance, deciding on the exact level of reduction will be considerably more difficult. Perhaps the most complex set of decisions involves market access. The United States will surely fight for the application of the Swiss harmonizing formula

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through expansion of tariff-rate quotas, whereby imports falling under the quota are subject to a lower tariff than imports above the quota. *Id.* para. 2.1(i); see OPTIONS FOR PROGRESS, *supra* note 8, at 12-14 (explaining tariff-rate quotas).

<sup>107</sup> Joint Paper, *supra* note 13, para. 2.1(ii).

<sup>108</sup> *Id.* para. 2.2.

<sup>109</sup> *Id.* paras. 2.4-2.6.

<sup>110</sup> *Id.* para. 3.3.

<sup>111</sup> *Id.* para. 3.2.

<sup>112</sup> *Id.*

<sup>113</sup> See *id.* paras. 3.4-3.5.

<sup>114</sup> See James Cox, *U.S., European Union Urge Cuts in Farm Subsidies*, USA TODAY, Aug. 14, 2003, at 3B (quoting Senator Charles Grassley as saying "[t]he devil is in the details, and many aspects of the proposal need to be developed").

to the most important tariffs, and conversely, the EU will seek application of simple average tariff reductions. Once that is decided, the parties will begin arguing anew over the coefficient to be utilized in the Swiss formula and average and minimum reduction amounts.

Perhaps less contentious are domestic support and export credit figures. In each area the parties were relatively appeased with neither drastically abandoning their original positions. Regarding domestic support, both the United States and EU agree that Amber Box support should be reduced, and the United States achieved its goal of limiting support with a five percent cap on support that is less trade distorting.

The Joint Paper reached its fairest and most respectable conclusion on export competition. With parallel disciplines on export subsidies and credits, both parties are forced to relinquish some support, but will simultaneously reap the benefits of the other's reductions. Nonetheless, a myriad of problems remain after the presentation of the Joint Paper.

Although the United States and EU are powerhouses in the agricultural arena and pivotal to the success of WTO agreements, one cannot forget that 147 other members also have a role in approving a final agreement. From the perspective of other developed and developing nations, the Joint Paper was wanting.<sup>115</sup> Many European and American domestic subsidies, which respectively total \$88 billion and \$52 billion annually, are included in the Blue Box, and thus are not governed by Joint Paper restrictions.<sup>116</sup> Further, many developing nations, being agricultural exporters, saw the Joint Paper as an attempt to open their doors via tariff reductions without demanding similar domestic support sacrifices from the United States and EU.<sup>117</sup> Also unhelpful was the lack of concrete numbers, for developing nations could be confident that the farm lobby in developed countries would work hard to keep final liberalization commitments at a minimum.<sup>118</sup>

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<sup>115</sup> See Naomi Koppel, *U.S., EU Forge Compromise On Farm Trade*, WASH. POST, Aug. 14, 2003, at E1 (quoting India's WTO ambassador as saying the proposal is not feasible for India, Australia's ambassador as saying the proposal is an accommodation to the U.S. and EU, and Brazil's ambassador as saying he is wary of the proposal).

<sup>116</sup> *An Agreement to Deal*, *supra* note 100.

<sup>117</sup> See Paul Meller & David Barboza, *Deal Reached on Subsidies for Farmers*, N.Y. TIMES, Aug. 14, 2003, at C1 (quoting Indian Ambassador to the WTO K.M. Chandrasekhar as saying the proposal "seems to be an attempt to pry open the developing country markets without clear commitments on the part of either the United States or the EU to open their own markets").

<sup>118</sup> *An Agreement to Deal*, *supra* note 100.

### 3. *G21 Communiqué*

Only days after the United States and EU reached an agreement, WTO General Council Chairperson Carlos Pérez del Castillo submitted a draft Cancún Ministerial text to trade ministers that largely reflected the posture of the Joint Paper.<sup>119</sup> In response to the draft and its perceived unfairness, Indian Ambassador to the WTO K.M. Chandrasekhar took the initiative in forming a curious group of twenty-one African, Caribbean, Asian, and Latin nations.<sup>120</sup> Serving as a counterweight to the United States and EU, the G21 presented its own modalities paper shortly before the Cancun meeting.<sup>121</sup> The Joint EC-U.S. Paper, no longer the sole basis for negotiations, was flanked by the Communiqué. The cornerstone of the Communiqué is the elimination of circumvention techniques used by developed nations to overcome restrictions. In domestic support, for instance, the Communiqué abandons the Blue Box classification, which often serves as a receptacle for support disallowed in other classifications.<sup>122</sup> Export subsidies are also more tightly controlled so that export credits and food aid cannot be used as an end-run around export subsidy regulations. And in the area of market access, the Communiqué culls the availability of special safeguards for developed nations.<sup>123</sup>

The Communiqué is bold in that it abandons the URAA convention of grouping domestic support in Green, Blue, and Amber Boxes according to the level of trade distortion. The reluctance of the G21 to follow the URAA stems from the propensity of developed nations to simply reclassify Amber Box payments in another category to avoid restrictions.<sup>124</sup> The most egregious example of the deleterious effects of such actions involves cotton. The United States and China, two countries that account for forty-five percent of the world's cotton growth, spend over \$3 billion and \$1.2 billion, respectively, annually on cotton subsidies, with the EU giving \$700 million annually to

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<sup>119</sup> World Trade Organization Draft Cancun Ministerial Text (Aug. 24, 2003), at [http://www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/draft\\_decl\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min03_e/draft_decl_e.htm) [hereinafter First Draft Text].

<sup>120</sup> The exact size and membership of the G21 fluctuated, but its membership hovered around twenty-one members. See *supra* note 15 for a list of G21 members.

<sup>121</sup> G21 Communiqué, *supra* note 15.

<sup>122</sup> *Id.* art. 1.1(iii).

<sup>123</sup> See generally *India: Statement by H.E. Mr. Arun Jaitley, Minister of Commerce and Industry and Law and Justice*, WTO Ministerial Conference, 5th Sess. (Cancún), WTO Doc. WT/MIN(03)/ST/7 (2003).

<sup>124</sup> See *supra* notes 67-68 and accompanying text.

growers in Greece and Spain.<sup>125</sup> The result is a dramatic price depression on the world market that sullies the livelihood of some 10 million cotton growers in West Africa.<sup>126</sup> Consequently, the Communiqué is designed to end developed-world-relished domestic support that is made possible through Blue Box classification.

However, like the Joint Paper, the Communiqué leaves out concrete figures and is only meant to be a framework. This framework accomplishes a fair level of harmonization by subjecting domestic support measures to reductions within a yet to be determined range with the products benefiting from the largest amount of support subject to reductions in the upper end of the range.<sup>127</sup> The Communiqué also reduces de minimis spending for developed countries,<sup>128</sup> the sum of the AMS and de minimis spending also being cut by an unspecified minimum percentage.<sup>129</sup> Lastly, and perhaps most importantly to escape a situation similar to the cotton debacle, the Communiqué caps and/or reduces Green Box support for developed countries.<sup>130</sup>

The Joint Paper and Communiqué have remarkably similar market access provisions that stipulate a hybrid method for reducing tariffs. Like the Joint Paper, the Communiqué suggests subjecting some tariffs to a simple average reduction, but contains the additional element of further reducing tariffs on processed products when such tariffs are higher than the tariff on the product in its primary form.<sup>131</sup> Other tariff lines are subject to the Swiss harmonizing formula, while still other products are duty free.<sup>132</sup> Another similarity is the application of a ceiling under which all tariffs must fall by either reducing tariffs directly or expanding tariff rate quotas.<sup>133</sup>

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<sup>125</sup> *A Great Yarn*, ECONOMIST, Dec. 20, 2003, at 43.

<sup>126</sup> *See id.* Notably, in a case filed by Brazil, a WTO dispute settlement panel determined the United States to be in violation of WTO subsidy commitments. WTO Dispute Settlement Panel Report on U.S. Subsidies on Upland Cotton, WTO Doc. WT/DS267/R (2004); *see also A Knotty Problem; America and the WTO*, ECONOMIST, May 1, 2004, at 77 (summarizing the WTO's ruling). The United States has since filed an appeal. *United States – Subsidies on Upland Cotton: Notification of an Appeal by the United States*, WTO Doc. WT/DS267/17 (2004).

<sup>127</sup> G21 Communiqué, *supra* note 15.

<sup>128</sup> *Id.* para. 1.1(iv).

<sup>129</sup> *Id.* para. 1.1(v). De minimis spending is maintained at existing levels for developing countries. *Id.* para. 1.4.

<sup>130</sup> *Id.* para. 1.2.

<sup>131</sup> *Id.* para. 2.1(i).

<sup>132</sup> *Id.* para. 2.1(ii-iii).

<sup>133</sup> *Id.* para. 2.2. Regarding tariff rate quotas, *see supra* note 106.

The Communiqué departs from the Joint Paper by requiring that the special agricultural safeguard be discontinued for developed countries.<sup>134</sup> Also, the Communiqué expands the amount of duty-free access available to developing countries by eliminating duties on tropical products, as well as on some percentage of agricultural imports from developing nations.<sup>135</sup> Finally, while the Joint Paper only calls for special and differential treatment in the form of lower tariff reductions and longer implementation periods, the Communiqué resembles the Harbinson Proposal in calling for the establishment of "special products" not subject to tariff reductions, and average and minimum cuts for the remaining tariff lines.<sup>136</sup>

Lastly, with regard to export subsidies, the Communiqué abandons the parallel approach used in the Joint Paper. A logical fear is that linking export subsidies and credits, rather than having the intended effect of encouraging quicker liberalization, would force the United States and EU into a truce whereby each maintains their respective payment programs to avoid export competition reductions altogether. Instead, the Communiqué proposes phasing out export subsidies in similar fashion to the Joint Paper, whereby export subsidies on products enumerated by developing countries are phased out rapidly and other export subsidies are phased out at a slower pace.<sup>137</sup> The Communiqué also requires development of disciplines to prevent commercial displacement through food aid programs.<sup>138</sup> But the Communiqué fails to elucidate how export credits, a crucially important issue to the developing world, are to be governed. It only calls for disciplines to be "implemented on a rules based approach" to prevent circumvention of export subsidy commitments.<sup>139</sup> Unfortunately, the method for creating such a regime is not articulated in the Communiqué, leaving unanswered what the rules of the "rules based approach" might entail. For this reason, the Joint Paper's treatment of export subsidies is superior and at least ensures some level of export credit reduction vis-à-vis export subsidy reduction commitments.<sup>140</sup>

In sum, the Communiqué is roughly similar to the Joint Paper, but does not reflect some of the specific elements laid out by the United States and EU.

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<sup>134</sup> *Id.* para. 2.4. A special safeguard mechanism is available to developing countries under both proposals. *Id.* para. 2.7.

<sup>135</sup> *Id.* para. 2.5.

<sup>136</sup> *Id.* para. 2.6.

<sup>137</sup> *Id.* para. 3.1.

<sup>138</sup> *Id.* para. 3.3.

<sup>139</sup> *Id.* para. 3.2.

<sup>140</sup> Joint Paper, *supra* note 13, para. 3.2.

Because the United States desires reductions in domestic support as well, the G21 might be able to court its support in abandoning the URAA box classification. Such a move would bring the United States back to the more drastic approach it assumed in its original WTO agriculture proposal.<sup>141</sup> Intense pressure from the EU, however, will very likely constrain the United States from assuming a position more aggressive than that agreed to in the Joint Paper.

The Communiqué and the Joint Paper most closely resemble one another in the area of market access. Both call for the dual application of a simple average reduction and the Swiss harmonizing formula. But while a market access framework is easily drafted and an agreement seems achievable, the substance of the framework may prove immensely difficult to settle. As was concluded regarding the Joint Paper, genuine market access negotiations commence with choosing the actual figures to be applied inside the framework, not in finding a general structure. Members may agree to reduce tariffs in principle, but as is historically the case, actual tariff reduction commitments will be fiercely debated.

Lastly, the Communiqué unequivocally rejects the Joint Paper's export competition provisions. While the Joint Paper was innovative in finding consensus by intimately linking export subsidy and credit reductions, the Communiqué only makes a generalized suggestion of developing disciplines based on rules. Thus almost by default, the Communiqué appears unlikely to exert influence on the Joint Paper's export competition framework.

#### 4. Draft Text

Despite the failure of prior efforts to deliver an acceptable modalities text, genuine hope for a breakthrough was carried into the Cancun Ministerial Conference. On the eve of the conference, U.S. Secretary of Agriculture Ann M. Veneman said that "[t]he prospects for success in the World Trade Organization negotiations to liberalize global trade are now becoming somewhat brighter. The new momentum again provided some hope for achieving historic progress in international trade."<sup>142</sup> But hope was accompanied by equal doses of realism about the difficulty of negotiating in a

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<sup>141</sup> See U.S. WTO Agriculture Proposal, *supra* note 78.

<sup>142</sup> Ann M. Veneman, *Veneman: Prospects for WTO Agreement Brighter*, DELTA FARM PRESS, Sept. 12, 2003, at 36.

multilateral context.<sup>143</sup> As illustrated by the G21's need to issue a Communiqué, the original Draft Text was ill-received. The cover letter of that text reported a now widely shared view that the objective in agriculture at Cancún should be to add impetus to the negotiations through, first, agreeing on a framework faithful to the Doha mandate, and second, directing the subsequent work towards establishment of full modalities.<sup>144</sup> Beyond that basic agreement however, developing nations concurred with little else.<sup>145</sup> To reinvigorate talks and to pull developing nations away from the brink, General Council Chairman del Castillo issued a second revision of the Draft Text that closely reflected the Joint Paper while making concessions to developing nations.<sup>146</sup> In the areas of domestic support, market access, and export subsidies, the Draft Text was an amalgam of the U.S., EU, and G21 proposals.

Preliminarily, the Draft Text embraces a common middle ground and calls for a reduction in the AMS and de minimis spending.<sup>147</sup> It also establishes special and differential treatment for developing nations by allowing for lower reductions of trade-distorting domestic support and longer implementation periods.<sup>148</sup> Remaining in the text, however, in contrast to the Communiqué, is the availability of less trade-distorting payments "based on fixed areas and yields" so long as such support does not exceed five percent of the total value of agriculture production.<sup>149</sup> Left unresolved by the Draft Text is the issue of

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<sup>143</sup> See Message from Rubens Ricupero, Secretary-General UN Conference on Trade and Development, to the Fifth Ministerial Conference of the World Trade Organization (Sept. 10, 2003) (discussing the potential of open markets to create jobs and income while urging negotiators to work together), available at [www.un.org/apps/sg/printsgstats.asp?nid=491](http://www.un.org/apps/sg/printsgstats.asp?nid=491); Robert B. Zoellick, *Committed in Cancun*, WALL ST. J., Sept. 8, 2003, at A16 (discussing income gains to be had from a free trade agreement and describing attainment of a negotiating framework as "no small challenge" due to the number and diversity of participants).

<sup>144</sup> Letter from Carlos Pérez del Castillo, General Council Chairperson, & Supachai Panitchpakdi, Director-General, World Trade Organization, to Dr. Luis Ernesto Derbez Bautista, Secretario de Relaciones Exteriores, Mexico (Aug. 31, 2003), at [http://www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/draft\\_decl\\_covletter\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min03_e/draft_decl_covletter_e.htm).

<sup>145</sup> See generally Scott Miller & Neil King, Jr., *Poor Countries May Hold Sway in WTO Session*, WALL ST. J., Sept. 11, 2003, at A11 (reflecting the general displeasure of developing nations with the first draft).

<sup>146</sup> World Trade Organization Draft Cancun Ministerial Text, Second Revision (Sept. 13, 2003), at [http://www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/draft\\_decl\\_rev2\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min03_e/draft_decl_rev2_e.htm) [hereinafter Draft Text].

<sup>147</sup> *Id.* Annex A, paras. 1.1-1.2. Developing nations are exempt from the requirement to reduce de minimis spending. *Id.* Annex A, para. 1.7.

<sup>148</sup> *Id.* Annex A, para. 1.6

<sup>149</sup> *Id.* Annex A, para. 1.3.

Green Box payments,<sup>150</sup> possibly revealing just how contentious the issue is between the developed and developing worlds. As the Joint Paper made clear, the United States and EU are not interested in abandoning Green Box support.<sup>151</sup> The G21, on the other hand, unequivocally calls for it to be capped and/or eliminated.<sup>152</sup> Thus bargaining positions may have been so divergent as to leave Chairman Castillo without a basis for compromise, except to say that Green Box measures shall be reviewed to ensure that they “have no, or at most minimal, trade-distorting effects or effects on production.”<sup>153</sup> Thus, Green Box support is one of the few areas that saw movement from the first to second drafts. The language from the second draft quoted above appears to be a move in the direction of Green Box supporters, namely the United States and European Union.

The Joint Paper and the Communiqué were not drastically different in their treatment of market access, thus the Draft Text mimics both proposals, leaning slightly more toward the U.S.-EU position. Again, it adopts a “blended formula” whereby some tariff lines are subject to average and minimum simple average reductions and other tariff lines are subject to the Swiss harmonizing formula.<sup>154</sup> To limit excessive tariffs, the Draft Text incorporates a maximum tariff ceiling that must be met through tariff reduction or expanded tariff-rate quotas.<sup>155</sup> This area also saw movement from the first draft towards the developed world, namely the EU, allowing exemptions for a limited number of products based on non-trade concerns. The Draft Text also calls for special and differential treatment with developing nations being obligated to a unique and less stringent set of tariff reduction commitments.<sup>156</sup> More controversial are special agricultural safeguards, which the Draft Text leaves untouched, except to say that they will still be available to developing nations.<sup>157</sup> Although both the Joint Paper and Communiqué agree to enable the use of special safeguards by developing nations, the G21 favors eliminating the special safeguards altogether for developed nations. Developed nations naturally oppose such a restriction, thus the Draft Text only says that the issue

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<sup>150</sup> *Id.* Annex A, para. 1.5.

<sup>151</sup> Joint EC-U.S. Paper, *supra* note 13, para. 1.

<sup>152</sup> G21 Communiqué, *supra* note 15.

<sup>153</sup> Draft Text, *supra* note 146, Annex A, para. 1.5.

<sup>154</sup> *Id.* Annex A, para. 2.1.

<sup>155</sup> *Id.* Annex A, para. 2.2.

<sup>156</sup> *Id.* Annex A, paras. 2.6-2.8.

<sup>157</sup> *Id.* Annex A, para. 2.9.

“remain[s] under negotiation.”<sup>158</sup> Specific terms regarding tariff escalation are also absent.<sup>159</sup>

Lastly, the Joint Paper proposes linking the reduction and elimination of export subsidies with export credits, and thus provides a clearer and more workable standard than the Communiqué’s generic requirement that a “rules based approach” be developed.<sup>160</sup> Accordingly, the Draft Text mirrors the Joint Paper’s export competition provisions.<sup>161</sup> Export subsidies on products of particular interest to developing countries are eliminated; budgetary and quantity allowances for the remaining products are reduced with a view to phasing them out.<sup>162</sup> Members would then commit to eliminate trade-distorting export credits on the products enumerated in Article 3.1 over the same period agreed to for export subsidies.<sup>163</sup> Finally, the Draft Text calls for disciplines to be developed that “prevent commercial displacement through food aid operations.”<sup>164</sup>

Ultimately, the agricultural framework suggested in the second revision failed. U.S. Trade Representative Robert Zoellick observed that “country after country had scorned the draft text.”<sup>165</sup> Chief among the detractors were developing nations that, after not receiving the concessions they desired from developed nations on agriculture, caused the entire meeting to fail by refusing to negotiate on pivotal investment and antitrust rules.<sup>166</sup>

### *B. Finding a Route to Trade Liberalization*

According to WTO Director-General Supachai Pantchpakdi, “In the end the ministers could not summon the necessary flexibility and political will to bridge the gaps that separated them. Sadly, those that will suffer the most for their inability to compromise are the poorest countries among us.”<sup>167</sup> Many

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<sup>158</sup> *Id.* Annex A, para. 2.5.

<sup>159</sup> *Id.* Annex A, para. 2.3.

<sup>160</sup> G21 Communiqué, *supra* note 15, para. 3.2.

<sup>161</sup> *See generally* Draft Text, *supra* note 146; Joint Paper, *supra* note 13.

<sup>162</sup> Draft Text, *supra* note 146.

<sup>163</sup> *Id.* Annex A, para. 3.2.

<sup>164</sup> *Id.* Annex A, para. 3.5.

<sup>165</sup> Zoellick, *supra* note 6. *See supra* note 6 for an explanation of the role of the Singapore issues in negotiations.

<sup>166</sup> Neil King, Jr. & Scott Miller, *Trade Talks Fail Amid Big Divide Over Farm Issues*, WALL ST. J., Sept. 15, 2003, at A1.

<sup>167</sup> Supachai Panitchpakdi, *The Real Losers Are the Poor: After Cancun*, INT’L HERALD TRIB., at 6, Sept. 18, 2003, available at 2003 WLNR 5261613.

paths to agricultural trade liberalization exist, however; a WTO agreement is but one. Thus, before returning to a discussion on how to reach agreements within the WTO, alternatives must be explored.

### *1. Bilateral and Regional Trade Agreements Outside the WTO*

As a result of the inability to reach an agreement in Cancun, members are forced to consider resorting to bilateral and regional trade agreements to proceed with agricultural liberalization.<sup>168</sup> The WTO is becoming too unwieldy to do otherwise. EU Trade Commissioner Pascal Lamy described the current WTO structure as worse than “medieval,” saying, “I’m now wondering whether neolithic isn’t a more appropriate term.”<sup>169</sup> Lamy’s central complaint, shared by most others, is that consensus is an absurd expectation and operating standard when 148 members must negotiate on complex trade issues.<sup>170</sup> Further, the WTO Director General does not have the power of initiative, so negotiations can be pulled at any Member’s whim.<sup>171</sup>

Bilateral and regional agreements, or regionalism, offer advantages beyond escaping WTO inefficiencies.<sup>172</sup> First, governments can better respond to domestic pressures by negotiating in the controlled setting offered by agreements with few parties. Although world opinion is strongly in favor of increased international trade, most people still believe the “availability of good paying jobs” is declining and the “gap between rich and poor” is widening as a result of globalization.<sup>173</sup> Thus, politics dictates that negotiations must be framed carefully to quell fears over trade liberalization. In a bilateral or

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<sup>168</sup> See Neil King, Jr. & Scott Miller, *Cancun: Victory for Whom?*, WALL ST. J., Sept. 16, 2003, at A4 (noting that the United States was in negotiations with fourteen countries during the Cancun conference, with more announcing their interest in bilateral agreements “as the talks broke down”).

<sup>169</sup> Pascal Lamy, *Post-Cancun Primer: My WTO ‘Q&A’*, WALL ST. J., Sept. 23, 2003, at A24.

<sup>170</sup> See *id.* (explaining that the WTO “is unable to handle the weight and complexity of the negotiating issues with 148 members operating under consensus”).

<sup>171</sup> *Id.*

<sup>172</sup> See generally Robert Z. Lawrence, *Emerging Regional Arrangements: Building Blocks or Stumbling Blocks*, in 5 FINANCE AND THE INTERNATIONAL ECONOMY 25 (Richard O’Brien ed., 1991) (arguing that “major regional initiatives currently under way are more likely to represent the building blocks of a world economy than stumbling blocks which prevent its emergence”).

<sup>173</sup> The Pew Research Center, *World Publics Approve Increased International Trade* (Sept. 5, 2003), at <http://people-press.org/commentary/display.php3?AnalysisID=68>. In reality, globalization lessens income disparities and contributes to employment. See NORBERG, *supra* note 9, at 87-89, 136-37 (noting that “incomes [are] more evenly distributed in countries with . . . open markets” and “employment has grown fastest” in the most “internationalized economies”).

regional setting, the negotiating parties retain more control over the final outcome of any agreement and are free to act in self-interest with less constraint, in contrast to the constant compromises that must be produced in the WTO to keep negotiations moving. This freedom reassures the voting public that jobs and other domestic concerns will be protected and consequently renders them more willing to support international negotiation.

Second, and perhaps more importantly, regionalism creates momentum for multilateral negotiations, a process known as "competitive liberalization."<sup>174</sup> For example, the Central American Free Trade Agreement (CAFTA) creates open markets between Central American countries and the United States.<sup>175</sup> Wanting to take advantage of the markets encompassed in CAFTA, Mercosur (a South American customs union), or alternatively, individual nations, will then have a greater stake in joining the Free Trade Areas of the Americas (FTAA), a proposed free trade area comprised of North America, Latin America, and the Caribbean. In turn, the FTAA will encourage the EU and other trading blocs outside the free trade area to enter into multilateral agreements so they may benefit from FTAA markets as well.<sup>176</sup> The benefits of competitive liberalization are two-fold. First, gains from free trade can be had while waiting for a broader multilateral agreement to materialize. Additionally, the terms of a bilateral or regional agreement, if adverse to non-parties, can increase the incentive for those countries to negotiate.<sup>177</sup>

Lastly, bilateral and regional agreements may be concluded with relative speed. The flexibility that is gained by negotiating with one or a few parties as opposed to 147 can produce immediate agreements that contemporaneously address the issues of the day. The United States, for instance, is aggressively pursuing bilateral agreements to improve trade while negotiations are stalled in the WTO. One such agreement was signed on August 8, 2004, to bring the

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<sup>174</sup> C. Fred Bergsten, *A Renaissance for U.S. Trade Policy?*, FOREIGN AFF., Nov.-Dec. 2002, at 86, 94.

<sup>175</sup> Press Release, Office of the U.S. Trade Representative, U.S. & Central American Countries Conclude Historic Free Trade Agreement (Dec. 17, 2003), available at [http://www.ustr.gov/Document\\_Library/Press\\_Releases/2003/December/U.S.\\_Central\\_American\\_Countries\\_Conclude\\_Historic\\_Free\\_Trade\\_Agreement.html](http://www.ustr.gov/Document_Library/Press_Releases/2003/December/U.S._Central_American_Countries_Conclude_Historic_Free_Trade_Agreement.html).

<sup>176</sup> Bergsten, *supra* note 174.

<sup>177</sup> *See id.* (making a similar argument based on the U.S. farm bill's increase in domestic support). *See generally* Edward Alden & Adam Thompson, *Defectors Peel Away from G21 Doha Round Challengers*, FIN. TIMES (London), Oct. 10, 2003, at 9 (discussing Costa Rica, Colombia, and Peru peeling away from the G21 to work more closely with the United States on trade liberalization).

Dominican Republic into CAFTA.<sup>178</sup> Similar agreements were also recently signed with Morocco and Australia.<sup>179</sup> In the case of Morocco, President George W. Bush pursued a free trade agreement as part of his vision for a Middle East Free Trade Area by 2013.<sup>180</sup> Thus, in an effort to address the vitally important concerns of terrorism and instability emanating from the Middle East, President Bush is using bilateral agreements to quickly form relationships and expedite the promotion of economic and social reform abroad.<sup>181</sup>

But this is not to say that spurring liberalization through regionalism is without consequence, or even the best policy to pursue. The foremost concern is that regionalism may force different trading blocs to become isolated.<sup>182</sup> Taking Asia as an example, Japan has ended a fifty-year commitment to multilateral trade because of the proliferation of regional free trade agreements.<sup>183</sup> Not wanting to be left in the cold, Japan, China, and South Korea are flirting with membership in the Association of Southeast Asian Nations (ASEAN).<sup>184</sup> Closer ties between Asian economies have resulted in less trade with the United States, which is relished in Asian markets. For example, “Japan’s imports from China rose from \$36 billion to almost \$60 billion between 1995 and 2001, while its imports from the United States fell, from \$76 billion to \$63 billion.”<sup>185</sup> A similar trend is also occurring in many other Asian countries as well.<sup>186</sup> Thus, rather than forcing economic integration, bilateral and regional agreements—at least in this context—have led to some separation of the U.S. and Asian economies. The United States, because of its highly

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<sup>178</sup> See USTR Zoellick Statement at Signing of U.S.-D.R.-Central America FTA (Aug. 5, 2004), [http://www.ustr.gov/Document\\_Library/Press\\_Releases/2004/August/USTR\\_Zoellick\\_Statement\\_at\\_Signing\\_of\\_U.S.-D.R.-Central\\_America\\_FTA.html](http://www.ustr.gov/Document_Library/Press_Releases/2004/August/USTR_Zoellick_Statement_at_Signing_of_U.S.-D.R.-Central_America_FTA.html).

<sup>179</sup> United States and Morocco Sign Historic Free Trade Agreement (June 15, 2004), [http://www.ustr.gov/Document\\_Library/Press\\_Releases/2004/June/United\\_States\\_Morocco\\_Sign\\_Historic\\_Free\\_Trade\\_Agreement.html](http://www.ustr.gov/Document_Library/Press_Releases/2004/June/United_States_Morocco_Sign_Historic_Free_Trade_Agreement.html); United States and Australia Sign Free Trade Agreement (May 18, 2004), [http://www.ustr.gov/Document\\_Library/Press\\_Releases/2004/May/United\\_States\\_Australia\\_Sign\\_Free\\_Trade\\_Agreement.html](http://www.ustr.gov/Document_Library/Press_Releases/2004/May/United_States_Australia_Sign_Free_Trade_Agreement.html).

<sup>180</sup> United States and Morocco Sign Historic Free Trade Agreement, *supra* note 179.

<sup>181</sup> *Id.*

<sup>182</sup> See Bernard K. Gordon, *A High-Risk Trade Policy*, FOREIGN AFF., July-Aug. 2003, at 105 (examining the role regionalism plays in reducing multilateral trade).

<sup>183</sup> *Id.*

<sup>184</sup> The ten ASEAN members are Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam. Association of Southeast Asian Nations, Member Countries, at <http://www.aseansec.org/74.htm> (last visited Apr. 29, 2005).

<sup>185</sup> Gordon, *supra* note 182.

<sup>186</sup> *Id.*

diversified global distribution of trade, would be most harmed if regionalism does in fact drive distant trading blocs to an internal market.<sup>187</sup>

Furthermore, disputes are handled less effectively in a bilateral setting than under the auspices of the WTO. For example, the Canada and U.S. Free Trade Agreement (CUSTA) governed the trade of wheat and barley between Canada and the United States.<sup>188</sup> When Canadian exports to the United States surged in 1993, U.S. grain producers sought protection through trade laws.<sup>189</sup> In addition, Minnesota, Montana, and North Dakota blockaded Canadian grain and livestock shipments.<sup>190</sup> Montana, North Dakota, and South Dakota also responded by announcing more stringent truck inspection standards, and increased inspections of Canadian trucks.<sup>191</sup> The matter only came to a resolution when five years later the United States and Canada announced a Record of Understanding.<sup>192</sup> Under the WTO, conflicts are less likely to spiral into a “series of legal actions, hostile words, and border blockades”<sup>193</sup> as did the U.S.-Canada grain dispute. First, imports would be coming from a multitude of countries, so petty regulations erecting obstacles to trade from a particular source are less effective. Second, the reputational damage and threat of significant retaliatory action within the WTO discourage such disputes in the first place. Last, whereas a party to a bilateral agreement may be able to browbeat the other party, the WTO dispute resolution process provides the resources for weaker countries in multilateral agreements to effectively apply and uphold trade law.<sup>194</sup> Thus, the WTO can ensure that the needs of all countries are addressed and no trading bloc becomes isolated.

For these reasons, multilateral agreements must be the primary, but not necessarily the only, tool of agricultural liberalization. Although this requires compromise in an unwieldy system, common goals and minor revisions—like

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<sup>187</sup> *Id.*

<sup>188</sup> U.S.-Canada Free Trade Agreement, Jan. 2, 1988, U.S.-Can., 27 I.L.M. 293 (CUSTA was suspended upon the implementation of the North American Free Trade Agreement).

<sup>189</sup> Won W. Koo & Ihn H. Uhm, *U.S.-Canadian Grain Disputes*, 9 MINN. J. GLOBAL TRADE 103, 104-05 (2000).

<sup>190</sup> *Id.* at 105.

<sup>191</sup> *Id.*

<sup>192</sup> Record of Understanding Between the Governments of the United States of America and Canada Regarding Areas of Agricultural Trade, Dec. 2, 1998, <http://www.fas.usda.gov/itp/canada/rou.html>.

<sup>193</sup> Koo & Uhm, *supra* note 189, at 116.

<sup>194</sup> See *White Man's Shame*, ECONOMIST, Sept. 25, 1999, at 89 (noting the efforts of several countries to “set[ ] up an advisory centre to inform poor countries about WTO law and help them bring dispute settlement cases”).

granting the Director General the power of initiative—can quickly cure many WTO impediments. Regionalism is a legitimate alternative in pursuing agricultural agreements, but the short-term benefits of bilateral and regional deals could displace the long-term gains to be had from a comprehensive multilateral agreement.

## 2. *Toward a Workable Modalities Draft*

Considering the benefits of a broad international agricultural agreement, development of a modalities draft in the WTO is the most efficient and powerful method for ending protectionism. Due to common interests shared by developed and developing nations alike in reducing barriers to global trade, the Draft Text is not obsolete and may yet prevail.<sup>195</sup> In fact, trade ministers meeting in Geneva, Switzerland, reached an agreement on July 31, 2004,<sup>196</sup> that, while limited, revives the discussions ended in Cancun.<sup>197</sup> Like other draft agreements, the latest leaves details to be negotiated in the future. At a minimum, it serves as an agreement on how to negotiate. But more optimistically, the Geneva agreement signals a retreat from the harsh negotiating positions assumed in Cancun and a willingness to actually implement a trade-opening deal.<sup>198</sup> As U.S. Trade Representative Zoellick stated: “After the detour in Cancun, we have put these WTO negotiations back on track. We have laid out a map for the road ahead. And next we are going to have to negotiate the speed limits for how far and how fast we will lower trade barriers. . . .”<sup>199</sup>

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<sup>195</sup> See Peter Sutherland, *Cancun Was a Setback But Not a Tragedy*, FIN. TIMES (London), Sept. 18, 2003, at 23.

<sup>196</sup> *Doha Work Programme: Draft General Council Decision of July 2004*, WTO General Council, WTO Doc. WT/GC/535 (2004) [hereinafter Draft Decision].

<sup>197</sup> See Paul Blustein, *Accord Reached on Global Trade*, WASH. POST, Aug. 1, 2004, at A1 (quoting European Trade Commissioner Pascal Lamy as saying, “I said in Cancun that the WTO was in intensive care. Today I can say that it is not only out of the hospital but well and running.”).

<sup>198</sup> See generally *Now Harvest It; World Trade*, ECONOMIST, Aug. 7, 2004, at 59 (discussing Geneva talks).

<sup>199</sup> Press Release, Transcript of Press Conference with USTR Zoellick at the Conclusion of WTO General Council Meeting, Geneva, Switzerland (Aug. 1, 2004), [http://www.ustr.gov/Document\\_Library/Transcripts/2004/August/Transcript\\_of\\_Press\\_Conference\\_with\\_USTR\\_Zoellick\\_At\\_the\\_Conclusion\\_of\\_WTO\\_General\\_Council\\_Meeting,\\_Geneva,\\_Switzerl.html](http://www.ustr.gov/Document_Library/Transcripts/2004/August/Transcript_of_Press_Conference_with_USTR_Zoellick_At_the_Conclusion_of_WTO_General_Council_Meeting,_Geneva,_Switzerl.html).

Free trade produces prosperity (per capita GDP in the most open economies is nearly eight times higher than in the least open economies)<sup>200</sup> and growth (per capita percentage GDP growth in the most free economies is nearly five times that in the least free economies).<sup>201</sup> Accordingly, trade ministers must proceed with the Geneva agreement and toward a final draft that strongly values liberalization over the pleas of special interests in the farm sector.

*a. Domestic Support*

Domestic support provisions in the Draft Text are not far from the U.S.-EU position, nor are they far from the G21 position. Although the Draft Text maintained Article 6.5 of the URAA in opposition to G21 demands, the tenor is to place tighter restrictions on Blue Box support to eliminate abuse.<sup>202</sup> At least judging from the Joint Paper, the United States and EU will embrace this,<sup>203</sup> and given controls tight enough to prevent circumvention of domestic support restrictions, the G21 can additionally be brought into agreement.<sup>204</sup>

The Geneva agreement takes the appropriate step of going even further than the Draft Text to reduce domestic support. It takes the unexpected approach of applying “a strong element of harmonization in the reductions made by developed Members.”<sup>205</sup> Thus, “Members having higher levels of trade-distorting domestic support will make greater overall reductions in order to achieve a harmonizing result.”<sup>206</sup> Additionally, the Geneva agreement (while not citing figures) strengthens the Draft Text by calling for “substantial reductions” in Total AMS and de minimus spending.<sup>207</sup>

It is conceivable that ministers can make even more progress. Foremost, maintenance of the Blue Box is unnecessary. “The blue box, which contains the US and EU direct payments that were granted exemption from challenges under the Blair House Agreement, was a creature of its time, necessary to get

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<sup>200</sup> NORBERG, *supra* note 9, at 118.

<sup>201</sup> *Id.* at 119.

<sup>202</sup> Draft Text, *supra* note 146, Annex A, paras. 1.3, 1.5.

<sup>203</sup> See Joint Paper, *supra* note 13, para. 1.2.

<sup>204</sup> See generally U.S. GENERAL ACCOUNTING OFFICE, GAO-04-250, WORLD TRADE ORGANIZATION: CUNCUN MINISTERIAL FAILS TO MOVE GLOBAL TRADE NEGOTIATIONS FORWARD; NEXT STEPS UNCERTAIN 11 (2004) [hereinafter GAO], available at <http://www.gao.gov/new.items/d04250.pdf>.

<sup>205</sup> Draft Decision, *supra* note 196, Annex A, para. 6.

<sup>206</sup> *Id.* para. 7.

<sup>207</sup> *Id.*

agreement to go ahead with the broader Uruguay Round package.”<sup>208</sup> Today, however, use of the Blue Box is counterproductive: it is resented by the developing world and its maintenance is inconsistent with the goal of reducing domestic support. All payments that are clearly not trade-distorting can be continued through use of the Green Box, and payments that are trade-distorting can be continued under the more tightly regulated Amber Box. Thus, members are encouraged to decouple payments from output, as is the trend in U.S. and EU policy, thereby allowing a Green Box categorization.<sup>209</sup> All other payments, necessarily falling into the Amber Box, would be subject to strict controls.

*b. Market Access*

Market access is even less controversial insofar as establishing a modalities text is concerned. The Joint Paper, Communiqué, and Draft Text parallel each other. In fact, the basic structure of each is identical: all call for a blended approach using simple and average reductions along with the Swiss harmonizing formula.<sup>210</sup> Of course, negotiations will toughen as members must agree on numbers. The pivotal issue, then, will become which items are governed by the Swiss formula and which are governed by simple average reductions.<sup>211</sup> The Geneva agreement prudently places emphasis on the Swiss formula, saying “[p]rogressivity in tariff reductions will be achieved through deeper cuts in higher tariffs with flexibilities for sensitive products.”<sup>212</sup> By predominately using the Swiss formula, tariffs will fall to open markets more quickly.

Improvement can be made with regard to special and differential treatment. Indeed, with the leverage gained from eliminating the Blue Box, developing countries may be persuaded to abandon special and differential treatment altogether. After all, their economic interests are almost always poorly served by preserving tariffs.<sup>213</sup> First, developing countries lose bargaining leverage with developed countries by maintaining special and differential treatment and, therefore, cannot ask for the concessions that are needed to open potential markets.<sup>214</sup> Second, many of the tariffs erected by the developing world are

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<sup>208</sup> TIMOTHY JOSLING, AGRICULTURAL TRADE POLICY: COMPLETING THE REFORM 115 (1998).

<sup>209</sup> *Id.*

<sup>210</sup> See *supra* notes 154-55 and accompanying text.

<sup>211</sup> GAO, *supra* note 204, at 12.

<sup>212</sup> Draft Decision, *supra* note 196, Annex A, para. 29.

<sup>213</sup> Winters, *supra* note 38, at 178.

<sup>214</sup> *Id.*

paid by the developing world.<sup>215</sup> “About 40 percent of exports from the developing countries go to other developing countries. . . . Thus, more than 70 percent of the customs dues people in developing countries are forced to pay are levied by other developing countries.”<sup>216</sup> As such, special and differential treatment only stagnates trade between countries that could most benefit from the exploitation of new markets and the importation of more efficiently produced products.

With special and differential treatment abandoned, maintaining the special agricultural safeguard will become developing countries’ central concern, for absent the comfort offered by permanent tariffs available under special and differential treatment, developing countries may feel exposed if unable to react to changing market conditions. Given the potential benefits of reducing tariffs by eliminating special and differential treatment, developed countries may view preservation of the special agricultural safeguard as an acceptable compromise. Of course, the Geneva agreement’s language calling for an “appropriate number” of products to be treated as sensitive must be taken seriously as not to allow a vast number of products to be placed into the classification.<sup>217</sup>

### *c. Export Competition*

Finally, the Draft Text offers an excellent opportunity to end the use of export subsidies, a goal common to the United States and the developing world.<sup>218</sup> By linking export subsidies and credits as suggested in the Joint Paper, the Draft Text endorses an excellent solution for overcoming an issue that previously produced tension between the United States and the EU.<sup>219</sup> While all parties must sacrifice, each gains from similar sacrifices by trading partners. Although the Communiqué offered a far different method for regulating export competition, the Geneva agreement, fully endorsed by the G21, reflects a change in the G21’s position. Now, “Members agree to establish detailed modalities ensuring the parallel elimination of all forms of export subsidies and disciplines on all export measures with equivalent effect by a credible end date.”<sup>220</sup> The only concern now is establishing an end date.

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<sup>215</sup> NORBERG, *supra* note 9, at 175.

<sup>216</sup> *Id.*

<sup>217</sup> Draft Decision, *supra* note 196, Annex A, para. 31.

<sup>218</sup> See generally GAO, *supra* note 204, at 13 (discussing export subsidy negotiations).

<sup>219</sup> See *supra* notes 77-81 and accompanying text.

<sup>220</sup> Draft Decision, *supra* note 196, Annex A, para. 17.

To conclude, bilateral and regional agreements undoubtedly have a role in liberalizing agricultural trade. In fact, such agreements may facilitate broader multilateral agreements. But the effect of an ambitious multilateral agreement negotiated in the WTO so far outweighs agreements on a smaller scale that members must brave negotiating treachery in hopes of reaching an accord. The Geneva agreement is a strong indication that the effort expended in Cancun is beginning to pay off. While terms are still malleable, negotiators should strive to go as far as possible in eliminating barriers to trade. The methods available for doing so are ending the Blue Box classification, eliminating special and differential treatment in favor of the special agricultural safeguard, and setting an end date for export subsidies and credits as soon as possible.

#### IV. CONCLUSION

Trade ministers began the Doha Round with high hopes of reforming agricultural trade. After Cancun, there is no reason to abandon such aspirations. The stakes are much too high. Reduction of trade barriers has great potential to boost the world economy, alleviate poverty, and raise the standard of living for countries at every stage of development. A viable modalities draft to accomplish such lofty objectives is at hand, particularly in light of the success in Geneva.

The negotiating road has not been pleasant, but trade ministers have nevertheless continued to make progress. Beginning with the Harbinson Proposal, each subsequent modalities draft has come closer to delivering a consensus. The Cancun Ministerial Draft Text, augmented by the Geneva agreement, is the best effort to date. First, in the area of domestic support, the Draft Text goes much further than the URAA. Total AMS and *de minimis* spending are reduced, and Green Box support is more closely reviewed to ensure that it has no trade-distorting effects. With concessions that further limit Green Box support or even eliminate the Blue Box altogether, the developing countries that initially stalled talks can be brought back to the negotiating table in a supportive posture. Second, market access is less controversial. The United States, EU, and G21 agree insofar as the Cancun framework is at issue. Although negotiations will toughen beyond the modalities phase, all parties at least agree to the use of a hybrid approach using the Swiss formula and a simple average reduction. Arguably, by abandoning Blue Box support, developing nations can be persuaded to end special and differential treatment, thereby serving their own interests as much as those of

the developing world. Lastly, the Draft Text makes admirable strides in further regulating export competition. The approach taken in the Draft Text, borrowed from the U.S.-EU Joint Paper, binds export credits and subsidies together, reducing one with the other. With reductions eminent by a credible end date—hopefully occurring sooner rather than later—developed and developing countries can certainly agree to this section without reservation.

But as of yet, there is no final agreement. In the meantime, many countries are turning to bilateral and regional agreements. Although the WTO remains the best avenue for nurturing agricultural trade reform, the short-term benefits of regionalism may lure countries into abandoning, at least temporarily, the WTO and its procedural inefficiencies. As summarized by U.S. Trade Representative Zoellick, “the key division at Cancun was between the can-do and the won’t-do . . . . As WTO members ponder the future, the US will not wait: we will move towards free trade with can-do countries.”<sup>221</sup> While every step toward free trade is respectable, agricultural trade liberalization must be fully and fairly shared. This is best accomplished by returning to the draft Cancun Ministerial Text as augmented by the Geneva agreement and realizing the benefits produced through multilateral agricultural negotiations.

Measured negotiation and political vision can turn current points of agreement into a final modalities text. Thereafter, the difficult process of negotiating specific reductions will begin. It is therefore crucial that whatever momentum assembled thus far in the Doha Round is carried forward so as not to allow the progress made in drafting an aggressive modalities text to evaporate.

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<sup>221</sup> Zoellick, *supra* note 6.