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# WTO AGRICULTURAL TRADE AND THE UNFULFILLED PROMISE OF DEVELOPMENT

*Dr. Destaw A. Yigzaw*<sup>\*</sup>

## ABSTRACT

*The World Trade Organization (WTO) was established with an alluring promise of enhancing the living standards of people around the world, creating jobs and spurring development, while ensuring equitable distribution of the fruits of trade, with particular regard to the needs of the poor. However, critics see the WTO as a mercantilist system tailored to the commercial interests of wealthy nations and their corporations, with little or no attention to the interests of the poor. What happens to agriculture affects the poor disproportionately. If spurring economic development and thereby enhancing the living standards of people is indeed the WTO's goal, no sector seems more significant to the accomplishment of that mission than agriculture. Hence, probing the fairness of agricultural trade provides a special insight with which to judge whether the WTO is true to its word, and conversely, to evaluate the validity of criticism directed against the trading regime. That is the aim of this article. It examines the WTO agricultural trade regime and concludes that the fact that agricultural trade remains the most protected and distorted sector, despite its unrivalled significance to development, is hardly a characteristic of a pro-development trading system.*

## I. INTRODUCTION

Despite the WTO's promise of increasing the standard of living of people across the globe through the creation of jobs while keeping a focus on the needs of the poor,<sup>1</sup> it is commonly accused of destroying jobs, shattering livelihoods, and generally being anti-

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<sup>1</sup> See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 [hereinafter Marrakesh Agreement].

poor.<sup>2</sup> Accusations against the trading regime are diverse and multifaceted. Broadly, they may be summarized into two categories. At the interstate level, critics maintain that the WTO system is tailored to the interests of industrialized nations who have designed the institution and negotiated its rules.<sup>3</sup> As such, it is often argued that while trade of industrial products (for which industrialized nations have comparative advantage) has been remarkably liberalized, agricultural trade, which is of greater interest to developing countries, is still saddled with protectionism.<sup>4</sup> At best, the argument goes, that the system has failed to address the development aspirations of poor nations and thus the alleviation of human suffering associated with economic deprivation. At worst, it ensures the perpetuation of the North's hegemony in global trade.<sup>5</sup> One may add that when that hegemony is challenged by the emergence of new powers, the WTO became unable to muster agreement or enthusiasm, as the current Doha Round stalemate and concurrent shift of focus towards regional trade agreement suggest.<sup>6</sup>

Within nations, the WTO is seen by many as “a symbol of mercantilism, capitalism, the tool through which powerful multinational corporations impose their law over human beings, impairing their social, economic[,] and cultural rights.”<sup>7</sup> Although

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<sup>2</sup> See Special Rapporteurs on Globalization and Human Rights, *The Realization of Economic, Social and Cultural Rights*, Comm'n on Human Rights, U.N. Doc. E/CN.4/Sub.2/2000/13 (June 15, 2000) (by Joe Oloka-Onyango and Deepika Udagama).

<sup>3</sup> See, e.g., MARC PILISUK & JENNIFER ACHORD ROUNTREE, WHO BENEFITS FROM GLOBAL VIOLENCE AND WAR: UNCOVERING A DESTRUCTIVE SYSTEM 122–23 (2008).

<sup>4</sup> See JOSEPH E. STIGLITZ & ANDREW CHARLTON, FAIR TRADE FOR ALL 44 (2006). As a matter of fact, global average tariff on merchandise trade has been slashed from 40% to just below 4% during the GATT era. By contrast, agriculture witnessed a reverse trend. See MELAKU GEBOYE DESTA, THE LAW OF INTERNATIONAL TRADE IN AGRICULTURAL PRODUCTS 7 (2002).

<sup>5</sup> See generally Sungjoon Cho, *The Demise of Development in the Doha Round Negotiations*, 45 TEX. INT'L L.J. 573 (2010).

<sup>6</sup> See Craig VanGrasstek, *Speaking Truth about Power: The Real Problem in the Multilateral Trading System*, in BUILDING ON BALI: A WORK PROGRAMME FOR THE WTO 59, 61 (Simon J. Evenett & Alejandro Jara eds., 2013).

<sup>7</sup> Pascal Lamy, Dir.-Gen., WTO, *Towards Shared Responsibility and Greater Coherence: Human Rights, Trade and Macroeconomic Policy*, Address at the Colloquium on Human Rights in the Global Economy (Jan.

the WTO's *raison d'être* lies in the enhancement of economic welfare for all, many believe that trade rules are actually tailored to the interests of powerful corporations that wield strong lobbying power.<sup>8</sup> It is argued that at the WTO, governments essentially represent the interests of their respective commercial communities, while the poor have neither standing nor representation.<sup>9</sup>

What happens to agriculture affects the poor disproportionately. Around 75% of the world's poor depend on agriculture as a source of income and livelihood.<sup>10</sup> Agriculture is also critical to the urban poor and non-farm households who spend up to 80% of their incomes on food.<sup>11</sup> In other words, agricultural

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13, 2010) (transcript available at [https://www.wto.org/english/news\\_e/sppl\\_e/sppl146\\_e.htm](https://www.wto.org/english/news_e/sppl_e/sppl146_e.htm)). The WTO dismisses such accusations as regrettable misconceptions about the trading regime. See, e.g., WTO, 10 COMMON MISUNDERSTANDINGS ABOUT THE WTO (1999), available at [www.depts.washington.edu/wtohist/documents/WTOmisunderstandings.pdf](http://www.depts.washington.edu/wtohist/documents/WTOmisunderstandings.pdf).

<sup>8</sup> See Kishore Gawande, *The Structure of Lobbying and Protection in U.S. Agriculture* 41 (World Bank Policy Research, Working Paper No. 3722, 2005).

<sup>9</sup> For example, despite the obvious interactions between trade and various human rights issues, no UN human rights institution or specialized agency (such as the International Labor Organization) or any other human rights body has observer status at the WTO. See SARAH JOSEPH, BLAME IT ON THE WTO?: A HUMAN RIGHTS CRITIQUE 66 (2011). On the other hand, the International Monetary Fund, the World Bank, and similar institutions have observer status at almost every single Council (including the General Council), Committee, or Working Group. *International Intergovernmental Organizations Granted Observer Status to WTO Bodies*, WTO, [https://www.wto.org/english/thewto\\_e/igo\\_obs\\_e.htm](https://www.wto.org/english/thewto_e/igo_obs_e.htm) (last visited June 14, 2015).

<sup>10</sup> See WORLD BANK, WORLD DEVELOPMENT REPORT 2008: AGRICULTURE FOR DEVELOPMENT 45 (2007). Poverty is largely a rural phenomenon. Three in every four of the 1.4 billion people who live in extreme poverty, i.e., surviving on less than \$1.25 a day (the main poverty line at 2005 prices), live in rural areas. *Poverty Headcount Ratio at \$1.25 a Day (PPP) (% of Population)*, WORLD BANK, <http://data.worldbank.org/indicator/SI.POV.DDAY> (last visited June 14, 2015).

<sup>11</sup> See Alex F. McCalla & John Nash, *Agricultural Trade Reform and Developing Countries*, in REFORMING AGRICULTURAL TRADE FOR DEVELOPING COUNTRIES 2 (Alex F. McCalla & John Nash eds., 2007); Jonathan Brooks, *Agricultural Trade Reform, Adjustment and Poverty*:

trade has a more pronounced distributional effect than trade in any other sector.<sup>12</sup> Recognition of this enormous distributional effect is the point of departure for our diagnosis of the role of agricultural trade in development. Likewise, agriculture's economic significance for poor nations is remarkably higher.<sup>13</sup> Agriculture is often a poor nation's biggest employer; largest source of gross domestic product (GDP), export earnings, and tax revenues; and generally, the primary engine of economic growth.<sup>14</sup> In 2009, for example, agriculture accounted for 58% of the GDP of Sierra Leone and employed over two-thirds of the work force.<sup>15</sup> By contrast, for industrialized nations such as the U.S., Japan, Germany, the UK, Switzerland, and Belgium, agriculture accounted for no more than 1% of the GDP and employed less than 4% of the work force.<sup>16</sup>

Agricultural trade policy reform is estimated to generate up to 70% of the global gains from merchandize trade reform.<sup>17</sup> Conversely, although agricultural trade accounts for just 8% of the global merchandize trade, it is responsible for approximately three-

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*Mapping the Linkages*, in ORG. FOR ECON. CO-OPERATION & DEV. [OECD], AGRICULTURAL TRADE AND POVERTY 9 (2003).

<sup>12</sup> In 2010 alone, for example, hikes in food prices have plunged around 44 million more people into extreme poverty. *Food Price Watch*, WORLD BANK, (Poverty Reduction and Equity Group at the World Bank, Washington, D.C.) Feb. 2011, at 1. Meanwhile, the number of millionaires continued to grow. See Robert Frank, *Millionaire Population Bounces Back to Pre-Crisis Peak*, WALL ST. J. (June 10, 2010, 12:01 PM), <http://blogs.wsj.com/wealth/2010/06/10/millionaire-population-bounces-back-to-pre-crisis-peak>.

<sup>13</sup> See Patrick A. Messerlin, *Reforming Agricultural Policies in the Doha Round*, in ECONOMIC DEVELOPMENT AND MULTILATERAL TRADE COOPERATION 3 (Simon J. Evenett & Bernard M. Hoekman eds., 2006).

<sup>14</sup> In least-developed countries, agriculture on average accounts for 40% of GDP, 35% of export, and employs up to 70% of the workforce. See *id.*

<sup>15</sup> See *Agriculture, Value Added (% of GDP)*, WORLD BANK, <http://data.worldbank.org/indicator/NV.AGR.TOTL.ZS> (last visited June 14, 2015).

<sup>16</sup> See *id.*

<sup>17</sup> See Dominique van der Mensbrugge & John C. Beghin, *Global Agricultural Reform: What is at Stake?*, in GLOBAL AGRICULTURAL TRADE AND DEVELOPING COUNTRIES 115 (M. Ataman Aksoy & John C. Beghin eds., 2005).

fifths of the global gain forgone due to trade distortions.<sup>18</sup> GDP growth generated by agriculture is up to four times more effective in alleviating poverty than growth generated by other sectors.<sup>19</sup> Although industrialized nations dominate agricultural trade,<sup>20</sup> developing countries' agriculture accounts for two-thirds of the world's agricultural value-added.<sup>21</sup> Therefore, the case for overhauling agricultural trade is compelling. Agriculture represents the ultimate test of the development promise of the WTO. In fact, if spurring economic development and thereby raising the standards of living of people is the WTO's mission, no sector seems to have greater significance to the accomplishment of that mission than agriculture. Therefore, probing the fairness of agricultural trade provides a unique vantage point with which to evaluate the credibility of the trading regime.

By demonstrating how gross distortions in agricultural trade inhibit the development aspirations of the world's poor, this article argues that the WTO's ostensible goals have little relevance to the institution's *modus operandi*. It maintains that the fact that agriculture remains the most protected and distorted sector, despite its unparalleled significance to development, hardly bears out the declaration that raising standards of living is the WTO's goal.<sup>22</sup> Part II details the reasons and motives for agricultural protectionism. Part III analyzes the Agreement on Agriculture (AoA) and explains how existing rules undermine rather than spur development. It also

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<sup>18</sup> Kym Anderson & Will Martin, *Agriculture, Trade Reform, and the Doha Agenda* 12–13 (World Bank Policy Research, Working Paper No. 3607, 2005).

<sup>19</sup> See WORLD BANK, WORLD DEVELOPMENT REPORT 2008: AGRICULTURE FOR DEVELOPMENT, *supra* note 10, at 6.

<sup>20</sup> "OECD countries dominate world trade in agriculture - with over 70% of exports and 75% of imports; least developed countries account for only about 1% of world agricultural imports and exports." *The Doha Development Round of Trade Negotiations: Understanding the Issues*, OECD, <http://www.oecd.org/agriculture/thedohadevelopmentroundoftradenegotiationsunderstandingtheissues.htm> (last visited June 14, 2015).

<sup>21</sup> WORLD BANK, WORLD DEVELOPMENT REPORT 2008: AGRICULTURE FOR DEVELOPMENT, *supra* note 10, at 3.

<sup>22</sup> Agriculture is the most protected and distorted sector. See KYM ANDERSON, U.N. CONF. ON TRADE & DEV., AGRICULTURE, TRADE REFORM AND POVERTY REDUCTION: IMPLICATIONS FOR SUB-SAHARAN AFRICA, at 1, U.N. Sales No. E.04.II.D.5 (2004).

elucidates why agricultural protectionism continues to derail Doha Round negotiations, seriously undermining the WTO's credibility in the process. It is argued here that addressing longstanding issues of agricultural trade is not only an imperative for the completion of the Doha Round but also represents a credibility test for the trading regime.

## II. AGRICULTURE: A SUI GENERIS?

Agriculture is heretical to the gospel of free trade. The roots of agricultural protectionism can be traced back to classical antiquity.<sup>23</sup> Since the medieval times, agricultural protectionism has always been an "institutional norm."<sup>24</sup> Those who strenuously proclaim the virtues of free trade have always found ways to make an exception for agriculture.<sup>25</sup> Even in the heydays of the free trade doctrine, as in late eighteenth century Britain, agriculture was protected with export subsidies and prohibitive import duties.<sup>26</sup> Adam Smith observed:

The law of England . . . favors agriculture not only indirectly by the protection of commerce, but by several direct encouragements. Except in times of scarcity, the exportation of corn is not only free, but encouraged by bounty. In times of moderate plenty, the importation of foreign corn is loaded

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<sup>23</sup> In ancient Greece, for example, grain trade was subject to stricter laws than trade in other commodities, and a serious mistake on the part of supervisory officials was punishable by death. See P. Spitz, *The Right to Food for Peoples and for the People: A Historical Perspective*, in *THE RIGHT TO FOOD* 169, 173–74 (P. Alston & K. Tomaševski eds., 1984).

<sup>24</sup> See Ken A. Ingersent & A. J. Rayner, *Agricultural Policy in Western Europe and the United States*, 83 *AM. J. AGRIC. ECON.* 788 (1999). Agricultural protectionism has likewise been the federal government's policy in the USA ever since the country's foundation. See Cody A. Thacker, *Agricultural Trade Liberalization in the Doha Round: The Search for a Modalities Draft*, 33 *GA. J. INT'L & COMP. L.* 721, 723 (2005).

<sup>25</sup> See Kym Anderson, *Five Decades of Distortion to Agricultural Incentives* 3 (World Bank Agricultural Distortions Working Paper No. 76, 2009).

<sup>26</sup> See generally ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 393–94 (Edwin Cannan ed., Univ. of Chicago Press 1977) (1776).

with duties that amount to a prohibition. The importation of live cattle . . . is prohibited at all times . . . . Those that cultivate land, therefore, have monopoly against their countrymen for the two greatest and most important articles of land produce, bread and butcher's meat.<sup>27</sup>

Likewise, the reinvigoration of free trade after World War II largely bypassed agriculture. Pre-Uruguay Round attempts to bring agriculture into the mainstream General Agreement on Tariffs and Trade (GATT) discipline proved unsuccessful.<sup>28</sup> Plausibly dubbed "the deal-maker or breaker," agriculture continues to determine the pace and progress of multilateral trade negotiations. It was responsible for the unprecedented protraction of the Uruguay Round.<sup>29</sup> It also contributed to the failures of the WTO Ministerial Conference of 1999 in Seattle.<sup>30</sup> Once again, it has emerged as the major obstacle in the current Doha Round, and is blamed for the collapse of numerous initiatives over the last fourteen years.<sup>31</sup> While the recent deal at the ninth WTO Ministerial Conference has been widely hailed, there is nothing in the deal that shows progress towards agricultural trade liberalization.<sup>32</sup>

Despite its unique potential for poverty alleviation, WTO members, rich and poor, remain stubbornly reluctant to open up their agriculture to global competition.<sup>33</sup> This appears paradoxical because, from an economic point of view, agriculture is no longer the sector it once was. While it remains the backbone of many poor

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

<sup>28</sup> See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL RELATIONS* 314 (2nd ed. 1997).

<sup>29</sup> At the Uruguay Round, negotiations "proceeded at a pace only to the extent it was permitted by the U.S. and the EC negotiators who were locked in a very intense political struggle over the issue of agriculture." *Id.*

<sup>30</sup> Agriculture is also a major source of trade dispute. See DESTA, *supra* note 4, at 7.

<sup>31</sup> See, e.g., Tim Josling, *An Overview of the WTO Agricultural Negotiations*, in *REFORMING AGRICULTURAL TRADE FOR DEVELOPING COUNTRIES* 62 (Alex F. McCalla & John Nash eds., 2007).

<sup>32</sup> See generally Melaku Geboye Desta, *The WTO Negotiations on Agriculture: What Next After Bali?*, in *BUILDING ON BALI*, *supra* note 6, at 111.

<sup>33</sup> See generally Tim Josling, *A Post-Bali Agenda for Agriculture*, in *BUILDING ON BALI*, *supra* note 6, at 105.



economies, the sector's contribution to industrialized nations' economies has declined remarkably.<sup>34</sup> The commercial significance of agriculture has likewise shrunk; its share in the global merchandise trade has dropped from over 40% in 1950 to less than 10% in 1999.<sup>35</sup> Yet governments seem to believe that agriculture is somehow special. The WTO Committee on Agriculture concluded, "[s]pecific characteristics of agriculture need continued separate treatment within WTO."<sup>36</sup> The vexing question is this: why are states unwilling to place faith in the market when it comes to agriculture? The explanation lies in two related reasons: one epitomizes the clash between trade and nontrade concerns, while the other represents the conflict of interests between industrialized nations and their developing counterparts.

First, agriculture is so distinctively multifunctional that comparative advantage arguments must be treated with great caution. Food security lies at the heart of agriculture's multifunctionality. Food, which makes up approximately 80% of agricultural trade, is simply too essential to let the market dictate outcomes.<sup>37</sup> Agriculture is also vital for development, employment, rural amenity, biodiversity, landscape, and environmental sustainability, in addition to its sensitivity in domestic politics. Second, developing countries have a disproportionately higher stake in agriculture. As the lifeline of many developing countries' economies, a fair agricultural trade

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<sup>34</sup> See, e.g., *Agriculture, Value Added (% of GDP)*, *supra* note 15.

<sup>35</sup> See WTO, *WORLD TRADE REPORT 2008: TRADE IN A GLOBALIZING WORLD 17* (2008). It should be noted, however, that the decline in the relative share is mostly due to the dramatic rise of trade in manufactured products. Otherwise, global agricultural exports have nearly tripled over the last two decades. See *Farm Trade Rises Amid Continuing Concern, Committee Hears*, WTO (Nov. 19 2009), [http://www.wto.org/english/news\\_e/news09\\_e/ag\\_com\\_19nov09\\_e.htm](http://www.wto.org/english/news_e/news09_e/ag_com_19nov09_e.htm).

<sup>36</sup> In 2000, a group of thirty-eight WTO members submitted a "Note on Non-trade Concerns" to the WTO Committee on Agriculture. Fourth Special Session of the Committee on Agriculture, *Statement by Australia: Non-Trade Concerns*, ¶ 28, G/AG/NG/W/59 (Nov. 29, 2000). In their notes, they emphasized that "food is the most essential good," that it needs to be treated differently, and that "every country has the right" to take necessary measures to ensure food security and other non-trade concerns. *Id.* Accordingly, the Committee concluded that agriculture's unique characteristics warrant the decision to continue treating the sector differently. *Id.*

<sup>37</sup> See *Agriculture: Explanation*, WTO, [http://www.wto.org/english/tratop\\_e/agric\\_e/ag\\_intro01\\_intro\\_e.htm](http://www.wto.org/english/tratop_e/agric_e/ag_intro01_intro_e.htm) (last visited June 14, 2015).

epitomizes their longstanding quest for a pro-development trade structure.<sup>38</sup> Agriculture is thus the litmus test of the promises of the “Development Round.”<sup>39</sup> Developing countries feel disadvantaged by past agreements and thus seek meaningful liberalization in agriculture, a sector many of them regard as their niche.<sup>40</sup> They want industrialized nations to cut their massive agricultural support and prohibitive tariffs.<sup>41</sup> Thus far, rich nations have been unwilling to do so.<sup>42</sup> They demand that developing countries reciprocate by dismantling their own farm protection, including measures that are meant to safeguard food security.<sup>43</sup> Before turning to these issues, a few words on the concept and scope of agricultural products are in order.

#### A. AGRICULTURAL PRODUCTS

The GATT never had a definition for agricultural products. The evolution of the concept is rather perplexing. Agricultural trade differs from trade in other products due to its historical exemption from the GATT disciplines on quantitative restrictions and export

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<sup>38</sup> See generally Merlinda D. Ingco & John D. Nash, *What's at Stake? Developing-country Interests in the Doha Development Round*, in AGRICULTURE AND THE WTO: CREATING A TRADING SYSTEM FOR DEVELOPMENT 3 (Merlinda D. Ingco & John D. Nash eds., 2004).

<sup>39</sup> Ostensibly, the development needs of poor member states lies at the heart of the Doha Round. See WTO, Ministerial Declaration of 20 November 2001, ¶ 2, WT/MIN(01)/DEC/1 (Nov. 20, 2001) [hereinafter Doha Declaration].

<sup>40</sup> Although the majority of WTO members are developing countries, substantive agreements were traditionally negotiated between few protagonists, while developing countries campaigned for preferential treatment, thereby undermining their bargaining power. See STIGLITZ & CHARLTON, *supra* note 4, at 42–43.

<sup>41</sup> Food prices measured at the farm gate in OECD countries are 30% higher than in international markets, making it impenetrable for exporters from developing countries. Farmers in OECD countries receive annual government support of around \$280 billion (mostly on dairy, cotton, and rice), which is more than three times the amount of official development assistance from OECD countries to developing countries. See *The Doha Development Round of Trade Negotiations*, *supra* note 20.

<sup>42</sup> See Ingco & Nash, *supra* note 38, at 39.

<sup>43</sup> See *id.*

subsidies.<sup>44</sup> The meaning of the term agricultural products may thus be gleaned in these areas. Yet, the concept does not figure uniformly in the two.

For the purpose of subsidies, until the Tokyo Round, agricultural products were lumped under the rubric of “primary products.”<sup>45</sup> The 1955 Review Session amendments to the GATT distinguished between “primary” and “non-primary” products.<sup>46</sup> A primary product was thus defined as “any product of farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.”<sup>47</sup> This definition was transplanted almost verbatim from the Havana Charter.<sup>48</sup> The Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the GATT (Subsidies Code), a result of the Tokyo Round negotiations, distinguished between “certain primary products” and other products.<sup>49</sup> Agricultural products in the Code’s language were generally subsumed under certain primary products

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<sup>44</sup> See R. Sharma, *Agriculture in the GATT: A Historical Account*, FOOD & AGRIC. ORG., <http://www.fao.org/docrep/003/x7352e/x7352e04.htm> (last visited June 14, 2015).

<sup>45</sup> Kevin C. Kennedy, *Reforming Farm Trade in the Next Round of WTO Multilateral Trade Negotiations*, 35 J. WORLD TRADE 1061, 1064 (2001).

<sup>46</sup> See JACKSON, *supra* note 29, at 190.

<sup>47</sup> General Agreement on Tariffs and Trade, Annex I, ad art. XVI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

<sup>48</sup> See United Nations Conference on Trade and Employment, Havana, Cuba, Nov. 21, 1947–Mar. 24, 1948, Havana Charter for an International Trade Organization, U.N. Doc. E/CONF.2/78, art. 56 (Mar. 4, 1948) [hereinafter Havana Charter].

<sup>49</sup> Agreement on the Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, April 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619, *reprinted in* GATT B.I.S.D. (26th Supp.) at 64 (Article 9 of the Interpretation Agreement states, “signatories shall not grant export subsidies on products other than certain primary products.”). The term “certain primary products” embraces “any product of farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.” ANALYTICAL INDEX OF THE GATT, ARTICLE XVI – SUBSIDIES 455, *available at* [www.wto.org/english/res\\_e/booksp\\_e/gatt\\_ai\\_e/art16\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art16_e.pdf).

until the Uruguay Round.<sup>50</sup> Yet, what precisely constitutes a primary product was not always unequivocal. For example, in the *EC Wheat Flour* case, whether or not wheat flour was a primary product was in contention.<sup>51</sup>

However, for the purpose of quantitative restrictions the exception under GATT Article XI applies only to “agricultural or fishery products.”<sup>52</sup> Apart from that, we do not find the term agricultural product defined under the GATT.<sup>53</sup> Confronted with definitional problems, the GATT panel in *Japan-Agriculture* held that from the long-standing practice of the GATT, products falling under chapters one to twenty-four of the Customs Cooperation Council Nomenclature (CCCN) could, in principle, be regarded as agricultural products.<sup>54</sup> The first twenty-four chapters of the CCCN list included fisheries, and thus, the panel’s interpretation is consistent with the meaning of Article XI.<sup>55</sup>

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<sup>50</sup> Andrew Stoler, *The Evolution of Subsidies Disciplines in GATT and the WTO*, 44 J. WORLD TRADE 797, 804 n.12 (2010).

<sup>51</sup> See Report of the Panel, *European Economic Community–Subsidy on Export of Wheat Flour*, ¶ 2.3 SCM/42 (Mar. 21, 1983) (unadopted).

<sup>52</sup> GATT, *supra* note 47, art. XI, ¶ 2(c).

<sup>53</sup> See *id.* Annex I’s Notes and Supplementary Provisions state that the “term primary products” includes agricultural products. See *id.* at Annex I, ad art. XXXVI, para. 4.

<sup>54</sup> Report of the Panel, *Japan–Restrictions on Imports of Certain Agricultural Products*, ¶ 5.1.3.2. L/6253-35S/163 (Feb. 2, 1988).

<sup>55</sup> See *id.*; GATT, *supra* note 47, art. XI, ¶ 2(c). The CCCN evolved from the Geneva Nomenclature, which came into existence in 1937 as a Draft Customs Nomenclature of the League of Nations. It was replaced by Brussels Tariff Nomenclature (BTN) in 1959, renamed as CCCN in 1974, and was replaced by the Harmonized System (HS) in 1988. The first twenty-four chapters of the HS Nomenclature edition (2002) covers, *inter alia*, live animals and animal products; fisheries products; products of animal origin not elsewhere specified or included; vegetable products (including live trees and other plants, bulbs and roots); fruits and nuts; coffee, tea, and spices; cereals and cereal preparations (such as flour and pastrycooks); products of the milling industry (such as starches, oil seeds and miscellaneous grains); seeds; industrial or medicinal plants; straw and fodder; lac, gums and other extracts; sugar products; cocoa products; tobacco products, and beverages. *Harmonized System Nomenclature 2002 edition*, WORLD CUSTOMS ORG., [http://www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hs\\_nomenclature\\_older\\_edition/hs\\_nomenclature\\_table\\_2002.aspx](http://www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hs_nomenclature_older_edition/hs_nomenclature_table_2002.aspx) (last visited June 14, 2015).

The AoA makes a departure from the GATT tradition by not covering fishery products.<sup>56</sup> Thus, cases like *Tuna-Dolphin* and others cannot arise in the framework of the AoA. By contrast, some other (mostly non-food) products have been added to the HS list mentioned above.<sup>57</sup> In sum, the scope of agriculture products is not limited to crops, livestock, and livestock products.<sup>58</sup> While food products dominate agricultural trade, not all food products are agricultural products nor vice versa.<sup>59</sup>

#### B. MULTIFUNCTIONALITY OF AGRICULTURE

Agriculture has always had multiple functions. However, the term multifunctionality cut into agricultural policy discourse only recently. The Rio Earth Summit of 1992 (Summit) was the first international forum that recognized the multifunctionality of agriculture.<sup>60</sup> The Summit concluded by declaring that agricultural policies should be reviewed “in the light of the multifunctional aspect of agriculture, particularly with regard to food security and sustainable development.”<sup>61</sup> There has been a significant debate on

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<sup>56</sup> See Marrakesh Agreement Establishing the World Trade Organization, Agreement on Agriculture, Annex 1A, Apr. 15, 1994, 1867 U.N.T.S. 4 [hereinafter AoA].

<sup>57</sup> See *id.* The new additions include mannitol, sorbitol, essential oils, hides and skins, silk products, wool and fur products, cotton, and others. Generally, not only primary products (e.g., food grain, livestock, livestock products) but also processed products (chocolates, beverages, tobacco products), as well as fibers (cotton) and raw materials (animal skins) are covered. *Id.*

<sup>58</sup> See *id.*; *Japan—Restrictions on Imports of Certain Agricultural Products*, *supra* note 54.

<sup>59</sup> Thus, it is important to distinguish the two so that protectionist measures, justified on the ground of food security, may not affect trade in nonfood agricultural products. *Id.*

<sup>60</sup> See G.A. WILSON, MULTIFUNCTIONAL AGRICULTURE: A TRANSITION THEORY PERSPECTIVE 183 (2007).

<sup>61</sup> United Nations Conference on Environment and Development; Rio de Janeiro, Braz., June 3–14, 1992, *Agenda 21*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex 2 (Aug. 12, 1992). See generally Teunis van Rheenen & Tewodaj Mengistu, *Rural Areas in Transition: A Developing World Perspective*, in MULTIFUNCTIONAL RURAL LAND MANAGEMENT: ECONOMICS AND POLICIES 326 (Floor Brouwer & C. Martijn van der Heide eds., 2009).

agriculture's multifunctionality since the Summit.<sup>62</sup> The debate is, however, beset by conceptual obscurity and skepticism.

The Organisation for Economic Co-operation and Development (OECD) has been a pioneer in providing a theoretical framework for multifunctionality in agriculture and trying to map out its relevance in the formulation of agricultural trade policy.<sup>63</sup> The OECD defines agricultural multifunctionality from an economic perspective based on two key elements. First, "the existence of multiple commodity and non-commodity outputs that are jointly produced by agriculture." Second, "the fact that some of the non-commodity outputs exhibit the characteristics of externalities or public goods, with the result that markets for these goods do not exist or function poorly."<sup>64</sup> Therefore, according to the OECD, food, fiber, and other raw materials are subsumed under "commodity outputs," whereas agriculture's role in food security, employment, environmental sustainability and recreational amenities, tradition, rural landscape, biodiversity, and the like are classified as "non-commodity" outputs.<sup>65</sup>

However, many believe that treating food exclusively from a commercial point of view poses a serious threat to "non-commodity" values of agriculture, including food security.<sup>66</sup> Speaking at an event marking the 16th World Food Day at the height of the global food crisis, former U.S. President Bill Clinton stated

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<sup>62</sup> See generally Bruno Losch, *Debating the Multifunctionality of Agriculture: From Trade Negotiations to Development Policies by the South*, 4 J. AGRARIAN CHANGE 336 (2004).

<sup>63</sup> See LEO MAIER & MIKITARO SHOBAYASHI, OECD, MULTIFUNCTIONALITY: TOWARDS AN ANALYTICAL FRAMEWORK 5 (2001).

<sup>64</sup> *Id.* at 13.

<sup>65</sup> See OECD, MULTIFUNCTIONALITY: POLICY IMPLICATIONS 7–13 (2008). In earlier reports, the OECD categorized agricultural outputs into "food" and "non-food" outputs, later switching to the terms "market" and "non-market" goods, and finally settling on "commodity" and "non-commodity" output classifications. See MAIER & MIKITARO, *supra* note 63, at 10.

<sup>66</sup> Commodification of food is viewed as a theoretical paradigm that underlies the unprecedented expansion of corporate farming, known for heavy reliance on chemical use and agricultural biotechnology. This may be antithetical to the sustainability not only of the environment, but also of long-term food security. See generally FRED MAGDOFF ET AL., HUNGRY FOR PROFIT: THE AGRIBUSINESS THREAT TO FARMERS, FOOD, AND THE ENVIRONMENT (2000) (providing a collection of essays regarding changes in agriculture).

that the world blundered (while negotiating trade agreements) by treating food as a commodity rather than as a vital right of the poor, and that contributed to the food crisis.<sup>67</sup> That is, of course, without forgetting that states have a legal obligation under international law to respect and protect everyone's right to adequate food.<sup>68</sup> Furthermore, treating food as a commodity and food security as one of the many externalities of food production is problematic for several reasons. First, food supply is the primary function of agriculture.<sup>69</sup> Unlike environmental sustainability or rural amenity, food security is not something incidental to the process of agricultural production. As such, putting food and food security into separate categories of commodity and non-commodity functions is unconvincing since agriculture's primary function of food production may not be cogently separated from its role in food security. Second, unlike all other multifunctional outputs, food security is not a nonfood value.<sup>70</sup> Third, food security underlies most multifunctional outputs of agriculture, from rural employment to environmental sustainability and biodiversity.<sup>71</sup> Fourth, whether food security may be regarded as a public good is arguable.<sup>72</sup> Finally, it may even be

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<sup>67</sup> See Bill Clinton: "We Blew It" On Global Food, CBS NEWS, Feb. 11, 2009, <http://www.cbsnews.com/stories/2008/10/23/world/main4542268.shtml>.

<sup>68</sup> For more on this, see generally Destaw A. Yizaw, *Hunger and the Law: Freedom from Hunger as a Freestanding Right*, 36 HOUS. J. INT'L L. 656 (2014) (arguing that the right to food embraces both the right to be free from hunger and the right to adequate food, which should be treated distinct from each other).

<sup>69</sup> See Food & Agric. Org., *The Energy and Agriculture Nexus: Environment and Natural Resources* (Env't & Natural Res. Working Paper No. 4, 2000), available at <http://www.fao.org/docrep/003/x8054e/x8054e07.htm>.

<sup>70</sup> See David Vanzetti & Els Wynen, *The "Multifunctionality" of Agriculture and Its Implications for Policy*, in AGRICULTURE AND THE WTO: CREATING A TRADING SYSTEM FOR DEVELOPMENT 174–75 (2004).

<sup>71</sup> While some multifunctional outputs of agriculture have intangible benefits, most are tied to food security, directly or otherwise. Even though environmental sustainability is arguably the most crucial determinant of future global food security, biodiversity is also pivotal for food security, which is why "Biodiversity for Food Security" was the theme for the 2004 World Food Day. For more on this, see Marsha A. Echols, *Focus on Biodiversity for Food Diversity: Expressing the Value of Agrodiversity and Its Know-How in International Sales*, 48 HOW. L. J. 431 (2004).

<sup>72</sup> See Vanzetti & Wynen, *supra* note 70, at 175.

argued that food security is not a joint product of agricultural production, as it can be ensured through international trade.<sup>73</sup>

Article 20 of the AoA explicitly mandates that food security and other “non-trade concerns” shall be taken into account in further agricultural negotiations.<sup>74</sup> This has also been reaffirmed by the Doha Ministerial Declarations.<sup>75</sup> This seems to be a positive response to those who accuse the WTO of coddling trade and commercial interests at the expense of legitimate non-trade concerns.<sup>76</sup> However, harmonizing agricultural trade liberalization with attending non-trade concerns has proved to be extraordinarily difficult. Few dispute the multifunctionality of agriculture,<sup>77</sup> yet there is skepticism that some WTO members invoke multifunctionality disingenuously as covert protectionism.<sup>78</sup> The fact that most agricultural subsidies in OECD countries go to large-scale farmers and corporate agribusinesses seem to bear out this skepticism.<sup>79</sup> Indeed, a closer scrutiny of the issue suggests that disagreements on multifunctionality are often patterned along the lines of the subjective comparative advantages of nations.

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<sup>73</sup> The pinnacle of comparative advantage theory, however ideal, is a rule-based, predictable, and stable world, where each nation does what it is capable of doing best, and relies on the international market to secure everything else. Hence, theoretically, a nation could ensure its food security without engaging in food production at all.

<sup>74</sup> AoA, *supra* note 56, at 422–23.

<sup>75</sup> See Doha Declaration, *supra* note 39, ¶ 13.

<sup>76</sup> See James R. Simpson & Thomas J. Schoenbaum, *Non-trade Concerns in WTO Trade Negotiations: Legal and Legitimate Reasons for Revising the “Box” System?*, 2 INT’L J. AGRIC. RES., GOVERNANCE, & ECOLOGY 399, 401–02 (2003).

<sup>77</sup> In the WTO context, multifunctionality is understood as the “[i]dea that agriculture has many functions in addition to producing food and fibre, e.g. environmental protection, landscape preservation, rural employment, food security, etc.” *Glossary*, WTO, [http://www.wto.org/english/thewto\\_e/glossary\\_e/glossary\\_e.htm](http://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm) (last visited June 14, 2015).

<sup>78</sup> See generally MARY BOHMAN ET AL., ECON. RESEARCH SERV., USDA, *THE USE AND ABUSE OF MULTIFUNCTIONALITY* (1999).

<sup>79</sup> A large portion of the massive agricultural subsidies in OECD countries (90% in the case of the U.S.) goes to the richest 25% of farmers. WORLD BANK, *GLOBAL ECONOMIC PROSPECTS 2004: REALIZING THE DEVELOPMENT PROMISE OF THE DOHA AGENDA* 121 (2003). Thus, claims about rural welfare, employment, environmental sustainability, and other aspects of multifunctionality merit serious scrutiny.



## 1. MULTIFUNCTIONALITY AND COMPARATIVE ADVANTAGE

Once a member country's comparative advantage in agriculture is known, it is easy to guess its position on the issue of multifunctionality. The so-called friends of multifunctionality (including the EU, Japan, Mauritius, Norway, South Korea, and Switzerland) argue that production-linked agricultural support is essential to maintain positive externalities and public goods associated with agricultural production.<sup>80</sup> They believe that the Green Box is insufficient and therefore advocate greater flexibility. These high cost food producing countries also maintain a relatively high level of amber box support relative to what is permitted under the AoA.<sup>81</sup> On the other hand, WTO members that have a strong comparative advantage in agriculture, particularly the U.S. and the Cairns Group,<sup>82</sup> believe that multifunctionality serves as a disguise for protectionism.<sup>83</sup> Certain aspects of multifunctionality, such as cultural significance or rural landscape, are indeed difficult to reasonably value and thus are susceptible to abuse.<sup>84</sup> Like industrialized nations, developing countries' positions on multifunctionality are heterogeneous. Many developing countries,

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<sup>80</sup> See Jessrey M. Peterson *et al.*, *Multifunctionality and Optimal Environmental Policies for Agriculture in an Open Economy*, in AGRICULTURE AND THE WTO: CREATING A TRADING SYSTEM FOR DEVELOPMENT 165 (2004).

<sup>81</sup> BOHMAN ET AL., *supra* note 78, at 6–7.

<sup>82</sup> The Cairns Group is a group of agricultural exporting nations formed in 1986 in Cairns, Australia. Its members are: Argentina, Australia, Bolivia, Brazil, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Pakistan, Paraguay, Peru, the Philippines, South Africa, Thailand, and Uruguay. Since its formation, the group has lobbied for agricultural trade liberalization, and represents probably the most influential block in agricultural negotiations, other than the EU. THE CAIRNS GROUP, <http://www.cairnsgroup.org/Pages/default.aspx> (last visited June 14, 2015).

<sup>83</sup> Eugenio Diaz-Bonilla and Rashid S. Kaukab, *Liberalizing Agricultural Trade and Developing Countries*, CARNEGIE ENDOWMENT FOR INT'L PEACE, <http://carnegieendowment.org/2003/03/03/liberalizing-agricultural-trade-and-developing-countries>.

<sup>84</sup> See Janet Stephenson, *The Cultural Values Model: An Intergrated Approach to Values in Landscape*, 84 LANDSCAPE & URBAN PLANNING 127, 127 (2009). The concern here is that WTO members may inflate the cultural significance of crop production or other aesthetic values, such as rural landscape, to justify their agricultural support.

including members of the Cairns Group, are skeptical about multifunctionality, which they consider as a form of “special and differential treatment for rich countries.”<sup>85</sup> However, these countries are still keen on the issue of development. Many of them are also cognizant of their vulnerabilities, especially regarding food security, and thus cannot afford to object to multifunctionality altogether.<sup>86</sup>

## 2. FOOD SECURITY: THE CRUX OF MULTIFUNCTIONALITY

Multifunctionality may be used as a bandwagon to smuggle various interests into the WTO.<sup>87</sup> Though it is true that multifunctionality is not peculiar to agriculture, there are characteristics that are unique to agriculture.<sup>88</sup> Agriculture is the source of 95% of the worldwide calorie intake (fishing and hunting account for the remaining 5%).<sup>89</sup> As such, agriculture is the bedrock of human security,<sup>90</sup> and a nation’s survival can even depend upon access to food.<sup>91</sup> Further, national security has historically been the major justification for agricultural protectionism.<sup>92</sup> States still consider food self-sufficiency as a core component of their national security strategy.<sup>93</sup> In his address to the Future Farmers of America,

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<sup>85</sup> *Briefing Note Regarding Agricultural Issues Raised at the Seattle Ministerial Conference*, WTO, [http://www.wto.org/english/thewto\\_e/minist\\_e/min99\\_e/english/about\\_e/07ag\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/07ag_e.htm) (last visited June 14, 2015).

<sup>86</sup> The vulnerability of international trade to manipulation by powerful nations and the “North-South duel” is quite evident in agriculture. However, WTO members’ sector interests are too diverse to fit into “North-South” categorization. For example, whereas the Cairns Group embraces both poor and rich nations, both poor and developed nations are net food importing.

<sup>87</sup> See Vanzetti & Wynen, *supra* note 70, at 170.

<sup>88</sup> See OECD, *supra* note 65, at 10.

<sup>89</sup> See Stefan Mann, *Degrees of Jointness for Food Security and Agriculture in Multifunctionality*, in *AGRICULTURE: EVALUATING THE DEGREE OF JOINTNESS*, POLICY IMPLICATIONS 159 (OECD 2008).

<sup>90</sup> “There have always been two major components of human security: freedom from fear and freedom from want.” U.N. DEV. PROGRAMME, *HUMAN DEVELOPMENT REPORT 24* (1994).

<sup>91</sup> MICHAEL J. TREBILCOCK ET AL., *THE REGULATION OF INTERNATIONAL TRADE* 440 (4th ed. 2013).

<sup>92</sup> See PETER GOUREVITCH, *POLITICS IN HARD TIMES: COMPARATIVE RESPONSES TO INTERNATIONAL ECONOMIC CRISES* 46 (1986).

<sup>93</sup> See, e.g., Aryn Baker, *Desert Dreams: Can the Middle Eastern Country of Qatar Learn to Feed Itself?*, *TIME* (Nov. 19, 2012),

former U.S. President George W. Bush remarked: “Can you imagine a country that was unable to grow enough food to feed the people? It would be a nation subject to international pressure. It would be a nation at risk. And so when we’re talking about American agriculture, we’re really talking about a national security issue.”<sup>94</sup> With a touch of hypocrisy, however, President Bush argued that American farmers ought to feed the world:

I want America’s farmers and ranchers feeding those who are hungry, those who need foodstuffs. We’re the best in the world at growing . . . And, therefore, we ought to work hard to open up all avenues, all markets, so we can feed people. . . . There was a big debate . . . as to whether or not China ought to be allowed into what’s called [t]he [WTO]. I argued vociferously that they should be[.] . . . [B]y opening up Chinese markets to American foodstuffs, it will be beneficial to American farmers . . . we want to be feeding the Chinese.<sup>95</sup>

The importance of food security in the controversy over multifunctionality can be gleaned from two facts.<sup>96</sup> First, as indicated above, while net food importing countries are keen about

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<http://science.time.com/2012/11/19/desert-dreams-can-the-middle-eastern-country-of-qatar-learn-to-feed-itself/> (“[A] homegrown meal is not only possible, but essential for the Mideast country’s national security.”); Jonathan Shrier, *Food Security Contributes to National Security*, U.S. DEPT. OF STATE OFFICIAL BLOG (Oct. 28, 2011), <http://blogs.state.gov/stories/2011/10/28/food-security-contributes-national-security> (“Investments made to ward off food insecurity and prevent its recurrence can prevent the vicious cycles of rising extremism, armed conflict, and state failure that can require far larger commitments of resources down the road.”).

<sup>94</sup> Press Release, Office of the Press Secretary, President’s Remarks to the Future Farmers of America (July 27, 2001), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2001/07/20010727-2.html>.

<sup>95</sup> *Id.*

<sup>96</sup> Vanzetti & Wynen, *supra* note 70, at 169–70. Food security is different, not only because it is the most crucial feature of multifunctionality, but also because it underlies other aspects of multifunctionality, as discussed above.

multifunctionality, surplus producing countries are generally less enthusiastic about it.<sup>97</sup> Second, the credibility of concerns for many other aspects of multifunctionality is suspect. This is particularly true with respect to the aesthetic values of agriculture. For example, even though most societies were once predominantly agrarian, there is almost nothing particularly revealing about why agriculture is of particular cultural significance for some countries but not for others. Even the credibility of less controversial aspects of multifunctionality, such as environmental sustainability and biodiversity, must be subjected to scrutiny. While agriculture has a unique potential in sustaining the environment, mainly through preserving biodiversity, it also contributes to its destruction.<sup>98</sup> Beyond exhausting fertile soil and underground water, agriculture contributes up to 30% of greenhouse gas emissions,<sup>99</sup> making it the second largest polluter.<sup>100</sup> Yet, countries that espouse multifunctionality have not necessarily been keen in cutting greenhouse gas emissions or the intensive use of chemicals in their agricultural sectors. Nor are they necessarily sticking to traditional methods of farming either.

Net food importing industrialized nations and developing countries are particularly keen about food security.<sup>101</sup> However, the roots of their concern are different. Net food importing industrialized countries are concerned about the supply side of the equation; their concern is mainly associated with international market volatility and export restrictions.<sup>102</sup> Accordingly, they advocate a strong WTO discipline that helps ensure a stable food supply in the international market by, inter alia, prohibiting export restrictions.<sup>103</sup> In their joint

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<sup>97</sup> While food importing industrialized nations champion multifunctionality, the U.S., the Cairns Groups, and many other developing countries generally oppose it as a justification for domestic support. See Vanzetti & Wynen, *supra* note 70, at 3.

<sup>98</sup> See WORLD BANK, WORLD DEVELOPMENT REPORT 2008: AGRICULTURE FOR DEVELOPMENT, *supra* note 10, at 4.

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

<sup>100</sup> Carin Smaller & Sophia Murphy, *Bridging the Divide: A Human Rights Vision for Global Food Trade*, in THE GLOBAL FOOD CHALLENGE: TOWARDS A HUMAN RIGHTS APPROACH TO TRADE AND INVESTMENT POLICIES 112 (Sophia Murphy & Armin Paasch eds., 2009).

<sup>101</sup> See *id.* at 9.

<sup>102</sup> See WTO Comm. on Agric., *Food Security and the Role of Domestic Agricultural Production*, ¶ 14, G/AG/NG/W/36/Rev.1 (Nov. 9, 2000).

<sup>103</sup> See *id.* ¶¶ 39, 40.

submission to the WTO Committee on Agriculture, Japan and the Republic of Korea have emphasized that while trade liberalization contributes to food security by augmenting domestic production, “there is always a risk of import interruption” due to wars, conflicts, export embargoes or restrictions, and other unforeseen circumstances.<sup>104</sup> Citing the 1973 soybeans embargo, they stressed that their concern was not merely speculative.<sup>105</sup> Accordingly, they argued that since existing WTO law does not provide a guarantee against import disruptions, every country may exercise its legitimate right to use domestic production as an insurance against possible import risks.<sup>106</sup> Their claim was vindicated again when, following the 2008 commodity price hike, many countries resorted to export restrictions in order to ensure adequate domestic supply or otherwise insulate their consumers from high international prices.<sup>107</sup>

By contrast, poverty, rather than export restrictions, is at the root of food insecurity for developing countries.<sup>108</sup> Thus, prohibition against export bans may not necessarily improve their situation.; it

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<sup>104</sup> See *id.* ¶¶ 17, 37, 45.

<sup>105</sup> See *id.* ¶ 37. The 1973 oil crisis triggered by the Arab-Israeli War was accompanied by a global food crisis. Consequent to the US embargo, soybeans disappeared from the Japanese markets, and that forced the Japanese government to overhaul its national food and agricultural policy and embrace food self-sufficiency as a government priority. See Osamu Koyama, *The Relationship Between Domestic Agricultural Production and Food Security: A Japanese Case*, in MULTIFUNCTIONALITY IN AGRICULTURE: EVALUATING THE DEGREE OF JOINTNESS, POLICY IMPLICATIONS 184 (2008).

<sup>106</sup> WTO Comm. on Agric., *supra* note 105, ¶ 5, 8, 45, 50.

<sup>107</sup> Quantitative restrictions are still legitimate in food products, only subject to certain minimal conditions. The insufficiency of the WTO discipline has been exposed in recent years “when export restrictions exacerbated or even . . . caused severe disruption and a collapse in confidence on international markets.” See PRICE VOLATILITY IN FOOD AND AGRICULTURAL MARKETS: POLICY RESPONSES 25 ¶ 95, 97 (2011), available at [http://www.oecd.org/document/20/0,3746,en\\_2649\\_37401\\_48152724\\_1\\_1\\_1\\_37401,00.html](http://www.oecd.org/document/20/0,3746,en_2649_37401_48152724_1_1_1_37401,00.html).

<sup>108</sup> See generally SUMITER S. BROCA, FOOD INSECURITY, POVERTY AND AGRICULTURE: A CONCEPT PAPER 6 (2002), available at <http://www.fao.org/3/a-ae405e.pdf> (explaining that poverty reduction and rural development through growth in agriculture will provide access to food). Of course, there are also net food importing WTO members among least developed nations, and there is no doubt that they will be affected by export restrictions. However, since food insecurity issues exist on both the demand and supply side, trade liberalization alone does not solve this problem.

may even do a disservice to them. In a fully liberalized trade, food, like other commodities, would flow towards solvent regions.<sup>109</sup> That means an average Nigerian with an annual consumption expenditure of just \$279 will have to compete with a Luxembourger who can afford to spend \$17,232 per year on consumption.<sup>110</sup> On average, countries where more than 15% of their population is hungry import less than 10% of their food, compared to over 25% percent in food-secure countries.<sup>111</sup> Therefore, economic development is the only way to ensure food security for developing countries.

It must also be emphasized that food security being an equivocal concept, protectionist measures may not necessarily enhance food security for households.<sup>112</sup> In fact, although around a billion people in the world go hungry every day, ensuring global food security by boosting production has not been the priority of the global agricultural trade policy makers.<sup>113</sup> On the contrary, overproduction of food, generated by generous subsidies in rich

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<sup>109</sup> Market forces facilitate the movements of goods to places where they can fetch the most competitive price rather than to places where they have greater utility. Food is no exception. Even during the Great Irish famine, food was exported from impoverished Ireland to England. See AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 172 (Alfred A. Knopf, Inc. 1999).

<sup>110</sup> According to the World Bank, the mean annual consumption expenditure in Nigeria based on Purchasing Power Parity (PPP) is \$279, whereas in Luxembourg it is \$17,232. WORLD BANK, *WORLD DEVELOPMENT REPORT: EQUITY AND DEVELOPMENT* 6 (Oxford Univ. Press 2005).

<sup>111</sup> This is despite the fact that food-secure countries spend less than half as much of their export earnings as food-insecure ones. See FAO, *THE STATE OF FOOD INSECURITY IN THE WORLD: MONITORING PROGRESS TOWARDS THE WORLD FOOD SUMMIT AND MILLENNIUM DEVELOPMENT GOALS* 18 (FAO 2004).

<sup>112</sup> Food security may mean different things, depending on whose security is at issue. According to FAO, food security “exists when all people, at all times, have both physical, and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life.” *Food Security Definition*, FAO, <http://www.fao.org/hunger/en/> (last visited June 14, 2015). In the WTO context, however, food security refers to the physical availability of adequate food at national level. It is concerned solely with the supply side of the equation. See *Food Security*, WORLD HEALTH ORG., <http://www.who.int/trade/glossary/story028/en/> (last visited June 14, 2015). These are radically different conceptions.

<sup>113</sup> See Tesfa G. Gebremedhin, *Problems and Prospects of the World Food Situation*, 18(2) J. AGRIBUSINESS 221, 222 (2000).

nations, has long been regarded as the “[r]eal illness of international trade in agricultural products.”<sup>114</sup> As a result, discouraging food production now figures as a goal under the AoA.<sup>115</sup> Blue Box subsidies that go to farmers are now coupled with conditions that require them to limit production.<sup>116</sup> In sum, while governments are generally sensitive about food security, their sensitivity varies depending on whose security is at stake.<sup>117</sup> Primarily, food is a necessity and only secondarily a trade commodity. When hunger strikes, survival is at stake, not just security. Therefore, it is critical that food security trumps trade or other considerations. However, national food security shows almost nothing about what happens to the individual; hence, protectionist measures that are justified on the ground of food security must be subjected to scrutiny.<sup>118</sup>

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<sup>114</sup> MEL ANNALD, INTERNATIONAL AGRICULTURAL TRADE DISPUTES: CASE STUDIES IN NORTH AMERICA 64 (Andrew Schmitz et al. eds., 2005).

<sup>115</sup> ARATHI BHASKAR & JOHN C. BEGHIN, HOW COUPLED ARE DECOUPLED FARM PAYMENTS? A REVIEW OF THE EVIDENCE 1 (2007).

<sup>116</sup> *See id.* The reason is clear: we live in a world awash with surplus food. Global food insecurity (in the sense of dearth in aggregate food supply) is not a genuine problem today. The concern here is rather that unconditional government support would lead to overproduction of food, which may, in turn, from a commercial point of view, suppress food prices or distort world trade in food products.

<sup>117</sup> *See generally* Special Rapporteur on the Right to Food, *Economic, Social and Cultural Rights: The Right to Food*, ¶¶ 21–23, Comm’n on Human Rights, U.N. Doc. E/CN.4/2004/10 (Feb. 9, 2004) (explaining agricultural prices have fallen but consumer prices have increased). Nations that regard food as a matter of national security should not suggest that they are equally concerned about household food security. The appalling scale of global hunger is not a testament of any such concern. “No amount of posturing by statesmen and bureaucrats and no amount of academic debate and dissection of the ‘technical’ issues can conceal the fact that the eradication of hunger and malnutrition has not, in practice, been a priority concern of the vast majority of governments. The political will has clearly been absent.” THE RIGHT TO FOOD 60 (P. Alston & K. Tomasevski eds., 1984).

<sup>118</sup> A WTO member that invokes food security as a justification for its protectionist policies must be challenged based on its records in fighting hunger and malnutrition. National food security, like GDP, conceals more than it reveals about the lives of individuals. Food security figures, in the most concrete manner, should be measured only at the individual level, and that ought to be the yardstick by which a state’s commitment to food security is measured.

C. AGRICULTURE AND THE FALSE PROMISE OF  
DEVELOPMENT

The historical discontent of developing countries with the GATT/WTO is nowhere more glaring than in agriculture.<sup>119</sup> The gospel of comparative advantage preached by the North suddenly vanishes when it comes to agriculture.<sup>120</sup> The enormity of economic gains involved becomes utterly irrelevant. Agriculture represents the clearest embodiment of the hypocrisy and double standards about open trade and comparative advantage.<sup>121</sup> Agricultural scholar Kevin Watkins writes that “[i]n the real world of agricultural trade, market survival depends less upon comparative advantage, than upon comparative access to subsidies—an area in which northern producers enjoy unrivaled dominance.”<sup>122</sup> The United Nations Development Programme (UNDP) adds:

Developed country governments seldom waste an opportunity to emphasize the virtues of open markets, level playing fields and free trade, especially in their prescriptions for poor countries. Yet the same governments maintain a formidable array of protectionism barriers against developing countries. They also spend billions of dollars on agricultural subsidies. Such policies . . . [deny] millions of people in developing countries a chance to share in the benefits of trade. Hypocrisy and double standards are not strong foundations for

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<sup>119</sup> Investigations by GATT itself and various committees set up by GATT have shown how agricultural protectionism in rich countries harms poor countries. See GATT, TRENDS IN INTERNATIONAL TRADE: REPORT BY A PANEL OF EXPERTS 80 (1958).

<sup>120</sup> Agriculture is “the only area in which export subsidies are [still] permitted; three-digit tariff levels are common . . . and a number of trade-distortive . . . domestic support measures are still shielded from . . . [the] dispute settlement system . . .” DESTA, *supra* note 4, at 9.

<sup>121</sup> See KEVIN WATKINS, AGRICULTURAL TRADE AND FOOD SECURITY 4 (1995).

<sup>122</sup> *Id.*



rule-based multilateral system geared toward human development.<sup>123</sup>

From the inception of the GATT, developing nations were wary of the agreement and wasted no time in voicing their objections to the U.S. proposal.<sup>124</sup> Some developing countries even witnessed a decline in their export earnings after joining the GATT.<sup>125</sup> As a result, they demanded equitable trade terms under the GATT framework.<sup>126</sup> Although the validity of their demands were corroborated by the GATT's own investigations, the system still remains lopsided.<sup>127</sup> Indeed, given their peripheral role in the negotiation processes, it should not come as a surprise that developing countries suffer from systemic disadvantages in the GATT/WTO systems.<sup>128</sup> Competition between unequals is unfair

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<sup>123</sup> U.N. DEV. PROGRAMME [UNDP], HUMAN DEVELOPMENT REPORT: INTERNATIONAL COOPERATION AT A CROSSROADS: AID, TRADE AND SECURITY IN AN UNEQUAL WORLD 113 (2005).

<sup>124</sup> Developing countries (then, mainly Latin American countries, as nearly the whole of Africa and many in Asia were under colony) objected to the U.S. proposal for multilateral trade liberalization in late 1945. "Those that had been colonies had been taught by their parent countries that economic benefit was maximized by controlling trade and suppressing competition from alternative suppliers." ROBERT E. HUDEC, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM 12 (1987).

<sup>125</sup> Chantal Thomas, *Developing Countries and Multilateral Trade Agreements: Law and the Promise of Development*, 108 HARV. L. REV 1715, 1718–19 (1995).

<sup>126</sup> When the GATT could not meaningfully address its quest for structural changes in the global economic order, developing countries turned to the U.N. Using their numerical advantage, they pushed through the General Assembly resolutions that were aimed at reforming the existing global economic relations, the most ambitious of which was the 1974 General Assembly Declaration on the Establishment of a New International Economic Order (NIEO). The NIEO was based on the recognition that the existing economic relations were unjust and contrary to the U.N. Charter. See Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (S-VI), U.N. Doc. A/RES/S-6/3201 (May 1, 1974).

<sup>127</sup> "Just as there is a bias within the WTO against 'non-trade' interests, there is a bias in the WTO processes against developing States." SARAH JOSEPH, BLAME IT ON THE WTO? A HUMAN RIGHTS CRITIQUE 62 (2011).

<sup>128</sup> See generally WTO, WORLD TRADE REPORT 2011: THE WTO AND PREFERENTIAL TRADE AGREEMENTS: FROM CO-EXISTENCE TO COHERENCE 114 (2011) (explaining that developing countries may be disadvantaged because

enough already; when the dominant parties set the rules of the game, the weaker players' capabilities are circumscribed *a priori*.<sup>129</sup> Yet, the hallmark of trade is competition, not cooperation, and agreements are curved out of cut-throat negotiations. In view of this, the expectation that developed nations should be more benevolent towards their developing partners may be partly misplaced.<sup>130</sup>

Developing countries face several handicaps in their trade relationship with the North. First, in the face of pronounced power differentials, the very idea of a rule-based trading system is a relative concept.<sup>131</sup> Second, although agriculture is the only niche for many developing countries, trade in high-value agricultural products such as coffee, banana, and cocoa is dominated by a handful of companies in industrialized countries and the developing countries' share of

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they are forced to accept rules that are inappropriate for their level of development). Despite the fact that the GATT/WTO, unlike the Bretton Woods institutions, had a one-nation, one-vote system, developing countries had little influence in its decisions. Crucially, the requirement of unanimity in GATT/WTO decision-making means that negotiations are more important than the actual voting, and given their limited market share, poor countries have limited advantage around the negotiating table.

<sup>129</sup> See generally RICHARD H. STEINBERG, *TRADE ENVIRONMENT NEGOTIATIONS IN THE EU, NAFTA, AND GATT/WTO: STATE POWER, INTERESTS, AND THE STRUCTURE OF REGIME SOLUTIONS* 14 (1995) (explaining that powerful countries can force less powerful countries to accept particular solutions).

<sup>130</sup> Despite the rhetoric about trade cooperation, trade largely proceeds between profit-driven private traders (typically corporations). This commonly realized point suggests that the corporate lobby is often powerful enough to trump the development needs of the poor and similar considerations.

<sup>131</sup> In 1985, for example, the U.S., claiming that the activities of the Government of Nicaragua constituted a threat to its national security, invoked GATT Article XXI and banned almost all imports from and exports to Nicaragua. See Report by the Panel, *United States—Trade Measures Affecting Nicaragua*, ¶ 4.1, L/6053 (Oct. 13, 1986). Although Nicaragua complained and a panel was established, it was of no avail. First, the panel rightly decided that it could not examine the validity or motivation for the invocation of Article XXI(b)(iii) by the U.S. (Art XI leaves no room for evaluating the substantive merit of the of members' measures). See *id.* Second, even if the Panel were to find the U.S. measure to be inconsistent with its GATT obligations, the ultimate remedy Nicaragua could obtain would be waiver of its GATT obligations towards the U.S., which had already been rendered meaningless by the two-way embargo. See *id.*

these exports is declining.<sup>132</sup> Third, while no country has transformed its economy by relying on the export of primary products, poor countries processed products are subjected to prohibitive tariffs and non-tariff barriers in rich nations.<sup>133</sup> As a result, trade in processed products is being increasingly dominated by a handful of vertically integrated corporations.<sup>134</sup> For example, in 2007, a pound of roasted Shirkinia Sun-Dried Sidamo coffee in a Starbucks bag commanded \$26 in the U.S.<sup>135</sup> Nevertheless, the poor farmer who sun-dried that same coffee in Sidamo, Ethiopia, earned around just \$1 for it.<sup>136</sup> Because of the prevailing extreme level of market concentration and sharp technological disparities, the share of least developed countries (LDCs) in processed agricultural exports has dropped from a negligible 0.7% in the 1980s to just 0.3% by the 1990s.<sup>137</sup> Perhaps the most formidable handicap of poor countries is the lack of technology.<sup>138</sup> For example, from 2000 to 2003, agricultural labor productivity in LDCs was less than 1% that of the level in developed nations.<sup>139</sup> With such a magnitude of productivity differential, it is uncertain if trade liberalization alone can address the

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<sup>132</sup> Just four companies control 40% of the global trade in coffee. Six chocolate manufacturers that dominate cocoa production and trade claim half of the global sales from chocolates. The EU countries alone account for 40% of total agricultural exports, up from around 20% in the 1960s. In contrast, developing countries that were net agricultural exporters in the 1960s are now net importers. See FAO, *THE STATE OF AGRICULTURAL COMMODITY MARKETS* 30–33 (2004).

<sup>133</sup> See Hans Peter Lankes, *Market Access for Developing Countries*, INT'L MONETARY FUND, <http://www.imf.org/external/pubs/ft/fandd/2002/09/lankes.htm> (last visited June 14 2015).

<sup>134</sup> See CORPORATE POWER AND GLOBAL AGRIFOOD GOVERNANCE 27–29 (Jennifer Clapp & Doric Fuchs eds., 2009); see also WORLD BANK, *WORLD DEVELOPMENT REPORT 2008: AGRICULTURE FOR DEVELOPMENT* *supra* note 10, at 135.

<sup>135</sup> See Stephan Faris, *Starbucks vs. Ethiopia: The Country that Gave the World the Coffee Bean and the Company that Invented the \$4 Latte are Fighting over a Trademark*, FORTUNE (Feb. 26, 2007, 5:56 AM) [http://money.cnn.com/magazines/fortune/fortune\\_archive/2007/03/05/8401343/index.htm](http://money.cnn.com/magazines/fortune/fortune_archive/2007/03/05/8401343/index.htm).

<sup>136</sup> See *id.*

<sup>137</sup> See FAO, *supra* note 132, at 26.

<sup>138</sup> See UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *THE LEAST DEVELOPED COUNTRIES REPORT 2006: DEVELOPING PRODUCTIVE CAPACITIES* 163 (2006).

<sup>139</sup> See *id.* at IX.

needs of the poor.<sup>140</sup> Yet, although the UN Charter and various international treaties oblige the dissemination of agricultural technology, the WTO agreements ensure the perpetuation of a technological divide.<sup>141</sup> Fourth, while effective trade bargaining requires coalition building, the diversity of developing countries hinders them from forging a common front.<sup>142</sup> Fifth, developing countries' traditional obsession on Special and Differential (S&D) treatment seems to further marginalize them at the negotiating table.<sup>143</sup> In addition, poor countries have such limited representation in Geneva that their delegates struggle to grasp what is under discussion, let alone influence the course of events during complex negotiations.<sup>144</sup> The WTO legal framework is so complex that it is

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<sup>140</sup> See generally *id.* (reasoning that trade liberalization alone cannot solve this problem). In fact, some developing countries had been granted tariff preferences through various schemes, such as the Lomé Convention (replaced by the Cotonou Agreement in 2000), the Everything But Arms (EBA) initiative, and the United States' Africa Growth Opportunity Act (AGOA). Yet, the fact that these schemes have not resulted in enhanced agricultural exports from those poor nations to Europe and the U.S. suggests that the problem is deeper than tariff preference can cure. "Today, the share of world exports of Sub-Saharan Africa . . . is less than one-half that of Belgium . . . . If Africa enjoyed the same share of world exports as it did in the 1980s, its exports today would be some \$119 billion higher . . . about five times aid flows and budget savings from debt services relief provided by high-income countries in 2002." UNDP, *supra* note 123, at 117.

<sup>141</sup> See Nancy Birdsall & Robert Z. Lawrence, *Deep Integration and Trade Agreements*, in GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY 128, 144 (Inge Kaul et al. eds., 1999), available at <http://web.undp.org/globalpublicgoods/TheBook/globalpublicgoods.pdf>.

<sup>142</sup> "Effective bargaining in [multilateral trade negotiations] requires coalition building, so that, aside from the United States and Japan, blocks of countries became the major players negotiating on all issues." Raymond F. Hopkins, *Developing Countries in the Uruguay Round: Bargaining Under Uncertainty and Inequality*, in WORLD AGRICULTURE AND THE GATT 143 (William P. Avery ed., 1993).

<sup>143</sup> Developing countries have traditionally lobbied for "Special & Differential" treatment; but "free ridership" often comes at a cost, and in this case their bargaining power is the price to be paid. This means that multilateral trade negotiations will be conducted essentially among industrialized nations. See generally STIGLITZ & CHARLTON, *supra* note 4, at 43.

<sup>144</sup> In the 2005 Ministerial Meeting in Hong Kong, for instance, 356 delegates represented the U.S., while Burundi had just three. As a result, after days of arduous negotiations when delegates became exhausted and

“probably fully understood by no nation that has accepted it, including some of the richest and most powerful trading nations.”<sup>145</sup> If well-resourced nations, including those that helped design the system and negotiated agreements, are represented by delegates with the highest level of expertise who still struggle to fully understand the system, how poor members that are represented by only one or two delegates would fare is easy to guess.<sup>146</sup> Sixth, the very culture of negotiation at the WTO excludes many members from “important aspects of deal-brokering.”<sup>147</sup> Finally, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) and the Agreement on Technical Barrier to Trade (TBT) are viewed by the developing world as bottlenecks, as they reflect the standards of developed nations and may be employed for protectionist purposes.<sup>148</sup> In practice, implementation of these agreements has proven to be costly.<sup>149</sup>

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sleep deprived, those delegates in large numbers could take turns sleeping, while the rest “had to be on 24-hour duty.” See OXFAM INT’L, BRIEFING PAPER NO. 85, WHAT HAPPENED IN HONG KONG? 5 (2005).

<sup>145</sup> JOHN H. JACKSON, *The Uruguay Round and the WTO: The New Organization and its Antecedents*, in THE WORLD TRADE ORGANIZATION 1 (1998).

<sup>146</sup> See *id.*

<sup>147</sup> “The negotiating culture of the GATT served to exclude numerous Members from important aspects of deal-brokering. Policies and treaties were negotiated in notorious ‘Green Room’ meetings to which only certain Members were invited, and in which discussions were secret. Green Room decisions were then presented to other Members as *faits accomplis*.” JOSEPH, *supra* note 127, at 63; see also UNDP, DEEPENING DEMOCRACY IN A FRAGMENTED WORLD, HUMAN DEVELOPMENT REPORT 2002, at 118 (Oxford Univ. Press 2002). The green room refers to a process, rather than a location or physical structure.

<sup>148</sup> See generally UNCTAD, *International Trade in Genetically Modified Organisms and Multilateral Negotiations: A New Dilemma for Developing Countries*, ¶ 128, UNCTAD/DITC/TNCD/1 (July 5, 2000) (“[T]he basic concept of the precautionary principle is already present in the WTO in several key provisions, such as the SPS and TBT Agreements.”).

<sup>149</sup> Implementations of WTO agreements regarding customs valuation, sanitary and phytosanitary measures (SPS), and intellectual property rights (TRIPs) are estimated to cost a typical developing country around \$150 million, which is equivalent to the annual development budget of many least developed nations. See Dani Rodrik, *The Global Governance of Trade: As if Development Really Mattered* 30 (July, 2001) (unpublished paper prepared for the UNDP, Harvard Univ.).

In general, although developing countries are the overwhelming majority in the WTO,<sup>150</sup> their influence has always been minimal.<sup>151</sup> For example, almost three-quarters of the 108 countries that participated in the Uruguay Round negotiations were developing nations.<sup>152</sup> However, a few protagonists, notably the U.S. and the EU, once again mainly determined the outcome of the round.<sup>153</sup> As a consequence, the balance not only in tariff reduction on industrial products, which was the traditional pursuit of the GATT, but also in all of the so-called new issues, was tilted in favor of rich nations.<sup>154</sup> The four new issues added into the GATT, like Trade in Services (TIS), Trade-Related Aspects of Intellectual Property (TRIPS), and Trade-Related Investment Measures (TRIMS), unarguably reflect the priorities of developed nations and their corporations.<sup>155</sup> What remains is agriculture. Given the greater stake developing countries have in the sector, one would expect them to have a significant role in agricultural negotiations.<sup>156</sup> However, the battle on agriculture was mainly a two-way showdown between the EU and the U.S.<sup>157</sup> Many of the outstanding disagreements were hammered out by the bilateral agreement between the two powers in the Blair House Accord.<sup>158</sup>

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<sup>150</sup> See *Understanding the WTO: Developing Countries*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/dev1\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm) (last visited June 14, 2015).

<sup>151</sup> See YASH TANDON, NORTH-SOUTH INST., TECHNICAL ASSISTANCE AS A POLITICAL INSTRUMENT 71–72 (2002).

<sup>152</sup> See *id.*

<sup>153</sup> See *id.*

<sup>154</sup> See Hopkins, *supra* note 142, at 143.

<sup>155</sup> See *id.* at 160–62.

<sup>156</sup> Interestingly, developing countries did not draft any special positions on agricultural trade liberalization during the first five years of the Uruguay Round negotiations; however, the proposal for compensation by a group of five food aid receiving countries (Egypt, Jamaica, Mexico, Morocco, and Peru), is the exception. Developing countries' participation was largely limited to reacting to the initiatives of others. See *id.* at 149–50.

<sup>157</sup> Power relationships between rich countries, especially the U.S. and the EU, explain much of the history of the postwar multilateral trading system. See STIGLITZ & CHARLTON, *supra* note 4, at 43–44.

<sup>158</sup> The agreement reached between the U.S. and the EU at the Blair House in Washington, D.C. is considered a momentous event not only for agriculture, but also for the conclusion of the round. Of course, because the accord was bilateral, it had to be accepted by other negotiators, notably the Cairns Group, which traditionally advocated greater market expansion;

Undertaking costly commitments, such as those embodied in agreements on new issues, developing countries would legitimately expect commensurate tariff cuts on the part of rich nations.<sup>159</sup> However, studies show that average tariff cuts in developed countries were actually much less than that agreed to by developing nations.<sup>160</sup> Access to rich nations' markets for agricultural products, particularly processed products, is limited due to prohibitive tariffs and generous subsidies in those countries.<sup>161</sup>

### III. AGRICULTURE IN THE GATT/WTO SYSTEM

Agriculture contributed to and suffered from the Great Depression.<sup>162</sup> Surplus agricultural production in the 1920s caused prices to slump and brought agricultural trade to a standstill.<sup>163</sup> Governments responded to the crisis by adopting interventionist policies in the form of price controls, production planning and allocation of inputs, food rationing, trade restrictions, and others.<sup>164</sup> Such policies continued through the war and beyond.<sup>165</sup> Farmers were impoverished to the point that they needed "the provisions of 'the welfare state' that was everywhere being created."<sup>166</sup> Against

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countries that opposed sweeping agricultural trade reform include Japan, the Republic of Korea, and the Philippines. See TIMOTHY E. JOSLING ET AL., AGRICULTURE IN THE GATT 156–63 (1996); DESTA, *supra* note 4, at 65–66.

<sup>159</sup> See J. MICHAEL FINGER & L. ALAN WINTERS, RECIPROCIY IN THE WTO 56 (Bernard M. Hoekman et al. eds., 2002).

<sup>160</sup> See *id.*

<sup>161</sup> Even in industry, developed countries subject developing countries' exports to tariff rates that are three to four times higher than the rates applied to other rich countries' products. See UNDP, *supra* note 93, at 127.

<sup>162</sup> See NEW YORK TIMES ALMANAC 304 (John W. Wright et al. eds., 2001).

<sup>163</sup> See *id.*

<sup>164</sup> The U.S. Agricultural Adjustment Act of 1933 is worth mentioning here. This Act not only extended to producers of basic crops' support prices, but also empowered the President to raise tariffs by up to fifty percent or impose quotas on imports if such imports materially interfered with the agricultural adjustment program. See JOSLING ET AL., *supra* note 158, at 11–12.

<sup>165</sup> See *id.* at 11. In the U.S. in particular, "following World War II, more than half of what the farmers collected in the market place for certain crops—such as peanuts and sorghum grain—resulted from government aid programs." PAUL A. SAMUELSON, ECONOMICS 388 (11th ed. 1980).

<sup>166</sup> See JOSLING ET AL., *supra* note 158, at 11.

such an existential backdrop, it is apparent that the architects of the multilateral trading system did not anticipate that states would open up their agricultural sectors for global competition anytime soon.<sup>167</sup>

#### A. *THE GATT ERA*

Agriculture was in principle covered by GATT rules.<sup>168</sup> However, it had effectively eluded any meaningful discipline for decades due to sweeping exemptions; in particular, from the prohibition of quantitative restrictions and export subsidies under Articles XI and XVI, respectively.<sup>169</sup> Protectionism was at its height during the interwar period and came mostly in the form of non-tariff measures, such as quantitative restrictions.<sup>170</sup> Thus, eliminating quantitative restrictions formed one of the priorities of the postwar multilateral trade agenda.<sup>171</sup> As a result, GATT Article XI, §1, prohibits the use of “prohibitions or restrictions other than duties,

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<sup>167</sup> Agriculture is often considered “the GATT’s greatest failure.” JOACHIM ZIETZ & ALBERTO VALDÉS, *AGRICULTURE IN THE GATT: ALTERNATIVE APPROACHES TO REFORM 10* (1988). It should be stressed, however, that from the beginning, the ambitious plan to liberalize global trade deliberately left agriculture out of the frame of discussion. Even the Havana Charter made exceptions to rules prohibiting quantitative restrictions. *See generally* Havana Charter, *supra* note 48, arts. 20, 25–28 (excepting “export prohibitions or restrictions applied for the period necessary to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting Member country” and “import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade”).

<sup>168</sup> *See* R. Sharma, *Agriculture in the GATT: A Historical Account*, in FAO, *MULTILATERAL TRADE NEGOTIATIONS IN AGRICULTURE: A RESOURCE MANUAL* 4, 4.2 (2000).

<sup>169</sup> *See* GATT, *supra* note 47, arts. XI, XVI.

<sup>170</sup> *See generally* Barry Eichengreen & Douglas A. Irwin, *The Slide to Protectionism in the Great Depression: Who Succumbed and Why?* 871 (Nat’l Bureau of Econ. Research, Working Paper No. 15142, 2009) (“[T]here was considerable variation in the extent to which countries imposed protectionist measures. While some countries raised tariffs sharply and imposed draconian controls on foreign exchange transactions, others tightened trade and exchange restrictions only marginally.”).

<sup>171</sup> *See* WILLIAM H. COOPER, CONG. RESEARCH SERV., RL31356, *FREE TRADE AGREEMENTS: IMPACT ON U.S. TRADE AND IMPLICATIONS FOR U.S. TRADE POLICY* 4 (2014).



taxes or other charges.”<sup>172</sup> However, Article XI §2 declares that such prohibition does not apply to agriculture.<sup>173</sup> Agriculture was likewise exempted from the prohibition of export subsidies.<sup>174</sup> Article XVI §3 only advises contacting parties to “seek to avoid the use of subsidies on the export of primary products.”<sup>175</sup> These exceptions were tailored to the agricultural policies of the major architect of the GATT, the U.S.<sup>176</sup> Yet, the U.S. was unwilling to comply even with the minimal requirements of Articles XI and XVI, and it continued to pursue inconsistent policies until it eventually sought and obtained a waiver in 1955.<sup>177</sup> Given its influence in the GATT process, the U.S.’s retreat meant that the issue would remain stalled until the U.S. itself would pick it up again.<sup>178</sup>

The establishment of the European Common Agricultural Policy (CAP) in 1962 was yet another significant obstacle to agricultural trade liberalization.<sup>179</sup> Conversely, the CAP forced the U.S. to rethink its position on agriculture and initiate the launching of the Kennedy Round in 1963.<sup>180</sup> CAP subsidies not only transformed

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<sup>172</sup> GATT, *supra* note 47, art. XI, § 1.

<sup>173</sup> *See id.*, § 2.

<sup>174</sup> *See id.*, art. XVI.

<sup>175</sup> *Id.* These agricultural loopholes expanded further as GATT discipline on industrial products tightened. In 1955, the U.S. was granted a waiver from its obligations under GATT Articles II and XI. The EU established the Common Agricultural Policy in the early 1960s and consolidated preexisting protectionism. Moreover, newly joining GATT Contracting Parties were keen to use the “grandfather clause” to protect their agricultural sectors. *See* VICTOR MOSOTI & AMBRA GOBENA, INTERNATIONAL TRADE RULES AND THE AGRICULTURAL SECTOR 34–36 (2007).

<sup>176</sup> Article XI is considered a multilateral embodiment of Section 22 of the U.S. Agricultural Adjustment Act, which sanctioned the use of import quotas for a list of agricultural products. *See* Theodore H. Cohn, *The Changing Role of the United States in the Global Agricultural Trade Regime*, 7 INT’L POL. ECON. Y.B. 17, 36 (1993).

<sup>177</sup> *See* JACKSON, *supra* note 28, at 314; JOSLING ET AL., *supra* note 158, at 13–14.

<sup>178</sup> *See* JACKSON, *supra* note 28, at 314.

<sup>179</sup> *See generally* CHRISTINA L. DAVIS, FOOD FIGHTS OVER FREE TRADE: HOW INTERNATIONAL INSTITUTIONS PROMOTE AGRICULTURAL TRADE LIBERALIZATION 227 (2003).

<sup>180</sup> *See* Alberta Sbragia, *The EU, the US, and Trade Policy: Competitive Interdependence In the Management of Globalization* (Apr. 23–25, 2009)

the EC from a net importer into a net exporter of major agricultural products, but also remarkably boosted the EC's share in the global agricultural market as the U.S.'s share decreased.<sup>181</sup> CAP policies proved to be major sources of trade wrangling, especially between the EC and the U.S.<sup>182</sup> Interestingly, it was not long after it had obtained a waiver that the U.S. reversed its position and took the lead in the attempt to bring agriculture into a meaningful GATT discipline during the Kennedy Round, but without success.<sup>183</sup> The U.S. tried once again in the Tokyo Round, but failed.<sup>184</sup> In the Uruguay Round, the U.S., backed by the Cairns Group "mounted an almost do or die effort" to see to it that agriculture was integrated into the trading system.<sup>185</sup> After dragging it out for years, the conclusion of the Round was in sight when the U.S. and the EC reached a basic agreement on agriculture in the Blair House Accord.<sup>186</sup>

#### B. THE URUGUAY ROUND AGREEMENT ON AGRICULTURE

The GATT Ministerial Declaration that launched the Uruguay Round of multilateral negotiations in 1986 in Punta del Este resolved that the negotiations would achieve "further liberalization and expansion of world trade to the benefit of all countries, especially less-developed contracting parties."<sup>187</sup> For many less-developed countries, no sector has greater significance than agriculture.<sup>188</sup> Hence, examining whether, and to what extent, their

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(unpublished conference paper), *available at*  
[http://aei.pitt.edu/33126/1/sbragia\\_alberta.pdf](http://aei.pitt.edu/33126/1/sbragia_alberta.pdf).

<sup>181</sup> See DAVIS, *supra* note 179, at 273.

<sup>182</sup> Thirty-five of the forty-five complaints under GATT against the EC between 1970 and 1989 relate to agriculture. Similarly, almost two-thirds of the complaints against the EU during the first five years of the WTO relate to agricultural products. *See id.* at 227–28.

<sup>183</sup> See JACKSON, *supra* note 28, at 314–16.

<sup>184</sup> *See id.*

<sup>185</sup> *Id.*

<sup>186</sup> *See id.*; see also Robert L. Paarlberg, *Why Agriculture Blocked the Uruguay Round: Evolving Strategies in a Two-Level Game*, 7 INT'L POL. ECON. Y.B. 39, 47 (1993).

<sup>187</sup> GATT, Ministerial Declaration on the Uruguay Round, 25 I.L.M. 1623, 1624 (1986).

<sup>188</sup> Mike Moore, Dir.-Gen., WTO, Statement on WTO Negotiations: Agriculture and Developing Countries (Dec. 6, 2000), *available at*  
[https://www.wto.org/english/news\\_e/spmm\\_e/spmm47\\_e.htm](https://www.wto.org/english/news_e/spmm_e/spmm47_e.htm).

interests have been reflected in the AoA provides a unique parameter to evaluate if the above declaration carries anything beyond rhetoric.

The AoA is regarded as one of the most important achievements of the Uruguay Round.<sup>189</sup> It is praised for putting an end to the decades-long neglect of agriculture.<sup>190</sup> However, if the AoA is a success, it is more for providing a framework for future negotiations rather than for actually integrating agriculture into the mainstream GATT/WTO discipline. Agriculture is still substantially more distorted than trade in any other product.<sup>191</sup> Substantively, the merits of the AoA can only be judged by examining to what extent it has resolved longstanding problems of agricultural trade.

## 1. STRUCTURE OF THE AGREEMENT

The AoA is the first multilateral agreement dedicated to agriculture.<sup>192</sup> It contains just twenty-one articles and five annexes, establishing generally applicable rules and standards.<sup>193</sup> The details of actual quantitative commitments are contained in country schedules.<sup>194</sup> The Agreement is structured along three main areas of

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<sup>189</sup> Josling, *supra* note 31, at 168.

<sup>190</sup> *See id.*

<sup>191</sup> *See generally* Dimitrios G. Demekas et al., *The Effects of the Common Agricultural Policy of the European Community: A Survey of Literature*, 2 J. OF COMMON MARKET STUD. 97, 132 (1988).

<sup>192</sup> It should be noted, however, that all GATT rules governing trade in goods still apply to agricultural trade. *See* ANDERSON & MARTIN, *supra* note 18, at 15. With the establishment of the WTO, GATT, the *de facto* institution, has become history. However, GATT, the agreement, is still alive, constituting one of the thirteen major agreements incorporated under Annex 1A to the agreement establishing the WTO. *See* Multilateral Agreement on Trade in Goods, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S 154, 175.

<sup>193</sup> *See generally* AoA, *supra* note 56.

<sup>194</sup> The schedule represents a member's list of commitments and the subject of the commitment. *See Guide to Reading the GATS Schedules of Specific Commitments and the List of Article II (MFN) Exemptions*, WTO, [https://www.wto.org/english/tratop\\_e/serv\\_e/guide1\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/guide1_e.htm) (last visited June 14, 2015). Regarding tariffs, for example, each member country's schedule contains the commitments the country has made, including the tariff rates on each product covered, tariff ceiling, etc. *Id.* Schedules of concessions are an integral part of the GATT as explicitly stated under Article 3(1) of the AoA and GATT Article II: 7. AoA, *supra* note 56, at art. 3(1); GATT, *supra* note

discipline, known as “pillars”, which include market access, export competition, and domestic support.<sup>195</sup> It imposes essentially three types of obligations: to increase market access for agricultural imports, to convert non-tariff measures into tariffs (subject to exceptions), and to reduce export subsidy and domestic support.<sup>196</sup> The agreement also accords special and differential treatment to developing countries, albeit generally limited to lower reductions and longer implementation periods, rather than improved market access, as the preamble of the AoA suggests.<sup>197</sup>

## 2. MARKET ACCESS

Market access sums up the central thrust of trade agreements. Trade agreements are fundamental concessions by states to open up their markets for each other’s exports.<sup>198</sup> Market access has been by far the most important source of trade wrangling. A cursory look at agricultural trade disputes shows that out of 127 disputes and requests for consultation, 50 involved alleged violations

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47, at art. II:7. Schedules that countries agreed to during the Uruguay Round combined to consist of around twenty thousand pages. WTO, *THE WTO AGREEMENT SERIES 2: GENERAL AGREEMENT ON TARIFFS AND TRADE 2* (1998).

<sup>195</sup> Market access concerns mainly border measures on imports that may serve to limit the competitiveness of imported products in the domestic market, among other things; export subsidies are intended to achieve the opposite—boost the competitiveness of domestic products in foreign markets. See WTO, *UNDERSTANDING THE WTO 12–13* (5th ed. 2015). Domestic support, on the other hand, encompasses a range of support measures, including direct market price support to farmers. See *Domestic Support: Amber, Blue and Green Boxes*, WTO, [https://www.wto.org/english/tratop\\_e/agric\\_e/negs\\_bkgrnd13\\_boxes\\_e.htm](https://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd13_boxes_e.htm) (last visited June 14, 2015).

<sup>196</sup> See UNCTAD, *Dispute Settlement, World Trade Organization: 3.15 Agriculture*, 3, UNCTAD/EDM/Misc.232/Add.32 (2003).

<sup>197</sup> The preamble of the AoA states that “Special and Differential” treatment given to developing countries would mainly take the form of market access to their products. See AoA, *supra* note 56, ¶ 5. This, however, has not been reflected in the operative rules, including the schedules of concession. See Josling, *supra* note 31, at 68.

<sup>198</sup> See *generally Free Trade Agreements*, INT’L TRADE ADMIN., <http://trade.gov/fta/> (last visited June 14, 2015).

of Article 4 of the AoA, i.e., market access.<sup>199</sup> Countries traditionally employ two kinds of barriers to restrict or ban the free movements of goods into their territories: tariff and non-tariff barriers.<sup>200</sup> Of the two, non-tariff measures are particularly disliked.<sup>201</sup> They are generally viewed as symbols of protectionism, discrimination, and arbitrariness.<sup>202</sup> Accordingly, eliminating quantitative restrictions figured prominently in the priorities of GATT. Nevertheless, exceptions such as those under GATT Articles XX and XXI are reminders that complete elimination of non-tariff barriers is unrealistic. Still, phasing out non-tariff barriers was one of the major priorities of the AoA. Further, the AoA also mandates the conversion of non-tariff barriers into tariffs,<sup>203</sup> a process known as tariffication. One justification for this is that unlike quantitative restrictions, which tend to be arbitrary, tariffs impose an equivalent burden on all exporters.<sup>204</sup>

a. Tariffication

Article 4(2) of the AoA ensures that, subject to certain exceptions, ordinary tariffs are the only legitimate form of border

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<sup>199</sup> See *Disputes by Agreement*, WTO, [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_agreements\\_index\\_e.htm?id=A1#selected\\_agreement](http://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A1#selected_agreement) (last visited June 14, 2015).

<sup>200</sup> See PETROS C. MAVROIDIS, *TRADE IN GOODS: THE GATT AND THE OTHER AGREEMENTS REGULATING TRADE IN GOODS* 72 (2007).

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

<sup>202</sup> Both tariffs and non-tariff barriers may effectively curtail the free movement of goods. However, while GATT set out to eliminate quantitative restriction, subject to exceptions of course, it appears that eliminating tariffs *in toto* has never been figured as the objective of the GATT/WTO. See *id.* Trade talks on tariffs are normally about reducing them, not eliminating them altogether. See *id.*; see also DESTA, *supra* note 4, at 16–19.

<sup>203</sup> Originally, the U.S. proposed a complete phase out of non-tariff barriers to occur within ten years. The EU and rice-producing countries, particularly Japan and Korea, did not agree. In the end, it was again the U.S. that formally proposed tariffication as a compromise. While the EC accepted the proposal subject to a number of conditions, Japan and Korea went on to secure special privileges to delay implementation of tariffication under Annex 5. See DESTA, *supra* note 4, at 63–64; Josling, *supra* note 31, at 169.

<sup>204</sup> See *General Agreement on Tariffs and Trade*, WTO, [https://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/gatt1994\\_05\\_e.htm](https://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_05_e.htm) (last visited June 14, 2015).

restriction in agriculture.<sup>205</sup> Tariffication has thus ended the longstanding agricultural exception to GATT Article XI.<sup>206</sup> Crucially, it also requires tariff bindings and reductions to improve, or at least maintain, existing levels of market access.<sup>207</sup> As such, agriculture has become the first area where nearly all tariff lines are bound.<sup>208</sup> In addition, as the important footnote to Article 4(2) affirms,<sup>209</sup> country specific derogations from GATT provisions, such as waivers or protocols of accession cannot be invoked to institute quantitative restrictions on agriculture.<sup>210</sup> It must also be emphasized that the AoA even rejects customs duties other than ordinary duties.<sup>211</sup> However, the trickiest part of the story is that tariffication generally resulted in exceedingly high tariff rates.<sup>212</sup> Thus, the practical effect of tariffication in addressing the problem of market access has been unremarkable.

Article 4(2) is not without exceptions. Quantitative restrictions may be provisionally employed for safeguard purposes in accordance with Article 5.<sup>213</sup> Annex 5 to the AoA contains further exceptions to the tariffication requirement.<sup>214</sup> In both cases the

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<sup>205</sup> AoA, *supra* note 56, at art. 4(2).

<sup>206</sup> For more information on measures that must be converted into ordinary customs duties under Article 4(2), see *id.* at n.1.

<sup>207</sup> Tariff bindings refers to tariff ceilings beyond which countries cannot raise tariffs. Additionally, member countries have committed to cut average tariff levels by 36% and tariffs per product by a minimum of 15%. Two-thirds of these percentage rates apply to developing nations.

<sup>208</sup> DESTA, *supra* note 4, at 66–67.

<sup>209</sup> See AoA, *supra* note 56, at art. 4(2) n.1.

<sup>210</sup> See Josling, *supra* note 31, at 180.

<sup>211</sup> What so-called ordinary customs duties refers to is not clear; however, footnote 1 of Art 4(2) explains that such restrictions include variable import levies, minimum import prices, and voluntary export restraints, which are basically forms of customs duties and are not considered as ordinary customs duties. See AoA, *supra* note 56, at art. 4(2) n.1.

<sup>212</sup> DESTA, *supra* note 4, at 75–76.

<sup>213</sup> The idea here is that the removal of quantitative restrictions might trigger import surges, in which case the country concerned is allowed to use safeguard measures to deal with the situation. This is in addition to GATT exceptions that are applicable to any trade in goods, such as those under Articles VI (antidumping), XII (safeguards), XIX (emergency), XX (general exceptions), and XXI (national security). See AoA, *supra* note 56, at art. 5.

<sup>214</sup> Annex 5 to the agreement covers products that have been designated as meriting special treatment, mainly on account of their vitality for food security. See *id.*

criteria are clearly specified.<sup>215</sup> Also, in regards to food products, export restrictions are legitimate under Article 12, subject to the obligation to give due consideration to the effects of such prohibitions or restrictions on importing members' food security, giving advance notice in writing, and consultation upon request with other WTO members.<sup>216</sup> Developing countries that are not net exporters of the foodstuff in issue are exempt altogether.<sup>217</sup>

#### b. Tariff Reduction

Tariffication per se does not improve market access; the tariff must also be low. However, in many instances agricultural tariff rates today are almost as high as before the Uruguay Round,<sup>218</sup> and in some cases are even higher.<sup>219</sup> Countries used a range of avenues to manipulate commitments made and set their tariffs as high as possible. For one, the base period chosen (1986–1988) “was a time of very high protection levels.”<sup>220</sup> Second, the actual process of tariffication was left to individual members.<sup>221</sup> Thus, countries easily inflated their domestic prices while understating world prices to result in tariff rates which were more protectionist than nontariff barriers were during the base period.<sup>222</sup> Tariff reduction commitments also allow a degree of flexibility. While members have agreed to reduce tariffs by an average of 36%, they can still maintain relatively high tariffs with just 15% reduction on sensitive products.<sup>223</sup>

Importantly, processed agricultural products are subjected to significantly higher tariffs than raw products. For example, in

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<sup>215</sup> *See id.*

<sup>216</sup> *See id.*

<sup>217</sup> *See id.* at art. 12(2).

<sup>218</sup> *See Tariffs: More Binding and Closer to Zero*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm2\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm2_e.htm) (last visited June 14, 2015).

<sup>219</sup> *See id.*

<sup>220</sup> KAREN Z. ACKERMAN ET AL., USDA, AGRICULTURE IN THE WTO 8 (1998).

<sup>221</sup> *See ANITA REGMI ET AL.*, USDA, MARKET ACCESS FOR HIGH-VALUE FOOD 1, 4 (2005).

<sup>222</sup> *See id.*

<sup>223</sup> *See* Juan A. Marchetti & Martin Roy, *The TISA Initiative: An Overview of Market Access Issues* 6–14 (World Trade Org. Econ. Research and Stat. Div., Staff Working Paper ERSD-2013-11, 2003).

Canada processed food products are subject to tariffs that are twelve times higher than first stage products.<sup>224</sup> The EU imposes tariffs from 0% to 9% on cocoa paste, but it grows to 30% on the final product.<sup>225</sup> It is clear that such tariff escalation excludes poor countries from high-value agricultural market, and hinders their integration into the global economy. Therefore, it is no wonder that the share of LCDs in processed agricultural exports has declined over the years.<sup>226</sup>

In sum, although there are issues associated with tariff choices, tariffification may have made agricultural trade more transparent.<sup>227</sup> Yet, high tariffs coupled with an array of domestic support leave much to be desired in terms of actual market openings in the sector. Tariffs on agricultural imports remain up to three times higher than those on industrial products.<sup>228</sup> Such an asymmetric tariff structure is clearly unhelpful for many poor countries that rely heavily on agricultural exports. More puzzling is the fact that tariffs on tropical agricultural products are generally higher than those on temperate zone agricultural products.<sup>229</sup> Substantively, the AoA has not addressed the massive trade imbalance against developing countries.<sup>230</sup> For all its achievements, the Uruguay Round is thus criticized as skewed and disappointing for developing nations.<sup>231</sup>

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<sup>224</sup> UNDP, *supra* note 123, at 127.

<sup>225</sup> *Id.*

<sup>226</sup> SEE HAROLD M. HARRIS, JR. & GEOFFREY A. BENSON, SOUTHERN EXTENSION INT'L TRADE TASK FORCE, SOUTHERN AGRICULTURE IN A WORLD ECONOMY, 8, SRDC No. 198-1 (2013).

<sup>227</sup> See WTO, MARKET ACCESS FOR GOODS AND NON-AGRICULTURAL MARKET ACCESS (NAMA) NEGOTIATIONS 92–93 (2012); *see generally* Harry de Gorter & Erika Kliauga, *Reducing Tariff Versus Expanding Tariff Rate Quotas*, in Anderson & Martin, *supra* note 18, at 17 (explaining that there are issues of transparency and clarity in the implementation processes for tariffs).

<sup>228</sup> See Josling, *supra* note 31, at 105.

<sup>229</sup> OLIVIER DE SCHUTTER & FRIEDRICH-EBERT-STIFTUNG, INTERNATIONAL TRADE IN AGRICULTURE AND THE RIGHT TO FOOD 12–13 (2009).

<sup>230</sup> See Anderson & Martin, *supra* note 18, at 7–12 (as noted above, agriculture is the only area most poor nations can hope to gain a fair share of the fruits of international trade, and as the Uruguay Round agreements offer little for such hope to materialize, sights are set on Doha, which so far has unfortunately failed to redeem past inequalities).

<sup>231</sup> See Julio J. Nogués, *Agricultural Exporters in a Protectionist World: Review and Policy Implications of Barriers against Mercosur* 9 (Inst. for the



While some export-oriented truly developing countries have benefited, many of them are net losers of the Round.<sup>232</sup>

### 3. EXPORT COMPETITION

In the beginning, Article XVI of the GATT did not prohibit the use of subsidies in all products.<sup>233</sup> It contained modest, if not meaningless, requirements of notification and consultation.<sup>234</sup> The absence of any meaningful restraint on subsidies tended to cancel out the achievements gained through tariff reduction. As a result, the 1955 amendment expanded Article XVI to include more specific prohibitions on export subsidies.<sup>235</sup> Article 3 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) has reinforced this prohibition.<sup>236</sup> Export subsidies are prohibited because they may result in “dumping,” i.e., products being sold in foreign markets for far less than their cost of production.<sup>237</sup> Dumping has long been considered an unfair trade practice because it distorts

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Integration of Latin America and the Caribbean, Working Paper 16, 2004); Watkins, *supra* note 124, at 4 (“The Uruguay Round will not substantially alter this [biased] position, except to enhance the advantage of the northern agriculture...the subsidy systems of the major industrial countries will remain intact, while developing countries will be required to further liberalize access to their markets. This imbalance is not widely recognized in developing countries, where the UR [Uruguay Round] agreement has been welcomed as the first step towards a more stable food trading system. But like most acts of fraud, the UR agreement is better understood by its architects, in this case the EU and the US, than by its victims.”).

<sup>232</sup> STIGLITZ & CHARLTON, *supra* note 4, at 46–47 (estimating that the least forty-eight developed countries will sustain an annual loss of \$600 million as a result of the Uruguay Round).

<sup>233</sup> See LARS BRINK, COMMITMENTS UNDER THE WTO AGREEMENT ON AGRICULTURE AND THE DOHA DRAFT MODALITIES: HOW DO THEY COMPARE TO CURRENT POLICY? 27–34 (2014).

<sup>234</sup> See DESTA, *supra* note 4, at 103.

<sup>235</sup> See *generally id.* at 99 (“If the term ‘trade war’ has been used in connection with the GATT/WTO system . . . a substantial majority of cases must have been related to the sphere of agricultural trade in general and export subsidies in particular.”).

<sup>236</sup> See Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, 1869 U.N.T.S. 14.

<sup>237</sup> See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S. 201.

fair competition, entitling the affected party to respond by the use of anti-dumping and countervailing duties.<sup>238</sup> In agriculture, however, export subsidies have always been legitimate within the “equitable share” provision in Article XVI of the GATT.<sup>239</sup>

The AoA does not prohibit export subsidies either—a cynical view may be that an agreement that was carved essentially out of an accord between two major subsidizers and exporters of agriculture; i.e., the EU and U.S., could not be expected to prohibit export subsidy in the first place. Both parties are still firm on maintaining agricultural support, and subsidy was not the issue that principally divided them.<sup>240</sup> The fact that both the U.S. and EU strongly sought the renewal of the peace clause during the Doha negotiations is an indication of their desire to maintain their agricultural subsidies.<sup>241</sup> However, the AoA subjects subsidies to reduction. Article 9 enumerates the types of subsidies subject to reduction, while actual reduction commitments are contained in country schedules.<sup>242</sup> Reduction commitments under Article 9.2(b)(iv) require developed countries to cut budgetary outlays by 36% and the quantities of subsidized exports by 21% over a six-year period based on their 1986–1990 levels.<sup>243</sup> Developing countries must cut their budgetary outlays and quantities of subsidized exports by 24% and 14% respectively, two-thirds of the rate for developed countries, over a ten-year period, while least-developed members are exempt altogether.<sup>244</sup>

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<sup>238</sup> JACKSON, *supra* note 28, at 247–77.

<sup>239</sup> See R. Pearce & R. Sharma, *Export Subsidies*, in MULTILATERAL TRADE NEGOTIATIONS ON AGRICULTURE: A RESOURCE MANUAL 3.3 (2002).

<sup>240</sup> RAJ BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE 94 (3d. ed., 2008) (explaining that the EU and the U.S. have differences on the definition of export subsidy. The EU accounts for around 90% of direct export subsidies paid by the developed world. However, the EU accuses the U.S. of using food aid and other forms of support programs (amounting to indirect export subsidy), which, when combined, makes the U.S. an even larger subsidizer).

<sup>241</sup> See Matthew C. Porterfield, *U.S. Farm Subsidies and the Expiration of the WTO's Peace Clause*, 27 U. PA. J. INT'L ECON. L. 1002, 1032 (2006).

<sup>242</sup> See AoA, *supra* note 56, at art. 9.

<sup>243</sup> See *id.*

<sup>244</sup> See *id.* (noting that art 9.2(b) allows flexibility in implementation). From 1996 to 1999, a country could exceed its export subsidy commitments or carryover unused subsidies as long as the cumulative export subsidy did not exceed the total commitments in its schedule and neither the annual

On the surface, poor countries are free riders as far as export subsidy commitments are concerned. In reality, however, they cannot afford to maintain meaningful subsidies in the first place; most of them cannot even afford to exempt the sector from taxation.<sup>245</sup> It is well known that all developed nations have historically used subsidies (and other forms of protectionist measures) until they ensured that their industries were ready for global competition.<sup>246</sup> Accordingly, it is argued that reducing subsidies adversely and disproportionately affects developing countries in the long term.<sup>247</sup> However, at present not only are poor countries unable to maintain subsidies even to the permitted level, but their primary preoccupation is market access; accordingly, they generally favor reduction or the elimination of subsidies.<sup>248</sup> Yet studies show that after the implementation period, agricultural subsidies in OECD countries remains staggeringly high.<sup>249</sup> According to the UNDP,

The basic problem to be addressed in the WTO negotiations on agriculture can be summarized in three words: rich country subsidies. In the last round . . . rich countries promised to cut agricultural subsidies. Since then, they have increased them. They now spend just over \$1 billion a year on aid to agriculture in poor countries, and just under \$1 billion a day subsidizing overproduction at home—a less appropriate ordering of priorities is difficult to imagine.<sup>250</sup>

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budgetary outlay nor the subsidized exports exceeded 3% or 1.7% of the base period quantities, respectively. *See id.*

<sup>245</sup> *See* FAO, *THE STATE OF FOOD AND AGRICULTURE: AGRICULTURAL TRADE AND POVERTY: CAN TRADE WORK FOR THE POOR?* 27 (2005).

<sup>246</sup> *Id.* at 26–27.

<sup>247</sup> *See generally* UNDP, *supra* note 126, at 131–135 (explaining the argument related to the broader discontent that WTO rules deny developing countries the right to do what industrialized nations have done while they were developing, stifle competition, and ensure that developed countries continue to get benefits, while developing countries reinforce the disparity).

<sup>248</sup> FAO, *supra* note 245, at 24–28.

<sup>249</sup> *See* Editorial, *A Disgraceful Farm Bill*, N.Y. TIMES, May 16, 2008, [http://www.nytimes.com/2008/05/16/opinion/16fri3.html?\\_r=0](http://www.nytimes.com/2008/05/16/opinion/16fri3.html?_r=0).

<sup>250</sup> UNDP, *supra* note 123, at 10.

For example, in the early 2000s a dairy cow in the EU received a daily subsidy greater than the per capita daily income of around half of the world's population.<sup>251</sup> Through such heavy-handed subsidies, rich nations not only deprive their poor counterparts of export earnings that they desperately need, but they also compound the misery of producers in poor countries by driving them out of their own markets.<sup>252</sup> It has been found that some agricultural subsidies provided by the rich countries are inconsistent with the AoA.<sup>253</sup> Brazil successfully challenged the U.S. cotton subsidy before the WTO Dispute Settlement Body (DSB) in the *US-Upland Cotton* case.<sup>254</sup> The panel found that the U.S. had provided several forms of prohibited subsidies worth billions of dollars.<sup>255</sup> The panel's finding was upheld by the appellate body, with only slight modification, and was subsequently adopted by the DSB.<sup>256</sup> However, the U.S. refused to comply with the DSB recommendations to withdraw subsidies that had been found inconsistent with its WTO obligations.<sup>257</sup> Brazil subsequently secured authorization to retaliate before the disputing parties agreed on a framework for working out solutions to the dispute.<sup>258</sup> The long-awaited U.S. Agricultural Act, signed into law in February of 2014, eliminated direct support to farmers.<sup>259</sup> However, the Act also introduced several new programs that protect

<sup>251</sup> Special Rapporteur on the Right to Food, *supra* note 120, ¶ 16.

<sup>252</sup> See Nsongurua J. Udombana, *A Question of Justice: The WTO, Africa, and Countermeasures for Breaches of International Trade Obligations*, 38 J. MARSHALL L. REV. 1153, 1173 (2005).

<sup>253</sup> See LIZ STUART, OXFAM INT'L, TRUTH OR CONSEQUENCES: WHY THE EU AND THE USA MUST REFORM THEIR SUBSIDIES OR PAY THE PRICE 1–6 (2005).

<sup>254</sup> Panel Report, *United States—Subsidies on Upland Cotton (US-Upland Cotton)*, WT/DS267/R (Sep. 8, 2004); Appellate Body Report, *United States-Subsidies on Upland Cotton*, WT/DS267/AB/R (Mar. 3, 2005).

<sup>255</sup> Panel Report, *United States—Subsidies on Upland Cotton (US-Upland Cotton)*, WT/DS267/R, ¶¶ 7.875–948, 8.1.

<sup>256</sup> Appellate Body Report, *United States-Subsidies on Upland Cotton*, WT/DS267/AB/R, ¶ 8.1.

<sup>257</sup> See Arbitration Report, *United States – Subsidies on Upland Cotton*, WT/DS267/ARB/1, WT/DS267/ARB/2, WT/DS267/ARB/2/Corr.1 (Aug. 8, 2009).

<sup>258</sup> For a short summary and status of the case, see WTO, US—UPLAND COTTON, [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/1pagesum\\_e/ds267sum\\_e.pdf](https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds267sum_e.pdf).

<sup>259</sup> RANDY SCHNEPF, CONG. RESEARCH SERV., R43817, 2014 FARM BILL PROVISIONS AND WTO COMPLIANCE 6, 10 (2014).

farmers and cotton producers against price and yield losses.<sup>260</sup> Since these programs fall under the trade distorting amber box payments, cotton seems far from a settled issue.<sup>261</sup> Clearly, Brazil remains unimpressed.<sup>262</sup>

Although (unlike Brazil) they are not expected to challenge prohibited subsidies before the DSB, the so-called C4 countries in West Africa—Benin, Burkina Faso, Chad, and Mali—that produce cotton at half the cost of the U.S., strongly campaigned against the U.S. cotton subsidy.<sup>263</sup> They claimed to have sustained severe losses in export earnings (estimated at 1%–3% of their GDP) due to the U.S. cotton subsidy.<sup>264</sup> Such a heavy subsidy highlights the travesty in aid to poor nations. In 2001, for instance, Mali received \$37 million in aid.<sup>265</sup> However, the country claims to have lost \$43 million in export revenue because of cotton subsidies in rich countries alone.<sup>266</sup> Besides, the amount of subsidies in the developed world defies economic sense. Between 1999 and 2003, for example, U.S. cotton producers received a \$13.1 billion subsidy for a crop estimated at \$13.94 billion.<sup>267</sup> Under such circumstances, it is obvious that subsistence cotton farmers in poor countries, who cannot rely on their

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<sup>260</sup> *Id.* at 14–18.

<sup>261</sup> *See id.* at 11–20.

<sup>262</sup> *See* Steve Baragona, *Brazil Says US Farm Bill Violates Trade Rules*, THE VOICE OF AMERICA (Feb. 20, 2014, 7:55 PM), <http://www.voanews.com/content/brazil-says-us-farm-bill-violates-trade-rules-/1856057.html>.

<sup>263</sup> Michael J. Shumaker, *Tearing the Fabric of the World Trade Organization: United States - Subsidies on Upland Cotton*, 32 N.C.J. INT'L L. & COM. REG. 550 (2007) (showing that the Cotton Four (C4) countries, supported by non-governmental organizations, such as Oxfam, have been vocal against the U.S. cotton subsidies, particularly since Cancún, demanding the elimination of cotton subsidies).

<sup>264</sup> UNDP, *supra* note 123, at 131; *see generally* Vance E. Hendrix, *The Farm Bill of 2002, The WTO, and Poor African Farmers: Can They Co-Exist?* 12 TULSA J. COMP. & INT'L L. 227 (2004) (identifying severe losses in export earnings).

<sup>265</sup> Blaise Compaore, President, Burkina Faso, Address on Cotton Submission to WTO Trade Negotiations Committee (June 11, 2003), *available at* [http://www.wto.org/english/news\\_e/news03\\_e/tnc\\_10june03\\_e.htm](http://www.wto.org/english/news_e/news03_e/tnc_10june03_e.htm).

<sup>266</sup> *Id.*

<sup>267</sup> Stephen J. Powell & Andrew Schmitz, *The Cotton and Sugar Subsidies Decision: WTO's Dispute Settlement System Rebalances the Agreement on Agriculture*, 10 DRAKE J. AGRIC. L. 288, 289 (2006).

governments for any support, do not stand a chance. A World Bank study shows that half of the cost from cotton trade distortion to Sub-Saharan Africa is largely attributed to U.S. cotton policies, with only a quarter of the cost due to policies of developing countries, and the remainder resulting from EU policies.<sup>268</sup> Such a massive subsidy can suppress prices, shattering the livelihoods of poor farmers in poor countries. However, poor countries hardly challenge rich countries' subsidies before the DSB, mainly because the ultimate outcome depends on the power to retaliate, something which most of them lack terribly.<sup>269</sup> Likewise, some of the EU's agricultural subsidies were found to be in violation of the AoA.<sup>270</sup>

The goal of export subsidies is to distort international trade. Thus, export subsidies are a direct antithesis of the theory of free trade and comparative advantage, which is the main reason why it was outlawed as far back as 1955 for industrial products in which rich nations have a comparative advantage.<sup>271</sup> When it comes to agriculture (the only sector many poor nations stand a chance in global trade competition) export subsidies continue to distort trade.<sup>272</sup> To be sure, there has been some reduction of export subsidies in recent years, but that is due to rising market prices and other practical reasons associated with budget cuts in rich countries rather than the effectiveness of the AoA.<sup>273</sup> Of all protectionist tools, export subsidy, which is the most trade distorting form of support, puts poor

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<sup>268</sup> See Kym Anderson & Ernesto Valenzuela, *The World Trade Organization's Doha Cotton Initiative: A Tale of Two Issues* 8–10 (World Bank, Policy Research Working Paper No. 3918, 2006).

<sup>269</sup> See generally Luke Olson, *Incentivizing Access to the WTO's Dispute System for the Least Developed Countries: Legal Flaws in Brazil's Upland Cotton Decision*, 23 MINN. J. INT'L LAW 125 (2014) (explaining that substantive justice at the WTO seems to be a luxury that only the rich can afford; therefore, the least developed nations rarely resort to the WTO's DSB).

<sup>270</sup> See Appellate Body Report, *European Communities-Export Subsidies on Sugar*, WT/DS266/36 (Sept. 6, 2006); UNDP, *supra* note 123, at 130.

<sup>271</sup> WTO, WORLD TRADE REPORT 2006, at 189–90 (2006).

<sup>272</sup> *Id.*

<sup>273</sup> See generally Lilian Ruiz & Harry de Gorter, *The Impacts of Export Subsidy Reduction Commitments in the Agreement on Agriculture*, 3 (conference paper, Am. Agric. Econ. Ass'n Annual Meeting, July 30-Aug. 2) (2000), available at <http://purl.umn.edu/21844> (giving an overview of export subsidy commitments in the AoA).

countries at a harsh disadvantage.<sup>274</sup> Simply put, existing subsidy levels make a mockery of the overriding objective of the AoA.

#### 4. DOMESTIC SUPPORT

The SCM Agreement classifies subsidies by boxes that reflect traffic light colors: green (permitted), amber (to be reduced), and red (prohibited).<sup>275</sup> Unsurprisingly, agriculture does not conform to the traffic light metaphor of the SCM.<sup>276</sup> The AoA deviates from the “traffic rule” approach in two respects. First, the AoA has no red box per se—subsidies that are trade distorting and thus are prohibited under the SCM agreement are tolerated in agriculture.<sup>277</sup> Instead, the AoA aims for gradual reduction of trade distorting subsidies.<sup>278</sup> Accordingly, domestic support exceeding ‘amber box’ commitment levels is prohibited.<sup>279</sup> Second, the AoA introduces a ‘blue box’ for subsidies that are tied to programs that limit production.<sup>280</sup>

**Amber Box:** Article 6 of the AoA sets out commitments to reduce domestic support.<sup>281</sup> Amber box support has a direct link to prices and production.<sup>282</sup> Hence, commitments are expressed in terms of the total Aggregate Measure of Support (AMS), calculated on a product-specific basis in accordance with Annexes 3 and 4.<sup>283</sup> Although Amber Box support is the most trade-distorting domestic support, all members are allowed to provide support up to a *de*

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<sup>274</sup> See *Trade Reforms and Food Security: Conceptualizing the Linkages*, FOOD & AGRIC. ORG. 42 (2003). With regard to market access, poor countries can do what rich countries can, i.e., erect trade barriers. *Id.* at 94. However, because they are poor, they cannot subsidize their agricultural sectors like rich countries do. *Id.*

<sup>275</sup> *Domestic support: Amber, Blue and Green Boxes*, WTO, [https://www.wto.org/english/tratop\\_e/agric\\_e/negs\\_bkgrnd13\\_boxes\\_e.htm](https://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd13_boxes_e.htm) (last updated Dec. 1, 2004).

<sup>276</sup> See *id.*

<sup>277</sup> See Agreement on Subsidies and Countervailing Measures, *supra* note 236, art. 3.1 (explaining that agriculture is the only exception to the rule prohibiting subsidies that fall under the Red Box).

<sup>278</sup> MATTHIAS HERDEGEN, PRINCIPLES OF INTERNATIONAL ECONOMIC LAW 252 (2014).

<sup>279</sup> See AoA, *supra* note 56, art. 6.3.

<sup>280</sup> See WTO, WORLD TRADE REPORT 2006, *supra* note 271, at 193–94.

<sup>281</sup> See AoA, *supra* note 56, art. 6.2.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* art. 6.1.

*minimis* threshold.<sup>284</sup> All member states may provide annual product-specific domestic support, not exceeding 5% of the value of their total annual basic agricultural production. In addition, they may provide a non-product specific support (e.g. on fertilizer) of up to 5% of the value of their total agricultural production.<sup>285</sup> For developing countries, the *de minimis* threshold is 10% in both cases.<sup>286</sup> The amount of subsidy depends on the value of a country's annual aggregate production, which means that countries that possess efficient techniques of production have a superior advantage over those that suffer from the perennial problem of production inefficiency.<sup>287</sup> In terms of reduction, developed nations have agreed to cut their support by 20% over six years starting in 1995.<sup>288</sup> Developing countries must cut by 13% over ten years, while least developed countries are again exempt.<sup>289</sup> In theory, this appears favorable to developing countries. In reality, however, it is a different story, as these percentages (like all other reduction commitments) are calculated based on the base period total AMS.<sup>290</sup> Thus, while a 20% cut in rich countries still leaves a massive amount to farm support,<sup>291</sup> most developing countries did not maintain significant agricultural support during the base period.<sup>292</sup> Even now, most developing countries are unable to provide support even at the permitted *de minimis* level.<sup>293</sup> Poor countries regard agriculture as a source of tax revenue, not as a sector they ought to support.

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<sup>284</sup> *Id.* art. 6.3.

<sup>285</sup> *Id.* art. 6.4.

<sup>286</sup> *See id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Agriculture: Fairer Markets for Farmers*, WTO,

[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm3\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm3_e.htm) (last visited June 14 2015).

<sup>289</sup> *Id.*

<sup>290</sup> AoA, *supra* note 56, art. 6.2.

<sup>291</sup> FAO, *THE RIGHT TO FOOD GUIDELINES: INFORMATION PAPERS AND CASE STUDIES 60* (2006). Around 90% of farm subsidies are provided by developed nations. *Id.*

<sup>292</sup> *See BOHMAN ET AL.*, *supra* note 78, at 5. Thus, developed nations can provide an annual support up to 5% of the total value of agricultural product, and studies show some even maintain an amber support far beyond the permissible threshold. *Id.* at 19.

<sup>293</sup> *Id.* at 19.



The AoA prohibits countries from introducing new types of domestic support.<sup>294</sup> Again, this puts developing countries at a disadvantage. By the base period, developed countries already had various forms of support in place. By contrast, most developing countries did not have meaningful support programs, and now they cannot introduce new ones.<sup>295</sup> Note that the AMS is calculated in exclusion of the *de minimis* level of support, production-limiting agricultural support, as well as support under the long list of permissible programs deemed to be nontrade distorting or only minimally distorting.<sup>296</sup> Hence, AMS does not reflect all government transfers to farmers.<sup>297</sup> While average AMS has declined since the base period, overall agricultural support remains significantly higher.<sup>298</sup> In monetary terms, overall government transfer to farmers in OECD countries was even higher in 2003 than it was in 1986–1988.<sup>299</sup> The laxity of the AoA can be gleaned from the fact that actual amber box support, even in rich nations, is lower than the permissible threshold.

**Green Box:** Agricultural supports under this category are deemed to have no or minimal trade distorting effect; hence, they are

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<sup>294</sup> *Id.* at 5.

<sup>295</sup> See Report of the Special Rapporteur on the Right to Food, *Mission to the World Trade Org.*, ¶ 13, U.N. Doc. A/HRC/10/5/Add.2 (Feb. 4, 2009).

<sup>296</sup> See AoA, *supra* note 56, at Annex 3 (noting that the AMS only covers support under the amber box that are above the *de minimis* threshold, and does not cover support programs falling under the blue box or green box category).

<sup>297</sup> FAO, *supra* note 245, at 30.

<sup>298</sup> See OECD, AGRICULTURAL POLICES IN OECD COUNTRIES: AT A GLANCE 29 (2010).

<sup>299</sup> Agricultural support in OECD countries has fallen from 37% of the gross value of farm recipients in 1986–1988 base period to about 30% in 2003–2005. PETER DICKEN, GLOBAL SHIFT: MAPPING THE CHANGING CONTOURS OF THE WORLD ECONOMY 271 (6th ed. 2010). However, the actual amount of annual support has increased from \$242 billion to \$273 billion over the same period (over 90% of this amount is provided by the EU). *Id.* at 288. Even when agricultural support fell to “historic lows” as a result of high commodity prices and compellingly tight budgets particularly in Europe, OECD countries provided \$227 billion in 2010. See *Agriculture: Support to agriculture at historic lows, OECD says*, OECD (Sept. 9, 2011), [http://www.oecd.org/document/48/0,3746,en\\_2649\\_37401\\_48714608\\_1\\_1\\_1\\_37401,00.html](http://www.oecd.org/document/48/0,3746,en_2649_37401_48714608_1_1_1_37401,00.html).

permitted.<sup>300</sup> However, many believe that Green Box subsidies do actually distort trade.<sup>301</sup> The long list of programs that governments may legitimately employ to support their agricultural sectors under Annex 2 include rural development aids, agricultural research outlays, disease control, infrastructure, insurance and food security, and even “decoupled” direct payments to farmers, among others.<sup>302</sup> The Green Box is essentially the compromise between the desire to reduce agricultural trade distortions and the almost intuitive apprehension of true liberalization.<sup>303</sup> Currently, there is no limit on the amount of subsidies the government may provide under this category.<sup>304</sup> As a result, the trajectory of Green Box support has been rising in many instances since the AoA came into force. In the U.S., for instance, government payments in this category have soared from \$46.1 billion in 1995 up to \$125.1 billion in 2011.<sup>305</sup> In 1999-2000, the U.S. spent \$1.3 billion on rice subsidies when the total rice production was just \$1.2 billion.<sup>306</sup> Meanwhile, Japan spends more money on

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<sup>300</sup> Arvind Panagariya, *Liberalizing Agriculture*, FOREIGN AFFAIRS, <http://www.foreignaffairs.com/articles/61217/arvind-panagariya/liberalizing-agriculture> (last visited June 14, 2015). Clearly, not all of those programs are nontrade distorting, and how minimal their distorting effect has also been controversial. See generally World Trade Organization, Ministerial Declaration of 18 December 2005, WT/MIN(05)/DEC (2005).

<sup>301</sup> See WTO, WTO AGRICULTURE NEGOTIATIONS: THE ISSUES, AND WHERE WE ARE NOW 55 (Dec 1, 2004).

<sup>302</sup> See AoA, *supra* note 56, at Annex 2. See also FAO, *supra* note 245, at 32. As long as it is not related to current production, governments may make direct payment to their farmers; they are thus deemed to have no impact on farmers’ wealth or risk assessment in their agricultural investment decisions, although this remains controversial. *Id.*

<sup>303</sup> Cody A. Thacker, *Agricultural Trade Liberalization in the Doha Round: The Search for a Modalities Draft*, 33 GA. J. INT’L & COMP. L. 721, 745 (2005).

<sup>304</sup> *Id.*

<sup>305</sup> See *Government Payments & the Farm Sector*, U.S. DEPARTMENT OF AGRIC., <http://www.ers.usda.gov/topics/farm-economy/farm-commodity-policy/government-payments-the-farm-sector.aspx#.U6RBiPldW8A> (last updated Apr. 1, 2014).

<sup>306</sup> Devinder Sharma, *Zero Tolerance for Farm Subsidies*, INDIA TOGETHER (Feb. 1, 2003), <http://indiatogether.org/zerotolr-op-ed>.

agricultural support than the overall value of its agricultural production.<sup>307</sup>

**Blue Box:** This is another permitted support measure that may involve direct payments. Blue Box supports are essentially Amber Box subsidies coupled with a condition that the recipient farmers limit trade-distorting production.<sup>308</sup> Direct payment under the Blue Box may be provided based on fixed areas and yields, on 85% or less of the base level of production, and based on livestock numbers.<sup>309</sup> The ostensible rationale for introducing a new Blue Box in agriculture was to assist countries to reform their farm sectors.<sup>310</sup> It was particularly suited for the EU, where market support payments have historically either caused overproduction or were found to be inefficient.<sup>311</sup> Both Green Box and Blue Box subsidies are susceptible to abuse. For instance, OECD countries are accused of manipulating these categories to reshuffle support programs that would have normally fallen under the Amber Box.<sup>312</sup> As a result, while most of these nations may have met their AMS reduction commitments, the overall level of support remains unchanged since the Uruguay Round.<sup>313</sup> Besides, there is no restriction on export of products that benefit from support under these two boxes.<sup>314</sup> Because most developing countries lack the requisite resources to maintain these support programs, it is obvious that these exceptions mainly benefit rich nations.

In general, the AoA has laid out the framework to establish a “fair and market-oriented” trading structure, which is the overriding goal of the agreement.<sup>315</sup> However, actual trade commitments under the AoA are unsatisfactory. It has not effectively addressed

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<sup>307</sup> Devinder Sharma, *Protecting Agriculture: “Zero-Tolerance” on Farm Subsidies*, INST. FOR POL’Y STUD. (Feb. 5, 2003), [http://www.ipsdc.org/protecting\\_agriculture\\_zero-tolerance\\_on\\_farm\\_subsidies/](http://www.ipsdc.org/protecting_agriculture_zero-tolerance_on_farm_subsidies/).

<sup>308</sup> *Domestic support*, WTO, [https://www.wto.org/english/tratop\\_e/agric\\_e/ag\\_intro03\\_domestic\\_e.htm](https://www.wto.org/english/tratop_e/agric_e/ag_intro03_domestic_e.htm) (last visited June 14, 2015).

<sup>309</sup> See AoA, *supra* note 56, at art. 6.5.

<sup>310</sup> *Agriculture: Fairer Markets for Farmers*, *supra* note 288.

<sup>311</sup> *Id.*

<sup>312</sup> See *id.*

<sup>313</sup> UNDP, *supra* note 123, at 129.

<sup>314</sup> DE SCHUTTER & STIFTUNG *supra* note 229, at 13.

<sup>315</sup> VICTOR MOSOTI & AMBRA GOBENA, INTERNATIONAL TRADE RULE AND THE AGRICULTURE SECTOR: SELECTED IMPLEMENTATION ISSUES 40–41 (2007).

outstanding issues in agriculture dealing with market access, export competition, or domestic support.<sup>316</sup> Substantively, agricultural trade remains as unfair and almost as distorted as ever.<sup>317</sup> Both developed and developing nations are responsible for high tariff-induced distortions.<sup>318</sup> In rich countries, high tariffs are reinforced by an array of support programs, ensuring that their markets are almost impenetrable.<sup>319</sup> The level of agricultural protectionism in industrialized countries “fl[ies] in the face of the rhetoric” about free trade and comparative advantage.<sup>320</sup> If a deal negotiated mainly by rich countries was expected to address the development needs of poorer countries and thereby boost their ability to tackle poverty and deprivation, it has clearly failed to do so.<sup>321</sup> Yet, agriculture is an unfinished business. The Doha Development Agenda (DDA) presents another opportunity to meaningfully address the development needs of the poor and improve the credibility of the system.<sup>322</sup>

### C. DOHA ROUND NEGOTIATIONS ON AGRICULTURE

The Havana Charter envisioned an international trade organization that would comprehensively deal with trade and

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<sup>316</sup> José Maria Garcia Alvarz-Coque, *The Mediterranean and the WTO, in* AGRI.MED: AGRICULTURE, FISHERIES, FOOD AND SUSTAINABLE RURAL DEVELOPMENT IN THE MEDITERRANEAN REGION 32–33 (2006).

<sup>317</sup> INFO. & EXTERNAL REL. DIVISION, WTO, UNDERSTANDING THE WTO 51 (5th ed. 2005) [hereinafter INFO. & EXTERNAL REL. DIVISION]. Some rich WTO members are also accused of deliberately overestimating the level of protectionism during the base period (1986–1988) to ensure that the level of protectionism at the end of the implementation period remains steady. *See* Messerlin, *supra* note 13, at 4.

<sup>318</sup> INFO. & EXTERNAL REL. DIVISION, *supra* note 317, at 98.

<sup>319</sup> *See* Messerlin, *supra* note 13, at 5–6.

<sup>320</sup> Alessndro Antimiani & Luca Salvatici, *EU Trade Policies: Benchmarking Protection in a General Equilibrium Framework*, 26 (TRADEAG, Working Paper May 4, 2005).

<sup>321</sup> U.N. DEP’T ECON. & SOC. AFFAIRS, ACHIEVING SUSTAINABLE DEVELOPMENT AND PROMOTING DEVELOPMENT COOPERATION: DIOLAGUES AT THE ECONOMIC AND SOCIAL COUNCIL 154–156, U.N. Sales No. E.08.II.A.11 (2008).

<sup>322</sup> *See generally* NAT’L FOREIGN TRADE COUNCIL, THE DOHA DEVELOPMENT AGENDA, TURNING VISION INTO REALITY 1–2 (2005).

development issues within the UN framework.<sup>323</sup> At about the same time the ITO Charter was being negotiated, a related, albeit less ambitious negotiation resulted in one of the most remarkable agreements—the GATT.<sup>324</sup> Although the ITO was meant to serve as an umbrella institution that would administer the GATT, the latter had entered into force before the Havana Conference by virtue of the Protocol of Provisional Application (PPA).<sup>325</sup> Despite its humble beginning, the GATT would prove to be an outstanding agreement and de facto institution until it eventually evolved into the WTO in 1995.<sup>326</sup> By contrast, the failure of the ITO project meant that development and social issues would remain on the fringes of trade negotiations for decades.<sup>327</sup> Expansion of trade had practically been the sole goal of trade rounds during the GATT era.<sup>328</sup> The DDA promises a break from that mercantilist tradition. For the first time,

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<sup>323</sup> In its very first meeting on February 18, 1946, the United Nations Economic and Social Council adopted a resolution calling for an international conference on trade and employment. *See* Econ. & Soc. Council Res. 13, Resolutions Adopted by the Econ. & Soc. Council, 3rd Sess., Sept. 11–Dec. 10, 1946, U.N. Doc. E/245/Rev.1, (1946). A series of negotiations took place until their culmination in 1948 by the adoption of the ITO Charter in Havana, Cuba. *See generally* Havana Charter, *supra* note 48. Being the final act of the U.N. Conference on Trade and Employment, the Havana Charter contains chapters devoted to development and employment issues. *See generally id.*

<sup>324</sup> CRAIG VANGRASSTEK, *WTO, THE HISTORY AND FUTURE OF THE WORLD TRADE ORGANIZATION* 44 (2013).

<sup>325</sup> Petros C. Mavroidis, *Trade in Goods: The GATT and Other Agreements Regulating Trade in Goods*, 8 *WORLD TRADE REV.* 472, 472–74 (2007).

<sup>326</sup> Susan Ariel Aaronson, *From GATTO to WTO: The Evolution of an Obscure Agency to one Perceived as Obstructing Democracy*, *EH.NET ENCYCLOPEDIA OF ECONOMIC AND BUSINESS HISTORY* (April 1, 2015, 4:38 PM), <http://eh.net/encyclopedia/from-gatt-to-wto-the-evolution-of-an-obscure-agency-to-one-perceived-as-obstructing-democracy-2/>.

<sup>327</sup> *Id.*

<sup>328</sup> *The GATT Years: from Havana to Marrakesh*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm) (last visited June 14, 2015). The previous eight GATT trade negotiation rounds dealt almost exclusively with the reduction or elimination of trade barriers. *Id.* Those rounds, usually named after the city where the negotiations were launched, are, chronologically: Geneva (1947); Annecy (1949); Torquay (1950); Geneva (1956); Dillon (1960–1961); Kennedy (1962–1967); Tokyo (1973–1979); and the Uruguay Round, the most remarkable and the final round under the GATT (1986–1994). *Id.*

trade came to be viewed not as an end itself, but as a means to foster development and prosperity for all.<sup>329</sup> With a view towards ensuring that “all . . . peoples . . . benefit from the increased opportunities and welfare gains that the multilateral trading system generates,” member states declared their commitment to place the development needs of developing countries at the heart of the WTO’s work.<sup>330</sup> Since no sector has greater significance to the development needs of the poor, liberalizing agricultural trade figures prominently in the first developed round in the history of the multilateral trading regime.<sup>331</sup> The avowed emphasis on the development needs and interests of developing nations seems to have bred high expectations in the developing world.<sup>332</sup> The expectation, however, is in stark contrast with what developed nations are willing to concede. The development idealism of Doha seems to have evaporated by the heat of mercantilist realism.<sup>333</sup>

The Doha Round was set to be concluded by January 1, 2005.<sup>334</sup> Over a decade from that deadline, a deal on modalities framework has yet to be struck. Successive attempts to salvage the Round have so far ended in failure.<sup>335</sup> The Bali Agreement is the only exception in this regard, although the deal is only a miniscule

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<sup>329</sup> Vinaye Ancharaz, *Can the Doha Round be Saved?*, in *THE FUTURE AND THE WTO: CONFRONTING THE CHALLENGES – A COLLECTION OF SHORT ESSAYS* 102, 103–04 (2012).

<sup>330</sup> Doha Declaration, *supra* note 39, ¶ 2.

<sup>331</sup> Most developing countries have no greater need or interest than an improved market access for their agricultural products. Thus, the DDR was launched with the aim of, *inter alia*, improving market access; reducing (with a view to phasing out) all forms of export subsidies; and substantial reduction of trade-distorting domestic support in agriculture. Josef Schmidhuber & Seth Meyer, *How Has the Treadmill Changed Direction? WTO Negotiations in the Light of a Potential New Global Agricultural Market Environment*, in *TACKLING AGRICULTURE IN THE POST-BALI CONTEXT* 33 (Ricardo Melendez-Ortiz ed., 2014). In return, rich countries sought greater market access particularly in the areas of services and investment. See Doha Declaration, *supra* note 39, ¶¶ 2, 13–15.

<sup>332</sup> See Doha Declaration, *supra* note 39, ¶¶ 2, 13–15.

<sup>333</sup> As WTO members “succumbed so completely to the pursuit of their commercial self-interest[,] . . . Doha Round has . . . lost nearly all links to its original purpose-trade liberalization to spur development . . .” Raj Bhala, *Resurrecting the Doha Round: Devilish Details, Grand Themes, and China Too*, 45 *TEX. INT’L L. J.* 1, 4 (2009).

<sup>334</sup> See Doha Declaration, *supra* note 39, ¶ 45.

<sup>335</sup> Ancharaz, *supra* note 329, at 104–05.

portion of the DDA.<sup>336</sup> In view of this fact, and the apparent shift of focus to regional and transcontinental trade alliances, the fate of the DDA seems increasingly uncertain.<sup>337</sup> Disagreements on agriculture epitomize the rather cheerless history of Doha negotiations.<sup>338</sup> A deal on a modalities framework was set to be struck at the Cancún Ministerial Conference in 2003, but resulted in failure.<sup>339</sup> The failure was attributed primarily to the EU's refusal to reform the CAP and the U.S.'s unwillingness to cut farm subsidies.<sup>340</sup> In the summer of 2004, negotiators agreed on the so-called July 2004 package.<sup>341</sup> Aside from a few specifics, such as placing a cap on Blue Box subsidies, the July 2004 package was limited to broad outlines.<sup>342</sup>

The Hong Kong Ministerial Conference tried to address some of the most outstanding issues in agriculture.<sup>343</sup> Member states agreed to eliminate all forms of export subsidies in agriculture by the

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<sup>336</sup> “The Bali package is only distantly related to the heart of the 2001 agenda.” Richard Baldwin, *APEC-like Duties for a Post-Bali WTO*, in *BUILDING ON BALI*, *supra* note 6, at 43.

<sup>337</sup> Juegen Matthes, *Reform of the WTO and the International Trading System: Which Place for the EU?*, in *THE FUTURE OF THE EU TRADE POLICY* 52, 63 (2011). In addition to the existing regional trade alliances, several transcontinental trade agreements are being negotiated among different groups of countries. *THE TIPP: THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP BETWEEN THE EUROPEAN UNION AND THE UNITED STATES* 24–27 (Joaquin Roy & Roberto Dominguez eds., 2014).

<sup>338</sup> Susan C. Schwab, *After Doha, Why Negotiations Are Doomed and What We Should Do About It*, *FOREIGN AFFAIRS* (June 2011), <http://www.foreignaffairs.com/articles/67719/susan-c-schwab/after-doha>.

<sup>339</sup> Doha Declaration, *supra* note 39, at ¶3. Modalities are “the blueprints for the final deal” outlining the formulas and approaches on how to cut tariffs, reduce subsidies and support, and deal with other issues—cutting cotton subsidy by 50%—once modalities are agreed, a WTO member would apply the appropriate formula to compute the scale of quantitative reductions on the product concerned. *See Briefing Report, Agriculture: Negotiating Modalities*, *WORLD TRADE ORGANIZATION* (last visited June 14, 2015), [http://www.wto.org/english/tratop\\_e/dda\\_e/status\\_e/agric\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/status_e/agric_e.htm).

<sup>340</sup> *See* Cho, *supra* note 5, at 578; Messerlin, *supra* note 13, at 4.

<sup>341</sup> *See* WTO, Decision Adopted by the General Council on 1 August 2004, 7–8, WT/L/579 (2004).

<sup>342</sup> The agreement is to limit blue box support to 5% of the overall value of agricultural production of a member. *Id.* at A-1.

<sup>343</sup> *See* WTO, Doha Work Programme Ministerial Declaration of 18 December 2005, 6–12, WT/MIN(05)/DEC (2005).

end of 2013.<sup>344</sup> They also declared to discipline in-kind international food aid so as to ensure that it would not be used as a form of indirect export subsidy or to simply dispose surplus production.<sup>345</sup> Certain principles in favor of developing countries were also agreed upon.<sup>346</sup> However, trade ministers could not agree on modalities for both agricultural and non-agricultural market access (NAMA).<sup>347</sup>

With no sign of a breakthrough, negotiators gathered in Geneva in the summer of 2008 hoping to forge a deal on modalities.<sup>348</sup> Once again they could not narrow down their differences on key issues.<sup>349</sup> The 2008 draft modalities for agriculture outlines a tiered formula of reduction of domestic support and tariffs while seeking to eliminate export subsidies.<sup>350</sup> In regards to the Overall Trade-Distorting Support (OTDS), for example, the highest tier (e.g., for the Base Level OTDS exceeding \$60 billion)

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<sup>344</sup> *Id.* at 6, 11.

<sup>345</sup> Simone Heri & Christian Haberli, *Can the World Trade Organization Ensure that Food Aid is Genuine?* 44-45 (NCCR Trade Reg., Working Paper No. 2009/19). Food aid may have similar effect as other forms of export subsidy—the West, particularly the U.S., has traditionally been accused of using aid to dump surplus food in the third world, thereby killing off local production and creating aid dependency. See JOSLING ET AL., *supra* note 158, at 32–33. In the early 1950s, for example, concessional sales and donations accounted for around 60 percent of USA’s wheat exports. See *id.* Thus, there is a desire to discipline international food aid. See, e.g., WTO, Revised Draft Modalities for Agriculture, TN/AG/W/4/Rev. 4 (2008).

<sup>346</sup> *Id.*

<sup>347</sup> See Bernard Hoekman & Marcelo Olarreaga, *The WTO after Cancun*, 38 *INTERECONOMICS* 232, 232–234 (2003).

<sup>348</sup> Heading to Geneva without even a deal on modalities, negotiators must have felt a sense of urgency to at least clinch a deal on modalities, particularly in view of the economic turmoil. Pascal Lamy himself sent an optimistic signal when he declared, “[we are] within reach of a major step in our drive to conclude the Round this year . . . .” Trade Negotiations Committee, *Lamy Says Time for Action is Now Amid Economic Threats*, WORLD TRADE ORGANIZATION (July 21, 2008), [http://www.wto.org/english/news\\_e/news08\\_e/meet08\\_chair\\_21july08\\_e.htm](http://www.wto.org/english/news_e/news08_e/meet08_chair_21july08_e.htm).

<sup>349</sup> On the fourth day of the negotiations, it was declared that despite intensive negotiations, positions on agriculture, Cotton, market access formula for developed countries, sensitive products, special products and SSM as well as NAMA, “remain[ed] too far apart.” *Id.*

<sup>350</sup> RANDY SCHNEPF, CONG. RESEARCH SERV., RS22927, WTO Doha Round: Implications for U.S. Agriculture 10–11 (2014).



requires a 75% or 85% cut.<sup>351</sup> This tier concerns the EU.<sup>352</sup> Second tier reduction (e.g., for the Base Level OTDS of \$10 billion to \$60 billion) would be 66% or 73%.<sup>353</sup> The U.S. and Japan fall under this tier.<sup>354</sup> That would bring the U.S. OTDS from the current ceiling of \$48.2 billion down to around \$16.4 billion or \$13 billion. This may look like a big scale down, but in reality, that amounts to almost no cut as the average current OTDS of the U.S. stands at about \$14 billion.<sup>355</sup> In reciprocity, developing countries had to agree that they would use the Special Safeguard Mechanism (SSM) only in the event of an import surge by a volume of 40% or more.<sup>356</sup> In earlier negotiations, the U.S. conditioned its farm subsidy cuts on tariff reductions in the EU and the tightening of special protection, including those designed to safeguard livelihoods in developing countries.<sup>357</sup> This prompted the Indian negotiator to lament, “I’m willing to negotiate commerce, but subsistence, livelihood, security, I will not be willing to negotiate.”<sup>358</sup> SSM would prove to be one of the sticking points on which convergence could not be attained, as July talks collapsed unsurprisingly.

The July draft modalities framework was revised once again—the fourth time that year—and was circulated in December 2008.<sup>359</sup> The latest draft adopts single numbers rather than ranges for

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<sup>351</sup> In agriculture, OTDS includes Amber Box, Blue Box, and *de minimis* supports. See *Overall Trade-distorting Domestic Support (OTDS)*, WTO Glossary, [https://www.wto.org/english/thewto\\_e/glossary\\_e/glossary\\_e.htm](https://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm) (last visited June 14, 2015).

<sup>352</sup> *Id.*

<sup>353</sup> WTO, Revised Draft Modalities for Agriculture, *supra* note 345, at 2–3.

<sup>354</sup> *Id.*

<sup>355</sup> “Since the introduction of the 2002 Farm Act, farm program payments have averaged about \$14 billion per fiscal year.” *Farm and Commodity Policy: Government Payments and the Farm Sector*, USDA (2007) <http://www.ers.usda.gov/briefing/farmpolicy/gov-pay.htm>.

<sup>356</sup> *WTO Mini-Ministerial Evades Collapse, as Lamy Finds ‘Way Forward’*, INT’L CTR. FOR TRADE AND SUSTAINABLE DEV. (July, 26 2008), <http://ictsd.org/i/wto/geneva2008/englishupdates/14493/>.

<sup>357</sup> Larry Elliot & Ashley Seager, *Despair as Five Years of World Trade Talks Fail*, THE GUARDIAN (July 31, 2006), <http://www.guardian.co.uk/eu/story/0,,1811387,00.html>.

<sup>358</sup> *Id.*

<sup>359</sup> *Unofficial Guide to the 6 December 2008 ‘Revised Draft Modalities’*, WTO (Dec. 9, 2008), [https://www.wto.org/english/tratop\\_e/agric\\_e/ag\\_modals\\_dec08\\_e.htm](https://www.wto.org/english/tratop_e/agric_e/ag_modals_dec08_e.htm).

domestic support and tariff reductions.<sup>360</sup> It also slightly modifies provisions on special safeguard, tariff simplification, and flexibilities for different member states.<sup>361</sup> Aside from these minor modifications the December modalities text is not remarkably different from its July predecessor.<sup>362</sup>

### 1. THE BALI PACKAGE

The 2008 breakdown sank the DDA into a state of paralysis. As chances of resurrecting the DDA looked bleak, negotiators agreed in 2011 to work on a smaller package of selected issues.<sup>363</sup> Conceding that it was “unlikely that all elements of the Doha Development Round could be concluded simultaneously in the near future,” ministers decided to pick “low hanging fruit.”<sup>364</sup> The change in approach seems to work as trade ministers finally reached a deal at the ninth WTO Ministerial Conference in Bali, Indonesia, in December 2013.<sup>365</sup> Negotiators, long hankering for success, greeted the Bali package with a sigh of relief.<sup>366</sup> Beyond the euphoria, however, what is the significance of the Bali deal to the broader DDA? Concerning agricultural trade liberalization, it is tempting to say nothing at all. Indeed, the deal on agriculture represents more of a reversion to protectionism than a leap towards liberalization.

The Bali package is an agreement on three issues: trade facilitation, agriculture, and development.<sup>367</sup> The trade facilitation leg, which seeks to simplify customs procedures by reducing costs and enhancing efficiency, is probably the most important

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<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

<sup>362</sup> *See id.*

<sup>363</sup> *See Day 3: Samoa and Montenegro Join Russia with Membership Agreed, as Ministers Wrap Up Conference*, WTO (Dec. 17, 2011), [https://www.wto.org/english/news\\_e/news11\\_e/mn11a\\_17dec11\\_e.htm](https://www.wto.org/english/news_e/news11_e/mn11a_17dec11_e.htm).

<sup>364</sup> *Id.*

<sup>365</sup> *See* Christophe Bellmann, *The Bali Agreement: Implications for Development and the WTO*, 5 INT’L DEV. POL’Y 2, 2–3 (2014).

<sup>366</sup> “‘For the first time in our history: the WTO has truly delivered,’ said Director General Roberto Azevêdo.” *See Days 3, 4 and 5: Round-the-clock Consultations Produce ‘Bali Package’*, WTO (Dec. 7, 2013), [http://www.wto.org/english/news\\_e/news13\\_e/mc9sum\\_07dec13\\_e.htm](http://www.wto.org/english/news_e/news13_e/mc9sum_07dec13_e.htm).

<sup>367</sup> *See* World Trade Organization, Ministerial Declaration of 7 December 2013, WT/MIN(13)/38, WT/L/913 (2013) [hereinafter Bali Ministerial Declaration].

breakthrough achieved in Bali.<sup>368</sup> The agreement on agriculture, which was a result of negotiations between rich nations and the G-33, led by India, in turn covers three areas: public stockholding for food security purposes, tariff-rate quota administration, and export competition.<sup>369</sup> The decision on public stockholding grants developing countries an interim immunity from legal challenges even when their domestic support exceeds the permissible limit.<sup>370</sup> While this may please countries such as India, LCDs have limited resources to maintain meaningful public stockholding programs. Clearly, development is the only way to integrate LCDs into the global economy. Yet, on the issue of development, the Bali package is, as usual, limited to best endeavor clauses.

There has never been a shortage of political declarations to assist developing countries.<sup>371</sup> For example, with regard to improving market access, rich WTO members agreed during the Hong Kong Ministerial to provide duty-free and quota free market access “for all products originating from all LCDs by 2008.”<sup>372</sup> They likewise vowed to address the issue of cotton within the agriculture negotiations.<sup>373</sup> However, the Hong Kong Ministerial Declaration remains an empty promise. Similarly, the Bali Agreement does not add anything substantive other than recycling broken promises.<sup>374</sup> Importantly, with agricultural labor productivity less than 1% of the level in rich nations, LCDs stand little chance in global agricultural trade competition without a transfer of agricultural technology, as mandated by the Doha Declaration.<sup>375</sup> However, there has been no material progress in this regard.

Similarly, the Bali package does not contain a legally binding agreement on export competition.<sup>376</sup> It merely represents a

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<sup>368</sup> *See id.*

<sup>369</sup> *Id.*

<sup>370</sup> *See id.* ¶ 2.

<sup>371</sup> *See* WTO, Ministerial Declaration of 22 December 2005, WT/MIN(05)/DEC, Annex F, Decision 36 (2005) [hereinafter Hong Kong Ministerial Declaration].

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> *See generally* Bali Ministerial Declaration, *supra* note 367 (the Bali Decision in this regard is for developed countries to “seek to improve their existing duty-free and quota-free” access for LCD’s products).

<sup>375</sup> *See* Doha Declaration, *supra* note 39, at ¶ 37.

<sup>376</sup> *See* Bali Ministerial Declaration, *supra* note 367, at ¶ 8.

declaration to exhibit restraint in using export subsidies.<sup>377</sup> Negotiators, acknowledging “that all forms of export subsidies and all measures with equivalent effect are a highly trade distorting and protectionist form of support,” expressed their regret that they were unable to keep their words on eliminating export subsidies by the end of 2013 as agreed in the Hong Kong Ministerial Declaration.<sup>378</sup> With past failures in mind, they did not dare to set a timeframe for the elimination of export subsidy this time.<sup>379</sup> Generally, the absence of any material progress with respect to market access, export competition, and technology transfer means the Bali deal has little significance to the development needs of poor countries. Virtually all outstanding issues of agricultural trade and development in general remain unaddressed.

*D. AGRICULTURE: THE KEY TO WTO'S CREDIBILITY*

As years pass by, the skepticism on whether the Doha Round will ever be completed grows.<sup>380</sup> Trade negotiations have collapsed and deadlines have been missed before, yet the multilateral trading system has only grown stronger.<sup>381</sup> Thus, there is room for optimism. However, it is also important to recognize that Doha is radically different from previous rounds for a few fundamental reasons.<sup>382</sup> First, the North-South trade dynamics have shifted in a more profound way than ever before.<sup>383</sup> It is sometimes claimed that the global South wielded greater collective leverage in the 1970s than today. Yet while the South has traditionally campaigned for preferential treatment, actual trade rules have almost always been

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<sup>377</sup> *See id.*

<sup>378</sup> *Id.* ¶ 1.

<sup>379</sup> *Id.* ¶ 13 (agreeing to instead review the issue at the 10<sup>th</sup> Ministerial in 2015).

<sup>380</sup> Bhala, *supra* note 333, at 9 (“[F]ollowing the July 2008 collapse . . . only truly optimistic trade souls could keep faith in the resurrection of the Doha Round.”).

<sup>381</sup> *See* Schwab, *supra* note 338.

<sup>382</sup> There are, of course, other incidental factors, such as the global economic crisis, making economic recovery the preoccupation of many governments. Also, a severe economic crisis, attributable mainly to excessive deregulation, is not a good advertisement upon which to sell the virtues of the open market.

<sup>383</sup> *See* WILL MARTIN, WORLD BANK, TRADE POLICIES, DEVELOPING COUNTRIES, AND GLOBALIZATION 13 (2001).

determined by the North.<sup>384</sup> The rise of emerging powers is changing that tradition.<sup>385</sup> Developing countries have never been more assertive.<sup>386</sup> More importantly, Doha is the first development round in GATT/WTO history.<sup>387</sup> While the plea of developing countries for a pro-development trade structure had always fallen on deaf ears, the widespread popular discontent and powerful protests in Seattle and elsewhere against the WTO model of globalization seemed to finally force the trading regime to change course.<sup>388</sup> It is important to remember that the Doha Round was launched against the backdrop of a failed attempt to start the Millennium Round of trade negotiations at the Third Ministerial Conference.<sup>389</sup> However, for the WTO to genuinely embrace development, is almost tantamount to altering its mercantilist ethos and identity.<sup>390</sup> Historically, the ITO project collapsed while the GATT thrived because development and social issues do not sit well with mercantilism.<sup>391</sup>

However, there is no getting around the longstanding quest for a pro-development trading system. First, unlike when there was little scrutiny about the trading regime outside of a few experts in the field, the WTO is now a household name. People from poor farmers

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<sup>384</sup> See Cho, *supra* note 5, at 594–98.

<sup>385</sup> See Lamy, *supra* note 7.

<sup>386</sup> See Pedro de Motta Vieg, *Brazil and the G-20 Group of Developing Countries*, WTO, available at [https://www.wto.org/ENGLISH/res\\_e/booksp\\_e/casestudies\\_e/case7\\_e.htm](https://www.wto.org/ENGLISH/res_e/booksp_e/casestudies_e/case7_e.htm) (last visited June 14, 2015).

<sup>387</sup> *Doha Round Trade Talks – Explained*, THE GUARDIAN (Sept. 3, 2012), <http://www.theguardian.com/global-development/2012/sep/03/doha-round-trade-talks-explainer>

<sup>388</sup> See generally BRIGID GAVIN, THE EUROPEAN UNION AND GLOBALIZATION: TOWARDS GLOBAL DEMOCRATIC GOVERNANCE (Edward Elgar Publ'g, Inc., 2001).

<sup>389</sup> The Third Ministerial Conference that convened in Seattle at the end of 1999 was set to launch a new round of trade negotiations (the first within the WTO framework) that, if launched, would have been called the Millennium Round. Disagreements on major trade negotiations compounded by a massive protest (widely known as “Battle of Seattle”) meant that the launching of a new round had to be put on hold.

<sup>390</sup> See Cho, *supra* note 5, at 583.

<sup>391</sup> In reality, development and social issues are seen as liabilities, rather than as the ultimate goals of the multilateral trade, as they do not suit the pursuit of commercial self-interest. While developed countries resist any substantive relation of trade to development, developing countries object to the integration of labor standards into the WTO system.

in Africa and Asia to factory workers in the developed world know how their interests can be affected by the WTO. Thanks to the WTO's own success and the information age that we live in, trade deals can no longer go unexamined. Crucially, as the WTO's own charter declares, trade is not an end in itself; it is a means to a socioeconomic end.<sup>392</sup> The WTO is now being challenged to remain true to its charter. There is hardly a more legitimate demand. The question concerns the fundamental tenets of international trade, and is thus simply not going to go away because WTO members turn to regional and megaregional trade alliances.

It cannot be emphasized enough that the rationale for free trade lies not in the accumulation of aggregate wealth, but in the advancement of human welfare. According to Adam Smith, a trading system that is sustained by what he calls "powerful merchants" and "manufacturers"—the counterparts to today's corporations—which serve their narrow commercial interests at the expense of the wider society belongs to mercantilism.<sup>393</sup> Since mercantilists believe that trade should be harnessed towards wealth and power aggrandizement, they advocate trade-distorting measures, such as import barriers and export stimulants.<sup>394</sup> By contrast, the kind of trade advocated by classical political economists has to be both free and fair, that offers a fair chance for all, big and small. Equity and fairness are central to the idea of free trade advocated by Adam Smith.<sup>395</sup>

As the above analysis has shown, the WTO agricultural trade remains neither free nor fair. In all material aspects, it embodies

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<sup>392</sup> See generally Marrakesh Agreement, *supra* note 1.

<sup>393</sup> See SMITH, *supra* note 26, at 626.

<sup>394</sup> *Id.* at 393–95.

<sup>395</sup> *Id.* at 609 (writing with regard to labor exploitation, "it is not by their work, but by the complete work of the weavers, that our great master manufacturers make their profits . . . By extorting from the legislature bounties upon the exportation of their own linen, high duties upon the importation of all foreign linen . . . they endeavor to sell their own goods as dear as possible . . . They are as intent to keep down the wages of their own weavers, as the earnings of the poor spinners, and it is by no means for the benefit of the workman . . . It is the industry which is carried on for the benefit of the rich and the powerful, that is principally encouraged by our mercantilist system. That which is carried on for the benefit of the poor and the indigent is too often, either neglected, or opposed.").

mercantilism. Indeed, fundamental criticisms directed at the WTO today mirror Adam Smith's refutation of mercantilism.<sup>396</sup> In view of this, the DDA represents a classic dilemma for WTO members: a dilemma between continuing the pursuits of self-interest (mercantilism) and advancing the common good (development). If the DDA is indeed about development, reforming agricultural trade is imperative, not just because agriculture has profound significance to development, but because the sector also remains indefensibly distorted. The WTO's own credibility is at stake. Even without explicit references to the far-reaching goals justifying the WTO's institutional existence, the legitimacy of the trading regime (of any institution) must ultimately be assessed by reference to the results in human terms.

#### IV. CONCLUSION

Generally speaking, industrialized nations have a superior comparative advantage over developing countries in almost every sector; from trade in industrial products to the so-called *new issues* brought into the multilateral trading system during the Uruguay Round. For many developing countries, agriculture represents the only area in which they stand a chance in global trade competition. Thus, even from a mercantilist point of view (i.e., without referring to the issue of development), developing countries have a strong case in seeking improved market access for their agricultural products. Yet, of all the sectors, agricultural trade remains highly protected and distorted. Unarguably, the prevailing level of protectionism does not cohere with the idea of a fair and market-oriented agricultural trading system.

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<sup>396</sup> *See id.* Classical political economists refuted the doctrine of mercantilism on economic and social virtue grounds. Smith argued that merchants and manufacturers contrive to sustain mercantilism for they derive "the greatest advantage" from the monopoly of the domestic market (due to the imposition of high duties or import prohibitions) at the expense of farmers, laborers, smaller traders and the society at large, paralleling modern day accusations of corporate lobby and trade rules tailed to the interests of big businesses, at the cost of social and development values. *Id.*

Agriculture holds the key for the conclusion of Doha Development Round. Without addressing outstanding issues of agricultural trade, the round cannot be a development round. But how can WTO members turn agriculture into a building block of the round? The choice is both simple and vexing. It is simple because it is mainly a question of translating declarations that have been made into concrete agreements. That is, to establish a genuinely free and fair agricultural trading system. However, non-binding political declarations should not be mistaken for political will. A free and fair agricultural trading system does not admit export subsidy, which is the complete antithesis of such a system. Existing three-digit agricultural tariff levels do not blend in the idea of free trade. Some countries' farm support in the Green Box category alone exceeds the total GDP of most WTO members, and that is hardly compatible with free and fair agricultural trade. However, the failure of WTO negotiations over the last thirteen meetings is proof that the political will to dismantle all these protectionist tools and create a truly fair and development oriented trade structure is lacking. It cannot be emphasized enough that the challenge is formidable. Yet, there is no other option than to rise up to the challenge; not only because it is morally imperative, but also because equitable development is crucial for a peaceful and prosperous world on the promise of which the WTO was established.



