THE FALCONER DRAFT TEXT FOR THE DOHA ROUND WTO NEGOTIATIONS ON AGRICULTURE – A 'HA'PORTH OF TAR' TO SAVE THE VESSEL FROM SINKING OR JUST A DAB OF PAINT ON AN IRREPARABLY BROKEN HULL?

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I INTRODUCTION

On 17 July 2007, the Chair of the World Trade Organization ('WTO')[1] negotiating Committee on Agriculture released the draft Falconer text[2] as a suggestion of a politically feasible outcome to the Doha Round agriculture negotiations. Although much of it is not drafted as a legal instrument, it represents the first real suggestion of a final outcome since the Harbinson text of February 2003.[3] Earlier efforts like the del Castillo and Derbez texts at the time of the Cancún Ministerial in September 2003 were closer to what became the Framework Agreement of 1 August 2007.[4]

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1 Established pursuant to the *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) ('WTO Agreement').

2 *Committee on Agriculture – Special Session: Draft Modalities for Agriculture*, WTO Doc JOB(07) ('Falconer text'), subsequently reissued with minor corrections as *Committee on Agriculture – Special Session: Revised Draft Modalities for Agriculture*, WTO Doc TN/AG/W/A on 1 August 2007. Both texts at <http://www.wto.org/english/tratop_e/agric_e/chair_texts07_e.htm> at 25 August 2007. In this article, the paragraph references are to the numbered paragraphs in the later document, WTO Doc TN/AG/W/4.

3 *Committee on Agriculture – Special Session: Negotiations on Agriculture – First Draft of Modalities for the Further Commitments*, WTO Doc TN/AG/W/1 (2003); *Committee on Agriculture – Special Session – Negotiations on Agriculture – First Draft of Modalities for the Further Commitments – Revision*, WTO Doc TN/AG/W/1/Rev.1 (2003).

4 *Preparations for the Fifth Session of the Ministerial Conference – Draft Cancún Ministerial Text – Revision*, WTO Doc JOB(03)/150/Rev.1 (2003) A–1 ('del Castillo text'). See also the subsequent revision: *Preparations for the Fifth Session of the Ministerial Conference: Draft Cancún Ministerial Text – Second Revision*, WTO Doc JOB(03)/150/Rev.2 (2003) ('Derbez text'). Both at WTO, *The Fifth WTO Ministerial Conference* (2003) <http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_e.htm> at 26 August 2007; *Doha Work Programme – Decision Adopted by the General Council on 1 August 2004 – Annex A Framework for Establishing Modalities in Agriculture*, WTO Doc WT/L/579 (2004) ('Framework Agreement', sometimes called the 'July Framework Agreement').

The purpose of this article is not just to summarise the Falconer text. The purpose is to set out how the proposed outcome would fit into the context of the overall framework of rules under the *Agreement Establishing the World Trade Organization* ('*WTO Agreement*'),[5] and to assess how it would fit into the continuing reform of agricultural trade that began with the Uruguay Round *Agreement on Agriculture*[6] and which may end with the same *General Agreement on Tariffs and Trade* ('*GATT*')[7] rules applying to all sectors of trade.

II THE IMPORTANT THING IS THE ENTIRE SYSTEM OF RULES NOT THE THREE PILLARS

The article is divided into consideration of the three pillars: market access, export competition and domestic support. However, despite the practical division of the negotiation into non-agricultural market access ('NAMA') and agriculture, and of the agriculture negotiation, in turn, into the three pillars, in the end, there is one negotiation and one set of rules. Therefore, I make some preliminary comments on some issues relating to the entire system which inherently affect the agriculture negotiation: dispersion, instrumentation, and two aspects of non-discrimination.

First, the round is arbitrarily divided into NAMA and agriculture. For 40 years, it was difficult to negotiate tariff reductions across all products because agricultural and textiles trade were obstructed by quantitative restrictions ('QRs'). Developing countries could correctly complain that rounds of tariff negotiations had not achieved liberalisation of trade in products of interest to developing countries, or put another way, that *GATT* discriminated against countries having a comparative advantage in agriculture or textiles. The Doha Round offered a new opportunity. For the first time in a mostly QR free environment, it was possible to have one big negotiation across all products. The two Chairs of the Agriculture and the NAMA negotiating committees have recognised that they are dealing with two parts of a single set of rules by choosing to release their draft texts at the same time. The NAMA text[8] provides for reductions of non-agricultural tariffs using a Swiss formula[9] with a co-efficient of [8][9][10] for Developed Members with no product exclusions and of

5 See *WTO Agreement*, above n 1.

6 *WTO Agreement*, above n 1, annex 1A (*Agreement on Agriculture*) 1867 UNTS 410 ('*Agreement on Agriculture*').

7 *WTO Agreement*, above n 1, annex 1A (*General Agreement on Tariffs and Trade*) 1867 UNTS 190.

8 *Negotiating Group on Market Access – Draft NAMA Modalities*, WTO Doc JOB(07)/126 (2007) ('NAMA text'). Also available at: <http://www.wto.org/english/tratop_e/markacc_e/markacc_chair_texts07_e.htm> at 25 August 2007.

9 See entry for Swiss Formula in Walter Goode, *Dictionary of Trade Policy Terms* (4th ed, 2003) 336. The Swiss formula applies a higher reduction rate to higher tariff rates through the formula: $Z=AX/(A+X)$ where X is the initial tariff rate, A is the agreed coefficient, and Z is the post-reductions tariff rate. See also paragraph 14 and table 2 of WTO, *Formula Approaches to Tariff Negotiations – Note by the Secretariat – Revisions*, WTO Doc TN/MA/S/3/Rev.2 (11 April 2003).

10 In many places in the Falconer and NAMA texts there are numbers in brackets. I repeat these exactly as they appear in the text.

[19][23] for Developing Members[11] who would be able to halve the reduction rate for some products and to not bind 5 per cent of products at all.[12]

For agriculture, the Falconer text also provides for dispersion reducing tariff reductions but using a tiered formula to apply higher linear cuts to higher starting tariff rates. The Falconer text allows enough leeway for Developed Members to exclude most highly protected products from significant liberalisation and allows Developing Members to protect vast slices of their tariff lines from liberalisation. For these reasons alone, the outcome proposed in the two texts is unlikely to achieve the objective of removing discrimination against countries with comparative advantage in agriculture or generally to achieve the objective or ensuring the system delivers benefits to all Members regardless of their comparative advantage.

Second, the negotiation on agricultural trade has been divided into the three pillars. One should not forget that the ultimate objective is a single set of rules that helps to guide Members away from protectionist behaviour (arising from the asymmetrical influence of import competing interests) toward welfare enhancing behaviour in a way that still leaves Members free to adopt appropriately targeted measures to deal with their objectives or perceived market failures. Such a scheme of regulation uses reciprocity to encourage politicians to choose to achieve objectives by using policy instruments which impose the least cost on the rest of the community.[13] It is intrinsic to this scheme that the *GATT* establish a hierarchy of rules which imposes the most disciplines on quantitative import barriers, slightly less disciplines on price based import barriers (tariffs), a little less discipline on taxpayer rather than consumer financed instruments and among those, more discipline on export subsidies, less on production linked subsides, even less on non-production linked subsidies and as an important question of sovereignty, no discipline at all on non-specific non-production linked tax payer funded provision of public goods. The same hierarchy of priorities has emerged from quantitative analyses of the relative size of welfare benefits that can be attained by removing government policies in the three areas of import barriers, export subsidies and domestic support. A 2005 World Bank study found that over 90 per cent of the economic welfare gains that could be achieved from

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11 The coefficient for Developed Members is severe (compared to the coefficients of 14 and 16 used in the Tokyo Round; see Goode, above n 9. The difference between the coefficients for Developed and Developing Members is large enough that the ending tariff rates for Developing Members would be significantly higher than for Developed Members but small enough that the average rate of reduction would be larger for Developing Members than Developed Members (in effect requiring Developing Members to catch up on a part of the less than reciprocal reductions made in previous rounds). See International Centre for Trade and Sustainable Development, 'Draft NAMA Agreement Text Criticised by Many Developing Countries' (2007) 11(28) *Bridges Weekly Trade News Digest* <http://www.ictsd.org/weekly/07-08-01/story2.htm> at 19 August 2007.

12 NAMA text, above n 8, 10–12 [5]–[8].

13 For an explanation of the way that the *GATT* modifies choice of instrument rather than choice of policy objective, see Frieder Roessler, 'The Constitutional Function of the Multilateral Trade Order' in Meinhard Hilf and Ernst-Ulrich Petersmann (eds), *National Constitutions and International Economic Law* (1993) 53–62. See also, Brett Williams, 'The Influence and Lack of Influence of Principles on the Negotiation for the Accession of China to the WTO' (2001) 33 (3–4) *George Washington International Law Review* 791, 819–23.

removing import barriers and subsidies would flow from the removal of the import barriers rather than from the removal of the subsidies.[14] In comparison with the gains from removing import barriers, the welfare gains to be achieved from reducing domestic support are quite small. Therefore, attempts to balance the level of ambition for each of the three pillars should not be allowed to obstruct achievement of the basic objective of the rules: to encourage politicians to choose to achieve their objectives using the lowest cost policy instrument.

Third, demands for special and differential treatment ('SDT') for developing countries have been a high profile aspect of the negotiations. Many forget that the *GATT* basically works because of reciprocity and that those who give little in negotiations have little to threaten to take back in dispute settlement. Further, the division between developed and developing countries that was accepted back in the Tokyo Round is meaningless today. Almost no attention has been devoted to the distinctions made in economic theory which accept that for some countries, without administrative capacity to implement tax and spend policies, it may not be possible to choose to achieve a given objective by choosing a policy instrument which is better targeted and more efficient than a trade policy.[15] However, the subset of countries that fit into this category has become progressively smaller. Many countries that no doubt were regarded as being so undeveloped as for it to be inappropriate to require strict reciprocity from them in the 1970s now have governments which actively provide extensive public goods and operate tax and spend systems which provide transfer payments. As contemplated by the Enabling Clause in 1979, they have in fact graduated to a position in which they are capable of fully participating in the trading system and providing reciprocal concessions, which importantly would help to provide incentives for politicians in rich countries to give and maintain concessions.[16] However, the political power of import competing protectionists in these less developed countries has also graduated and they have realised that one of their best tools for arguing for continued protection is to try to extend and elaborate upon the concept of SDT. There is a risk that such argument may extend SDT beyond countries that cannot choose instruments more effective than trade instruments and, therefore, that SDT becomes a technique not for enhancing welfare but for diminishing the economic welfare of developing countries. These texts accord a right to SDT which is independent of any consideration of

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14 Thomas W Hertel and Roman Keeney, 'What Is at Stake: The Relative Importance of Import Barriers, Export Subsidies, and Domestic Support' in Kym Anderson and Will Martin (eds), *Agricultural Trade Reform and the Doha Development Agenda* (2005) Table 2.7 ch 2; see also Kym Anderson and Will Martin, 'Agriculture, Trade Reform and the Doha Agenda' in Kym Anderson and Will Martin (eds), *Agricultural Trade Reform and the Doha Development Agenda* (2005) Table 5 ch 1, an earlier version of which was published as Kym Anderson and Will Martin, 'Agricultural Trade Reform and the Doha Development Agenda' (2005) 28(9) *World Economy* 1301, Table 5 on 1312.

15 Warner Max Corden, *Trade Policy and Economic Welfare* (2nd ed, 1997) 33–41, ch 3: 'The Four Assumptions of the Theory of Domestic Divergences'.

16 *Differential and More Favourable Treatment Reciprocity and Fuller participation of Developing Countries* GATT BISD, 26th Supp, 203–5, GATT Doc L/4903 (1979) (Decision of 28 November 1979) ('the Enabling Clause'). The Enabling Clause, [7], provides that less-developed countries 'expect that their capacity to make contributions… would improve… and they would accordingly expect to participate more fully in the framework of rights and obligations under the general agreement'.

institutional and administrative capacity to achieve objectives without trade instruments. To that extent, they do a disservice to the vast majority of people in developing countries.

Fourth, one must wonder about the extent to which the range of possible political outcomes in this negotiation is skewed by the presence of deviations from the general rule of non-discrimination embodied in the 'most favoured nation' ('MFN') rule. Have such deviations from non-discrimination already broken the system of harnessing political support from exporters to help overcome the political weight of protectionists? For example, exporters who have already gained duty free access to certain large markets may not be motivated to support politicians who support multilateral liberalisation. There may be other exporters who, having gained preferential access to a significant market, may have an incentive to lobby against rather than in support of politicians who implement multilateral liberalisation. Existing and contemplated preferential arrangements may even change the incentive for politicians to be interested in particular parts of the negotiation. For example, a politician negotiating a free trade agreement which will give duty free access to one of the world's largest markets may in the multilateral negotiation be less interested in reducing customs duties than they otherwise would be and more inclined to focus on reducing domestic support. These consequences of discrimination reduce the likelihood of there being sufficient political support from exporters to offset political opposition from import competing producers to those politicians who choose to agree on multilateral reductions on import barriers. Has it gone so far that the system is broken? The stalemate so far may indicate that the answer is 'yes'. Even if an agreement is eventually reached, it will be worth considering the extent to which the scope of that deal will have been shaped politically by the extent to which the system and the Members have tolerated deviations from the MFN rule.

III THE FIRST PILLAR: MARKET ACCESS

A The Existing (Post-Uruguay Round) Rules on Market Access

The Uruguay Round outcome included 'tariffication' of QRs and setting of bindings on all tariff rates on agricultural products (without being accompanied by a rule for universal bindings on industrials). The outcome was complicated by the continued tolerance of specific tariffs. More significantly, it was complicated by requiring those converting quantitative restrictions to tariffs, where there were no significant imports, to create low rate Tariff-Rate Quotas ('TQs') and allowing them to resort to a variable levy type mechanism called the Special Agricultural Safeguard ('SSG').[17] In some cases, the in-quota tariff rates are in fact very high (eg, Indonesia's in-TQ rate on rice).

17 *Modalities for the Establishment of Specific Binding Commitments under the Reform Programme*, GATT Doc MTN.GNG/MA/W/24 (20 December 1993) [5]–[6].

B Move to a Tariff-Only Regime

Three Members have not completed the Uruguay Round tariffication process for eliminating QRs, namely Korea, Chinese Taipei and The Philippines.[18] These countries must expect to have to dis-invoke Annex 5. The Falconer text does not mention this and it should.

It was as an ancillary part of the Uruguay Round tariffication process that TQs (technically a violation of *GATT* Article XI:1) were proposed during the Uruguay Round as a temporary measure which would fade away as the implementation of tariff cuts progressed. However, with the winding back of the ambition for the size of the Uruguay Round tariff cuts (only 15 per cent (or less in practice) for protected products) the TQs became a permanent part of the rules. TQs have the disadvantage that if the out of TQ tariff rate is high, the effective import constraint is the quantitative aspect of the TQ. That is exactly what tariffication was supposed to abolish. The problem has been made worse by Members, in at least one instance, allowing a Member to use Article XXVIII renegotiations to create new TQs (instead of treating them as violations of Article XI:1).[19]

In the Doha Round, the Cairns Group and the US proposed different ways of moving to a tariff only regime. The Cairns Group (without the support of Canada, Indonesia or Malaysia) had proposed expanding the volume of the TQs so much that the in-quota tariff rates would have become the effective rate of protection.[20] The US had proposed such massive cuts to out of quota tariffs that they would be reduced to the in-TQ rates.[21] Either approach would make the quantitative limits of TQs largely irrelevant. The drawback with both approaches was that in the event of the ambition in the negotiation being wound back from such significant liberalisation for all products and all countries, the system would not move to a tariff-only system and would be left leaving scope for quantitative

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18 *Committee on Market Access – Rectification and Modification of Schedule – Schedule LX – Republic of Korea*, WTO Doc G/MA/TAR/RS/98 (2005); *Committee on Market Access – Rectification and Modification of Schedules – Schedule LXXV – Republic of the Philippines – Revision*, WTO Doc G/MA/TAR/RS/99/Rev.1 (2006).

19 *Committee on Market Access – Rectifications and Modifications of Schedules – Schedule XII – India*, WTO Doc G/MA/TAR/RS/66 (2000).

20 Their first proposal was Cairns Group (minus Canada): *Committee on Agriculture – Special Session – WTO Negotiations on Agriculture – Cairns Group Negotiating Proposal – Market Access*, WTO Doc G/AG/NG/W/54 (2000). But the first one to put numbers into the proposal was Cairns Group (minus Canada, Indonesia, and Malaysia), *Proposal on Market Access*, WTO Doc JOB(02)/112 (2002) which proposed that TQ volumes be increased to 20 per cent of consumption, also at Cairns Group <www.cairnsgroup.org/proposals/job02_112.pdf> at 9 September 2007.

21 The first United States proposal on market access was in *Committee on Agriculture – Special Session – Proposal for Comprehensive Long-Term Agricultural Trade Reform – Submission from the United States*, WTO Doc G/AG/NG/W/15 (2000). But the first one to put numbers into the proposal was: United States Department of Agriculture Foreign Agricultural Service, *US Proposal for Global Agricultural Trade Reform* (2002) <http://www.fas.usda.gov/itp/wto/proposal.htm> at 19 August 2007. See also Office of the United States Trade Representative, 'Administration Unveils Comprehensive US Trade Proposal to Expand American Farmers Access to overseas markets' (Press Release, 25 July 2002) <http://www.ustr.gov/Document_Library/Press_Releases/2002/Section_Index.html> at 25 August 2007. This proposed expanding TQ volumes by 20 per cent and reducing out of TQ tariffs by a Swiss Formula that would impose a 25 per cent cap and set a date for elimination.

control of imports. No-one else, apart from the Swiss, proposed any mechanism for moving to a tariff only regime. Without making a specific proposal, the Swiss suggested developing a formula 'drawing inspiration from Article XXVIII'.[22] It is submitted that a transition to a tariff only regime could be achieved by offering a concessional Article XXVIII style mechanism allowing removal of TQs in exchange for larger reductions in out of quota tariffs.

The Falconer text does not mandate expansions of volumes for all TQs. It mandates reasonably high tariff cuts but not high enough to render the TQs irrelevant. It is only those products which are allowed concessional tariff cuts that would be subject to expansions of TQ volumes. In summary, the Falconer text leaves the task of removing TQs and moving to a simple tariff only regime for a later round of negotiations. It would leave some countries able to use the quantitative element of TQs as their main form of protection for certain products.

In addition, it may remain possible for some Members to use import monopolies to impose surreptitious QRs to limit the fill of the TQ volumes (as Korea was found to have done when the Panel in *Korea – Beef*[23] found that the fact that the entity with exclusive import rights had failed to import when it would have been profitable to do so indicated that it was applying a restriction within the meaning of *GATT* Article XI:1).[24] This would have become impossible if Members had been receptive to proposals made in the Doha Round to prohibit exclusive import rights. The Falconer text does not contain such a provision. Clearly, the Chairman thought it unlikely that agreement would be reached on such a rule change and based his text on the Framework Agreement which also did not mention exclusive import rights. Hopefully, the approach taken by the Panel in *Korea – Beef* will discourage cheating on the QR rule but a simple rule change would have been better.

Finally, TQs can have the same two defects as any QR. These are that their method of allocation can result, first, in the importing country suffering an even bigger deadweight welfare loss than would arise from an equivalent tariff and, secondly, in discrimination. Both problems could be avoided by a rule mandating the auctioning of TQ entitlements. The Falconer text contains no such proposal and refers only to disciplines to be developed.[25]

C Moving to Bindings on an Ad Valorem Basis

In contrast to the NAMA text which appears to require a conversion at the beginning of the implementation period, the Falconer text proposes that bound duties be expressed in ad valorem basis no later than the end of the implementation period.[26] It is disappointing that some Members are not prepared

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22 *Committee on Agriculture – Special Session – WTO: Negotiations on Agriculture – Proposal by Switzerland*, WTO Doc G/AG/NG/W/94 (2000) 6, [6.1.2].

23 *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc WT/DS161, WT/DS169/R (2000) (Report of the Panel) ('*Korea – Beef*').

24 Ibid [767]. The Panel report was adopted with the Appellate Body report on 10 January 2001; this issue was not appealed.

25 Falconer text, above n 2, [88]. Cf NAMA text, above n 6, 11–12 [6(d)], [8(e)].

26 Falconer text, above n 2, [84], but note the bracketed reference to [or specific and compound].

to implement this from the beginning of the implementation period. It would simplify the application of the tariff cuts so as to reduce the tendency toward cheating on the cuts (as happened at the end of the Uruguay Round).[27]

D Tariff Reductions

The rate of reductions on tariff rates has been only a part of the controversy in the negotiation. Even more contentious has been the argument about the extent to which particular products can be either excluded from liberalisation or subjected to a concessional form of liberalisation commitment. Also contentious has been whether there should be any safeguard mechanism to apply over and above the *Agreement on Safeguards*,[28] to whom should it be available, how easy should it be to trigger, and how protective should it be?

These various aspects are related. The pre-WTO era left many products with very high rates of protection due to them having been protected by import quotas and the Uruguay Round did little more than bind the (sometimes inflated) pre-existing margin of protection and reduce it by the minimum rate of 15 per cent. Many developing countries in the pre-WTO era were among those applying import quotas and they also tended to have very high tariff rates as a result of deviations from reciprocity in earlier rounds. In the Uruguay Round, they were able to apply a minimum tariff reduction of only 10 per cent. The Uruguay Round rules introduced a concession to the countries tariffying import quotas, that they be allowed an additional safeguard against price falls. However, it was limited so that large parts of any price falls would not be compensated for by the safeguard measure. The overall effect of the Uruguay Round was that there were quite a few countries in which the rate of protection on a significant range of products was hardly diminished at all and the system allowed some Members to increase the rate of protection on some products to compensate for a portion of falls in world prices.

The high rates of protection exhibited dispersion and disparity: dispersion being widely different rates of protection on different products by the same country and disparity being different rates of protection by different countries. The existence of these high rates of protection led to very different demands. Exporting interests sought a formula for reductions that would reduce higher tariffs by higher rates. This would reduce both dispersion and disparity. Wanting an even greater reduction in disparity, the United States was cheeky enough to propose that reductions should come from applied rather than bound rates, despite the longstanding tradition that parties be given credit for liberalisation carried out between rounds.[29] Although this suggestion was not accepted, clearly the disparity in tariff rates resulting from non-reciprocity in previous rounds must have been a large factor in leading the US to seek tariff cuts of a high order of

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27 For some discussion of the inflation of tariff equivalents in the Uruguay Round see Merlinda D Ingco, 'Tariffication in the Uruguay Round: How Much Liberalisation?' (1996) 19(4) *World Economy* 425.

28 *WTO Agreement*, above n 1, annex 1A (*Agreement on Safeguards*) 1869 UNTS 154.

29 See *Committee on Agriculture – Special Session – Proposal for Comprehensive Long-Term Agricultural Trade Reform – Submission from the United States*, WTO Doc G/AG/NG/W/15 (2000) 2.

magnitude, for moderate cuts would have been insufficient to create any market access over that existing under applied rates in a number of important Developing Members. Defensive interests sought ways to minimise the liberalisation that would be applied to the most politically sensitive sectors, typically those with the highest protection. At earlier stages in the negotiation, there was some focus on protecting sensitive products by adopting a formula which would allow averaging with a minimum cut to any one product. However, since the G20 so strongly opposed the US–EC blended formula proposal in the lead up to Cancún,[30] there has been acceptance of some kind of harmonising formula and those wanting to protect sensitive products have focused their attention on excluding sensitive products from the formula and establishing less liberalising disciplines for the sensitive products. A similar defensive argument came from developing countries not so much to protect particular tariff peaks but to protect farmers more generally from the burden of adjustment to liberalisation. These countries, which became known as the G33, sought a carve out from the reduction commitments for 'Special Products' and sought to be able, through a Special Safeguard Mechanism, to apply protection similar to the variable levy type protection that the EC had applied for the 30 years to 1994.

1 *The Falconer Text Tariff Reductions*

The Falconer text provides for four bands of reductions of ordinary (out of quota) rates on a harmonising basis[31] but does not specify the length of the implementation period, so one can only guess as to how this translates into annual reductions. The text allows for Developing Members to apply lower reduction rates with broader bands and to drop the rates even further if the average reduction exceeds [36–40] per cent. Notably the text suggests SDT in the form of lower reductions rather than a longer implementation period. Less emphasis on lower reductions and more emphasis on longer implementation would in the long-term help to achieve some approximation of reciprocity.

The bands and the reductions within each band are set out in the following table:[32]

30 *European Communities-United States – Proposed Framework*, WTO Doc JOB(03)/157 (2003). The G20 reaction was set out in *Ministerial Conference – Fifth Session – Cancún, 10–14 September 2003 – Agriculture – Framework Proposal – Joint Proposal by Argentina, Bolivia, Brazil, Chile, China, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, India, Mexico, Pakistan, Paraguay, Peru, Philippines, South Africa, Thailand and Venezuela*, WTO Doc WT/MIN(03)/W/6 (2003). This proposal was later signed on to by Egypt and Nigeria. See *Ministerial Conference – Fifth Session – Cancún, 10–14 September 2003 – Agriculture – Framework Proposal – Joint Proposal by Argentina, Bolivia, Brazil, Chile, China, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, India, Mexico, Pakistan, Paraguay, Peru, Philippines, South Africa, Thailand and Venezuela – Addendum*, WTO Doc WT/MIN(03)/W/6/Add.1 (2003); *Ministerial Conference – Fifth Session – Cancún, 10–14 September 2003 – Agriculture – Framework Proposal – Joint Proposal by Argentina, Bolivia, Brazil, Chile, China, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, India, Mexico, Pakistan, Paraguay, Peru, Philippines, South Africa, Thailand and Venezuela – Addendum*, WTO Doc WT/MIN(03)/W/6/Add.2 (2003).

31 Falconer text, above n 2, [49].

32 Ibid [49]–[51].

Table No 1. Rates of Reductions on Customs Duties

Developed Members		Developing Members	Lesser of	
For AVE rates between	Rate of Tariff Cut		A (as below) Or if this works out to an average above [36-40]	B (max average at [36–40]%) If 40 then
≤20%	48–52%	R ≤ 30%	2/3 x 48–52%	A x 40/Avg*
20% < R ≤ 50%	55–60%	30% < R ≤ 80%	2/3 x 55–60%	A x 40/Avg
50% < R ≤ 75%	62–65%	80% < R ≤ 130%	2/3 x 62–65%	A x 40/Avg
R > 75%	66–73%	R > 130%	2/3 x 66–73%	A x 40/Avg

*(*Where average means the average reduction resulting from the formula in A. This will have the effect of reducing the average reduction down to 40 in accordance with [50]. Note [50] refers not to 40 but to [36–40]).*

Small and vulnerable economies ('SVEs') are allowed to apply rates 10 percentage points lower than the rates for developing countries and to drop them even further if the average reduction exceeds 24 per cent.[33] (Of course, if any Central American or ACP (African, Caribbean and Pacific) countries who have granted, or in the future grant, preferential access to either the US or the EU are not disqualified from this SVE category then their exclusion from tariff cuts would do nothing but protect preferential access of US or EU exporters.) Recently acceded Members may extend the implementation period and drop up to [5 per cent] ad valorem points from the percentage rate of reduction.[34]

2 *The Carve-out for Sensitive Products*

Unlike the NAMA text, the Falconer text allows all Members to choose to apply a lower percentage tariff reduction to some tariff lines. Members are allowed to apply lower reductions on a maximum number of tariff lines if they expand the volume of TQs (on a MFN basis). The lower percentage tariff cut may be somewhere between one third and two thirds of the otherwise applicable percentage cut with the expansion of volume being larger for a deviation by two thirds than for a deviation by one third from the otherwise applicable percentage cut. The text allows Members with 30 per cent of tariff lines in the top band (below 20 or 30 per cent, as applicable) to designate a greater number of sensitive products but if they so choose the required volume expansions are

33 Ibid [52]–[53].
34 Ibid [125]–[127].

larger.[35] The rules also provide for the expansion of volume to be reduced if certain thresholds are met in terms of the volume of existing imports under an existing TQ or the volume of imports at the out of quota rate.[36]

The text allows Developing Members to designate one third more products as sensitive products than Developed Members and allows their expansions of TQ volumes to be nominally two thirds of the expansions required from developed Members. In the case of Developing Members, the required percentage of volume of domestic consumption is based on a quantification of domestic consumption which excludes self consumption by farmers of their own production.[37]

Table No 2. Additional Volumes of Tariff Rate Quotas

	Developed Member	Developed with 30 per cent of tariff lines below 20%	Developing Member	Developing Member with more than 30% of tariff lines below 30%
Maximum number of tariff lines	4–6%	6–8%	[4–6] x 4/3	[6–8]% x 4/3
Min of 1/3 of applicable rate of reduction	New volume of [3–5] % of consumption	New Average Volume [4.5–6.5]% plus minimum [3–5]% on all products	New volume 2/3 of [3–5]% of consumption*	New volume 2/3 of average volume [4.5–6.5]% plus minimum 2/3 of [3][5]% on all products*
Max of 2/3 of applicable rate of reduction	New volume of [4-6]% of consumption	New average volume [4.5–6.5]% plus minimum [4–6]% on all products	New volume of 2/3 of [4][6]% of consumption*	New average volume [4.5–6.5]% plus minimum [4–6]% on all products*

** In the case of developing countries, the references to domestic consumption do not include self consumption of subsistence production.*

The Falconer text provides that the expansions of volumes may be reduced if:

- imports under an existing TQ are already at least 10 per cent of consumption;
- imports at the out of quota rate are already greater than the larger of half the TQ volume or 1 per cent of consumption;

35 Ibid [53], [57], [63].
36 Ibid [59]–[61].
37 Ibid [54], [62].

- after implementing the Doha tariff reductions, imports at the out of quota rate have increased [2][3] times the new volume commitment.[38]

The figure of between 4 and 6 per cent being allowed as Sensitive Products is a critical variable in the negotiation. It is more liberal than the reference to between 1 and 5 per cent suggested in the Chairman's Communication of 30 April 2007[39] and is also more liberal than the US, G20 and Cairns Group had originally sought. Perhaps even more important is that the required treatment of Sensitive Products substantially undermines the transition to a tariff-only system. This proposal would lead to even more Members imposing TQs and even more situations in which the binding constraint would be the volume of the TQ. The requirement to open a TQ could be dropped if the discount to the required rate of reduction were kept small. The political sensitivity could be accommodated by a considerably longer implementation period and access to a safeguard provision with Developing Members having an even longer implementation period and an even softer safeguard provision.

3 *The Carve out for Special Products*

Without any additional provisions on Special Products, Developing Members would already be:

- giving only two thirds the tariff cuts of Developed Members with an overall ceiling of a 40 per cent average cut (with small and vulnerable economies being able to reduce the tariff cut by a further 10 percentage points with an overall ceiling of a 24 per cent cut);
- able to designate one third more products sensitive products; and
- on such sensitive products be able to make only one third of the otherwise applicable developing country tariff cut and in exchange offer expansions of TQ volume of two thirds of the volume required from a Developed Member (i.e 2/3 of [4][6]) of consumption.

The Falconer text states that there would be a further provision to allow 'each developing country Member' to designate a number of tariff lines as 'Special Products'. The text does not set out suggested provisions but it does express an opinion on the two key aspects: the number of products that can be designated as 'Special Products'; and the extent of liberalisation commitments on such special products.

As to the number of products designated as 'Special Products', the Falconer text suggests that:

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38 Ibid [60]–[62].

39 Crawford Falconer, *Communication from the Chairman of the Committee on Agriculture – Special Session* (2007) WTO <http://www.wto.org/english/tratop_e/agric_e/chair_texts07_e.htm> at 25 August 2007 ('Chairman's Communication of 30 April 2007').

- the entitlement to designate a 'Special Product' should flow from some objective indicators (using as a starting point the G33 indicators list);[40]
- there be an entitlement to designate a minimum percentage of tariff lines as Special Products and that the minimum percentage ought to be higher than the corresponding percentage of tariff lines permitted to be designated as Sensitive Products (which means more than four thirds of [4][6] per cent of tariff lines).[41]

It can be noted that this is more lenient than the suggestion in the Chairman's Communication of 30 April 2007 which referred to 'between 5 and 8 per cent for specials on the assumption that you are looking at between 1 and 5 per cent for Sensitives'.[42]

As to the extent of deviation from the required liberalisation, the Falconer text notes that Members have not yet reached any agreement on this and also refers to the views of the Chairman in the Challenges paper.[43] There, he noted that the July 2004 Framework Agreement had said that special products would be eligible for 'more flexible treatment' rather than complete exemption from liberalisation.[44] There he had suggested that tariff rates on special products should be cut by a rate that would be around 2/3 of the otherwise applicable cut with a minimum cut on each tariff line to be set somewhere between 10 and 20 per cent.[45]

4 *Tariff Escalation*

The mandate for the negotiations provides that Members should address tariff escalation. The Falconer text contains no draft text on this issue and merely keeps

40 Ibid [94]–[96]. *G33 Proposal on the Modalities for the Designation and Treatment of any Agricultural Product as a Special Product (SP) by any Developing Country Member*, WTO Doc JOB(05)/304 (2005), also at <http://www.agtradepolicy.org/output/resource/G33_proposal_SPs_22Nov05.pdf> at 9 September 2007. See also the revised list issued by the G-33 Ministerial Communique, WTO Doc JOB(07)/35 (2007), of which items 1 to 8 are variations on self-sufficiency or sunset protection arguments, 9 being based on tax capacity is a legitimate argument for SDT, 10 is a terms of trade issue which should be dealt with outside the negotiation, 11 could be addressed by ensuring access to countervailing duties ('CVDs') or other safeguards, and 12 is a straight forward rejection of the comparative advantage argument for liberalisation, also at <http://www.agtradepolicy.org/output/resource/G-33%20indicators.pdf> at 9 September 2007. See also Pakistan's proposal *Modalities for the Selection and treatment of Special Products (SPs) by Developing Countries – Communication from the Delegation of Pakistan*, WTO Doc JOB(07)/46 (2007), also at <http://www.agtradepolicy.org/output/resource/PakSPApr07.pdf> at 9 September 2007, and the subsequent Communication from the G-33, *G-33 Comments on Pakistan's Paper* WTO Doc JOB(07)/53 (2007), also at <http://www.tradeobservatory.org/library.cfm?refID=98318> at 9 September 2007.

41 Falconer text, above n 2, [97].

42 Chairman's Communication of 30 April 2007, above n 39, [128].

43 'Challenges paper' refers to the Chairman's Communication of 30 April 2007, above n 39, and to its 'Second Instalment': Crawford Falconer, *Communication from the Chairman of the Committee on Agriculture, Special Session – Second Instalment* (2007) WTO <http://www.wto.org/English/tratop_e/agric_e/chair_texts07_e.htm> at 9 September 2007 ('Chairman's Communication – Second Instalment').

44 Chairman's Communication of 30 April 2007, above n 39, [134]. He was referring to the July Framework Agreement, above n 4, [40].

45 Chairman's Communication of 30 April 2007, above n 39, [137]–[138].

it on the agenda, airing the possibility that some additional tariff cut might be imposed in cases where tariff escalation has not been improved by the other elements.[46] Of course, if there is any need for special provisions addressing tariff escalation, it will be because the Members have allowed too many carve outs from what could have been harmonising tariff reductions applying to all products in all Members.

E The Safeguard Provisions

1 *The Article 5 Special Safeguard Mechanism*

Under Article XXVIII Members can increase a bound tariff permanently but only by agreeing on compensatory liberalisation or being exposed to retaliation. Under the safeguard provision in *GATT* Article XIX (as modified by the *Agreement on Safeguards*), a safeguard measure can be imposed temporarily without compensation or exposure to retaliation if it can be established that an increase in imports is causing injury. As mentioned above, in the Uruguay Round, the parties introduced a concession to the countries tariffying import quotas in the form of recourse to an additional safeguard mechanism ('SSG').[47] Eligibility to use the SSG mechanism is restricted to products upon which quantitative restrictions had been converted to ordinary customs duties and which are designated with the symbol SSG in the Member's Schedule.[48]

The SSG is essentially two separate safeguard mechanisms, one triggered by increases in volume of imports and the other triggered by falling import prices. If the volume of imports as a proportion of domestic consumption increases above the volume over the three preceding years by a specified amount then the Member may apply an additional customs duty no larger than one third of the applied ordinary customs duty for no more than one year. If the previous proportion of imports to consumption is less than 10 per cent then the ratio must increase by 25 per cent to trigger eligibility for the safeguards; if it is between 10 and 30 per cent then the ratio need only increase by 10 per cent and if it is greater than 30 per cent then the ratio need increase by only 5 per cent.[49] Alternatively, if the import price falls below a reference price (based on the average price from 1986 to 1988, which for many products was a relatively low-price period), then a Member may apply a duty (with no limit on duration) equal to a portion of the gap between the actual import price and the reference price according to a sliding scale. The sliding scale gave only a small degree of protection against small price falls (eg, less than 30 per cent of the gap following a fall in the import price up to 40 per cent below the reference price), but a higher degree of protection against more drastic price falls (eg, 90 per cent of the portion of any price fall which is more than 75 per cent of the reference price).[50]

46 Falconer text, above n 2, [64]–[71].
47 *Agreement on Agriculture*, above n 6, art 5.
48 Ibid art 5.1.
49 Ibid arts 4, 1(a).
50 Ibid arts 5, 1(b).

A problem with the existing form of Article 5 is that a Member would be entitled to impose a SSG indefinitely even though imports had not increased absolutely or relative to consumption but the world price had fallen by more than 10 per cent of the reference price. A second problem is that if the imposition of an SSG results in a fall in the ratio of imports to consumption, then that lower proportion would become the new baseline for the volume based trigger.

The Falconer draft text contains two alternative provisions which respond to diverging opinions as to whether the SSG should be abolished or retained with modified triggers. Paragraph 89 provides for Article 5 to expire at the end of the implementation period. The alternative in paragraph 90 provides for the volume trigger to require an absolute increase in imports of 25 per cent above the previous three years' average, and for the price triggered safeguard to half the size of the SSG that could be imposed in response to the different price trigger levels.

The second alternative would limit the problems set out above. However, the parties could eliminate such problems by modifying the price triggered safeguard so that it would only be available if the fall in price were accompanied by at least some small increase in the volume of imports.

2 *The New Special Safeguard mechanism*

Developing Members particularly the G-33 have proposed that Developing Members be able to impose an additional Special Safeguard Mechanism ('SSM'). There was a one line reference in the pre-Cancún Derbez text. The G-33 did not submit a draft text until March 2006[51] and a variation of this was set out in the Chairman's July 2006 'Draft Possible Modalities on Agriculture' at Annex E.[52]

The Falconer text does not propose a text and it refers to Members having been unable to reach agreement. However, it does suggest some parameters for the SSM:

- that the SSM only apply where changes in imports are unusual or excessive;
- that it have both price and volume triggers;
- that the benchmark for the volume trigger be related to the volume over the previous 3 to 5 years and that the trigger be around 110 per cent of the benchmark;
- that the benchmark for the price trigger be set according to a price prevailing over a period of 12 to 18 months;

51 *G-33 Proposal on Special Safeguard Mechanism for Developing Countries*, Committee on Agriculture, Special Session , WTO Doc JOB(06)/64 (2006), also at <http://www.agtradepolicy.org/output/resource/G33_revised_proposal_SSM_23Mar06.pdf> at 9 September 2007.

52 *Committee on Agriculture – Special Session: Draft Possible Modalities on Agriculture*, WTO Doc TN/AG/W/3 (2006).

- in relation to the price trigger, the paper questions whether the SSM should be the full difference between the benchmark price and the actual import price but does not specify what the benchmark price would be;
- that the same rule on parallelism would apply as applies to Article XIX, that is, if imports from PTA countries are counted in assessing the triggers, then the SSM must be applied to their trade as well; and
- that duration be limited to the end of a relevant 12 month period.[53]

It is difficult to tell what agreement may emerge. It is remarkable how similar the G33 proposal is to the proposal made by the EC in the Uruguay Round in 1990 when it began to consider that tariffication of QRs might be required. The EC had proposed a Safeguard that would allow an additional tariff equal to 30 per cent of price falls within a margin of 30 per cent below the (1986-1988) reference price plus 100 per cent of price falls greater than 30 per cent of the reference price and that they be able to keep the Safeguard in place for so long as the price remained below the reference price.[54] The Cairns Group tried to insist on a set of triggers that would always require an increase in volume but a lower increase in volume if the increase in volume was accompanied by a fall in price.[55] On this, the Cairns Group was unsuccessful. Both the US and the Cairns Group insisted that the duration of the measure not exceed 12 months and, on this, they were only partially successful with the *Agreement on Agriculture* providing for a time limit for the volume-triggered but not the price-triggered SSG.[56]

The outcome of the Uruguay Round negotiation was surely informed by the fact that parties wanted to avoid any party being able to operate variable levies as the EC had over the previous 30 years. The variable levies had provided the same insulation from world price signals as QRs. However, a limited variable levy was accepted as a way of softening the transition from markets being completely insulated from world prices to markets having only a bound and limited margin of protection from world prices. The situation in the Doha Round is similar with many developing countries moving for the first time to a tariff rate that is not prohibitive. This author's suggestion would be that the SSM be available to such countries on the same terms that were available to the EC after the Uruguay

53 Falconer text, above n 2, [102]–[111].

54 Commission of the European Communities Spokesman's Service, *European Community Offer on Agriculture for the Uruguay Round of the GATT Negotiations* (8 November 1990) Annex IV <http://aei.pitt.edu/2933/01/027.pdf> at 9 September 2007.

55 *GATT* Negotiating Group on Agriculture, *Proposal by Argentina, Australia, Brazil, Chile, Colombia, Hungary, Indonesia, Malaysia, New Zealand, Philippines, Thailand, Uruguay – Cairns Group Proposal for a Multilateral Reform Program For Agriculture* (undated) (copy on file with the author). It is understood this proposal was submitted to the *GATT* Secretariat on 15 October 1990: see *Negotiating Group on Agriculture – Submission by Hungary* GATT Doc MTN.GNG/NG5/W/212 (1990) which refers to the Cairns Group countries having submitted a proposal on 15 October.

56 See Brett G Williams, 'The Importance of Disciplining the Choice of Policy to the Effectiveness of The GATT as International Law Disciplining Agricultural Trade Policies' (PhD thesis, University of Adelaide, 2000) 615, 622. There the discussion of the US proposal draws on: UNCTAD, 'Efforts at Agricultural Reform: Issues in the negotiations' in UN Conference on Trade and Development ('UNCTAD'), *Trade and Development Report 1991* (1991); Jimmye Hillman, 'The US Perspective' in Kenneth Ingersent, Anthony Rayner and Robert Hine (eds), *Agriculture in the Uruguay Round* (1994) 26.

Round and for exactly as long and that then they should be required to conform to the amended more limited SSG.

F Erosion of Preferences

The Falconer text does not contain draft text on erosion of preferences except to suggest some lengthening of the implementation period for tariff cuts on a limited number of tariff lines in line with what is being proposed in the NAMA text.[57]

That discriminatory preferences should not be allowed to disrupt the process of multilateral liberalisation would be consistent with the approach taken since the very inception of *GATT* as manifested in *GATT* Article I:2 and the *Brazil Taxes* case.[58] It is a given that if a country wants to be part of the system, then if they at any time receive preferences, those preferences are going to have a diminishing margin over time. It would be perverse if the system allowed a large market (eg, EU) to use preference giving as a technique for buying additional constituencies for opposing multilateral liberalisation on particular products (eg, sugar, bananas)!

IV THE SECOND PILLAR: EXPORT SUBSIDIES

A The Existing (Post- Uruguay Round) Rules on Export Subsidies

The Uruguay Round achieved a general prohibition in Article 3.1(a) of the *Agreement on Subsidies and Countervailing Measures* ('*SCM Agreement*')[59] on subsidies contingent on export performance. Such subsidies could be justification for countervailing duties ('CVDs') or for multilaterally authorised suspension of obligations. Export subsidies on agricultural products were exempted until 1 January 2004 from actions based on that general prohibition provided that they conformed to the bound levels in a Members Schedule and also from serious prejudice claims under the *SCM Agreement* and from CVDs in some limited circumstances.[60] It is this author's understanding that at the end of the Uruguay Round, most if not all WTO Members contemplated that at the end of the period set out in Article 13, Members would commit to further reductions in the bound level of export subsidies and that at least the immunity from actions under the Article 3 prohibition would be extended for another limited period.

The Falconer draft text does not include the text of a peace clause and it does not indicate whether a peace clause needs to be agreed upon.[61] It is possible that

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57 Falconer text, above n 2, [117]–[122]. NAMA text, above n 8, 15 [28].

58 See *Brazilian Internal Taxes*, GATT BISD II/181 (1949) adopting a one way track approach to Art I:2 ('*Brazil Taxes*').

59 *WTO Agreement*, above n 1, annex 1A (*Agreement on Subsidies and Countervailing Measures*) 1869 UNTS 14.

60 *Agreement on Agriculture*, above n 6, Art 13(c).

61 The peace clause was omitted from the Chairman's Communication of 30 April 2007, above n 39, and also from the Chairman's Communication – Second Instalment, above n 43; it was also omitted from the July Framework Agreement. The Derbez text provided at [6]: '[t]he Peace Clause will be extended by […] months'.

some Members will be prepared to rely on a legal interpretation of Article 21 of the *Agreement on Agriculture* as sufficient assurance that Article 3.1(a) of the *SCM Agreement* does not apply to the products subject to bindings under the *Agreement on Agriculture*. It would be better to extend Article 13 for a limited period and to provide clearly that at the end of the implementation period, agricultural products would be subject to the same rule in Article 3.1(a) of the *SCM Agreement* as applies to other products.

The Uruguay Round also achieved scheduled bindings on export subsidies on agricultural products. There was lengthy negotiation about the form that these commitments should take. There was a concern that a limit on budget outlays might be insufficient to limit the payment of very high per unit export subsidies on particular products. At one stage, the EC offered a commitment to limit the per unit export subsidy on any product to the permissible per unit customs duty (though in conjunction with another proposal that would have allowed customs duties to be increased to offset falls in world prices).[62] The US and the Cairns Group insisted on specificity to product group even if not to specific products and that the commitments be in the form of limits on both budget outlays and volumes of subsidised exports. The *Agreement on Agriculture* provides that Members may not provide export subsidies (defined as subsidies contingent on export performance) except within a Member's scheduled limits on amount of budget outlays and the volume of product receiving the benefit of an export subsidy. Although the *Agreement on Agriculture* does not refer to commitments having to be product specific, commitments were made on the basis of broad product groups rather than for all production.[63] In determining whether a Member's budget outlays and volume of subsidised product are within a Member's scheduled limits, it is necessary to count all of the types of subsidies listed in Article 9.1. Article 10.1 provides that export subsidies not listed in Article 9.1 must not be used in a way that circumvents the export subsidy commitments.

Two aspects warrant further elaboration: export credits and volume commitments. The list of export subsidies in Article 9.1 which must be counted for the purposes of determining conformity with the reduction commitments does not include export credits. Article 10.2 commits Members to develop disciplines to govern export credits. In the *US – Cotton* case, the Appellate Body decided that Article 10.2 does not take export credits outside the scope of Article 10.1 and that the application of export credits in a way that undermines export subsidy commitments can be a violation of Article 10.1.[64] This result surprised some,

62 *Negotiating Group on Agriculture – Global Proposal of the European Community on the Lon-Term Objectives for the Multilateral Negotiations on Agricultural Questions*, GATT Doc MTN.GNG/NG5/W/145 (1989) pt III(5).

63 As required by [7] of Annex 8 of Part B of the Draft text on Agriculture in Section L of: *Uruguay Round – Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, GATT Doc MTN.TNC/W/FA (20 December 1991)('*Uruguay Round – Draft Final Act*'). Note that Part B was not incorporated into the *Agreement on Agriculture*.

64 *United States – Subsidies on Upland Cotton*, WTO Doc WT/DS267/AB/R, AB-2004-5 (2005) (Report of the Appellate Body) ('*US – Cotton*'). The decision was somewhat controversial given that one Member of the Appellate Body disagreed on this point.

certainly the US, which seems to have been proceeding on the basis that it could continue to provide export credits until new disciplines came into force. The result perhaps creates some urgency for those who would like to see some extension of immunity for certain export credits.

Second, paragraph (c) of Article 9.1 refers to measures not involving a charge on the public account but which nevertheless involve a payment on export financed by governmental action. The provision is not unlike the provision of the *SCM Agreement* (Article 1.1(a)(iv)) which extends the definition of subsidy to cover measures not involving a financial contribution from the government but nevertheless involving another entity providing a financial contribution at the direction of the government. The *EC – Sugar*[65] case concerned a combination of tariffs, intervention purchasing, export refunds and a quantitative restraint on domestic sales. These measures enabled producers to extract a high price from sales of some quantities of sugar and to sell a volume of sugar in excess of that permitted to be sold on the domestic market at low prices on the export market. Even though these exported volumes had not received a direct export refund, they were found to have received an export subsidy within Article 9.1(c). This result surprised some, certainly the EC, which had given its volume commitment on the basis that only the volumes actually receiving direct export subsidies would be counted. The result creates some imprecision as to what is required to be counted for purposes of assessing conformity with volume commitments.

B The Elimination of Export Subsidies

The Falconer text provides for the elimination of export subsidies by Developed Members by 2013 and by Developing Members by a date to be agreed.[66] The text requires that the budget outlay commitments must be reduced for Developed Members by 50 per cent by 2010 and then by equal instalments ending in 2013 and for Developing Members in equal annual instalments ending at a date to be agreed.[67] The text provides that Developing Members' existing right to pay marketing and transport subsidies on exports under Article 9.4 would be eliminated but not until 5 years after the date for elimination of Developing Members' export subsidies.[68]

The Falconer text provides for two alternative possibilities on the further role of commitments on volumes:

> Quantity outlay commitments will [be reduced in equal annual instalments from the applicable Uruguay Round commitment levels] (or)[apply as a standstill from the commencement until the end of the implementation period at the lower of either the then current actual applied quantity levels or the Uruguay bound levels reduced by 20 per cent].[69]

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65 *European Communities – Export Subsidies on Sugar*, WTO Doc WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, AB-2005-2 (2005) (Report of the Appellate Body) ('*EC – Sugar*').

66 Falconer text, above n 2, [139], [141].

67 Ibid.

68 Ibid [142].

69 Ibid [140].

Which one is adopted may turn on the attitude of the EC. The EC's willingness to commit to further volume commitments will depend on the extent to which their planned reductions in support prices would lead to reduced domestic production. The *EC – Sugar* decision is a further complicating factor which may cause the EC to resist further commitments on volumes.

In any case, the Members could limit the extent to which budget outlay commitments can be swung around so as to increase per unit export subsidies on particular products by adding an additional commitment that per unit export subsidies cannot exceed fixed amounts, perhaps the per unit customs duty that could be collected on a particular product.

The Export Competition section of the Falconer text has three Annexes.

1 *Export Competition: Annex D on Export Credits, Export Credit Guarantees or Insurance Programmes*

Annex D provides that any export financing support not in conformity with the terms of paragraph 4 [sic] must be within the bound levels until the elimination date and be eliminated by the elimination date.[70] The essence of paragraph 4 is that permitted export financing schemes must not operate at a loss.[71] For export credits, the maximum repayment term should not exceed 180 days (longer for a Developing Member) and the interest rate should be at least LIBOR[72] plus [5] points.[73] Export financing schemes should cover costs over a period of [4][5] years (for Developing Members, [6][7.5] years).[74]

2 *Export Competition: Annex E on Agricultural Exporting State Trading*

At all stages of the negotiation, the EC has indicated that its willingness to reduce and eliminate export subsidies is contingent on the same disciplines applying to export monopolies. There are two ways in which exclusive export rights might amount to an export subsidy (in the sense of being an incentive to sell at export rather than in the domestic market). First, an export monopoly might pay an export subsidy if it receives subsidies from the government and does not cover its own costs. Second, even in the absence of any government injection of funds, an export monopoly might pay an export subsidy if it also has exclusive control over the quantity of domestic production that can be released into the domestic market and if it uses that power to raise the domestic price so as to extract monopoly rents from domestic consumers and then uses those funds to make export sales at a loss.

The Falconer Draft text requires Members to eliminate certain practices. Government injection of funds to entities with exclusive export rights would be caught under paragraphs 3(a)(ii) and (iii) relating respectively to direct financing and underwriting of losses. The use as export subsidies of monopoly rents

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70 Falconer text, above n 2, *Annex D Possible New Article 10.2 Of The Agreement On Agriculture Export Credits, Export Credit Guarantees Or Insurance Programmes* [1], [5].

71 Ibid [4(a)]–[4(h)].

72 London Interbank Offered Rate: a daily average of London interbank deposit rates.

73 Ibid [4(a)], [4(c)], [5(a)]. See also, [5(b)].

74 Ibid [4(g)], [5(d)].

extracted from domestic sales might be caught by paragraph 3(b) which provides that:

> Members shall:
>
> (b) ensure that any use of monopoly powers by such enterprises is not exercised in a manner which, either de jure or de facto effectively circumvents the provisions set out in sub-paragraphs (i) to (iii) above.

It would be better to have a straight forward prohibition on giving exclusive rights over exports to any entity that has any exclusive rights relating to sales into the domestic market.

Under the list of practices to be eliminated under paragraph 3(a) the text also contains the following paragraph:

> (iv) [by 2013, the use of export monopoly powers for such enterprises].

Holding export monopoly powers in the absence of government financing and in the absence of any exclusive rights in respect of domestic sales cannot result in export subsidies. Such an entity might be able to sell at different prices in different markets but such practices, which could be carried out by any private firm, are not export subsidies. Therefore, paragraph (iv) is an unnecessary intrusion. It would be a perverse result if the Members agreed to prohibit export monopoly powers that do not amount to export subsidies but failed to agree to prohibit import monopoly powers that do create import barriers.

3 *Export Competition: Annex F on International Food Aid*

The key provision is paragraph 9 which provides that in-kind food aid transactions would be regarded as circumventing export subsidy commitments (and violating Article 10.1) if they:

(i) are outside the 'Safe Box' containing food aid provided in accordance with paragraphs 4 to 8 in situations of need determined by the United nations or Red Cross;

(ii) cause commercial displacement;

(iii) fail to meet criteria listed in paragraph 10.

Further requirements are set out in paragraph 2.

V THE THIRD PILLAR: DOMESTIC SUPPORT

A The Existing (Post-Uruguay Round) Rules on Domestic Support

Just as politicians have a tendency to choose wealth transfers using import barriers in preference to subsidies, so might they also have a tendency to use production subsidies in preference to income payments. Economic analysis reveals that the wealth transfer costs the rest of the community more if it is given in the form of a production subsidy rather than an income payment.[75] The *GATT* system encourages politicians to shift the form of such wealth transfers from import barriers to production subsidies and, further, from production subsidies to

75 On the hierarchy of policies see, eg, Corden, above n 15, 21–5.

income payments. Just as the gains from reducing import barriers will be greater if the system applies the most encouragement to shift away from those import barriers providing the highest rate of protection, so the gains from shifting away from production subsidies to less distorting instruments will be greater if the system applies the most encouragement to shift away from those production subsidies which provide the highest effective rates of producer support.

The pre-WTO rules did not require removal of non-export subsidies. The rules allowed countervailing duties ('CVDs') and also non-violation nullification or impairment claims ('NV claims'). The new rules under the *SCM Agreement* are similar. Non-prohibited subsidies need not be removed but if, and only if, they are industry specific, they are exposed to CVDs and the possibility of multilaterally authorised retaliation for adverse effects in the home market, export markets or third country markets.

The availability of a non-violation claim against a subsidy on production introduced after the grant of a tariff concession was supported by the Panel report in *EC – Oilseeds*.[76] Over 1991 and 1992, the EC changed the way it made payments under the Common Agricultural Policy, so that farmer compensation payments would no longer be made on the difference between target prices and actual price received on actual production but would be income support payments based on the difference between target prices and references world market prices on a fixed volume of production.[77] The second un-adopted *EC – Oilseeds* Panel said that even these revised form of payments constituted a non-violation nullification or impairment of the pre-existing tariff concessions.[78]

At the time, the draft agriculture text contained in the Dunkel text (named after the then Director-General of the *GATT* Secretariat) provided for an Aggregate Measure of Support ('AMS') to be scheduled by each Member and reduced by 20 per cent.[79] This AMS would only count support provided above a designated price level and therefore increases in subsidies to compensate for falls in world prices below the designated reference price would not be counted.[80] The parties had also agreed that the AMS would not count a *de minimis* level of AMS of up

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76 *EEC – Payments and subsidies paid to processors and producers of oilseeds and related animal-feed proteins*, GATT BISD, 37th Supp, 86, GATT Doc L/6627 (1989) [157] (Report of the Panel Adopted on 25 January 1990) ('*EC – Oilseeds Panel Report*'), though the finding related to a subsidy to the purchaser not to the producer, and the EC made a reservation on the nullification and impairment findings: GATT Doc L/6636 (25 January 1990).

77 The EC Agriculture Minister announced changes in January 1991: EC, 'The development and future of the common agricultural policy' in EC, *Bulletin of the European Communities (supplement 5/91)* (1991). For oilseeds, changes were enacted in December 1991: *European Economic Community – Follow-Up on the Panel Report 'Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins'*, GATT BISD 39th Supp, 191, GATT Doc DSR28/4 (1992) [7] ('*EC – Oilseeds Follow-Up Report*'). The changes to the Common Agricultural Policy ('CAP') were adopted in June 1992. See Commission of the European Communities, *Our Farming Future* (1993) 21.

78 *EC – Oilseeds follow up report*, above n 77.

79 See art 8 of Part B 'Agreement on Modalities' which was part of Part L 'Draft Agreement on Agriculture' in *Uruguay Round – Draft Final Act*, above n 63. Part L is hereafter referred to as the 'draft Dunkel text' of December 1991.

80 This was implemented by paras [8]–[11] of Annex 3 to the *Agreement on Agriculture* which is incorporated into the definition of 'Aggregate Measure of Support' in art 1(a) of the *Agreement on Agriculture*.

to 5 per cent (for developing countries 10 per cent) of the total value of agricultural production and up to 5 per cent of the value of production of any particular product without such support being counted in the AMS. The draft text provided for a (green box) exemption from reductions for certain non or minimally trade distorting subsidies including direct income support payments which were not related to production or prices in any year after a base year. On the basis of the Dunkel draft, the new Common Agricultural Policy ('CAP') payments would not fit within the Green Box and would have to be counted in the AMS. At the 20 November 1992 Blair House meeting, the United States agreed to exclude these payments from the calculation of the AMS so long as the US deficiency payments under the USA 1990 Farm legislation would also be excluded.[81] This resulted in the insertion of Article 6.5 to exclude certain payments on fixed quantities of production or productive assets, known as the Blue Box exemption.

The 'Peace Clause' in the *Agreement on Agriculture* exempted Green Box subsidies from CVDs, from non-violation nullification or impairment claims, and from any claim under the adverse effect rules of Part III of the *SCM Agreement*.[82] The Blue Box subsidies were not given the same exemptions. They were lumped in with the AMS, and the *de minimis* payments and given a lesser degree of immunity from challenge. These were exempt from adverse effect claims and only from a limited scope of CVDs but these exemptions were conditional upon the measures not granting support to a specific commodity in excess of that decided during the 1992 marketing year.[83] This extremely badly drafted proviso is open to a range of possible interpretations and even the Appellate Body in the *US – Cotton* case declined to say whether the US had fallen outside the scope of the immunity because its payments were based on a bigger price gap or were an absolutely larger budget outlay than in 1992.[84]

Therefore, the general rules under the *SCM Agreement* do not absolutely prohibit a Member from adopting an objective of a minimum volume of local production and achieving that non-trade objective by what would be the lowest cost way to achieve it but merely discourage the subsidy by giving other Members the right to seek compensatory liberalisation on other products or to resort to either multilaterally authorised retaliation calibrated to the degree of impact that the subsidy has on trade volume or to unilateral CVDs limited to the per unit value of the subsidy. Arguably the experience in disputes since 1995

81 The elements of the Blair House (which are the US President's Guest quarters in Washington) deal are set out in *Outline of the US–EC Agreement on Oilseeds and Uruguay Round Issues* (1992) (Copy on file with the Office of the United States Trade Representative) and in Commission of the European Communities, *The European Community and the Uruguay Round* (1992) 17–18. See also, Commission of the European Communities, *Details of GATT Deal and Compatibility with CAP Reform* (1992) 3–5 (Copy on file with European Commission). The Blair House deal is also described in Charles E Hanrahan, 'Oilseeds, Agriculture and the Uruguay Round' in Congressional Research Service – The Library of Congress, *CRS Report for Congress 92–904* (4 December 1992).

82 *Agreement on Agriculture*, above n 6, art 13(a).

83 *Agreement on Agriculture*, above n 6, art 13(b).

84 *United States – Subsidies on Upland Cotton*, WTO Doc WT/DS267/AB/R, AB-2004-5 (2005) [390] (Report of the Appellate Body) ('*US – Cotton*').

shows that the adverse effect rules in the *SCM Agreement* are a sufficient way to discipline non-prohibited subsidies and that more specific disciplines are not necessary. Because of the way that remedies under these rules are calibrated, then on their own they are likely to lead to a shift down the scale from production and price linked subsides, to non-production but price linked subsidies, to lesser degrees of price-linkage, to non-production non-price linked subsidies and finally to non-agriculture specific subsidies. The *Agreement on Agriculture* modified these general rules by making them stricter in one sense and weaker in another. First, it prohibited AMS above scheduled levels. Second, the *Agreement on Agriculture* exempted a broader class of subsidies from CVDs and adverse effects remedies until 1 January 2004. Whereas non-agricultural subsidies are exempt only if they are not industry specific, agricultural subsidies were, until 2004, exempt if they were industry specific but minimally trade distorting (Green Box), industry specific and price-contingent up to the 1992 level of support even if not production linked (Blue Box), or industry specific and linked to both price and production up to the bound level plus 5 per cent (Amber Box plus *de minimis*).

With the expiry of Article 13, all specific subsidies are exposed to adverse effect claims. Non-violation claims are limited by the extent to which the presence of an AMS binding, or even a Blue Box notification, renders it difficult to establish a legitimate expectation that access would not be impaired by a subsequent subsidy but they would still be possible in other circumstances. Serious prejudice claims depend on complainants establishing causation between a subsidy and the effects set out in Article 6.3 of the *SCM Agreement*. Some Members' need for the peace clause immunities has changed; the EU in particular, having moved its CAP subsidies away from price linkages, is less exposed. However, it does seem quite unlikely that the US will agree to further cuts in domestic support without some degree of immunity from adverse effects claims and that both the EU and the USA would like to see an explicit immunity for at least the green box category. The Falconer text does not mention any extension of any form of the peace clause. It may have been better to suggest an outcome that might pre-empt any last minute inclusion of a very broad peace clause.

The Doha Declaration[85] mandates 'substantial reductions in trade-distorting domestic support' but this is part of the overall objective of achieving a 'fair and market-oriented trading system' through strengthened rules and specific commitments.[86] The task in renegotiating the *Agreement on Agriculture*'s domestic support rules in the context of the overall objective is:

(1) to construct rules on subsidies that do encourage a shift from less efficient toward more efficient subsidies by:

(1.1) circumscribing any immunity beyond the immunity in the *SCM Agreement* for non-industry specific subsidies; and

85 *Ministerial Conference – Fourth Session: Doha, 9–14 November 2001 – Ministerial Declaration Adopted on 14 November 2001*, WTO Doc WT/MIN(01)/DEC/1 (2001) ('Doha Declaration').

86 Ibid [13].

(1.2) committing to 'substantial reductions' where significant welfare gains can be achieved from limiting any non-prohibited subsidies in a stronger way than would be achieved through CVD and adverse effect remedies; and

(2) to achieve the relatively small welfare gains available from disciplines on non-export subsidies in a way that does not make it harder to achieve the much larger welfare gains that can only be achieved by reducing import barriers, that is, in a way that does not impair the overall objective of 'achieving a fair and market-oriented trading system'.

On the first objective, immunities, a distinction between effects on import substitution and effects on exports might be useful for the next stage of reform. This author's suggestion would be:

Immunity	**From NV or 6.3(a) Claims**	**From other Adverse Effect Claims (Serious prejudice or injury claims)**	**CVD**
(1) Non-agriculture specific subsidies	Yes	Yes	Yes
(2) Agriculture specific but not linked to either production or price (Green)	Yes	Yes	Yes
(3) Linked to price but not production (Blue) or with limited link to production with or without links to price (Blue as in the current Article 6.5)	Yes	No	No
(4) Linked to production up to a common cap per unit of value (Amber but *de minimis*)	Yes	No	No
(5) Subsidies Linked to production – other than (4) (Amber)	Yes (up to negotiated product specific caps)	No	No

Such a regime would facilitate shifts from more distorting to less distorting policies because the product specific subsidies that were higher on a per unit basis would expose subsidising Members to the largest remedies, and product specific subsidies beyond a *de minimis* level would expose subsidising Members to larger remedies than Blue Box subsidies, and Blue Box subsidies would expose subsidising Members to some remedies compared to Green Box subsidies that would expose the subsidising Member to no remedies at all.

To further facilitate a shift from less efficient to more efficient policies, the Members should have sought to shift away from production linked subsidies to less distorting subsidies by focusing the greatest pressure on those production linked subsidies providing the highest rate of producer support. This would have required product specific caps on production linked support, measured to include the entire percentage of support above the world price (without such measurement being limited to exclude support below a fixed reference) and the application of reductions with higher percentage reductions being applied to products receiving subsidies that are highest in terms of percentage of value of production. Commitments on this basis would also make it easier to enforce the law when measures are implemented rather than having to wait for the collection of information after the relevant period. It would sharpen the focus on the need for reductions in import barriers if the definition of AMS were also amended to exclude the possibility of support provided through import barriers being double counted in the AMS. This would require adjustment to paragraphs 8 to 10 of Annex 3 of the *Agreement on Agriculture* so that intervention schemes not utilized because of import barriers are not counted in the AMS. On this basis, import barriers would be disciplined by rules on import barriers including those requiring tariff cuts and the AMS would only discipline non-export subsidies.

On the third objective, not tightening subsidy rules to the point where the tightening inhibits achievement of welfare gains from tariff reductions, a solution lies in leaving Members sufficient freedom to use subsidies, partly through the construction of the safeguard measure. On non-agricultural products, Article XXVIII already allows a Member to increase a subsidy in exchange for compensatory liberalisation[87] and Article XIX and the *Agreement on Safeguards* already provide that in the event of an increase of imports, a Member can increase a production linked subsidy for three years without compensation or retaliation.[88] Currently, Article 21 of the *Agreement on Agriculture* may prohibit such subsidy increases. However, the trade effects and the welfare losses would be minimised if Members had greater freedom to use subsidies rather than tariff surcharges to deal with increases in import volumes or falls in import prices of Sensitive (or Special) products. The Article XXVIII and XIX processes could be made available. In addition the SSG could also be adapted to this purpose. In combination with a more comprehensive approach to tariff reductions and a focus on reducing the entire percentage above the world price from product specific Amber Subsidies, such mechanisms could facilitate a softening in the process of adjustment without undermining the reduction of import tariffs on a comprehensive basis and the reduction of the highest per unit production linked subsidies. Such mechanisms would enable Members to move from import tariffs to subsidies, and from more to less trade distorting subsidies (Amber to Blue to Green) without being in violation of their obligations and exposed to retaliation. Developed Members could lead this transition gradually shifting the SSG from a mechanism justifying tariffs and to one justifying subsidies. Developing Members could graduate to this more restrictive form of SSG when, after an appropriate time lag, they have the capacity to do so.

The above principles are hardly reflected at all in the extraordinarily complicated rules in the Falconer text that I describe below.

The Falconer draft text is divided into the following sections:

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87 This view is supported by the statement in *Report of Review Working Party III on Barriers to Trade Other Than Restrictions or Tariffs*, GATT Doc L/334 (1955) [14].

88 *Agreement on Safeguards*, above n 28, arts 5, 8.

- 1A: A tiered formula for reductions in Overall Trade-Distorting Support ('OTDS');
- 1B: A tiered formula for reductions in Total AMS;
- 1C: Product-Specific AMS Caps;
- 1D: De Minimis;
- 1E: Blue Box definition and cap;
- 1F: Amendment of the definition of the Green Box; and
- 1G: A formula for applying a higher rate of reduction for AMS for cotton.

I will deal with the Divisions in the order of importance that I have identified and will deal last with the new OTDS rules.

B AMS – Product Specific Caps and Reductions

The existing rules on AMS do not impose caps on AMS for particular products. I have suggested above that it would be desirable to:

- break the AMS cap down into AMS caps in terms of proportion of value of production of each specific product; and
- remove the fixed external reference prices from the calculation of AMS so that payments to compensate for prices falling below those reference prices would be included in the calculation of the AMS; but to compensate *partially* for this change but allowing recourse to 'safeguard' price linked subsidies where prices below historical levels lead to increased volumes of imports.

The initial US proposal called for reductions of AMS as a proportion of value of production.[89] However, it is noticeable that the US did not propose that AMS caps be made product specific or that product specific AMS caps be reduced as a proportion of value of production. The joint US-EC proposal before Cancún merely called for a reduction in 'the most trade-distorting support measures in the range of []% – []%'.[90] That was followed by the first G20 proposal, its Framework Proposal presented on 4 September 2003 just before the Cancún

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89 *Committee on Agriculture – Special Session – Proposal for Comprehensive Long-Term Agricultural Trade Reform – Submission from the United States*, WTO Doc G/AG/NG/W/15 (2000).

90 European Commission – External Trade, *EC – US Joint Text: Agriculture* (13 August 2003) 1 <http://trade.ec.europa.eu/doclib/html/113884.htm> at 9 September 2007.

Ministerial.[91] The G20 called for reduction of all trade distorting support measures (including AMS and *de minimis*) on a product specific basis (and for the abolition of the Blue Box).[92] The Derbez text presented at Cancún went half way. It proposed reductions in the Total Bound AMS but also proposed capping of product specific AMS.[93]

All of the draft texts before the July Framework Agreement[94] were compatible with the notion that the rules should require reductions in AMS in terms of the proportion of value of production and that the reductions would be harmonising in the sense that higher rates of reduction would be applied to AMS at higher proportions of value of production. However, in the intensive negotiations that led to the July Framework, the following draft clauses were edited significantly: (i) '[t]here will be a strong element of harmonization in the reductions made by developed Members. Specifically, higher levels of permitted trade-distorting domestic support, *in either absolute or relative terms*, will be subject to deeper cuts'[95]; and (ii) '[m]embers having higher Total AMS, *in either absolute or relative terms*, will make greater reductions'.[96] Both were edited so that the final version did not include the words '*in either absolute or relative terms*'. During 2005 the proposals became explicit in stipulating that the higher rates of reduction should be applied to those with the highest *absolute* value of AMS. The effect of this is that a large country paying a large absolute amount of AMS which constituted a small proportion of the value of production would be subjected to a large percentage reduction in AMS but that a small country paying a small absolute amount of AMS which constituted a large proportion of value of production would be subjected to a small percentage reduction in AMS.

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91 *Ministerial Conference – Fifth Session – Cancún, 10–14 September 2003 – Agriculture – Framework Proposal – Joint Proposal by Argentina, Bolivia, Brazil, Chile, China, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, India, Mexico, Pakistan, Paraguay, Peru, Philippines, South Africa, Thailand and Venezuela*, WTO Doc WT/MIN(03)/W/6 (2003). This proposal was later signed on to by Egypt and Nigeria. See, *Ministerial Conference – Fifth Session – Cancún, 10–14 September 2003 – Agriculture – Framework Proposal – Joint Proposal by Argentina, Bolivia, Brazil, Chile, China, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, India, Mexico, Pakistan, Paraguay, Peru, Philippines, South Africa, Thailand and Venezuela – Addendum*, WTO Doc WT/MIN(03)/W/6/Add.1 (2003); *Ministerial Conference – Fifth Session – Cancún, 10–14 September 2003 – Agriculture – Framework Proposal – Joint Proposal by Argentina, Bolivia, Brazil, Chile, China, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, India, Mexico, Pakistan, Paraguay, Peru, Philippines, South Africa, Thailand and Venezuela – Addendum*, WTO Doc WT/MIN(03)/W/6/Add.2 (2003).

92 *Ministerial Conference – Fifth Session – Cancún, 10–14 September 2003 – Agriculture – Framework Proposal – Joint Proposal by Argentina, Bolivia, Brazil, Chile, China, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, India, Mexico, Pakistan, Paraguay, Peru, Philippines, South Africa, Thailand and Venezuela*, WTO Doc WT/MIN(03)/W/6 (2003) [1.1].

93 Derbez text, above n 4, [1.1].

94 July Framework Agreement, above n 4.

95 Ibid [6], bullet point 2, which does not contain the words 'in either absolute or relative terms' (emphasis added above) which are included in the earlier version WTO Doc JOB(04)/96, dated 16 July 2004. The author understands that the G10 argued strongly against applying higher reductions on the basis of relative size of AMS.

96 Ibid [9], bullet point 2, which does not contain the words 'in either absolute or relative terms' (emphasis added above) which are included in the earlier version WTO Doc JOB(04)/96, dated 16 July 2004.

This shift in the negotiation, in this author's view, reflects a lack of consideration of the way that the rules function to guide Members away from welfare diminishing policies toward welfare enhancing policies. The outcome suggested as politically feasible by the Falconer text would be far removed from the principles set out above.

1 *Product Specific Caps but No Reductions*

As noted above the existing rules do not impose caps on Amber subsidies for particular products. The Falconer text provides for product specific AMS limits as set out in the following table but does not provide for reductions in product specific AMS.

Table No 3 Product Specific Caps on AMS

	Product	Product Specific Cap
1	Products for Developed Members subject to special rules in 3 and 4 below	The average AMS for the product during 1995–2000[97]
2	Products for The United States subject to special rules in 3 and 4 below.*	The average proportion of total AMS for that product during 1995–2004 as a proportion of total AMS during the period 1995–2000[98]
3	Product for which a Developed Member has introduced AMS above *de minimis* since 2000	The average AMS for the product during the 'most recent two notified post base period years'[99]
4	Product for which a Developed Member's AMS during 1995–2000 was below the *de minimis* level	The [current][new] *de minimis* level[100]
5	Products for Developing Members	The Developing Members choice of: (a) the average applied levels during either 1995-2000 or 1995–2004, as selected by the Member; or (b) two times the Members product specific *de minimis* level; or (c) 20 per cent of the Annual Bound Total AMS in any year.

**In fact, it is not clear from the text but I am assuming that the rules in paragraphs 23 and 24 also apply to the US.*

2 *Reductions Harmonising Absolute Amounts, not Proportion of Production*

The Falconer draft text provides for reductions in total AMS to be applied in equal annual instalments over an unspecified implementation period. The starting point is the Final Bound Commitment level in force under Part IV of a Member's Schedule on Goods ('the Final Bound Total AMS'). The rates of reduction are in

97 Falconer text, above n 2, [20]–[21].
98 Ibid [22].
99 Ibid [24].
100 Ibid [23].

three tiers on the basis of the total absolute size of the Final Bound Total AMS. Members with a Final Bound Total AMS which is higher than 40 per cent of the value of agricultural production would have the rate of reduction increased. The rate for Developing Members would be two-thirds of the rate for Developed Members[101] and no reductions at all would be required from 'small low income recently acceded Members'[102] or from Net Food Importing Developing Countries ('NFIDCs').[103] These rates are represented in the following table.

Table No 4 Rates of Reduction in Total AMS

The Member's Final Bound Total AMS in US$ billion	Reduction rate for Developed Country	Reduction rate for Developed Country with AMS > 40% of production	Reduction rate for Developing Country (over a longer implementation period)	Reduction rate for SLI-RAMs or NFIDCs
> 40	[70]%			0
15 < FBT AMS ≤ 40	[60]%	[60] + ([70] – [60])%		0
FBT AMS ≤ 15	[45]%	[45] + 0.5([60]-[45])%	2/3 x [45]%	0

3 *Modifications to the Exclusion of* **de minimis** *from the AMS*

As set out above, the existing rules allow a certain *de minimis* level of what would otherwise be Amber Box subsidies not to be counted in the calculation of a Member's AMS. The *de minimis* amount not required to be counted are:

- Product specific support up to 5 per cent of the value of a Member's production of any particular product for a given year (for developing countries 10 per cent); and
- Non-product specific support (but which would nevertheless not fit into either the Green or Blue Boxes) of up to 5 per cent of the total value of a Member's agricultural production for a given year (for developing countries 10 per cent).[104]

The Falconer draft text provides that the *de minimis* levels should be reduced by 'at least [50] [60] per cent [and two-thirds of those percentages for some developing countries] and by a greater amount if that would be required to adjust to the rate of cut of Overall Trade-Distorting Domestic Support.'[105] While the wording obscures the meaning, the author believes that the table below sets out the required reduction in *de minimis*.

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101 Ibid [15].
102 Ibid [13].
103 Ibid [16].
104 *Agreement on Agriculture*, above n 6, art 4.
105 Falconer text, above n 2, [27]–[31].

Table No 5 Rates of Reduction of De Minimis Support

Member	Rate of reduction of *de minimis* support	By equal annual instalments over
Developed Member	Higher of: The rate applicable to cuts in OTDS; and [50][60]%	The implementation period
Developing Members (not in the categories below)	Higher of: The rate applicable to cuts to the OTDS: and 2/3 of [50][60]%	A longer implementation period
Recently Acceded Developing Members	Higher of: The rate applicable to cuts in OTDS minus 5%; or 2/3 of [50][60] minus 5%.	A longer implementation period
Recently acceded small low income Members	No reduction in *de minimis*	
Developing Members with no AMS commitments	No reduction in *de minimis*	
Developing Members with AMS commitments, but that allocate almost all that support for subsistence and resource poor farmers	No reduction in *de minimis*	
Listed Net Food Importing Developing Members	No reduction in *de minimis*	

4 *Modification to the Exclusion of Blue Box from AMS*

The existing Article 6.5 exempts production limiting programmes from the calculation of the AMS if:

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

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

(iii) livestock payments are made on a fixed number of head.

As discussed the category was created to allow the EC to change from paying subsidies on actual production calculated by reference to the difference between target prices and actual sale prices to new CAP payments on a fixed amount of production calculated by reference to the difference between target prices and a reference world price. The drafting of Article 6.5 was imprecise. This author's understanding is that the Members' general understanding was that once for a particular hectare of land the EC (or any other Member) changed over to a fixed amount of production calculated by reference to an estimated yield for that hectare, then that fixed amount of production could not be subsequently changed even though the payment could vary depending on the gap between the target price and the market price. Similarly, once a payment was changed from one based on the gap between target price and actual price for production of animal products to the new CAP payment based on the gap applied for a particular farmer in respect of a fixed number of head of animals, then that fixed number of head of animals could not be changed even though the actual payment might fluctuate depending on the gap between the target price and the market price.

However, the imprecise legal drafting gave rise to some uncertainty as to whether the base levels of hectares and yields, of production and of number of head had to be fixed once for all time or whether it was permissible to reset them for a new marketing period in such a way that the payment was still calculated on the fixed base and not on actual production. One possibility was that a change to the base took the measure outside of the immunity provided by the peace clause but did not take it outside of the Article 6.5 exemption from having to be counted in the AMS.

The Falconer draft text provision removes (at least some of) this uncertainty in the interpretation of Article 6.5 by redrafting the article in the following form:

> Article 6.5 The value of the following direct payments shall be excluded from a Member's calculation of its Current Total AMS:
>
> (a) Direct payments under production-limiting programmes if:
>
> (i) such payments are based on fixed and unchanging areas and yields; or
>
> (ii) such payments are made on 85 per cent or less of a fixed and unchanging base level of production; or
>
> (iii) live stock payments are made on a fixed and unchanging number of head.
>
> (b) Direct payments that do not require production if:
>
> (i) such payments are based on fixed and unchanging bases and yields; or
>
> (ii) livestock payments made on a fixed and unchanging number of head; and
>
> (iii) such payments are made on 85 per cent or less of a fixed and unchanging base level of production.

In addition, Article 6.5 did not place any limit on the amount of Blue Box paid in total or on a particular product. The only limit was that the immunity in the Article 13 peace clause would only cover payments that provided a level of support no higher than that set for the 1992 year. (I have already discussed the ambiguity in that provision.) Any higher level of support would expose the Blue Box payments to challenges under Part III of the *SCM Agreement*. While some negotiating proposals sought to abolish the Blue Box, others sought to limit the size of the payments given the benefit of the Blue Box exclusion from AMS.

The Falconer draft text provides for quantitative limits on Blue Box payments as follows.

The total value of payments under Article 6.5 should not exceed a maximum percentage of 2.5 per cent for developed countries and 5 per cent for developing countries, of the 'average total value of agricultural production during the base period'.[106] The text does not define 'base period' but presumably it refers to the 1995–2000 base period referred to in paragraph 1. Members with 40 per cent or more of their trade-distorting support (non-Green box support) in the Blue Box category would be allowed a higher maximum equal to the base period Blue Box payment, and reduced by the same percentage as the particular Member is required to cut its Total AMS.[107]

The text provides for limits on the payments on particular products:

- for payments under paragraph 6.5(a), the product specific ceiling is the average value of support for the particular product during the 1995–2000 period;[108] and
- for payments under paragraph 6.5(b), a fairly incomprehensible provision (paragraph 37) seems to allow Members to set their own product specific limits within the overall total cap of 2.5 per cent (or 5 per cent) and then to shift support between products as long as support for a particular product does not exceed [110][120] per cent of the planned product specific support.

The above product specific ceilings can be exceeded in some circumstances in which a Member, (in what could be set up as an Article XXVIII–like process), either:

- if it has an AMS commitment for the product, reduces the product specific ceiling for AMS by the same amount;[109]
- if the Member does not have an AMS commitment to reduce in exchange for increasing the product specific Blue Box ceiling, reduces the Blue Box ceiling for another product by a corresponding amount (and the increase in the Blue Box ceiling for the first product is not more than 10 per cent or the total Blue Box ceiling);[110] or
- if a Developing Members particularly dependent on the production of a particular product exceeds the 5 per cent total Blue Box ceiling but decreases its AMS by a corresponding amount.[111]

4 *AMS and Blue Box for Cotton*

For cotton, the Falconer text provides for Specific AMS caps at the average total absolute level for 1995-2000 and reductions from that level at a rate higher than the rate applicable to Total AMS over only one third of the implementation period.[112] The reduction rate is defined as the sum of the ordinary rate applicable to reduction of the Total AMS ('Rg') and additional percentage points

106 Ibid [34], [39].
107 Ibid [35].
108 Ibid [36].
109 Ibid [38].
110 Ibid.
111 Ibid [40].
112 Ibid [42] sets out the rate of reductions; [43] sets out the starting caps; [44] sets out the implementation period.

determined according to a mystifying formula, in which the additional percentage points are specified as:

((100 – Rg) * 100) / 3 * Rg.

For any rates of reduction of total AMS between 45 and 70, the rate of reduction would be a little over 80 per cent.

The text also provides for a product specific cap on AMS for cotton of one third of the otherwise applicable cap. In ordinary circumstances (as set out above), this would mean a limit of one third of the average value of Blue Box support paid for cotton during the years 1995-2004.

C Green Box

Annex A to the Falconer draft text includes an amended version of Annex 2 to the *Agreement on Agriculture*. I set out only three of the amendments.

1 *Paragraph 2 – addition of sub-paragraph (h)*

Paragraph 2 relates to expenditures for services to agriculture or the rural community which not in the form of direct payments to producers or processors, are funded by taxpayers not consumers and do not provide price support. Paragraph (2)(g) sets out a non-exhaustive inclusive list which includes infrastructure services not including subsidies to inputs or operating costs. The Falconer text includes an additional paragraph 2(h) which would cover rural development including 'rural employment programmes'. I submit that this should be redrafted to ensure that it does not include programmes providing employment subsidies to employers for employing labour in agriculture and covers only programmes providing employment subsidies to employers for employing labour regardless of the field of employment.

2 *Alteration to Paragraph 3 on Public stockholding for food security purposes*

The existing paragraph accords Green Box status to expenditures on accumulating and holding food security stock but a proviso in the footnote requires that if stocks are released from the stocks at prices below the price at which they are acquired from farmers then the difference must be counted in the AMS. The Falconer text provides for such a difference between the two prices to be covered by the *de minimis* percentage. Given the importance of disciplining price support, it would better to say that the difference must be 'accounted for in the AMS except to the extent it is accommodated within the *de minimis* allowance under Article 6.4'.

3 *Paragraph 6 Decoupled income support – alteration to paragraph 6(a)*

Paragraph 6 accords Green Box status to payments to entities identified as eligible by virtue of criteria 'such as income, status as a producer or landowner, factor use or production level in a defined and fixed base period.' To be exempt, the payments must meet the criteria in paragraphs 6(b) to 6(e) which relate to not being linked to production or prices and also must meet the basic criteria in paragraph 1 of being funded by taxpayers on consumers and not providing price support. The Falconer text provides that in respect of their base period for defining eligibility, the Members must notify the WTO of the base period and not change the base period except within strict limits which ensure that the change in the base period does not increase the support to producers.

D A tiered formula for reductions in Overall Trade-Distorting Support ('OTDS')

The existing rules do not contain an additional limit on OTDS over and above the limits on AMS and *de minimis*. In the G20's pre-Cancún Framework Proposal, the G20 called for abolition of the Blue Box and, in addition to reductions in AMS and in *de minimis*, called for a separate percentage reduction of the sum of AMS and *de minimis*.[113] (Notably they also called for the Green Box exemption for direct income payments to be capped and reduced, an unlikely and undesirable outcome.[114]) The proposal reflected a concern that some Members might be able to shift support from AMS to Blue Box in a way that undermined reductions of AMS. However, it is difficult to see what such an overall commitment achieves that could not be achieved in other ways; for example, through limits on product specific AMS and *de minimis*, and on product specific Blue Box or even with limits on product specific AMS and *de minimis* without limits on Blue Box but with the discipline of serious prejudice claims. Nevertheless, the idea of an overall reduction in trade-distorting domestic support was adopted in the July 2004 Framework Agreement. There, it was suggested that the overall level of all trade-distorting support, comprising the Final Bound AMS, plus permitted *de minimis* plus permitted Blue Box, would be reduced according to a tiered formula.[115] It was to be on the basis that it would apply as a minimum overall commitment on total support not on a product specific basis, which would only take effect where the combination of implementing commitments to reduce blue box, *de minimis* and AMS did not achieve the minimum rate of reduction.[116]

The Falconer draft text provides for a reduction in OTDS consisting of the sum of:

(i) the Final Bound Total AMS as defined in Article 1(h) of the *Agreement on Agriculture*; plus

(ii) 10 per cent of [the] value of production in the 1995–2000 base period (this being composed of 5 per cent of VOP for product specific and non-product specific AMS respectively'); plus

113 *Ministerial Conference – Fifth Session – Cancún, 10–14 September 2003 – Agriculture – Framework Proposal – Joint Proposal by Argentina, Bolivia, Brazil, Chile, China, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, India, Mexico, Pakistan, Paraguay, Peru, Philippines, South Africa, Thailand and Venezuela*, WTO Doc WT/MIN(03)/W/6 (2003) [1.1(v)].

114 Ibid [1.2].

115 July Framework Agreement, above n 4, [7].

116 July Framework Agreement, above n 4, [8].

(iii) the higher of existing average Blue Box payments, or 5 per cent of the average total value of agricultural production, in the 1995–2000 base period.[117]

The rate of reduction is slightly higher than for the total AMS. As for the reduction of AMS, the size of the rate of reduction is tiered not on the basis of the value of support relative to value of production but on the *absolute* value of support. The allowances of lower reduction rates to Developing Members and to certain other Members are similar to the variations in the rates applicable to reducing the AMS. All Members making reduction are to make a 20 per cent cut in the first year down to 80 per cent of the base level. The remainder of the cuts are phased over an implementation period which would be longer for Developing Members.

Table No 6 Rates of Reduction in Total OTDS

The Member's Base Overall Trade-Distorting Support in US$ billion	Reduction rate for Developed Member[118]	Reduction rate for Developed Member with OTDS > 40 per cent of production[119]	Reduction rate for Developing Member with AMS commitments (after the first year over a longer implementation period)[120]	Reduction rate for Developing Member without any AMS commitments[121]	Reduction rate for SLI-RAMs[122] or NFIDCs[123]
> 60	[75][80]%			0	0
10 < OTDS ≤ 60	[66][73]%	[66][73] + 0.5(difference between [75][80] – [66][73])%		0	0
OTDS ≤ 10	[50][60]%		2/3 x [50][60]%	0	0

VI SUMMARY AND CONCLUDING OBSERVATIONS

The proposed agreement has more weaknesses than strengths.

On market access, the text:

117 Falconer text, above n 2, [1].
118 Ibid [2].
119 Ibid [3].
120 Ibid [7].
121 Ibid [6].
122 Ibid.
123 Ibid [8].

- would achieve a useful step in changing all tariffs to an ad valorem basis in both agriculture and NAMA;
- would leave high import barriers on a range of products in a range of Members (with some exclusions from reductions protecting US and EU preferences) to such an extent as to fail to capture a significant portion of the welfare gains available from further liberalisation;[124]
- would leave TQs in place so that for some products the volume limit will remain the binding constraint (and more TQs may be added);
- would not prohibit surreptitious imposition of QRs via exclusive import rights (since it fails to prohibit grant of exclusive rights over imports);
- would not remove self impoverishing methods of administering TQs (since it fails to mandate auctioning of TQ rights);
- fails to make all invocations of the SSG contingent on an increase in volume of imports and fails to put a time limit on the price-triggered SSG; and
- may impose useful constraints on the SSM. The negotiators minds could be focused if they could treat the SSM as temporary leading to an application to all of the SSG.

On export subsidies, the Agreement would bring the prohibition of Export Subsidies almost into line with Article 3.1(a) of the *SCM Agreement* but should clarify that Art 3 will apply. All of the objectives of the export subsidy annexes could be achieved better by a transition to non-agriculture specific rules, mostly already in the *SCM Agreement*:

- the application of Article 3 and the Illustrative List could deal adequately with export credits (though it is acknowledged that this point deserves more thorough argument than is contained in this paper);
- the application of Article 3 would also discipline any export subsidies through state trading entities through entrustment and direction;
- discipline over export subsidies arising from pooling domestic and export receipts should be achieved by prohibiting the grant of exclusive powers over domestic sales to any entity which has exclusive powers over export sales (and not by prohibiting export monopolies).

The provisions on Domestic Support are unsatisfactory in a variety of ways:

- they do not reduce high per unit subsides on particular products. The product specific AMS caps only apply as a retrospective check on the averages and do not count support for price falls. They ought to prohibit payments above a per unit amount and these should be subject to reductions

124 See Kym Anderson and Will Martin, 'Agricultural Trade Reform and the Doha Development Agenda' (2005) 28(9) *World Economy* 1301, 1314, estimating the proportion of possible welfare gains that would be lost if products are designated as sensitive.

which harmonise the level of support measured as a percentage of world prices; such rules could be enforced without waiting until the end of the period to count what was actually paid.

- they do not clarify that the Amber Box and Blue Box subsidies should not regain any immunity from serious prejudice claims.
- All of the detailed reductions of Blue Box, OTDS and *de minimis* are unnecessary complications which will achieve nothing and may even impair movement from more distorting policies to less distorting policies. The Members should tighten the constraints on product specific per unit AMS and ensure the availability of serious prejudice claims and delete these superfluous rules on Blue Box, OTDS and *de minimis*.
- The Cotton provisions would only be necessary if product specific AMS caps are not tightened sufficiently under a harmonisation formula.

The design of the Safeguards provisions should reflect the objective in Article 5 of the *Agreement on Safeguards* that safeguards should do no more than insulate from injury and facilitate adjustment. In theory, this should mean that a Member that can facilitate adjustment thought targeted subsidies instead of import barriers should do so. Although jurisprudence on the *Agreement on Safeguards* has yet to enunciate that position, the *Agreement on Agriculture* could lead the trend in the way that it adjusted its definition of AMS and set up the SSG and SSM. Developed Members should be given freedom to increase production linked subsidies in response to price falls and to lose some of their freedom to apply safeguard tariffs. This could be accomplished by ceasing to exclude from the definition of AMS support in relation to price falls below a fixed reference price but then allowing volume triggered safeguards in the form of production or price specific subsidies to compensate for only a portion of the price falls. Developing Members could have a broader recourse to safeguard tariffs but only for products liberalised in the first place.

These suggestions would help mover closer to having a single set of rules for all sectors of trade which would more effectively guide Members to be able to overcome the influence of import competing protectionists so as to choose welfare enhancing policies.

In summary, the liberalisation of import barriers suggested by the Falconer text would fail to harvest the biggest welfare gains that could be achieved because of the carve outs. Similarly the liberalisation of the non-export subsidies would also fail to harvest the biggest welfare gains that could be achieved because of the focus on total, instead of product specific support, and on absolute rather than per unit or relative size of subsidies. By addressing so much attention to achieving the very small welfare gains to be harvested from the liberalisation of the domestic support the Members have handicapped their ability to harvest the very large welfare gains that could have been harvested from the liberalisation of the import barriers.

In some senses, the outcome here is to put the EU, the US and the G10 into exactly their desired positions. The EU would still be able to apply high tariffs to a sugar, dairy and meat but would be able to tell the various EU farmers that it is not allowed to pay them subsidies. The G10 countries will also be happy with that outcome, with Korea and Japan being able to keep their high tariffs on rice. Similarly, the US will remain in a position in which it can shelter sugar and dairy industries from tariff cuts. The US may even gain a continued immunity for its price linked payments from serious prejudice claims. Canada would also retain high protection on some of those products that it currently protects heavily.

In failing to remove the major distortions, the Members will have failed to achieve all the benefits that could have been achieved from a Development Round. The main reason will be that their politicians, negotiators and advisers will have negotiated their way out of most of the changes that would have brought gains in economic welfare to their citizens.

The Developing Members, especially, need to reconsider what they want out of the WTO system. It is a system in which Members can harness the interests of exporters to help each other overcome the political weight of import competing protectionists. The Developing Members needed to achieve:

- reductions in import barriers in the EU and the G10 across all products including sugar, dairy, meat, bananas and other tropical products; and
- the removal of immunities from serious prejudice claims or CVDs, but to allow some limited immunity from nullification and impairment claims when subsidies do not generate exports.

To achieve these kind of outcomes requires a focus on maintaining the structure of the rules to harness the political weight of exporters so as to overcome the political power of import competing producers in Developed Member countries and also in their own countries. Developing Members will not be able to achieve these outcomes if they focus instead on creating additional exceptions.

The Developing Members, by focusing on the exceptions for themselves instead of the basic structure of the rules have not chosen the best way to achieve a fairer and more open system. They could have achieved a real development-centred outcome had they sought:

- a general harmonising tariff cut with no exclusions for either sensitive or special products that necessarily would have addressed tariff peaks, tariff escalation and tropical products (even if the reduction rates were a little smaller than proposed in paragraph 49 of the Falconer text);
- to focus SDT more on the length of the implementation period than on the extent of the deviation from the size of the tariff cuts;
- to protect sensitive and special products by means of the safeguard provisions only; and
- focused efforts on reducing high per unit Amber Box subsidies and left the ordinary SCM rules to deal with the rest.

The Developing Members excessive focus on reducing subsidies has backed the EU and G10 into a corner in which they can only refuse to concede on sensitive products thereby destroying most of the desirable Development Round outcomes. The approach is entirely out of line with the evidence that shows that the welfare gains to be achieved from reducing domestic subsidies are much smaller than the welfare gains to be achieved by reducing import barriers, and that excluding a fairly small percentage of product lines significantly diminishes the potential welfare gains from the tariff reductions.[125]

The people in Developing Member countries are being sold out by their leaders and their civil society advisers. A development round on this basis, laden with ridiculously complicated exceptions, might achieve a gain for the political support for Developing Member politicians but it will not achieve significant welfare gains for Developing Member populations. The modifications of the rules and tolerance of protectionism would also be likely to have a detrimental effect on future rounds of negotiations. The entire system may be much less capable in future rounds of helping Developing and Developed Members overcome their political opposition to policies that would provide gains to billions of people in Developing Member countries. The general failure of Developed and Developing Member officials, and their advisers, to understand the need for principles of reciprocity, instrumentation and non-discrimination to underpin a multilateral legal system will leave their clients having to face the next best alternative: dealing in a lopsided way in a spaghetti bowl of bilateral agreements in a world in which the big powers deal with them and each other on the basis of power instead of law.

Having criticised the text so much, I do have to acknowledge that it is put forward not as a recommended solution but as a possibly politically feasible one. That the only possible political solution is one that leaves so much scope for the most protected to remain protected and that severely limits the possibility for further mutually politically beneficial deals suggests that something is wrong with the system. It is a system which can harness the interests of exporters to provide political support for politicians to offset the political opposition they would receive for choosing to switch from welfare diminishing to welfare enhancing policies. However, to operate effectively, the system requires reciprocal exchanges within a framework that rewards better choice of policy instrument. The possibility for new reciprocal exchanges and the maintenance of previous reciprocal exchanges must not be undermined by preferential deals or resort to quantitative restrictions. It is beginning to appear that the *GATT* system has deviated too far from these guiding principles of reciprocity, ranking of policy instrument and non-discrimination to be capable of harnessing the interests of exporters to arrive at politically sustainable and economic welfare enhancing deals. While Chairman Falconer may have scraped a deal together (and saved himself and his colleagues from being charged with having sunk the vessel for want of a 'ha'porth of tar'),[126] the colours of the deal indicate some serious defects in the structure of the vessel which may not be capable of being fixed without taking it out of the water and rebuilding it from first principles.

125 See Hertel and Keeney, above n 14, table 2.7; Anderson and Martin, above n 124, 1314.

126 Chairman's Communication of 30 April 2007, above n 39, [125].

That might be the optimistic view. It is more than slightly possible that the deviations from reciprocity, ranking of instruments and non-discrimination have already progressed so far that not even this very imperfect deal is possible and that we are already in the position of needing to start rebuilding the ship from first principles before it is overrun by preferential deals.