

UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

SPECIAL AND DIFFERENTIAL TREATMENT FOR TRADE IN AGRICULTURE: DOES IT ANSWER THE QUEST FOR DEVELOPMENT IN AFRICAN COUNTRIES?



Mini-thesis Submitted in Partial Fulfilment of the Requirements for the Award of the LL.M Degree in International Trade and Investment Law

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May 2009

Declaration

I declare that, “**Special and Differential Treatment for Trade in Agriculture: Does It Answer the Quest for Development in African countries?**” is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Fantu Farris Mulleta

Signed:

May 2009



Table of Contents

Declaration.....	II
Table of Contents.....	III
Key Words.....	V
Acknowledgements.....	VI
Abbreviations and Acronyms.....	VII
CHAPTER I – GENERAL INTRODUCTION	
1.1-Introduction.....	1
1.2-Objectives of the Research.....	3
1.3-Significance of the Research.....	4
1.4-Scope of the Research.....	5
1.5-Methodology and General Overview of Chapters.....	6
CHAPTER II – SPECIAL AND DIFFERENTIAL TREATMENT	
2.1-Introduction to Special and Differential Treatment.....	8
2.2-Rationales for the Introduction of Special and Differential Treatment under the Multilateral Trading System.....	9
2.3-Conceptual Evolution of Special and Differential Treatment.....	12
2.3.1-The Pre-Uruguay Period.....	13
2.3.2-The Uruguay Round.....	18
2.3.3-The Post-Uruguay Period.....	20
2.4-Basic Categories of Special and Differential Treatment.....	22
2.4.1-Special and Differential Treatments which Involve the Positive Action of Developed Members.....	22
2.4.2-Special and Differential Treatments in the Form of Lesser and Flexible Obligations on Developing Members.....	27
2.5-Major Criticisms against Special and Differential Treatment.....	30
2.6-Conclusion.....	32
CHAPTER III – TRADE IN AGRICULTURE UNDER THE WTO	
3.1-Major Peculiarities of Trade in Agricultural Products.....	34

3.2-Trade in Agriculture under the GATT.....	36
3.3-The Agreement on Agriculture and its Major Disciplines.....	40
3.3.1-Market Access.....	41
3.3.2-Domestic Support.....	48
3.3.3-Export Subsidies.....	57
3.4-Trade in Agricultural Products under the Doha Round.....	65
3.5-Conclusion.....	70
 CHAPTER IV – SPECIAL AND DIFFERENTIAL TREATMENT FOR TRADE IN AGRICULTURE AND ITS IMPLICATIONS FOR THE INTERESTS OF AFRICAN COUNTRIES	
4.1-The Role of Agriculture and Trade in Agricultural Products in the Economy of African Countries.....	72
4.2-Major Special and Differential Treatment Clauses under Agricultural Trade Rules.....	78
4.3-Economic Weight of the Major Agricultural Special and Differential Treatment Clauses for African Countries.....	84
4.3.1-The Use of Special and Differential Treatment under Agricultural Market Access in Africa.....	85
4.3.2-The Use of Special and Differential Treatment under Agricultural Support Programmes in Africa.....	92
4.4-Conclusion.....	96
 CHAPTER V – CONCLUSION AND RECOMMENDATIONS	
5.1-Conclusion.....	98
5.2-Recommendations.....	101
BIBLIOGRAPHY.....	104

Key Words

Agreement on Agriculture, Developing Countries, Doha Development Agenda, Domestic Support, Enabling Clause, Export Subsidy, Least-developed Countries, Market Access, Special and Differential Treatment, Special Safeguard Mechanisms



Acknowledgements

Glory to GOD for His unconditional love and blessings.

My deepest gratitude goes to my supervisor, Prof. Riekie M. Wandrag, for her unreserved effort in closely supervising and giving her invaluable comments throughout my research undertaking.

I am obliged to Dr Edwini Kessie, Counsellor in the World Trade Organization, for his constructive comments and suggestions.

I am always grateful for having a loving and supportive family who never stopped believing in me.

Many thanks to all friends who made me enjoy Cape Town.



Abbreviations and Acronyms

AGOA - African Growth Opportunity Act

AMS – Aggregate Measure of Support

AoA – Agreement on Agriculture

EBA – Everything but Arms

EC – European Communities

FAO – Food and Agriculture Organization of the United Nations

GATS – General Agreement on Trade in Services

GATT – General Agreement on Tariffs and Trade

GDP – Gross Domestic Product

MDG – Millennium Development Goal

MFN – Most Favoured Nation

OECD – Organization for Economic Cooperation and Development

OTDS – Overall Trade Distorting Domestic Support

SCM – Subsidies and Countervailing Measures

SPS – Sanitary and Phytosanitary

TBT – Technical Barriers to Trade

TRIPS – Trade-Related Aspects of Intellectual Property Rights

UN – United Nations

US – United States of America

WTO – World Trade Organization



CHAPTER I – GENERAL INTRODUCTION

1.1- Introduction

Starting from 2000, multilateral trade talks and other international conferences have manifested a major shift from a general lobby for globalisation to a development oriented global integration that takes into account the development interest of developing and least-developed countries.¹ The United Nations (UN) took the first initiative through the formulation of the Millennium Development Goals that was then followed by the Doha Development Agenda. The Doha Declaration stresses the idea that developing and least-developed countries need to equally benefit from the increased opportunities and welfare gains of trade liberalisation. Accordingly, it requires placement of the needs and interests of these countries at the heart of the Doha Work Programme.²

Actually, the granting of special and differential treatment to developing and least-developed countries, on the basis that they are not economically strong enough to undertake the adjustments for trade liberalisation and need assistance to that effect, dates back to the mid-1950's.³ However, the Doha Round of trade negotiations seems to follow a new approach in highlighting the need for operational, effective and enabling special and differential treatment for developing and least-developed countries.⁴

Agriculture is an economic sector that employs a significant part of the population of African countries and is an area in which almost all African countries have a comparative advantage in global trade. Hence, compared to non-agricultural products and the service sector, agricultural commodities are of export interest to

¹ World Trade Report (2003) 78

² Paragraph 2 of the Doha Ministerial Declaration

³ Special and differential treatment is first introduced at the General Agreement on Tariffs and Trade (GATT) review session in 1955 where Article XVIII of the GATT was revised to permit contracting parties, the economies of which can only support low standards of living and those in the early stages of development, to adopt safeguard measures in case of balance of payments problems or to promote the establishment of particular industries. See Kessie in Bermann and Mavroidis (eds) (2007) 17

⁴ See paragraph 13 of the Doha Ministerial Declaration

African countries. It is also an established fact that an overall economic growth in most developing countries is highly dependent on export performance in agricultural products,⁵ which proves the vital role of increased agricultural trade in the economy of these countries. However, agricultural trade is the least liberalised sector in the multilateral trade arena, being subject to a higher tariff rate and technically institutionalised trade distorting domestic support measures, as well as export subsidies. Even if a reduction commitment on tariffs and outlays on trade distorting agricultural subsidies was undertaken in the Uruguay Round of trade negotiations that resulted in the Agreement on Agriculture, still the tariff rates on agricultural products are a lot higher than those of industrial products, proving the modest effect of the Agreement.⁶ It is estimated that the average applied Most Favoured Nation (MFN) tariffs of developed countries on agricultural products are more than four times those applied on industrial products.⁷ Also, the issue of farming subsidies by governments of developed countries and their unpleasant impact on poor farmers in developing countries continues to be a point of contention between the developing and developed worlds.⁸ Taking all these facts into consideration, the Director-General of the World Trade Organization (WTO) termed agricultural trade as 'the most protected, subsidized, and thus distorted sector of members' economy'.⁹

On the other hand, the Agreement on Agriculture contains lots of special and differential treatment clauses in favour of developing and least-developed countries.¹⁰ The Doha Ministerial Declaration also requires special and differential treatment to be an integral part of all elements of agricultural negotiations and to be embodied in the Schedules of concessions and commitments. This is to some extent reflected in the current negotiating draft text on agricultural trade.¹¹ Unlike the GATT provisions, the Agreement on Agriculture contains detailed special and differential treatment clauses, most of which are legally enforceable by their nature. However,

⁵ Diaz, Robinson, Thomas and Yanoma (2003) 27

⁶ Anderson in Hoekman and Martin (eds) (2003) 31

⁷ The WTO Director-General Annual Report (2005) 22

⁸ Zunckel (2004) 4

⁹ The WTO Director-General Annual Report (2005) 23

¹⁰ Paragraph 6 of the Preamble and Articles 6(2), (4)(b), 9(4), 15, 20 of the Agreement on Agriculture

¹¹ Paragraphs 2, 6-8, 16, 18, 27, 28, 31, 32, 48, 57, 58, 63-65, 72,78, 103, 105, 120-149, and 153 of the Revised Draft Modalities for Agriculture

the mere fact that they are enforceable in character does not necessarily mean that they are important, since their importance greatly depends on their relevance in effectively addressing the interests of the beneficiaries. It is the basic aim of this research paper to evaluate the importance of the existing special and differential treatment clauses for agricultural growth in African countries, taking the above point into consideration.

What makes trade in agriculture different and more sensitive than other WTO concerns is that it is an area in which most developing and least-developed countries have a concrete export interest, thereby looking for freer trade therein, while most developed countries are still in a protectionist practice.¹² The sensitivity of agricultural discussion is witnessed in the pre-Doha multilateral trade negotiations where the success or failure of each round was directly tied to the outcome of the agricultural negotiations.¹³ Agricultural trade also acquires a central place in the current Doha Round of trade negotiations.

1.2- Objectives of the Research

The main objectives of this research are:

- to identify the major interests of African countries in agricultural trade;
- to examine the existing trade rules on agriculture and current negotiations on how far they affect (positively and/or negatively) the interests of African countries; and, most importantly,
- to critically analyse the economic resonance of special and differential treatment provisions in respect thereof.

Moreover, the research paper seeks to investigate the possible ways in which African countries can maximise their benefit from the existing special and differential treatment clauses for trade in agriculture, and, then, make recommendations as to what should be the potential bargaining position of African countries with regard to future trade negotiations on agricultural trade.

¹² Ingco and Nash in Ingco and Nash (eds) (2004) 8

¹³ Desta (2006) 29

1.3- Significance of the Research

Traditionally the economy of most African countries is dependent on agriculture. But, in addition, agriculture is a sector in which most African countries have a comparative advantage and thus an export interest in the global market. Nonetheless, the global trade in agricultural products is less liberalised than trade in industrial products in that import tariffs on agricultural commodities are too high, coupled with tariff peaks and tariff escalation, while the rate of reduction or liberalisation is very low.¹⁴

To make things worse, the global trade in agricultural products is highly distorted because of the domestic support and export subsidies rich countries give to their farmers and traders to boost production and export capacity.¹⁵ This reality is sore to most African countries who cannot freely export the one thing in which they have a comparative advantage due to the high tariff wall in the developed world.¹⁶ It also became hard for the unsubsidised, rather taxed, small scale farmers in African countries to compete with the large scale farmers in the developed world, who provide subsidised cheap agricultural products to the global market. It is common to see diversified farm subsidy schemes in most of the developed countries that make it impossible for farmers in poor countries to compete on a level playing field with those subsidised agricultural producers in developed countries.¹⁷

Even if the Uruguay Round of trade negotiations has brought a separate discipline for trade in agriculture, it did not push down agricultural tariff rates and subsidy outlays to a meaningful level that can improve the market access for agricultural products of developing countries. The subsequent Ministerial meetings could also not manage to further liberalise the sector and agriculture continues to be the major area of divergence between the developed and the developing worlds. Even the Doha Round, which is supposed to be a 'development round' for developing and least-developed countries, did not bring any progress in this area up to this date. In the Mini-Ministerial Conference held in July 2008, too, countries failed to bridge their

¹⁴ World Trade Report (2003) Executive Summary, XIX

¹⁵ Desta (2006) 23

¹⁶ Diaz, Robinson, Thomas and Yanoma (2003) 29

¹⁷ The WTO Director-General Annual Report (2005) 22-23

differences in agricultural matters, which resulted in the collapse of the whole negotiation and left the issue of agriculture without any solution.¹⁸

The special and differential treatment clauses under the Agreement on Agriculture tend to adopt a protectionist or defensive approach, in that the Agreement allows, among other things, a lesser rate of tariff and subsidy reduction, and longer period of implementation, for developing countries while excluding less-developed countries from any reduction commitment. The same approach has been adopted in the current agricultural negotiating draft that offers preferential treatment in the form of lesser rate of tariff and subsidy reduction, longer period of implementation, greater percentage of tariff lines for designation of sensitive products, designation of special products for more flexibility, and introduction of Special Safeguard Mechanisms, for developing countries, while least-developed countries are still excluded from any commitment.¹⁹

Here the research question is: whether the existent special and differential treatment clauses for trade in agriculture and the approach adopted therein are effective in addressing the trade needs of the developing world, particularly African countries? What is it that African countries need with regard agricultural trade and to what extent do the special and differential treatment clauses address this need?

1.4- Scope of the Research

The issue of trade in agriculture is a sensitive one for all developing and least-developed countries in the entire world. But the scope of this research will be limited to the concerns of African countries. Moreover, even if all trade matters under the WTO are tied to special and differential treatment clauses, the analytical part of this research will concentrate more on the special and differential treatment clauses related to trade in agriculture.

¹⁸ <http://www.wto.org/english/news_e/news08_e/news08_e.htm> [accessed on 5 January 2009]

¹⁹ Paragraphs 7,8,16,63,72,105,120-149 and 153 of the Revised Draft Modalities for Agriculture

1.5- Methodology and General Overview of Chapters

The research will essentially be a literature based study. In examining issues of interest to the research objective, reference will be made both to primary and secondary sources. The various legal texts and official documents of the WTO, including members' notifications to the Committee on Agriculture and African Group negotiating proposals will be primary sources of reference. As a secondary source, the research will heavily rely on statistical publications of the WTO, Food and Agriculture Organization of the United Nations (FAO), World Bank and other relevant organisations. Reference will also be made to relevant books, scholarly articles, discussion papers, reports and websites, as secondary sources of information.

The research paper is structured into five chapters. The first chapter will elucidate the overall objective of the research and also provide a background discussion on agricultural trade matters and special and differential treatment. Under the second chapter, the conceptual evolution of the different forms of special and differential treatment will be discussed, together with the theoretical justifications for and the criticisms against the application of such different forms of special and differential treatment.

The third chapter will make an assessment of the status of agricultural trade in the multilateral trading system. Based on the premise that agricultural trade has been less regulated and more distorted in the past, recent developments in the disciplining of the global agricultural trade will be considered under this chapter. Particularly, an examination will be made on market access, domestic support and export subsidy disciplines of the Agreement on Agriculture and the progress under the Doha Round of trade negotiations.

The fourth chapter will examine the role of agriculture and trade in agricultural products in the economy of African countries and the various constraints facing agricultural export growth in such countries. Then, based on the various interests African countries have or should have in agricultural trade, a pragmatic assessment will be done as to how far the interests of African countries are addressed in the

different special and differential treatment clauses under agricultural trade rules. Particularly, an examination will be done of the economic weight the existing special and differential treatment provisions carry for the agricultural sector of African countries. Finally, the fifth chapter will provide major conclusions of the whole study and make relevant recommendations on the matter.



CHAPTER II – SPECIAL AND DIFFERENTIAL TREATMENT

2.1- Introduction to Special and Differential Treatment

The notion of special and differential treatment has been employed since the early days of the GATT. Yet, none of the Agreements under the GATT and subsequently under the WTO regime have stipulated a single legal definition for the term 'special and differential treatment'. Rather, the Agreements set the different forms of special and differential treatment and their manner of application in different situations. Hence, based on its nature and forms, special and differential treatment can be defined as the differential and preferential rights and privileges that are given to developing countries, but not extended to developed countries, under the multilateral trading system.²⁰

In regard of their low economic status and developmental needs, developing members of the WTO, unlike their developed partners, receive various forms differential and preferential treatments. However, akin to its definition, there is no objective determination or limitation on the nature and scope of special and differential treatment, nor is there an official list of developing countries, as beneficiaries of special and differential treatment, under the WTO.²¹ Hence, in the absence of a standard criterion to determine the nature and scope of special and differential treatment, any deviation from the general rules of the WTO, permitted only in favour of developing members or, any other standard of treatment that is more beneficial or preferential for developing members will form part of special and differential treatment. In the affirmation of the above point one writer states:

[Special and differential treatment] is a newer concept, and has been less clearly defined, but it appears at a minimum to mean assisting developing countries to comply with current rules.²²

The idea of special and differential treatment was not an integral and inherent part of multilateral trade liberalisation when the latter conceptually evolved in the 1940's. At that time, when countries realised the economic benefit of opening up one's market

²⁰ Whalley in Hoekman and Ozden (eds) (2006) 473

²¹ Under the WTO, members form part of a category of developing countries through self-designation. See Carl (2001) 31

²² Page (2004) 4

and decided to establish a global framework for trade liberalization, the issue of developing countries or differential treatment was not on the agenda.²³ It rather got its foundation following the movement towards trade liberalisation, when developing countries started to feel the economic imbalance between developed and developing contracting parties of the GATT and the difficulty they were facing in complying with and implementing their obligations due to their low level of economic development.²⁴ Consequently, the idea of special and differential treatment was introduced to accommodate the trade and developmental needs of developing countries under the multilateral trading system. The subsequent topics will examine the theoretical justifications for the application of special and differential treatment, the conceptual evolution and the resulting current forms of special and differential treatment, and some of the criticisms against their application.

2.2- Rationales for the Introduction of Special and Differential Treatment under the Multilateral Trading System

The fundamental reason for the introduction of special and differential treatment under the GATT was basically related to the prevailing disparity in economic development among contracting parties of the time. With increment in the number of developing countries acceding to the GATT, the discontent of these countries for being equally treated with the developed countries has also increased. Developing countries started opposing the general application of the GATT on the argument that 'equal treatment of unequals is unjust'.²⁵ Accordingly, developing countries called for the adoption of increased obligations on developed countries regarding the treatment of developing countries and reduced duties on their side. In the words of Robert Hudec:

The developing country bloc has sought two kinds of change in general. It has urged the developed countries towards a greater "legalism" - more effective enforcement of developed country obligations, and adoption of new developed country obligations for the particular benefit of developing countries. On the other hand,

²³ Kessie in Bermann and Mavroidis (eds) (2007) 16

²⁴ Id, 17

²⁵ Wolf in Hoekman and Ozden (eds) (2006) 436

the bloc has worked just as hard to remove inconvenient GATT obligations controlling its-own conduct.²⁶

Among the various rationales contemplated, the primary rationale for the introduction of special and differential treatment under the multilateral trading system is the difference in economic and financial policies between developing and developed countries, as a consequence of the difference in their level of economic development.²⁷

In fact, one of the major criticisms against the original text of the GATT and the notion of trade liberalisation in the 1940's was the assumption taken under the GATT that there is an 'economic homogeneity' and common interest among contracting parties of the GATT,²⁸ while in reality there was not. According to proponents of special and differential treatment, industries of developing countries, being in an early stage of development, cannot freely compete with established industries of the developed world, and therefore, need a certain level of market protection in their favour.²⁹ Hence, developing countries were of the opinion that, due to their low level of industrial development, they cannot afford to take an equal commitment with those of industrialized countries in the multilateral trade Agreements. Particularly, they cannot afford to freely open their markets for the outside world to the extent that drives their domestic industries out of the market and, discourages the establishment of new industries. Accordingly, the idea that developing countries need to be granted differential and preferential treatment to protect their industrial establishments, even in derogation of their general obligations, was established through time.

Moreover, the prevalence of balance of payments problems in most developing countries, due to less diversification of exports and dependence on exports of low price products has also laid the foundation for the introduction of special and differential treatment.³⁰ This reality justifies the need for flexibility in favour of developing countries in two ways.

²⁶ Robert Hudec (1975) 208

²⁷ Stevens in Hoekman and Ozden (eds) (2006) 535-6

²⁸ Carl (2001) 36

²⁹ Low in Bermann and Mavroidis (eds) (2007) 345

³⁰ Michalopoulos (2000) 3

On the one hand, developing countries have taken a view that tackling balance of payments problems necessitates diversification of exports through the establishment of new industries for the production and export of diversified products, especially products with relatively high price and low volatility.³¹ To that end, developing countries started pushing for the provision of special and differential treatment in the form of a permission for the application of some trade restrictive measures with a view to promote the domestic establishment of particular industries. On the other hand, developing countries have rationalised the need for flexibility in the imposition of temporary import restrictions so as to directly deal with the financial aspect of their balance of payment problems – preserving the outflow of hard currency.³²

The second fundamental justification for the introduction of special and differential treatment is the increased cost of adjustment and implementation of obligations under the multilateral trading system.³³ Beyond progressive reduction of import tariffs, accession to the WTO requires members to make sure that their domestic laws and regulations are compatible with the WTO rules.³⁴ Such requirements were demanding for most developing countries which had adopted import substitution as their economic policy and were enforcing the same through their laws and regulations.³⁵ Hence, upon accession to the WTO, most of the developing countries were basically obliged to amend their domestic laws and regulations in accordance with the WTO rules.

Also, there was consensus that the obligations under some of the WTO Agreements are quite technical, the implementation of which requires establishment of new institutional frameworks and progress in technical capacity.³⁶

All these requirements entail a significant cost of adjustment and implementation that is onerous for developing countries to afford, given their fragile economies. Consequently, the need for a longer period of implementation and technical

³¹ Michalopoulos (2000) 3

³² Whalley in Hoekman and Ozden (eds) (2006) 474

³³ Chadha in Hoekman and Martin (eds) (2003) 3

³⁴ See for instance Article 41(1) of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) that requires members to bring their domestic laws on enforcement of intellectual property rights in conformity with the provisions under the Agreement.

³⁵ Carl (2001) 34

³⁶ Michalopoulos (2000) 17

assistance in favour of developing members is recognized under the WTO as part of special and differential treatment.³⁷

The other major rationale for the introduction and provision of special and differential treatment is the need to facilitate integration of developing countries into the multilateral trading system.³⁸ This justification begins with the premise that developing countries have been marginalised in the international trading arena; their share in the world trade is very minimal and; most of them suffer from balance of payments problems. This point is well reflected by one scholar as:

Developing countries are intrinsically disadvantaged in their participation in international trade, and therefore, any multilateral agreement involving them and developed countries must take into account this intrinsic weakness in specifying their rights and responsibilities.³⁹

Hence, to mainstream developing countries in the trading system, there was a need for the introduction of a new scheme that could particularly enhance export opportunities for products originating from these countries. Accordingly, a call arises for the introduction of a system of preferential market access for products of developing countries, without a requirement on such countries to grant a reciprocal market access.

2.3- Conceptual Evolution of Special and Differential Treatment

The recognition and adoption of special and differential treatment under the multilateral trading system was not instant. It is rather a result of the gradual conceptual evolution and development dynamics of the past fifty years. Depending on the differing developmental, financial and trade needs of developing countries in different points in time, the various forms of special and differential treatment came into being during different phases. This section will examine the conceptual evolution of special and differential treatment in three phases – the pre-Uruguay period, Uruguay Round and post-Uruguay period.

³⁷ Chadha in Hoekman and Martin (eds) (2003) 3

³⁸ Kessie in Bermann and Mavroidis (eds) (2007) 13

³⁹ Michalopoulos (2000) 15

2.3.1- The Pre-Uruguay Period

Upon adoption of the GATT in 1947, the idea of special and differential treatment got no recognition under the newly created multilateral trading arena.⁴⁰ Contractual parties of the time did not make any indication of differential or more favourable treatment for the developing parties in the application of the GATT. Rather, it was made clear that for the mutual advantage of all, the GATT will equally apply on all contractual parties through a reciprocal arrangement.⁴¹ Hence, the rights and obligations of all parties under the GATT were alike.

Differentiation between developed and developing contracting parties and flexibility in favour of the latter was first introduced upon the revision of Article XVIII of the GATT in 1955.⁴² In recognition of the difference between developed and developing parties in their level of financial stability and industrial development, Article XVIII of the GATT was revised to permit developing parties to temporarily modify or withdraw their tariff concessions and/or impose import restrictions in order to promote the establishment of a particular industry or safeguard their financial position against balance of payments problems. This revised provision of the GATT made, for the first time, a distinction between contracting parties of the GATT, through the provision of the above mentioned flexibilities to 'contracting parties the economies of which can only support low standards of living and are in the early stages of development'.⁴³

The issue of developing countries was then brought for discussion in the 12th session of the GATT contracting parties in 1957. In the session, the contracting parties identified fluctuating commodity prices and the prevalent insufficiency of export earnings to meet import demand in developing countries as the major drawbacks in the multilateral trading system.⁴⁴ Consequently, a panel of experts chaired by Professor Gottfried Haberler was established to examine the above mentioned drawbacks in the trading system, which panel came up with a finding that the trade barriers products of developing countries face in the developed market are too high,

⁴⁰ Kessie in Bermann and Mavroidis (eds) (2007) 16

⁴¹ Paragraph 3 under the preamble of the GATT

⁴² Kessie in Bermann and Mavroidis (eds) (2007) 17

⁴³ See Article XVIII (1) and (2) of the GATT

⁴⁴ Keck and Low (2004) 4

thereby rendering the export earnings of developing states insufficient to meet their developmental needs.⁴⁵

Subsequent to the Haberler Report, a committee established by contracting parties of the GATT to further investigate the problems of developing countries, often known as Committee III, delivered the following report as to the prevalent imbalance of trade between developing and developed parties of the GATT:

...high tariffs faced exports of less-developed countries in a wide range of products... The less-developed countries had experienced particular difficulties in negotiating reduction of those duties, especially because the principal suppliers of some of these products were not less-developed countries and because the less-developed countries often had little to offer in tariff negotiations...of 4400 tariff concessions made in the Dillon Round, only 160 were on items considered to be of export interest to the less-developed countries.⁴⁶

Hence, in regard to the trade and development needs of developing countries, the idea of reduction of trade barriers in developed states for products of export interest to developing countries was suggested by Committee III in 1963. This proposal for an improved market access in favour of products of developing countries received a legal foundation in 1966 with the incorporation of part IV in the GATT text, as a part on trade and development. The incorporation of part IV of the GATT was a vital stride in the conceptual evolution of special and differential treatment in that it, for the first time, listed the trade and development needs of developing countries and recognized the application of special and differential treatment in an explicit manner.

Part IV of the GATT starts with the reaffirmation of the fact that there is a wide gap in the standard of living between developed and developing countries and thus, the need to enable developing countries to use special measures for the promotion of their trade and development.⁴⁷ Basically, the incorporation of part IV of the GATT has

⁴⁵ The report is commonly known as the "Haberler Report", after the name of the chair person – Professor Haberler

⁴⁶ Paragraphs 229-30 of the Committee III Report, See also Hindley in Hoekman and Ozden (eds) (2006) 468

⁴⁷ Article XXXVI (1) (c) and (f) of the GATT

resulted in the introduction of two crucial notions within the multilateral trading system.

Primarily, part IV of the GATT has introduced the notion of preferential market access for products of export interest to developing countries. In this regard, Article XXXVI (1) of the GATT provides that developed countries shall 'to the fullest extent possible' accord high priority and refrain from introducing or increasing tariffs and non-tariff barriers on products of export interest to developing countries. Even if the term employed under Article XXXVI (1) resulted in the creation of no enforceable legal obligation on developed countries,⁴⁸ it has at least introduced the system of preferential trade in favour of products of developing countries that was later authorised under the Enabling Clause.

The other major introduction of part IV of the GATT is the idea of non-reciprocity in tariff negotiations. As mentioned at the beginning of this section, the GATT was first introduced on the foundation principle of reciprocity, in that, a country will open its market for products of another country in return for the market access its products enjoy in the other country. The GATT further asserts the principle of reciprocity under Article XXVIII (1) bis, which provides that negotiations for the reduction of the general level of tariffs and other charges will be undertaken on reciprocal and mutually advantageous grounds.⁴⁹ Generally, before the incorporation of part IV, the GATT was operating market liberalisation and tariff negotiations on a give and take basis. While introducing the notion of non-reciprocity, Article XXXVI (8) of the GATT provides that:

The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.

Essentially, the notion of non-reciprocity is that developing countries need not reciprocate for tariff concessions made to them by developed countries in trade negotiations.⁵⁰ Hence, it enables developing countries to enjoy MFN market access

⁴⁸ Kessie in Bermann and Mavroidis (eds) (2007) 23-4

⁴⁹ See also Paragraph 3 under the preamble of the GATT

⁵⁰ Whalley in Hoekman and Ozden (eds) (2006) 475

in developed countries without granting a similar market access for products of developed countries; even without making any concession for that matter.

As it will be discussed in-depth in the last section of this chapter, the notion of non-reciprocity is highly criticised for pushing developing countries away from being active participants in tariff negotiations, thereby facilitating their marginalisation in the multilateral trading system.⁵¹ This is because, the notion of non-reciprocity guarantees developing members to benefit from the results of tariff negotiations without even making concessions or contributions to such negotiations. This discourages developing members from making concessions and having an active role in trade negotiations. It seems it is in recognition of such criticisms that a gradual shift is made from the notion of non-reciprocity to less-than-full reciprocity in the Uruguay and the subsequent Doha Round of trade negotiations.⁵²

Beside the incorporation of part IV of the GATT, the other important development in the pre-Uruguay period was the introduction of the General System of Preferences in favour of developing countries. Even if developed countries were 'encouraged' to provide improved market access for products of export interest to developing countries under part IV of the GATT, it did not provide any express waiver from or an exception to the MFN obligation of parties. It is later, in 1971 that a ten years waiver was granted for members from their MFN obligation for the provision of preferential market access to products of developing countries.⁵³ However, due to the temporary nature of the waiver,⁵⁴ there was a need for the establishment of a permanent legal ground to the Generalised System of Preference, which gave rise to the adoption of the Enabling Clause in the Tokyo Round of trade negotiations in 1979.⁵⁵

The Enabling Clause has presented the Generalised System of Preference as a permanent exception to the MFN obligation, in that, developed countries are allowed

⁵¹ Kessie in Bermann and Mavroidis (eds) (2007) 18

⁵² See Paragraph 16 of the Doha Ministerial Declaration and also the Agreement on Agriculture under which both developed and developing members gave tariff concessions, but at a different rate

⁵³ See the Decision of 25 June 1971-Generalised, Non-reciprocal and Non-discriminatory Preferences Beneficial to Developing Countries

⁵⁴ The particular waiver is granted only for 10 years. Besides, waivers are normally granted on a conditional and temporary basis, being subject to revision. See more on Article IX(3) and (4) of the Marrakesh Agreement Establishing the WTO

⁵⁵ Decision on Differential and more Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, November 1979

to grant preferential market access exclusively to developing countries, without being responsible for discriminatory treatment under Article I of the GATT.

The Enabling Clause has also introduced the idea of graduation for the first time.⁵⁶ The notion of graduation came into the picture when some of the developing countries started to gain better terms of trade and became competitive in the world market, thereby rendering the continued provision of special and differential treatment to such countries economically and politically costly on developed countries.⁵⁷

In this respect, Paragraph 7 of the Enabling Clause provides that developing countries are expected to fully participate in the framework of the rights and obligations of the GATT, and make concessions on mutually agreed terms with the progressive development of their economies and improvement in their trade situations. This means, upon attainment of a certain level of economic and industrial development, a developing state needs to be graduated or excluded from the category of 'developing states' and thus, from being a beneficiary of special and differential treatment. However, no objective criterion is set under the Enabling Clause as to what level of progress will suffice for the graduation of a developing member from its category. It rather sets the broad principle of graduation, leaving the details of its application for future negotiations.

Moreover, the Enabling Clause has brought a dynamic transformation in the evolution of special and differential treatment through the creation of differentiation among developing countries. Under the Enabling Clause, a distinction is made between developing and least-developed countries on the application of the Generalised System of Preference. Accordingly, Paragraph 2(d) of the Enabling Clause permits developed countries to grant deeper preferences to least-developed countries, without providing the same to developing countries. This has generally opened the door for a separate consideration of the financial, developmental and trade needs of least-developed countries from the needs of developing countries.⁵⁸

⁵⁶ Keck and Low (2004) 5

⁵⁷ Hindley in Hoekman and Ozden (eds) (2006) 468-9

⁵⁸ See Paragraph 8 of the Enabling Clause

2.3.2- The Uruguay Round

In addition to establishment of the WTO, the Uruguay Round of trade negotiations gave birth to various new Agreements including: the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Agreement on Technical Barriers to Trade (TBT), the Agreement on Agriculture (AoA), the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) and many others. All the Agreements resulting from the Uruguay Round form part of the Marrakesh Agreement Establishing the WTO, most of them being multilateral trade Agreements.⁵⁹ Unlike the original text of the GATT, the Marrakesh Agreement Establishing the WTO, under its preamble, recognises the trade and developmental needs of developing countries as one of its core concerns.⁶⁰

The primary development in the Uruguay Round is that the different Agreements resulting from the Round have incorporated diversified and new forms of special and differential treatment in their text. This is mainly because the implementation of obligations in most of these new Agreements requires members to have a better technical and institutional capacity.⁶¹ Hence, taking into consideration the general lack of technical and institutional capacity in most developing countries, the Agreements came up with new special and differential treatment clauses in the form of longer transitional periods and technical assistance for developing members. Accordingly, almost all of the Agreements in the Uruguay Round call developed members and international institutions to support the better integration of developing countries into the global trading system through the provision of technical assistance.⁶²

The other remarkable development in the Uruguay Round is the dramatic shift in negotiating approach from non-reciprocity back to reciprocal trading arrangements that take into account the needs of developing members - what is later termed as

⁵⁹ Multilateral Agreements, unlike Plurilateral Agreements, are automatically binding on all members in the Uruguay Round and, are binding on new members upon accession with a single undertaking. See Article II and XII of the Marrakesh Agreement Establishing the WTO

⁶⁰ See paragraph 2 under the preamble of the Marrakesh Agreement Establishing the WTO

⁶¹ Keck and Low (2004) 6

⁶² See Articles 9, 11, 67, 27(2), and 20(3) of SPS, TBT, TRIPS, DSU and the Agreement on Implementation of Article VII of the GATT 1994, respectively.

less-than-full reciprocity.⁶³ There are, in fact, different suggestions as to the reasons for the change in negotiating approach, among which, the change in domestic economic policy in most of the developing countries from import substitution to increased export performance through active involvement in market access negotiations is the major one.⁶⁴

In the pre-Uruguay period, tariffs and non-tariff barriers on products of competitive interest for developing countries were too high, while the participation or the role of developing countries in shaping and influencing multilateral trade negotiations was insignificant.⁶⁵ Hence with time, developing countries have started to realise that they did not gain much from the protectionist or defensive approach that they were exercising under the guard of the principle of non-reciprocity in trade negotiations.

Accordingly, in the Uruguay Round, developing countries have developed an interest to participate in negotiations and take negotiated commitments so as to gain an improved market access for products of export interest to them, particularly, agricultural and textile products.⁶⁶ In this respect, developing countries were successful in bringing their interests to the negotiating table with the subsequent introduction of new disciplines on both agricultural and textile trade at the end of the Uruguay Round. Consequently, under the Agreement on Agriculture, developing countries, just like their developed partners, have assumed obligations in the reduction and elimination of tariffs and non-tariff barriers, though the level of concession they made is relatively lower than the concessions made by developed states.⁶⁷

Nonetheless, least-developed members have been exempted from making reciprocal concessions in the Uruguay Round. In this regard, the Decision on Measures in Favour of Least-Developed Countries, which is among the Uruguay Round Agreements, provides that:

⁶³ Whalley in Hoekman and Ozden (eds) (2006) 477-8

⁶⁴ Ibid

⁶⁵ Hindley in Hoekman and Ozden (eds) (2006) 468

⁶⁶ Hoekman in Guha-Khasnobis (ed) (2004) 11

⁶⁷ Developing countries have agreed to reduce their average tariff rate on agricultural products by 24%, while the developed countries have to reduce by 36%

...the least-developed countries, for so long as they remain in that category, while complying with the general rules...will only be required to undertake commitments and concessions to the extent consistent with their industrial development, financial and trade needs, or their administrative and institutional capabilities.⁶⁸

Lastly, on the issue of differentiation of least-developed members from their developing partners, the Uruguay Round, in continuation of the approach adopted in the Enabling Clause, called for greater preferential treatment in favour of least-developed countries in the form of deeper preferential market access, more flexible transitional periods and increased technical assistance.⁶⁹

2.3.3- The Post-Uruguay Period

As discussed earlier, the concept of special and differential treatment had expanded in scope and form in the pre-Uruguay period and the Uruguay Round of trade negotiations. At the end of the Uruguay Round, special and differential treatment got various forms including: the permission to deviate from tariff commitments, impose quantitative restrictions or apply greater subsidies under certain circumstances; preferential market access under the Generalised System of Preference; longer periods of implementation and, technical assistance in favour of developing countries.

However, with the expansion of the concept, the doubt as to the effectiveness of the various forms of special and differential treatment in properly addressing the trade and development needs of the beneficiaries has also increased.⁷⁰ Many have been of the opinion that the operating special and differential treatments did not bring much benefit to developing countries, most of which are not yet economically better-off.⁷¹

Hence, in the post-Uruguay period, much emphasis has been placed on improving the enforceability and effectiveness of the existing special and differential treatment, rather than further expanding its scope and form. Members' great concern over the

⁶⁸ Paragraph 1 of the Decision on Measures in Favour of Least-Developed Countries

⁶⁹ Ibid, Paragraphs 1 and 2

⁷⁰ Whalley in Hoekman and Ozden (eds) (2006) 487

⁷¹ Ibid

effectiveness of special and differential treatment is clearly manifested in the Doha Ministerial Declaration, which provides that:

...all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational.⁷²

It seems that the Doha Ministerial Declaration gives more weight, among all forms of special and differential treatment, to preferential market access for products of export interest to developing countries. It is because, the provisions of the Declaration highly emphasise on the idea that developing countries need to secure a fair share in the global trade,⁷³ which essentially requires the provision of an increased and preferential market access benefits for products of developing countries. Accordingly, the Declaration sets out a general objective for the establishment of a duty-free quota-free market access regime for products originating from least-developed countries,⁷⁴ which objective got a concrete legal basis later in the Hong Kong Ministerial Conference, 2005.

Under the Hong Kong Ministerial Declaration, developed members of the WTO made a commitment to provide duty-free quota-free market access for all or at least 97% of the products originating from least-developed countries.⁷⁵ Unlike part IV of the GATT and the Enabling Clause, the Hong Kong Ministerial Declaration has introduced a zero tariff market access for products of least-developed countries and also, employed terminology that imposes an obligation on developed countries, rendering the scheme with an enforceable character. This commitment can in fact be considered as a culmination in the conceptual development of preferential market access, as far as least-developed countries are concerned. It also indicates the high level of acceptance that the idea of improved market access gets in the multilateral trading system.

However, the practical application of duty-free quota-free market access is not as ideal as it seems in that, there are some doubts as to the effectiveness of the scheme

⁷² Paragraph 44 of the Doha Ministerial Declaration

⁷³ See Paragraph 2 under the preamble of the Doha Ministerial Declaration

⁷⁴ See Paragraph 42 of the Doha Ministerial Declaration

⁷⁵ Paragraph 36 under Annex F of the Ministerial Declaration in the Hong Kong Ministerial Conference, 22 December 2005

in properly addressing the export interests of least-developed countries.⁷⁶ Particularly, the permission for exclusion of 3% of countries' tariff lines from the duty-free quota-free market access can significantly impair the benefits that are normally expected to arise from the scheme. This is because; export shares of most least-developed countries in the markets of developed states is very small and can easily fall under the 3% flexibility. As identified in one study, 3% of the tariff lines of most developed states easily account for 90%-98% of the total exports from least-developed countries.⁷⁷ This in effect means developed countries can practically exclude almost all products of export interest to least-developed countries from the duty-free scheme by the simple exclusion of only 3% of their tariff lines, which will defeat the purpose of entire scheme.

2.4- Basic Categories of Special and Differential Treatment

As it was discussed in the previous section, it took about half a century for special and differential treatment to gain the present form. Currently, there are different forms of special and differential treatment. In this section, all special and differential treatment provisions under the multilateral trading system are grouped into two general categories, based on the nature of differentiation and preference they provide. Accordingly, they are categorised as; special and differential treatments which involve the positive action of developed members and, special and differential treatments in the form of lesser and flexible obligations on developing members. The subsequent section will deal with the various forms of special and differential treatment under each category and issues involved therein.

2.4.1- Special and Differential Treatments which Involve the Positive Action of Developed Members

This category of special and differential treatment incorporates all those provisions which oblige or encourage, as the case may be, developed members of the WTO to provide differential and preferential treatment to developing members or their products. Taking the diverse needs of developing countries into account, the different Agreements under the WTO call developed members to grant preferential market

⁷⁶ Laborde (2008) 8

⁷⁷ Id, 5

access to products of developing members; pay due consideration to the developmental needs of developing members and, extend technical assistance to the same.⁷⁸ These three forms of special and differential treatment have a commonality to the extent that the benefit developing countries can potentially get from any of them is dependent upon the positive action that developed countries will be willing to take.

The first form of special and differential treatment under this category is the provision of preferential market access for products of developing countries. This particular form of special and preferential treatment is conceptually the most important one since increased trade opportunities for products of export interest is the vital and continuing quest of developing countries.⁷⁹ In the affirmation of this fact, part IV of the GATT asserts that there is a strong direct correlation between export earnings and economic development in developing countries and thus, there is the need for rapid and sustained expansion of export earnings in developing countries.⁸⁰ In this regard, the Enabling Clause, which introduces the Generalised System of Preference on a permanent basis, provides that:

Notwithstanding the provisions of Article I of the General Agreement, contracting parties 'may' accord differential and more favourable treatment to developing countries without according such treatment to other contracting parties...⁸¹

The Enabling Clause permits developed members to derogate from their MFN obligation under Article I of the GATT to make preferences exclusively to developing members or their products. However, it imposes no obligation on developed members to grant such preferences. It rather legalises the provision of preferential market access by relieving developed members from their MFN obligation in circumstances where they are willing to grant a preference. But, once a developed

⁷⁸ See for instance, Articles XXX:2 of the GATS, 9.1 of SPS Agreement, 67 of TRIPS and 11 of the TBT Agreement

⁷⁹ Kessie in Bermann and Mavroidis (eds) (2007) 21

⁸⁰ Article XXXVI (1) (b) and (2) of the GATT

⁸¹ Paragraph 1 of the Enabling Clause

member chooses to give preferential market access, it has an obligation to apply the preference on a non-discriminatory basis among the developing members.⁸²

Even though the Generalised System of Preference is recognised as a vital form of special and differential treatment,⁸³ it does not escape from critics as to its practicability; it is even the most vastly criticised form of special and differential treatment.

Criticisms against the Generalised System of Preference start with the voluntary nature of the system.⁸⁴ As mentioned earlier, the Enabling Clause introduces the preferential system in 'may' clause that gives full discretion for developed members to grant, not to grant or to withdraw an ongoing preference on their choice. This makes the entire system unsecured for developing countries,⁸⁵ since the preferential market access they are currently enjoying can be terminated at any point in time, even without any reason.

Moreover, the economic benefit developing countries can potentially derive from the Generalised System of Preference is mitigated due to the prevalent exclusion of products which are of vital export interest to developing countries, especially agricultural and textile products, from the preferential arrangement.⁸⁶ According to a report by the Director-General of the WTO in 2005, the average preferential tariff rate applied by the EC, US and Japan on agricultural products of developing countries is approximately 69%, 56% and 69%, respectively, greater than the average preferential tariff on industrial products.⁸⁷ This clearly shows that even if agricultural products are covered under the preferential trading system, the degree of tariff preference these products are enjoying is very minimal, as compared to industrial products.

⁸² However, the obligation of a preference granting state not to discriminate among developing members is narrowly interpreted by the WTO Appellate Body in the *EC-Tariff preferences* that limits the scope of the obligation only to non-discrimination among similarly situated developing members, thereby authorising discrimination among developing countries based on an objective criteria. See the Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS26/AB/R, adopted 20 April 2004, DSR 2004:III, 925

⁸³ Michalopoulos (2000) 7

⁸⁴ Gallagher (2000) 15

⁸⁵ Kessie in Bermann and Mavroidis (eds) (2007) 2

⁸⁶ The WTO Director-General Annual Report (2005) 19-20

⁸⁷ Id, 19

Logically, considering the fact that the Generalised System of Preference is introduced to promote the export opportunities of developing countries, the effectiveness of the system as a special and differential treatment is highly dependent upon the prioritised inclusion of products of vital export interest to developing states into the system. This is because; it is naturally on areas of comparative advantage and export interest, particularly in agriculture, mining and textile and clothing, that developing countries greatly need market access. Hence, restricting the application of the preferential system only to products which are not of major export interest to the beneficiaries or, a bias towards the same will apparently defeat the very purpose of the preferential system.

The issue of preference erosion is also another point of discontent commonly raised by developing countries.⁸⁸ The fact that there is reduction of MFN tariff rates across the board under a series of multilateral trade negotiations and, even elimination of tariffs and non-tariff barriers through regional trade Agreements among developed countries has resulted in diminution of the benefits developing countries used to get from the preferential market access scheme.⁸⁹ Consequently, with a view to preserve their margin of preference, beneficiaries of preferential arrangements tend to become opponents of a broad based trade liberalisation under the multilateral trading system.⁹⁰

In general, these and other related pitfalls of the Generalised System of Preference lead some to the conclusion that the preferential system is used by developed countries as 'an easy substitute for the action [they took] in more essential areas'.⁹¹

In addition to the Generalised System of Preference, the other important form of special and differential treatment under this category is the provision of technical assistance for developing countries. Some of the Agreements under the WTO require members to have a considerable level of technical, institutional and legal capacity for compliance with the obligations therein. For instance, under the SPS Agreement, members are required to undertake a scientific risk assessment or apply international

⁸⁸ Gallagher (2000) 15

⁸⁹ Alexandraki and Lankes in Hoekman and Ozden (eds) (2006) 399

⁹⁰ Id, 397

⁹¹ Kessie in Bermann and Mavroidis (eds) (2007) 21 For further discussion on the pitfalls of the Generalised System of Preference, see Low in Bermann and Mavroidis (eds) (2007) 343

technical standards before taking SPS measures on imports.⁹² Hence, if an import involves a scientific risk or does not meet the international technical standards of safety, an SPS measure can be legitimately imposed on it. Developing countries might face two different difficulties from this particular provision.

Firstly, members are prohibited from applying SPS measures on imports unless they took a scientific risk assessment test that requires the acquisition of technical facilities and expertise, which are scarce in most developing countries.⁹³ Secondly, exports of developing countries can be easily subjected to SPS measures by importing members for not meeting scientific or international technical standards of safety, which are onerous to meet for most developing countries given their less-sophisticated and stagnant production technology.⁹⁴

The same is true with the TBT Agreement and TRIPS, both of which require members to have an established technical, institutional as well as legal capacity to comply with and/or implement their commitments under each Agreement.⁹⁵ Here, most developing countries will inevitably face difficulties to comply with and implement their obligations due to technical and institutional incapacity, which essentially is intrinsic to their low level of economic development.

It is based on the above premise that the provision of technical assistance is recognised as a vital form of special and differential treatment under most of the Uruguay Round Agreements.⁹⁶ Under such Agreements, developing countries are promised technical assistance in the form of training, advice, grant or credits on production technology, technical standards, promotion of infrastructure, research and on other related areas.⁹⁷

As mentioned at the beginning of this section, the provision of technical assistance, as a form of special and differential treatment, has a commonality with the preferential market access scheme in that the execution of both requires the affirmative action of developed members. Furthermore, like the Generalised System

⁹² Article 3 of the SPS Agreement

⁹³ Ingco and Nash in Ingco and Nash (eds) (2004) 18

⁹⁴ Guide to the Uruguay Round Agreements (1998) 242, See also Ghatak and Ingersent (1984) 10

⁹⁵ See Articles 10 and 41 of the TBT and TRIPS Agreements, respectively

⁹⁶ See Articles XXX:2 of GATS, 67 of TRIPS, 3.3 of the Agreement on Preshipment Inspection, 9.1 of SPS Agreement and 11 together with 12.7 of the TBT Agreement

⁹⁷ Ibid

of Preference, developed members are not under any obligation to provide technical assistance for developing members. Rather, developed members are called to grant technical assistances on 'mutually agreed terms',⁹⁸ which makes the provision of such assistance permissive and not obligatory.

However, unlike the Generalised System of Preference, the provision of technical assistance is not entirely dependent upon the positive will of developed members, since part of such assistance will also be granted by the WTO Secretariat and other international organisations.⁹⁹

2.4.2- Special and Differential Treatments in the Form of Lesser and Flexible Obligations on Developing Members

The second category of special and differential treatment covers those provisions under the GATT or the WTO Agreements which impose lesser or flexible obligations on developing members than the ordinary obligations applicable on developed members. In most of the multilateral trade Agreements, the level of commitment developing countries are required to undertake is relatively lesser than the commitment of developed countries and, the former are also given a longer period to implement their commitments. Besides, under some of the multilateral disciplines, developing members are totally excluded from taking commitments or, are allowed to provisionally set-aside the commitments they undertook.¹⁰⁰

The major rationale for the provision of those special and differential treatments under this category is to give a certain level of flexibility or breathing space for developing countries to implement their individual development policies and programmes, even in derogation of some of the WTO rules.¹⁰¹ Sometimes, the implementation of domestic financial or developmental programmes might necessitate members to adopt a certain level of trade protectionism, which is restrictively disciplined under the WTO rules. Hence, the basic concern is to make sure that the commitments and concessions under the multilateral trading system will

⁹⁸ See Articles 3.3 of the Agreement on Preshipment Inspection, 67 of TRIPS and 20.3 of the Agreement on Implementation of Article VII of GATT

⁹⁹ See Article XXV:2 of the GATT, Paragraph 12 of the Understanding on Balance of Payments Provisions of the GATT and Section D of the Trade Policy Review Mechanism

¹⁰⁰ See Article XVIII of the GATT

¹⁰¹ See Article XVIII (2) of the GATT and Paragraph 1 of the Decision on Safeguard Action for Development Purposes

not hamper the development, financial and trade needs of developing countries.¹⁰² Further, the recognition that developing members do not have the economic, institutional and technical sufficiency to implement their obligations on the same pace with developed members has laid the foundation for the introduction of some of the special and differential treatment clauses under discussion.

The undertaking of lesser commitments by developing members in trade negotiations is among the typical forms of special and differential treatment under this category. Lately, with the transformation of the notion of non-reciprocity into less-than-full reciprocity, developing members have started taking negotiated commitments and concessions with a certain degree of flexibility as policy space. In this regard, Paragraph 16 of the Doha Ministerial Declaration provides that:

...negotiations shall take fully into account the special needs and interests of developing and least-developed country participants, including through less-than-full reciprocity in reduction commitments...¹⁰³

The Agreement on Agriculture is one example in which, developing members hold lesser obligations in terms of tariff and subsidy reduction commitments; while least-developed members are entirely exempted from taking any reduction commitment.¹⁰⁴ Also, under the draft negotiating texts of the current Doha Round, both for agricultural and non-agricultural products, it is proposed that developing countries hold lesser rates of tariff reduction commitment, through a greater coefficient under non-agricultural market access.¹⁰⁵

The other form of special and differential treatment under this category is the flexibility given to developing countries to implement their financial and development policies by setting aside the application of some of the general rules of the WTO. Safeguard measures in Article XVIII of the GATT, under which developing countries are authorised to impose market access restrictions on imports for the establishment

¹⁰² Paragraph 5 of the Enabling Clause

¹⁰³ See also Paragraph 2 under Annex B of the Doha Work Program, Decision Adopted by the General Council on 1 August 2004, WT/L/579

¹⁰⁴ See Articles 6(2), 9(2) (b) (iv) and 15 of the Agreement on Agriculture

¹⁰⁵ See Paragraphs 5 and the following of the Revised Draft Modalities for Non-Agricultural Market Access and, Paragraphs 63 and the following of the Revised Draft Modalities for Agriculture

of a particular industry and in cases of balance of payments problems, is a classic form of special and differential treatment under this category. Accordingly, in the circumstances mentioned above, developing members are permitted to modify or withdraw their concessions or, impose quantitative restrictions setting aside the application of Articles II and XI of the GATT, respectively.

Besides, the exclusion of agricultural investment and input subsidies of developing members from the domestic support reduction commitment under Article 6 (2) of the Agreement on Agriculture is a clear instance of special and differential treatment in the category of 'flexibility and lesser obligations'. In the case of least-developed members, the flexibility is even broader, which in some instances goes to the extent of exemption of these set of countries from any commitment.¹⁰⁶

Another important flexibility in favour of developing members is the authorisation under the Enabling Clause for the formation of preferential trading regimes among developing members, without extension of such trade preferences to developed members. Under the Enabling Clause, developing members are given the liberty to form regional or global arrangements for the mutual reduction or elimination of tariffs among themselves.¹⁰⁷ This provision is an exception from the MFN principle under Article I of the GATT because had it not been for the authorisation in this provision, any favourable arrangement among developing states can be legitimately claimed by any developed member on the base of non-discrimination or the MFN principle. It is also considerably beneficial for developing members because it permits them to form preferential market arrangements exclusively among themselves without the conclusion of regional trade Agreements, which are tied to strict requirements under Article XXIV of the GATT. Hence, the arrangement under the Enabling Clause makes the formation of preferential trading blocs among developing countries easier and more flexible, without any formality requirement to fulfil.

Here, it is worth noting that, unlike the first category, all forms of special and differential treatment under the second category are legally enforceable in character in that, developing countries can legitimately set aside the application of some of the multilateral rules, without being responsible for violation, or, they will not be obliged to

¹⁰⁶ See Article 15 (2) of the Agreement on Agriculture

¹⁰⁷ Paragraph 2(c) of the Enabling Clause

undertake commitments beyond the reduced rate they are provided with through special and differential treatment.

2.5- Major Criticisms against Special and Differential Treatment

Even if the idea of special and differential treatment gets full recognition and, is incorporated under almost all of the WTO Agreements, it does not mean that it is absolutely defect free. With time, the relevance of the different forms of special and differential treatment and their impact on the multilateral trading system have faced various criticisms from different angles.

Primarily, flexibilities and exemptions from the ordinary rules are criticised for they discourage developing countries from making internal policy and institutional adjustments necessary for their effective integration into the multilateral trading system.¹⁰⁸ This is mainly because, when developing members are permitted to slow their pace of trade liberalisation and easily set-aside the application of the basic trading rules, they will tend to reduce their effort towards liberalisation since there is no urge to do so.

Especially, the notion of non-reciprocity in trade negotiations has been strongly criticised for promoting a sense of 'free riding' among developing countries.¹⁰⁹ It is argued that due to the notion of non-reciprocity in trade negotiations, developing countries have become disinterested to engage in exchange of concessions that in turn resulted in the prevalence of high tariffs on products of export interest to them.¹¹⁰

In addition, the provision of broader flexibilities for developing members is criticised because it largely motivates developing countries to adopt a protectionist or defensive orientation that is in opposition to their development needs and the aspirations of the multilateral trading system.¹¹¹ One writer, in his argument against special and differential treatment, states the conceptual contradiction between the multilateral trade liberalisation and special and differential treatment as:

¹⁰⁸ Sharer (2000) 1

¹⁰⁹ Kessie in Bermann and Mavroidis (eds) (2007) 18

¹¹⁰ Hindley in Hoekman and Ozden (eds) (2006) 468

¹¹¹ Michalopoulos (2000) 12 and 28

The demands of developing countries, however understandable in origin, were mistaken and were indeed demanding to the sustainability of the liberal trading system.¹¹²

Many opponents of special and differential treatment argue that the creation of diverse loopholes in the GATT and, the subsequent erosion of the basic principles of the GATT are inherently incompatible with the maintenance of stable, transparent and liberal trade policies.¹¹³ This even backfires against developing countries, which were supposed to be beneficiaries of the flexibilities. For instance, foreign investors always need stability, transparency and security in the policy framework of host states which can be gained from the adoption of the WTO rules as they are. Hence, when there is a wide range of flexibility in the hands of host states, there is lesser policy security and thus, foreign investment incentive.¹¹⁴

Some also challenge the general application of most special and differential treatment provisions in favour of all developing members.¹¹⁵ With demonstration of progress in the economy of some developing countries, the idea of making a distinction among developing members based on their level of development and, the graduation of some from the benefit of special and differential treatment became a prevalent thought, especially among developed countries.¹¹⁶ In support of a dissimilar treatment among developing members, one writer argues:

There is very little economic reason to suggest that some of the more developed of the developing countries cannot compete in the products in which they have comparative advantage with developed countries...¹¹⁷

Even if a distinction is already made between least-developed and developing countries under most of the special and differential treatment provisions, one cannot find the same distinction in the treatment of developing countries. This makes it

¹¹² Wolf in Hoekman and Ozden (eds) (2006) 437

¹¹³ Id, 443

¹¹⁴ Diaz, Robinson, Thomas and Yanoma (2003) 25

¹¹⁵ Low in Bermann and Mavroidis (2007) 334

¹¹⁶ Ibid

¹¹⁷ Michalopoulos (2000) 25

hardly possible for the system to separately and effectively address the problems of those developing countries which are in a serious need of help.

Hence, the analogous treatment of those developing members which demonstrate a better integration and a competitive share in the world market with those developing members which are still marginalised in the trading system hampers the effectiveness of special and differential treatment provisions.¹¹⁸

Lastly, it is worth noting the argument of some that the multilateral trading system, particularly the WTO, is not the proper forum to deal with the issue of economic development or the specific problems of developing countries.¹¹⁹ According to proponents of this argument, there are proper forums established to exclusively deal with issues of development and concerns of developing countries, hence, bringing the same matter under the international trading arrangement distorts the rule based multilateral trading system and, is not well founded on an 'ethical premise'.¹²⁰

2.6- Conclusion

Neither the notion of special and differential treatment nor the term developing countries are given an official definition under the GATT and the WTO. But based on its application and different forms, special and differential treatment can be defined as the differential and preferential rights and privileges that are given to developing countries, but not extended to developed countries, under the multilateral trading system.

Currently, after the conceptual evolution of special and differential treatment for half a century, developing countries are granted various forms of special and differential treatment that includes: flexibilities to deviate from tariff commitments, impose quantitative restrictions or provide subsidies under certain circumstances, preferential market access under the Generalised System of Preference, longer period of implementation and technical assistance in favour of developing countries.

However, through time, the major emphasis of special and differential provisions has moved from the imposition of lesser and flexible obligations on developing members

¹¹⁸ Michalopoulos (2000) 25

¹¹⁹ Hindley in Hoekman and Ozden (eds) (2006) 467

¹²⁰ Ibid

to the provision of improved preferential market access for products of export interest to developing members. Due to the continued pursuit of improved market access opportunities and better terms of trade by developing countries, the Generalised System of Preference has got a central place in the concern of special and differential treatment.

Lastly, even if the introduction of special and differential provisions is backed by sound economic and political justifications, the administration, relevance and effectiveness of some forms of special and differential treatment are subjects of diverse economic criticisms.



CHAPTER III – TRADE IN AGRICULTURAL PRODUCTS UNDER THE MULTILATERAL TRADING SYSTEM

3.1- Major Peculiarities of Trade in Agricultural Products

As it will be seen in more detail under the subsequent sections, there is a substantial difference in the disciplines which regulate trade in agricultural products from that of industrial products. Also, agricultural commodities are mostly subjected to high tariffs in the world trade, compared to the tariffs applied on industrial products.¹²¹ As identified in one study, while the world average bound tariff rate for agricultural products is 62%, industrial products are subjected to an average bound tariff of 29%.¹²² Particularly in the Quad,¹²³ the average MFN applied tariff rate on agricultural commodities is four times greater than the average tariff applied on industrial products.¹²⁴ Such high tariff walls erected at borders naturally create hardship on agricultural exporters to penetrate into the domestic markets of importing countries.

Besides, the prevalent increment of agricultural tariff rates with an increase in the level of processing - commonly referred to as tariff escalation – and its adverse impact on the establishment and growth of value-added agricultural activities is another peculiar feature of agricultural trade.¹²⁵

Though the share of trade in agricultural commodities in the total world trade is relatively smaller,¹²⁶ agricultural trade matters are too sensitive, thereby serving as deal-makers and breakers in multilateral trade negotiations.¹²⁷ Agricultural matters became this sensitive largely due to the fact that the generous agricultural support programmes of developed countries have a damaging impact on the trade interests of most developing countries, which have a comparative advantage and an export interest in agricultural commodities.¹²⁸ The trade distorting effects of such support

¹²¹ Low in Bermann and Mavroidis (eds) (2007) 342

¹²² World Trade Report (2003) 127

¹²³ Under the WTO, the term 'Quad' refers to the four big trading members – the EC, US, Canada and Japan

¹²⁴ The WTO Director-General Annual Report (2005) 22

¹²⁵ Ingco and Nash in Ingco and Nash (eds) (2004) 8

¹²⁶ In the 1990's, trade in agricultural products cover only 10.3% of the world total trade and, this figure went down to 7.9% in 2000-2002. See Paiva (2005) 4

¹²⁷ Desta (2002) 9

¹²⁸ Diaz, Robinson, Thomas and Yukitsugo (2003) 23

programmes make it really difficult for poor agricultural producers to effectively compete against the 'deep pockets of the rich and powerful countries of the world'.¹²⁹ This, in fact, is reflected in the declining trend in the export of agricultural products from developing to developed countries, unlike developing countries' growing share in the export of industrial products.¹³⁰

In brief, trade in agricultural products is subjected to a higher level of restrictions and distortions as well as, a lower rate of liberalisation in the world market.¹³¹ This tendency of high protectionism in agricultural trade is not a simple market coincidence; rather, it results from the different values that countries attach to agriculture.

Ordinarily, agriculture has a vital role to play on matters of food safety and security, environmental protection and bio-diversity, rural development, alleviation of poverty, animal welfare, cultural heritages and some other issues, which are commonly referred to as the 'multi-functionality effects of agriculture' or 'non-trade concerns'.¹³² This multi-functional role of agriculture goes to the extent of safeguarding national autonomy in the sense that the political independence of a country is highly reliant on agricultural self-sufficiency, particularly food security.¹³³ Consequently, such interconnectivity with all the above issues gives agriculture an important place in the economic, social, political, cultural and environmental aspects of human life.

Accordingly, most countries provide subsidies for their agricultural producers on the ground that they need to support one or more of the multi-functionality effects of agriculture.¹³⁴ Here, the problem is: the support and protection extended to agricultural producers under the guise of multi-functionality concurrently stimulate agricultural production and, distort the world market to the detriment of agricultural producers in poor countries.¹³⁵ Hence, it became a legitimate concern to look for a means, if any, to separate the production effect of agriculture from its accessory

¹²⁹ Josling in McCalla and Nash (eds) (2007) vol.1, 60

¹³⁰ Between the years 1980-81 and 2000-01, while the agricultural export share of developing countries to the developed market decreases from 25.8% to 22.9%, their share in the export of industrial products raises from 12.7% to 21.1%. See Ingco and Nash in Ingco and Nash (eds) (2004) 16

¹³¹ Guide to the Uruguay Round Agreements (1998) 55

¹³² Paarlberg, Berdahl and Lee in McCalla and Nash (eds) (2007) vol.1, 205

¹³³ Desta (2002) 308

¹³⁴ The WTO Director-General Annual Report (2005) 25

¹³⁵ Diaz-Bonilla, Robinson, Thomas and Yanoma (2003) 22

multi-functionality effects and, support the latter in exclusion of the former. It is with this idea in mind that members are required to decouple income support payments from production type or volume and also, exclude productivity from being a prerequisite in the provision of Blue Box and Green Box domestic support measures.¹³⁶ But, as it will be examined in the coming section, there are some doubts as to the effectiveness of these requirements in practically delinking or avoiding the production stimulant effects of such support measures.

The following sections will examine in detail the differing characteristics of agricultural disciplines under the multilateral trading system and, the efforts made to bring agricultural trade in compliance with the general principles of the WTO.

3.2- Trade in Agriculture under the GATT

Some writers identify trade in agriculture as a segment that did not fall within the scope of regulation of the GATT and thus, did not form part of the multilateral trade disciplines in the pre-Uruguay period.¹³⁷ This assertion is hardly acceptable given the comprehensive scope of the original provisions of the GATT and the subsequent evolution thereof.

When the GATT was adopted in 1947, it was meant to govern the multilateral trading system on all products that fall under the definition of 'goods'.¹³⁸ In the GATT provisions that set the founding principles, including the MFN, National Treatment, tariff concessions and reciprocity, reference is generally made to import and export products, with no distinction among the different types of products.¹³⁹ Hence, Agricultural products, being in the general category of goods or products, were under the full regulation of the GATT.

However, as it will be seen in detail below, agricultural products had been subjected to prominent exceptions under the GATT. Yet, even these exceptions did not exclude agricultural products from the GATT regulation; they rather exclude

¹³⁶ See paragraph 6 under Annex 2 and, Article 6 (5) of the Agreement on Agriculture

¹³⁷ Hertel and Martin in Hoekman and Martin (eds) (2003) 1 and 61

¹³⁸ In paragraph 2 under the preamble of the GATT, one of the founding objectives of the GATT is to expand the production and exchange of 'goods'

¹³⁹ See Articles I,II, III and XI of the GATT under which a reference is made to 'products' in general

agricultural products from some of the general principles and regulate them separately as GATT exceptions.

Under the original GATT text,¹⁴⁰ agricultural products were subjected to an exceptional treatment in the application of one of the fundamental principles of the GATT – the prohibition of quantitative restrictions. Taking the elimination of non-tariff barriers and progressive liberalisation of tariffs as its central objectives,¹⁴¹ the GATT under Article XI (1) forbids the application of import or export prohibitions and restrictions in the form of non-tariff barriers. However, this prominent provision of the GATT suffers from an exception when it comes to the importation and exportation of agricultural products.

Under Article XI (2) (a) of the GATT, members are allowed to temporarily apply export prohibitions or restrictions for the prevention or relieve of critical food shortage. This is a clear case of exception from paragraph 1 of the same Article because, in the instances of critical shortage of foodstuffs, which are agricultural products, members are relieved from their obligation not to apply export restrictions and prohibitions. Besides, under Article XI (2) (c) of the GATT, members are authorised to impose restrictions on the importation of agricultural and fishery products for the removal of a temporary surplus or to restrict the domestic production and marketing of like or substitutive products. These two sets of exceptions from the general prohibition of quantitative restrictions form the initial deviations of the GATT in the market access regulation of agricultural products. Accordingly, unlike in the case of industrial products, the application of non-tariff barriers on agricultural commodities got a continued existence under the GATT regime.

The second set of exception in the treatment of agricultural products came with the adoption of Article XVI (3) and (4) in the GATT revision session of 1955. Under section B in Article XVI of the GATT, while the application of export subsidies is generally prohibited, an exceptional permission is made in relation to primary products which essentially include agricultural products in their natural form or with a

¹⁴⁰ The text adopted in 1947, before being revised in 1955

¹⁴¹ Rao and Guru (2003) 35

slight degree of processing.¹⁴² As it will be seen in detail under section 3.3.3, export subsidies are among the most obvious trade distorting forms of agricultural subsidies.¹⁴³ It is in recognition of this trade distorting effect that Article XVI (4) of the GATT prohibits the application of export subsidies regarding industrial products, which by definition are non-primary products. However, in relation to primary products, Article XVI (3) of the GATT provides an exceptional discipline as:

...contracting parties *should seek to avoid* the use of subsidies on the export of primary products. If, however, a contracting party grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory, such subsidy shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product...

Hence, as long as a member can prove that its export of a primary product does not go beyond its equitable share of the world export trade, it can freely apply export subsidies on primary products. In fact, various cases were brought before the Dispute Settlement Body of the WTO in relation to Article XVI (3) of the GATT, especially over the interpretation of the phrase 'more than an equitable share of world export trade', which is the only restriction in the application of export subsidies on primary products.

Accordingly, a member is said to acquire 'more than an equitable share of world export trade' when there is a growth in the export share of such member through displacement of the share of others.¹⁴⁴ Hence, to challenge the export subsidy regime of another member on primary products, a member has to prove the existence of a positive correlation between the export subsidy applied and the growth in the export share of the applying member and, most importantly, the existence of a market share that it has lost due to the growth in the export volume of the applying member. This line of interpretation was concurred by the Panel in *EC -*

¹⁴² As per the Interpretative Note to Article XVI, section B of the GATT, a primary product is defined as 'any products of farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as its customarily required to prepare it for marketing in substantial volume in international trade'.

¹⁴³ Desta (2002) 100

¹⁴⁴ See Article 10 (2) (a) of the Tokyo Round Subsidies Code or The Agreement on Interpretation and Application of Articles VI, XVI, XXIII of the General Agreement on Tariffs and Trade

Wheat Flour,¹⁴⁵ in which, the Panel authorized the export subsidy regime of the EC, despite the fact that there was a significant rise in the world export share of the EC, for there was no proof that the reduction in the export share of the USA was due to the expanding share of the EC in the world market.¹⁴⁶

Also in *French - Wheat*,¹⁴⁷ the Panel reasoned out its finding that the French export subsidy on wheat and wheat flour resulted in the country acquiring more than an equitable share in world export trade as follows:

In the three Southeast Asian markets combined, French supplies represented a greatly increased proportion of total imports of wheat flour, accounting for 0.7 percent in 1954 and 46 percent in the first half of 1958. The share of Australian supplies, on the other hand, fell from 83 percent in 1954 to 37 percent in the first half of 1958. While other suppliers of wheat flour have recently begun to play a larger part in the Southeast Asian markets, and although it is difficult to estimate to what extent such incursions as these are displacing traditional exporters, it is nevertheless clear that French supplies have in fact to a large extent displaced Australian supplies in the three markets.¹⁴⁸

In general, this line of interpretation is the latest one in terms of the case jurisprudence of the WTO and, is supported by Article 10 (2) (a) of the Tokyo Round Subsidies Code, which furnishes it with a certain degree of force.

Following the market access and export subsidy exceptions of the GATT, the deviation of agricultural disciplines from the general GATT principles has further broadened upon the provision of a waiver to the USA from Article XI of the GATT in its importation of diverse agricultural products,¹⁴⁹ and, a generous permission to the EC for the application of variable import levies and export subsidies.¹⁵⁰ In the presence of general exceptions under Article XI (2) of the GATT for the application of

¹⁴⁵ *European Economic Community – subsidies on Export of Wheat Flour* (SCM/42) 21 March 1983

¹⁴⁶ Paragraphs 4.8, 5.3 and 5.4 of the Panel Report on *EC – Wheat Flour* case

¹⁴⁷ *French Assistance to Exports of Wheat and Wheat Flour* (L/924 BISD 7S/46) 21 November 1958

¹⁴⁸ Paragraph 23(b) and (c) of the Panel Report on *French – Wheat* case

¹⁴⁹ Waiver Granted to the United States in Connection with Import Restrictions Imposed under Section 22 of the United States Agricultural adjustment Act of 1933, Decision of 5 March 1955 BISD 03S/32-41 June 1955

¹⁵⁰ See Delcros (2002) 222-3

quantitative restrictions on agricultural products, the relevance of the USA-waiver is to authorise the USA to apply quantitative restrictions without even meeting the requirements set under Article XI (2) of the GATT for the application of the exceptions. Accordingly, the waiver gave permission to the USA for an unconditional application of non-tariff barriers on the importation of certain agricultural products which further weakens the market access discipline of the GATT as far as agricultural products are concerned.

Generally, even though trade in agricultural products was not entirely excluded from the GATT regulation, it has been subjected to a series of exceptions and deviations, which authorised the application of the most trade distorting practices in relation to agricultural products, despite the prohibition on the application of the same on industrial products. This, in fact, was a source of discontent for most developing members as they have a comparative advantage and an export interest in agricultural commodities and, thus, were looking for freer trade and more strict disciplines in the area.¹⁵¹

It is these loopholes in the principal GATT provisions and, the resulting distortion of agricultural trade that necessitated the introduction of separate disciplines for trade in agricultural products under the Uruguay Round of trade negotiations.

3.3- The Agreement on Agriculture and Its Major Disciplines

As considered earlier, the various exceptions under the GATT provisions, subsequent waivers and lax authorisations have greatly barred the ordinary market access and export subsidy disciplines of the GATT from being applicable on agricultural products, thereby broadening the difference between the treatment of agricultural and industrial products under the multilateral trading system. After suffering from distortions for about half a century, the multilateral trade in agricultural products has got its own separate discipline upon the adoption of the Agreement on Agriculture as one of the results of the Uruguay Round trade negotiations and, part of the Marrakesh Agreement Establishing the World Trade Organization.¹⁵²

¹⁵¹ Desta (2002) 107

¹⁵² The Marrakesh Agreement Establishing the World Trade Organization, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations (Marrakesh 1994)

The Agreement on Agriculture did not bring the disciplines for agricultural trade into an immediate equivalence with the long established disciplines for trade in industrial products; it rather, as stated in its preamble, establishes the basis for the initiation of an ongoing reform process.¹⁵³

Accordingly, with the view to establish a 'fair and market oriented agricultural trading system',¹⁵⁴ the Agreement on Agriculture has brought explicit disciplines on agricultural market access, domestic support and export subsidies, which are commonly referred as the 'three pillars of the Agreement on Agriculture'.¹⁵⁵ The following section holds a brief discussion of these three pillars of the Agreement on Agriculture and the disciplines therein.

3.3.1- Market Access

The notion of market access refers to the opening up of one's domestic market for foreign products through a reduction or elimination of tariffs and non-tariff barriers on imports. Ordinarily, countries have the sovereign power to decide on what to import into and export from their territory and so, have the power to control the type and volume of imports through tariffs and non-tariff barriers. In the exercise of their sovereign power, countries impose tariffs and non-tariff barriers on imports for diverse reasons including: the protection of domestic producers from foreign competition, raising state revenue and, for the implementation of domestic policies and programmes like, financial or environmental policies.¹⁵⁶

However, the sovereignty of states and thus, their power to freely impose import restrictions is usually limited through the conclusion of international Agreements. Accordingly, under the GATT 1947, contracting parties have committed themselves to give a secured and predictable market access for products originating from any contracting party through binding their tariff reduction commitments and with the abolition of quantitative restrictions.¹⁵⁷

¹⁵³ See paragraph 1 under the preamble of the Agreement on Agriculture. Moreover, Article 20 of the same Agreement sets the foundation for the continuation of the reform process through continuing negotiations

¹⁵⁴ See paragraph 2 under the preamble of the Agreement on Agriculture

¹⁵⁵ Goode (2003) 353

¹⁵⁶ Desta (2002) 15

¹⁵⁷ See Articles II and XI of the GATT 1947

Given the fact that the global market access is far less liberalised for agricultural products than for industrialised products,¹⁵⁸ it is not surprising to see market access being one of the most important pillars of the Agreement on Agriculture. In this respect, one of the major triumphs of the Agreement on Agriculture and, the distinguishing feature of agricultural trade from trade in non-agricultural products, is the replacement of non-tariff barriers into their tariff 'equivalent' through the process commonly known as 'tariffication'.¹⁵⁹ Under footnote 1 for Article 4 (2) of the Agreement on Agriculture, a list of non-tariff barriers is provided that need to be converted into ordinary custom duties, which list include: quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints and similar border measures other than ordinary custom duties. As it can be seen from the list, especially from the last phrase, all trade barriers other than tariffs or, in simple terms, non-tariff barriers fall under the scope of Article 4 as subjects of tariffication.

Accordingly, Article 4 (2) of the Agreement on Agriculture prohibits WTO members from applying non-tariff measures all of which are already subjected to tariffication. However, this prohibition is not absolute in that members can still exceptionally apply non-tariff barriers on agricultural imports through Special Agricultural Safeguards under the Agreement on Agriculture; in line with balance of payments or other general provisions of the GATT and, as per the exception under Annex 5 of the Agreement on Agriculture.¹⁶⁰

It is in fact worth noting that by permitting the conversion of non-tariff barriers into their tariff 'equivalent', the Agreement on Agriculture gives a certain degree of legitimate recognition to non-tariff barriers, which are generally prohibited under Article XI of the GATT. However, given the fact that the prohibition of quantitative restrictions under the GATT is subjected to various exceptions in its application to agricultural products, the process of tariffication does not give recognition to new forms of non-tariff barriers; it rather converts those non-tariff barriers that were already in effect through the GATT exceptions into their tariff 'equivalent'.

¹⁵⁸ The WTO Director-General Annual Report (2005) 22

¹⁵⁹ Desta (2002) 62 and 67

¹⁶⁰ See Article 4 (2) of the Agreement on Agriculture and foot note 1 under the same Article

The general obligation of members not to apply non-tariff barriers that are subjected to tariffication is dealt in *India - Quantitative Restrictions*,¹⁶¹ in which the Panel found India's measure of quantitative restrictions on agricultural products being in violation of India's obligation not to maintain measures which are required to be converted into ordinary custom duties.¹⁶² Though, India justified its measures using the balance of payments exception under footnote 1 of the Agreement on Agriculture, the Panel, as upheld by the Appellate Body, found that India's quantitative restriction measures did not meet the requirements of Article XVIII of the GATT for balance of payments exception and thus, could not be justified by the exceptions in footnote 1 of the Agreement on Agriculture.¹⁶³

Theoretically, tariffication plays an imperative role in the process of trade liberalisation because, it is easier to quantify, bound and control tariff rates rather than non-tariff barriers.¹⁶⁴ Even if a tariff by itself is a trade barrier and, the tariffs resulting from the process of tariffication are in effect 'equivalent' with their counterpart non-tariff barriers, tariffication is useful in simplifying the different forms of trade barriers into one form, thereby creating a transparent global trading system.¹⁶⁵ In fact, the tariffication process under the Uruguay Round makes negotiations in the subsequent Doha Round relatively easier because the issue of market access has boiled down only to reduction of tariff rates.¹⁶⁶

However, the practical application of tariffication is highly criticized for resulting in high tariffs and trade restrictions, even beyond the equivalent of all tariff and non-tariff restrictions that were applicable before tariffication took place.¹⁶⁷ This was essentially because, in the instance of converting non-tariff barriers into their tariff 'equivalent', most countries have adopted tariff rates that are in excess of the actual equivalent of the non-tariff barriers, which instance is referred as 'dirty tariffication'.¹⁶⁸

¹⁶¹ *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* (WT/DS90/R) / DSR 1999:V, 1799

¹⁶² Paragraphs 5.240-242 of the Panel Report on *India - Quantitative Restrictions* case

¹⁶³ *Ibid*, See also Paragraphs 112-120 of the Appellate Body Report on *India - Quantitative Restrictions* case

¹⁶⁴ Desta (2002) 67

¹⁶⁵ Delcros (2002) 233

¹⁶⁶ The WTO Director-General Annual Report (2005) 22

¹⁶⁷ Finger and Schuknecht in Hoekman and Martin (eds) (2003) 278

¹⁶⁸ Goode (2003) 399

Beside dirty tariffication, the selection of 1986-88 as the base period for tariff reduction commitment in which period tariff rates were particularly too high and, the adoption of high ceiling bindings by developing members in return for their unbound tariff lines were also among the significant factors for the prevalence of high tariff regime after tariffication took place.¹⁶⁹ Consequently, even if the tariff rates resulting from tariffication were bound and reduced under members' Schedules of concessions, the reduction commitment was not able to bring the desired market access reform since reduction was made from bound tariffs which were well beyond the applied tariff rates.¹⁷⁰

In spite of its modest effect in the reform process, the market access discipline of the Agreement on Agriculture is at least relevant for its control on members not to increase their level of tariff protection in the future, furnishing a certain level of market security.¹⁷¹ Elaborating on this merit of the Agreement on Agriculture, one writer states:

...in light of the long history of agricultural protection growth in industrial countries, even achieving a standstill in agricultural protection via the Uruguay Round could be described as progress. It would be an advance over what otherwise might have been the case in part because it would reduce the risk of newly industrialising countries following the more advanced one's down the agricultural protection growth path...¹⁷²

Once non-tariff barriers were changed into their tariff 'equivalent', tariff reduction commitment is given under the Agreement on Agriculture. Accordingly, developed and developing members have committed themselves to reduce their overall average bound tariff rates on agricultural products by 36% and 24%, minimal reduction on each tariff line being 15% and 10%, with an implementation period of 6 and 10 years, respectively.¹⁷³ Though the introduction of a separate new discipline

¹⁶⁹ Gallagher (2000) 42

¹⁷⁰ Hertel and Martin in Hoekman and Martin (eds) (2003) 62

¹⁷¹ Members have given tariff bindings in their Schedule of commitment from which bindings they cannot increase their applied tariffs. See Article 4 of the Agreement on Agriculture

¹⁷² Anderson in Hoekman and Martin (eds) (2003) 28

¹⁷³ See paragraph 5 of the Modalities for the Establishment of Specific Binding Commitment under the Reform Programme (MTN.GNG/MA/W/24) 20 Dec. 1993 and, Article 15 (2) of the Agreement on Agriculture

for reduction of agricultural tariffs is a major development by itself, the tariff reduction commitment under the Agreement on Agriculture has got certain downsides that are worth considering.

Primarily, the percentage reduction is agreed to be made from bound tariff rates, which, due to the dirty tariffication and other reasons mentioned earlier, were far beyond the applied tariff rates.¹⁷⁴ Hence, what the reduction process did, if at all, is reduce the water or the overhang between the bound and applied agricultural tariff rates that existed in the pre-Uruguay period. This renders the tariff reduction under the Agreement on Agriculture merely numerical but not economical from the perspective of agricultural exporters who still have to face similar applied tariff rates.

Moreover, the fact that a linear reduction is agreed from the overall average agricultural bound tariff rate, rather than from each tariff line, has its own adverse effect on the reform process. For instance, when developed members commit themselves for a 36% reduction, it does not mean that they have to reduce their tariff rate on each and every agricultural product by 36%; their commitment only concerns the reduction of their overall average agricultural tariff rate. Hence, whatever the reduction rate on each tariff line might be, as long as it meets the minimum reduction of 15%, a member is only required to bring its overall average agricultural tariff rate to a level of 36% reduction from the level on the base period. This undeniably gives members the discretion to decide on the rate of reduction on individual tariff lines and thus, the leverage to extend protection to their sensitive products through lesser tariff cuts.¹⁷⁵

It is the mitigated effect of the general tariff reduction process and the resulting high tariff regime that necessitated the introduction of Tariff Rate Quotas for the preservation of the pre-Uruguay trend of market access or for the creation of new minimum market access opportunities.¹⁷⁶ In this regard, members are required to maintain the pre-existing volume of agricultural imports or, if such import volume is lesser than 5% of the domestic consumption on the base period of 1986-88, provide a new minimum market access opportunity that amounts 3% of the domestic production, which then will progressively expand to 5% at the end of the

¹⁷⁴ Finger and Schuknecht in Hoekman and Martin (eds) (2003) 278

¹⁷⁵ Hoda and Ashok (2003) 19

¹⁷⁶ Gallagher (2000) 43

implementation period, 2001.¹⁷⁷ Accordingly, member's obligation to grant a minimum market access opportunity will get discharged through the imposition of lesser tariff rates on a certain minimum volume of import, which is often known as an 'in-quota volume'.¹⁷⁸ This results in a new agricultural market access arrangement in which members have dual tariff bindings - in-quota and out-of-quota tariff bindings.

Ideally, a system of Tariff Rate Quota is beneficial in rectifying the problems of high tariffs for the in-quota volume, which will be subjected to a lesser in-quota tariff rate. However, the administration of Tariff Rate Quotas is highly criticised because members are given a wider range of discretion and control in the allocation of in-quota volumes.¹⁷⁹ For instance, the minimum market access commitment of members is stipulated on an overall average agricultural import basis, which enables members to grant distinct tariff quotas for exports from different countries or allocate the quota for some specified exports only and, manoeuvre the system in favour of their sensitive agricultural products.¹⁸⁰ But, given the fact that the system of Tariff Rate Quota is introduced to enable exporting members to get at least some minimum level of export opportunity, any leverage in the hands of importing members to effectively shield their sensitive areas even from the minimum market access requirement will clearly defeat the very purpose of Tariff Rate Quotas. Besides, there is a legitimate concern that the existence of lesser in-quota tariff rate might be used by some members as a cover to avoid a deeper cut in the out-quota tariff rates, which cover the majority of agricultural imports.¹⁸¹

As far as market access is concerned, the last and very crucial introduction of the Agreement on Agriculture is the notion of Special Agricultural Safeguard. As per Article 5 of the Agreement on Agriculture, members are given the flexibility to temporarily deviate from their tariff concessions and, apply a tariff on a particular agricultural product in excess of the bound tariff rate when there is a surge on an import volume or a fall in the price of that particular agricultural product. The

¹⁷⁷ Paragraphs 5 and 6 of the Modalities for the Establishment of Specific Binding Commitment under the Reform Programme (MTN.GNG/MA/W/24) 20 Dec. 1993

¹⁷⁸ Desta (2002) 78

¹⁷⁹ The WTO Director-General Annual Report (2005) 16

¹⁸⁰ Delcros (2002) 234

¹⁸¹ As reported by the WTO Director-General in 2005, tariff rate quota covers only 3.3% and 1.6% of the total tariff lines in the EC and Japan, respectively, which are the two members with the largest tariff rate quota coverage as compared to the coverage in other members. See the WTO Director-General Annual Report (2005) 16. See also Anderson in Hoekman and Martin (eds) (2003) 47

Agreement on Agriculture has created a discipline for the application of Special Agricultural Safeguard by regulating the level of import volume or price at which the measure can be triggered and, the permissible level of tariff rise as a remedy available upon trigger.

Accordingly, members are allowed to deviate from their tariff concessions when the current import volume of a certain agricultural product exceeds by 5%-25% the import volume of such a product during the base period,¹⁸² or when there is at least a 10% fall in the import price of an agricultural product from the price during the base period - 1986-88. As to the tariff deviations or remedies available, while members are generally required not to exceed one third of the ordinary custom duty for a volume trigger, the permitted level of tariff deviation for price falls increases with an increment in the difference between the current import price and the average price during the base period.¹⁸³

Nonetheless, it is important to notice that the application of Special Agricultural Safeguard is not open in relation to all agricultural products. Under Article 5 (1) of the Agreement on Agriculture, it is clearly provided that a member can make use of Special Agricultural Safeguards only for those agricultural products in relation to which it has undertaken a tariffication process and, has designated the symbol "SSG" under its Schedule of concession. Hence, if an import surge or a price fall occurs in relation to a tariff line which is not tariffied or in relation to which a right for the application of Special Agricultural Safeguard is not reserved, an importing member cannot apply Special Agricultural Safeguard even if the volume or price trigger is well beyond the limit. In such cases, what a member can do is to resort to the general safeguard provisions under the GATT and the Agreement on Safeguards,¹⁸⁴ which, however, permit the application of safeguard measures subject to the rigorous requirements of serious injury or a threat thereof.¹⁸⁵

¹⁸² The level of trigger in the case of an import surge differs depending on the percentage share of an imported agricultural product in the domestic consumption of the same product during the base period - three preceding years for which data are available. Accordingly, the greater the share of an import in the domestic consumption, the lower the trigger level will be. For details, see Article 5(4) of the Agreement on Agriculture.

¹⁸³ See Article 5(4) and (5) of the Agreement on Agriculture

¹⁸⁴ Article 21 of the Agreement on Agriculture confirms the continued application of the GATT provisions and the Multilateral Trade Agreements under Annex 1A of the WTO Agreement, on agricultural matters that are not covered under the Agreement on Agriculture

¹⁸⁵ See Article XIX (1) of the GATT and Article 2 of the Agreement on Safeguards

Of all members to the WTO, only 39 members, with a majority of developing members, have made a reservation for the application of Special Agricultural Safeguard under their Schedule of commitment.¹⁸⁶ Hence, these 39 members are the only WTO members that can legitimately make use of the Special Agricultural Safeguard mechanism under the Agreement on Agriculture.

3.3.2- Domestic Support

The term domestic support indicates any form of support provided by a government in favour of its agricultural producers or farmers.¹⁸⁷ As it was considered in detail in the first section of this chapter, the multifunctional effects of agriculture motivate countries to have a broader ground for the extension of diverse protection mechanisms in favour of their agricultural sector. In their effort to protect their agricultural products, countries usually restrict the importation of foreign agricultural products through tariffs and non-tariff barriers and/or promote the production and exportation of domestic agricultural products through the provision of various forms of support for agricultural producers. Hence, besides the imposition of high tariffs and non-tariff barriers on agricultural imports, the other trade protectionist mechanism is the provision of domestic support in favour of agricultural producers.

However, it is not true that the provision of domestic support only targets the protection of domestic producers from international market competition. Sometimes, countries grant diverse forms of support for their agricultural producers for reasons like: production limitation, for rural development, for environmental protection programmes or, to improve the living standard of producers.¹⁸⁸

Here, it is worth noting that the trade distorting effect of a domestic support measure is highly related to the reason for which it is provided and, particularly, with the actual impact of the support measure on production.¹⁸⁹ If a certain sort of domestic support is provided so as to stimulate production volume or, if provision of the support is dependent upon production performance, it will be a trade distorting domestic support since, the over-production effect of such a support will benefit the

¹⁸⁶ For the list of members, see <http://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd11_ssg_e.htm> [accessed on 18 January 2009]

¹⁸⁷ See Article 6 (1) of the Agreement on Agriculture

¹⁸⁸ See Annex 2 of the Agreement on Agriculture

¹⁸⁹ Desta (2002) 306

uncompetitive domestic producers at the expense of efficient foreign producers in the world market.¹⁹⁰ Accordingly, based on the level of trade distortion they can potentially produce, the Agreement on Agriculture groups the different forms of domestic support measures into three categories, conventionally labelled under the WTO as Amber Box, Blue Box and Green Box domestic support measures.¹⁹¹

The Amber Box domestic support incorporates those domestic support measures that are trade distorting by their nature and, thus, are subjects of reduction commitment by members.¹⁹² Under Article 6 of the Agreement on Agriculture, the Amber Box is designated as 'all domestic support measures in favour of agricultural producers with the exception of domestic measures which are not subject to reduction', under the Blue or Green Box. This means, any kind of domestic support measure which does not form part of the exclusion under the Green Box or Blue Box is by definition an Amber Box domestic support measure, which is a catch all basket definition.

Ordinarily, all the trade distorting domestic support measures, which are related to production performance and have a direct impact in boosting productivity, form part of the Amber Box domestic support measures.¹⁹³ Classic examples of Amber box domestic support measures are market price support and direct payment to agricultural producers contingent upon production performance.¹⁹⁴

Market price support is a prominent form in the application of domestic support measures. It is basically a governmental act of artificially fixing the domestic price of agricultural products beyond the world price.¹⁹⁵ It is called an artificial price fixing because, the domestic price will not be determined by the free interaction of demand and supply in the domestic market; it is rather fixed by a governmental regulation.¹⁹⁶ Being part of the Amber Box domestic support, market price support targets at

¹⁹⁰ Guide to the Uruguay Round Agreements (1998) 56

¹⁹¹ <http://www.wto.org/english/tratop_e/agric_e/agboxes_e.htm> [accessed on 16 December 2008]

¹⁹² <www.wto.org/english/docs_e/legal_e/ursum_e.htm/agreement> [accessed on 5 November 2008]

¹⁹³ Since the definition of Blue and Green Box domestic support measures expressly exclude production tied support measures, which are of high trade-distorting effect, such support measures fall under the definition of Amber Box domestic support. See Articles 6(1), (5) and Annex 2 of the Agreement on Agriculture

¹⁹⁴ Desta (2002) 310

¹⁹⁵ The WTO Director-General Annual Report (2005) 23

¹⁹⁶ For instance, it is estimated that the price of agricultural products in the Organisation for Economic Co-operation and Development (OECD) countries is fixed to be around 30% greater than the world price. See Paiva (2005) 6

increasing the profit of agricultural producers, thereby stimulating productivity. In normal economic circumstances, if production return increases beyond the ordinary level due to a high fixed price, rationally, producers will positively respond to the stimulant and increase productivity. This means, market price support has a direct relationship with productivity and, mostly results in production surplus.¹⁹⁷

Fixing higher domestic price is a positive stimulant not only to domestic producers but also to foreign exporters, who will be motivated to export more to that particular country to take advantage of the higher price in the domestic market.¹⁹⁸ Consequently, market price support mostly calls for the imposition of import restrictions and the provision of export subsidies so as to discourage over flooding of imports and, get rid of the domestic production surplus, respectively.¹⁹⁹

The other downside of market price support is that instead of improving the livelihood standard of small producers, it greatly benefits large scale agricultural producers, who take greater proportion of the price support due to their higher production volume.²⁰⁰ Hence, rather than redistribution of income in favour of poor farmers, market price support mostly results in accumulation of profit and over production by the beneficiary large scale agricultural producers. Generally, due to such multiple economic impairments it causes, market price support can be designated as one of the most trade distorting forms of Amber Box domestic support measures.

However, despite its high trade distorting nature, market price support is the most widely used form of domestic support in many developed countries.²⁰¹ This can be easily inferred from the high share of market price support in the general provision of domestic support measures, which share accounts around 57%, 38% and 90% of the total domestic support provision in the EC, USA and Japan, respectively.²⁰²

The generous provision of Amber Box domestic support measures and the resulting trade distortion became the major concerns of most developing countries as well as the Agreement on Agriculture due to the competitive interest most developing

¹⁹⁷ Desta (2002) 311

¹⁹⁸ Ibid

¹⁹⁹ The WTO Director-General Annual Report (2005) 23

²⁰⁰ Id, 25-6

²⁰¹ Desta (2002) 310

²⁰² The WTO Director-General Annual Report (2005) 24

countries have on agricultural production and, the adverse effect of Amber Box support programmes on the trade interests of developing countries.²⁰³ Though it is true that the application of Amber Box domestic support measures has a detrimental effect on the trade interests of all agricultural exporters, such a detriment is more severe on developing countries which provide no or very insignificant amount of production subsidies for their agricultural producers.²⁰⁴ All the negative consequences of developed countries' Amber Box domestic support measures, including distortion of natural market competition, price volatility and import surges, operate directly against agricultural producers in developing countries who have a natural comparative advantage in the area but got diminutive trade shares in world trade.²⁰⁵ Proving the adverse effects of Amber Box domestic support measures on developing countries, all simulations for the Uruguay Round of trade negotiations have demonstrated a finding that agricultural production of developing countries will significantly increase if there is a reduction in the application of trade distorting subsidies in the developed world.²⁰⁶

It is in recognition of the adverse effects of Amber Box domestic support measures that the Agreement on Agriculture for the first time requires members to bind and reduce their annual budgetary outlays on Amber Box domestic support measures, which outlay is referred under the Agreement as Total Aggregate Measure of Support (Total AMS).²⁰⁷ As noted under Annex 3 of the Agreement on Agriculture, the technical calculation of Total AMS in monetary terms involves the summation of budgetary outlays for non-exempt direct payments, market price support as derived from the price difference in the domestic and external market and, an outlay for any other subsidy not exempted from reduction commitment.

In the entire history of subsidy disciplines under the GATT and the Agreement on Subsidies and Countervailing Measures (SCM), members have never been required to quantify, schedule and reduce their subsidy outlays; rather, depending on the

²⁰³ Zunckel (2004) 1

²⁰⁴ Hoekman, Francis and Olarreaga in McCalla and Nash (eds) (2007) vol.1, 103

²⁰⁵ Hoekman, Michalopoulos and Winters in Hoekman and Ozden (eds) (2006) 540

²⁰⁶ Diaz, Robinson, Thomas and Yanoma (2003) 23

²⁰⁷ Under Article 1 of the Agreement on Agriculture, the Aggregate Measure of Support (AMS) is defined as the annual level of support, expressed in monetary terms, provided in favour of agricultural producers as product-specific or non-product-specific support, other than those supports excluded from reduction under the same Agreement.

nature of different subsidies, members were either totally prohibited from applying some subsidies or were allowed to apply some others in a manner that does not affect the interests of other members.²⁰⁸ Hence, the approach adopted under the Agreement on Agriculture to quantify, bind and progressively reduce Amber Box domestic support outlays can be considered as one of the diverse 'innovations' of the Agreement on Agriculture.²⁰⁹

Accordingly, under the Agreement on Agriculture, developed members are bound to reduce their Total AMS outlay by 20% in six years implementation period starting from 1995, while developing members will reduce their outlay by 13.3% within ten years implementation period as of 1995.²¹⁰ Thus, as per Articles 3 (2) and 6 (3) of the Agreement on Agriculture, members are prohibited from providing Amber Box domestic support measures in excess of the commitment levels under their Schedules of concession. Here, it is worth noting that the domestic support reduction commitment Schedule of each member forms an integral part of the GATT 1994.²¹¹ Hence, provision of Amber Box domestic support measures by any member beyond its bound commitment level amounts to a violation of its own domestic support reduction Schedule and also a violation of the GATT 1994.

However, a reduced application of Amber Box domestic support measures is allowed only for those members which specify their Total AMS commitment level under part IV of their Schedule.²¹² Hence, if a member makes no specification of its Total AMS outlays in its Schedule of commitment, it cannot benefit from the AMS reduction discipline of the Agreement on Agriculture and, is restricted to the *de minimis* amount in its application of Amber Box domestic support measures.²¹³ Yet, of all members of the WTO, only 34 members have scheduled their AMS outlays,²¹⁴ which 34 members are therefore the only members which can provide Amber Box domestic support measures in excess of the *de minimis* amount. In fact, major providers of

²⁰⁸ See Article XVI of the GATT and Articles 3 and 5 of the SCM Agreement

²⁰⁹ Desta (2002) 393

²¹⁰ The percentage reduction is agreed to be made from the Total AMS on the base period 1986-1988

²¹¹ Article 3(1) of the Agreement on Agriculture

²¹² Article 7(2)(b) of the Agreement on Agriculture

²¹³ Ibid

²¹⁴ The list of 34 members which have a scheduled commitment over their Total AMS outlays is available at <http://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd13_boxes_e.htm> [accessed on 20 January 2009]

Amber Box domestic support measures, including the EC, USA and Japan, have scheduled their AMS outlays and thus, are authorised to keep on the provision of such measures with a reduced amount. This reasonably shades a certain level of doubt as to the effectiveness of the requirement of scheduling in trimming down the widespread application of Amber Box domestic support measures, given the fact that the requirement has no control over major suppliers of trade distorting domestic support measures.

The general reduction discipline of the Agreement on Agriculture over Amber Box domestic support outlays is not absolute in that members are given the flexibility to exclude some 'minimal' amount of trade distorting support –*de minimis*– from the calculation of Total AMS and thus, from a reduction commitment.²¹⁵ As a *de minimis* amount, developed and developing members are permitted to provide trade distorting domestic support of up to 5% and 10%, respectively, of their total value of agricultural production being out of the reach of reduction commitment. This practically means the Amber Box reduction discipline is effective only on those members whose outlay on such domestic support measures is more than the *de minimis* amount.²¹⁶

Besides, under Article 6 (2) of the Agreement on Agriculture, developing countries are given further flexibility to exclude some particular forms of Amber Box domestic support measures - agricultural investment and input subsidies as well as subsidies for diversification from growing illicit narcotic crops - from the calculation of Total AMS outlays or from reduction commitment. This flexibility forms part of special and differential treatment provided in recognition of the developmental and trade needs of developing countries.

The second category of domestic support measures under the Agreement on Agriculture is the Blue Box domestic support, which refers to direct payments made by governments in favour of their agricultural producers under production-limiting

²¹⁵ Article 6(4) of the Agreement on Agriculture

²¹⁶ Only 30 members provide Amber Box domestic support measures beyond their *de minimis* level. Thus, these 30 members are the only WTO members that are subjected to the reduction commitment. See <www.wto.org/english/docs_e/legal_e/ursum_e.htm/agreement > [accessed on 16 January 2006]

programmes.²¹⁷ This category of domestic support has a commonality with the Amber Box domestic support measures to the extent that the application of both is tied to production volume. This can be seen from Article 6 (5) (a) of the Agreement on Agriculture under which, the basis for the provision of Blue Box domestic support measures is either production yields per fixed area or a livestock payment per fixed number of heads. The primary difference between the Blue Box and Amber Box domestic support measures is that the former is not provided as a production incentive; rather, it is a production-limiting support. But still, the Blue Box domestic support is not totally decoupled from production since it is paid to agricultural producers based on their level of production and, will not be paid in the absence of production.²¹⁸

However, unlike Amber Box domestic support measures, the Blue Box domestic support is not a subject of member's reduction commitment since outlays on the Blue Box are excluded from the calculation of Total AMS.²¹⁹ Hence, under the Agreement on Agriculture, members are entirely free to increase to any extent their outlays on a pre-existing Blue Box domestic support or introduce new support measures as long as the measures introduced qualify the requirements of Blue Box domestic support under Article 6 (5) of the Agreement on Agriculture.

Under most of the negotiations preceding the Agreement on Agriculture, domestic support measures were categorised as Amber Box and Green Box; it is in the last moment of the Uruguay Round of agricultural negotiations that the Blue Box domestic support got official recognition as part of the different forms of domestic support measures. In the Dunkel proposal of 1991, which is known for laying the foundation of the Agreement on Agriculture, the Blue Box domestic support was totally not recognised and, domestic support measures were simply grouped into Amber and Green Box.²²⁰ It is later at the Blair House Agreement between the USA and EC that the Blue Box domestic support was introduced as a deal-maker for the

²¹⁷ Article 6(5) of the Agreement on Agriculture

²¹⁸ Desta (2002) 412

²¹⁹ Article 6(5)(b) of the Agreement on Agriculture

²²⁰ Delcros (2002) 235

safe accommodation of the domestic support programmes of both the EC and USA under the Agreement on Agriculture.²²¹

Accordingly, the linkage Blue Box domestic support has with production and its original introduction as a safety-box for the subsidy programmes of the USA and EC creates resentment on the side of most members of the WTO that such a Box is nothing more than one way of shielding trade distorting support programmes of rich countries.²²² It is due to the suspicion they had against the Blue Box domestic support measures that most members advocate for a change in discipline of such support measures under the current Doha Round of trade negotiations. In fact, in their 2003 proposal, the G-20 developing countries went to the extent of suggesting the total elimination of Article 6 (5) of the Agreement on Agriculture and thus, Blue Box domestic support measures.²²³ The details as to the new developments in the Doha Round on the application of Blue Box domestic support measures will be discussed under a subsequent topic.

The last category of domestic support is the Green Box domestic support measures. Under the Agreement on Agriculture, the Green Box domestic support is characterised as categories of domestic support measures that 'have no, or at most minimal, trade-distorting effects or effects on production'.²²⁴ Unlike the Amber Box domestic support, Green Box domestic support measures do not involve price support or a transfer from consumers; need to be decoupled from production and, can only be given for the reasons specified under Annex 2 of the Agreement on Agriculture.

Due to the fact that Green Box domestic support measures have no or little trade distorting effect, they can be freely applied by members without any limitation or reduction commitment.²²⁵ The free application of Green Box domestic support measures is allowed to enable members to provide subsidies and support programmes for the promotion of social, economic and environmental policies,²²⁶

²²¹ Desta (2002) 412

²²² Ibid

²²³ See Paragraph 1.1 of the Agriculture – Framework Proposal of the G-20 Countries, September 2003 (WT/MIN(03)/W/6

²²⁴ See Paragraph 1 under Annex 2 of the Agreement on Agriculture

²²⁵ Article 6 (1) of the Agreement on Agriculture

²²⁶ See Annex 2 of the Agreement on Agriculture

most of which policies form part of the multifunctional effects or non-trade concerns of agriculture. In this regard, as per Annex 2 of the Agreement on Agriculture, members can freely give domestic support for programmes like: research, pest and disease control, training services, marketing and promotion services, infrastructural services, food security, decoupled income support programmes, income safety-net programmes, Structural adjustment assistance, relief from natural disasters, environmental programmes and regional assistance programmes. Most of the programmes listed above are crucial policy considerations of every government, which therefore gives the Green Box support measures an important place in the implementation of such policy considerations.

Because the application of Green Box domestic support measures is delinked from production and involves important policy considerations, there is a common positive stand among members on the free application of such support measures under the Agreement on Agriculture. Nonetheless, there is a concern by many developing members that some of the programmes labelled under the Green Box domestic support might in reality have more than a minimal trade distorting effect.²²⁷ For instance, under the provision of Green Box domestic support measures in a form of direct payment to agricultural producers, even if it's direct application is 'decoupled' from production, it will inevitably increase the income of agricultural producers in developed countries and thus, rationally, facilitate their productivity at the detriment of agricultural producers in resource poor countries. Thus, it is sometimes important to look beyond the way support measures are labelled and, to enquire as to the actual impact of such support measures on production and trade. This is especially important in the existence of Article 13 of the Agreement on Agriculture that excludes all Green Box domestic support measures from being subjected to countervailing duties, actions under Article XVI of the GATT and, actions based on non-violation nullification and impairment of benefits, during the implementation period. It is with this concern that most developing members, including the African Group, have frequently proposed for the adoption of tighter criteria in the determination of Green Box domestic support programmes.²²⁸

²²⁷ Zunckel (2004) 7

²²⁸ See for instance Paragraph 18 of the WTO African Group: Joint Proposal on the Negotiations on Agriculture, March 2001 (G/AG/NG/W/142)

3.3.3- Export Subsidies

Export subsidies are financial contributions made by a government or a public body, which contributions confer benefits on and are contingent upon export performance of the recipient.²²⁹ The term export subsidy is not peculiar under the Agreement on Agriculture; it has been well familiarised and used in the same context under the GATT, the Tokyo Round Subsidies Code and the SCM Agreement. However, the discipline of export subsidies under the Agreement on Agriculture is far different from the discipline under the SCM Agreement, which totally and expressly prohibits the application of export subsidies.²³⁰

Under Article 3 of the SCM Agreement, export subsidies are classified under the category of prohibited subsidies, the grant or maintenance of which is strictly forbidden. Hence, if a member is found applying export subsidies by the WTO Dispute Settlement Body, upon initiation of a case by any member, it will be recommended to out-rightly withdraw such subsidies and upon failure to do so, will be subjected to retaliation by the complainant party.²³¹ Hence, the discipline of export subsidies under the SCM Agreement is quite a stringent one. This is justifiable because export subsidies by definition are directly related to and conditional upon the export performance of the recipient.

Naturally, export subsidies lessen the cost of exportation of products, thereby giving recipients the advantage of bringing cheaper products to the world market, as compared to the ordinary price of unsubsidised products.²³² Hence, it has a direct effect of boosting export volume at a depressed price, which therefore is highly trade distorting. The adverse effects of agricultural export subsidies is particularly severe on developing countries most of which are agricultural exporters but provide no or very insignificant amounts of subsidies for their agricultural exports.²³³ However, under the Agreement on Agriculture, the application of export subsidies is far from

²²⁹ See Article 1(e) of the Agreement on Agriculture and Article 1 of the SCM Agreement

²³⁰ Article 3.1 of the SCM Agreement

²³¹ See Article 6 of the SCM Agreement

²³² Desta (2002) 100

²³³ Diaz, Robinson, Thomas and Yanoma (2003) 29

being prohibited. It is rather partially restricted in terms of budgetary outlays and export volume.²³⁴

Export subsidies have a commonality with domestic support measures to the extent that both practically fall under the definition of subsidy as per Article 1 of the SCM Agreement. However, unlike domestic support measures, export subsidies are provided with a view to increase the export capacity of recipients and is always trade distorting. Also, while domestic support measures are always given for agricultural producers, it is not necessarily the case for export subsidies, which are essentially provided in favour of agricultural exporters, who might be producers or just traders.

In the negotiations preceding the Agreement on Agriculture, export subsidies were not welcomed by several of the WTO members, even by some of the wealthy states that are known for their intense application of subsidies.²³⁵ Taking into account its absolute trade distorting nature, even if most members were in favour of the total prohibition of agricultural export subsidies, the EC, as a major custodian of export subsidies, succeeded in the negotiations for the continuing application of agricultural export subsidies with only a reduction commitment.²³⁶

Accordingly, the Agreement on Agriculture requires developed members to reduce their budgetary outlays on export subsidies and their volume of subsidized exports by 36% and 21%, respectively, from the amount and volume in the base period of 1986-1990, while developing members are required to take 2/3 of such reduction commitments.²³⁷ However, it is worth noting that the Agreement on Agriculture does not limit the application of all forms of agricultural export subsidies. It rather makes an exclusive list of agricultural export subsidies that are subjected to the above mentioned reduction commitments and left the others free for an unlimited application.

²³⁴ See Article 9(2)(b)(iv) of the Agreement on Agriculture

²³⁵ For instance, the US, in its June 1990 proposal, has suggested for the total elimination of agricultural export subsidies within five years implementation period.

²³⁶ Delcros (2002) 240

²³⁷ See Articles 3(3), 8 and 9(2)(b)(IV) of the Agreement on Agriculture

Article 9 (1) of the Agreement on Agriculture provides the list of different forms of export subsidies that are subjected to the reduction commitments and, the provision of which beyond the limit of concession will amount to a violation of the WTO rules.²³⁸ These agricultural export subsidies are; direct subsidies contingent on export performance, sale or disposal for export of non-commercial stocks of agricultural products at a price lower than for a domestic sale, government financed payments on the export of an agricultural product, provision of subsidies to reduce the costs of marketing agricultural exports, more favourable internal transport and freight charges for export shipments than domestic shipments and finally, subsidies on agricultural products contingent on their incorporation in exported products.²³⁹ So, these are the only types of export subsidies in the application of which a state cannot exceed its budgetary and volume limit. This practically means, as long as a state can prove that its export subsidy does not fall within the list of Article 9 (1), it can freely make use of export subsidies on any agricultural product, subject to the anti-circumvention rule under Article 10 (1) of the Agreement on Agriculture.

Under Article 10 (1) of the Agreement on Agriculture, members are prohibited from applying those export subsidies which are not listed under Article 9 (1) in a manner that results in or threatens to lead to circumvention of their export subsidy commitments. Strictly speaking, this provision does not create a restriction on the application of those export subsidies that are not listed under Article 9 (1); it rather strengthens the discipline on those export subsidies which are under the exhaustive list of Article 9 (1) of the Agreement on Agriculture. This is true because, as per the merit of Article 10 (1), a member cannot complain against another member for the mere fact that the latter has intensively applied any form of export subsidy that is not listed under Article 9 (1). To challenge the provision of such a subsidy, there must be proof that its application enables or will enable a member to effectively get rid of its commitments on the listed export subsidies. Hence, there is no restriction on the very application of non-listed export subsidies.

It is very important and interesting to notice that even the discipline for those export subsidies that are listed under Article 9 (1) of the Agreement on Agriculture differs

²³⁸ See Articles 3(3) and 8 of the Agreement on Agriculture

²³⁹ See Article 9(1) of the Agreement on Agriculture

based on the categories of agricultural products for the export of which such subsidies are provided. It is stipulated under Article 3 (3) of the Agreement on Agriculture that the application of listed export subsidies within the reduction limit is permitted only for those agricultural products which are specified under member's Schedule of commitment. This means, if a state specifies some of its agricultural products in its Schedule of commitment, it can continue providing a reduced amount of export subsidies under Article 9 (1) for the scheduled agricultural products but, cannot give the same export subsidy for its agricultural products which do not form part of its Schedule of commitment.

To make it generally simple, the Agreement on Agriculture groups export subsidies into two categories - export subsidies listed under Article 9 (1) and export subsidies not listed under Article 9 (1). As far as those export subsidies listed under Article 9 (1) are concerned, they can be applied with limit on scheduled agricultural products but, are strictly prohibited for unscheduled agricultural products. In the case of non-listed export subsidies, there is no reduction commitment and, subject to the anti-circumvention rule, they can be freely applied on any agricultural product, even on unscheduled agricultural products.²⁴⁰

In fact, there are differing opinions as to whether the Agreement on Agriculture permits the application of non-listed export subsidies on unscheduled agricultural products. Primarily, Article 3 (3) of the Agreement on Agriculture provides that:

...a member shall not provide 'export subsidies listed in paragraph 1 of Article 9' in respect of the agricultural products or groups of products specified in section II of part IV of its Schedule in excess of the budgetary outlay and quantity commitment levels specified therein and shall not provide 'such subsidies' in respect of any agricultural products not specified in that section of its Schedule.

As it can be clearly understood from the merit of the above provision, which is the only provision under the Agreement on Agriculture that talks about the requirement

²⁴⁰ Under Article 3(3) of the Agreement on Agriculture, the requirement of scheduling is stipulated only in relation to export subsidies listed in paragraph 1 of Article 9 of the same Agreement.

of scheduling agricultural products, a distinction is made between scheduled and unscheduled agricultural products only in relation to the application of export subsidies that are listed under Article 9 (1) of the Agreement on Agriculture. Hence, there is no specific distinction between scheduled and unscheduled agricultural products as far as export subsidies that are not listed under Article 9 (1) are concerned and, the discipline for such export subsidies is similar regardless of the type of agricultural products involved.

The differing opinion as to the legality of applying non-listed export subsidies on unscheduled agricultural products came from the differing interpretation of Article 10 of the Agreement on Agriculture, which provides that:

Export subsidies not listed in paragraph 1 of Article 9 shall not be applied in a manner which results in, or which threatens to lead to, circumvention of '*export subsidy commitments*'; nor shall non-commercial transactions be used to circumvent such commitments.

Some scholars interpret the phrase '*export subsidy commitments*' in the above provision to mean only reduction commitment - the commitment of members not to provide listed export subsidies to scheduled agricultural products in excess of the scheduled reduction level.²⁴¹ This line of interpretation excludes the commitment of members not to provide at all listed export subsidies to unscheduled agricultural products from the scope of '*export subsidy commitments*' under Article 10 (1) and thus, from the rule of anti-circumvention in the application of non-listed export subsidies. This means, given the fact that Article 10 (1) is the only provision that expressly permits, though indirectly, the application of non-listed export subsidies, the permission to apply non-listed export subsidies is only limited to scheduled agricultural products, they being the only subjects of reduction commitment. In favour of this line of interpretation, one scholar argues:

...one can talk of circumvention of commitments only if the non-listed export subsidies are used on a scheduled product that is

²⁴¹ Desta (2002) 237-8

subject to a commitment in respect of the listed export subsidies. To the extent that no such commitment exists in respect of a given product, it is difficult to talk of circumvention. Consequently, within these limits, non-scheduled agricultural products fall outside the scope of Article 10 of the Agreement on Agriculture.²⁴²

Here, the question is: are the unscheduled agricultural products really excluded from the scope of Article 10 of the Agreement on Agriculture or from the scope of application of non-listed export subsidies? To answer this question, the core issue worth addressing is to find out the meaning of the phrase 'export subsidy commitments' under Article 10 (1) of the Agreement on Agriculture.

Article 3 of the Agreement on Agriculture, captioned as 'Incorporation of concessions and commitments', defines the major commitments of members in the areas of agricultural domestic support and export subsidies. Under Article 3 (3) of the same Agreement, the export subsidy commitments of members are defined as: the commitment not to provide export subsidies listed in Article 9 (1) in respect of scheduled agricultural products in excess of budgetary outlay and quantity commitment levels and, the commitment not to provide at all the same subsidies in respect of unscheduled agricultural products. This means, under Article 10 (1) of the Agreement on Agriculture, members are required not to apply non-listed export subsidies in a manner that circumvents their commitments on scheduled agricultural products and on those that are not scheduled as well. Hence, the permission for the provision of non-listed export subsidies, inferred from Article 10 (1) of the Agreement on Agriculture, is equally applicable both on scheduled and unscheduled agricultural products. In fact, this line of interpretation is supported by the Appellate Body in *US-FSC*,²⁴³ which Appellate Body states that:

In our view, the terms "export subsidy commitments" and "reduction commitments" have different meanings. "*Reduction* commitments" is a narrower term than "export subsidy commitments" and refers only to commitments made, under the first clause of Article 3.3, with

²⁴² Ibid

²⁴³ *United States – Tax Treatment For "Foreign Sales Corporations"* (WT/DS108/AB/R) / DSR 2000:III, 1619

respect to *scheduled* agricultural products... The term "export subsidy commitments" has a wider reach that covers commitments and obligations relating to *both* scheduled and unscheduled agricultural products.²⁴⁴

The requirement of scheduling agricultural products is introduced with a view to prevent expansion in the application of agricultural export subsidies by limiting them only for those members which make a specification and those agricultural products specified in member's schedule of commitment.²⁴⁵ But, when we see the reality in the mid 1990's, 83% of the world export subsidies were given by the EC, while the USA, Norway and Switzerland gave 98% of the remaining 17%.²⁴⁶ All these major providers of export subsidies have already scheduled most of their agricultural products in their schedule of commitment, and thus are allowed to keep on granting export subsidy in a reduced amount.²⁴⁷ Hence, the restriction is essentially effective on those members which have no or a very insignificant share in the provision of agricultural export subsidies. This logically creates a legitimate doubt as to the relevance of the requirement of scheduling in restricting the provision of export subsidies, given the major providers are still in play.

The entire regulatory discipline of export subsidies under the Agreement on Agriculture is best analyzed in *US - FSC*, in which the US tax regime that exempts the foreign trade income of Foreign Sales Corporations from the payment of income tax was challenged by the EC. The USA provided tax exemption only for Foreign Sales Corporations which are engaged in the sale of US products in foreign countries and only to the extent of their income earned from the export of US products.²⁴⁸ The EC challenged the act of USA as a provision of export subsidy in violation of the SCM Agreement and the Agreement on Agriculture.

Taking into account the fact that tax exemption is a practice of forgoing government revenue that is otherwise due, it was obvious, in fact found by the Panel and upheld

²⁴⁴ Paragraph 147 of the Appellate Body Report on *US - FSC* case

²⁴⁵ *Desta* (2002) 235

²⁴⁶ Anderson in Hoekman and Martin (eds) (2003) 46

²⁴⁷ *Desta* (2006) 19

²⁴⁸ Paragraph 11 of the Appellate Body Report on *US - FSC* case

by the Appellate Body, that USA was providing subsidy as per the definition of subsidy under Article 1 of the SCM Agreement.²⁴⁹ Besides, given the fact that the tax exemption was given only in favour of Foreign Sales Corporations and only for their export-related earnings, the subsidy falls under the definition of export subsidy – a subsidy contingent upon export performance.²⁵⁰ After establishing the existence of export subsidy, the next question worth asking is whether the application of this particular export subsidy is in violation of the discipline of export subsidies under the Agreement on Agriculture? In this regard, the Panel sets two criteria to determine if there is any violation of Article 3 of the Agreement on Agriculture. These are: 1) the export subsidy at issue must fall within the list of export subsidies contained under Article 9 (1) of the Agreement on Agriculture and, 2) the export subsidy must be in excess of the reduction commitment levels for scheduled products, or provided at any level for unscheduled products.²⁵¹

In its findings, the Panel classified US's tax exemption regime as an export subsidy provided to reduce the costs of marketing exports of agricultural products under Article 9 (1) (d). Accordingly, the Panel held that USA violates its obligation under Article 3 (3) of the Agreement on Agriculture by the mere provision of export subsidy covered under Article 9 (1) for unscheduled agricultural products and by the provision of the same subsidy for scheduled agricultural products in excess of its commitment level.²⁵²

The matter became more interesting when the Appellate Body, upon challenge by the USA, reversed the Panel's finding of labelling the US income tax exemption regime as an 'export subsidy provided to reduce the costs of marketing exports' under Article 9 (1) (d) of the Agreement on Agriculture. The Appellate Body considered the different costs of marketing as specific costs while it took tax liability as a general cost of business.²⁵³ In reversing the Panel's finding in the categorisation of the US income tax exemption as an export subsidy provided to reduce the costs of marketing exports, the Appellate Body stated that:

²⁴⁹ Ibid, Paragraphs 90-5

²⁵⁰ Ibid, Paragraphs 121 and 141

²⁵¹ Paragraph 7.145 of the Panel Report on *US – FSC* case

²⁵² Ibid, Paragraph 7.159

²⁵³ Paragraphs 129-30 of the Appellate Body Report on *US – FSC* case

Income tax liability under the FSC measures can also be viewed as related to the business of marketing exports only in the very broadest sense. Income tax liability under the FSC measures arises only when goods are actually sold for export, that is, when they have been the subject of successful marketing....if income tax liability arising from export sales can be viewed as among the "costs of marketing exports", then so too can virtually any other cost incurred by a business engaged in exporting. This cannot be what was intended by Article 9.1(d).²⁵⁴

Accordingly, the Appellate Body concluded that the US tax exemption regime forms part of export subsidy measures that are not listed under Article 9 (1) of the Agreement on Agriculture.²⁵⁵ This obviously affected the whole findings of the Panel as far as Agricultural products are concerned since members do not have reduction commitments in the case of agricultural export subsidies that are not listed under Article 9 (1) of the Agreement on Agriculture. Rather, the Appellate Body found that the 'absence of limitation on the amount of exemption' and lack of 'discretion on the side of the USA government' on the application of the tax exemption provide members with a way that threatens to lead to circumvention of their obligations on the provision of export subsidies listed under Article 9 (1) both on scheduled and unscheduled agricultural products,²⁵⁶ which therefore is a violation of Article 10 (1) of the Agreement on Agriculture.

3.4- Trade in Agricultural Products under the Doha Round

The mandate for a post-Uruguay agricultural trade negotiation is derived from Article 20 of the Agreement on Agriculture which requires the initiation of new agricultural trade talks immediately before the end of the implementation period under the Agreement. Accordingly, the ongoing Doha Round, which was launched at the fourth WTO Ministerial Conference in November 2001, places trade in agriculture as one of its core work programmes. In affirming the placement of agricultural issues in the

²⁵⁴ Ibid, Paragraph 131

²⁵⁵ Ibid, Paragraph 142

²⁵⁶ Ibid, Paragraphs 149-53

Doha Round negotiating agenda and setting the overall objective of the Round on agricultural negotiations, the Doha Ministerial Declaration provides:

...Building on the work carried out to date and without prejudging the outcome of the negotiations, we commit ourselves to comprehensive negotiations aimed at: substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support...²⁵⁷

Though the Doha Ministerial Declaration sets March 2003 as the deadline for the establishment of all the modalities for further commitments,²⁵⁸ members did not find it that easy to reach an agreement on any modality by the due date.²⁵⁹ It is later in the 2004 Doha Work Programme²⁶⁰ and the subsequent 2005 Doha Work Programme²⁶¹ that the frameworks for agricultural modalities have been developed. These two Work Programmes came up with various frameworks of modalities on agricultural market access, domestic support and export subsidies, which frameworks are substantially different from the disciplines under the Agreement on Agriculture.

In respect of agricultural market access, an agreement has been reached for the reduction of tariffs from the bound tariff rates that resulted after the implementation of market access commitments under the Agreement on Agriculture.²⁶² However, unlike the Agreement on Agriculture in which a linear cut is made from the average agricultural tariff rate, the framework Agreements set for tariff reduction using a tiered formula with four tariff bands.²⁶³ The tiered formula is more efficient than a linear cut in that under the former, the rate of reduction gets higher with an increment

²⁵⁷ Paragraph 13 of the Doha Ministerial Declaration

²⁵⁸ Paragraph 14 of the Doha Ministerial Declaration

²⁵⁹ The draft modalities prepared by the chairman of the Agricultural Committee immediately before the deadline – the Harbinson Draft, March 2003 (TN/AG/W/1/Rev.1) – failed to get the consensus of all members, leaving them with no agreement on the deadline

²⁶⁰ Doha Work Program, Decision Adopted by the General Council on 1 August 2004, (WT/L/579)

²⁶¹ Doha Work Program, Hong Kong Ministerial Declaration Adopted on 18 December 2005, (WT/MIN(05)/DEC)

²⁶² Paragraph 29 under Annex A of the 2004 Doha Work Program

²⁶³ See paragraph 28 under Annex A of the 2004 Doha Work Program and paragraph 7 of the 2005 Doha Work Program

on tariff rates, thereby deeply affecting high tariffs,²⁶⁴ which are greatly prevalent in the world agricultural market due to dirty tariffication and other downsides of the Uruguay Round Agreement on Agriculture.

There are, however, some other formulas, like the Swiss Formula, which have a more rigorous effect than the tiered formula in deeply reducing high tariffs and harmonising different tariff lines.²⁶⁵ In fact, tariff reduction for non-agricultural market access is agreed to be made using a Swiss Formula with a view to 'reduce or eliminate tariff peaks, high tariffs and tariff escalation'.²⁶⁶ Hence, the tiered formula will provide a relatively moderate liberalisation for agricultural market access, as compared to the Swiss Formula cut for non-agricultural market access; but will noticeably provide a deeper tariff reduction than the linear cut under the Agreement on Agriculture.

Besides, unlike the overall average cut under the Agreement on Agriculture, the tiered formula subjects each tariff line to a particular percentage of tariff reduction depending on the band under which the tariff line falls. This will reduce the discretion of members to decide on the rate of reduction over individual tariff lines and thus, their potential to manipulate the system in favour of their sensitive agricultural products. However, no determination is made under the framework Agreements on the thresholds for each of the four tariff bands and the percentage cut therein. Though, different proposals were made in the post-Hong Kong period,²⁶⁷ no agreement has yet been reached over the threshold points and the rate of reduction.

In addition to the Special Agricultural Safeguard exception under the Agreement on Agriculture, the Doha Round came up with various exceptions from tariff reduction commitment of members in the form of flexibilities for sensitive and special agricultural Products and, through Special Safeguard Mechanisms.²⁶⁸ Accordingly, while all members are given the flexibility to designate certain tariff lines as sensitive

²⁶⁴ See paragraph 29 under Annex A of the 2004 Doha Work Program, see also Desta (2006) 7 and 12

²⁶⁵ Hoekman and Michalopoulos in Hoekman and Ozden (eds) (2006) 545

²⁶⁶ Paragraph 14 of the 2005 Doha Work Program

²⁶⁷ See the June 2006, July 2007 and July 2008 draft modalities on agriculture, all of which came up with different proposals on the thresholds and rate of tariff reduction

²⁶⁸ See paragraphs 31, 41 and 42 under Annex A of the 2004 Doha Work Program and paragraph 7 of the 2005 Doha Work Program

products and deviate, to a certain level, from the ordinary tariff cut on such tariff lines, developing members are provided with an additional flexibility to designate some special products for a lesser rate of tariff reduction.²⁶⁹ Special Safeguard Mechanism is also a developing country version of Special Agricultural Safeguard, which Special Safeguard Mechanism is triggered by an import surge or a price fall in the market of developing members.²⁷⁰

However, both the 2004 and 2005 Work Programmes have failed to determine various issues including: the number of tariff lines that can be designated by members as sensitive or special agricultural products and the extent of deviation available from the ordinary rate of tariff reduction; the point of trigger in an import surge or a price fall for the application of Special Safeguard Mechanism and, the extent of tariff deviation allowed as a safeguard measure. Even though, different proposals were made each year from 2006 up to 2008 in respect of the above market access issues,²⁷¹ none of them succeeded in bringing members into an agreement. In fact, the point of trigger for the application of Special Safeguard Mechanism and, the extent of tariff deviation therein served as the immediate cause for the collapse of the July 2008 Mini-Ministerial Conference,²⁷² which left everything in vain.²⁷³

Regarding the domestic support pillar of agricultural trade, the Doha Round has brought some significant changes over the Uruguay Round disciplines. Primarily, in addition to reduction of outlays on AMS, which essentially is the Amber Box domestic support, the Doha Round introduces a reduction of outlays on the Overall Trade Distorting Domestic Support (OTDS), which is the sum of all outlays on Amber Box domestic support (AMS), *de minimis* level of trade distorting domestic support

²⁶⁹ As per paragraph 41 in Annex A of the 2004 Doha Work Program, agricultural products can be designated as special products based on the criteria of food security, livelihood security and rural development needs.

²⁷⁰ See paragraph 7 of the 2005 Doha Work Program

²⁷¹ The three proposals made from 2006 up to 2008 are: the Draft Possible Modalities on Agriculture, 22 June 2006 (JOB(06)/199); the Draft Modalities for Agriculture, 17 July 2007 (JOB(07)/128) and; the Revised Draft Modalities for Agriculture, July 2008 (TN/AG/W/4/Rev.3)

²⁷² Among the G-7 countries, while developing members propose 15% import surge as the minimal trigger point, developed members had proposed the trigger point to be 40%.

²⁷³ Even though an agreement was reached on significant part of the deal, a disagreement on few issues left the whole deal in vain because of the principle of single undertaking under the WTO - nothing is agreed unless everything is agreed.

and, the Blue Box domestic support.²⁷⁴ In the existence of a reduction discipline over AMS, the major relevance of introducing a limitation on OTDS is controlling the Blue Box domestic support measures the application of which was freely authorised under the Agreement on Agriculture. Hence, the introduction of limitation on OTDS outlays will to some extent address the concern of many members on the unlimited application and adverse effects of the Blue Box domestic support measures, which has been discussed under the previous section.

The reduction of outlays on AMS and OTDS, alike the framework Agreement for tariff reduction, is agreed to be made using a tiered formula but, with three bands.²⁷⁵ Here also, even though no agreement has yet been reached over the threshold outlays for each band and the percentage reduction therein, there is at least a consensus that a member with the highest level of support will be in the top band, the two members with the second and third highest levels of support will be in the middle band and, all the other members will fall in the bottom band.²⁷⁶ As to the notifications made to the WTO Committee on Agriculture, the EC, Japan and USA form the three highest providers of domestic support; EC being the highest provider of trade distorting domestic support will fall in the top band and, the remaining two members will fall in the middle band.²⁷⁷ This makes sense because the above three members provide the significant amount of domestic support outlays, which account for around 95% of the total domestic support outlays notified to the WTO Committee on Agriculture.²⁷⁸ Hence, a deeper cut in the domestic support outlays of these three members will alone bring a significant reform in world agricultural trade.

As far as export subsidies are concerned, a notable development has been achieved during the Hong Kong Ministerial Conference in which members have agreed for the total elimination of all forms of agricultural export subsidies by year 2013.²⁷⁹ Here, it is worth noting that the framework Agreement, unlike the Agreement on Agriculture,

²⁷⁴ See Paragraph 7 under Annex A of the 2004 Doha Work Program

²⁷⁵ See paragraphs 7-9 under Annex A of the 2004 Doha Work Program and paragraph 5 of the 2005 Doha Work Program

²⁷⁶ Paragraph 5 of the 2005 Doha Work Program

²⁷⁷ The bound AMS outlay of the EC, USA and Japan is 67.2 million Euro, 19.1 million dollars and 3.97 billion yen. See <http://www.wto.org/english/tratop_e/agric_e/agric_e.htm> [accessed on 7 January 2009]

²⁷⁸ Josling in McCalla and Nash (eds) (2007) vol.1, 36

²⁷⁹ Paragraph 6 of the 2005 Doha Work Program

makes no distinction among the different forms of agricultural export subsidies, thereby setting the year 2013 for the elimination of all forms of agricultural export subsidies. Moreover, based on the mandate set under Article 10 (2) of the Agreement on Agriculture for the development of internationally agreed disciplines over export credits, export credit guarantees and insurance programmes, the Hong Kong Declaration requires such schemes to be self-financing, applicable in accordance with market consistency and of shorter duration – 180 days and shorter.²⁸⁰

In general, though series of Doha Round trade negotiations were undertaken up to this date, nothing concrete is achieved more than the two framework Agreements. In this regard, the latest and a highly comprehensive Doha Round modalities negotiation was undertaken in the July 2008 Mini-Ministerial Conference, which however was not successful to bring members into an agreement. Hence, agricultural trade, which was subjected to trade distorting practices in the GATT regime and, a modest liberalisation process in the Uruguay Round, still persists in contest. In reflecting the importance of a Doha Round progress for agricultural exporters, especially for developing and least-developed members, the EC Trade Commissioner – Mr. Peter Mandelson - stated that:

...we needed the Doha Round to lock in the openness we have benefited from over the last decade. For developing world, especially the poor, lose of the deal [in the Mini-Ministerial Conference] is loss of the last opportunity to secure farm subsidy reform in the developed world; that alone is a development tragedy.²⁸¹

3.5- Conclusion

Beginning with the GATT exceptions on agricultural market access and export subsidies, the disciplines for trade in agricultural products have faced various deviations from the general principles of the multilateral trading system. Due to the

²⁸⁰ Ibid

²⁸¹ Taken from the speech of Mr. Peter Mandelson, EC Trade Commissioner, at a press conference on 29 July 2008. Available at <<http://www.wto.org>> [accessed on 18 September 2008]

different interests attached to agriculture that countries want to protect, trade in agricultural products is exceptionally subjected to a greater degree of border protection and trade distorting support programmes, as compared to the support and protection provided for non-agricultural products. Such higher degree of agricultural protection and support have become developmental concerns of most developing countries due to the fact that such countries have a comparative advantage and an export interest in agricultural commodities and thus, are looking for a freer trading arrangement.

A reform process towards a freer agricultural trading system has started with the adoption of the Agreement on Agriculture which brought separate and new disciplines on agricultural market access, domestic support and export subsidies. Though members have taken commitments, under the Agreement on Agriculture, for the reduction of agricultural tariffs, outlays on trade distorting domestic support and export subsidies, the net trade liberalising effect of the reform process was modest due to different snags under the Agreement on Agriculture.

In the current Doha Round of trade negotiations, trade in agricultural products is given an important place with a view to further liberalise the world agricultural market in favour of developing countries and fulfil the mandate under Article 20 of the Agreement on Agriculture. Though different attempts were made to conclude a Doha Round agricultural Agreement, nothing concrete is yet achieved other than the 2004 and 2005 framework Agreements which lay down the general formula for the reduction of tariffs, AMS and OTDS and, set the year 2013 for the elimination of agricultural export subsidies. With the collapse of the July 2008 Mini-Ministerial Conference, mainly because of agricultural matters, trade in agricultural products still continues to be among the most contentious areas of the multilateral trading system.

CHAPTER IV – SPECIAL AND DIFFERENTIAL TREATMENT FOR TRADE IN AGRICULTURE AND ITS IMPLICATIONS FOR THE INTERESTS OF AFRICAN COUNTRIES

4.1- The Role of Agriculture and Trade in Agricultural Products in the Economy of African Countries

Of all the economic sectors, agriculture has a central role in the economic growth and social welfare of most developing countries.²⁸² Due to the larger share agriculture has in the national income, employment and export earnings of most developing countries, an overall economic development in such countries is highly reliant on a positive trend in agricultural growth.²⁸³ According to a report by the Director-General of the WTO in 2005, agriculture accounts for one fourth of the Gross Domestic Product (GDP) and employs half of the economically active population in most developing countries.²⁸⁴ It is this strong link agriculture has with the overall economy of most developing countries, coupled with the comparative advantage such countries have in agricultural trade,²⁸⁵ that give the agricultural sector a prominent place in the economic and developmental prospects of most developing countries.

Particularly in Africa, most countries have a comparative advantage in the production and export of agricultural commodities due to the abundance of natural resources and un-skilled labour force in such countries that best fit the agricultural sector.²⁸⁶ Besides, agriculture serves as a major employer; a significant source of income, export and rural livelihood as well as a stimulant for other economic sectors in most African countries.²⁸⁷

²⁸² McCalla and Nash in McCalla and Nash (eds) (2007) vol.1, 2

²⁸³ Ingco and Nash in Ingco and Nash (eds) (2004) 2

²⁸⁴ The WTO Director-General Annual Report (2005) 22

²⁸⁵ Hoekman in Guha-Khasnobis (ed) (2004) 18

²⁸⁶ World Development Report 2008: Agriculture for Development (2007) 35

²⁸⁷ See Paragraphs 1 and 2 of the WTO African Group Joint Proposal on the Negotiations on Agriculture, March 2001 (G/AG/NG/W/142)

As to a study made by the FAO for the year 2004, the average contribution of agriculture in the total GDP of African countries is around 26.3%.²⁸⁸ But this figure, being an average estimate, does not reflect the considerably high economic dependence of some African countries on agriculture. For instance, in the Central African Republic, Chad, Congo Democratic Republic, Guinea-Bissau and Liberia, agricultural GDP covers more than half of each country's total GDP.²⁸⁹

Agriculture is also a major employer in Africa, where an average 58.8% of the economically active population is engaged in agricultural production.²⁹⁰ Given the agrarian economy most African countries have, the employment share of agriculture goes beyond 80% in countries like: Burkina Faso, Burundi, Ethiopia, Guinea, Guinea-Bissau, Malawi, Niger and Ruanda.²⁹¹ The above figures indicate the big role agriculture plays in the economy of most African counties and the relatively greater dependence of the population in such countries on the Agricultural sector, as compared to the situation in most developed countries.²⁹²

Moreover, an average 61% of the population in most African countries live in rural areas where agriculture is the main source of living.²⁹³ In some African countries like: Burundi, Ethiopia, Lesotho, Malawi and Uganda, the rural population accounts for more than 80% of the total population.²⁹⁴ Greater dependence of the African rural population on agricultural activities makes growth in the agricultural sector an indispensable factor for a growth in the income and living standard of this majority section of the rural society.²⁹⁵

Agricultural growth also plays an indispensable role in the alleviation of poverty, given the fact that a higher level of poverty is prevalent in the large rural population.²⁹⁶ As to the 2008 World Development Report, three of every four poor people in developing countries live in rural areas, being dependent on agriculture for

²⁸⁸ <http://www.fao.org/ES/ess/yearbook/vol_1_1/pdf/g02.pdf> [accessed on 24 January 2009]

²⁸⁹ Ibid

²⁹⁰ <http://www.fao.org/ES/ess/yearbook/vol_1_1/pdf/a03.pdf> [accessed on 25 January 2009]

²⁹¹ Ibid

²⁹² For instance, in the USA and Japan, agriculture accounts only for 2% and 3%, respectively, of the total employment and 1% of both countries' GDP for the year 2004

²⁹³ <http://www.fao.org/ES/ess/yearbook/vol_1_1/pdf/a02.pdf> [accessed on 24 January 2009]

²⁹⁴ Ibid

²⁹⁵ Ingco and Nash in Ingco and Nash (eds) (2004) 4

²⁹⁶ Id, 2 and 4

a livelihood.²⁹⁷ Particularly in Africa, it is estimated that 82% of the rural population lives under poverty.²⁹⁸ Hence, agriculture, being a major employer of the African rural population, plays a crucial role in the promotion of rural development and alleviation of poverty in the continent. In asserting this fact, one writer states:

If the development community had to choose just one activity with which to address the first MDG of reducing extreme poverty and hunger in Africa, it should be to produce more food.²⁹⁹

Furthermore, agricultural trade plays a considerable role in the overall economy of most African countries. In an estimate done for the year 2004, the average share of agricultural exports in the total merchandise export of Africa was around 26.6%.³⁰⁰ For some African countries like Benin, Gambia, Guinea-Bissau and Malawi, the share of agricultural exports exceeds even two thirds of the total merchandise export.³⁰¹ Given the natural comparative advantage most African countries have in agriculture and their low level of industrial development, it is not a surprise to see agricultural exports playing a considerable role in the economy of most African countries.

Despite the economic dependence of most African countries on agriculture and engagement of the majority section of the society in agricultural activities, the share of the continent in the world total agricultural export is too small. In the year 2004, Africa contributed only 3.22% to the total world agricultural exports.³⁰² If the contribution of individual countries to the above figure is examined, agricultural exports from five African countries accounted for 53.4% of the total agricultural exports of the continent,³⁰³ while agricultural exports from South Africa alone accounted for 17.7% of the continent's total share in the world agricultural export. This indicates the fact that the relative agricultural export performance of the continent is too small and, even this small amount is dominated by very few African countries.

²⁹⁷ World Development Report 2008: Agriculture for Development (2007) 26

²⁹⁸ World Bank Assistance for Agriculture in Sub-Saharan Africa: An IEG Review (2007) 3

²⁹⁹ Hartmann in World Bank Assistance for Agriculture in Sub-Saharan Africa: An IEG Review (2007) 4

³⁰⁰ <http://www.fao.org/ES/ess/yearbook/vol_1_1/pdf/c03.pdf> [accessed on 25 January 2009]

³⁰¹ Ibid

³⁰² <http://www.fao.org/statistics/yearbook/vol_1_1/pdf/c02.pdf> [accessed on 24 January 2009]

³⁰³ These five African countries are: Cote d'Ivoire, Egypt, Ghana, Kenya and South Africa

Besides, an examination of the export performance of Africa over the past three decades shows that its share in the world agricultural export is in a declining trend, falling from 5.75% in 1979/80 to 3.59% in 1989/90 and then to 3.22% in 2004.³⁰⁴ In general, the agricultural export share of Africa in the world trade is too small, which share is largely dominated by few countries and is also in a declining trend; facilitating marginalisation of the continent in world trade.³⁰⁵ This raises a legitimate question as to how the agricultural export share of Africa is getting smaller while the continent has a natural comparative advantage in agricultural production and trade.

Different factors have made their own contribution to the diminution of the export share of Africa in the world trade. The maintenance of high agricultural tariffs, tariff peaks and tariff escalation by most of the developed countries, which are the major destinations for agricultural exports of Africa, are among the principal impediments on the agricultural export growth of the continent.³⁰⁶ As it was examined in chapter III, most developed countries impose higher tariffs on agricultural imports as compared to the tariffs applied on non-agricultural products. For instance in the EC, where the majority of African agricultural commodities are exported,³⁰⁷ the simple average MFN applied tariff rate on agricultural imports is 15.1%, while the average applied tariff on non-agricultural imports is only 3.9%.³⁰⁸ The maintenance of high agricultural tariffs by major importing countries is detrimental to the trade interests of most African countries as agricultural exporters, since such high tariffs will increase the price of agricultural exports from Africa over the domestic price of agricultural commodities in importing countries, putting the former at a competitive disadvantage.³⁰⁹

Particularly, the escalating nature of tariffs in most developed countries together with the level of processing of agricultural imports play a big role in discouraging developing countries from venturing into the production and export of high value agricultural products and agro-industrial activities that would have enhanced the total value of agricultural exports and the share of agricultural GDP in the total GDP of

³⁰⁴ <http://www.fao.org/statistics/yearbook/vol_1_1/pdf/c02.pdf> [accessed on 24 January 2009]

³⁰⁵ Diao, Dorosh and Rahman (2003) 6

³⁰⁶ Nyangito (2004) 7

³⁰⁷ Agricultural Trade Performance by Developing Countries 1990-99: Background Paper by the Secretariat Revision, January 2001 (G/AG/NG/S/6/Rev.1) 9

³⁰⁸ World Tariff Profiles 2006 (2007) 78

³⁰⁹ Diao, Dorosh and Rahman (2003) 15

such countries.³¹⁰ This is of a particular concern for most African countries which are greatly dependent on the production and export of primary agricultural commodities that are subjects of high price volatility and depression in the world market.³¹¹ Quantifying the benefit of African countries from agricultural trade liberalisation in developed countries, one study has projected that the Sub-Saharan Africa will gain a 14% increase in its non-oil exports if the QUAD countries (USA, EU, Japan and Canada) eliminate their trade barriers facing Africa's exports.³¹²

However, it is important to note that the average bound agricultural tariffs are also higher in most developing countries,³¹³ especially in Africa,³¹⁴ the reduction of which can be considered as a negotiating coin by such countries to get an increased access to the world agricultural market.

The other major barrier to agricultural export growth in Africa is the broad application of agricultural support programs in most developed countries and the resulting distortion in the world agricultural market.³¹⁵ Most developed countries provide generous domestic support and agricultural export subsidies that have a general effect of depressing the world price for agricultural commodities, at the detriment of unsubsidised agricultural products of poor countries which are being knocked out of the world and their own domestic market by cheaper subsidised exports.³¹⁶ This is a serious setback for agricultural export growth in Africa where government spending on agricultural production and export is too low while the production tax farmers are required to pay, is higher.³¹⁷ As to an average estimate done by the World Bank in 2007, only 4% of the total governmental spending in African countries goes to the agricultural sector.³¹⁸ This figure is too small as compared to the total agricultural spending in OECD countries, which is more than twice the total value of agricultural

³¹⁰ Ingco and Nash in Ingco and Nash (eds) (2004) 10

³¹¹ Paragraph 1 of the Modalities for Negotiations on Agricultural Commodity Issues, A proposal Submitted by the African Group to the Special Session of the Committee on Agriculture, June 2006 (TN/AG/GEN/18)

³¹² Osakwe in Morrison and Sarris (eds) (2007) 345

³¹³ Michalopoulos (1999) 16

³¹⁴ There is an average of more than 50% overhang or gap between the average bound and applied agricultural tariff rate in Africa. See Low in Bermann and Mavroidis (eds) (2007) 350-2

³¹⁵ Zunckel (2004) 1

³¹⁶ Diao, Dorosh and Rahman (2003) VII

³¹⁷ Bach and Andersen (2008) 2

³¹⁸ World Development Report 2008: Agriculture for Development (2007) 40

exports from all developing countries.³¹⁹ This generally indicates how little agricultural producers and exporters in African countries are supported by their governments and how much they will be affected by the generous support programs of developed countries.

Besides trade protectionism and agricultural support programmes of most developed countries, the other major factor that has contributed to the decline in the agricultural export share of Africa is the low level of agricultural productivity or supply side constraint that is greatly prevalent in the continent.³²⁰ Unlike the large scale mechanised farming schemes that are widely practiced in most developed and some high income developing countries, agricultural production is predominantly a small scale and 'private family activity' in most African countries.³²¹ Because of under utilisation of irrigation in Africa,³²² agricultural production is highly dependent on natural rainfall and, is exposed to climatic variability in most parts of the continent.³²³ Hence, the predominance of small scale subsistence farming and its high dependence on nature has resulted in the prevalence of low agricultural productivity and food insecurity in Africa which in turn have a negative implication on the agricultural export performance of the continent.

The other related problem of most African countries is a greater dependence on the export of less-diversified primary agricultural commodities.³²⁴ It is estimated in one study that the export of nine Agricultural commodities – banana, cocoa, coffee, cotton, groundnuts, rubber, sugar, tea and tobacco – accounts for 71% of the total agricultural exports from Sub-Saharan Africa.³²⁵ There are even some African countries whose agricultural export is greatly dependent on a single agricultural commodity.³²⁶ This increases the vulnerability of African countries to price depression and volatility in the world market since any fluctuation in the world price

³¹⁹ <http://www.oecdobserver.org/news/fullstory.php/aid/551/why_agriltural_trade_liberalisation_matters.html> [accessed on 6 January 2009]

³²⁰ Aksoy and Beghin in Aksoy and Beghin (eds) (2005) 4

³²¹ World Bank Assistance to Agriculture in Sub-Saharan Africa: An IEG Review (2007) 9

³²² Only 4% of the total cropped land in Africa is irrigated. See Africa Development Indicators (2006) 12

³²³ Id, 14-5

³²⁴ Carl (2001) 19

³²⁵ Nyangito (2004) 4

³²⁶ For instance, tobacco accounts for 70-75% of Malawi's total agricultural export; coffee accounts for 70% of Uganda's total agricultural export and, cotton accounts for 65% of Mali's total agricultural export. See Diao, Dorosh and Rahman (2003) 14

of these dominant agricultural commodities will significantly affect the overall export value of agriculture and economic growth in such countries. For instance, between the years 1997 and 2001, the world price of coffee, cotton, cocoa, sugar and tea, all of which are dominant exports of Africa, have faced a depression by 66%, 39%, 30%, 24% and 17%, respectively, which depression has caused a distress in the economy of those African countries that depend on the export of one or more of the above mentioned agricultural commodities.³²⁷

Based on the above enquiry, the following two sections will examine the various forms of special and differential treatment provisions under agricultural trade disciplines and their effectiveness in addressing the above mentioned agricultural trade and developmental interests of African countries.

4.2- Major Special and Differential Treatment Clauses under Agricultural Trade Rules

As discussed in chapter II, developing countries are provided with various forms of special and differential treatment under the GATT and in the different Agreements under the WTO. As far as agricultural trade is concerned, Article 21 of the Agreement on Agriculture affirms the continued application, on agricultural trade matters, of the GATT 1994 and other multilateral trade Agreements under Annex 1A of the WTO Agreement, subject to the provisions of the Agreement on Agriculture. Hence, unless otherwise expressly provided or practically excluded, all special and differential treatment provisions under the GATT and Annex 1A of the WTO Agreements have an application on trade in agricultural products. In this section, a particular emphasis will be paid to those special and differential treatment clauses which have a specific application on trade in agricultural products.

Though, almost all trade sectors of developing countries earn benefits from the application of special and differential treatment, an effective application of special and differential treatment on trade in agricultural products is of a crucial concern for most developing countries.³²⁸ This is because, the central rationale behind special and differential treatment is to enhance the trade capacity of developing countries for

³²⁷ UNCTAD, 2001

³²⁸ Special and differential treatment for developing countries in the Agreement for Agriculture, A Paper by India in a Special Session of the Committee on Agriculture, 4-6 February 2002

their effective integration in the world trading system;³²⁹ and, agricultural trade is the area in which most developing countries have a greater trade and developmental interest.³³⁰ Accordingly, paragraph 6 under the preamble of the Agreement on Agriculture asserts the central place special and differential treatment provisions have in agricultural trade by making such provisions an integral part of agricultural trade negotiations.

The Agreement on Agriculture incorporates both of the two major categories of special and differential treatment that are examined under section 2.4 – special and differential treatments which involve the positive action of developed members and special and differential treatments in the form of lesser and flexible obligations on developing members.

As a part of the first category of special and differential treatment, the preamble of the Agreement on Agriculture calls developed members to ‘take fully into account the particular needs and conditions of developing country members by providing for a greater improvement of opportunities and terms of access for agricultural products of particular interest’ to developing countries.³³¹ To this effect, developed countries are called to undertake a full liberalisation of trade on tropical agricultural products and other products of particular importance to developing countries in the diversification of production from the growing of illicit narcotic crops.³³²

Though, a general recognition is made of the need for an increased and preferential trading arrangement in favour of major agricultural exports of developing countries, no Article is devoted under the Agreement on Agriculture to give an enforceable nature to the general and discretionary statement under its preamble. The idea of fullest liberalisation of trade in tropical and diversification products by developed countries has been also identified in the 2004 framework Agreement as one of the central issues of the Doha Round agricultural negotiations,³³³ which however is not yet concluded.³³⁴

³²⁹ Kessie in Bermann and Mavroidis (eds) (2007) 13

³³⁰ McCalla and Nash in McCalla and Nash (eds) (2007) vol.1, 2

³³¹ Paragraph 5 under the preamble of the Agreement on Agriculture

³³² Ibid

³³³ Paragraph 43 under Annex A of the 2004 Doha Work Programme

³³⁴ Under Paragraphs 138-39 of the Revised Draft Modalities for Agriculture, a deeper reduction of tariffs on tropical and diversification products is proposed in addition to the tiered formula cut

Most of the special and differential treatment provisions under the Agreement on Agriculture form part of the second category of special and differential treatment which authorises developing members to undertake lesser commitments with greater flexibilities. Accordingly, under almost all the disciplines of agricultural market access, domestic support and export subsidies, developing members are provided with some forms of flexibilities as a policy space.

Under agricultural market access, developing members are allowed to make various deviations from the general principles of 'no application of non-tariff barriers and an average 36%, with a minimum 15%, reduction of agricultural tariffs over six years of implementation period'.³³⁵ Primarily, developing members are given the flexibility, subject to the requirements under Annex 5 of the Agreement on Agriculture, to maintain non-tariff barriers over primary agricultural commodities that are predominant staples in the traditional diet of such countries.³³⁶ This flexibility forms an exception from the general restriction on the introduction or maintenance of non-tariff barriers under Article 4 (2) of the Agreement on Agriculture.

Besides, developing countries are allowed to change their unbound tariff lines with ceiling bindings and then, undertake only two thirds of the ordinary tariff reduction commitment; that is a 24% average tariff reduction commitment with a 10% minimum cut over 10 years of implementation period.³³⁷ This enables most developing members to adopt high ceiling bindings with lower reduction commitment, thereby keeping their agricultural bound tariffs at a higher rate.³³⁸ As a result, the average Post-Uruguay agricultural bound tariff in developing countries has been estimated to be around 60%, which is four times greater than the average agricultural bound tariff of developed countries on the same period.³³⁹

Under the two framework Agreements, concluded subsequent to the Agreement on Agriculture, developing members are provided with a wider range of flexibility even to deviate from their relatively smaller tariff reduction commitment through the

³³⁵ See Articles 4(2) and 15(2) of the Agreement on Agriculture and Paragraph 5 of the Modalities for the Establishment of Specific Binding Commitments under the Reform Programme, December 1993 (MTN/GNG/MA/W/24)

³³⁶ Section B, Paragraph 7 under Annex 5 of the Agreement on Agriculture

³³⁷ See Paragraph 15 of the Modalities for the Establishment of Specific Binding Commitments under the Reform Programme, December 1993 (MTN/GNG/MA/W/24) and Article 15(2) of the Agreement on Agriculture

³³⁸ Gallagher (2000) 42

³³⁹ Matthews (2001) 79

designation of some special agricultural products or the application of Special Safeguard Mechanisms. In recognition of their rural development and food security concerns, flexibility is given for developing members to make a certain deviation from their ordinary level of tariff reduction commitment in relation to some special agricultural products which will be so designated by such members on the criteria of food security, livelihood security and rural development.³⁴⁰

The flexibilities for developing members under agricultural market access are further broadened with the introduction, in the framework Agreements, of Special Safeguard Mechanism the application of which requires the conclusion of the Doha Round with detailed rules on it. Accordingly, developing members are provided with the leverage to have recourse to a Special Safeguard Mechanism and increase tariffs beyond the bound rate in the occasion of an import surge or a price fall.³⁴¹

Though, the detailed rules on the trigger point and safeguarding remedies is not yet agreed, the general application of Special Safeguard Mechanism is very similar to the Special Agricultural Safeguard under the Agreement on Agriculture in that both safeguard measures will be triggered by an import surge or a price fall and, both relieve members from going through the stringent requirements under the Agreement on Safeguards.³⁴² However, the Special Safeguard Mechanism is more flexible than Special Agricultural Safeguard since application of the former, unlike the latter, will not require members to undertake tariffication and reserve such a right under their Schedule of commitment.³⁴³ Hence, those developing members which did not reserve a right for the application of Special Agricultural Safeguard under the Uruguay Round will now have recourse to the Special Safeguard Mechanism without making any reservation of right. This will enable developing members to have quicker access to Special Safeguard Mechanism than to Special Agricultural Safeguards given the fact that only 21 developing members have reserved a right for the application of Special Agricultural Safeguard.³⁴⁴ This holds especially true for

³⁴⁰ Paragraph 41 under Annex A of the 2004 Doha Work Programme and Paragraph 7 of the 2005 Doha Work Programme

³⁴¹ Paragraph 42 under Annex A of the 2004 Doha Work Programme and Paragraph 7 of the 2005 Doha Work Programme

³⁴² See Article 5(1) of the Agreement on Agriculture and Paragraph 7 of the 2005 Doha Work Programme

³⁴³ Ibid

³⁴⁴ Matthews (2005) 6, for the list of WTO members which have reserved a right, see

<http://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd11_ssg_e.htm> [accessed on 25 January 2009]

African members, only 6 of which have reserved a right for the application of Special Agricultural Safeguard³⁴⁵ and none of them has ever exercised their right.³⁴⁶

Most of the above mentioned agricultural market access flexibilities are justified on the ground that tariffs form an important source of government revenue in most developing countries; hence a greater and immediate reduction of tariffs will have a drastic impact on the economy of such countries.³⁴⁷ For instance, as to a study made on Sub-Saharan Africa over the period 2000-2003, tariff revenue has accounted for more than 40% of the total revenue in ten Sub-Saharan African countries.³⁴⁸ Besides, some justify the need for Special Safeguard Mechanisms in favour of developing countries based on the premise that it helps to increase the price of subsidised cheap agricultural imports and thus,³⁴⁹ save domestic producers in developing countries from the price depressing effect of agricultural subsidies of developed members.³⁵⁰

Under the domestic support discipline of the Agreement on Agriculture, developing members are provided with diverse flexibilities in the calculation and reduction of outlays on Amber Box domestic support measures. Regarding the calculation of Total AMS, which is the subject of reduction under the Agreement on Agriculture, developing members are granted with the flexibility to exclude investment subsidies which are generally available to agriculture; agricultural input subsidies generally available to low income or resource-poor producers and, domestic support for diversification from growing illicit narcotic crops – together referred as Development Box –³⁵¹ from the calculation of Total AMS and thus from their reduction commitment.³⁵² Exemption of developing members from undertaking an outlay reduction on the Development Box forms part of the flexibilities in favour of such members because had it not been for the exemption, outlays on the Development

³⁴⁵ The 6 African members are: Botswana, Morocco, Namibia, South Africa, Swaziland and Tunisia

³⁴⁶ See Members' notification on Special Agricultural Safeguard at http://www.wto.org/english/tratop_e/agric_e/agric_e.htm [accessed on 22 March 2009]

³⁴⁷ Jensen (2007) 95-6

³⁴⁸ The ten countries are: Comoros, Gambia, Niger, Benin, Lesotho, Madagascar, Mali, Sierra Leone, Togo and Uganda, See Osakwe in Morrison and Sarris (eds) (2007) 337

³⁴⁹ Id, 99

³⁵⁰ Hoekman, Michalopoulos and Winters in Hoekman and Ozden (eds) (2006) 540

³⁵¹ Matthews (2001) 81

³⁵² Article 6(2) of the Agreement on Agriculture

Box would form part of the Total AMS and be subjected to the general reduction commitment.³⁵³

Besides, as a *de minimis* amount, developing members are allowed to exclude, in the calculation of Total AMS, product specific and non-product specific Amber Box domestic support measures each of which shall not exceed 10% of the total value of production in such countries, while developed countries are entitled to a *de minimis* amount that is smaller by half.³⁵⁴ On the rate of reduction also, developing members have undertaken a lesser rate of Total AMS reduction commitment, which is only two thirds of the reduction commitment by developed members.³⁵⁵

Under the third - export subsidies - discipline of the Agreement on Agriculture, developing members are given several flexibilities from the general obligations on members to cut budgetary outlays on those export subsidies listed under Article 9 (1) of the Agreement on Agriculture by 36% and reduce the volume of subsidised exports by 21%, over six years of implementation period.³⁵⁶ Accordingly, while developing members are required to reduce their budgetary outlays on listed export subsidies and their volume of subsidised exports by 24% and 14%, respectively, the period for implementation of their commitments is extended up to ten years.³⁵⁷

Even among export subsidies listed under Article 9 (1) of the Agreement on Agriculture, developing members are allowed to temporarily set-aside their reduction commitment on those subsidies which are provided to reduce the costs of marketing agricultural exports and grant more favourable internal transport or freight charges for export shipments.³⁵⁸

Lastly, it is worth to point out that least-developed countries are provided with an absolute flexibility under the Agreement on Agriculture and the subsequent framework Agreements. As per Article 15 (2) of the Agreement on Agriculture, least-developed country members are freed from undertaking any reduction commitment under all the three pillars of agricultural market access, domestic support and export

³⁵³ Ibid

³⁵⁴ Article 6(4)(a) and (b) of the Agreement on Agriculture

³⁵⁵ Paragraphs 8 and 15 of the Modalities for the Establishment of Specific Binding Commitments under the Reform Programme, December 1993 (MTN/GNG/MA/W/24)

³⁵⁶ Article 9(2)(b)(iv) of the Agreement on Agriculture

³⁵⁷ Ibid

³⁵⁸ Article 9(4) of the Agreement on Agriculture

subsidies. Hence, such members are entitled to claim all market access benefits resulting from trade negotiations between developed and developing members without contributing any commitment to such negotiations.³⁵⁹ Exemption of least-developed members from reduction commitments and their entitlement to concessions negotiated by other members through non-reciprocity endures in the current Doha Round too with the provisions of the two framework Agreements to this effect.³⁶⁰

4.3- Economic Weight of the Major Agricultural Special and Differential Treatment Clauses for African Countries

The way the WTO functions is based on mercantilist self-interest. It is therefore necessary that [developing] countries should be expected to define their interests in special and differential treatment...³⁶¹

The Doha Ministerial Declaration has identified the provision of operationally effective and enabling special and differential treatment for developing countries in their agricultural trade as one of the major concerns of the Doha Round trade negotiations.³⁶² Such an initiative for reconsideration of the existing special and differential treatment provisions, being an essential move in the evolutionary dynamics of special and differential treatment, poses a question on how much effective and relevant the pre-existing special and differential treatment provisions were for the beneficiaries.

Given the fact that special and differential treatments are meant to address the developmental needs of developing countries and improve the trade terms of the same, an examination of the relevance and effectiveness of special and differential treatment clauses requires a prior identification of the crucial trade and developmental concerns of developing countries. Examination of the relevance and effectiveness of the currently operational special and differential treatment provisions

³⁵⁹ Paragraph 16 of the Modalities for Establishment of Specific Binding Commitments under the Reform Programme, December 1993 (MTN.GNG/MA/W/24)

³⁶⁰ See Paragraph 45 under Annex A of the 2004 Doha Work Programme and Paragraph 142 of the Revised Draft Modalities for Agriculture, July 2008 (TN/AG/W/4/Rev.3)

³⁶¹ Kleen and Page (2005) Executive Summary, VIII

³⁶² Paragraph 13 of the Doha Ministerial Declaration

for agricultural trade of Africa being the central aim of this chapter, the previous two topics have identified the major concerns of Africa in agricultural trade and the currently operating special and differential treatment provisions under agricultural trade rules.

Accordingly, under this section, an examination will be made as to what extent the existing special and differential treatment provisions have addressed the needs of African countries in agricultural trade and which special and differential treatment provisions most facilitate agricultural growth in the continent. To this effect, the existing special and differential treatments under agricultural trade rules are generally grouped into two categories – special and differential treatments under agricultural market access and special and differential treatments under agricultural support programs.

4.3.1- The Use of Special and Differential Treatment under Agricultural Market Access in Africa

It has already been identified under section 4.1 that agricultural exports play a crucial role in the overall economic development of most African countries,³⁶³ which agricultural exports are however greatly hampered by the imposition of high tariffs and tariff escalation in most countries of export destination; the prevalence of volatility on the world price of most primary agricultural commodities; the lack of export diversification and supply side constraints.³⁶⁴ Accordingly, an increase in the export volume and value of agricultural products; substitution of primary commodity exports by high value and value-added agricultural products as well as diversification of agricultural production and export have become the major trade interests of most African countries.³⁶⁵ To meet these interests, what African countries principally need from the multilateral trading system is: an improved access to agricultural markets of major importing countries, which can be gained through greater reduction in the MFN tariff rates and/or deeper and more effective preferential market access schemes; a

³⁶³ Diaz-Bonilla, Robinson, Thomas and Yanoma (2003) 27

³⁶⁴ World Bank Assistance for Agriculture in Sub-Saharan Africa: An IEG Review (2007) 9, see also, Nyangito (2004) 7

³⁶⁵ Paragraphs 9, 12 and 13 of the WTO African Group Joint Proposal on the Negotiations on Agriculture, March 2001 (G/AG/NG/W/142)

deeper reduction of tariff peaks and escalating tariffs as well as, technical assistance for the promotion of productivity and export diversification in the continent.³⁶⁶

However, as identified in the previous section, the special and differential treatment provisions under the market access discipline of the Agreement on Agriculture and the subsequent framework Agreements resemble more lessening in the tariff reduction commitment of developing members through exclusion of some tariff lines from tariffication; imposition of lesser tariff reduction commitment; provision of greater tariff protection for special agricultural products and introduction of Special Safeguard Mechanisms.³⁶⁷ All these flexibilities enable developing members to apply a relatively greater tariff protection on agricultural imports rather than giving better market access for their agricultural exports.

The idea of improving market access opportunities for agricultural exports of developing countries, which is the central concern of most African countries and other developing members, did not get the well deserved attention under the Agreement on Agriculture that provides nothing more than a general aspiration under its preamble.³⁶⁸ Accordingly, agricultural exports of developing countries are left to benefit from the general and discretionary preferential trading scheme under the Enabling Clause, while the issue of tariff peaks and tariff escalation, which are also major concerns of African countries, are left to the ongoing Doha Round trade negotiations.³⁶⁹

Taking the agricultural trade interests of the continent into consideration, the African Group in the WTO Negotiations has presented important market access issues on the Doha Round negotiating table. Underlining the point that most value-added agricultural exports from Africa face substantially higher tariffs in the major export markets,³⁷⁰ the African Group has proposed for a substantial reduction in tariff peaks

³⁶⁶ Paragraphs 2.1 and 2.3 of the Modalities for the Negotiations on Agricultural Commodities Issues: Proposal Submitted by the African Group to the Special Session of the Committee on Agriculture, June 2006 (TN/AG/GEN/18)

³⁶⁷ Annex 5 of the Agreement on Agriculture, Paragraph 7 of the 2005 Doha Work Programme and Paragraph 13 of the Modalities for the Establishment of Specific Binding Commitments under the Reform Programme, December 1993 (MTN/GNG/MA/W/24)

³⁶⁸ Paragraph 5 under the preamble of the Agreement on Agriculture

³⁶⁹ See Paragraph 36 under Annex A of the 2004 Doha Work Programme

³⁷⁰ Paragraph 12 of the WTO African Group: Joint Proposal on the Negotiations on Agriculture, March 2001 (G/AG/NG/W/142)

and tariff escalation facing developing countries' exports, in addition to the provision of improved and binding preferential trade opportunities for agricultural exports from developing countries.³⁷¹ At the same time however, there is a lesser initiative among members of this group to take a reciprocal commitment for liberalisation of one's own trade policies due to their craving for the maintenance of a greater policy space.³⁷² For instance, in its 2001 negotiating proposal, the African Group had proposed the introduction of a special and differential treatment that will exclude all developing members from taking any tariff reduction commitment on key staples under the Doha Round market liberalisation.³⁷³

Besides the undertaking of lesser agricultural reform by developing members, the idea of agricultural non-reciprocity or exemption of least-developed members from the agricultural reform process persists in the Doha Round through the two framework Agreements and the 2008 agricultural draft modalities text.³⁷⁴ Here, the issue worth examining is: whether it is beneficial for developing and least-developed countries to chase after lesser commitments and exemptions from agricultural market reform with the instrumentality of special and differential treatments. This issue is of a particular concern for Africa given the fact that the majority of the world's least-developed countries are found in this continent.

The adoption of a protectionist or inward-looking approach by developing countries in the agricultural trade reform process has its own adverse effect in the agricultural growth of these countries.³⁷⁵ The following discussion will examine two of the general costs of lesser trade liberalisation or exemption from tariff reduction commitment, which costs are: the loss of export opportunities from market liberalisation on sensitive products by the developed members and the loss of efficiency gain from one's own trade liberalisation.

³⁷¹ Paragraph 13 of the WTO African Group: Joint Proposal on the Negotiations on Agriculture, March 2001 (G/AG/NG/W/142)

³⁷² Jensen (2007) 94-5

³⁷³ Paragraph 13 of the WTO African Group: Joint Proposal on the Negotiations on Agriculture, March 2001 (G/AG/NG/W/142)

³⁷⁴ Paragraph 45 under Annex A of the 2004 Doha Work Programme and Paragraph 142 of the Revised Draft Modalities for Agriculture, July 2008 (TN/AG/W/4/Rev.3)

³⁷⁵ Ingco and Nash in Ingco and Nash (eds) (2004) 5

The first down side of special and differential treatments in the form of application of relatively higher agricultural tariff protection by developing members and exemption from tariff reduction commitment by least-developed members is the loss of aggressive negotiating power by such countries to get an improved access for their exports of sensitive agricultural products to the developed countries' markets.³⁷⁶

As a matter of fact, the WTO is a trade organisation; just like developing members, developed members have their own economic, trade and national interests to protect and, will be willing to gratuitously assist the developmental and trade needs of developing members only to the extent that will not jeopardise their own interests. This can be clearly inferred from the preferential trading arrangements of the USA and EU in favour of exports from developing countries. Under the African Growth Opportunity Act (AGOA), which is a preferential arrangement in favour of eligible Sub-Saharan African countries for a duty-free export of products to the USA market, an express limitation is set on product eligibility in that products which are sensitive when imported from African countries are excluded from enjoying any preference.³⁷⁷ The same is true under the 'Everything but Arms Initiative' (EBA) of the EU in which sensitive imports of the EU – banana, sugar and rice – are provisionally excluded from the preferential scheme.³⁷⁸ Such arrangements prove the fact that the charity of developed countries is mostly limited to those areas which are economically and politically less-costly, thereby resulting in the exclusion of most sensitive agricultural imports of developed members from the non-reciprocal Generalised System of Preference.³⁷⁹ Hence, engagement of developing members in reciprocal trade concessions is necessary to motivate developed members to undertake a substantial market access reform on their sensitive agricultural imports, since the existence of reciprocity will render the reform on such sensitive products economically and politically less-costly. Elaborating on this view, two writers' have stated:

Despite the acceptance in the GATT/WTO of the concept of non-reciprocity, the ground reality is that obtaining reciprocal concession by trading partners is politically imperative in all democracies before

³⁷⁶ Ingco and Croome in Ingco and Nash (eds) (2004) 39

³⁷⁷ <http://www.agoa.gov/eligibility/product_eligibility.htm> [accessed on 7 February 2009]

³⁷⁸ <http://ec.europa.eu/trade/issues/global/gsp/eba/index_en.htm> [accessed on 10 February 2009]

³⁷⁹ The WTO Director-General Annual Report (2005) 19-29

any trade liberalisation effort is undertaken affecting sensitive sectors of the economy...when reciprocal concessions are not made by developing countries, their developed partners follow the line of least resistance and make only small reduction of tariffs in sensitive sectors.³⁸⁰

In fact, one of the major reasons for the prevalence of high tariffs in most developed countries on products of greater export interest to developing countries, especially agricultural products, is the undertaking of smaller reciprocal concessions by developing members due to the principle of non-reciprocity in the GATT era and, the adoption of high ceiling bindings and lesser reduction commitments under the Uruguay Round.³⁸¹

Hence, taking into account the crucial role of increased agricultural export in the economy of most African countries and the fact that the significant part of welfare gain from agricultural reform concentrates on the liberalisation of sensitive agricultural products,³⁸² it is logically advisable for African countries to opt for an offensive approach as far as agricultural market access is concerned and press for more special and differential treatment in the form of deeper reduction of MFN agricultural tariff rates by developed members and increased preferential market access opportunities for sensitive agricultural exports, rather than a lesser and flexible market access commitment for themselves.

The second cost of those special and differential treatments which entitle developing members to a relatively higher agricultural tariff protection and exempt least-developed members from tariff reduction commitment is the loss of efficiency gains from one's own trade liberalisation. It is generally true that countries earn increased efficiency gains from their own liberal trade policies³⁸³ and the more flexibility developing members are given to undertake lesser agricultural tariff reduction commitment, the smaller their welfare gain will become from the whole agricultural

³⁸⁰ Hoda and Ashok (2003) 18

³⁸¹ Low in Bermann and Mavroidis (eds) (2007) 342

³⁸² It is estimated by Anderson and Martin that market reform on sensitive agricultural products can bring three quarter of the total welfare gain from agricultural reform. See Anderson and Martin (2005) 1314

³⁸³ Anderson and Martin (2005) 1311

reform process.³⁸⁴ In a projection done on the potential welfare gains that can be earned from the Doha Round agricultural reform, it is established that the efficiency gains of most developing countries will raise if such countries undertake a multilateral agricultural tariff liberalisation with no flexibility in the form of lesser reduction or exclusion from reduction commitment.³⁸⁵ Particularly, in an estimate done for Sub-Saharan African countries, while agricultural reform will contribute 78% to the region's total welfare gain from multilateral trade liberalisation, one third of such welfare gain will come from the liberalisation of their own agricultural trade policies.³⁸⁶ This shows the vital role of agricultural market liberalisation in developing countries, particularly in African countries, for the maximisation of their own welfare gains and, the existence of a considerable welfare loss as an opportunity cost of developing countries' flexibility to undertake lesser agricultural market liberalisation.

Nevertheless, it does not mean that the flexibility to undertake lesser or no agricultural tariff reduction commitment is entirely of no use for developing and least-developed countries. Given the smaller application of agricultural subsidies in most developing countries,³⁸⁷ import duties are the only practically available trade policy instrument that can be used for stabilisation of domestic agricultural markets and protection of domestic producers from cheap and subsidised agricultural imports.³⁸⁸ This holds also true for African countries where the price depressing effects of developed countries' agricultural support programmes is severe.³⁸⁹ However, the market stabilisation role of tariffs can hardly justify the flexibility for lesser tariff reduction commitment in the current Doha Round since developing countries are to be provided with the flexibility to apply Special Safeguard Mechanisms for stabilisation of agricultural markets from an import surge or a price fall.

Besides, the existence of a wider gap between the bound and applied agricultural tariff rates in most developing countries renders a reciprocal market liberalisation in

³⁸⁴ Anderson and Martin in Anderson and Martin (eds) (2006) 31

³⁸⁵ Anderson, Martin and Mensbrugge in Anderson and Martin (eds) (2006) 361

³⁸⁶ Africa Development Indicators (2006) 4

³⁸⁷ Josling in McCalla and Nash (eds) (2007) vol.1, 60

³⁸⁸ Hoekman, Michalopoulos and Winters in Hoekman and Ozden (eds) (2006) 555)

³⁸⁹ Zunckel (2004) 1

such countries an important element of the general agricultural reform.³⁹⁰ Particularly in Africa, the average overhang between the bound and applied agricultural tariff exceeds 50%, which overhang is even more than 100% in some African countries like: Gambia, Lesotho, Malawi, Zimbabwe, Tanzania and Zambia.³⁹¹

In addition to the urge to undertake a lesser degree of liberalisation on their own agricultural tariffs, some preference receiving African countries, together with other preference receiving developing members, have a less-enthusiastic attitude towards a deeper reduction of agricultural tariffs by preference giving developed members because of the fear of losing the margin of preference that they have been enjoying in the pre-reform period.³⁹² In fact, the issue of preference erosion is lately playing a big role in the creation of a division in the negotiating position of African countries as a group.³⁹³

However, as examined in the previous chapters, the Generalised System of Preference is by itself not secured enough to be relied upon. Primarily, due to the discretionary nature of the preferential trading system, there is no assurance for the continued existence of pre-existing preferences.³⁹⁴ Secondly, it is already said that both the scope and level of preference agricultural products are enjoying is much lesser than that of industrial products,³⁹⁵ which is in the reverse of the trade and developmental needs of most African countries. Besides, as examined earlier, a deliberate exclusion is made on sensitive agricultural imports under the AGOA and EBA, which, together with temporary nature of such preferential arrangements, reduces the effectiveness and reliability of the preferential system.

Besides, the significant portion of preferential market access benefits are dominated by few advanced developing members, more than 50% of which benefit is enjoyed

³⁹⁰ Matthews (2005) 5

³⁹¹ Low in Bermann and Mavroidis (eds) (2007) 350-2

³⁹² Zunckel (2004) 1

³⁹³ While most African countries, as agricultural exporters, want a deeper reduction of agricultural tariffs in developed countries, some preference receiving African countries want to maintain their margin of preference through lesser liberalisation of MFN tariffs by preference giving developed countries

³⁹⁴ Garcia (2004) 303

³⁹⁵ The WTO Director-General Annual Report (2005) 19-20

by Brazil, Hong Kong, Korea and Taiwan.³⁹⁶ Hence, rather than the Generalised System of Preference, the best way for African countries to get a secured and predictable access to the world agricultural market is through multilateral tariff liberalisation on MFN basis. Yet, the Generalised System of preference is more relevant for African countries than other forms of special and differential treatment which entitle developing members to the flexibility to take lesser market liberalisation commitments,³⁹⁷ since the major concern of African countries in agricultural trade is an improved market access to their primary and value-added agricultural commodities.

In fact, concerning preferential market access, African countries seem to have a common and strong stand in looking for a broadened and secured preferential access to the markets of major agricultural importing developed members. In this regard, under their joint proposal in 2001, African countries have proposed for all preferential trade arrangements to have a binding power on preference giving members under the framework of the Agreement on Agriculture.³⁹⁸

4.3.2- The Use of Special and Differential Treatment under Agricultural Support Programmes in Africa

Under the domestic support and export subsidy pillars of agricultural trade rules, developing members are allowed to provide agricultural subsidies with wider flexibilities through lesser reduction of AMS and export subsidy outlays; free application of the Development Box domestic support measures; provision of higher *de minimis* amount and temporary exclusion of outlays on some export subsidies from reduction commitment.³⁹⁹

As examined in detail under chapter III, a significant share of the world total agricultural subsidies are provided by developed countries,⁴⁰⁰ the trade distorting

³⁹⁶ Michalopoulos (2000) 10

³⁹⁷ Kessie in Berman and Mavroidis (eds) (2007) 21

³⁹⁸ Paragraph 13 of the WTO African Group: Joint Proposal on the Negotiations on Agriculture, March 2001 (G/AG/NG/W/142)

³⁹⁹ Articles 6(2), 6(4), 9(2)(b)(iv) and 9(4) of the Agreement on Agriculture and Paragraph 15 of the Modalities for the Establishment of Specific Binding Commitments under the Reform Programme, December 1993 (MTN/GNG/MA/W/24)

⁴⁰⁰ Anderson in Hoekman and Martin (eds) (2003) 46

effect of which subsidies is however considerably higher on poor and less-subsidised agricultural producers in developing countries.⁴⁰¹ There are generally two alternative ways available to rectify the damages that arise from the trade distorting agricultural support programmes of developed countries.

The first way is to permit developing countries to provide export subsidies and domestic support measures to a much greater level than that of developed countries so as to compensate the former for the past agricultural trade distortion that has operated at their detriment and thus, bring a trade balance between developed and developing countries. However, this approach will not abolish the ongoing distortion in the world agricultural market; rather it will authorise the continuation of distortion by parties other than those which are responsible for the current distortion.

The alternative way is to abolish future trade distortions and impediments on agricultural exports of developing countries through the total elimination of trade distorting domestic support measures and export subsidies. This way, since both developing and developed countries will provide no trade distorting agricultural subsidies, they will have an equal competition floor in future trade relations and, the past trade distortion and inequality against developing countries can be compensated through technical assistance and/or preferential market access in favour of developing countries. This approach, unlike the first one, can abolish trade distortions while simultaneously bringing the trade equilibrium between developed and developing countries as far as agricultural subsidies are concerned.

If the above two approaches are examined from the view point of developing states, particularly African countries, the first approach is not sound since it is not financially feasible for such countries to provide export subsidies and domestic support measures to an extent that can neutralise the trade distortion created by the export subsidy and domestic support measures of developed countries.⁴⁰² As to the World Development Report 2008, only 4% of the total government spending in most African countries goes to the Agricultural sector.⁴⁰³ This figure is too small as compared to

⁴⁰¹ Josling in McCalla and Nash (eds) (2007) vol.1, 60

⁴⁰² Hoekman, Michalopoulos and Winters in Hoekman and Ozden (eds) (2006) 555

⁴⁰³ World Development Report 2008: Agriculture for Development (2007) 40

the total agricultural support in OECD countries, which roughly is equal to the sum annual GDP of all Sub-Saharan African countries.⁴⁰⁴

As to members' notification to the WTO Committee on Agriculture, the Total bound AMS level of South Africa and Morocco, which are the only two African members with scheduled AMS commitment, is 2,015 million Rand and 706 million DHS, respectively, while the Total bound AMS level of the EC and USA is 67,159 million Euro and 19,103 million USD, respectively.⁴⁰⁵ This shows how small the Total AMS levels of the above two African members is as compared to the scheduled AMS levels of the major developed members. Yet, due to limited financial resources and the existence of other domestic policy priorities, the South African government has provided no Amber Box domestic support measures under any of its report period up until 2008.⁴⁰⁶

In an estimate done for the years immediately before implementation of the commitments under the Agreement on Agriculture, the EU provides 83% of the world export subsidies while export subsidies of the USA, Norway and Switzerland accounts for 98% of the remaining 17% of the world export subsidies.⁴⁰⁷ This indicates the fact that even before a monetary limitation was set on the provision of export subsidies under the Agreement on Agriculture, it was the developed countries that were providing almost all of the world export subsidies and, the application of export subsidies in developing countries, including in Africa, was very insignificant mainly because of financial and not legal limitations.

Besides, the provision of greater amount of export subsidies and domestic support measures should not be a policy choice for African countries since such agricultural support programmes have their own negative economic implications which most African countries can hardly carry.⁴⁰⁸ Ordinarily, the provision of domestic support measures and export subsidies needs reallocation of resources, which are scarce in

⁴⁰⁴ The WTO Director-General Annual Report (2005) 23

⁴⁰⁵ See members' notification on domestic support commitments, available at http://www.wto.org/english/tratop_e/agric_e/agric_e.htm [accessed on 17 February 2009]

⁴⁰⁶ Ibid

⁴⁰⁷ Anderson in Hoekman and Martin (eds) (2003) 46

⁴⁰⁸ Diaz-Bonilla, Robinson, Thomas and Yanoma (2003) 21

all African countries, and, mostly results in allocative distortions⁴⁰⁹ and production inefficiencies on the economy of subsidising countries.⁴¹⁰

However most importantly, even if they want to provide agricultural subsidies and get the financial means to do so, almost all African countries do not even have the option to provide Amber Box domestic support measures and export subsidies due to the requirement of scheduling outlays on agricultural subsidies under the Agreement on Agriculture.⁴¹¹ As it is examined under section 3.3.2, the Agreement on Agriculture restricts the provision of Amber Box domestic support measures only to those members that have scheduled their Total AMS commitment and limits other members to the *de minimis* level.⁴¹² Of all African countries which are members to the WTO, it is only South Africa and Morocco that have scheduled their Total AMS outlays.⁴¹³ Hence, South Africa and Morocco are the only two African countries which can provide Amber Box domestic support measures beyond the *de minimis* level, in accordance with their reduction commitment. Even from the two African countries, it is only Morocco that is in the category of developing members and thus, a beneficiary of special and differential treatment under the WTO. Hence, the flexibilities given for developing members to undertake a lower and slower AMS reduction commitment is totally not relevant for African countries, except for Morocco, since they are denied of the provision of Amber Box domestic support measures in any amount greater than the *de minimis* level.

The same is true for listed agricultural export subsidies the application of which is restricted among 25 members which have scheduled their outlays on agricultural export subsidies.⁴¹⁴ Here also, South Africa is the only African country that has scheduled its export subsidy outlays and thus, is entitled to provide any of those export subsidies listed under Article 9 (1) of the Agreement on Agriculture.⁴¹⁵ But, since South Africa is not a developing member and thus a beneficiary of special and

⁴⁰⁹ Keck and Low (2004) 18

⁴¹⁰ Desta (2002) 312

⁴¹¹ Articles 7 and 3(3) of the Agreement on Agriculture

⁴¹² Article 7 of the Agreement on Agriculture

⁴¹³ <http://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd13_boxes_e.htm> [accessed on 20 January 2009]

⁴¹⁴ Article 3(3) of the Agreement on Agriculture

⁴¹⁵ Josling in McCalla and Nash (eds) (2007) vol.1, 29

differential treatment, the flexibility to undertake a lesser and slower export subsidy reduction commitment under the Agreement on Agriculture works in favour of no African country. In general, the requirement of scheduling outlays on agricultural subsidies renders those forms of special and differential treatment which entitle lesser and slower reduction of AMS and export subsidy outlays for developing countries entirely of no use for African countries.

Hence, the general trade distorting effect of Amber Box domestic support measures and export subsidies largely applied by developed countries, coupled with the financial constraint and legal limitation on African countries not to apply such agricultural support measures makes the elimination or reduction to a very minimal amount of such support programmes in developed countries the only way to bring a fair and market oriented agricultural trading system in the global market.

4.4- Conclusion

An overall economic development in most African countries is directly or indirectly reliant on agricultural growth and particularly on a growth in agricultural exports. This is due to the fact that agriculture serves as a major employer; a significant source of export and income as well as a principal means of rural livelihood in most part of Africa. However, owing to the maintenance of high agricultural tariffs, tariff peaks and tariff escalation by most developed countries; the provision of greater agricultural subsidies by the same as well as the prevalence of low level of agricultural productivity and lack of export diversification in most part of Africa, export share of the continent in the world agricultural trade is too small, which share is also in a declining trend for the past three decades.

The Agreement on Agriculture and subsequent framework Agreements of the Doha Round provide developing members with various flexibilities to apply greater tariff protection and agricultural subsidies in the form of special and differential treatment. Under agricultural market access, while developing members are allowed to undertake lesser tariff reduction commitment, they are also entitled to deviate from their ordinary reduction commitment and impose higher tariffs on the occasion of import surges or price falls or, in relation to some commodities that they designate as

special. Under the disciplines of agricultural subsidies too, in addition to undertaking lesser reduction commitment on Amber Box domestic support measures and export subsidy outlays, developing members are given further flexibilities to exclude certain trade distorting domestic support measures and export subsidies from their reduction commitment. The flexibility gets deeper for least-developed members, which are totally excluded from undertaking any reduction commitment both on their agricultural tariffs and subsidy outlays.

Though most African countries, as developing and least-developed members to the WTO, are given greater flexibilities to maintain higher agricultural tariffs, it is not always in the interest of such countries to maintain high tariffs. By maintaining higher agricultural tariffs, most African countries will forfeit the possibility of getting an improved market access for their agricultural commodities that are import sensitive in most developed countries. Also, the efficiency gains of most developing members from agricultural trade reform diminish with the maintenance of higher agricultural tariffs.

African Countries are not also beneficiaries of most of the flexibilities under domestic support and export subsidy disciplines which entitle developing members to have a greater level of outlays on Amber Box domestic support measures and export subsidies. While the majority of African countries do not even have the right to provide listed export subsidies and exceed the *de minimis* level in their application of Amber Box domestic support measures, those few African members which have reserved a right for the application of Amber Box domestic support measures and export subsidies have also refrained from applying them due to financial constraints and the fear of allocative distortion that follows the application such agricultural support programmes.

CHAPTER V – CONCLUSION AND RECOMMENDATIONS

5.1- Conclusion

Since the conceptual inception of special and differential treatment in the 1950's, developing members of the WTO have been provided with wider ranges of flexibilities and preferences in the multilateral trade arena. Based on the changing trade and economic interests of developing members at different junctures, various exceptions and deviations have been introduced under the rule based multilateral trading system, which have consistently broadened the scope of special and differential treatment.

Though the multilateral trading system was first designed to provide homogeneous rights and obligations to all its members, the prevalence of heterogeneous trade and financial interests among different members at different levels of economic development had hindered the practicability of a 'one size fits all' approach. Accordingly, differentiation in the treatment of developed and developing members and preference in favour of the latter had its foundation in the early days of the GATT with the core aspiration of enhancing the industrial development and export earnings of developing members through their better and easier integration into the multilateral trading system.

However, experience in the last five decades has proved that the application of most special and differential treatment provisions is not as easy and helpful as it appears on print. The principle of non-reciprocity had driven most developing members to become passive participants in the global trading system, only to have it backfire against them resulting in higher tariff regimes for most products of export interest to such members. The discretionary nature of the Generalised System of Preference, together with the prevalent exclusion of products of vital export interest to most developing countries, especially agricultural products, from this system and/or the provision of lesser degree of tariff preference for such products have also impeded the reliability and effectiveness of the preferential trading system as a form of special and differential treatment.

In spite of the fact that foreign earnings of most developing members is greatly dependent on agricultural exports, the global trade in agricultural products has long been the most protected and distorted sector in the multilateral trading system.

Trade in agricultural products is the only sector in the multilateral trading system where quantitative restrictions are not simply abolished but are changed into tariff 'equivalents'; members can still legitimately provide export subsidies and, imports face tariff escalation based on their level of processing. In most developed countries, agricultural tariffs are by far greater than tariffs applied on non-agricultural products, while the level of overhang between bound and applied agricultural tariffs of most developing members is still too high.

The generous agricultural support programmes of most developed members have also played a big role in distorting the global agricultural market to the detriment of poor agricultural producers in developing countries. Trade distorting domestic support measures and export subsidies of most developed members have well contributed to the prevailing price volatility in the world agricultural market that exacerbates the vulnerability of agricultural producers in most developing countries. Trade distorting domestic support measures and export subsidies of developed countries have also contributed to the maintenance of high bound agricultural tariffs by most developing countries since such countries need greater policy space, in the form of higher bound tariffs, for market stabilisation and protection of domestic producers from the adverse effects of developed countries' trade distorting agricultural support programmes.

While the GATT exceptions for the flexible application of quantitative restrictions and export subsidies in relation to agricultural products had initially paved the way for distortion of the global trade in agricultural products, subsequent waivers and derogative authorisations from the general GATT rules have intensified agricultural protectionism and support in most developed countries. Though some new measures were adopted under the Uruguay Round of negotiations for the disciplining of the world trade in agricultural products, the disciplines were not strict enough to eliminate or even considerably reduce tariff peaks, tariff escalation, trade distorting domestic support measures and export subsidies in the agricultural market. So far, the ongoing Doha Round of trade negotiations also bring nothing more concrete than two framework Agreements on agricultural modalities such that agricultural trade continues being the most protected and distorted sector in the multilateral trading system.

Whereas those days when developing members were entitled to simply benefit from negotiated market access opportunities without making any reciprocal concessions are long over, developing members are still provided with diverse flexibilities in their commitments under agricultural market access, domestic support and export subsidy disciplines. Yet, regardless of the fact that most developing countries have a huge export interest in agricultural commodities, the Agreement on Agriculture pays less attention to those forms of special and differential treatment that provide improved market access opportunities for agricultural exports of developing members. Rather, under the Agreement on Agriculture, while developing members are granted greater flexibilities to undertake lesser and slower reduction commitments on agricultural tariffs, trade distorting domestic support measures and export subsidy outlays, least-developed members are totally exempted from undertaking any commitment as a prolongation of non-reciprocity.

Though most African countries, as developing and least-developed members of the WTO, are given greater flexibilities to maintain higher agricultural tariffs, it is not always in the interest of such countries to maintain high tariffs. This is mainly because it discourages developed members from undertaking deeper tariff reduction commitments and/or giving preferential trade opportunities on their sensitive agricultural imports, which is crucial for agricultural export growth of most African countries. Moreover, the more flexibility developing members are given to maintain higher agricultural tariffs, the lesser their efficiency gains will become from the whole agricultural trade reform process.

Most of the flexibilities under domestic support and export subsidy disciplines are also not relevant for African members since almost all of them are prohibited from providing listed export subsidies and applying Amber Box domestic support measures in any amount greater than the *de minimis* level. Even for those few African members which have reserved a right for the application of Amber Box domestic support measures and export subsidies, the flexibility to provide subsidies in a greater amount has proven not to be economically worthwhile, since such countries are not in the financial position to compete with the large scale agricultural subsidies of developed members. Also, the subsidies they provide predominantly form part of the Green Box and Blue Box domestic support measures, the provision

of both of which is not a subject of members' reduction commitments, calling for no special and differential treatment to increase outlays on such domestic support measures.

5.2- Recommendations

Based on the findings and conclusions reached in respect of the economic weight and effectiveness of the different special and differential treatment provisions for African countries, the following measures should be taken into consideration to maximise the benefit of African countries in the global agricultural trade, particularly from the application of special and differential treatments.

First and foremost, taking into account the fact that reduction of tariffs on MFN basis is a more secured means of getting improved market access, African countries should develop an aggressive negotiating approach for a significant reduction of the MFN tariff bindings of developed members on their sensitive agricultural commodities, the importation of which is still highly protected. In this regard, African countries should consider making concessions for the reduction of their bound agricultural tariffs on areas where they have greater tariff overhang, as a negotiating tool to get improved market access in developed countries.

African countries should also challenge the bias against agricultural commodities under the Generalised System of Preference. In this respect, African countries should push for an extension in the scope and degree of preference developed members provide to agricultural commodities and make sure that agricultural products of greater export interest to them are incorporated under the preferential system. Most African countries being least-developed members to the WTO should also press for extension of the duty-free quota-free scheme to all agricultural products of least-developed members so that developed countries will not have the leverage to exclude their sensitive products and products of greater export interest to the beneficiaries from the scheme.

To greatly make use of their comparative advantage in agricultural production, African countries need to create a strong link between their agricultural and industrial sectors as well as expand their export base from primary agricultural commodities to processed and semi-processed agricultural products. This can be achieved through

the provision of incentives for private investments on the production and export of processed and semi-processed agricultural commodities. Such investment is crucial to lessen the vulnerability of African countries from price volatility that is prevalent in the global market for primary agricultural commodities. To this end, African countries should also develop a strong position towards elimination of tariff peaks and tariff escalation on processed and semi-processed agricultural products which greatly discourage exportation of value-added and high priced agricultural commodities.

Regarding trade distorting domestic support measures and export subsidies, African countries should adopt a firm stand for a quicker elimination of both since only agricultural producers and exporters in a few developed countries are great beneficiaries of such support programmes while agricultural producers in most African countries are direct victims of the trade distorting effect of such support programmes. In this regard, African countries should not accept flexibilities for a greater provision of trade distorting domestic support measures and export subsidies as a compromise for the continued application of such trade distorting agricultural support programmes in developed countries since the very provision of export subsidies and trade distorting domestic support measures by most African countries is legally restricted under the Agreement on Agriculture.

Provided that an agreement is reached for the total elimination or substantial reduction of outlays on trade distorting domestic support measures and export subsidies, African countries should develop a political willingness to make reciprocal concessions for the reduction of their high bound agricultural tariffs in exchange for better market access for their agricultural commodities into major export destinations like the EU, especially on sensitive and highly protected areas.

Most importantly, African countries should consider the formation of a strong and effective regional trading block amongst themselves on the basis of the Enabling Clause that provides the possibility for preferential trading arrangements among developing countries on less strict criteria than under the GATT. Given the prevalent proliferation of diverse regional agreements and a consequent overlapping of membership in the continent, African countries need to adopt a consolidated approach and bring the different regional integration efforts together for a deeper and faster regional integration process in the continent. The formation of a strong

regional agricultural market can be an advantageous move for most African countries since the level of distortion of such a regional agricultural market will be lesser, given the fact that developed countries are major providers of agricultural subsidies and so, major distorters of the global trade in agricultural commodities. Hence, the promotion of a regional agricultural market can give African countries the benefit of trading on relatively equal terms and with less distortion which thus, will stimulate them to safely open up their respective domestic agricultural markets without the fear of over flooding of cheaper subsidised imports.

Moreover, increased regional trading can enable African countries to acquire a better trade share in the global agricultural market which in turn will strengthen their bargaining power in the multilateral trading system as a regional block. In general, through the promotion of regional trade among themselves, African countries can minimise the costs and trade barriers their agricultural products face in intercontinental trade. However, to effectively trade among themselves, African countries need to diversify their export basis and improve their supply side capacity for which, they should press for more comprehensive technical and financial assistance through the aid for trade programme.

Generally, African countries should play a proactive role in future agricultural trade negotiations and make sure that their interests and concerns are well accommodated under special and differential treatment provisions. Yet, they should not accept special and differential treatment at the expense of deeper and quicker agricultural reform process since they will benefit more from a freer and market oriented agricultural trading system.

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