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Notes

Cotton, U.S. Domestic Policy, and Trade Wars: The Future of WTO Agriculture Negotiations

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INTRODUCTION

The subject of international trade in agriculture is extremely contentious. In small, undeveloped countries, agriculture represents an accessible means by which governments can establish productive industries to raise the standard of living for its citizens. Viewed from this perspective, one may wonder why negotiations on the further development of an international system to promote fair trade in agricultural products would cause thousands to protest, as was the case in Seattle, Washington in 1999.¹

In the ten years since the creation of the World Trade Organization (WTO), “liberalization” of agricultural trade has developed both positive and negative connotations. In one sense, liberalization holds the promise of an equitable system in which developing countries can gain access to world markets and receive a fair price for their products.² On the other hand, many

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1. See U.S. GEN. ACCOUNTING OFFICE, WORLD TRADE ORGANIZATION: SEATTLE MINISTERIAL: OUTCOMES AND LESSONS LEARNED; TESTIMONY: COMMITTEE ON FINANCE, U.S. SENATE 9 (Feb. 10, 2000), at <http://www.gao.gov/archive/ns00086t.pdf> [hereinafter SEATTLE MINISTERIAL].

2. See Isikeli Maitoga, *The Experience of Developing Countries in the Multilateral Trading System: An Assessment of the Seattle Ministerial and Beyond*, in ESSAYS ON THE FUTURE OF THE WTO: FINDING A NEW BALANCE 47, 49 (Kim Van der

see the WTO as a system that exploits poor countries to the advantage of developed countries and multinational corporations.³ Regardless of these opposing views, the WTO is an international organization through which developing countries have the potential to advocate for themselves and work towards creating a system favorable to their interests, and equitable in its administration.

This Note will analyze how recent developments in WTO agriculture negotiations will impact future negotiations, and subsequently, the likely success of the ongoing Doha Round. Part I analyzes the history of international trade in agriculture under the World Trade Organization and focuses on recent developments relating to ongoing agriculture negotiations. Part II looks at how these recent developments affect the relative negotiating positions of major figures in the ongoing agriculture negotiations. Part III looks at the implications of a new balance in negotiation and argues that, in light of the U.S. position with respect to maintenance of its domestic support programs, litigation will very likely be used by developing countries to enforce compliance with existing agreements. This Note concludes that litigation will not ultimately achieve further liberalization of international trade in agriculture; rather, what is required is restraint on the part of developing nations and a true commitment to liberalization of agriculture by the United States and other developed nations.

I. AGRICULTURE AND THE WORLD TRADE ORGANIZATION: 1995–2004

A. THE URUGUAY ROUND AGREEMENTS: ESTABLISHING A SYSTEM OF TRADE FOR AGRICULTURE

The Marrekesh Agreement, the result of the nine-year Uruguay Round⁴ of negotiations, provided for the establishment of

Borghet et al. eds., 2003).

3. *See id.* at 48.

4. A round is a comprehensive period of negotiations with a set beginning and end, during which a large package of concessions among members is developed and ultimately agreed upon as a single package. U.S. GEN. ACCOUNTING OFFICE, WORLD TRADE ORGANIZATION: CANCUN MINISTERIAL FAILS TO MOVE GLOBAL TRADE NEGOTIATIONS FORWARD: NEXT STEPS UNCERTAIN; REPORT TO CHAIRMAN, COMMITTEE ON FINANCE, U.S. SENATE, AND THE CHAIRMAN, COMMITTEE ON WAYS AND MEANS, HOUSE OF REPRESENTATIVES 3 (Jan. 2004), at <http://www.gao.gov/>

the WTO on January 1, 1995.⁵ The Agreement on Agriculture (AoA),⁶ one of several agreements annexed to the Marrakesh Agreement, was significant because it effectively brought agricultural trade under a system of multilateral rules for the first time, and laid a foundation for further liberalization of agricultural production and trade.⁷ The long-term objective of the AoA is “to establish a fair and market-oriented agricultural trading system.”⁸ To that end, the preamble of the AoA sets out several guiding principles.⁹ Specifically, it is acknowledged that developed countries agree that their market access commitments will take into account the agricultural needs of developing countries in particular.¹⁰ Furthermore, commitments under the reform program should be shared equitably among members, taking into account a number of non-trade related concerns.¹¹ Bearing these principles in mind, the AoA outlines three “pillars”: improving market access,¹² reduction of domestic support programs,¹³ and a broad prohibition on maintenance of export sub-

new.items/d04250.pdf [hereinafter CUNCUN MINISTERIAL].

5. World Trade Organization, *Marrakesh Agreement Establishing the World Trade Organization*, 1867 TREATY SERIES: TREATIES AND INTERNATIONAL AGREEMENTS REGISTERED OR FILED AND RECORDED WITH THE SECRETARIAT OF THE UNITED NATIONS 1 (1998) (I. No. 31874).

6. World Trade Organization, *Agreement on Agriculture*, 1867 TREATY SERIES: TREATIES AND INTERNATIONAL AGREEMENTS REGISTERED OR FILED AND RECORDED WITH THE SECRETARIAT OF THE UNITED NATIONS 410 (1998) (I. No. 31874) [hereinafter AoA].

7. Carmen G. Gonzalez, *Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries*, 27 COLUM. J. ENVTL. L. 433, 440 (2002); see also Hugh Corbet, *Agriculture and Other Items on the World Trade Organization Agenda*, in AGRICULTURE, TRADE, AND THE WTO: CREATING A TRADING ENVIRONMENT FOR DEVELOPMENT 65 (Merlinda D. Ingco ed., 2003).

8. AoA, *supra* note 6, at 410.

9. *Id.*

10. WTO SECRETARIAT, GUIDE TO THE URUGUAY ROUND AGREEMENTS 52 (Kluwer Law International 1999).

11. *Id.* Such concerns include food security, protecting the environment, possible negative effects on least developed countries (“LDCs”) and net food-importing countries, and the integral principles of special and differential treatment. *Id.*

12. The market access commitments of the AoA deal broadly with tariffs, requiring members to establish tariff-only regimes (known as “tariffication”) whereby non-tariff import restrictions are converted into tariff barriers that provide an equivalent level of protection. These levels must then be reduced over the implementation period. *Id.*

13. With respect to domestic support, the concept underlying the AoA is that there are generally two types of support: “Green Box” measures, which have little or no trade-distorting effect, and “Amber Box” measures, which have trade-distorting effects. *Id.* at 56. To be regarded as Green Box, support measures must meet the criteria in Annex 2 to the AoA. *Id.* at 57. Green Box measures are essentially those which are part of a publicly-funded government program, not involving

sidy programs.¹⁴ In order to accomplish the aims of further liberalizing trade, the Marrakesh Agreement calls for Ministerial Conferences to be held every two years,¹⁵ and the AoA itself called for agricultural negotiations to resume through Committee on Agriculture (CoA) meetings by early 2000 in order to agree on further liberalization measures.¹⁶

B. THE EXPERIENCE OF IMPLEMENTING THE AGREEMENT ON AGRICULTURE

1. *Implementation and Developed Countries*

It became clear during the implementation period that the AoA was a good foundation for further liberalization of agricultural trade, but that considerable progress was still necessary.¹⁷ With respect to export subsidies, while the AoA instituted a rigid program of reducing the use of export subsidies, the European Union (EU) continued to rely heavily on such measures through the maintenance of its Common Agricultural Policy (CAP).¹⁸ Because the EU accounts for more than ninety percent of global export subsidy expenditures, continuing negotiations since the AoA have largely focused on reducing EU domestic re-

transfers from consumers, and which do not provide price support to producers. *Id.* Measures that qualify as Green Box are exempt from reduction requirements. *Id.* Trade distorting (Amber Box) practices are measured according to the Total Aggregate Measure of Support (AMS). *Id.* at 58. Base Total AMS for each member is a quantification of all domestic agricultural subsidies during the 1986–88 base period. *Id.* Three types of Amber Box support are exempt from reduction requirements: 1) *de-minimus* support; 2) certain measures to encourage rural and agricultural development in developing countries, and 3) certain direct payments under production-limiting programs (known as “Blue Box”). *Id.*

14. Export subsidies are banned under the AoA unless they qualify under one of four limited exceptions. *Id.* at 59.

15. ASIF H. QURESHI, *THE WORLD TRADE ORGANIZATION: IMPLEMENTING INTERNATIONAL TRADE NORMS 6* (Manchester University Press 1996).

16. *Id.* at 40.

17. See generally Mary E. Burfisher, *Options for Agricultural Policy Reform in the World Trade Organization Negotiations*, in *AGRICULTURE, TRADE, AND THE WTO: CREATING A TRADING ENVIRONMENT FOR DEVELOPMENT* 135 (Merlinda D. Ingco ed., 2003).

18. See *id.* at 143. During the implementation period, the Common Agricultural Policy was the single largest expenditure in the EU budget (42% of total). Because European farmers had come to rely on its generous subsidies, reform was an extremely controversial domestic policy matter. U.S. GEN. ACCOUNTING OFFICE, *WORLD TRADE ORGANIZATION: EARLY DECISIONS ARE VITAL TO PROGRESS IN ONGOING NEGOTIATIONS; REPORT TO CONGRESSIONAL REQUESTERS* 13 (Sept. 2000), at <http://www.gao.gov/new.items/d02879.pdf> [hereinafter EARLY DECISIONS].

liance export subsidies.¹⁹

Of the three pillars, domestic support was the least effective aspect of the AoA in terms of achieving the stated objective of creating a fair and market-oriented agriculture trading system.²⁰ In this respect, the AoA left in place “an uneven playing field of domestic support across countries and commodities.”²¹ Countries with high support levels in the base period have high ceilings that allow continued high support, while countries with no support are constrained in their ability to introduce new domestic support measures.²² The United States typifies the continued high support levels of developed countries. As of 1998, the United States had met only 44.7 percent of its ceiling.²³ In the Organization for Economic Co-operation and Development (OECD)²⁴ as a whole, almost sixty percent of domestic agricultural support is excluded from reduction commitments.²⁵ In fact, during this period, reduction of Total Current AMS was accompanied by an increase in exempt support, particularly Green Box support.²⁶ The United States, EU, and Japan recorded the largest increases in Green Box support.²⁷ The increase in the United States can be attributed to the shift towards decoupled payments under the 1996 FAIR Act,²⁸ which are exempt Green

19. Burfisher, *supra* note 17, at 143.

20. Tim Josling, *Domestic Farm Policies and the WTO Negotiations on Domestic Support*, prepared for INTERNATIONAL CONFERENCE: AGRICULTURAL POLICY REFORM AND THE WTO: WHERE ARE WE HEADING? 4 (Capri, Italy, June 23–26, 2003), at <http://www.ecostat.unical.it/2003agradeconf/invited%20papers/josling.pdf>.

21. Burfisher, *supra* note 17, at 139.

22. *Id.*

23. *Id.* at 141.

24. The OECD is a group of thirty industrialized countries which share “a commitment to democratic government and the market economy.” OECD, *About OECD*, at http://www.oecd.org/about/0,2337,en_2649_201185_1_1_1_1_1,00.html (last visited Oct. 18, 2004).

25. Dimitris Diakosavvas, *The Uruguay Round Agreement on Agriculture in Practice: How Open are OECD Markets?*, in AGRICULTURE, TRADE, AND THE WTO: CREATING A TRADING ENVIRONMENT FOR DEVELOPMENT 21, 43 (Merlinda D. Ingo ed., 2003).

26. *Id.*

27. *Id.* Examples of Green Box support include direct support to farmers that is decoupled from production, payments for relief from natural disasters, and domestic food aid, among many other categories. AoA, *supra* note 6, at 425–29 (Annex 2).

28. David Orden, *U.S. Agricultural Policy: The 2002 Farm Bill and WTO Doha Round Proposal*, WTO NEGOTIATIONS AND CHANGES IN NATIONAL AGRICULTURAL AND TRADE POLICIES: CONSEQUENCES FOR DEVELOPING COUNTRIES 33 (International Food Policy Research Institute Feb. 2003), at <http://www.ifpri.org/divs/tmd/dp/papers/tmdp109.pdf>. For an explanation of decoupled support programs, see *supra* note 27 and *infra* note 124.

Box support under the AoA.²⁹

2. Implementation and Developing Countries

During and after the implementation period, it became apparent to developing nations that the “gospel of trade liberalization,” as embodied in the AoA, was largely illusory.³⁰ This perception can be understood in light of the fact that agricultural trade became a negotiating priority during the Uruguay Round because of vigorous competition between the United States and the EU to expand their shares of international agricultural markets.³¹ As a result, though the text of the AoA was drafted in light of a commitment to reducing trade distorting practices with the special needs of developing countries in mind, the agreement largely reflects the needs and priorities of developed countries at the time.³² As such, many of the economic gains promised to developing countries did not materialize.³³

C. THE DOHA ROUND

1. Launching a New Round

The 2001 Ministerial Conference in Doha, Qatar succeeded in finalizing a declaration,³⁴ known as the Doha Development Agenda (DDA).³⁵ The DDA calls for a new negotiating Round,

29. See John Baffes, *Cotton: Market Setting, Trade Policies, and Issues*, Research Working Paper 3218, DEVELOPMENT PROSPECTS GROUP, THE WORLD BANK 19 (Feb. 2004), available at <http://www.ccawaibl.com/uploads/worldbankcotton.pdf>. In fact, the United States largely relies on domestic support programs, as it has generally low tariffs and few export subsidy programs. Orden, *supra* note 28.

30. See generally Mataitoga, *supra* note 2, at 47–63.

31. Gonzalez, *supra* note 7, at 449–50.

32. *Id.* Through the use of domestic support and export subsidies under the CAP, the EU had changed from a net food importer to a net food exporter. *Id.* at 450. Thus, as the EU was rapidly gaining market share and dumping excess production on world markets, the United States, facing budgetary pressure to reduce agricultural subsidies and hoping to benefit domestic producers by curbing EU use of export subsidies, made agriculture reform a priority of the Uruguay Round. *Id.*

33. Mataitoga, *supra* note 2, at 49; see *supra* notes 17–29 and accompanying text.

34. The previous Ministerial Conference, held in 1999 in Seattle, WA, failed to launch a new round amidst significant world protest. See SEATTLE MINISTERIAL, *supra* note 1, at 3. The failure was largely due to insufficient preparation and an ineffective negotiating structure which excluded a number of developing nations from meaningful participation in negotiations. *Id.* at 2.

35. World Trade Organization, *Doha Ministerial 2001: Ministerial Declaration*,

scheduled to last three years, and to be completed by January 1, 2005.³⁶ The DDA is a “single undertaking,” which means that agreements on different topics must be accepted together as one package.³⁷ As was the case during the implementation period, agriculture continued to be one of the most contentious areas of negotiation, and thus, a cornerstone of the DDA.³⁸ The provisions of the DDA dealing with agriculture mandate further progress, calling for negotiations aimed at accomplishing “reductions of, with a view to phasing out, all forms of export subsidies” for farm products and “substantial reductions in trade-distorting domestic” support schemes, but “without prejudging the outcome” of these talks, and taking into account the need for special and differential treatment for under-developed countries.³⁹

While the Doha Ministerial was declared a success,⁴⁰ the DDA itself largely symbolizes only an agreement for further negotiations, with few substantive commitments.⁴¹ With respect to the provisions on agriculture, the DDA constitutes a good basis for future negotiations because it broadly covers all possible forms of protection, from tariffs to subsidies of all kinds.⁴² The progress made in launching a new round is widely attributed to the leadership of the United States, whose flexibility and stated commitment to accomplishing liberalization through WTO negotiations were crucial in obtaining agricultural concessions from the EU.⁴³ These concessions, in turn, allowed the two parties to

41 INT'L LEGAL MATERIALS 746 (2002), available at <http://www.wto.org> [hereinafter DDA].

36. Raj Bhala, *Challenges of Poverty and Islam Facing American Trade Law*, 17 ST. JOHN'S J. LEGAL COMMENT. 471, 472 (2003). The end-date of the Doha Round has since been postponed indefinitely. See *infra* note 95.

37. See DDA, *supra* note 35, ¶ 47.

38. See Melaku Geboye Desta, *Agriculture and the Doha Development Agenda: Any Hopes for Improvement?*, in ESSAYS ON THE FUTURE OF THE WTO: FINDING A NEW BALANCE 149 (Kim Van der Borghet et al. eds., 2003) (stating that agriculture, as it had been during the Uruguay Round, was the “deal-maker” at the Doha conference); see also EARLY DECISIONS, *supra* note 18, at 12–13.

39. DDA, *supra* note 35, ¶ 13.

40. See Press Release, WTO, Ministerial Conference Ends with Agreement on New Programme (Nov. 14, 2001), at http://www.wto.org/english/news_e/pres01_e/pr255_e.htm.

41. Bhala, *supra* note 36, at 476.

42. Patrick A. Messerlin, *Agriculture in the Doha Agenda, prepared for WORLD BANK ROUNDTABLE ON POLICY RESEARCH IN PREPARATION FOR THE 5TH WTO MINISTERIAL 1* (Aug. 2002), at http://www.econ.worldbank.org/files/25198_wps3009.pdf.

43. EARLY DECISIONS, *supra* note 18, at 28.

work together to forge a consensus among other WTO members,⁴⁴ many of whom are developing countries with diverse interests.⁴⁵

After the conclusion of the Ministerial Conference in Doha, the difficult task still lay ahead:⁴⁶ the DDA called for agriculture modalities to be established by March 31, 2003.⁴⁷ Modalities were a crucial next step in the negotiating process because they set out a framework for the continuation of negotiations by “giving members a broad outline of goals and targets for the further liberalization of agriculture trade and the time lines for achieving them.”⁴⁸ The modalities were to be used by member countries in the preparation of their country-specific reduction commitment offers which, under the Doha timetable, were due at the fifth Ministerial Conference held in Cancun, Mexico in September, 2003.⁴⁹

2. *Problems in Furthering the Round*

a. Failure to Reach the March 31, 2003 Agriculture Modalities Deadline

Ongoing agricultural negotiations hit a potentially fatal stumbling block when negotiators failed to reach the March 31, 2003 modalities deadline.⁵⁰ The negotiations had covered a broad range of agricultural liberalization issues, and little progress was made because countries had become deeply entrenched in their positions and unwilling to make concessions.⁵¹ Specifically, sharp differences over issues such as the formula for cutting tariffs, types of subsidies disciplined, and the extent to which developing countries should be granted favorable terms resulted in the failure to reach an agreement.⁵² Despite the im-

44. *Id.* at 7.

45. *See id.* at 18–19.

46. *See id.* at 12.

47. DDA, *supra* note 35, ¶ 14.

48. Daniel Pruzin & Joe Kirwin, *Trade Diplomats Downplay Impact of Missed Deadline in WTO Farm Talks*, 20 INT'L TRADE REP. (BNA) 587, 587 (Apr. 3, 2003).

49. *Id.*

50. *See Agriculture Modalities: Deadline Missed, Eyes Now on Cancun*, 7 BRIDGES-WEEKLY TRADE NEWS DIGEST (Apr. 2, 2003), at <http://www.ictsd.org/weekly/03-04-02/story1.htm> [hereinafter *Agriculture Modalities*].

51. *See id.*

52. Daniel Pruzin, *Trade Officials End WTO Meeting on Doha with Few Signs of Progress*, 20 INT'L TRADE REP. (BNA) 629, 629 (Apr. 10, 2003).

portance of establishing a draft text on modalities,⁵³ member countries and WTO officials downplayed the failure and remained optimistic that a modalities draft could be worked out before Cancun.⁵⁴ Domestic policy issues of the EU and United States, which are discussed below, played a significant part in this failure.⁵⁵

The United States was widely criticized for enactment of its 2002 Farm Bill,⁵⁶ which was seen by many WTO member countries as a retreat from existing agricultural liberalization commitments.⁵⁷ This legislation was of particular concern to the international community because 1) it was argued that the Farm Bill would cause the United States to exceed its Uruguay Round limit on domestic support subsidies,⁵⁸ and 2) given that WTO members were then in the process of negotiating further reductions in farm subsidies and liberalization of agricultural trade, it was seen to seriously undermine the negotiations.⁵⁹ These claims were particularly important, as the United States is recognized as a key leader in agricultural negotiations.⁶⁰ In the face of severe criticism, the United States defended the Bill by arguing that under AoA commitments, it is allowed to provide \$19.1 billion a year in trade-distorting domestic support, and that domestic support provided by the 2002 Farm Bill will not result in that limit being exceeded.⁶¹

53. See *supra* notes 48–49 and accompanying text.

54. See Press Release, WTO, Farm Talks Miss Deadline; but 'Work Must Go On', Says Supachai, (Mar. 31, 2003), at http://www.wto.org/english/news/new_e/pr03_e/pr336_3.htm.

55. See CANCUN MINISTERIAL, *supra* note 4, at 10.

56. Farm Security and Rural Investment Act of 2002, 7 U.S.C. § 7901 et. seq. (West Supp. 2004) [hereinafter 2002 Farm Bill]. The Bill boosted government support for certain crops and dairy products by approximately \$6.4 billion annually over six years. Gary G. Yerkey, *Zoellick Calls EU Charges of Protectionism 'Sanctimonious,' Defends Farm Bill Subsidies*, 19 INT'L TRADE REP. (BNA) 915, 915 (May 23, 2002). The 2002 Farm Bill does not impose new market access restrictions nor does it increase agricultural export subsidies; it addresses only domestic agricultural support. Fact Sheet, United States Embassy, Tokyo, Japan, USTR Describes Farm Bill in Context of Other WTO Members' Support Limits, at <http://japan.usembassy.gov/e/p/tp-20030911b3.html> (last visited Oct. 2, 2004).

57. Daniel Pruzin, *Farm Bill Will Not Impact Doha Round Agriculture Negotiations, Allgeier Claims*, 19 INT'L TRADE REP. (BNA) 1292, 1293 (July 25, 2002).

58. Derrick Cain et al., *Senate Passes Farm Bill After House Vote; Supporters Defend Against Foreign Criticism*, 19 INT'L TRADE REP. (BNA) 830, 830 (May 9, 2002).

59. Pruzin, *supra* note 57, at 1293.

60. See *supra* notes 43–45 and accompanying text; ORDEN, *supra* note 28, at 33.

61. Gary G. Yerkey, *New Farm Bill Will Not Cause U.S. to Violate its Commitments in WTO, U.S. Official Says*, 19 INT'L TRADE REP. (BNA) 953, 954 (May 30,

Despite widespread criticism of the 2002 Farm Bill, fault for the failure to reach agreement on the modalities text is commonly attributed to the European Commission (EC).⁶² As a result of an internal EU mid-term review of the CAP in June of 2003, the EC was unable to demonstrate flexibility with respect to the phasing out of export subsidies.⁶³ The EU's inflexibility was extremely problematic because the elimination of export subsidies continued to be a main focus of negotiations.⁶⁴ Thus because the EU, in addition to a number of other developed countries, was unable to demonstrate flexibility in the negotiation process as a result of domestic political forces, negotiators were unable to reach agreement.⁶⁵

b. Collapse of the 2003 Cancun Ministerial

The 2003 Cancun Ministerial, like the Seattle Ministerial in 1999, failed in achieving an agreement.⁶⁶ The objective of the Cancun Ministerial was to assess the progress of current negotiations, and provide political impetus and a framework for further progress with the round.⁶⁷ The Ministerial meeting had begun cautiously, as little progress had been made in negotiations during the year prior to the conference, largely due to concern over the CAP.⁶⁸ While the Ministerial failed for a number of reasons, agricultural negotiations remained a cornerstone of the overall negotiations, and failed to make significant pro-

2002); *cf. supra* text accompanying note 23 (noting that the United States had met only 44.7% of its ceiling on permitted domestic support under the AoA).

62. *Id.* The European Commission negotiates trade agreements on behalf of the European Union member countries. *Id.*

63. See *Agriculture Modalities*, *supra* note 50.

64. See Burfisher, *supra* note 17, at 143.

65. See *Agriculture Modalities*, *supra* note 50.

66. STAFF OF HOUSE COMM. ON WAYS AND MEANS, 108TH CONG., REPORT ON TRADE MISSION TO THE WTO MINISTERIAL MEETING IN CUNCUN, WMCP: 108-9, at 1 (Comm. Print Sept. 2003) [hereinafter TRADE MISSION], available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_ways_and_means_committee_prints&docid=f:91324.pdf.

67. STAFF OF HOUSE OF COMMONS INT'L DEV. COMM., TRADE AND DEVELOPMENT AT THE WTO: LEARNING THE LESSONS OF CUNCUN TO REVIVE A GENUINE DEVELOPMENT ROUND, HC 92-1, at 6 (First Report 2003-04) [hereinafter LESSONS OF CUNCUN], available at <http://www.publications.parliament.uk/pa/cmintdev/92/92.pdf>.

68. CUNCUN MINISTERIAL, *supra* note 4, at 7. After considerable internal debate, the EU agreed to CAP reform, including introduction of decoupled support programs. *Id.* Even after the reform was announced, WTO members were still unsure whether the stated reforms would result in a significantly ambitious negotiating proposal. *Id.*

gress.⁶⁹ Three issues were of particular significance: 1) the inability of the EU, Japan, and Korea to negotiate ambitious liberalization in agricultural trade,⁷⁰ 2) the newly-created G20 group of developing countries' opposition to proposed plans on the ground that they were not drastic enough in liberalizing agricultural trade,⁷¹ and 3) the insistence of four African countries that support and subsidies on cotton be eliminated immediately.⁷²

The Sectoral Initiative in Favour of Cotton,⁷³ proposed by four West and Central African countries, brought the issue of domestic support of cotton to the forefront of overall WTO negotiations.⁷⁴ The Initiative stated that LDC-countries have made strenuous efforts to comply with all WTO agriculture liberalization objectives, and despite becoming among the most efficient producers of cotton, all resulting economic benefits are nullified by the domestic support programs of developed countries.⁷⁵ It singled out the United States, EU, and China as the largest subsidizers of cotton,⁷⁶ and claimed that their domestic support programs were significantly driving down world prices.⁷⁷ Con-

69. LESSONS OF CANCUN, *supra* note 67, at 6.

70. See *supra* text accompanying note 65.

71. CANCUN MINISTERIAL, *supra* note 4, at 14–15. The Cairns Group—Argentina, Australia, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Paraguay, the Philippines, South Africa, Thailand, and Uruguay—is a group of net-agriculture exporting countries that has often sided with the United States on an ambitious liberalization agenda. *Id.* at 11. The emergence of the G20—a group fluctuating in number, more diverse than the Cairns Group, but with significant overlap in membership—was important because it pushed for even more drastic liberalization proposals, openly criticized proposals by a number of developed countries, and was in turn criticized by developed countries for its aggressive negotiating tactics. *Id.* at 14–15.

72. *Id.* at 15. These countries were Benin, Burkina Faso, Chad, and Mali. LESSONS OF CANCUN, *supra* note 67, at 20.

73. Joint Proposal by Benin, Burkina Faso, Chad & Mali, Poverty Reduction: Sectoral Initiative in Favour of Cotton, TN/AG/GEN/4 (May 16, 2003) [hereinafter Sectoral Initiative], available at http://docsonline.wto.org/gen_home.asp?language=1&_=1. The document WT/MIN(03)/W/2 (Aug. 15, 2003) is the actual document presented at the Cancun Ministerial.

74. INT'L CENTRE FOR TRADE AND SUSTAINABLE DEV., AGRICULTURE NEGOTIATIONS AT THE WTO, Q. INTELLIGENCE REP. NO. 10, at 8 (Mar. 2004), at <http://www.ictsd.org/issarea/attd/products/docs/AgricultureNegotiations10.pdf>.

75. Sectoral Initiative, *supra* note 73, ¶¶ 1, 3.

76. *Id.* ¶ 16 (stating that combined support given by these three countries was estimated at US\$6 billion in 2001–02 and concluding that the WTO objectives of phasing out production and export subsidies have not been achieved in the case of cotton).

77. *Id.* ¶¶ 21, 23 (stating that “[i]t has been established that there is a link between large-scale subsidies and the collapse in global cotton prices over the past

sequently, the countries demanded that cotton support programs be immediately eliminated, and farmers in developing countries compensated for losses suffered during the phasing-out of such programs.⁷⁸

The absoluteness and immediacy of this proposal underscores the significance of the cotton issue: cotton is the single most important textile fiber in the world, and accounts for thirty to forty percent of export earnings, and in the four African countries who tabled the proposal, between five to ten percent of gross domestic product (GDP).⁷⁹ The international market has been subject to considerable market intervention in the United States and EU, two of the largest and most inefficient producers of cotton.⁸⁰ This movement was, therefore, a specific demonstration of developing countries' general frustration over the refusal of the United States and EU to make significant cuts to their harmful domestic support programs.⁸¹ Despite support from a number of countries, the United States refused to specifically address immediate elimination of cotton support programs during the Ministerial and afterwards.⁸² Rather, the United States tabled a proposal which focused on the elimination of tariffs on textiles and garments and restructuring aid for African cotton industries; the U.S. proposal and the compromise proposal of Director-General Supachai were not well received by the African countries.⁸³

c. Effective Participation is a Resource-Intensive Endeavor

A contributing factor to ongoing difficulties in the negotiating process has been ineffective participation on the part of developing countries. Maintaining a constant presence in the daily operations of the WTO—small-scale meetings, informal re-

decade," and citing in support the fact that during the period 1999/2000–2001/02, while production increased by 14 percent, export earnings fell by 31 percent).

78. *Id.* ¶¶ 26, 35–39.

79. SECTORAL INITIATIVE, *supra* note 73, ¶ 9; *see also* BAFRES, *supra* note 29, at *v*.

80. *See* BAFRES, *supra* note 29, at *v–vi*. The U.S. cotton sector is expected to receive approximately \$4 billion in support through 2008, which means U.S. producers will receive close to twice the world market price for their cotton. *Id.* at 13; *see also* Dennis T. Avery, *Should U.S. Try to Derail WTO Decision on Cotton Subsidies?*, COLUMBUS DISPATCH, June 21, 2004, at 7A.

81. *See generally* BAFRES, *supra* note 29.

82. *See* Daniel Pruzin, *EU to Reaffirm Initiative to Address African Demands on Cotton Subsidies*, 21 INT'L TRADE REP. (BNA) 271, 271 (Feb. 12, 2004).

83. *Id.*

lationship-building, etc.—in Geneva requires extensive financial, intellectual, and personnel resources.⁸⁴ Many developing countries do not, however, have the requisite resources at their disposal to ensure an effective presence in routine, but important, processes in Geneva.⁸⁵ To address this problem, the WTO has a program to provide assistance, which enables developing nations to better participate in day-to-day processes at the WTO.⁸⁶ Unfortunately, this fund has not proven effective in overcoming the fundamental problems developing countries experience in maintaining a presence like that of major countries such as the United States, and significant disparities continue to exist.⁸⁷

D. RECENT DEVELOPMENTS: SIGNIFICANT CHANGES IN THE DYNAMICS OF NEGOTIATION

1. *Expiration of the "Peace Clause"*

The "Peace Clause" of AoA Article 13 was an important factor in agricultural trade negotiations from 1995 through 2003. Under the terms of the Peace Clause, most WTO dispute settlement challenges against a country's agriculture programs were precluded so long as subsidies conformed to liberalization commitments under the AoA.⁸⁸ Thus, while the United States and EU were required to reduce existing domestic subsidies and banned from enacting new export subsidies under the AoA, they were allowed to maintain annual government support at a combined level of US \$150 billion annually, without the possibility of legal challenge from other countries.⁸⁹

This protection ended on January 1, 2004, when the Peace Clause expired.⁹⁰ As a result, the full substantive and legal apparatus of the WTO is, for the first time, available to member countries for challenging EU and U.S. agricultural subsidies.⁹¹

84. See Bhala, *supra* note 36, at 488–89.

85. *Id.*

86. *Id.*

87. *Id.* at 489.

88. Richard H. Steinberg & Timothy E. Josling, *When the Peace Ends: The Vulnerability of EC and US Agricultural Subsidies to the WTO Legal Challenge*, 6 J. INT'L ECON. L. 369, 369 (2003).

89. *Id.* at 370.

90. *Id.*

91. *Id.*

In light of the increasing frustration of developing countries over the lack of progress in agriculture liberalization negotiations, many commentators have forecast that developing countries will turn to WTO litigation to achieve their aims.⁹² The case brought by Brazil against the U.S. cotton subsidies is seen as possibly the first case in a new type of “trade war.”⁹³

2. Agreement on the DDA Mandated Framework for Agriculture Modalities

By July of 2004, the WTO had come to an almost complete standstill as a result of the divide created in the wake of the failed Cancun Ministerial.⁹⁴ The WTO had imposed upon itself the end of July 2004 as a deadline for drafting an agriculture framework.⁹⁵ It was widely feared that failure to meet the deadline would do irreparable harm to the Doha Round and the WTO itself.⁹⁶

Despite last minute doubts as to whether a framework would be agreed upon, an “historic” twelve-hour negotiating session on July 31 resulted in a broad policy framework.⁹⁷ The framework was hailed by many officials as a “milestone” that cleared the way for framework negotiations in other areas, thereby re-energizing the stalled DDA negotiations.⁹⁸ The United States continued to act as a leader in the process, demonstrating and stressing the need for flexibility and submitting

92. See Michael D. Goldhaber & Matt Fleischer-Black, *Trade Wars*, THE AMERICAN LAWYER, Mar. 2004, at 14; *Unpicking Cotton Subsidies*, THE ECONOMIST, April 30, 2004, available at http://www.economist.com/agenda/displayStory.cfm?story_id=2626900.

93. *Unpicking Cotton Subsidies*, *supra* note 92; see discussion *infra* Parts I.D.3, II–III.

94. See, e.g., Ashfaq Bokhari, *Major Bid to Salvage Doha Talks*, DAWN, July 19, 2004, at <http://www.dawn.com/2004/07/19/eb8.htm>.

95. Int'l Centre for Trade and Sustainable Dev., *WTO: July Framework Agreed at Eleventh Hour*, 8 BRIDGES WEEKLY TRADE NEWS DIGEST, Aug. 3, 2004, at <http://www.ictsd.org/weekly/04-08-03/story1.htm> [hereinafter *Eleventh Hour*]. While the original March 31, 2003 deadline was for establishing a modalities text, given the substantial difficulty of arriving at any kind of agreement, the self-imposed July deadline aimed only at establishing a more general framework. See *id.*

96. Bimal Ghosh, *Trade Jitters*, THE WALL STREET J. EUR., July 29, 2004, at A7.

97. Gary G. Yerkey, *Farm Deal Clears Way for Broader Pact Setting Framework for Future WTO Talks*, 21 INT'L TRADE REP. (BNA) 1304, 1304 (Aug. 5, 2004); see also Christopher S. Rugaber, *WTO Framework Makes 'Historic' Changes to Farm Trade Talks*, *Johnson Says*, 21 INT'L TRADE REP. (BNA) 1340, 1341 (Aug. 12, 2004).

98. Yerkey, *supra* note 97, at 1304.

draft proposals to move negotiations forward.⁹⁹

The "July Package"¹⁰⁰ essentially narrows the parameters for future negotiations on trade in agriculture, industrial goods, services, and other areas.¹⁰¹ While the framework is itself an extremely significant accomplishment, there is still much work ahead because modalities of substance remain to be negotiated.¹⁰² As with the DDA generally, the provisions which deal with the three agriculture "pillars" are central to the July Package.¹⁰³

The final text of the July Package reflects the fact that the EU had by this time agreed to eliminate its use of export subsidies.¹⁰⁴ Thus, with respect to export subsidies, the agreement uses strong language which aims at the elimination of export subsidies by a certain, but currently undetermined date.¹⁰⁵ The market access provisions, while not eliminating use of tariffs, call for relatively straightforward reductions through use of a to-be-determined formula, by which tariffs will be grouped into tiers and reduced in varying degrees.¹⁰⁶

Unlike the other two "pillars," which represent an agreement to work towards further reductions, the market access provisions are a combination of reductions and redefinitions, which have a much more uncertain result. Members agreed to reduce overall trade distorting support by twenty percent.¹⁰⁷

99. Daniel Pruzin, *WTO Ag Chair Sees Market Access Progress*, 21 INT'L TRADE REP. (BNA) 1092, 1094 (July 1, 2004) (discussing United States's draft proposal); see also Rossella Brevetti, *Supachai Stresses U.S. Leadership in WTO; Says U.S. Elections Will Not Impede Progress*, 21 INT'L TRADE REP. (BNA) 385, 385 (Mar. 4, 2004) (statement of Supachai) ("The reality is this: when the U.S. leads, the system can move forward; when it withdraws, the system drifts.")

100. The July Package is the name by which the WTO refers to the July 31 framework. General Council, *Decision Adopted by the General Council on 1 August 2004*, Annex A, WT/L/579, available at http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm [hereinafter July Package].

101. Rugaber, *supra* note 97, at 1340.

102. *Eleventh Hour*, *supra* note 95. The end-date of January 1, 2005 was postponed indefinitely in recognition of the significant work ahead. *Id.*

103. See July Package, *supra* note 100, Annex A (provisions on agriculture constitute approximately half of the framework).

104. See Daniel Pruzin, *Agriculture Official Says EU Ready to Move on Subsidy Demands, Subject to Conditions*, 21 INT'L TRADE REP. (BNA) 722, 722 (Apr. 29, 2004); see also CUNCUN MINISTERIAL, *supra* note 4, at 7; cf. *supra* notes 18–19.

105. July Package, *supra* note 100, Annex A, ¶ 17.

106. *Id.* ¶ 27–28.

107. Int'l Centre for Trade and Sustainable Dev., *The Main Features of the Agriculture Modalities Framework*, 8 BRIDGES MONTHLY REV. 3, 3 (July–Aug. 2004), at <http://www.ictsd.org/monthly/bridges/BRIDGES8-7.pdf> [hereinafter *Main Features*]. Under the July Package, trade distorting support compromises final bound total

However, after the focus of negotiations shifted away from export subsidies, the United States insisted upon redefinition of the Blue Box to accommodate U.S. counter-cyclical payments.¹⁰⁸ Despite proposals of developing countries since Cancun, which have called for elimination of the Blue Box, and intense last-minute negotiations on the topic, U.S. demands were included in the framework, essentially creating a new category of exempt support.¹⁰⁹ The impact of this Blue Box redefinition is unclear, as the domestic support provisions may limit this new flexibility by requiring further negotiation of “additional criteria” to ensure that Blue Box Payments “are less distorting than AMS measures,” take into account other WTO rights and obligations, and “will not have the perverse effect of undoing ongoing reforms.”¹¹⁰ In addition to the redefined Blue Box, the impact of the July Package on domestic support programs is unclear due to the inclusion of language calling for review and clarification of the Green Box, “with a view to ensuring that Green Box measures have no, or at most minimal, trade-distorting effects or effects on production.”¹¹¹

Continuing calls for action by the authors of the Sectoral Initiative in Favour of Cotton led to a partial resolution of the matter through last-minute negotiations and subsequent inclusion of provisions in the July Package.¹¹² The framework incorporated a separate provision which states that the cotton issue will be dealt with “ambitiously, expeditiously, and specifically” within the WTO agriculture talks.¹¹³ To ensure such treatment of the matter, the July Package calls for creation of a subcommittee and states that the CoA must ensure “appropriate priori-

AMS, permitted *de minimus* levels, and permitted Blue Box levels. *Id.* In addition to this general reduction, Amber Box support will eventually be cut and *de minimus* support reduced. *Id.*

108. Daniel Pruzin & Gary G. Yerkey, *Delays Occur in New WTO Framework Text; Ag Chair Warns Draft is Substantially Revised*, 21 INT'L TRADE REP. (BNA) 1266, 1266–67 (July 29, 2004). Counter-cyclical payments are an income safety net, where payments are based on historical production and are not tied to current production (and thus “decoupled”). Econ. Research Serv./U.S. Dep't of Agric., *Counter-cyclical payments*, at <http://www.ers.usda.gov/features/farbill/analysis/> (last visited Oct. 27, 2004). Under this program (new under 2002 Farm Bill), counter-cyclical payments are available whenever the effective market price is less than the target price (established by a 2002–03 base price). *Id.*

109. *Main Features*, *supra* note 107, at 3.

110. July Package, *supra* note 100, Annex A, ¶ 14.

111. *Id.* ¶ 16.

112. Gary G. Yerkey, *U.S., African Nations Resolve Cotton Dispute*, 21 INT'L TRADE REP. (BNA) 1306, 1306 (Aug 5, 2004).

113. July Package, *supra* note 100, Annex A, ¶ 4.

tization of the cotton issue independently from other sectoral initiatives.”¹¹⁴ Hence, while the African countries acceded to U.S. pleas that the cotton issue be treated within larger agriculture negotiations rather than as a stand-alone issue, the agreement is nonetheless an important step in the right direction.¹¹⁵

3. *Brazil v. United States—Subsidies on Upland Cotton*

Some see Brazil’s complaint against U.S. cotton subsidies as the first battle in a new era of “trade wars.”¹¹⁶ Accordingly, the September 8, 2004 publication of the WTO Dispute Settlement Body (DSB) panel ruling in *Brazil v. United States—Subsidies on Upland Cotton*¹¹⁷ was a highly significant event. The panel had been asked to determine whether various U.S. domestic support measures were inconsistent with obligations under provisions of the AoA, GATT 1994, and the Subsidies and Countervailing Measures (SCM) Agreement.¹¹⁸ The panel agreed with Brazil’s principal claim, holding that the amount of subsidies provided to cotton producers in the years 1999 through 2002 caused “serious prejudice” to Brazilian producers by encouraging U.S. production and driving down world prices.¹¹⁹ The United States had asserted that the support practices were shielded by the Peace Clause,¹²⁰ but the panel found that the subsidies were over 1992 limits, and therefore actionable.¹²¹

In reaching these conclusions, the panel made two significant findings. First, the court found that U.S. Export Credit Guarantee Programs and a category of Step 2 marketing payments offered to exporters were illegal export subsidies under

114. *Id.*

115. See Yerkey, *supra* note 112, at 1306.

116. See Goldhaber & Fleischer-Black, *supra* note 92, at 14–15.

117. Report of the Panel, WTO, *United States—Subsidies on Upland Cotton*, WT/DS267/R at 1–2 (Sept. 8, 2004), at <http://www.wto.org>. The panel was formed on March 18, 2003, pursuant to the request of Brazil. *Id.* at 1.

118. THE WTO SECRETARIAT, *supra* note 10, at 1–2. GATT 1994 is the basic set of trade rules, largely taken over from GATT 1947 (the predecessor of the WTO), that in conjunction with Annex 1A agreements (including AoA) now represent goods-related obligations of WTO members. *Id.* The SCM Agreement aims at balancing concerns that government subsidies should not put other countries’ industries at a disadvantage, and outlines a system of dealing with claims of unfair use of subsidies. *Id.* at 90–91. Subsidies are classified as exempt (Green Box), actionable (Amber Box), or prohibited. *Id.* at 91–92.

119. Daniel Pruzin, *WTO Panel Backs Brazil in Complaint Against U.S. Over Cotton Subsidies*, 21 INT’L TRADE REP. (BNA) 716, 716 (Apr. 29, 2004).

120. Since the matter was filed in 2003, the peace clause had not yet expired.

121. See *supra* text accompanying note 88.

the SCM Agreement.¹²² As such, they must be “withdrawn without delay.”¹²³ Second, the court found that certain Producer Flexibility Contracts (PFC) and Direct Payments (DP) paid out under the 1996 Farm Act were prohibited Amber Box subsidies, rather than Green Box as the United States had contended.¹²⁴ Thus, concluding that the Peace Clause protected none of these items, the panel found that a direct causal link existed between these price-contingent (not decoupled) payments and significant price suppression of cotton on the world market.¹²⁵ Accordingly, the United States will be required to remove the adverse effects causing the serious prejudice.¹²⁶

Upon announcement of the decision, the United States made several emphatic assertions. First, it notified the DSB of its decision to appeal adverse aspects of the panel report.¹²⁷ Furthermore, it reiterated its position that there will be no immediate changes to domestic cotton programs until the appeal has been heard.¹²⁸ Finally, in light of the significant debate and international interest in the outcome of the dispute, the United States has confirmed its dedication to achieving change through continued negotiations, rather than litigation.¹²⁹

II. CHANGES IN THE BALANCE OF POWER: DEVELOPING

122. Int'l Centre for Trade and Sustainable Dev., *Unraveling the Details and Potential Impacts of the Final Cotton Report*, 8 BRIDGES MONTHLY REV. 12, 12 (Sept. 2004), at <http://www.ictsd.org/monthly/bridges/BRIDGES8-8.pdf> [hereinafter *Unraveling the Details*]. Export Credits are programs that offer loan guarantees to foreign buyers in countries where credit markets are not fully developed. CUNCUN MINISTERIAL, *supra* note 4, at 13 n.16. Step-2 market payments are made to eligible cotton exporters and domestic end users of cotton who purchase U.S. cotton when domestic U.S. prices exceed prices in northern Europe by a certain level. BAFFES, *supra* note 29, at 13.

123. *Id.*

124. *Unraveling the Details*, *supra* note 122, at 12. They were not Green Box because under the AoA, such payments must be “decoupled,” that is, not linked directly to growing (or abstaining from growing) a specific type of crop. Instead, these programs were held to be directly linked because they require farmers not to grow fruit or nuts. *Id.*

125. *Id.*

126. John Baffes, Trade Note, *Brazil vs. US: Cotton Subsidies and Implications for Development*, The World Bank Group 4 (July 12, 2004), at <http://www.worldbank.org>.

127. WTO News, WTO, *US Appeals Panel Report on Cotton*, (Oct. 18, 2004), at http://www.wto.org/english/news_e/news_e.htm [hereinafter US Appeals Report].

128. *Unraveling the Details*, *supra* note 122, at 12.

129. Gary G. Yerkey, Rosella Brevetti, & Derek Cain, *U.S. Plans to Appeal WTO Cotton Ruling Citing ‘Serious Concerns’ with Decision*, 21 INT’L TRADE REP. (BNA) 718, 718–19 (Apr. 29, 2004).

COUNTRIES VIS-À-VIS THE UNITED STATES

The period from July 2003 to September 2004 saw the rise of cotton as a singularly important topic in overall agriculture negotiations.¹³⁰ The development of cotton as a topic of negotiation, distinct from broader discussions on the three pillars and related issues, provides the opportunity to analyze the important issues underlying agricultural negotiations generally, and to do so free from the analytical complexities that arise due the large number of issues simultaneously negotiated as part of the Doha Round.¹³¹ Furthermore, such an analysis is extremely important because the cotton issue will play a significant role in ongoing negotiations, and will therefore affect the likelihood of reaching a successful conclusion to the current Doha Round.

Recent events relating to cotton will have direct consequences on the balance of power in future agriculture negotiations, particularly with respect to two major blocs/countries. First, developing nations have recently made significant gains in negotiating power, resulting in the potential for a more balanced outcome to the current Round. Second, while the U.S. leadership has been instrumental in making progress in agriculture negotiations thus far,¹³² recent developments have highlighted the fact that long-term U.S. domestic policy is inconsistent with the aims of the AoA. This makes it highly unlikely that the United States will be able to assume its customary and necessary leadership role in continuing agriculture negotiations. Consequently, the relative changes in power between these two major negotiating forces, in addition to larger cotton-related issues, will play a significant role in determining the outcome of the current Round.

A. RELATIVE GAINS IN THE NEGOTIATING POWER OF DEVELOPING COUNTRIES

1. Brazil vs. United States—Subsidies on Upland Cotton: Creating Significant Precedent

The ruling against U.S. cotton subsidies is extremely important to developing nations in two significant respects. First, the

130. See *supra* Part I.C.2.b.

131. See *supra* notes 112–115 and accompanying text (discussing July Package provision making cotton subsidies a separate negotiation topic).

132. See Brevetti, *supra* note 99, at 385.

decision, from an international organization with widely accepted legitimacy,¹³³ held that U.S. domestic support programs have a direct and harmful effect on the international cotton market.¹³⁴ Specifically, the DSB found that there was a direct causal link between U.S. Amber Box programs and depression of world prices, which caused serious prejudice in violation of the SCM Agreement.¹³⁵ This conclusion is important in that it affirms the criticism many developing countries have levied against the developed world, and which have been largely ignored, since the Uruguay Round.¹³⁶ In particular, this ruling confirms the allegations set forth in the Sectoral Initiative in Favour of Cotton, which stated that domestic support programs used by the United States have a significant and harmful effect on the price of cotton on world markets.¹³⁷ This decision is, therefore, a symbolic affirmation of developing countries' frustrations over the pace of, and commitment of developed countries to, serious liberalization of agriculture.¹³⁸

The true significance of this precedent, however, is not its symbolic import. It is of great consequence because it has large potential for use in claims of prejudice against a number of other domestic support programs.¹³⁹ The Peace Clause has, until this ruling, barred virtually all potential claims against the domestic support programs of developed countries.¹⁴⁰ As a result, a developed country's classification of a program as Green Box, rather than Amber Box, has never before been challenged.¹⁴¹ In the case of U.S. cotton, the panel found that the subsidies at issue were improperly classified by the United States as Green Box.¹⁴² The panel went on to find that \$2.3–4.1 billion in Amber Box subsidies per year from 1999–2000 de-

133. *But cf.* JOSLING, *supra* note 20, at 14 (discussing recent high-profile WTO decisions fuelling concerns about democratic legitimacy of the WTO process).

134. *See* Pruzin, *supra* note 119, at 717 (summarizing WTO panel ruling on Upland Cotton).

135. *Id.* at 716.

136. *See* Pruzin, *supra* note 99, at 1093 (discussing conflicting views between developing countries and the United States over U.S. domestic support); Pruzin, *supra* note 119, at 716 (discussing critics of U.S. agricultural subsidy programs).

137. *See* SECTORAL INITIATIVE, *supra* note 73, at 4.

138. *See id.*

139. Minutes, Standing Committee, International Cotton Advisory Committee, SC-M-473 Final, at 3 (June 2, 2004), at http://www.icac.org/icac/delegates/sc_minutes/2004/473.pdf (summarizing presentation of Prof. Joseph Pelzman) [hereinafter Standing Committee].

140. Pruzin, *supra* note 119, at 716.

141. *Id.*

142. *See supra* note 124 and accompanying text.

pressed world cotton prices by 12.6 percent.¹⁴³ Subsidy programs of this magnitude are not confined solely to the U.S. cotton industry: the thirty OECD countries provided over \$318 billion in total support to agriculture in 2002.¹⁴⁴ U.S. and EU support programs for cereal and soybeans, as well as the EU's cotton regime, are likely to be targeted in the near future.¹⁴⁵ Furthermore, on October 15, 2004, the DSB issued its report on a second claim by Brazil, finding that the EU had significantly exceeded its scheduled commitments on exportation of heavily subsidized sugar for every year since 1995.¹⁴⁶ In short, there are a significant number of domestic support programs that are susceptible to attack, and to which the precedent of this case is directly applicable.

The likelihood that claims will be filed against a number of other domestic support programs is increased by the establishment of a relatively low evidentiary showing required in serious prejudice claims.¹⁴⁷ As this type of case had not previously been heard by the DSB, it was necessary to adopt an evidentiary standard for demonstrating "serious prejudice."¹⁴⁸ Instead of adopting a more stringent evidentiary standard, the panel decided on a standard which effectively lowers the showing required of developing countries: a country is not required to produce any precise quantification of the subsidy at issue in order to prove "serious prejudice."¹⁴⁹

The precedent set by this case is, therefore, important both in that it affirms the position of many developing countries with respect to the damaging effects of domestic support programs used in developed countries, and because it has possible applicability to a large number of existing domestic support programs. This decision stands for the proposition that the domestic subsidies of developed countries may now be questioned, and in order to be found actionable, precise subsidy quantifications are not required. Hence, the challenge and its outcome are in

143. Pruzin, *supra* note 119, at 716–17.

144. *Id.* at 716.

145. See Daniel Pruzin, *WTO Ruling on Cotton Expected to Pose Challenge to United States*, 21 INT'L TRADE REP. (BNA) 1032, 1033 (Jun. 17, 2004); *Unraveling the Details*, *supra* note 122, at 13.

146. Int'l Centre for Trade and Sustainable Dev., *Panel Finds EU's Sugar Exports Vastly Overstep WTO Limits*, 8 BRIDGES MONTHLY REV. 13 (Oct. 2004), at <http://www.ictsd.org/monthly/bridges/BRIDGES8-9.pdf>.

147. *Unraveling the Details*, *supra* note 122, at 13.

148. See *id.*

149. See *id.*

themselves significant because developing countries will be emboldened to assert complaints if they feel commitments are not honored.

2. *Solidarity and Setting the Agenda: The Group of West and Central African Countries*

The persistency and unity of voice demonstrated by the four African nations illustrates how developing nations can, through direct involvement, have a significant impact on agriculture negotiations. The Sectoral Initiative in Favour of Cotton was considered by many to be a major factor in the collapse of the Cancun Ministerial in 2003.¹⁵⁰ But in a very important sense, the failure at Cancun was a positive development for developing nations.¹⁵¹ The ambitious proposal by four African nations met resistance by the major cotton producing bodies: the United States, EU, and China. In receiving such a response, the proposal served as a litmus test for the willingness of developed countries to commit to negotiation of substantial reforms.¹⁵² The practical effect of the Sectoral Initiative was that developing countries had a direct role in setting the agenda and voicing their concerns.¹⁵³ Ultimately, the failure at Cancun was due to the unwillingness of developed countries to acknowledge that the geopolitics of the WTO had changed, and that flexibility was required on their part to negotiate issues that are important to the developing world.¹⁵⁴

The growing influence and assertiveness of developing countries is further seen in the fact that the July Package contains a distinct provision addressing the cotton issue originally raised by the African countries.¹⁵⁵ Although the proposal elicited no response, stubbornness, or arrogance in the process of negotiation from the United States, the four African countries were able to maintain efforts towards the elimination of domes-

150. CUNCUN MINISTERIAL, *supra* note 4, at 15–16.

151. See LESSONS OF CUNCUN, *supra* note 67, at 9.

152. *Id.* at 16.

153. *Id.* at 15–16.

154. *Id.* The emergence of the G20 at Cancun as an influential negotiating power has been widely recognized and is a further demonstration of the better balance emerging between developed and developing countries in the WTO. See *supra* note 71 and accompanying text.

155. See *supra* notes 112–115 and accompanying text (discussing inclusion of cotton as a separate issue in July Package).

tic support measures on cotton.¹⁵⁶ The willingness of the United States to specifically include provisions on cotton is arguably related to the then-pending decision against it in the Upland Cotton dispute with Brazil.¹⁵⁷ Even in this matter, Chad and Benin asserted their rights to participate as LDC third parties; accordingly, the panel took account of their allegations that U.S. subsidies caused harm to foreign cotton industries as evidentiary support.¹⁵⁸

The success of the four African countries in getting the United States to specifically address cotton in the July Package highlights several important points for similar action on the part of developing countries in the future. First, the four LDCs worked together where continued persistence would have been difficult on the part of one country alone. Developing countries, and LDCs in particular, have faced significant difficulties maintaining active participation in daily WTO operations; maintaining a regular presence in Geneva is an extremely complex and expensive endeavor.¹⁵⁹ Continued cooperation, to overcome this barrier, was ultimately possible because the issue addressed by the countries was extremely narrow.¹⁶⁰ This is essential for proper cooperation, since developing nations are an extremely heterogeneous group with diverse interests.¹⁶¹ This focus and cooperation has demonstrated that developing countries have the power, within the current WTO system, to affect positive change in terms of setting the agenda to focus on issues of paramount importance to them. The inaccessibility of the negotiating process and continued dominance of developed countries is what caused the Seattle Ministerial to fail.¹⁶² The Cancun Ministerial failed because developing countries attempted to set the agenda, but developed countries resisted.¹⁶³ Hence, for the first time, developing countries have successfully used the WTO system to accomplish a positive result of their own design.¹⁶⁴

156. See Yerkey, *supra* note 115, at 1306.

157. *Unraveling the Details*, *supra* note 122, at 13.

158. *Id.* at 12.

159. See *supra* Part I.C.2.c.

160. See SECTORAL INITIATIVE, *supra* note 73, at 2 (stating that “[t]he elimination of subsidies for cotton production and export is the only specific interest of WCA cotton-producing countries in the Doha Round”); cf. SEATTLE MINISTERIAL, *supra* note 1, at 4 (stating that disagreement and consequent failure of Seattle Ministerial stemmed from, *inter alia*, complexity of issues being addressed).

161. See CANCUN MINISTERIAL, *supra* note 4, at 2–3.

162. See *supra* note 34.

163. See *supra* notes 150–154 and accompanying text.

164. Cf. Avery, *supra* note 80, at 7A (discussing developing countries “flexing

3. *The Combined Effect of Unity and Precedent*

These two developments, the establishment of significant precedent and unity of position among developing countries in order to affect change in the agenda, represent an improving balance in overall negotiations. After ten years of WTO existence, developing countries have reached a point where precedent supports their most pressing needs,¹⁶⁵ countries disadvantaged in terms of relative size and resources are finding ways to work together to affect change, and thus the overall imbalance perceived in the WTO negotiating process throughout the implementation period appears to be improving in favor of developing countries.¹⁶⁶ Perhaps most significantly, this change in balance has occurred not as a result of concessions from developed countries, but rather as a result of using the system that all WTO members designed during the Uruguay Round.¹⁶⁷

The significance of this change in balance is of two kinds. One, it is important to note that such a change in balance demonstrates that despite difficult progress, the system put in place is becoming more effective in accomplishing its stated aim of "establish[ing] a fair and market-oriented agricultural trading system."¹⁶⁸ Second, given the context of ongoing negotiations, the acknowledgement of a change in balance indicates that there are other major powers involved in striking a balance. Accordingly, it is necessary to examine the relative changes in position of other major negotiating powers in order to arrive at a true picture of the current balance.

B. THE CONFLICT BETWEEN U.S. DOMESTIC SUPPORT PROGRAMS AND ITS ABILITY TO LEAD

The outlook for a better balance between developed and developing countries in the future of agriculture negotiations assumes, however, that the United States will continue to act in its customary role as a leader.¹⁶⁹ The context of recent agriculture negotiations has changed substantially, due largely to a shift in the primary focus of agriculture negotiations from ex-

their muscles" at Cancun).

165. See *infra* Part III.C (discussing the use of WTO precedence in litigation).

166. See, e.g., Bhala, *supra* note 36, at 487.

167. See *supra* notes 4–8 and accompanying text (discussing Marrakesh Agreement and the AoA).

168. AoA, *supra* note 8, preamble.

169. See *supra* notes 43–45; see also *supra* notes 60–61 and accompanying text.

port subsidies to domestic support,¹⁷⁰ and to the rise of cotton subsidies as a central issue.¹⁷¹ Accordingly, the persistence of U.S. domestic policy-makers in maintaining current domestic support levels poses a real and serious risk to the ability of U.S. trade negotiators to demonstrate needed flexibility, and consequently to facilitate trade negotiations through its role as a leader.

1. The Customary Role of the United States in Working Towards Further Liberalization

The concept of balance is important in analyzing international trade negotiations; a significant aspect of this notion is the balancing of domestic policies with international commitments.¹⁷² It is unsurprising that countries typically attempt to negotiate terms that are favorable to their producers and markets and which lessen the shock of drastic reform to domestic policies in accordance with international agreements.¹⁷³ In this sense, the balance between international agreements and domestic policy is crucial to the success of negotiations; without reasonable domestic political support of the negotiating process and its outcomes, countries are powerless to effectively participate in constructive dialogue with other countries.¹⁷⁴ There is a direct correlation between the relative importance of a single country in the negotiating process and the impact of (sizeable) domestic tension on the probability of negotiations ending in success.¹⁷⁵ Therefore, experience demonstrates that trade negotiations are most productive when all countries come prepared to negotiate with a clear conception of their goals, dedicated to overall negotiation objectives, and willing/able to make concessions.¹⁷⁶ The absence of these factors from the agriculture mo-

170. The United States continues to focus on market access; however, there is a clear shift on the part of many other WTO members in focus from export subsidies to domestic subsidies, due to EU agreement to phase out their reliance on export subsidies. See Pruzin & Yerkey, *supra* note 108, at 1266–67.

171. See *supra* Part I.C.2.b (discussing cotton initiative in context of Cancun Ministerial); *supra* Part I.D.3 (discussing Brazil v. United States—Upland Cotton); see also notes 112–115 and accompanying text (discussing inclusion of agreement on further cotton negotiations in July Package).

172. See Bhala, *supra* note 36, at 483.

173. *Id.*

174. See Corbet, *supra* note 7, at 68 (discussing relationship between domestic politics and agriculture negotiations).

175. See *supra* Part I.C.2.a (discussing failure to reach modalities deadline).

176. Compare Part I.C.2.a, with I.D.2 (reaching agreement on Agriculture

dalities negotiations and Cancun Ministerial is largely why those meetings failed.¹⁷⁷

Bearing these factors in mind, the United States has earned its reputation throughout the implementation period as a leader in making progress in ongoing negotiations. In evaluating the leadership of the United States to date, it is important to distinguish between two aspects of ongoing negotiations: continued progress in agricultural negotiations and the actual results of implemented agreements. It is clear that the schedule of reductions set forth in the AoA, most clearly with respect to domestic support subsidies, were not dramatic in accomplishing significant liberalization of trade in agriculture.¹⁷⁸ While it has been argued that the insubstantial reductions implemented to date under the AoA indicate a lack of true commitment to reform, it is clear that the AoA represents, in the least, a beginning and potential for further liberalization.¹⁷⁹ Likewise, the launching of a new round at Doha, and the drafting of a framework for further agriculture reduction commitments are all positive steps, particularly in light of the increasing participation of developing countries.¹⁸⁰ Therefore, regardless of the substantive effects of these numerous agreements, frameworks, and scheduled reductions, they represent nominal progress towards a fairer system of agricultural trade.

These progressive agreements have been difficult to reach, and the United States has been widely recognized as a necessary force in reconciling divergent interests.¹⁸¹ The United States has demonstrated the necessary commitment to the aims of the AoA, has had a clear conception of its objectives, and perhaps most importantly, has shown its ability, and urged others, to be flexible throughout negotiations.¹⁸² Assumption of this role on the part of the United States has been possible both because of its status in world trade and because of the focus of negotiations. Clearly, given that the United States is a major force in world trade, it is necessary that it be a leader.¹⁸³ More importantly, the United States has been able to demonstrate flexi-

framework in light of EU's agreement to phase out export subsidies).

177. See *supra* Parts I.C.2.a, I.C.2.b (discussing failure to reach modalities deadline and collapse of the Cancun Ministerial, respectively).

178. See *supra* notes 20–29 and accompanying text.

179. ORDEN, *supra* note 28, at 7.

180. See *supra* Part II.A.

181. See *supra* notes 43–45, 60–61, 99 and accompanying text.

182. See *supra* note 99 and accompanying text.

183. See Brevetti, *supra* note 99, at 385.

bility and thus assume a leadership role because, since the Uruguay Round, much of the focus for continued reform has been on market access and export subsidies;¹⁸⁴ the United States does not rely heavily on either of these measures.¹⁸⁵ Consequently, despite criticism for enacting the 2002 Farm Bill,¹⁸⁶ the position of the United States with respect to the main focus of continuing negotiations has not been in direct and substantial conflict with U.S. domestic policy. Therefore, during the past ten years, the United States has been able to maintain a proper balance between advocating for further liberalization while not significantly changing existing support structures in its own agricultural sector.

2. Maintaining a Multilateral Trade System Favorable to the American Cotton Industry

The ability of the United States to maintain its status as leader and facilitator of agriculture trade negotiations has become significantly more complex in light of the recent shift in the focus of agriculture negotiations. In looking at the position of the United States with respect to maintenance of its domestic support programs, the tension between international agriculture negotiations and U.S. domestic policy becomes apparent. This apparent tension will significantly limit U.S. trade negotiators' ability to demonstrate necessary flexibility in ongoing negotiations. Thus the cotton issue, analyzed from the perspective of U.S. domestic policy, demonstrates a stark divergence between past assumption of leadership by the United States, and its future ability to do so.¹⁸⁷

a. Indications of Resistance

Significant indications of U.S. inflexibility first became apparent during the Cancun Ministerial, when the group of West and Central African Countries introduced the Sectoral Initiative in Favour of Cotton.¹⁸⁸ Between the Cancun Ministerial and the agreement on cotton included in the July Package, the United States consistently resisted calls to directly address cotton sub-

184. Pruzin & Yerkey, *supra* note 108, at 1266–67.

185. ORDEN, *supra* note 28, at 33.

186. See *supra* notes 56–61 and accompanying text (discussing enactment and criticism of 2002 Farm Bill).

187. See *infra* Part III.B.

188. See *supra* notes 74–81 and accompanying text.

sidies.¹⁸⁹ Given that U.S. cotton subsidies were at the time the subject of a WTO dispute settlement complaint, it was understandable that the United States delayed meaningful negotiations in order to take the panel ruling into account in shaping its strategy. The manner in which the United States handled repeated claims to address cotton subsidies was, however, inappropriate in light of the United States's consistent urging that flexibility is a necessary component to ongoing negotiations.¹⁹⁰ Because the cotton issue is a problem of paramount importance to many developing nations,¹⁹¹ the outright refusal of the United States to engage in constructive negotiations has stated clearly its defensive position and lack of willingness to undertake reform, despite the fact that the United States is clearly the largest subsidizer of cotton.¹⁹² Accordingly, the United States failed to demonstrate that when its interests are directly involved, as opposed to reform discussions on market access or export subsidies, it is willing to actively participate to arrive at an equitable result.

In the eyes of much of the international trade community, the Upland Cotton ruling confirmed that the U.S. refusal to work towards remedying the injurious effects of its cotton support programs was inappropriate.¹⁹³ Furthermore, the appeal by the Office of the U.S. Trade Representative is a further indication of an unwillingness to participate in ongoing negotiations in a constructive manner.¹⁹⁴ The announcement to appeal the decision is particularly significant, however, because the consequences of losing highlight the most troubling aspect of the U.S. position on domestic support programs for cotton: U.S. trade representatives may be unable to demonstrate the flexibility WTO member-countries demand. The lack of negotiating flexibility arises from two distinct portions of the dispute settlement ruling, discussed in the next section.

b. The United States's Refusal to Dismantle Domestic Support Programs

First, should the United States lose on appeal, it will be al-

189. Pruzin, *supra* note 82, at 271.

190. See *supra* Part II.B.1 (discussing past U.S. leadership and need for flexibility).

191. See *supra* notes 79–81 and accompanying text.

192. Pruzin, *supra* note 82, at 271.

193. See Pruzin, *supra* note 119, at 716.

194. US Appeals Report, *supra* note 127.

most impossible for it to comply with the panel ruling, which requires withdrawal of certain Step 2 programs¹⁹⁵ within six months of the final ruling.¹⁹⁶ Withdrawal of lucrative Step 2 programs held illegal is unlikely, because doing so would require the approval of a reluctant U.S. Congress.¹⁹⁷ Reluctance exists on the part of Congress because there is an extremely effective farm lobby in developed countries, particularly the United States, which is strongly opposed to measures that decrease farm support.¹⁹⁸ As an editorial in the *Washington Post* characterized the U.S. farm lobby: “[t]he main reason for [the continuing use of farm subsidies in developed countries at the expense of poor countries] lies in politics. Even though agriculture accounts for less than 3 percent of the U.S. work force, . . . farmers . . . are adept at holding politicians hostage.”¹⁹⁹ The importance of such programs to U.S. farmers is best understood when one considers that such programs have evolved around the central themes of raising/stabilizing farm income and preserving the small farm.²⁰⁰

The significance of farm programs for U.S. politics is particularly clear in a Presidential and Congressional election year. For example, while proclaiming the positive state of the country during the second presidential debate of 2004, President Bush informed viewers that, “the farm income in America is high.”²⁰¹ Although only three percent of the American workforce is employed in agriculture, farm wages were a central example of America’s current prosperity. Little political will exists to decrease current levels of farm support, because farmers are an extremely persuasive and important constituency. If the United States is required to withdraw Step 2 programs, it is very

195. Certain Step 2 programs were held by the dispute settlement panel to be prohibited “export subsidies.” See *supra* notes 122–123 and accompanying text. While this analysis is largely concerned with U.S. reluctance to dismantle domestic support measures, this aspect of the ruling is still highly significant because the Step 2 programs support domestic markets. *Id.* In addition, the motivations and issues involved in reluctance to bring the illegal programs into line with WTO agreements are the same as those underlying domestic support measures. *Id.*

196. Pruzin, *supra* note 145, at 1032. For consequences of failing to comply, see *infra* notes 263–269 and accompanying text.

197. Pruzin, *supra* note 145, at 1032.

198. See Corbet, *supra* note 7, at 68.

199. *The Farm-Subsidy Scandal*, Editorial, WASH. POST, Jan. 12, 2001, at A24.

200. Baffes, *supra* note 29, at 12.

201. President George W. Bush, closing statement of second presidential debate, Washington University, St. Louis, MO, Oct. 8, 2004, transcript available at <http://www.debates.org/pages/trans2004c.html> (last visited Oct. 22, 2004); see also Avery, *supra* note 80, at 7A.

unlikely that Congress will respect the WTO ruling.²⁰²

The second significant aspect of the cotton ruling, classification of U.S. support programs as Amber Box rather than Green Box, likewise poses significant problems to U.S. domestic policy.²⁰³ After the Uruguay Round, the United States largely turned away from export subsidies and tariffs, and designed programs with Green Box measures to ensure compliance with the AoA and yet maintain significant support programs for farmers.²⁰⁴ The consequence of finding certain PFC and DP programs Amber Box is that the United States will be required to re-classify billions of dollars in farm support as Amber Box, and such programs will then be subject to reduction commitments.²⁰⁵ This result is significant because the implications of the ruling apply not just to the cotton industry, but to the entire U.S. agricultural sector. In 2001–2002, for example, U.S. farmers received nearly \$17 billion through DP programs.²⁰⁶ While the panel decision does not affect all DP programs formerly classified as Green Box, given that the United States has met approximately fifty percent of its reduction commitment of \$19.1 billion (as of 1998), even a portion of the total DP programs subsequently subject to reduction commitments could threaten the ability of the United States to meet its reduction commitments.²⁰⁷ The potential difficulties in meeting reduction commitments as a result of the ruling are exacerbated by the domestic support provisions of the July Package, which call for a further twenty percent reduction in combined support provided through Final Total Bound AMS.²⁰⁸ Therefore, should the United States lose upon appeal, compliance with current and near-future reduction commitments could pose a significant problem.

Just as is the case with Step 2 programs determined to be illegal export subsidies, there is little political will to change legislation to reflect WTO interpretations of American programs as Amber Box. The response of the U.S. farm constituency to the July Package demonstrates how, politically, removal of farm

202. See *infra* Part III.C. (discussing consequence of non-compliance and threat of increased litigation).

203. See *supra* Part I.D.3 (discussing WTO panel decision against the United States).

204. *Supra* notes 28–29 and accompanying text.

205. Pruzin, *supra* note 119, at 717.

206. ORDEN, *supra* note 28, at 9, 40.

207. Pruzin, *supra* note 119, at 717.

208. July Package, *supra* note 100, Annex A, ¶ 7.

support is extremely unpopular.²⁰⁹ Furthermore, the domestic response indicates a lack of trust between sectors of the domestic agriculture industry and trade representatives.²¹⁰ In fact, according to the U.S. Cotton Council, the panel's interpretation of AoA commitments and definitions varies greatly from those of the United States at the time it entered into the agreement.²¹¹ As a result of the Upland Cotton ruling, the job of trade negotiators in the WTO just became significantly more difficult, because U.S. farmers and politicians are far less likely to trust any agreements that come before Congress for approval and enactment into law.²¹² Consequently, appealing the decision is the most likely chance the United States has to avoid the significant problem of aligning domestic policy and international commitments.

If the United States loses its appeal, it is likely that it will have to make substantial changes to its domestic support policy. Regardless of whether the U.S. Trade Representative chooses to "unilaterally disarm" in accordance with international commitments, it appears as though, due to domestic politics, the United States will not be willing to change its policies prior to the expiration of the current Farm Bill in 2008.²¹³ Essentially, the dispute settlement panel ruling has highlighted the fact that U.S. domestic support is injurious, and given that the United States currently structures most of its programs as domestic support, there is no course of action left for the United States but to take serious steps towards reducing reliance on trade-distorting domestic support measures. The refusal of U.S. politicians to take account of this has extremely troubling consequences for the success of the current Doha Round.

209. Christopher S. Rugaber, *Zoellick, Blasting Daschle, Says Framework for Doha will not Hurt U.S. Farm Programs*, 21 INT'L TRADE REP. (BNA) 1341, 1341 (Aug. 12, 2004). Senator Tom Daschle sharply criticized U.S. Trade Representative Robert Zoellick for his agreement to the July Package, arguing that the 20 percent reduction in domestic support "dealt a devastating blow to farm support . . . [that is] necessary to protect producers." *Id.*

210. *See id.*

211. *See* Gary G. Yerkey, *U.S. Cotton Producers Promise to Fight WTO Ruling but Also to Abide by WTO Rules*, 21 INT'L TRADE REP. (BNA) 911, 911 (May 27, 2004).

212. *Id.*

213. Cain, *supra* note 58, at 830.

III. LACK OF PROGRESS DUE TO THE POSITION OF THE UNITED STATES AND RESPONSIVE LITIGATION

A. THE CURRENT CLIMATE OF AGRICULTURE NEGOTIATIONS AND WHAT IS AT STAKE

Logically, agriculture negotiations should be viewed as a progression, where the AoA represents a foundation and the DDA a commitment towards further liberalization of agriculture trade.²¹⁴ This progression has been characterized by failed attempts and difficult accomplishments,²¹⁵ and the line between success and failure is often quite thin.²¹⁶ It is clear, however, that there is a commitment to furthering the objectives of the AoA and reaching a successful conclusion to the DDA, as evidenced by continuing support for the WTO, continued efforts at honoring commitments, and continuing participation in negotiations.

Despite this continuing commitment, many accomplishments under the AoA have not been substantial in terms of delivering on the promises of increasing liberalization in agriculture.²¹⁷ In the ten years since the signing of the AoA, countries have not been able to effectively negotiate an agriculture modalities text. Moreover, while agreements subsequent to the AoA reflect successively more narrow agreements for further liberalization, they make no specific reduction commitments.²¹⁸ Accordingly, the most difficult series of agriculture negotiations clearly lie ahead.²¹⁹

As the focus of negotiations becomes increasingly narrow, the leadership of the United States will be essential for bridging gaps and forging a consensus.²²⁰ At this stage in negotiations, if agreement cannot be reached on an agriculture modalities text,

214. See, e.g., ORDEN, *supra* note 28, at 7.

215. See generally *supra* Part I.

216. See, e.g., Part I.D.2 (discussing last-minute agreement on the July Package).

217. See, e.g., *supra* Part I.B (discussing implementation of AoA).

218. Compare Part I.C.2 (discussing problems in furthering the Doha Round, particularly failure to reach a modalities agreement), with Part I.D.2 (discussing agreement on the July Package, which is not a modalities text, but rather a framework).

219. See, e.g., Bhala, *supra* note 36, at 482 (quoting WTO Director-General Moore as saying that Doha put the WTO in a position where future progress would be difficult).

220. Brevetti, *supra* note 99, at 385; see also LESSONS OF CANCUN, *supra* note 67, at 4.

three years of substantial effort on the part of WTO members will have been lost; the DDA is a single undertaking, and without agreement on agriculture, there will be no successful conclusion to the Doha Round.²²¹ Furthermore, loss of current momentum as a result of the inability to reach agreement will likely result in several years of inactivity before another serious attempt can be made at launching a new round. Due to the U.S. position on maintaining domestic support programs in opposition to existing WTO agreements, the United States will not be able to act in its customary role as a leader, which will likely have adverse effects upon continuing negotiations.

B. THE EFFECT OF THE U.S. POSITION ON CONTINUING NEGOTIATIONS

1. Short-Term Implications: Uncertainty

CoA meetings took place in October, November, and December of 2004, to move forward, and agree on specific provisions in accordance with the guidelines set out in the July Package.²²² As past meetings have demonstrated, it is essential that countries come to meetings with a clear conception of what it is they hope to accomplish and willingness to demonstrate flexibility in coming to an agreement between all members.²²³ With respect to domestic support negotiations, the United States will not know what its position is until the appeal has been heard, and a final ruling issued on whether U.S. support measures are properly classified as Green Box or Amber Box. The appeal on Upland Cotton will not have been decided until after the final CoA meeting in December.²²⁴ This uncertainty is of particular importance, given that revising Green Box policy has emerged as a contentious issue as of the first CoA meeting in October.²²⁵ As a result of its position, the United States will not be able to play a decisive role in shaping short-term continuing negotia-

221. See LESSONS OF CANCUN, *supra* note 67, at 3.

222. Int'l Centre for Trade and Sustainable Dev., *Agriculture Talks Inch Forward*, 8 BRIDGES WEEKLY TRADE NEWS DIGEST, Oct. 13, 2004, at <http://www.ictsd.org/weekly/04-10-13/story3.htm>.

223. See, e.g., *supra* note 176 and accompanying text.

224. The United States filed its notice of appeal on October 18, 2004. US Appeals Report, *supra* note 127. The WTO's Appellate Body thereafter has 90 days to issue a ruling. Pruzin, *supra* note 145, at 1032.

225. Int'l Centre for Trade and Sustainable Dev., *supra* note 222.

tions on domestic support.

If reform of Green Box policy becomes a focus of the near-term CoA meetings, the United States's inability to substantially participate could have serious consequences for overall progress. This is a serious concern, as there is early disagreement between the Cairns Group and developed countries, namely the EC and Switzerland, as to whether Green Box reform is properly within the scope of the July Package.²²⁶ As the sides are drawn, this is traditionally a situation where the United States has stepped in to bridge gaps and build consensus.²²⁷ The United States has only stated an indeterminate position—essentially being noncommittal—and thus demonstrated how the current U.S. position impairs its ability to lead in a meaningful way.²²⁸

2. Long-Term Effects of the United States's Position: Standing in the Way of Progress

Regardless of whether the U.S. appeal is successful, the position of U.S. Trade Representatives in ongoing agriculture negotiations is disconcertingly similar to that of the EC in 2003. As a result of political unwillingness to reform domestic farm policies throughout the EU, EC agriculture negotiators were unable to demonstrate flexibility in negotiations regarding the elimination of export subsidies, and the modalities deadline was missed.²²⁹ The unwillingness of U.S. domestic political forces to work towards the phasing out of trade-distorting domestic support measures effectively strips U.S. Trade Representatives of the necessary ability to demonstrate flexibility in negotiations.²³⁰ This flexibility is essential to working towards agreement in agricultural matters. Therefore, as a result of domestic political refusal to remove support programs for farmers, the United States will not be able to contribute, in a meaningful ca-

226. *Id.* The July Package states that the Green Box should be "reviewed and clarified" to ensure that it is at most, minimally trade distorting. *Id.* Countries disagree as to whether current development of strong disciplines is beyond the scope of the July Package. *Id.*

227. *See, e.g., supra* notes 43–45 and accompanying text.

228. *See* Int'l Centre for Trade and Sustainable Dev., *supra* note 222. The United States's position at this time is that there *may be* some room to negotiate Green Box reform. *Id.*

229. *See supra* Part I.C.2.a (discussing failure to reach March 31, 2003 modalities deadline).

230. *See supra* Part II.B.2 (discussing unwillingness of U.S. politicians to remove domestic support programs).

capacity, towards reduction and elimination of trade distorting domestic support. As a major trading power, the inability to contribute is not a minor irritation or drawback. The constructive engagement of the United States in all aspects of ongoing negotiations, particularly domestic support, is necessary if there is to be a successful conclusion.²³¹ Consequently, the United States's inability to contribute on the focus of ongoing negotiations will prevent further progress under the current round.

Relative to the failure caused by the EU in 2003, several factors make it more likely that the U.S. position on domestic support measures will impede successful conclusion of the current Round. First, an analysis of previous agriculture negotiations demonstrates the necessity of U.S. leadership.²³² Second, the current negotiations aim at a text more technical and narrow than in previous agreements.²³³ Hence, the act of arriving at a text, particularly in the absence of U.S. leadership, is inherently more difficult. Third, as a function of the time that has passed since the Doha Round was launched, the current negotiations carry with them greater expectations and existing frustrations, resulting in comparably greater pressure to succeed.²³⁴ Furthermore, the consequences of failing are greater as well—three years of hard work and modest gains lost. Finally, as a result of the current panel decision against U.S. cotton subsidies, there is an objective assessment of U.S. programs that concludes they are harmful and improperly classified. Therefore, if the United States persists in refusing to dismantle its trade-distorting domestic support measures, the ongoing agriculture negotiations are likely to fail.

It could be argued in response, that the alternative to complete failure of the Round is an agriculture modalities text that fails to make further progress with respect to domestic support measures, leaves progress in that area for future negotiations, and thus allows the Round to move forward. In support of this alternative, it can be pointed out that developing countries accepted a similar result in signing the July Package: developing countries recognized the need to accept a watered-down text in order to keep the talks afloat, but refused to accept any text where they would be worse off than where they currently

231. See Brevetti, *supra* note 99, at 385.

232. See *supra* Part II.B.1.

233. See *supra* note 95.

234. See, e.g., Pruzin & Yerkey, *supra* note 95, at 1266–68.

were.²³⁵ Despite this common sentiment among developing countries, the United States was able to serve its own interests and include an expanded definition of the Blue Box to include countercyclical payments.²³⁶

This alternative is not likely to occur, however, as further postponements on the subject of domestic support measures will be unacceptable to developing countries. The concession to the United States was made because there was general political will to move forward, and as a framework (versus a modalities text), the July Package is necessarily drafted in general terms.²³⁷ Negotiations upon a modalities text will involve a considerably different set of circumstances. First, the negotiating dynamic is significantly changed now that export subsidies are no longer a focus of negotiations;²³⁸ lines will be more clearly drawn according to countries' focus on obtaining better market access (i.e., developed countries)²³⁹ or eliminating use of domestic support measures (i.e., developing countries).²⁴⁰ Second, while developing countries were clearly willing to make concessions in order to come to agreement on the July Package, the framework calls for further limitations on domestic support measures through reexamination of Blue Box and Green Box categories to ensure they serve the overarching principles of the AoA.²⁴¹ Finally, the culmination of recent developments is empowerment of developing countries and thereby a better balance in the negotiation process.²⁴² Therefore, the behavior of the United States in making concessions on its domestic support programs, particularly in the cotton industry, is likely to be dispositive in the successful outcome of the continuing Doha Round.

235. Pruzin & Yerkey, *supra* note 108, at 1266–67 (discussing statements by Argentina's Secretary of International Trade, Martin Redrado).

236. *Id.*

237. See Pruzin & Yerkey, *supra* note 108, at 1266.

238. Compare *supra* notes 18–19 (discussing EU reliance on export subsidies under CAP as focus of ongoing negotiations), with *supra* note 104 and accompanying text (discussing EU agreement to give abandon reliance on export subsidies).

239. See, e.g., Daniel Pruzin, *WTO Members Review Draft Ag Framework*, 21 INT'L TRADE REP. (BNA) 1220, 1220 (July 22, 2004) (discussing main objective of United States in negotiations leading up to July Package).

240. See, e.g., Yerkey, *supra* note 94 at 1306 (discussing how developing countries' will no longer be willing to be "short-changed" on the subject of domestic subsidies).

241. See *supra* notes 110–111 and accompanying text.

242. *Supra* Part II.A.

C. IS LITIGATION THE ANSWER?

The combination of a number of factors—expiration of the Peace Clause, the Upland Cotton ruling, continued frustration of developing countries, increasing unity and influence among developing countries, failure to make progress in further reducing the use of trade-distorting domestic support in developed countries—have created the perfect atmosphere for a “trade war.”²⁴³ Such a trade war would represent a shift in the primary focus of the WTO from facilitating ongoing trade negotiations to deciding trade disputes.²⁴⁴ The possibility of increased litigation has been heralded as a means for developing countries to achieve the promises of liberalization.²⁴⁵ While there are a number of beneficial aspects inherent in a shift towards litigation-focused WTO, several pragmatic concerns ultimately demonstrate that litigation is not the means by which true liberalization of agriculture will be achieved. Rather, in order for true progress, ongoing negotiations need true commitment and patience from all participating countries, primarily the United States.

1. Proposed Benefits of a Litigation-Focused WTO System

The opportunity for litigation has been heralded as a means for developing countries to obtain the promised benefits of trade liberalization.²⁴⁶ The cotton dispute created valuable precedent that can potentially be used against a number of other countries to enforce compliance with existing agreements.²⁴⁷ In this sense, the promise of liberalization under the AoA would be more significantly realized than it has been with the existing degree of compliance. In light of the growing frustration of developing countries, particularly as demonstrated by the Sectoral Initiative in Favour of Cotton, and consequent rush of claims expected, the extensive use of litigation would shift the focus of the WTO from a system of diplomatic concessions and negotiated settlements based on mutual and shared benefits to an adversarial system.²⁴⁸

243. See Goldhaber & Fleischer-Black, *supra* note 92, at 15.

244. Standing Committee, *supra* note 139, at 3.

245. See Avery, *supra* note 80, at 7A.

246. *Id.*

247. See *supra* Part II.A.1 (discussing precedent created by Upland Cotton ruling).

248. Standing Committee, *supra* note 139, at 2.

As a rules-based system with a "single winner," the governance of international trade in agriculture would be more transparent.²⁴⁹ Increased transparency in the process of developing principles of agricultural trade is a development favorable and important to developing countries; to date, the participation of developing countries has been limited both by a lack of necessary resources²⁵⁰ and because of exclusion from a number of negotiating sessions, the result of difficulties inherent in an organization with hundreds of member-countries.²⁵¹ Furthermore, the net impact of an increase in litigation would appear to be greater adherence to existing agreements.²⁵²

The re-organization of WTO negotiating procedures in response to a new focus on litigation would significantly affect future negotiations.²⁵³ In such a system, the potential threat of litigation, combined with the difficulty of negotiating multilateral agreements, would place more of an emphasis on simpler, sector-specific bilateral agreements.²⁵⁴ A shift in the focus of the WTO to facilitating simpler bilateral agreements would result in an increase in agreements, again with far greater transparency than is present in the current system of multilateral agreements.²⁵⁵ Thus, a shift in the focus of the WTO system from negotiation to litigation holds the potential to result in greater compliance with existing agreements and create a more transparent system for future negotiations, both of which generally benefit developing countries.

The agreement to include provisions related to the Sectoral Initiative in the July Package demonstrates several of these factors coming into play. In this case, the threat of litigation arguably "forced" the United States to agree to inclusion of cotton as a specific topic of negotiation within larger agriculture talks.²⁵⁶ The negotiations were essentially bilateral in nature, as they occurred between the United States and four small countries with very similar interests in the matter.²⁵⁷ Finally,

249. *Id.*

250. *Supra* Part 0.

251. *See, e.g.*, note 34 (discussing failure of 1999 Seattle Ministerial).

252. *See* Standing Committee, *supra* note 139, at 3. *But cf. infra* notes 262-268 and accompanying text (discussing the threats of regular use of litigation).

253. *Id.* at 2.

254. *Id.* In fact, the difficulties surrounding the failure of the Cancun Ministerial spurred such an increase in negotiation on bilateral and regional agreements. *See infra* notes 272-274 and accompanying text.

255. *See* Standing Committee, *supra* note 139, at 2-3.

256. *See* Int'l Centre for Trade and Sustainable Dev., *supra* note 122, at 13.

257. *See* Yerkey, *supra* note 112, at 1306.

the result of these direct negotiations between the United States and African countries was a sector-specific agreement on how to move forward on the issue of cotton support and its effect on African production.²⁵⁸

2. *Pragmatic Concerns Against a Litigation-Focused System*

a. *Logistical Difficulties Inherent in a System of Regular WTO Litigation*

The regular use of international litigation to ensure compliance with current agreements will be difficult, if not impossible, for many developing countries. Litigation through the WTO is a complex endeavor, which requires substantial financial and intellectual resources.²⁵⁹ In order for the WTO to function properly, it is necessary that all members participate in basic functions equally and effectively. Given the current difficulties developing countries face in maintaining an effective presence in Geneva, many developing countries will continue to have insufficient resources to undertake lengthy and complex trade litigation.²⁶⁰ Litigation as a regular tool to enforce compliance or reconcile different interpretations of existing agreements is simply not a viable alternative for many developing countries.²⁶¹

Even where a developing country possesses sufficient resources to engage in litigation as a means to enforce compliance, such a strategy ignores political realities. It has been suggested that litigation holds the potential to “take abusive farm subsidies away from the politicians.”²⁶² However, with the current political situation in the United States, politicians are unlikely to amend existing litigation to reflect the changes mandated by the panel decision.²⁶³ Ultimately, should the United States not comply with the panel decision, WTO rules allow Brazil to impose trade sanctions against the United States until it has complied.²⁶⁴

258. See *supra* Part I.D.2 (discussing inclusion of cotton-related issues in July Package).

259. See *e.g.*, Bhala, *supra* note 36, at 488; Goldhaber & Fleischer-Black, *supra* note 92, at 15.

260. See *supra* Part I.C.2.c.

261. *But cf.* Standing Committee, *supra* note 139, at 3 (stating that there is “greater capacity among developing countries to bring complaints within the WTO”).

262. Avery, *supra* note 80, at 7A.

263. See *supra* Part II.B.2.

264. JOSLING, *supra* note 20, at 14.

Trade sanctions were originally conceived of as a way of putting gentle pressure on governments to adhere to dispute settlement panel rulings under a multilateral trading system.²⁶⁵ In a litigation-focused system, trade sanctions could become the norm, rather than the exception, thereby allowing countries to continue to violate trade agreements so long as the costs of compliance are greater than those of sanctions.²⁶⁶ Trade sanctions are currently the exception, and panel decisions largely adhered to, because a focus on a multilateral system of negotiation maintains international political pressure on governments to make required changes, thereby preserving the integrity of the multilateral negotiating system to the benefit of all members.²⁶⁷ Therefore, regular use of litigation to ensure compliance poses the significant threat of actually allowing countries to retreat from current agreements through other countries' use of trade sanctions, to the detriment of international trade.²⁶⁸

b. Attendant Conceptual Difficulties

A shift in focus of the current WTO system towards litigation is conceptually problematic, because such a shift would work against the fundamental aim of the AoA: development of a fair market-based system of trade in agriculture.²⁶⁹ Litigation, if used regularly as a tool by developing countries, will likely evolve into a retaliatory weapon used by developed countries: larger developing countries have agriculture industries that utilize support and protection mechanisms, and are thus subject to claims by other countries as well.²⁷⁰ In this context, a shift away from complex multilateral agreements towards transparent, sector-specific, bilateral agreements makes sense, as countries will want to reduce costs associated with litigation, and bilateral agreements will serve to preempt litigation or to remedy unfavorable situations created by the imposition of tariffs through previous litigation. Smaller developing countries do not, however, utilize domestic support programs or export sub-

265. *Id.*

266. *See id.* *But cf.* Standing Committee, *supra* note 139, at 3 (suggesting that litigation gives politicians a politically acceptable reason to change domestic legislation in order to comply with international obligations).

267. One such example is the continued pressure countries placed on the EU to eliminate export subsidy programs that violated the spirit of the AoA. *Supra* note 104 and accompanying text.

268. JOSLING, *supra* note 20, at 14.

269. *See* AoA, *supra* note 6, preamble.

270. *See* Goldhaber & Fleischer-Black, *supra* note 92, at 15.

sidies because they are expensive programs to maintain.²⁷¹ As such, smaller countries will be precluded from regular use of litigation due to lack of resources, and there will be reduced incentive for larger countries to engage in bilateral negotiations with smaller countries. Consequently, in a system where bilateral agreements become prevalent as a response to litigation, smaller developing countries will be excluded from many aspects of the WTO system.

This is not to say that a system of bilateral agreements, independent of a litigation-focused system, necessarily excludes all developing countries from meaningful participation. Since the collapse of the Cancun Ministerial, there has been a significant increase in energy focused on bilateral and regional negotiations.²⁷² Many of these negotiations, working towards regional free trade agreements, are between developed countries and smaller developing countries.²⁷³ In such a case however, necessary resources are diverted away from participation in multilateral negotiations, thereby decreasing the likelihood that ongoing multilateral negotiations will be successful; hence, while bilateral and multilateral negotiations/agreements are not mutually exclusive, focusing on bilateral agreements has significant potential to negatively impact the viability of ongoing multilateral negotiations.²⁷⁴ The important point with both bilateral agreements resulting from a litigation-focused system and those bilateral agreements which exist alongside multilateral agreements, is that there is no opportunity for meaningful participation by *all countries* in order to affect market liberalization. Under both situations, many small developing countries and least developed countries are excluded from participating in the process that affects change in international agricultural trade.

The practical exclusion of smaller developing countries from the WTO system of regulating international trade in agriculture

271. See Standing Committee, *supra* note 139, at 2.

272. See, e.g., Brevetti, *supra* note 99, at 385. See generally Int'l Centre for Trade and Sustainable Development, *Regional Integration Spurred and Complicated by Cancun*, 7 BRIDGES MONTHLY REV. 16–19 (Sept.–Oct. 2004), at <http://www.ictsd.org/monthly/bridges/BRIDGES7-7.pdf> [hereinafter *Regional Integration*].

273. *Regional Integration*, *supra* note 272, at 16–19. One example is the Central America Free Trade Agreement (CAFTA), which is an agreement between the United States, Costa Rica, El Salvador, Honduras, Guatemala and Nicaragua. *Id.* at 16.

274. See Brevetti, *supra* note 99, at 385 (citing comments made by WTO Director-General Supachai).

would represent a significant erosion of the recent improvements in the system. In the current system, which focuses primarily on multilateral negotiations and agreements, developing countries are increasingly participating and affecting positive change.²⁷⁵ The bilateral agreement-focused system that would exist in the context of prevalent litigation is strikingly similar to the pre-AoA environment of international trade. Namely, agreements and practices would be shaped by competition and adverse interests, rather than working towards the common goal of a fair, market-based system. Conceptually, the development of a WTO system of international trade in agriculture, premised on the ability to litigate regularly, would represent a period of regression from current progress made in the area of agricultural trade liberalization.²⁷⁶

3. The Solution: Real Commitment from Developed Nations, Patience and Restraint on the Part of Developing Nations

It is clear that the most difficult period of negotiations lie ahead.²⁷⁷ Furthermore, it is in the best interests of all parties involved to continue to utilize and support the current system of multilateral agriculture negotiations. To ensure a successful outcome of ongoing agriculture negotiations, and thus the Doha Round, action is required on the part of both developing and developed countries.

Developing countries must show restraint in using the possibility of litigation to resolve frustrations that arise during the course of ongoing multilateral negotiations.²⁷⁸ It is clear from the Upland Cotton dispute that the newly available option of litigation is a valuable tool, which may help ensure compliance with existing agreements.²⁷⁹ But as the previous analysis points

275. See *supra* Part II.A.2.

276. This fact has been frequently recognized by the Office of the U.S. Trade Representative. Specifically, Allen F. Johnson has stated that cases such as the Upland Cotton dispute are not what "creates the necessary energy and momentum that's going to create a successful conclusion [to the WTO trade talks.]" Pruzin, *supra* note 129, at 718 (quoting Allen F. Johnson, USTR Chief Agriculture Negotiator). Instead, the United States has "always believed that negotiations are the best way of solving these issues and moving the process forward." *Id.*

277. See Burfisher, *supra* note 17, at 135-37 (discussing benefits that would accrue to developing and developed countries if all agricultural subsidies and tariffs were eliminated).

278. *Unraveling the Details*, *supra* note 122, at 13.

279. *Supra* Parts I.D.3 (discussing Upland Cotton case), II.A.1 (discussing precedent created by Upland Cotton case).

out, the excessive use of litigation has the potential to drastically change the nature and focus of the WTO; such a change would ultimately be detrimental to the interests of smaller developing countries.²⁸⁰ As a result, it is incumbent upon developing countries to help maintain the system that is increasingly working in their interests. Article 3.7 of the Dispute Settlement Understanding recognizes this fact, and mandates that WTO members have a responsibility to consider the implications of disputes they present to the DSB: "before bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful."²⁸¹ Without such restraint, much of the potential for progress in liberalizing trade will be lost.²⁸²

It is unreasonable, however, to expect developing countries to show restraint indefinitely; there has been growing frustration during the past ten years over the unwillingness of developed countries to abandon programs that distort international markets. If the current Round is to be successful, ultimately the United States, and to a substantial degree other developed countries as well, must ultimately take the true aims of the AoA to heart, and work to align domestic policy with international agreements. This goal is not impossible: the EU's agreement to end its reliance on export subsidies is a significant development that demonstrates domestic political forces can act according to international agreements.²⁸³ Without a true commitment, the near future of the WTO negotiations, at least, will be characterized by a great deal of effort and ultimately a colossal failure to acknowledge the true benefits which will accrue from implementation of increasingly greater liberalization of international trade in agriculture.

CONCLUSION

International trade in agriculture has been governed by a

280. *Supra* Part III.C.2 (discussing negative effects of a shift in the WTO towards litigation).

281. Dispute Settlement Understanding, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994). The DSU, found in Annex 2 to the Marrakesh Agreement, outlines the procedures by which trade disputes are handled through the WTO. THE WTO SECRETARIAT, *supra* note 10, at 20.

282. *See supra* Part III.C.2 (discussing problems with a litigation-based WTO system).

283. *See supra* note 104 and accompanying text.

multilateral system of rules for ten years, and this period has been characterized both by significant failures and difficult accomplishments. Despite numerous difficulties and criticisms, a pattern of progress towards a system of increasingly liberalized trade in agriculture is discernable. Recent events have demonstrated that developing countries are increasingly able to participate in the multilateral system to affect change that works in their interests. This increased potential for future gains in liberalization of agricultural trade is, however, offset by recent actions of the United States. In particular, demonstrations of the U.S. reluctance to dismantle its domestic support programs, which have become the focus of ongoing agriculture talks and have been condemned by the DSB, indicate that the United States will be unable to act in its customary role as a leader in the ongoing Doha Talks.

The interplay between these relative changes in negotiating power and roles, in light of a number of other significant factors including expiration of the Peace Clause, has made the likelihood of litigation over agricultural programs high. The potential impasse represented by the threat of a "trade war" poses a significant threat to the nature of the WTO as it is known today, most notably the promise of trade liberalization under the current multilateral system of trade in agriculture, as embodied in the Doha Round. If the aims of the AoA are to be furthered, and liberalization of agriculture continued, then action is required on the part of all WTO member countries. Developing countries have achieved a better balance in negotiating power and have at their disposal the novel possibility of litigation. However, this possibility also holds the potential to work against their interests in achieving greater liberalization of trade in agriculture. As such, it is necessary that developing countries exercise sound judgment and restraint in exercising this new-found power. However, a true commitment to an equitable system of free trade is also required on the part of the United States and other developed countries.